APPENDIX

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APPENDIX A

United States Court of Appeals
for the Second Circuit

August Term 2021
No. 20-1681

NEAL BISSONNETTE AND TYLER WOJNAROWSKI,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

LEPAGE BAKERIES PARK ST., LLC, C.K. SALES CO.,
LLC, AND FLOWERS FOODS, INC.,
Defendants-Appellees.

On Appeal from the United States District Court of the
District of Connecticut

Argued: October 22, 2021
Decided: May 5, 2022

Before: Jacobs, Pooler, *Circuit Judges*, Gujarati, *District Judge*.*

DENNIS JACOBS, *Circuit Judge*:

Plaintiffs deliver baked goods by truck to stores and restaurants in designated territories within Connecticut. They bring this action in the United States District Court for the District of Connecticut (Dooley, J.) on behalf of a putative class against Flowers Foods, Inc. and two of its subsidiaries, which manufacture the baked goods that the plaintiffs deliver. Plaintiffs allege unpaid or withheld wages, unpaid overtime wages, and unjust enrichment pursuant to the Fair Labor Standards Act and Connecticut wage laws. The district court granted the defendants' motion to compel arbitration and dismissed the case.

The decisive question on appeal is whether the plaintiffs are "transportation workers" within the meaning of the Federal Arbitration Act ("FAA"). That matters because the FAA, which confers on the federal courts an expansive obligation to enforce arbitration agreements, has an exclusion for contracts with "seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. That exclusion is construed to cover "transportation workers." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

Of the issues subsumed in that question, some are settled. For example, an independent contractor can be a

* Judge Diane Gujarati of the United States District Court for the Eastern District of New York, sitting by designation.

transportation worker, a point germane to this case in which the drivers own their routes and may sell them to others. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543-44 (2019).

The district court ruled that the plaintiffs are not "transportation workers" and "grant[ed] the Defendants' motion to dismiss in favor of arbitration." Special App'x 15. The court undertook a thorough review of the circumstances that might bear on the question, such as the extent of similarity between the plaintiffs' work and the work of those in the maritime and railroad industries. That analysis is consonant with the prescription in *Lenz v. Yellow Transportation*, Inc., 431 F.3d 348 (8th Cir. 2005), which approached the question by considering eight non-exclusive factors. We affirm without rejecting or adopting the district court's analysis, which may very well be a way to decide closer cases. We hold that the plaintiffs are not "transportation workers," even though they drive trucks, because they are in the bakery industry, not a transportation industry.

In arriving at that holding, we first consider an alternative ground for affirmance that might obviate the federal statutory question by allowing the arbitration to proceed under Connecticut arbitration law, which has no exclusion for transportation workers; but vexed questions beset a ruling that affirms on that alternative basis. We therefore must come to grips with whether the plaintiffs are "transportation workers." We agree with the district court that they are not. We affirm the district court's order compelling arbitration and dismissing the case.

I

Flowers Foods, Inc. is the holding company of subsidiaries that produce breads (including Wonder

Bread), as well as buns, rolls, and snack cakes in 47 bakeries. Other subsidiaries of Flowers Foods sell exclusive distribution rights for the baked goods within specified geographic areas. (Flowers Foods, Inc. and its subsidiaries, including defendants LePage Bakeries Park St., LLC and C.K. Sales Co., LLC, are hereinafter referred to as "Flowers.") The individuals who purchase the distribution rights--designated independent distributors--market, sell, and distribute Flowers baked goods. The relationship between Flowers and each independent distributor is set out in a Distributor Agreement. *See* Joint App'x 84-159.

Plaintiffs Neal Bissonnette and Tyler Wojnarowski are two of these independent distributors, both of whom own distribution rights in Connecticut. Bissonnette, who previously delivered baked goods as an employee of Flowers, entered into a Distributor Agreement with Flowers in 2017. Wojnarowski entered into a Distributor Agreement with Flowers in 2018.

Pursuant to the Distributor Agreement, the plaintiffs pick up the baked goods from local Connecticut warehouses and deliver the goods to stores and restaurants within their assigned territories. Subject to certain adjustments, the plaintiffs earn the difference between the price at which the plaintiffs acquire the bakery products from Flowers, and the price paid by the stores and restaurants. In their roles as independent distributors, the plaintiffs undertake to maximize sales; solicit new locations; stock shelves and rotate products; remove stale products; acquire delivery vehicles; maintain equipment and insurance; distribute Flowers' advertising materials and develop their own (with prior approval by Flowers); retain legal and accounting services; and hire

help. The plaintiffs may also profit from the sale of their distribution rights.[1] Though the plaintiffs are permitted to sell noncompetitive products alongside Flowers products, the plaintiffs concede that they do not work for any other company or entity, and that they typically work at least forty hours per week selling and distributing Flowers products.

The Distributor Agreement states that the parties may submit disputes arising from the Distributor Agreement to binding arbitration in accordance with the conditions set forth in an appended Arbitration Agreement. The Arbitration Agreement provides that "any claim, dispute, and/or controversy . . . shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act (9 U.S.C. §§ 1, et seq.) . . ." Joint App'x 117. Arbitrability is an issue reserved to the arbitrator except for issues concerning the "prohibition against class, collective, representative or multi-plaintiff action arbitration" and the "applicability of the FAA." *Id.* at 118. The Arbitration Agreement is "governed by the FAA and Connecticut law to the extent Connecticut law is not inconsistent with the FAA." *Id.* at 119.

II

We have jurisdiction over the district court's order

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[1] The Distributor Agreement defines the plaintiffs as "independent contractor[s]" for all purposes, and makes clear that the plaintiffs are "independent business[es]." The plaintiffs dispute that characterization. But this distinction no longer matters for FAA purposes because the Supreme Court has clarified that the exclusion for "transportation workers" applies with equal force to employees and to independent contractors. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543-44 (2019).

compelling arbitration and dismissing the case because it is a "final decision with respect to an arbitration" pursuant to Section 16(a)(3) of the FAA. *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 86-87, 89 (2000).

III

We review *de novo* the district court's order compelling arbitration. *Atlas Air, Inc. v. Int'l Bhd. of Teamsters*, 943 F.3d 568, 577 (2d Cir. 2019).

The Arbitration Agreement, which provides for arbitration "under the Federal Arbitration Act," elsewhere provides that it "shall be governed by the FAA and *Connecticut law to the extent Connecticut law is not inconsistent with the FAA*." Joint App'x 117, 119 (emphasis added). Since Connecticut arbitration law has no exclusion for transportation workers, *see* Conn. Gen. Stat. Ann. § 52-408 (arbitration agreements shall be "valid, irrevocable and enforceable"), Flowers urges that we compel arbitration pursuant to Connecticut law, regardless of whether the FAA applies.

The Second Circuit has not ruled on the application of state law to arbitration agreements under the FAA. One court within this Circuit has observed that "[m]ultiple courts" have rejected the proposition that "state arbitration law is preempted" when a plaintiff is excluded from the FAA. *Smith v. Allstate Power Vac, Inc.*, 482 F. Supp. 3d 40, 47 (E.D.N.Y. 2020) (Gershon, J.); *see also Michel v. Parts Auth., Inc.*, 15 Civ. 5730 (ARR), 2016 WL 5372797, at *3 (E.D.N.Y. Sept. 26, 2016) ("Even assuming the FAA does not apply, New York state law governing arbitration does apply."). Other Circuits lean the same

way.[2]

Even if state law can compel arbitration when the FAA does not, the meaning of the phrase "not inconsistent" in the Arbitration Agreement is unclear. Joint App'x 119. Flowers argues that Connecticut law is "not inconsistent" with the FAA because the FAA does not *preclude* the enforcement of arbitration agreements with transportation workers. The plaintiffs counter that Connecticut law *is* inconsistent because the FAA excludes transportation workers while Connecticut law does not.

Prudence counsels against a remand for arbitration to proceed under Connecticut law. The availability of Connecticut arbitration entails the construal of a phrase with a disputed meaning. Ascertaining the intent of the parties would ordinarily involve a remand for fact finding. Although the Agreement provides that issues of arbitrability are reserved for the arbitrator, that expedient may be blocked because the arbitrator's ambit excludes the applicability of the FAA, which is implicated

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[2] *See, e.g.*, *Harper v. Amazon.com Servs., Inc.*, 12 F.4th 287, 295 (3d Cir. 2021) (observing that there is no language in the FAA that "explicitly preempts the enforcement of state arbitration statutes") (quoting *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 595 (3d Cir. 2004)); *see also Saxon v. Sw. Airlines Co.*, 993 F.3d 492, 502 (7th Cir. 2021), *cert. granted*, 142 S. Ct. 638 (2021) (explaining that even though the plaintiff qualified for the "transportation worker" exclusion to the FAA, she "could still face arbitration under state law"); *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 24 (1st Cir. 2017), *aff'd*, 139 S. Ct. 532 (2019) (explaining that exclusion from the FAA pursuant to Section 1 "has no impact on other avenues (such as state law) by which a party may compel arbitration"); *Cole v. Burns Int'l Sec. Serv.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997) ("[W]e have little doubt that, even if an arbitration agreement is outside the FAA, the agreement still may be enforced.").

here.

True, "a court should decide for itself whether § 1's 'contracts of employment' exclusion applies before ordering arbitration." *New Prime Inc.*, 139 S. Ct. at 537. But that prescription may not bear upon whether the availability of arbitration under state law can obviate the exclusion. *See Harper v. Amazon.com Servs., Inc.*, 12 F.4th 287, 296 n.8 (3d Cir. 2021) (observing that "no binding precedent requires district courts to ignore arbitrability under state law when the applicability of § 1 is uncertain"); *Hamrick v. Partsfleet, LLC*, 1 F.4th 1337, 1353 (11th Cir. 2021) ("We would only look to state arbitration law *after* we decided the federal issue of whether the transportation worker exemption applied to the drivers.") (emphasis in original). Therefore, we proceed to decide whether the plaintiffs fall within the FAA exclusion.

IV

The FAA, which reflects a "liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), nevertheless excludes the employment contracts of "seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The class of workers encompassed by that residual clause is "transportation workers." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). Since neither Congress nor the Supreme Court has defined "transportation worker," we define it by affinity. The two examples that the FAA gives are "seamen" and "railroad employees." 9 U.S.C. § 1. These examples are telling because they locate the "transportation worker" in the context of a *transportation industry*.

One explanation advanced for the exclusion is that Congress "did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers." *See Circuit City*, 532 U.S. at 121. But that explanation does not limit or delineate the category. The specification of workers in a *transportation industry* is a reliable principle for construing the clause here.

Our cases have dealt with the exclusion, albeit in quite different contexts and largely prior to *Circuit City*, 532 U.S. at 119, which narrowed the scope to transportation workers. The cases nevertheless adumbrated the principle that decides this case. The holding in *Erving v. Virginia Squires Basketball*, 468 F.2d 1064 (2d Cir. 1972)--that the FAA exclusion is limited to workers involved in the transportation industry--is still vital. *Id.* at 1069. For example, *Maryland Casualty Co. v. Realty Advisory Board on Labor Relations*, 107 F.3d 979 (2d Cir. 1997), ruled that employees of a commercial cleaner were not covered by the exclusion, which is "limited to workers involved in the transportation industries." *Id.* at 982. After *Circuit City*, 532 U.S. at 119, this Court observed that the exclusion did not apply to sheriffs because the clause is "interpreted . . . narrowly to encompass only 'workers involved in the transportation industries.'" *Adams v. Suozzi*, 433 F.3d 220, 226 n.5 (2d Cir. 2005) (quoting *Md. Cas. Co.*, 107 F.3d at 982).

This narrowing principle is likewise applied in other Circuits. In *Eastus v. ISS Facility Services, Inc.*, 960 F.3d 207 (5th Cir. 2020), the Fifth Circuit observed that "because 'engaged in interstate commerce' is preceded by a listing of specific occupations *within the transportation industry*, 'railroad workers' and 'seamen,' 'Section 1 exempts from the FAA only contracts of employment of

transportation workers.'" *Id.* at 209 (emphasis added) (quoting Circuit City, 523 U.S. at 119). Eastus then defined "transportation workers" as "those actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are." *Id.* at 210 (quoting *Rojas v. TK Commc'ns, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996)).

The Eleventh Circuit has held that an account manager at a company that rents and delivers furniture across state borders was subject to the FAA because he was "not a transportation industry worker." *Hill v. Rent-A-Ctr., Inc.*, 398 F.3d 1286, 1288 (11th Cir. 2005). *Hill* discerned that Congress intended to exclude "a class of workers in the transportation industry, rather than . . . workers who incidentally transported goods interstate as part of their job in an industry that would otherwise be unregulated." *Id.* at 1289; *see also id.* at 1290 ("[I]t is apparent Congress was concerned only with giving the arbitration exemption to 'classes' of transportation workers within the transportation industry."). The test most recently articulated by the Eleventh Circuit is that the transportation worker exclusion applies if the employee is part of a class of workers: "(1) employed in the transportation industry; and (2) [who], in the main, actually engage[] in foreign or interstate commerce." *Hamrick*, 1 F.4th at 1349 (remanding for the district court to consider whether last-mile delivery workers qualify for the exclusion).[3]

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[3] The plaintiffs in this case cite *Martins v. Flowers Foods, Inc.*, 463 F. Supp. 3d 1290 (M.D. Fla. 2020), which held that Flowers distributors perform their work in the transportation industry. *Id.* at 1298. But the Eleventh Circuit vacated the judgment by a summary

Although none of these cases defines "transportation industry," we conclude that an individual works in a transportation industry if the industry in which the individual works pegs its charges chiefly to the movement of goods or passengers, and the industry's predominant source of commercial revenue is generated by that movement.

On this basis, the plaintiffs are in the bakery industry. Though plaintiffs spend appreciable parts of their working days moving goods from place to place by truck, the stores and restaurants are not buying the movement of the baked goods, so long as they arrive. The charges are for the baked goods themselves, and the movement of those goods is at most a component of total price. The commerce is in breads, buns, rolls, and snack cakes--not transportation services. *See, e.g.*, *Hill*, 398 F.3d at 1288-90 (holding that a Rent-A-Center manager whose "duties involved making delivery of goods to customers out of state in his employer's truck" did not work in the "transportation industry"). Although contractual parties cannot effectively stipulate to the status of employees as transportation workers (or not), the Distributor Agreement here recognizes and identifies the industry: "[m]aintaining a fresh market is a fundamental tenet of the *baking industry*." Joint App'x 95 (emphasis added).[4]

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order, directing reconsideration in light of *Hamrick v. Partsfleet, LLC*, 1 F.4th 1337 (11th Cir. 2021). *See Martins v. Flowers Foods, Inc.*, 852 F. App'x 519 (11th Cir. 2021) (summary order). The district court has not yet issued a ruling on remand.

[4] Although the plaintiffs never leave the state of Connecticut, we do not consider whether this case could be decided on the ground that the interstate element of the exclusion is not satisfied. The issue may

As the plaintiffs do not work in the transportation industry, they are not excluded from the FAA, and the district court appropriately compelled arbitration under the Arbitration Agreement.

V

The district court decided this case along the lines of analysis prescribed by the Eighth Circuit in *Lenz v. Yellow Transportation, Inc.*, 431 F.3d 348 (8th Cir. 2005). *Lenz* adduced eight "non-exclusive" factors for "determining whether an employee is so closely related to interstate commerce that he or she fits within the § 1 exemption":

> [F]irst, whether the employee works in the transportation industry; second, whether the employee is directly responsible for transporting the goods in interstate commerce; third, whether the employee handles goods that travel interstate; fourth, whether the employee supervises employees who are themselves transportation workers, such as truck drivers; fifth, whether, like seamen or railroad employees, the employee is within a class of employees for which special arbitration already existed when Congress enacted the FAA; sixth, whether the vehicle itself is vital to the commercial enterprise of the employer; seventh, whether a strike by the employee would disrupt interstate commerce; and eighth, the nexus that exists between the employee's job duties and the vehicle the employee uses in carrying out his

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not be simple. The baked goods originate outside of Connecticut; and there are railroads that operate within a single state, terminus to terminus--the Long Island Railroad comes to mind.

> duties (i.e., a truck driver whose only job is to deliver goods cannot perform his job without a truck).

Id. at 352. The district court relied upon certain Lenz factors, but not all, and not explicitly. *See Bissonnette v. Lepage Bakeries Park St., LLC*, 460 F. Supp. 3d 191, 198-202 (D. Conn. 2020). Although we identify no error in the district court's conscientious analysis, we resolve the question before us on the more straightforward ground that the plaintiffs do not work in a transportation industry.

We acknowledge that our approach is not a universal solvent. We do not attempt to decide issues arising across the federal court system as to which of the following may be a "transportation worker":

- Individuals who work for transportation companies but who do not themselves move goods or passengers--for example, supervisors, ticket salespersons, and luggage attendants. *Compare Saxon v. Sw. Airlines Co.*, 993 F.3d 492, 498 (7th Cir. 2021), *cert. granted*, 142 S. Ct. 638 (2021) (holding that an airline ramp supervisor was excluded from the FAA); *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 593-94 (3d Cir. 2004) (holding that a "field services supervisor" of delivery drivers was excluded), *with Eastus*, 960 F.3d at 212 (holding that an airline employee who supervised ticketing and gate agents and handled luggage was not excluded); *Cole v. Burns Int'l Sec. Serv.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997) (holding that a security worker at train station was not excluded); *Lenz*, 431 F.3d at 352-53 (holding that a customer service representative for a trucking

company was not excluded).

- Workers who transport goods or passengers within a state, when those goods or passengers originate out of state. *See, e.g.*, *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 802 (7th Cir. 2020) (holding that food delivery drivers who do not cross state lines are subject to the FAA); *Capriole v. Uber Techs., Inc.*, 7 F.4th 854, 865-66 (9th Cir. 2021) (holding that Uber drivers are subject to the FAA because most of their trips are intrastate).
- Workers for major retailers who transport goods intrastate within a larger transportation network that is interstate. *Compare Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 917 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1374 (2021) (holding that Amazon contractors are transportation workers because they "complete the delivery of goods that Amazon ships across state lines and for which Amazon hires . . . workers to complete the delivery"); *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 26 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 2794 (2021), *reh'g denied*, 141 S. Ct. 2886 (2021) (holding that "last-mile delivery workers who haul goods on the final legs of interstate journeys are transportation workers engaged in . . . interstate commerce," even if they do not themselves cross state lines) (internal quotation marks omitted), *with Hamrick*, 1 F.4th at 1351 (remanding to consider whether final-mile delivery workers "are in a class of workers employed in the transportation industry that actually engages in foreign or interstate commerce").

We have no occasion to hazard answers to these questions.

CONCLUSION

For the reasons stated above, we affirm the order compelling arbitration and dismissing the case.

DENNIS JACOBS, *Circuit Judge*, concurring:

The obligation to consider appellate jurisdiction ordinarily entails a straightforward analysis. In this case, the straightforward analysis leads to another and difficult question.

Having issued an order to compel arbitration, the district court dismissed the case, and assured the parties that "[i]f, after the arbitration, any party seeks further relief from the Court, the Clerk of Court shall direct assign any such motion or petition to the undersigned." Special App'x 15. The dismissal amounts to a final order, notwithstanding the contemplation of further initiatives--such as confirmation, vacatur, or modification of the award--that may be sought in future litigation. So pursuant to Section 16(a)(3) of the Federal Arbitration Act ("FAA"), we have jurisdiction over this appeal. But the contemplation of future litigation reflects an intuitive appreciation that the district court's role under the FAA may be unfulfilled. The district court, having power to stay proceedings pending arbitration, should not have dismissed the case.

I

When a district court grants an application to enforce an arbitration clause, there is a question as to whether Section 3 of the FAA requires that a stay be entered. Courts across the Circuits are divided on this question; some hold that a stay is mandatory, and others hold that a district court may dismiss the case.[1] In 2015, our decision

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[1] *Compare, e.g.*, *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir. 1992) (per curiam) ("Upon finding that a claim is

in *Katz v. Cellco Partnership*, 794 F.3d 341 (2d Cir. 2015) ("*Katz*"), articulated the rule as follows: a stay is mandatory when "all claims have been referred to arbitration and *a stay requested*." *Id.* at 345 (emphasis added). Following *Katz*, courts in this Circuit are split on whether a stay is required even if no party requests one.[2]

This issue is consequential. When a case is stayed pending arbitration, the order compelling or directing arbitration is interlocutory, and therefore unappealable; the parties must proceed forthwith to arbitration. But when such a case is dismissed, the party resisting arbitration can appeal at once, and thereby delay the arbitration, with associated costs and uncertainties. This appears to be where we are now.

How did we get here? In this case, Flowers moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1)

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subject to an arbitration agreement, the court should order that the action be stayed pending arbitration."), *with Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 156 & n. 21 (1st Cir. 1998) ("[A] court may dismiss, rather than stay, a case when all of the issues before the court are arbitrable.").

