No. 20-1681

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Neal Bissonnette, individually and on behalf of all others similarly situated, and Tyler Wojnarowski, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

Lepage Bakeries Park St., LLC, C.K. Sales Co., LLC, and Flowers Foods, Inc.,

Defendants-Appellees.

On Appeal from the U.S. District Court
for the District of Connecticut
No. 3:19-cv-00965 – Judge Kari A. Dooley

RESPONSE BRIEF OF DEFENDANTS-APPELLEES LEPAGE BAKERIES PARK ST., LLC, C.K. SALES CO., LLC, AND FLOWERS FOODS, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants-Appellees state that Defendant-Appellee C.K. Sales Co., LLC is a wholly owned susidiary of Defendant-Appellee Lepage Bakeries Park St., LLC, which is itself a wholly owned subsidiary of Defendant-Appellee Flowers Foods, Inc. Defendant-Appellee Fowers Foods, Inc. is a publicly held corporation.

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

INTRODUCTION

Flowers Foods, Inc. and its bakery subsidiaries (collectively, "Flowers Foods" or "Flowers") produce a wide range of food products, including well-known brands of breads and snacks. Plaintiffs are independent business owner franchisees—referred to as "Independent Distributors"—who purchased the rights to market, sell, and distribute Flowers products within defined geographic territories. Independent Distributors have broad discretion to run their independently operated businesses. By using their own business acumen and engaging in various activities to increase their sales—such as soliciting new accounts, asking for displays, and merchandising effectively—they can turn a profit both by selling Flowers products within their territories and by increasing the value of those territories for resale.

In this lawsuit, Plaintiffs claim that they are actually employees, not independent contractors, and so are entitled to overtime wages and liquidated damages under Connecticut law and the Fair Labor Standards Act ("FLSA"). Plaintiffs are wrong on the merits of that claim. This appeal, however, is about only the threshold question of whether a court or an arbitrator should resolve it. Because Plaintiffs signed Arbitration Agreements that cover any claim "challenging the[ir] independent contractor status," JA118, the District Court correctly found that this case belongs in arbitration.

On appeal, Plaintiffs do not dispute that the Arbitration Agreements cover the claims at issue here. Plaintiffs contend, however, that they qualify as "transportation workers" under § 1 of the Federal Arbitration Act ("FAA") and, as a result, cannot be

compelled to arbitrate. They further argue that the District Court's contrary ruling turned on improper factual inferences.

As an initial matter, this Court need not even reach those § 1 arguments because, even if Plaintiffs were right that the FAA exemption applied, the Arbitration Agreements are independently enforceable under Connecticut law. The Agreements are "governed by the FAA *and* Connecticut law to the extent Connecticut law is not inconsistent with the FAA." *Id.* at JA119 (emphasis added). Unlike the FAA, Connecticut law contains no "transportation" exception and would mandate arbitration here. Enforcing the Agreements' arbitration provisions under Connecticut law would not be "inconsistent" with the FAA. The FAA does not *prohibit* the enforcement of arbitration agreements covered by § 1; it is simply silent as to those agreements. Moreover, enforcing the Agreements under state law would actually further the "liberal federal policy favoring arbitration agreements" reflected in the FAA. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). And if there were any doubt about the availability of arbitration under Connecticut law, the Agreements expressly provide that an arbitrator should decide that question in the first instance.

In any event, the District Court correctly found that the § 1 exemption—which covers "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1—does not apply. The Supreme Court clarified in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), that § 1 must be afforded a "narrow construction," and that its residual clause applies only to

"transportation workers." *See id.* at 115–19. Plaintiffs do not qualify as "transportation workers" for three independent reasons: they are not employed in the transportation industry; they are primarily business owners, not truck drivers; and any transportation in which they do engage is exclusively *intra*state.

Finally, despite Plaintiffs' efforts to manufacture a factual dispute, all of these points are apparent from the pleadings and the contracts at issue. This Court need not look beyond those documents to resolve this appeal. And to the extent Plaintiffs take issue with any of the factual premises on which the District Court relied, they should have introduced their own declaration or sought discovery. Instead, they have relied on legal representations that, as the District Court recognized, have no bearing on the question at hand.

For any and all of these reasons, this Court should affirm the decision below granting Flowers' motion to dismiss and to compel arbitration.

STATEMENT OF THE ISSUES

I. Should the District Court's judgment be affirmed on the ground that the Arbitration Agreements are enforceable under state law?

II. In the alternative, did the District Court correctly find that the Arbitration Agreements are enforceable under the FAA?

III. Did the District Court apply the correct standard for a motion to compel arbitration?

STATEMENT OF THE CASE

A. Independent Distributors of Flowers Foods and Its Subsidiaries

Flowers Foods "is one of the largest producers of packaged bakery foods in the United States." Am. Compl., JA14 ¶ 13. "The company operates 47 highly efficient bakeries that produce a wide range of bakery foods," including under well-known "brand names such as Country Kitchen and Wonder Bread." *Id.* at JA14 ¶¶ 12–13. Flowers, through its baking subsidiaries, divides the market for its products into geographic territories, and sells exclusive sales distribution rights within each territory to franchisees it refers to as "Independent Distributors." *See* Distributor Agreement, JA86. Independent Distributors, in turn, market, sell, and distribute Flowers products to retail stores, convenience stores, and restaurants within their respective territories. *See id.* at JA87.

The relationship between the subsidiaries of Flowers Foods and its Independent Distributors is spelled out in Distributor Agreements. *See id.* at JA85–120. Plaintiffs owned and operated franchises, and those companies entered into the Distributor Agreements directly with CK Sales Co., LLC.[1] The Distributor Agreements are "governed by the laws of the State of Connecticut." *Id.* at JA105 ¶ 20.11. And they make clear that Independent Distributors are independent business owners, not Flowers employees. *See, e.g.*, *id.* at JA 97 ¶ 16.1 ("[I]t is of the essence of th[e] Agreement

[1] CK Sales Co. LLC is a wholly-owned subsidiary of Lepage Bakeries Park Street, LLC, which is a wholly-owned subsidiary of Flowers Foods. *See* D.Ct. Dkt. No. 17.

that DISTRIBUTOR is an independent business," and "[t]he status of DISTRIBUTOR pursuant to th[e] Agreement is that of independent contractor for all purposes.").

That means, among other things, that Flowers does not control "the specific details or manner and means of [each Distributor's] business." *Id.* For example, the Agreements provide that Independent Distributors are "responsible for obtaining [their] own delivery vehicle(s) and purchasing adequate insurance thereon." *Id.* at JA93 ¶ 9.1. They can make and use their own "advertising materials." *Id.* at JA95 ¶ 13.1. They may use Flowers "trade names and trademarks" as they see fit "in connection with [the] advertising, promoting, marketing, sale, and distribution of [Flowers] Products in the Territory." *Id.* at JA101 ¶ 19.1. They can decide whether to dispose of stale products, sell them for non-human consumption, or sell them back to Flowers. *Id.* at JA95 ¶¶ 12.1–12.3. They are "solely responsible for all taxes and transactional reporting requirements." *Id.* at JA97 ¶ 15.4. They may "engage any legal and/or accounting professional services [they] deem[ ] necessary." *Id.* at JA98 ¶ 16.4. And, they can operate outside businesses and sell noncompetitive products. *See id.* at JA89 ¶ 5.1.

