No. 24-935

IN THE

Supreme Court of the United States

FLOWERS FOODS, INC., ET AL.,

Petitioners,

v.

ANGELO BROCK,

Respondent.

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

BRIEF OF AMICI CURIAE PUBLIC JUSTICE AND AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Public Justice is a nonprofit legal advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. The organization maintains an Access to Justice Project that pursues litigation and advocacy efforts to remove procedural obstacles that unduly restrict the ability of workers, consumers, and people whose civil rights have been violated to seek redress for their injuries in the civil court system.

As part of its Access to Justice Project, Public Justice appeared before this Court as counsel of record for Respondent in *New Prime Inc. v. Oliveira*, 586 U.S. 105 (2019), where this Court held that transportation workers are exempt from the Federal Arbitration Act. Public Justice has a continued interest in ensuring that the exemption in § 1 of the FAA is properly interpreted in accordance with its text and the historical and statutory context in which the statute was enacted.

The American Association for Justice (AAJ) is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar.

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 80-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Arbitration Act (FAA) exempts from its reach "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. This case asks the Court to decide whether Angelo Brock, a truck driver who delivers Flowers Foods' products on the last leg of their interstate journey to their destinations at retail stores, is part of a "class of workers engaged in foreign or interstate commerce" encompassed by the exemption. Contemporanous sources from the time of the FAA's enactment in 1925 confirm that he is.

First, leading up to the enactment of the FAA, this Court routinely interpreted "interstate commerce" to include a good's entire journey to its final destination, even if the journey was broken up into legs, some of which were only a short distance within one state. Specifically, it concluded that the type of last-mile delivery at issue here—transporting goods from a manufacturer's warehouse to a retail store as the last leg of their interstate journey—was part of interstate commerce. And this Court applied that definition to hold that the railroad workers who delivered such goods were engaged in interstate commerce for the purposes of the Federal Employers' Liability Act (FELA), just as the railroads who employed them

were engaged in interstate commerce under the Interstate Commerce Act.

Second, as this Court has explained, Congress enacted the § 1 exemption to avoid unsettling existing dispute-resolution schemes covering workers like "railroad employees" under Title III of the Transportation Act of 1920 and "seamen" under §§ 25-26 of the Shipping Commissioners Act of 1872. Those contemporaneous dispute-resolution schemes covered disputes involving workers, like Mr. Brock, who transport goods on an intrastate leg of an interstate journey, even if they do not cross any state or foreign border. Indeed, by 1925, the Railroad Labor Board—part of the dispute-resolution scheme this Court understood the § 1 exemption to preserve—had repeatedly decided disputes between carriers and such workers. Similarly, "seamen" who could assent to shipping commissioner arbitration included workers, such as maritime pilots, who did not necessarily cross state or foreign borders. Thus, by operation of the *ejusdem generis* canon, the § 1 exemption includes workers who transport goods at some point along their interstate journey, even if such workers do not themselves transport the goods across state or foreign borders. If Congress had intended the FAA to cover such workers, as Flowers argues, that would have disrupted the very dispute-resolution schemes it had enacted the § 1 exemption to preserve.

Because these sources make plain that the FAA exempts workers like Mr. Brock, this Court should affirm the Tenth Circuit's conclusion that the § 1 exemption applies.

ARGUMENT

I. At the Time the FAA Was Enacted, "Interstate Commerce" Included the Intrastate Leg of an Interstate Journey.

Section 1's transportation-worker exemption must be interpreted in accordance with the text's meaning at the time the law was enacted. *See Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 455 (2022). And when the FAA was enacted in 1925, a "class of workers engaged in foreign or interstate commerce" included those who transported goods or passengers on an intrastate leg of a continuous interstate journey. A good was understood to be in foreign or interstate commerce from the time it "started in the course of transportation to another state or foreign country" until it reached its intended final destination, even if the first or final leg of that journey took place within a single state. *See* 1 Bouvier's Law Dictionary and Concise Encyclopedia 532 (8th ed. 1914) (explaining that "an express company taking goods from a steamer or railroad and transporting them through the street of the city to the consignee is still engaged in interstate commerce").

That understanding is confirmed by this Court's pre-1925 caselaw defining interstate commerce and contemporaneous interpretations of similar statutes like FELA and the Interstate Commerce Act. All those sources support the conclusion that workers who, like Mr. Brock, transport goods on an intrastate leg of an interstate journey, are "engaged in foreign or interstate commerce" for purposes of the exemption in § 1 of the FAA.

A. Since well before the enactment of the FAA in 1925, this Court has recognized that "interstate

commerce" includes every phase of a good's continuous journey—from start to finish. The "general rule" was that, once "transportation has acquired an interstate character," that character "continues at least until the load reaches the point where the parties originally intended that movement should finally end." *Binderup v. Pathe Exch. Inc.*, 263 U.S. 291, 309 (1923) (citation modified); *see also Rhodes v. Iowa*, 170 U.S. 412, 415 (1898) (defining interstate commerce as "the continuity of shipment of goods coming from one state into another from the point of transmission to the point of consignment, and the accomplishment there of the delivery covered by the contract"); *Covington Stock-Yards Co. v. Keith*, 139 U.S. 128, 136 (1891) (holding that transportation "begins with [the item's] delivery to the carrier to be loaded upon its cars, and ends only after [it] is unloaded and delivered, or offered to be delivered, to the consignee").