[2] *Compare China Media Express Holdings, Inc. by Barth v. Nexus Exec. Risks, Ltd.*, 182 F. Supp. 3d 42, 53 (S.D.N.Y. 2016) (staying case "[p]ursuant to the Second Circuit's decision in *Katz*" even though parties seeking arbitration requested dismissal); *Merrick v. UnitedHealth Grp. Inc.*, 127 F. Supp. 3d 138, 154 (S.D.N.Y. 2015) (staying the action even though "no party has requested a stay"), *with Benzemann v. Citibank N.A.*, 622 F. App'x 16, 18 (2d Cir. 2015) (summary order) (ruling that because the plaintiff did not request a stay, "Section 3 did not require the district court to stay the proceedings"); *Zambrano v. Strategic Delivery Sols., LLC*, No. 15 Civ. 8410, 2016 WL 5339552, at *10 (S.D.N.Y. Sept. 22, 2016) (observing that "because Defendants seek dismissal rather than a stay . . . this Court has discretion whether to stay or dismiss Plaintiffs' action under the FAA," and ultimately staying the case).

and the FAA, or in the alternative, to compel arbitration. For some reason, Flowers explicitly sought a dismissal "in lieu of a stay," *see* Joint App'x 73-74, and the plaintiffs, who resisted arbitration, did not request a stay. Thus, the district court granted Flowers' "motion to dismiss in favor of arbitration," closed the case, and directed the Clerk of Court to assign any post-arbitration petitions for relief to the same judge. Special App'x 15-16. Today, we have affirmed the order compelling arbitration and dismissing the case.

Katz can be read to mean that, when no stay is requested, the district court retains discretion to stay the case *or* dismiss it. That reading is invited by *Katz* without being compelled by it.

II

Katz construed Section 3 of the FAA to mandate a stay when "all claims have been referred to arbitration and a stay requested." 794 F.3d at 345. However, the FAA mandates a stay whether or not a party requests one. This construal is consistent with the purpose of the FAA.

Properly construed, the text of Section 3 bars a court from enforcing an arbitration clause *sua sponte*, but if a party applies for enforcement of the clause, Section 3 requires a court that enforces it to stay proceedings in the interim:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, ***shall on application of one of the parties stay the***

> ***trial of the action until such arbitration has been had in accordance with the terms of the agreement***, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (emphasis added). Read naturally and in context, the referenced "application of one of the parties" is the application to enforce the arbitration clause. The text does not contemplate (let alone require) a separate application to stay proceedings in district court. *See Cont'l Cas. Co. v. Am. Nat'l Ins. Co.*, 417 F.3d 727, 732 n.7 (7th Cir. 2005) ("[T]he proper course of action when a party seeks to invoke an arbitration clause is to *stay* the proceedings pending arbitration rather than to dismiss outright.") (emphasis in original).

Reading Section 3 to require a stay pending arbitration regardless of whether a stay has been requested is consistent with the FAA's pro-arbitration posture.[3] Congress intended the FAA 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). That is why the FAA "provides two parallel devices for enforcing an arbitration agreement: a stay of litigation in any case raising a dispute referable to arbitration, 9 U.S.C. § 3"--at issue here--"and an affirmative order to

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[3] For what it is worth, *Katz* does not clearly say otherwise. *Katz* observes that Section 3's "plain language specifies that the court 'shall' stay proceedings pending arbitration, provided an application is made and certain conditions are met." 794 F.3d at 345. *Katz* does not specify the type of "application" that must be made, though (in my view) *Katz* does (and must be read to) reference the application to enforce an arbitration clause. Nor does *Katz* point to anything in the statute that says that a mandatory stay is dependent upon an explicit request for a stay.

engage in arbitration, § 4." *Id.* It is hard to square congressional intent with the idea that Section 3's mandatory stay is conditional upon a party's explicit request for a stay alongside its application to compel arbitration.

The FAA provision governing appeals underscores the congressional policy of "rapid and unobstructed enforcement of arbitration agreements." *Moses*, 460 U.S. at 23. Section 16 forecloses an appeal from an order that directs the parties to proceed with arbitration, including a stay order under Section 3:

> Except as otherwise provided in section 1292(b) of title 28 [interlocutory decisions], an appeal may not be taken from an interlocutory order--
>
> (1) granting a stay of any action under section 3 of this title;
>
> (2) directing arbitration to proceed under section 4 of this title;[4]
>
> (3) compelling arbitration under section 206 of this title [providing for enforcement abroad and court-appointed arbitrators]; or
>
> (4) refusing to enjoin an arbitration that is subject to this title.

See 9 U.S.C. § 16(b). That provision "is a pro-arbitration statute designed to prevent the appellate aspect of the

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[4] 9 U.S.C. § 4, which deals with enforcement of arbitration clauses regardless of whether the contract has become the subject of federal litigation, provides in part: "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."

litigation process from impeding the expeditious disposition of an arbitration." *Augustea Impb Et Salvataggi v. Mitsubishi Corp.*, 126 F.3d 95, 99 (2d Cir. 1997) (quoting David D. Siegel, *Practice Commentary: Appeals from Arbitrability Determinations*, 9 U.S.C.A. § 16, at 352 (West Supp. 1997)).[5] The purpose is defeated if a dismissal is entered instead of a stay. *See Arabian Motors Grp. W.L.L. v. Ford Motor Co.*, 19 F.4th 938, 942 (6th Cir. 2021) ("Because a dismissal, unlike a stay, permits an objecting party to file an immediate appeal, a district court dismissal order undercuts the pro-arbitration appellate-review provisions of the Act.").

III

Our opinion in *Katz* is regrettable, particularly as the Supreme Court has now given guidance that reinforces my view of Section 3. *See Badgerow v. Walters*, 142 S. Ct. 1310 (2022) ("*Badgerow*"). *Badgerow* conducted a thorough analysis of the FAA's text, and held that the "look through" approach for finding federal jurisdiction in petitions under Section 4 does not apply to petitions under Sections 9 and 10 of the FAA. This holding has ramifications when a district court dismisses a case after compelling arbitration because a dismissal will certainly require a district court to find an independent jurisdictional basis whenever a new FAA petition arises from the same case. A stay, however, may enable the court and the parties to sidestep these consequences.

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[5] Not to the contrary is the FAA provision that an appeal may be taken from "a final decision with respect to an arbitration." 9 U.S.C. § 16(a)(3). The FAA allows an appeal from a final decision that is entered after the arbitration has run its course, *id.*, as well as appeals from, *inter alia*, orders that refuse a stay of an action or deny a petition to arbitrate, *see* 9 U.S.C. § 16(a)(1).

It is settled that a federal court deciding whether to enforce an arbitration agreement under Section 4 must find an independent jurisdictional basis, either on the face of the petition (for diversity jurisdiction) or by looking through to the petition to see if the underlying controversy arises under federal law (for federal question jurisdiction). *See Vaden v. Discover Bank*, 556 U.S. 49, 62 (2009); *Hermes of Paris, Inc. v. Swain*, 867 F.3d 321, 324 (2d Cir. 2017). But, under *Badgerow*, a district court lacks jurisdiction over a petition to confirm or vacate an arbitral award under Sections 9 and 10, respectively, unless the jurisdictional basis appears on the "face of the application itself." *Badgerow*, 142 S. Ct. at 1317-18. This means that there must either be diversity jurisdiction, or a federal question with respect to the award's confirmation or vacatur (no examples of the latter are supplied in Badgerow itself). *Id.* Unlike with Section 4 petitions, courts may not locate federal question jurisdiction by looking through to the underlying controversy. *Id.* As a result of this ruling, many more Section 9 and 10 petitions will be adjudicated in state courts. *Id.* at 1321-22. This will raise an impediment to parties seeking federal court assistance to facilitate their arbitrations when there is no jurisdictional basis on the face of their petitions.

It is too early to say whether issuance of a stay pursuant to Section 3 may allow parties to seek enforcement, vacatur, or modification of an award, 9 U.S.C. §§ 9-11, or seek other assistance under the FAA, *see id.* §§ 5 (appointment of arbitrators), 7 (summoning witnesses), without need for an independent basis for federal jurisdiction--though Justice Breyer's dissent in

Badgerow suggests as much.[6] As this Court has observed, "practitioners who wish to preserve access to federal courts for later disputes over arbitrators, subpoenas, or final awards [may] attempt to 'lock in' jurisdiction by filing a federal suit first, followed by motions to compel and a stay of proceedings." *Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 387 (2d Cir. 2016), *abrogated on other grounds by Badgerow v. Walters*, 142 S. Ct. 1310 (2022); *see also* Ian R. MacNeil et al., *Federal Arbitration Law: Agreements, Awards, and Remedies under the Federal Arbitration Act* § 9.2.3.1 (Supp. 1999) (explaining that when a district court stays proceedings pending arbitration, "[a]fter an award, parties desiring to confirm, vacate, or modify the award, can return to the federal court in which the stayed litigation is pending for determination of those issues," as "[t]he court had federal question subject matter jurisdiction and has never lost it.").

In short, the stay of a suit pending arbitration is (in my view) arguably compelled and certainly prudent.

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[6] Indeed, foreseeing the chaos post-*Badgerow*, Justice Breyer suggested that a stay is the solution: "[i]f a party to an arbitration agreement files a lawsuit in federal court but then is ordered to resolve the claims in arbitration, the federal court may stay the suit and possibly retain jurisdiction over related FAA motions." *Badgerow*, 142 S. Ct. at 1326 (Breyer, J., dissenting) (citing § 3, *Vaden v. Discover Bank*, 556 U.S. 49, 65 (2009)). For its part, the *Badgerow* majority did not address the effect of a stay on a district court's jurisdiction to resolve later-filed FAA petitions; it explicitly declined to consider whether a district court would have jurisdiction to resolve a Section 5 petition that is made "in tandem with" a Section 4 petition. *Id.* at 1320 n.6.

POOLER, *Circuit Judge*, dissenting:

The plaintiffs are commercial truck drivers who deliver the defendants' packaged baked goods to supermarkets and retail outlets in Connecticut. They allege that the defendants deprived them of the legal protections owed to employees, including the right to overtime premiums, by misclassifying them as independent contractors. On appeal now is whether this serious charge should be litigated, as the drivers want, or arbitrated, as the company prefers. The parties have an arbitration agreement. But the Federal Arbitration Act, which empowers federal courts to enforce those agreements, does not apply to employment contracts of "any . . . class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1—that is, transportation workers, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). The key question, then, is whether the plaintiffs are transportation workers.

I would hold that they are. The "one area of clear common ground" among federal courts addressing the transportation worker exemption is that truck drivers qualify. *Kowalewski v. Samandarov*, 590 F. Supp. 2d 477, 482-83 (S.D.N.Y. 2008) (collecting cases); *see also, e.g.*, *Lenz v. Yellow Transp., Inc.*, 431 F.3d 348, 351 (8th Cir. 2005) ("Indisputably, if Lenz were a truck driver, he would be considered a transportation worker under § 1 of the FAA."). The majority's contrary conclusion—that because the plaintiffs are truckers for a bakery company, they "are in the bakery industry" and therefore not transportation workers, Maj. Op. at 16—is textually and precedentially baseless. Rather, "a trucker is a transportation worker regardless of whether he transports his employer's goods or the goods of a third

party[.]" *Int'l Broth. of Teamsters Loc. Union No. 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 957 (7th Cir. 2012). Because I cannot join the majority in sending this dispute to arbitration, I respectfully dissent.

I. The Plaintiffs Are Transportation Workers.

"[N]othing" in the FAA "shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The majority and I agree that the Distributor Agreements, the ones the plaintiffs assert misclassify them as independent contractors, are "contracts of employment." Contracts of employment include all "agreements to perform work," whether by employees or independent contractors. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 544 (2019).

I part ways, though, with the majority's conclusion that the plaintiffs are not transportation workers. Although the Supreme Court has not yet defined who precisely qualifies as a transportation worker,[1] there are clearer lodestars than the majority acknowledges. As Justice Barrett, then of the Seventh Circuit, recently summarized:

> Both we and our sister circuits have repeatedly emphasized that transportation workers are those who are actually engaged in the movement of goods in interstate commerce. To determine whether a class of workers meets that definition,

[1] That definition may come soon. *See Sw. Airlines Co. v. Saxon*, No. 21-309 (U.S. argued Mar. 28, 2022) (addressing whether workers who load or unload goods from vehicles that travel in interstate commerce, but who do not themselves do the transporting, are "transportation workers").

> we consider whether the interstate movement of goods is a central part of the class members' job description. Then, if such a class exists, we ask in turn whether the plaintiff is a member of it. Sometimes that determination is easy to make—as it is for truckers who drive an interstate route. Sometimes that determination is harder—as it is for truckers who drive an intrastate leg of an interstate route. Whether easy or hard, though, the inquiry is always focused on the worker's active engagement in the enterprise of moving goods across interstate lines. That is the inquiry that *Circuit City* demands.

Wallace v. Grubhub Holdings, Inc., 970 F.3d 798, 801-02 (7th Cir. 2020) (citations and internal quotation marks omitted).

This Circuit's cases fit well within the mainstream. In our foundational case, we held that Section 1 did not exempt from arbitration a dispute concerning the collective bargaining agreement of factory workers who manufactured automotive electrical equipment. *Signal-Stat Corp. v. Loc. 475, United Elec. Radio & Mach. Workers of Am.*, 235 F.2d 298, 303 (2d Cir. 1956), *overruled on other grounds by Coca-Cola Bottling Co. of N.Y., Inc. v. Soft Drink & Brewery Workers Union Loc. 812*, 242 F.3d 52 (2d Cir. 2001). Rather than being "actually engaged in interstate and foreign commerce," we observed, the workers were "merely engaged in the manufacture of goods for interstate commerce." *Id.* (emphasis added). Two decades later, we concluded that Julius "Dr. J" Erving, the basketball player, was not a transportation worker because he "clearly is not involved in the transportation industry." *Erving v. Virginia*

Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972). To bolster the point, we cited the First Circuit's formulation of the *Signal-Stat* inquiry as asking whether a worker is "involved in, or closely related to the actual movement of goods in interstate commerce." *Id.* (citing *Dickstein v. duPont*, 443 F.2d 783 (1st Cir. 1971)). Since *Signal-Stat* and *Erving*, we have held the exemption inapplicable to other individuals whose jobs did not involve transportation. *E.g.*, *Maryland Cas. Co. v. Realty Advisory Bd. on Lab. Rels.*, 107 F.3d 979, 982 (2d Cir. 1997) (commercial cleaning workers). On the other hand, the "cases in this Circuit that have found that a worker falls under the residuary exemption . . . all involve workers who either physically move goods through interstate commerce, such as truck drivers, or workers who are closely tied to this movement[.]" *Kowalewski*, 590 F. Supp. 2d at 485.

Understood against this backdrop, the plaintiffs here are paradigmatic transportation workers. They "work at least forty hours per week delivering the" defendants' baked goods. App'x at 17 ¶ 33. This work consists of driving commercial delivery trucks "to stores within a territory designated by Defendants, delivering Defendants' products to these stores, and arranging the products on the shelves according to Defendants' standards." App'x at 17 ¶ 33. At the end of the day, the plaintiffs return to the defendants' warehouse, upload data to the defendants' system, and sort stale bread for resale by the defendants. Unlike the factory workers in *Signal-Stat*, the plaintiffs are not "merely engaged in the manufacture of goods for interstate commerce," but rather are "actually engaged in . . . commerce." 235 F.2d at 303. And like seamen and railroad employees—against whom a putative transportation worker's work should be

measured, *see Circuit City*, 532 U.S. at 115—the plaintiffs' daily work is "centered on the transport of goods in interstate or foreign commerce," *Wallace*, 970 F.3d at 802 (so characterizing the work of seamen and railroad workers).

That the plaintiffs do not themselves cross state lines during their routes is of no moment. "The great weight of authority . . . holds that interstate travel is not strictly necessary" to qualify someone as a transportation worker. *Haider v. Lyft, Inc.*, No. 20-cv-2997, 2021 WL 1226442, at *4 (S.D.N.Y. Mar. 31, 2021). The First and Ninth Circuits, for instance, have held that so-called "last-mile delivery drivers" for Amazon are transportation workers "[b]y virtue of their work transporting goods or people 'within the flow of interstate commerce,'" despite never personally crossing state lines. *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 26 (1st Cir. 2020*)*; *see also Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 916 (9th Cir. 2020).

So too, here, the plaintiffs "form a vital link in the chain of interstate transportation." *Haider*, 2021 WL 1226442, at *4. The goods they transport are delivered to the defendants' warehouse from one of their commercial bakery locations outside Connecticut; the plaintiffs then transport those goods to stores and retail locations in-state. Like the Amazon drivers, the plaintiffs "carry the goods for a portion of [a] single interstate journey," *Cunningham v. Lyft, Inc.*, 17 F.4th 244, 251 (1st Cir. 2021), and are "indispensable parts of [an interstate] distribution system," *Waithaka v. Amazon.com, Inc.*, 404 F. Supp. 3d 335, 343 (D. Mass. 2019). These facts also distinguish the plaintiffs from drivers for Grubhub, the food delivery app, whom the Seventh Circuit recently deemed not to be transportation workers. *Wallace*, 970 F.3d at 803. Those

workers drive typically short distances to deliver take-out orders prepared by local restaurants. The Seventh Circuit concluded that they are not transportation workers because—unlike the plaintiffs here—they are not "engaged *in the channels* of foreign or interstate commerce," even if the ingredients from which a meal is made crossed state lines. *Id.* at 802 (emphasis in original) (quotation marks omitted).

It is also immaterial that the plaintiffs perform a few customer service and sales tasks beyond their transportation work. A worker's performance of some tasks beyond transportation does not necessarily remove her from Section 1's ambit. To be sure, some courts have held that a transportation worker's job duties must be more than "tangentially related to [the] movement of goods." *Lenz*, 431 F.3d at 351-52; *see also, e.g.*, *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1289 (11th Cir. 2005) (requiring that transportation work be more than "incidental" to a worker's employment). But it is impossible to conclude on this record that transportation work is merely incidental or tangential to the plaintiffs' employment. The title of their contracts—"Distributor Agreements"—defines their principal purpose. The additional tasks the Distributor Agreements obligate the plaintiffs to perform emanate from the delivery work. And the defendants offer no evidence to counter the complaint's allegations that the actual delivery of product constituted the lion's share of the plaintiffs' work.[2] The

[2] Indeed, in a case strikingly similar to this one, the District of Massachusetts recently concluded that a group of the same defendants' Massachusetts-based delivery drivers were "transportation workers" under the FAA, principally because those

plaintiffs are thus a far cry from Hill, an account manager for a furniture and equipment rental business who only occasionally delivered rental furniture out of state, *Hill*, 398 F.3d at 1289, and Lenz, a customer service representative for a trucking company who neither "directly transported goods" nor "directly supervise[d] [any] drivers in interstate commerce," *Lenz*, 431 F.3d at 352-53.

Because the movement of goods through interstate commerce is a central part of the plaintiffs' occupation as truckers, I would hold that they belong to a "class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, and that the FAA does not apply to their Distributor Agreements.

II. The Majority's Errors.

The majority's contrary conclusion is supported by neither the FAA's text nor any case interpreting it. The majority begins, accurately enough, with this Court's tendency to characterize the transportation worker exemption as "limited to workers involved in the

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plaintiffs had submitted "sworn affidavits stating that they spend the majority of their time making deliveries," "there [was] nothing in the record to suggest that Plaintiffs were carrying out all of the other responsibilities included in the[ir] Distributor Agreements and business plans, or that those other responsibilities took up more time than driving," and, "[e]ven assuming that Plaintiffs' work primarily involve[d] . . . engaging in tasks that only relate to delivery of the interstate goods rather than actually performing the deliveries themselves, those activities are still so closely related to interstate commerce that Plaintiffs [were] practically a part of it." *Canales v. Lepage Bakeries Park St. LLC*, No. 1:21-cv-40065-ADB, 2022 WL 952130, at *5-*6 (D. Mass. Mar. 30, 2022). The court therefore declined to compel arbitration under the FAA of those drivers' employment misclassification claims against the defendants. *Id.* at *1.

transportation industry." Maj. Op. at 13. I have no quarrel with this premise. But I cannot endorse the tortured reasoning that follows. Finding that no case has given a satisfactory definition to the term "transportation industry," the majority posits, without citation, that "an individual works in a transportation industry if the industry in which the individual works pegs its charges chiefly to the movement of goods or passengers, and the industry's predominant source of commercial revenue is generated by that movement." Maj. Op. at 15-16. The majority then concludes that, "[o]n this basis, the plaintiffs are in the bakery industry," not the transportation industry, because the stores and restaurants to which they deliver the defendants' baked goods are "not buying the movement of the baked goods, so long as they arrive. The charges are for the baked goods themselves, and the movement of those goods is at most a component of total price." Maj. Op. at 16. Long story short, the plaintiffs are not transportation workers, even though they "spend appreciable parts of their working days moving goods from place to place by truck," because they do not work for a trucking company. Maj. Op. at 16.

