No. 23-51

IN THE

Supreme Court of the United States

NEAL BISSONNETTE, ET AL.,

Petitioners,

v.

LEPAGE BAKERIES PARK ST., LLC, ET AL.,

Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether business franchisees who independently distribute baked goods within a fixed intrastate territory are within a "class of workers engaged in foreign or interstate commerce" whose claims are exempt from arbitration under § 1 of the Federal Arbitration Act.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as an amicus in important Federal Arbitration Act (FAA) cases. *See, e.g.*, *Sw. Airlines Co. v. Saxon*, 596 U.S. 450 (2022); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018). And WLF's Legal Studies Division routinely produces scholarly papers on arbitration. *See, e.g.*, Brad Davis, Southwest Airlines v. Saxon: *SCOTUS Left Much Unsaid in Ruling on Cargo Loaders' Exemption from Arbitration*, WLF Legal Backgrounder, https://perma.cc/W9TB-AX5F.

The FAA "establishes a federal policy favoring arbitration." *Shearson/Am. Exp. Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Section 2 requires that most people comply with their arbitration agreements. But § 1 of the FAA contains a discrete exemption for workers who "play a direct and 'necessary role in the free flow of goods' across borders." *Saxon*, 596 U.S. at 458. Congress included this exemption to enable workers in the transportation industry to arbitrate through other congressionally created channels. Petitioners here are not subject to an alternative channel of this sort; they just want to avoid arbitration altogether. They seek to gut the federal policy in favor of arbitration by expanding the § 1 exemption far beyond its proper bounds. The Court should clarify that § 1

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* No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation or its counsel, helped pay for this brief's preparation or submission.

covers only those classes of workers who are *both* within the transportation industry *and* engaged in cross-border transportation.

STATEMENT OF THE CASE

Flowers Foods, Inc. and its subsidiaries produce popular baked goods and snacks. Pet. App. 3a–4a. Although they style themselves as "commercial truck drivers," Petitioners are in fact franchisees who own the right to market, sell, and distribute certain Flowers products within fixed territories in Connecticut. *Id.* at 4a. Petitioners make money by buying Flowers products from Flowers and reselling them to others at a profit. *Id.* Even if Petitioners sometimes deliver Flowers products, they do so only inside Connecticut. *Id.*

Petitioners sued Flowers for alleged violations of Connecticut wage-and-hour laws and the Fair Labor Standards Act. Pet. App. 100a. Flowers moved to dismiss and, alternatively, to compel arbitration because Petitioners agreed to arbitrate their claims. *Id.* Flowers invoked § 2 of the FAA, which says that an otherwise valid arbitration clause in a "contract evidencing a transaction involving commerce" is "enforceable." 9 U.S.C. § 2. In response, Petitioners invoked § 1 of the FAA, known as the "transportation-worker exemption." Pet. App. 100a. It says that the FAA does not govern "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Petitioners insist that they fall within the § 1 exemption.

Emphasizing that Petitioners are franchise business owners rather than mere delivery drivers, the district court rejected Petitioners' construction of § 1 and granted Flowers's motion to compel. Pet. App. 101a. As the district court explained, Petitioners are "more akin to sales workers or managers who are generally responsible for all aspects of a bakery distribution business" than to "traditional transportation workers like a long-haul trucker, railroad worker, or seaman." *Id.* at 114a.

The Second Circuit affirmed. With the benefit of this Court's opinion in *Saxon*, the Second Circuit held that § 1 covers only essential workers in the "transportation industry"—not individuals like Petitioners, who sell baked goods and distribute them intrastate. Pet. App. 11a. This construction, the court explained, best tracks § 1's text, whose use of "seamen" and "railroad employees" "locate the 'transportation worker' in the context of a transportation industry." *Id.* at 8a.

The late Judge Pooler dissented. Pet. App. 24a–37a. She insisted that Petitioners "*do work* in a transportation industry: trucking." *Id.* at 34a. The Second Circuit denied Petitioners' rehearing petition over Judge Nathan's dissent, which Judges Robinson and Pérez joined. *Id.* at 79a. This Court granted review.

SUMMARY OF ARGUMENT

Litigation is expensive. It's expensive for businesses, which must pay lawyers to argue and employees to miss work to testify. It's expensive for consumers and workers, who cover businesses' costs through higher prices and lower wages. It's expensive for the

judiciary, which must pay for "judges, attendants, light, heat, and power—and even ventilation in some courthouses." Joint Hearings on S. 1005 and H. R. 646 before the Subcommittees on the Judiciary, 68th Cong., 1st Sess. (1924) (statement of Charles L. Bernheimer). And it's expensive for the average citizen; for just as corporate litigation expenses are really consumer and worker expenses, the judiciary's expenses are really taxpayer expenses.

