No. 23-51

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in protecting meaningful access to the courts, in accordance with the text and history of the Constitution and important federal statutes, and therefore has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Enacted in 1925, the Federal Arbitration Act generally requires courts to enforce agreements to arbitrate disputes outside of litigation. 9 U.S.C § 2. But the Act's first section contains an exemption: "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. In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), this Court held that the exemption's residual clause is best interpreted as "confine[d]" to "transportation workers," *id.* at 109, that is, those who are "actively 'engaged in transportation' of . . . goods across borders via the channels of foreign or interstate commerce," *Sw.*

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[1] Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

Airlines Co. v. Saxon, 596 U.S. 450, 458 (2022) (quoting *Circuit City*, 532 U.S. at 121).

Despite this, the court below concluded that Petitioners, whose primary duty is "deliver[ing] baked goods by truck," Pet. App. 39a, do not qualify as "transportation workers" because their employer, a commercial bakery, does not operate in the transportation "industry." This atextual "industry" requirement is wholly untethered from the text and history of Section 1 and should be rejected.

This Court has instructed that the question of whether a person falls within a "class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, should be resolved by reference to the "ordinary, contemporary, common meaning" of the phrase. *Saxon*, 596 U.S. at 455 (quoting *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014)). And at the time of the FAA's enactment, the ordinary meaning of the provision at issue here contained no hidden "industry" requirement.

To the contrary, early twentieth-century dictionaries defined "worker" by identifying the actual work that the worker "perform[ed]," *Funk & Wagnalls New Standard Dictionary* 2731 (1913), as opposed to the person or company *for whom* the work was done. And in the context of the residual clause, the term "engaged," meaning "[o]ccupied" or "involved in," *see, e.g.*, *Webster's New International Dictionary* 725 (1st ed. 1923), referred to the actual work that the "class of workers" "engaged" in—not the work of their employers. Finally, the term "class" simply denoted a group of persons or things united by a common characteristic or attribute. None of these terms included an implicit "industry" requirement; they focused on the work carried out by the "class of

workers," not the industry within which the workers' employers operated.

The court below did not engage with any of this evidence of original meaning—in fact, it did not engage with the text of the residual clause at all. Instead, it went straight to the preceding language of Section 1 and, with no analysis, concluded that the terms "seamen" and "railroad employees" both "locate the 'transportation worker' in the context of a transportation industry." Pet. App. 46a. It then held that pursuant to the *ejusdem generis* canon, the residual clause should also be so limited. Pet. App. 46a. This was wrong.

As this Court has repeatedly recognized, for the *ejusdem generis* canon to limit the meaning of a catchall term, all preceding specific terms—in this case, both "seamen" *and* "railroad employees"—must share the same limiting characteristic. Yet in 1925, neither the long-standing definition of "seaman" in the United States Code, nor that term's ordinary meaning as evinced by contemporaneous dictionaries, supported restricting its scope to any particular industry. Accordingly, an "industry" requirement cannot be the common attribute of that exemption's specific terms that defines the scope of the FAA exemption's residual clause.

Finally, this Court should not impose an atextual "industry" requirement on the FAA exemption's residual clause because such a requirement would be at odds with the clause's history. In passing the FAA, Congress included the exemption to avoid "unsettl[ing] established or developing statutory dispute resolution schemes covering specific workers," including the scheme covering "seamen" under the Shipping Commissioners Act of 1872. *Circuit City*, 532 U.S. at 121. Significantly, the scope of the Shipping

Commissioners Act's scheme did *not* depend on the particular industry of the owner of the vessel on which the seaman had contracted to serve. Rather, shipping-commissioner arbitration expressly covered "any question whatsoever" in a seaman's dispute with a master, owner, agent, or consignee. If the residual clause included an "industry" requirement, many seamen's disputes would have been covered by both the Shipping Commissioners Act *and* the FAA, negating the Shipping Commissioners Act's post-dispute arbitration scheme that Congress sought to leave untouched in 1925.

In sum, the transportation "industry" requirement that the court below imposed on the residual clause cannot be justified by the chief sources this Court consults to decipher the original meaning of statutes. This Court should reject it and hew to the straightforward text of the provision, as it has done before.