This cannot be. It is troubling enough that the majority offers no basis—not textual, not precedential, not from the business world or even a dictionary—for its supposed definition of "transportation industry." That definition, with its unexplained focus on how the "source of commercial revenue is generated," is also needlessly convoluted, compared with more natural definitions of the term: for instance, that a "transportation industry" is one "whose mission it is to move goods," *Tran v. Texan Lincoln Mercury, Inc.*, No. H-07-1815, 2007 WL 2471616, at*5 (S.D. Tex. Aug. 29, 2007), or one "directly involved in

the movement of goods," *Zamora v. Swift Transp. Corp.*, No. EP-07-CA-00400-KC, 2008 WL 2369769, at *6 (W.D. Tex. June 3, 2008).

At base, though, the majority simply misconstrues how courts use the term "transportation industry." As discussed, we have sometimes described workers whose occupations did not involve the movement of goods as being outside the transportation industry. So it was with Dr. J in *Erving*, 468 F.2d at 1069; the commercial cleaners in *Maryland Casualty Co.*, 107 F.3d at 982; and the sheriffs in *Adams v. Suozzi*, 433 F.3d 220, 226 n.5 (2d Cir. 2005). Some cases have also addressed whether workers at a transportation company who are "one step removed from the actual physical delivery of goods," like the customer service representative Lenz, can still qualify as transportation workers. *Kowalewski*, 590 F. Supp. 2d at 483 n.6; *Lenz*, 431 F.3d at 352.

Until today, however, we have never held that a worker whose full-time job was to move goods through interstate commerce was not a transportation worker merely because she did not work for a trucking or shipping company or an airline. To the contrary, other courts regularly—and correctly—reject this proposition. *See, e.g.*, *Kienstra*, 702 F.3d at 957 ("[A] trucker is a transportation worker regardless of whether he transports his employer's goods or the goods of a third party[.]"); *Saxon v. Sw. Airlines Co.*, 993 F.3d 492, 497 (7th Cir. 2021) ("[A] transportation worker need not work for a transportation company[.]"); *Waithaka*, 966 F.3d at 23 ("[A] class of workers [need not] be employed by an interstate transportation business or a business of a certain geographic scope to fall within the Section 1 exemption[.]"); *Canales*, 2022 WL 952130, at *6 (rejecting

the argument that "an employer [must] be a transportation company for § 1 to apply").

These observations align with the FAA's text: Section 1 asks whether a worker belongs to a class of workers "engaged in interstate or foreign commerce." 9 U.S.C. § 1. It does not ask for whom the worker undertakes her transportation work. Of course, a company is entitled to decide for business reasons to transport its own goods. But the truckers it hires do not cease to be transportation workers the moment they are brought in-house. If the workers' principal daily tasks involve them in the actual movement of goods through interstate commerce, they are transportation workers.

The majority's novel rule that only those employed by transportation companies can be transportation workers finds no more support from the out-of-Circuit cases it cites. The majority describes *Hill*, the Eleventh Circuit case, as holding that "an account manager at a company that rents and delivers furniture across state borders was not excluded from the FAA because he was 'not a transportation industry worker.'" Maj. Op. at 14 (quoting *Hill*, 398 F.3d at 1288). But the majority omits the court's reasoning. It was not because Hill worked for a "company that rents and delivers furniture" that he was deemed not to be a transportation worker. Instead, the court focused on the nature of Hill's work for the company. Hill was not "within a class of workers within the transportation industry" because he was an account manager who only "incidentally transported goods interstate" as part of that job. *Hill*, 398 F.3d at 1289.

The majority also wrongly contends that *Eastus v. ISS Facility Services, Inc.*, a Fifth Circuit case, embraces its "narrowing principle." Maj. Op. at 14 (citing 960 F.3d 207

(5th Cir. 2020)). That case concerned a supervisor of ticketing and gate agents at an international airport. *Eastus*, 960 F.3d at 208. Applying the "operative standard" that the transportation worker exemption covers only those "actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are," *id.* at 209-10, the court concluded that Eastus did not qualify because although her "duties could at most be construed as loading and unloading airplanes," she "was not engaged in an aircraft's actual movement in interstate commerce," *id.* at 212. *Hill* and *Eastus* thus recognize what the majority does not: that the FAA requires characterization of the work done by a particular worker claiming entitlement to the residuary exemption, not merely the work of the company as a whole.

In any event, the majority's analysis fails on its own terms. Even assuming that "[t]he specification of workers in a *transportation industry* is a reliable principle for construing the [residual] clause," Maj. Op. at 13, the plaintiffs *do* work in a transportation industry: trucking. A company may employ different classes of workers, some in transportation and some outside it. I have little doubt that the people who bake Wonder Bread, like the factory workers in *Signal-Stat*, are not transportation workers. *See* 235 F.2d at 303. But the plaintiffs' mission, reflected on the first page of their Distributor Agreements, is to move goods. *See* App'x at 86 (stating that plaintiffs will be operating a "distributorship business"). They are "active[ly] engage[d] in the enterprise of" interstate transportation in a way those bakers are not. *Wallace*, 970 F.3d at 802. And to the extent that, in efficiently delivering the defendants' baked goods, the plaintiffs incidentally satisfy that "fundamental tenet of the bakery industry" of

"[m]aintaining a fresh market," App'x at 95, 132, they do so in the same way that all truckers serve the industries of the companies whose products they deliver.

There are few classes of workers more paradigmatically "engaged in foreign or interstate commerce" than those who operate commercial trucks to deliver products. Abandoning this universally recognized principle, the majority departs from the FAA's text, this Circuit's cases, and those of our sister circuits.

III. Other Issues.

Before concluding, I address two other brief points. The first is the defendants' argument, unavailing in my view, that Connecticut law provides an alternative basis to compel arbitration regardless of the FAA's applicability. A few district courts in this Circuit have enforced arbitration clauses under state law where the clauses "d[id] not plausibly suggest that the parties intended for the clause[s] to be discarded in the event that the FAA was found inapplicable." *Islam v. Lyft, Inc.*, 524 F. Supp. 3d 338, 359 (S.D.N.Y. 2021); *see also, e.g.*, *Valdes v. Swift Transp. Co., Inc.*, 292 F. Supp. 2d 524, 528 (S.D.N.Y. 2003); *Burgos v. Ne. Logistics, Inc.*, No. 15-CV-6840 (CBA) (CLP), 2017 WL 10187756, at *4 (E.D.N.Y. Mar. 30, 2017). This case is different. The arbitration agreement states that it "shall be governed by the FAA and *Connecticut* law to the extent *Connecticut* law is not inconsistent with the FAA." App'x at 199 (underlining in original). But Connecticut law and the FAA are crucially inconsistent here: While the FAA exempts transportation workers like the plaintiffs, Connecticut law contains no analogous carve-out. *See* Conn. Gen. Stat. Ann. § 52-408. Given this inconsistency, the arbitration agreement itself prohibits recourse to Connecticut law should the FAA be

held inapplicable.

My second brief point is in response to the concurrence's view that, once a court decides that arbitration is appropriate, "the FAA mandates a stay whether or not a party requests one." Concur. Op. at 4. To be clear, because I conclude that arbitration should not have been compelled here, resolution of this issue is not necessary to my analysis. I write only to correct what I see as the concurrence's misreading of Section 3 of the FAA. That provision states that a district court, "upon being satisfied that [an issue] is referable to arbitration . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3. Section 3's use of the mandatory "shall," we have held, means that where a party specifically applies for a stay pending the outcome of arbitration, the district court lacks discretion to dismiss the case instead. *Katz v. Cellco P'ship*, 794 F.3d 341, 346 (2d Cir. 2015).

It does not follow, however, that where a party does not request a stay—or where, as here, a party expressly seeks dismissal—a district court is still required to issue a stay. Section 3 is triggered "on application of one of the parties [to] stay the trial" and where, among other things, the "applicant for the stay is not in default." 9 U.S.C. § 3. This reference to the "applicant for the stay" thus squarely contradicts the concurrence's assertion that "[t]he text does not contemplate (let alone require) a separate application to stay proceedings in the district court." Concur. Op. at 5. Accordingly, where a party does not request a stay, there is no "application [to] stay the

trial," and a district court retains the authority to dismiss the action. *See Katz*, 794 F.3d at 346 (explaining that, absent a statutory mandate to stay proceedings, district courts "enjoy an inherent authority to manage their dockets"); *Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254, 277 (E.D.N.Y. 2019) ("Although Section 3 of the FAA only speaks of staying proceedings, it is well-settled than an arbitrable dispute may be dismissed in lieu of a stay if the defendant requests dismissal."); *Zambrano v. Strategic Delivery Sols., LLC*, No. 15-CV-08410, 2016 WL 5339552, at *10 (S.D.N.Y. Sept. 22, 2016) ("[B]ecause Defendants seek dismissal rather than a stay . . . this Court has discretion whether to stay or dismiss Plaintiffs' action under the FAA."); *Benzemann v. Citibank N.A.*, 622 F. App'x 16, 18 (2d Cir. 2015) (summary order) (endorsing this view).

CONCLUSION

The plaintiffs' daily work transporting goods in the stream of interstate commerce places them in the transportation worker exemption's heartland. They belong to a "class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, and the FAA does not apply to their Distributor Agreements. I respectfully dissent.

APPENDIX B

United States Court of Appeals
for the Second Circuit

August Term 2021
No. 20-1681

NEAL BISSONNETTE AND TYLER WOJNAROWSKI,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

LEPAGE BAKERIES PARK ST., LLC, C.K. SALES CO.,
LLC, AND FLOWERS FOODS, INC.,
Defendants-Appellees.

On Appeal from the United States District Court of the
District of Connecticut

Argued: October 22, 2021
Decided: May 5, 2022
Amended: September 26, 2022

Before: Jacobs, Pooler, *Circuit Judges*, Gujarati, *District Judge*.*

DENNIS JACOBS, *Circuit Judge*:

Plaintiffs deliver baked goods by truck to stores and restaurants in designated territories within Connecticut. They bring this action in the United States District Court for the District of Connecticut (Dooley, J.) on behalf of a putative class against Flowers Foods, Inc. and two of its subsidiaries, which manufacture the baked goods that the plaintiffs deliver. Plaintiffs allege unpaid or withheld wages, unpaid overtime wages, and unjust enrichment pursuant to the Fair Labor Standards Act and Connecticut wage laws. The district court granted the defendants' motion to compel arbitration and dismissed the case.

The decisive question on appeal is whether the plaintiffs are "transportation workers" within the meaning of the Federal Arbitration Act ("FAA"). That matters because the FAA, which confers on the federal courts an expansive obligation to enforce arbitration agreements, has an exclusion for contracts with "seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. That exclusion is construed to cover "transportation workers." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

Of the issues subsumed in that question, some are settled. For example, an independent contractor can be a

* Judge Diane Gujarati of the United States District Court for the Eastern District of New York, sitting by designation.

transportation worker, a point germane to this case in which the drivers own their routes and may sell them to others. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543-44 (2019).

The district court ruled that the plaintiffs are not "transportation workers" and "grant[ed] the Defendants' motion to dismiss in favor of arbitration." Special App'x 15. The court undertook a thorough review of the circumstances that might bear on the question, such as the extent of similarity between the plaintiffs' work and the work of those in the maritime and railroad industries. That analysis is consonant with the prescription in *Lenz v. Yellow Transportation, Inc.*, 431 F.3d 348 (8th Cir. 2005), which approached the question by considering eight non-exclusive factors. We affirm without rejecting or adopting the district court's analysis, which may very well be a way to decide closer cases. We hold that the plaintiffs are not "transportation workers," even though they drive trucks, because they are in the bakery industry, not a transportation industry.

In arriving at that holding, we first consider an alternative ground for affirmance that might obviate the federal statutory question by allowing the arbitration to proceed under Connecticut arbitration law, which has no exclusion for transportation workers; but vexed questions beset a ruling that affirms on that alternative basis.

We therefore must come to grips with whether the plaintiffs are "transportation workers." Our initial opinion on this appeal, *Bissonnette v. LePage Bakeries Park St., LLC*, 33 F.4th 650 (2d Cir. 2022), concluded that they are not. The Supreme Court subsequently issued *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022) ("*Saxon*"), which provides guidance on the meaning of

"transportation workers," and the plaintiffs moved for rehearing or rehearing *en banc* in light of this intervening authority. We granted the motion for rehearing and withdrew our opinion of May 5, 2022. Now, after considering *Saxon*, we again affirm the district court's order compelling arbitration and dismissing the case. Additional oral argument is unnecessary.[1]

I

Flowers Foods, Inc. is the holding company of subsidiaries that produce breads (including Wonder Bread), as well as buns, rolls, and snack cakes in 47 bakeries. Other subsidiaries of Flowers Foods sell exclusive distribution rights for the baked goods within specified geographic areas. (Flowers Foods, Inc. and its subsidiaries, including defendants LePage Bakeries Park St., LLC and C.K. Sales Co., LLC, are hereinafter referred to as "Flowers.") The individuals who purchase the distribution rights--designated independent distributors--market, sell, and distribute Flowers baked goods. The relationship between Flowers and each independent distributor is set out in a Distributor Agreement. See Joint App'x 84-159.

Plaintiffs Neal Bissonnette and Tyler Wojnarowski are two of these independent distributors, both of whom own distribution rights in Connecticut. Bissonnette, who previously delivered baked goods as an employee of Flowers, entered into a Distributor Agreement with Flowers in 2017. Wojnarowski entered into a Distributor Agreement with Flowers in 2018.

Pursuant to the Distributor Agreement, the plaintiffs

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[1] Defendants' request to respond to plaintiffs' petition for rehearing is denied as moot.

pick up the baked goods from local Connecticut warehouses and deliver the goods to stores and restaurants within their assigned territories. Subject to certain adjustments, the plaintiffs earn the difference between the price at which the plaintiffs acquire the bakery products from Flowers, and the price paid by the stores and restaurants. In their roles as independent distributors, the plaintiffs undertake to maximize sales; solicit new locations; stock shelves and rotate products; remove stale products; acquire delivery vehicles; maintain equipment and insurance; distribute Flowers' advertising materials and develop their own (with prior approval by Flowers); retain legal and accounting services; and hire help. The plaintiffs may also profit from the sale of their distribution rights.[2] Though the plaintiffs are permitted to sell noncompetitive products alongside Flowers products, the plaintiffs concede that they do not work for any other company or entity, and that they typically work at least forty hours per week selling and distributing Flowers products.

The Distributor Agreement states that the parties may submit disputes arising from the Distributor Agreement to binding arbitration in accordance with the conditions set forth in an appended Arbitration Agreement. The Arbitration Agreement provides that "any claim, dispute, and/or controversy . . . shall be

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[2] The Distributor Agreement defines the plaintiffs as "independent contractor[s]" for all purposes, and makes clear that the plaintiffs are "independent business[es]." The plaintiffs dispute that characterization. But this distinction no longer matters for FAA purposes because the Supreme Court has clarified that the exclusion for "transportation workers" applies with equal force to employees and to independent contractors. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543-44 (2019).

submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act (9 U.S.C. §§ 1, et seq.) . . .” Joint App’x 117. Arbitrability is an issue reserved to the arbitrator except for issues concerning the “prohibition against class, collective, representative or multi-plaintiff action arbitration” and the “applicability of the FAA.” *Id.* at 118. The Arbitration Agreement is “governed by the FAA and Connecticut law to the extent Connecticut law is not inconsistent with the FAA.” *Id.* at 119.

II

We have jurisdiction over the district court’s order compelling arbitration and dismissing the case because it is a “final decision with respect to an arbitration” pursuant to Section 16(a)(3) of the FAA. *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 86-87, 89 (2000).

III

We review *de novo* the district court’s order compelling arbitration. *Atlas Air, Inc. v. Int’l Bhd. of Teamsters*, 943 F.3d 568, 577 (2d Cir. 2019).

The Arbitration Agreement, which provides for arbitration “under the Federal Arbitration Act,” elsewhere provides that it “shall be governed by the FAA and Connecticut law to the extent *Connecticut law is not inconsistent with the FAA.*” Joint App’x 117, 119 (emphasis added). Since Connecticut arbitration law has no exclusion for transportation workers, *see* Conn. Gen. Stat. Ann. § 52-408 (arbitration agreements shall be “valid, irrevocable and enforceable”), Flowers urges that we compel arbitration pursuant to Connecticut law, regardless of whether the FAA applies.

The Second Circuit has not ruled on the application of

state law to arbitration agreements under the FAA. One court within this Circuit has observed that "[m]ultiple courts" have rejected the proposition that "state arbitration law is preempted" when a plaintiff is excluded from the FAA. *Smith v. Allstate Power Vac, Inc.*, 482 F. Supp. 3d 40, 47 (E.D.N.Y. 2020) (Gershon, J.); *see also Michel v. Parts Auth., Inc.*, 15 Civ. 5730 (ARR), 2016 WL 5372797, at *3 (E.D.N.Y. Sept. 26, 2016) ("Even assuming the FAA does not apply, New York state law governing arbitration does apply."). Other Circuits lean the same way.[3]

Even if state law can compel arbitration when the FAA does not, the meaning of the phrase "not inconsistent" in the Arbitration Agreement is unclear. Joint App'x 119. Flowers argues that Connecticut law is "not inconsistent" with the FAA because the FAA does not *preclude* the enforcement of arbitration agreements with transportation workers. The plaintiffs counter that Connecticut law *is* inconsistent because the FAA excludes transportation workers while Connecticut law does not.

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[3] *See, e.g.*, *Harper v. Amazon.com Servs., Inc.*, 12 F.4th 287, 295 (3d Cir. 2021) (observing that there is no language in the FAA that "explicitly preempts the enforcement of state arbitration statutes") (quoting *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 595 (3d Cir. 2004)); *see also Saxon v. Sw. Airlines Co.*, 993 F.3d 492, 502 (7th Cir. 2021) (explaining that even though the plaintiff qualified for the "transportation worker" exclusion to the FAA, she "could still face arbitration under state law"), *aff'd*, 142 S. Ct. 1783 (2022); *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 24 (1st Cir. 2017), *aff'd*, 139 S. Ct. 532 (2019) (explaining that exclusion from the FAA pursuant to Section 1 "has no impact on other avenues (such as state law) by which a party may compel arbitration"); *Cole v. Burns Int'l Sec. Serv.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997) ("[W]e have little doubt that, even if an arbitration agreement is outside the FAA, the agreement still may be enforced.").

Prudence counsels against a remand for arbitration to proceed under Connecticut law. The availability of Connecticut arbitration entails the construal of a phrase with a disputed meaning. Ascertaining the intent of the parties would ordinarily involve a remand for fact finding. Although the Agreement provides that issues of arbitrability are reserved for the arbitrator, that expedient may be blocked because the arbitrator's ambit excludes the applicability of the FAA, which is implicated here.

True, "a court should decide for itself whether § 1's 'contracts of employment' exclusion applies before ordering arbitration." *New Prime Inc.*, 139 S. Ct. at 537. But that prescription may not bear upon whether the availability of arbitration under state law can obviate the exclusion. *See Harper v. Amazon.com Servs., Inc.*, 12 F.4th 287, 296 n.8 (3d Cir. 2021) (observing that "no binding precedent requires district courts to ignore arbitrability under state law when the applicability of § 1 is uncertain"); *Hamrick v. Partsfleet, LLC*, 1 F.4th 1337, 1353 (11th Cir. 2021) ("We would only look to state arbitration law *after* we decided the federal issue of whether the transportation worker exemption applied to the drivers.") (emphasis in original). Therefore, we proceed to decide whether the plaintiffs fall within the FAA exclusion.

IV

The FAA, which reflects a "liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), nevertheless excludes the employment contracts of "seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce." 9

U.S.C. § 1. The class of workers encompassed by that residual clause is "transportation workers." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). Since neither Congress nor the Supreme Court has defined "transportation worker," we define it by affinity. The two examples that the FAA gives are "seamen" and "railroad employees." 9 U.S.C. § 1. These examples are telling because they locate the "transportation worker" in the context of a transportation industry. *See, e.g.*, *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1791 (2022) (explaining that "seamen" constitute a "subset of workers engaged in the maritime shipping industry").

One explanation advanced for the exclusion is that Congress "did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers." *See Circuit City*, 532 U.S. at 121. But that explanation does not limit or delineate the category. The specification of workers in a *transportation industry* is a reliable principle for construing the clause here.

Our cases have dealt with the exclusion, albeit in quite different contexts and largely prior to *Circuit City*, 532 U.S. at 119, which narrowed the scope to transportation workers. The cases nevertheless adumbrated the principle that decides this case. The holding in *Erving v. Virginia Squires Basketball*, 468 F.2d 1064 (2d Cir. 1972)--that the FAA exclusion is limited to workers involved in the transportation industry--is still vital. *Id.* at 1069. For example, *Maryland Casualty Co. v. Realty Advisory Board on Labor Relations*, 107 F.3d 979 (2d Cir. 1997), ruled that employees of a commercial cleaner were not covered by the exclusion, which is "limited to workers involved in the transportation industries." *Id.* at 982. After *Circuit City*, 532 U.S. at 119, this Court observed that the

exclusion did not apply to sheriffs because the clause is "interpreted . . . narrowly to encompass only 'workers involved in the transportation industries.'" *Adams v. Suozzi*, 433 F.3d 220, 226 n.5 (2d Cir. 2005) (quoting *Md. Cas. Co.*, 107 F.3d at 982).

