

49 F.4th 655

United States Court of Appeals, 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.

No. 20-1681

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August Term 2021

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Argued: October 22, 2021

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Decided: May 5, 2022

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Amended: September 26, 2022

Synopsis

Background: Commercial truck drivers who delivered baked goods in designated territories in Connecticut brought putative class action against manufacturer of baked goods, alleging unpaid or withheld wages, unpaid overtime wages, and unjust enrichment pursuant to Fair Labor Standards Act and Connecticut wage laws. The United States District Court for the District of Connecticut, [Kari A. Dooley, J.](#), determined that drivers **did not** qualify as transportation workers, ordered arbitration, and dismissed case. Drivers appealed.

[Holding:] The Court of Appeals, [Jacobs](#), Circuit Judge, held that truckers were not “transportation workers” within meaning of **Federal Arbitration Act (FAA)**.

Affirmed.

[Jacobs](#), Circuit Judge, filed concurring opinion.

[Pooler](#), Circuit Judge, filed dissenting opinion.

Opinion, [33 F.4th 650](#), superseded.

West Headnotes (10)

[1] **Alternative Dispute Resolution** ⚡ Employment disputes
Commerce ⚡ Arbitration

An independent contractor can be a transportation worker within the meaning of the **Federal Arbitration Act (FAA)** that confers an expansive obligation on the federal courts to enforce arbitration agreements, but has an exclusion for contracts with “seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce.” [9 U.S.C.A. § 1](#).

[2] **Alternative Dispute Resolution** ⚡ Employment disputes
Commerce ⚡ Arbitration

Distributor agreement defining commercial truck drivers as “independent contractor[s]” for all purposes, and making clear that drivers were “independent business[es]”, **did not** matter for purposes of **Federal Arbitration Act** that conferred expansive obligation on federal courts to enforce arbitration agreements, since exclusion for “transportation workers” applied with equal force to employees and to independent contractors. [9 U.S.C.A. § 1](#).

[3] **Alternative Dispute Resolution** ⚡ Decisions reviewable; finality

Court of Appeals had jurisdiction over district court's order compelling arbitration and dismissing putative class action brought by commercial truck drivers who delivered baked goods in designated territories in Connecticut against manufacturer of baked goods, alleging unpaid or withheld wages, unpaid overtime wages, and unjust enrichment pursuant to Fair Labor Standards Act and Connecticut wage laws, since order was “final decision with respect

to arbitration” pursuant to **Federal Arbitration Act**. 9 U.S.C.A. § 16(a)(3).

[4] **Alternative Dispute Resolution** 🔑 Scope and standards of review
 Court of Appeals reviews de novo district court's order compelling arbitration under **Federal Arbitration Act**. 9 U.S.C.A. § 1.

[5] **Alternative Dispute Resolution** 🔑 Existence and validity of agreement
 Federal court should decide for itself whether **Federal Arbitration Act's** “contracts of employment” exclusion applies before ordering arbitration, but that prescription may not bear upon whether availability of arbitration under state law can obviate exclusion. 9 U.S.C.A. § 1.

[6] **Alternative Dispute Resolution** 🔑 Constitutional and statutory provisions and rules of court
Federal Arbitration Act (FAA) reflects liberal federal policy favoring arbitration agreements. 9 U.S.C.A. § 1.

[7] **Alternative Dispute Resolution** 🔑 Employment disputes
Commerce 🔑 Arbitration
 “Transportation workers” are encompassed by the class of workers in residual clause of the **Federal Arbitration Act** excluding the employment contracts of “seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C.A. § 1.

[8] **Alternative Dispute Resolution** 🔑 Employment disputes
Commerce 🔑 Arbitration
 The **Federal Arbitration Act** exclusion for the employment contracts of “seamen, railroad employees, [and] any other class of workers

engaged in foreign or interstate commerce” is limited to workers involved in the transportation industry. 9 U.S.C.A. § 1.

[9] **Alternative Dispute Resolution** 🔑 Employment disputes
Commerce 🔑 Arbitration

An individual works in a “transportation industry,” as required for application of the **Federal Arbitration Act** exclusion for the employment contracts of “seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce,” if the industry in which the individual works pegs its charges chiefly to the movement of goods or passengers, and the industry's predominant source of commercial revenue is generated by that movement. 9 U.S.C.A. § 1.

1 Cases that cite this headnote

[10] **Alternative Dispute Resolution** 🔑 Employment disputes
Commerce 🔑 Arbitration

Commercial truck drivers who delivered baked goods in designated territories in Connecticut were not “transportation workers” within meaning of **Federal Arbitration Act (FAA)** exclusion for the employment contracts of “seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce,” since drivers were in bakery industry, not transportation industry. 9 U.S.C.A. § 1.

1 Cases that cite this headnote

*656 On Appeal From the United States District Court For the District of Connecticut(Dooley, J.)

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Before: JACOBS, POOLER, Circuit Judges, GUJARATI, District Judge.*

Opinion

Judge Jacobs concurs in a separate opinion, and Judge Pooler dissents in a separate opinion.

Dennis Jacobs, Circuit Judge:

*657 Plaintiffs deliver baked goods by truck to stores and restaurants in designated territories within Connecticut. They bring this action in the United States District Court for the District of Connecticut (Dooley, J.) on behalf of a putative class against Flowers Foods, Inc. and two of its subsidiaries, which manufacture the baked goods that the plaintiffs deliver. Plaintiffs allege unpaid or withheld wages, unpaid overtime wages, and unjust enrichment pursuant to the Fair Labor Standards Act and Connecticut wage laws. The district court granted the defendants’ motion to compel arbitration and dismissed the case.

The decisive question on appeal is whether the plaintiffs are “transportation workers” within the meaning of the **Federal Arbitration Act** (“FAA”). That matters because the **FAA**, which confers on the federal courts an expansive obligation to enforce arbitration agreements, has an exclusion for contracts with “seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1. That exclusion is construed to cover “transportation workers.” [Circuit City Stores, Inc. v. Adams](#), 532 U.S. 105, 119, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001).

[1] Of the issues subsumed in that question, some are settled. For example, an independent contractor can be a transportation worker, a point germane to this case in which the drivers own their routes and may sell them to others. [New Prime Inc. v. Oliveira](#), — U.S. —, 139 S. Ct. 532, 543-44, 202 L.Ed.2d 536 (2019).

The district court ruled that the plaintiffs are not “transportation workers” and “grant[ed] the Defendants’ motion to dismiss in favor of arbitration.” Special App’x 15.

The court undertook a thorough review of the circumstances that might bear on the question, such as the extent of similarity between the plaintiffs’ work and the work of those in the maritime and railroad industries. That analysis is consonant with the prescription in [Lenz v. Yellow Transportation, Inc.](#), 431 F.3d 348 (8th Cir. 2005), which approached the question by considering eight non-exclusive factors. We affirm without rejecting or adopting the district court’s analysis, which may very well be a way to decide closer cases. We hold that the plaintiffs are not “transportation workers,” even though they drive trucks, because they are in the bakery industry, not a transportation industry.

In arriving at that holding, we first consider an alternative ground for affirmance that might obviate the federal statutory question by allowing the arbitration to proceed under Connecticut arbitration law, which has no exclusion for transportation workers; but vexed questions beset a ruling that affirms on that alternative basis.

We therefore must come to grips with whether the plaintiffs are “transportation workers.” Our initial opinion on this appeal, [Bissonnette v. LePage Bakeries Park St., LLC](#), 33 F.4th 650 (2d Cir. 2022), concluded that they are not. The Supreme Court subsequently issued [Southwest Airlines Co. v. Saxon](#), — U.S. —, 142 S. Ct. 1783, 213 L.Ed.2d 27 (2022) (“[Saxon](#)”), which provides guidance on the meaning of “transportation workers,” and the plaintiffs *658 moved for rehearing or rehearing *en banc* in light of this intervening authority. We granted the motion for rehearing and withdrew our opinion of May 5, 2022. Now, after considering [Saxon](#), we again affirm the district court’s order compelling arbitration and dismissing the case. Additional oral argument is unnecessary.¹

I

Flowers Foods, Inc. is the holding company of subsidiaries that produce breads (including Wonder Bread), as well as buns, rolls, and snack cakes in 47 bakeries. Other subsidiaries of Flowers Foods sell exclusive distribution rights for the baked goods within specified geographic areas. (Flowers Foods, Inc. and its subsidiaries, including defendants LePage Bakeries Park St., LLC and C.K. Sales Co., LLC, are hereinafter referred to as “Flowers.”) The individuals who purchase the distribution rights--designated independent distributors--market, sell, and distribute Flowers baked goods. The relationship between Flowers and each

independent distributor is set out in a Distributor Agreement. See Joint App'x 84-159.

