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IN THE SUPREME COURT OF THE UNITED STATES

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NEAL BISSONNETTE, ET AL.,)

Petitioners,)

v.) No. 23-51

LePAGE BAKERIES PARK ST., LLC,)

ET AL.,)

Respondents.)

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Washington, D.C.

Tuesday, February 20, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:13 a.m.

APPEARANCES:

JENNIFER D. BENNETT, ESQUIRE, San Francisco, California; on behalf of the Petitioners.

TRACI L. LOVITT, ESQUIRE, New York, New York; on behalf of the Respondents.

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P R O C E E D I N G S

(11:13 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 23-51, Bissonnette versus LePage Bakeries.

Ms. Bennett.

ORAL ARGUMENT OF JENNIFER D. BENNETT

ON BEHALF OF THE PETITIONERS

MS. BENNETT: Thank you. Mr. Chief Justice, and may it please the Court:

Less than two years ago, in Southwest versus Saxon, this Court carefully examined the text and history of the Federal Arbitration Act's worker exemption, and it held that the exemption applies to "any class of workers directly involved in transporting goods across state or international borders."

Flowers now asks this Court to add an additional unwritten requirement that the worker's employer must sell transportation. According to Flowers, if the thousands of truck drivers who work full-time hauling its goods were only implied -- employed by a trucking company that Flowers had hired to do so, then they'd be exempt transportation workers. But,

1 because Flowers essentially created its own
2 in-house trucking company, it says that those
3 same truck drivers are no longer transportation
4 workers.

5 That distinction has no basis in the
6 text of the statute. Flowers' only attempt at a
7 textual argument is its invocation of ejusdem
8 generis, but that argument fails from the start
9 because Flowers can't identify a single example
10 of the word "seamen" ever being defined based on
11 whether a worker's employer sold transportation.

12 In fact, if Flowers' drivers were on
13 boats rather than trucks, under Flowers' own
14 definition of "seamen," they would be seamen.
15 In the words of Saxon, that sinks the company's
16 ejusdem generis argument.

17 Unable to rely on the text, Flowers
18 pivots to administrability. But, even if this
19 Court could rewrite statutes to make them easier
20 to apply, Flowers' rule is anything but
21 workable. Flowers can't even explain how it
22 would apply in this very case.

23 This Court should reject Flowers'
24 attempt to add to the FAA an employer-based
25 industry requirement that is both atextual and

1 unworkable.

2 I welcome this Court's questions.

3 JUSTICE THOMAS: If this case is
4 decided in your favor, would it affect the
5 separate question of whether or not this --
6 these drivers are engaged in intrastate
7 deliveries?

8 MS. BENNETT: No, I don't think it
9 would. The only question -- you know, as this
10 case comes to the Court, built into the question
11 presented is the assumption that the workers are
12 members of a class of workers engaged in
13 interstate commerce. It wouldn't affect that at
14 all.

15 The only question here is, assuming
16 that to be true, is there an additional
17 requirement that the individual plaintiffs be
18 employed by a company that's in the
19 transportation industry?

20 JUSTICE THOMAS: So why would the
21 inquiry into transportation industry be any more
22 complicated than the inquiry into transportation
23 workers?

24 MS. BENNETT: So, by -- by
25 "transportation workers," I take it you mean

1 whether someone is directly involved?

2 JUSTICE THOMAS: Yeah.

3 MS. BENNETT: So -- so I think there
4 are -- I think there are certainly going to be
5 edge cases about whether some -- a class of
6 workers is directly involved in transporting
7 goods across state or international borders. I
8 would concede that. But what Flowers is asking
9 is that we adopt an additional requirement on
10 top of that that wouldn't obviate that inquiry.

11 So take, for example, Amazon. So it
12 has trucks traveling across the highway. It has
13 planes in the air. Maybe there's a difficult
14 question about whether those, you know, say,
15 truckers are directly involved in transporting
16 goods across borders. But what Flowers says is,
17 in addition to figuring out that question, we
18 also have to figure out whether Amazon sells
19 transportation.

20 So, you know, how do we know? Do we
21 need discovery into whether it sells
22 transportation? Does it matter who it sells it
23 to? Does it just have to sell it to its
24 customers? Does it have to sell it to other
25 companies? Does it matter how much

1 transportation it sells? Does it matter what
2 percentage of its price is in revenues? All of
3 these are going to be difficult questions that
4 are then layered on top of the question you
5 raised, which is already in the text of the
6 statute.

7 And so -- and in Amazon's case, for
8 example, it doesn't get us out of the question
9 you raised. It just adds an additional one on
10 top.

11 JUSTICE KAVANAUGH: In your opening,
12 you emphasized the text quite a bit.

13 MS. BENNETT: Yes, Your Honor.

14 JUSTICE KAVANAUGH: But, in ejusdem
15 generis cases, by definition, we're not
16 following the literal text of the residual
17 clause. Instead, we're looking at the listed
18 items and trying to discern what connects those
19 listed items, what feature of those listed items
20 is common. And as -- as the Scalia-Garner
21 treatise says, that can be somewhat
22 indeterminate. A difficult position for judges,
23 but we have to try to figure it out.

24 So seamen and railroad employees in
25 1925, one thing that it seems was going on and I

1 want to get your reaction to is Congress took
2 them out of this arbitration regime. All
3 workers, all contracts of employment are subject
4 to arbitration. It takes them out, but it takes
5 them out -- seemingly, you have to look at the
6 legal context, I would think, because they had a
7 separate arbitration regime that already
8 existed.

9 In other words, at least as I read the
10 record, and it is murky in parts, I'll grant
11 you, as of 1925, Congress didn't want anyone to
12 be outside of arbitration. They wanted
13 Section 2 for most workers and then not for
14 seamen and railroad employees because there was
15 a separate arbitration regime.

16 Why, when we look at the common legal
17 context that connects those terms, isn't that
18 the correct way to look at it? Why is that
19 wrong?

20 MS. BENNETT: There's two answers to
21 that. One is we know that Congress wasn't
22 exempting just workers who had alternative
23 dispute resolution regimes because it added the
24 residual clause, and that residual clause would
25 have covered no workers at all at the time.

1 JUSTICE KAVANAUGH: At the time, but
2 what Congress was doing, arguably -- this is the
3 argument -- was contemplating that there would
4 be future industries that would fit in. And in
5 1936, the airline industry comes in, and those
6 employees are funneled into the same kind of
7 separate arbitration -- or the railway
8 arbitration regime. So Congress was
9 accommodating the future.

10 MS. BENNETT: Sure. So the -- the
11 second historical answer to that is, even if
12 this Court were going to try to discern some
13 purpose of the exemption and instead of focusing
14 specifically on the text, which is difficult a
15 hundred years later, you know, if you look at
16 seamen, I think one of the assumptions under
17 that -- underlying that question is seamen
18 had -- were going to arbitration, that there was
19 a mandatory arbitration scheme that covered
20 seamen, and that's actually just -- just not
21 correct.

22 So the Shipping Commissioners Act,
23 which is the statute that provided for shipping
24 commissioner arbitration for seamen, two things
25 about that. It wasn't limited to employers who

1 sold transportation, so it was -- it had
2 geographic limitations. It was about seamen who
3 were traveling abroad, coast to coast, and some
4 coastwise seamen, like the people on lumber
5 boats who would have been employed in lumber
6 companies.

7 So, even if you think that's the
8 purpose of the exemption, is to accommodate
9 these alternative dispute resolution schemes,
10 adding an employer-based industry requirement
11 would actually conflict with that purpose.

12 I also want to take a step back and
13 talk about what the dispute resolution scheme
14 was governing seamen at the time, and this Court
15 has discussed that in its U.S. Bulk Carriers
16 case, and what the Court said is, you know, from
17 the beginning of time essentially, seamen have
18 been wards of the court. They've been subject
19 to the court's protection with a right to bring
20 cases in court. And since 1790, Congress had
21 enshrined that right in statutes.

22 And what the Shipping Commissioners
23 Act did is it said, if certain seamen, after a
24 dispute arises, if they agree with the master of
25 their boat in writing to go to the -- to the

1 shipping commissioner, then they can do so.