In *Binderup*, the Court applied that definition of interstate commerce to last-mile deliveries similar to Mr. Brock, concluding that the distribution of films to movie theaters was "interstate commerce" despite the use of a local agency for the last intrastate leg of the delivery. 263 U.S. at 309. As the Court explained, the fact that "the commodity is consigned to a local agency of the distributors, to be by that agency held until delivery to the lessee in the same state" did not "put an end to the interstate character of the transaction and transform it into one purely intrastate[.]" *Id.*

Similarly, in *Heymann v. Southern Ry. Co.*, this Court rejected the argument that "the interstate transportation of the goods ended when they were placed in the warehouse" mid-journey, concluding

that interstate commerce ceases only "after delivery" to the goods' final destination. 203 U.S. 270, 272, 276 (1906). As a result, it held that liquor shipped across state lines continued to be in interstate commerce until received by the recipient, even if it sat in a warehouse until local delivery was made. *Id.*; *see also Norfolk & Western Railroad Co. v. Commonwealth of Pennsylvania*, 136 U.S. 114, 119 (1890) (company whose railroad was entirely within Pennsylvania was "engaged in interstate commerce" because it was a link in a chain of railroads that carried passenger and freight from other states into Pennsylvania, and from Pennsylvania into other states); *The Daniel Ball*, 77 U.S. 557, 565 (1870) (holding that a steamer that operated solely in Michigan and "did not run in connection with, or in continuation of, any line of vessels or railway leading to other States" was nevertheless "engaged in commerce between the States" as long as "she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State").

This Court specifically applied that definition of interstate commerce to hold that workers engaged in the transportation of goods along their interstate journey were engaged in interstate commerce, even if the worker facilitated the transportation of the good only a short distance within a single state. In *Rearick v. Pennsylvania*, a worker who locally delivered brooms shipped from Ohio to customers in Pennsylvania was "engaged in interstate commerce"—even though he only completed the Pennsylvania leg of the brooms' journeys. 203 U.S. 507, 512-13 (1906). And in *Rhodes v. Iowa*, a worker moving goods from a train platform to a freight

warehouse at the train station "was a part of the interstate commerce transportation," even though he was not involved in unloading them from the train, and even though the goods were stored in the warehouse temporarily before being delivered to the recipient. 170 U.S. at 426. Given the backdrop of these cases, Congress's reference in the FAA to "workers engaged in foreign or interstate commerce" should be read to encompass last-mile drivers like Mr. Brock.

B. This Court embraced that existing understanding of interstate commerce in the FELA context too. Enacted in 1908, FELA requires railroads "engaging in commerce" to pay "damages to any person suffering injury while he is employed by such carrier in such commerce." 45 U.S.C. § 51. It applies only to carriers "engaged in interstate commerce for injuries sustained by its employees while engaged in such commerce." *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 51 (1912). Yet, this Court routinely held prior to the FAA's enactment that FELA applied to workers who never crossed state lines. *See Shanks v. Delaware, L. & W.R. Co.*, 239 U.S. 556, 558-59 (1916) (collecting cases). Specifically, it held that workers who transport goods that are destined for—or arriving from—another state are engaged in interstate commerce, even if those workers are only responsible for a specific leg of the journey that takes place entirely within a single state.

For example, in *Philadelphia & Reading Railway Co. v. Hancock*, the Court held that a railroad worker whose "duties . . . never took him out of Pennsylvania" was still engaged in interstate commerce and subject to FELA because the coal he transported within Pennsylvania was destined for other states. 253 U.S.

284, 285-86 (1920). His transportation of the coal from a mine to a railroad storage yard "two miles away" was "a step in the transportation of the coal to real and ultimate destinations" outside of Pennsylvania, and he was therefore engaged in the interstate transportation of goods. *Id.* Similarly, prior to *Hancock*, this Court had held that a switch engine foreman injured on a train hauling lumber within Florida was engaged in interstate commerce because the lumber's ultimate destination was New Jersey. *See Seaboard Air Line Ry. v. Moore*, 228 U.S. 433, 435 (1913) (stating it "plain" that lower court's ruling that employee was not engaged in interstate commerce was "without merit").