Plaintiffs Neal Bissonnette and Tyler Wojnarowski are two of these independent distributors, both of whom own distribution rights in Connecticut. Bissonnette, who previously delivered baked goods as an employee of Flowers, entered into a Distributor Agreement with Flowers in 2017. Wojnarowski entered into a Distributor Agreement with Flowers in 2018.

[2] Pursuant to the Distributor Agreement, the plaintiffs pick up the baked goods from local Connecticut warehouses and deliver the goods to stores and restaurants within their assigned territories. Subject to certain adjustments, the plaintiffs earn the difference between the price at which the plaintiffs acquire the bakery products from Flowers, and the price paid by the stores and restaurants. In their roles as independent distributors, the plaintiffs undertake to maximize sales; solicit new locations; stock shelves and rotate products; remove stale products; acquire delivery vehicles; maintain equipment and insurance; distribute Flowers' advertising materials and develop their own (with prior approval by Flowers); retain legal and accounting services; and hire help. The plaintiffs may also profit from the sale of their distribution rights.² Though the plaintiffs are permitted to sell noncompetitive products alongside Flowers products, the plaintiffs concede that they **do not** work for any other company or entity, and that they typically work at least forty hours per week selling and distributing Flowers products.

The Distributor Agreement states that the parties may submit disputes arising from the Distributor Agreement to binding arbitration in accordance with the conditions set forth in an appended Arbitration Agreement. The Arbitration Agreement provides that “any claim, dispute, and/or controversy ... shall be submitted to and determined exclusively by binding arbitration under the **Federal Arbitration Act** (9 U.S.C. §§ 1, et seq.) ...” Joint App'x 117. *659 Arbitrability is an issue reserved to the arbitrator except for issues concerning the “prohibition against class, collective, representative or multi-plaintiff action arbitration” and the “applicability of the **FAA**.” *Id.* at 118. The Arbitration Agreement is “governed by the **FAA** and Connecticut law to the extent Connecticut law is not inconsistent with the **FAA**.” *Id.* at 119.

II

[3] We have jurisdiction over the district court's order compelling arbitration and dismissing the case because it is a “final decision with respect to an arbitration” pursuant to Section 16(a)(3) of the **FAA**. See [Green Tree Fin. Corp. Alabama v. Randolph](#), 531 U.S. 79, 86-87, 89, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000).

III

[4] We review *de novo* the district court's order compelling arbitration. [Atlas Air, Inc. v. Int'l Bhd. of Teamsters](#), 943 F.3d 568, 577 (2d Cir. 2019).

The Arbitration Agreement, which provides for arbitration “under the **Federal Arbitration Act**,” elsewhere provides that it “shall be governed by the **FAA** and *Connecticut law to the extent Connecticut law is not inconsistent with the **FAA***.” Joint App'x 117, 119 (emphasis added). Since Connecticut arbitration law has no exclusion for transportation workers, see [Conn. Gen. Stat. Ann. § 52-408](#) (arbitration agreements shall be “valid, irrevocable and enforceable”), Flowers urges that we compel arbitration pursuant to Connecticut law, regardless of whether the **FAA** applies.

The Second Circuit has not ruled on the application of state law to arbitration agreements under the **FAA**. One court within this Circuit has observed that “[m]ultiple courts” have rejected the proposition that “state arbitration law is preempted” when a plaintiff is excluded from the **FAA**. [Smith v. Allstate Power Vac. Inc.](#), 482 F. Supp. 3d 40, 47 (E.D.N.Y. 2020) (Gershon, J.); see also [Michel v. Parts Auth., Inc.](#), 15 Civ. 5730 (ARR), 2016 WL 5372797, at *3 (E.D.N.Y. Sept. 26, 2016) (“Even assuming the **FAA does not** apply, New York state law governing arbitration does apply.”). Other Circuits lean the same way.³

Even if state law can compel arbitration when the **FAA does not**, the meaning of the phrase “not inconsistent” in the Arbitration Agreement is unclear. Joint App'x 119. Flowers argues that Connecticut law is “not inconsistent” with the **FAA** because the **FAA does not preclude** the enforcement of arbitration agreements with transportation workers. The plaintiffs counter that Connecticut law *is* inconsistent because the **FAA** excludes transportation workers while Connecticut law **does not**.

Prudence counsels against a remand for arbitration to proceed under Connecticut *660 law. The availability of

Connecticut arbitration entails the construal of a phrase with a disputed meaning. Ascertaining the intent of the parties would ordinarily involve a remand for fact finding. Although the Agreement provides that issues of arbitrability are reserved for the arbitrator, that expedient may be blocked because the arbitrator's ambit excludes the applicability of the **FAA**, which is implicated here.

[5] True, “a court should decide for itself whether § 1’s ‘contracts of employment’ exclusion applies before ordering arbitration.” New Prime Inc., 139 S. Ct. at 537. But that prescription may not bear upon whether the availability of arbitration under state law can obviate the exclusion. See Harper v. Amazon.com Servs., Inc., 12 F.4th 287, 296 n.8 (3d Cir. 2021) (observing that “no binding precedent requires district courts to ignore arbitrability under state law when the applicability of § 1 is uncertain”); Hamrick v. Partsfleet, LLC, 1 F.4th 1337, 1353 (11th Cir. 2021) (“We would only look to state arbitration law *after* we decided the federal issue of whether the transportation worker exemption applied to the drivers.”) (emphasis in original). Therefore, we proceed to decide whether the plaintiffs fall within the **FAA** exclusion.

IV

[6] [7] The **FAA**, which reflects a “liberal federal policy favoring arbitration agreements,” Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), nevertheless excludes the employment contracts of “seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1. The class of workers encompassed by that residual clause is “transportation workers.” Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001). Since neither Congress nor the Supreme Court has defined “transportation worker,” we define it by affinity. The two examples that the **FAA** gives are “seamen” and “railroad employees.” 9 U.S.C. § 1. These examples are telling because they locate the “transportation worker” in the context of a *transportation industry*. See, e.g., Sw. Airlines Co. v. Saxon, — U.S. —, 142 S. Ct. 1783, 1791, 213 L.Ed.2d 27 (2022) (explaining that “seamen” constitute a “subset of workers engaged in the maritime shipping industry”).

One explanation advanced for the exclusion is that Congress “**did not** wish to unsettle established or developing statutory dispute resolution schemes covering specific workers.” See

Circuit City, 532 U.S. at 121, 121 S.Ct. 1302. But that explanation **does not** limit or delineate the category. The specification of workers in a *transportation industry* is a reliable principle for construing the clause here.

[8] Our cases have dealt with the exclusion, albeit in quite different contexts and largely prior to Circuit City, 532 U.S. at 119, 121 S.Ct. 1302, which narrowed the scope to transportation workers. The cases nevertheless adumbrated the principle that decides this case. The holding in Erving v. Virginia Squires Basketball, 468 F.2d 1064 (2d Cir. 1972)—that the **FAA** exclusion is limited to workers involved in the transportation industry—is still vital. Id. at 1069. For example, Maryland Casualty Co. v. Realty Advisory Board on Labor Relations, 107 F.3d 979 (2d Cir. 1997), ruled that employees of a commercial cleaner were not covered by the exclusion, which is “limited to workers involved in the transportation industries.” Id. at 982. After Circuit City, 532 U.S. at 119, 121 S.Ct. 1302, this Court observed that the exclusion **did not** apply to sheriffs because the clause is “interpreted ... narrowly to encompass *661 only ‘workers involved in the transportation industries.’ ” Adams v. Suozzi, 433 F.3d 220, 226 n.5 (2d Cir. 2005) (quoting Md. Cas. Co., 107 F.3d at 982).