2 And what this Court held is that
3 imposing a pre-dispute mandatory arbitration
4 scheme would conflict with this age-old right to
5 go to court --

6 JUSTICE KAVANAUGH: So you think
7 Congress in 1925 wanted seamen to be able to go
8 straight to court?

9 MS. BENNETT: I think that's exactly
10 right. And I think that's what the --

11 JUSTICE KAVANAUGH: Where -- is there
12 anything to support that?

13 MS. BENNETT: Sure. So -- so there
14 are a few things. One is what this Court said
15 in U.S. Bulk Carriers. If you look at the title
16 of the U.S. Code, which is Title 46, enacted in
17 1925, the same year that the Federal Arbitration
18 Act was enacted, what you'll see is references
19 all of the -- a lot of the rights. The
20 references say you can go to court.

21 And if you look at the Shipping
22 Commissioners Act itself, it only applies if,
23 after the dispute has arisen, the parties to the
24 dispute agree in writing to go to arbitration.

25 In other words, it only applies

1 post-disputes, quite different than what the
2 Federal Arbitration Act would require. And --
3 and this Court explained all of this in -- in
4 the U.S. Bulk Carriers case, and in that case,
5 it was looking at grievance arbitration, but the
6 principles apply, and -- and the principles are
7 this mandatory pre-dispute arbitration statute
8 would have -- would have interrupted all of
9 this.

10 JUSTICE BARRETT: Counsel, can I --
11 I'm sorry, are you finished?

12 JUSTICE KAVANAUGH: Go ahead.

13 JUSTICE BARRETT: Is there any
14 continuing reason -- and this is just my
15 ignorance, so I'm just curious -- we were
16 talking about why in 1925 what the regulatory
17 regime was and whether Congress wanted to funnel
18 some of these transportation workers into
19 alternative dispute mechanism -- resolution
20 mechanisms.

21 Is this now just an anachronism, or is
22 there any continuing reason for transportation
23 workers to be exempt?

24 MS. BENNETT: So I'll -- I'll -- I'll
25 be quite honest with you, which is it's not

1 clear entirely what the purpose was in 1925.

2 It's not clear now.

3 You know, I think, if you -- if you
4 look at the history, what was happening is that
5 there were, you know, strike after strike in the
6 transportation -- among transportation workers,
7 and -- and -- and among maritime workers
8 specifically, the strikes were -- were -- the
9 core of those strikers were lumber boats, people
10 who were not employed by employers in the
11 transportation industry.

12 And -- and to the extent that what
13 Congress was doing is saying these people are
14 really important to our economy and every time
15 they strike they are interrupting commerce, you
16 know, the seamen strike amongst the lumber boats
17 in 1923 interrupted the whole building boom on
18 the West Coast, and so --

19 JUSTICE BARRETT: But -- but that's
20 all from the past, right?

21 MS. BENNETT: Sure. So it may have --

22 JUSTICE BARRETT: So my question is
23 just like, yeah, now.

24 MS. BENNETT: Right. So putting that
25 in that context, you know, one thing that --

1 that courts do and that group-based arbitration
2 does is it makes transparent issues that are
3 coming up amongst transportation workers and
4 amongst these companies, and it gives Congress
5 and the executive branch, which was often
6 involved in these disputes in the past, insight
7 into -- into how these disputes are arising and
8 maybe the potential for heading them off.

9 And so I do think there's a modern
10 reason, you know, to the extent we think that
11 was the reason in 1925, it's no different now in
12 what it -- in that people going to court and
13 people going to sort of labor-based grievance,
14 group-based arbitration like in the railroad
15 statutes would -- would flag these kinds of
16 disputes perhaps before they end up, you know,
17 in nationwide strikes that are going to
18 interrupt commerce.

19 JUSTICE SOTOMAYOR: The Second Circuit
20 did not rely on the district court's reasoning.

21 MS. BENNETT: They did not.

22 JUSTICE SOTOMAYOR: And so it's not
23 before us. And -- and -- but this is more a
24 curiosity on my part.

25 The district court I understood said

1 they're not transportation workers because they
2 do more that's office-based. They're --
3 they're -- they're not a traditional
4 transportation worker.

5 How do you deal with that? If -- if
6 someone's job is, you know, at the end of the
7 day, they're making all this product, but they
8 deliver it from here to somewhere else, that's
9 enough for you?

10 MS. BENNETT: So I'd say there's a
11 factual answer to that question and a legal
12 answer, and I'll take the legal question first,
13 which is --

14 JUSTICE SOTOMAYOR: Okay. Go ahead.

15 MS. BENNETT: -- which is I think what
16 you're raising is the question of some workers
17 have different tasks that they do and how do --
18 how do we deal with that question. And the
19 first stab I would take at that is to look at
20 this Court's decision in Saxon actually.

21 You know, Ms. Saxon in Saxon spent
22 three days a week roughly loading and unloading
23 cargo and two days a week supervising other
24 people. And what this Court said is three days
25 a week is enough. We don't need to look at

1 whether the supervision counts.

2 And -- and, you know, so -- and so
3 there may be, I think, tough questions in very
4 few cases actually where people are -- are
5 having multiple jobs. I'll note that these
6 aren't -- we haven't seen them in the lower
7 courts. It doesn't come up often.

8 And there are -- and the way I would
9 deal with answering them, you know, if it's say
10 less than Saxon but more than never is -- is to
11 look -- you know, I would do two things. One is
12 I would look in 1925 and see, for example, how
13 much, you know, of the time did someone have to
14 spend doing the kinds of work that somebody is
15 doing to be a seamen and a railroad employee.

16 I'd also note that this comes up in
17 other statutory regimes and I might look at
18 those cases. So, for example, there's a whole
19 body of law around the Jones Act, which is the
20 case that involves -- the statute governing when
21 seamen are injured and when they can bring
22 claims about what percentage of the time the
23 person has to be connected to the vessel in
24 order for them to be a seamen, and so I might
25 look at that body of law.

1 There's a body of law under the Motor
2 Carriers Act about how much a -- a company needs
3 to be engaged in commerce to be subject to that
4 act.

5 So it's not an unusual question, and
6 courts have tools to answer that question. It's
7 also not a question that comes up much.

8 JUSTICE KAVANAUGH: Can I ask you
9 about Saxon itself and also comments in your
10 brief that it would make no sense to adopt the
11 opposing side's view?

12 Because, in Saxon, at oral argument,
13 it was repeatedly stated to us, if we're talking
14 about a company that is shipping its own goods,
15 those people likely wouldn't have been railroad
16 -- railroad employees or seamen at the time.

17 "Not just Amazon department stores,
18 those people are likely not exempt, and here's
19 why. There was a distinction that was made
20 between railroads that shipped things for the
21 public, and I think that's how we normally
22 understood -- understand seamen and railroad
23 employees and say a coal company's internal
24 railroads."

25 And there's another -- there's more.

1 "We have seamen and railroad employees, the two
2 classes of workers that had preexisting dispute
3 resolution statutes at the time and were
4 commonly understood categories."

5 "As a class, the seamen are the people
6 who do the work of the shipping industry. As a
7 class, railroad employees are people who do the
8 work of the railroad industry."

9 Now I bring that up not to bind
10 anyone. I bring that up just because that was
11 the common-sense understanding of counsel -- of
12 Saxon, and so it seems odd that you would read
13 the Saxon opinion to have blown through those
14 limits that were being stressed by counsel for
15 Saxon about the implications of the position,
16 number one.

17 And it seems odd also to say the other
18 side's position just makes no sense when --
19 given what was said at the oral argument in
20 Saxon. So I just want to give you an
21 opportunity to respond to that.

22 MS. BENNETT: Sure. A -- a few
23 responses to that. One is, you know, we don't
24 read Saxon to decide the question presented
25 here. I don't think --

1 JUSTICE KAVANAUGH: Because I
2 certainly didn't think that based on what
3 happened at oral argument.

4 MS. BENNETT: Sure. And I -- I
5 think -- I think it leaves the question
6 presented open, although I will say I think
7 Flowers' argument is inconsistent with the
8 reasoning of Saxon, which is we look at what
9 these words meant in 1925, and we also are
10 looking for a commonality between seamen and
11 railroad employees, and if there isn't that
12 commonality, we're not going to add an
13 additional requirement.

