No. 23-51

In the Supreme Court of the United States

NEAL BISSONNETTE and TYLER WOJNAROWSKI,
on behalf of themselves and all others similarly situated,
Petitioners,

v.

LEPAGE BAKERIES PARK ST., LLC, C.K. SALES CO., LLC, and FLOWERS FOODS, INC.,
Respondents.

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

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INTRODUCTION

Flowers begins its brief by announcing that it will defend the Second Circuit's rule. That rule, the introduction says, is "simple" and "correct." Yet Flowers makes no effort to actually demonstrate that grafting a price-structure-and-revenue requirement onto the Federal Arbitration Act is either simple or correct. It can't. So instead, the company abandons the Second Circuit's rule and proposes its own: The FAA, Flowers argues, exempts only those transportation workers whose employers "sell transportation services."

But Flowers' proposal suffers from the same fundamental flaw as the Second Circuit's. It has no basis in the text of the statute.

Flowers doesn't even try to argue that a worker's employer must sell transportation services for the worker to belong to a "class of workers engaged in commerce." Its only real attempt at a textual argument is to contend that because the FAA explicitly exempts "seamen" and "railroad employees," the exemption must be limited to workers whose employers sell transportation services. But in 1925, neither "seamen" nor "railroad employees" necessarily worked for businesses that sold transportation. Indeed, Flowers can't identify even a single example of the word "seamen" *ever* being used to mean workers whose employers sell transportation services. That "sinks" its *ejusdem generis* argument. *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 461 (2022).

Unable to rely on the text, Flowers' main pitch is that its sells-transportation-services requirement would make the exemption narrower and, supposedly, easier for courts to apply. But neither narrowness nor judicial convenience is a legitimate reason for ignoring the text of a statute.

And, in any event, the text as written is already narrow. As this Court held in *Circuit City* and again in *Saxon*, the exemption applies only to classes of workers that are engaged in foreign or interstate transportation. That doesn't include pizza delivery drivers or pest-control workers. But it does include commercial truck drivers.

Nor does Flowers' proposal allow courts to avoid hard questions. It just adds additional questions on top of the ones actually presented by the statute's text: What does it mean for a company to sell transportation services and how should a court determine whether a company does so? Does it matter how much transportation a business sells or how often? What about companies that use subsidiaries to transport their goods? Are workers for those subsidiaries exempt because the subsidiary technically sells transportation to its parent company? More fundamentally, why don't Flowers' drivers themselves satisfy the company's test? After all, Flowers isn't just selling baked goods; it's selling the transportation of those goods to retailers' stores. Why is that not enough? Flowers declines to answer any of these questions.

Flowers' requirement makes so little sense that its own amicus, Amazon, repudiates it. The FAA's exemption, Amazon emphasizes, "does *not* turn on the activities of the company for which the worker works." Amazon Br. 5–6. As Amazon recognizes, Flowers' argument is virtually identical to the argument this Court rejected in *Saxon*: Flowers seeks to limit the FAA based on a characteristic that "seamen" and "railroad employees" do not share, claiming (incorrectly) that doing so is necessary to ensure that the exemption is narrow and easy to apply. This Court rejected that argument in *Saxon*, reaffirming that the FAA must be interpreted according to its text. *Saxon*, 596 U.S. at 461–62. It should do the same here.

ARGUMENT

I. Flowers does not dispute that a worker's employer is irrelevant to determining whether the worker belongs to a "class of workers engaged in commerce."

The FAA explicitly specifies which workers are exempt: those who belong to "any" "class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Flowers all but ignores this statutory language. It does not attempt to explain what these words meant in 1925—let alone demonstrate that they had anything to do with whether a worker's employer sold transportation services. Nor could it. As explained in the opening brief, when the FAA was enacted, any worker engaged in the foreign or interstate transportation of goods would have been understood to be "engaged in foreign or interstate commerce." Pet. Br. 16–21.[1]

Although it offers no alternative interpretation, Flowers nevertheless insists that the phrase "engaged in commerce" cannot possibly apply to "*anyone* engaged in foreign or interstate transportation." Resp. Br. 32. But the company does not support its insistence with any evidence about the meaning of these words in 1925. Instead, it purports to rely on this Court's decisions in *Circuit City* and *Saxon*. But neither decision supports its argument.