Similarly, the Eleventh Circuit has held that an account manager at a company that rents and delivers furniture across state borders was subject to the **FAA** because he was “not a transportation industry worker.” Hill v. Rent-A-Ctr., Inc., 398 F.3d 1286, 1288 (11th Cir. 2005). Hill discerned that Congress intended to exclude “a class of workers in the transportation industry, rather than ... workers who incidentally transported goods interstate as part of their job in an industry that would otherwise be unregulated.” Id. at 1289; see also id. at 1290 (“[I]t is apparent Congress was concerned only with giving the arbitration exemption to ‘classes’ of transportation workers within the transportation industry.”). The test most recently articulated by the Eleventh Circuit is that the transportation worker exclusion applies if the employee is part of a class of workers: “(1) employed in the transportation industry; and (2) [who], in the main, actually engage[] in foreign or interstate commerce.” Hamrick, 1 F.4th at 1349 (remanding for the district court to consider whether last-mile delivery workers qualify for the exclusion).⁴

[9] Although none of these cases defines “transportation industry,” we conclude that an individual works in a transportation industry if the industry in which the individual works pegs its charges chiefly to the movement of goods

or passengers, and the industry's predominant source of commercial revenue is generated by that movement.

[10] In [Erving](#) and [Maryland Casualty](#), this Court set forth that only a worker in a transportation industry can be classified as a transportation worker. That point needed no elaboration in [Saxon](#) because there the plaintiff worked for an airline. An airline, an analog to transport by rail and sea, is in the business of moving people and freight, and its charges are for activity related to that movement. (Customers **do not** fly for the infotainment or the food.)

At the same time, as [Saxon](#) teaches, not everyone who works in a transportation industry is a transportation worker. To determine who is, we must consider “the actual work that the members of the class, as a whole, typically carry out,” that is, what the worker “frequently” does for the employer. See [142 S. Ct. at 1788](#). It follows that not everybody who works in the airline industry is a transportation worker--many airline employees are engaged in accounting, regulatory compliance, advertising, and such. But in our case, the distinctions drawn in [Saxon](#) **do not** come into play; those who work in the bakery industry are not transportation workers, even those who drive a truck from which they sell and deliver the breads and cakes.

The dissent's repeated incantation that the plaintiffs are exempt because they work in the “trucking industry” is erroneous. Although the plaintiffs spend appreciable parts of their working days moving goods from place to place by truck, the decisive fact is that the stores and restaurants are not buying the movement of the baked goods, so long as they arrive. Customers *662 pay for the baked goods themselves; the movement of those goods is at most a component of total price. The commerce is in breads, buns, rolls, and snack cakes--not transportation services. 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** work in the “transportation industry”). Although contractual parties cannot effectively stipulate to the status of employees as transportation workers (or not), the Distributor Agreement here recognizes and identifies the industry: “[m]aintaining a fresh market is a fundamental tenet of the *baking industry*.”⁵ Joint App'x 95 (emphasis added).

Because the plaintiffs **do not** work in the transportation industry, they are not excluded from the [FAA](#), and the district court appropriately compelled arbitration under the Arbitration Agreement.

V

The district court decided this case along the lines of analysis prescribed by the Eighth Circuit in [Lenz v. Yellow Transportation, Inc.](#), [431 F.3d 348](#) (8th Cir. 2005). [Lenz](#) adduced eight “non-exclusive” factors for “determining whether an employee is so closely related to interstate commerce that he or she fits within the § 1 exemption”:

[F]irst, whether the employee works in the transportation industry; second, whether the employee is directly responsible for transporting the goods in interstate commerce; third, whether the employee handles goods that travel interstate; fourth, whether the employee supervises employees who are themselves transportation workers, such as truck drivers; fifth, 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](#); sixth, whether the vehicle itself is vital to the commercial enterprise of the employer; seventh, whether a strike by the employee would disrupt interstate commerce; and eighth, the nexus that exists between the employee's job duties and the vehicle the employee uses in carrying out his duties (i.e., a truck driver whose only job is to deliver goods cannot perform his job without a truck). [Id. at 352](#). The district court relied upon certain [Lenz](#) factors, but not all, and not explicitly. See [Bissonnette v. LePage Bakeries Park St., LLC](#), [460 F. Supp. 3d 191, 198-202](#) (D. Conn. 2020). Although we identify no error in the district court's conscientious analysis, we resolve the question before us on the more straightforward ground that the plaintiffs **do not** work in a transportation industry.

*663 We acknowledge that our approach is not a universal solvent. We **do not** attempt to decide issues that have arisen across the federal court system as to which of the following workers may be a “transportation worker”:

- Workers who transport goods or passengers within a state, when those goods or passengers originate out of state. See, e.g., [Wallace v. Grubhub Holdings, Inc.](#), [970 F.3d 798, 802](#) (7th Cir. 2020) (holding that food delivery drivers who **do not** cross state lines are subject to the [FAA](#)); [Capriole v. Uber Techs., Inc.](#), [7 F.4th 854, 865-66](#) (9th Cir. 2021) (holding that Uber drivers are subject to the [FAA](#) because most of their trips are intrastate).

- Workers for major retailers who transport goods intrastate within a larger transportation network that is interstate. Compare [Rittmann v. Amazon.com, Inc.](#), 971 F.3d 904, 917 (9th Cir. 2020), cert. denied, — U.S. —, 141 S. Ct. 1374, 209 L.Ed.2d 121 (2021) (holding that Amazon contractors are transportation workers because they “complete the delivery of goods that Amazon ships across state lines and for which Amazon hires ... workers to complete the delivery”); [Waithaka v. Amazon.com, Inc.](#), 966 F.3d 10, 26 (1st Cir. 2020), cert. denied, — U.S. —, 141 S. Ct. 2794, 210 L.Ed.2d 928 (2021), reh'g denied, — U.S. —, 141 S. Ct. 2886, 210 L.Ed.2d 1001 (2021) (holding that “last-mile delivery workers who haul goods on the final legs of interstate journeys are transportation workers engaged in ... interstate commerce,” even if they **do not** themselves cross state lines) (internal quotation marks omitted), with [Hamrick](#), 1 F.4th at 1351 (remanding to consider whether final-mile delivery workers “are in a class of workers employed in the transportation industry that actually engages in foreign or interstate commerce”).

We have no occasion to hazard answers to these questions.

CONCLUSION

For the reasons stated above, we affirm the order compelling arbitration and dismissing the case.

DENNIS JACOBS, Circuit Judge, concurring:

The obligation to consider appellate jurisdiction ordinarily entails a straightforward analysis. In this case, the straightforward analysis leads to another and difficult question.

Having issued an order to compel arbitration, the district court dismissed the case, and assured the parties that “[i]f, after the arbitration, any party seeks further relief from the Court, the Clerk of Court shall direct assign any such motion or petition to the undersigned.” Special App’x 15. The dismissal amounts to a final order, notwithstanding the contemplation of further initiatives—such as confirmation, vacatur, or modification of the award—that may be sought in future litigation. So pursuant to Section 16(a)(3) of the **Federal Arbitration Act** (“**FAA**”), we have jurisdiction over this appeal. But the contemplation of future litigation reflects an intuitive appreciation that the district court’s role under the **FAA** may be unfulfilled. The

district court, having power to stay proceedings pending arbitration, should not have dismissed the case.

I

When a district court grants an application to enforce an arbitration clause, there is a question as to whether Section 3 of the *664 **FAA** requires that a stay be entered. Courts across the Circuits are divided on this question; some hold that a stay is mandatory, and others hold that a district court may dismiss the case.¹ In 2015, our decision in [Katz v. Cellco Partnership](#), 794 F.3d 341 (2d Cir. 2015) (“[Katz](#)”), articulated the rule as follows: a stay is mandatory when “all claims have been referred to arbitration *and a stay requested.*” [Id.](#) at 345 (emphasis added). Following [Katz](#), courts in this Circuit are split on whether a stay is required even if no party requests one.²

This issue is consequential. When a case is stayed pending arbitration, the order compelling or directing arbitration is interlocutory, and therefore unappealable; the parties must proceed forthwith to arbitration. But when such a case is dismissed, the party resisting arbitration can appeal at once, and thereby delay the arbitration, with associated costs and uncertainties. This appears to be where we are now.

