UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NATHANIEL SILVA and
PHIL ROTHKUGEL, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

SCHMIDT BAKING DISTRIBUTION, LLC,
and SCHMIDT BAKING COMPANY, INC.

Defendants.

Case No. 3:23-cv-01695-MPS

MOTION OF NATIONAL EMPLOYMENT LAW PROJECT FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS

The National Employment Law Project (NELP) respectfully moves for leave to file a brief as amicus curiae in support of Plaintiffs' motion for certification of an interlocutory appeal under 28 U.S.C. 1292(b) of the Court's Order compelling arbitration.

NELP is a non-profit organization with over 50 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. We collaborate closely with community-based worker centers, unions, and state policy groups and have litigated directly and participated as *amicus* in numerous cases addressing the rights of purported independent contractors under the Fair Labor Standards Act, the National Labor Relations Act, and various state wage and hour laws, as well as in a number of cases involving the scope of the Federal Arbitration Act. NELP seeks to ensure that all workers receive the full protection of labor and employment laws and that employers are not rewarded for skirting their obligations.

As experts in the evolving legal forms employers are using to structure work, we think and write about how these work structures have allowed employers to shift their social obligations as employers onto their workers. We focus in particular on industries where subcontracting and independent contractor misclassifications are especially prevalent. We have studied and written about the working conditions and employment relationships of truck drivers, publishing two comprehensive reports on the subject, *The Big Rig: Poverty, Pollution, and the Misclassification of Truck Drivers at America's Ports*, in 2010, and *The Big Rig Overhaul: Restoring Middle-Class Jobs at America's Ports Through Labor Law Enforcement*, in 2014. We have also studied the work structures of last-mile delivery drivers at companies like FedEx and Amazon. We have litigated and participated as amicus curiae in numerous cases addressing independent contractor misclassification under federal and state labor and employment laws, and have written extensively about new and evolving forms of independent contractor misclassification, such as the increasing prevalence of employers requiring workers to incorporate and form LLCs as a condition of work. *See*, *e.g.*, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries*, NELP Policy Brief (Oct. 2020).

Throughout this work, we have seen how mandatory arbitration clauses have prevented workers from challenging these kinds of systemic misclassification practices. Workers have pursued claims against employers for misclassification schemes adopted to enable wage theft and other employment law violations, but have been repeatedly unable to get any judicial resolution, on the merits, as to whether such schemes are in fact illegal. Instead, workers have been shunted into private, individualized arbitration proceedings, where class-wide claims are prohibited—often meaning that a worker's individual claims are no longer worth the cost of litigating—and

any arbitral award is neither public nor precedential. Too often, the result is that employers maintain these work structures even where they illegally deprive workers of their fundamental rights to a minimum wage, overtime, unemployment insurance, and to organize.

More generally, we have studied and written about the rise of employer-imposed arbitration clauses in adhesion employment contracts, and how this has effectively hollowed out the private enforcement of employment law across sectors across the country. *See*, *e.g.*, Hugh Baran & Elisabeth Campbell, *Forced Arbitration Helped Employers Who Committed Wage Theft Pocket $9.2 Billion in 2019 From Workers in Low-Paid Jobs*, NELP Data Brief (June 2021). We have also closely followed the evolution of the FAA's Section 1 exemption in recent years, and filed amicus briefs in the Supreme Court in *New Prime v. Oliveira*, 586 U.S. 105 (2019) and *Bissonnette v. Lepage Bakeries Park St. LLC*, 601 U.S. 246 (2024) regarding the application of the section 1 exemption.

In short, as an organization with deep understanding of misclassification practices prevalent in low-wage workplaces across the country, and with expertise on mandatory arbitration and the evolving law of the FAA, NELP has an important perspective to offer this Court. We therefore seek leave to file an amicus brief providing some context on the evolving forms of independent contractor misclassification, the increasing prevalence of incorporation requirements as part of these schemes, and the significant consequences to misclassified workers hoping to challenge these decisions should this Court's rule of decision hold.

The proposed brief is filed with this motion. Proposed amicus has sought consent for this filing from parties' counsel. Plaintiffs have consented to the motion, and Defendants have not.

For the foregoing reasons, Proposed Amicus respectfully requests that the Court grant this Motion for Leave to File a Brief as Amicus Curiae in Support of Plaintiffs.