14 Now I think you asked about some
15 answers to the hypotheticals in -- in Saxon.

16 JUSTICE KAVANAUGH: Mm-hmm.

17 MS. BENNETT: You know, and I'll note
18 that this question wasn't presented either way
19 in Saxon, and -- and there were some
20 hypotheticals I do think that touched on this
21 question, but the -- you know, and I apologize
22 if -- if the answer wasn't as clear as it should
23 have been. The gravamen of that --

24 JUSTICE KAVANAUGH: Well, I thought
25 the answer was very clear actually.

1 MS. BENNETT: Well, so -- so --

2 JUSTICE KAVANAUGH: It was reassuring,
3 I think the word "narrow" was used, reassuring
4 that the holding in favor of Saxon would be
5 narrow and would not extend to industries other
6 than the transportation industry, which that may
7 be incorrect, but to call it like that makes no
8 sense is a little much for me at least.

9 MS. BENNETT: Sure. And I think the
10 -- the gravamen -- you know, the -- there were
11 specific predictions maybe, but the gravamen of
12 that answer is to know whether the Federal
13 Arbitration Act exempts a particular class of
14 workers, what we'd have to do is go back and
15 look in 1925 and see what these words meant.
16 And we've now -- you know, because it wasn't the
17 question presented in Saxon, that -- that
18 research hadn't been done. We've now done that
19 that.

20 And I think it's very clear that in
21 1925, the word "seamen" did not mean somebody
22 who was employed by a company that sold
23 transportation, and I -- I'd like to turn to
24 that briefly if -- if I may.

25 You know, every source we have, when

1 you go back and take a look, dictionaries, case
2 law, books, other statutes, literally any piece
3 of evidence we have confirms that the word
4 "seamen" included anyone who worked aboard a
5 vessel in furtherance of its purpose. It had
6 nothing to with whether an employer sold
7 transportation or in the Second Circuit's word
8 had a particular price or revenue structure.

9 And I'll note that this Court has
10 already canvassed this history at least twice
11 and first in Wilander and then again in Saxon,
12 and both times it came to the same conclusion,
13 which is that "seaman" -- "seamen" rather is a
14 longstanding, well-defined term that in 1925
15 plainly meant everybody who worked aboard a
16 vessel.

17 Now, to its credit, I actually don't
18 take Flowers to dispute this ordinary meaning of
19 "seamen." Maybe they'll get up and tell me I'm
20 wrong about how I read their brief. But -- but
21 what I take them to say is, you know, whatever
22 the ordinary meaning is, for purposes of the
23 Federal Arbitration Act, the Court should give
24 the word a different definition, and that
25 different definition should be something like

1 workers aboard a ship in a carrying trade
2 carrying goods for trade and commerce.

3 And -- and there are two problems,
4 though, with this request. The first is not
5 only is this not the ordinary meaning of
6 "seamen" in 1925, it's not any meaning ever of
7 "seamen" in 1925 or since then. What that
8 definition comes from is a definition that a
9 single district court gave to the term "merchant
10 vessel," and the term "merchant vessel" is
11 nowhere in the Federal Arbitration Act.

12 So Flowers has to demonstrate a
13 commonality between seamen and railroad
14 employees, not between railroad employees and
15 merchant vessels. So that's the first problem.
16 It's just not in the statute.

17 The second problem, though, is that
18 even if this Court were willing to accept this
19 definition of words that aren't even in the
20 statute as the definition of "seamen" for
21 purposes of the Federal Arbitration Act and
22 define it in accordance with what Flowers says
23 we should define it, Flowers' drivers meet its
24 own definition. There's no question that
25 Flowers' truck drivers are engaged in

1 transporting goods for commerce, just like the
2 people on lumber boats in 1925, just like the
3 people on the barges carrying railroad tie
4 manufacturers' goods in this Court's decision in
5 Ayer.

6 And so, even if we were to accept
7 every single one of Flowers' arguments on
8 seamen, they still haven't shown that this
9 employer-based industry requirement has anything
10 to do with the words of the statute.

11 JUSTICE KAGAN: And -- and just to
12 understand, what are the categories of seamen
13 who do not work in the shipping industry?

14 MS. BENNETT: There's a vast number of
15 them, and they're not -- you know, one thing
16 that's difficult is they're not -- well, so I
17 actually -- I want to take a step back and --
18 and -- and talk about the word "industry" very
19 briefly, which is to say, when you say "in the
20 shipping industry," we can mean two different
21 things. One is we can mean the workers who are
22 in the industry, as in these are people who do
23 shipping work. They do the work of the boat.
24 Or you can mean sort of an employer-based
25 requirement, which is they work for a company

1 that sells transportation on Flowers' version.

2 And I think the intuition that seamen
3 and railroad employees are definitely in the
4 transportation industry is an intuition on the
5 first question about industry people --

6 JUSTICE KAGAN: So assuming what I
7 meant was the second.

8 MS. BENNETT: Sure. Sure. A slightly
9 --

10 JUSTICE KAGAN: So who are the seamen
11 who are not working for shippers?

12 MS. BENNETT: There's a bunch of them.
13 So there are a bunch of manufacturers, for
14 example, who employed seamen. There is -- a
15 railroad tie manufacturer, for example, in Ayer
16 employed seamen. There were lumber boats all up
17 and down the West Coast that employed seamen.
18 They worked for lumber companies. They didn't
19 work for transportation companies. There were
20 coal companies that employed seamen. The Ford
21 Motor Company employed seamen. There's a host
22 of -- of employers that employed seamen.

23 And the reason is very similar to why
24 you have a host of companies employing truckers
25 today, which is that, unlike railroads, which

1 require, you know, like a track and a railroad,
2 which is expensive and -- and
3 infrastructure-heavy and can only be laid in
4 certain places, all you needed to ship your own
5 goods is a boat --

6 JUSTICE KAVANAUGH: And before --

7 MS. BENNETT: -- just like --

8 JUSTICE KAVANAUGH: Keep going.

9 Sorry.

10 MS. BENNETT: No, please go ahead.

11 JUSTICE KAVANAUGH: Before 1925 -- and
12 you might have addressed this earlier, but I
13 want to make sure I have it nailed down. Before
14 1925, could those employees who worked, as
15 Justice Kagan said, not in the shipping industry
16 but, say, lumber barges and that kind of
17 thing -- if they had a dispute, did it go to the
18 shipping arbitration regime, or did it go to
19 court?

20 MS. BENNETT: They could choose. So
21 the -- the shipping arbitration regime, the --
22 the -- it applied to anybody who was not paid on
23 profit share, who was on an international
24 voyage, a coast-to-coast voyage, or a coasting
25 voyage if they had signed ship -- shipping

1 articles before the shipping commissioner.

2 JUSTICE KAVANAUGH: Right, but that --
3 I think that blends into my concern earlier that
4 the linkage was, even if you have a slightly
5 broader category of seamen than they say, they
6 were covered by this separate arbitration
7 regime, I think is what you're saying.

8 MS. BENNETT: Some were and some were
9 not. It would depend on the length of their
10 voyage essentially.

11 JUSTICE JACKSON: Didn't you also say
12 it depended on whether they chose afterwards?

13 MS. BENNETT: Yes. That's exactly
14 right.

15 JUSTICE JACKSON: Yeah.

16 MS. BENNETT: So -- so -- and they --
17 it was only if -- you know, even the seamen who
18 were covered by this statute would only go to
19 arbitration if they chose to do so along with
20 the master of their boat.

21 JUSTICE GORSUCH: I do want to
22 understand, though, Justice Kavanaugh's point,
23 who would not have been included in the regime?
24 You said there are some seamen who wouldn't be.
25 Who are they?

1 MS. BENNETT: So anybody who was on a
2 coasting voyage who did not sign their shipping
3 articles in front of a shipping commissioner.
4 So the lumber -- to take the lumber boat as an
5 example, the lumber boat workers who had signed
6 shipping articles before the shipping
7 commissioner could have gone to shipping
8 commissioner arbitration. Those who didn't
9 could not.

10 Anybody who wasn't on an ocean voyage.
11 So anybody who was on a river or on a lake,
12 those were certainly seamen. They could not
13 have --

14 JUSTICE GORSUCH: Categorically
15 outside the arbitration provision?

16 MS. BENNETT: Categorically outside
17 because those voyages were only international,
18 coast-to-coast, or coastwise. So anybody doing
19 seamen's work in the internal parts of the
20 United States. Anybody doing seamen's work that
21 was local, that didn't go very far, so, for
22 example, this Court's decision in Ellis talks
23 about dredgers as being seamen.