It's no mystery, then, why Congress passed the FAA. Courts had long refused to enforce most arbitration agreements, and this meant that more disputes remained in litigation. To save people time, money, and trouble, Congress empowered courts to enforce otherwise valid clauses, in contracts "involving commerce," that require streamlined private dispute resolution—arbitration. 9 U.S.C. § 2. But the FAA contains a qualification. It does not govern "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

Contrary to Petitioners' elastic reading, § 1 is not the product of Congress's desire to excuse from arbitration *any* worker involved in the transportation of goods. Rather, § 1 exists because transportation strikes in the wake of World War I threatened to disrupt other national industries dependent on transportation services. Congress made sure certain classes of transportation workers would engage in arbitration governed by *other* federal laws. When Congress enacted the FAA, seamen and railroad workers were subject to their own federal arbitration regimes. Congress exempted these classes of workers from the FAA to ensure that the FAA did not disrupt those distinct

systems of alternative-dispute-resolution. (The seamen had, in fact, lobbied for this carve out.)

As for § 1's residual clause—the carveout for "other class[es] of workers engaged in foreign or interstate commerce"—it covers only those workers whom Congress expected would get their own federal arbitration law or special remedial scheme. Congress reserved that option for workers *precisely analogous* to seamen and railroad employees. That means workers who (1) traverse national and international shipping lanes and (2) might reasonably be expected to cause major economic disruption through labor action. In short, § 1 exempts from the FAA only workers in the transportation industry who regularly carry goods and passengers across interstate or foreign borders.

Section 1 simply accommodates existing or anticipated federal arbitration laws tailored to specific classes of workers in the transportation sector. And because § 1 fulfills this singular purpose, there is no principled way to stretch its application. Although some judge-made tests purport to expand the exemption beyond those who play a key role in the interstate and international transportation of goods and passengers, these contrived standards defy statutory text and context, produce inconsistent results, and serve no congressional goal. Absent a bright-line rule from this Court, substantial litigation over the scope of FAA § 1 will continue to burden companies and the courts.

ARGUMENT

I. ONLY CLASSES OF TRANSPORTATION-INDUSTRY WORKERS KEY TO MOVING GOODS AND PASSENGERS ACROSS BORDERS ARE COVERED BY FAA § 1.

Section 2 of the FAA empowers a party to enforce an (otherwise valid) arbitration clause in "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. Congress enacted the statute to thwart the "great variety" of "devices and formulas" that judges "hostil[e] towards arbitration" had used to "declar[e] arbitration against public policy." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011). And it used broad terms ("evidencing" a transaction "involving" commerce) because it wanted the FAA to extend as far as the federal legislative power under the Commerce Clause can go. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995). In short, Congress wanted the FAA to govern most arbitration clauses.

Most, but not all. Section 1 of the FAA withdraws from the statute's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. As shown below, that exemption cuts much more narrowly than Petitioners contend.

First, Congress framed § 2 more broadly than § 1. Section 2 extends the FAA to a contract "involving" commerce, while § 1 removes it from a contract of employment signed by certain classes of transportation workers "engaged in" foreign or interstate commerce. The "open-ended" § 2 is limited by the "narrower" § 1. *Circuit City Stores, Inc. v. Adams*,

532 U.S. 105, 118 (2001). This manifests an intent to withdraw only a small sliver of contracts from the FAA's purview. After all, if Congress had wanted the FAA to have a narrow ambit—if it had wanted it to apply, say, only to contracts between merchants—it could have simply said so. It would have made no sense for Congress to craft a narrow statute by the circuitous method of (1) writing a sweeping clause, and then (2) cutting that clause to the bone with another, almost equally sweeping clause.

What's more, under the venerable statutory canon *noscitur a sociis*, "a word is known by the company it keeps." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Section 1 lists *seamen*, *railroad employees*, and *others* "engaged in" foreign or interstate commerce. The section's more general category ("any other class of workers engaged in foreign or interstate commerce") is "controlled and defined" by the concrete examples that precede it ("seamen" and "railroad employees"). *Circuit City*, 532 U.S. at 114–15. So § 1 governs seamen, railroad employees, and *others like them*. Others, that is, who engage in foreign or interstate shipping and transportation like seamen and railroad employees do. Section 1 is a discrete carveout for narrow classes of transportation workers who "play a direct and 'necessary role in the free flow of goods' across borders." *Saxon*, 596 U.S. at 458.

