Case No. 20-11378

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DANIEL MARTINS,
individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

vs.

FLOWERS FOODS, INC., et al.

Defendants-Appellants.

Appeal from an Order of the United States District Court
for the Middle District of Florida, Case No. 8:16-cv-03145-MSS-JSS

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

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, counsel for *amicus curiae* hereby certify that, in the addition to the persons identified in Flowers Foods's brief as having an interest in this appeal, the following attorneys, persons, associations of persons, firms, partnerships, or corporations may have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

1. The Chamber of Commerce of the United States of America (*Amicus curiae*)
2. Jones, Daniel E. (Counsel for *amicus curiae*)
3. Lehotsky, Steven P. (Counsel for *amicus curiae*)
4. Mayer Brown LLP (Counsel for *amicus curiae*)
5. Parasharami, Archis A. (Counsel for *amicus curiae*)
6. Urick, Jonathan D. (Counsel for *amicus curiae*)
7. U.S. Chamber Litigation Center (Counsel for *amicus curiae*)

The Chamber of Commerce of the United States of America hereby certifies that it is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

This 10th day of June, 2020.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Federal Rules of Appellate Procedure 27 and 29(a)(3) and Eleventh Circuit Rules 27-1 and 29-1, 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. The Chamber 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. One of the Chamber's responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases 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. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the policy reflected 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 several recent appeals presenting issues about the interpretation and application of Section 1 of the FAA. *See, e.g.*, *Souran v. Grubhub* & *Wallace v. Grubhub*, Nos. 19-1564 & 19-2156 (7th Cir.); *Waithaka v. Amazon.com, Inc.*, No. 19-1848 (1st Cir.); *Rittmann v. Amazon.com, Inc.*, No. 19-35381 (9th Cir.).

4. Here, the proposed brief explains that district court's decision holding that Section 1 of the FAA exempts local distributors of

baked goods from that statute's coverage cannot be squared with either the text or historical context of the FAA. And the district court's ad hoc approach—based on whether the goods being distributed originated in another state—threatens substantial litigation costs resulting both from future disputes over the FAA's application and from conclusions, like the one below, that deprive businesses and workers of the benefits of the national policy favoring arbitration. Finally, the Chamber also has a significant interest in ensuring—contrary to the decision below—that arbitration agreements are enforceable under applicable state law in those narrow circumstances where the FAA does not apply.

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. Plaintiff-appellee does not consent, necessitating the filing of 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: June 10, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A) and 32(g)(1) because it contains 518 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 Century Schoolbook.

Dated: June 10, 2020 /s/ *Archis A. Parasharami*

CERTIFICATE OF SERVICE

I certify that on June 10, 2020, I filed the foregoing via the CM/ECF system and the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

Dated: June 10, 2020 /s/ *Archis A. Parasharami*

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5. Parasharami, Archis A. (Counsel for *amicus curiae*)
6. Urick, Jonathan D. (Counsel for *amicus curiae*)
7. U.S. Chamber Litigation Center (Counsel for *amicus curiae*)

The Chamber of Commerce of the United States of America hereby certifies that it is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

This 10th day of June, 2020.

Respectfully submitted,

/s/ Archis A. Parasharami

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David Sherwyn, Samuel Estreicher, and Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, Stanford L. Rev. 1557 (2005) 30, 31

Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1 (2017) 31

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber 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. One of the Chamber's responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases 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. Arbitration is speedy,

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[1] No counsel for a party authored this brief in whole or in part, and no person other than the Chamber, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

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

The Chamber therefore has a significant interest in the proper interpretation of the FAA and in reversal of the decision below. The district court's decision holding that Section 1 of the FAA exempts local distributors of baked goods from that statute's coverage cannot be squared with either the text or historical context of the FAA. And the district court's ad hoc approach—based on whether the goods being distributed originated in another state—threatens substantial litigation costs resulting both from future disputes over the FAA's application and from conclusions, like the one below, that deprive businesses and workers of the benefits of the national policy favoring arbitration. Finally, the Chamber also has a significant interest in ensuring—contrary to the decision below—that arbitration agreements are enforceable under applicable state law in those narrow circumstances where the FAA does not apply.

