No. 22-1268

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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MARGARITO V. CANALES; BENJAMIN J. BARDZIK,

*Plaintiffs-Appellees*,

v.

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

*Defendants-Appellants.*

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On Appeal from the United States District Court
for the District of Massachusetts, No. 1:21-cv-40065-ADB

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# BRIEF OF DEFENDANTS-APPELLANTS

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants-Appellants state that Defendant-Appellant C.K. Sales Co., LLC is a wholly owned subsidiary of Defendant-Appellant Lepage Bakeries Park St., LLC, which is itself a wholly owned subsidiary of Defendant-Appellant Flowers Foods, Inc. Defendant-Appellant Flowers Foods, Inc. is a publicly held corporation whose shares are traded on the New York Stock Exchange under the ticket symbol FLO.

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## STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellants Flowers Foods, Inc. and its bakery subsidiaries (collectively, "Flowers Foods" or "Flowers") respectfully request oral argument. This appeal raises important questions about the meaning and scope of the Federal Arbitration Act's "transportation worker" exemption. *See* 9 U.S.C. § 1. That provision is the subject of a recent decision by the U.S. Supreme Court, *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022); a recently filed petition for certiorari, *Domino's Pizza LLC v. Carmona*, No. 21-1572 (U.S.); and many other recent and pending cases across the country. Flowers respectfully submits that oral argument will help the Court analyze and resolve the issues.

## STATEMENT OF JURISDICTION

This is an appeal from an order of the United States District Court for the District of Massachusetts, which had diversity jurisdiction under 28 U.S.C. § 1332. Flowers moved to dismiss this lawsuit, or in the alternative to stay the lawsuit and compel Plaintiffs to arbitrate their claims pursuant to their contractual agreements. Dkt. 10 (Aug. 13, 2021). On March 30, 2022, the district court denied Flowers' motion. Add. 1. On April 11, 2022, Flowers filed a timely notice of appeal. App. 138. This court has jurisdiction over the district court's order denying Flowers' motion pursuant to 9 U.S.C. § 16.

## STATEMENT OF THE ISSUE

Whether the district court erred in concluding that Plaintiffs—owners of an independent franchise business that purchased the rights to market, sell, and distribute Flowers products within defined, intrastate territories—qualify as "transportation workers" under § 1 of the Federal Arbitration Act.

## INTRODUCTION

Flowers produces a wide range of food products, including well-known brands of breads and snacks. Flowers subsidiaries contract with "Independent Distributors" to facilitate the sale and local distribution of Flowers products. Independent Distributors are independently operated franchise businesses that market, sell, and distribute Flowers products exclusively within defined geographic territories. Independent Distributors can turn a profit (or incur a loss) by increasing (or decreasing) the sales of Flowers products within their territories or by reselling those territories for more (or less) than their original purchase price. To succeed, Independent Distributors must of course distribute Flowers products. But they must also use their business acumen to execute and increase sales—for example, by soliciting new accounts, asking for displays, and merchandising effectively.

Plaintiffs are owners of T&B Dough Boys, Inc. ("T&B"), an Independent Distributor that entered written agreements to purchase the rights to market, sell, and distribute Flowers products in four territories—all of which are within the Commonwealth of Massachusetts. In this lawsuit, Plaintiffs allege that they qualify as Flowers employees, entitling them to unpaid wages, overtime compensation, and other damages under Massachusetts law. Plaintiffs' claims lack merit. This appeal, however, is limited to the threshold question of whether a court or an arbitrator should resolve them. Because Plaintiffs signed arbitration agreements that cover

any claim they might have against Flowers, including claims about T&B's "status as anything other than an independent contractor," the district court should have granted Flowers' motion to compel arbitration. App. 86–87.

The district court held, however, that Flowers cannot enforce these arbitration agreements under § 1 of the FAA. Add. 9. Section 1 provides that 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. In interpreting that provision, the Supreme Court has emphasized that the residual clause (*i.e.*, the "other class of workers") must be "afforded a narrow construction." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001). In addition, the clause must be "controlled and defined by reference to the enumerated categories of workers which are recited just before it." *Id.* at 115.

Nevertheless, the district court concluded that Plaintiffs qualify as "transportation workers" for purposes of § 1. In so doing, it committed three distinct errors.

*First*, the court effectively acknowledged that neither Plaintiffs nor their trucks *ever* "cross state lines," and their business operates exclusively within the Commonwealth of Massachusetts. Add. 11 n.3. Nevertheless, it found that Plaintiffs still qualify as "foreign or interstate" transportation workers because "the baked goods" they sell, market, and distribute previously "crossed state lines." *Id.*

at 9–10 & n.3. However, the Supreme Court recently reaffirmed that workers must themselves be "*directly* involved in transporting goods across state or international borders" for § 1 to apply. *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1789 (2022) (emphasis added); *see also id.* at 1789 n.2 (leaving open the question whether § 1 sweeps in "last leg" drivers for that reason). And this Court has likewise emphasized that transportation workers must be "primarily devoted to the movement of goods and people *beyond* state boundaries." *Cunningham v. Lyft, Inc.*, 17 F.4th 244, 253 (1st Cir. 2021) (emphasis added). Because Plaintiffs' sales and distribution activities occur exclusively within the Commonwealth, § 1 does not apply. A contrary ruling would encompass all manner of workers that look nothing like "seamen" or "railroad employees," transforming § 1's narrow exception into a sweeping one that swallows the rule for broad swaths of the national economy.

*Second*, the district court relied almost exclusively on Plaintiffs' self-serving, three-page affidavits to conclude that they spend most of their workdays driving trucks. Add. 10–11. But the text of § 1 demands that courts focus on the text of the relevant "contracts of employment" and on the "class of workers" as a whole, not on any individual worker's account of his activities. 9 U.S.C. § 1; *see also Saxon*, 142 S. Ct. at 1786. Under the contracts between Flowers and T&B, Plaintiffs are franchise business owners with a wide array of responsibilities, whose success or failure is measured not by-the-mile but in terms of sales and growth. Although

Plaintiffs may choose to deliver product themselves, they are also free to (and in fact do) hire employees to do that work. And in any event their income does not rise or fall based on how far or long they drive. As a result, their role is nothing like that of "seamen" or "railroad employees"—neither of which can outsource the transportation component of their work and still have a job. In § 1, Congress meant to capture workers for whom direct involvement in interstate transportation is the *sine qua non* of their employment. So Plaintiffs do not qualify.

*Third*, Flowers is a baking company, not a transportation company, and individuals working *outside* the "transportation industry" simply do not fall within § 1's ambit. *Hill v. Rent-A-Ctr., Inc.*, 398 F.3d 1286, 1290 (11th Cir. 2005); *see also Bissonnette v. LePage Bakeries Park St., LLC*, 33 F.4th 650, 652 (2d Cir. 2022) ("plaintiffs are not 'transportation workers,' even though they drive trucks, because they are . . . not [in] a transportation industry").

For any and all of these reasons, this Court should reverse the decision below and compel arbitration.

## STATEMENT OF THE CASE

### A. Factual Background

"Flowers Foods is the parent holding company of numerous operating subsidiaries which produce fresh breads, buns, rolls, and snack cakes." App. 17 ¶ 2. Flowers divides the market for its products into geographic territories, and sells

exclusive sales and distribution rights for each territory to franchisees it calls "[I]ndependent [D]istributors." *Id.* at 7 ¶¶ 15, 19; *id.* at 34. Independent Distributors market, sell, and distribute Flowers products to retail stores, convenience stores, and restaurants within their respective territories. *See id.* at 34–35 ¶¶ 2.1, 2.4. In the process, Independent Distributors purchase products from Flowers and then resell those products to their customers at a higher price. *See id.* at 21 ¶ 12. Each Independent Distributor's profits thus consist of the difference between the products' purchase price and their sale price, minus the Independent Distributor's other business expenses. By establishing new product accounts within their territories and growing existing relationships, Independent Distributors can also increase the value of those territories, which they may then "s[e]l[l] or transfer[] in whole or in part." *Id.* at 45 ¶ 15.1. On the flipside, Independent Distributors can incur losses when they fail to provide good service, when accounts shrink or shut down, or when they fail to properly manage their business expenses.

Plaintiffs are the two owners of T&B Dough Boys, a Massachusetts corporation that serves as an Independent Distributor for Flowers subsidiary CK Sales. *Id.* at 18 ¶ 4; *id.* at 26 ¶ 18. Margarito Canales—a former grocery store employee with "experience in retail, management, and in sales," *id.* at 121—owns 51% of T&B, and Benjamin Bardzik—who "had the connections to get . . . decent and affordable trucks" for T&B, *id.* at 122—owns the other 49%. *Id.* at 26 ¶ 18. In

2018, T&B entered into Distributor Agreements with CK Sales for three territories. *Id.* at 34; *id.* at 18–19 ¶ 5. All three of those territories fall entirely within the Commonwealth of Massachusetts, and all three are serviced from a warehouse located in North Reading, Massachusetts. *Id.* at 18–19 ¶ 5, 21 ¶ 11. Plaintiffs allege that they were personally involved in the day-to-day operations of T&B in those territories, *see id.* at 8–9 ¶¶ 22, 25, 34, though T&B also hired employees to assist in that work, *see id.* at 19 ¶ 6; *id.* at 90.

In June 2019, T&B expanded by purchasing a fourth Massachusetts territory. *Id.* at 19 ¶ 7. In connection with that purchase, Plaintiffs submitted a business plan, which discussed how they planned to increase sales of Flowers products within the fourth territory by adding accounts and selling additional brands of Flowers products. *See id.* at 19–20 ¶ 8; *id.* at 90–91. The new territory included "a well-known vacation spot in addition to being an affluent area" and "a hot-bed for organic products." *Id.* at 123. And Plaintiffs were confident that T&B could increase its profit margin by ordering the right products, providing special items for weekend sales, and ensuring sufficient supply of products during periods of seasonal demand, *e.g.*, hot dog buns in the summer. *See id.* at 90–91. The plan also specified that a full-time T&B employee would work in the fourth territory five days a week. *See*

*id.* at 90. Plaintiffs planned to merchandise and interface with large customers on Wednesdays and Sundays. *See id.*

In October 2020, however, Plaintiffs arranged for CK Sales (the Flowers subsidiary with whom they directly contracted) to buy back the fourth territory in order to facilitate T&B's purchase of a different territory (the "fifth territory"). *Id.* at 20 ¶ 9. Once again, T&B signed a Distributor Agreement with CK Sales. *Id.* at 94. And once again, Plaintiffs submitted a business plan, which heavily emphasized the role of the additional full-time employee T&B had hired. *Id.* at 20 ¶ 9; *id.* at 121–27. Substituting this fifth territory for the fourth, the plan explained, would increase T&B's profit margin because the fifth territory (unlike the fourth one) "would be in a contiguous territory with the [first] three." *Id.* at 123. Not only did Plaintiffs represent that owning contiguous territories would allow T&B to operate more efficiently, they also asserted that the value of their investment would increase because contiguous territories would "mak[e] a potential sale to a [new] prospective owner more attractive." *Id.*

**B. The Distributor Agreements**

The relationship between Flowers' subsidiaries and T&B is spelled out in the Distributor Agreements Plaintiffs signed on T&B's behalf.[1] App. at 33–88, 93–119.