How did we get here? In this case, Flowers moved to dismiss the complaint pursuant to [Fed. R. Civ. P. 12\(b\)\(1\)](#) and the **FAA**, or in the alternative, to compel arbitration. For some reason, Flowers explicitly sought a dismissal “in lieu of a stay,” see Joint App’x 73-74, and the plaintiffs, who resisted arbitration, **did not** request a stay. Thus, the district court granted Flowers’ “motion to dismiss in favor of arbitration,” closed the case, and directed the Clerk of Court to assign any post-arbitration petitions for relief to the same judge. Special App’x 15-16. Today, we have affirmed the order compelling arbitration and dismissing the case.

[Katz](#) can be read to mean that, when no stay is requested, the district court retains discretion to stay the case *or* dismiss it. That reading is invited by [Katz](#) without being compelled by it.

II

[Katz](#) construed Section 3 of the **FAA** to mandate a stay when “all claims have been referred to arbitration and a stay

requested.” 794 F.3d at 345. However, the **FAA** mandates a stay whether or not a party requests one. This construal is consistent with the purpose of the **FAA**.

Properly construed, the text of Section 3 bars a court from enforcing an arbitration clause *sua sponte*; but if a party applies for enforcement of the clause, Section 3 requires a court that enforces it to stay proceedings in the interim:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration *665 under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, ***shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement***, providing the applicant for the stay is not in default in proceeding with such arbitration. 9 U.S.C. § 3 (emphasis added). Read naturally and in context, the referenced “application of one of the parties” is the application to enforce the arbitration clause. The text **does not** contemplate (let alone require) a separate application to stay proceedings in district court. See *Cont'l Cas. Co. v. Am. Nat'l Ins. Co.*, 417 F.3d 727, 732 n.7 (7th Cir. 2005) (“[T]he proper course of action when a party seeks to invoke an arbitration clause is to *stay* the proceedings pending arbitration rather than to dismiss outright.”) (emphasis in original).

Reading Section 3 to require a stay pending arbitration regardless of whether a stay has been requested is consistent with the **FAA's** pro-arbitration posture.³ Congress intended the **FAA** to “move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.” *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). That is why the **FAA** “provides two parallel devices for enforcing an arbitration agreement: a stay of litigation in any case raising a dispute referable to arbitration, 9 U.S.C. § 3”--at issue here--“and an affirmative order to engage in arbitration, § 4.” *Id.* It is hard to square congressional intent with the idea that Section 3’s mandatory stay is conditional upon a party’s explicit request for a stay alongside its application to compel arbitration.

The **FAA** provision governing appeals underscores the congressional policy of “rapid and unobstructed enforcement of arbitration agreements.” *Moses*, 460 U.S. at 23, 103 S.Ct. 927. Section 16 forecloses an appeal from an order that directs

the parties to proceed with arbitration, including a stay order under Section 3:

Except as otherwise provided in section 1292(b) of title 28 [interlocutory decisions], an appeal may not be taken from an interlocutory order--

- (1) granting a stay of any action under section 3 of this title;
- (2) directing arbitration to proceed under section 4 of this title;⁴
- (3) compelling arbitration under section 206 of this title [providing for enforcement abroad and court-appointed arbitrators]; or
- (4) refusing to enjoin an arbitration that is subject to this title.

*666 See 9 U.S.C. § 16(b). That provision “is a pro-arbitration statute designed to prevent the appellate aspect of the litigation process from impeding the expeditious disposition of an arbitration.” *Augustea Impb Et Salvataggi v. Mitsubishi Corp.*, 126 F.3d 95, 99 (2d Cir. 1997) (quoting David D. Siegel, *Practice Commentary: Appeals from Arbitrability Determinations*, 9 U.S.C.A. § 16, at 352 (West Supp. 1997)).⁵ The purpose is defeated if a dismissal is entered instead of a stay. See *Arabian Motors Grp. W.L.L. v. Ford Motor Co.*, 19 F.4th 938, 942 (6th Cir. 2021) (“Because a dismissal, unlike a stay, permits an objecting party to file an immediate appeal, a district court dismissal order undercuts the pro-arbitration appellate-review provisions of the Act.”).

III

Our opinion in *Katz* is regrettable, particularly as the Supreme Court has now given guidance that reinforces my view of Section 3. See *Badgerow v. Walters*, — U.S. —, 142 S. Ct. 1310, 212 L.Ed.2d 355 (2022) (“*Badgerow*”). *Badgerow* conducted a thorough analysis of the **FAA's** text, and held that the “look through” approach for finding federal jurisdiction in petitions under Section 4 **does not** apply to petitions under Sections 9 and 10 of the **FAA**. This holding has ramifications when a district court dismisses a case after compelling arbitration because a dismissal will certainly require a district court to find an independent jurisdictional basis whenever a new **FAA** petition arises from the same case. A stay, however, may enable the court and the parties to sidestep these consequences.

It is settled that a federal court deciding whether to enforce an arbitration agreement under [Section 4](#) must find an independent jurisdictional basis, either on the face of the petition (for diversity jurisdiction) or by looking through to the petition to see if the underlying controversy arises under federal law (for federal question jurisdiction). See [Vaden v. Discover Bank](#), 556 U.S. 49, 62, 129 S.Ct. 1262, 173 L.Ed.2d 206 (2009); [Hermes of Paris, Inc. v. Swain](#), 867 F.3d 321, 324 (2d Cir. 2017). But, under [Badgerow](#), a district court lacks jurisdiction over a petition to confirm or vacate an arbitral award under Sections 9 and 10, respectively, unless the jurisdictional basis appears on the “face of the application itself.” [Badgerow](#), 142 S. Ct. at 1317-18. This means that there must either be diversity jurisdiction, or a federal question with respect to the award's confirmation or vacatur (no examples of the latter are supplied in [Badgerow](#) itself). [Id.](#) Unlike with [Section 4](#) petitions, courts may not locate federal question jurisdiction by looking through to the underlying controversy. [Id.](#) As a result of this ruling, many more Section 9 and 10 petitions will be adjudicated in state courts. [Id.](#) at 1321-22. This will raise an impediment to parties seeking federal court assistance to facilitate their arbitrations when there is no jurisdictional basis on the face of their petitions.

It is too early to say whether issuance of a stay pursuant to [Section 3](#) may allow parties to seek enforcement, vacatur, or modification of an award, 9 U.S.C. §§ 9-11, or seek other assistance under the [FAA](#), see [id.](#) §§ 5 (appointment of arbitrators), 7 (summoning witnesses), without need for an independent basis for federal jurisdiction--though *667 Justice Breyer's dissent in [Badgerow](#) suggests as much.⁶ As this Court has observed, “practitioners who wish to preserve access to federal courts for later disputes over arbitrators, subpoenas, or final awards [may] attempt to ‘lock in’ jurisdiction by filing a federal suit first, followed by motions to compel and a stay of proceedings.” [Doscher v. Sea Port Grp. Sec., LLC](#), 832 F.3d 372, 387 (2d Cir. 2016), abrogated on other grounds by [Badgerow v. Walters](#), — U.S. —, 142 S. Ct. 1310, 212 L.Ed.2d 355 (2022); see also Ian R. MacNeil et al., [Federal Arbitration Law: Agreements, Awards, and Remedies under the Federal Arbitration Act](#) § 9.2.3.1 (Supp. 1999) (explaining that when a district court stays proceedings pending arbitration, “[a]fter an award, parties desiring to confirm, vacate, or modify the award, can return to the federal court in which the stayed litigation is pending for determination of those issues,” as “[t]he court had federal question subject matter jurisdiction and has never lost it.”).