INTRODUCTION AND SUMMARY OF ARGUMENT

For nearly a century, the Federal Arbitration Act has reflected Congress's strong commitment to arbitration. Congress enacted the FAA in 1925 to "reverse longstanding judicial hostility to arbitration agreements" and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quotation marks omitted); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (the FAA "seeks broadly to overcome judicial hostility to arbitration agreements"). The FAA thus embodies an "'emphatic federal policy in favor of arbitral dispute resolution.'" *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (quoting *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011)).

The FAA's principal substantive provision, Section 2, applies to any "contract 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 clause power to the full." *Allied-Bruce*, 513 U.S. at 277.

The exemption from the FAA's reach in Section 1, by contrast, requires a "precise reading." *Circuit City Stores, Inc. v. Adams*, 532

U.S. 105, 118, 119 (2001). Section 1 excludes "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). As the Supreme Court recently explained in addressing the phrase "contracts of employment," courts must interpret the language of Section 1 based on the "ordinary meaning" of the words "at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (alterations and quotation marks omitted).

Here, the district court held that distributors who market and sell Flowers Foods baked goods in specifically defined geographic areas are "engaged in * * * interstate commerce" within the meaning of Section 1 and thus not subject to the FAA. Even though many of the distributors' responsibilities have nothing to do with the transportation of the goods, and even though there was *no* evidence that any Flowers Foods distributors *ever* cross state lines in connection with their work, the district court held that workers who deliver goods are engaged in interstate commerce when "at least a portion of the goods delivered are *produced* out of state." A292 (emphasis added; quotation marks omitted).

The district court's approach cannot be squared with the plain meaning of the statute—which focuses on the *activities* of the relevant "class of workers" rather than the origin of the delivered goods—and it also violates the original understanding of what it meant to be a member of a "class of workers engaged in * * * interstate commerce" at the time of the FAA's enactment in 1925. That phrase, according to both contemporaneous dictionaries and case law, refers to when the workers actually move goods across state or national borders—not the local, intrastate distribution of goods.

The district court's approach also gives short shrift to the fact that the relevant language in Section 1—"other class of workers engaged in foreign or interstate commerce"—is a "residual phrase, following, in the same sentence, explicit reference to 'seamen' and 'railroad employees.'" *Circuit City*, 532 U.S. at 114. "The wording of § 1 calls for the application of the maxim *ejusdem generis*" to "give effect to the terms 'seamen' and 'railroad employees'"—groups that were already subject at the time of the FAA's enactment to separate federal dispute-resolution procedures that Congress "did not wish to unsettle." *Id.* at 114-15, 121. The distributors in this case are not analogous to the maritime and

railway workers of 1925. Their work does not predominantly entail the movement of goods across state lines nor are they subject to other special federal regulation.

The district court's contrary interpretation, if permitted to stand, would significantly increase litigation costs and generate disputes over the FAA's application to a potentially broad array of quintessentially local workers. If the fact that goods that are distributed by the workers at issue had previously originated in another state were potentially enough to transform the workers' distribution activity into "interstate commerce" in the transportation industry, that would create an exception that swallows the rule. As a result, wide swathes of the economy could be deprived of the well-established benefits of arbitration, including lower costs and greater efficiency. Moreover, in every case, the proposed approach would require fact-specific inquiries into the origin and movement of the distributed goods—undermining the very simplicity, informality, and expedition of arbitration to which the parties agreed and that the FAA is designed to protect. And the increased costs of litigating both the merits in court and the applicability of the Section 1 exemption would be passed on in the form

of decreased payments to employees and independent contractors or increased costs to consumers.