[1] The language of the 2018, 2019, and 2020 Agreements is identical unless otherwise noted. *See* App. 33–88, 93–119.

In each case, Canales signed the Distributor Agreement for T&B, and Bardzik signed as a witness. *Id.* at 55, 85, 116. The Distributor Agreements make clear that T&B is "an independent business." *Id.* at 46–47 ¶ 16.1 ("DISTRIBUTOR's business is separate and apart from that of COMPANY and it is of the essence of this Agreement that DISTRIBUTOR is an independent business."). They also make clear that Flowers does not control "the specific details or manner and means of [each Distributor's] business." *Id.*

Those general provisions are consistent with more specific ones. For example, the Agreements provide that the Independent Distributor is "responsible for obtaining [its] own delivery vehicle(s) and purchasing adequate insurance thereon[.]" *Id.* at 41–42 ¶ 9.1. It can make and use its own "advertising materials." *Id.* at 44 ¶ 13.1. It may use Flowers "trade names and trademarks" as it sees fit "in connection with [the] advertising, promoting, marketing, sale, and distribution of [Flowers] Products in the Territory." *Id.* at 50 ¶ 19.1. And it can decide whether to dispose of "[s]tale" products, sell them for non-human consumption, donate them to charity, or sell them back to Flowers. *Id.* at 43–44 ¶¶ 12.1–12.3. In addition, the Independent Distributor is "solely responsible for all taxes and transactional reporting requirements." *Id.* at 46 ¶ 15.4. It may "engage any legal and/or accounting professional services [it] deems necessary." *Id.* at 47 ¶ 16.3. And it can operate outside businesses and sell noncompetitive products. *See id.* at 37–38 ¶ 5.1.

The Agreements, moreover, "do[] not require that [the Distributor's] obligations [t]hereunder be conducted personally by [an] Owner." *Id.* at 47 ¶ 16.2. Instead, an Independent Distributor is "free to engage such persons as [it] deems appropriate"—just as T&B did here. *Id.* Moreover, an Independent Distributor is contractually obligated to use its "best efforts" to increase sales. *See id.* at 37–38 ¶ 5.1.

The Distributor Agreements also contain a "Mandatory and Binding Arbitration" provision that incorporates, as Exhibit K, a separate Arbitration Agreement. *See id.* at 49–50 ¶ 18.3 (Distributor Agreement provision); *id.* at 58 (Arbitration Agreement). The Arbitration Agreement provides that:

> The parties agree that any claim, dispute, and/or controversy except as specifically excluded herein, that either DISTRIBUTOR (***including its owner or owners***) may have against COMPANY ([or its affiliates and agents]) or that COMPANY may have against DISTRIBUTOR (or its owners[] [and agents]), arising from, related to, or having any relationship or connection whatsoever with the Distributor Agreement between DISTRIBUTOR and COMPANY ("Agreement"), including the termination of the Agreement, services provided to COMPANY by DISTRIBUTOR, or any other association that DISTRIBUTOR may have with COMPANY ("Covered Claims") 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 ("AAA" or "AAA Rules"), or any successor rules, except as otherwise agreed to by the parties and/or specified herein.

*Id.* (emphasis added). The covered claims specifically include "claims challenging the independent contractor status of [the Independent Distributor], claims alleging

that [the Independent Distributor] was misclassified as an independent contractor, [and] any other claims premised upon [the Independent Distributor's] alleged status as anything other than an independent contractor[.]" *Id.* at 59.

The Agreement further states that "[t]he Arbitrator shall have the authority to award the same damages and other relief that would have been available in court." *Id.* at 58. And "[a]ny issues concerning arbitrability of a particular issue or claim under this Arbitration Agreement (except for those concerning the validity or enforceability of the prohibition against class . . . arbitration and/or applicability of the FAA) shall be resolved by the arbitrator, not a court." *Id.* at 59.

In connection with the Distributor Agreement, Plaintiffs also each signed a separate Personal Guaranty, in which both Plaintiffs expressly agreed and acknowledged that they would be "subject to the Arbitration Agreement attached hereto as Exhibit K." *Id.* at 56–57.

### C. Procedural History

On June 17, 2021, Plaintiffs filed a complaint in the U.S. District Court for the District of Massachusetts alleging that Defendants had misclassified them as independent contractors in violation of Massachusetts law. App. 5. Defendants moved pursuant to the Distributor Agreements to dismiss Plaintiffs' lawsuit in favor of arbitration, or alternatively to stay the lawsuit pending arbitration. Dkt. 10. As is relevant to this appeal, Plaintiffs argued that they cannot be compelled to arbitrate

under the FAA because they qualify as "transportation workers" for purposes of the § 1 exemption. Opp. to Mot. to Dismiss at 14–16, Dkt. 16.[2]

On March 30, 2022, the district court denied Defendants' motion, finding that Plaintiffs are "transportation workers within the meaning of § 1 and are exempt from the FAA." Add. 14. In so doing, the district court relied heavily on "Plaintiffs' statements that they spend over fifty hours a week delivering goods," even though "the Distributor Agreements do not require Plaintiffs to personally drive trucks or deliver goods[.]" *Id.* at 11. The district court also stated that Plaintiffs' other work is "so closely related to interstate commerce that Plaintiffs are practically a part of it." *Id.* at 12. With respect to the interstate element, the district court acknowledged that Plaintiffs never asserted that "they ever had to physically cross state lines to carry out their responsibilities." *Id.* at 11 & n.3. But "Plaintiffs[] represent[ed] that the baked goods crossed state lines before" they reached the warehouse. *Id.* And according to the district court, that was enough.

[2] Plaintiffs also argued that they were not bound by the arbitration provisions in the Distributor Agreements because they had signed those Agreements only on T&B's behalf. *See* Opp. to Mot. to Dismiss at 4–8, Dkt. 16. In addition, they argued the Distributor Agreements are invalid under Massachusetts law. *Id.* at 8–14. Both arguments are meritless. But the district court did not definitively resolve them, and they are not part of this appeal.

On April 11, 2022, Defendants timely appealed, invoking their right to interlocutory review of decisions denying motions to compel arbitration under the FAA. *See* 9 U.S.C. § 16.

## STANDARD OF REVIEW

This Court reviews *de novo* a district court's denial of a motion to compel arbitration. *Cunningham*, 17 F.4th at 249 (reviewing *de novo* the question of whether plaintiffs qualify for interstate transportation workers exemption to the FAA). On the merits of the arbitration issue, a "party to an arbitration agreement seeking to avoid arbitration generally bears the burden of showing the agreement to be inapplicable or invalid." *Harrington v. Atl. Sounding Co.*, 602 F.3d 113, 124 (2d Cir. 2010). And courts must construe "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration[.]" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (citation omitted); *cf. also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (holding that the party resisting arbitration must "show that Congress intended to preclude a waiver of a judicial forum [for the claims at issue]").

## SUMMARY OF THE ARGUMENT

Section 1's "residual clause" is "narrow," and courts must interpret it "by reference to the enumerated categories of workers": "seamen" and "railroad employees." *Circuit City*, 532 U.S. at 106, 115; *see also Saxon*, 142 S. Ct. at 1789.

Independent Distributors like Plaintiffs do not fall within § 1 because they are not a "class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. That is true for three independent reasons.

**I.** Plaintiffs are not "engaged in foreign or interstate commerce" for purposes of § 1 because they sell, market, and distribute Flowers products only within the bounds of the Commonwealth.

**A.** Plaintiffs own the rights to sell, market, and distribute Flowers products within geographically defined territories. Each of those territories is entirely within the bounds of Massachusetts. Thus, Plaintiffs *never* personally engage in interstate transportation in connection with their work for Flowers; that work occurs entirely within the Commonwealth. The baked goods they distribute, moreover, do not cross state lines once they come into Plaintiffs' possession; the goods' journey with T&B begins and ends in Massachusetts. Accordingly, Plaintiffs are engaged in purely *intrastate* aspects of the sale of those goods, not in "foreign or interstate commerce" as § 1 requires. In that respect, Plaintiffs look nothing like the "seamen" and "railroad employees" mentioned in the statute or the airline cargo loaders in *Saxon*. They do not even look like the Lyft driver plaintiffs in *Cunningham*, who sometimes cross state lines and regularly carry passengers to and from airports, as Plaintiffs never distribute goods bound for anywhere outside of the Commonwealth. Because Plaintiffs are not "primarily devoted to the movement of goods and people beyond

state boundaries," they are not exempt from the FAA under § 1. *Cunningham*, 17 F.4th at 253.

**B.** The fact that the baked goods Plaintiffs sell, market, and distribute may have themselves crossed state lines prior to reaching Plaintiffs is irrelevant. Indeed, this Court rejected a similar argument in *Cunningham*, when it drew "a line between the interstate transportation provided by the airlines and the local intrastate transportation provided by Lyft drivers." *Id.* at 251. It should do the same here. Any other rule would extend § 1 far beyond its intended scope, bringing any worker who touches a good in transit within its reach.

**II.** Even assuming the requisite "foreign or interstate" nexus were present, Plaintiffs are not akin to "seamen" and "railroad employees" because they are independent, franchise business owners with a wide array of responsibilities.

**A.** Section 1 covers only those classes of workers for whom "the interstate movement of goods is a central part of the . . . job description." *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 801 (7th Cir. 2020) (Barrett, J.). Plaintiffs own an independent business franchise. In that role, they balance a wide variety of sales and customer-service responsibilities—and may choose which of those responsibilities to delegate to employees. *See supra* at 9–12. Plaintiffs are thus nothing like the kinds of employees that qualify as "transportation workers" under § 1. Plaintiffs' allegations that they spend most of their days driving trucks do not change that result.