In short, the stay of a suit pending arbitration is (in my view) arguably compelled and certainly prudent.

[POOLER](#), Circuit Judge, dissenting:

The plaintiffs are commercial truck drivers who deliver the defendants’ packaged baked goods to supermarkets and other retail outlets in Connecticut. They allege that the defendants deprived them of the legal protections owed to employees, including the right to overtime premiums, by misclassifying them as independent contractors. On appeal now is whether this serious charge should be litigated, as the drivers want, or arbitrated, as their employer prefers. The parties have an arbitration agreement. But the [Federal Arbitration Act](#), which empowers federal courts to enforce those agreements, [does not](#) apply to employment contracts of “any ... class of workers engaged in foreign or interstate commerce,” 9 U.S.C. § 1—that is, “transportation workers,” [Circuit City Stores, Inc. v. Adams](#), 532 U.S. 105, 119, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001). The question, then, is whether the plaintiffs are transportation workers.

When we first considered this case a few months ago, I thought the answer was clear: Of course these truckers are transportation workers. See [Bissonnette v. LePage Bakeries Park St., LLC](#), 33 F.4th 650, 662 (2d Cir. 2022) (Pooler, *J.*, dissenting). After all, the “one area of clear common ground” concerning this exemption to the [FAA](#) has been that truck drivers qualify. [Kowalewski v. Samandarov](#), 590 F. Supp. 2d 477, 482-83 (S.D.N.Y. 2008) (Sullivan, *J.*) (collecting cases). In view of this consensus, I thought anomalous and unfounded the majority's contrary conclusion that because the plaintiffs do their trucking for a bakery company, they “are in the bakery industry, not a transportation industry,” hence not transportation workers. [Bissonnette](#), 33 F.4th at 652. Instead, I would have joined the several other courts that have recognized the obvious: “[A] trucker is a transportation worker regardless of whether he transports his employer's *668 goods or the goods of a third party.” [Int'l Broth. of Teamsters Loc. Union No. 50 v. Kienstra Precast, LLC](#), 702 F.3d 954, 957 (7th Cir. 2012).

The Supreme Court's decision in [Southwest Airlines Co. v. Saxon](#), issued a month after our ruling, reinforces my view. See — U.S. —, 142 S. Ct. 1783, 213 L.Ed.2d 27 (2022). [Saxon](#) directs our attention to “the actual work that the members of the class, as a whole, typically carry out.” [Id.](#) at 1788. Someone “is therefore a member of a ‘class of

workers’ based on what she does” for her employer, “not what [the employer] does generally.” *Id.* Yet the majority, caught flat-footed by *Saxon*, elects to ignore it. The majority’s revised decision continues to hold that the plaintiffs are not transportation workers, even though they “spend appreciable parts of their working days moving goods from place to place by truck,” because of what their employer, a baked goods company, does generally. Maj. Op. at —. From the start, this holding was textually baseless and inconsistent with the decisions of courts nationwide. Add to that list the Supreme Court. For the second time now, therefore, I must respectfully dissent.

I. The Plaintiffs Are Transportation Workers.

Latrice Saxon was a ramp supervisor for Southwest Airlines. Her work “frequently require[d] her to load and unload baggage, airmail, and commercial cargo on and off airplanes that travel across the country.” *Saxon*, 142 S. Ct. at 1787. The question before the Supreme Court was whether she belonged to a class of workers engaged in foreign or interstate commerce. In concluding that she did—and that her employment contract was therefore exempt from the **FAA**—the Court employed a two-step analysis. First, the Court sought to “defin[e] the relevant ‘class of workers’ to which Saxon belong[ed].” *Id.* at 1788-89. Saxon argued that “because air transportation as an industry is engaged in interstate commerce, airline employees constitute a class of workers covered by § 1.” *Id.* at 1788 (alterations and internal quotation marks omitted). The Court “rejected Saxon’s industrywide approach.” *Id.* Instead, it reasoned, “[t]he word ‘workers’ directs the interpreter’s attention to the *performance* of work,” and “the word ‘engaged’ ... similarly emphasizes the actual work that the members of the class, as a whole, typically carry out.” *Id.* (emphasis in original). Accordingly, Saxon was “a member of a ‘class of workers’ based on what she does at Southwest, not what Southwest does generally.” *Id.* And because Southwest had “not meaningfully contested that ramp supervisors like Saxon frequently load and unload cargo,” the Court “accept[ed] that Saxon belongs to a class of workers who physically load and unload cargo on and off airplanes on a frequent basis.” *Id.* at 1788-89.

Second, the Court determined that this class of workers was “engaged in foreign or interstate commerce.” *Id.* at 1789. Because “to be ‘engaged’ in something means to be ‘occupied,’ ‘employed,’ or ‘involved’ in it,” and because commerce “includes, among other things, ‘the transportation of ... goods, both by land and by sea,’” the Court explained

that “any class of workers directly involved in transporting goods across state or international borders falls within § 1’s exemption.” *Id.* The Court concluded that “[a]irplane cargo loaders are such a class,” because, among other reasons, “it is ‘too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically a part of it.’ ” *Id.* (quoting *Baltimore & Ohio Sw. R. Co. v. Burtch*, 263 U.S. 540, 544, 44 S.Ct. 165, 68 L.Ed. 433 (1924)).

*669 Applying this framework here, the plaintiffs plainly belong to a class of workers engaged in interstate commerce. We start by defining the relevant class, with a focus on the actual work the class members typically carry out. The plaintiffs “work at least forty hours per week delivering the” defendants’ baked goods. App’x at 17 ¶ 33. This work principally consists of driving Department of Transportation-registered commercial trucks “to stores within a territory designated by Defendants, delivering Defendants’ products to these stores, and arranging the products on the shelves according to Defendants’ standards.” App’x at 17 ¶ 33. The plaintiffs therefore belong to a class of workers who, in the majority’s words, “spend appreciable parts of their working days moving goods from place to place by truck.” Maj. Op. at —. Or, in common parlance, they are commercial truck drivers.

But are the plaintiffs “engaged in foreign or interstate commerce?” 9 U.S.C. § 1. At first, this may look like a closer question, because they **do not** cross state lines. But neither did Saxon. She merely “load[ed] cargo on a plane bound for interstate transit.” *Saxon*, 142 S. Ct. at 1790. Still, the Supreme Court held, “airplane cargo loaders plainly do perform ‘activities within the flow of interstate commerce’ when they handle goods traveling in interstate ... commerce.” *Id.* at 1792. It **did not** matter that Saxon “d[id] not physically accompany freight across state or international boundaries.” *Id.* at 1791. The same is true of these truckers. The loaves of Wonder Bread they transport are delivered to the defendants’ warehouse from commercial bakeries outside Connecticut; they then transport the bread to its final destination in-state. Like Saxon, the plaintiff truckers handle goods traveling in interstate commerce every day. If Saxon is intimately involved with the transportation of those goods, the truckers here are, too. The majority opinion, in a footnote, states that the Court **does not** consider whether the case could be decided on the ground that the interstate element of the exclusion is not satisfied, noting that it is not a simple issue. *See* Maj. Op. at — n.5. However, the district court

acknowledged that defendants' products are manufactured out of state and are delivered to warehouses in-state, and as such, the plaintiffs meet the threshold of being "engaged in ... interstate commerce." See 9 U.S.C. § 1; *Bissonnette v. LePage Bakeries Park St., LLC*, 460 F. Supp. 3d 191, 198 (D. Conn. 2020).

Pre-*Saxon* cases furnish the same conclusion. "The great weight of authority ... holds that interstate travel is not strictly necessary" to qualify someone as a transportation worker. *Haider v. Lyft, Inc.*, No. 20-cv-2997, 2021 WL 1226442, at *4 (S.D.N.Y. Mar. 31, 2021). The First and Ninth Circuits, for instance, have held that so-called "last-mile delivery drivers" for Amazon are transportation workers "[b]y virtue of their work transporting goods or people 'within the flow of interstate commerce,'" despite never personally crossing state lines. *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 26 (1st Cir. 2020); see also *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 916 (9th Cir. 2020). The theory is that, when a product crosses state lines in a "single, unbroken stream of interstate commerce" from origin to customer, interstate commerce becomes a "central part" of the job description of even those delivery drivers who take the product on the last, intrastate leg of the journey. *Carmona v. Domino's Pizza, LLC*, 21 F.4th 627, 630 (9th Cir. 2021).

