No. 24-935

In the

Supreme Court of the United States

FLOWER FOODS, INC., et al.,
Petitioners,

v.

ANGELO BROCK,
Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether workers who locally deliver goods that have traveled in interstate commerce—but who neither transport the goods across state borders nor interact with vehicles that cross borders—are "transportation workers" "engaged in foreign or interstate commerce" under 9 U.S.C. § 1.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. It defends free enterprise, individual rights, limited government, and the rule of law. WLF advances that mission, in part, by appearing as amicus curiae to urge this Court to give proper effect to Congress's longtime policy favoring arbitration agreements. *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246 (2024); *Sw. Airlines Co. v. Saxon*, 596 U.S. 450 (2022).

INTRODUCTION AND SUMMARY OF ARGUMENT

Basic textualism suggests that a law called the Federal Arbitration Act likely sets out federal policy for arbitration. And so the FAA does—as it has since President Coolidge signed it into law in 1925. The FAA ousted old caselaw that effectively deleted arbitration clauses from contracts, and requires courts to give effect to the written agreements as signed by the parties. The FAA accordingly eschews "complexity and uncertainty" about its pro-arbitration mission and ought not be interpreted to "breed litigation from a statute that seeks to avoid it." *Bissonnette*, 601 U.S. at 254 (punctuation altered, citation omitted).

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

That context matters when reading the FAA's modest exemptions from its sweeping scope. After all, "a vacuum is no home for a textualist." *Biden v. Neb.*, 600 U.S. 477, 517 (2023) (Barrett, J., concurring). Section 1 of the Act provides that "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." 9 U.S.C. § 1. That narrow exception should be an easy one for a court to apply when reviewing a defendant's motion to compel arbitration. But the Tenth Circuit, compounding a similar error by the First and Ninth Circuits, has developed an inchoate balancing test based on the flawed proposition that workers operating wholly in-state may be treated as "engaged in interstate commerce," Pet. App. 3a, not based on "what they do," but on how isolated provisions of a distributor agreement sound. *Bissonnette*, 601 U.S. at 255.

That's a recipe for "mini-trials," "extensive discovery," and an invitation for the courts "to explore the internal structure and revenue models of a company before deciding a simple motion to compel arbitration." *Id.* at 254 (capitalization altered). There's no need for this Court to bless the creation of such "a regular, slow, and expensive practice in FAA cases" that flies in the face of Congress's policy choice to minimize, not unleash, litigation. *Id.*

Inchoate balancing tests not only breed judicial inefficiency, but they also inevitably yield counterintuitive outcomes like the one below. "Brock operates his own business, takes title to the goods, services his own customers, and can increase profits through various business strategies of his choice."

Pet. App. 22a. Sure, the contract between Brock and Flower Foods imposes some conditions for the sake of *both* parties' business reputations, like a provision preventing Brock from purchasing products just to let them rot. *Id.* at 23a–24a. But that can't change the cut-and-dried fact that Brock buys the products, owns the products, and then takes them "from a Colorado warehouse to his Colorado customers." Pet. 3. And yet the Tenth Circuit's balancing test transmogrifies that in-state commerce into interstate commerce, cancelling the arbitration agreement and swinging open the courthouse door.

Thankfully, the best reading of the statute doesn't compel an outcome so inconsistent with the FAA's purpose. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme") (internal quotation marks and citation omitted). By beginning its list of caveats with "seamen" and "railroad workers," the FAA limits the scope of that exemption to workers that, like those two categories, "'must at least play a direct and necessary role in the free flow of goods *across* borders.'" *Bissonnette*, 601 U.S. at 256 (quoting *Sw. Airlines*, 596 U.S. at 458) (emphasis supplied).

So the statute's text compels reversal here. Brock just isn't "actively engaged in the enterprise of moving goods across interstate lines." *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 802 (7th Cir. 2020) (Barrett, J.); *Lopez v. Cintas Corp.*, 47 F.4th 428, 433 (5th Cir. 2022) ("Giving § 1 more limited reach means limiting its applicability to those actively

engaged in transportation of those goods across borders, which is something the class of local delivery drivers here simply does not do") (internal quotation marks and citation omitted). They never leave Colorado. Pet. 3. And "neither Brock nor any others he employed crossed state lines to deliver goods in connection with the operation of his business." Pet. App. 12a (internal quotation marks and citation omitted).

So text and purpose are perfectly aligned. In-state commerce—here the delivery of goods by a last-mile service delivered wholly within a state's borders—cannot be converted to interstate commerce.