The § 1 inquiry must focus on the terms of the "contract[] of employment" and on the class of workers "as a whole." *Saxon*, 142 S. Ct. at 1787. And the contracts here confirm that Plaintiffs are business owners, not truck drivers.

**B.** Indeed, Plaintiffs do not even have "contracts of employment" within the meaning of § 1. As the Supreme Court explained in *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019), § 1 applies only to "contract[s] for the performance of work by workers." *Id.* at 540–41. But here, the only contract for the performance of work is with T&B, not with Plaintiffs themselves. *E.g.*, App. 33–55. Plaintiffs are not obligated to work for Flowers at all, and the Distributor Agreement includes no payment terms. The primary role of T&B in the contracts at issue underscores that Plaintiffs are not "transportation workers" for purposes of § 1.

**III.** Finally, Plaintiffs are not transportation workers because they do not work in the transportation industry. Flowers is not an airline (like Southwest Airlines in *Saxon*) or a rideshare company (like Lyft in *Cunningham*). It is not even a marketplace for the distribution of goods (like Amazon in *Waithaka*). Instead, Flowers is engaged in the fundamentally different enterprise of producing baked goods. Because the "transportation worker" exception applies only to classes of workers within the transportation industry, Plaintiffs do not qualify.

## ARGUMENT

Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Gilmer*, 500 U.S. at 24. To that end, the FAA embodies a "liberal federal policy favoring arbitration." *Cunningham*, 17 F.4th at 249 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). The Act's primary substantive provision, § 2, states that arbitration agreements "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. Section 1, in turn, sets forth a narrow exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id*. § 1; *see Circuit City*, 532 U.S. at 118. The Supreme Court has repeatedly explained that the exemption's "residual clause"—*i.e.*, the "other class of workers"—"should . . . be controlled and defined by reference to the enumerated categories of workers which are recited just before it[.]" *Circuit City*, 532 U.S. at 114–15; *see also Saxon*, 142 S. Ct. at 1786.

In applying that standard, courts have identified three necessary characteristics of plaintiffs who fall within § 1's residual clause. *First*, the "class of workers" to which the plaintiff belongs must be "directly involved in transporting goods across state or international borders." *Saxon*, 142 S. Ct. at 1789; *see also Cunningham*, 17 F.4th at 253. *Second*, the "movement of goods" must be "a central

part of the . . . job description." *Wallace*, 970 F.3d at 801. *Third*, the "class of workers" must be part of "the transportation industry." *Hamrick v. Partsfleet, LLC*, 1 F.4th 1337, 1349 (11th Cir. 2021); *see also Bissonnette*, 33 F.4th at 652. Plaintiffs miss all three marks.

## I. PLAINTIFFS ARE NOT ENGAGED IN FOREIGN OR INTERSTATE TRANSPORTATION.

To qualify as "transportation workers" under § 1's residual clause, Plaintiffs must belong to a class of workers "primarily devoted to the movement of goods and people beyond state boundaries." *Cunningham*, 17 F.4th at 253; *see also Saxon*, 142 S. Ct. at 1789 (explaining that workers must be "directly involved in transporting goods across state or international borders"). Because Plaintiffs are "in the business of facilitating local, intrastate" transportation, not foreign or interstate transportation, they fall outside of § 1. *Cunningham*, 17 F.4th at 253. That is true notwithstanding that the baked goods Plaintiffs sell, market, and distribute cross state borders before coming into Plaintiffs' hands.

### A. Plaintiffs' Business Operates Exclusively Within the Commonwealth of Massachusetts.

There is no dispute that T&B's business consists of selling, marketing, and distributing Flowers products within strictly defined geographic territories. There is also no dispute that those territories are all within the Commonwealth of Massachusetts. *See* Add. 11 n.3 ("Plaintiffs do not assert that they ever had to

physically cross state lines to carry out their responsibilities."); App. 6 ¶ 9 (alleging that Plaintiffs "deliver . . . baked goods and stock shelves at stores in Massachusetts along specific routes, also known as 'territories.'"); *id.* at 18 ¶ 3 ("Plaintiffs . . . purchase distribution rights to sell and distribute products in a defined geographic area ('territory')."); *id.* at 21 ¶ 11 ("[A]ll of their territories were entirely in Massachusetts."). Plaintiffs, accordingly, are in "the business of facilitating local, intrastate" sales and distribution. *Cunningham*, 17 F.4th at 253. They play no role—much less a "primar[y]" role—in "the movement of goods [or] people beyond state boundaries." *Id.*; *see also Wallace*, 970 F.3d at 801 (explaining that "interstate movement of goods" must be a "central part of [the workers'] job description").

As a result, Plaintiffs are "fundamentally unlike seamen and railroad employees," the enumerated classes of workers specifically mentioned in § 1. *Cunningham*, 17 F.4th at 253; *see also Circuit City*, 532 U.S. at 115 (explaining that the residual clause should be "controlled and defined by reference" to the specific classes of "'seamen' " and " 'railroad employees'" mentioned immediately prior). They are also fundamentally unlike other classes of workers that courts have found to be sufficiently connected to foreign or interstate commerce to qualify as "transportation workers" under § 1. The Southwest Airlines employees in *Saxon*, for example, were responsible for "physically loading cargo directly on and off an airplane headed out of State." 142 S. Ct. at 1792. And the plaintiff in *New Prime*

worked for an "interstate trucking company" that transported goods across state lines. 139 S. Ct. at 536.

Instead, the intrastate nature of Plaintiffs' work more closely resembles classes of workers that courts have held *not* to qualify as transportation workers. In *Cunningham*, for example, this Court rejected a § 1 claim by Lyft drivers on the ground that their "job[s] primarily involve[d] intrastate transportation." *Cunningham*, 17 F.4th at 252. Likewise, in *Capriole*, the Ninth Circuit held that § 1 does not apply to Uber drivers because their "work 'predominantly entail[ed] intrastate trips[.]'" *Capriole v. Uber Techs., Inc.*, 7 F.4th 854, 864 (9th Cir. 2021) (quoting *In re Grice*, 974 F.3d 950, 956–58 (9th Cir. 2020)).[3] Finally, in *Wallace*, then-Judge Barrett held that Grubhub drivers who delivered food from local restaurants to area residents did not qualify as "transportation workers" under § 1 because their work was not connected to "the act of moving . . . goods across state or national borders." 970 F.3d at 802–03; *see also Wallace v. Grubhub Holdings*

[3] In *Singh v. Uber Technologies Inc.*, 939 F.3d 210 (3d Cir. 2019), the Third Circuit did not rule out the possibility that Uber drivers could fall within the § 1 exemption. *Id.* at 227. It simply remanded for discovery because the "pleadings sa[id] little about whether the class of transportation workers to which Singh belongs are engaged in interstate commerce or sufficiently related work." *Id.* at 226; *see also id.* at 227–28 (noting that the court lacked such fundamental information as "the contents of the parties' agreement(s)"). Of course, to the extent the Third Circuit's analysis in *Singh* conflicts with this Court's analysis in *Cunningham*, *Cunningham* controls.

*Inc.*, No. 18 C 4538, 2019 WL 1399986, at *3 (N.D. Ill. Mar. 28, 2019) (making clear that the plaintiffs had never "argue[d] that they crossed state lines" in the course of their work); *see also, e.g.*, *Magana v. DoorDash*, *Inc.*, 343 F. Supp. 3d 891, 899 (N.D. Cal. 2018) (explaining that courts have "declined to find that a delivery driver engaged in interstate commerce [for purposes of § 1] where he did not allege that he made interstate deliveries").

Indeed, this case is much easier than *Cunningham*, *Capriole*, and even *Wallace*, because neither Plaintiffs nor their trucks *ever* cross state lines in the course of their work; the baked goods Plaintiffs sell and distribute always end their journeys inside the Commonwealth. By contrast, the Lyft drivers in *Cunningham* alleged that many of them at least "occasionally transport[ed] passengers across state lines." *Cunningham*, 17 F.4th at 252. The Uber drives in *Capriole* alleged that they "sometimes cross[ed] state lines" to pick up or drop off passengers. *Capriole*, 7 F.4th at 863. And while the GrubHub driver plaintiffs in *Wallace* never alleged that they crossed state lines, 2019 WL 1399986, at *3, it is entirely possible that food delivery drivers could pick up pizzas in northern Connecticut and deliver them to homes in southern Massachusetts (or vice versa). Restaurant delivery is fluid

between border towns. Unlike *any* of these other cases, the in-state geographic scope of Plaintiffs' work is spelled out in the relevant contracts.

Because Plaintiffs belong to a class of workers engaged in intrastate sales and distribution, they fall outside the scope of § 1's residual clause.

### B. The Fact That Flowers Products May Have Crossed State Lines at Some Point Is Insufficient to Render Plaintiffs "Foreign or Interstate" Transportation Workers.

In ruling otherwise, the district court appears to have relied exclusively on the fact that "the baked goods" T&B sells, markets, and distributes "crossed state lines before arriving" at the warehouse from which Plaintiffs' sales and distribution process begins. Add. 11. But the fact that Flowers products may have traveled in interstate commerce at some point in their histories is insufficient to bring Plaintiffs within the scope of § 1.[4]

[4] To be sure, the fact that Flowers products cross state lines separate and apart from T&B's business *does* mean that Plaintiffs work within "interstate commerce" for purposes of the Motor Carrier Act exemption to the FLSA. But that is a completely different statutory framework that is "irrelevant" to "the issue of whether [the plaintiff] is excepted from arbitration under Section 1 of the FAA." *Freeman v. Easy Mobile Labs, Inc.*, No. 16-CV-00018, 2016 WL 4479545, at *2 n.2 (W.D. Ky. Aug. 24, 2016); *see also Vargas v. Delivery Outsourcing, LLC*, No. 15-CV-03408, 2016 WL 946112, at *4 (N.D. Cal. Mar. 14, 2016) (explaining that cases addressing the FLSA are not relevant to the FAA question because the FLSA is "construed broadly" whereas § 1 of the FAA is "construed narrowly"). The Motor Carrier Act comes much closer to "expressing congressional intent to regulate to the outer limits of authority under the Commerce Clause" than does the FAA. *Circuit City*, 532 U.S. at 115–16.