But why would Congress want to fully protect commercial arbitration *except* when it comes to nationwide transportation, the very lifeblood of commerce? The answer lies in the history behind Congress's decision to single out rails, sails, and other common carriers. Special reasons applied to each group—reasons that point to § 1's exceedingly limited

role in Congress's otherwise uniform arbitration scheme.

Start with the railroads. "Before the modern highway system, railroads were the only practical means of long-distance transportation." Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 U. Fla. L. Rev. 337, 382 (1983). And "railroad employees were among the first to organize nationally." *Id.* The railroads were thus both a keystone of the economy and a hotbed of labor friction. No surprise, then, that the national government spotted the need for streamlined dispute resolution for the rail industry long before it spotted the need for it in the wider market. "Reacting to a drastic increase in [railroad worker] strikes, President Grover Cleveland recommended to Congress in 1886 the creation of a permanent board for voluntary arbitration of railroad labor disputes." *Id.* at 382.

The resulting law—and a series of others—failed to stem the strikes. *Id.* at 382–85. But Congress kept trying. As World War I brought home the importance to national security of America's transportation industry, wartime inflation sparked a dramatic rise in labor unrest. In 1919 alone, over 4 million workers—one-fifth of the nation's workforce—participated in labor strikes. David Pietrusza, *1920: The Year of Six Presidents* 143 (2007). For years—up to and through 1925, the year the FAA was passed—Congress collaborated with the railroads and their workers to create a special rail-industry arbitration regime.

In the Transportation Act of 1920, Congress clarified that not everyone who worked on a train was

a railroad employee entitled to a special arbitration process. The Act's dispute resolution provisions applied only to "carriers and their officers, employees, and agents." Transportation Act of 1920, Pub. L. No. 66-152, § 301, 41 Stat. 456. The Act defined "carrier," in accord with the Interstate Commerce Act, as "any common carrier or carriers engaged in the [foreign or interstate] transportation of passengers or property wholly by railroad, or partly by railroad and partly by water." *Id.* § 300(1); Interstate Commerce Act, Pub. L. No. 49-104, § 1, 24 Stat. 379 (1887). In short, the Transportation Act supplied a special dispute resolution mechanism for only those workers engaged in the common carriage of goods or persons.

At the time Congress was considering the FAA, "railway executives and union officials" held "a series of conferences aimed at drafting a new law." Nolan & Abrams, *supra*, at 386. The Railway Labor Act of 1926 created a comprehensive process for resolving labor grievances for unionized railway workers. *Id.* at 386–87. The law even banned strikes "over certain grievance disputes." *Id.* at 387. It would, of course, have made no sense for Congress to disrupt the delicate negotiations underlying this law by slapping the FAA on the railroads.

What's more, federal courts at the time considered companies that used the railroads to ship goods for their own benefit, rather than as common carriers for others, to be outside the scope of the Interstate Commerce Act. *See Pa. R.R. Co. v. Pub. Utils. Comm'n of Ohio*, 298 U.S. 170, 175 (1936). For example, although many logging and mining companies maintained private railroads, they were not considered "railroad companies" because the railways were used

exclusively by the company and not open for public hire. *See, e.g., Sisk v. White Oak Lumber Co.*, 14 F.2d 552, 553 (W.D. Va. 1926) ("railroad company" does not "include those who own or operate private railroads as an incident to some other business"). Workers engaged in such private carriage would not be expected to avail themselves of their own arbitration regime. The crucial distinction was the "right of the public to use the road's facilities and to demand service of it, rather than the extent of [the company's] business." *United States v. La. & Pac. Ry. Co.*, 234 U.S. 1, 23–25 (1914).

Even after enacting the FAA, Congress continued to treat common carriers differently from private carriers. The Motor Carrier Act of 1935, for example, authorized the Interstate Commerce Commission to regulate motor-vehicle carriers. Pub. L. No. 74-255, 49 Stat. 543. But it distinguished between "common carrier by motor vehicle" and other motor vehicle carriers (such as "contract carrier by motor vehicle" and "private carrier of property by motor vehicle"). *Id.* Read in its historical context, then, FAA § 1's exemption covers only those engaged in common carriage of goods and passengers—not every delivery worker loosely engaged in interstate commerce. Congress was not concerned with private carriage of one's own products, because a private carriage strike wouldn't cripple the economy or threaten national security. This crucial backdrop informs § 1's purpose and the meaning of its residual clause.