Similarly, the Eleventh Circuit has held that an account manager at a company that rents and delivers furniture across state borders was subject to the FAA because he was "not a transportation industry worker." *Hill v. Rent-A-Ctr., Inc.*, 398 F.3d 1286, 1288 (11th Cir. 2005). *Hill* discerned that Congress intended to exclude "a class of workers in the transportation industry, rather than . . . workers who incidentally transported goods interstate as part of their job in an industry that would otherwise be unregulated." *Id.* at 1289; *see also id.* at 1290 ("[I]t is apparent Congress was concerned only with giving the arbitration exemption to 'classes' of transportation workers within the transportation industry."). The test most recently articulated by the Eleventh Circuit is that the transportation worker exclusion applies if the employee is part of a class of workers: "(1) employed in the transportation industry; and (2) [who], in the main, actually engage[] in foreign or interstate commerce." *Hamrick*, 1 F.4th at 1349 (remanding for the district court to consider whether last-mile delivery workers qualify for the exclusion).[4]

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[4] The plaintiffs in this case cite *Martins v. Flowers Foods, Inc.*, 463 F. Supp. 3d 1290 (M.D. Fla. 2020), which held that Flowers distributors perform their work in the transportation industry. *Id.* at 1298. But the Eleventh Circuit vacated the judgment by a summary order, directing reconsideration in light of *Hamrick v. Partsfleet, LLC*, 1 F.4th 1337 (11th Cir. 2021). *See Martins v. Flowers Foods, Inc.*, 852 F. App'x 519 (11th Cir. 2021) (summary order). The district

Although none of these cases defines "transportation industry," we conclude that an individual works in a transportation industry if the industry in which the individual works pegs its charges chiefly to the movement of goods or passengers, and the industry's predominant source of commercial revenue is generated by that movement.

In *Erving* and *Maryland Casualty*, this Court set forth that only a worker in a transportation industry can be classified as a transportation worker. That point needed no elaboration in *Saxon* because there the plaintiff worked for an airline. An airline, an analog to transport by rail and sea, is in the business of moving people and freight, and its charges are for activity related to that movement. (Customers do not fly for the infotainment or the food.)

At the same time, as *Saxon* teaches, not everyone who works in a transportation industry is a transportation worker. To determine who is, we must consider "the actual work that the members of the class, as a whole, typically carry out," that is, what the worker "frequently" does for the employer. *See* 142 S. Ct. at 1788. It follows that not everybody who works in the airline industry is a transportation worker--many airline employees are engaged in accounting, regulatory compliance, advertising, and such. But in our case, the distinctions drawn in *Saxon* do not come into play; those who work in the bakery industry are not transportation workers, even those who drive a truck from which they sell and deliver the breads and cakes.

The dissent's repeated incantation that the plaintiffs are exempt because they work in the "trucking industry"

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court has not yet issued a ruling on remand.

is erroneous. Although the plaintiffs spend appreciable parts of their working days moving goods from place to place by truck, the decisive fact is that the stores and restaurants are not buying the movement of the baked goods, so long as they arrive. Customers pay for the baked goods themselves; the movement of those goods is at most a component of total price. The commerce is in breads, buns, rolls, and snack cakes--not transportation services. *See, e.g.*, *Hill*, 398 F.3d at 1288-90 (holding that a Rent-A-Center manager whose "duties involved making delivery of goods to customers out of state in his employer's truck" did not work in the "transportation industry"). Although contractual parties cannot effectively stipulate to the status of employees as transportation workers (or not), the Distributor Agreement here recognizes and identifies the industry: "[m]aintaining a fresh market is a fundamental tenet of the *baking industry*."[5] Joint App'x 95 (emphasis added).

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[5] Although the plaintiffs never leave the state of Connecticut, we do not consider whether this case could be decided on the ground that the interstate element of the exclusion is not satisfied. The issue may not be simple. *See, e.g.*, *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1789 n.2 (2022) (acknowledging that it can be difficult to define a class of workers' involvement in interstate commerce). The baked goods originate outside of Connecticut; and there are railroads that operate within a single state, terminus to terminus--the Long Island Railroad comes to mind.

Notably, on successive days, two courts in the same district reached opposite conclusions as to whether rideshare drivers are engaged in interstate commerce. *Compare Islam v. Lyft, Inc.*, 524 F. Supp. 3d 338, 353 (S.D.N.Y. 2021) (Abrams, J.) (exempt from the FAA because they perform "sufficient numbers of interstate rides, with sufficient regularity"), *with Aleksanian v. Uber Techs. Inc.*, 524 F. Supp. 3d 251, 262-63 (S.D.N.Y. 2021) (Carter, J.) (not exempt because "interstate trip[s]" are "occasional").

Because the plaintiffs do not work in the transportation industry, they are not excluded from the FAA, and the district court appropriately compelled arbitration under the Arbitration Agreement.

V

The district court decided this case along the lines of analysis prescribed by the Eighth Circuit in *Lenz v. Yellow Transportation, Inc.*, 431 F.3d 348 (8th Cir. 2005). *Lenz* adduced eight "non-exclusive" factors for "determining whether an employee is so closely related to interstate commerce that he or she fits within the § 1 exemption":

> [F]irst, whether the employee works in the transportation industry; second, whether the employee is directly responsible for transporting the goods in interstate commerce; third, whether the employee handles goods that travel interstate; fourth, whether the employee supervises employees who are themselves transportation workers, such as truck drivers; fifth, whether, like seamen or railroad employees, the employee is within a class of employees for which special arbitration already existed when Congress enacted the FAA; sixth, whether the vehicle itself is vital to the commercial enterprise of the employer; seventh, whether a strike by the employee would disrupt interstate commerce; and eighth, the nexus that exists between the employee's job duties and the vehicle the employee uses in carrying out his duties (i.e., a truck driver whose only job is to deliver goods cannot perform his job without a truck).

Id. at 352. The district court relied upon certain *Lenz*

factors, but not all, and not explicitly. *See Bissonnette v. Lepage Bakeries Park St., LLC*, 460 F. Supp. 3d 191, 198-202 (D. Conn. 2020). Although we identify no error in the district court's conscientious analysis, we resolve the question before us on the more straightforward ground that the plaintiffs do not work in a transportation industry.

We acknowledge that our approach is not a universal solvent. We do not attempt to decide issues that have arisen across the federal court system as to which of the following workers may be a "transportation worker":

- Workers who transport goods or passengers within a state, when those goods or passengers originate out of state. *See, e.g.*, *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 802 (7th Cir. 2020) (holding that food delivery drivers who do not cross state lines are subject to the FAA); *Capriole v. Uber Techs., Inc.*, 7 F.4th 854, 865-66 (9th Cir. 2021) (holding that Uber drivers are subject to the FAA because most of their trips are intrastate).
- Workers for major retailers who transport goods intrastate within a larger transportation network that is interstate. *Compare Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 917 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1374 (2021) (holding that Amazon contractors are transportation workers because they "complete the delivery of goods that Amazon ships across state lines and for which Amazon hires . . . workers to complete the delivery"); *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 26 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 2794 (2021), *reh'g denied*, 141 S. Ct. 2886 (2021) (holding that "last-mile delivery workers who haul

> goods on the final legs of interstate journeys are transportation workers engaged in . . . interstate commerce," even if they do not themselves cross state lines) (internal quotation marks omitted), *with Hamrick*, 1 F.4th at 1351 (remanding to consider whether final-mile delivery workers "are in a class of workers employed in the transportation industry that actually engages in foreign or interstate commerce").

We have no occasion to hazard answers to these questions.

CONCLUSION

For the reasons stated above, we affirm the order compelling arbitration and dismissing the case.

DENNIS JACOBS, *Circuit Judge*, concurring:

The obligation to consider appellate jurisdiction ordinarily entails a straightforward analysis. In this case, the straightforward analysis leads to another and difficult question.

Having issued an order to compel arbitration, the district court dismissed the case, and assured the parties that "[i]f, after the arbitration, any party seeks further relief from the Court, the Clerk of Court shall direct assign any such motion or petition to the undersigned." Special App'x 15. The dismissal amounts to a final order, notwithstanding the contemplation of further initiatives--such as confirmation, vacatur, or modification of the award--that may be sought in future litigation. So pursuant to Section 16(a)(3) of the Federal Arbitration Act ("FAA"), we have jurisdiction over this appeal. But the contemplation of future litigation reflects an intuitive appreciation that the district court's role under the FAA may be unfulfilled. The district court, having power to stay proceedings pending arbitration, should not have dismissed the case.

I

When a district court grants an application to enforce an arbitration clause, there is a question as to whether Section 3 of the FAA requires that a stay be entered. Courts across the Circuits are divided on this question; some hold that a stay is mandatory, and others hold that a district court may dismiss the case.[1] In 2015, our decision in *Katz v. Cellco Partnership*, 794 F.3d 341 (2d Cir. 2015)

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[1] *Compare, e.g.*, *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir. 1992) (per curiam) ("Upon finding that a claim is

("*Katz*"), articulated the rule as follows: a stay is mandatory when "all claims have been referred to arbitration *and a stay requested*." *Id.* at 345 (emphasis added). Following *Katz*, courts in this Circuit are split on whether a stay is required even if no party requests one.[2]

This issue is consequential. When a case is stayed pending arbitration, the order compelling or directing arbitration is interlocutory, and therefore unappealable; the parties must proceed forthwith to arbitration. But when such a case is dismissed, the party resisting arbitration can appeal at once, and thereby delay the arbitration, with associated costs and uncertainties. This appears to be where we are now.

How did we get here? In this case, Flowers moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) and the FAA, or in the alternative, to compel arbitration.

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subject to an arbitration agreement, the court should order that the action be stayed pending arbitration."), *with Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 156 & n. 21 (1st Cir. 1998) ("[A] court may dismiss, rather than stay, a case when all of the issues before the court are arbitrable.").

[2] *Compare China Media Express Holdings, Inc. by Barth v. Nexus Exec. Risks, Ltd.*, 182 F. Supp. 3d 42, 53 (S.D.N.Y. 2016) (staying case "[p]ursuant to the Second Circuit's decision in *Katz*" even though parties seeking arbitration requested dismissal); *Merrick v. UnitedHealth Grp. Inc.*, 127 F. Supp. 3d 138, 154 (S.D.N.Y. 2015) (staying the action even though "no party has requested a stay"), *with Benzemann v. Citibank N.A.*, 622 F. App'x 16, 18 (2d Cir. 2015) (summary order) (ruling that because the plaintiff did not request a stay, "Section 3 did not require the district court to stay the proceedings"); *Zambrano v. Strategic Delivery Sols., LLC*, No. 15 Civ. 8410, 2016 WL 5339552, at *10 (S.D.N.Y. Sept. 22, 2016) (observing that "because Defendants seek dismissal rather than a stay . . . this Court has discretion whether to stay or dismiss Plaintiffs' action under the FAA," and ultimately staying the case).

For some reason, Flowers explicitly sought a dismissal "in lieu of a stay," *see* Joint App'x 73-74, and the plaintiffs, who resisted arbitration, did not request a stay. Thus, the district court granted Flowers' "motion to dismiss in favor of arbitration," closed the case, and directed the Clerk of Court to assign any post-arbitration petitions for relief to the same judge. Special App'x 15-16. Today, we have affirmed the order compelling arbitration and dismissing the case.

Katz can be read to mean that, when no stay is requested, the district court retains discretion to stay the case *or* dismiss it. That reading is invited by *Katz* without being compelled by it.

II

Katz construed Section 3 of the FAA to mandate a stay when "all claims have been referred to arbitration and a stay requested." 794 F.3d at 345. However, the FAA mandates a stay whether or not a party requests one. This construal is consistent with the purpose of the FAA.

Properly construed, the text of Section 3 bars a court from enforcing an arbitration clause *sua sponte*; but if a party applies for enforcement of the clause, Section 3 requires a court that enforces it to stay proceedings in the interim:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, ***shall on application of one of the parties stay the trial of the action until such arbitration has been***

> ***had in accordance with the terms of the agreement,*** providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (emphasis added). Read naturally and in context, the referenced "application of one of the parties" is the application to enforce the arbitration clause. The text does not contemplate (let alone require) a separate application to stay proceedings in district court. *See Cont'l Cas. Co. v. Am. Nat'l Ins. Co.*, 417 F.3d 727, 732 n.7 (7th Cir. 2005) ("[T]he proper course of action when a party seeks to invoke an arbitration clause is to *stay* the proceedings pending arbitration rather than to dismiss outright.") (emphasis in original).

Reading Section 3 to require a stay pending arbitration regardless of whether a stay has been requested is consistent with the FAA's pro-arbitration posture.[3] Congress intended the FAA 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). That is why the FAA "provides two parallel devices for enforcing an arbitration agreement: a stay of litigation in any case raising a dispute referable to arbitration, 9 U.S.C. § 3"--at issue here--"and an affirmative order to engage in arbitration, § 4." *Id.* It is hard to square

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[3] For what it is worth, *Katz* does not clearly say otherwise. *Katz* observes that Section 3's "plain language specifies that the court 'shall' stay proceedings pending arbitration, provided an application is made and certain conditions are met." 794 F.3d at 345. *Katz* does not specify the type of "application" that must be made, though (in my view) *Katz* does (and must be read to) reference the application to enforce an arbitration clause. Nor does *Katz* point to anything in the statute that says that a mandatory stay is dependent upon an explicit request for a stay.

congressional intent with the idea that Section 3's mandatory stay is conditional upon a party's explicit request for a stay alongside its application to compel arbitration.

The FAA provision governing appeals underscores the congressional policy of "rapid and unobstructed enforcement of arbitration agreements." Moses, 460 U.S. at 23. Section 16 forecloses an appeal from an order that directs the parties to proceed with arbitration, including a stay order under Section 3:

> Except as otherwise provided in section 1292(b) of title 28 [interlocutory decisions], an appeal may not be taken from an interlocutory order--
>
> (1) granting a stay of any action under section 3 of this title;
>
> (2) directing arbitration to proceed under section 4 of this title;[4]
>
> (3) compelling arbitration under section 206 of this title [providing for enforcement abroad and court-appointed arbitrators]; or
>
> (4) refusing to enjoin an arbitration that is subject to this title.

See 9 U.S.C. § 16(b). That provision "is a pro-arbitration statute designed to prevent the appellate aspect of the litigation process from impeding the expeditious

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[4] 9 U.S.C. § 4, which deals with enforcement of arbitration clauses regardless of whether the contract has become the subject of federal litigation, provides in part: "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."

disposition of an arbitration." *Augustea Impb Et Salvataggi v. Mitsubishi Corp.*, 126 F.3d 95, 99 (2d Cir. 1997) (quoting David D. Siegel, *Practice Commentary: Appeals from Arbitrability Determinations*, 9 U.S.C.A. § 16, at 352 (West Supp. 1997)).[5] The purpose is defeated if a dismissal is entered instead of a stay. *See Arabian Motors Grp. W.L.L. v. Ford Motor Co.*, 19 F.4th 938, 942 (6th Cir. 2021) ("Because a dismissal, unlike a stay, permits an objecting party to file an immediate appeal, a district court dismissal order undercuts the pro-arbitration appellate-review provisions of the Act.").

III

Our opinion in *Katz* is regrettable, particularly as the Supreme Court has now given guidance that reinforces my view of Section 3. *See Badgerow v. Walters*, 142 S. Ct. 1310 (2022) ("*Badgerow*"). *Badgerow* conducted a thorough analysis of the FAA's text, and held that the "look through" approach for finding federal jurisdiction in petitions under Section 4 does not apply to petitions under Sections 9 and 10 of the FAA. This holding has ramifications when a district court dismisses a case after compelling arbitration because a dismissal will certainly require a district court to find an independent jurisdictional basis whenever a new FAA petition arises from the same case. A stay, however, may enable the court and the parties to sidestep these consequences.

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[5] Not to the contrary is the FAA provision that an appeal may be taken from "a final decision with respect to an arbitration." 9 U.S.C. § 16(a)(3). The FAA allows an appeal from a final decision that is entered after the arbitration has run its course, *id.*, as well as appeals from, *inter alia*, orders that refuse a stay of an action or deny a petition to arbitrate, *see* 9 U.S.C. § 16(a)(1).

It is settled that a federal court deciding whether to enforce an arbitration agreement under Section 4 must find an independent jurisdictional basis, either on the face of the petition (for diversity jurisdiction) or by looking through to the petition to see if the underlying controversy arises under federal law (for federal question jurisdiction). *See Vaden v. Discover Bank*, 556 U.S. 49, 62 (2009); *Hermes of Paris, Inc. v. Swain*, 867 F.3d 321, 324 (2d Cir. 2017). But, under *Badgerow*, a district court lacks jurisdiction over a petition to confirm or vacate an arbitral award under Sections 9 and 10, respectively, unless the jurisdictional basis appears on the "face of the application itself." *Badgerow*, 142 S. Ct. at 1317-18. This means that there must either be diversity jurisdiction, or a federal question with respect to the award's confirmation or vacatur (no examples of the latter are supplied in *Badgerow* itself). *Id.* Unlike with Section 4 petitions, courts may not locate federal question jurisdiction by looking through to the underlying controversy. Id. As a result of this ruling, many more Section 9 and 10 petitions will be adjudicated in state courts. *Id.* at 1321-22. This will raise an impediment to parties seeking federal court assistance to facilitate their arbitrations when there is no jurisdictional basis on the face of their petitions.

It is too early to say whether issuance of a stay pursuant to Section 3 may allow parties to seek enforcement, vacatur, or modification of an award, 9 U.S.C. §§ 9-11, or seek other assistance under the FAA, *see id.* §§ 5 (appointment of arbitrators), 7 (summoning witnesses), without need for an independent basis for federal jurisdiction--though Justice Breyer's dissent in

Badgerow suggests as much.[6] As this Court has observed, "practitioners who wish to preserve access to federal courts for later disputes over arbitrators, subpoenas, or final awards [may] attempt to 'lock in' jurisdiction by filing a federal suit first, followed by motions to compel and a stay of proceedings." *Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 387 (2d Cir. 2016), *abrogated on other grounds by Badgerow v. Walters*, 142 S. Ct. 1310 (2022); *see also* Ian R. MacNeil et al., *Federal Arbitration Law: Agreements, Awards, and Remedies under the Federal Arbitration Act* § 9.2.3.1 (Supp. 1999) (explaining that when a district court stays proceedings pending arbitration, "[a]fter an award, parties desiring to confirm, vacate, or modify the award, can return to the federal court in which the stayed litigation is pending for determination of those issues," as "[t]he court had federal question subject matter jurisdiction and has never lost it.").

In short, the stay of a suit pending arbitration is (in my view) arguably compelled and certainly prudent.

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[6] Indeed, foreseeing the chaos post-*Badgerow*, Justice Breyer suggested that a stay is the solution: "[i]f a party to an arbitration agreement files a lawsuit in federal court but then is ordered to resolve the claims in arbitration, the federal court may stay the suit and possibly retain jurisdiction over related FAA motions." *Badgerow*, 142 S. Ct. at 1326 (Breyer, J., dissenting) (citing § 3, *Vaden v. Discover Bank*, 556 U.S. 49, 65 (2009)). For its part, the *Badgerow* majority did not address the effect of a stay on a district court's jurisdiction to resolve later-filed FAA petitions; it explicitly declined to consider whether a district court would have jurisdiction to resolve a Section 5 petition that is made "in tandem with" a Section 4 petition. *Id.* at 1320 n.6.

POOLER, *Circuit Judge*, dissenting:

The plaintiffs are commercial truck drivers who deliver the defendants' packaged baked goods to supermarkets and other retail outlets in Connecticut. They allege that the defendants deprived them of the legal protections owed to employees, including the right to overtime premiums, by misclassifying them as independent contractors. On appeal now is whether this serious charge should be litigated, as the drivers want, or arbitrated, as their employer prefers. The parties have an arbitration agreement. But the Federal Arbitration Act, which empowers federal courts to enforce those agreements, does not apply to employment contracts of "any . . . class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1—that is, "transportation workers," *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). The question, then, is whether the plaintiffs are transportation workers.

When we first considered this case a few months ago, I thought the answer was clear: Of course these truckers are transportation workers. *See Bissonnette v. LePage Bakeries Park St., LLC*, 33 F.4th 650, 662 (2d Cir. 2022) (Pooler, *J.*, dissenting). After all, the "one area of clear common ground" concerning this exemption to the FAA has been that truck drivers qualify. *Kowalewski v. Samandarov*, 590 F. Supp. 2d 477, 482-83 (S.D.N.Y. 2008) (Sullivan, *J.*) (collecting cases). In view of this consensus, I thought anomalous and unfounded the majority's contrary conclusion that because the plaintiffs do their trucking for a bakery company, they "are in the bakery industry, not a transportation industry," hence not transportation workers. *Bissonnette*, 33 F.4th at 652. Instead, I would have joined the several other courts that

have recognized the obvious: "[A] trucker is a transportation worker regardless of whether he transports his employer's goods or the goods of a third party." *Int'l Broth. of Teamsters Loc. Union No. 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 957 (7th Cir. 2012).