Importantly, whether a worker was engaged in interstate commerce in these cases did not depend on whether or how long goods paused between delivery by the worker and the next leg of the interstate journey. For example, in *Hancock*, the worker delivered rail cars loaded with coal from a mine to a railyard, where his duties "terminated." 253 U.S. at 285-86. The coal would then wait at the railyard until another crew picked it up and transported it "some 10 miles" to scales, where the coal would be weighed and "billed to specifically designated consignees in another state." *Id.* at 286. After that, the coal for each customer would wait to be picked up by another crew and "[i]n due time" would proceed to its final destination in another state. *Id.* The Court explicitly rejected the argument that the coal was not "part of interstate commerce" until it was weighed at the scales and designated for a particular customer in another state, and it held that the worker who transported the coal from the mine to the railyard at the beginning of its journey was still "employed in

commerce between states" because the shipment he carried "was but a step in the transportation of the coal to real and ultimate destinations in another state." *Id.* The same is true here: Mr. Brock was engaged in interstate commerce because his route was "a step in the transportation" of goods to across state lines, regardless of whether the goods he was transporting had paused at a warehouse to be sorted before he picked them up.

Thus, prior to the FAA's enactment in 1925, this Court had held that a worker engaged in the transportation of goods between states is "engaged in interstate commerce" even if they are only responsible for one leg of that journey that takes place entirely within one state. As a result, we can assume that, when Congress used nearly identical language in § 1 of the FAA, it intended to encompass workers like Mr. Brock who transport goods on one intrastate leg of an interstate journey.

Flowers argues (at 14) that FELA cases "shed no light on the meaning of § 1." That's wrong. This Court and lower courts routinely look to non-FAA cases to determine what it meant to be "engaged in foreign or interstate commerce" in 1925 when Congress enacted the FAA. *See Circuit City Stores v. Adams*, 532 U.S. 105, 117 (2001); *Saxon*, 596 U.S. at 457-59; *Lopez v. Aircraft Serv. Int'l, Inc.*, 107 F.4th at 1102-03 (9th Cir. 2024); *see also New Prime*, 586 U.S. at 114 (looking to the meaning of § 1's terms "at the time of the Act's adoption in 1925"). That's because courts "normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010). Pre-1925 FELA cases are no exception, especially because "FELA

contains language nearly identical to that of Section 1 of the FAA." *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 19 (1st Cir. 2020); *see* 45 U.S.C. § 51. Congress "must have had [FELA] in mind" when it drafted Section 1 of the FAA, given that it "incorporate[ed] almost exactly the same phraseology." *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., (U.E.) Local 437*, 207 F.2d 450, 453 (3d Cir. 1953).

Flowers contends (at 40) that FELA cases are inapt because the FAA focuses on the "workers' own engagement in interstate commerce," whereas FELA's focus is on the "*railcar's journey*." The First Circuit rejected this argument in *Waithaka*, and this Court should too. "[T]his argument overlooks Congress's amendments to FELA in 1908" which made FELA apply "only when both the carrier *and* the injured employee had been engaged in interstate commerce." *Waithaka v. Amazon.com, Inc.,* 966 F.3d 10, 21 (1st Cir. 2020). Thus, "FELA was concerned with the activities of employees, just as the FAA is." *Id.* And on top of that, in the FELA precedents discussed, *supra*, the question before the Court was "the same as it is here: whether transportation workers engaged in interstate commerce." *Id.*; *see, e.g.*, *Hancock*, 253 U.S. at 285 (explaining that question was whether the *worker* "was employed in commerce between states"). Thus, contrary to Flowers' position, this Court's FELA cases are directly relevant to interpreting the meaning of "engaged in foreign or interstate commerce" in the FAA.

C. Case law interpreting the Interstate Commerce Act provides additional confirmation that "interstate

commerce" includes a purely intrastate leg of a good's journey. In 1925, the Interstate Commerce Act applied "to common carriers engaged in — (a) the transportation of passengers or property . . . by railroad." § 400, 41 Stat. at 474, codified at 49 U.S.C. § 1(1) (1925). But it applied only to railroads when they engaged in interstate or foreign transportation, not to the "transportation of passengers or property . . . wholly within one State . . . ." 49 U.S.C. § 1(2)(a). But even with that exception, it was interpreted to apply to the purely intrastate legs of goods' continuous journey between states. For example, in *Denver & R.G.R. Co. v. Interstate Com. Comm'n,* 195 F. 968, 972 (Comm. Ct. 1912), the Commerce Court held that a railroad transporting beer between two cities in Colorado was subject to the Act where that intrastate leg was part of the beer's journey from out of state. The court noted it was undisputed that the Colorado railroad was engaged in interstate commerce "because the traffic was carried by continuous movement from a point in one state to a point in another state," *id.* at 969, and it held that the Act was intended to cover railroads engaged in such interstate commerce even if they transported goods on only an intrastate leg of that movement, *id.* at 973.