24 JUSTICE GORSUCH: Got it.

25 MS. BENNETT: Yeah.

1 JUSTICE GORSUCH: Thank you.

2 JUSTICE JACKSON: So, even if we
3 reject the transportation industry test, we
4 would still have to distinguish transportation
5 workers from other workers, and you talked a
6 little bit with Justice Sotomayor about that.

7 Are you suggesting that we -- if we
8 side with you in this case, that we take this
9 opportunity to say more about that distinction,
10 or do you think Saxon covers it?

11 MS. BENNETT: I think Saxon covers it,
12 and Saxon lays out a pretty clear test, which is
13 workers that are directly involved in
14 transporting goods across foreign or state
15 borders. And -- and I'll note, since Saxon, the
16 lower courts are pretty much agreed about what
17 that means, and so I think, you know, if there
18 is some further dispute that comes up, perhaps
19 this Court may need to weigh in in that case,
20 but I don't think this Court needs to do so
21 here.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Thomas?

25 Justice Alito?

1 Justice Sotomayor?

2 Justice Kagan?

3 Justice Gorsuch?

4 JUSTICE GORSUCH: Your friends on the
5 other side make a large feature about some
6 language in -- in Saxon, and I'm not sure you
7 quite had a chance to address it yet, but seamen
8 constituted a subset of workers engaged in the
9 maritime shipping industry. Put aside history.
10 How do you deal with that as a matter of
11 precedent?

12 MS. BENNETT: I think there are -- are
13 two answers to that. One is -- and they're
14 related. One is the argument that the Court was
15 discussing there was just the argument that
16 anybody who did the work of shipping would be
17 exempt and would be a seamen. What the Court
18 was saying is not everybody who did the work of
19 shipping was a seamen. What they were saying --
20 what -- you know, the people who are seamen are
21 people who do the work of shipping on a boat.

22 JUSTICE GORSUCH: Got it.

23 MS. BENNETT: So I don't think the
24 Court was answering --

25 JUSTICE GORSUCH: That's one. You

1 said you had two.

2 MS. BENNETT: The second is related,
3 which is -- so the -- it's similar to the answer
4 I was giving Justice Kagan earlier, which is
5 what it means to be in an industry. So, for
6 example, you know, Jones Day, certainly in the
7 legal services industry. I don't think the head
8 chef at the cafeteria of Jones Day would say
9 that she is in the legal services industry. I
10 think she'd say she's in the food services
11 industry.

12 JUSTICE GORSUCH: How does that differ
13 from the first point?

14 MS. BENNETT: I think they're related.
15 It's the same thing. Essentially, what the
16 Court --

17 JUSTICE GORSUCH: Okay. All right.
18 Thank you.

19 MS. BENNETT: -- understood.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh?

22 Justice Barrett?

23 Justice Jackson?

24 Thank you, counsel.

25 MS. BENNETT: Thank you.

1 CHIEF JUSTICE ROBERTS: Ms. Lovitt.

2 ORAL ARGUMENT OF TRACI L. LOVITT

3 ON BEHALF OF THE RESPONDENTS

4 MS. LOVITT: Thank you, Mr. Chief
5 Justice, and may it please the Court:

6 As counsel has made clear, Petitioners
7 view the Section 1 exemption as encompassing any
8 worker directly involved in a good's interstate
9 journey, from the plant worker who loads goods
10 for shipment to the store clerk who unloads them
11 and shelves them.

12 But, in *Circuit City*, this Court said
13 that the Section 1 exemption should be read
14 narrowly and should be interpreted with
15 reference to the *ejusdem* canon, context, and
16 history, all three of which demonstrate that the
17 exemption is limited to transportation industry
18 workers.

19 After all, in 1925 -- Justice
20 Kavanaugh is correct -- seamen and railroad
21 employees were defined by the industry in which
22 they work. And that commonality should carry
23 through to the residual clause. Context and
24 history tell you why this line makes sense.

25 By 1925, Congress knew that labor

1 disputes involving transport -- transportation
2 industry workers were different. They were
3 unique. They could cause famines in Chicago.
4 And in response, Congress passed two and only
5 two federal arbitration statutes, one governing
6 railroad employees in the rail industry and one
7 governing seamen, who, under the Shipping
8 Commissioners Act, were limited to those in the
9 shipping industry.

10 Petitioners can't provide a why for
11 the enumeration. They can't explain why you
12 would pair railroad employees and seamen
13 together. And they advocate a definition of
14 "seamen" that is so broad, it's flatly
15 inconsistent with the notion of a transportation
16 worker and this Court's holding in Circuit City.

17 The result, a poor fit. And
18 Petitioners show by example. Petitioners buy
19 Flowers' bread. They pay Flowers for product.
20 Then they take title to the bread, and it is
21 only after they take title to the bread that
22 they then move it intrastate in order to sell it
23 to retailers for a profit. They are under no
24 personal obligation to move anything. They look
25 nothing like railroad employees or seamen.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: We -- we have looked
3 at the performance of the workers in Saxon, and
4 wouldn't it complicate matters now to look at
5 the entire industry as the -- certainly, the
6 district court did and -- and the Second Circuit
7 did?

8 MS. LOVITT: I don't think so, Justice
9 Thomas.

10 JUSTICE THOMAS: And don't you think
11 -- I mean, I thought we foreclosed that. We
12 said that we won't look. The argument -- part
13 of the argument in Saxon was, well, she, Saxon,
14 is in the -- in the transportation industry
15 therefore.

16 And as I hear you, you're saying,
17 well, Petitioner here is not in the
18 transportation industry therefore. And we
19 foreclosed that, I thought, in -- in Saxon.

20 MS. LOVITT: So two points, Justice
21 Thomas. The first was that you have to read
22 those holdings in Saxon in light of the
23 background fact that Ms. Saxon was an airline
24 transportation industry worker. The Court
25 presupposed that fact. And as Justice Kavanaugh

1 read from the oral argument, that was accepted
2 fact and part of the background on which the
3 holding was made.

4 The second point is the industry-wide
5 holding, and in that part of the Court's
6 opinion, the Court was rejecting Ms. Saxon's
7 argument that it was sufficient for her to fall
8 within the Section 1 exemption just because she
9 was a transportation industry worker.

10 And our argument is not that it's
11 sufficient. We think that -- that you have to
12 do the Saxon analysis, but the first question
13 is, is being in the transportation industry
14 necessary?

15 And -- and -- and the answer to that
16 should be yes, because, you know, ever since
17 1972 in the Second Circuit, the background rule
18 has been that you have to be in a transportation
19 industry. That's the Erving decision that
20 predates Circuit City and was on the winning
21 side of the Circuit City split.

22 JUSTICE JACKSON: So we have cases
23 from the 1920s in which you didn't have to be in
24 the transportation industry in order to be
25 counted as a seaman. So how do you square your

1 position with that?

2 MS. LOVITT: So I -- first, I think
3 Saxon informs what it means to be a seamen,
4 but -- but, Justice Jackson, those cases aren't
5 dealing with the limit here, which is you
6 already have Circuit City, and Circuit City has
7 already held that ejusdem -- because of the
8 ejusdem canon, there are implied limits.

9 And one of those implied limits is
10 it's not a limitless seamen. It's the seamen
11 who are transportation workers. And I think
12 that's where Petitioners' definition gets in
13 trouble because Petitioners freely admit that
14 their seamen are pirates, they're enemy ship
15 folks, they're on recreational boats.

16 JUSTICE JACKSON: I understand that.

17 JUSTICE BARRETT: But can I --

18 JUSTICE JACKSON: But how do you
19 square that with cases where we have actors
20 aboard a ship being counted as seamen, for
21 example?

22 MS. LOVITT: Most of those are Jones
23 Act cases, and --

24 JUSTICE JACKSON: Well, why does that
25 matter when Congress was using the word "seamen"

1 as I'm sure it was understood at the time that
2 statute was passed?

