Nos. 20-1373, 20-1379, 20-1544, 20-1549, 20-1567

In the United States Court of Appeals
for the First Circuit

Nos. 20-1373, 20-1379

MELODY CUNNINGHAM, individually and on behalf of all others similarly situated; FRUNWI MANCHO, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees/Cross-Appellants,

MARTIN EL KOUSSA, individually and on behalf of all others similarly situated; VLADIMIR LEONIDAS, individually and on behalf of all others similarly situated,

Plaintiffs,

– v. –

LYFT, INC.; LOGAN GREEN; JOHN ZIMMER,

Defendants-Appellants/Cross-Appellees.

Nos. 20-1544, 20-1549, 20-1567

MELODY CUNNINGHAM, individually and on behalf of all others similarly situated; FRUNWI MANCHO, individually and on behalf of all others similarly situated; MARTIN EL KOUSSA, individually and on behalf of all others similarly situated; VLADIMIR LEONIDAS, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees/Cross-Appellants,

– v. –

LYFT, INC.; LOGAN GREEN; JOHN ZIMMER,

Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court for the District of Massachusetts, No. 19-cv-11974 (Hon. Indira Talwani)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit 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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes and Rules

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF THE *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. One of the Chamber's responsibilities 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 (the "Act"), 9 U.S.C. §§ 1-16.

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, inexpen-

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[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5). All parties consented to the filing of this brief.

sive, and less adversarial than litigation in court. Based on the policy reflected in the Federal Arbitration Act, 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 rideshare and other local transportation services.

The Chamber therefore has a significant interest in the proper interpretation of the Act and in reversal of the decision below. The district court's decision holding that Section 1 of the Act exempts from that statute's coverage the arbitration agreements of four rideshare drivers in Massachusetts cannot be squared with the text and structure of the Act or the growing consensus among courts that rideshare drivers do not fall within the narrow Section 1 exemption. And the district court's atextual and plaintiff-specific approach, if adopted, threatens to create substantial uncertainty and deprive numerous businesses and workers of the benefits of the national policy favoring arbitration.

The Chamber also has a strong interest in the jurisdictional question presented in this appeal. After the defendants here (collectively, "Lyft") filed a notice of appeal from the order denying their motion to compel arbi-

tration, the district court ruled on a preliminary-injunction motion filed by the plaintiffs. That should not have happened, because, as the majority of circuits have concluded, the filing of a notice of appeal from an order denying a motion to compel arbitration divests the district court of jurisdiction to proceed on the merits. The minority rule, by contrast, threatens to subject defendants, including the Chamber's members and affiliates, to the very burdens and expenses of litigation that they contracted to avoid.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For nearly a century, the Federal Arbitration Act has reflected Congress's strong commitment to arbitration. Congress enacted the Act in 1925 to "reverse 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 Act 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 Act'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 exemption from the Act's reach in Section 1, by contrast, requires a "precise reading." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118, 119 (2001). Section 1 excludes "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). As the Supreme Court recently explained in interpreting the phrase "contracts of employment," courts must interpret the language of Section 1 based on the "ordinary meaning" of the words "at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (alterations and quotation marks omitted).

Here, the district court held that four rideshare drivers using Lyft's platform in Massachusetts were "engaged in * * * interstate commerce" within the meaning of Section 1 and therefore exempt from the Act. That holding represents a lone and unjustified departure from a growing con-

sensus among courts that rideshare drivers, as a class, are not engaged in interstate commerce within the narrow meaning of Section 1. *See* Lyft Br. 40-42 & n.18 (collecting cases). The district court committed at least three fundamental errors in its Section 1 analysis.

First, the district court looked only at the named plaintiffs rather than considering the activities of the relevant "class of workers" as a whole. That plaintiff-specific focus defies the plain language of Section 1, which asks "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." *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 800 (7th Cir. 2020) (quotation marks omitted; emphasis in original); *accord Rogers v. Lyft, Inc.*, 452 F. Supp. 3d 904, 915 (N.D. Cal. 2020). The relevant "other class of workers" for purposes of Section 1 must be defined in general occupational terms—like the preceding terms "seamen" and "railroad employees" (9 U.S.C. § 1)—not restricted to the allegations in a particular case.

