No. SJC-13228

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

VERONICA ARCHER, ANDREA KRAUTZ, PAUL GIROUARD, PATRICK LEE,

Plaintiffs-Appellees,

v.

GRUBHUB, INC.,

Defendant-Appellant.

On Appeal from a Judgment of the
Superior Court for Suffolk County

BRIEF FOR AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

JENNIFER B. DICKEY
JONATHAN D. URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5337

Of Counsel

MARK C. FLEMING (BBO # 639358)
CHARLES C. KELSH (BBO # 703558)
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Mark.Fleming@wilmerhale.com
Chaz.Kelsh@wilmerhale.com

Attorneys for Amicus Curiae

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community, including cases involving the enforceability of arbitration agreements and interpretation of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA").

This is such a case. Many of the Chamber's members and affiliates regularly rely on arbitration agreements in their contractual relationships. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less

[1] Pursuant to Mass. R. App. P. 17(c)(5), the Chamber declares that no party or counsel for a party authored this brief in whole or in part and that no person other than the Chamber, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. The Chamber and its counsel further declare that, although the Chamber has filed amicus briefs on similar issues in other cases, they have not represented one of the parties to the present appeal in any proceeding involving similar issues, nor have they been a party or represented a party in a proceeding or transaction that is at issue in the present appeal.

adversarial than litigation in court. Based on the policy reflected in the FAA, the Chamber's members and affiliates have structured millions of contractual relationships around the use of arbitration to resolve disputes. These relationships include large numbers of agreements with workers who perform local delivery services. The Chamber therefore has a significant interest in the proper interpretation of the FAA and in reversal of the Superior Court's order.

SUMMARY OF ARGUMENT

For nearly a century, the Federal Arbitration Act has reflected Congress's strong commitment to arbitration as a means of dispute resolution. Congress enacted the FAA in 1925 to "reverse the longstanding judicial hostility to arbitration agreements" and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quotation marks omitted); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (the FAA "seeks broadly to overcome judicial hostility to arbitration agreements"). The FAA thus embodies an "'emphatic federal policy in favor of arbitral dispute resolution.'" *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (quoting *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011)).

The FAA's principal substantive provision, Section 2, applies to any "contract evidencing a transaction involving commerce." 9 U.S.C. § 2. The Supreme Court has held that the phrase "involving commerce" "signals an intent to exercise

Congress' commerce [clause] power to the full." *Allied-Bruce*, 513 U.S. at 277. The same is not true of Section 1, which excludes from the FAA "contracts of employment of seamen, railroad employees, or any other *class of workers engaged in foreign or interstate commerce*." 9 U.S.C. § 1 (emphasis added). Section 1, the Supreme Court has held, requires a "precise reading." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118, 119 (2001).

Here, the Superior Court held that Plaintiffs, who make local deliveries through the Grubhub application, are in a "class of workers engaged in … interstate commerce" within the meaning of Section 1 and thus excluded from the FAA. Add. 58-63. The court based that conclusion on its finding that Plaintiffs "periodically transported and delivered both pre-packaged food items … and non-food items" made in other states as part of their duties as delivery drivers. Add. 58. It held that the Section 1 exemption applied to Plaintiffs because "the pre-packaged and non-food products [they] delivered … constitute part of the continuous flow of 'interstate commerce,' and Plaintiffs' function in physically transporting those products to their final destinations necessarily qualifie[d]" them for Section 1's exemption. Add. 61.

The Superior Court's approach is inconsistent with the language and structure of Section 1, which focuses on the activities of a "class of workers," not the origin or movement of goods or the overall nature of a business. That misguided approach also ignores the fact that the relevant language in Section 1—"other class of workers

engaged in foreign or interstate commerce"—is a "residual phrase, following, in the same sentence, explicit reference to 'seamen' and 'railroad employees.'" *Circuit City*, 532 U.S. at 114. "The wording of § 1 calls for the application of the maxim *ejusdem generis*" to "give effect to the terms 'seamen' and 'railroad employees'"—groups that were already subject at the time of the FAA's enactment to separate federal dispute-resolution procedures that Congress "did not wish to unsettle." *Id.* at 114-115, 121. Modern-day local delivery drivers are not analogous to the maritime and railway workers of 1925. They do not facilitate the movement of goods across state lines nor are they connected, by contract or otherwise, to an interstate shipper that does so. Rather, they are hired separately by Grubhub and its customers to provide a wholly intrastate service that begins after the goods' interstate journey has ended.