The Supreme Court's decision in *Southwest Airlines Co. v. Saxon*, issued a month after our ruling, reinforces my view. *See* 142 S. Ct. 1783 (2022). *Saxon* directs our attention to "the actual work that the members of the class, as a whole, typically carry out." *Id.* at 1788. Someone "is therefore a member of a 'class of workers' based on what she does" for her employer, "not what [the employer] does generally." *Id.* Yet the majority, caught flat-footed by *Saxon*, elects to ignore it. The majority's revised decision continues to hold that the plaintiffs are not transportation workers, even though they "spend appreciable parts of their working days moving goods from place to place by truck," because of what their employer, a baked goods company, does generally. Maj. Op. at 17. From the start, this holding was textually baseless and inconsistent with the decisions of courts nationwide. Add to that list the Supreme Court. For the second time now, therefore, I must respectfully dissent.

I. The Plaintiffs Are Transportation Workers.

Latrice Saxon was a ramp supervisor for Southwest Airlines. Her work "frequently require[d] her to load and unload baggage, airmail, and commercial cargo on and off airplanes that travel across the country." *Saxon*, 142 S. Ct. at 1787. The question before the Supreme Court was whether she belonged to a class of workers engaged in foreign or interstate commerce. In concluding that she did—and that her employment contract was therefore exempt from the FAA—the Court employed a two-step

analysis. First, the Court sought to "defin[e] the relevant 'class of workers' to which Saxon belong[ed]." *Id.* at 1788-89. Saxon argued that "because air transportation as an industry is engaged in interstate commerce, airline employees constitute a class of workers covered by § 1." *Id.* at 1788 (alterations and internal quotation marks omitted). The Court "rejected Saxon's industrywide approach." *Id.* Instead, it reasoned, "[t]he word 'workers' directs the interpreter's attention to the *performance* of work," and "the word 'engaged' . . . similarly emphasizes the actual work that the members of the class, as a whole, typically carry out." *Id.* (emphasis in original). Accordingly, Saxon was "a member of a 'class of workers' based on what she does at Southwest, not what Southwest does generally." Id. And because Southwest had "not meaningfully contested that ramp supervisors like Saxon frequently load and unload cargo," the Court "accept[ed] that Saxon belongs to a class of workers who physically load and unload cargo on and off airplanes on a frequent basis." *Id.* at 1788-89.

Second, the Court determined that this class of workers was "engaged in foreign or interstate commerce." *Id.* at 1789. Because "to be 'engaged' in something means to be 'occupied,' 'employed,' or 'involved' in it," and because commerce "includes, among other things, 'the transportation of . . . goods, both by land and by sea,'" the Court explained that "any class of workers directly involved in transporting goods across state or international borders falls within § 1's exemption." *Id.* The Court concluded that "[a]irplane cargo loaders are such a class," because, among other reasons, "it is 'too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate

transportation as to be practically a part of it.'" *Id.* (quoting *Baltimore & Ohio Sw. R. Co. v. Burtch*, 263 U.S. 540, 544 (1924)).

Applying this framework here, the plaintiffs plainly belong to a class of workers engaged in interstate commerce. We start by defining the relevant class, with a focus on the actual work the class members typically carry out. The plaintiffs "work at least forty hours per week delivering the" defendants' baked goods. App'x at 17 ¶ 33. This work principally consists of driving Department of Transportation-registered commercial trucks "to stores within a territory designated by Defendants, delivering Defendants' products to these stores, and arranging the products on the shelves according to Defendants' standards." App'x at 17 ¶ 33. The plaintiffs therefore belong to a class of workers who, in the majority's words, "spend appreciable parts of their working days moving goods from place to place by truck." Maj. Op. at 17. Or, in common parlance, they are commercial truck drivers.

But are the plaintiffs "engaged in foreign or interstate commerce?" 9 U.S.C. § 1. At first, this may look like a closer question, because they do not cross state lines. But neither did Saxon. She merely "load[ed] cargo on a plane bound for interstate transit." *Saxon*, 142 S. Ct. at 1790. Still, the Supreme Court held, "airplane cargo loaders plainly do perform 'activities within the flow of interstate commerce' when they handle goods traveling in interstate . . . commerce." *Id.* at 1792. It did not matter that Saxon "d[id] not physically accompany freight across state or international boundaries." *Id.* at 1791. The same is true of these truckers. The loaves of Wonder Bread they transport are delivered to the defendants' warehouse from commercial bakeries outside Connecticut; they then

transport the bread to its final destination in-state. Like Saxon, the plaintiff truckers handle goods traveling in interstate commerce every day. If Saxon is intimately involved with the transportation of those goods, the truckers here are, too. The majority opinion, in a footnote, states that the Court does not consider whether the case could be decided on the ground that the interstate element of the exclusion is not satisfied, noting that it is not a simple issue. *See* Maj. Op. at 18 n.5. However, the district court acknowledged that defendants' products are manufactured out of state and are delivered to warehouses in-state, and as such, the plaintiffs meet the threshold of being "engaged in . . . interstate commerce." *See* 9 U.S.C. § 1; *Bissonette v. Lepage Bakeries Park St., LLC*, 460 F. Supp. 3d 191, 198 (D. Conn. 2020).

Pre-*Saxon* cases furnish the same conclusion. "The great weight of authority . . . holds that interstate travel is not strictly necessary" to qualify someone as a transportation worker. *Haider v. Lyft, Inc.*, No. 20-cv-2997, 2021 WL 1226442, at *4 (S.D.N.Y. Mar. 31, 2021). The First and Ninth Circuits, for instance, have held that so-called "last-mile delivery drivers" for Amazon are transportation workers "[b]y virtue of their work transporting goods or people 'within the flow of interstate commerce,'" despite never personally crossing state lines. *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 26 (1st Cir. 2020); *see also Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 916 (9th Cir. 2020). The theory is that, when a product crosses state lines in a "single, unbroken stream of interstate commerce" from origin to customer, interstate commerce becomes a "central part" of the job description of even those delivery drivers who take the product on the last, intrastate leg of the journey. *Carmona v. Domino's Pizza, LLC*, 21 F.4th 627, 630 (9th Cir. 2021).

So it is here. Like the Amazon drivers, the plaintiffs carry the goods for a portion of a single interstate journey and are "indispensable parts of [an interstate] distribution system." *Waithaka v. Amazon.com, Inc.*, 404 F. Supp. 3d 335, 343 (D. Mass. 2019). These facts also distinguish the plaintiffs from those "workers whose occupations have nothing to do with interstate transport" whom the Seventh Circuit has worried might be "swe[pt] in" by an overbroad reading of the Section 1 exemption: for instance, the "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." *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 802 (7th Cir. 2020).

Because the movement of goods through interstate commerce is a central part of the plaintiffs' occupation as truckers, I would hold that they belong to a "class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, and that the FAA does not apply to their Distributor Agreements.

II. The Majority's Errors.

When considering the majority opinion's erroneous contrary conclusion, note what it does and does not hold. The majority does not hold, as had the district court, that the plaintiffs are not transportation workers because their few additional customer service and sales responsibilities make them "more akin to sales workers or managers" than "traditional . . . long-haul trucker[s]." *Bissonette*, 460 F. Supp. 3d at 200.[1] Nor does the majority

[1] The district court's reasoning is itself unconvincing. I have no issue with the premise that a transportation worker's job duties must be more than "tangentially related to [the] movement of goods." *Lenz*

exclude the plaintiffs from the FAA's residual exemption on the ground that their work is insufficiently connected to interstate commerce; this question, after all, "may not be simple," as "there are railroads that operate within a single state, terminus to terminus." Maj. Op. at 18 n.4.

Instead, the majority concludes that, even assuming these plaintiffs are traditional truckers, and even assuming the interstate element is satisfied, they are still not transportation workers, because they work for a bakery. The majority reasons that "[t]he specification of workers in a *transportation industr*y is a reliable principle for construing the [residual] clause." Maj. Op. at 13 (emphasis in original). It then instructs—without reference to the FAA's text, any case law, the business

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v. Yellow Transp., Inc., 431 F.3d 348, 351- 52 (8th Cir. 2005); *see also, e.g.*, *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1289 (11th Cir. 2005) (requiring that transportation work be more than "incidental" to a worker's employment). But it is impossible to conclude on this record that transportation work is merely incidental or tangential to the plaintiffs' employment. The title of their contracts—"Distributor Agreements"—defines their principal purpose. The additional tasks the Distributor Agreements obligate the plaintiffs to perform emanate from the delivery work. And the defendants offer no evidence to counter the complaint's allegations that the actual delivery of product constituted the lion's share of the plaintiffs' work. It is not surprising, then, that in a case strikingly similar to this one, the District of Massachusetts recently concluded that a group of the same defendants' Massachusetts-based delivery drivers qualified as transportation workers, principally because those plaintiffs had submitted "sworn affidavits stating that they spend the majority of their time making deliveries" and "there [was] nothing in the record to suggest that Plaintiffs were carrying out all of the other responsibilities included in the[ir] Distributor Agreements and business plans, or that those other responsibilities took up more time than driving." *Canales v. Lepage Bakeries Park St. LLC*, No. 1:21-cv-40065-ADB, 2022 WL 952130, at *5-*6 (D. Mass. Mar. 30, 2022).

world, or even a dictionary—that "an individual works in a transportation industry if the industry in which the individual works pegs its charges chiefly to the movement of goods or passengers, and the industry's predominant source of commercial revenue is generated by that movement." Maj. Op. at 16. The majority concludes that that the plaintiffs "are in the bakery industry, not a transportation industry," Maj. Op. at 5, because "the stores and restaurants are not buying the movement of the baked goods, so long as they arrive. The bill they pay is for the baked goods themselves; the movement of those goods is at most a component of total price." Maj. Op. at 17-18. Long story short, the plaintiffs are not transportation workers because they do not work for a trucking company.

Can this really be the law? Certainly not under *Saxon*. Only by looking to what their employer does generally—making and selling bread—can the majority conclude that the plaintiffs are not transportation workers.[2] The plaintiffs drive trucks; they are not bakers. And while they happen to be employed by the bakery whose bread they deliver, this is nothing new. *See Loc. 50, Bakery &*

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[2] In any event, I am not sure this even accurately depicts the defendants' commerce. No facts in the record concerned each defendant's "predominant sources of commercial revenue." For their part, the plaintiffs aver that discovery "would reveal that CK Sales [the defendant with whom the plaintiffs executed the Distributor Agreements] does not earn any revenues from the sale of baked goods, [but rather] that it primarily generates revenue by designing 'distribution territories' and selling the 'distribution rights' to perform deliveries within those territories to Distributors like Plaintiffs—that is, it generates revenue through the distribution of goods, not the manufacturing of them." Plaintiffs-Appellants' Petition for Rehearing or for Rehearing En Banc at 18.

Confectionary Workers v. Gen. Baking Co., 97 F. Supp. 73, 74 (S.D.N.Y. 1951) (describing labor negotiations and strike of Bakery Drivers Union and production stoppage arising therefrom). Nor is it uncommon today for a company to hire its own delivery drivers. Scores of truckers in the United States work directly for beverage companies, furniture companies, retailers, food manufacturers, energy companies, and grocery stores. One cannot get far on an interstate without seeing an eighteen-wheeler soliciting for "Drive4Walmart.com."[3] *Saxon* makes plain that the drivers these companies hire do not cease to be transportation workers the moment they are brought in-house. If the workers' principal daily tasks involve them in the actual movement of goods through interstate commerce, they are transportation workers. *See Saxon*, 142 S. Ct. at 1790 (describing as the "central feature of a transportation worker" the "active[] engage[ment] in transportation of . . . goods across borders via the channels of foreign or interstate commerce" (internal quotation marks omitted)). By focusing on the nature of the defendants' business, and not on the nature of the plaintiffs' work, the majority offers the sort of industrywide approach *Saxon* proscribes.

The majority, of course, tries to sidestep *Saxon*. Its argument seems to be that because Saxon worked for a company that likely "pegs its charges chiefly to the

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[3] *See* WALMART CAREERS, https://careers.walmart.com/drivers-distribution-centers/drivers (last visited Aug. 16, 2022) ("Traveling over 900 million miles a year, our private fleet of over 12,000 Class A drivers deliver countless loads of merchandise to Walmart and Sam's Club locations across the nation while representing the values associated with our Spark.").

movement of goods and passengers," Maj. Op. at 16, while the plaintiffs (per the majority) do not, the "distinctions drawn in *Saxon* do not come into play." Maj. Op. at 17. Yet *Saxon* is not so limited. To the contrary, the Court squarely foreclosed that Southwest Airlines' "predominant source of commercial revenue" could be relevant to whether Saxon was a transportation worker. Again: "Saxon is . . . a member of a 'class of workers' based on what she does at Southwest, not what Southwest does generally." *Saxon*, 142 S. Ct. at 1788.

But the majority conflicts with more than just *Saxon*. For decades, the "one area of clear common ground among the federal courts" has been "that truck drivers—that is, drivers actually involved in the interstate transportation of physical goods"—are transportation workers. *Kowalewski*, 590 F. Supp. 2d at 482-83. *See also Lenz*, 431 F.3d at 351 (declaring it "[i]ndisputabl[e]" that, if the plaintiff "were a truck driver, he would be considered a transportation worker"); *Palcko v. Airbone Express*, 372 F.3d 588, 593-94 (3d Cir. 2004) (assuming that truck drivers fall within the residuary exemption); *Harden v. Roadway Package Sys.*, 249 F.3d 1137, 1140 (9th Cir. 2001) ("delivery driver" was transportation worker); *Smith v. Allstate Power Vac. Inc.*, 482 F. Supp. 3d 40, 46 (E.D.N.Y. 2020) (truck driver for waste removal company was transportation worker); *Veliz v. Cintas Corp.*, No. 03-cv-1180, 2004 WL 2452851, at *5 (N.D. Cal. Apr. 5, 2004) ("The most obvious case where a plaintiff falls under the FAA exemption is where the plaintiff directly transports goods in interstate [commerce], such as [an] interstate truck driver . . . .").

A natural corollary, as several courts have correctly recognized, is that "a transportation worker need not

work for a transportation company." *Saxon v. Sw. Airlines Co.*, 993 F.3d 492, 497 (7th Cir. 2021), *aff'd Saxon*, 142 S. Ct. 1783. Rather, "a trucker is a transportation worker regardless of whether he transports his employer's goods or the goods of a third party." *Kienstra*, 702 F.3d at 957; *see also Waithaka*, 966 F.3d at 23 ("[A] class of workers [need not] be employed by an interstate transportation business or a business of a certain geographic scope to fall within the Section 1 exemption[.]"); *Canales*, 2022 WL 952130, at *6 (rejecting the argument that "an employer [must] be a transportation company for § 1 to apply"). These observations align with the FAA's text: Section 1 asks whether a worker belongs to a class of workers "engaged in interstate or foreign commerce." 9 U.S.C. § 1. It does not ask for whom the worker undertakes her transportation work.

The majority ignores all these cases. And the ones it does rely on do not support its novel rule that only those employed by transportation companies can be transportation workers. The Second Circuit cases allegedly demonstrating a "transportation industry" limitation involved workers whose occupations did not involve the movement of goods or passengers. *See Adams v. Suozzi*, 433 F.3d 220, 226 n.5 (2d Cir. 2005) (sheriffs); *Maryland Cas. Co. v. Realty Advisory Bd. on Lab. Rels.*, 107 F.3d 979, 982 (2d Cir. 1997) (commercial cleaning workers); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) (the basketball player Julius "Dr. J" Erving). These cases tell us little about people like the plaintiffs, who actually transport goods through interstate commerce every day. Nor does *Hill v. Rent-A-Center, Inc.*, an Eleventh Circuit case, help the majority. The majority asserts that *Hill* held that "an account manager at a company that rents and delivers

furniture across state borders was not excluded from the FAA because he was 'not a transportation industry worker.'" Maj. Op. at 14 (quoting 398 F.3d at 1288). But the majority omits the court's reasoning. It was not because Hill worked for a "company that rents and delivers furniture" that he was deemed not to be a transportation worker. Instead, the court focused on the nature of Hill's work for the company. Hill was not "within a class of workers within the transportation industry" because, unlike the truckers here, he was an account manager who only "incidentally transported goods interstate" as part of that job. *Hill*, 398 F.3d at 1289. Even *Hill* thus recognized what *Saxon* instructs and the majority rejects: that the FAA requires us to characterize the work of the employed, not the employer.

In any event, the majority's analysis fails on its own terms. Even assuming that "[t]he specification of workers in a *transportation industry* is a reliable principle for construing the [residual] clause," Maj. Op. at 13, the plaintiffs *do* work in a transportation industry: trucking. A company may employ different classes of workers, some in transportation and some outside it. I have little doubt that the people who bake Wonder Bread are not transportation workers. *See Signal-Stat Corp. v. Loc. 475, United Elec. Radio & Mach. Workers of Am.*, 235 F.2d 298, 303 (2d Cir. 1956), *overruled on other grounds by Coca-Cola Bottling Co. of N.Y., Inc. v. Soft Drink & Brewery Workers Union Loc. 812*, 242 F.3d 52 (2d Cir. 2001) (factory workers who manufactured automotive electrical equipment were not transportation workers because they were "merely engaged in the manufacture of goods for interstate commerce"). But the plaintiffs' mission, reflected on the first page of their Distributor Agreements, is to move goods. *See* App'x at 86 (stating

that plaintiffs will be operating a "distributorship business"). They are actively engaged in the enterprise of interstate transportation in a way those bakers are not. And to the extent that, in efficiently delivering the defendants' baked goods, the plaintiffs incidentally satisfy that "fundamental tenet of the bakery industry" of "[m]aintaining a fresh market," App'x at 95, they do so in the same way that all truckers serve the industries of the companies whose products they deliver.

There are few classes of workers more paradigmatically "engaged in foreign or interstate commerce" than those who operate commercial trucks to deliver products. Abandoning this universally recognized principle, the majority departs from the FAA's text, the Supreme Court's clear instructions, and decades of case law nationwide.

III. Other Issues.

As in my dissent the first time around, I address two other brief points before concluding. The first is the defendants' argument, unavailing in my view, that Connecticut law provides an alternative basis to compel arbitration regardless of the FAA's applicability. A few district courts in this Circuit have enforced arbitration clauses under state law where the clauses "d[id] not plausibly suggest that the parties intended for the clause[s] to be discarded in the event that the FAA was found inapplicable." *Islam v. Lyft, Inc.*, 524 F. Supp. 3d 338, 359 (S.D.N.Y. 2021); *see also, e.g.*, *Valdes v. Swift Transp. Co., Inc.*, 292 F. Supp. 2d 524, 528 (S.D.N.Y. 2003); *Burgos v. Ne. Logistics, Inc.*, No. 15-CV-6840 (CBA) (CLP), 2017 WL 10187756, at *4 (E.D.N.Y. Mar. 30, 2017). This case is different. The arbitration agreement states that it "shall be governed by the FAA

and *Connecticut* law to the extent *Connecticut* law is not inconsistent with the FAA." App'x at 199 (underlining in original). But Connecticut law and the FAA are crucially inconsistent here: While the FAA exempts transportation workers like the plaintiffs, Connecticut law contains no analogous carve-out. *See* Conn. Gen. Stat. Ann. § 52-408. Given this inconsistency, the arbitration agreement itself prohibits recourse to Connecticut law should the FAA be held inapplicable.

My second brief point is in response to the concurrence's view that, once a court decides that arbitration is appropriate, "the FAA mandates a stay whether or not a party requests one." Concur. Op. at 4. To be clear, because I conclude that arbitration should not have been compelled here, resolution of this issue is not necessary to my analysis. I write only to correct what I see as the concurrence's misreading of Section 3 of the FAA. That provision states that a district court, "upon being satisfied that [an issue] is referable to arbitration . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3. Section 3's use of the mandatory "shall," we have held, means that where a party specifically applies for a stay pending the outcome of arbitration, the district court lacks discretion to dismiss the case instead. *Katz v. Cellco P'ship*, 794 F.3d 341, 346 (2d Cir. 2015).

It does not follow, however, that where a party does not request a stay—or where, as here, a party expressly seeks dismissal—a district court is still required to issue a stay. Section 3 is triggered "on application of one of the

parties [to] stay the trial" and where, among other things, the "applicant for the stay is not in default." 9 U.S.C. § 3. This reference to the "applicant for the stay" thus squarely contradicts the concurrence's assertion that "[t]he text does not contemplate (let alone require) a separate application to stay proceedings in the district court." Concur. Op. at 5. Accordingly, where a party does not request a stay, there is no "application [to] stay the trial," and a district court retains the authority to dismiss the action. *See Katz*, 794 F.3d at 346 (explaining that, absent a statutory mandate to stay proceedings, district courts "enjoy an inherent authority to manage their dockets"); *Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254, 277 (E.D.N.Y. 2019) ("Although Section 3 of the FAA only speaks of staying proceedings, it is well-settled than an arbitrable dispute may be dismissed in lieu of a stay if the defendant requests dismissal."); *Zambrano v. Strategic Delivery Sols., LLC*, No. 15-CV-08410, 2016 WL 5339552, at *10 (S.D.N.Y. Sept. 22, 2016) ("[B]ecause Defendants seek dismissal rather than a stay . . . this Court has discretion whether to stay or dismiss Plaintiffs' action under the FAA."); *Benzemann v. Citibank N.A.*, 622 F. App'x 16, 18 (2d Cir. 2015) (summary order) (endorsing this view).