In *Circuit City*, this Court looked to the "plain meaning" of the statute's terms and concluded that the FAA exempts "transportation workers"—not workers

[1] For simplicity, this brief omits ellipses when shortening "engaged in foreign or interstate commerce" to "engaged in commerce." In addition, unless otherwise specified, all internal quotation marks, emphases, alterations, and citations are omitted from quotations throughout.

whose employers sell transportation services. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). And, less than two years ago in *Saxon*, this Court explicitly held that "*any* class of workers directly involved in transporting goods across state or international borders falls within § 1's exemption." *Saxon*, 596 U.S. at 457 (emphasis added). The Court came to that conclusion by examining the ordinary meaning of the phrase "engaged in commerce" at the time the FAA was enacted. *See id.*

Flowers doesn't identify any reason to doubt this Court's ordinary-meaning analysis in *Saxon*—or the conclusion it reached. Instead, the company takes issue with some of the other cases we cite in our opening brief—cases contemporaneous with the FAA that use the phrase "engaged in commerce" to describe anyone engaged in foreign or interstate transportation. But these cases merely support the conclusion that this Court already reached in *Saxon*. Flowers' quibbles are irrelevant because the company can't dispute the fundamental point: In 1925, workers transporting interstate goods were well understood to be engaged in interstate commerce, regardless of who employed them.

In any event, Flowers' quibbles are misplaced. The company's main complaint (at 33–34) is that many of the cases from the early twentieth century that discuss commerce and those engaged in it took the view that the Commerce Clause prohibits states from taxing interstate commerce. Because this Court later disavowed that view, Flowers says, those cases cannot be used to determine the meaning of "interstate commerce" in 1925.

But this Court did not change its mind about what "interstate commerce" *meant* in 1925; it merely came to believe that it was permissible for states to tax it. *See, e.g.*, *United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 851

(1996). The change in this Court's Commerce Clause jurisprudence, therefore, doesn't undermine the value of these cases in demonstrating the ordinary meaning of "commerce" and "engaged in commerce" when the FAA was enacted.

Ultimately, Flowers' attempt to nitpick individual sources falters on the historical reality that *every* source we have reflects the same understanding: Workers engaged in interstate transportation were "engaged in commerce"—regardless of whether their employer sold transportation services. *See* Pet. Br. 16–21. Flowers does not cite, and we have not found, a single source to the contrary. The company doesn't offer an alternative interpretation of the phrase "engaged in commerce" because there is no alternative interpretation.

II. The *ejusdem generis* canon cannot limit the worker exemption based on a characteristic that seamen and railroad employees do not share.

Flowers' only genuine attempt at a textual argument is its contention that, because the FAA explicitly exempts "seamen" and "railroad employees," the *ejusdem generis* canon counsels that the worker exemption should be limited to workers whose employers sell transportation services. But Flowers immediately runs into an insurmountable obstacle: "Seamen" have never been limited to workers whose employers sell transportation. Flowers does not even try to argue otherwise. Nor does it dispute that "railroad employees" did not necessarily work for a railroad company.

Ejusdem generis does not permit courts to limit a statute based on a characteristic the statute's enumerated categories do not share. *Saxon*, 596 U.S. at 462. Nothing Flowers says about "seamen" or "railroad employees" can overcome this fundamental problem.

Seamen. Flowers begins its discussion of "seamen" with a concession. The company admits that in 1925, the word "'seamen' commonly meant . . . 'any person . . . employed or engaged in any capacity on board any ship.'" Resp. Br. 16 (quoting *Saxon*, 596 U.S. at 460). That ordinary meaning is dispositive here.