June 11, 2024

Respectfully submitted,

/s/ *Gregg D. Adler*

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CERTIFICATE OF SERVICE

I certify that on June 11, 2024, a true and correct copy of the foregoing Motion for Leave to File Brief as Amicus Curiae was served on all counsel via the CM/ECF system.

/s/ *Gregg D. Adler*
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BRIEF OF AMICUS CURIAE NATIONAL EMPLOYMENT LAW PROJECT IN SUPPORT OF PLAINTIFFS AND CERTIFICATION FOR INTERLOCUTORY REVIEW

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INTEREST OF AMICUS CURIAE

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

INTRODUCTION

Nathaniel Silva and Phil Rothkugel are commercial truck drivers who worked full time transporting foodstuffs for Defendant Schmidt Baking. Both were initially hired to do this work as W-2 employees, in which capacity they picked up baked foods from a centralized warehouse in Connecticut, transported and delivered them to grocery stores and other authorized retail outlets across the state, unloaded the products onto store shelves, and removed stale products to return to Schmidt. See Dkt. 24-1 at ¶ 6; Dkt. 24-2 at ¶ 5. Had their employment continued in this form, it is undisputed that they would qualify as exempt transportation workers under Section 1

of the Federal Arbitration Act (FAA), 9 U.S.C. § 1, and would be able to proceed with their wage and hour claims in court.

However, several months into Plaintiffs' employment, Schmidt required them to form limited liability corporations (LLCs) and execute "Distributor Agreements" on behalf of those newly-formed corporate entities in order to keep their jobs. Dkt. 24-1. These were, in effect, legal fictions; sham LLCs without any practical impact on the work, designed to obscure the reality that this remained an employer-employee relationship. Neither plaintiff had ever formed an LLC, and only did so now because they had been instructed to do so. Dkt. 24-1, Silva Decl. at ¶ 9 ("Schmidt also required me to form a corporate entity in order to sign the agreement. Schmidt assisted me in forming the corporation. It was called Silva Baked Goods, Inc. I had never formed a corporation before."). Nor did the newly formed LLCs make them true independent contractors, running their own business and outside the protection of employment laws. *See*, *e.g.*, *Padovano v. FedEx Ground Package Sys., Inc.*, 2016 WL 7056574, at *4 (W.D.N.Y. Dec. 5, 2016) (explaining that "[i]f any business could avoid [wage and hour law] by simply classifying their workers as independent contractors and compensating them through corporations rather than paying them directly, [wage and hour law] would be rendered useless").

Essentially nothing changed about the nature of their work or their relationship to Schmidt Baking—except that they now appeared to be incorporated entities independently contracting with Schmidt to transport the goods they had once transported as W-2 employees. Both Silva and Rothkugel continued to work full time for Schmidt, driving trucks full of Defendant's products to retail stores across Connecticut, subject to substantial control and employer oversight.

Plaintiffs then brought this action for wage theft, alleging that Schmidt had illegally misclassified them as independent contractors, had unlawfully deducted fees from their wages, and failed to pay them overtime. Dkt. 1, First Amended Complaint, at 31-32. But they have now been prevented from pursuing these claims in court, and instead shunted into private and individual arbitration, on the grounds that the existence of these sham LLCs pushed them outside of the coverage of the FAA Section 1's transportation worker exemption. Under this Court's Order, corporate entities cannot be "workers" and Distribution Agreements between two corporate entities cannot be "contracts of employment," no matter the substance of the work relationship between the parties or the nature of the work performed.

We file this brief as amicus curiae to express our concern about the decision, and its adverse impacts on the many low-wage workers subject to similar misclassification schemes. More specifically, we write to urge this Court to grant Plaintiffs' 1292(b) motion for an interlocutory appeal. The issue of whether employers like Schmidt may use incorporation requirements to evade Section 1's exemption and force their workers' claims out of court and into private arbitration is precisely the kind of legal question that should be resolved on appeal before this case proceeds to arbitration.

As laid out below, this question satisfies the three requirements of 1292(b) and merits certification for interlocutory review: 1) it is a controlling question of law; 2) as to which there are substantial grounds for difference of opinion; and 3) an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). It is also a question of "special consequence," *see Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013) (noting that courts should not hesitate to grant interlocutory review on a question of special consequence), as the increasing prevalence of incorporation requirements as a form of

misclassification opens up a significant loophole in the scope of the Section 1 exemption. Because the analysis under prongs 1) and 3) is addressed extensively elsewhere in the briefing, we have focused our discussion primarily on (2) the substantial grounds for difference of opinion, and also on why this is a question of special consequence.