So it is here. Like the Amazon drivers, the plaintiffs carry the goods for a portion of a single interstate journey and are "indispensable parts of [an interstate] distribution system." *670 *Waithaka v. Amazon.com, Inc.*, 404 F. Supp. 3d 335, 343 (D. Mass. 2019). These facts also distinguish the plaintiffs from those "workers whose occupations have nothing to do with interstate transport" whom the Seventh Circuit has worried might be "swe[pt] in" by an overbroad reading of the Section 1 exemption: for instance, the "dry cleaners who deliver pressed shirts manufactured in Taiwan and ice cream truck drivers selling **treats** made with milk from an out-of-state dairy." *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 802 (7th Cir. 2020).

Because the movement of goods through interstate commerce is a central part of the plaintiffs' occupation as truckers, I would hold that they belong to a "class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, and that the **FAA does not** apply to their Distributor Agreements.

II. The Majority's Errors.

When considering the majority opinion's erroneous contrary conclusion, note what it does and **does not** hold. The majority **does not** hold, as had the district court, that the plaintiffs are not transportation workers because their few additional customer service and sales responsibilities make them "more akin to sales workers or managers" than "traditional ... long-haul trucker[s]." *Bissonnette*, 460 F. Supp. 3d at 200.¹ Nor does the majority exclude the plaintiffs from the **FAA's** residual exemption on the ground that their work is insufficiently connected to interstate commerce; this question, after all, "may not be simple," as "there are railroads that operate within a single state, terminus to terminus." Maj. Op. at — n.4.

Instead, the majority concludes that, even assuming these plaintiffs are traditional truckers, and even assuming the interstate element is satisfied, they are still not transportation workers, because they work for a bakery. The majority reasons that "[t]he specification of workers in a *transportation industry* is a reliable principle for construing the [residual] clause." Maj. Op. at — (emphasis in original). It then instructs—without reference to the **FAA's** text, any case law, the business world, or even a dictionary—that "an individual works in a transportation industry if the industry in which the individual works pegs its charges chiefly to the movement of goods or passengers, and the industry's predominant source of commercial *671 revenue is generated by that movement." Maj. Op. at —. The majority concludes that that the plaintiffs "are in the bakery industry, not a transportation industry," Maj. Op. at —, because "the stores and restaurants are not buying the movement of the baked goods, so long as they arrive. The bill they pay is for the baked goods themselves; the movement of those goods is at most a component of total price." Maj. Op. at — — —. Long story short, the plaintiffs are not transportation workers because they **do not** work for a trucking company.

Can this really be the law? Certainly not under *Saxon*. Only by looking to what their employer does generally—making and selling bread—can the majority conclude that the plaintiffs are not transportation workers.² The plaintiffs drive trucks; they are not bakers. And while they happen to be employed by the bakery whose bread they deliver, this is nothing new. See *Loc. 50, Bakery & Confectionery Workers v. Gen. Baking Co.*, 97 F. Supp. 73, 74 (S.D.N.Y. 1951) (describing labor negotiations and strike of Bakery Drivers Union and production stoppage arising therefrom). Nor is it uncommon today for a company to hire its own delivery

drivers. Scores of truckers in the United States work directly for beverage companies, furniture companies, retailers, food manufacturers, energy companies, and grocery stores. One cannot get far on an interstate without seeing an eighteen-wheeler soliciting for “Drive4Walmart.com.”³ *Saxon* makes plain that the drivers these companies hire **do not** cease to be transportation workers the moment they are brought in-house. If the workers’ principal daily tasks involve them in the actual movement of goods through interstate commerce, they are transportation workers. See *Saxon*, 142 S. Ct. at 1790 (describing as the “central feature of a transportation worker” the “active[] engage[ment] in transportation of ... goods across borders via the channels of foreign or interstate commerce” (internal quotation marks omitted)). By focusing on the nature of the defendants’ business, and not on the nature of the plaintiffs’ work, the majority offers the sort of industrywide approach *Saxon* proscribes.

The majority, of course, tries to sidestep *Saxon*. Its argument seems to be that because *Saxon* worked for a company that likely “pegs its charges chiefly to the movement of goods and passengers,” Maj. Op. at —, while the plaintiffs (per the majority) **do not**, the “distinctions drawn in *Saxon* **do not** come into play.” Maj. Op. at —. Yet *Saxon* is not so limited. To the contrary, the Court squarely foreclosed that Southwest Airlines’ “predominant source of commercial revenue” could be relevant to whether *Saxon* was a transportation *672 worker. Again: “*Saxon* is ... a member of a ‘class of workers’ based on what she does at Southwest, not what Southwest does generally.” *Saxon*, 142 S. Ct. at 1788.

But the majority conflicts with more than just *Saxon*. For decades, the “one area of clear common ground among the federal courts” has been “that truck drivers—that is, drivers actually involved in the interstate transportation of physical goods”—are transportation workers. *Kowalewski*, 590 F. Supp. 2d at 482-83. See also *Lenz*, 431 F.3d at 351 (declaring it “[i]ndisputabl[e]” that, if the plaintiff “were a truck driver, he would be considered a transportation worker”); *Palcko v. Airborne Express*, 372 F.3d 588, 593-94 (3d Cir. 2004) (assuming that truck drivers fall within the residuary exemption); *Harden v. Roadway Package Sys.*, 249 F.3d 1137, 1140 (9th Cir. 2001) (“delivery driver” was transportation worker); *Smith v. Allstate Power Vac, Inc.*, 482 F. Supp. 3d 40, 46 (E.D.N.Y. 2020) (truck driver for waste removal company was transportation worker); *Veliz v. Cintas Corp.*, No. 03-cv-1180, 2004 WL 2452851, at *5 (N.D. Cal. Apr. 5, 2004) (“The most obvious case where a plaintiff falls under the **FAA** exemption is where the plaintiff

directly transports goods in interstate [commerce], such as [an] interstate truck driver”).

A natural corollary, as several courts have correctly recognized, is that “a transportation worker need not work for a transportation company.” *Saxon v. Sw. Airlines Co.*, 993 F.3d 492, 497 (7th Cir. 2021), *aff’d Saxon*, 142 S. Ct. 1783. Rather, “a trucker is a transportation worker regardless of whether he transports his employer’s goods or the goods of a third party.” *Kienstra*, 702 F.3d at 957; see also *Waihaka*, 966 F.3d at 23 (“[A] class of workers [need not] be employed by an interstate transportation business or a business of a certain geographic scope to fall within the **Section 1** exemption[.]”); *Canales*, — F.Supp.3d at —, 2022 WL 952130, at *6 (rejecting the argument that “an employer [must] be a transportation company for § 1 to apply”). These observations align with the **FAA’s** text: **Section 1** asks whether a worker belongs to a class of workers “engaged in interstate or foreign commerce.” 9 U.S.C. § 1. It **does not** ask for whom the worker undertakes her transportation work.

The majority ignores all these cases. And the ones it does rely on **do not** support its novel rule that only those employed by transportation companies can be transportation workers. The Second Circuit cases allegedly demonstrating a “transportation industry” limitation involved workers whose occupations **did not** involve the movement of goods or passengers. See *Adams v. Suozzi*, 433 F.3d 220, 226 n.5 (2d Cir. 2005) (sheriffs); *Maryland Cas. Co. v. Realty Advisory Bd. on Lab. Rels.*, 107 F.3d 979, 982 (2d Cir. 1997) (commercial cleaning workers); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) (the basketball player Julius “Dr. J” Erving). These cases tell us little about people like the plaintiffs, who actually transport goods through interstate commerce every day. Nor does *Hill v. Rent-A-Center, Inc.*, an Eleventh Circuit case, help the majority. The majority asserts that *Hill* held that “an account manager at a company that rents and delivers furniture across state borders was not excluded from the **FAA** because he was ‘not a transportation industry worker.’ ” Maj. Op. at — (quoting 398 F.3d at 1288). But the majority omits the court’s reasoning. It was not because *Hill* worked for a “company that rents and delivers furniture” that he was deemed not to be a transportation worker. Instead, the court focused on the nature of *Hill’s* work for the company. *Hill* was not “within a *673 class of workers within the transportation industry” because, unlike the truckers here, he was an account manager who only “incidentally transported goods interstate” as part of that job. *Hill*, 398 F.3d at 1289. Even *Hill* thus recognized what *Saxon*

instructs and the majority rejects: that the **FAA** requires us to characterize the work of the employed, not the employer.

