No. 23-51

In The
Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AMICI CURIAE NATIONAL EMPLOYMENT LAW PROJECT AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The National Employment Law Project ("NELP") is a non-profit organization with over 50 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP has studied and written about the working conditions and employment relationships of truck drivers, publishing two comprehensive reports on the subject, The Big Rig: Poverty, Pollution, and the Misclassification of Truck Drivers at America's Ports, in 2010, and The Big Rig Overhaul: Restoring Middle-Class Jobs at America's Ports Through Labor Law Enforcement, in 2014. NELP has litigated and participated as amicus curiae in numerous cases addressing independent contractor misclassification under federal and state labor and employment laws, and in a number of cases involving the scope of the Federal Arbitration Act. NELP seeks to ensure that all workers receive the full protection of labor and employment laws and that employers are not rewarded for skirting their obligations.

Founded in 1985, the National Employment Lawyers Association ("NELA") is the largest bar association in the country focused on empowering workers' rights attorneys. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

workers in employment, wage and hour, labor, and civil rights disputes. NELA attorneys litigate daily in every circuit, giving NELA a unique perspective on how principles announced by courts in employment cases actually play out on the ground. As such, NELA has a particular interest in ensuring that workers are correctly classified under the Federal Arbitration Act and other relevant employment statutes.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 1 of the Federal Arbitration Act exempts from coverage "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 *Circuit City Stores, Inc. v. Adams*, this Court interpreted the residual clause to extend only as far as the contracts of employment of "transportation workers." 532 U.S. 105, 119 (2001). Then in *New Prime Inc. v. Oliveira*, it clarified that "transportation workers" need not be employees, just workers who had been hired pursuant to contracts of employment, or "agreements to perform work." 139 S. Ct. 532, 539 (2019). Finally, in *Sw. Airlines Co. v. Saxon*, this Court made clear that the lodestar of the legal analysis under Section 1 is "the actual work that the members of the class, as a whole, typically carry out." 596 U.S. 450, 456 (2022). Where the class of workers is "actively engaged" in the transportation of goods in interstate commerce, they are exempt. *See id.* at 458.

Petitioners Neil Bissonnette and Tyler Wojnarowski are commercial truck drivers tasked with transporting baked goods and snack foods from a centralized warehouse to retail stores across Connecticut. They fall squarely within this category of exempt workers. Like other transportation workers this Court has found to be exempt, their contracts of employment are plainly "agreements to perform work" that bring them within the scope of the exemption. And like railroad employees and seamen, the essence of the work they typically perform day-to-day is transportation, consisting principally of picking up and transporting goods in the flow of interstate commerce.

Respondents Lepage Bakeries and Flowers Foods have tried throughout the course of this litigation to obscure this reality, pointing to the form contracts Flowers Foods and its subsidiaries required the drivers to sign (the "Distributor Agreements"). *See* JA48.[2] According to the written terms in those contracts, Petitioners are "Independent Distributors"—franchise business owners operating within Flowers' "unique business model," not "mere truck drivers"—for whom picking up and delivering product is only one of several work obligations. *See* JA48; Opp. 1-2.

But under the FAA, like under every other labor and employment statute, neither the terms of the employment contract nor the corporate structure of the work relationship governs the legal analysis. Flowers'

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[2] Citations to "JA" are to the joint appendix filed in the Second Circuit.

purported "unique business model" does not render its commercial truck drivers somehow not "transportation workers," and does not make its arbitration clauses enforceable. In fact, its business model is just a common form of independent contractor misclassification—used by other baked goods conglomerates, as well as by multinational distribution companies, like FedEx—whose illegality is the basis of the workers' original claims for unpaid wages in this case. Petitioners brought the action below to seek judicial resolution of whether Flowers used this misclassification scheme to unlawfully withhold their wages. This Court should not now permit Flowers to hide behind these contracts to compel its drivers' claims into arbitration.

We write to address a few basic points. First, this Court should look to the actual work these commercial truck drivers typically perform in assessing whether they are exempt transportation workers, and not rely on misleading company-imposed labels and contractual terms. Second, the actual work Petitioners performed shows clearly that they were "transportation workers" actively and primarily engaged in the transportation of goods. Third, this Court should ignore Respondents' repeated invocation that it has created some sort of unique business model that it contends merits special treatment under the FAA. Its "business model" is neither unique nor deserving of a special look. It is a form of independent contractor misclassification—the very subject of the underlying action in this case—designed to prevent workers like Mr. Bissonnette from vindicating his rights under labor and

employment law. Finally, the Second Circuit's requirement that a worker actively engaged in transportation work has to also show that they are employed in the transportation industry, by a transportation company, is contrary to the law and opens up significant arbitrage opportunities for corporations. Employers should not be able to define for themselves whether their workers are outside the reach of the FAA.