ARGUMENT

I. Whether Otherwise Exempt Transportation Workers May be Compelled to Arbitrate their Claims Because They Were Required to Operate Through LLCs is a "Controlling Question of Law."

In order to succeed on a 1292(b) motion, a party must identify a controlling question of law to certify for appeal. The certified question must be a "pure" question of law, *Century Pac., Inc. v. Hilton Hotels Corp.*, 574 F. Supp. 2d 369, 371 (S.D.N.Y. 2008) (quoting *Ahrenholz v. Bd. of Tr.*, 219 F.3d 674, 676–77 (7th Cir.2000)), and must "materially affect the outcome of the litigation," *United States ex rel. Quartararo v. Cath. Health Sys. of Long Island Inc.*, 521 F. Supp. 3d 265, 276 (E.D.N.Y. 2021).

Both questions Plaintiffs have identified are controlling questions of law on which this Court should certify appeal. But we write in particular to counsel review on the first of these questions: whether the contracts of delivery drivers who incorporate as business entities can be exempt under Section 1 of the Federal Arbitration Act (FAA) as "contracts of employment" of a "class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. It is a pure question of law that will materially affect the outcome of this litigation, determining whether Plaintiffs and other similarly situated transportation workers can pursue their wage and hour claims in court, or instead need to proceed through arbitration. *See Islam v. Lyft, Inc.*, No. 20-CV-3004 (RA), 2021 WL 2651653, at *4 (S.D.N.Y. June 28, 2021) (holding that application of section 1

exemption was controlling question of law); *D'Antuono v. Serv. Road Corp.*, No. 3:11CV33 MRK, 2011 WL 2222313, at *1 (D. Conn. June 7, 2011) (holding that "whether that arbitration agreement is enforceable based on existing Second Circuit precedent" was a controlling question of law). Further, because many other low-wage workers operate under functionally identical work arrangements required by companies, this issue is likely to have "precedential value for a large number of cases." *Tantaros v. Fox News Network, LLC.*, 465 F. Supp. 3d 385, 390 (S.D.N.Y. 2020).

II. There Are Substantial Grounds for Difference of Opinion.

Section 1292(b) next requires a showing that there are substantial grounds for difference of opinion on the certified question, which may exist when "(1) there is conflicting authority on the issue, or (2) the issue is particularly difficult and of first impression for the Second Circuit." *Pen Am. Ctr., Inc. v. Trump*, No. 18-CV-9433, 2020 WL 5836419, at *2 (S.D.N.Y. Oct. 1, 2020). This question meets both of these requirements. Taking these in reverse order: first, because neither the Supreme Court nor the Second Circuit has squarely addressed the issue of whether incorporation requirements place otherwise eligible transportation workers outside the coverage of the Section 1 exemption. And second, because there is significant conflicting authority on this question, for the three reasons laid out below.

A. The Recent Line of Supreme Court Cases Focus on the Actual Work Typically Performed, Not the Legal Form of the Employment Relationship.

In its 2019 decision in *New Prime v. Oliveira*, 586 U.S. 105 (2019), the Supreme Court addressed one variation of this question. In assessing whether Mr. Oliveira, a long-haul trucker operating as an independent contractor but doing transportation work for New Prime, was covered under Section 1, the Court maintained that the pertinent question was whether interstate

transportation work was being performed, not the legal form of the relationship. *Id*. at 121 (holding that because "contract of employment" was not a term of art at the time of the Act's adoption in 1925, it should be read broadly to embrace independent contractor relationships…) Although Mr. Oliveira's contract with New Prime was not, strictly speaking, a formal employment contract between an employer and employee, it functioned as "an agreement to perform work," bringing it within the sweep of the Section 1 exemption. *Id*.

In fact, Oliveira had contracted to work for New Prime through an incorporated entity—called "Hallmark Trucking LLC"—that he was required by New Prime to set up. *See Oliveira v. New Prime, Inc.*, 141 F. Supp. 3d 125, 128 (D. Mass. 2015). But the existence of an LLC mediating the relationship between the transportation worker and the company employing him to perform work did not carve him out of coverage under Section 1's exemption. In other words, the Supreme Court already decided in that case that an agreement between two corporations can be a covered "contract of employment," as long as it is an agreement for the "performance of *work* by *workers*." *New Prime*, 586 U.S. at 116 (emphasis in original).

