No. 22-1268

In the United States Court of Appeals for the First Circuit

MARGARITO V. CANALES; BENJAMIN J. BARDZIK,

Plaintiffs-Appellees,

– v. –

CK SALES CO., LLC; LEPAGE BAKERIES PARK STREET, LLC; FLOWERS FOODS, INC.,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Massachusetts, No. 21-cv-40065 (Hon. Allison D. Burroughs)

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Federal Rules of Appellate Procedure 27 and 29(a)(3), the Chamber of Commerce of the United States of America respectfully requests leave of this Court to file the accompanying brief as *amicus curiae* in support of defendants-appellants. In support of this motion, the Chamber states as follows:

1. The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community, including cases involving the enforceability of arbitration agreements and interpretation of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.

2. Many of the Chamber's members and affiliates regularly rely on arbitration agreements in their contractual relationships. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation in court. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation. Based on the policy embodied in the FAA, the Chamber's members and affiliates have structured millions of contractual relationships around the use of arbitration to resolve disputes.

3. The Chamber therefore has a significant interest in the proper interpretation of the FAA and in reversal of the decision below. The Chamber has participated as *amicus curiae* in many recent appeals, including in the Supreme Court and this Court, presenting issues about the interpretation and application of Section 1 of the FAA. *See, e.g.*, *Southwest Airlines Co. v. Saxon*, No. 21-309 (S. Ct.); *New Prime, Inc. v. Oliveira*, No. 17-340 (S. Ct.); *Cunningham v. Lyft, Inc.*, Nos. 20-1373, 20-1379, 20-1544, 20-1549, 20-1567 (1st Cir.); *Waithaka v. Amazon.com, Inc.*, No. 19-1848 (1st Cir.); *Rogers v. Lyft, Inc.*, No. 20-15689 (9th Cir.); *Harper v. Amazon.com Servs., Inc.*, No. 20-2614 (3d Cir.); *Martins v. Flowers Foods, Inc.*, No. 20-11378 (11th Cir.); *Wallace*

v. Grubhub Holdings, Inc. & *Souran v. Grubhub Holdings, Inc.*, Nos. 19-1564 & 19-2156 (7th Cir.); *Rittmann v. Amazon.com, Inc.*, No. 19-35381 (9th Cir.).

4. Here, the proposed brief offers additional arguments about why the district court's decision holding that the FAA does not apply to franchise owners in the bakery industry whose work takes place solely within a single state and is several steps removed from the actual movement of goods in interstate commerce cannot be squared with the text and structure of the statute or the Supreme Court's recent interpretation of it in *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022). In addition, from the unique perspective and expertise of the Chamber, the brief explains that the district court's decision improperly limits the FAA's protections and introduces uncertainty that will engender costly and protracted disputes over the application of the FAA, harming both businesses and workers.

5. Counsel for the Chamber contacted counsel for both parties to obtain their respective positions on the filing of its *amicus* brief. Defendants-appellants consent to the filing. Counsel for plaintiffs-appellees represented that plaintiffs will not oppose this motion for

leave but that they do not consent to the filing of the brief, necessitating this motion.

Accordingly, the Chamber respectfully requests that the Court grant this motion and accept for filing its brief as *amicus curiae* in support of defendants-appellants.

Dated: July 18, 2022

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this motion:

(i) complies with the type-volume limitations of Rule 27(d)(2)(A) because it contains 601 words, excluding the parts of the motion exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

/s/ Archis A. Parasharami
Archis A. Parasharami

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2022, I electronically filed the foregoing with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users, who will be served by the appellate CM/ECF system.

s/ Archis A. Parasharami
Archis A. Parasharami

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes and Rule

TABLE OF AUTHORITIES (continued)

Page(s)

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community, including cases involving the enforceability of arbitration agreements and interpretation of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.

Many of the Chamber's members and affiliates regularly rely on arbitration agreements in their contractual relationships. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation in court. Arbitration is

[1] No counsel for a party authored this brief in whole or in part, and no person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5).

speedy, fair, inexpensive, and less adversarial than litigation. Based on the policy embodied in the FAA, the Chamber's members and affiliates have structured millions of contractual relationships around the use of arbitration to resolve disputes.