That means the actual requirements to meet the text of § 1 are straightforward. Does the class of workers at issue typically move goods across state lines? If yes, they're exempted. Does the class of workers typically move goods wholly in-state? If so, they're not exempted, and Congress's centenarian command to the courts to "'favor[] arbitration'" prevails. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)). That's an on/off switch that the lower courts can swiftly apply—no complicated, multi-factor balancing, extensive discovery, or cumbersome motions practice needed. This Court should reverse.

ARGUMENT

I. AFFIRMING THE DECISION BELOW WILL "BREED LITIGATION FROM A STATUTE THAT SEEKS TO AVOID IT."

Litigation is expensive. Arbitration—less so. Victor Schwartz & Christopher Appel, *Setting the Record Straight About the Benefits of Pre-Dispute Arbitration*, WLF Legal Backgrounder (June 7, 2019); https://perma.cc/SW5P-JFCK. But for most of the Nation's history, the courts—federal and state—evinced abject "hostility" to "the enforcement of arbitration agreements." *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001). This judicial skepticism of contracted-for arbitration was a hangover from the "then-longstanding English practice" of finding ways to render arbitration agreements unenforceable. *Id.*

In 1925, Congress intervened. It passed the FAA, which firmly "establishes a federal policy favoring arbitration." *Shearson/Am. Express*, 482 U.S. at 226 (internal quotation marks and citation omitted). It instructs that "a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. But there's a caveat. "[N]othing" in the FAA "shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id.* § 1.

Given the FAA's litigation-minimizing mission, it follows that applying those exceptions shouldn't require a lot of lifting from the parties or the judge.

Determining whether a prospective plaintiff belongs to a "class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, shouldn't require a court to oversee "[e]xtensive discovery" or minutely sift "the internal structure and revenue models of a company before deciding a simple motion to compel arbitration." *Bissonnette*, 601 U.S. at 254. As "a statute that seeks to avoid" litigation, *Cir. City*, 532 U.S. at 123 (internal quotation marks and citation omitted), § 1 appropriately resists a reading that will make "[m]ini-trials . . . a regular, slow, and expensive practice in FAA cases." *Bissonnette*, 601 U.S. at 254.

But that's the future that Brock and other plaintiffs (and their lawyers) across the Nation have placed on offer. This Court, unlike the First, Ninth, and Tenth Circuits, should refuse to accept. Those courts of appeals have insisted that so long as a worker merely delivers goods that were placed in the stream of commerce, that's sufficient to reverse the 100-year-old general rule favoring arbitration. Pet. App. 26a–28a (collecting cases); *Rittman v. Amazon.com, Inc.*, 971 F.3d 904, 915–16 (9th Cir. 2020).

As anyone with even a passing knowledge of this Court's personal jurisdiction caselaw knows, the stream-of-commerce metaphor cannot provide an objective, bright-line rule for lower courts to apply. *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 112 (1987) (O'Connor, J., plurality); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 883 (2011) (Kennedy, J., plurality). And because stream-of-commerce is so vague and elastic a term, it risks "obliterat[ing] the distinction between what is national and what is local in the activities of

commerce." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring).

Consider this case. To find that the § 1 exemption applied, the Tenth Circuit had to determine that wholly in-state deliveries were performed by "workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Yet unlike the airline workers in *Southwest Airlines*, Brock wasn't sending and receiving the goods of others on cross-country or international trips. "Brock operates his own business, takes title to the goods, services his own customers, and can increase profits through various business strategies of his choice." Pet. App. 22a. Brock contracts for the property, loads it up, and delivers his goods "from a Colorado warehouse to *his* Colorado customers." Pet. 3 (emphasis supplied). If § 1 for some reason excused a "class of workers engaged in *intra*state commerce," Brock would have the law on his side. But it doesn't, so he must arbitrate his claims.

These aren't contested facts, either. The Tenth Circuit tells us that "neither Brock nor any others he employed crossed state lines to deliver goods in connection with the operation of his business." Pet. App. 12a (internal quotation marks and citation omitted). Rather than letting these facts control the law, however, the Tenth Circuit went prospecting for new, better facts. There weren't any, so the court of appeals chose to blow up modest contracting provisions, like those designed "to protect the business reputation of *both* Brock, Inc. and Flowers Denver," Pet. App. 23a (internal punctuation and citation omitted, emphasis in original), and to gin up

a fuzzy balancing test. But "when an appellate judge comes up with nothing better than a totality of the circumstances test to explain his decision, he is not so much pronouncing the law in the normal sense as engaging in the less exalted function of fact finding." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1180–81 (1989).