CONCLUSION

The plaintiffs' daily work transporting goods in the stream of interstate commerce places them in the transportation worker exemption's heartland. They belong to a "class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1; the FAA does not apply to their Distributor Agreements; and, for the second time, I respectfully dissent. Now it rests with our

Court as a whole, or the Supreme Court, to correct the majority's mistakes.

APPENDIX C

United States Court of Appeals,
Second Circuit

No. 20-1681

NEAL BISSONNETTE AND TYLER WOJNAROWSKI,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,
Plaintiffs-Appellants,
v.
LEPAGE BAKERIES PARK ST., LLC, C.K. SALES CO.,
LLC, AND FLOWERS FOODS, INC.,
Defendants-Appellees.

Present: DEBRA ANN LIVINGSTON,
Chief Judge,
JOSÉ A. CABRANES, RAYMOND J. LOHIER, JR.,
RICHARD J. SULLIVAN, JOSEPH F. BIANCO,
MICHAEL H. PARK, WILLIAM J. NARDINI,
STEVEN J. MENASHI, EUNICE C. LEE, BETH
ROBINSON, MYRNA PÉREZ, ALISON J. NATHAN,
SARAH A. L. MERRIAM,
Circuit Judges.

Ordered: February 15, 2023

Following disposition of this appeal on May 5, 2022, Plaintiffs-Appellants filed a petition for rehearing *en banc*. The opinion was amended September 26, 2022, and a judge on the panel thereafter requested a poll on whether to rehear the case *en banc*. A poll having been conducted and there being no majority favoring *en banc* review, the petition for rehearing *en banc* is hereby **DENIED**.

Alison J. Nathan, *Circuit Judge*, joined by Beth Robinson and Myrna Pérez, *Circuit Judges*, dissents by opinion in the denial of rehearing *en banc*.

Dennis Jacobs, *Circuit Judge*, filed a statement with respect to the denial of rehearing *en banc*.

Rosemary S. Pooler, *Circuit Judge*, filed a statement with respect to the denial of rehearing *en banc*.

FOR THE COURT:
Catherine O' Hagan Wolfe, Clerk

ALISON J. NATHAN, *Circuit Judge*, joined by BETH ROBINSON and MYRNA PÉREZ, *Circuit Judges*, dissenting from the order denying rehearing *en banc*:

In this Circuit, rehearing *en banc* is quite rare. And for good reason. Rehearing cases only in exceptional circumstances promotes virtues such as judicial economy and collegiality and accords with our Circuit's longstanding tradition "of general deference to panel adjudication—a deference which holds whether or not the judges of the Court agree with the panel's disposition of the matter before it." *New York v. Dep't of Just.*, 964 F.3d 150, 166 (2d Cir. 2020) (Katzmann, C.J., dissenting from denial of rehearing *en banc*). Even so, one circumstance in which this rare step is warranted is when an intervening decision of the Supreme Court directly conflicts with circuit precedent.

The Supreme Court's decision in *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022), decided after the panel issued its original decision in this case, is just such an intervening decision. Both *Saxon* and this case involve statutory interpretation of Section 1 of the Federal Arbitration Act (FAA). The FAA broadly requires courts to enforce arbitration agreements in any "contract evidencing a transaction involving commerce." 9 U.S.C. § 2. Section 1 exempts from the Act's coverage "contracts of employment of seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce." *Id.* § 1. Prior to *Saxon*, our Court interpreted this exemption as limited to "workers involved in the transportation industries." *Adams v. Suozzi*, 433 F.3d 220, 226 n.5 (2d Cir. 2005) (citation omitted); *see also Md. Cas. Co. v. Realty Advisory Bd. on Lab. Rels.*, 107 F.3d 979, 982 (2d Cir. 1997); *Erving v. Va. Squires Basketball Club*,

468 F.2d 1064, 1069 (2d Cir. 1972). The original majority opinion in this case applied this circuit precedent without the benefit of the Supreme Court's decision in *Saxon* and concluded that the exemption did not apply to Appellants, truck drivers transporting baked goods. The majority so held because the Appellants are employed by a bakery conglomerate, which the court determined is not an employer in the transportation industry. Accordingly, the original opinion concluded that the Plaintiff truck drivers would have to pursue their claims for unpaid wages through arbitration, rather than in court. *Bissonnette v. LePage Bakeries Park St., LLC*, 33 F.4th 650, 657 (2d Cir.), *amended and superseded on reh'g*, 49 F.4th 655 (2d Cir. 2022). Judge Pooler's original dissent argued that this was error from the get-go. *See Bissonnette*, 33 F.4th at 662–68. Agree or disagree, prior to *Saxon*, the original majority opinion's conclusion constituted an available application of then-controlling Second Circuit precedent.

But then the Supreme Court handed down *Saxon*. This intervening decision expressly rejects the notion embedded in our circuit precedent that the industry in which an employer operates, rather than the work that the employee does, determines whether the employee belongs to a "class of workers engaged in foreign or interstate commerce." Saxon, a ramp supervisor at Southwest Airlines whose work regularly required her to load and unload cargo from planes, brought claims against Southwest under the Fair Labor Standards Act. *Saxon*, 142 S. Ct. at 1787. Southwest contended that Saxon's claims had to be arbitrated because the Section 1 exemption applied only to workers who physically move goods across state or international boundaries. In contrast, Saxon argued that the exemption covers all workers who carry out the customary work of airlines. *Id.*

at 1790–91. The Supreme Court, rejecting both interpretations, concluded that Saxon fit within the exemption because "Saxon is . . . a member of a 'class of workers' based on what *she does* at Southwest, *not what Southwest does generally*." *Id.* at 1788 (emphasis added). Because what Saxon does is load cargo on and off airplanes, the Supreme Court held that she could litigate, rather than arbitrate, her claims. *Id.* at 1793.

In reaching this conclusion, Justice Thomas, writing for a unanimous Court, focused on the text of Section 1 exempting "seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. He reasoned that "[b]ecause 'seamen' includes only those who work on board a vessel, they constitute a subset of workers engaged in the maritime shipping industry," not the entire industry. *Id.* at 1791. The carveout, therefore, does not "identify[] transportation workers on an industrywide basis." *Id.* Based on the text of the statute, the Court further provided a simple and straightforward test to determine who is exempted. The Court held that "any class of workers directly involved in transporting goods across state or international borders falls within § 1's exemption." *Id.* at 1789.

Unsurprisingly, the panel in this case agreed to panel rehearing in light of *Saxon*. But after considering the Supreme Court's opinion, the panel majority issued an amended opinion that continues to do the opposite of what *Saxon*'s reasoning and holding require. The amended majority opinion does not consider the work performed by Appellants—driving trucks and delivering goods—in determining whether they are transportation workers. Rather, the amended opinion concludes that "the

distinctions drawn in *Saxon* do not come into play" because they apply only when an employer operates in a transportation industry, and the employer in this case is a bakery rather than something like an airline or a trucking company. *Bissonnette*, 49 F.4th at 661–62. Thus, the amended majority opinion continues to identify transportation workers on an industrywide basis and expressly holds: "[T]he plaintiffs are not 'transportation workers,' even though they drive trucks, because they are in the bakery industry, not a transportation industry." *Id.* at 657.

The amended majority opinion attempts to reconcile this move with *Saxon* by ignoring Justice Thomas's textual reasoning and supplanting the Supreme Court's clear interpretive directives with its own atextual test. *Saxon* explained that the FAA's use of the words "workers" and "engaged," rather than "employees" or "servants," emphasizes "the *performance* of work" and "the actual work that the members of the class, as a whole, typically carry out." *Saxon*, 142 S. Ct. at 1788 (emphasis in original). Paying no heed to this analysis, the amended opinion instead requires workers to establish eligibility for the Section 1 exemption based on both the work they perform *and* the work their employer does on an industry-wide basis. *See Bissonnette*, 49 F.4th at 661.

The amended opinion's primary justification for establishing this multilayered framework, aside from fidelity to past Second Circuit precedent, is that the examples of "'seamen' and 'railroad employees' . . . . are telling because they locate the 'transportation worker' in the context of a *transportation industry*." *Id.* at 660. In so reasoning, the majority sticks with what the Supreme Court expressly termed a "flawed premise[:] that

'seamen' and 'railroad employees' are both industrywide categories." *Saxon*, 142 S. Ct. at 1791. Whereas Justice Thomas rejected this premise because the term "seamen" does not encompass the entire shipping industry, the amended opinion presumes that all "seamen" work for transportation companies. But just as truck drivers sometimes work for bakery conglomerates, seamen might work for companies in a non-transportation industry that operate their own ships, say, fisheries, large retailers, or oil companies. It is impossible to reconcile the amended opinion's analysis with the Supreme Court's contrary conclusion that "the two terms [seamen and railroad employees] cannot share a 'common attribute' of identifying transportation workers on an industrywide basis." *Id.*

Ultimately, in order to rationalize the imposition of an additional test contrary to *Saxon's* holding, the amended majority opinion falls back on the FAA's pro-arbitration statutory purpose and the purported need for further limits on Section 1's scope. *See Bissonnette*, 49 F.4th at 660–61; *see also* Statement of Judge Jacobs at 5 ("The problem is the frustration of the congressional preference for arbitration by expanding the exemption beyond its purpose and any definable limits . . . ."). But *Saxon* rejected this argument too. Southwest similarly argued that "the FAA's 'proarbitration purposes' . . . counsel[] in favor of an interpretation that errs on the side of fewer § 1 exemptions," but Justice Thomas responded, "we are not 'free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal' . . . and we have no warrant to elevate vague invocations of statutory purpose over the words Congress chose." *Saxon*, 142 S. Ct. at 1792–93 (quoting *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019)). Nor do we need to. *Saxon* provides a

"workable principle," Statement of Judge Jacobs at 4, in its statutory holding that "any class of workers directly involved in transporting goods across state or international borders falls within § 1's exemption," *Saxon* at 1789.

In sum, maintaining the "transportation industry" requirement is, as *Saxon* demonstrates and holds, unsupported by the text of the FAA. *Saxon* tells us that in interpreting the Section 1 exemption, we must attend to the nature of a worker's duties, not the industry of their employer. Our prior precedent and the amended opinion do not so attend. Because the amended majority opinion is in direct conflict with the textual reasoning and holding of the Supreme Court's intervening decision in *Saxon*, I respectfully dissent from the denial of rehearing *en banc*.

DENNIS JACOBS, *Circuit Judge*, Statement of Views in Support of the Denial of Rehearing *in Banc*[1]:

The issue is whether the plaintiffs, purveyors of baked goods in Connecticut, are "transportation workers" who, under an exception to the Federal Arbitration Act (FAA), cannot be compelled by contract to arbitrate. 9 U.S.C. § 1; *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). As the Supreme Court has explained, not everyone working in a transportation industry is a transportation worker: back-office staff and lawyers come to mind. *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1788 (2022). At the same time, every appellate opinion that grants exemption to a transportation worker under Section 1 of the FAA decides or presumes the prior question of whether that person works in a transportation industry.[2] So much for a circuit split.

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[1] As a senior judge, I have no vote on whether to rehear a case *in banc*. As a member of the panel that decided the case that is the subject of the *in banc* order, however, I am privileged to respond to an opinion dissenting from the denial of rehearing.

[2] *See, e.g.*, *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 23 (1st Cir. 2020), *cert. denied* 141 S. Ct. 2794 (2021) ("We simply point out, as is evident here, that the nature of the business for which the workers perform their activities is important in determining whether the contracts of a class of workers are covered by Section 1."); *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 907 (9th Cir. 2020), *cert. denied* 141 S. Ct. 1374 (2021) ("Plaintiffs . . . contracted with Amazon Logistics, Inc. to provide delivery services for Amazon's app-based delivery program, Amazon Flex . . . ."); *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 590 (3d Cir. 2004) ("[Defendant] is a package transportation and delivery company . . . ."); *Harden v. Roadway Package Sys., Inc.*, 249 F.3d 1137, 1139 (9th Cir. 2001) (plaintiff engaged to "provid[e] a small package information, transportation and delivery service throughout the United States"); *see also, e.g.*,

The plaintiffs in *Bissonnette* buy baked goods from a company that makes a score of buns, rolls, and snack cakes, as well as Wonder Bread. *Bissonnette v. LePage Bakeries Park St., LLC*, 49 F.4th 655, 658 (2d Cir. 2022). They purchase local distribution rights, solicit business from shops and supermarkets within their territory, sell the goods to the stores they sign up, arrange the fresh goods on the shelves, and carry away the rest. *Id.* They earn the difference between the prices at which they buy and sell the baked goods. *Id.* To do this, they drive a truck. If they could be deemed transportation workers simply by eliding the foundational question of whether they work in a transportation industry, so could the undertaker who drives a hearse, the milkman in the morning, the chef in a food truck, and the person who delivers a pepperoni with extra cheese.

The Supreme Court in *Saxon* concluded that a person who works as a ramp supervisor for Southwest Airlines--supervising workers who "physically load and unload baggage, airmail, and freight," and pitching in herself--qualifies as a "transportation worker." *Saxon*, 142 S. Ct. at 1787. The self-evident premise of *Saxon* was that an

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Hill v. Rent-A-Center, Inc., 398 F.3d 1286, 1290 (11th Cir. 2005) ("Because [plaintiff] was not within a class of workers within the transportation industry, his employment contract is not exempted from the FAA's mandatory arbitration provisions."); *Lenz v. Yellow Transp., Inc.*, 431 F.3d 348, 349 (8th Cir. 2005) ("[Plaintiff] works in the transportation industry . . . . A . . . .difficult question arises when an employee, like [plaintiff], works for a transportation company but is not a truck driver or transporter of goods."); *but see Carmona v. Domino's Pizza, LLC*, 21 F.4th 627, 629–30 (9th Cir. 2021), *vacated* 143 S. Ct. 361 (2022) (concluding that truck drivers for Domino's Pizza were transportation workers).

airline is a transportation industry. *Id.* ("Southwest Airlines moves a lot of cargo."). The Court rejected the plaintiff's industrywide approach because it would have made all workers in a transportation industry into transportation workers. *Id.* at 1791 ("We . . . reject Saxon's argument that § 1 exempts virtually all employees of major transportation providers."). This makes sense: "those who design Southwest's website" are not transportation workers, nor are "those who run the Southwest credit-card points program." *Id.* at 1790–91. Under *Saxon*, we look at "the actual work that members of the class, as a whole, typically carry out" to determine who *within a transportation industry* qualifies as a transportation worker. *Id.* at 1788. But the Court in *Saxon* had no cause to consider the status of workers who transport goods in an industry that is *not* a transportation industry.

To be exempt from contractually compelled arbitration, a worker must be one who works in a transportation industry. We know this because (i) the statute exempts "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), and because (ii) the Supreme Court tells us the statute is "controlled and defined by reference to the enumerated *categories of workers* which are recited," *Cir. City*, 532 U.S. at 115 (emphasis added). The prime error that has been rejected in this *in banc* poll is to skip the question of whether the plaintiffs work in a transportation industry, and to consider only whether they move things about.

The statute creates an exemption for those who work moving goods and passengers in one of the mighty

engines of interstate and international transport, not for everyone who works on wheels. As this Court's opinion frames the resulting principle: an "individual works in a transportation industry if the industry in which the individual works pegs its charges chiefly to the movement of goods or passengers, and the industry's predominant source of commercial revenue is generated by that movement." *Bissonnette*, 49 F.4th at 661–62. If my friends have some other workable principle for deciding the question, I have not seen it. Their way leads to non-exclusive lists of factors, tests, and elements, enumerated--but not limited--to encompass all possibly relevant circumstances, then choreographed into steps and skewered into prongs, reviewed for clear error to the extent found as facts but weighed *de novo*, and afforded due deference as to this but not that. And all of that would be overlaid by disputes over whether the transportation is foreign or interstate commerce.[3] The consequence is that many such motions to compel arbitration would grow into sizable litigations and close-fought appeals.

The resulting problem is not overwork for the courts; we turn the lights on to decide questions. The problem is the frustration of the congressional preference for arbitration by expanding the exemption beyond its

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[3] The plaintiffs work only in Connecticut. *Bissonnette*, 49 F.4th at 657. The dissent posits that they are nevertheless "engaged in foreign or interstate commerce" because "[t]he loaves of Wonder Bread they transport are delivered to the defendant's warehouse from commercial bakeries outside Connecticut." *Id.* at 669 (Pooler, J., dissenting). I agree that, under *Saxon*, the employer's entanglement with interstate commerce affects whether the worker falls under Section 1. 142 S. Ct. at 1789. But surely what matters is the interstate character of the employer's industry, not the interstate character of the Wonder Bread.

purpose and any definable limits, and requiring that motions to compel arbitration run a gauntlet of expensive and uncertain litigation. My friends dissent without advancing a useful alternative to the Court's opinion.

Unfortunately, Section 1 will often generate puzzles, anomalies, and close cases. But this case is not one of them. Reader, pass by.

POOLER, *Circuit Judge*, Statement in Opposition to the Denial of Rehearing En Banc[1]

The Court today decides not to convene en banc to review *Bissonnette v. LePage Bakeries Park St., LLC*, 49 F.4th 655 (2d Cir. 2022), a decision that directly contravenes the Supreme Court's recent opinion in *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022). The panel refused to amend the majority opinion accordingly following Saxon and instead fashioned its own definition of transportation workers under the Federal Arbitration Act ("FAA") out of whole cloth without any reference to the FAA's text, a dictionary, the business world, or—for that matter—any case law. The Court's decision puts this Circuit's precedent regrettably out of step with both the Supreme Court and decisions from sister Circuits.

The named plaintiffs, Neal Bissonnette and Tyler Wojnarowski, are commercial truck drivers who represent a putative class of plaintiffs who distribute baked goods in Connecticut for Flowers Foods, Inc. and two of its subsidiaries, LePage Bakeries Park St., LLC and C.K. Sales Co. (collectively, "Defendants"). To work for Defendants, each putative class member was required to form a corporate entity that then entered into a "Distribution Agreement" with C.K. Sales, entitling the corporation to certain distribution rights in exchange for monetary consideration. Each Distribution Agreement

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[1] As a senior judge, I cannot vote on whether to rehear a case en banc, Fed. R. App. P. 35(a), and thus cannot dissent. As a member of the original panel that decided the case that is the subject of the en banc order, however, I may file a statement of views in the circumstances here, where an active judge has filed an opinion respecting that order.

contains a mandatory and binding arbitration provision. The Distribution Agreements require plaintiffs to work at least forty hours per week, driving vehicles to stores within a territory designated by Defendants, delivering Defendants' baked goods, and arranging the products on the shelves according to Defendants' standards. Plaintiffs must comply with Defendants' policies and procedures, including the time, place, and manner of pick-ups and deliveries. Plaintiffs must return to the warehouse each day after completing their deliveries to upload data to Defendants' system. Plaintiffs are responsible for obtaining and insuring their own delivery vehicles.

Plaintiffs filed suit seeking certification as a Fair Labor Standards Act ("FLSA") collective action and a Federal Rule of Civil Procedure 23 class action; damages for unpaid wage and other losses; restitution of payments made by plaintiffs to purchase their routes; statutory penalties and liquidated damages under Connecticut law and the FLSA; and an injunction ordering Defendants to reclassify plaintiffs as employees. However, the appeal did not directly deal with the substance of the complaint's allegations.

There were two principal issues on appeal. First, whether the FAA governed the parties' arbitration provision in the Distribution Agreement or whether plaintiffs fall within the FAA's Section 1 exemption for "seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1 – in other words, "transportation workers," *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). Second, whether, if the FAA did not govern the arbitration provision, Connecticut law nevertheless compelled arbitration. Because the majority held that the

truck driver-plaintiffs were not transportation workers and thus the arbitration provision applied, the majority did not reach the second issue regarding Connecticut law.

When the panel first considered this case prior to the Supreme Court issuing *Saxon*, I thought the answer certain – that truck drivers are transportation workers. *See Bissonnette v. LePage Bakeries Park St., LLC*, 33 F.4th 650, 662 (2d Cir. 2022) (Pooler, *J.*, dissenting). Among the district courts, "one area of clear common ground" regarding the exemption to the FAA has been that truck drivers qualify. *Kowalewski v. Samandarov*, 590 F. Supp. 2d 477, 482-83 (S.D.N.Y. 2008) (Sullivan, J.). Other circuits agree. *See Lenz v. Yellow Transp., Inc.*, 431 F.3d 348, 351 (8th Cir. 2005) ("Indisputably, if [the employee] were a truck driver, he would be considered a transportation worker under § 1 of the FAA."); *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 593-94 (3d Cir. 2004) (presuming that truck drivers fall within the residual clause of Section 1 of the FAA); *Harden v. Roadway Package Sys., Inc.*, 249 F.3d 1137, 1140 (9th Cir. 2001) (concluding that a "delivery driver" was a transportation worker).