ARGUMENT

I. The Ordinary Public Meaning of the FAA Exemption's Residual Clause Does Not Support an Implicit "Industry" Requirement.

It is a "'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute.'" *Wisc. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (quoting *Perrin v. United States,* 444 U.S. 37, 42 (1979)). Relying on the meaning of the statutory text at the time of its enactment avoids judicial amendment of legislation "outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution commands," and ensures that "reliance interests in the settled meaning of a

statute" are not upset. *New Prime v. Oliveira*, 139 S. Ct. 532, 539 (2019) (quoting *INS v. Chadha,* 462 U.S. 919, 951 (1983)).

To identify the ordinary public meaning of a statutory term or phrase, this Court typically consults "[d]ictionaries from the era of [the statute]'s enactment." *Sandifer*, 571 U.S. at 227; *see, e.g.*, *Saxon*, 596 U.S. at 456 (relying on contemporaneous dictionary editions to interpret the FAA); *New Prime*, 139 S. Ct. at 539-40 (same). That means that a key question in this case is whether dictionaries from around the time of the FAA's enactment defined the terms of Section 1 in a manner such that its residual clause is best construed as applying only to those people who work for companies in the transportation *industry*. The answer is plainly no.

A. "Workers"

The FAA exemption's residual clause "speaks of 'workers,' not 'employees' or 'servants.'" *Saxon*, 596 U.S. at 456 (quoting *New Prime*, 139 S. Ct. at 540-41). This distinction is significant. By 1925, dictionaries defined the term "servant" to focus on the servant's relationship with his employer, both in ordinary usage, *see, e.g.*, *Webster's New International Dictionary* 1926 (1st ed. 1923) ("[a]ny person employed by another and subject in his employment to his employer's directions and control"), and as a legal term of art, *see, e.g.*, *Black's Law Dictionary* 1075 (2d. ed. 1910) ("one who is employed to render personal services to his employer"). Similarly, the term "employee" had at least begun to signify the concept of "one who is employed," 1 *Bouvier's Law Dictionary* 1035 (8th ed. 1914)—that is, the term focused on the fact that an employee's duties are performed "in the service of an employer," *Webster's New International Dictionary* 718 (1st ed. 1923).

Early twentieth-century dictionary definitions of "worker," the term Congress chose for the residual clause *instead of* "servant" or "employee," stand in marked contrast. As this Court has explained, they "direct[] the interpreter's attention to 'the *performance* of work,'" rather than the industry that the employer works in "generally." *Saxon*, 596 U.S. at 456 (emphasis in original) (quoting *New Prime*, 139 S. Ct. at 541).

For instance, the first edition of *Webster's New International Dictionary*, defined "worker" simply as "[o]ne that works." *Webster's New International Dictionary* 2350 (1st ed. 1923). This phrase identifies the noun, "one," by reference to the verb that one performs: "work." It is the fact that one "works" that renders one a "worker." The company that a worker works for—no less that company's *industry*—is not relevant at all.

Other early twentieth-century dictionaries similarly linked the term "worker" to the performance of work rather than the worker's relationship with a company or its industry. An early edition of *Funk & Wagnalls* defined "worker" as "[o]ne who or that which performs work." *Funk & Wagnalls New Standard Dictionary* 2731 (1913). And the first edition of the *Oxford English Dictionary*, then titled *A New English Dictionary on Historical Principles*, provided as the primary definition of "worker": "[o]ne who makes, creates, produces, or contrives." 10 *A New English Dictionary on Historical Principles* pt. 2, at 295 (1st ed. 1928).

Examination of the verb form and sentence structure used by then-contemporary dictionary definitions of "worker" sheds further light on the meaning of the term. These definitions consistently invoked a present-tense verb in the active voice: a

"worker" is one who "works," "performs," "creates," "produces," "contrives." *See id.*; *Funk & Wagnalls New Standard Dictionary* 2731 (1913); *Webster's New International Dictionary* 2350 (1st ed. 1923). The subject—that is, the "worker"—acts rather than is acted upon.