The reason seamen are mentioned in § 1 is more obvious still. From the beginning of the republic, the federal government had taken a keen interest in maritime working conditions. For instance, the First

Congress "enacted protective legislation giving seamen the right to written employment contracts * * * [and] protection from onboard debt collection." Ahmed A. White, *Mutiny, Shipboard Strikes, and the Supreme Court's Subversion of New Deal Labor Law*, 25 Berkeley J. Emp. & Lab. L. 275, 292 (2004) (discussing Act of July 20, 1790, 1 Stat. 131, 131–35); *see also Southern S.S. Co. v. NLRB*, 316 U.S. 31, 38–39 (1942) ("Workers at sea have been the beneficiaries of extraordinary legislative solicitude[.] * * * The statutes of the United States contain elaborate requirements with respect to such matters as their medicines, clothing, heat, hours and watches, wages, and return transportation to this country if destitute abroad.").

The First Congress also regulated the earliest form of maritime alternative-dispute resolution—better known as mutiny—through its power "to define and punish * * * Felonies committed on the high Seas." U.S. Const. art. I § 8, cl. 10. "If any seaman shall * * * make a revolt in the ship," declared the Crimes Act of 1790, he "shall be deemed * * * a pirate and a felon, and * * * shall suffer death." 1 Stat. 112, 114. Despite this and other punitive laws, robust "labor protest" was "a common feature of shipboard life in the nineteenth and early twentieth centuries." White, *supra*, at 299–301. After World War I, efficient access to ships and ports became a national security imperative. By 1925, seamen (like railroad workers) were both highly organized and the subject of several federal labor laws. *See id*. at 305. As far back as 1872, in fact, Congress had provided seamen a distinct form of arbitration, overseen by "shipping commissioners," in many ports. *See* Shipping Commissioners Act of 1872, § 25, 17 Stat. 262, 267.

When Congress was considering the FAA, the president of the International Seamen's Union, Andrew Furuseth, lobbied to exempt seamen from the law's reach. *See* Imre Szalai, *An Annotated Legislative Record for the Federal Arbitration Act* 56 (2020) (exchange between Senator Sterling and Mr. Piatt). He feared that, given then-existing quirks of admiralty law, seamen were especially vulnerable to hidden arbitration clauses. 26 *Proc. Ann. Convention Int'l Seamen's Union Am.* 203–04 (1923). He feared too that, unlike other workers, seamen (and railway laborers) were subject, if they ignored such a clause, to being "forced" into "involuntary labor." *Id.* at 203. And he believed that the courts, which had historically viewed seamen as "wards of the admiralty," treated his constituents with special favor. Irving Bernstein, *The Lean Years: A History of the American Worker 1920-1933* 400–03 (1960). The seamen's exemption from the FAA thus has all the hallmarks of a legislative compromise extracted by an interest group—and limited to that group's unique circumstances.

It is true that, in a letter to Congress supporting passage of the FAA, then-Secretary of Commerce Herbert Hoover wrote: "If objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'" Joint Hearings on S. 1005 and H. R. 646, *supra*. But the historical context confirms that Hoover, in referring to "workers' contracts," was most likely just responding to the special needs of a few discrete transportation industries (and the special lobbying of the seamen in particular).

Given the context discussed above—context confirmed by an early authority on this topic, *Tenney Engineering, Inc. v. United Elec. Radio & Machine Workers*, 207 F.2d 450, 452–53 (3d Cir. 1953)—the keys to understanding § 1 of the FAA are (1) the unique situation of (and lobbying by) seamen and (2) "the existence of administrative rather than judicial machinery for settlement of labor disputes" involving seamen and railroad workers. *Amalgamated Ass'n St. Elec. Ry. & Motor Coach Emp. of Am. v. Penn. Greyhound Lines, Inc.*, 192 F.2d 310, 313 (3d Cir. 1951). Congress understood, above all, that including sea and rail workers in the FAA "would have created pointless friction" in "already sensitive area[s]." *Id.* Once these driving forces are accounted for, the scope of § 1 becomes clear.