Finally, the district independently erred in another important respect by refusing to enforce the arbitration agreements under either Florida or Georgia law (depending upon the relevant agreement) in the event the FAA does not apply. The arbitration agreements state that they "shall be governed by the FAA and Florida [or Georgia] law to the extent Florida [or Georgia] law is not inconsistent with the FAA." A144. That language straightforwardly invokes the preemptive effect of the FAA as a federal statute, and does not offer even the slightest indication that the parties intended to disclaim their agreements to arbitrate in the event that the FAA is inapplicable. Indeed, the district court's tortured reading of the choice-of-law provision to avoid compelling arbitration altogether not only runs afoul of ordinary interpretive principles, but also stands as an affront to the pro-arbitration policies embodied by Florida and Georgia arbitration law.

The judgment of the district court should be reversed.

ARGUMENT

I. The FAA's Section 1 Exemption Does Not Encompass Local Distributors.

A. In 1925, The Plain Meaning Of "Class Of Workers Engaged In * * * Interstate Commerce" Referred To A Group Of Workers Whose Work Predominantly Involved The Actual Transportation Of Goods Across State Lines.

It is a "fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary, contemporary, common meaning * * * at the time Congress enacted the statute." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (quotation marks omitted); *accord New Prime*, 139 S. Ct. at 539. "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law." *Wisconsin Cent.*, 138 S. Ct. at 2074; *see also New Prime*, 139 S. Ct. at 539 (recognizing the "reliance interests in the settled meaning of a statute").

Here, the district court was mistaken in focusing on the origin of the distributed *goods*, rather than the activities of the "class of *workers*"

(9 U.S.C. § 1 (emphasis added)). Both common and legal usage of the phrase "engaged in foreign or interstate commerce" (9 U.S.C. § 1) at the time of the FAA's enactment point in the same direction: That phrase meant—and means—the actual transportation of goods across state or national borders. Because the local distributors here are not members of a class of workers who regularly and predominantly engage in such transportation, the district court erred in holding their arbitration agreements exempt from the FAA.

1. The distributors in these cases are not "engaged in * * * interstate commerce" as those words were defined by popular and legal dictionaries in circulation at the time the FAA was enacted.

To begin with, the word "engaged" had (and continues to have) a meaning far narrower than "affecting" or "involving." *See Circuit City*, 532 U.S. at 118. To be "engaged" in an activity meant to be "occupied" or "employed" at it. Webster's New International Dictionary (1st ed. 1909); *see also* The Desk Standard Dictionary of the English Language 276 (new ed. 1922) (defining "engage" as "[t]o bind or obtain by promise"); Black's Law Dictionary 425 (2d ed. 1910) (defining "engagement" as "[a] contract" or "obligation"). Thus, Congress's use of

the word "engaged" focuses the inquiry onto the activities that the workers are tasked with performing.

"Interstate commerce," in turn, referred to actual movement of property across state lines. Black's Law Dictionary, for example, defined "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." Black's Law Dictionary 651 (2d ed. 1910). Another contemporaneous legal encyclopedia defined "interstate commerce" as "commercial transactions * * * between persons resident in different States of the Union, or carried on by lines of transport extending into more than one State." The Century Dictionary & Cyclopedia (1914).

Put together, then, to be a member of the "class of workers engaged in * * * interstate commerce" in 1925 meant to be part of a group of workers "employed" or "occupied" in "traffic" or "transportation" of goods "between or among the several states."

The distributors in this case are not "engaged in * * * interstate commerce" as understood in these then-contemporary sources. As

Flowers' brief details (at 31-38), many of the responsibilities of the distributors have nothing to do with the transportation of goods. And there is no evidence that the distributors in this case have *ever* crossed state lines in their work, much less that their work predominantly involves transportation of baked goods between points in different states. *See, e.g.*, *Rogers v. Lyft, Inc.*, --- F. Supp. 3d ----, 2020 WL 1684151, at *6 (N.D. Cal. Apr. 7, 2020) (holding that Section 1 does not apply to members of a class of workers whose work "*predominantly* entails intrastate trips") (emphasis added); *see also, e.g.*, *Heller v. Rasier, LLC*, 2020 WL 413243, at *8 (C.D. Cal. Jan. 7, 2020) (same when the plaintiffs were not "part of a group that *routinely*" engages in transportation across state lines) (emphasis added); *Grice v. Uber Techs., Inc.*, 2020 WL 497487, at *8 (C.D. Cal. Jan. 7, 2020) (same). Rather, the case involves local distribution of food within defined geographic regions. "Because the plain language of [Section 1] is unambiguous," the Court's inquiry "begins" and "ends" here. *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 631 (2018) (quotation marks omitted).