Thus, by 1925, as Interstate Commerce Commissions (ICC) decisions evince, the Act covered the intrastate delivery of goods from a manufacturer's warehouse to a merchants' store (often referred to as "store-door" delivery). *See e.g.*, *Casassa v. Pennsylvania R.R. Co.*, 24 I.C.C. 629 (1912); *Washington D.C., Store-Door Delivery*, 27 I.C.C. 347 (1913); *Merchants & Manufacturers Ass'n v. Baltimore & Ohio R.R. Co.*, 30 I.C.C. 388 (1914). Such carrier services subject to the Act also included "truck

or wagon transfer services performed in connection with terminal services of a common carrier subject to the act." *In re Legality of Tariffs Purporting to Embrace or Cover Motor-Truck or Wagon Transfer Serv. in Connection with Trans. by Rail or Water*, 91 I.C.C. 539, 547 (1924). In those cases, carriers contracted with motor-truck companies to transport freight by truck, as "agents for the carriers," to "so-called off-track stations" within the terminal district (locations that rail track did not reach) where the freight was received and delivered, or to transport that freight to the "store door of the shipper . . . without passing it through the off-track stations." *Id.* at 541.

In short, all three of these strands of case law confirm that, at the time the FAA was enacted, it was well-established that a worker engaged in the transportation of a good along its interstate journey was engaged in interstate commerce, even if that worker facilitated transportation only within a single state.

II. Interpreting the § 1 Exemption to Apply to Last-Mile Drivers like Mr. Brock Harmonizes the Exemption with Existing Dispute Resolution Schemes for Railroad Employees and Seamen as Congress Intended.

The FAA was also enacted against the backdrop of existing dispute resolution schemes for certain categories of workers, including railroad employees and seamen. This Court has inferred "that Congress excluded 'seamen' and 'railroad employees' from the FAA because it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers." *Circuit City*, 532 U.S. at

121; *accord New Prime*, 586 U.S. at 110-11; *Bissonnette v. LePage Bakeries Park St., LLC,* 601 U.S. 246, 253 (2024). And, at the time, those existing dispute-resolution schemes covered the disputes of workers who did not cross state lines. So, to effectuate Congress's intent, the § 1 exemption must be interpreted to encompass railroad employees and seamen—and, by operation of *ejusdem generis*, other transportation workers—who did not cross state lines but would have been covered by those schemes.

A. The Existing Dispute Resolution Mechanism for Railroad Workers Included Those Workers Who Did Not Transport Goods Across State Lines.

When Congress enacted the FAA in 1925, it included the § 1 exemption to prevent the FAA from disrupting the settled scope of the existing "grievance procedures" that then existed for railroad workers under Title III of the Transportation Act, 1920, ch. 91, §§ 300–316, 41 Stat. 456, 469-74. *Circuit City*, 532 U.S. at 121. Accordingly, the scope of the exemption for "railroad employees" must be coextensive with the scope of Title III's dispute resolution scheme "at the time of the Act's adoption in 1925," *New Prime*, 586 U.S. at 113; *see Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 587 U.S. 601, 608 (2019) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (citation modified).

Title III's dispute-resolution scheme covered disputes between any "carrier" and its "employees" or "subordinate officials." § 301, 41 Stat. at 469. It required "all carriers . . . to exert every reasonable effort and adopt every available means to avoid any

interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof." *Id.* If railroads and workers could not resolve their disputes themselves by conference or by a board of adjustment, the Act authorized a nine-member Railroad Labor Board to hear and decide those disputes, §§ 304-307, 41 Stat. at 469-70. That Board had jurisdiction over disputes about grievances, rules, working conditions, and wages. §§ 303, 307(a)-(b), 41 Stat. at 470-71.

Title III's dispute-resolution scheme indicates that the FAA's "railroad employees" exemption and, by *ejusdem generis*, the FAA exemption's residual clause, cover workers who deliver goods as part of those goods' interstate journey, even if they do not cross State or foreign borders to do so.

i. Congress linked Title III's coverage to the scope of carrier services subject to the Interstate Commerce Act.

Whether a railroad carrier was subject to Title III's dispute-resolution scheme depended on whether that carrier "engaged in" activities that qualified as "transportation" of passengers or property under the Interstate Commerce Act. *See* § 300, 41 Stat. at 469. In this way, Congress yoked Title III's scope to the Interstate Commerce Act's definition of "transportation," which, as described above, covered intrastate legs of transportation in interstate or foreign commerce. *See* Section I(C), *supra*.

As a result, by 1925 when the FAA was enacted, Title III's scope largely mirrored the scope of the Interstate Commerce Commission (ICC)'s authority under the Interstate Commerce Act. Although the Railroad Labor Board was not "bound" by the ICC's

statutory interpretations, the Board had declared that those interpretations deserved "careful thought" when "interpreting identical language." *Bhd. of Locomotive Eng'rs v. Spokane & E. Ry. & Power Co.*, 1 R.L.B. 53, 56 (1920) (construing exception to definition of "carrier" in Title III). Indeed, as the Board explained, Congress had "clearly intended" the Board's wage-setting and the ICC's rate-setting to be "interdependent." *Id.* at 57. Thus, just as the ICC had jurisdiction over railroad carriers engaged in intrastate transportation along goods' interstate journey, *see* Section I(C), *supra*, so did the Railroad Labor Board as to the workers employed by those carriers.

ii. The Railroad Labor Board regularly decided disputes involving workers who did not cross state or foreign borders.