1. Again, this Court interprets the FAA, like any other statute, "according to its ordinary, contemporary, common meaning." *Saxon*, 596 U.S. at 455; *see also McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991) ("In the absence of contrary indication, we assume" that the term "seaman" should be given "its established meaning."). And Flowers itself concedes that the ordinary, contemporary, common meaning of "seamen" was anyone who worked on a boat. It has to. This Court has already held as much. *See Saxon*, 596 U.S. at 460; *Wilander*, 498 U.S. at 346 (explaining that by the early twentieth century, it was "settled" that the word "seaman" meant any "person employed on board a vessel in furtherance of its purpose").

In accordance with this ordinary meaning, "seamen" have always included workers employed by companies that did not sell transportation services. Pet. Br. 23–25. Flowers takes issue with a few of the many examples cited in our opening brief, but ultimately it does not—and cannot—contest that basic historical fact. In fact, Flowers itself recognizes (at 38) that "seamen" commonly worked aboard ships that "were used as an incidental part of a different business," such as selling railroad ties or dredging.

Nevertheless, the company argues that for purposes of the FAA, this Court should jettison the ordinary meaning of "seamen" and limit the term to workers aboard a boat whose employers "sell transportation services." Resp. Br.

16. But Flowers does not identify a single example of the word "seamen" *ever* being defined that way. So not only is Flowers' proposal inconsistent with the *ordinary* meaning of "seamen"; it's not even a *possible* meaning.

That's all that's required to reject the company's *ejusdem generis* argument. Employment by a business that sells transportation services can't possibly be a "common attribute" of seamen and railroad employees if it is not an attribute of seamen at all. *See Saxon*, 596 U.S. at 461.

2. Flowers tries to save its argument by moving the goalposts. Unable to demonstrate that the word "seamen" meant only those boat-workers whose employers sell transportation services, the company instead argues that "seamen" sometimes meant "workers on a ship that is engaged in a carrying trade in connection with trade and commerce." Resp. Br. 17. As explained below, that is wrong. Flowers does not cite—and we have not found—a single example of "seamen" being defined this way. *See infra* pages 8–10.

But even if Flowers' definition were correct, that wouldn't save its *ejusdem generis* argument. To succeed, Flowers needs to demonstrate that seamen and railroad employees share the characteristic of being employed by companies that sell transportation. But workers can be—and, in 1925, frequently were—employed on a ship that carries goods "in connection with trade and commerce" even if they are not employed by a transportation company. Take, for example, the seamen employed by lumber companies on the Pacific coast or by manufacturers that shipped their own goods to market.[2]

[2] Flowers suggests (at 37–38) that lumber schooners were owned by associations of lumber companies. Some were, but many lumber companies owned (or leased) their own ships and hired their own

See Pet. Br. 23–25. Those workers would satisfy Flowers' proposed definition of "seamen," but they did not work for businesses that sold transportation services.

And, again, Flowers concedes that its proposed definition isn't the word's ordinary meaning. So, at most, Flowers has demonstrated that the word "seamen" *could*—but usually didn't—have a specialized meaning that doesn't even capture the limitation that the company seeks to impose. On Flowers' own definition, then, "seamen" do "not necessarily share the attribute that [Flowers] would like [this Court] to read into the catchall provision." *Saxon*, 596 U.S. at 462. In other words, Flowers refutes its own *ejusdem generis* argument. *See id.*

3. Flowers' argument would fail even if it weren't self-refuting. Although the company suggests (at 17) that its proposed "seamen" definition comes from statutes contemporaneous with the FAA, it actually comes from a single district court decision that was defining the phrase "merchant vessel"—not the word "seamen." *In re Jupp*, 274 F. 494, 495 (W.D. Wash. 1921). *Jupp* held that a ship used to repair cables was not a "merchant ship" for purposes of a statute that authorized the naturalization of noncitizens who worked aboard merchant vessels. *Id.* The court reasoned that a "merchant" is someone who buys or sells goods. *Id.* And so, the court concluded, a "merchant ship must be a ship that is engaged in a carrying trade in