Moreover, the Superior Court's overly broad interpretation of the Section 1 exemption breaks with the overwhelming weight of authority, both in Massachusetts and nationwide. Federal courts sitting in Massachusetts have reached the opposite conclusion, holding that local delivery drivers are not a class of workers covered by the Section 1 exemption. Two other federal circuits have likewise rejected the Superior Court's interpretation. Most notably, the Seventh Circuit, in an opinion authored by then-Judge Barrett, concluded that the very same category of workers—"food delivery drivers for Grubhub"—"do not fall within § 1 of the FAA." *Wallace*

v. Grubhub Holdings, Inc., 970 F.3d 798, 799, 803 (7th Cir. 2020). The court rejected the very reasoning adopted by the Superior Court in this case—that delivering pre-packaged goods like "potato chips" or "a piece of dessert chocolate" that have moved across state or national borders suffices to trigger Section 1's residual clause. *Id.* at 802. Instead, the court explained, "the workers must be connected not simply to the goods, but to the act of moving those goods across state or national borders." *Id.* No state's highest court has adopted the Superior Court's interpretation of Section 1 either. This Court should avoid making Massachusetts an outlier on this important question of federal law.

The Superior Court's interpretation, if adopted by this Court, would significantly increase litigation costs and generate harmful uncertainty over whether the Section 1 exemption covers a potentially broad array of quintessentially local workers. If purely local courier activity made a worker "engaged in foreign or interstate commerce" under Section 1 merely because locally transported goods previously originated in another state or country, that exception would swallow much of the FAA's substantive protections for arbitration agreements. Wide swaths of the economy would be deprived of the well-established benefits of arbitration, including lower costs and greater efficiency, due to the fortuity of whether goods had previously completed a trip across state or international borders. Moreover, in every case, the proposed approach would require fact-specific inquiries into both the

origin and "flow" of locally-transported goods—undermining the very simplicity, informality, and speed of arbitration to which the parties agreed and that the FAA is designed to protect. And the increased costs of litigating both the merits in court and the applicability of the Section 1 exemption would inevitably be passed on in the form of higher prices for consumers and lower earnings for workers.

The Superior Court's order should be reversed.

ARGUMENT

I. SECTION 1'S EXEMPTION DOES NOT ENCOMPASS LOCAL DELIVERY DRIVERS

A. Section 1's Residual Clause Applies Only To "Class[es] Of Workers" Who Actually And Regularly Engage In Transportation Across State Or National Borders As A Central Part Of Their Job

The FAA's principal substantive provision, Section 2, provides that an arbitration agreement in "a contract evidencing a transaction involving commerce … shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2 (emphasis added). The Supreme Court of the United States has instructed that "involving commerce" must be read "expansively" to reach all arbitration agreements within Congress's commerce power. *Allied-Bruce*, 513 U.S. at 274.

Section 1 creates a limited exception to Section 2's broad coverage, providing that the FAA's protections for arbitration agreements do not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged

in foreign or interstate commerce." 9 U.S.C. § 1. In contrast to the expansive reach of Section 2, the Section 1 exemption requires a "narrow construction" and "precise reading." *Circuit City*, 532 U.S. at 118-119.

When the FAA was enacted, to be "engaged" in an activity meant to be "occupied" or "employed" at it. *Webster's New International Dictionary* (1st ed. 1909); *see also Webster's Collegiate Dictionary* (3d ed. 1919) (same); *The Desk Standard Dictionary of the English Language* 276 (new ed. 1922) (defining "engage" as "[t]o bind or obtain by promise"). Congress's use of the word "engaged" therefore focuses the inquiry on the particular activities that the "class of workers" is tasked with performing.

The Supreme Court's decisions inform the proper "narrow" and "precise reading" of Section 1's residual clause. The Supreme Court has instructed that the clause also should be read narrowly because of "the maxim *ejusdem generis*, the statutory canon that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City*, 532 U.S. at 114-115 (quotation marks omitted); *cf. Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1625 (2018) ("[W]here, as here, a more general term follows more specific terms in a list, the general term is usually understood to 'embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" (quoting

Circuit City, 532 U.S. at 115)); *Banushi v. Dorfman*, 438 Mass. 242, 244 (2002) ("The doctrine [of *ejusdem generis*] is most appropriate when a series of several terms is listed that concludes with the disputed language.").