Consistent with the scope of Title III, the Railroad Labor Board regularly exercised jurisdiction to decide disputes between carriers and workers who engaged in intrastate deliveries of goods transported in interstate commerce to their final destination.

For example, consider the Railroad Labor Board's *second* decision. There, the Board declared "just and reasonable" wage increases for the "employees" and "subordinate officials" who worked for various railroad carriers as well as "all Union Depot and terminal companies" for which those railroad carriers owned majority stock. *Int'l Ass'n of Machinists v. Atchinson, Topeka & Santa Fe Ry.*, 1 R.L.B. 13, 14-22, 28 (1920) ("Decision No. 2"). The Board's wage increases included worker classifications such as "[s]tation, platform, warehouse, transfer, dock, pier,

storeroom, stock room, and team-track freight-handlers or *truckers*, or others similarly employed." *Id.* at 22 (emphasis added). In other words, the Board's jurisdiction covered workers who were not on the trains themselves and did not cross state lines.

The Board also decided disputes involving workers—including drivers making deliveries—who handled or delivered baggage or freight and otherwise did not cross state or foreign borders. *See, e.g.*, *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Emps. v. Chicago Great W. R.R. Co.*, 3 R.L.B. 542 (1922) (dispute involving "clerks, foremen, checkers, stowers, stevedores, and *truckers* now employed on the transfer platform in Olewein, Iowa, keeping records and handling excessive freight for the carrier") (emphasis added); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Emps. v. American Ry. Express Co.*, 6 R.L.B. 1120 (1925) (dispute arising from driver delivery of package that was stolen from wagon); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Emps. v. American Ry. Express Co.*, 6 R.L.B. 1132 (1925) (carrier assessed delivery employees $50 each for loss of shipment of pearls shipped from Philadelphia and delivered from carrier's terminal to address in New York City); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Emps. v. American Ry. Express Co.*, 5 R.L.B. 795 (1924) (challenge to carrier "abolishment" of position of worker employed "as transfer and delivery man"); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Emps. v. American Ry. Express Co.*, 5 R.L.B. 221 (1924) (challenge to removal of position of "express driver").

The point here is simple. Though they conducted only intrastate deliveries, these workers fell within Title III's dispute-resolution scheme, even if their work of handling or delivering goods already transported in interstate commerce did not involve themselves crossing state or foreign borders. These workers were *not* "engaged in purely private local transportation." Pet. Br. at 31. Rather, these workers engaged in interstate and foreign commerce, as evinced by the regular exercise of jurisdiction over disputes involving such workers by the Railroad Labor Board. And, in excluding "railroad employees" from the FAA, Congress intended to exclude them—and other transportation workers like them—too.

iii. Title III covered railroad workers who did not travel interstate to advance its purpose of avoiding strikes.

Title III's dispute-resolution scheme had an important purpose: to "prevent the interruption of interstate commerce by labor disputes and strikes" by encouraging "settlement without strikes." *Pennsylvania R. Co. v. U.S. R.R. Labor Bd.*, 261 U.S. 72, 79 (1923). Had the FAA's "railroad employees" exemption excluded workers who delivered goods along the final leg of their interstate journey, the FAA would have undermined that purpose.

Indeed, preventing strikes was partly why the Railroad Labor Board read its jurisdiction to include disputes involving all types of railroad workers, including workers who were nominally employed by a third-party contractor. A strike by any category of railroad worker could bring interstate railway transportation to a halt. *See* Resolution, 3 R.L.B. 1137 (1922) (Railroad Labor Board began an inquiry and

ordered carrier and labor representatives to appear, citing in part the worry that "a strike by *any or all* of said classes of employees threatens an interruption of traffic.") (emphasis added); *Ry. Emps.' Dep't, A.F. of L v. Indiana Harbor Belt R.R. Co.*, No. 982, 3 R.L.B. 332, 334 (1922) ("Decision No. 982") (holding that the Board's jurisdiction included workers employed by third-party contractors).

The Board later applied or extended Decision No. 982 to various categories of workers, including freight-handlers and others who handed goods traveling in interstate commerce but did not cross state borders. *See*, *e.g.*, *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Emps. v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 3 R.L.B. 594, 596 (1922) (handling freight); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Emps. v. Erie R.R. Co.*, 3 R.L.B. 667, 668 (1922) (freight handling, janitorial work, messenger services, mailroom and station employees, train and engine-crew callers, yard-office clerks, baggage-room employees); *Amer. Fed'n R.R. Workers v. N.Y. Cent. R.R. Co.*, 3 R.L.B. 687, 688 (1922) (handling baggage and mail); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees v. N.Y. Cent. R.R. Co.*, 3 R.L.B. 705, 706-07 (1922) (freight handling); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Emps. v. N.Y. Cent. R.R.*, 5 R.L.B. 405, 406 (1924) (handling baggage and mail); *Amer. Fed'n R.R. Workers v. N.Y. Cent. R.R. Co.*, 5 R.L.B. 409, 410 (1924) (handling baggage and mail).