2. "What the dictionaries suggest, legal authorities confirm." *New Prime*, 139 S. Ct. at 540.

Several early cases prior to the enactment of the FAA involved litigation under the Federal Employers' Liability Act of 1908 (FELA), which provided a federal right of recovery for employees of interstate railroads if the employee worked for a "common carrier by railroad * * * *engaging* in commerce between any of the several states" *and* the employee was "employed in such [*i.e.*, interstate] commerce" at the time of injury. 35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657 (emphasis added); *see, e.g.*, *Illinois Cent. R. Co. v. Behrens*, 233 U.S. 473, 478 (1914). In other words, liability under the statute applied only when both the common carrier and the injured employee were engaged in interstate commerce.

The Court in *Behrens* held that such language—which, unlike Section 1, focuses on the individual worker rather than the class of workers—requires an analysis of the particular service the employee was providing at the time of the injury. Despite the fact that that railroads are an instrumentality of interstate commerce and that the carrier was engaged in such commerce, the Court explained, the statute

did not apply to an employee who was injured while "engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another." *Behrens*, 233 U.S. at 478 (emphasis added). Rather, the Court reasoned, Congress's use of the phrase "employed in such commerce" demonstrated its intent "to confine its action to injuries occurring when *the particular service* in which the employee is engaged is a part of interstate commerce." *Id.* (emphasis added). Under that logic, which applies similarly to assessing the activities of the relevant "class of workers" (9 U.S.C. § 1), the "particular service" performed by the distributors—primarily local distribution of baked goods—is not "a part of interstate commerce" either.

Indeed, the focus in the 1908 version of FELA on the particular activity performed by the worker—as reflected in the language "employed in such commerce"—was a direct response to the Supreme Court's decision holding unconstitutional a predecessor of that statute enacted in 1906. *See Howard v. Illinois Cent. R. Co.*, 207 U.S. 463, 497 (1908). The problem with the prior statute (under then-prevailing constitutional principles) was that the statute subjected to federal liability all employers who engaged in interstate commerce for injuries

suffered by any of their employees, regardless of whether the employees themselves were involved in interstate activity. *See id.* at 499-502. Given that background, Section 1 of the FAA's use of the term "class of workers engaged in * * * interstate commerce" should be interpreted to reflect the Congress's recognition in 1925 of the same then-applicable constitutional problem that had led it to revise the FELA in 1908. Decades ago, the Third Circuit recognized as much, explaining: "In incorporating almost exactly the same phraseology into the Arbitration Act of 1925 [as in "the Federal Employers' Liability Act of 1908,"] its draftsmen and the Congress which enacted it must have had in mind this current construction of the language which they used." *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am.*, 207 F.2d 450, 453 (3d Cir. 1953).

To be sure, the analogy to the FELA has limits in interpreting the Section 1 exemption. Unlike the Section 1 exemption, which the Supreme Court has admonished requires a "precise reading" and "narrow construction" (*Circuit City*, 532 U.S. at 118, 119), FELA has long been "construed liberally." *Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930); *see also, e.g.*, *Shanks v. Del., Lackawanna & W. R.R.*, 239

U.S. 556, 558 (1916). Section 1 also uses the term "class of workers" rather than focusing on any one particular worker. And Congress ultimately revised the relevant provision of the FELA in 1939 to encompass all employees whose duties "in any way directly or closely and substantially[] affect [interstate] commerce." *S. Pac. Co. v. Gileo*, 351 U.S. 493, 497 (1956). But that revision only serves to underscore that the prior version (the 1908 FELA) was the guide for Section 1 of the FAA, and that its use of the term "class of workers engaged in * * * interstate commerce" requires focusing on the particular activity performed by that class of workers.