Here, the phrase "any other class of workers engaged in foreign or interstate commerce" is the third entry in a list, following the enumerated terms "seamen" and "railroad employees." 9 U.S.C. § 1. As the Supreme Court explained in *Circuit City*, the residual clause "should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it." 532 U.S. at 115. In other words, the residual clause must be construed narrowly to reach only "class[es] of workers" that are similar—regarding their engagement in foreign or interstate commerce—to the enumerated classes of "seamen" and "railroad employees." *Cf. Banushi*, 438 Mass. at 244.

As a result, Section 1's exclusion encompasses only "class[es] of workers" regularly engaged in actual transportation across state or national borders. As the Seventh Circuit held, engaging in foreign or interstate commerce requires "workers [to] be connected not simply to the goods but to the *act of moving those goods* across state or national borders." *Wallace*, 970 F.3d at 802 (emphasis added). Because the residual clause refers specifically to a "class of workers," "we know that in determining whether the exemption applies, the question is 'not whether the

individual worker actually engaged in interstate commerce, but whether the class of workers to which the complaining worker belonged engaged in interstate commerce.'" *Id.* at 800 (quoting *Bacashihua v. U.S. Postal Serv.*, 859 F.2d 402, 405 (6th Cir. 1988)). Accordingly, the analytical focus is on the work performed by the *class* of workers to which a worker belongs—here, local delivery drivers—not the details of one worker's specific tasks.

Moreover, the occasional crossing of state or national lines is insufficient to trigger Section 1's exemption. Rather, transportation across state or national borders must be a "central part" of the work performed by the "class of workers." *Wallace*, 970 F.3d at 801; *see also Hamrick v. Partsfleet, LLC*, 1 F.4th 1337, 1346 (11th Cir. 2021) (requiring "the class of workers [to], in the main, 'actually engage' in the transportation of goods in interstate commerce" for the residual clause to apply). Occasional or incidental border crossing does not qualify. That follows from what it means to be "engaged in foreign or interstate commerce" in a similar fashion to "seamen" and "railroad employees," 9 U.S.C. § 1, "whose occupations are centered on the transport of goods in interstate or foreign commerce," *Wallace*, 970 F.3d at 802. Consequently, in evaluating the application of Section 1's residual clause, a court must "consider whether the interstate movement of goods is a central part of the class members' job description." *Id.* at 801; *see also Eastus v. ISS Facility Servs., Inc.*, 960 F.3d 207, 210 (5th Cir. 2020) (workers must "engage[] in the movement of

goods in interstate commerce in the same way that seamen and railroad workers are" (quotation marks omitted)).

Finally, workers' connection to goods moving in interstate commerce does not, on its own, trigger Section 1's exemption: The workers must also be connected "to the act of *moving* those goods across state or national borders." *Wallace*, 970 F.3d at 802 (emphasis added). Simply moving goods that were *previously* moved across such borders is insufficient. This interpretation is "more faithful to the text because, like section one, [it] focus[es] on what a class of worker must be engaged in doing and not the goods." *Hamrick*, 1 F.4th at 1349. Focusing on the interstate travel of the goods, by contrast, "would run afoul of the [Supreme] Court's instruction that the scope of the residual clause 'be controlled and defined' by the work done by seamen and railroad workers." *Wallace*, 970 F.3d at 802 (quoting *Circuit City*, 532 U.S. at 106).

B. The Local Delivery Driver Plaintiffs Do Not Belong To A "Class Of Workers Engaged" In Interstate Transportation of Goods

1. Plaintiffs Do Not Belong To A Class Of Workers That Actually Transports Goods Across State Lines, Much Less As A Central Part Of Their Job

Plaintiffs do not belong to a class of workers "engaged in interstate commerce" because they are nothing like the railroad workers or seamen that inform the scope of Section 1's residual clause. They do not engage in actual transportation across state or national borders as a central part of their job description. Indeed, they

do not allege that any part of their job requires them to cross state or national borders at all. Rather, their primary duties involve picking up, transporting, and delivering takeout restaurant meals and other goods from local merchants to local customers in the same state.