Section 1 was meant to apply, at most, to workers in cross-border transportation industries subject, or likely to become subject, to (1) their own unique federal arbitration scheme (in the case of the RLA and unionized railway workers) or (2) a specialized federal scheme governing wages, hours, and working conditions (in the case of the seamen). In other words, the FAA's "draftsmen had in mind the two groups of transportation workers as to which special arbitration legislation already existed and they rounded out the exclusionary clause by excluding all other similar classes of workers." *Tenney*, 207 F.2d at 452–53.

And this is essentially how most federal courts have come to understand § 1. A worker must be "employed in the transportation industry" to qualify as a "transportation worker" under § 1. *Hamrick v. Partsfleet, LLC*, 1 F.4th 1337 (11th Cir. 2021); *see also Lenz v. Yellow Transp., Inc.*, 431 F.3d 348, 349 (8th

Cir. 2005) ("[Plaintiff] works in the transportation industry."); *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1290 (11th Cir. 2005) ("Because [plaintiff] was not within a class of workers within the transportation industry, his employment contract is not exempted from the FAA's mandatory arbitration provisions."); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) ("[T]he exclusionary clause in Section 1 applie[s] only to those actually in the transportation industry."). As Judge Jacobs noted below in his concurrence, besides the First Circuit, "every appellate [court] that grants exemption to a transportation worker under Section 1 of the FAA decides or presumes the prior question of whether that person works in a transportation industry." Pet. App. 85 & n.2 (Jacobs, J., concurring).

This understanding of § 1 also squares with this Court's leading precedent in *Circuit City*. 532 U.S. at 118. There the Court noted the distinction between § 2's use of the broad "involving commerce" and § 1's use of the narrower "engaged in commerce," 532 U.S. at 118; and it stressed the importance of reading "other class of workers" in line with "seamen" and "railroad employees," *id.* at 114–15. It also endorsed the view that Congress's decision "to exempt [from the FAA] the workers over whom the commerce power [i]s most apparent" arose from the special status of those workers' industries. *Id.* at 120. "It is reasonable to assume," *Circuit City* explained, "that Congress excluded 'seamen' and 'railroad employees' from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers." *Id.* at 121. The residual clause about "other class of workers," under this reading, covers only those "transportation

workers" who, being themselves essential to the "free flow of goods" across borders, might, like seamen and railroad employees, get a federal arbitration law of their own. *Id.*

The import of *Circuit City*'s statutory analysis is unmistakable: § 1 should apply to only those workers key to carrying goods and people across national or international borders, as seamen and railroad employees do. Indeed, workers in the transportation industry are precisely the kinds of workers who might generate the type of labor issues that would spur Congress to pass "specific legislation" (*id.* at 121), as it did for the seamen and the railroad employees.

Hill reads *Circuit City* accurately. Hill was an account manager for a furniture rental company. 398 F.3d at 1288. As part of his job, he sometimes delivered "goods to customers out of state in his employer's truck." *Id.* He argued that § 1 exempted him from arbitration with his employer. After discussing *Circuit City*, however, *Hill* holds that § 1 does not cover workers who "incidentally transported goods interstate as part of their job in an industry that would otherwise be unregulated"—an industry, that is, for which Congress would not create "specific legislation." *Id.* at 1289. "There is no indication," *Hill* continues,

> that Congress would be any more concerned about the regulation of the interstate transportation activity incidental to Hill's employment as an account manager, than it would in regulating interstate 'transportation' activities of an interstate traveling pharmaceutical salesmen who incidentally delivered products

> in his travels, or a pizza delivery person who delivered pizza across a state line to a customer in a neighboring town.

Id. at 1289–90. Exactly so. *Hill*'s analysis is even more clear-cut in this case. After all, Petitioners are not engaged in interstate transportation of any sort; they merely deliver products intrastate, solely in Connecticut.

This Court's decision last term in *Saxon* changes nothing. First, Saxon was an airline employee, so the Court had no need to consider § 1's application outside the transportation industry. 596 U.S. at 457; Pet App. 86a–87a ("The self-evident premise of *Saxon* was that an airline is a transportation industry.") And *Saxon* clarifies that § 1 applies only to classes of workers who "actually engage[] in interstate commerce in their day-to-day work." 596 U.S. at 456.

When Congress enacted the FAA, railroad employees and seamen were unique, highly regulated classes of transportation workers engaged in the business of providing common carriage of goods and passengers. The crucial factor driving the creation of § 1 (other than straight special-interest lobbying for seamen) was whether a distinct federal scheme existed, or was likely to arise, for a given class of state- or foreign-boundary-crossing workers.