The Court has continued to emphasize that while "'in commerce' does not, of course, necessarily have a uniform meaning whenever used by Congress," "the phrase '*engaged in* commerce'" generally "indicat[es] a *limited* assertion of federal jurisdiction." *United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 277, 280 (1975) (emphasis added). And the Court further explained that Congress's use of "engaged in commerce" has long been "understood to have a more limited reach" than phrases like "involving" or "affecting commerce." *Circuit City*, 532 U.S. at 115.

Consistent with this approach, courts of appeals have routinely held "that section 1 of the FAA exempts only the employment contracts of workers *actually engaged in* the *movement* of goods *in interstate commerce*." *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1471 (D.C. Cir. 1997) (emphasis added) (collecting cases).[2] As the Third Circuit has put it, Congress's intent was "to include only those other classes of workers [in addition to railroad employees and seamen] who are likewise engaged directly in commerce." *Tenney*, 207 F.2d at 452; *see also, e.g.*, *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995) ("We conclude that the exclusionary clause of § 1 of the Arbitration Act should be narrowly construed to apply to employment contracts of seamen, railroad workers, and any other class of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are."). This Court has

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[2] The Third Circuit's recent decision in *Singh v. Uber Technologies, Inc.*, held that the transportation of passengers rather than goods can qualify as interstate commerce. 939 F.3d 210, 219-26 (3d Cir. 2019). Although the Chamber disagrees with that holding, that issue is not presented by this case, which undisputedly involves goods. The Third Circuit did not decide whether the driver in that case belonged to a class of workers engaged in interstate commerce, instead remanding to the district court to conduct that inquiry in the first instance. *Id.* at 226-28.

agreed with *Tenney* and similar decisions that the class of workers "must 'actually engage' in the transportation of goods in interstate commerce" in order for Section 1 to even potentially apply. *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1290 (11th Cir. 2005).

This limitation of Section 1 to a class of workers whose activities predominantly entail the crossing of state lines also is consistent with this Court's decisions interpreting analogously worded criminal statutes, which hold that phrases such as "in interstate or foreign commerce" require "that an offender cross state lines." *United States v. Leichtman*, 742 F.2d 598, 602 n.5 (11th Cir. 1984) (citing *United States v. Bankston*, 603 F.2d 528, 532 (5th Cir. 1979)); *see also, e.g.*, *Rogers*, 2020 WL 1684151, at *5 (pointing to similar Ninth Circuit interpretations of criminal statutes in explaining that Section 1 requires transportation "across state lines").

3. Finally, this Court has made clear that the "interstate transportation factor" is "a necessary but not sufficient showing for the purposes of the exemption." *Hill*, 398 F.3d at 1290. In addition, the class of workers also must work "in the transportation industry," just as railroad and maritime workers do—and the exception does not cover

those "who incidentally transport[ ] goods interstate" in performing work outside of that industry. *Id.* at 1289-90. Thus, for example, Section 1 does not cover "a pizza delivery person who delivered pizza across a state line to a customer in a nearby town," or the account manager in *Hill* who incidentally crossed state lines with customers' merchandise in the process of serving those customers. *Id.* at 1290. As another court recently 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*, 2020 WL 1684151, at *6.

As Flowers' brief convincingly explains (at 21-31), the same is true of distributors of baked goods, who are not members of a class of workers in the transportation industry. Indeed, the district court's contrary holding expands Section 1 beyond recognition: virtually any business that manufactures or produces a good will employ or contract with workers to market, sell, and distribute that good. Treating all such workers as workers in the transportation industry in the same manner as railroad or maritime workers would make *Hill*'s limitation effectively meaningless and 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.

In short, both the plain text of Section 1 and the overwhelming weight of authority point to the conclusion that a worker must be a member of a class of workers in the transportation industry that regularly engages in actual transportation of goods across borders in order for the Section 1 exemption to apply.

B. The Historical Context Against Which Section 1 Was Enacted Confirms That Section 1 Must Be Given A Precise Meaning.

The context in which Section 1 of the FAA was enacted also strongly supports limiting Section 1's exemption to classes of workers actually and regularly engaged in interstate transportation of goods, just like "seamen" and "railroad employees."