ARGUMENT

I. In assessing whether Petitioners are exempt transportation workers, this Court must look to the actual work they typically perform, not just the terms of their employment contracts.

In determining whether someone belongs to a "class of workers" exempt under Section 1 of the Federal Arbitration Act, what matters is what those workers typically do all day. The focus of the legal analysis is "the actual work that the members of the class, as a whole, typically carry out." *Sw. Airlines v. Saxon*, 450 U.S. at 456.

This follows from the text and structure of Section 1. Seamen and railroad employees are characterized as transportation workers by reference to what work they typically do. As this Court wrote in its *Saxon* decision, the word "workers" in the statutory phrase directs attention to "the *performance* of work." *Id*. (emphasis supplied). Latrice Saxon, the ramp supervisor whose

claims Southwest Airlines sought to compel into arbitration, was a transportation worker "based on what she does at Southwest." *Id*. Workers who are "actively engaged" in the transportation of goods as a fundamental part of their work are transportation workers. *Saxon*, 450 U.S. at 458.[3]

Respondents try and turn this Court's attention away from the actual performance of the work, and towards the "Distributor Agreements" they drafted and required Petitioners to sign. JA48. As Respondents would have it, the terms of these adhesion contracts and the labels they give their workers are enough to show that the class of workers they employ to transport their goods are not, in fact, transportation workers. In their telling, Petitioners should not be confused for "truckers who merely deliver[] goods." Opp. at 18. The company claims its drivers operate independent businesses as a part of Flowers' "unique, franchise-based business model," and have a "wide array of

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[3] *See*, *e.g.*, *Rittman v. Amazon, Inc.*, 971 F.3d 904, 911 (9th Cir. 2020) (making the determination as to whether workers are exempt transportation workers involves looking at the "inherent nature of the work performed"); *Capriole v. Uber Technologies, Inc.*, 7 F.4th 854, 865 (9th Cir. 2021) ("the analysis focuses on the inherent nature of the work performed and whether the nature of the work primarily implicates inter- or intrastate commerce"); *Fraga v. Premium Retail Services, Inc.*, 61 F.4th 228, 236 (1st Cir. 2023) (focus of the analysis is "on the work in which Fraga and other merchandisers were actually engaged"); *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 801 (7th Cir. 2020) (noting repeated emphasis that "transportation workers are those who are actually engaged in the movement of goods in interstate commerce" (internal quotation omitted)).

responsibilities, none of which they are required to perform personally." Opp. at 22.

But there is no federal statute that allows employers to decide for themselves—through their choice of contract term or by label—whether their workers are protected by statute. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729–30 (1947) ("Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the [Fair Labor Standards] Act."); *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 290 (7th Cir. 2016) ("[S]tatus as an employee for purposes of the FLSA depends on the totality of circumstances rather than on any technical label[.]")[4]; *N.L.R.B. v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968) (explaining that employee status under the NLRA is not determined by reference to a "shorthand formula or magic phrase," but by assessing "all the incidents of the relationship" and the "total factual context"); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) (holding the same under ERISA).

The FAA is no different. Flowers cannot decide for itself whether its distributors are transportation workers covered by the Section 1 exemption simply by

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[4] *See also Safarian v. Am. DG Energy Inc.*, 622 F. App'x 149, 151 (3d Cir. 2015) ("[T]he [question of misclassification] arises because the parties structured the relationship as an independent contractor, but the caselaw counsels that, for purposes of the worker's rights under the FLSA, we must look beyond the structure to the economic realities.")

calling them "Independent Distributors," requiring them to incorporate as independent businesses, and declaring that they have non-transportation responsibilities. What matters is what the drivers typically do. And what Petitioners typically do all day is transport goods for Flowers Foods.

II. Petitioners are commercial truck drivers hired to perform "transportation work," regardless of how Flowers characterizes them in its contracts of employment.

Petitioners in this case are commercial truck drivers who are hired by the bakeries to transport a wide variety of baked goods and snack products. These products, manufactured by Flowers Foods outside of Connecticut, are shipped to a centralized warehouse in Waterbury, Connecticut, where workers like Neil Bissonnette & Tyler Wojnarowski pick them up, load them onto commercial trucks, and drive them to grocery stores and other retailers across the state. *See* JA14-17. No other workers are responsible for the last leg distribution of Respondents' products. JA15. Without them, products would arrive from other states and sit in warehouses until stale.