That is clear, first and foremost, from the text of § 1, which extends only to "foreign or interstate commerce." 9 U.S.C. § 1. In *Circuit City*, the Court engaged in an extended interpretation of the phrase "interstate commerce" in § 1, and concluded that that language cannot be read to extend to "the outer limits of [Congress's] authority under the Commerce Clause." 532 U.S. at 115–16. Instead, the Court "relied on two well-settled canons of statutory interpretation"—meaningful variation and *ejusdem generis*—to conclude that workers "must at least play a direct and 'necessary role in the free flow of goods' across borders" to qualify as "transportation workers" for purposes of the residual clause. *Saxon*, 142 S. Ct. at 1789–90 (summarizing and quoting *Circuit City*, 532 U.S. at 115–17, 119, 121). The focus, in other words, is on the role of the *workers*, not the origin of the *goods*. *See Hamrick*, 1 F.4th at 1350 ("Section one is directed at what the class of workers is engaged in, and not what it is carrying.").

*Saxon* underscores that point. As the Supreme Court emphasized, § 1 "speaks of 'workers[.]'" 142 S. Ct. 1788 (quoting *New Prime*, 139 S. Ct. at 541). And that word "directs the interpreter's attention to 'the performance of work.'" *Id.* (quoting *New Prime*, 139 S. Ct. at 541). In addition, "the word 'engaged' . . . similarly emphasizes the actual work that the members of the class, as a whole, typically carry out." *Id.* (citations omitted). Accordingly, "to fall within the exemption, the workers

must be connected not simply to the goods, but to the act of moving those goods across state or national borders." *Wallace*, 970 F.3d at 802.

Consistent with these principles, courts have consistently found that § 1 applies only where the plaintiffs belong to a class of workers that is *itself* actively engaged in the enterprise of interstate transportation. *See, e.g.*, *Saxon*, 142 S. Ct. at 1790 (emphasizing that "one who loads cargo on a plane bound for interstate transit is intimately involved with the commerce (*e.g.*, transportation) of that cargo"). The fact that the goods or people transported may have crossed state lines at some other point—and separate and apart from the worker's activities—is irrelevant for purposes of § 1. *See Wallace*, 970 F.3d at 802 (holding that local delivery drivers did not qualify as "transportation workers" merely because "they carr[ied] goods that have moved across state and even national lines"); *Hamrick*, 1 F.4th at 1350 (holding that the fact "that the goods that are being transported have crossed state lines" is insufficient). For that reason, the Supreme Court made clear that it was not deciding whether so-called "last leg" drivers fell within § 1's scope; the question was not before the Court and the answer was not "so plain." *Saxon*, 142 S. Ct. at 1789 n.2.

To be sure, some courts have found that workers in the transportation industry who provide last-mile services as part of an interstate shipping operation—*e.g.*, "truckers who drive an intrastate leg of an interstate route"—can qualify as

"transportation workers" for purposes of § 1. *Wallace*, 970 F.3d at 802 (citing *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 25–26 (1st Cir. 2020)); *but see Hamrick*, 1 F.4th at 1352 (rejecting that position). In two recent cases, for example, courts have held that last-mile Amazon delivery drivers are "transportation workers" for purposes of § 1. *See Waithaka*, 966 F.3d at 26; *Rittman v. Amazon.com, Inc.*, 971 F.3d 904, 915 (9th Cir. 2020). In so doing, those courts reasoned that Amazon drivers are simply links in an unbroken interstate transit chain. *Rittman*, 971 F.3d at 916 ("The interstate transactions between Amazon and the customer do not conclude until the packages reach their intended destinations[.]"); *see also Cunningham*, 17 F.4th at 251 (discussing *Waithaka* and emphasizing that Amazon had "agreed with Amazon customers to transport goods interstate from their point of origin" all the way "to the customer's home").

But these cases were decided without the benefit of *Saxon*, and cannot be reconciled with the Supreme Court's focus on the direct involvement of workers in transportation across state or international borders. *See Saxon*, 142 S. Ct. at 1786–90 & n.2. In all events, the facts here are different because Plaintiffs own and operate a self-contained—and inherently local—business. Indeed, *Rittman* itself made clear that the § 1 analysis may well have turned out differently if Amazon's goods had been "held at warehouses for later sales to local retailers," and the delivery drivers were executing those subsequent sales. *Rittman*, 971 F.3d at 916. And here, T&B's

contracts with Flowers subsidiaries make clear that T&B actually purchases Flowers products and then resells them to its own customers for profit. *See* App. 21 ¶ 12.

*Cunningham* and *Capriole*—the Lyft and Uber cases from this Court and the Ninth Circuit, respectively—help crystalize the distinctions between Plaintiffs and last-mile delivery drivers. In those cases, the plaintiffs argued that they were interstate transportation workers because they "pick up and drop off passengers at airports who are heading to (or returning from) interstate travel" and would occasionally provide cross-border rides. *Capriole*, 7 F.4th at 863; *see also Cunningham*, 17 F.4th at 250. Both courts rejected those arguments. *See Cunningham* 17 F.4th at 250–52; *Capriole*, F.4th at 863–67. In *Cunningham*, this Court distinguished between (1) a single, integrated cross-border journey (for example, where a railroad contracts to have a passenger driven from one station to another), and (2) two separate journeys, handled by two different companies (for example, where a taxi takes a passenger to a railroad station). *See* 17 F.4th at 250 (discussing *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), overruled on other grounds by *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984)). Rideshare drivers, this Court concluded, fit squarely in the latter category. Just as "[o]ne would not reasonably say that [individuals] are engaged in interstate trucking" if they "give truck drivers rides to and from their garages," neither could

one reasonably say that rideshare drivers are "engaged in interstate travel merely because they bring passengers to and from an airport." *Id.* at 251.

The same is true here. Independent Distributors like T&B purchase products from Flowers and then resell those products to their customers for a higher price. *See* App. 21 ¶ 12. Although the baked goods they sell and distribute—much like the passengers Lyft and Uber drivers collect from airports—may have previously made an interstate journey, Independent Distributors like T&B are not directly engaged in undertaking or facilitating any border crossings. Again, the § 1 inquiry focuses on the workers, not the goods. *See, e.g.*, *Hamrick*, 1 F.4th at 1350. And Plaintiffs' role is limited to sales, marketing, and distribution within the Commonwealth of Massachusetts. Because Plaintiffs provide an "independent local service," *Cunningham*, 17 F.4th at 250 (quoting *Yellow Cab*, 332 U.S. at 233), and have no "direct and 'necessary role'" in interstate transportation, *Saxon*, 142 S. Ct. at 1790 (quoting *Circuit City*, 532 U.S. at 121), they are not "engaged in foreign or interstate commerce" for purposes of § 1.

To hold otherwise would stretch § 1 far beyond its intended bounds. It is a fact of modern life that much of what we use and consume travels in interstate commerce before it arrives in our households. If the fact that a worker is involved in the sale or distribution of a good that once travelled in interstate commerce were enough to make him an interstate transportation worker for purposes of § 1, then

many workers who look nothing like "seamen" or "railroad employees" would qualify. Take, for example, a florist who purchases flowers from out of state and then delivers bouquets to neighboring homes. Or take the paperboy, who receives newspapers from out of state and then cycles around his neighborhood dropping them off at subscribers' homes. These are surely not the kind of interstate transportation workers Congress had in mind. Plaintiffs are not, either.

## II. PLAINTIFFS ARE BUSINESS OWNERS, NOT TRANSPORTATION WORKERS.

This Court need go no further to conclude that Plaintiffs are not "transportation workers" for purposes of § 1. But even if this Court were to somehow find that Plaintiffs are engaged in "foreign or interstate" transportation, their role as franchise business owners separately excludes them from § 1's scope. As independent business owners, Plaintiffs have a broad array of responsibilities, and so look nothing like the "seamen" and "railroad employees" § 1 contemplates. 9 U.S.C. § 1. Indeed, the only "contract[] of employment" potentially at issue, *id.*, runs to T&B, not to Plaintiffs.

### A. Plaintiffs Are Franchise Business Owners, Not Transportation Workers.

The text of the FAA makes clear that § 1 covers only those workers whose primary responsibility is interstate transportation. That is apparent from § 1's references to "seamen" and "railroad employees"—groups of workers who transport

goods for a living. *See Circuit City*, 532 U.S. at 115 (explaining that "the residual clause . . . should . . . be controlled and defined by reference to" the terms "seamen" and "railroad employees"). It also follows from § 1's use of the word "engage[]." Workers are "engaged" in interstate transportation when that is the job they are hired to perform. *See, e.g.*, 5 OXFORD ENGLISH DICTIONARY 247–48 (2d ed. 1989) (defining "engage" as "[t]o hire, secure the services of," "[t]o enter into an agreement for service," or "[t]o provide occupation for, employ"). They are not "engaged" in interstate transportation when transportation of goods (or work integral thereto) is not their main "job description." *See Wallace*, 970 F.3d at 800–01; *Hill*, 398 F.3d at 1289.

"To determine whether a class of workers meets that definition, [courts] consider whether the interstate movement of goods is a *central part* of the class members' job description," like it is for "seamen" and "railroad employees." *Wallace*, 970 F.3d at 801 (emphasis added). Workers "whose occupation is not *defined by* its engagement in interstate commerce does not qualify for the exemption just because [they] occasionally perform[] that kind of work." *Id.* at 800 (emphasis added).

Plaintiffs are independent franchisee business owners, and their business, T&B, has a wide variety of sales and customer-service responsibilities. *See supra* at 9–12 (describing the responsibilities of Independent Distributors); *see also* App.

34–55 (same). In addition to overseeing T&B's delivery of products (and among other responsibilities), Plaintiffs ensure that T&B "obtain[s] [its] own delivery vehicle(s) and purchas[es] adequate insurance thereon," *id.* at 41–42 ¶ 9.1; makes and uses "advertising materials," *id.* at 44 ¶ 13.1; and hires any necessary employees, *id.* at 47 ¶¶ 16.2–16.3. *See supra* at 9–12. As owners of the business, Plaintiffs are not required to conduct any of these activities "personally." *Id.* at 47 ¶ 16.2. And T&B may ultimately sell all or a portion of its territories to a third party. *See id.* at 45 ¶ 15.1.