Strikes were such a concern that it appears that a major railroad workers' strike led to the inclusion of the § 1 exemption in the FAA. In 1922, over 250,000

shopmen—workers who maintained railroads' rolling stock and did not cross state lines—walked off the job. *See* Colin J. Davis, *Power at Odds: The 1922 National Railroad Shopmen's Strike* (1997) at 67-68. Violent clashes followed, *see id.* at 83-100, as did railroad service interruptions, which led to serious shortages in grain, coal, and steel, among other costs to the national economy, *see id.* at 163.

A few months after the shopmen's strike ended, in December 1922, precursor bills to the FAA were introduced in Congress. *See* 64 Cong. Rec. 797 (1922) (H.R. 13522); 64 Cong. Rec. 732 (1922) (S. 4214). Commerce Secretary Herbert Hoover, who months earlier had met with railroad executives and their financiers to resolve the shopmen's strike, *see* Davis, *supra* at 107-09, wrote to the Senate Judiciary subcommittee then holding hearings on the Senate bill (S. 4214) to express support and suggest an exemption: "If objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'" *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong., 4th Sess. 14 (1923) (reprinting letter) (hereinafter "Hearing on S. 4213").

Although these FAA bills died in committee, new versions of them, now with Hoover's proposed exemption, were filed in the next Congress, and Hoover endorsed those bills. *See Arbitration of*

Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomm. of the Comm. on the Judiciary, 68th Cong., 1st Sess. 20 (1924).

iv. If the FAA applied to railroad workers who do not cross state or foreign borders, it would have disrupted Title III's dispute resolution scheme.

Had the FAA's § 1 exemption been limited to the contracts of railroad employees who transported goods across state lines, the FAA would have disrupted Title III's dispute-resolution scheme. To illustrate, suppose that contracts to work for carriers as store-door deliverymen subject to the Board's Decision No. 2 included pre-dispute arbitration clauses. If so, under Flowers' narrow reading of § 1, the railroad could have compelled arbitration of those workers' disputes *outside* Title III's dispute-resolution scheme, because those workers delivered goods only on the last, intrastate leg of their journey, not across state or foreign borders. At the same time, the Railroad Labor Board could still decide those disputes, having held those workers fall within the scope of Title III, and because the Board did not need both parties' assent to assert its jurisdiction. *See* § 307(a)(1)-(3), (b)(1)-(3), 41 Stat. at 470-71.

Thus, the same dispute could lead to both an arbitral award and a Railroad Labor Board decision. The problem: the FAA made the arbitral award judicially enforceable, 9 U.S.C. § 9, while a Railroad Labor Board decision was *not* judicially enforceable under the Transportation Act, *see Pennsylvania R. Co.*, 261 U.S. at 79, nor subject to judicial review on the "correctness" of the Board's conclusions, *id.* at 85. Accordingly, if the arbitrator and the Railroad Labor

Board disagreed, the FAA—by making the arbitrator's award judicially enforceable—would in effect let the arbitral award supplant the Board's (judicially unenforceable) decision.

This would have completely unsettled Title III's dispute-resolution scheme. Congress predicated that scheme on using the force of public opinion, not judicial enforceability, to motivate compliance with Board decisions. *See id.* at 79 (Board decision's "only sanction" is "the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to the proceeding."); *id.* at 84 ("Under the act there is no constraint upon [the parties] to do what the Board decides they should do except the moral constraint . . . of publication of its decision.").

The union representing train station workers and freight handlers put it more bluntly: Labor unions would "fight to the last ditch" to keep Board decisions judicially unenforceable; if not, it would "be tantamount to denying workers the right to strike." Editorial, "Compulsion Means Slavery," 22 *The Ry. Clerk*, 376 (July 1, 1923). If carriers could not enforce Board decisions in court, workers kept hold of their right to strike as a way to compel carriers to obey Board decisions "favoring the workers" while the carriers already had enough power "to command the respect of the workers for every just and reasonable" Board decision favoring carriers. *Id.*

Thus, although the 68th Congress excluded "railroad employees" from the FAA to avoid unsettling Title III's dispute-resolution scheme,

Circuit City, 532 U.S. at 121, Flowers' reading of the FAA exemption would have done just that.

B. Shipping Commissioner Arbitration Covered Seamen Even if They Had Not Crossed State or Foreign Borders.

As with railroad workers, Congress excluded "contracts of employment of seamen" from the FAA to avoid unsettling the then-established statutory dispute-resolution scheme for seamen's disputes under the Shipping Commissioners Act of 1872, ch. 322, §§ 25-26, 17 Stat. 262, 267.[2] *See Circuit City*, 532 U.S. at 121 (citing this scheme). If the FAA exemption for "seamen" had covered only workers who transported goods across state or foreign borders, as Flowers argues, the FAA would have disrupted that scheme.