Respondents try to distinguish Petitioners from other commercial truck drivers by arguing that they are not "mere truck drivers," but independent franchise business owners with a "wide array of responsibilities" beyond transporting goods. *See* Opp. at 21, 23. But the determination of whether these are exempt

transportation workers does not turn on contractual labels or the corporate structure of their employment relationship. It turns on an analysis of what actual work Petitioners—and the class of workers to which they belong—typically do all day.

Looking at the actual work Petitioners typically performed, it clearly consisted almost entirely of picking up goods at the Flowers warehouse, driving to stores within a specific territory designated by Flowers, and delivering exclusively Flowers' bakery products to those stores. Neil Bissonnette would typically spend "at least forty hours per week delivering the baked goods." JA17 at 33. That was the central assignment of his job, and left little time for anything else.

Other reported cases involving commercial truck drivers transporting Flowers' goods tell a similar story. A federal district court in Massachusetts found that Flowers' truck drivers' work "consist[ed] primarily of driving trucks delivering [Flowers'] bread products from their warehouse to their customer along particular delivery routes" and that they "spent a minimum of fifty hours per week driving." *Canales v. Lepage Bakeries, LLC*, 596 F. Supp. 3d 261, 268-69 (D. Mass. Mar. 30, 2022) *aff'd on appeal*, 67 F.4th 38 (1st Cir. 2022). And as another federal court concluded: "Far from being incidental to [the workers] employment, the transportation of goods in interstate commerce is the primary duty of Plaintiffs as distributors. Plainly stated, their distribution work is not incidental to any other work because they perform no other work for Flowers Foods." *Martins v. Flower Foods, Inc.*, 463 F. Supp. 3d

1290, 1296 (M.D. Fla. 2020), *vacated and remanded on other grounds*, 852 F. App'x 519 (11th Cir. 2021). The evidence of "the actual work" that Flowers' distributors "typically carry out" points clearly in one direction: Petitioners were transportation workers.

III. Flowers' business model—a form of independent contractor misclassification endemic in commercial trucking—does not make its arbitration clauses enforceable.

In addition to arguing that Petitioners are not *transportation* workers, Respondents also argue that its commercial truck drivers are not really *workers* at all. Section 1's transportation worker exemption, they suggest, should not apply to purported business-to-business arrangements between two incorporated entities. As they describe it, Flowers' "unique, franchise-based business model" does not implicate the question of whether commercial truck drivers are engaged in commerce within the meaning of Section 1. Opp. at 20. Respondents claim that "Petitioners operate independent, intrastate businesses," and are therefore not within the exemption. Opp. at 21.

First, the suggestion that Petitioners might not be covered by Section 1's sweep solely because Flowers required them to incorporate as a condition of work is pure misdirection. Decades of case law make it crystal clear that incorporation does not shield employers from liability under a wide array of federal and state employment statutes. *See*, *e.g.*, *Frankel v. Bally, Inc.*,

987 F.2d 86, 90–91 (2d Cir. 1993) ("[T]he corporate form under which a plaintiff does business is not dispositive in a determination of whether an individual is an employee or an independent contractor within the meaning of the ADEA.").[5]

If businesses could avoid their obligations under labor and employment laws simply by requiring their workers to incorporate and paying them through corporations rather than paying them directly, the law "would be rendered useless." *Padovano v. FedEx Ground Package Sys., Inc.*, 2016 WL 7056574, at *4 (W.D.N.Y. Dec. 5, 2016). The same is true of the FAA. Employers like Flowers Foods cannot avoid the transportation worker exemption in Section 1 just by requiring their drivers to incorporate or by labeling them as "franchisees."

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[5] *See also Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1103 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 877 (2014) ("While 'purporting to relinquish' some control to the drivers by making the drivers form their own businesses and hire helpers, [defendant] 'retained absolute overall control' over the key parts of the business."); *In re FedEx Ground Package System, Inc.*, 712 F. Supp. 2d 776, 793 (N.D. Ind. 2010) ("if FedEx retains the right to control unincorporated drivers, it retains the right to control incorporated drivers"); *Parilla v. Allcom Constr. & Install. Svcs., LLC*, 2009 WL 2868432 (M.D. Fla. 2009) (plaintiff who incorporated was an employee; incorporation was a "façade"); *DaSilva v. Border Transfer of MA, Inc.*, 296 F. Supp. 3d 389, 402 (D. Mass. 2017) ("incorporation cannot be a shield to prevent liability under the [Massachusetts] Wage Act"); *Afinson v. FedEx Ground Package Sys., Inc.*, 244 P.3d 32 (Wash. Ct. App. 2010) (disregarding delivery drivers' personal corporate entities in analysis of the drivers' individual employment status).

