Case No. 20-2614

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ROBERT HARPER,

Plaintiff-Appellee,

v.

AMAZON.COM SERVICES, INC., and JOHN DOES 1-5 AND 6-10,

Defendant-Appellant.

Appeal from the United States District Court for the
District of New Jersey, Case No. 3:19-cv-21735 (Hon. Freda L. Wolfson)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America hereby certifies that it 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.

This 13th day of October, 2020.

Respectfully submitted,

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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, inexpensive, and less adversarial than litigation in court. Based on the policy reflected in the Act, the Chamber's members and affiliates have structured millions of contractual relationships around the use of arbitration to resolve disputes.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than the Chamber, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

The Chamber therefore has a significant interest in the proper interpretation of the Federal Arbitration Act. The overbroad interpretation urged by the plaintiff in this case and adopted by some other courts cannot be squared with either the text or historical context of the Act. And that approach—based on whether the goods being delivered originated in another state—threatens substantial litigation costs resulting both from future disputes over the Act's application and from conclusions that deprive businesses and workers of the benefits of the national policy favoring arbitration. Finally, the Chamber also has a significant interest in ensuring that arbitration agreements are enforceable under applicable state law in those narrow circumstances where the Act does not apply.

INTRODUCTION AND SUMMARY OF 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 Act "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.

In recent years, plaintiffs increasingly have tried to avoid the Act's reach by invoking the exemption in Section 1, which 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). The Supreme Court has held that this exemption must "be afforded a narrow construction." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001). As the Supreme Court recently explained in addressing 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 declined to decide whether the plaintiff, an Amazon Flex worker, is a member of a "class of workers engaged in * * * interstate commerce" within the meaning of Section 1. It instead required the parties to conduct additional discovery, even though the plaintiff never asked for it, based on

the plaintiff's allegation that at most he occasionally crossed state lines in the course of making local deliveries. JA15-16.

As Amazon's brief persuasively explains, that was erroneous, and the district court should have decided the issue as a matter of law on the current record. For example, the district court's focus on the allegations of the named plaintiff was plainly incorrect, because Section 1 refers to the "class of workers." As this Court has already held, the "inquiry regarding § 1's residual clause asks a court to look to classes of workers rather than particular workers." *Singh v. Uber Techs., Inc.*, 939 F.3d 210, 227 (3d Cir. 2019). The Seventh Circuit similarly held recently that 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).

The Chamber writes to address the merits of what it means to be a member of a "class of workers engaged in foreign or interstate commerce" within the meaning of Section 1. Some courts considering Amazon Flex workers have held that they are engaged in interstate commerce—notwithstanding the purely local nature of their deliveries—because the *goods* being transported often have crossed state lines. *See Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 915-19 (9th Cir.

2020); *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 17-26 (1st Cir. 2020). But that approach cannot be squared with the plain meaning of the statute—which focuses on the *activities* of the relevant "class of workers" rather than the origin and movement of the delivered *goods*—and it also violates the original understanding of what it meant to be a member of a "class of workers engaged in * * * interstate commerce" at the time of the Act's enactment in 1925. That phrase, according to both contemporaneous dictionaries and case law, refers to when the workers actually move goods across state or national borders—not the local, intrastate delivery of goods. *See Rittmann*, 971 F.3d at 925-28 (Bress, J., dissenting).

The contrary approach also gives short shrift to 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; *see also Rittmann*, 971 F.3d at 927-28 (Bress, J., dissenting). "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 Act's enactment to separate federal dispute-resolution procedures that Congress "did not wish to unsettle." *Circuit City*, 532 U.S. at 114-15, 121. The Amazon Flex workers in this case are not analogous to the maritime and railway

workers of 1925. Their work does not predominantly entail the movement of goods across state lines nor are they subject to other special federal regulation.

A contrary interpretation, if adopted, would significantly increase litigation costs and generate disputes over the Act's application to a potentially broad array of quintessentially local workers. If the fact that goods that are distributed by the workers at issue had previously originated in another state were potentially enough to transform the workers' local activity into "interstate commerce," that would create an exception that swallows the rule. As a result, wide swathes of the economy could be deprived of the well-established benefits of arbitration, including lower costs and greater efficiency. Moreover, in every case, the proposed approach would require fact-specific inquiries into the origin and movement of the distributed goods—undermining 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 refusing to consider whether to enforce the arbitration agreement under state law in the event the Federal Arbitration Act does not apply. Aside from the parties'

selection of the Act to govern the arbitration clause, the parties chose Washington law to govern their agreement, and New Jersey law would apply in the absence of an applicable choice-of-law clause. Either State would enforce the arbitration agreement. This Court should therefore make clear that the common-place selection of the Federal Arbitration Act to govern an arbitration provision does not yield the absurd result that arbitration is precluded altogether if the Act does not apply.