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seamen. *See, e.g.*, *Bos. Marine Ins. Co. v. Metro. Redwood Lumber Co.*, 197 F. 703, 705–06 (9th Cir. 1912) (lumber company was the "sole owner" of a schooner and employed "seamen"); Wilson Compton, *The Organization of the Lumber Industry* 52 (1916) (noting that it was common in the Pacific Northwest for companies to "ship their lumber in their own schooners"); William Cronon, *Nature's Metropolis: Chicago and the Great West* 170 (1991).

connection with trade and commerce, and not merely engaged in the transportation of such goods as may be necessary for repairs of cable lines of a privately owned concern, and which goods are not designed for the general trade." *Id. Jupp* says nothing at all about "seamen."

This single district court definition of "merchant ship" cannot possibly limit the FAA's worker exemption. Unlike the statute at issue in *Jupp*, the FAA does not say workers "on board merchant vessels"; it says "seamen." *Cf. New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 542 (2019) (rejecting a similar effort to limit the worker exemption by relying on the definition of a word not present in the statute's text).

But even if Flowers could convince this Court to write the words "on board merchant vessels" into the FAA, a ship was often called a "merchant vessel" simply to distinguish it from a military vessel. *See, e.g.*, *Tucker v. Alexandroff*, 183 U.S. 424, 446 (1902) ("Being, as we have already held, a ship, she must be either a ship of war or merchant vessel, and as she was clearly not a merchant vessel, the only other alternative applies."). Similarly, "merchant seamen" commonly included any seaman "employed in a private vessel"—as opposed to those "employed in the navy or public ships." *Black's Law Dictionary* 773 (2d ed. 1910); *accord, e.g.*, *United States v. Sullivan*, 43 F. 602, 604 (C.C.D. Or. 1890). Thus, contrary to the district court's analysis in *Jupp* (and, perhaps, modern ears), "merchant seamen" and "merchant vessels" did not necessarily have anything to do with merchants in the narrow sense of those who sell goods. Often, they merely meant commercial ships, rather than military ones.

This loose usage is reflected in the statutes regulating seamen enacted in the years prior to the FAA. For

example, the Shipping Commissioners Act—which Flowers says "pertain[ed] to 'Seamen engaged in Merchant Ships,'" Resp. Br. 17 (quoting Shipping Commissioners Act of 1872, ch. 322, 17 Stat. 262)—explicitly defined "ship" to "comprehend *every* description of vessel" and "seaman" as "*every* person" employed aboard a ship. § 65, 17 Stat. at 277 (emphasis added). And the *Merchant* Marine Act of 1920 provided a cause of action to injured seamen, which applied to anyone employed aboard any vessel "in furtherance of its purpose." *Wilander*, 498 U.S. at 346. When Congress wanted to limit the kinds of vessels to which a statute applied, it said so explicitly. *See, e.g.*, Seamen's Act of 1915, ch. 153, § 2, 38 Stat. 1164, 1164 (stating that the provision applied to "all merchant vessels," except "fishing or whaling vessels, or yachts"); § 6, 38 Stat. at 1165 (similar).

And again, this argument is self-defeating. Even if this Court were willing to judicially amend the FAA to exempt solely those seamen aboard merchant vessels, and even if it narrowly defined merchant vessels to mean ships "engaged in a carrying trade in connection with trade and commerce," the most that could possibly show is that the FAA exempts workers who transport goods for trade and commerce. That's precisely what Flowers' drivers do.[3]

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[3] Flowers' contention (at 23–24) that the ordinary meaning of "seamen" excluded fishermen fails for similar reasons. It is both incorrect and irrelevant. As this Court explained in *Wilander*, although there had previously been some confusion, by 1920, it was clear that "seamen" included all workers "on board a vessel in furtherance of its purpose." 498 U.S. at 345–46 (citing fishermen as an example). And regardless of how fishermen were treated, on Flowers' own argument, workers aboard a boat transporting goods for commerce were seamen. There's no dispute that Flowers' drivers transport goods for commerce.