In *Wallace*, the Seventh Circuit reached the same conclusion with respect to the same category of workers, holding that local delivery drivers performing work for Grubhub do not fall within Section 1's residual clause. 970 F.3d at 803. The court held that including these workers, who make exclusively intrastate deliveries, in Section 1's exception "would sweep in numerous categories of workers whose occupations have nothing to do with interstate transport—for example, 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." *Id.* at 802. The Eleventh Circuit has also "reject[ed] the … view that the transportation worker exemption is met by performing intrastate trips transporting items which had been previously transported interstate." *Hamrick*, 1 F.4th at 1349 (quotation marks omitted). Noting that "in the text of the exemption, 'engaged in foreign or interstate commerce' modifies 'workers' and not 'goods,'" the Eleventh Circuit concluded that Section 1's residual clause "requir[es] that the class of workers actually engages in the transportation of persons or property between points in one state (or country) and points in another state (or country)." *Id.* at 1350.

The First and Ninth Circuits have applied this framework to reach the same conclusion with respect to rideshare drivers, such as those who use the Uber and Lyft platforms to offer rides, holding that they do not fall within the Section 1 exemption because they overwhelmingly provide local, intrastate rides. *See Cunningham v. Lyft, Inc.*, 17 F.4th 244, 252-253 (1st Cir. 2021); *Capriole v. Uber Techs., Inc.*, 7 F.4th 854, 865-866 (9th Cir. 2021). The First Circuit held that it "cannot even arguably be said" that rideshare drivers and other local workers are a class of "workers primarily devoted to the movement of goods and people beyond state boundaries." *Cunningham*, 17 F.4th at 253. Or, as the Ninth Circuit similarly put it, such local workers, even if they occasionally cross state lines, stand in stark "contrast" to "seamen and railroad workers," for whom "the interstate movement of goods and passengers over long distances and across national or state lines is an indelible and 'central part of the job description.'" *Capriole*, 7 F.4th at 865 (quoting *Wallace*, 970 F.3d at 803).

2. Delivery Of Goods That Previously Traveled Interstate Does Not Mean That Local Delivery Drivers Are Engaged In Interstate Commerce

That the drivers also make *intrastate* deliveries of items that *previously* traveled in interstate commerce does not transform a "central part" of the workers' job description into transportation across state or national borders. *Wallace*, 970 F.3d at 801. That is so not only because *the drivers themselves* are not "engaged" in

the goods' transportation across state or national borders, but also because the goods' interstate journey *already ended* when they arrived at the restaurant, deli, convenience store, or drug store from which the local delivery driver picked them up. Any further journey occasioned by a Grubhub customer and fulfilled by a Grubhub driver does not return the goods to the flow of interstate commerce; rather, it is a purely *intrastate* errand.

As the Supreme Court recognized, once "merchandise coming from without the state was unloaded at [the importer's] place of business[,] its 'interstate movement had ended.'" *Higgins v. Carr Bros. Co.*, 317 U.S. 572, 574 (1943); *see also Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568 (1943) (goods cease moving in interstate commerce once "they reach the customers for whom they are intended"). After that point, any subsequent "distribution … to customers [within the state], *is all intrastate commerce*," because the foreign seller no longer "has anything to do with determining what the ultimate destination of the [product] is." *Atlantic Coast Line R. Co. v. Standard Oil Co. of Ky.*, 275 U.S. 257, 267, 268-269 (1927) (emphasis added); *accord Jewel Tea Co. v. Williams*, 118 F.2d 202, 207 (10th Cir. 1941) ("Where goods are ordered and shipped in interstate commerce to meet the anticipated demands of customers *without a specific order therefor* from the customer and the goods come to rest in a warehouse, the interstate commerce ceases when the goods come to rest in the state." (emphasis added)).

Courts have reached the same conclusion with respect to local rideshare and delivery drivers, holding that their intrastate trips do not "form part of a single, unbroken stream of interstate commerce that renders interstate travel a 'central part' of a rideshare driver's job description," even where their passengers' ultimate origin or destination may be out of state. *Capriole*, 7 F.4th at 866. Local delivery drivers are "unaffiliated, independent participants" on an intrastate leg of the goods' journey from producer to consumer, "rather than an integral part of a single, unbroken stream of interstate commerce." *Id.* at 867; *see also Cunningham*, 17 F.4th at 250 (reasoning that, even when taking a passenger to or from an airport, a "Lyft driver contracts with the passenger *as part of the driver's normal local service* to take the passenger to the start (or from the finish) of the passenger's interstate journey" (emphasis added)). The service for which Grubhub and its customers hire these delivery drivers—the intrastate delivery of goods so that the customer can avoid having to walk or drive to the restaurant or store where they are for sale—does not return the delivered items to interstate commerce. *Walling*, 317 U.S. at 568.