Second, the district court relied on the fact that the plaintiffs sometimes drive passengers to or from Logan Airport. But binding Supreme Court precedent, both before and after the enactment of the Federal Arbi-

tration Act in 1925, dictates that, during this independent local transportation, the passengers are not "within the flow of interstate commerce." *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 13 (1st Cir. 2020). In denying a petition for mandamus, the Ninth Circuit recently recognized this exact distinction in a case involving Uber, noting that giving local rides to and from airports is "'not an integral part of interstate transportation.'" *In re Grice*, --- F.3d ----, 2020 WL 5268941, at *4 (9th Cir. Sept. 4, 2020) (quoting *United States v. Yellow Cab*, 332 U.S. 218, 233 (1947), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984)).[2] If the mere fact that a person or good has independently traveled across state lines were enough to satisfy the Section 1 exemption, that "would allow the exception to swallow the rule." *In re Grice*, 2020 WL 5268941, at *5. It's also telling that although local passenger transportation jobs ex-

[2] For all of the reasons set forth in its brief in *Waithaka*, the Chamber believes that the "flow of commerce" approach to the Section 1 inquiry is incorrect. Instead, the original meaning and context of the phrase "other class of workers engaged in * * * interstate commerce" at the time of the Federal Arbitration Act's enactment in 1925 refers to a group of workers whose work centrally involves the actual movement of goods across state or national borders. *See Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 925-28 (9th Cir. 2020) (Bress, J., dissenting). But that disagreement is immaterial here, because, as *Yellow Cab* makes clear, giving occasional rides to and from airports does not qualify as being "engaged in * * * interstate commerce" even under the flow of commerce theory. *See In re Grice*, 2020 WL 5268941, at *4.

isted in 1925, no contemporaneous sources suggest that those local workers were engaged in interstate commerce or intended to be excluded from the Act's reach.

Third, the Supreme Court in *Circuit City* indicated that the Section 1 exemption is limited to "transportation workers * * * actually engaged in the movement *of goods* in interstate commerce." 532 U.S. at 112 (emphasis added; quotation marks omitted). That follows from application of the *ejusdem generis* canon, which dictates that the phrase "other class of workers" must be interpreted consistently with the preceding terms "seamen" and "railroad employees." Both railroad and maritime workers as a class are, and at the time of the Act's enactment were, engaged in the movement of goods across state lines. Rideshare drivers, by contrast, ordinarily transport *passengers* across short distances. A number of courts have therefore correctly held that rideshare drivers are not "engaged in foreign or interstate commerce" for this additional and independent reason.

The district court's interpretation, if permitted to stand, would significantly increase litigation costs and generate disputes over the Act's application to a potentially broad array of quintessentially local workers. In

every case, the district court's approach would require plaintiff-specific inquiries and thereby cause application of the Federal Arbitration Act to vary case by case and worker by worker—undermining the national application of that federal statute and the very simplicity, informality, and expedition of arbitration to which the parties agreed and that the Act is designed to protect. And the increased costs of litigating both the merits in court and the applicability of the Section 1 exemption would be passed on in the form of decreased payments to employees and independent contractors or increased costs to consumers.

Finally, the district court independently erred in another important respect by ruling on the plaintiffs' preliminary injunction motion after Lyft appealed from the denial of its motion to compel arbitration. The majority of circuits have held that an appeal under Section 16(a) of the Federal Arbitration Act divests the district court of jurisdiction to undertake further proceedings on the merits. That approach is the correct one, because allowing district court proceedings to continue during an appeal largely defeats the point of the immediate appeal authorized by Congress and threatens to deprive businesses and other defendants of the expediency

and lower cost of arbitration to which they agreed and that the Act is designed to protect.