In contrast, contemporaneous definitions of "servant" and "employee" consistently used the passive voice: for servant, "[a]ny person employed by another," *Webster's New International Dictionary* 1926 (1st ed. 1923), or "one who is employed to render personal services to his employer," *Black's Law Dictionary* 1075 (2d ed. 1910), and for "employee," "a person employed," *id.* at 421, or "[o]ne employed by another," *Webster's New International Dictionary* 718 (1st ed. 1923). In these definitions, the subject of the verb—the "employee" or "servant"—does not act; rather, he is passively acted upon by the person employing his services. As this Court recently put it, "[p]assive voice pulls the actor off the stage." *Bartenwerfer v. Buckley*, 598 U.S. 69, 75 (2023). Thus, these definitions center the relationship with the employer, as opposed to the actual work carried out by the "employee" or "servant."

But Congress did not choose either of these terms for the FAA's residual clause; instead, it chose "worker," a term consistently defined to stress the work that an individual performs, not the company that he performs the work for. It would thus be exceptionally odd for the worker's company's "industry," as opposed to the worker's actual work, to be the dispositive factor in determining whether a "class of workers" is exempt from the FAA.

Further support for this conclusion comes from the fact that contemporaneous *legal* dictionaries did not typically include definitions for "worker." *See, e.g.*, *Black's Law Dictionary* (2d ed. 1910); 3 *Bouvier's Law*

Dictionary (8th ed. 1914); *Cyclopedic Law Dictionary* (2d ed. 1922). This suggests that "worker" was not a recognized term of art entitled to some distinct, "industry"-contingent meaning for purposes of interpreting federal law; rather, the term "should be read in the ordinary and natural sense." *Helvering v. San Joaquin Fruit & Inv. Co.*, 297 U.S. 496, 499 (1936); *see id.* (relying on "common and usual meaning" where word was "not a term of art in the law").

B. "Class"

Nor was there a hidden "industry" requirement buried in the early twentieth-century dictionary definitions of the term "class," as in a "class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1.

Both standard and legal dictionaries from the time of the FAA's enactment defined "class" as, essentially, a group of persons or things sharing some common characteristic. For instance, *Webster's* defined "class" as "[a] group of persons, things, qualities, or activities, having common characteristics or attributes." *Webster's New International Dictionary* 410 (1st ed. 1923). The *Oxford English Dictionary* described a "class," in "the leading sense," as "[a] number of individuals (persons or things) possessing common attributes, and grouped together under a general or 'class' name." 2 *The Oxford English Dictionary* 466 (1933); *see also, e.g.*, *Funk & Wagnalls Desk Standard Dictionary* 160 (1919) ("[a] number or body of persons with common characteristics"). And *Black's Law Dictionary* deemed a "class" "a group of persons or things, taken collectively, having certain qualities in common, and constituting a unit for certain purposes." *Black's Law Dictionary* 206 (2d ed. 1910); *see also, e.g.*, *Cyclopedic Law Dictionary* 171 (2d ed. 1922) ("[a]

number of persons or things ranked together for some common purpose, or as possessing some attribute in common").

These definitions provide little insight into the nature of the common characteristic that the "class of workers" must share, but they do make clear that a class is united by an attribute of the *members* who make up the class. In this case, those members are "workers," not the companies for whom the "workers" work. Put another way, it is the workers as individuals—not their employers—who must comprise the "class" treated as a cohesive whole under the ordinary meaning of the phrase "class of workers."

C. "Engaged"

As this Court also explained in *Saxon*, just as the term worker, as defined in 1925, focused on the "*performance* of work," the term "engaged" "similarly emphasize[d] the actual work that the members of the class, as a whole, typically carry out." *Saxon*, 596 U.S. at 456 (emphasis in original).

Most standard dictionaries from the period defined "engaged" as "occupied" or "involved in." *See, e.g.*, *Webster's New International Dictionary* 725 (1st ed. 1923) ("[o]ccupied," "employed" or "involved in"); *Funk & Wagnalls Desk Standard Dictionary* 276 (1919) ("[o]ccupied" or "busy"). And most legal dictionaries from the time did not contain definitions of "engage" or "engaged," suggesting it was not a legal term of art. *See, e.g.*, *Cyclopedic Law Dictionary* 351 (2d ed. 1922) (no entry for "engage" or "engaged"); *Black's Law Dictionary* 425 (2d ed. 1910) (same).[2]

[2] Legal dictionaries did define "engagement," but those definitions were specific to French law and not relevant here. *See,*

Moreover, the structure of the FAA's residual clause, "class of workers engaged in foreign or interstate commerce," uses the past participle "engaged" to describe the work that *the "class of workers" themselves* are engaged in, as opposed to the companies they work for. Congress could have easily exempted the employment contracts of a "class of workers *who work for companies* engaged in foreign or interstate commerce" to make clear that the company's industry, as opposed to the class of workers' actual work, was relevant to the application of the FAA exemption. It did not do so.