Plaintiffs offer a series of cases for the proposition that workers whose jobs occur wholly within one state can nevertheless be engaged in the interstate movement of goods, *see* Red Br. 27-29, but even assuming the correctness of those decisions, *none* involves a situation where the goods had already reached the intended destination of the interstate shipper and were then moved again within the

same state by a worker for a *wholly separate* company. Rather, in each one, the plaintiff was an employee of the original interstate shipper, directly involved with the transportation of goods on one uninterrupted journey. *See Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 916 (9th Cir. 2020) (intrastate driver on last leg of interstate journey was engaged in interstate commerce because "[t]he interstate transactions between Amazon and the customer do not conclude until the packages reach their intended destinations"); *Nieto v. Fresno Beverage Co.*, 33 Cal. App. 5th 274, 284 (2019) (intrastate liquor delivery driver delivering goods from his employer's warehouse to his employer's customers was "the last phase of a continuous journey of … interstate commerce"); *Bacashihua*, 859 F.2d at 405 (postal workers); *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 593-594 (3d Cir. 2004) (supervisor of drivers delivering packages arriving from other states); *Muller v. Roy Miller Freight Lines, LLC*, 34 Cal. App. 5th 1056, 1065-1069 (2019) (truck driver employed by national shipper, carrying goods of which "over 99 percent" originated out of state); *Christie v. Loomis Armored US, Inc.*, No. 10-CV-02011-WJM-KMT, 2011 WL 6152979, at *3 (D. Colo. Dec. 9, 2011) (delivery driver for employer that "identifie[d] itself as engaged in the business of interstate transport of currency"); *Ward v. Express Messenger Sys., Inc.*, 413 F. Supp. 3d 1079, 1086 (D. Colo. 2019) (intrastate delivery driver for employer that transported packages among eight states). None of those cases is remotely like this one, where Plaintiffs' work

involves simply driving goods from a local store or restaurant that Grubhub's customers would otherwise acquire by visiting those businesses themselves.

3. Plaintiffs Fall Within The Scope Of Section 2's Substantive Arbitration Protections Even Though They Are Not Covered By Section 1's Residual Clause

Plaintiffs claim in the alternative that, if they do not fall within the scope of Section 1's residual clause, they are wholly outside the reach of the FAA. *See* Red Br. 35-36. That claim is startlingly wrong, as this Court has recognized. *See Global Cos., LLC v. Commissioner of Revenue*, 459 Mass. 492, 496-497 (2011). The Supreme Court clearly instructed in *Circuit City* that Section 2's use of "affecting commerce" "indicates Congress' intent to regulate to the outer limits of its authority under the Commerce Clause," 532 U.S. at 115, unlike Section 1's use of "engaged in interstate commerce," which must "be afforded a narrow construction," *id.* at 118. If the two phrases had the same meaning, as Plaintiffs suggest, Section 1's residual clause "would exclude all employment contracts from the FAA," precisely the interpretation *Circuit City* rejected. *Id.* at 119.

II. THE SUPERIOR COURT'S REASONING IS INCONSISTENT WITH EVERY OTHER RELEVANT AUTHORITY, AND NO OTHER COURT HAS ADOPTED IT

Other than the Superior Court in this case, every court to have considered whether Section 1's residual clause covers local delivery drivers—or even a similar question—has reached the opposite conclusion, including both federal circuits to have considered this issue. *See Wallace*, 970 F.3d at 801; *Hamrick*, 1 F.4th at 1351.

No other state court has adopted the Superior Court's view. Massachusetts should not become an outlier on this issue, particularly where the Supreme Court of the United States has provided clear guidance on the FAA's proper interpretation.[2]

A. The First Circuit's Most Relevant Cases Do Not Support The Superior Court's Decision

The First Circuit has decided two cases addressing the scope of Section 1's residual clause. Its decision in *Cunningham v. Lyft, Inc.*, 17 F.4th 244, 251 (1st Cir. 2021), confirms the Superior Court's error. In that case, the First Circuit rejected a claim that Lyft drivers were covered by the residual clause either because some of their rides went to or from Logan Airport or because their trips occasionally crossed state lines.