ARGUMENT

I. The FAA's Section 1 Exemption Does Not Encompass Local Workers.

A. In 1925, The Plain Meaning Of "Class Of Workers Engaged In * * * Interstate Commerce" Referred To A Group Of Workers Whose Work Predominantly Involved The Actual Transportation Of Goods Across State Lines.

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) (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").

Under those principles, it is a mistake to focus on the origin and movement of the delivered *goods*, rather than the activities of the "class of *workers*" (9 U.S.C. § 1 (emphasis added)). Both common and legal usage of the phrase "engaged in foreign or interstate commerce" (9 U.S.C. § 1) at the time of the Federal Arbitration Act's enactment point in the same direction: That phrase meant—and means—the actual transportation of goods across state or national borders. Because the local delivery workers here are not members of a class of workers who regularly and predominantly engage in such transportation, the district court erred in holding their arbitration agreements exempt from the FAA.

1. The workers in this case are not "engaged in * * * interstate commerce" as those words were defined by popular and legal dictionaries in circulation at the time the FAA was enacted.

To begin with, the word "engaged" had (and continues to have) a meaning far narrower than "affecting" or "involving." *See Circuit City*, 532 U.S. at 118. To be "engaged" in an activity meant to be "occupied" or "employed" at it. Webster's New International Dictionary (1st ed. 1909); *see also* The Desk Standard Dictionary of the English Language 276 (new ed. 1922) (defining "engage" as "[t]o bind or obtain by promise"); Black's Law Dictionary 425 (2d ed.

1910) (defining "engagement" as "[a] contract" or "obligation"). Thus, Congress's use of the word "engaged" focuses the inquiry onto the activities that the workers are tasked with performing.

"Interstate commerce," in turn, referred to actual movement of property across state lines. Black's Law Dictionary, for example, defined "interstate commerce" as "commerce between two states," specifically—"traffic, intercourse, commercial trading, or [] transportation" "between or among the several states of the Union, or from or between points in one state and points in another state." Black's Law Dictionary 651 (2d ed. 1910). Another contemporaneous legal encyclopedia defined "interstate commerce" as "commercial transactions * * * between persons resident in different States of the Union, or carried on by lines of transport extending into more than one State." The Century Dictionary & Cyclopedia (1914).

Put together, then, to be a member of the "class of workers engaged in * * * interstate commerce" in 1925 meant to be part of a group of workers "employed" or "occupied" in "traffic" or "transportation" of goods "between or among the several states." *See also Rittmann*, 971 F.3d at 926 (Bress, J., dissenting) (making a similar observation that contemporary sources confirm that to be "engaged in interstate commerce" within the meaning of that phrase at the

time of the Federal Arbitration Act's enactment requires "transporting goods across state lines").

The Amazon Flex workers in this case are not "engaged in * * * interstate commerce" as understood in these then-contemporary sources. As Amazon's brief details (at 6, 35-38), Amazon Flex drivers as a class make purely local deliveries. And any crossing of state lines in the course of making those local deliveries occurs only "by happenstance of geography" and does "not alter the intrastate" character of the work of the class as a whole. *Rogers v. Lyft, Inc.*, 452 F. Supp. 3d 904, 916 (N.D. Cal. 2020) (citing *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1290 (11th Cir. 2005) (holding that Section 1 does not apply to "incidental" interstate movement, such as "the interstate 'transportation' activities of * * * a pizza delivery person who delivered pizza across a state line to a customer in a neighboring town")).

"Because the plain language of [Section 1] is unambiguous," the Court's inquiry "begins" and "ends" here. *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 631 (2018) (quotation marks omitted).

2. "What the dictionaries suggest, legal authorities confirm." *New Prime*, 139 S. Ct. at 540.

The Supreme Court has emphasized that while "'in commerce' does not, of course, necessarily have a uniform meaning whenever used by Congress," "the

phrase '*engaged in* commerce'" generally "indicat[es] a *limited* assertion of federal jurisdiction." *United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 277, 280, 283 (1975) (emphasis added) (holding, even under the much broader reach of the Clayton Act, that "simply supplying localized services to a corporation engaged in interstate commerce" did not satisfy that statute's applicable "in commerce" requirement). And the Court further explained that Congress's use of "engaged in commerce" has long been "understood to have a more limited reach" than phrases like "involving" or "affecting commerce." *Circuit City*, 532 U.S. at 115.