Second, and more importantly, Flowers' business model is not unique at all. A number of other food distribution companies—along with the major multinational corporation FedEx—have essentially identical business models. They call their workers independent businesses, sell them the rights to do work they once did as employees, and require them to incorporate—all while continuing to exercise significant control over the work they do and what they get paid.[6]

Snyder's-Lance, most famous for its ubiquitous pretzels, is a good example. Like Flowers, it deemed all of its distributors to be independent contractors, requiring them to sign standardized "Distributor Agreements" that granted the distributors the rights to sell its products to various stores at certain prices. *Mode v. S-L Distribution Co., LLC*, 2021 WL 3921344, *2 (W.D.N.C. Sept. 1, 2021). But, as one district court concluded, Snyder's-Lance exercised "substantial control" over how workers were required to perform their jobs, and it allowed workers only "limited" opportunities for

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[6] Neil Bissonnette was initially hired as an employee truck driver, before being terminated. He was then effectively rehired as an independent contractor, and Flowers required him to incorporate and purchase the rights to specific delivery routes. *See* JA15. Snyder's-Lance did the same. Lance truck drivers had been employees until the merger with Synder's of Hanover, when the newly formed S-L switched to Snyder's purported independent contractor model. The conversion to the new model resulted in over a thousand employees losing their jobs, however, many of the employees who were already familiar operating a route territory purchased routes from S-L and became Distributors. *See Mode v. S-L Distribution Co., LLC*, 2021 WL 3921344, *2 (W.D.N.C. Sept. 21, 2021).

profit and loss, showing that the drivers were misclassified employees. *See id.* at *6-8.[7]

A more familiar example is FedEx. FedEx Ground and Home Delivery long used the same business model as Flowers: treating its delivery drivers as "contractors" who had to purchase their rights to distribute FedEx's packages within a certain region, and crafting lengthy independent contractor agreements that purported to allow the drivers to operate their own businesses. Multiple federal courts held that these drivers were nonetheless employees. *See Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1047 (9th Cir. 2014) (holding that FedEx delivery drivers were employees under Oregon's wage laws); *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 988 (9th Cir. 2014) (holding that FedEx delivery drivers were employees for purposes of California's wage laws); *Craig v. FedEx Ground Package Sys., Inc.*, 335 P.3d 66, 92 (Kan. 2014) (holding that FedEx delivery drivers were employees for purposes of Kansas' wage laws).

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[7] Another example is the largest bakery product manufacturing company in the United States, Bimbo Bakeries. Bimbo hired its commercial truck drivers pursuant to an indistinguishable distribution arrangement to the one used by Flowers Foods, labeling them independent contractors, and delegating theoretical control in its contracts. But the Connecticut Department of Labor, looking at all the facts, determined that the truck drivers were in fact Bimbo employees, irrespective of how Bimbo labeled them in contract. *Ricky Proctor v. George Weston Bakery*, Board Case No. 9007-BR-09 (Conn. Dept. of Lab., Employment Security App. Div., Nov. 18, 2009).

In sum, this "business model" that Respondents tout as meriting special treatment is not at all unique. It is a widespread form of independent contractor misclassification—an illegal business practice, endemic in trucking, that denies workers their rights under labor and employment law and deprives state and federal coffers of important funds.[8] Respondents now point to this same misclassification scheme—the scheme that Petitioners allege illegally deprived them of overtime pay under federal law—as a reason for this Court to compel the workers' claims into arbitration. But the question of whether Flowers misclassified its commercial truck drivers and violated their employment rights under the Fair Labor Standards Act is the central question that should be answered, on the merits, by a federal court. Flowers cannot use its misclassification scheme as a shield to shunt Petitioner's claims into private and individualized arbitration and avoid a public judicial resolution.

Third and finally, regardless of whether Petitioners are employees or independent contractors, they are unequivocally "workers" with "contracts of employment" covered under the Act. Respondents demand an

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[8] Employers who misclassify workers are able to unlawfully lower their operating costs, by avoiding compliance with labor and employment laws and by dodging taxes and other payroll costs required for employees. *See Independent Contractor Misclassification Imposes Huge Costs On Workers And Federal And State Treasuries*, NAT'L EMPLOYMENT L. PROJECT (Oct. 2020), *available at* https://www.nelp.org/wp-content/uploads/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf.

exception for their "unique business model," but this demand is little more than another request for an independent contractor carveout from Section 1 coverage. By a sleight of hand, they are attempting to relitigate precisely the issue that was already settled by this Court in *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019). But whatever corporate forms mediate the relationship between Flowers and its drivers, their contracts of employment were plainly "agreement[s] to perform work." *Id.* at 539. Even if this Court believed Respondents' contention that these workers are true independent contractors, they nonetheless belong to a class of exempt transportation workers whose employment claims must be resolved before a court, not an arbitrator.