The district court's decision holding that the FAA does not apply to franchise owners in the bakery industry whose work takes place solely within a single state and is several steps removed from the actual movement of goods in interstate commerce cannot be squared with the text and structure of the statute or the Supreme Court's recent interpretation of it in *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022). And the district court's decision improperly limits the FAA's protections and introduces uncertainty that will engender costly and protracted disputes over the application of the FAA, harming both businesses and workers. The Chamber therefore has a significant interest in the proper interpretation of the FAA and in reversal of the decision below.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Congress enacted the Federal Arbitration Act (FAA) in 1925 "in response to judicial hostility to arbitration." *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1917 (2022). For nearly a century, FAA has embodied Congress's strong commitment to protecting the enforceability of arbitration agreements.

To that end, Section 2 of the FAA broadly protects arbitration agreements "evidencing a transaction involving commerce." 9 U.S.C. § 2. The Supreme Court has held that the phrase "involving commerce" "signals an intent to exercise Congress' commerce power to the full." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995).

In recent years, opponents of arbitration increasingly have tried to avoid the FAA's protections by invoking the limited exemption in Section 1, which excludes from the Act'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 (emphasis added).

This case presents a prime example. Defendants' brief explains (at 3-4, 20) that plaintiffs belong to a class of workers that markets, sells, and distributes baked goods entirely within a single state—here, the

Commonwealth of Massachusetts—and many of their responsibilities have nothing to do with the transportation of the goods. Notwithstanding the purely intrastate character of these workers' responsibilities, plaintiffs resisted enforcement of their arbitration agreements by asserting that they are covered by the Section 1 exemption. The district court agreed, holding that "the baked goods" themselves previously "crossed state lines" and relying on plaintiff-specific affidavits to conclude that much of plaintiffs' work time is spent driving trucks and making deliveries of those goods. Add. 9-11.[2]

As defendants explain (Opening Br. 4-6), the district court committed at least three fundamental errors in its Section 1 analysis. The Chamber writes separately to address two of those errors.[3]

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[2] Because plaintiffs handle goods, the Court does not have occasion in this case to address the issue whether Section 1 is limited to classes of workers who transport goods, and does not include those who transport passengers and their effects. *See, e.g.*, *Cunningham v. Lyft, Inc.*, 17 F.4th 244, 249 (1st Cir. 2021) (declining to "address this contention" because the Section 1 exemption does not apply to rideshare drivers for other reasons).

[3] The remaining error—that the district court focused on the named plaintiffs' own activities rather than considering the activities of the relevant "class of workers" as a whole or whether the plaintiffs' affidavits describe work representative of that performed by the class—also warrants reversal for the reasons explained by defendants (*e.g.*, Opening Br. 5-6, 33-34). The district court's error is highlighted by the Supreme

First, the district court's expansive interpretation of what it means to be "engaged in . . . commerce" cannot be squared with the plain meaning of the statute. More than two decades ago, the Supreme Court instructed that Section 1's exemption must be given a "narrow construction" and "precise reading." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118, 119 (2001). In *Southwest Airlines*, the Court reaffirmed that Section 1 must be interpreted according to its "contemporary, common meaning" at the time the FAA was enacted in 1925—which included a circumscribed view of what it meant to be "engaged in . . . commerce." 142 S. Ct. at 1788 (quotation marks omitted). The relevant language in Section 1—"other class of workers engaged in foreign or interstate commerce"—is also cabined by "the application of the maxim *ejusdem generis*" because it is a "residual phrase, following, in the same sentence, explicit reference to 'seamen' and 'railroad employees.'" *Circuit City*, 532 U.S. at 114; *see Sw. Airlines*, 142 S. Ct. at 1790.

These interpretive principles make clear that what matters is "the actual *work*" performed by the "class of workers" rather than the origin

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Court's instruction in *Southwest Airlines* to assess "the actual work that the members of the class, *as a whole*, typically carry out." 142 S. Ct. at 1788 (emphasis added).

and movement of the goods. *Sw. Airlines*, 142 S. Ct. at 1788 (emphasis added). The district court failed to focus on the work, instead resting its conclusion on the previous interstate journey of the distributed goods. That approach, if upheld, would result in Section 1's residual clause sweeping far beyond workers "*directly involved* in transporting goods across state or international borders." *Id.* at 1789 (emphasis added); *see also*, *e.g.*, *Hamrick v. Partsfleet, LLC*, 1 F.4th 1337, 1350 (11th Cir. 2021); *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 802 (7th Cir. 2020) (Barrett, J.).