ARGUMENT

I. The Federal Arbitration Act's Section 1 Exemption Does Not Encompass Rideshare Drivers.

A. The Phrase "Other Class Of Workers Engaged In * * * Interstate Commerce" Requires Examining The Activities Of The Group Of Workers, Not The Individual Named Plaintiffs Or A Geographic Subset Of That Group.

It is a "fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary, contemporary, common meaning * * * at the time Congress enacted the statute." *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (internal quotation marks omitted); *accord New Prime*, 139 S. Ct. at 539. "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law." *Wisconsin Cent.*, 138 S. Ct. at 2074; *see also New Prime*, 139 S. Ct. at 539 (recognizing the "reliance interests in the settled meaning of a statute").

Here, the district court erred at the outset by focusing on the activities of the named plaintiffs, rather than the activities of the "*class* of *work-*

ers" (9 U.S.C. § 1 (emphasis added))—*i.e.*, rideshare drivers in the United States. Because the text of Section 1 is clear on this point, it is no surprise that numerous other courts have rejected the district court's plaintiff-specific approach. Section 1 asks "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." *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 800 (7th Cir. 2020) (quotation marks omitted; emphasis in original); *accord Singh v. Uber Techs., Inc.*, 939 F.3d 210, 227 (3d Cir. 2019); *Rogers v. Lyft, Inc.*, 452 F. Supp. 3d 904, 915 (N.D. Cal. 2020).

Moreover, the "other class of workers" must be defined in general occupational terms, not defined by reference to the allegations in a particular case or the class that the plaintiff seeks to represent.

That conclusion follows from Section 1's text and structure. The Supreme Court in *Circuit City* explained at length that the residual category of "other class of workers engaged in * * * commerce" must be "controlled and defined by reference to the enumerated categories of workers which are recited just before it"—namely, "seamen" and "railroad employees." 532 U.S. at 115; *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).

"Seamen" and "railroad employees" are general job categories, not narrow categories of workers limited to the allegations in a particular case or a particular geographic area. The residual phrase "other class of workers" must therefore be interpreted in the same way. After all, Congress would never enact a statute that read, for example: "seamen, railroad employees, truck drivers, and Massachusetts rideshare drivers."

Honoring that principle, the Ninth Circuit recently looked at "rideshare drivers, as a class." *In re Grice*, 2020 WL 5268941, at *3. Other courts have done the same. *See Rogers*, 452 F. Supp. 3d at 915-16 (looking at the "overall class" of drivers using the Lyft platform rather than California drivers); *Wallace v. Grubhub Holdings Inc.*, 2019 WL 1399986, at *4 (N.D. Ill. Mar. 28, 2019) (concluding that "Grubhub drivers" as a group "do not belong to a class of workers engaged in interstate commerce"), *aff'd*, 970 F.3d 798. This Court in *Waithaka* similarly looked at the "class" of

"AmFlex workers" as a whole rather than just the named plaintiff or the putative class he sought to represent. 966 F.3d at 17, 18, 22.

A case-specific and localized approach, by contrast, would yield absurd results. If the relevant "class of workers" is defined by reference to the plaintiff in a particular case or where he or she works, then the applicability of the Federal Arbitration Act—a statute which embodies a "*national* policy favoring arbitration" (*Concepcion*, 563 U.S. at 346 (emphasis added))—instead would vary from case to case, worker to worker, state to state, or city to city. For instance, a rideshare driver in Honolulu or Los Angeles—who is highly unlikely to cross a state line—would be subject to the Act, while a driver in Washington, D.C. or Kansas City providing the same kind of local passenger transportation might not. In other words, application of Section 1 would turn on "happenstance of geography," even though where a particular rideshare driver or subset of drivers happens to work does "not alter the intrastate transportation function performed by the class of workers" as a whole. *Rogers*, 452 F. Supp. 3d at 916 (citing *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1290 (11th Cir. 2005) (Section 1 does not apply to "incidental" interstate movement)).