The Supreme Court in *Circuit City* explained at length that the residual category of "workers engaged in interstate * * * commerce" must be "controlled and defined by reference to the enumerated categories of workers which are recited just before it"—namely, "seamen" and "railroad employees." 532 U.S. at 115. The Court determined 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"; "and the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent." *Id.* 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).

Specifically, 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., etc., Workers v. Gen. Elec. Co.*, 233 F.2d 85, 99 (1st Cir. 1956); *Tenney*, 207 F.2d at 452; Hearings on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 4th Sess. 9 (1923). 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* Andrew Furuseth, Analysis of H.R. 13522 (1924).[3]

Congress' inclusion of "railroad employees" in Section 1 appeared to stem from the same concerns. Congress had developed 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. *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*.

[3] In declining to place any weight on Furuseth's objections to the FAA, the Supreme Court recognized that "the fact that a certain interest group sponsored or opposed particular legislation" is not a basis for discerning the meaning of a statute. *Circuit City*, 532 U.S. at 120. Rather, this history simply provides context for the Court's 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." *Id.* at 121. Specifically, the Court explained that it is "rational" to interpret Section 1 to reflect Congress's decision "to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself" the ability to regulate separately "those engaged in transportation" in the same manner as maritime and railroad workers. *Id.*

(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 Missouri-Kansas-Texas R. R. v. Missouri-Kansas-Texas R. Co.*, 320 U.S. 323, 328 n.3 (1943) (summarizing the "fifty years of evolution" of the railroad dispute resolution framework).

As the Supreme Court summarized: "[i]t is reasonable to assume 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." *Circuit City*, 532 U.S. at 121. The residual category of other transportation workers was included for a similar reason. *Cf. Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1625 (2018) ("[W]here, as here, a more general term follows more specific terms in a list, the general term is usually understood to 'embrace only objects similar in nature to those objects enumerated by the preceding specific words.'") (quoting *Circuit City*, 532 U.S. at 115). That is, Congress contemplated extending similar legislation to other categories of workers: "Indeed, such

legislation was soon to follow, with the amendment of the Railway Labor Act in 1936 to include air carriers and their employees." *Circuit City*, 532 U.S. at 121.

The fact that the Congress in 1925 declined to upset dispute-resolution frameworks that it had been tailoring for the railroad or maritime industry over decades hardly supports the exemption of local distributors of goods—who share no such similar history and for whom Congress has not provided any comparable, industry-specific means of dispute resolution. Indeed, the district court did not point to any comparable dispute-resolution regimes for distributors at the time the FAA was enacted, or any time thereafter.

II. Even If The FAA Did Not Apply Here, The Arbitration Agreements Are Enforceable Under State Law.

As Flowers' brief explains (at 39-48), the arbitration agreements in this case are also enforceable under state law in the alternative. In ruling otherwise and declining to compel arbitration altogether, the district court relied on the language in the arbitration agreements stating that the agreements "shall be governed by the FAA and Florida [or Georgia] law to the extent Florida [or Georgia] law is not inconsistent with the FAA." A144. In the lower court's view, Florida or

Georgia law are "inconsistent with the FAA" because those laws do not contain an exemption similar to Section 1 of the FAA. A295-296. That conclusion was wrong, for several reasons.

First, there is nothing "inconsistent with the FAA" about applying state arbitration law in the event the FAA does not apply. Contrary to the district court's apparent reading, Section 1 of the FAA does not *prohibit* arbitration of disputes with classes of workers that fall within its terms. It simply exempts agreements to arbitrate those disputes from the *FAA*'s coverage. *See* 9 U.S.C. § 1 (*"[N]othing herein contained shall apply* to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.") (emphasis added). Accordingly, whether or not the Section 1 exemption applies should have "no impact on other avenues (such as state law) by which a party may compel arbitration." *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 24 (1st Cir. 2017), *aff'd*, 139 S. Ct. 532 (2019); *see also, e.g., Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 596 (3d Cir. 2004) ("[T]he effect of Section 1 is merely to leave the arbitrability of disputes in the excluded categories as if the [Federal] Arbitration Act had never been enacted.") (quotation marks omitted). Enforcing