Indeed, the district court's focus on the goods, rather than the work, misinterprets Section 1 for the additional reason that the residual clause is limited to classes of workers whose duties *center* on interstate movement. Then-Judge Barrett explained that, for a class of workers to perform work analogous to "seamen" and "railroad employees," "interstate movement of goods" must be "a *central part* of the class members' job description." *Wallace*, 970 F.3d at 801 (emphasis added). And the Supreme Court just last Term agreed in *Southwest Airlines* that the word "engaged" in Section 1 "emphasizes the actual work that the members of the class, as a whole, *typically* carry out." 142 S. Ct. at 1788 (emphasis

added). Yet here the plaintiffs do not engage in interstate movement of goods at all, let alone as a typical or central part of their jobs.

Second, plaintiffs independently fall outside Section 1's residual clause because they do not work in the "transportation industry." *Hamrick*, 1 F.4th at 1346. That requirement stems from the Supreme Court's repeated recognition that Section 1 "exempts . . . only those contracts involving 'transportation workers'" and from the Court's instruction to interpret the residual clause by reference to "the specific classes of 'seamen' and 'railroad employees' that precede it." *Sw. Airlines*, 142 S. Ct. at 1789-90 (quoting *Circuit City*, 532 U.S. at 109, 115). Thus, as the Eleventh Circuit has recognized, the enumerated terms "seamen" and "railroad employees" demonstrate that "Congress was concerned only with giving the arbitration exception to 'classes' of workers within the transportation industry." *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1290 (11th Cir. 2005). Because the plaintiffs here are in the bakery industry, the Section 1 exemption does not apply. This Court should either adopt the Eleventh Circuit's reasoning on that point or, at least, find the Section 1 exemption inapplicable because plaintiffs do not belong to a class

of workers engaged in interstate commerce and reserve this issue to avoid creating a direct circuit split with the Eleventh Circuit.

In all events, this Court should reject the district court's expansive approach to what counts as being "engaged in foreign or interstate commerce," which creates serious practical problems. If adopted, that approach would generate significant litigation over whether the FAA applies to a broad and indeterminate array of workers. Businesses and workers will face uncertainty over whether the FAA protects their arbitration agreements and delay in referring disputes to arbitration even if the FAA ultimately does protect those agreements. As a result, wide sectors of the economy could be deprived of the benefits secured by the FAA, including lower costs and greater efficiency. And the increased costs of litigating both the applicability of the Section 1 exemption, and, if necessary, the merits in court would be passed on in the form of decreased payments to workers or increased costs to consumers.

The district court's order should be reversed.

ARGUMENT

I. The Text And Structure Of The FAA Demonstrate That Plaintiffs Are Not Included Within A "Class Of Workers Engaged In . . . Interstate Commerce."

A. Section 1's Residual Clause Is Limited To Classes Of Workers Directly Involved In Transporting Goods Across State Or International Borders.

1. The FAA's principal substantive provision, Section 2, provides that an arbitration agreement in "a contract evidencing a transaction *involving commerce* . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2 (emphasis added). The Supreme Court has instructed that *Section 2's* "involving commerce" language must be read "expansively" to reach all arbitration agreements within Congress's commerce power. *Allied-Bruce*, 513 U.S. at 274.

Section 1, by contrast, creates a very limited exception to Section 2's broad coverage, providing that the FAA's federal-law protections for arbitration agreements do not 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 (emphasis added). The Supreme Court has instructed that the Section 1 "engaged in . . . commerce" exemption requires a "narrow construction" and "precise reading." *Circuit City*, 532 U.S. at 118-19.

The Supreme Court's recent decision in *Southwest Airlines* reaffirms three interpretive principles that inform the proper "narrow" and "precise reading."

First, the Section 1 exemption must be interpreted based on the "ordinary, contemporary, common meaning" of the statutory text at the time Congress enacted the FAA in 1925. *Sw. Airlines*, 142 S. Ct. at 1788 (quotation marks omitted); *accord New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (also recognizing the "reliance interests in the settled meaning of a statute").

Second, the words of the statutes must be interpreted "'in their context.'" *Sw. Airlines*, 142 S. Ct. at 1788 (quoting *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1888 (2019)).

Third, with respect to Section 1's residual clause in particular, the Court has instructed that under "the *ejusdem generis* canon," the clause should be "'controlled and defined by reference' to the specific classes of 'seamen' and 'railroad employees' that precede it." *Sw. Airlines*, 142 S. Ct. at 1789-90 (quoting *Circuit City*, 532 U.S. at 115). In other words, the residual clause must be construed narrowly to reach only classes of workers that are similar—in terms of their engagement with foreign or

interstate commerce—to the enumerated groups of "seamen" and "railroad employees."