The same is true of the plaintiff workers whose claims were before the Supreme Court in *Bissonnette v. Lepage Bakeries*—a case involving wage and hour claims brought by commercial truck drivers doing last-mile delivery work for a baked foods company, but operating through LLCs. 601 U.S. 246 (2024). Although the *Bissonnette* Court did not directly address the status of the workers as purported independent contractors, whose contracts of employment were formally structured as business-to-business arrangements between corporate entities, *see id*. at 249, the Court focused its analysis on the actual "performance of work." *Id.* at 253. That focus followed from the central holding of the Court in the 2022 case *Sw. Airlines v. Saxon*, that the lodestar of the analysis is on "the actual work that the members of the class, as a whole, typically carry out."

596 U.S. 450, 456 (2022). *See also Fraga v. Premium Retail Servs.*, 61 F.4th 228, 235 (1st Cir. 2023) (observing that "Saxon's repeated and emphasized command to focus on what the workers themselves actually do strongly suggests that workers who do transportation work are transportation workers."). As best applied here, the guidance to lower courts from these cases is to focus on the actual work typically performed in assessing whether a given plaintiff is an exempt transportation worker, not on the formal appearance of the work relationship as described by the employer in their contracts of employment.

B. The Amazon Cases in Other Circuits Are Distinguishable and Do Not Support the Court's Decision Here.

Second, while recognizing that this Court's rule of decision is in line with a few other lower court cases addressing this issue, several of the cases this Court pointed to as authority for its decision are readily distinguishable, and in fact counsel the opposite conclusion. Three other federal courts of appeals have addressed this question and decided that corporate entities cannot be exempt transportation workers. But two of those—the Fourth and Ninth Circuits—were decided in regard to Amazon delivery workers on facts quite different to those present here.[1]

In *Amos v. Amazon Logistics Inc.*, 74 F.4th 591, 597 (4th Cir. 2023), the plaintiffs compelled to arbitrate their claims were Amazon delivery subcontractors known as "Delivery Service Partners," which are the entities responsible for the vast majority of Amazon's last-mile distribution.[2] But these Delivery Service Partners were not individual truck drivers operating

[1] The third case is the Sixth Circuit case *Tillman Transportation, LLC v. MI Business Incorp.*, 95 F.4th 1057 (6th Cir. 2024).

[2] The Delivery Service Partners are a network of near-identical subcontractors across the country, each of which contract with Amazon (and only with Amazon) to deliver packages to locations in a specific geographical area. Josh Eidelson & Matt Day, *Amazon Work Rules Govern Tweets, Body Odor of Contract Drivers*, Bloomberg (May 5, 2021), *available at* https://www.bloomberg.com/news/articles/2021-05-05/amazon-work-rules-govern-tweets-body-odor-of-contract-drivers. Amazon provides its subcontractors with all the tools necessary to establish

through the corporate veneer of an LLC. They were actual corporate entities who hired and maintained payroll for tens and sometimes hundreds of delivery drivers. As the Fourth Circuit panel wrote in *Amos*, the plaintiff's LLC—through which she contracted with Amazon, and under which she was bound by an arbitration clause—"was not some legal fiction existing only to shield Amazon from unwanted liabilities… It was not a 'nominal party' or 'mere window dressing' that could be swept aside." Rather, it "was a major North Carolina employer in and of itself, with several hundred delivery drivers on its payroll." *Id.*, 74 F.4th at 597.

Similarly, the plaintiffs in *Fli-Lo Falcon, LLC v. Amazon*, 97 F.4th 1190 (9th Cir. 2024) were Amazon Delivery Service Partners each with many employees hired to deliver packages to Amazon customers. Although the majority declined to join the Third Circuit in addressing the issue of fictitious incorporation, Judge Thomas did so in her concurring opinion. *See id*. at 1201-02 (Thomas, J., concurring). She noted that the plaintiffs in the case were "not sham corporations, but bona fide business entities, and their relationship with Amazon [was] not an employment relationship, but a commercial one." *Id*., at 1202. But she made sure to register her concern as to how the decision might play out under a different set of facts: it might "allow companies to contract around the FAA's exemption by forcing their transportation workers to create sham corporations, then contracting with those corporations rather than employing the workers directly." *Id*.