But the majority inexplicably concluded that because plaintiffs deliver baked goods, they "are in the bakery industry, not a transportation industry." *See Bissonnette*, 49 F.4th at 657. *But see Int'l Bhd. of Teamsters Loc. Union No. 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 957 (7th Cir. 2012) ("[A] trucker is a transportation worker regardless of whether he transports his employer's goods or the goods of a third party . . . .").

A month after *Bissonnette* issued, the Supreme Court resolved a circuit split when it handed down *Saxon*. In deciding whether an employee is a "transportation

worker" under 9 U.S.C. § 1, *Saxon* holds that a person is "a member of a 'class of workers' based on what she does" for her employer, "not what [the employer] does generally." 142 S. Ct. at 1788. When given the opportunity to revise its opinion to conform with *Saxon*'s clear holding, the majority elected not to. The revised decision clings to the fallacy that plaintiffs are not transportation workers, despite acknowledging they "spend appreciable parts of their working days moving goods from place to place by truck." *Bissonnette*, 49 F.4th at 661.

Bissonnette cannot be reconciled with *Saxon*'s clear direction. In reaching the result that it did, the majority ignored *Saxon*'s instruction to analyze "the actual work that the members of the class . . . carry out." 142 S. Ct. at 1788.

I. Plaintiffs are "transportation workers" under the FAA.

FAA Section 1 sets out an exemption for employment contracts of "seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, of which the Supreme Court has stated that the residual clause refers to "transportation workers," *Cir. City Stores, Inc.*, 532 U.S. at 119. Because neither the FAA nor the Supreme Court provides us with a definition for "transportation workers," the majority looks to the examples given, focusing on the context of the transportation industry. *See Bissonnette*, 49 F.4th at 660. The majority then creates its own definition of "transportation worker" completely untethered to the FAA's statutory text and states that "an individual works in a transportation industry if the industry in which the individual works pegs its charges chiefly to the movement of goods or passengers, and the industry's predominant

source of commercial revenue is generated by that movement." *Id.* at 661.

Compare that with the approach taken in *Saxon*. There, the Supreme Court held that a ramp supervisor for Southwest Airlines belonged to a class of transportation workers engaged in foreign or interstate commerce and thus exempt from the FAA. *Saxon*, 142 S. Ct. at 1787, 1793. In reaching its conclusion, the Court first sought to "defin[e] the relevant 'class of workers' to which Saxon belong[ed]." *Id.* at 1788-89. The Court reasoned that "[t]he word 'workers' directs the interpreter's attention to 'the *performance* of work'" and "the word 'engaged' . . . similarly emphasizes the actual work that the members of the class, as a whole, typically carry out." Id. at 1788. Accordingly, Saxon was "a member of a 'class of workers' based on *what she does at Southwest, not what Southwest does generally*." *Id.* (emphasis added). Second, the Court determined that this class of workers was "engaged in foreign or interstate commerce" because "any class of workers directly involved in transporting goods across state or international borders falls within § 1's exemption." *Id.* at 1789.

Applying *Saxon*'s two-step framework, first, plaintiffs here plainly belong to a class of workers who, in the majority's words, "spend appreciable parts of their working days moving goods from place to place by truck." *Bissonnette*, 49 F.4th at 661. But the majority finds that because plaintiffs' commerce is in "breads, buns, rolls, and snack cakes," and the movement of such commerce is "at most a component of [the] price," that plaintiffs are bakery workers. *Id.* at 662. The majority entirely disregards that plaintiffs' work principally consists of

driving Department of Transportation-registered commercial trucks delivering Defendant's products.

The majority declined to engage in *Saxon*'s two-step analysis. Having concluded that plaintiffs are bakery workers, it did "not consider whether this case could be decided on the ground that the interstate element of the exclusion is not satisfied," admitting that it is not a "simple" inquiry. *See id.* at 662 n.5. Though plaintiffs do not cross state lines, even the district court acknowledged that Defendants' products are manufactured out of state and are delivered to warehouses in-state, and as such, plaintiffs meet the threshold of being "engaged in . . . interstate commerce." *Bissonette v. Lepage Bakeries Park St., LLC*, 460 F. Supp. 3d 191, 198 (D. Conn. 2020). Saxon also never crossed state lines, but rather "load[ed] cargo on a plane bound for interstate transit." *Saxon*, 142 S. Ct. at 1790. The Supreme Court held that sufficed, as "airplane cargo loaders plainly do perform 'activities within the flow of interstate commerce' when they handle goods traveling in interstate . . . commerce." *Id.* at 1792. Prior to *Saxon*, other circuits reached the same result – the First and Ninth Circuits, for instance, held that so-called "last-mile delivery workers" for Amazon are transportation workers "[b]y virtue of their work transporting goods or people 'within the flow of interstate commerce,'" despite never personally crossing state lines. *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 26 (1st Cir. 2020); *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 916-19 (9th Cir. 2020) (finding that local delivery drivers who contracted with Amazon to provide delivery services are transportation workers engaged in interstate commerce and thus exempt from FAA § 1).

Because the core of plaintiffs' work entails transporting goods through interstate commerce, I concluded that plaintiffs are "transportation workers" exempt from the FAA. *Bissonnette*, 49 F.4th at 674 (Pooler, *J.*, dissenting).

II. The Majority ignores and sidesteps *Saxon's* holding.

The rationale of the majority opinion cannot be squared with *Saxon*. As the Supreme Court observed, the word "workers" in the FAA directs the interpretation to "the performance of work." *Saxon*, 142 S. Ct. at 1788. Despite this direction, the majority concludes that plaintiffs "are in the bakery industry, not a transportation industry," *Bissonnette*, 49 F.4th at 657, because "the stores and restaurants are not buying the movement of the baked goods, so long as they arrive," *id.* at 661. Plaintiffs are truck drivers, not bakers, and yet the majority cannot look past the fact that their employer is a bakery, despite the actual work plaintiffs do for the bakery. By focusing on the nature of Defendants' business, and not on the nature of plaintiffs' work, the majority takes an industrywide approach—an approach explicitly rejected by *Saxon*.

The majority attempts to sidestep *Saxon* by reasoning that its work-focused distinction does not come into play. Our Circuit, the majority claims, recognized that "only a worker in a transportation industry can be classified as a transportation worker" in *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972) and *Maryland Casualty Co. v. Realty Advisory Board on Labor Relations*, 107 F.3d 979 (2d Cir. 1997). *Bissonnette*, 49 F.4th at 661. Notably, both the cases relied on by the majority predate the Supreme Court's decision in *Circuit*

City Stores, Inc. v. Adams, 532 U.S. 105 (2001), in which the Court held that Section 1 of the FAA "exempts . . . only contracts of employment of transportation workers," *id.* at 119. Moreover, neither of those two cases involved workers whose occupations required the movement of goods or passengers. *See Erving*, 468 F.2d at 1066, 1069 (noting that Erving, a professional basketball player, was not in the transportation industry); *Md. Cas.Co.*,107 F.3d at 980-82 (concluding that commercial cleaners were not in the transportation industry). The majority claims that because Saxon worked for an airline, the Supreme Court did not need to elaborate that only those employed by transportation industry employers can be held as transportation workers. *See Bissonnette*, 49 F.4th at 661.

That is not what *Saxon* says. Indeed, the majority's interpretation is far more cramped than what *Saxon* sets out. The majority ignored Saxon's emphasis on Southwest Airlines' "predominant source of commercial revenue," *id.*, in determining whether Saxon was a transportation worker, instead focusing on "what [Saxon] does at Southwest, not what Southwest does generally," *Saxon*, 142 S. Ct. at 1788. *Saxon* affirmed the Seventh Circuit's decision recognizing that "a transportation worker need not work for a transportation company." *Saxon v. Sw. Airlines Co.*, 993 F.3d 492, 497 (7th Cir. 2021), *aff'd*, *Saxon*, 142 S. Ct. 1783. Other courts hold the same. *See Waithaka*, 966 F.3d at 23 ("[A] class of workers [need not] be employed by an interstate transportation business [n]or a business of a certain geographic scope to fall within the Section 1 exemption."); *Canales v. Lepage Bakeries Park St. LLC*, 596 F. Supp. 3d 261, 270 (D. Mass. 2022) (rejecting the argument that "an employer [must] be a transportation company for § 1 to apply" in case against the same defendants as here). These decisions align with

the FAA's text, which asks whether an individual belongs to a class of workers "engaged in foreign or interstate commerce." 9 U.S.C. § 1. The text does not ask for whom the worker undertakes their transportation work.

Those who operate commercial trucks to deliver products, as plaintiffs do, are paradigmatically "engaged in foreign or interstate commerce." *See* 9 U.S.C. § 1. If *Bissonnette* remains the law of this Circuit, it does so by departing from the FAA's text, the Supreme Court's clear instructions, and decades of caselaw nationwide. I urge plaintiffs to seek certiorari, as now, only the Supreme Court can correct the majority's mistakes.

For these reasons, I respectfully submit this statement to accompany the denial of rehearing en banc.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

NEAL BISSONNETTE, TYLER WOJNAROWSKI, *Plaintiffs*, v. LEPAGE BAKERIES PARK ST., LLC, C.K. SALES CO., LLC, FLOWERS FOODS, INC., *Defendants*.	No. 3:19-cv-00965 (KAD) **MEMORANDUM OF DECISION RE: DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO COMPEL ARBITRATION AND SUPPLMENTAL. MOTION TO DISMISS (ECF NOS. 31, 41)** May 14, 2020

KARI A. DOOLEY, *United States District Judge*:

Plaintiffs Neal Bissonnette ("Bissonette") and Tyler Wojnarowski ("Wojnarowski" and, collectively, the "Plaintiffs") brought this putative class action under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), against Defendants Lepage Bakeries Park St., LLC ("Lepage"), CK Sales Co., LLC, ("CK Sales"), and Flowers Foods, Inc. ("Flowers Foods" and, collectively, the "Defendants") alleging that Defendants deliberately misclassified Plaintiffs as independent contractors in violation of Connecticut law and the FLSA. On September 18, 2019, Defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) (ECF No. 31) and supporting memorandum (ECF No. 31-1) in which they urge the Court to dismiss the action, or, in the alternative, to compel arbitration, pursuant to an arbitration agreement executed by the parties. On October 9, 2019, Plaintiffs filed an opposition to the motion to dismiss (ECF No. 32) in which they argue principally that Plaintiffs cannot be compelled to arbitrate under the Federal Arbitration Act("FAA") because they fall within the FAA's exemption for transportation workers. Defendants filed their reply brief on October 23, 2019 (ECF No. 35) and oral argument was held on December 5, 2019. (ECF No. 44.) The Court has also considered Plaintiffs' sur-reply (ECF No. 48) and the Defendants' response (ECF No. 49) following oral argument, as well as a notice of supplemental authority filed by the Plaintiffs on April 1, 2020. (ECF No. 50.) For

the following reasons, Defendants' motion to dismiss is GRANTED.[1]

BACKGROUND

I. The Parties and Their Relationship

Defendants are in the business of producing, transporting, and selling baked goods under brand names such as Wonder Bread and Country Kitchen. (First Am. Compl., "FAC," ¶ 12, ECF No. 24.) CK Sales is a wholly-owned subsidiary of Lepage, which is a wholly-owned subsidiary of Flowers Foods. (Defs.' Mem. at 1 n.1; Rule 7.1 Disclosure Statement, ECF No. 17.)

Plaintiffs' respective companies are franchisees that each entered into a "Distribution Agreement" with CK Sales, through which they acquired certain distribution rights in exchange for monetary consideration.[2] (FAC

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[1] After Defendants filed their motion to dismiss, Plaintiffs filed Opt-in Consent forms for two additional putative plaintiffs, Danny Burgos ("Burgos") and Kyle Sullivan ("Sullivan"). (ECF Nos. 34, 37.) With the Court's permission, Defendants have supplemented the motion to dismiss with the arbitration contracts executed by Burgos and Sullivan on behalf of their respective companies. (ECF Nos. 41, 41-1.) Defendants seek dismissal of the opt-in Plaintiffs' claims on the same grounds asserted in the subject motion, and this Memorandum of Decision accordingly applies to the claims of all four Plaintiffs.

[2] Neither the Plaintiffs nor the Defendants draw a distinction between the Plaintiffs and their respective companies and neither has argued that the distinction has any bearing on the issues to be decided. It is not clear to the Court that the parties are correct in this regard. The Supreme Court has never had occasion to determine whether the FAA Section 1 exemption would apply to an alleged "transportation worker" that is in fact a legal entity such as a corporation and not a person. In *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019), the Court held that a contract between a trucking company and an independent contractor employee was a "contract of

¶¶ 16–17; Lithicum Decl. ¶¶ 6–7, ECF No. 31-2.) In essence, Plaintiffs purchase Defendants' products from CK Sales and resell them to their customers at a higher price. (*See* Lithicum Decl. ¶ 9.) In doing so they pick up baked goods that have been delivered from one of Defendants' commercial bakeries to a local warehouse and then deliver those products to retail outlets in Connecticut, where they display the products in accord with Defendants' standards. (FAC ¶¶ 18, 33.) Plaintiffs allege that in an average week they spend at least forty hours delivering the Defendants' baked goods.[3] (*Id.* ¶ 33.) As franchisees, however, Plaintiffs are also contractually responsible for operating and growing their businesses, including by developing and maintaining customer relationships and servicing customers in their territories. (Lithicum Decl. ¶ 8.) Though the Distribution Agreements

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employment" within the meaning of the FAA without acknowledging that the contract was actually with the independent contractor's LLC— an issue that was disposed of earlier in the litigation by the First Circuit Court of Appeals. *See Oliveira v. New Prime, Inc.*, 857 F.3d 7, 17 (1st Cir. 2017) (noting that because the defendant treated the contract as one between Oliveira and the trucking company instead of one between the trucking company and Oliveira's LLC the court would do the same, and concluding that "because the parties do not dispute that Oliveira is a transportation worker under § 1, we need not address whether an LLC or other corporate entity can itself qualify as a transportation worker.") Likewise, because the parties agreed that Oliveira was otherwise "a worker engaged in interstate commerce" for purposes of the FAA, the issue was apparently not before the Supreme Court. *See* 139 S. Ct. at 539 (quotation marks and alterations omitted). This Court need not take up the issue due to its conclusion that the Plaintiffs (whether individuals or corporate entities) are not transportation workers within the scope of the exemption.

[3] Prior to becoming a franchisee, Bissonette was also employed by the Defendants as a delivery driver. (FAC ¶ 15.)

classify Plaintiffs as independent contractors, Plaintiffs allege that they are, in fact, employees given the degree of supervision and control Defendants retain over Plaintiffs' work. (*See* FAC ¶¶ 21–37.)

Plaintiffs brought this putative class action under the FLSA on behalf of themselves and "all individuals who have signed a distributor agreement and who personally deliver products for Defendants in the State of Connecticut." (*Id.* ¶ 38.) They allege that Defendants deliberately misclassified Plaintiffs as independent contractors in violation of Connecticut law and the FLSA and assert claims for unpaid or withheld wages pursuant to Conn. Gen. Stat. § 31-72 (Count I), overtime wages pursuant to Conn Gen. Stat. § 31-76C (Count II), and back wages for overtime worked, liquidated damages, and reasonable costs and attorneys' fees pursuant to the FLSA (Count III). They also assert a claim for unjust enrichment (also captioned Count III, though in effect constituting Count IV).

II. The Arbitration Agreements

The Distribution Agreements signed by the Plaintiffs each contain a "Mandatory and Binding Arbitration" provision that incorporates, as Exhibit K, a separate Arbitration Agreement.[4] That Arbitration Agreement

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[4] For example, the Distributor Agreement executed by CK Sales and Bissonnette's company, Bissonnette Inc., provides in relevant part:

> All claims, disputes, and controversies arising out of or in any manner relating to this Agreement or any other agreement executed in connection with this Agreement, or to the performance, interpretation, application or enforcement hereof, including, but not limited to breach hereof and/or

provides in relevant part that claims "arising from, related to, or having any relationship or connection whatsoever with the Distributor Agreement . . . shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act (9 U.S.C. §§ 1, et seq.) ('FAA') in conformity with the Commercial Arbitration Rules of the American Arbitration Association . . . ." (Distributor Agreements Ex. K at 1, ECF No. 31-2 at 41, 80; ECF No. 41-1 at 38, 112.) It expressly includes as covered claims those "alleging that DISTRIBUTOR was misclassified as an independent contractor, [and] any other claims premised upon DISTRIBUTOR's alleged status as anything other than an independent contractor . . . ." (Ex. K at 2.) The Arbitration Agreement also contains a class action waiver which states:

> **TO THE MAXIMUM EXTENT PERMITTED BY LAW, BOTH PARTIES EXPLICITLY WAIVE ANY RIGHT TO: (1) INITIATE OR MAINTAIN ANY COVERED CLAIM ON A CLASS, COLLECTIVE, REPRESENTATIVE, OR MULTI-PLAINTIFF BASIS EITHER IN COURT OR**

> termination hereof, which has not been resolved pursuant to the negotiation and mediation provisions herein shall be submitted to binding arbitration in accordance with the terms and conditions set forth in the Arbitration Agreement attached hereto as **Exhibit K**, excepting only such claims, disputes, and controversies as specifically excluded therein.

(Distributor Agreement § 18.3, ECF No. 31-2 at 25.) Wojnarowski's Distribution Agreement, which he executed in his capacity as President of his company, Blue Star Distributors Inc., contains substantially similar language (ECF No. 31-2 at 62), as do the Distribution Agreements executed by Sullivan on behalf of his company, KTS Distributors Inc., and Burgos on behalf of his company, Burgos Distribution Inc. (ECF No. 41-1 at 20, 94.)

> **ARBITRATION; (2) SERVE OR PARTICIPATE AS A REPRESENTATIVE OF ANY SUCH CLASS, COLLECTIVE, OR REPRESENTATIVE ACTION; (3) SERVE OR PARTICIPATE AS A MEMBER OF ANY SUCH CLASS, COLLECTIVE, OR REPRESENTATIVE ACTION; OR (4) RECOVER ANY RELIEF FROM ANY SUCH CLASS, COLLECTIVE, REPRESENTATIVE, OR MULTI-PLAINTIFF ACTION.**

(Ex. K at 1.) It further provides that "[a]ny issues concerning arbitrability of a particular issue or claim under this Arbitration Agreement, . . . shall be resolved by the arbitrator, not a court," with certain exceptions, including one for issues "concerning . . . the applicability of the FAA." (Ex. K at 2.) Finally, the Arbitration Agreement contains a choice of law provision which provides that it "shall be governed by the FAA and *Connecticut* law to the extent *Connecticut* law is not inconsistent with the FAA." (Ex. K at 3.)

Relying on these provisions, Defendants argue that this action must be dismissed and alternatively seek an order compelling arbitration. As noted previously, Plaintiffs respond that they cannot be compelled to arbitrate because they fall within the FAA's exemption for transportation workers. They further assert that they cannot be compelled to arbitrate under Connecticut law because: (1) requiring arbitration would be "inconsistent within the FAA" and thus violate the Arbitration Agreement; (2) the FAA preempts Connecticut law; and (3) the class action waiver is unenforceable under Connecticut law as a matter of public policy.

STANDARD OF REVIEW

A party aggrieved by another party's failure or refusal to arbitrate may petition the district court for an order directing that arbitration commence in the manner provided for in the parties' agreement. 9 U.S.C. § 4. In deciding whether arbitration must be compelled, the Court applies a standard comparable to that applied on a motion for summary judgment. *See Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 113 (2d Cir. 2012) (citing *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003)).[5] Thus, "[w]hile it is generally improper to consider documents not appended to the initial pleading or incorporated in that pleading by reference in the context of a Rule 12(b)(6) motion to dismiss, it is proper (and in fact necessary) to consider such extrinsic evidence when faced with a motion to compel arbitration." *Guida v. Home Sav. of Am., Inc.*,

[5] Defendants filed a motion to dismiss pursuant to Rule 12(b)(1), which invokes a challenge to the Court's subject matter jurisdiction. "Whether the parties agreed to arbitrate the dispute, however, does not affect the Court's subject-matter jurisdiction," and "[h]ere, Plaintiff[s'] federal statutory claims clearly supply the Court with federal question jurisdiction." *Armor All/STP Prod. Co. v. TSI Prod., Inc.*, 337 F. Supp. 3d 156, 163 n.2 (D. Conn. 2018). Because Defendants specifically seek to require Plaintiffs to participate in individual arbitration, the Court applies the standard of review applicable to ruling on a motion to compel arbitration. *See Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016) (recognizing courts' authority to convert motions to dismiss into motions to compel when consistent with the relief sought by the moving party); *see also Lobban v. Cromwell Towers Apartments, Ltd. P'ship*, 345 F. Supp. 3d 334, 342 (S.D.N.Y. 2018) (converting motion to dismiss into motion to compel and applying summary judgment standard where, as here, defendant sought to compel arbitration in the alternative).