Applying these three principles, the Court in *Southwest Airlines* held that a class of workers must be "typically" and "directly involved in transporting goods across state or international borders" in order to be "engaged in foreign or interstate commerce" within the meaning of Section 1's residual clause. *Sw. Airlines*, 142 S. Ct. at 1788-89; *see id.* at 1790 ("Put another way, transportation workers must be actively engaged in transportation of those goods across borders via the channels of foreign or interstate commerce.") (quotation marks omitted).

2. The class of workers that includes plaintiffs does not come close to satisfying this standard. As defendants' brief details (at 19-27), these workers market, sell, and distribute baked goods entirely within a single state. And unlike the cargo loaders in *Southwest Airlines*, these workers are not involved at all in the goods' crossing of state borders, which occurs before the goods come into the workers' hands, separate and apart from the workers' in-state activities. *Cf. Sw. Airlines*, 142 S. Ct. at 1790 (comparing the act of loading cargo to "wharfage," which Section 1 refers to as a "matter[] in foreign commerce") (quoting 9 U.S.C. § 1).

The district court's reliance on the fact that the baked goods "crossed state lines" at a prior point in their longer journey through the supply chain, Add. 11, cannot be squared with the Supreme Court's recent direction to assess the actual work performed by the class.

That conclusion follows from Section 1's use of the word "workers," which "directs the interpreter's attention to 'the *performance* of work.'" *Sw. Airlines* 142 S. Ct. at 1788 (quoting *New Prime*, 139 S. Ct. at 540-41). In addition, "the word 'engaged'" "similarly emphasizes the *actual work* that the members of the class, as a whole, typically carry out." *Id.* (emphasis added).

Moreover, given the Supreme Court's instruction that Section 1 be given a "narrow construction" (*Circuit City* , 532 U.S. at 118), each of Section 1's relevant terms—including "workers," "engaged," and "commerce"—must be interpreted based on their ordinary meanings at the time of the FAA's enactment, rather than any expansive modern conceptions of what qualifies as interstate commerce. *Sw. Airlines*, 142 S. Ct. at 1788-89 (collecting contemporary dictionary definitions); *see also*, *e.g.*, Black's Law Dictionary 651 (2d ed. 1910) (defining "interstate commerce" as "commerce between two states," specifically—"traffic, intercourse,

commercial trading, or [] transportation" "between or among the several states of the Union, or from or between points in one state and points in another state"); *Hamrick*, 1 F.4th at 1350 (relying on this contemporary definition of "interstate commerce" to conclude that the class of workers must "actually engage[]" in cross-border transportation).

Pre-*Southwest* decisions from other circuits are in accord. In addressing the applicability of Section 1 to "drivers who make local deliveries of goods and materials that have been shipped from out-of-state to a local warehouse," the Eleventh Circuit held that the district court had erred by "focus[ing] on the movement of the goods" rather than whether the class of workers, "in the main, actually engages in interstate commerce," meaning the transportation of goods "across state lines." *Hamrick*, 1 F.4th at 1340, 1346, 1350-52. It held, contrary to the district court here, that workers who move goods from one in-state location to another do not fall within the Section 1 exemption just because the goods "had been previously transported interstate." *Id.* at 1349 (quotation marks omitted). That is because, "in the text of the exemption, 'engaged in foreign or interstate commerce' modifies 'workers' and not 'goods.'" *Id.* at 1350.

Writing for the Seventh Circuit, then-Judge Barrett likewise rejected the plaintiffs' argument that the Section 1 "exemption is not so much about what the worker does as about where the goods have been." *Wallace*, 970 F.3d at 802. Instead, engaging in foreign or interstate commerce requires "workers [to] be connected not simply to the goods but to the *act of moving those goods across* state or national borders." *Id.* (emphasis added). Indeed, focusing on the origin and movement of the goods "would sweep in numerous categories of workers whose occupations have nothing to do with interstate transport—for example, dry cleaners who deliver pressed shirts manufactured in Taiwan and ice cream truck drivers selling treats made with milk from an out-of-state dairy." *Id.* The Seventh Circuit therefore held that local food delivery drivers who deliver meals and packaged items from restaurants to diners are not "engaged in . . . interstate commerce" within the meaning of Section 1 of the FAA, because "the interstate movement of goods" was not "a central part of the job description of the class of workers." *Id.* at 803.