In order to best accomplish these ends, moreover, Plaintiffs prepared formal business plans. *Id.* at 90–91, 121–27. As those plans reflect, Plaintiffs had ample opportunity to develop and execute strategies aimed at increasing T&B's sales and profitability. For example, in a territory that included "a well-known vacation spot" and "an affluent area," Plaintiffs chose to promote "Dave's Killer Bread" in particular. *Id.* at 123. During summer months, Plaintiffs knew that buns and rolls would be in high demand. *Id.* at 90, 123. And where necessary or helpful to increase sales or efficiency, Plaintiffs hired and deployed part- and full-time employees. *See id.* at 90, 122–25. In doing all this, Plaintiffs monitored the resale value of their territories—both individually, and as a group. *See id.* at 127 (strategizing that contiguous territories would be more valuable than disparate ones in a potential

future sale). They were not calculating revenue by the mile or otherwise deriving revenue from truck driving itself.

It goes without saying that, in all of these respects, Plaintiffs differ from the "seamen" and "railroad employees" specifically identified in § 1. Indeed, Plaintiffs' status as independent business owners and the wide array of responsibilities that entails readily distinguishes them from the plaintiffs in just about every other § 1 case on the books—including the cargo loaders in *Saxon*, the Amazon delivery drivers in *Waithaka* and *Rittman*, the Grubhub drivers in *Wallace*, and the rideshare drivers in *Cunningham* and *Capriole*.

The "account manager" plaintiff in *Hill* perhaps resembles Plaintiffs most closely. As an "account manager" for Rent-A-Center, that "plaintiff's job duties involved making delivery of goods to customers out of state in his employer's truck[.]" 398 F.3d at 1288. He neither owned a business nor had the ability to delegate any delivery responsibilities to others. Still, his primary role was as an "account manager," not a truck driver. *Id.* And § 1, the Eleventh Circuit reasoned, was not designed to cover "interstate transportation activity incidental to . . . employment as an account manager." *Id.* at 1289; *cf. also, e.g.*, *Veliz v. Cintas Corp.*, No. C 03-1180, 2004 WL 2452851, at *1–2 (N.D. Cal. Apr. 5, 2004) (holding that "Sales Service Representatives" whose job was to "drive from . . . customer to . . . customer, delivering items such as uniforms, picking-up dirty uniforms for cleaning,

restocking other supplies, and (to varying and controverted degrees) selling additional products" were not "transportation workers"), *modified on other grounds on reconsideration*, 2005 WL 1048699 (N.D. Cal. May 4, 2005). That is all the more true of franchise business owners. Although Plaintiffs may choose to drive trucks when operating their businesses and servicing their customers, they may also hire others to do that work and, in any event, also perform myriad other non-transportation related functions that fundamentally transform the nature of their job description.

In holding otherwise, the district court relied almost exclusively on Plaintiffs' affidavits, which attest that Plaintiffs drive trucks most of the time. *See* Add. 10–11 ("Plaintiffs have put forth sworn affidavits stating that they spend the majority of their time making deliveries."). As an initial matter, the Distributor Agreements—which are the "contracts of employment" to which § 1 directs its analysis—delineate the full range of responsibilities Plaintiffs undertook on T&B's behalf. And Plaintiffs' own business plans—including, in particular, their decision to hire employees—confirm that they are far more than truck drivers. *See* App. 90, 122–25.

Moreover, the analysis in § 1 cases does not focus on one idiosyncratic worker. Instead, courts must assess the work that the relevant category of workers "as a whole, typically carr[ies] out." *Saxon*, 142 S. Ct. at 1788. So the way in which

Plaintiffs themselves happen to spend their time is, at most, only part of the story. To identify the job responsibilities that a "class, as a whole, typically carr[ies] out," *id.*, § 1 itself makes clear where a court's attention ought to focus: the very "contracts of employment" at issue. The Distributor Agreements, accordingly, trump Plaintiffs' unsupported individual accounts. Those agreements spell out the Independent Distributors' "job description." *Wallace*, 970 F.3d at 801. And they make more than clear that the owners of Independent Distributors—who are free to choose not to personally engage in *any* transportation—are not mere "transportation workers."[5]

### B. Because Plaintiffs are Business Owners, the Only "Contract of Employment" Runs to T&B, not to Plaintiffs.

All that assumes, moreover, that Plaintiffs—as opposed to T&B—have "contracts of employment" with Flowers in the first place. 9 U.S.C. § 1. After all, the § 1 exemption does not apply to every agreement involving transportation workers. It applies only to "*contracts of employment* of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id.*

[5] To the extent this Court believes that the Distributor Agreements and undisputed facts regarding the role of Independent Distributors do not definitively answer the § 1 question (and finds that the interstate and industry points are not otherwise dispositive), it should remand for the district court to develop and assess facts regarding the role of Independent Distributors more broadly. *See, e.g.*, *Singh*, 939 F.3d at 229 (remanding on similar grounds).

(emphasis added); *see also New Prime*, 139 S. Ct. at 540–41 (explaining that § 1 applies to "contract[s] for the performance of work by workers"). And because Plaintiffs are independent business owners, not employees, Plaintiffs do not even have one of those.

To the contrary, the only "employment contract" at issue here runs to T&B—the entity on whose behalf the Distributor Agreement was signed—not to Plaintiffs in their personal capacities. Although *New Prime* makes clear that the phrase "contracts of employment" sweeps in "contract[s] for the performance of work by workers" who may not qualify as employees, it never suggested that a "contract for the performance of work" was not required. *New Prime*, 139 S. Ct. at 541. Quite the opposite: Its holding that "contracts of employment" encompasses both "employer-employee agreements to perform work" and "agreements by independent contractors to perform work" presupposes that *some* "contract for the performance" of work by the plaintiffs is at issue. *Id.* at 541–42.

Plaintiffs here have identified no "contract for the[ir] performance of work" for *any Defendant*—only contracts that afford them an opportunity to work for *T&B* if they wish to do so. App. 47 ¶ 16.2 ("This Agreement does not require that DISTRIBUTOR'S obligations hereunder be conducted personally by Owner . . . ."); *see also* Add. 11 (acknowledging the Distributor Agreements "do not require Plaintiffs to personally drive trucks or deliver goods"). Those contracts (the

Distributor Agreements) say nothing about how Plaintiffs—51/49 equity owners of an independent business—are to be paid. Indeed, whether Plaintiffs make a profit or incur a loss hinges on their own business decisions.

Yes, Plaintiffs also signed Personal Guaranties in connection with T&B's Distributor Agreements. App. 56–57. In so doing, Plaintiffs agreed to serve as a "suret[ies]"—*i.e.*, to "pay any amounts due and owing" in the event T&B were to breach the Distributor Agreements. *Id.* They also agreed to arbitrate any claims they might have against Flowers. *See id.* ("GUARANTOR agrees and acknowledges he/she is subject to the Arbitration Agreement"). But nowhere did Plaintiffs agree to "perform work" for Flowers, as a "contract of employment" would require. *See New Prime*, 139 S. Ct. at 539.

That the "contract of employment" at issue is the Distributor Agreement between Flowers and T&B is thus yet another reason § 1 does not apply to Plaintiffs' claims. It also highlights the fundamental problem with Plaintiffs' attempt to classify themselves as "transportation workers": Plaintiffs are the owners of an independent, separately incorporated business. *That business* purchased from Flowers the right to sell, market, and distribute its products within specific geographic territories. Plaintiffs, as owners, may choose to do any or all of that sales, marketing, and distribution work on T&B's behalf. But they remain franchise business owners, not transportation "transportation workers" under § 1.

## III. FLOWERS IS NOT PART OF THE TRANSPORTATION INDUSTRY

Even if Plaintiffs were "directly involved in transporting goods across state or international borders," *Saxon*, 142 S. Ct. at 1789, and even if their job description were akin to a seaman's or a railroad employee's, Plaintiffs would *still* not qualify as transportation workers under § 1 because they are not "employed in the transportation industry." *Hill*, 398 F.3d at 1290; *see also Bissonnette*, 33 F.4th at 655 ("[T]he FAA exclusion is limited to workers involved in the transportation industry[.]") (citing *Erving v. Va. Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972)).

That the § 1 exemption is limited to "'classes' of transportation workers" who work "within the transportation industry" is apparent from the text of § 1. *Hill*, 398 F.3d at 1289–90. Indeed, it follows from the very same *ejusdem generis* reasoning that informs the other aspects of the § 1 analysis. *See id.* The terms "seamen" and "railroad employees" both refer to workers in the transportation industry. And "Congress' demonstrated concern with transportation workers[']. . . necessary role in the free flow of goods explains the linkage [of the residual clause] to the two specific, enumerated types of workers identified in the preceding portion of the sentence." *Circuit City*, 532 U.S. at 121. The "'permissible inference,'" accordingly, is "that Congress' intent when it created the exception was to reserve regulation of such employees for separate legislation more specific to the

transportation industry." *Hill*, 398 F.3d at 1289 (quoting *Circuit City*, 532 U.S. at 120–21).

Section 1 focused on the transportation industry for good reason. At the time the FAA was passed, the country had been deeply impacted by strikes within that industry, which threatened to disrupt other industries dependent on transportation for their separate livelihoods. *See, e.g.*, A.P. Winston, *The Significance of the Pullman Strike*, 9 J. POL. ECON. 540 (1901); Margaret Gadsby, *Strike of the Railroad Shopmen*, 15 MONTHLY LAB. REV. 1, 6 (1922). As a result, "Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers" and adopted "grievance procedures . . . for railroad employees." *Circuit City*, 532 U.S. at 121 (citing Shipping Commissioners Act of 1872, 17 Stat. 262). And "the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes"—later extended to cover airline labor disputes—"was imminent[.]" *Id.* (citing Transportation Act of 1920, 41 Stat. 456, and Railway Labor Act of 1926, 44 Stat. 577). By exempting classes of workers in the transportation industry from the FAA, Congress ensured that the FAA would not preempt these "established or developing statutory dispute resolution schemes covering specific workers." *Id.*

As the Second Circuit explained in *Bissonnette*, "an individual works in a transportation industry"—and is thus potentially covered by § 1—"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." 33 F.4th at 656; *see also, 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 the "transportation industry[]" is "an industry whose mission it is to move goods"). Shipping companies, trucking companies, and airlines are all prime examples of transportation industry participants. *See, e.g.*, *Saxon*, 142 S. Ct. at 1787 ("Southwest Airlines moves a lot of cargo."). Passenger bus companies and rideshare companies—which transport people, instead of goods—are, too. *See, e.g.*, *Capriole*, 7 F.4th at 858 ("Uber . . . develops app-based platforms to connect 'drivers,' individuals who provide transportation services, with 'riders,' those in need of transportation services.").