arbitration agreements through state law, "as if the FAA 'had never been enacted,' does not contradict any language of the FAA, but in contrast furthers the general policy goals of the FAA favoring arbitration." *Palcko,* 372 F.3d at 596 (quoting *Mason-Dixon Lines, Inc. v. Local Union No. 560,* 443 F.2d 807, 809 (3d Cir. 1971)); *see also Bernhardt v. Polygraphic Co. of Am.,* 350 U.S. 198, 203 (1956) (looking to state law to determine enforceability of arbitration agreement where FAA did not govern).

As numerous other courts have recognized, there can thus be no conflict or inconsistency between the FAA and state law if the FAA simply doesn't apply. *See, e.g., Davis v. EGL Eagle Glob. Logistics L.P.*, 243 F. App'x 39, 44 (5th Cir. 2007) ("[T]he FAA does not preempt [Texas law] because this case presents the situation where the FAA refuses to enforce an arbitration provision (assuming for the moment that Davis meets the exemption for transportation workers) that the [Texas arbitration statute] would enforce."); *see also* Flowers' Br. 40-42 (collecting additional cases from across the country applying state law after concluding or assuming that the Section 1 exemption prevents application of the FAA).

Second, the district court's reading of the choice-of-law clause is entirely unnatural. In context, it is plain that the language selecting state law to the extent it "is not inconsistent with the FAA" simply invokes the fundamental precept under the Supremacy Clause that the FAA, as a federal statute, preempts contrary state law. *See, e.g.*, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019) (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011)); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015).

But if the district court's erroneous reading were permitted to stand, this commonplace language would instead be interpreted to prohibit arbitration altogether when the FAA is held not to apply. That interpretation finds no support in the contractual language or the text of the FAA and is anathema to the pro-arbitration policies reflected in the state laws chosen by the parties. *See, e.g.*, *Orkin Exterminating Co. v. Petsch*, 872 So.2d 259, 263 (Fla. Ct. App. 2004); *Helms v. Franklin Builders, Inc.*, 700 S.E.2d 609, 611 (Ga. Ct. App. 2010).

Indeed, the district court's strained reading of the choice-of-law provision is a mirror image of the interpretation rejected by the U.S. Supreme Court in *Imburgia*. In *Imburgia*, the agreement required

arbitration unless the waiver of class arbitration was unenforceable "under the law of your state"—in that case, California. 136 S. Ct. at 466. The agreement was drafted prior to *Concepcion*, at a time when "the parties likely believed that the words 'law of your state' included California law that then made class-arbitration waivers unenforceable." *Id.* at 468-69. Yet the California Court of Appeal concluded that even after *Concepcion*, which held that the FAA preempted that California rule, the parties' use of the words "law of your state" should be read to include even preempted or invalid state law. *Id.* at 467. This interpretation was untenable, the U.S. Supreme Court explained, because it departed from the "ordinary meaning" of the phrase—selecting "*valid* state law"—and instead impermissibly reflected a "unique" interpretation of the arbitration agreement that was "restricted to that field." *Id.* at 469.

The same kind of idiosyncratic reading of an arbitration clause is taking place here. The parties agreed to arbitrate their disputes and to apply non-preempted state law. By turning the parties' unremarkable choice-of-law provision on its head and treating it as a ground to deny arbitration outright, the district court departed from the "ordinary

meaning" of the contract's terms in service of a uniquely anti-arbitration approach. *Imburgia*, 136 S. Ct. at 469.

Finally, even if the district court had been correct that the choice-of-law provision is somehow ineffective—and it was wrong about that—that result would not lead to its conclusion that the arbitration agreement is unenforceable. As Flowers points out, the arbitration agreements contain a severability clause, with the remainder of the agreement "continu[ing] in full force and effect" if any portion is unenforceable. A144.