IV. The Second Circuit's "transportation industry" requirement ignores settled case law and would lead courts to treat identical workers differently.

Respondents urge this Court to adopt an expansive version of the Second Circuit's "transportation industry" requirement, which would require workers to show not only that they belonged to a class of workers "actively engaged" in transportation work in interstate commerce, but also that they did that work for a company in the "transportation industry." For two reasons, this Court should reject this novel formulation.

First, this Court and several courts of appeals have already considered and rejected the imposition of

a "transportation industry" requirement. In *Saxon*, this Court rejected Latrice Saxon's argument that the relevant inquiry should be about whether her employer, Southwest Airlines, did transportation work. Instead, the inquiry should focus on the work that the worker typically does. *Southwest Airlines v. Saxon*, 596 U.S. 450, 456 (2022) ("Saxon is . . . a member of a 'class of workers' based on what *she does* at Southwest, *not what Southwest does generally*." (emphasis added)). The First, Seventh, and Ninth Circuits have concluded the same. *See Fraga v. Premium Retail Servs. Inc.*, 61 F.4th 228, 235 (1st Cir. 2023); *Carmona Mendoza v. Domino's Pizza, LLC*, 73 F.4th 1135, 1136-38 (9th Cir. 2023); *Saxon v. Sw. Airlines Co.*, 993 F.3d 492, 497 (7th Cir. 2021).[9] In short, to be a transportation worker is not to be a worker who does transportation work for a company in the transportation industry; it means to do transportation work.

Second, adopting the additional requirement that workers must show the company is in the transportation industry would exclude huge numbers of transportation workers and lead to absurd results. A majority of the nearly 2 million U.S.-based truck drivers in 2022

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[9] *See also Lopez v. Cintas Corporation*, 47 F.4th 428, 431 (5th Cir. 2022) ("Because the FAA speaks of workers . . . we determine the relevant class of workers by the work [the worker] actually did."); *Brock v. Flowers Foods, Inc.*, 2023 WL 3481395, ___ F. Supp. 3d ___ (D. Colo. May 16, 2023) (explaining that "the nature of an employer's business is not dispositive" on the Section 1 analysis, but rather the focus is "on the work a plaintiff performs").

worked for non-trucking companies.[10] They work directly for beverage companies, furniture companies, retailers, food manufacturers, energy companies, and grocery stores. Companies like Walmart, Amazon, and Stellantis use their own fleets.[11] Under the Second Circuit's rule, those truckers would be outside of the Section 1 exemption solely based on the name and claimed industry of the corporation or companies using their services, despite being quintessential transportation workers.

And many of the companies that hire some of their truck drivers directly may also outsource others to an intermediary logistics or distribution company. Two commercial truck drivers may work every day delivering Coca Cola products in a Coca Cola van exclusively for Coca Cola, but would be treated differently under the FAA depending on the company that engaged them. The worker hired directly by Coca Cola would be required to arbitrate their claims, whereas the worker hired through an intermediary company in the transportation industry would be exempt.

Not only would such a rule be profoundly counterintuitive, but it would also be an invitation to large employers to simply contract around Section 1's exemption. If the apparent industry or sector of the entity named on a worker's contract of employment is

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[10] Robert Iafolla, *Private Fleet Drivers' Court Access Grabs Justices' Attention*, BLOOMBERG LAW (Oct. 4, 2023) (quoting Jason Miller, professor of supply chain management at Michigan State University).

[11] *Id.*

determinative of whether or not the workers' legal claims must be resolved in arbitration, employers will simply avoid naming transportation companies in their contracts.

Respondents' proposed industry requirement is wrong as a matter of law, and it would open up a gaping hole in the Section 1 exemption for employer arbitrage. This Court should reaffirm the rule it laid down in *Saxon*: transportation workers are defined by what work they actually do, not by the industry their employer is in.

CONCLUSION

For the foregoing reasons, amici urge this Court to reverse the judgment of the U.S. Court of Appeals for the Second Circuit.

November 15, 2023

Respectfully submitted,

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