B. Occasional Local Trips To And From Airports Or Train Stations Do Not Mean That The Relevant "Class Of Workers" Is "Engaged In * * * Interstate Commerce" For Purposes Of Section 1.

The district court's rationale that giving rides to or from Logan Airport is enough to trigger the Section 1 exemption is contradicted by Supreme Court precedent and has been rejected by numerous other courts.

1. Even under the much broader reach of the Sherman Act, the Supreme Court has held that when local taxi cabs transport passengers between their homes and a railroad station "in the normal course of their independent local service, that service is not an integral part of interstate transportation." *Yellow Cab*, 332 U.S. at 232. In *Yellow Cab*, the Court explained that "the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination." *Id.* at 231. "What happens prior to or subsequent to that rail journey," the Court continued, "is not a constituent part of the interstate movement." *Id.* at 232. Instead, absent a contractual arrangement or some other pre-arranged link between the local ride and the interstate journey, "[t]o the taxicab driver, it is just another local fare." *Id.*

Accordingly, *Yellow Cab* leads to the conclusion that the fact that rideshare drivers may sometimes "pick up and drop off people at airports and train stations" does not "mean that they are, as a class, 'engaged in' interstate commerce." *Rogers*, 452 F. Supp. 3d at 916; *accord Capriole v. Uber Techs., Inc.*, --- F. Supp. 3d ----, 2020 WL 2563276, at *8 (N.D. Cal. May 14, 2020). As the Ninth Circuit recently held in a case involving Uber, "*Yellow Cab* * * * supports the district court's rationale for denying [the plaintiff's] § 1 argument" because giving local rides to and from airports is "'not an integral part of interstate transportation.'" *In re Grice*, 2020 WL 5268941, at *4; *see also, e.g.*, *Packard v. Pittsburgh Transp. Co.*, 418 F.3d 246, 258 (3d Cir. 2005) (citing *Yellow Cab* in holding that independent local shuttle service to train and bus terminals and the airport was separate from the passengers' interstate journeys and therefore not part of "interstate commerce" within the meaning of the Motor Carrier Act exemption to the Fair Labor Standards Act).

Relatedly, it is instructive that Section 1 has never been held to apply to other forms of predominantly local passenger transportation. For example, it is beyond dispute that taxi cabs were in use in the decades prior to the Act's enactment in 1925. *See, e.g.*, *Aurora Taxi Co. v. Yellow Cab*

Mfg. Co., 229 Ill. App. 641 (Ill. Ct. App. 1923); *The Taxicab Cases*, 143 N.Y.S. 279 (N.Y. Sup. Ct., New York Cnty. 1913); *Stewart Taxi Serv. Co. v. Getz*, 84 A. 338 (Md. 1912). Yet there was no suggestion at the time of the Act's enactment that Section 1 exempted taxi drivers from the Act's coverage.

Indeed, over two decades prior to the Act the Supreme Court held that an intrastate cab service operated by a railroad to carry passengers to and from a ferry was not interstate commerce immune from state taxation, because it was not "continuous interstate transportation" "between the states." *New York ex rel. Pennsylvania Railroad v. Knight*, 192 U.S. 21, 26-27 (1904). As the Court explained, the local cab service was "an independent local service, preliminary or subsequent to any interstate transportation" and had "no contractual or necessary relation to interstate transportation." *Id.* at 26-28; *see also* Lyft Br. 22-23.

Although there are meaningful differences between taxicab drivers and rideshare drivers, there is no doubt that both classes of workers focus on the local transportation of passengers. Had Congress intended in 1925 to treat predominantly local passenger transportation activity in the same manner as railroad or maritime work, it surely would have found a more

direct way of doing so than Section 1's residual clause. After all, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

2. The above decisions involving the local transportation of passengers are the most relevant here, and dictate reversal. But even in the context of goods, decades of precedents hold, in a variety of contexts involving statutes broader than Section 1, that the flow of goods in interstate commerce ceases once the goods reach the purchaser who contracted for their interstate shipment. As the Supreme Court has put it, 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); *Walling v. Goldblatt Bros.*, 128 F.2d 778, 780 (7th Cir. 1942) (same); *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 separate and 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." *Atl. Coast Line R. Co. v. Standard Oil Co. of Kentucky*, 275 U.S. 257, 267, 268-69 (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).