Rather than confront these decisions, the district court relied heavily on this Court's decision in *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10 (1st Cir. 2020), which held that the Section 1 exemption applies to the

contracts of Amazon Flex drivers providing local, "last leg[]" deliveries of goods on "interstate journeys." *Id.* at 13. The Chamber maintains that the exemption does not apply to such drivers for the reasons discussed in its *amicus* brief in that case. Moreover, although the Supreme Court had no occasion to rule on that issue in *Southwest Airlines*, it suggested that the applicability of the exemption to such drivers was not "so plain" as its applicability to cargo loaders because last leg delivery drivers "carr[y] out duties further removed from the channels of interstate commerce or the actual crossing of borders." 142 S. Ct. at 1789 n.2.; *see* Opening Br. 25-27.

But the Court need not revisit *Waithaka* here in order to reverse, because the district court ignored critical distinguishing characteristics of the workers at issue in *Waithaka*. As defendants explain (Br. 25-29), the class of workers here does not provide last-mile delivery services as part of a single, unbroken interstate transaction. Instead, the workers purchase the baked goods from defendants and independently market, sell, and distribute them to customers within a single state. Thus, their work more closely resembles the "'independent local service'" that this

Court has recognized does *not* trigger Section 1's residual clause. *Cunningham v. Lyft, Inc.*, 17 F.4th 244, 250-51 (1st Cir. 2021) (quoting *United States v. Yellow Cab Co.*, 332 U.S. 218, 233 (1947), *overruled on other grounds by Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752 (1984)); *see* Opening Br. 27-29.

B. Section 1's Residual Clause Additionally Requires That Direct Involvement In Transporting Goods Across State Or International Borders Is A Central Part Of The Workers' Job Description.

The district court's interpretation of Section 1 was incorrect for another reason: the exemption's residual clause applies only if transportation of goods across state or national borders is *central* to the work performed by the relevant class of workers.

As the Seventh Circuit has explained, Congress viewed seamen and railroad employees as workers "whose occupations [we]re *centered* on the transport of goods in interstate and foreign commerce." *Wallace*, 970 F.3d at 802 (emphasis added). Under the residual clause, therefore, a party seeking to avoid the FAA's coverage must also "demonstrate that the interstate movement of goods is a *central part* of the job description of the class of workers to which they belong." *Id.* at 803 (emphasis added).

Applying this standard, this Court and the Ninth Circuit have agreed, for example, that rideshare drivers (such as those who use the Uber and Lyft platforms to offer rides) do not fall within the Section 1 exemption because they overwhelmingly provide local, intrastate rides. *See Cunningham*, 17 F.4th at 252-53; *Capriole v. Uber Techs., Inc.*, 7 F.4th 854, 865-66 (9th Cir. 2021). It "cannot even arguably be said" that rideshare drivers (and other local workers) are a class of "workers primarily devoted to the movement of goods and people beyond state boundaries." *Cunningham*, 17 F.4th at 253. Or, as the Ninth Circuit similarly put it, such local workers, even if they occasionally cross state lines, stand in stark "contrast" to "seamen and railroad workers," for whom "the interstate movement of goods and passengers over long distances and across national or state lines is an indelible and 'central part of the job description.'" *Capriole*, 7 F.4th at 865 (quoting *Wallace*, 970 F.3d at 803); *see also Sw. Airlines*, 142 S. Ct. at 1788-89 (instructing courts to look at "the actual work that the members of the class, as a whole, *typically* carry out" and noting that Saxon belonged to a class of workers "who physically load and unload cargo on and off airplanes on a *frequent* basis") (emphasis added).

The class of workers here does not satisfy these standards either. For the reasons above, the class is not "directly involved" or "actively engaged" in cross-border transportation at all. *Sw. Airlines*, 142 S. Ct. at 1789-90 (quotation marks omitted). It follows that such transportation cannot be a central part of their job description. Moreover, as defendants' brief explains (at 29-34), many of the responsibilities of the distributors have nothing to do with the transportation of goods, even intrastate. For this reason, too, plaintiffs do not belong to a class of workers "engaged in . . . interstate commerce" within the meaning of Section 1.