Consistent with this approach, courts of appeals have routinely held "that section 1 of the FAA exempts only the employment contracts of workers *actually engaged in* the *movement* of goods *in interstate commerce*." *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1471 (D.C. Cir. 1997) (emphasis added) (collecting cases).[2] As this Court has put it, Congress's intent was "to include only those other classes of workers [in addition to railroad employees and seamen] who are likewise engaged directly in commerce." *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am.*, 207 F.2d 450, 452 (3d Cir. 1953); *see also, e.g.*, *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995) ("We

[2] This Court's recent decision in *Singh* held that the transportation of passengers rather than goods can qualify as interstate commerce. 939 F.3d at 219-26. Although the Chamber disagrees with that holding, that issue is not presented by this case, which undisputedly involves goods.

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 Seventh Circuit's recent opinion in *Wallace* is also instructive. The Seventh Circuit 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." 2020 WL 4463062, at *3. 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). In other words, the court considered whether "the interstate movement of goods is a *central part of the job description* of the class of workers." *Id.* (emphasis added). That is not the case for local Amazon Flex delivery drivers.[3]

Several early cases prior to the enactment of the Federal Arbitration Act involved litigation under the Federal Employers' Liability Act of 1908 (FELA),

[3] As Judge Bress pointed out in *Rittmann*, "[w]hile *Wallace* acknowledged that *Waithaka* was a 'harder' case," its reasoning supports the opposite result from *Waithaka* and *Rittmann*, because "*Wallace* made clear that § 1 does not turn on whether the goods previously traveled in interstate commerce." *Rittmann*, 971 F.3d at 934 (Bress, J., dissenting).

which provided a federal right of recovery for employees of interstate railroads if the employee worked for a "common carrier by railroad * * * *engaging* in commerce between any of the several states" *and* the employee was "employed in such [*i.e.*, interstate] commerce" at the time of injury. 35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657 (emphasis added); *see, e.g.*, *Illinois Cent. R. Co. v. Behrens*, 233 U.S. 473, 478 (1914). In other words, liability under the statute applied only when both the common carrier and the injured employee were engaged in interstate commerce.

The Court in *Behrens* held that such language—which, unlike Section 1, focuses on the individual worker rather than the class of workers—requires an analysis of the particular service the employee was providing at the time of the injury. Despite the fact that railroads are an instrumentality of interstate commerce and that the carrier was engaged in such commerce, the Court explained, the statute did not apply to an employee who was injured while "engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another." *Behrens*, 233 U.S. at 478 (emphasis added). Rather, the Court reasoned, Congress's use of the phrase "employed in such commerce" demonstrated its intent "to confine its action to injuries occurring when *the particular service* in which the employee is engaged is a part of interstate commerce." *Id.* (emphasis added). Under that logic, which applies similarly to assessing the activities of the relevant

"class of workers" (9 U.S.C. § 1), the "particular service" performed by the Amazon Flex workers—primarily local deliveries—is not "a part of interstate commerce" either.

The focus in the 1908 version of FELA on the particular activity performed by the worker—as reflected in the language "employed in such commerce"—was a direct response to the Supreme Court's decision holding unconstitutional a predecessor of that statute enacted in 1906. *See Howard v. Illinois Cent. R. Co.*, 207 U.S. 463, 497 (1908). The problem with the prior statute (under then-prevailing constitutional principles) was that the statute subjected to federal liability all employers who engaged in interstate commerce for injuries suffered by any of their employees, regardless of whether the employees themselves were involved in interstate activity. *See id.* at 499-502. Given that background, Section 1 of the FAA's use of the term "class of workers engaged in * * * interstate commerce" should be interpreted to reflect Congress's recognition in 1925 of the same then-applicable constitutional problem that had led it to revise the FELA in 1908. *See Tenney*, 207 F.2d at 453.