In any event, the majority's analysis fails on its own terms. Even assuming that “[t]he specification of workers in a *transportation industry* is a reliable principle for construing the [residual] clause,” Maj. Op. at —, the plaintiffs *do* work in a transportation industry: trucking. A company may employ different classes of workers, some in transportation and some outside it. I have little doubt that the people who bake Wonder Bread are not transportation workers. See *Signal-Stat Corp. v. Loc. 475, United Elec. Radio & Mach. Workers of Am.*, 235 F.2d 298, 303 (2d Cir. 1956), *overruled on other grounds by Coca-Cola Bottling Co. of N.Y., Inc. v. Soft Drink & Brewery Workers Union Loc. 812*, 242 F.3d 52 (2d Cir. 2001) (factory workers who manufactured automotive electrical equipment were not transportation workers because they were “merely engaged in the manufacture of goods for interstate commerce”). But the plaintiffs’ mission, reflected on the first page of their Distributor Agreements, is to move goods. See App’x at 86 (stating that plaintiffs will be operating a “distributorship business”). They are actively engaged in the enterprise of interstate transportation in a way those bakers are not. And to the extent that, in efficiently delivering the defendants’ baked goods, the plaintiffs incidentally satisfy that “fundamental tenet of the bakery industry” of “[m]aintaining a fresh market,” App’x at 95, they do so in the same way that all truckers serve the industries of the companies whose products they deliver.

There are few classes of workers more paradigmatically “engaged in foreign or interstate commerce” than those who operate commercial trucks to deliver products. Abandoning this universally recognized principle, the majority departs from the **FAA’s** text, the Supreme Court’s clear instructions, and decades of case law nationwide.

III. Other Issues.

As in my dissent the first time around, I address two other brief points before concluding. The first is the defendants’ argument, unavailing in my view, that Connecticut law provides an alternative basis to compel arbitration regardless of the **FAA’s** applicability. A few district courts in this Circuit have enforced arbitration clauses under state law where the clauses “d[id] not plausibly suggest that the parties intended for the clause[s] to be discarded in the event that the **FAA** was found inapplicable.” *Islam v. Lyft, Inc.*, 524 F. Supp.

3d 338, 359 (S.D.N.Y. 2021); see also, e.g., *Valdes v. Swift Transp. Co., Inc.*, 292 F. Supp. 2d 524, 528 (S.D.N.Y. 2003); *Burgos v. Ne. Logistics, Inc.*, No. 15-CV-6840 (CBA) (CLP), 2017 WL 10187756, at *4 (E.D.N.Y. Mar. 30, 2017). This case is different. The arbitration agreement states that it “shall be governed by the **FAA** and Connecticut law to the extent Connecticut law is not inconsistent with the **FAA**.” App’x at 199 (underlining in original). But Connecticut law and the **FAA** are crucially inconsistent here: While the **FAA** exempts transportation workers like the plaintiffs, Connecticut law contains no analogous carve-out. See *Conn. Gen. Stat. Ann. § 52-408*. Given this inconsistency, the arbitration agreement itself prohibits recourse to Connecticut law should the **FAA** be held inapplicable.

My second brief point is in response to the concurrence’s view that, once a court *674 decides that arbitration is appropriate, “the **FAA** mandates a stay whether or not a party requests one.” Concur. Op. at —. To be clear, because I conclude that arbitration should not have been compelled here, resolution of this issue is not necessary to my analysis. I write only to correct what I see as the concurrence’s misreading of Section 3 of the **FAA**. That provision states that a district court, “upon being satisfied that [an issue] is referable to arbitration ... shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.” 9 U.S.C. § 3. Section 3’s use of the mandatory “shall,” we have held, means that where a party specifically applies for a stay pending the outcome of arbitration, the district court lacks discretion to dismiss the case instead. *Katz v. Cellco P’ship*, 794 F.3d 341, 346 (2d Cir. 2015).

It **does not** follow, however, that where a party **does not** request a stay—or where, as here, a party expressly seeks dismissal—a district court is still required to issue a stay. Section 3 is triggered “on application of one of the parties [to] stay the trial” and where, among other things, the “applicant for the stay is not in default.” 9 U.S.C. § 3. This reference to the “applicant for the stay” thus squarely contradicts the concurrence’s assertion that “[t]he text **does not** contemplate (let alone require) a separate application to stay proceedings in the district court.” Concur. Op. at —. Accordingly, where a party **does not** request a stay, there is no “application [to] stay the trial,” and a district court retains the authority to dismiss the action. See *Katz*, 794 F.3d at 346 (explaining that, absent a statutory mandate to stay proceedings, district courts “enjoy

an inherent authority to manage their dockets”); *Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254, 277 (E.D.N.Y. 2019) (“Although Section 3 of the **FAA** only speaks of staying proceedings, it is well-settled that an arbitrable dispute may be dismissed in lieu of a stay if the defendant requests dismissal.”); *Zambrano v. Strategic Delivery Sols., LLC*, No. 15-CV-08410, 2016 WL 5339552, at *10 (S.D.N.Y. Sept. 22, 2016) (“[B]ecause Defendants seek dismissal rather than a stay ... this Court has discretion whether to stay or dismiss Plaintiffs’ action under the **FAA**.”); *Benzemann v. Citibank N.A.*, 622 F. App’x 16, 18 (2d Cir. 2015) (summary order) (endorsing this view).

Conclusion

The plaintiffs’ daily work transporting goods in the stream of interstate commerce places them in the transportation worker exemption’s heartland. They belong to a “class of workers engaged in foreign or interstate commerce,” 9 U.S.C. § 1; the **FAA does not** apply to their Distributor Agreements; and, for the second time, I respectfully dissent. Now it rests with our Court as a whole, or the Supreme Court, to correct the majority’s mistakes.

All Citations

49 F.4th 655

Footnotes

- * Judge Diane Gujarati of the United States District Court for the Eastern District of New York, sitting by designation.
- 1 Defendants’ request to respond to plaintiffs’ petition for rehearing is denied as moot.
 - 2 The Distributor Agreement defines the plaintiffs as “independent contractor[s]” for all purposes, and makes clear that the plaintiffs are “independent business[es].” The plaintiffs dispute that characterization. But this distinction no longer matters for **FAA** purposes because the Supreme Court has clarified that the exclusion for “transportation workers” applies with equal force to employees and to independent contractors. *New Prime Inc. v. Oliveira*, — U.S. —, 139 S. Ct. 532, 543-44, 202 L.Ed.2d 536 (2019).
 - 3 See, e.g., *Harper v. Amazon.com Servs., Inc.*, 12 F.4th 287, 295 (3d Cir. 2021) (observing that there is no language in the **FAA** that “explicitly preempts the enforcement of state arbitration statutes”) (quoting *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 595 (3d Cir. 2004)); see also *Saxon v. Sw. Airlines Co.*, 993 F.3d 492, 502 (7th Cir. 2021) (explaining that even though the plaintiff qualified for the “transportation worker” exclusion to the **FAA**, she “could still face arbitration under state law”), *aff’d*, — U.S. —, 142 S. Ct. 1783, 213 L.Ed.2d 27 (2022); *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 24 (1st Cir. 2017), *aff’d*, — U.S. —, 139 S. Ct. 532, 202 L.Ed.2d 536 (2019) (explaining that exclusion from the **FAA** pursuant to Section 1 “has no impact on other avenues (such as state law) by which a party may compel arbitration”); *Cole v. Burns Int’l Sec. Serv.*, 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.”).
 - 4 The plaintiffs in this case cite *Martins v. Flowers Foods, Inc.*, 463 F. Supp. 3d 1290 (M.D. Fla. 2020), which held that Flowers distributors perform their work in the transportation industry. *Id.* at 1298. But the Eleventh Circuit vacated the judgment by a summary order, directing reconsideration in light of *Hamrick v. Partsfleet, LLC*, 1 F.4th 1337 (11th Cir. 2021). See *Martins v. Flowers Foods, Inc.*, 852 F. App’x 519 (11th Cir. 2021) (summary order). The district court has not yet issued a ruling on remand.
 - 5 Although the plaintiffs never leave the state of Connecticut, we **do not** consider whether this case could be decided on the ground that the interstate element of the exclusion is not satisfied. The issue may not be simple. See, e.g., *Sw. Airlines Co. v. Saxon*, — U.S. —, 142 S. Ct. 1783, 1789 n.2, 213 L.Ed.2d 27 (2022) (acknowledging that it can be difficult to define a class of workers’ involvement in interstate commerce). The baked goods originate outside of Connecticut; and there are railroads that operate within a single state, terminus to terminus--the Long Island Railroad comes to mind.