The Agreements, moreover, "do[] not require that [the Distributor's] obligations [t]hereunder be conducted personally." *Id.* at JA98 ¶ 16.2. Instead, the Independent Distributors are "free to engage such persons as [they] deem[] appropriate" to perform all or some of the work for their distributorships at their discretion. *Id.* at JA98 ¶ 16.3. Independent Distributors are contractually obligated to use their "Best Efforts" to increase sales, and can do so by, among other measures, soliciting new accounts, asking

for displays, recommending new products, providing good customer service, and merchandising effectively. *See id.* at JA89–90 ¶ 5.1.

Independent Distributors make money in several ways. Because they purchase products from Flowers at a discount and resell those products to their customers for a higher price, they profit from the sale of Flowers products within their territories and increasing those sales in various ways. They also increase their profit by using their business acumen to minimize their expenses and control their costs. Moreover, because Independent Distributors own an equity interest in their territories, they can increase the value of their territories, and then resell those territories in whole or in part at a profit. *See id.* at JA96 ¶ 15.1 (explaining that "[t]he Distribution Rights are owned by the DISTRIBUTOR and may be sold or transferred in whole or in part by DISTRIBUTOR").

B. The Independent Distributor Arbitration Agreements

The Distributor Agreements contain a "Mandatory and Binding Arbitration" provision that incorporates, as Exhibit K, a separate Arbitration Agreement. *See id.* at JA101 ¶ 18.3 (Distributor Agreement); JA117–19 (Arbitration Agreement). The Arbitration Agreement provides that "any claim, dispute, and/or controversy except as specifically excluded herein . . . shall be submitted to and determined exclusively by binding arbitration." JA117. The covered claims include "any claims challenging the independent contractor status of [the Independent Distributor], claims alleging that [the Independent Distributor] was misclassified as an independent contractor, any other

claims premised upon [the Independent Distributor's] alleged status as anything other than an independent contractor." *Id.* at JA118.

The Agreement further states that arbitration of covered claims shall be conducted "in conformity with the Commercial Arbitration Rules of the American Arbitration Association." *Id.* at JA117. And "[t]he Arbitrator shall have the authority to award the same damages and other relief that would have been available in court." *Id.* The parties agreed, moreover, that arbitration would be conducted "on an individual basis only and not as a plaintiff or class member in any purported class, collective, representative, or multi-plaintiff action." *Id.* ("To the maximum extent permitted by law, both parties explicitly waive any right to . . . initiate or maintain any covered claim on a class, collective, representative, or multi-plaintiff basis either in court or arbitration[.]" (emphasis and capitalization omitted)). And "[a]ny issues concerning arbitrability of a particular issue or claim under this Arbitration Agreement (except for those concerning the validity or enforceability of the prohibition against class... arbitration and/or applicability of the FAA) shall be resolved by the arbitrator, not a court." *Id.* at JA118.

The Arbitration Agreement also contains a choice-of-law provision and a severability clause. The choice-of-law provision states that the "Arbitration Agreement shall be governed by the FAA and Connecticut law to the extent Connecticut law is not inconsistent with the FAA." *Id.* at JA119. The severability clause states that, "[i]f any provision of . . . this Arbitration Agreement [is] determined to be unlawful, invalid, or

unenforceable, such provisions shall be enforced to the greatest extent permissible under the law, or, if necessary, severed, and all remaining terms and provisions shall continue in full force and effect." *Id.* at JA118.

C. Procedural History

Plaintiffs-Appellants are Independent Distributor franchisees who allege that they should be classified as employees, rather than independent contractors, under Connecticut wage laws and the FLSA. Am. Compl., JA19–21 ¶¶ 44–57. They filed a putative class action in federal court seeking to recover overtime wages, wages they claim were unlawfully withheld, and amounts by which they claim Flowers was unjustly enriched as a result of the alleged misclassification. *See id.* Flowers moved to dismiss or, in the alternative, to compel arbitration. *See* Mot. to Dismiss, JA45–46. Because "Plaintiffs entered into binding arbitration agreements under which they agreed to arbitrate all of the claims in this lawsuit on an individual basis," Flowers explained, their putative class lawsuit must "be dismissed in favor of individual arbitration." *Id.* at JA45.

The District Court agreed. As a threshold matter, however, the District Court rejected Flowers' argument that it need not reach the applicability of the FAA because arbitration would be required under Connecticut law even if the § 1 exemption applied. *See* D.Ct. Op., SA7 n.7. The Arbitration Agreement, the Court reasoned, provides for the application of Connecticut law only "to the extent Connecticut law is not inconsistent with the FAA." *Id.* (quoting JA119) (emphasis omitted). And, in the Court's view, "it would be 'inconsistent with the FAA' for the Court to exercise its

authority under Connecticut law to compel arbitration if the Court would lack authority to do the same under the FAA." *Id.*

The District Court proceeded to conclude, however, that the Arbitration Agreements are enforceable under the FAA. *See id.* at SA6–18. Citing the Supreme Court's decision in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the Court explained that § 1's residual clause applies to workers "in the transportation industry"—like "the enumerated categories of 'seamen' and 'railroad employees'"—who are "actually engaged" in the transportation of goods. D.Ct. Op., SA8, SA15. And the Court did not even reach the threshold question whether Flowers "can be characterized as operating in the transportation industry" because it found that Plaintiffs do not qualify as "transportation workers regardless." *Id.* at SA8–9 n.8.

"Plaintiffs' Distributor Agreements," the Court reasoned, "evidence a much broader scope of responsibility that belies the claim that they are only or even principally truck drivers." *Id.* at SA11. "Plaintiffs purchase and own the territories comprising their routes," the Court continued, and their distribution of Flowers products is simply "the means by which they realize and increase sales and profits for their franchise businesses." *Id.* Accordingly, the Court found that "Plaintiffs' role as distributor franchisees" was not "sufficiently analogous to that of early 20th century railroad workers or seamen to warrant a finding that Congress would have envisioned the FAA exception embracing such workers." *Id.* at SA14. Instead, the Court concluded, they

are "more akin to sales workers or managers": classes of workers that other courts have found do not qualify as "transportation workers" for purposes of the FAA. *Id.* at SA12.

In reaching that result, the District Court relied primarily on the terms of the Distributor Agreements themselves. *See id.* at SA10–15 (citing Distributor Agreement, JA86–120); *see also, e.g.*, *id.* at SA14 (relying on "[t]he fact that Plaintiffs' contracts expressly contemplate delegation of delivery work and all manner of Plaintiffs' business operations"). It also looked to a short Declaration authenticating those Agreements and briefly explaining the role of Independent Distributors. *See id.* at SA9–12 (citing Linthicum Decl., JA78–83). Plaintiffs neither disputed the authenticity of the Agreements nor "put forth any evidence" to refute the contents of the Declaration. *Id.* at SA13. Instead, they sought "to create a factual dispute by citing [Flowers'] representations in this and other litigation, concerning [Flowers'] *legal status* under other statutory regimes," like the Fair Labor Standards Act and the Federal Aviation Administration Authorization Act of 1994. *Id.* at SA13 & n.11 (emphasis added).

The District Court recognized, however, that prior litigation statements regarding the applicability of those other statutory regimes "have no bearing on" the § 1 analysis. *Id.* at SA13. "[T]hose statements, which were made in the context of completely different statutory frameworks, in no way constitute 'judicial admissions' that Plaintiffs were in 'a class of workers engaged in foreign or interstate commerce under the FAA.'" *Id.* at SA13 n.11 (quotations omitted). But even "credit[ing] [them] as facts bearing on the instant litigation," those statements only support the undisputed

proposition "that driving trucks and delivering products that travel in interstate commerce comprise some of the Plaintiffs' responsibilities" and thus "[did] not change the outcome of the Court's analysis." *Id.*

Having concluded that "Plaintiffs are not transportation workers under the FAA and because the parties [did] not otherwise dispute that they entered into a binding arbitration agreement," the District Court granted Flowers' "motion to dismiss in favor of arbitration." SA15. This appeal followed.