The analogy to the FELA has limits in interpreting the Section 1 exemption, however, because FELA does "not share the FAA's text, 'context,' or 'purpose.'" *Rittmann*, 971 F.3d at 931 (Bress, J., dissenting). Unlike the Section 1 exemption, which the Supreme Court has admonished requires a "precise reading" and

"narrow construction" (*Circuit City*, 532 U.S. at 118, 119), FELA has long been "construed liberally." *Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930); *see also, e.g.*, *Shanks v. Del., Lackawanna & W. R.R.*, 239 U.S. 556, 558 (1916). Section 1 also uses the term "class of workers" rather than focusing on any one particular worker. Section 1 places the term "class of workers" in a residual clause that requires reading it in conjunction with the enumerated terms "seamen" and "railroad employees." And Congress ultimately revised the relevant provision of the FELA in 1939 to encompass all employees whose duties "in any way directly or closely and substantially[] affect [interstate] commerce." *S. Pac. Co. v. Gileo*, 351 U.S. 493, 497 (1956). That revision serves only to underscore the sole lesson that can be drawn from the prior version (the 1908 FELA): Section 1's use of the term "class of workers engaged in * * * interstate commerce" requires focusing on the particular activity performed by that class of workers.

Given these differences, the First and Ninth Circuits thus went much too far in skipping past Section 1's plain language and structure and instead relying on early FELA cases in support of their overbroad reading of Section 1. In any event, as Judge Bress pointed out, several of the early FELA cases cited by those courts concluded that a railroad worker performing intrastate activity was *not* engaged in interstate commerce, even under the more liberal interpretation afforded FELA.

Rittmann, 971 F.3d at 922-23 (Bress, J., dissenting) (discussing *Shanks*, 239 U.S. at 558, and *Behrens*, 233 U.S. at 476-78).

In short, both the plain text of Section 1 and the better-reasoned authority point to the conclusion that a worker must be a member of a class of workers that regularly engages in actual transportation of goods across borders in order for the Section 1 exemption to apply.

B. The Historical Context Against Which Section 1 Was Enacted Confirms That Section 1 Must Be Given A Precise Meaning.

The context in which Section 1 of the Act was enacted also strongly supports limiting Section 1's exemption to classes of workers actually and regularly engaged in interstate transportation of goods, just like "seamen" and "railroad employees."

The Supreme Court in *Circuit City* explained at length that the residual category of "workers engaged in interstate * * * 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. The Court determined that "seamen" and "railroad employees" were excluded from the Act because "[b]y the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers"; "grievance procedures existed for railroad employees under federal law"; "and the passage of a more comprehensive statute providing for the

mediation and arbitration of railroad labor disputes was imminent." *Id.* at 121 (citing, respectively, the Shipping Commissioners Act of 1872, 17 Stat. 262; Transportation Act of 1920, 41 Stat. 456; and Railway Labor Act of 1926, 44 Stat. 577).

Specifically, although "the legislative record on the § 1 exemption is quite sparse," what little there is "suggest[s] that the exception may have been added in response to the objections of [Andrew Furuseth,] the president of the International Seamen's Union of America." *Circuit City*, 532 U.S. at 119; *see also United Elec., etc., Workers v. Gen. Elec. Co.*, 233 F.2d 85, 99 (1st Cir. 1956); *Tenney*, 207 F.2d at 452; Hearings on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 4th Sess. 9 (1923). Furuseth argued in part that seamen's contracts should be excluded because they "constitute a class of workers as to whom Congress had long provided machinery for arbitration." *Tenney*, 207 F.2d at 452; *see also* Andrew Furuseth, Analysis of H.R. 13522 (1924).[4]

[4] In declining to place any weight on Furuseth's objections to the Act, the Supreme Court recognized that "the fact that a certain interest group sponsored or opposed particular legislation" is not a basis for discerning the meaning of a statute. *Circuit City*, 532 U.S. at 120. Rather, this history simply provides context for the Court's conclusion that the "residual exclusion" of "'any other class of workers engaged in foreign or interstate commerce'" is "link[ed] to the two specific, enumerated types of workers identified in the preceding portion of the sentence." *Id.* at 121. Specifically, the Court explained that it is "rational" to interpret Section 1 to reflect Congress's decision "to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself" the

Congress' inclusion of "railroad employees" in Section 1 appeared to stem from the same concerns. Congress had developed special dispute-resolution procedures for that industry, too, in response to a long history of labor disputes. Indeed, by the time the Act was enacted, mediation and arbitration had been central features of the railroad dispute resolution process for nearly forty years. *See, e.g.*, Act of October 1, 1888, 25 Stat. 501 (providing for voluntary arbitration); Erdman Act of June 1, 1898, 30 Stat. 424, ch. 370, §§ 2, 3 (establishing a more detailed procedure involving both mediation and arbitration); Newlands Act of July 15, 1913, 38 Stat. 103, 45 U.S.C. § 101 *et seq.* (establishing a permanent Board of Mediation and Conciliation); Title III of the Transportation Act of 1920, 41 Stat. 456, 469 (establishing a Railroad Labor Board and more detailed provisions for resolution of railroad labor disputes); *see also Gen. Comm. of Adjustment of Bhd. of Locomotive Eng'rs for Missouri-Kansas-Texas R.R. v. Missouri-Kansas-Texas R. Co.*, 320 U.S. 323, 328 n.3 (1943) (summarizing the "fifty years of evolution" of the railroad dispute resolution framework).