3 MS. LOVITT: Two reasons. The first
4 is the Jones Act has a broad remedial purpose,
5 and this Court has repeatedly recognized in the
6 Jones Act context that it's reaching to the
7 outer limit of seamen.

8 The second is that there's no other
9 federal statute that uses railroad employees and
10 seamen together, and Circuit City says that that
11 list has meaning and that list means that
12 Section 1 seamen are different from other
13 seamen. They share a commonality with railroad
14 employees. And this Court held in Circuit City
15 that that commonality is transportation worker.

16 CHIEF JUSTICE ROBERTS: Well, but
17 commonality can get very complicated, as your
18 friend on the other side said. I mean, where
19 did the price structure and revenue approach
20 come from?

21 MS. LOVITT: That -- that was part of
22 the Second Circuit's decision and --

23 CHIEF JUSTICE ROBERTS: Yeah, but
24 where did it -- where did they get it?

25 MS. LOVITT: I think the Court was

1 looking to characteristics of folks in the
2 transportation industry and giving a more
3 granular approach to what are common
4 characteristics on the facts of this case.

5 And, again, these facts aren't
6 disputed. So there's for purposes --

7 CHIEF JUSTICE ROBERTS: No, no, but I
8 mean they're not -- they're trying to figure out
9 what the transportation industry is.

10 MS. LOVITT: Mm-hmm. Right.

11 CHIEF JUSTICE ROBERTS: And, again,
12 I -- I think they just kind of made up, not -- I
13 don't use that in a pejorative sense, maybe
14 created this price structure and revenue
15 approach, but it really imposes a -- a difficult
16 burden and it would seem to me a lot of
17 different results. I mean, you'd have conflict
18 among the lower courts considering how that
19 applies.

20 I mean -- and the examples they give I
21 think are pretty compelling. I mean, is -- is
22 Amazon in the transportation business just
23 because it has a fleet of planes that it uses or
24 part of Amazon is?

25 MS. LOVITT: So, to take your kind of

1 three questions there, so I'll --

2 CHIEF JUSTICE ROBERTS: Sorry.

3 MS. LOVITT: -- I'll try to keep track
4 of them, but the first -- the first question,
5 which is about the Second Circuit's analysis, I
6 think the Second Circuit was giving factors that
7 were relevant to this case.

8 I think the test is broader than that
9 and it has been broader than that because,
10 again, the background rule for -- since at least
11 1972 in the Second Circuit has been you have to
12 be in the transportation industry, and it's been
13 a line between, are you hauling only your own
14 stuff, or is part of your business hauling
15 third-party goods as well?

16 And that's a very clean line. Let's
17 use your Amazon example. I think, in Amazon --
18 and, again, I don't -- I'm not Amazon's counsel,
19 so I'm speaking as purely a consumer. As I
20 understand Amazon, they're shipping not only
21 some Amazon retail products, but their regular
22 course of business involves shipping all sorts
23 of products that they don't manufacture.

24 CHIEF JUSTICE ROBERTS: Well, but --

25 MS. LOVITT: I think they're clearly

1 in the transportation industry.

2 CHIEF JUSTICE ROBERTS: Well, but
3 sometimes they use their own planes and
4 sometimes they use FedEx's planes.

5 MS. LOVITT: And it --

6 CHIEF JUSTICE ROBERTS: So -- and
7 sometimes the workers who do exactly the same
8 thing count as in the transportation industry,
9 but in the other -- other times they don't.

10 MS. LOVITT: Well, again, I think that
11 in the Amazon case, you're -- you're -- you're
12 in the transportation industry, and they get out
13 for -- for last-mile reasons. But, to your
14 question, which is sometimes they use FedEx,
15 that's correct, but if FedEx -- if we had used
16 FedEx, the defendant in this suit wouldn't be
17 Flowers Foods. It would be FedEx because the
18 contract of employment would be between FedEx
19 and the worker.

20 Why would Congress do that? That was
21 your last question. I think that's the key
22 question. And there's a lot of reasons why
23 Congress would do this. There's -- this is --
24 to us, Section 1, the exemption, is a wholesale
25 policy judgment by Congress that transportation

1 industry workers are different.

2 And we know Congress is making
3 wholesale judgments because it had put only two
4 classes of workers in arbitration or had federal
5 arbitration statutes, railroad employees and
6 seamen, in the shipping industry.

7 And why would Congress do that?
8 Because, up to 1925, there had been many
9 strikes, as Petitioners point out, but only
10 strikes involving the transportation industry
11 brought the country to a halt and caused famines
12 in Chicago. And so Congress could reasonably
13 say this is different.

14 Today, we -- because the economy is
15 different, we can think of all sorts of reasons
16 why that policy judgment doesn't fit on the
17 modern economy, but that doesn't make Congress's
18 judgment in 1925 wrong.

19 JUSTICE BARRETT: But, Ms. Lovitt, the
20 Shipping Commissioners Act, Ms. Bennett says
21 that, in fact, it did encompass seamen who were
22 outside of the shipping industry.

23 If I agree with her about that, do you
24 lose?

25 MS. LOVITT: Well, I -- I would

1 disagree with that, and if I can answer that
2 question first, then yours, Justice Barrett.

3 JUSTICE BARRETT: Sure.

4 MS. LOVITT: So the Shipping
5 Commissioners Act has two large restrictions.
6 The first was in -- and I'm citing the 1925
7 version -- 46 U.S.C. Section 464 and
8 Section 465.

9 Section 464 says it's only voyage --
10 vessels that have voyages from the East Coast in
11 the United States to the West Coast and from a
12 port in the United States to a port overseas,
13 not Canada. And then there's a second limit
14 that you can't be earning a profit from the
15 things that you're shipping. So you're not --
16 you're not making your money because you're
17 shipping fish and you're selling the fish.
18 You're making the money off the transportation.

19 Those two limits boil down to the
20 shipping industry, and here's where I think a
21 little bit of history of shipping helps a lot.

22 The Panama Canal didn't open until
23 1914, so to get from San Francisco to Boston in
24 1914 was almost a nine-month journey. You don't
25 take that journey and return with an empty ship.

1 Those factors that are in the Shipping
2 Commissioners Act are isolating the industry.

3 And it makes sense because the people
4 who need the arbitration remedy, the seamen who
5 need the arbitration remedy are those who are
6 going from port to port to port to port to port,
7 going on a new vessel every time. They aren't
8 the employees of -- of a company that's making
9 the same journey back and forth and they're
10 regularly employed.

11 JUSTICE BARRETT: Except you just
12 pointed out reasons in the statute that limited.

13 MS. LOVITT: Mm-hmm.

14 JUSTICE BARRETT: So you're saying
15 this wasn't just any seamen, it was seamen who
16 met these particular restrictions.

17 Well, Section 1 doesn't have that
18 additional language. It just says seamen. So
19 why wouldn't Section 1 be a broader subset of
20 the narrower subset that you're talking about?

21 MS. LOVITT: Because, in both New
22 Prime and in Circuit City, this Court recognized
23 that the rich fabric upon which the Section 1
24 exemption was passed was the fabric of the
25 Shipping Commissioners Act and the Rail -- the

1 Railway Act, and both of those were limited in
2 effect to the shipping industry workers, and so
3 it would have been unusual at the time to bring
4 in all of these seamen who, again, Petitioners
5 concede recreational boats are in.

6 So, if you work on a yacht, you are --
7 and you never transport a good and you're just
8 sightseeing with, you know, whoever owns the
9 yacht, you're a seamen within the Section 1
10 construct. That's not a transportation worker,
11 and that's not what Congress was getting at.
12 They were getting at that narrow subset of
13 workers who actually impact the national
14 commerce and national security.

15 JUSTICE JACKSON: But why do those
16 workers have to be in the industry?

17 I mean, I can agree with you that the
18 statute is about transportation workers and, in
19 fact, we've held that. So we're not talking
20 about -- I mean, maybe -- maybe I would disagree
21 with the representation that you just made about
22 people who are working on a yacht. Maybe.

23 But I think the line there is drawn
24 between transportation worker and other workers.
25 Both -- you can have transportation workers in a

1 different kind of industry. That's why I don't
2 understand where the industry limitation is
3 coming from. That's not in the statute.