Judge Thomas' hypothetical is exactly the situation faced in this case. Plaintiffs were required to form sham corporations in order to keep their jobs, and asked to execute Distributor

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their fleets, requiring them to lease company-emblazoned vans, and assigning them a certain number of "routes" to complete each day. *See Ahaji Amos v. Amazon Logistics*, 22-cv-00055, at *2-11 (M.D.N.C. complaint filed Jan. 24, 2022).

Agreements that function in practice as straightforward contracts of employment. Plaintiffs then brought this action to challenge these practices, seeing them as legal fictions designed by Schmidt to avoid its obligations under wage and hour law. This Court's order now points to those exact corporate forms as grounds to decline Plaintiffs a judicial forum to resolve those claims. It is a rule of decision that stands in contrast to the decisions in *Amos* and *New Prime*, and that threatens to open up a yawning loophole in the coverage of the FAA's Section 1 exemption.

C. The Court's Ruling would put the FAA Squarely at Odds with Longstanding Principles of Labor and Employment Law.

Third and finally, the issue of whether employers can use incorporation requirements to define the status of their workers has been definitively resolved in the other legal context under which it arises. Decades of case law under numerous federal and state labor and employment statutes make it crystal clear that incorporation does not shield employers from their obligations to their workers. *See*, *e.g.*, *Frankel v. Bally, Inc.*, 987 F.2d 86, 90–91 (2d Cir. 1993) ("[T]he corporate form under which a plaintiff does business is not dispositive in a determination of whether an individual is an employee or an independent contractor within the meaning of the ADEA."); *In re FedEx Ground Package System, Inc.*, 712 F. Supp. 2d 776, 793 (N.D. Ind. 2010) ("if FedEx retains the right to control unincorporated drivers, it retains the right to control incorporated drivers"); *Parilla v. Allcom Constr. & Install. Svcs.*, LLC, 2009 WL 2868432 (M.D. Fl. 2009) (plaintiff who incorporated was an employee; incorporation was a "façade"); *DaSilva v. Border Transfer of MA, Inc.*, 296 F. Supp. 3d 389, 402 (D. Mass. 2017) ("incorporation cannot be a shield to prevent liability under the [Massachusetts] Wage Act"); *Anfinson v. FedEx Ground*, 244 P.3d 32 (Wash. Ct. App. 2010) (disregarding delivery drivers' personal corporate entities in analysis of the drivers' individual employment status); *Ruiz v. Affinity Logistics Corp.*,

754 F.3d 1093, 1103 (9th Cir. 2014) *cert. denied*, 135 S. Ct. 877 (2014) ("While 'purporting to relinquish' some control to the drivers by making the drivers form their own businesses and hire helpers, [defendant] 'retained absolute overall control' over the key parts of the business.").

There is no federal statute that allows employers to decide for themselves—through their choice of contract term or by label—whether their workers are protected by statute. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729–30 (1947) ("Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the [Fair Labor Standards] Act.").[3] The FAA is no different. Whatever corporate forms mediate the relationship between Schmidt and its drivers, there are at least substantial grounds for believing that their contracts of employment were "agreement[s] to perform work." *New Prime*, 586 U.S. at 121.

III. An Immediate Appeal on the Issue of Arbitrability May Advance the Termination of the Litigation.

The third factor parties must show in a 1292(b) motion is that an immediate appeal may materially advance the ultimate termination of the litigation. "When [an immediate appeal] promises to advance the time for trial or shorten the time required therefor," it materially advances the litigation. *Youngers v. Virtus Inv. Partners Inc.*, 228 F. Supp. 3d 295, 302 (S.D.N.Y. 2017).

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[3] See also *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 290 (7th Cir. 2016) ("[S]tatus as an employee for purposes of the FLSA depends on the totality of circumstances rather than on any technical label[.]")[3]; *N.L.R.B. v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968) (explaining that employee status under the NLRA is not determined by reference to a "shorthand formula or magic phrase," but by assessing "all the incidents of the relationship" and the "total factual context"); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) (holding the same under ERISA).