"The statute creates an exemption for those who work moving goods and passengers in one of the mighty engines of interstate and international transport, not for everyone who works on wheels." Pet. App. 87a–88a (Jacobs, J., concurring). Properly

read, then, § 1 governs only seamen, railroad employees, and other classes of workers in the transportation industry who regularly carry goods and passengers for hire across interstate or foreign borders. Petitioners cannot meet that test.

II. ABSENT A BRIGHT-LINE RULE, SUBSTANTIAL LITIGATION OVER THE SCOPE OF FAA § 1 WILL CONTINUE TO BURDEN THE COURTS.

What the statutory text and historical context establish, logic confirms. There is no principled way to stretch § 1 beyond seamen, railroad employees, and other transportation-industry workers. To prevent Congress's broad policy favoring arbitration from continuing to unravel one lawsuit at a time, this Court should establish a bright-line rule.

"Judicial action must be governed by *standard*, by *rule*, and [it] must be principled, rational, and based upon reasoned distinctions found in the Constitution or laws." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Yet by what "standard" or "rule" is a judge to decide which workers outside the transportation industry fall within the § 1 exemption? Is it enough to merely work for a *business* whose products are part of the flow of commerce? *Rittmann v. Amazon.com*, 971 F.3d 904, 917 (9th Cir. 2020). Is it enough to *sometimes* transport goods across state lines? *Hill*, 398 F.3d at 1288–90. How close is close enough? How often is often enough? And above all: Why? No "principled, rational" basis can be "found in the * * * law[]" for any of these tests. *Rucho*, 139 S. Ct. at 2507. Each is unmoored from the statute itself.

Businesses "crave certainty as much as almost anything: certainty is what allows them to make long-term plans and long-term investments." Alan Greenspan & Adrian Wooldridge, *Capitalism in America: A History* 258 (2018). The last thing the business community needs is another multi-factor test. "When an appellate judge says that the * * * issue must be decided * * * by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989). Because "each judge" will "use[] his favorite factors in every case," there will "be no common ground." *United States v. Pinto*, 875 F.2d 143, 145 (7th Cir. 1989). Judges inevitably will apply disparate policies and reach inconsistent results. A basic aspect of justice is the like treatment of like cases. "And the trouble with the discretion-conferring approach to judicial law making is that it does not satisfy this sense of justice very well." Scalia, *supra*, at 1178. Although "we will have * * * balancing modes of analysis with us forever," those modes should "be avoided where possible." *Id.* at 1187. Balancing tests sow confusion where there should be clarity.

The Court may not choose among a panoply of policy goals because § 1 contains no such *dueling* policies. There is only, on the one hand, a law that "seeks broadly to overcome judicial hostility to arbitration agreements," *Circuit City*, 532 U.S. at 118, and, on the other, a narrow exemption for "the workers over whom the commerce power [i]s most apparent"—an exemption that can be explained only as a carveout for discrete transportation industry sectors with "established or developing statutory dispute resolution schemes covering specific workers," *id.* at 120–21.

Expanding § 1 beyond those "specific workers"—beyond seamen, railroad workers, and other border-hopping common carriers—"would not answer to any concern expressed to or by Congress in the debates leading up to the passage of the [FAA]." *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997).

Petitioners' rule, by contrast, would stretch § 1 far beyond its intended scope, transforming it from a narrow exemption for discrete classes of transportation-industry workers to a sweeping one that can entangle any business that hires workers to move or deliver goods. This Court should not engage in a flight of logical fancy to extend § 1; rather, it should deploy some common sense to constrain it.

Mindful that Congress fixed its attention in § 1 on discrete classes of transportation-industry workers most likely to enjoy their own distinct federal remedial schemes, this Court should construe "any other class of workers engaged in foreign or interstate commerce" to include only those workers in the transportation industry who are key to carrying goods or passengers across state or national borders. Petitioners do not meet that test. They look nothing like the "seamen" and "railroad employees" Congress set out in § 1 to excuse from the FAA. Like most other workers, they must honor their arbitration agreements.

* * *

The Second Circuit's "transportation industry" test is a reliable and easily administrable rule for construing § 1 of the FAA. It honors both the text and the historical context of the FAA. It also provides businesses with much-needed certainty about whether

their arbitration agreements fall within § 1's transportation-worker exemption. This Court should adopt it.

CONCLUSION

The Second Circuit's judgment should be affirmed.

Respectfully submitted,

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