C. Section 1 Also Does Not Apply For The Independent Reason That Plaintiffs Do Not Work In The Transportation Industry.

The Supreme Court reaffirmed in *Southwest Airlines* that Section 1 "exempts . . . only those contracts involving 'transportation workers.'" 142 S. Ct. at 1789 (quoting *Circuit City*, 532 U.S. at 109). While the Court has "not provide[d] a complete definition of 'transportation worker'" (*id.* at 1790), the Eleventh Circuit recently reaffirmed that a transportation worker must work "in the transportation industry," just as seamen and railroad workers do. *Hamrick*, 1 F.4th at 1346 (quoting *Hill*, 398 F.3d at 1290).

That requirement follows from application of the *ejusdem generis* canon to interpret the residual clause by reference to "the specific classes of 'seamen' and 'railroad employees' that precede it." *Sw. Airlines*, 142 S. Ct. at 1790 (quoting *Circuit City*, 532 U.S. at 115); *see also id.* at 1792 (explaining that "the inference embodied in *ejusdem generis* is that Congress remained focused on some common attribute shared by the preceding list of specific items when it used the catchall phrase") (alterations and quotation marks omitted). Those examples, the Eleventh Circuit explained, make it "apparent [that] Congress was concerned only with giving the arbitration exemption to 'classes' of transportation workers within the transportation industry." *Hill*, 398 F.3d at 1290; *accord Hamrick*, 1 F.4th at 1345.

Limiting the residual clause to those workers in the transportation industry whose engagement with foreign or interstate commerce mirrors that of seamen and railroad employees also ensures that Section 1's narrow exemption does not sweep in countless workers outside of the transportation industry "who incidentally transport[] goods interstate" in performing work outside of that industry. *Hill*, 398 F.3d at 1289-90. Thus, Section 1 does not cover "a pizza delivery person who delivered pizza

across a state line to a customer in a neighboring town," or the account manager in *Hill* who occasionally crossed the border between Georgia and Alabama in delivering furniture and other items to customers. *Id.* at 1290. As another court put it, citing *Hill*, "[n]otwithstanding the fact that pizzas are crossing state lines, no pizza delivery person belongs to a 'class of workers engaged in foreign or interstate commerce.'" *Rogers v. Lyft, Inc.*, 452 F. Supp. 3d 904, 916 (N.D. Cal. 2020), *aff'd*, 2022 WL 474166 (9th Cir. Feb. 16, 2022).

The transportation-industry requirement is further supported by Section 1's history. The Supreme Court has recognized that "seamen" and "railroad employees" were excluded from the FAA because "[b]y the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers"; "grievance procedures existed for railroad employees under federal law" in response to a history of disruptive labor disputes; "and the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent." *Circuit City*, 532 U.S. at 121 (citing, respectively, the Shipping

Commissioners Act of 1872, 17 Stat. 262; Transportation Act of 1920, 41 Stat. 456; and Railway Labor Act of 1926, 44 Stat. 577).

Although "the legislative record on the § 1 exemption is quite sparse," what little there is "suggest[s] that the exception may have been added in response to the objections of [Andrew Furuseth,] the president of the International Seamen's Union of America." *Circuit City*, 532 U.S. at 119; *see also United Elec., Radio & Mach. Workers v. Gen. Elec. Co.*, 233 F.2d 85, 99 (1st Cir. 1956); *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers*, 207 F.2d 450, 452 (3d Cir. 1953); Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 9 (1923) (statement of W.H.H. Platt, Am. Bar Ass'n). Furuseth argued in part that seamen's contracts should be excluded because they "constitute a class of workers as to whom Congress had long provided machinery for arbitration." *Tenney,* 207 F.2d at 452; *see also* Matthew W. Finkin, *"Workers' Contracts" under the United States Arbitration Act: An Essay in Historical*

Clarification, 17 Berkeley J. Emp. & Lab. L. 282, 300-02 (1996) (quoting Andrew Furuseth, Analysis of H.R. 13522 (1923)).[4]

Congress's inclusion of "railroad employees" in Section 1 appeared to stem from the same concerns. Congress had previously enacted special dispute-resolution procedures for that industry, too, in response to a long history of labor disputes. Indeed, by the time the FAA was enacted, mediation and arbitration had been central features of the railroad dispute resolution process for nearly forty years.[5]

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[4] While the Supreme Court recognized in *Circuit City* that "the fact that a certain interest group sponsored or opposed particular legislation" is not a basis for discerning the meaning of a statute, it pointed to the history as context for its conclusion that the "residual exclusion" of "'any other class of workers engaged in foreign or interstate commerce'" is "link[ed] to the two specific, enumerated types of workers identified in the preceding portion of the sentence." *Circuit City*, 532 U.S. at 120-21.