STANDARD OF REVIEW

This Court "review[s] a district court's order granting a motion to compel arbitration *de novo*." *Brown v. St. Paul Travelers Cos., Inc.*, 331 F. App'x 68, 69 (2d Cir. 2009). Any "factual findings upon which that conclusion is based, however, are reviewed for clear error." *Weiss v. Macy's Retail Holdings, Inc.*, 741 F. App'x 24, 26 (2d Cir. 2018) (internal quotation marks and citation omitted). Moreover, this Court may affirm the district court's ruling "on any ground which finds support in the record, regardless of the ground upon which the trial court relied." *McCall v. Pataki*, 232 F.3d 321, 323 (2d Cir. 2000) (internal quotation marks and citation omitted).

On the merits, both federal law and Connecticut law share an "emphatic . . . policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *see also Town of Stratford v. Int'l Ass'n of Firefighters, AFL-CIO, Local 998*, 728 A.2d 1063, 1074 (Conn. 1999). Consistent with that policy, a "party to an arbitration agreement seeking to avoid arbitration generally bears the

burden of showing the agreement to be inapplicable or invalid." *Harrington v. Atl. Sounding Co.*, 602 F.3d 113, 124 (2d Cir. 2010). And courts must construe "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration." *Mitsubishi Motors*, 473 U.S. at 626 (citation omitted); *see also Bd. of Educ. of Town of Wallingford v. Wallingford Educ. Ass'n*, 858 A.2d 762, 766 (Conn. 2004) ("An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." (citation and internal quotation marks omitted)).

SUMMARY OF ARGUMENT

The Arbitration Agreements are enforceable both under Connecticut law and under the FAA, each of which constitutes an independent basis for affirmance.

I. First, even assuming the Agreements were exempt from the FAA under § 1, they are enforceable under Connecticut law.

A. Section 1 excludes a limited class of arbitration agreements from the FAA's coverage. But it "has no impact on other avenues (such as state law) by which a party may compel arbitration." *Oliveira v. New Prime, Inc.* (*New Prime I*), 857 F.3d 7, 24 (1st Cir. 2017).

B. Here, the Agreements make clear that Connecticut law applies "to the extent Connecticut law is not inconsistent with the FAA." Distributor Agreement, JA158. There is no dispute that the Agreements are enforceable under Connecticut law. And

far from being "inconsistent with the FAA," enforcing the Agreements would advance both the Act's pro-arbitration goals and the parties' unambiguous intent to arbitrate.

C. Moreover, the Arbitration Agreements provide that (with limited exceptions) "[a]ny issues concerning arbitrability of a particular . . . claim under th[e] Arbitration Agreement . . . shall be resolved by the arbitrator, not a court." *Id.* at JA118. So if there were any doubt as to state-law enforceability, the arbitrator should resolve it in the first instance.

II. Second and in the alternative, the Agreements are enforceable under the FAA because § 1 does not apply.

A. The Supreme Court has held that § 1's "residual clause" should be interpreted "narrow[ly]" and "by reference to the enumerated categories of workers which are recited just before it." *Circuit City*, 532 U.S. at 106, 115. Consistent with those principles, courts have generally found that individuals qualify as "transportation workers" for purposes of § 1 where (1) they work within the "transportation industry," (2) the transportation of goods is their primary responsibility, and (3) that transportation involves crossing state lines. None of those things are true here.

B. First, Plaintiffs do not work in the "transportation industry" because Flowers is a bakery, not a transportation company. **C.** Second, Plaintiffs are not primarily engaged in transportation in the way that "seamen" and "railroad employees" are because they are independent business owners with a wide array of responsibilities. **D.** Third, any transportation in which Plaintiffs engage occurs exclusively within the

boundaries of their intrastate territories. **E.** Finally, any doubts about the applicability of the FAA should be resolved in favor of arbitration. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25.

III. Plaintiffs are wrong to argue that the District Court applied the incorrect standard. **A.** As an initial matter, this Court need not reach that question because it can affirm based on undisputed facts contained in Plaintiffs' own pleadings and the Distributor Agreements themselves. **B.** In any event, the District Court applied the correct standard: Plaintiffs neither submitted their own declaration nor sought discovery, and the legal representations on which they rely make no difference to the § 1 inquiry.

ARGUMENT

I. THE ARBITRATION AGREEMENTS ARE ENFORCEABLE UNDER STATE LAW.

This Court need not reach the question whether the Arbitration Agreements are exempt from the FAA because, even assuming the § 1 exemption applied, the Agreements are enforceable under Connecticut Law. Section 1 merely exempts covered agreements from the FAA's scope; it does not displace existing state-law mechanisms for enforcing arbitration agreements. The Agreements themselves make clear that Connecticut law applies. And any question about the availability of arbitration under state law should be resolved by the arbitrator in the first instance.

A. Section 1 of the FAA Does Not Limit the Availability of Arbitration Under State Law.

Section 1 of the FAA is an exemption, not a prohibition. It "does not . . . in any way address the enforceability of employment contracts exempt from the FAA." *Valdes v. Swift Transp. Co.*, 292 F. Supp. 2d 524, 529 (S.D.N.Y. 2003). "It simply excludes [covered] contracts from FAA coverage entirely." *Id.*; *see* 9 U.S.C. § 1 ("*[N]othing herein contained shall apply* to contracts of employment of . . . workers engaged in foreign or interstate commerce." (emphasis added)). "[T]he effect of Section 1," accordingly, "is merely to leave the arbitrability of disputes in the excluded categories as if the [FAA] had never been enacted." *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 596 (3d Cir. 2004) (citation omitted).

The applicability of the FAA's "transportation worker" exemption thus "has no impact on other avenues (such as state law) by which a party may compel arbitration." *New Prime I*, 857 F.3d at 24. Even where the exemption applies, "enforcement of the arbitration agreement . . . under . . . state law, as if the FAA 'had never been enacted,' does not contradict any of the language of the FAA, but in contrast furthers the general policy goals of the FAA favoring arbitration." *Palcko*, 372 F.3d at 596; *see also Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997) ("[W]e have little doubt that, even if an arbitration agreement is outside the FAA, the agreement still may be enforced . . . ."); *Davis v. EGL Eagle Glob. Logistics L.P.*, 243 F. App'x 39, 44 (5th Cir. 2007) ("[T]he FAA does not preempt [Texas law] because this case presents the

situation where the FAA refuses to enforce an arbitration provision (assuming for the moment that [the plaintiff] meets the exception for transportation workers) that [Texas law] would enforce.").

Consistent with these principles, courts around the country have found state arbitration law applicable—and enforced arbitration agreements under state law—even where the "transportation worker" exemption applies. *See, e.g.*, *Espinosa v. SNAP Logistics Corp.*, No. 17 Civ. 6383, 2018 WL 9563311, at *5 (S.D.N.Y. Apr. 3, 2018) ("[E]ven if Plaintiff is exempt from the FAA, the application of the exemption does not preclude enforcement of the arbitration provision under New York state law."); *Breazeale v. Victim Servs., Inc.*, 198 F. Supp. 3d 1070, 1079 (N.D. Cal. 2016) ("When a contract with an arbitration provision falls beyond the reach of the FAA, courts look to state law to decide whether arbitration should be compelled nonetheless."); *Shanks v. Swift Transp. Co.*, No. L-07-55, 2008 WL 2513056, at *4 (S.D. Tex. June 19, 2008) ("The weight of authority shows that even if the FAA is inapplicable, state arbitration law governs."); *Maldonado v. Sys. Servs. of Am., Inc.*, No. SACV 09-542 JVS, 2009 WL 10675793, at *2 (C.D. Cal. June 18, 2009) ("California law related to arbitrations may be enforced where the FAA does not apply.").