In rejecting the first theory, the First Circuit relied on the Supreme Court's holding that "when local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service, that service is not an integral part of interstate transportation." *Cunningham*, 17 F.4th at 250 (quoting *United States v. Yellow Cab Co.*, 332 U.S. 218, 233 (1947)). "To the taxicab driver, it is just another local fare." *Yellow Cab*, 332 U.S. at 232.

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[2] The Supreme Court heard oral argument in *Southwest Airlines Co. v. Saxon*, No. 21-309 (U.S.), on March 28, 2022, and is likely to decide the case later this year. *Saxon* presents the question whether workers who load or unload goods from vehicles that travel in interstate commerce, but do not physically transport such goods themselves—in that case, airline workers who load and unload cargo from airplanes—are covered by Section 1's residual clause.

Because the Lyft drivers did not "contract with the airlines to help the airlines perform" ground transportation, the court reasoned that "[d]rawing a line between the interstate transportation provided by the airlines and the local intrastate transportation provided by Lyft drivers makes sense when defining the nature of activity in which plaintiffs are engaged." *Cunningham*, 17 F.4th at 251. In rejecting the second theory, the First Circuit reasoned that Section 1's structure requires comparing a class of workers to "seamen" and "railroad employees," "two classes of transportation workers primarily devoted to the movement of goods and people beyond state boundaries." *Id.* at 253. It concluded that "[t]he same cannot even arguably be said of Lyft drivers … a class of workers engaged primarily in local intrastate transportation." *Id.*

In this case, there is no allegation that Plaintiffs or similar local delivery drivers performing work for Grubhub *ever* crossed state lines, and their relationship to interstate transportation is as remote as that of the Lyft drivers in *Cunningham*. As with the passengers of the *Cunningham* drivers, there is a clear dividing line between the interstate journey of the goods Plaintiffs might deliver, which ends before they pick the goods up, and the goods' later *intrastate* travel. As in *Cunningham*, that later trip is entirely independent of any prior interstate travel and does not occur by "agreement[] between" Grubhub and any interstate shipper. 17 F.4th at 251.

The First Circuit's decision in *Waithaka v. Amazon.com, Inc.*, is not to the contrary. There, the court held that "last-mile delivery workers who haul goods on the final legs of interstate journeys are transportation workers 'engaged in … interstate commerce,' regardless of whether the workers themselves physically cross state lines." 966 F.3d 10, 26 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 2794 (2021), *reh'g denied*, 141 S. Ct. 2886 (2021). Recognizing "the importance of *the workers' own connection* to interstate commerce," *Waithaka*, 966 F.3d at 23, the Court swept Amazon last-mile delivery drivers into the residual clause "even if the workers were responsible only for an intrastate leg of [an] interstate journey," *id.* at 22. Although *Waithaka* departed from *Circuit City*'s instruction that "the FAA's purpose of overcoming judicial hostility to arbitration further compel[s] that the § 1 exclusion be afforded a narrow construction," 532 U.S. at 106, neither its logic nor its facts supports the Superior Court's order. As discussed above, the interstate journey of any goods delivered by Plaintiffs had ended, and Plaintiffs, as a class of workers, had no connection, contractual or otherwise, to the goods' prior interstate transportation. The goods had already reached the intended destination of their interstate journey—the shelves of the businesses from which Plaintiffs pick up the goods. Any subsequent *entirely intrastate* journey did not return the goods to interstate commerce, particularly where even Grubhub—the company for which Plaintiffs were performing work—also had *absolutely no connection* to the goods'

interstate travel, unlike in *Waithaka*, where Amazon was responsible for the entire journey.

B. Decisions Of The Federal District Court In Massachusetts Have Also Rejected The Superior Court's Reasoning

Two decisions of the U.S. District Court for the District of Massachusetts have also rejected the specific arguments Plaintiffs advance in this case.[3] One rejected the contention that goods "sourced from out-of-state manufacturers … remain in the flow of interstate commerce while [local] drivers cart them from the local store to the local customer." *Immediato v. Postmates, Inc.*, Civ. No. 20-12308-RGS, 2021 WL 828381, at *2 (D. Mass. Mar. 4, 2021) (Stearns, J.). The federal district court specifically discussed the Superior Court's decision in this case, holding that it "largely ignore[d] the Supreme Court's 'admonition that § 1 as a whole must be afforded a narrow construction.'" *Id.* (quoting *Wallace*, 970 F.3d at 802). Another federal district judge recognized that cases on which another local driver sought to rely "share a unifying theme that weighs against [the driver] here: in each case the