4. Falling back, Flowers asks this Court to rely on "statutory context" to override the ordinary meaning of the word "seamen." Resp. Br. 20, 35–37. But the "context" in which the word "seamen" appears offers no basis to deviate from its ordinary meaning. Flowers attempts a sort of reverse *ejusdem generis* argument, contending that the FAA's catchall phrase limits the word "seamen" to solely those who were "engaged in commerce." Resp. Br. 17–18. Not only is that backwards—"seamen" and "railroad employees" limit the catchall phrase, not the other way around—but it doesn't support Flowers' interpretation. The company doesn't dispute that workers can be "engaged in commerce" without working for a business that sells transportation services.

Similarly, Flowers' "contracts of employment" argument is both wrong and irrelevant. Contrary to the company's contention (at 18), Congress regulated the "contracts of employment" of many seamen besides those "traveling in vessels engaged in foreign or coast-to-coast trade." *See, e.g.*, 46 U.S.C. § 574 (1925) (requiring that contracts of employment of seamen "from a port in one State to a port in any other than an adjoining State" be in writing); 46 U.S.C. § 596 (1925) (regulating payment of wages to seamen on vessels making "coasting voyages").

And, regardless, Flowers is not arguing that the FAA's worker exemption should be geographically limited; it's arguing that it should be limited by employer. The company cites—and we have found—no statute regulating contracts of employment (or anything else) that contains that limitation.

For that reason, the company's effort (at 35) to rely on the "statutory frameworks against which Congress was legislating" also fails. Every statute Flowers cites—and every statute we have found—used the word "seamen" in

accordance with its ordinary meaning. Indeed, the title of the U.S. Code that governed "shipping," codified the same year the FAA was enacted, defined "seamen" to include "every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board" "any vessel." 46 U.S.C. § 713 (1925). This definition came from the Shipping Commissioners Act—the statute that governed maritime dispute resolution. § 65, 17 Stat. at 277.

To be sure, the scope of statutes regulating seamen at the time—and even specific provisions within a given statute—varied greatly. *Compare, e.g.*, Jones Act, ch. 250, § 33, 41 Stat. 988, 1007 (1920) (enabling "any seaman" to bring negligence claims against their employer), *with* Seamen's Act of 1915, ch. 153, § 2, 38 Stat. 1164, 1164 (regulating seamen aboard "merchant vessels" except "fishing or whaling vessels, or yachts"), *and* § 13, 38 Stat. at 1169 (applying to seamen on any vessel, including "decked fishing vessels, naval vessels, or coast guard vessels").

But not a single statute was limited to seamen whose employers sold transportation services. And in every instance in which Congress sought to limit the scope of a statute, it did so explicitly—making clear that the word "seamen" itself contained no such limitations.

In the end, Flowers' "seamen" arguments all fail for the same reason: There simply is no evidence that the word "seamen" has ever meant boat-workers whose employer sells transportation services. Flowers' own amicus agrees. *See* Amazon Br. 6. There is, therefore, no basis to adopt such a limitation in the FAA.

Railroad employees. Flowers' attempt to rely instead on "railroad employees" fails for two reasons. First, again, to limit the FAA based on *ejusdem generis*, Flowers must identify a *commonality* between seamen and railroad

employees. *See Saxon*, 596 U.S. at 461. Flowers argues (at 42) that this Court need not identify the common factor "at the lowest possible level of generality." But the factor it identifies must at least *be* common. *Id.* Because seamen are not limited to workers whose employers sell transportation services, that cannot be the common factor—regardless of the scope of "railroad employees."