In any event, this Court already extensively grappled with the early twentieth-century meaning of the term "engaged" in *Circuit City* and concluded that only "transportation workers," as opposed to a broader category of workers, qualify as "engaged in foreign or interstate commerce" within the meaning of the FAA. 532 U.S. at 118-19; *see id.* at 106 (phrase "engaged in commerce" constitutes "a limited assertion of federal jurisdiction"); *United States v. Amer. Bldg. Maint. Indus.*, 422 U.S. 271, 279-80 (1975) (same). This case should thus be about whether truck drivers, like Petitioners here, are "transportation workers," *Circuit City*, 532 U.S. at 119, rather than whether they work for employers in the "transportation industry." By invoking a transportation *industry* requirement, the court below effectively rewrote this Court's decision in *Circuit City*.

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e.g., *Cyclopedic Law Dictionary* 351 (2d ed. 1922) ("In French law. A contract; the obligations arising from a *quasi* contract."); *Black's Law Dictionary* 425 (2d ed. 1910) (similar).

D. This Court's Cases Bearing on Original Meaning

Circuit City is not the only case in which this Court has discussed the original meaning of Section 1 of the FAA in a manner wholly inconsistent with the holding of the court below. This Court's more recent decision in *Saxon* also forecloses the atextual "industry" requirement that the court below imposed.

In *Saxon*, this Court was faced with the question of whether an airline ramp supervisor belonged to a "class of workers engaged in foreign or interstate commerce." 596 U.S. at 453. The Court ultimately ruled that she did, and thus was exempt from the FAA. *Id.* However, in reaching that conclusion, the Court determined that Saxon belonged to a class of workers whose *actual work* of "physically load[ing] and unload[ing] cargo on and off planes traveling in interstate commerce" rendered her a member of "a class of workers engaged in foreign or interstate commerce." *Id.* at 457.

Critically, the Court rejected Saxon's argument that she was a "transportation worker" simply because she worked for an airline—an employer in the transportation *industry*. Pointing to the original public meaning of the terms "worker" and "engaged," this Court held that Saxon was "a member of a 'class of workers' based on what she does at Southwest, *not what Southwest does generally*." *Id.* at 456 (emphasis added). Thus, the Court "rejected Saxon's industrywide approach," holding that the nature of her work, not the nature of her employer's industry, determined whether or not she qualified as a "transportation worker" under Section 1. *Id.*

It is impossible to square this holding with the "industry" requirement imposed by the court below.

Just as Saxon's work for a company in the transportation industry could not automatically make her a transportation worker, neither can Petitioners' transportation work for a company in the baked goods industry automatically foreclose their characterization as "transportation workers," *Circuit City*, 532 U.S. at 121, that is, workers who are "actively 'engaged in transportation' of . . . goods across borders via the channels of foreign or interstate commerce," *Saxon*, 596 U.S. at 458 (quoting *id.* at 121).

II. Application of the *Ejusdem Generis* Canon Does Not Limit Section 1's Residual Clause to Individuals Who Work for Companies in the Transportation "Industry."

To aid its interpretation of Section 1, which (again) exempts from the FAA "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, the court below invoked the *ejusdem generis* canon, the principle that "when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration," *Norfolk & W. Ry. Co. v. Amer. Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991).

The logic behind "confin[ing]" the general term "to covering subjects comparable to the specifics it follows," *Hall St. Assocs. v. Mattel, Inc.,* 552 U.S. 576, 586 (2008), is "to ensure that [the] general word will not render [the] specific words meaningless," *CSX Transp., Inc. v. Ala. Dep't of Rev.,* 562 U.S. 277, 295 (2011). Critically, however, when employing this canon, this Court has cautioned that only the "common attribute" of the specific terms provides insight into the scope of the general term. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 224 (2008). "*Ejusdem generis*

neither demands nor permits [this Court to] limit a broadly worded catchall phrase based on an attribute that inheres in *only one* of the list's preceding specific terms." *Saxon*, 596 U.S. at 462 (emphasis added).