B. State Law Provides for Arbitration of Plaintiffs' Claims.

The District Court recognized this general principle. *See* D.Ct. Op., SA7 n.7 (explaining that Flowers is "correct that, as a general matter, state law applies to contracts that are not governed by the FAA"). It further found that the Arbitration

Agreements would be enforceable under Connecticut law, which does not include a "transportation worker" exemption. *See id.* ("Defendants are correct that Connecticut law does not contain an analogous transportation worker exemption[.]"); Conn. Gen. Stat. Ann. § 52-408 ("An agreement in any written contract . . . to settle by arbitration any controversy thereafter arising out of such contract . . . shall be valid, irrevocable and enforceable . . . ."). It concluded, however, that the *Agreements themselves* foreclose arbitration under Connecticut law. *See* D.Ct. Op., SA7 n.7.

That was error. The Arbitration Agreements state that they "shall be governed by the FAA and Connecticut law to the extent Connecticut law is not inconsistent with the FAA." Distributor Agreement, JA158. The District Court interpreted that provision to preclude enforcement under Connecticut law because, in its view, applying Connecticut law to enforce the agreements would be "inconsistent with the FAA." D.Ct. Op., SA7 n.7. That conclusion—expressed in a single sentence in a footnote—misunderstands both the nature of the "transportation worker" exception and the meaning of the choice-of-law clause in these arbitration agreements.

Again, the FAA does not *bar* enforcement of "transportation worker" arbitration agreements; it simply does not cover them. *See supra* Part I.A. There is thus no "inconsistency" between the FAA and Connecticut law with respect to the Agreements' enforceability. To the contrary, "enforcement of the arbitration agreement[s] . . . under . . . state law . . . furthers the general policy goals of the FAA favoring arbitration." *Palcko*, 372 F.3d at 596. It advances Connecticut's "strong public policy favoring

arbitration." *Town of Stratford*, 728 A.2d at 1074. And it effectuates the clear intent of these parties to submit disputes—including "claims challenging the independent contractor status" of the Independent Distributors—to arbitration. Arbitration Agreement, JA118.

Indeed, the parties' intent to arbitrate this dispute could hardly be clearer. The Distributor Agreement provides for arbitration of "[a]ll claims, disputes, and controversies arising out of or in any manner relating to this Agreement . . . in accordance with the terms and conditions set forth in the Arbitration Agreement." JA101 ¶ 18.3; *see also id.* at JA105 ¶ 20.11 (providing that the Agreement is governed by Connecticut law). The Arbitration Agreement—which is titled exactly that—sets forth the agreement to arbitrate in detailed and unambiguous terms. *See* JA117–19.

Although the Agreement invokes the FAA (because both parties understood that the FAA would apply), it *also* invokes Connecticut law. *See id.* at JA119. That belt-and-suspenders approach shows that the parties intended state law to fill the gap even if a court were to somehow find that the FAA did not apply. And if there were any doubt about that, the Agreement includes a savings clause, which confirms that the rest of the agreement, including the commitment to arbitrate disputes, must "continue in full force and effect" even if a court were to find the choice-of-law provision somehow inapplicable or invalid. *Id.* at JA118 ("If any provision of . . . this Arbitration Agreement [is] determined to be . . . unenforceable, such provisions shall be . . . severed, and all remaining terms and provisions shall continue in full force and effect."); *cf. Waithaka v.*

Amazon.com, Inc., 966 F.3d 10, 27 (1st Cir. 2020) ("Because the FAA is inapplicable, the portions of the governing law and dispute resolution sections selecting the FAA must be stricken from the Agreement, leaving Washington law as the default choice of law for assessing the enforceability of the arbitration . . . provisions of the parties' contract.").

Courts that have addressed the state-law enforceability question in the context of arbitration agreements similar to the ones at issue here have consistently enforced those agreements under state law. *Green v. U.S. Xpress Enterprises, Inc.*, 434 F. Supp. 3d 633 (E.D. Tenn. 2020), for example, involved an arbitration agreement governed by "the Federal Arbitration Act . . . or, if the Federal Arbitration Act is held not to apply, the arbitration laws of the State of Tennessee." *Id.* at 637 (quoting governing arbitration agreement). The court found that the agreement fell within § 1's exemption to the FAA, but it granted the defendants' motion to compel arbitration under Tennessee law. *Id.* at 644–45. Similarly, *Byars v. Dart Transit Co.*, 414 F. Supp. 3d 1082 (M.D. Tenn. 2019), involved an arbitration provision that was governed only by the FAA but that was part of a broader agreement subject to Minnesota law. *Id.* at 1088. After finding that the agreement fell within § 1's exemption to the FAA, the court granted the defendants' motion to compel arbitration under Minnesota law. *See id.* at 1094–95.

Indeed, other courts have generally held that arbitration agreements are enforceable under state law "even when the contract says that the Federal Arbitration Act applies *and mentions no other law*." *Atwood v. Rent-A-Ctr. E., Inc.*, No. 15-cv-1023-

MJR-SCW, 2016 WL 2766656, at *3 (S.D. Ill. May 13, 2016) (emphasis added). "[I]f the federal act doesn't apply," courts have reasoned, "the agreement to arbitrate remains viable, and the only question becomes what state's law applies to the contract to arbitrate." *Id.*; *see also, e.g.*, *Michel v. Parts Auth., Inc.*, No. 15-CV-5730, 2016 WL 5372797, at *4 (E.D.N.Y. Sept. 26, 2016) (rejecting the argument that "the FAA is the only statute that governs the parties' agreement simply because the parties cited to it in that agreement" (emphasis omitted)); *Kauffman v. U-Haul Int'l, Inc.*, No. 5:16-CV-04580, 2018 WL 4094959, at *5 (E.D. Pa. Aug. 28, 2018) ("[A]n arbitration clause can be enforced under state law even in the absence of a state law contingency provision."). This case is easier than those, as the Flowers Arbitration Agreements explicitly invoke state law.

The only case on which the District Court relied in reaching the contrary result—the Ninth Circuit's ruling in *In re Van Dusen*, 654 F.3d 838 (9th Cir. 2011)—did not present the state-law question at all. *Van Dusen* was a mandamus case about whether the district court had correctly left it to the arbitrator to decide whether a particular arbitration agreement was exempt from the FAA under § 1. *See id.* at 840. The court ultimately denied the mandamus petition, but, in so doing, it opined that "a district court has no authority to compel arbitration under Section 4 [*of the FAA*] where Section 1 exempts the underlying contract from the FAA's provisions." *Id.* at 843. That uncontroversial proposition has nothing do with the question whether a court may compel arbitration *under state law* where § 1 applies. *Van Dusen* does not address that question, and nothing in the opinion suggests that, where the FAA does not apply,

enforcing an arbitration agreement under state law would somehow be "inconsistent with the FAA."

Moreover, the Flowers Arbitration Agreements look nothing like the ones at issue in the few cases in which courts have declined to apply state law to enforce agreements subject to § 1. In *Rittmann v. Amazon.com, Inc.*, 383 F. Supp. 3d 1196 (W.D. Wash. 2019), *aff'd* 971 F.3d 904 (9th Cir. 2020), for example, an arbitration agreement subject to § 1 was deemed unenforceable under Washington law because "the parties explicitly indicated that Washington law [was] not applicable to the Arbitration Provision." 383 F. Supp. 3d at 1203. Similarly, in *Hamrick v. Partsfleet*, 411 F. Supp. 3d 1298, 1302 (M.D. Fla. 2019), the district court (in a decision currently pending on appeal) declined to enforce an arbitration agreement under state law because the arbitration agreement was expressly "*governed*" not by state law but "*by* the Federal Arbitration Act." *Id.* at 1302 (emphases in original). Where, as here, an arbitration agreement expressly incorporates state law, courts have consistently applied state law to enforce that agreement even where § 1 applies. *See, e.g.*, *Green*, 434 F. Supp. 3d at 644–45; *Byars*, 414 F. Supp. 3d at 1094–95.