Conversely, the transportation industry does not include "workers who incidentally transport[] goods interstate as part of their job in an industry that would otherwise be unregulated." *Hill*, 398 F.3d at 1289. As a result, § 1 does not apply to "an interstate traveling pharmaceutical salesman," as his business is selling pharmaceuticals, not transporting goods. *Id.* at 1290. It does not apply to a Rent-A-Center employee who spends some of her time delivering furniture, as her business is renting furniture, not transporting goods. *Id.* at 1289–90. And it does not apply to Flowers Independent Distributors, who traffic "in breads, buns, rolls, and snack

cakes—not transportation services." *Bissonnette*, 33 F.4th at 656. While Plaintiffs may "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." *Id.* "The charges are for the baked goods themselves, and the movement of those goods is at most a component of total price." *Id.*

If Flowers' role in distributing the breads and other baked goods it produces were enough to make Flowers part of the "transportation industry," then every company that makes and distributes a product—every electronics producer, clothing manufacturer, and beverage company—would be too. And *Circuit City*—which itself involved an employee of an electronics retailer—rejected that sweeping view of § 1. *See* 532 U.S. at 118.

The district court failed to meaningfully grapple with Flowers' argument on this score, reasoning that no "binding case law . . . requires an employer to be a transportation company for § 1 to apply." Add. 13. *Circuit City*, however, is binding. And while *Circuit City* may not have spoken as clearly on this point as other Courts of Appeals have in its wake, this Circuit should adhere to the consensus of its sisters and hold that § 1 reaches no further than the transportation industry's bounds. *See Hill*, 398 F.3d at 1290; *Bissonnette*, 33 F.4th at 655.

Neither *Waithaka* nor *Saxon* is to the contrary. In fact, in *Waithaka*, this Court confirmed that "[t]he nature of the business for which a class of workers perform

their activities must inform [the § 1] assessment." 966 F.3d at 22. And although Amazon's status as a member of the transportation industry is perhaps reasonably debatable, Amazon appears to have never argued that its delivery drivers were necessarily excluded from § 1 on that ground. *See* Appellants' Br., *Waithaka*, 966 F.3d 10 (No. 19-1848), 2019 WL 6114810. In *Saxon*, the Supreme Court rejected the plaintiff's position that *every person* working in the transportation industry qualifies as a "transportation worker" under § 1—*i.e.*, that involvement in that industry is *sufficient* to make § 1 apply. *See* 142 S. Ct. at 1792–93. But *Saxon* in no way implies that persons working *entirely outside* the transportation industry can nevertheless fall within § 1's scope—*i.e.*, that involvement in that industry is not *necessary* to make § 1 apply. Indeed, the Court had no occasion to even consider that question, as Southwest Airlines is plainly part of the industry.

In short, courts that have addressed the question directly have held that involvement in the "transportation industry" is a necessary (though not sufficient), threshold requirement for the application of § 1. *See Hill*, 398 F.3d at 1290; *Bissonnette*, 33 F.4th at 652. This Court should, too. And because Flowers is not part of the transportation industry, Plaintiffs are not "transportation workers" for purposes of § 1

* * *

Because Plaintiffs are not primarily devoted to "foreign or interstate" commerce; because they are business owners, not transportation workers; and because they work outside the transportation industry, this Court should reverse the decision below and hold that Plaintiffs' arbitration agreements are enforceable under the FAA. That result follows directly from the plain meaning of § 1 and the body of precedent interpreting that provision.

But if the Court thought there were some doubt on that score, it must be resolved in favor of arbitration. The FAA establishes "a liberal federal policy favoring arbitration agreements[.]" *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). That general policy "counsel[s] in favor of an expansive reading of § 2," which provides that arbitration agreements are "valid, irrevocable, and enforceable." *Circuit City*, 532 U.S. at 118–19 (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272–73 (1995)); 9 U.S.C. § 2. And it requires "that the § 1 exclusion provision," which exempts certain agreements from the FAA's scope, "be afforded a narrow construction." *Circuit City*, 532 U.S. at 118. The upshot is that—in this context as in others—"doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25.

## CONCLUSION

The Court should vacate the district court's order and remand for further proceedings consistent with its opinion.

Dated: July 20, 2022

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

This brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,910 words, excluding the parts of the brief exempted by Rule 32(f) and 6 Cir. R. 32(b)(1), as counted using the word-count function on Microsoft Word 2016 software.

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2016, in Times New Roman style, 14 point font.

Dated: July 20, 2022

Respectfully submitted,

*/s/ Traci L. Lovitt*
Traci L. Lovitt

**CERTIFICATE OF SERVICE**

I hereby certify that on July 20, 2022, I electronically filed the original of the foregoing Brief of Defendants-Appellants with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

Dated: July 20, 2022

Respectfully submitted,

*/s/ Traci L. Lovitt*
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# ADDENDUM

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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| MARGARITO V. CANALES and BENJAMIN J. BARDZIK,<br><br>Plaintiffs,<br><br>v.<br><br>LEPAGE BAKERIES PARK STREET LLC, CK SALES CO., LLC, and FLOWERS FOODS, INC.,<br><br>Defendants. | * | Civil Action No. 1:21-cv-40065-ADB |

**MEMORANDUM AND ORDER DENYING DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO COMPEL ARBITRATION**

Margarito V. Canales ("Canales") and Benjamin J. Bardzik ("Bardzik," collectively, "Plaintiffs") brought this action against Lepage Bakeries Park Street, LLC ("Lepage"), CK Sales Co., LLC ("CK Sales"), and Flowers Foods, Inc. (together with Lepage and CK Sales, "Defendants"), alleging that Defendants deliberately misclassified them as independent contractors in violation of Massachusetts law and thereby withheld wages and overtime compensation. See [ECF No. 1 ("Compl.")]. Currently before the Court is Defendants' motion to dismiss, or, in the alternative, compel arbitration pursuant to the Federal Arbitration Act ("FAA"). [ECF No. 9]. For the reasons set forth below, the motion is DENIED with leave to file a renewed motion to dismiss.

## I. BACKGROUND

### A. Factual Background

The Court draws the following facts from the complaint and the materials filed in connection with Defendants' motion to dismiss or compel arbitration. See Cullinane v. Uber Techs., Inc., 893 F.3d 53, 55 (1st Cir. 2018).

Defendants manufacture, sell, and distribute baked goods throughout Massachusetts. [Compl. ¶¶ 8–9; ECF No. 10-1 ¶¶ 2–4]. To carry out their operations, Defendants use a "direct-store-delivery" system in which "independent distributors" purchase distribution rights to deliver products and stock shelves at stores along particular routes. [Compl. ¶¶ 9, 11; ECF No. 10-1 ¶ 3]. Defendants classify these individuals as independent contractors. [Compl. ¶ 11].

Prior to April 2018, Plaintiffs worked as delivery drivers for Defendants. [Compl. ¶ 12]. In late 2017, Defendants' representatives approached Plaintiffs and told them that their delivery route would be purchased soon. [Id. ¶ 14]. Plaintiffs were under the impression that they would be terminated unless they purchased the route themselves and became independent distributors. [Id. ¶ 15]. According to Plaintiffs, Defendants falsely told them that Massachusetts law required them to purchase distribution rights for a minimum of three territories in order to become independent distributors. [Id. ¶¶ 16–17].

In June 2018, Plaintiffs, through their distribution company, T&B Dough Boys Inc. ("T&B"),[1] signed a contract with Defendants ("Distributor Agreement"), [ECF No. 10-3 (copy of Distributor Agreement)], to purchase the distribution rights for three routes, [Compl.¶ 21; ECF No. 10-1 ¶ 5]. The Distributor Agreement incorporates a separate exhibit requiring T&B,

[1] Plaintiffs formed T&B in 2018. [ECF No. 10-2 at 7]. Canales owns 51% of T&B, and Bardzik owns 49%. [Id. at 5].

including its owners, to arbitrate disputes with Defendants arising out of their business relationship (the "Arbitration Agreement"). [ECF No. 10-3 at 27–29]. The Arbitration Agreement states that:

> [t]he parties agree that any claim, dispute, and/or controversy except as specifically excluded herein, that either DISTRIBUTOR (including its owner or owners) may have against COMPANY (and/or its affiliated companies and its and/or their directors, officers, managers, employees, and agents and their successors and assigns) or that COMPANY may have against DISTRIBUTOR (or its owners, directors, officers, managers, employees, and agents), arising from, related to, or having any relationship or connection whatsoever with the Distributor Agreement between DISTRIBUTOR and COMPANY ("Agreement"), including the termination of the Agreement, services provided to COMPANY by DISTRIBUTOR, or any other association that DISTRIBUTOR may have with COMPANY ("Covered Claims") 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 ("AAA" or "AAA Rules"), or any successor rules, except as otherwise agreed to by the parties and/or specified herein.

[ECF No. 10-3 at 27]. The Arbitration Agreement also states that "[a]ll Covered Claims against COMPANY must be brought by DISTRIBUTOR on an individual basis only and not as a plaintiff or class member in any purported class, collective, representative, or multi-plaintiff action." [Id.]. The "Covered Claims" that must be submitted to arbitration include "any claims challenging the independent contractor status of DISTRIBUTOR" and "claims alleging that DISTRIBUTOR was misclassified as an independent contractor." [Id. at 28]. Finally, the Arbitration Agreement includes a delegation clause that provides that "[a]ny issues concerning arbitrability of a particular issue or claim under this Arbitration Agreement (except for those concerning the validity or enforceability of the prohibition against class, collective, representative, or multi-plaintiff action arbitration and/or applicability of the FAA) shall be resolved by the arbitrator, not a court." [Id.]. Although the Distributor Agreement is signed on behalf of T&B, Canales and Bardzik each also signed a Personal Guaranty, [ECF No. 10-3 at

25–26], certifying that each of them, as individuals, "agrees and acknowledges he/she is subject to" the Arbitration Agreement in the Distributor Agreement, [ECF No. 10 at 3–4; ECF No. 10-3 at 25–26]. In July 2019, Plaintiffs, through T&B, purchased a fourth distribution route, T&B signed another Distributor Agreement (with an identical Arbitration Agreement), and Plaintiffs submitted a business plan in connection with that purchase. [ECF No. 10-1 ¶ 7; ECF No. 10-4; ECF No. 10-5]. In October 2020, Plaintiffs arranged for CK Sales to buy back the fourth territory they purchased in July 2019 and then purchased a different territory. [ECF No. 10-1 ¶ 5]. In connection with that purchase, T&B again signed another Distributor Agreement with an Arbitration Agreement and submitted another business plan. [ECF Nos. 10-6, 10-7].