4 MS. LOVITT: I -- I think it's coming
5 from -- I think it is in the statute. I think
6 it's falling out of the enumeration. And as
7 Justice --

8 JUSTICE JACKSON: But we've said the
9 enumeration goes to transportation worker.
10 Seamen, railroad workers. The other we say is
11 limited by that to mean transportation workers.
12 Got it.

13 Where is the industry coming from?

14 MS. LOVITT: So two points. First, in
15 -- in Saxon, I think this Court correctly
16 recognized that it's never given an exhaustive
17 definition of "transportation worker."

18 So the industry is coming out of the
19 fact that in 1925, seamen were the seamen on
20 these merchant ships that run the shipping
21 industry, yes.

22 JUSTICE JACKSON: But what about
23 companies in 19 -- in the 1920s that had their
24 own fleets or own boats or railroad companies or
25 lumber companies that had railroad workers that

1 were their own, in-house?

2 MS. LOVITT: They were almost always
3 outside of the Shipping Commissioners Act
4 because they were making these little local
5 journeys that aren't falling within the
6 arbitration provisions.

7 And -- and a lot's been said -- if
8 you'd indulge me for 30 seconds, a lot's been
9 said about these lumber schooners. Petitioners
10 actually don't have the history right on lumber
11 schooners. Lumber schooners are a kind of boat
12 and they were owned by syndicates. The
13 syndicates included all people within the -- you
14 can imagine, the people who produced the lumber,
15 the people who were trading in lumber, the
16 people who converted the lumber to two-by-fours,
17 and people who made paper. And they had one --
18 and the master of the vessel. And they had one
19 interest, which was to keep the vessel full.
20 So, to the extent that they --

21 JUSTICE SOTOMAYOR: Counsel, isn't all
22 of this an argument for us looking at the
23 last-leg drivers and deciding whether this was
24 foreign or interstate commerce as understood at
25 the time?

1 MS. LOVITT: I --

2 JUSTICE SOTOMAYOR: I mean, that's
3 where I see this argument. I just don't see it
4 -- I mean, by the way, as an aside, Amazon,
5 who's an amicus on your side, doesn't agree with
6 you. On -- on pages 5 to 7 in their brief, they
7 say the focus is not on what the employee is
8 doing as part of its duties -- employer is
9 doing, but what -- what the industry is. And it
10 says it's what the employee is doing. Their
11 argument is, on what I'm saying your argument
12 is, we have to look more carefully and more
13 narrowly at what foreign or interstate commerce
14 means.

15 MS. LOVITT: Well, two -- two points,
16 Justice Sotomayor. The first is I doubt they
17 liked my answer that they were in the
18 transportation industry, which might explain
19 what they were doing on pages 5 through 7, but I
20 do think, if you disagree with us, that --

21 JUSTICE SOTOMAYOR: Well, they're
22 saying they're not, but they don't say that's
23 dispositive. What they're saying is what's
24 dispositive is that their workers are not
25 engaged in foreign or interstate commerce.

1 MS. LOVITT: And I -- I would agree
2 that if -- if you decide -- I think the last
3 mile cases are important. And I think you --
4 you do have to decide the last mile issue --

5 JUSTICE SOTOMAYOR: Not here, though.

6 MS. LOVITT: -- as well as our issue.
7 Not here, but it would be an issue for remand
8 because we've -- you know, we've preserved the
9 issue.

10 JUSTICE SOTOMAYOR: I -- we --

11 MS. LOVITT: But --

12 JUSTICE SOTOMAYOR: -- don't even have
13 to get into that. Whether you preserved it or
14 not, I didn't check.

15 MS. LOVITT: -- I do think --

16 JUSTICE SOTOMAYOR: The question is a
17 different question.

18 MS. LOVITT: -- I want to get to the
19 heart of that question, which is, is the problem
20 solved by last mile? And no, it's not, because,
21 again, the background rule here until about 2020
22 was that the transportation industry workers
23 were out, and that's why you're not seeing these
24 cases arise until just the past year or so.

25 And so the problem is you have a lot

1 of companies who are -- are like -- I'm just
2 going to say Acme to keep, you know, the record
3 clean. You have Acme Company, who actually has
4 their own drivers who cross state lines. That
5 company doesn't see themselves -- they're not in
6 the shipping industry in any -- in any way, and
7 they're not preserved by the last mile.

8 And so you start to introduce a whole
9 class of cases. I mean, every -- in the modern
10 economy, every retailer, every manufacturer has
11 a shipping department, and those shipping
12 departments are inevitably shipping goods in
13 interstate commerce.

14 And so you'd be -- in light of the
15 fact that the background rule excluded
16 transportation industries, you're opening a
17 whole other area that has been -- I mean,
18 honestly, if you look at Circuit City, it --
19 this -- cases that the Court affirmed in Circuit
20 City, the court of appeals cases, were all
21 assuming a transportation industry component.

22 JUSTICE BARRETT: Ms. Lovitt, do we
23 care -- let's -- let's say we do care. I want
24 to follow up on Justice Sotomayor's question.

25 If you win, if we say there is an

1 industry requirement, on the last mile -- if
2 we've shifted our focus to the industry, does
3 that go a long way toward settling the last mile
4 driver question against you because then would
5 we say, as long as you're a worker in the
6 industry and the industry is engaged in
7 interstate commerce, you get swept in? Or -- I
8 understand it wouldn't resolve it, but would it
9 make your argument harder?

10 MS. LOVITT: No, I don't think so
11 because we're viewing the industry issue as a
12 threshold issue. It's a necessary condition,
13 not a sufficient one. So you'd still have the
14 Saxon analysis. And at the reason why that is
15 important is because you're excluding a whole
16 line of cases that heretofore have been excluded
17 involving manufacturers.

18 You'd still need to decide the last
19 mile question. And I think, for the good of the
20 lower courts, it would be good to take one of
21 those cases because that's an additional
22 limitation, not an alternative limitation in our
23 view and one that would -- again, I think it's
24 important to deal with both preventing the wave
25 of cases. And, again, Petitioner is not denying

1 the fact that this is opening a whole new line
2 of cases that, since even before the time of
3 Circuit City, were viewed as off limits under
4 Section 1. It's -- it's -- it's preventing that
5 waterfall and cascade of cases.

6 JUSTICE KAVANAUGH: Do you -- do you
7 think, before 1925, as your friend on the other
8 side said, there were some workers who were not
9 covered by any arbitration regime?

10 MS. LOVITT: Industry workers? I
11 mean, prior to -- so you --

12 JUSTICE KAVANAUGH: Well, that might
13 have loaded the --

14 MS. LOVITT: Yeah.

15 JUSTICE KAVANAUGH: You might have
16 just loaded the question. I think the question
17 was seamen who don't work for what we would call
18 a maritime shipping company --

19 MS. LOVITT: Mm-hmm.

20 JUSTICE KAVANAUGH: -- fell into this
21 gray area where they were covered by neither
22 arbitration regime, I think was the theory, and
23 -- I think that was the theory or at least the
24 answer. Do you agree with that?

25 MS. LOVITT: So just if I could

1 restate the question to --

2 JUSTICE KAVANAUGH: Yeah. Please do.

3 MS. LOVITT: -- make sure I understand
4 it correctly, is that there -- there were seamen
5 who were outside the Shipping Commissioners Act
6 or, you know, that -- that don't work in the
7 shipping industry. That would be the leisure
8 example, right, and the recreational boats, the
9 folks who are -- who are on lumber schooners
10 that are just doing coastwise voyages, so
11 they're doing -- and those are the traditional
12 manufacturers. They would be outside of the
13 Shipping Commissioners Act.

14 We are operating a bit -- just to be
15 candid, there aren't any cases interpreting the
16 Shipping Commissioners Act. So you have to
17 interpret by analogy of, you know, what was
18 happening in the rail industries. In the rail
19 --

20 JUSTICE KAVANAUGH: And on the -- on
21 the rail industry, it's crystal -- well,
22 "crystal clear" is a little strong, but it's
23 clearer, right, that you had to be an employee
24 of the railroad?

25 MS. LOVITT: Yeah. We would use the

1 word "crystal clear," but in -- in the -- in the
2 federal arbitrations provisions governing
3 railroad employees, you had to be an employer of
4 the common carrier.