For this reason, in *Saxon*, this Court rejected invocation of *ejusdem generis* where it "proceed[ed] from the flawed premise that 'seamen' and 'railroad employees' are both industrywide categories." *Id.* at 460. While there was some ambiguity with respect to the term "railroad employees," this Court found that "seamen" plainly was not an "industrywide" category at the time of the FAA's enactment, and thus, defining the residual clause on an "industrywide" basis was improper. *Id.* at 460-61.

The court below relied on the same "flawed premise" in its application of *ejusdem generis*. With essentially no analysis, it concluded that the terms "seamen" and "railroad employees" both "locate the 'transportation worker' in the context of a transportation industry," Pet. App. 46a, and thus held that Petitioners were not transportation workers because their employer was a bakery, not a transportation company, *id.* at 49a.

As described further below, the predominant statutory definition of "seamen" in effect in 1925, as well as dictionaries from that era, make clear that a "seaman" was not defined by his company's industry in the early twentieth century. And in light of the operation of the *ejusdem generis* canon—which only permits limitation of the catchall phrase based on a "common attribute" of *all* preceding specific terms—that alone is enough for this Court to reject the holding and logic of the court below.

A. Statutory Definitions of "Seaman" in 1925

At the time of the FAA's passage, federal statutory law had expressly defined the term "seamen" without reference to the industry of the owner of the vessel on which a seaman worked for over half a century.

When the 42nd Congress enacted the Shipping Commissioners Act of 1872, ch. 322, 17 Stat. 262, it defined the term "seamen" to have a broad meaning that would encompass everyone (other than apprentices) who worked on a ship:

> That to avoid any doubt in the construction of this act, every person having the command of any ship belonging to any citizen of the United States shall . . . be deemed and taken to be the "master" of such ship; and that *every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a "seaman" within the meaning and for the purposes of this act* . . . .

Id. § 65, 17 Stat. at 277 (emphasis added).

By 1925, over half a century later, Congress had barely changed that definition of "seaman," which then appeared in and applied to the entire chapter in the U.S. Code devoted to protecting seamen:

> In the construction of this chapter, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the "master" thereof; and *every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a "seaman"* . . . .

46 U.S.C. § 713 (1925) (emphasis added).

Thus, in 1925, Congress had not restricted the statutory definition of "seaman" by reference to the industry of the owner of the vessel on which the seaman served. Nor had Congress imposed any such industry requirement by how it defined the "owner" of the vessel on which the seaman worked. *Compare* Shipping Commissioners Act § 65, 17 Stat. at 277 (defining "owner" to cover "all the several persons, if more than one, to whom the ship shall belong"), *with* 46 U.S.C. § 713 (1925) (same for "all the several persons, if more than one, to whom the vessel shall belong").

Indeed, when it came to vessel owners, the statutory definition in 1925—as in 1872—focused only on the owners' citizenship status, not their industry, *see* Shipping Commissioners Act § 65, 17 Stat. at 277 ("any ship belonging to any citizen of the United States"); 46 U.S.C. § 713 (1925) ("any vessel belonging to any citizen of the United States"). In other words, to be a "seaman," one had to work on a vessel owned by a U.S. citizen; the "industry" to which that citizen belonged was irrelevant.

B. Ordinary Public Meaning of "Seaman" in 1925

In drawing no distinctions based on the industry that owned the vessels on which "seamen" worked, the statutory definition in effect in 1925 was consistent with the ordinary public meaning of "seamen" at that time. True, some of the chief dictionary definitions of "seamen" were somewhat narrower than the statutory definitions—limiting the term to only those engaged in certain roles on a vessel—but none limited "seamen" to those who worked on a ship owned and operated by a shipping company, *i.e.*, a company in the transportation "industry."

For instance, the edition of *Webster's New International Dictionary* published in 1923 defined "seamen" as: "[o]ne whose occupation is to assist in the management of ships at sea; a mariner; a sailor; . . . [o]pposed to *landsman*." *Webster's New International Dictionary* 1906 (1st ed. 1923). This definition would exclude those who worked for a shipping company in a role that did not involve "assist[ing] in the management of ships at sea." At the same time, it would include the manager of a ship owned by a logging or mineral company, as nothing in the definition limits the term to those who work on a ship that *is owned by a shipping company* as opposed to a company in a different industry.