Since signing the Distributor Agreements, Plaintiffs represent that they have worked an average of sixty to eighty hours a week but have not been properly compensated and have been forced to pay various expenses, including delivery driver payments, delivery truck payments, insurance payments, gas and maintenance, "shrink charges" for missing or damaged goods, and "stale charges" for baked goods that have been returned as stale. [Compl. ¶¶ 23–28; ECF No. 19 ¶¶ 4, 6; ECF No. 20 ¶¶ 4, 6]. Plaintiffs also aver that they spend a minimum of fifty hours per week driving on two delivery routes and another twenty to thirty hours supervising other drivers who work their other delivery routes. [ECF No. 19 ¶¶ 4–6; ECF No. 20 ¶¶ 4–6]. Though Plaintiffs state that they spend the vast majority of their time driving or supervising drivers, the Distributor Agreements do not require the Plaintiffs to perform any driving themselves. [ECF No. 10-3 at 16 ("This [Distributor] Agreement does not require that DISTRIBUTOR'S obligations hereunder be conducted personally" by Plaintiffs or any specific individual)]. A declaration from a LePage employee describes Plaintiffs as having significant other responsibilities beyond driving, including "hiring employees at their discretion to run their four

territories; 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 independent business." [ECF No. 10-1 ¶ 10].

**B. Procedural Background**

Plaintiffs filed their eight-count complaint on June 17, 2021, alleging violations of the Massachusetts Wage Act, Mass. Gen. Laws ch. 149 §§ 148, 148B; the Massachusetts Minimum Fair Wage Law, Mass. Gen. Laws ch. 151 §§ 1, 1A; unjust enrichment; fraud/misrepresentation; breach of contract; and breach of the implied covenant of good faith and fair dealing. [Compl. ¶¶ 40–59]. On August 13, 2021, Defendants filed a motion to dismiss, or, in the alternative, to compel arbitration pursuant to the FAA, [ECF No. 9], which Plaintiffs opposed on September 10, 2021, [ECF No. 16]. Plaintiffs moved to supplement the record on September 29, 2021 and then filed supplemental affidavits regarding the nature of their work for Defendants. [ECF Nos. 17, 19, 20]. Defendants replied to Plaintiffs' supplemental materials on October 5, 2021. [ECF No. 24].

## II. LEGAL STANDARD

The FAA "'embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts.'" Soto-Fonalledas v. Ritz-Carlton San Juan Hotel Spa & Casino, 640 F.3d 471, 474 (1st Cir. 2011) (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)). According to the FAA, "[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . 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 party that seeks to compel arbitration is the one that bears the burden of proving "that a valid agreement to arbitrate exists, the movant has a right to enforce it, the other party is bound by it, and that the claim asserted falls within the scope of the arbitration agreement." Oyola v. Midland Funding, LLC, 295 F. Supp. 3d 14, 16–17 (D. Mass. 2018) (citing Bekele v. Lyft, Inc., 199 F. Supp. 3d 284, 293 (D. Mass. 2016), aff'd, 918 F.3d 181 (1st Cir. 2019)).

## III. DISCUSSION

Plaintiffs argue that they cannot be compelled to arbitrate because they qualify as transportation workers under § 1 of the FAA and are therefore exempt from the statute.[2] [ECF No. 16 at 14–16; ECF No. 17]. Here, the Arbitration Agreement explicitly reserves the question of the FAA's applicability for the courts, not an arbitrator. [ECF No. 10-3 at 27]. Thus, it falls to this Court to decide whether Plaintiffs qualify as transportation workers under § 1.

### A. Scope of the § 1 Exemption

Section 1 of the FAA states that the statute 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; see 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). In Circuit City Stores, Inc. v. Adams, the Supreme Court narrowly interpreted the phrase "any other class of workers engaged in foreign or interstate commerce" and limited its coverage to "transportation workers" engaged in foreign or intrastate commerce. 532 U.S. 105, 114, 119 (2001) ("Section 1 exempts from the FAA only contracts of employment of transportation workers."). The Court's

[2] Although Plaintiffs make several other arguments in opposition to the motion to dismiss, [ECF No. 16 at 4–14], because the § 1 issue is dispositive for the purposes of Defendants' pending motion, the Court begins and ends its discussion with an analysis of § 1.

analysis was guided by the canon of *ejusdem generis*, which required the Court to read "the residual clause . . . to give effect to the terms 'seamen' and 'railroad employees'. . ." Id. at 115. Notably, other than determining that the exemption applied only to seamen, railroad employees, and transportation workers, the Supreme Court declined to provide further guidance on which type of workers would fall within § 1.

Although the Supreme Court has provided scant guidance on how courts should define "transportation worker," the First Circuit has recently interpreted the term in the context of last-mile delivery drivers for Amazon. Waithaka, 966 F.3d at 26. In Waithaka v. Amazon.com, Inc., the First Circuit held that "last-mile delivery workers who haul goods on the final legs of interstate journeys" while employed by Amazon "are transportation workers 'engaged in . . . interstate commerce.'" Id. The First Circuit concluded that the § 1 exemption applied to these workers, "regardless of whether the workers themselves physically cross state lines" because the goods they were delivering had moved interstate. Id.; see also Immediato v. Postmates, Inc., No. 20-cv-12308, 2021 WL 828381 (D. Mass. Mar. 4, 2021) ("It is the goods, and not the workers, that define engagement in interstate commerce."). Due to the facts of the case before it, the First Circuit limited its analysis to workers that spent their time physically transporting goods for Amazon. Waithaka, 966 F.3d at 22 n.10. Although the First Circuit declined to explicitly define the boundaries of § 1, it noted that the exemption is not necessarily limited to workers that actually transport goods and opined "that the contracts of workers 'practically a part' of interstate transportation—such as workers sorting goods in warehouses during their interstate journeys or servicing cars or trucks used to make deliveries—[do not] necessarily fall outside the scope of the Section 1 exemption." Id. at 20 n.9. The First Circuit recognized precedent from the Third Circuit that "described Section 1 as covering workers 'who are actually engaged in the

movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it.'" Id. (quoting Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., (U.E.) Loc. 437, 207 F.2d 450, 452 (3d Cir. 1953)); see also Palcko v. Airborne Express, Inc., 372 F.3d 588, 593 (3d Cir. 2004) (finding that a worker who directly supervised package shipments was exempt under § 1 even though the worker did not personally transport packages); Saxon v. Sw. Airlines Co., 993 F.3d 492, 497 (7th Cir. 2021), cert. granted, 142 S. Ct. 638 (2021) (holding that ramp manager that assisted with loading and unloading passengers and cargo for airline fell within the § 1 exemption).

Although the First Circuit declined to further examine which workers may be "so closely related" to interstate commerce as to practically be a part of it, another court in this district recently considered that precise question. Fraga v. Premium Retail Servs., Inc., No. 21-cv-10751, 2022 WL 279847, at *7 (D. Mass. Jan. 31, 2022), appeal docketed No. 22-1130 (1st Cir. Feb. 10, 2022). After undertaking a thorough study of the statutory language and applicable case law from this and other circuits, that court concluded that § 1's residual clause should be read

> to include those "so closely related [to interstate transportation] as to be in practical effect part of it." See Tenney, 207 F.2d at 452 (emphasis added); Saxon, 993 F.3d at 494; Patterson, 113 F.3d at 836. This framework allows workers engaged in interstate commerce to be broken down into three categories: 1) "workers who themselves carried goods across state lines"; 2) "those who transported goods or passengers that were moving interstate"; and 3) those "in positions so closely related to interstate transportation as to be practically a part of it." See Waithaka, 966 F.3d at 20 (internal quotation marks omitted).

Id. Of particular significance in Fraga v. Premium Retail Services, Inc. was the language of the Federal Employer's Liability Act, which includes "nearly identical language to Section 1 of the FAA" and has been construed by the Supreme Court to include "'employees engaged in interstate transportation or in work so closely related to it as to be practically a part of it.'" Id. at *6 (quoting Shanks v. Del., Lackawanna & W.R.R., 239 U.S. 556, 558–59 (1916) (emphasis

omitted)). This Court agrees with the Fraga court's well-reasoned interpretation of § 1, as well as the views of other circuits, and likewise finds that workers engaged in activities so closely related to interstate commerce as to practically be a part of it are also transportation workers under § 1. See Palcko, 372 F.3d at 593; Saxon, 993 F.3d at 497.

After analyzing the scope of the exemption, the Fraga court determined that the plaintiff, who had the official job title of "Merchandiser," was so closely related to interstate commerce as to be a part of it. 2022 WL 279847 at *9. The defendant in that case operated a business that supported various retail customers by providing product displays, "point-of-purchase" displays, pricing, and signage for use in its customers' stores. Id. at *2. Despite her official job title, the court looked to the plaintiff's actual responsibilities, which included receiving "point-of-purchase" display materials that had traveled in interstate commerce, searching through and sorting those materials, and then transporting the displays to different stores. Id. at *8. The court concluded that the plaintiff "served as an integral part of delivering the goods to their end destination. This is the essence of handling goods that travel interstate." Id. In addition to these delivery responsibilities, the plaintiff's other responsibilities included auditing and stocking products, assembling the displays, and updating product pricing and signage. Id. at *2. The court did not find that the plaintiff's other responsibilities removed her from §1's scope. Id. at *9 ("While her work entails providing a service, she transports the goods used in that service, which were previously travelling interstate.").

**B. Applicability to this Case**

Having determined the scope of § 1, the Court next applies it to the facts of this case and concludes that Plaintiffs fall under the exemption and cannot be compelled to arbitrate their claims pursuant to the FAA.

Plaintiffs contend that their duties are "entirely consistent with the work performed by the plaintiffs in Waithaka" because the work they "engage in daily consists of transporting goods in the stream of interstate commerce." [ECF No. 16 at 15]. Defendants push back on this interpretation and argue that Plaintiffs are not delivery drivers and are instead "independent distributor franchisees" whose main responsibilities are customer service and growing the business, rather than transporting goods. [ECF No. 10 at 1, 14–15; ECF No. 24 at 3–5].