Second, Flowers concedes (at 40–41) that the phrase "railroad employees" was not necessarily limited to workers employed by a railroad company. Instead, it argues that companies that "operated railroads as incidental to their chief business"—manufacturers or commodities producers, for example—would not commonly be called railroad companies. Resp. Br. 38–39. But that's precisely the point. Although these companies were not railroad companies, the workers who labored on their railroads were often called "railroad employees." Pet. Br. 31. And the FAA refers to "railroad employees," not "railroad companies."

Flowers asserts (at 39) that most federal railroad statutes were explicitly limited "to railroads that sold transportation services." But, if anything, that demonstrates that Congress knew how to adopt such a limitation but chose not to do so in the FAA.

* * *

Even accepting every one of Flowers' arguments, at most, the company has demonstrated that the word "seamen" did not have anything to do with a worker's employer, and the phrase "railroad employees" was ambiguous. That "sinks" its *ejusdem generis* argument. *Saxon*, 596 U.S. at 461.

Contrary to Flowers' assertion (at 35), this conclusion doesn't render the terms "seamen" and "railroad employees" superfluous. They continue to serve the

function that this Court identified in *Circuit City*: They limit the exemption to transportation workers—rather than workers engaged in commerce of any kind.[4]

Flowers tries to rescue its argument by attributing the differences between "seamen" and "railroad employees" to "differences . . . inherent in the modes of transportation themselves." Resp. Br. 41. But that gives away the game: Regardless of the reason, the FAA cannot be limited by a characteristic that seamen and railroad employees don't share. *Saxon*, 596 U.S. at 461. It also reduces the company's industry argument to the contention that "seamen" are those engaged in transporting goods by sea, and "railroad employees" are those who transport goods by rail. *See* Resp. Br. 42. On that view, Flowers' truck drivers *are* in a transportation industry because their job is to transport goods by truck.

Indeed, trucking today is closely analogous to maritime shipping in 1925. Unlike railroad transportation, which requires expensive, fixed infrastructure (rails), maritime transportation requires only a boat. That's why, although rail transportation was largely handled by railroad companies, maritime shipping was often handled by manufacturers and commodities producers themselves—they could buy or lease their own boats. *See* Pet. Br. 22–24. The same is true of trucking today. As with

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[4] Flowers argues (at 35) that if Congress had intended the FAA to exclude all transportation workers, "it would have said that." But that argument applies equally to Flowers' interpretation. Congress could have written that the FAA exempts "workers engaged in transportation whose employers sell transportation services." But it chose not to. Any statute in which *ejusdem generis* limits the scope of a catch-all phrase could be rewritten to omit the enumerated categories and instead phrase the catch-all more narrowly. Flowers' argument, therefore, is really an argument against *ejusdem generis*—not an argument that its application of *ejusdem generis* is better.

maritime shipping in 1925, some manufacturers hire trucking businesses to transport their goods, but many goods are trucked by the companies who make or sell them. Pet. Br. 35–36. Either way, the commercial truck drivers who transport these goods are transportation workers—just like "seamen" in 1925.

III. Flowers' policy arguments cannot overcome the text of the statute and are unavailing anyway.

1. Unable to root its argument in the text of the statute, Flowers "falls back on statutory purpose." *Saxon*, 596 U.S. at 463. But even if "vague invocations of statutory purpose" could overcome a statute's text, *id.*, Flowers' purposivist argument fails on its own terms. Flowers starts by asserting that the purpose of the FAA's worker exemption is to "preserve[] the statutory protections and statutory dispute resolution schemes that [Congress] had tailored to the unique needs of workers in the maritime shipping and rail transportation industries." Resp. Br. 27. Those workers, Flowers recounts, had long been involved in contentious labor disputes, and Congress sought stability.