[3] Other federal district courts have done the same. *See, e.g.*, *Ross v. Subcontracting Concepts, LLC*, Civil Case No. 20-12994, 2021 WL 6072593, at *8 (E.D. Mich. Dec. 23, 2021); *Young v. Shipt, Inc.*, No. 1:20-cv-05858, 2021 WL 4439398, at *4 (N.D. Ill. Sept. 27, 2021); *O'Shea v. Maplebear Inc.*, 508 F. Supp. 3d 279, 289 (N.D. Ill. 2020); *Lee v. Postmates Inc.*, No. 18-cv-03421-JCS, 2018 WL 6605659, at *5-7 (N.D. Cal. Dec. 17, 2018); *Magana v. DoorDash, Inc.*, 343 F. Supp. 3d 891, 899-900 (N.D. Cal. 2018); *Vargas v. Delivery Outsourcing, LLC*, No. 15-cv-03408-JST, 2016 WL 946112, at *3-5 (N.D. Cal. Mar. 14, 2016); *Levin v. Caviar, Inc.*, 146 F. Supp. 3d 1146, 1152-1155 (N.D. Cal. 2015).

manufacturer of the good that travels in interstate commerce ultimately intended to see the good through to the final destination at issue." *Austin v. DoorDash, Inc.*, Civ. No. 17-cv-12498-IT, 2019 WL 4804781, at *4 (D. Mass. Sept. 30, 2019) (Talwani, J.). The court noted that there was "no allegation of a commercial connection between any interstate food distributor and the customers that receive prepared meals via [the driver's] delivery." *Id.* Both cases correctly construed Section 1's residual clause, unlike the Superior Court.

III. UNLESS REVERSED, THE SUPERIOR COURT'S MISREADING OF SECTION 1'S RESIDUAL CLAUSE WILL HARM MASSACHUSETTS BUSINESSES AND WORKERS

The failure to give Section 1 a proper, narrow construction carries significant practical consequences. The Superior Court's reading, if accepted, would create uncertainty for many businesses and workers, threatening to prevent them from obtaining the benefits of arbitration secured by the FAA. Indeed, the Supreme Court has repeatedly recognized the "real benefits" of "enforcement of arbitration provisions," *Circuit City*, 532 U.S. at 122-123, including "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes," *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010)); *accord Allied-Bruce*, 513 U.S. at 280 (one of the "advantages" of arbitration is that it is "cheaper and faster than litigation" (quotation marks omitted)); *14 Penn Plaza*

LLC v. Pyett, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."). This Court has likewise recognized that arbitration is "an expeditious and efficient means for resolving disputes." *Massachusetts Highway Dep't v. Perini Corp.*, 444 Mass. 366, 374 (2005) (citing *Home Gas Corp. of Mass. v. Walter's of Hadley, Inc.*, 403 Mass. 772, 774 (1989)).

These advantages extend to agreements between businesses and workers. The Supreme Court has been "clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." *Circuit City*, 532 U.S. at 123. To the contrary, the Supreme Court has emphasized that the lower costs of arbitration compared to litigation "may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Id.*

Empirical research confirms these conclusions. Scholars and researchers agree, for example, that the average employment dispute is resolved up to twice as quickly in arbitration as in court. Nam D. Pham, Ph.D. & Mary Donovan, *Fairer, Better, Faster III: An Empirical Assessment of Consumer and Employment Arbitration*, NDP Analytics 4, 15-16 (2022) (reporting that average resolution for

arbitration was approximately 50 days faster than litigation);[4] *see also, e.g.*, Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 55 (1998) (average resolution time for employment arbitration was 8.6 months—approximately half the average resolution time in court); David Sherwyn, Samuel Estreicher, & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1573 (2005) (collecting studies and concluding the same).

Further, "there is no evidence that plaintiffs fare significantly better in litigation." Sherwyn, 57 Stan. L. Rev. at 1578. A 2022 study released by the Chamber's Institute for Legal Reform found that employees were more than *three times* more likely to win in arbitration than in court. Pham, *supra*, at 4-12 (surveying more than 25,000 employment arbitration cases and 160,000 employment litigation cases resolved between 2014 to 2021). The same study found that the median employee who prevailed in arbitration won more than double the monetary award received by the median employee who won in court. *Id.* at 4, 14; *see also* Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. Disp. Resol. 1, 16 (2017) (arbitration is "favorable to employees as compared with court litigation").