Notably, on successive days, two courts in the same district reached opposite conclusions as to whether rideshare drivers are engaged in interstate commerce. Compare *Islam v. Lyft, Inc.*, 524 F. Supp. 3d 338, 353 (S.D.N.Y. 2021) (Abrams, J.) (exempt from the **FAA** because they perform “sufficient numbers of interstate rides, with sufficient regularity”), *with*

[Aleksanian v. Uber Techs. Inc.](#), 524 F. Supp. 3d 251, 262-63 (S.D.N.Y. 2021) (Carter, J.) (not exempt because “interstate trip[s]” are “occasional”).

- 1 Compare, e.g., [Bender v. A.G. Edwards & Sons, Inc.](#), 971 F.2d 698, 699 (11th Cir. 1992) (per curiam) (“Upon finding that a claim is subject to an arbitration agreement, the court should order that the action be stayed pending arbitration.”), with [Bercovitch v. Baldwin School, Inc.](#), 133 F.3d 141, 156 & n. 21 (1st Cir. 1998) (“[A] court may dismiss, rather than stay, a case when all of the issues before the court are arbitrable.”).
- 2 Compare [China Media Express Holdings, Inc. by Barth v. Nexus Exec. Risks, Ltd.](#), 182 F. Supp. 3d 42, 53 (S.D.N.Y. 2016) (staying case “[p]ursuant to the Second Circuit’s decision in [Katz](#)” even though parties seeking arbitration requested dismissal); [Merrick v. UnitedHealth Grp. Inc.](#), 127 F. Supp. 3d 138, 154 (S.D.N.Y. 2015) (staying the action even though “no party has requested a stay”), with [Benzemann v. Citibank N.A.](#), 622 F. App’x 16, 18 (2d Cir. 2015) (summary order) (ruling that because the plaintiff **did not** request a stay, “Section 3 **did not** require the district court to stay the proceedings”); [Zambrano v. Strategic Delivery Sols., LLC](#), No. 15 Civ. 8410, 2016 WL 5339552, at *10 (S.D.N.Y. Sept. 22, 2016) (observing that “because Defendants seek dismissal rather than a stay ... this Court has discretion whether to stay or dismiss Plaintiffs’ action under the **FAA**,” and ultimately staying the case).
- 3 For what it is worth, [Katz](#) **does not** clearly say otherwise. [Katz](#) observes that Section 3’s “plain language specifies that the court ‘shall’ stay proceedings pending arbitration, provided an application is made and certain conditions are met.” 794 F.3d at 345. [Katz](#) **does not** specify the type of “application” that must be made, though (in my view) [Katz](#) does (and must be read to) reference the application to enforce an arbitration clause. Nor does [Katz](#) point to anything in the statute that says that a mandatory stay is dependent upon an explicit request for a stay.
- 4 9 U.S.C. § 4, which deals with enforcement of arbitration clauses regardless of whether the contract has become the subject of federal litigation, provides in part: “The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.”
- 5 Not to the contrary is the **FAA** provision that an appeal may be taken from “a final decision with respect to an arbitration.” 9 U.S.C. § 16(a)(3). The **FAA** allows an appeal from a final decision that is entered after the arbitration has run its course, *id.*, as well as appeals from, *inter alia*, orders that refuse a stay of an action or deny a petition to arbitrate, *see* 9 U.S.C. § 16(a)(1).
- 6 Indeed, foreseeing the chaos post-[Badgerow](#), Justice Breyer suggested that a stay is the solution: “[i]f a party to an arbitration agreement files a lawsuit in federal court but then is ordered to resolve the claims in arbitration, the federal court may stay the suit and possibly retain jurisdiction over related **FAA** motions.” [Badgerow](#), 142 S. Ct. at 1326 (Breyer, J., dissenting) (citing § 3, [Vaden v. Discover Bank](#), 556 U.S. 49, 65, 129 S.Ct. 1262, 173 L.Ed.2d 206 (2009)). For its part, the [Badgerow](#) majority **did not** address the effect of a stay on a district court’s jurisdiction to resolve later-filed **FAA** petitions; it explicitly declined to consider whether a district court would have jurisdiction to resolve a Section 5 petition that is made “in tandem with” a Section 4 petition. *Id.* at 1320 n.6.
- 1 The district court’s reasoning is itself unconvincing. I have no issue with the premise that a transportation worker’s job duties must be more than “tangentially related to [the] movement of goods.” [Lenz v. Yellow Transp., Inc.](#), 431 F.3d 348, 351-52 (8th Cir. 2005); *see also*, e.g., [Hill v. Rent-A-Center, Inc.](#), 398 F.3d 1286, 1289 (11th Cir. 2005) (requiring that transportation work be more than “incidental” to a worker’s employment). But it is impossible to conclude on this record that transportation work is merely incidental or tangential to the plaintiffs’ employment. The title of their contracts —“Distributor Agreements”—defines their principal purpose. The additional tasks the Distributor Agreements obligate the plaintiffs to perform emanate from the delivery work. And the defendants offer no evidence to counter the complaint’s allegations that the actual delivery of product constituted the lion’s share of the plaintiffs’ work. It is not surprising, then, that in a case strikingly similar to this one, the District of Massachusetts recently concluded that a group of the same defendants’ Massachusetts-based delivery drivers qualified as transportation workers, principally because those plaintiffs had submitted “sworn affidavits stating that they spend the majority of their time making deliveries” and “there [was] nothing in the record to suggest that Plaintiffs were carrying out all of the other responsibilities included in the[ir] Distributor Agreements and business plans, or that those other responsibilities took up more time than driving.” [Canales v. LePage](#)

Bakeries Park St. LLC, No. 1:21-cv-40065-ADB, — F.Supp.3d —, — — —, 2022 WL 952130, at *5-*6 (D. Mass. Mar. 30, 2022).

- 2 In any event, I am not sure this even accurately depicts the defendants' commerce. No facts in the record concerned each defendant's "predominant sources of commercial revenue." For their part, the plaintiffs aver that discovery "would reveal that CK Sales [the defendant with whom the plaintiffs executed the Distributor Agreements] **does not** earn any revenues from the sale of baked goods, [but rather] that it primarily generates revenue by designing 'distribution territories' and selling the 'distribution rights' to perform deliveries within those territories to Distributors like Plaintiffs—that is, it generates revenue through the distribution of goods, not the manufacturing of them." Plaintiffs-Appellants' Petition for Rehearing or for Rehearing En Banc at 18.
- 3 See Walmart Careers, <https://careers.walmart.com/drivers-distribution-centers/drivers> (last visited Aug. 16, 2022) ("Traveling over 900 million miles a year, our private fleet of over 12,000 Class A drivers deliver countless loads of merchandise to Walmart and Sam's Club locations across the nation while representing the values associated with our Spark.").

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