The Seventh Circuit's recent decision in *Wallace* is in accord. The court rejected the theory that Grubhub drivers fell within the Section 1 exemption by virtue of the fact that "they carry goods that have moved across state and even national lines." 970 F.3d at 802. The Seventh Circuit explained that such attenuated connections to interstate commerce do not suffice under the narrow construction of Section 1 mandated by the Supreme Court in *Circuit City*. Instead, "to fall within the exemption, the workers must be connected not simply to the goods, but to *the act of moving* those goods *across state or national borders*." *Id.* (emphases added). And unlike the "last-leg delivery driver[s]" at issue in *Waithaka*, the local delivery driver has no contractual or other connection to the movement of a "package of potato chips" across state lines or in bringing a "piece of des-

sert chocolate" over from Switzerland. *Id.*; *see also In re Grice*, 2020 WL 5268941, at *5 (the Section 1 "'exemption is * * * about what the worker does,' not just 'where the goods [or people] have been'") (quoting *Wallace*, 970 F.3d at 802) (alterations the Ninth Circuit's).

Finally, in *Waithaka*, this Court looked to decisions involving the Federal Employers' Liability Act of 1908 (FELA). *See* 966 F.3d at 19-20. As Lyft's brief details (at 28-30), early FELA precedents support the same distinction between a single integrated interstate trip and independent local trips that separates this case from cases like *Waithaka*. For example, in *McCluskey v. Marysville & Northern Railway*, 243 U.S. 36 (1917), a railroad making intrastate trips to a transit hub was not engaged in interstate commerce for FELA purposes because that railroad "had no concern with the subsequent disposition of goods" and had no contractual or other "obligation to deliver them to another carrier" for interstate transport. *Id.* at 39-40.

In short, all of the above decisions point to the same result as in *Yellow Cab*: unless there is an arrangement for a single, integrated trip, the interstate journey of a passenger by plane or train begins and ends at the airport or train station, and does not extend to an independent local ride.

C. Section 1 Also Does Not Apply To Rideshare Drivers For The Additional And Independent Reason That They Primarily Transport Passengers Rather Than Goods.

Rideshare drivers differ from railroad and maritime workers in another important respect—they ordinarily transport passengers across short distances, while railroad and maritime workers as a class typically haul goods from state to state or country to country across long distances. In *Circuit City*, the Supreme Court indicated that the Section 1 exemption is limited to "workers 'actually engaged in the movement of *goods* in interstate commerce.'" 532 U.S. at 112 (emphasis added) (quoting *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1471 (D.C. Cir. 1997)). The Court further observed that "Congress' demonstrated concern" in Section 1 was "with transportation workers and their necessary role in the free flow of goods." *Id.* at 121.

Around the time of the Act's enactment, railroad employees and maritime workers not only were involved in the "free flow of goods," but also routinely moved those goods across long distances—underscoring the interstate nature of their work as Congress would have understood it. For example, one study reported that in 1920, the average freight haul by railroad was 308 miles. *See* L.E. Peabody, *Forecasting Future Volume of*

Railway Traffic, in 66 RAILWAY AGE 899, 900 (Samuel O. Dunn et al. eds., 1924); *see also, e.g.*, *Thirty-Third Annual Report on the Statistics of Railways in the United States* 37 (Interstate Commerce Comm., Bureau of Statistics 1933) (in 1919, the average freight haul of a Class I railroad traveled 178.29 miles). Another study reported that the average freight ship haul shortly after the Act's enactment was 660 miles. Harold Barger, *The Transportation Industries, 1889-1946: A Study of Output, Employment and Productivity* 128 (1951).