[5] *See*, *e.g.*, Act of October 1, 1888, 25 Stat. 501 (providing for voluntary arbitration); Erdman Act of June 1, 1898, 30 Stat. 424, ch. 370, §§ 2, 3 (establishing a more detailed procedure involving both mediation and arbitration); Newlands Act of July 15, 1913, 38 Stat. 103, 45 U.S.C. § 101 *et seq.* (establishing a permanent Board of Mediation and Conciliation); Title III of the Transportation Act of 1920, 41 Stat. 456, 469 (establishing a Railroad Labor Board and more detailed provisions for resolution of railroad labor disputes); *see also Gen. Comm. of Adjustment of Bhd. of Locomotive Eng'rs for Mo.-Kan.-Tex. R.R. v. Mo.-Kan.-Tex. R.R. Co.*, 320 U.S. 323, 328 n.3 (1943) (summarizing the "fifty years of evolution" of the railroad dispute resolution framework).

Congress thus decided to carve out narrow classes of workers so as not to "unsettle established or developing statutory dispute resolution schemes covering specific workers." *Circuit City*, 532 U.S. at 120-21. The residual category of other transportation workers was included for a similar reason. That is, Congress contemplated extending similar legislation to other categories of workers *in the transportation industry* engaged in transportation across state or national lines: "Indeed, such legislation was soon to follow, with the amendment of the Railway Labor Act in 1936 to include air carriers and [certain of] their employees." *Id.* at 121; *accord Hill*, 398 F.3d at 1289 (quoting same).

This history further supports limiting application of Section 1's residual clause to workers in the transportation industry.

The district court's contrary holding expands Section 1 beyond recognition: virtually any business that manufactures or produces goods will employ or contract with workers to market, sell, and distribute those goods. Treating all such workers as workers in the transportation industry in the same manner as railroad or maritime workers would give Section 1 an enormous sweep that is contrary to the "narrow construction" mandated by the Supreme Court. *Circuit City*, 532 U.S. at 118. Because

plaintiffs here belong to a class of workers in the bakery industry and not the transportation industry (Opening Br. 37-41), the Section 1 exemption does not apply.[6]

II. The District Court's Erroneous Reading Of Section 1 Harms Businesses And Workers.

The district court's failure to give Section 1 a proper construction, if adopted, will produce at least two significant practical consequences. First, it will generate time-consuming and costly litigation over the FAA's application—thereby undermining one of Congress's key goals in enacting the FAA. Second, it will deprive businesses and individuals of the benefits of arbitration protected by the FAA.

1. The Supreme Court has long recognized "Congress' clear intent, in the [Federal] Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). Straightforward, easily administrable rules are thus especially

[6] The district court appeared to believe that *Waithaka* forecloses limiting Section 1's residual clause to workers in the transportation industry. Add. 13. But this Court did not decide this issue, nor whether Amazon is in the transportation industry, because those issues were not presented to the Court. *See* Opening Br. 41.

important in the context of the FAA. Indeed, the *Circuit City* Court emphasized that Section 1 should not be interpreted in a manner that introduces "considerable complexity and uncertainty . . . , in the process undermining the FAA's proarbitration purposes and 'breeding litigation from a statute that seeks to avoid it.'" 532 U.S. at 123 (quoting *Allied-Bruce*, 513 U.S. at 275).

Interpreting the residual clause in accordance with its plain meaning—requiring that the class of workers be "typically" and "*directly* involved in transporting goods across state or international borders" (*Sw. Airlines*, 142 S. Ct. at 1788-89 (emphasis added))—produces a simple test that should be easy to apply. It should not be difficult or factually complex in the mine-run of cases to determine whether a class of workers is directly involved in the movement of goods across state lines or national boundaries as a central part of their job.

Under the district court's approach, by contrast, even when classes of workers primarily (or even, as here, entirely) carry out their work within a single state, courts will have to decide whether those workers are nevertheless somehow sufficiently bound up with interstate movement of goods to fall under the residual clause. And the court below offered no standard for making that determination.

Indeed, the district court's reading of Section 1, if adopted, will generate countless, expensive disputes over the enforceability of arbitration agreements with workers whose jobs are several steps removed from the actual interstate transportation of goods. Even if some of the parties' underlying disputes are ultimately compelled to arbitration, the intervening litigation over the FAA's application would severely undermine the FAA's purpose of ensuring speedy and efficient dispute resolution. And this expensive and time-consuming litigation would burden courts as well.