C. Any Doubts about State-Law Arbitrability Should Be Resolved by the Arbitrator.

Even if there were some question about the availability of arbitration under Connecticut law, the parties agreed that an arbitrator—not a court—would answer that question in the first instance. The Arbitration Agreements provide that "[a]ny issues

concerning arbitrability of a particular . . . claim under th[e] Arbitration Agreement (except for those concerning the validity or enforceability of the prohibition against class, collective, representative, or multi-plaintiff action arbitration and/or applicability of the FAA) shall be resolved by the arbitrator, not a court." JA118. That provision is unambiguous. It allows courts to decide whether the FAA applies to the Arbitration Agreements. *See* D.Ct. Op., SA 7 n.6. But, as the District Court simply failed to recognize, it delegates all other arbitrability issues—including the question whether the Agreements are enforceable under Connecticut law—to the arbitrator.

Delegations of threshold issues to arbitrators are enforceable. *See, e.g.*, *City of New Britain v. AFSCME, Council 4, Local 1186*, 43 A.3d 143, 150 (Conn. 2012) ("[P]arties may agree to arbitrate the question of arbitrability[.]"); *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010) ("[P]arties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy."). And "when arbitrability is assigned by the contract to the arbitrators, courts may not make an independent determination of arbitrability." *Conte v. City of Norwalk*, 376 A.2d 412, 413 (Conn. 1977). That principle applies here. To the extent this Court has doubts about whether these Arbitration Agreements are enforceable under state law, the Agreements still require affirmance of the decision below so that an arbitrator can address that issue in the first instance.

* * *

Because the Arbitration Agreements are enforceable under Connecticut law *regardless whether* the FAA applies (or, at the very least, that is a question for the arbitrator), this Court need go no further. It need not reach the substantive § 1 question. And it need to reach Plaintiffs' evidentiary argument, which goes exclusively the applicability of § 1. It can simply affirm the decision below, and allow this case to proceed to arbitration. *See Leecan v. Lopes*, 893 F.2d 1434, 1439 (2d Cir. 1990) ("We are free to affirm an appealed decision on any ground which finds support in the record, regardless of the ground upon which the trial court relied.").

II. IN ANY EVENT, THE DISTRICT COURT CORRECTLY FOUND THAT THE ARBITRATION AGREEMENTS ARE ALSO ENFORCEABLE UNDER THE FAA.

The Arbitration Agreements are also enforceable under the FAA because the § 1 exemption does not apply. That exemption applies only to individuals who, like "seamen" and "railroad employees," 9 U.S.C. § 1, work in the "transportation industry" and are primarily engaged in the interstate transportation of goods. *See generally Hill v. Rent-A-Ctr., Inc.*, 398 F.3d 1286, 1290 (11th Cir. 2005). Plaintiffs do not fit that bill for three independent reasons. First, Flowers is in the baking business, not the transportation industry. Second, Plaintiffs are franchisee business owners with a wide variety of responsibilities, not run-of-the-mill delivery drivers. Third, any transportation Plaintiffs may choose to perform occurs exclusively within a single state's borders. To the extent this Court has doubts on any of those points, they must be resolved in favor of arbitration.

A. The § 1 Exemption Applies Only to "Transportation Industry" Workers Who Are Primarily Engaged in Interstate Transportation.

Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Consistent with that purpose, the FAA embodies a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. The Act's primary substantive provision, § 2, states that arbitration agreements "in any . . . contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable." 9 U.S.C § 2.

The FAA does not extend to all arbitration agreements. Section 1 of the Act provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id.* § 1. The Supreme Court has afforded the § 1 exemption "a narrow construction." *Circuit City*, 532 U.S. at 118. It has explained that the exemption's "residual clause"—*i.e.*, the "other class of workers" phrase—"should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it." *Id.* at 114–15. Consistent with those principles, the Court has held that § 1 "exempts from the FAA *only* contracts of employment of *transportation workers*." *Id.* at 119 (emphases added); *see also New Prime Inc. v. Oliveira*, 139 S. Ct. 532,

540 (2019) (holding that § 1 also applies to independent contractors who qualify as "transportation workers").

In applying that standard, courts have identified three defining characteristics of "transportation workers" for purposes of § 1. First, "§ 1's exclusion is limited to workers involved in the transportation industries." *Maryland Cas. Co. v. Realty Advisory Bd. on Labor Relations*, 107 F.3d 979, 982 (2d Cir. 1997); *see also Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) (similar); *Hill*, 398 F.3d at 1290 (similar). Second, the employee must be part of a class of workers for which the "movement of goods is a central part of the . . . job description." *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 801 (7th Cir. 2020) (Barrett, J.); *see also, e.g.*, *Hill*, 398 F.3d at 1289–90. Third, the transportation in which the employee is engaged must be about "moving those goods *across state or national borders*." *Wallace*, 970 F.3d at 802 (emphasis added).[2]

[2] In *Lenz v. Yellow Transportation, Inc.*, 431 F.3d 348 (8th Cir. 2005), the Eighth Circuit subdivided some of these considerations—and identified additional ones—in endorsing a non-exhaustive list of eight factors that bear on whether § 1 applies. *See id.* at 350–51. As Plaintiffs acknowledge, other courts "have not explicitly adopted the *Lenz* factors." Opening Br. 25. But those factors are largely subsumed by the three criteria identified above. For example, courts often consider "whether, like seamen or railroad employees, the employee is within a class of employees for which special arbitration already existed when Congress enacted the FAA" and "whether a strike by the employee would disrupt interstate commerce" (*Lenz* factors six and eight) in evaluating "whether the employee works in the transportation industry" (*Lenz* factor one). 431 F.3d at 350–52; *see infra* Part II.B.

That three-part test appropriately limits § 1 to "'classes' of transportation workers" who, like "seamen" and "railroad employees," work "within the transportation industry." *Hill*, 398 F.3d at 1289–90. It does *not* capture "workers who incidentally transport[] goods interstate as part of their job in an industry that would otherwise be unregulated." *Id.* at 1289.

B. Plaintiffs Are Not Employed in the Transportation Industry.

The first part of the § 1 analysis is straightforward—and dispositive—in this case. Because Plaintiffs are not "employed in the transportation industry," they are not transportation workers for purposes of the FAA. *Hill*, 398 F.3d at 1290.

This Court has long recognized (including in decisions that predate *Circuit City*) that "transportation workers" are, most fundamentally, workers within the "transportation industr[y]." *See, e.g.*, *Signal-Stat Corp. v. Local 475, United Elec. Radio & Mach. Workers of Am.*, 235 F.2d 298, 302 (2d Cir. 1956), *overruled on other grounds by Coca-Cola Bottling Co. of N.Y., Inc. v. Soft Drink & Brewery Workers Union Local 812, Int'l Bhd. of Teamsters*, 242 F.3d 52 (2d Cir. 2001) ("[T]he exclusionary clause in Section 1 applies . . . only those actually in the transportation industries."); *Erving*, 468 F.2d at 1069 ("[T]he exclusionary clause in Section 1 applied only to those actually in the transportation industry."); *Maryland Cas. Co.*, 107 F.3d at 982 ("§ 1's exclusion is limited to workers involved in the transportation industries."). And the "transportation industry" is just what is sounds like: "an industry whose mission it is to move goods." *Tran v. Texan Lincoln Mercury, Inc.*, No. CIV.A. H-07-1815, 2007 WL 2471616, at *5 (S.D. Tex. Aug.