That's a mess—and it's not the kind of thing that's reducible to a straightforward standard that can resolve "a simple motion to compel arbitration." *Bissonnette*, 601 U.S. at 254. The distributor agreement between Flower Foods and Brock, for instance, stipulated that Brock's delivery personnel should look "'clean and neat.'" Pet. App. 23a (citation omitted). How much should that, and other picayune contractual restrictions, weigh against the fact that Brock took "title to . . . goods" that never left Colorado once Brock owned them? *Id*. at 22a.

And just how much judicial economy must be lost "examining the various relationships at play?" *Id*. What other facts might be added to the scales on either side? What's the tipping point? Will a court need access to emails between an independent distributor and representatives of the goods-maker? Depositions? In-court witness testimony? In short, "[a]ll this 'complexity and uncertainty' would 'breed litigation from a statute that seeks to avoid it.'" *Bissonnette*, 601 U.S. at 254 (quoting *Cir. City*, 532 U.S. at 123) (brackets omitted). This Court should draw a firm line that favors arbitration.

II. THE DECISION BELOW MISINTERPRETS THE TEXT OF SECTION 1.

The text doesn't support the Tenth Circuit's balancing test. The exemption clause shields the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the FAA's reach. 9 U.S.C. § 1. Let's start with Congress's considered decision to begin that list with "seamen" and "railroad employees."

First, it emphasizes that the exemption applies to categories of workers—as the subsequent "any other class" language confirms. Section 1 "speaks of 'workers,'" and therefore is focused on "the actual work that the members of the class, as a whole, *typically* carry out." *Sw. Airlines*, 596 U.S. at 456 (emphasis supplied, citation omitted). Section 1 does not exempt workers who occasionally engage in interstate commerce, or those whose scope of employment is ancillary to it. An Uber driver who occasionally drops off a passenger at an airport for an international flight, for instance, is too tangential to foreign commerce to be excused from mandatory arbitration.

Second, because "a word is 'given more precise content by the neighboring words with which it is associated,'" it cabins the class of workers covered to those who are the functional equivalent of railroad employees or seamen. *Fischer v. United States*, 603 U.S. 480, 487 (2024) (quoting *United States v. Williams*, 553 U.S. 285, 294 (2008)); *Bissonnette*, 601 U.S. at 255 (the "natural inference . . . is that 'seamen'

and 'railroad employees' share the employment characteristic of being transportation workers").

By 1925, the federal government had spent untold resources, under the authority of the Commerce Clause, to build railroads from coast-to-coast and to regulate maritime shipping. So railroad workers on the Overland Route were obviously engaged in interstate commerce. Seamen carrying cargo across the seas to America's trading partners were obviously engaged in foreign commerce. And any other "class of workers" exempted from the reach of § 1, must be similarly so intricately involved in either interstate or foreign commerce. *Sw. Airlines*, 596 U.S. at 457 (comparing airline cargo loaders to employees of the Baltimore & Ohio Southwestern Railroad Company and citing *Baltimore & Ohio Sw. R. Co. v. Burtch*, 263 U.S. 540, 544 (1924)).

The most natural reading of the statute, then, is that the residual clause covers only workers directly and regularly engaged in interstate or foreign deliveries. Indeed, that's how the Fifth and Seventh Circuits have interpreted the statute. This Court should affirm that approach.

The Seventh Circuit requires an "inquiry [that] is always focused on the worker's active engagement in the enterprise of moving goods across interstate lines." *Wallace*, 970 F.3d at 802. That case anticipated this Court's ruling in *Southwest Airlines*, which, in turn, served as the basis for the Fifth Circuit's ruling that "local delivery drivers" who perform a wholly intrastate route "simply" aren't "'actively engaged in transportation of those goods across borders.'" *Lopez*, 47 F.4th at 433 (quoting *Sw. Airlines*, 596 U.S. at

458). Rather than treating cases before them as a philosophy seminar on causation or as an invitation to mini-trials over ancillaries in a contract, those courts have laid down a rule of general application: did the class of workers typically and directly move the goods across state lines?

That rule, which is the natural reading of the statute, would resolve this case for Flower Foods. Just as no one would reduce the work of a stay-at-home mom who regularly packs her kid a sandwich for lunch to being a "sandwich maker," the typical work done by Brock is not defined by his neat appearance or other limited responsibilities to Flower Foods limned in the distributor agreement—it's the delivery of goods owned by Brock "from a Colorado warehouse to his Colorado customers." Pet. 3.

CONCLUSION

Section 1's residual clause doesn't apply to a class of workers engaged in solely in-state commerce. The Court should reverse.

Respectfully submitted,

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