5 And -- and then just to take it full
6 circle to Saxon, I mean, the cases that this
7 Court was citing in Saxon for the idea that a
8 cargo loader was part of the -- part of
9 interstate commerce, those are all rail common
10 carriers cases.

11 And the holding is, if you're a
12 baggage handler on a railroad that's in the
13 industry providing transportation services,
14 you're clearly in.

15 JUSTICE KAVANAUGH: And so the -- one
16 thing I couldn't figure out is, but I think the
17 number of workers who are going to be exempt and
18 number of companies who are going to have to
19 deal with this is massive if you lose. But, I
20 mean, spell that out for me. That's -- I'm not
21 sure how to quantify it really.

22 MS. LOVITT: So it's massive. Let's
23 -- let's -- again, these are all new cases in
24 the past, say, five years. In the past five
25 years, you've had cases against Domino's

1 franchisees, so you're bringing in every
2 franchise restaurant, which is why the
3 restaurant industry group filed on our behalf.

4 You're bringing in the medical
5 industry. Medical industry ships like this
6 because they need to get their products very
7 quickly from one place to another.

8 You're bringing in basically the
9 entire food industry because, again, these
10 point-to -- these point-to-sale shipments like
11 breads, things that go bad, beer, that you have
12 to -- that whole industry is now in.

13 And the way that the modern economy
14 works, this is how retail works. You're now
15 bringing in every retail industry that is
16 shipping their own -- they've got, you know,
17 warehouses going to brick-and-mortars.

18 JUSTICE JACKSON: But --

19 MS. LOVITT: Those companies are now
20 in.

21 JUSTICE JACKSON: But couldn't that be
22 taken care of through other doctrines?

23 MS. LOVITT: Not through last mile,
24 which I think was the -- the question.

25 JUSTICE JACKSON: Yes.

1 MS. LOVITT: Because these are --
2 these are case -- these are all companies that
3 are shipping over the borders. And the reason
4 why this hasn't been a problem to date is,
5 again, because the background rule has been the
6 transportation industry.

7 And even in Saxon, when you're talking
8 about the seamen who are under Section 1, you're
9 using a subset of the maritime shipping
10 industry. Even this Court in its -- I -- I'm
11 not saying its holding or decided anything, but
12 I think it's saying these -- this is the
13 language that's informing the lower courts.

14 JUSTICE ALITO: Well, that's a -- an
15 important point, and I hope that Ms. Bennett
16 will take the opportunity on rebuttal to address
17 it.

18 But let me just ask, on the other
19 side, it may have been straightforward for the
20 Second Circuit to apply its test to the facts of
21 this case, but will it be straightforward in
22 other cases? Will it not involve some very
23 difficult line-drawing problems?

24 MS. LOVITT: I -- I don't -- Justice
25 Alito, in our view, it's not.

1 Ninety-five percent of these cases, it's clear.
2 The FedExes, the UPS, the Yellow Freights, the
3 -- it's very clear who's in the shipping
4 industry because they're in the business of
5 shipping other people's goods.

6 And even there are companies like
7 Amazon, who ship their own and other people's,
8 but the usual course of their business is to
9 include other people's goods. There -- you
10 know, most companies -- I don't want to use the
11 word "most" because -- but a lot of --

12 JUSTICE ALITO: But there are not --
13 there are not a lot of companies that do -- in
14 which, let's say, 60 percent of their work
15 doesn't involve transportation, but -- or
16 70 percent doesn't involve transportation, but
17 30 percent does. There aren't companies that
18 might fall into that category?

19 MS. LOVITT: I -- I think you could
20 use the Saxon analysis for -- you know, Saxon
21 said how do you determine a worker's worth,
22 which is also a fact-based question. You use it
23 whether it's frequent. And I think that's the
24 same kind of straightforward analysis that you
25 could apply here. Are you frequently in the

1 business of shipping other people's goods?

2 And it's no more difficult than the
3 test in Saxon, but it offers a different test
4 and one that's going to exclude this mass body
5 of cases that have heretofore not -- not been in
6 the federal courts.

7 JUSTICE BARRETT: So I guess part of
8 what --

9 JUSTICE KAVANAUGH: The term --

10 JUSTICE BARRETT: I'm sorry.

11 JUSTICE KAVANAUGH: Go ahead.

12 JUSTICE BARRETT: Is part of what
13 you're saying that the industry has or industry
14 generally and the way that business is done now
15 has massively shifted and maybe those words mean
16 the same thing, maybe they mean what Ms. Bennett
17 says they do, but because of the way that
18 industry and shipping has changed, just kind of
19 as an anachronism, it doesn't really make
20 against, and then wouldn't it be for Congress to
21 fix it?

22 MS. LOVITT: I -- I think Congress
23 already fixed it. And because in -- when it
24 enacted Section 1, there is a residual clause.
25 Congress was anticipating that there were going

1 to be other industries and that -- that would
2 have the same kind of shipping element to them.
3 And the airline industry, for example, was the
4 very next stop.

5 And they also now have an arbitration
6 provision, which, by the way, to get to your
7 question that you asked Petitioners' counsel,
8 yes, this is still relevant because we still
9 have massive arbitration regimes governing the
10 rail industry and the air industry. And if you
11 had the FAA coming in, there'd be a question
12 over, you know, which one is preeminent.

13 And I can see Petitioner -- a whole
14 new line of cases where people -- where
15 employers are saying, no, we're outside of that
16 federal regime. We have a private contract, we
17 enforce it under the FAA. So there is
18 interference that could be done under the
19 modern -- modern statutes.

20 But I think, to get to your point,
21 it's not an anachronism. I think what has
22 changed is that in 1925, industries -- there
23 weren't big long haul, there really wasn't an
24 airline industry and there really wasn't an
25 over-the-road trucking industry. That didn't

1 really come until the 1950s. And the way people
2 shipped goods is by rail.

3 And -- and if you were shipping or
4 you're shipping long distances in the shipping
5 industry in vessels. And so the Section 1 was
6 really encompassing the entirety of the
7 transportation industry while anticipating that
8 the industry was also evolving and that Congress
9 might want to get involved there too.

10 If I can just make one last point, I
11 think part of the issue here too is there's not
12 been any industry component and now Saxon, if
13 you combine -- if you hold that there's no
14 industry requirement and you combine it with the
15 holding in Saxon, it's not only that you bring
16 in all of these, you know, manufacturers who
17 have never been within the scope of 1, but you
18 also bring in people who load goods.

19 And the next question is going to be,
20 well, what about the people who package them?
21 What about the people who sort them?

22 JUSTICE JACKSON: But I guess --

23 MS. LOVITT: What about the people in
24 the shipping department?

25 JUSTICE JACKSON: But -- but -- but I

1 guess what I don't understand is how your theory
2 is consistent with what you say Congress's goals
3 are with respect to Section 1. I mean,
4 throughout your brief, you say that Section 1
5 was intended to capture workers "critical to
6 commerce and national security."

7 So fine. We now have all these
8 companies that have components of transportation
9 within them, but their workers are doing things,
10 as you say, involving goods that are crossing
11 state lines and that are presumably critical to
12 commerce and national security.

13 So why would the line be between big
14 companies with in-house transportation arms
15 versus those that use FedEx?

16 MS. LOVITT: I'm glad you asked that
17 question. And it's the word "presumably"
18 because, if something -- in most labor disputes,
19 if you have a labor dispute between the employer
20 and their employees, the employer is best
21 situated to deal with that dispute.

22 The time when that's not true is when
23 you have transportation industry workers because
24 there are third-party effects that cascade for
25 the customers who have their -- their goods

1 on -- on the rails to --

2 JUSTICE JACKSON: But you're --
3 you're -- you're saying that that's what
4 Congress -- I -- I thought they were just trying
5 not to have the disruption.

6 MS. LOVITT: There -- Congress was
7 saying there are areas of the economy that are
8 so important that we're doing our own federal
9 arbitration scheme. We're not leaving it to the
10 private parties to decide how they're going to
11 resolve these remedies because they in -- they
12 involve third-party concerns.

13 And that was the history. In 1925,
14 the railroad labor industry, there were all --
15 again, all sorts of industry disputes, but it
16 was only the rail industry dispute that brought
17 Chicago to the point of famine, and that's when
18 Congress had to intervene and --

19 JUSTICE JACKSON: Now I just thought
20 that was because of the nature of the goods and
21 the fact that they were crossing state lines and
22 they were sort of intranational. And that's the
23 same with Amazon and Walmart and U.S. Foods and
24 companies that have internal transportation arms
25 today.