29, 2007); *see also Zamora v. Swift Transp. Corp.*, No. EP-07-CA-00400-KC, 2008 WL 2369769, at *6 (W.D. Tex. June 3, 2008) (explaining that the "transportation industry" is "an industry directly involved in the movement of goods"). Shipping companies, trucking companies, and airlines are part of that industry. *See, e.g.*, *Palcko*, 372 F.3d at 590 ("a package transportation and delivery company that engages in intrastate, interstate, and international shipping"). Cleaning companies, *see, e.g.*, *Maryland Cas. Co.*, 107 F.3d at 980; electrical-equipment manufacturers, *Signal-Stat Corp.*, 235 F.2d at 302; furniture-rental companies, *see, e.g.*, *Hill*, 398 F.3d at 1288; pharmaceutical-sales groups, *id.*; and food-delivery services, *id.*, are not.

Flowers fits neatly into the latter category of businesses. Once a small, family-run bakery, Flowers is now "one of the largest producers of packaged bakery foods in the United States." Am. Compl., JA14 ¶ 13. Today, "[t]he company operates 47 highly efficient bakeries that produce a wide range of bakery foods for retail and food service customers in the U.S." *Id.* at JA14 ¶ 13. Flowers is, in other words, a company primarily engaged in the production of baked goods, *not* the interstate transportation of goods or people.

To be sure, Flowers is involved in distributing the breads and other baked goods it produces, supporting and assisting its Independent Distributor franchisees. But if that were enough to make Flowers part of the "transportation industry," then *every* company that makes and distributes a product—be it toys, books, electronics, or furniture—would be too. And *Circuit City*—which itself involved an employee of a

well-known electronics retailer—rejected exactly that sweeping view of § 1. The scope of § 1's residual clause, the Supreme Court explained, cannot be construed to encompass all workers who act within the stream of commerce. 532 U.S. at 118. Instead, the residual clause must be "defined by reference to the enumerated categories of workers which are recited just before it": "seamen" and "railroad employees. *Id.* at 115. And "bakery workers"—or even "bakery foods distributors"—simply do not belong in the same category as "seamen" and "railroad employees." 9 U.S.C. § 1.

As the District Court recognized, interpreting § 1 to exclude workers like Plaintiffs (and, conversely, interpreting the FAA to include them) is consistent with the purpose of that provision, which was to leave space for separate, tailored legislation in industries where labor disputes were apt to disrupt commerce nationwide. *See* D.Ct. Op., SA8. During the Pullman Strike of 1894, for example, nationwide rail transit ground to a standstill when tens of thousands of workers went on strike. *See* A.P. Winston, *The Significance of the Pullman Strike*, 9 J. POL. ECON. 540 (1901). And during the Shopmen's Strike of 1922, more than 400 railway workers stopped work, causing a "transportation paralysis" that disrupted many other industries dependent on the railroads to distribute their goods or provide necessary supplies. *See* Margaret Gadsby, *Strike of the Railroad Shopmen*, 15 MONTHLY LAB. REV. 1, 6 (Dec. 1922). As a result of these and other incidents, "[b]y the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers." *Circuit City*, 532 U.S. at 121 (citing Shipping Commissioners Act of

1872, 17 Stat. 262). It had also adopted "grievance procedures . . . for railroad employees," and "the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes"—later extended to cover airline labor disputes—"was imminent." *Id.* (citing Transportation Act of 1920, 41 Stat. 456, and Railway Labor Act of 1926, 44 Stat. 577). By exempting "transportation industry" workers in § 1, Congress ensured that the FAA would not preempt these "established or developing statutory dispute resolution schemes covering specific workers." *Id.*; *see also, e.g.*, *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., (U.E.) Local 437*, 207 F.2d 450, 452–53 (3d Cir. 1953) ("The draftsmen had in mind the two groups of transportation workers as to which special arbitration legislation already existed and they rounded out the exclusionary clause by excluding all other similar classes of workers.").

Congress has never seen fit to adopt an industry-specific labor-dispute resolution scheme for bakeries or even food-producers more broadly. Moreover, any disruption caused by a strike among Flowers Independent Distributors would necessarily be limited to the distribution of Flowers bakery foods within the affected geographic territories. *See* D.Ct. Op., SA14 (finding that "the effects of . . . a strike" among Flowers Independent Distributors would not "be felt outside of their individual franchise territories"). It would not trigger the kind of "transportation emergency" and cross-industry shutdowns that motivated Congress to adopt the § 1 exemption. Gadsby, *supra*, at 6.

Because Plaintiffs do not work in the "transportation industry," this Court need go no further: They are not "transportation workers" for purposes of § 1.

C. Plaintiffs Are Primarily Business Owner Franchisees, Not Transportation Workers.

Even if Plaintiffs *did* work in the "transportation industry," the District Court correctly found that their position as franchisee business owners does not sufficiently resemble that of "seamen" of "railroad employees" as to qualify them as "transportation workers." *See generally* D.Ct. Op., SA10–15.

The text of the FAA makes clear that § 1 covers only those workers whose primary responsibility is interstate transportation. That is apparent from § 1's references to "seamen" and "railroad employees"—groups of workers who transport goods for a living. *See Circuit City*, 532 U.S. at 115 (explaining that "the residual clause . . . should . . . be controlled and defined by reference to" the terms "seamen" and "railroad employees"). It also follows from § 1's use of the word "engage[ ]." While "[t]he 'involving commerce' phrase" in "the basic coverage provision [of] § 2 . . . signals an intent to exercise Congress' commerce power to the full," the words "engaged in commerce" in § 1 "have a more limited reach." *Id.* Workers are "engaged" in interstate transportation when that is the job they are hired to perform. *See, e.g.*, 5 OXFORD ENGLISH DICTIONARY 247–48 (2d ed. 1989) (defining "engage" as "[t]o hire, secure the services of," "[t]o enter into an agreement for service," or "[t]o provide occupation for, employ"). They are not "engaged" in interstate transportation when transportation of

goods is "occasional[]" or "incidental[]." *Wallace*, 970 F.3d at 800; *Hill*, 398 F.3d at 1289.

"To determine whether a class of workers meets that definition, [courts] consider whether the interstate movement of goods is a central part of the class members' job description," like it is for "seamen" and "railroad employees." *Wallace*, 970 F.3d at 801. "[C]lasses of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it" qualify as "transportation workers" for purposes of § 1. *Tenney*, 207 F.2d at 452. But workers "whose occupation is not defined by its engagement in interstate commerce does not qualify for the exemption just because [they] occasionally perform[] that kind of work." *Wallace*, 970 F.3d at 800.

Plaintiffs are independent franchisee business owners with myriad sales and customer-service responsibilities. *See supra* at 4–6 (describing the responsibilities of Independent Distributors); *see also* Distributor Agreement, JA86–120 (same). In addition to overseeing the delivery of products, and among other responsibilities, Plaintiffs "obtain[] [their] own delivery vehicle(s) and purchas[e] adequate insurance thereon," *id.* at JA93 ¶ 9.1; make and use "advertising materials," *id.* at JA 95 ¶ 13.1; and hire employees at their discretion, *id.* at JA98 ¶¶ 16.3–16.4. *See supra* at 4–6. Plaintiffs are not required to conduct any of these activities "personally." *Id.* at JA98 ¶ 16.2. And as business owners, Plaintiffs are free to sell all or a portion of their territories. *See id.* at JA96 ¶ 15.1.