Consistent with that context and the above language in *Circuit City*, "[n]umerous courts have concluded that the *ejusdem generis* doctrine requires that the residual clause be limited only to those industries and workers dedicated to the movement of goods in interstate commerce, similar to seamen and railroad employees." *Heller v. Rasier LLC*, 2020 WL 413243, at *7 (C.D. Cal. Jan. 7, 2020); *see also, e.g.*, Lyft Br. 45 n.20 (collecting cases); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995) ("We conclude that the exclusionary clause of § 1 of the Arbitration Act should be narrowly construed to apply to employment contracts of seamen, railroad workers, and any other class of workers actually engaged

in the movement of goods in interstate commerce in the same way that seamen and railroad workers are.").

The Third Circuit has reached a contrary conclusion, holding that Section 1 can apply to a class of workers that transports passengers across state lines—although declining to determine whether drivers on the Uber platform were part of such a class. *Singh*, 939 F.3d at 226. But for all of the reasons detailed in Lyft's brief (at 46-47), *Singh* is unpersuasive on this point. For example, its observation that rail transportation included "railway passenger cars" (*Singh*, 939 F.3d at 221) does nothing to undermine the common-sense point that railroad employees as a *class* were heavily involved in transporting goods. That is not true of rideshare drivers. Moreover, freight and passenger transportation by rail could not be treated as wholly separate, because the two types of railway cars often ran on the same rail lines and passenger cars could transport freight as well. *See* Lyft Br. 47.

II. The District Court's Erroneous Reading Of Section 1 Harms Businesses And Workers.

The failure to give Section 1 a proper construction carries significant practical consequences.

To begin with, the patchwork, Balkanized application of Section 1 that results from the district court's plaintiff-specific focus (*see* pages 9-12, *supra*) would encourage forum shopping and other abuses by plaintiffs' lawyers. In an effort to evade their clients' obligations to arbitrate their disputes on an individual basis, enterprising class-action lawyers will inevitably seek out the relative handful of potential named plaintiffs who personally have made frequent interstate trips and who work in areas of the country that straddle state boundaries and then file in those forums—even if the plaintiff's activity does not accurately reflect the activities of the broader class of workers to which the plaintiff belongs. And those plaintiffs and their lawyers will seek to represent a class, recognizing that defendants in class actions face tremendous pressure to capitulate to what Judge Friendly termed "blackmail settlements," even if the claims are of dubious merit. Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973); *see also, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting "the risk of 'in terrorem' settlements that class actions entail"); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("[A] class action can result in 'potentially ruinous liability.'") (quoting Advisory Committee's Notes on Fed. R. Civ. P. 23).

Moreover, the decision below creates uncertainty for many businesses and workers, threatening to prevent those entities and individuals from obtaining the benefits of arbitration secured by the Act—or even from being able to obtain arbitration under state law.

Indeed, the Supreme Court has repeatedly recognized the "real benefits" of "enforcement of arbitration provisions," *Circuit City*, 532 U.S. at 122-23, 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).

The 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. A recent study released by the Chamber's Institute for Legal Reform found that "employee-plaintiff arbitration cases that were terminated with monetary awards averaged 569 days," while, "[i]n contrast, employee-plaintiff litigation cases that terminated with monetary awards required an average of 665 days." Nam D. Pham, Ph.D. & Mary Donovan, *Fairer, Better, Faster: An Empirical*

Assessment of Employment Arbitration, NDP Analytics 5, 11-12 (2019);[3] *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, and Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stanford L. Rev. 1557, 1573 (2005) (collecting studies and concluding the same).

Furthermore, "there is no evidence that plaintiffs fare significantly better in litigation." Sherwyn, *supra*, at 1578. Indeed, a study published last year found that employees were *three times* more likely to win in arbitration than in court. Pham, *supra*, at 5-7 (surveying more than 10,000 employment arbitration cases and 90,000 employment litigation cases resolved between 2014 to 2018). The same study found that employees who prevailed in arbitration "won approximately double the monetary award that employees received in cases won in court." *Id.* at 5-6, 9-10; *see also* Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-*

[3] Available at https://www.instituteforlegalreform.com/uploads/sites/1/Empirical-Assessment-Employment-Arbitration.pdf.