The same is true of the chief "seaman" definition included in the first edition of the *Oxford English Dictionary*: "[o]ne whose occupation or business is on the sea; a sailor as opposed to a landsman." 9 *Oxford English Dictionary* 329 (1933). This definition identifies the "seaman" by his own "occupation" at sea, not his employer's. A sailor responsible for navigating a ship owned by a corn producer would qualify as a seaman, yet the janitorial staff at a shipping company's land-based headquarters might not. *Cf. American Building Maintenance*, 422 U.S. at 283 ("simply supplying localized [janitorial] services to a corporation engaged in interstate commerce does not satisfy the 'in commerce' requirement" of § 7 [of the Clayton Act]").

Legal dictionaries from the early twentieth century contained similar definitions for "seaman." *Black's* described "seamen" as "[s]ailors, mariners; persons whose business is navigating ships," *Black's Law Dictionary* 1063 (2d ed. 1910), and other legal dictionaries contained nearly identical definitions, *see, e.g.*, *The Cyclopedic Law Dictionary* 920 (2d ed. 1922)

(defining "seaman" as "[a] sailor; a mariner; one whose business is navigation"); 3 *Bouvier's Law Dictionary* 3022 (8th ed. 1914) (same). Although, like some of the standard dictionaries of the time, these dictionaries used the term "business" in their definitions of "seaman," the relevant "business" or occupation was that of the sailor himself, not his employer. In other words, a sailor in charge of navigating a ship owned by an oil company would still be in the "business" of "navigation" under these definitions, even if his employer were in the natural resources industry as opposed to the transportation industry.

Notably, some early twentieth-century dictionaries contained conflicting information about whether the term "seamen" included officers of a ship. *Compare Webster's New International Dictionary* 1906 (1st ed. 1923) (stating the definition "applied to officers and esp. to common sailors"), *with Black's Law Dictionary* 1063 (2d. ed. 1910) ("[c]ommonly exclusive of the officers of a ship"). Yet as the dictionaries with more comprehensive definitions from the time make clear, these were merely variations on the term: "[t]he term 'seamen,' in its most enlarged sense, includes the captain as well as other persons of the crew; in a more confined signification, it extends only to the common sailors." *The Cyclopedic Law Dictionary* 920 (2d ed. 1922); *see* 3 *Bouvier's Law Dictionary* 3022 (8th ed. 1914) (same).

For purposes of this case, any distinction between officers and common sailors does not matter. Even in the narrowest sense—confined to "common sailors"—these early twentieth-century definitions of "seamen" would not exclude a sailor on a ship owned by a baked goods company.

III. Imposition of an "Industry" Requirement Would Have Unsettled the Shipping Commissioners Act's Dispute Resolution Scheme for Seamen—Precisely What Congress Adopted the FAA Exemption to Avoid.

Congress excluded "contracts of employment of seamen" from the FAA to avoid unsettling then-established statutory dispute-resolution schemes like the one for seamen under the Shipping Commissioners Act of 1872, ch. 322, §§ 25-26, 17 Stat. 262, 267, codified as amended, 46 U.S.C. §§ 651-52 (1925). *See Circuit City*, 532 U.S. at 121 (citing this scheme). That Act's scheme covered "any question whatsoever between a master, consignee, agent, or owner, and any of his crew." 46 U.S.C. § 651 (1925). Application of the scheme did *not* turn on the industry of the company for which the "crew" member (*i.e.*, the "seaman") worked. If the FAA's "seamen" exemption had covered only seamen on board vessels owned by companies in some industries but not others, the FAA would have subjected many seamen to two conflicting dispute-resolution schemes and deprived them of the choice of the *post*-dispute arbitration offered by the Shipping Commissioners Act—a result at odds with Congress's plan in passing the law.