Like the Rent-A-Center account managers in *Hill*—and unlike the "seamen" and "railroad employees" specifically identified in § 1—Plaintiffs thus do not qualify as "transportation workers" for purposes of the FAA. Indeed, Plaintiffs are even further afield from "seamen" and "railroad employees" than the plaintiff in *Hill*. There, the "plaintiff's job duties involved making delivery of goods to customers out of state in his employer's truck." 398 F.3d at 1288. He neither owned a business nor had the ability to delegate any delivery responsibilities to others. Still, his primary role was as an "account manager." *Id.* And § 1, the Eleventh Circuit reasoned, was not designed to cover "interstate transportation activity incidental to . . . employment as an account manager." *Id.* at 1289; *cf. also, e.g.*, *Veliz v. Cintas Corp.*, No. C 03-1180 SBA, 2004 WL 2452851, at *1–*2 (N.D. Cal. Apr. 5, 2004), *modified on other grounds on reconsideration*, 2005 WL 1048699 (N.D. Cal. May 4, 2005) (holding that "Sales Service Representatives" whose job was to "drive from . . . customer to . . . customer, delivering items such as uniforms, picking-up dirty uniforms for cleaning, restocking other supplies, and (to varying and controverted degrees) selling additional products" were not "transportation workers").

So too here. Although Plaintiffs may choose to drive a truck when operating their businesses and servicing their customers, they may also hire others to do that work and, in any event, also perform "myriad other non-transportation related functions that fundamentally transform the nature of the job description." D.Ct. Op., SA12–13. They are not like "seamen." And they are not like "railroad employees." They are franchisee

business owners. They are thus not members of the limited class of workers Congress intended to exclude from the FAA.

Plaintiffs' contrary arguments are meritless. Plaintiffs characterize the District Court's decision as "suggesting that a truck driver may only be found to be exempt from the FAA if his work was 'confined to' driving the truck, and he assumed no other responsibilities." Opening Br. 27 (quoting D.Ct. Op., SA9) (emphasis omitted). But the District Court said no such thing. Instead, it undertook exactly the inquiry that Plaintiffs' preferred authority—the Third Circuit's 1953 ruling in *Tenny*—did: It looked to the statutorily enumerated categories of "seamen" and "railroad employees," and asked whether Plaintiffs, like those kinds of workers, "are actually engaged in the movement of interstate or foreign commerce." 207 F.2d at 452. And it reached the same result as other courts considering contracts with workers who spend some time delivering goods but are not primarily engaged in the transportation goods. *See, e.g.*, *Hill*, 398 F.3d at 1288–90 (holding that a Rent-A-Center manager whose "duties involved making delivery of goods to customers out of state in his employer's truck" did not qualify as a "transportation worker"); *Wallace*, 970 F.3d at 803 (holding that GrubHub delivery drivers do not qualify as "transportation workers").

Plaintiffs also fault the District Court for putting too much weight on (1) its comparison of Plaintiffs to seamen and railroad workers, (2) the fact that a strike among Flowers Independent Distributors is unlikely to disrupt commerce on any significant scale, and (3) Plaintiffs' authority to delegate their delivery responsibilities. *See* Opening

Br. 27–30. But Plaintiffs do not seriously dispute the relevance of any of these considerations. After all, the first point follows directly from § 1's text. *See Circuit City*, 532 U.S. at 115 ("[T]he residual clause should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it[.]"); *Wallace*, 970 F.3d at 801 ("[T]he enumerated categories play a key role in defining the scope of the residual clause[.]"). And all three are directly relevant to the "transportation worker" inquiry, as myriad courts have recognized. *See, e.g.*, *Lenz*, 431 F.3d at 351–52 (considering "whether a strike by the employee would disrupt interstate commerce" and "whether the employee supervises employees who are themselves transportation workers").

D. Any Transportation in Which Plaintiffs Engage Is Not Interstate for Purposes of § 1.

Even if Plaintiffs worked in the "transportation industry" and were primarily engaged in the transportation of goods, they are not engaged in "foreign or interstate" transportation for purposes of § 1.[3] 9 U.S.C. § 1. It is undisputed, after all, that

[3] As the District Court here recognized, what constitutes "interstate commerce" under different statutory frameworks varies. *See supra* 10–11; D.Ct. Op., SA13 n.11. Flowers does maintain that the local delivery of products that have crossed state lines constitutes "interstate commerce" for purposes of the Motor Carrier Act exemption to the FLSA. But that is a completely different statutory framework that is "irrelevant" to "the issue of whether [the plaintiff] is excepted from arbitration under Section 1 of the FAA." *Freeman v. Easy Mobile Labs, Inc.*, No. 1:16-CV-00018, 2016 WL 4479545, at *2 n.2 (W.D. Ky. Aug. 24, 2016); *see also Vargas v. Delivery Outsourcing, LLC*, No. 15-CV-03408, 2016 WL 946112, at *4 (N.D. Cal. Mar. 14, 2016) (explaining that cases addressing the FLSA are not relevant to the FAA question because the FLSA is "construed broadly" whereas § 1 o the FAA is "construed narrowly").

Plaintiffs work exclusively within the geographic territories they purchased, and that those territories are within the borders of a single state. *See, e.g.*, Am. Compl., JA15 ¶ 18, JA17 ¶ 30; Distributor Agreement, JA107. Indeed, that limited geographic scope is fundamental to the Flowers Independent Distributor model, wherein each Distributor owns exclusive right to sell and distribute certain Flowers products only within a defined geographic territory.

Plaintiffs' only connection with *interstate* transportation is that the Flowers products they sell may, at some point in the products' history, have crossed state lines. But *Circuit City* squarely held that the phrase "interstate commerce" in § 1 does not stretch to "the outer limits of [Congress's] authority under the Commerce Clause." 532 U.S. at 115–16. Accordingly, "to fall within the exemption, the workers must be connected not simply to the goods, but to the act of moving those goods across state or national borders." *Wallace*, 970 F.3d at 802. In other words, where the transportation in which the *workers* are engaged is not interstate, the fact that the *goods* or their constituent parts may cross state lines is irrelevant for purposes of § 1. *See id.* (holding that delivery drivers did not qualify as "interstate transportation workers" merely because "they carr[ied] goods that have moved across state and even national lines"); *see also, e.g.*, *Lee v. Postmates Inc.*, No. 18-cv-03421-JCS, 2018 WL 6605659, at *7 (N.D. Cal. Dec. 17, 2018) (finding "no evidence of [the plaintiff] actually engaging in interstate commerce" for purposes of § 1 even though "she delivered packaged goods presumably produced out of state"); *Magana v. DoorDash, Inc.*, 343 F. Supp. 3d 891, 899 (N.D. Cal.

2018) (explaining that courts have "declined to find that a delivery driver engaged in interstate commerce [for purposes of § 1] where he did not allege that he made interstate deliveries").