2. The district court's approach, if adopted, also would deprive businesses and individuals of the benefits of arbitration secured by the FAA. Without that uniform federal protection, whether businesses and workers can invoke arbitration agreements will turn on state law and vary state by state. And the overall result will be that more disputes are resolved in court rather than in arbitration, because the FAA's protection against state-law rules that disfavor arbitration will no longer apply.

The Supreme Court has repeatedly recognized the "real benefits" of "enforcement of arbitration provisions," *Circuit City*, 532 U.S. at 122-23, which include "'lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes,'" *Lamps*

Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416 (2019) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010)); *accord Allied-Bruce*, 513 U.S. at 280 (one of the "advantages" of arbitration is that it is "cheaper and faster than litigation") (quotation marks omitted); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution.").

These advantages extend to agreements between businesses and workers. *See Circuit City*, 532 U.S. at 123 (rejecting the "supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context"). The lower costs of arbitration compared to litigation "may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Id.*

Empirical research confirms those observations. Scholars and researchers agree, for example, that the average employment dispute is resolved up to twice as quickly in arbitration as in court. *See* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 55 (1998) (average resolution time for employment arbitration was 8.6 months—approximately half the average resolution time in court); *see also*, *e.g.*, Nam D. Pham, Ph.D. &

Mary Donovan, *Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration*, NDP Analytics 5-6, 15 (March 2022), https://bit.ly/3yiU23A (reporting that average resolution for arbitration was approximately two months faster than litigation); Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003–Jan. 2004) (reporting findings that arbitration was 33% faster than analogous litigation); David Sherwyn, Samuel Estreicher, & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stanford L. Rev. 1557, 1573 (2005) (collecting studies reaching similar conclusions).

Further, "there is no evidence that plaintiffs fare significantly better in litigation." Sherwyn, *supra*, 57 Stanford L. Rev. at 1578. To the contrary, a recent study released by the Chamber's Institute for Legal Reform found that employees were nearly *four times* more likely to win in arbitration than in court. Pham, *supra*, at 4-5, 12, 17 (surveying more than 25,000 employment arbitration cases and 260,000 employment litigation cases resolved between 2014 to 2021 and reporting a 37.7% win rate in arbitration versus 10.8% in litigation). The same study found that the median monetary award for employees who prevailed in arbitration

was over double the award that employees received in cases won in court. *Id.* at 4-15, 14 ($142,332 in arbitration versus $68,956 in litigation); *see also* Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 16 (2017) (arbitration is "favorable to employees as compared with court litigation").

Earlier scholarship similarly found a higher employee-win rate in arbitration than in court. *See* Sherwyn, *supra*, 57 Stanford L. Rev. at 1568-69 (observing that, once dispositive motions are taken into account, the actual employee-win rate in court is "only 12% [to] 15%") (citing Maltby, *supra*, 30 Colum. Hum. Rts. L. Rev. at 47) (of dispositive motions granted in court, 98% are granted for the employer); Nat'l Workrights Inst., *Employment Arbitration: What Does the Data Show?* (2004), https://bit.ly/3IVddnP (concluding that employees were 19% more likely to win in arbitration than in court).

Thus, "there is no evidence that plaintiffs fare significantly better in litigation [than in arbitration]." St. Antoine, *supra*, 32 Ohio St. J. on Disp. Resol. at 16 (quotation marks omitted; alterations in original). Rather, arbitration is generally "favorable to employees as compared

with court litigation." *Id.*; *see also* Maltby, *supra*, 30 Colum. Hum. Rts. L. Rev. at 46.

In sum, adopting the district court's overbroad reading of Section 1 would impose real costs on businesses and workers. Not only is litigation more expensive than arbitration for businesses and workers alike, but the uncertainty stemming from the district court's approach would engender additional expensive disputes over the enforceability of arbitration agreements with workers. And these increased litigation costs would not be borne by businesses alone. Businesses would, in turn, pass on these litigation expenses to consumers (in the form of higher prices) and to workers (in the form of lower compensation).

CONCLUSION

The district court's order denying defendants' motion to compel arbitration should be reversed.

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Respectfully submitted.

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WITH TYPEFACE AND WORD-COUNT LIMITATIONS

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief:

(i) complies with the type-volume limitations of Rule 29(a)(5) because it contains 6,039 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

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/s/ Archis A. Parasharami
Archis A. Parasharami

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2022, I electronically filed the foregoing with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users, who will be served by the appellate CM/ECF system.

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