793 F. Supp. 2d 611, 613 n.2 (E.D.N.Y. 2011) (quotation marks and citations omitted).

"[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Long v. Amway Corp.*, 306 F. Supp. 3d 601, 607 (S.D.N.Y. 2018) (quoting *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 91 (2000)). "A party opposing arbitration may not satisfy this burden through 'general denials of the facts on which the right to arbitration depends'; instead, '[i]f the party seeking arbitration has substantiated the entitlement by a showing of evidentiary facts, the party opposing may not rest on a denial but must submit evidentiary facts showing that there is a dispute of fact to be tried.'" *Id.* (quoting *Oppenheimer & Co. v. Neidhardt*, 56 F.3d 352, 358 (2d Cir. 1995)).

DISCUSSION

The FAA provides that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "The FAA embodies a national policy favoring arbitration founded upon a desire to preserve the parties' ability to agree to arbitrate, rather than litigate, their disputes." *Doctor's Assocs., Inc. v. Alemayehu*, 934 F.3d 245, 250 (2d Cir. 2019) (quotation marks, alteration and citation omitted). As relevant here, however, the FAA does 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.

The threshold question in this case is whether Plaintiffs fall within the FAA Section 1 exemption such

that the Arbitration Agreement cannot be enforced against them.[6] This Court must therefore decide whether Plaintiffs fall within the FAA's so-called "residual clause" encompassing the contracts of "any other class of workers engaged in foreign or interstate commerce" as they contend. To start, the Supreme Court has held that this phrase is confined to transportation workers. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). If Plaintiffs are not transportation workers within the meaning of the statute, then the motion to dismiss must be granted in favor of an order compelling arbitration.[7]

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[6] As noted above, while the Arbitration Agreements in this case include a delegation clause requiring that questions of arbitrability be resolved by the arbitrator and not the Court, this provision excepts, *inter alia*, questions concerning "applicability of the FAA." (Ex. K at 2.) And the Supreme Court has recently clarified that even where an arbitration agreement delegates the question of arbitrability, such a provision can only be enforced in the context of a contract that is not excluded under Section 1 of the FAA. *See New Prime*, 139 S. Ct. at 537.

[7] Defendants alternatively assert that the Court need not decide the transportation worker issue because it is clear that arbitration is required under Connecticut law as an alternative to the FAA. Defendants are correct that Connecticut law does not contain an analogous transportation worker exemption, Conn. Gen. Stat. Ann. § 52-408, and they are also correct that, as a general matter, state law applies to contracts that are not governed by the FAA, *see, e.g.*, *Michel v. Parts Auth., Inc.*, No. 15-CV-5730 (ARR) (MDG), 2016 WL 5372797, at *3 (E.D.N.Y. Sept. 26, 2016). Here, however, the parties' Arbitration Agreement not only states that covered claims "shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act," but it also specifically provides that the "Agreement shall be governed by the FAA and *Connecticut* law to the extent *Connecticut* law is not inconsistent with the FAA." (Ex. K at 1, 3.) Because "a district court has no authority to compel arbitration

In *Circuit City* the Supreme Court confronted the question of whether the FAA's exclusion for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" extended to all contracts of employment, or only to those involving transportation workers, which, the Court noted, had been defined by some Courts of Appeals "as those workers 'actually engaged in the movement of goods in interstate commerce.'" 532 U.S. at 112 (quoting *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1471 (D.C. Cir. 1997)). In adopting the latter construction, the Court invoked the ejusdem generis canon of statutory interpretation to hold that the residual clause must be defined by reference to the enumerated categories of "seamen" and "railroad employees" that precede it. *See id.* at 114–15. The Court also observed that in enacting the FAA, Congress likely intended to carve out an exception for those in the transportation industry in light of other existing and anticipated federal statutory remedial schemes that covered these categories of workers. *See id.* at 120–21. In *New Prime*, 139 S. Ct. 532, the Supreme Court recently clarified that the exemption for transportation workers covers independent contractors as well as employees.

The Second Circuit has observed that the transportation worker exemption applies "narrowly to

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under Section 4 where Section 1 exempts the underlying contract from the FAA's provisions," *In re Van Dusen*, 654 F.3d 838, 843 (9th Cir. 2011), the Court concludes that it would be "inconsistent with the FAA" for the Court to exercise its authority under Connecticut law to compel arbitration if the Court would lack authority to do the same under the FAA. Accordingly, the threshold question of whether Plaintiffs are exempt from the FAA is one that the Court will treat as dispositive to the instant motion.

encompass only 'workers involved in the transportation industries.'" *Adams v. Suozzi*, 433 F.3d 220, 226 n.5 (2d Cir. 2005) (quoting *Md. Cas. Co. v. Realty Advisory Bd. on Labor Relations*, 107 F.3d 979, 982 (2d Cir. 1997)).[8] Beyond this initial requirement, the Second Circuit has not yet defined the contours of who qualifies as a "transportation worker," though other courts have developed various methods of resolving the question. *See, e.g.*, *Lenz v. Yellow Transp., Inc.*, 431 F.3d 348, 352 (8th Cir. 2005) (setting forth non-exhaustive eight-factor test); cf. *Kowalewski v. Samandarov*, 590 F. Supp. 2d 477, 482 n.3 (S.D.N.Y. 2008) (declining to follow the *Lenz* factors strictly, as they were formulated in the specific context of "a worker one step removed from the actual physical delivery of goods"—*i.e.*, a customer service representative

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[8] The Defendants first argue that they are not in the transportation industry (and by extension nor are their independent contractors) because their primary businesses are the baking, selling and distribution of baked goods, not the actual, physical movement of goods through interstate commerce. While such movement is necessary to transmit their products to consumers, they argue that it is only incidental to their primary business. *See, e.g.*, *Tran v. Texan Lincoln Mercury, Inc.*, No. H-07-1815, 2007 WL 2471616, at *5 (S.D. Tex. Aug. 29, 2007) (explaining that "[u]nder Fifth Circuit precedent, a transportation worker is someone who works in the transportation industry-an industry whose mission it is to move goods," while the plaintiff "worked in the automobile industry-an industry whose mission it is to manufacture and sell automobiles" and holding that plaintiff was not a transportation worker under the FAA). Plaintiffs respond that the cases relied upon by Defendants all involved workers one or more steps removed from the actual transportation of goods in commerce, such as a car dealership employee. The Court does not decide this issue in light of its determination that Plaintiffs have not established that they are transportation workers regardless of whether or not Defendants can be characterized as operating in the transportation industry.

for a transportation company). A review of the case law reveals that typically those "engaged in the movement of goods in interstate commerce" fall within the statutory heartland. *Circuit City*, 532 U.S. at 112 (internal quotation marks omitted). Here, as a threshold matter, the Plaintiffs check this box given that Defendants' products are manufactured out of state (*see* Defs.' Mem. at 18 n. 10) and are delivered to warehouses in-state and ultimately to store shelves by the Plaintiffs. But the parties dispute whether Plaintiffs' role is sufficiently confined to driving, delivery, and distribution so as to make them "transportation workers" for purposes of the Section 1 exemption.

In urging the Court to hold that Plaintiffs fall within the FAA's residual clause, the Plaintiffs characterize themselves as "last mile" delivery drivers for baked goods that originate outside of the State. They argue that they are therefore akin to those intrastate drivers that courts have held fall squarely within the FAA exemption because they deliver goods that have traveled in interstate commerce.[9] *See, e.g.*, *Waithaka v. Amazon.com, Inc.*, 404 F. Supp. 3d 335, 343 (D. Mass. 2019), *appeal docketed*, No. 19-1848 (1st Cir. Aug. 30, 2019) (holding that "last mile" delivery drivers for Amazon who deliver goods solely within Massachusetts are transportation workers as "they are indispensable parts of Amazon's distribution system" and are "so closely related to interstate commerce as to be part of it"); *Rittmann v. Amazon.com, Inc.*, 383 F. Supp. 3d 1196, 1201 (W.D. Wash. 2019) (finding no cognizable

[9] According to Jake Linthicum, Lepage's Distributor Enablement Operations Coordinator, Plaintiffs "do not cross state lines to deliver goods in connection with the operation of their business." (Linthicum Decl. ¶ 10.) This contention is not in dispute.

distinction between "long haul" and "short haul" drivers who transport goods that have traveled interstate and holding that "[i]f an employer's business is centered around the interstate transport of goods and the employee's job is to transport those goods to their final destination—even if it is the last leg of the journey—that employee falls within the transportation worker exemption."); *Nieto v. Fresno Beverage Co.*, 245 Cal. Rptr. 3d 69, 76 (Cal. Ct. App. 2019), *reh'g denied* (Mar. 27, 2019), *review denied* (July 10, 2019) (applying FAA Section 1 exemption to California delivery driver who worked for beverage distributor that purchased its products nationally and internationally)*; Ward v. Express Messenger Sys., Inc.*, 413 F. Supp.3d 1079, 1087 (D. Colo. 2019) (holding that Colorado drivers who delivered packages for customers that included Amazon and Staples were transportation workers where they, *inter alia*, transported and handled goods that traveled interstate despite "the absence of any indication that Plaintiffs transported goods across state lines"); *Christie v. Loomis Armored US, Inc.*, No. 10-CV- 02011 (WJM) (KMT), 2011 WL 6152979, at *3 (D. Colo. Dec. 9, 2011) (determining that the plaintiff driver was a transportation worker despite failing to show that she traveled out of state where "[h]er job is to transport currency, a good that is [i]ndisputably in the stream of interstate commerce"); *see also Diaz v. Michigan Logistics Inc.*, 167 F. Supp. 3d 375, 381 n.3 (E.D.N.Y. 2016) (assuming without deciding that plaintiffs "responsible for transporting and handling automotive parts that allegedly moved in interstate commerce" were exempt even though they did not actually cross state lines).

The Defendants assert that this line of cases, even if followed, is inapplicable in this situation. The Court

agrees. Indeed, the Court does not take issue with these cases or with the general proposition that a delivery driver responsible for transporting goods that have traveled interstate may well be a "transportation worker" for purposes of the FAA. As one court has aptly observed, "[i]f there is one area of clear common ground among the federal courts to address this question, it is that truck drivers—that is, drivers actually involved in the interstate transportation of physical goods—have been found to be 'transportation workers' for purposes of the residuary exemption in Section 1 of the FAA." *Saxon v. Sw. Airlines Co.*, No. 19-CV-0403, 2019 WL 4958247, at *4 (N.D. Ill. Oct. 8, 2019), appeal docketed, No. 19-3226 (7th Cir. Nov. 7, 2019) (quoting *Kowalewski*, 590 F. Supp. 2d at 482–83). Here, however, the Plaintiffs' Distributor Agreements evidence a much broader scope of responsibility that belies the claim that they are only or even principally truck drivers. Rather, because the Plaintiffs purchase and own the territories comprising their routes, their distribution efforts are the means by which they realize and increase sales and profits for their franchise businesses. (*See* Linthicum Decl. ¶ 8.) Toward that end, the Distributor Agreements do not obligate Plaintiffs "to perform any services personally," such as driving; instead, they grant Plaintiffs latitude in managing their businesses, "including hiring employees at their discretion to run their businesses."[10] (*Id.*; *see also* Distributor

[10] As noted above, the Supreme Court has not determined whether a corporate entity can be a "transportation worker" within the meaning of the Section 1 exemption. But where, as here, the purported "contract of employment" does not require any particular person to perform the work and allows the Plaintiff-entities to delegate the contractual obligations to one or more

Agreements § 16.2.) Plaintiffs are additionally responsible for not only obtaining and insuring their own delivery vehicles (Distributor Agreement § 9.1), but also:

> identifying and engaging potential new customers; developing relationships with key customer contacts; ordering products based on customer needs; servicing the customers in their territory; stocking and replenishing product at the customer locations; removing stale product; and other activity necessary to promote sales, customer service, and otherwise operate their businesses.

(Linthicum Decl. ¶ 8.) Plaintiffs are further required "to use their 'Best Efforts' to increase sales in their territories . . . including by asking for displays, providing good customer service, recommending new products, soliciting new accounts, and effective merchandising, among other things." (*Id.*; *see also* Distributor Agreements § 5.1.)

Defendants thus argue persuasively that Plaintiffs are "more akin to sales workers or managers who are generally responsible for all aspects of a bakery products distribution business" than they are to "traditional transportation workers like a long-haul trucker, railroad worker, or seaman." (Defs.' Mem. at 22.) The Defendants also cite to a somewhat comparable case where a district court held that a sales service representative ("SSR") position that involved driving and delivering the defendant's products but also included "restocking supplies, and receiving orders or facilitating sales for more supplies," did not fall within the transportation

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persons/employees, such a contractual arrangement renders it even more difficult to envision how the contracting entity could be classified a transportation worker.

worker exception. *Veliz v. Cintas Corp.*, No. C 03-1180 (SBA), 2004 WL 2452851, at *9 (N.D. Cal. Apr. 5, 2004), *modified on reconsideration on other grounds*, 2005 WL 1048699 (N.D. Cal. May 4, 2005). Recognizing that the "job duties certainly entail driving" but "do not, however, entail delivery of product in the same manner that a truck driver does," the court concluded that "[t]he primary duty of SSRs is more akin to customer service than it is to a warehouse trucker, railroad employee or seamen." *Id.* at *10.

The Plaintiffs distinguish *Veliz* because Plaintiffs *do* deliver product in the same manner as a truck driver—"Plaintiffs quite literally load a truck with products and then drive the truck to deliver the products to numerous locations." (Pls.' Opp. at 12 n.6.) But even if the movement of physical goods is the *sine qua non* of the FAA exemption, *see, e.g.*, *Kowalewski*, 590 F. Supp. 2d at 483–84, the Court is not aware of any case holding that a worker's responsibility for delivering physical goods will defeat compelling evidence that the worker performs myriad other non- transportation related functions that fundamentally transform the nature of the job description. On this issue Plaintiffs have not put forth any evidence to refute the Defendants' submissions, which reveal that Plaintiffs' functions include not merely distribution but also customer service and sales dimensions, and which further reveal that Plaintiffs are not even contractually obligated to transport Defendants' products personally. *Cf. Hamrick v. Partsfleet, LLC*, 411 F. Supp.3d 1298, 1302 (M.D. Fla. 2019) (finding transportation worker exemption applicable where "the transportation of goods that are and have been traveling in interstate commerce is the *totality* of Plaintiffs' job") (emphasis added). While Plaintiffs argue that issues of fact preclude the granting

of a motion to compel under the applicable summary judgment-like standard (Pl.s' Sur-Reply at 4), they again fail to come forward with evidence to rebut the Defendants' assertions so as to create such an issue of fact. *See Long*, 306 F. Supp. 3d at 607 ("[I]f the party seeking arbitration has substantiated the entitlement by a showing of evidentiary facts, the party opposing may not rest on a denial but must submit evidentiary facts showing that there is a dispute of fact to be tried") (quotation marks and citation omitted). Instead, Plaintiffs seek to create a factual dispute by citing Defendants' representations in this and other litigation, concerning Defendants' legal status under other statutory regimes that have no bearing on the FAA exemption.[11]

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[11] Plaintiffs cite Defendants' Tenth Defense in their Answer to the FAC, in which they state that assuming arguendo that Plaintiffs are "employees" within the meaning of the FLSA, their claims are barred by the FLSA's "Motor Carrier Exception," due to the fact that Plaintiffs "drive or drove vehicles with a Gross Vehicle Rating or Gross Vehicle Weight of at least 10,001 pounds, transport or were subject to transporting certain goods originating out of state, and because there is practical continuity of movement of these goods until they reach retail customers and other customers." (ECF No. 28 at 13.) They also cite Defendants' memorandum of law in support of their motion for summary judgment in *Bokanoski et al. v. Lepage Bakeries Park Street, LLC et al.*, No. 15-CV-00021 (JCH) (ECF No. 83-1 at 8) (D. Conn. April 6, 2016), in which Defendants argued that they "are a motor carrier of property within the meaning and purview of the [Federal Aviation Administration Authorization Act of 1994] because, through their own employees and contracting with independent contractor franchises, they deliver products that remain in the stream of interstate commerce to customers in Connecticut and throughout New England." (ECF No. 48-1 at 8.) Even if the Court were to credit these representations as facts bearing on the instant litigation, they only establish that driving trucks and delivering products that travel

Even allowing that Plaintiffs spend the majority of their working hours delivering products, moreover, the Court is doubtful that Plaintiffs' role as distributor franchisees is sufficiently analogous to that of early 20th century railroad workers or seamen to warrant a finding that Congress would have envisioned the FAA exception embracing such workers. *See Vargas v. Delivery Outsourcing, LLC*, No. 15-CV-03408 (JST), 2016 WL 946112, at *3 (N.D. Cal. Mar. 14, 2016) ("Section 1's exemption was intended to reach workers who would, by virtue of a strike, 'interrupt the free flow of goods to third parties in the same way that a seamen's strike or railroad employee's strike would.'") (quoting *Veliz*, 2004 WL

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in interstate commerce comprise some of the Plaintiffs' responsibilities, which the Court acknowledges but which does not change the outcome of the Court's analysis. Defendants also correctly observe that these statements, which were made in the context of completely different statutory frameworks, in no way constitute "judicial admissions" "that Plaintiffs are within 'a class of workers engaged in foreign or interstate commerce' under the FAA." (Defs.' Response to Sur-Reply at 2, ECF No. 49.) *See, e.g.*, *Freeman v. Easy Mobile Labs, Inc.*, No. 1:16-CV-00018 (GNS), 2016 WL 4479545, at *2 n.2 (W.D. Ky. Aug. 24, 2016) (finding the Motor Carrier Act exemption to the FLSA "irrelevant" with respect to "the issue of whether [the plaintiff] is excepted from arbitration under Section 1 of the FAA").

Plaintiffs also attach as an exhibit to their sur-reply a photograph of Plaintiff Bissonnette's truck, which is registered under Defendant Lepage's name and contains a federal Department of Transportation identification number, as evidence that "Plaintiffs are undoubtedly working for a 'transportation company' when they perform deliveries for Lepage, because only an entity that operates commercial vehicles hauling cargo in interstate commerce must obtain a federal DOT number." (Pls.' Sur-Reply at 3 n.4.) Again, however, while this evidence may support the notion that some part of Plaintiffs' work involves delivering goods in interstate commerce, it fails to overcome or even address the other evidence put forth by the Defendants.

2452851, at *3); *Lenz*, 431 F.3d at 352 (considering "whether a strike by the employee would disrupt interstate commerce" as one of the factors to be weighed in applying the transportation worker exemption). Plaintiffs argue that their failure to deliver Defendants' baked goods to Connecticut outlets as the result of a strike would cause "a ripple effect in interstate commerce," quoting *Rittman*, 383 F. Supp. 3d. at 1201 (Pls.' Opp. at 16), but Plaintiffs present no evidence to indicate that the effects of such a strike would be felt outside of their individual franchise territories within Connecticut. The fact that Plaintiffs' contracts expressly contemplate delegation of delivery work and all manner of Plaintiffs' business operations, moreover, undercuts the suggestion that Plaintiffs are personally indispensable to the flow of goods in a manner akin to a traditional truck driver, or that Plaintiffs are "so closely related to interstate commerce as to be part of it." *Waithaka*, 404 F. Supp.3d at 343.

Finally, the Court is mindful that the FAA exemption must be construed narrowly. *See Circuit City*, 532 U.S. at 118; *see also, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (citing the "liberal federal policy favoring arbitration agreements") (quotation marks and citation omitted). To extend Section 1 of the FAA to those in Plaintiffs' shoes on the current record would do the precise opposite. The Court therefore holds that Plaintiffs are not transportation workers under FAA Section 1 and that they accordingly must be compelled to arbitrate their claims pursuant to the Arbitration Agreement incorporated in their Distributor Agreements.

CONCLUSION

Because the Plaintiffs are not transportation workers under the FAA and because the parties do not otherwise dispute that they entered into a binding arbitration agreement, the Court GRANTS the Defendants' motion to dismiss in favor of arbitration. The Clerk of Court shall enter judgment in favor of the Defendants accordingly and is instructed to close the case. If, after the arbitration, any party seeks further relief from the Court, the Clerk of the Court shall direct assign any such motion or petition to the undersigned.

SO ORDERED at Bridgeport, Connecticut, this 14th day of May 2020.

/s/ *Kari A. Dooley*
KARI A. DOOLEY
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

NEAL BISSONNETTE, TYLER WOJNAROWSKI,	No. 3:19-cv-00965 (KAD)
Plaintiffs,	
v.	**JUDGMENT**
LEPAGE BAKERIES PARK ST., LLC, C.K. SALES CO., LLC, FLOWERS FOODS, INC.,	
Defendants.	May 15, 2020

This matter came on for consideration of defendants' Motion to Dismiss [doc. #31] and Supplemental Motion to Dismiss [doc. #41] before the Honorable Kari A. Dooley, United States District Judge. The Court has considered the full record of the case including applicable principles of law. On May 14, 2020, the court entered an order granting the motions in favor of the defendants.

It is therefore ORDERED, ADJUDGED and DECREED that judgment shall enter in favor of the defendants and the case is closed.

Dated at Bridgeport, Connecticut, this 15th day of May 2020.

ROBIN D. TABORA, Clerk

By: */s/ Kristen Gould*
Kristen Gould
Deputy Clerk