Here, it makes little sense to proceed to arbitration now only to return to appeal the arbitrability of the case once arbitration is completed—possibly several years down the road. Allowing an interlocutory appeal in this case would likely shorten the time required to terminate the case, conserving resources and allowing the prompt resolution of the central issue of arbitrability. *See Weber v. United States*, 484 F.3d 154, 159 (2d Cir. 2007) (stating that Congress "sought to assure the prompt resolution of knotty legal problems" in passing § 1292(b)). In fact, one district court in the Second Circuit already addressed this exact issue, finding this factor was met since "parties to this litigation will not have wasted two years in arbitrating claims that are later held to be nonarbitrable." *S.A. Mineracao Da Trindade-Samitri v. Utah Int'l Inc.*, 579 F. Supp. 1049, 1051 (S.D.N.Y. 1984). If the appeal is not certified, the court risks burdening the parties with expensive and time-consuming arbitration that may ultimately become moot.

IV. The Question to Be Certified is of "Special Consequence" and Should Be Resolved Definitively on Appeal.

If the statutory requirements of § 1292(b) are satisfied and the ruling involves a new legal question or is of "special consequence" the district court "should not hesitate to certify an interlocutory appeal." *Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013) (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009)). Although this inquiry is not formally one of the three prongs courts assess on a 1292(b) motion, it offers important context as to whether this is the kind of legal question a reviewing court should certify for interlocutory appeal. Here, the question of whether sham incorporation requirements can keep the claims of otherwise exempt transportation workers out of court is exactly the kind of new legal question of "special consequence" that merits immediate appellate review.

A. Incorporation Requirements Are an Increasingly Prevalent Form of Independent Contractor Misclassification, Affecting Many Thousands of Low-Wage Workers.

One reason the legal effect of these incorporation requirements is a question of special consequence is that they are becoming an increasingly common form of independent contractor misclassification. Employers have been using these schemes to try to avoid legal responsibility to their workers for years, requiring workers to form limited liability corporations, franchise entities, or other shell businesses in order to get or keep their jobs. The putative employer will then contract with the workers in their capacity as "owners" or "partners" of the shell company in order to avoid liability under labor and employment laws. *See* Catherine Ruckelshaus and Sarah Leberstein, *Summary of Independent Contractor Reforms New State and Federal Activity* (NELP Nov. 2011), available at https://www.nelp.org/app/uploads/2015/03/2011Independent ContractorReformUpdate.pdf (last visited 06/10/2024) (describing LLC as "new" form of misclassification in 2011 to which state legislatures were beginning to respond). These practices allow employers to shirk compliance with wage and hour laws, minimize the risk of union organizing, and avoid paying payroll taxes and unemployment insurance contributions. *See* Laura Padin, *Setting the Record Straight on Independent Contracting*, Testimony Before U.S. House of Representatives (Apr. 17, 2023) ("corporations that misclassify their workers can save 20 to 40 percent of payroll costs").

Labor enforcement agencies at the state and federal level have prosecuted employers using these same misclassification schemes. The United States Department of Labor has repeatedly pursued wage and hour claims against employers it alleges is misclassifying their

workers by requiring them to set up LLCs.[4] And as one state Deputy Labor Commissioner explained over ten years ago, "we will see individuals who are clearly employees called independent contractors. Now, we're seeing them called members of LLCs. The beat goes on."[5]

B. In Last Mile Trucking in Particular, Employers Are Using Incorporation to Evade Obligations and Keep Workers Claims out of Court.

These misclassification schemes have become especially endemic in the trucking industry. Many companies with significant last-mile distribution businesses have, like Schmidt, shifted their employment practices away from direct W-2 employment towards ostensible independent contracting, without meaningfully changing the nature of the work. FedEx, for example, adopted the same business model as Schmidt: treating its delivery drivers as "contractors," requiring them to incorporate and then purchase the rights to distribute FedEx's packages within a certain region, and crafting lengthy independent contractor agreements that purported to allow the drivers to operate their own businesses. *Anfinson v. FedEx Ground*, 244 P.3d 32, 35-36 (Wash. Ct. App. 2010) (describing FedEx's practice of contracting with drivers only through their personal corporate entities, and disregarding the existence of those entities in analysis of the drivers' individual employment status). Multiple federal courts held that these drivers were nonetheless employees. *See Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1047 (9th Cir. 2014) (holding that FedEx delivery drivers were employees under Oregon's

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[4] See, e.g., Wage and Hour Division, *WHD News Release: Investigation in Utah and Arizona Secures Wages and Benefits for More Than 1,000 Workers Who Were Wrongly Classified*, United States Department of Labor (April 23, 2015), https://www.dol.gov/newsroom/releases/whd/whd20150518 (describing case in which construction workers initially building houses in Utah and Arizona as employees were then required to become "member/owners" of limited liability companies to continue doing the same work on the same job sites for the same companies).