In the Shipping Commissioners Act of 1872, Congress authorized the appointment of "shipping commissioners" for each port of entry to oversee and enforce certain statutory requirements concerning the "wages, claims, or discharge of a seaman." *Id.* § 26, 17 Stat. 267; *see id.* §§ 12-24, 17 Stat. at 264-67. Among other things, the Shipping Commissioners Act authorized shipping commissioners to "hear and decide any question whatsoever between a master, consignee, agent or owner, and any of his crew, which

both parties agree in writing to submit to him." *Id.* § 25, 17 Stat. at 267. In this scheme, the shipping commissioner's award bound "both parties, and shall, in any legal proceedings which may be taken in the matter, before any court of justice, be deemed to be conclusive as to the rights of parties." *Id.*

Thereafter, while Congress added to seamen's legal protections, *see*, *e.g.*, Act of March 4, 1915, ch. 153, 38 Stat. 1164; Merchant Marine Act, 1920, ch. 250, § 33, 41 Stat. 988, 1007, and changed how shipping commissioners were appointed, supervised, and paid, *see generally* Lloyd M. Short, *The Bureau of Navigation: Its History, Activities and Organization* 85-88 (1923), the scope of shipping-commissioner arbitration remained unchanged, applying to "*any question whatsoever*," so long as the disputed question was "between a master, consignee, agent, or owner, and any of his crew," and "both parties" agreed "in writing" to submit that issue to the shipping commissioner, 46 U.S.C. § 651 (1925) (emphasis added). That included disputes governed by both federal law, *see, e.g.*, *id.* § 594 (1925) (seaman who "signed an agreement and is afterwards discharged before the commencement of the voyage . . . without fault on his part justifying such discharge" is entitled to one month's wages "as if it were wages duly earned"), and state law, *see, e.g.*, Ala. Code § 2506 (1923) ("[t]he master, owner or consignee of any ship or vessel must pay the pilot," a seaman "who conducts a vessel into or out of the bay or harbor of Mobile"); *see also* 46 U.S.C. §§ 211-15 (1925) (allowing states to regulate the employment and licensing of some maritime pilots). Congress thus subjected to shipping commissioner arbitration a notably broad array of different legal issues that did not turn on the

particular industry of the owners of the vessel on which the seamen served.

In describing the parties to such arbitration, *see id.* § 651 (1925) ("master, consignee, agent or owner, and any of his crew"); *id.* § 652 ("seaman"), Congress used maritime terms of art that did not refer to the industry of the owner of the vessel. For example, as discussed above, Congress expressly defined the term "seaman" to mean "every person (apprentices excluded) who shall be employed or engaged to serve in any capacity on board" any vessel "belonging to any citizen of the United States." 46 U.S.C. § 713 (1925); *see also id.* (defining "master" and "owner"). Similarly, it was well settled that a vessel's "crew" typically covered all its seamen and inferior officers, regardless of the industry of the owner of the vessel on which they served. *United States v. Winn*, 28 F. Cas. 733, 735 (C.C.D. Mass. 1838) (Story, J.); *accord The Marie*, 49 F. 286, 288 (D. Or. 1892) (cook was "one of the crew"); *see also The Buena Ventura*, 243 F. 797, 798-99 (S.D.N.Y. 1916) ("wireless operator" was part of vessel's "crew" despite coming on board "in pursuance of a contract between [vessel] owners and the Marconi Wireless Telegraph Company of America"); *The Manchioneal*, 243 F. 801, 805 & n.1 (2d Cir. 1917) (same); *The Bound Brook*, 146 F. 160, 164 (D. Mass. 1906) (a vessel's "crew" "naturally and primarily" refers to persons "on board her aiding in her navigation, without reference to the nature of the arrangement under which they are on board"); *cf.* "Seaman's Claim Arbitrated," *The Seamen's Journal*, Apr. 23, 1919, at 1-2 (reprinting arbitral opinion of U.S. Shipping Commissioner, New York, awarding wages to seaman shipped as waiter). Thus, this

scheme applied to individuals who worked on a vessel regardless of the industry that owned that vessel.[3]

Had the FAA exemption for "contracts of employment of seamen" included an implicit industry restriction, it would have resulted in a group of seamen covered by both the FAA and the Shipping Commissioners Act, "unsettl[ing]" shipping-commissioner arbitration in multiple ways, *Circuit City*, 532 U.S. at 121.