But the labor unrest Congress was concerned about was not limited to those employed by companies that sold transportation services. For example, seamen employed by lumber companies "played a leading role in virtually every maritime strike" on the west coast—threatening not just maritime transportation itself, but "[t]he great southern California building boom," which depended on lumber. Bruce Nelson, *Workers on the Waterfront: Seamen, Longshoremen, and Unionism in the 1930s*, at 43, 61 (1990); *see also supra* note 2 (explaining that lumber vessels were often owned by lumber companies). These workers were also the "backbone" of the Seamen's Union,

the head of which, Flowers acknowledges (at 28), motivated the worker exemption. Pet. Br. 28.

And, as we have already explained, neither "the statutory protections" for seamen nor their "dispute resolution scheme" was limited to those whose employers sold transportation. *See* Pet. Br. 26–27; *supra* pages 10–12. Indeed, in advocating for the worker exemption, the head of the Seamen's Union was particularly worried about safeguarding the protections of the Jones Act, which applied to all seamen. *See* Analysis of H.R. 13522 Submitted by President Andrew Furuseth to the Convention which was Adopted, in *Proceedings of the Twenty-Sixth Annual Convention of the International Seamen's Union of America* 203, 204 (1923).

And although Congress repeatedly tinkered with the scope of the Shipping Commissioners Act—and therefore its dispute resolution scheme—the statute was never limited to workers whose employers sold transportation services. *See* Pet. Br. 26 n.8 (citing amendments to the statute). If the purpose of the worker exemption was to avoid interfering with pre-existing statutory protections, limiting the exemption to those who work for businesses that sell transportation would undermine that purpose.

2. The core selling point of Flowers' interpretation, then, is not actually text or history or purpose, but that its reading of the worker exemption is "narrow." *See, e.g.*, Resp. Br. 1. But as with any statutory provision, the best reading of the exemption is not necessarily the narrowest; it's the one that accords with the text. *Saxon*, 596 U.S. at 463; *New Prime*, 139 S. Ct. at 543.

In any event, this Court has already given the exemption a "narrow construction" by limiting it to workers who share the same characteristic that seamen and railroad employees do—that is, transportation

workers. *Circuit City*, 532 U.S. at 118. Flowers asserts that absent the company's atextual limitation, the exemption will swallow the rule. *See, e.g.*, Resp. Br. 47; *see also* Cal. Emp. L. Council Amicus Br. 6. But absent Flowers' atextual limitation, the exemption will continue to mean exactly what this Court said it means in *Circuit City* and *Saxon*: Workers directly involved in the foreign or interstate transportation of goods are exempt, and those who are not aren't. It's been years since *Circuit City*, and no court has ever held that a pizza delivery driver or a pest-control worker is exempt from the FAA—including in circuits that have explicitly rejected an industry requirement. *Cf., e.g.*, *Saxon v. Sw. Airlines Co.*, 993 F.3d 492, 497 (7th Cir. 2021), *aff'd*, 596 U.S. 450 (since at least 2012, the Seventh Circuit has made clear that "a transportation worker need not work for a transportation company"); *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 803 (7th Cir. 2020) (holding that restaurant delivery drivers are not exempt).

That's because, as Flowers emphasizes (at 48), the exemption's text already contains several limitations. It is hard to see how a pizza delivery driver or a termite-eradication company, for example, could possibly belong to any "class of workers engaged in foreign or interstate commerce."[5]

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[5] Flowers' and its amici's concern rests primarily on their misunderstanding of what it meant to be "engaged in foreign or interstate commerce" in 1925—a question that is not presented here. When the FAA was enacted, a good was understood to be "in interstate commerce" from the time it was loaded onto a vessel to be shipped until at least the time it was unloaded at its final destination. *See, e.g.*, *Browning v. City of Waycross*, 233 U.S. 16, 20–21 (1913). So any worker who transported goods that were being shipped from one state to a destination in another state was understood to be "employed" or engaged in interstate commerce—even if the worker