Plaintiffs' job title alone is not dispositive because "[i]t is not the title of the worker, however, that is the key focus of the analysis but rather the actual activities performed." Fraga, 2022 WL 279847, at *5 (citing Waithaka, 966 F.3d at 22). Plaintiffs have each submitted a supplemental affidavit in which they swear "under the pains and penalties of perjury" that their work for Defendants "has consisted and still consists primarily of driving trucks delivering the Defendants' bread products from their warehouse to their customers along particular delivery routes," they "spend a minimum of [fifty] hours per week driving," and the remaining twenty to thirty hours of work per week consists of "supervising other individuals who drive trucks." [ECF No. 19 ¶¶ 2, 4–6; ECF No. 20 ¶¶ 2, 4–6]. Defendants argue that these affidavits should be given little, if any, weight since they do not account for, and ultimately contradict, the non-delivery responsibilities outlined in the Distributor Agreements and business plans, which include developing relationships with customers, hiring other drivers, and improving sales. [ECF No. 24 at 3–5]. Defendants also point to the fact that the Distributor Agreements explicitly do not require Plaintiffs to continue making the deliveries themselves. [ECF No. 10 at 14]. Importantly, Defendants do not assert that Plaintiffs never spend any time physically making deliveries but instead argue that they are not "primarily drivers" and the amount of time they spend driving is insufficient to push them into the § 1 exemption. [ECF No. 24 at 3, 5 ("It is

clear from [the LePage employee's] Declaration and Plaintiffs' own business plans that less than half of their time is devoted to driving and that driving is **incidental** to all of their other responsibilities. . . .") (emphasis in original)]. Further, Defendants do not challenge Plaintiffs' representation that the baked goods crossed state lines before arriving to Defendants' customers.[3] [ECF No. 19 ¶ 10; ECF No. 20 ¶ 10].

Defendants' argument that the Distributor Agreements and business plans are proof that Plaintiffs did not primarily engage in driving is unavailing. Plaintiffs have put forth sworn affidavits stating that they spend the majority of their time making deliveries. And, although the Distributor Agreements do not require Plaintiffs to personally drive trucks or deliver goods, they also do not prohibit such activities, and there is nothing in the record to suggest that Plaintiffs were carrying out all of the other responsibilities included in the Distributor Agreements and business plans, or that those other responsibilities took up more time than driving. Defendants also have not pointed to any binding case law that requires a worker to be transporting goods at all times in order to be considered a "transportation worker." Cf. Saxon, 993 F.3d at 494 (noting that "[o]stensibly [plainitff's] job is meant to be purely supervisory," but still finding that she was a transportation worker because her declaration stated that she would fill in as a ramp agent when the company was short on workers); Fraga, 2022 WL 279847, at *9 (recognizing that plaintiff had responsibilities other than delivering goods). Thus, taking Plaintiffs' statements that they spend over fifty hours a week delivering goods as true, Plaintiffs' responsibilities are essentially identical to the Waithaka delivery drivers' responsibilities and, under that binding precedent, clearly fall within the § 1 exemption.

[3] Plaintiffs do not assert that they ever had to physically cross state lines to carry out their responsibilities.

Even assuming that Plaintiffs' work primarily involves supervising other drivers and 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 are practically a part of it. Although the First Circuit did not expressly address the "so closely related" question, it noted that "so closely related" workers could include "workers sorting goods in warehouses during their interstate journeys or servicing cars or trucks used to make deliveries." Waithaka at 20 n.9. In Palcko v. Airborne Express, Inc., the Third Circuit held that the plaintiff, who was responsible for monitoring the improvement of drivers and ensuring timely and efficient package delivery, was so closely related to interstate commerce as to be a part of it and declined to limit § 1 to only those "truck drivers who physically move the packages." 372 F.3d at 593. Here, Plaintiffs' other responsibilities include hiring and supervising other drivers, building relationships with potential delivery customers, ordering products based on customer needs, making sure the products are properly stocked and not stale, and otherwise servicing the customers in their territory. These responsibilities, which generally require overseeing deliveries or ensuring that the delivered goods are in proper condition, are sufficiently similar to the hypothetical examples in Waithaka and the supervisor in Palcko to support the conclusion that Plaintiffs are transportation workers.

Defendants urge this Court to adopt the reasoning and holding of Bissonnette v. Lepage Bakeries Park St., LLC, 460 F. Supp. 3d 191 (D. Conn. 2020), which they argue is directly on point. [ECF No. 10 at 13–17; ECF No. 24]. In Bissonnette, another group of Defendants' employees filed suit alleging violations of various employment laws. 460 F. Supp. 3d at 193. Those employees, like Plaintiffs here, were also "franchisees" and had signed distributor agreements. Id. at 194. In that case, the district court dismissed the case in favor of arbitration

because the "Distributor Agreements evidence a much broader scope of responsibility [beyond delivering goods] that belies the claim that they are only or even principally truck drivers." Id. at 199. Bissonnette is distinguishable on two grounds. First, it does not appear that the Bissonnette court had sworn affidavits from the plaintiffs attesting that they spent fifty hours a week driving and making deliveries. Second, the Bissonnette court also did not meaningfully consider whether the non-driving responsibilities would result in the plaintiffs being so closely related to interstate commerce as to practically be a part of it. Id. at 202 (noting only that "[t]he 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." ). Accordingly, Bissonnette does not require this Court to dismiss or compel arbitration.

Defendants argue, in a final effort to overcome the § 1 exemption, that transportation is only incidental to their business because LePage is a bread baking company, and CK Sales is a company that is in the business of contracting with distributors. [ECF No. 10 at 16]. Therefore, according to Defendants, they are clearly distinct from a railroad operator, airline, or trucking company. [Id.]. Defendants fail to point to any binding case law that requires an employer to be a transportation company for § 1 to apply. To the contrary, the First Circuit, after describing Amazon as an "online retailer," rather than a trucking or transportation company, still found that its delivery drivers were transportation workers. Waithaka, 966 F.3d at 14, 26. Other courts have reached similar conclusions. See Saxon, 993 F.3d at 497 (noting that "a transportation worker need not work for a transportation company"); Fraga, 2022 WL 279847, at *5 ("It is not required that a class of workers be employed by an interstate transportation business nor a

business of a certain geographic scope to fall within Section 1." (internal quotation marks and citations omitted)). Therefore, the nature of Defendants' business alone does not mandate dismissal or compel arbitration.

In sum, Plaintiffs are transportation workers within the meaning of §1 and are exempt from the FAA. Therefore, Defendants' motion to dismiss, or, in the alternative, to compel arbitration pursuant to the FAA, is DENIED.

**C. State Arbitration Law**

Although the FAA does not require dismissal, the Court must still determine if arbitration can be compelled under state law. Waithaka, 966 F.3d at 26. The text of the Arbitration Agreement indicates, and the parties appear to agree, that Massachusetts arbitration law would apply if the FAA did not. [ECF No. 10-3 at 29 ("This Arbitration Agreement shall be governed by the FAA and []Massachusetts law to the extent Massachusetts law is not inconsistent with the FAA."); ECF No. 10 at 9; ECF No. 16 at 11]. Here, it is undisputed that the Arbitration Agreement waives any rights to proceed in a class action or multi-plaintiff suit and also specifically delegates an analysis of that wavier to the Court, not an arbitrator. [ECF No. 10-3 at 28–29]. After analyzing the relevant Massachusetts case law, the First Circuit in Waithaka held that "[the Massachusetts Supreme Judicial Court] would conclude that the right to pursue class relief in the employment context represents the fundamental public policy of the Commonwealth, such that this right cannot be contractually waived in an agreement not covered by the FAA." 966 F.3d at 29–33. Thus, "where the FAA does not control, class action waivers are void ab initio as matter of public policy in Massachusetts." Fraga, 2022 WL 279847, at *10. Accordingly, it appears that Massachusetts law would also not compel arbitration in this multi-plaintiff suit. Although this issue must be resolved, other than Plaintiffs' one-paragraph

argument that Massachusetts law would prohibit arbitration, neither party has comprehensively briefed this issue. [ECF No. 16 at 11 ("The arbitration provision's waiver of rights to proceed on a 'multi-plaintiff basis' violates Massachusetts law.")]. Because this is an important issue that would benefit from additional briefing, the Court allows Defendants leave to file a renewed motion to dismiss that solely addresses the issue of arbitration under state law.[4]

## IV. CONCLUSION

For the reasons set forth above, Plaintiffs are exempt from the FAA and cannot be compelled to arbitrate pursuant to that statute, but as noted above, the issue of state arbitration law remains. Accordingly, Defendants' motion to dismiss, or, in the alternative, to compel arbitration pursuant to the FAA, [ECF No. 9], is DENIED. Within fourteen (14) days of the date of this Order, Defendants should file a renewed motion to dismiss only addressing the specific

[4] Because the Court's resolution of the § 1 exemption issue is sufficient to resolve Defendants' pending motion, the Court has not analyzed Plaintiff's additional arguments that the Distributor Agreements (and consequently the Arbitration Agreements) are otherwise invalid or that Plaintiffs are not even parties to the Distributor Agreements. Although the Court reserves judgment on these issues at this time, it notes that other than the FAA's applicability and the waiver of class action rights, the Arbitration Agreement expressly delegates "[a]ny issues concerning arbitrability of a particular issue or claim" to an arbitrator and adopts the American Arbitration Association's rules, which provide that an "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." American Arbitration Association, Commercial Rules and Mediation Procedures, Rule 7(a) (2013). Although the Supreme Court has cautioned that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clea[r] and unmistakabl[e] evidence that they did so[,]" First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (second and third alterations in original) (internal quotation marks omitted) (quoting AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986)), it has also recently held that courts must respect delegations of arbitrability, Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 529 (2019); see also Boursiquot v. United Healthcare Servs. of Delaware, Inc., 158 N.E.3d 78, 83 (Mass. App. Ct. 2020) (analyzing delegation clauses under Massachusetts law). Here, Plaintiffs have failed to meaningfully grapple with the Arbitration Agreement's delegation provisions when advancing their other arguments in opposition to dismissal.

issue of state arbitration law or a status report indicating that they will not file another motion to dismiss.

**SO ORDERED.**

March 30, 2022

/s/ Allison D. Burroughs
ALLISON D. BURROUGHS
U.S. DISTRICT JUDGE