In the Shipping Commissioners Act of 1872, Congress authorized "shipping commissioners" to "hear and decide any question whatsoever between a master, consignee, agent or owner, and any of his crew, which both parties agree in writing to submit to him." § 25, 17 Stat. at 267. In this scheme, the shipping commissioner's award bound "both parties, and shall, in any legal proceedings which may be taken in the matter, before any court of justice, be deemed to be conclusive as to the rights of parties." *Id.* In any such "proceeding relating to the wages, claims, or discharge of a seaman," the shipping

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[2] In 1979, Congress ended the use of shipping commissioners. Department of Transportation and Related Agencies Appropriation Act, 1980, Pub. L. No. 96-131, 93 Stat. 1023, 1024 (1979).

commissioner could "call upon the owner, or his agent, or upon the master, or any mate, or any other member of the crew" to produce themselves or any documents they had for examination. § 26, 17 Stat. at 267. By 1925, shipping-commissioner arbitration *still* applied to "any question whatsoever between a master, consignee, agent, or owner, and any of his crew," if "both parties" agree "in writing" to submit that issue to the shipping commissioner. 46 U.S.C. § 651 (1925).

In denoting the parties to shipping-commissioner arbitration, *see id.* ("master, consignee, agent or owner, and any of his crew"); *id.* § 652 ("seaman"), Congress had in the 1872 Act expressly defined "master" as "every person having the command of any ship belonging to any citizen of the United States" and "seaman" as "every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same." *Id.* § 65, 17 Stat. at 277 (emphasis added). By 1925, over half a century later, those same definitions appeared in and applied to the entire chapter in the U.S. Code devoted to protecting seamen. 46 U.S.C. § 713 (1925).

Similarly, a vessel's "crew" typically covered any of its seamen and inferior officers, unless a statute excluded those officers "by enumerating them, as contradistinguished from the rest of the crew." *United States v. Winn*, 28 F. Cas. 733, 735 (C.C.D. Mass. 1838) (Story, J.). *E.g.*, *The Marie*, 49 F. 286, 287 (D. Or. 1892) (holding that vessel's cook was "one of the crew"); "Seaman's Claim Arbitrated," *The Seamen's Journal*, April 23, 1919, at 1-2 (reprinting arbitral opinion of U.S. Shipping Commissioner, New York, awarding wages to seaman shipped as waiter).

In 1874, Congress provided that the Shipping Commissioners Act of 1872 did not apply to

> sail or steam vessels engaged in the coastwide trade, except the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade touching at foreign ports or otherwise, or in the trade between the United States and the British North American possessions, or in any case where the seaman are by custom or agreement entitled to participate in the profits or result of a cruise, or voyage.

Act of June 9, 1874, ch. 260, 18 Stat. 64, 64-65, codified at 46 U.S.C. § 544 (1925); *see Inter-Island Steam Nav. Co. v. Byrne*, 239 U.S. 459, 462-63 (1915); *United States v. The Grace Lothrop*, 95 U.S. 527, 532 (1877).

Primarily on this basis, Flowers concludes that its reading of the FAA residual clause would not have disrupted shipping-commissioner arbitration of seaman disputes, because "no crew on a purely intrastate voyage in intrastate water could have reasonably expected to arbitrate through the shipping-commissioner process." Pet. Br. at 28. To the contrary, if the FAA's "seamen" exemption covered only those workers who in fact crossed state or foreign borders, the FAA would have disrupted how Congress had calibrated shipping-commissioner arbitration and in ways contrary to what "seaman" meant at the time.

Unlike the FAA, a shipping commissioner's arbitral authority is triggered only if "both parties agree in writing to submit [the disputed question] to

him," 46 U.S.C. § 651 (1925), *i.e.*, *after* the dispute arose, *see The W.F. Babcock*, 85 F. 978, 982-93 (2d Cir. 1898); *The Howick Hall*, 10 F.2d 162, 163 (E.D. La. 1925); *The Donna Lane*, 299 F. 977, 982 (W.D. Wash. 1924). This is partly why, in January 1923, International Seamen's Union of America President Andrew Furuseth objected to the FAA (then proposed without any § 1 exemption). His worry: Shipowners would add *pre*-dispute arbitration clauses when engaging a seaman. Then, when a dispute arose, they would use the FAA to *compel* that seaman to submit that dispute to shipping-commissioner arbitration, even though that seaman, if choosing *post*-dispute, would have rather gone to court. *See* Analysis of H.R. 13522 Submitted by President Andrew Furuseth to the Convention Which Was Adopted, in *Proceedings of the Twenty-Sixth Annual Convention of the International Seamen's Union of America* 204 (Int'l Seamen's Union of Am. ed. 1923).[3]

Had the FAA "seamen" exemption been as limited as Flowers reads it, the FAA would have disrupted shipping commissioner arbitration in just the way Furuseth warned, because such arbitration covered disputes that did *not* turn on whether the seaman had in fact crossed state or foreign borders.

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[3] The FAA's drafters referred to Furuseth's opposition when suggesting what became the FAA's workers exemption. *See Report of the Committee on Commerce, Trade and Commercial Law*, 46 Ann. Rep. A.B.A. 284, 287 (1923); *Hearing on S. 4213*, *supra* at 9. Although this Court gave no weight to Furuseth's opposition to *any* employment arbitration, *see Circuit City*, 532 U.S. at 119-20, his worry shows *how* the FAA could have affected shipping-commissioner arbitration, and thus why Congress had reason to exempt seamen from the FAA, *see id.* at 121.