Life Crisis or New Golden Age?, 32 Ohio St. J. on Disp. Resol. 1, 16 (2017) (arbitration is "favorable to employees as compared with court litigation").

Earlier scholarship likewise reports a higher employee-win rate in arbitration than in court. *See* Sherwyn, *supra*, at 1568-69 (observing that, once dispositive motions are taken into account, the actual employee-win rate in court is "only 12% to 15%") (citing Maltby, *supra*, 30 Colum. Hum. Rts. L. Rev. 29) (of dispositive motions granted in court, 98% are granted for the employer); Nat'l Workrights Inst., *Employment Arbitration: What Does the Data Show?* (2004) (concluding that employees were 19% more likely to win in arbitration than in court), available at goo.gl/nAqVXe.

On the other side of the equation, sweeping an unknown number of workers into Section 1's exemption would impose real costs on businesses. Not only is litigation more expensive than arbitration for businesses, but the uncertainty stemming from the district court's atextual and plaintiff-specific 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 * * *, 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). Moreover, businesses would, in turn, pass on these litigation expenses to consumers (in the form of higher prices) and workers (in the form of lower compensation).

III. The Filing Of A Notice Of Appeal From The Denial Of A Motion To Compel Arbitration Divests The District Court Of Jurisdiction To Proceed On The Merits.

Finally, as Lyft's brief correctly explains, the district court's ruling on the plaintiffs' preliminary-injunction motion should be vacated because the court lacked jurisdiction. Lyft Br. 47-54.

The Supreme Court has made clear that "the filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982).

Consistent with that principle, six circuits have held that an appeal from an order denying a motion to compel arbitration—which is authorized by Section 16(a) of the Federal Arbitration Act—requires the district court to hold further proceedings on the underlying claims in abeyance. Indeed, "[t]he core subject of an arbitrability appeal is the challenged continuation of proceedings before the district court on the underlying claims." *Levin v.*

Alms & Assocs., Inc., 634 F.3d 260, 264 (4th Cir. 2011); *see also Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 215 n.6 (3d Cir. 2007); *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1160 (10th Cir. 2005); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1251 (11th Cir. 2004) (per curiam); *Bombardier Corp. v. Nat'l R.R. Passenger Corp.*, 2002 WL 31818924, at *1 (D.C. Cir. 2002) (per curiam); *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997).

Although this Court has not had occasion to squarely answer the question of whether an immediate appeal authorized by Section 16(a) (enacted in 1988) divests the district court of jurisdiction, its pre-Section 16(a) decision in *Lummus Co. v. Commonwealth Oil Refining Co.*, 273 F.2d 613 (1959) (per curiam), which granted a stay of discovery pending an appeal from the denial of a motion to compel arbitration, strongly supports the majority view. The Court stayed discovery because the plaintiff obtaining further discovery in the district court would be "affirmatively inimical to [its] obligation to arbitrate, if this court determines it to have such obligation." *Id.* at 613. The Seventh Circuit's pathmarking opinion in *Bradford-Scott* holding that stays pending appeals of orders denying arbitration are

automatic relied on this Court's rationale in *Lummus*, explaining that it "is equally apt to appeals under § 16(a)." 128 F.3d at 506.

This Court's approach to appeals from the denial of qualified immunity provides further support for the majority view. As this Court has held, a non-frivolous appeal from the denial of qualified immunity automatically stays both further discovery and a trial on the merits. *Hegarty v. Somerset County*, 25 F.3d 17, 18 (1st Cir. 1994). Because the very question presented by the appeal is whether litigation is proper, "immunity from suit is effectively lost if a case is erroneously permitted to go to trial" before resolution of the appeal. *Id.* (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). The same is true in the arbitration context: the failure to stay district court proceedings "results in a denial or impairment of the appellant's ability to obtain its legal entitlement to avoidance of litigation" under the parties' arbitration agreement. *McCauley*, 413 F.3d at 1162 (analogizing to qualified immunity appeals); *see also*, *e.g.*, *Blinco*, 366 F.3d at 1252-53 (same); *Bradford-Scott*, 128 F.3d at 506 (same).[4]

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[4] For the above reasons, numerous district courts in the Sixth and Eighth Circuits (which have not decided this issue) also have "found the reasoning set forth by the majority of circuit courts * * * compelling" and "concluded [their] jurisdiction was divested by Defendants' filing of a notice of appeal from the Court's denial of a motion to compel arbitration."