Contrary to the district court's apparent belief, *some* law has to apply to the contract. As Flowers' brief explains, multiple courts have compelled arbitration under state law even where the agreement mentions *only* the FAA and does not select *any* state law. Flowers' Br. 45-46 (citing three decisions). That outcome makes sense under general contract principles, because in the absence of a valid choice of law clause, courts of course do not treat a contract as invalid. Rather, they apply the forum's conflicts-of-law principles to determine which state's law governs the contract's validity or enforceability. Florida, for example, applies the "traditional rule of *lex loci contractus*," in which a

contract "is governed by the law of the state in which the contract is made." *Fioretti v. Massachusetts Gen. Life Ins. Co.*, 53 F.3d 1228, 1235 (11th Cir. 1995). At a minimum, the district court should have applied that analysis and evaluated the arbitration agreements under the resulting state's law—which may well have been Florida or Georgia in any event—rather than declaring the arbitration agreement unenforceable.

III. The District Court's Approach Harms Businesses And Workers.

The failure to give Section 1 a proper construction carries significant practical consequences. The decision below creates uncertainty for many businesses and workers, threatening to prevent those entities and individuals from obtaining the benefits of arbitration secured by the FAA—or even from being able to obtain arbitration under state law.

Indeed, the Supreme Court has repeatedly recognized the "real benefits" of "enforcement of arbitration provisions," *Circuit City*, 532 U.S. at 122-23, including "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).

And the empirical research confirms these conclusions. Scholars and researchers agree, for example, that the average employment dispute is resolved up to twice as quickly in arbitration as in court. A recent study released by the Chamber's Institute for Legal Reform found that "employee-plaintiff arbitration cases that were terminated with monetary awards averaged 569 days," while, "[i]n contrast, employee-plaintiff litigation cases that terminated with monetary awards required an average of 665 days." Nam D. Pham, Ph.D. & Mary Donovan, *Fairer, Better, Faster: An Empirical Assessment of Employment Arbitration*, NDP Analytics 5, 11-12 (2019);[4] *see also, e.g.*, 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); David Sherwyn, Samuel

[4] Available at https://www.instituteforlegalreform.com/uploads/sites/1/Empirical-Assessment-Employment-Arbitration.pdf.

Estreicher, and Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stanford L. Rev. 1557, 1573 (2005) (collecting studies and concluding the same).

Furthermore, "there is no evidence that plaintiffs fare significantly better in litigation." Sherwyn, *supra*, at 1578. Indeed, a study published earlier this year found that employees were *three times* more likely to win in arbitration than in court. Pham, *supra*, at 5-7 (surveying more than 10,000 employment arbitration cases and 90,000 employment litigation cases resolved between 2014 to 2018). The same study found that employees who prevailed in arbitration "won approximately double the monetary award that employees received in cases won in court." *Id.* at 5-6, 9-10; *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 likewise reports a higher employee-win rate in arbitration than in court. *See* Sherwyn, *supra*, 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. 29) (of dispositive motions granted in

court, 98% are granted for the employer); Nat'l Workrights Inst., *Employment Arbitration: What Does the Data Show?* (2004) (concluding that employees were 19% more likely to win in arbitration than in court), available at goo.gl/nAqVXe.

On the other side of the equation, sweeping an unknown number of workers into Section 1's exemption would impose real costs on businesses. Not only is litigation more expensive than arbitration for businesses, but the uncertainty stemming from the district court's atextual and ahistorical approach would engender expensive disputes over the enforceability of arbitration agreements with workers never before considered to be "engaged in interstate commerce"—contrary to the Supreme Court's admonition that Section 1 should not 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.'" *Circuit City*, 532 U.S. at 123 (quoting *Allied-Bruce*, 513 U.S. at 275). Moreover, businesses would, in turn, pass on these litigation expenses to consumers (in the form of higher prices) and workers (in the form of lower compensation).

CONCLUSION

The district court's decision should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,396 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: June 10, 2020 /s/ *Archis A. Parasharami*

CERTIFICATE OF SERVICE

I certify that on June 10, 2020, I filed the foregoing via the CM/ECF system and the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

Dated: June 10, 2020 /s/ *Archis A. Parasharami*