To be sure, some courts have found that workers in the transportation industry who provide last-mile services as part of an interstate shipping operation—*e.g.*, "truckers who drive an intrastate leg of an interstate route," *Wallace*, 970 F.3d at 802—can qualify as "transportation workers" for purposes of § 1. In two recent cases, for example, courts have held that last-mile Amazon delivery drivers are "transportation workers" for purposes of § 1. *See Waithaka*, 966 F.3d at 26; *Rittman*, 971 F.3d at 915. But this case is much simpler than those. Unlike Amazon delivery drivers, Plaintiffs are not employed in the transportation industry. *See Waithaka*, 966 F.3d at 23 (taking into account "the nature of [Amazon's] business"); *Rittman*, 971 F.3d at 910 (recognizing that the delivery drivers were "transportation workers" and that the only question was "whether transportation workers must cross state lines" for the exemption to apply). Unlike Amazon delivery drivers, Plaintiffs are business owners, not truck drivers. *See Waithaka*, 966 F.3d at 13–14 (describing the drivers' role). And unlike Amazon delivery drivers, Plaintiffs are running a self-contained, local business, not serving as a link in a continuous interstate transit line akin to a seaman or railroad worker. *See Rittman*, 971 F.3d at 917 (explaining that Amazon delivery drivers "complete the delivery of goods that Amazon ships across state lines").

Because Plaintiffs engage only in local transportation, they are not interstate transportation workers within the meaning of § 1.

E. Any Doubts About the Applicability of the FAA Should Be Resolved in Favor of Arbitration.

Because the Independent Distributors possess *none* of the characteristics of "transportation workers," this is not a close case: Section 1 does not apply, and the Arbitration Agreements are enforceable under the FAA.

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

III. The District Court Applied the Correct Standard in Deciding Whether to Dismiss Plaintiffs' Suit and Compel Arbitration.

Unable to refute the District Court's § 1 ruling on the merits, Plaintiffs contend that the District Court applied the wrong standard by making factual inferences in

Flowers' favor without ordering discovery. *See* Opening Br. 31–41. Plaintiffs are wrong. As an initial matter, this Court can affirm the District Court's judgment—on either the state-law ground or under the FAA—based exclusively on undisputed facts contained in Plaintiffs' own pleadings and the Distributor Agreements themselves. In any event, the District Court applied the correct standard: Plaintiffs failed to submit their own evidence; they did not seek discovery; and the legal representations on which they continue to rely have no bearing on the § 1 issue.

A. The Court Need Not Look Beyond the Pleadings and the Distributor Agreements to Affirm.

This Court need not consider the contents of Flowers' declaration or any disputed facts in order to resolve this case.

For starters, the question whether the Arbitration Agreements are enforceable under Connecticut law presents a pure question of law. *See supra* Part I. And the answer to that question turns exclusively on the terms of the Agreements themselves. *See id.*

The § 1 question, too, requires no factual analysis; this Court can resolve it on the basis of the pleadings and the Distributor Agreement alone. Those documents make clear (and no one disputes) that Flowers is in the business of producing baked goods, not transportation. *See, e.g.*, Am. Compl., JA14–15 ¶¶ 12–13, 18 (describing Flowers' "baked goods business"). Those documents also make clear (and no one disputes) that Plaintiffs work exclusively within the bounds of a single state. *See, e.g.*, *id.* at JA17 ¶ 30 (explaining that Plaintiffs "pick up and drop off product at Defendants'

warehouse in Waterbury, Connecticut"); *id.* at JA15 ¶ 18 (explaining that Plaintiffs "deliver baked good products to retailers and other customers in Connecticut"); Distributor Agreement, JA107 (describing Plaintiff's territory). Each of those undisputed facts independently establishes that § 1 does not apply. *See supra* Parts II.B & II.D.

To be sure, the District Court considered Flowers' declaration—in addition to Plaintiffs own allegations and the contents of the Distributor Agreement—in finding that Plaintiffs are primarily business owner franchisees, not delivery drivers. *See* D.Ct. Op., SA11–13. But even on that point, Plaintiffs acknowledge that the District Court "rel[ied] almost exclusively on various sections of the distribution agreement." Opening Br. 27; *see, e.g.*, D.Ct. Op., SA11 ("[T]he Plaintiffs' Distributor Agreements evidence a much broader scope of responsibility that belies the claim that they are only or even principally truck drivers."). That document (the authenticity of which is undisputed) is repeatedly referenced in Plaintiffs' own pleadings, *see* Am. Compl., JA15–16, is properly considered on a motion to dismiss or to compel arbitration, *see, e.g.*, *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 231 (2d Cir. 2016), and is the focus of the statutory inquiry. *See* 9 U.S.C. § 1 (exempting "*contracts* of employment of" transportation workers (emphasis added)).

B. In Any Event, the District Court Applied the Right Standard.

There was also nothing wrong with the standard the District Court applied—including with respect to its consideration of Flowers' declaration. As this Court has

long held, courts should "appl[y] a standard similar to that applicable for a motion for summary judgment" "[i]n the context of motions to compel arbitration brought under the Federal Arbitration Act." *Bensadoun v. Jobe–Riat*, 316 F.3d 171, 175 (2d Cir. 2003); *see also Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 113 (2d Cir. 2012). And just like in the summary-judgment context, "it is not sufficient for the party opposing arbitration to utter general denials of the facts on which the right to arbitration depends." *Oppenheimer & Co. v. Neidhardt*, 56 F.3d 352, 358 (2d Cir. 1995). "If the party seeking arbitration has substantiated the entitlement by a showing of evidentiary facts, the party opposing may not rest on a denial but must submit evidentiary facts showing that there is a dispute of fact to be tried." *Id.*

That is exactly what happened here. In support of its motion to compel arbitration, Flowers offered a short declaration describing the Distributor Agreement and Plaintiffs' duties and responsibilities thereunder. *See* JA78–83. If Plaintiffs disagreed with any of the representations therein, they could have submitted their own declaration to rebut Flowers'. Or they could have sought discovery, as the plaintiffs did in the Third Circuit cases on which Plaintiffs rely. *See* Opening Br. 40–41 & n.16 (citing, *e.g.*, *Singh v. Uber Techs. Inc.*, 939 F.3d 210, 214 (3d Cir. 2019) (explaining that the plaintiff had asked the district court "that he be given the opportunity for discovery")). They did neither. *See, e.g.*, D.Ct. Op., SA13 ("Plaintiffs [did] not put forth *any* evidence to refute the Defendants' submissions." (emphasis added)). And even now, they do not explain what additional evidence they would have submitted or sought in discovery.

"Instead, Plaintiffs [have sought] to create a factual dispute by citing [Flowers'] representations in this and other litigation, concerning [Flowers'] legal status under other statutory regimes." *Id.* In particular, Plaintiffs have pointed to Flowers' statements in its Answer and in a prior lawsuit to the effect that, "[a]ssuming, *arguendo*, Plaintiffs . . . are employees under the FLSA, . . . their claims . . . are barred by the [FLSA's] Motor Carrier Exemption . . . because Plaintiffs . . . transport . . . certain goods originating out of state, and because there is practical continuity of movement of these goods until they reach retail customers and other customers." JA36; *see also* D.Ct. Op., SA13 n.11; Pl.'s Br. 35. But as the District Court recognized, legal arguments are not evidence. *See* D.Ct. Op., SA13 n.11. Even if they were, these statements were "made in the context of completely different statutory frameworks" that "have no bearing on the FAA exemption." *Id.* at SA13 & n.11; *see also supra* at 34 n.3 (citing cases). And even "credit[ing] these representations as facts bearing on the instant litigation"—as the District Court itself did—"they only establish that driving trucks and delivering products that travel in interstate commerce comprise some of the Plaintiffs' responsibilities." *Id.* at SA13 n.11. That undisputed fact "does not change the outcome of the [§ 1] analysis." *Id.*

CONCLUSION

The judgment below should be affirmed and this case should proceed to arbitration.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation in this Court's Local Rule 32.1 because it contains 10,728 words and was prepared in Microsoft Word using a proportional serif 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2021, I caused true and correct copies of the foregoing Response Brief to be served on counsel for all parties of record via the Electronic Case Filing (ECF) service.

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