[4] Available at https://instituteforlegalreform.com/wp-content/uploads/2022/03/FINAL-ndp-Consumer-and-Employment-Arbitration-Paper-2022.pdf.

Earlier scholarship likewise reported a higher employee-win rate in arbitration than in court. *See* Sherwyn, 57 Stan. L. Rev. at 1568-1569 (observing that, once dispositive motions are taken into account, the actual employee-win rate in court is "only 12% [to] 15%"); Maltby, 30 Colum. Hum. Rts. L. Rev. at 47 (of dispositive motions granted in court, 98% are granted for the employer); National Workrights Inst., *Employment Arbitration: What Does the Data Show?* (2004), *available at* goo.gl/nAqVXe (concluding that employees were 19% more likely to win in arbitration than in court).

Thus, "there is no evidence that plaintiffs fare significantly better in litigation [than in arbitration]." St. Antoine, 32 Ohio St. J. Disp. Resol. at 16 (quotation marks omitted; alterations in original). Rather, arbitration is generally "favorable to employees as compared with court litigation." *Id.*; *see also* Maltby, 30 Colum. Hum. Rts. L. Rev. at 46.

On the other side of the equation, sweeping an unknown number of local workers into Section 1's exemption would impose real costs on businesses. Not only is litigation more expensive for businesses than arbitration, but the uncertainty stemming from Plaintiffs' atextual and ahistorical approach would engender expensive disputes over the enforceability of arbitration agreements with workers never before considered to be "engaged in interstate commerce"—contrary to the Supreme Court's admonition that Section 1 should not interpreted in a manner that

introduces "considerable complexity and uncertainty" while "in the process undermining the FAA's proarbitration purposes and 'breeding litigation from a statute that seeks to avoid it.'" *Circuit City*, 532 U.S. at 123 (quoting *Allied-Bruce*, 513 U.S. at 275). And those increased litigation costs would not be borne by businesses alone. Businesses would, in turn, pass those litigation expenses on to consumers and workers in the form of higher prices and lower compensation.

The Superior Court's ruling is accordingly not only wrong as a matter of law, but also misguided as a matter of policy. This Court should ensure that Massachusetts courts apply the FAA correctly.

CONCLUSION

The Court should reverse the Superior Court's order.

Respectfully submitted,

/s/ Mark C. Fleming

MARK C. FLEMING (BBO # 639358)
CHARLES C. KELSH (BBO # 703558)
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Mark.Fleming@wilmerhale.com
Chaz.Kelsh@wilmerhale.com

Attorneys for Amicus Curiae

JENNIFER B. DICKEY
JONATHAN D. URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5337

Of Counsel

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MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16(K) CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure Rules 16(a)(13) (addendum), 16(e) (references to the record), Rule 20, and Rule 21, that pertain to the filing of briefs.

1. Exclusive of the exempted portions of the brief, as provided in Mass. R. App. P. 20(a)(2)(D), the brief contains 5,657 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word, version 1808, build 10730.20205 in 14 point Times New Roman font. The undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Mark C. Fleming

MARK C. FLEMING (BBO # 639358)
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Mark.Fleming@wilmerhale.com

April 11, 2022

CERTIFICATE OF SERVICE

I, Mark C. Fleming, hereby certify, under the penalties of perjury that on April 11, 2022, I caused a true and accurate copy of the foregoing to be filed via the Massachusetts Odyssey File & Serve site and served two copies upon the following counsel by electronic and overnight mail:

DANIEL S. FIELD (BBO #560096)
ALEXANDRA L. PICHETTE (BBO #697415)
CATHERINE M. SCOTT (BBO #691867)
MORGAN, BROWN & JOY, LLP
200 State Street, 11th Floor
Boston, MA 02109
(617) 523-6666
dfield@morganbrown.com
apichette@morganbrown.com
cscott@morganbrown.com

ERIC R. LEBLANC (BBO# 666786)
MICHAELA C. MAY (BBO# 676834)
BENNETT & BELFORT, P.C.
24 Thorndike Street, Suite 300
Cambridge, MA 02141
(617) 577-8800
eleblanc@bennettandbelfort.com
mmay@bennettandbelfort.com

/s/ Mark C. Fleming
MARK C. FLEMING (BBO # 639358)
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Mark.Fleming@wilmerhale.com