1 MS. LOVITT: So today -- let's take
2 Flowers. If -- if Flowers can't ship its bread,
3 that is -- that problem is best addressed
4 between Flowers and -- and its employees, but it
5 doesn't mean that the nation runs out of bread.
6 It means that people are going to have to buy
7 other bread for a little bit of time.

8 And that's true whenever you're
9 talking about a manufacturer. If it's a single
10 manufacturer that has a problem, there are other
11 manufacturers who aren't implicated. Where you
12 start to get the whole of the national economy
13 involved is when you're talking about the -- the
14 international and interstate shipping of goods
15 and that -- and that industry.

16 And, again, we may come up with a lot
17 of examples today where that doesn't make sense,
18 but in 1925, that was the lesson that Congress
19 had learned, and Congress responded by enacting
20 arbitration provisions for only two members of
21 the economy, two classes of workers, and they
22 were both in the transportation industry.

23 JUSTICE SOTOMAYOR: I just want to
24 make sure that the background principles, I've
25 got them in my head right.

1 MS. LOVITT: Mm-hmm.

2 JUSTICE SOTOMAYOR: These contracts
3 that these employees have with the employers
4 could be enforceable in state court. If they
5 require arbitration in state court, if you file
6 a suit in state court or they file a suit in
7 state court, those arbitration agreements have
8 to be honored, correct?

9 MS. LOVITT: That's the position we
10 took in the lower court, but there's a circuit
11 -- circuit court split on that question as well.
12 And I don't think that's a good answer because,
13 in a lot of states, you couldn't arbitrate this
14 at all either, so you don't get --

15 JUSTICE SOTOMAYOR: Because of state
16 laws not permitting it?

17 MS. LOVITT: Because of the state --
18 because of the state law.

19 JUSTICE SOTOMAYOR: Got it.

20 MS. LOVITT: If you have no other
21 questions?

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Thomas?

25 Justice Sotomayor?

1 JUSTICE KAVANAUGH: One question.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh?

4 JUSTICE KAVANAUGH: Is the -- the
5 phrase "common carrier" helpful or not helpful
6 here?

7 MS. LOVITT: I don't think it's
8 helpful because, in the shipping industry, I
9 mean, common carriers would mean ferries and
10 there's a whole component of the -- of the
11 shipping industry that aren't common carriers
12 that are really at the heart of it.

13 JUSTICE KAVANAUGH: Thank you.

14 MS. LOVITT: Mm-hmm.

15 CHIEF JUSTICE ROBERTS: Justice
16 Barrett?

17 Justice Jackson?

18 Thank you, counsel.

19 MS. LOVITT: Thank you.

20 CHIEF JUSTICE ROBERTS: Ms. Bennett,
21 rebuttal?

22 REBUTTAL ARGUMENT OF JENNIFER D. BENNETT
23 ON BEHALF OF THE PETITIONERS

24 MS. BENNETT: Sure. So I just want to
25 make -- thank you, Your Honor. I just want to

1 make three quick points.

2 The first is on the text. I didn't
3 hear a single argument that any word in this
4 text means somebody works for an employer that
5 sells transportation.

6 Again, even if we accept Flowers'
7 understanding of what the word "seamen" meant in
8 1925 and put aside fishermen and any of the
9 other people they are worried about, even if we
10 accept it's just people who are on vessels
11 transporting goods for commerce, that has
12 nothing to do with who employed those people.

13 And that's the way every statute
14 governing seamen worked in 1925. There were a
15 bunch of statutes that have a bunch of different
16 limitations, but all of them were very explicit
17 about what they were, and not a single one was
18 employer-based.

19 And that's for the second -- to take
20 the second reason, which is Flowers says don't
21 worry so much about the text, what we really
22 want to think about is policy and purpose. And
23 even if this Court were inclined to do so, even
24 if this Court were inclined to define what
25 Congress meant a hundred years ago, we have some

1 evidence about that, and -- and -- and Flowers
2 says look at the strikes that disrupted the
3 national economy.

4 In the maritime -- in shipping, in
5 maritime shipping, those strikes were led by
6 people on lumber boats, and I'll note we cite in
7 our brief the evidence that those people were on
8 boats were employed by the lumber companies and
9 on boats owned by those companies.

10 But, if Congress was really trying to
11 get at people who could disrupt commerce, you
12 know, the way strikes worked in 1925 is they
13 weren't employer-based. Everybody who did the
14 same job in the same location struck together,
15 and that's why they were so disruptive.

16 And so, if Congress was trying to get
17 at that, they would not have included an
18 employer-based limitation. I think that's why
19 we don't see one in the statute.

20 To Justice Alito's point about
21 narrowness, I think you asked that I address
22 that in rebuttal. Two points on that. One is
23 it's not true that the background rule in the
24 circuits has been this employer-based industry
25 requirement.

1 The Seventh Circuit decision in
2 Kienstra I believe was a concrete company. The
3 Ninth Circuit has decisions on Amazon. The
4 First Circuit does. You know, I'm not aware of
5 this requirement being true in any circuit until
6 really the Second Circuit made this decision and
7 the Eleventh Circuit had some decisions.

8 But even in the Second Circuit, when
9 the Second Circuit articulated, said that
10 workers needed to be in the transportation
11 industry, what it said was a basketball player
12 is not in the transportation industry. It
13 wasn't saying anything about who the employer
14 was.

15 And -- and as the dissent in this case
16 said in the Second Circuit, the well-established
17 rule has been forever that if the residual
18 clause covers anyone, it's truck drivers. And
19 given that longstanding principle, I still
20 haven't seen a single case where you have, you
21 know, pizza delivery drivers or pest control
22 workers or any of the people they're -- they're
23 worried about, actually any court saying that
24 they're exempt, despite the rule being
25 ordinarily, no court has really looked at

1 whether -- at this kind of employer-based test.

2 And -- and -- and the other thing is,
3 you know, they -- Flowers makes a big deal of
4 railroad employees. There are almost no
5 railroad employees today. Almost all of those
6 jobs are truckers now. And so we're not making
7 the exemption broader. We're just taking the
8 people who would have been railroad employees
9 and now they're truck drivers. And it so
10 happens that trucking works just like maritime
11 shipping, which is that some companies use
12 companies like FedEx, and some companies do what
13 Flowers did, which is essentially bring a
14 trucking company in-house themselves. There's
15 no reason that those workers should be treated
16 any differently.

17 And the last point I want to make is
18 just on administrability. Flowers hasn't
19 explained how its test or how the Second
20 Circuit's test would apply in this very case,
21 and that's in two ways. One, there's no dispute
22 here that Flowers sells transportation. The --
23 the retailers that Flowers sells to are not just
24 buying bread; they're buying the bread showing
25 up at their retail stores. It's not clear to me

1 why, for that reason alone, those -- they --
2 they don't -- Flowers doesn't satisfy its own
3 test.

4 And the second point is Flowers
5 actually has quite a complicated corporate
6 structure. And the drivers here aren't
7 contracting with Flowers. They're contracting
8 with a subsidiary of Flowers that only handles
9 transportation for other subsidiaries that make
10 baked goods. So that subsidiary is only
11 transporting other people's goods. And Flowers
12 doesn't explain why that too wouldn't satisfy
13 its test.

14 And what that shows is that its test,
15 the employer-based industry test, is going to be
16 really difficult to apply, and it's going to be
17 difficult to apply even in cases that Flowers
18 says, like this one, should be straightforward.
19 They're not.

20 And, again, this would have been a
21 problem in 1925, just as it is today. You know,
22 there were lumber companies that owned railroads
23 that may or may not have shipped entirely the
24 lumber company's goods. And it's not clear --
25 you know, Congress would have known in 1925 that

1 that would have been difficult to apply, and
2 there's no reason it would have included that
3 requirement in the statute here.

4 So, again, we ask that this Court
5 reject Flowers' request to add this requirement
6 that both has no basis in the text and would
7 just make the statute harder to apply.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 The case is submitted.

12 (Whereupon, at 12:14 p.m., the case
13 was submitted.)

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