To illustrate, suppose a vessel set to voyage from the port of San Francisco to the port of Philadelphia by way of the Panama Canal. If a "seaman signed an agreement" to work on that vessel and then was unjustifiably fired "*before* the commencement of th[at] voyage," that seaman had the right to receive one month's wages. 46 U.S.C. § 594 (1925) (emphasis added). If the master and the seaman assent, a shipping commissioner could decide any dispute over this right in San Francisco; the seaman was no less a "seaman" by not having in fact crossed a state or foreign border.

Similarly, if that seaman had joined the crew in San Francisco but was discharged when the vessel made an intermediate stop in the port of Los Angeles, the vessel's master or owner had to pay that seaman's wages within a specified time absent "sufficient cause." *Id.* § 596. Or if that seaman had been "shipped" contrary to "any act of Congress," that seaman could "leave the service at any time" and recover certain wages. *Id.* § 578. A shipping commissioner could decide disputes arising from these rights in Los Angeles if the master and the seaman assented, even though that seaman had not personally crossed any border between States or between a State and a foreign country or territory.

If the FAA had exempted only seamen who in fact had crossed interstate or foreign borders, shipowners could have used pre-dispute arbitration clauses and the FAA to force putatively non-exempt seamen into shipping-commissioner arbitration, thus undermining Congress's decision to predicate such arbitration on the *post-dispute* assent of both parties. Moreover, that scheme's coverage would have turned

on a question—whether the seaman had crossed State or foreign borders—that otherwise did not matter to the merits of many disputes.

Similarly, Flowers' reading of the FAA "seamen" exemption runs contrary to the status of maritime pilots as seamen. Maritime pilots are "trained and skilful [sic] seamen" hired to navigate vessels into and out of ports. *The China*, 74 U.S. 53, 67 (1868); *see Pac. Mail S.S. Co. v. Joliffe*, 69 U.S. 450, 456 (1864) (explaining that pilotage statute aimed "to create a body of hardy and skilful [sic] seamen . . . to pilot vessels seeking to enter or depart from the port"). Such pilots were treated as part of a vessel's crew. *See, e.g.*, 46 U.S.C. § 221 (1925) (requiring "all the officers of vessels of the United States who shall have charge of a watch, including pilots" to be U.S. citizens).

By 1925, Congress had long let States regulate the employment and licensing of some maritime pilots. *See* 46 U.S.C. §§ 211-215 (1925); *Anderson v. P. Coast S.S. Co.*, 225 U.S. 187, 195-98 (1912). In turn, some States required vessel masters or owners to hire a licensed pilot to navigate certain ports and waterways within the State's boundaries. *E.g.*, *China*, 74 U.S. at 60-61.

A pilot's status as a "seaman"—and thus whether shipping-commissioner arbitration could cover pilot fee disputes—did *not* turn on whether that pilot had in fact crossed any border between States or between a State and foreign country. To the contrary, pilots typically stayed at a particular port and joined a vessel's crew only so long as to navigate it into or out of that port. *See* Florence E. Parker, *Development and Operation of Pilots' Associations at Representative*

Ports, 19 Monthly Lab. Rev. 16, 18 (1924). Pilots' associations at each port owned the pilot-boats that brought pilots to the vessels they would then navigate into port. *See id.* at 17, 20.

Thus, while a vessel may have voyaged from, say, Philadelphia to San Francisco, a pilot who joined its crew just outside the port of San Francisco would not necessarily *himself* cross any border between two States, or between a State and any particular foreign country or territory, to bring that vessel into port. That pilot was nonetheless engaged in interstate or foreign commerce. *See Cooley v. Board of Wardens*, 53 U.S. 299, 316 (1852) (holding that the Commerce Clause power to regulate navigation includes regulating pilots even though "the pilot is on board only during *a part of* the voyage between ports of different states or between ports of the United States and foreign countries") (emphasis added). The example of maritime pilots alone shows how the FAA's "seamen" exemption can cover workers who do not cross State or foreign borders so long as their work plays a necessary role in the free flow of goods in interstate or foreign commerce.

* * * *

Because the existing dispute resolution schemes for railroad employees and seamen encompassed workers like Mr. Brock who transported goods or passengers intrastate as part of a longer interstate journey, this Court should conclude that the exceptions for railroad employees and seamen in § 1 of the FAA have the same scope. And, by operation of the *ejusdem generis* canon of construction, the phrase "other class of workers engaged in foreign or interstate commerce" is "controlled and defined by

reference" to the definitions of seamen and railroad employees that precede it, *Saxon*, 596 U.S. at 458, so it likewise covers workers like Mr. Brock who transport goods on an intrastate leg of an interstate journey.

CONCLUSION

This Court should decide the question presented in the respondent's favor.

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Respectfully submitted,

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