By contrast, only three circuits have held that the district court retains jurisdiction pending an appeal under Section 16(a) of the Federal Arbitration Act and that a stay of further proceedings is discretionary. *See Weingarten Realty Inv'rs v. Miller*, 661 F.3d 904, 908 (5th Cir. 2011); *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 54 (2d Cir. 2004); *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1410 (9th Cir. 1990). Those courts principally reason that the only issue on appeal is "the issue on arbitrability," and that the underlying claims present "independent issues." *Britton*, 916 F.2d at 1412. But "the conclusion does not follow" that "an appeal concerning arbitrability does not affect proceedings to resolve the merits." *Bradford-Scott*, 128 F.3d at 506. On the contrary, "[w]hether the litigation may go forward in the district court is precisely what the court of appeals must decide." *Id.*; *accord Levin*, 634 F.3d at 264; *Blinco*, 366 F.3d at 1249. And "[c]ontinuation of proceedings in the district court largely defeats the

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Ramsey v. H&R Block Inc., 2019 WL 5685686, at *2 (W.D. Mo. July 11, 2019); *see also, e.g.*, *Messina v. N. Cent. Distrib., Inc.*, 2015 WL 4479006, at *2 (D. Minn. July 22, 2015); *Shy v. Navistar Int'l Corp.*, 2014 WL 1818907, at *4 (S.D. Ohio May 7, 2014); *Wells Enters., Inc. v. Olympic Ice Cream*, 2013 WL 11256866, at *3 (N.D. Iowa Feb. 1, 2013); *Dental Assocs., P.C. v. Am. Dental Partners of Mich., LLC*, 2012 WL 1555093, at *2-4 (E.D. Mich. Apr. 30, 2012); *Express Scripts, Inc. v. Aegon Direct Mktg. Servs., Inc.*, 2007 WL 1040938, at *3 (E.D. Mo. Apr. 3, 2007).

point of the appeal and creates a risk of inconsistent handling of the case by two tribunals." *Bradford-Scott*, 128 F.3d at 505.

Next, the universally followed requirement that the appeal must be non-frivolous in order to divest the district court of jurisdiction fully answers the Ninth Circuit's concern about the use of frivolous appeals as a stalling tactic. *See Levin*, 634 F.3d at 265 ("[E]ach of the circuits adopting the majority view has created a frivolousness exception to the divestiture of jurisdiction.").

Finally, the district court's suggestion that there is a categorical exception to the majority rule for preliminary injunction motions (ADD024-027) is incorrect. The district court cited this Court's decision holding that even if an arbitration agreement requires the underlying claims in the case to be arbitrated, district courts may issue "preliminary injunctive relief *to preserve the status quo* pending arbitration." *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986) (emphasis added). But that holding has no bearing on the jurisdictional effect of a notice of appeal under Section 16(a). More important, it also has no relevance here because the plaintiffs asked for a mandatory injunction that effectively would have

awarded class-wide relief on the merits of their claims, not preservation of the status quo. *See* Lyft Br. 51-52.

CONCLUSION

The district court's orders denying defendants' motion to compel arbitration should be reversed and its order denying the plaintiffs' second preliminary-injunction motion vacated.

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Respectfully submitted.

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CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief:

(i) complies with the type-volume limitations of Rule 29(a)(5) because it contains 6,495 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

/s/ Archis A. Parasharami
Archis A. Parasharami

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2020, I electronically filed the foregoing with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users, who will be served by the appellate CM/ECF system.

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