[5] Anna Deknatel and Lauren Hoff-Downing, ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes, 18 U. Pa. J.L. & Soc. Change 53, 81 (2015) (quoting Utah Deputy Labor Commissioner Alan Hennebold).

wage laws); *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 988 (9th Cir. 2014) (holding that FedEx delivery drivers were employees for purposes of California's wage laws); *Craig v. FedEx Ground Package Sys., Inc.*, 335 P.3d 66, 92 (Kan. 2014) (holding that FedEx delivery drivers were employees for purposes of Kansas' wage laws).

Among baked foods conglomerates in particular, requiring workers to form sham LLCs to do business has become something of a business norm. Snyder's-Lance, like Schmidt, a baked goods conglomerate with a large distribution arm (most famous for its ubiquitous pretzels), is a good example. Before its merger with Snyder's, Lance truck drivers had been employed under a standard W-2 employment model. After the merger, the newly formed Snyder's-Lance switched to Snyder's purported independent contractor model—requiring all of its drivers to form LLCs and sign standardized "Distributor Agreements," and deeming them to be independent contractors. *See Mode v. S-L Distribution Co., LLC*, 2021 WL 3921344, *2 (W.D.N.C. Sept. 1, 2021). Flowers Foods, another baked foods company with a large distribution arm—also the defendant employer in Bissonnette—uses identical employment arrangements. *See*, *e.g.*, *Bissonnette v. Lepage Bakeries*, 469 F. Supp. 3d 191, 196-200 (D. Conn. 2020); *Canales v. Lepage Bakeries, LLC*, 596 F. Supp. 3d 261, 268-9 (D. Mass. Mar. 30, 2022) *aff'd on appeal*, 67 F.4th 38 (1st Cir. 2022). *Martins v. Flower Foods, Inc.*, 463 F. Supp. 3d 1290, 1296 (M.D. Fla. 2020), *vacated and remanded on other grounds*, 852 Fed. Appx. 519 (11th Cir. 2021).

In the last several years, many workers who have experienced wage theft and other employment law violations have challenged these practices, alleging that these Distributor Agreements were sham legal forms designed to obscure what was fundamentally an employment relationship. And reviewing courts have, to a significant extent, seen through these schemes. Some of these workers have successfully defeated summary judgement, *see*, *e.g.*, *Mode v. S-L*

Distribution Co., LLC, 18-cv-150, 2021 WL 3921344 *14-16 (W.D.N.C. Sept. 1, 2021), while others have achieved certification of their class claims, *see*, *e.g.*, *Carr v. Flowers Foods, Inc.*, 15-cv-6391, 2019 WL 2027299 (E.D. Pa. May 8, 2019), and still others have reached valuable settlements, *see*, *e.g.*, *Maranzano v. S-L Distribution Co., LLC*, 19-cv-1997 (M.D. Pa. Nov. 4, 2022); *Rivera v. Martin's Famous Pastry Shoppe, Inc.*, 20-cv-483, 2021 U.S. Dist. LEXIS 28829 (M.D. Pa. Feb. 16, 2021).

In sum, many thousands of individual commercial truck drivers and other transportation workers are hired through employment structures made to look like arms-length business-to-business arrangements. But like other low-wage workers in misclassification-prone industries, they tend to work full-time for a single employer, under their control and supervision, and are often victims of wage theft and other violations of their workplace rights. In recent years, many of these workers have challenged these practices and the misclassifications schemes that enable them, bringing classwide claims that cannot be pursued in individual arbitration. This Court's decision effectively thwarts their right to challenge these structures and to seek redress when their workplace rights are violated, making this exactly the kind of question of special consequence that deserves to be resolved on appeal.

CONCLUSION

For the foregoing reasons, we urge this Court to grant Plaintiffs' motion and certify interlocutory review of the order to compel arbitration.

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Respectfully submitted,

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