3. Flowers argues (at 48–49) that this Court should nevertheless write an industry requirement into the statute because, in its view, that requirement would be easier to apply than the requirements that are actually in the statute's text. But almost all of the cases it cites, in which application of the statute's written requirements would supposedly be "more fact-intensive" than Flowers' atextual limitation, were brought by workers that are indisputably employed by a company that sells transportation services. Resp. Br. 48 (citing cases against Uber, Lyft, and a logistics company). Adopting a threshold sells-transportation-services requirement would therefore do nothing to avoid any hard question in those cases. And in many other cases, it would just add another difficult question on top of those already posed by the statute itself.

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was only responsible for an intrastate leg of that journey. *See, e.g.*, *Phila. & Reading Ry. Co v. Hancock*, 253 U.S. 284, 286 (1920); *Rearick v. Pennsylvania*, 203 U.S. 507, 512–13 (1906); Public Justice Br. 3–7; DRI Br. 29.

But goods did not permanently remain in interstate commerce simply because they had, at some point, crossed state lines; once a good came to "permanent rest" in a state and became "commingled with the mass of property within [that] state," it was no longer in interstate commerce. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 543 (1935) (citing cases from before 1925 to distinguish goods that remained in the "practical continuity of movement" from one state to another and those that had "come to a permanent rest"). That's why lower courts have distinguished true last-mile drivers like the plaintiffs here—who transport goods on the last leg of their journey from Flowers' manufacturing plants outside Connecticut to the Connecticut retailers that ordered them—from, say, pizza delivery drivers who deliver cooked food from local restaurants to local customers. *See* Public Justice Br. 10–12 (citing cases).

Contrary to Flowers' assertion (at 49), in many cases, applying its industry requirement would be anything but "straightforward." In fact, the company doesn't even attempt to explain how it would apply—whether as the Second Circuit's price-structure-and-revenue version or as Flowers' newly minted sells-transportation-services version. Although Flowers chooses not to answer them, the administrability questions posed by the opening brief remain. *See* Pet. Br. 35–37.

For example, how does a court determine whether a company is selling transportation in the first place? After all, Flowers does not just sell baked goods to retailers; it sells them the service of delivering those baked goods to their stores. The company never explains why that doesn't satisfy its test.

How much transportation must a company sell? Consider Ford, which used its own ships and hired its own seamen to transport its own cars. Pet. Br. 23. Flowers suggests (at 37) that if Ford at some point allowed some other company to ship its cargo in one of Ford's ship, that would be enough to transform Ford into a transportation company. So if Flowers once transported Hostess products in its trucks, would that be enough to make Flowers a transportation company? What if this happened once a year? Once a week? If Amazon starts transporting goods for others but then stops, are its pilots temporarily exempt but then not?

And how does Flowers' requirement apply to more complicated corporate structures? The company suggests (at 38) that if lumber companies go in together on a ship that transports the companies' goods, the workers on that ship would satisfy its test. So does that mean that if Flowers and Hostess decided to share trucks, their truck drivers would be exempt? What if Flowers spun off a

subsidiary whose sole function was to transport Flowers' goods? Indeed, that seems to be how Flowers actually operates. *See* Pet. Br. 10 n.3.

These unanswered questions demonstrate not only how difficult Flowers' test would be to apply but also how little sense it makes. Why should a commercial truck driver who transports goods for Flowers be subject to the FAA but one who transports goods for Flowers and Hostess together be exempt? Why should it matter if a company directly transports its goods or uses a subsidiary or, for that matter, hires a trucking company?

Flowers' inscrutable industry requirement will only make the worker exemption more difficult for courts to apply. This Court should decline Flowers' request that it graft an atextual, unworkable limitation onto the statute.

CONCLUSION

The judgment of the court of appeals should be reversed.

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Respectfully submitted,

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