Perhaps most significantly, a shipping commissioner's arbitral authority was triggered only if "both parties agree[d] in writing to submit [the disputed question] to him," 46 U.S.C. § 651 (1925), *after* the dispute arose, *see The W.F. Babcock*, 85 F. 978, 982-83 (2d Cir. 1898); *The Howick Hall*, 10 F.2d 162, 163 (E.D. La. 1925); *The Donna Lane*, 299 F. 977, 982 (W.D. Wash. 1924). By contrast, under the FAA, an employer could compel enforcement of a *pre*-dispute arbitration clause in an employment contract. If the

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[3] By comparison, other laws passed by Congress expressly limited the scope of dispute resolution schemes to companies in a particular industry. For example, Title III of the Transportation Act of 1920, ch. 91, §§ 300-16, 41 Stat. 456, 469-74, created a Railroad Labor Board to decide disputes between railroad workers and any "carrier." *Id.* § 301, 41 Stat. at 469. Absent certain exceptions not relevant here, the term "carrier" covered "any express company, sleeping car company, and any carrier by railroad, subject to the Interstate Commerce Act," *id.* § 300, 41 Stat. at 469, *i.e.*, "common carriers engaged in . . . [t]he transportation of passengers or property . . . by railroad" in interstate or foreign commerce, *id.* § 400, 41 Stat. at 474, codified at 49 U.S.C. § 1(1) (1925). *See, e.g.*, *Int'l Ass'n of Machinists v. Atchinson, Topeka & Santa Fe Ry.*, 1 R.L.B. 13, 14-22, 28 (1920) (Railroad Labor Board decision declaring wage increases for workers who worked for various "carriers" as well as "all Union Depot and terminal companies" for which those "carriers" owned majority stock).

FAA exemption only covered seamen on vessels owned by companies in the transportation industry, some seamen covered by the shipping-commissioner arbitration scheme would also be subject to the FAA and thus *pre*-dispute arbitration clauses, negating the *post*-dispute agreement required to submit a dispute to shipping commissioner arbitration—a critical procedural protection for seamen.

Other problems could also arise. For instance, typically, under the Shipping Commissioners Act, if a single vessel was jointly owned, disputes involving seamen who worked on that vessel would be subject to a single shipping-commissioner arbitration if all parties agreed in writing to submit their dispute to shipping-commissioner arbitration. *See* 46 U.S.C. § 651 (1925) (giving the commissioner arbitral authority over an "owner"); *id.* § 713 (defining "owner" to cover "*all* the several persons, if more than one, to whom the vessel shall belong" (emphasis added)). But if the FAA exemption did not extend to seamen who worked on vessels owned by companies outside the transportation industry, some disputes involving jointly owned vessels would have been subject to the FAA in addition to the Shipping Commissioners Act, resulting in *two* separate arbitral decisions for the same dispute.

Concerns about these sorts of disruptions were partly why, in January 1923, International Seamen's Union of America President Andrew Furuseth objected to the FAA (then proposed without any workers exemption). His worry: shipowners would add *pre*-dispute arbitration clauses when engaging a seaman and then, when a dispute arose, they would use the FAA to compel that seaman to submit that dispute to shipping-commissioner arbitration, even though that seaman, if choosing *post*-dispute, would have opted to

go to court. *See* Analysis of H.R. 13522 Submitted by President Andrew Furuseth to the Convention Which Was Adopted, *in Proceedings of the Twenty-Sixth Annual Convention of the International Seamen's Union of America* 204 (1923). Notably, the FAA's drafters referred to Furuseth's opposition when proposing what became the FAA workers exemption. *See Report of the Committee on Commerce, Trade and Commercial Law*, 48 Ann. Rep. A.B.A. 284, 287 (1923); Hearing on S.4213 and S.4214 Before a Subcomm. of the S. Comm. on the Judiciary, 67th Cong., 4th Sess. 9 (1923). Congress thus passed the FAA exemption for "contracts of employment of seamen" to preserve the scope of post-dispute arbitration by shipping commissioners—something that it would not have achieved if the exemption contained an implicit "industry" requirement.

* * *

This case comes down to a simple question: are truck drivers transportation workers covered by the FAA exemption's residual clause? Under the original meaning of that provision, the answer is straightforward—yes. This Court should reject the imposition of a transportation "industry" requirement that has no basis in the statute's text and is at odds with its history.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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