As the Supreme Court summarized: "[i]t is reasonable to assume that Congress excluded 'seamen' and 'railroad employees' from the FAA for the simple reason that it did not wish to unsettle established or developing statutory

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ability to regulate separately "those engaged in transportation" in the same manner as maritime and railroad workers. *Id.*

dispute resolution schemes covering specific workers." *Circuit City*, 532 U.S. at 121. The residual category of other transportation workers was included for a similar reason. *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). That is, Congress contemplated extending similar legislation to other categories of workers: "Indeed, such legislation was soon to follow, with the amendment of the Railway Labor Act in 1936 to include air carriers and their employees." *Circuit City*, 532 U.S. at 121.

The fact that the Congress in 1925 declined to upset dispute-resolution frameworks that it had been tailoring for the railroad or maritime industry over decades hardly supports the exemption of local delivery workers—who share no such similar history and for whom Congress has not provided any comparable, industry-specific means of dispute resolution. Indeed, there are no comparable dispute-resolution regimes for local delivery workers at the time the Act was enacted, or any time thereafter.

II. Even If The Act Did Not Apply Here, The Arbitration Agreement Is Enforceable Under State Law.

As Amazon's brief explains (at 43-53), the arbitration agreement in this case is also enforceable under state law. The parties selected the Federal Arbitration Act

to govern the arbitration provision, and Amazon explains that in the event the Act does not apply, the relevant law is either the law of Washington (which governs the plaintiff's agreement with Amazon) or New Jersey (the law that would apply in the absence of a contractual choice of law).

The Chamber does not take a position on whether Washington or New Jersey is the more appropriate law to apply in this case. But the Chamber urges the Court to hold that when parties agree (as is routine) that the Federal Arbitration Act will govern their arbitration agreement, that circumstance cannot yield the profoundly anti-arbitration result that arbitration is precluded altogether in the event the Act ultimately does not apply.

To begin with, there is nothing inconsistent with the Act itself about applying state arbitration law. Section 1 of the Act does not *prohibit* arbitration of disputes with classes of workers that fall within its terms. It simply exempts agreements to arbitrate those disputes from the *Act*'s coverage. *See* 9 U.S.C. § 1 ("*[N]othing herein contained shall apply* to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.") (emphasis added). Accordingly, whether or not the Section 1 exemption applies should have "no impact on other avenues (such as state law) by which a party may compel arbitration." *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 24 (1st Cir. 2017), *aff'd*, 139 S. Ct. 532 (2019).

As this Court has put it, "the effect of Section 1 is merely to leave the arbitrability of disputes in the excluded categories as if the [Federal] Arbitration Act had never been enacted." *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 596 (3d Cir. 2004) (quotation marks omitted). Enforcing arbitration agreements through state law, "as if the FAA 'had never been enacted,' does not contradict any language of the FAA, but in contrast furthers the general policy goals of the FAA favoring arbitration." *Id.* (quoting *Mason-Dixon Lines, Inc. v. Local Union No. 560*, 443 F.2d 807, 809 (3d Cir. 1971)); *see also Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) (looking to state law to determine enforceability of arbitration agreement where the Act did not govern).

As numerous other courts have recognized, there can thus be no conflict or inconsistency between the Federal Arbitration Act and state law if the Act simply doesn't apply. *See, e.g.*, *Davis v. EGL Eagle Glob. Logistics L.P.*, 243 F. App'x 39, 44 (5th Cir. 2007) ("[T]he FAA does not preempt [Texas law] because this case presents the situation where the FAA refuses to enforce an arbitration provision (assuming for the moment that Davis meets the exemption for transportation workers) that the [Texas arbitration statute] would enforce."); *see also* Amazon Br. 39-40 (collecting additional cases from across the country applying state law after assuming without deciding that the Section 1 exemption would prevent application of the Act).

To be sure, the Ninth Circuit in *Rittmann* noted that the same arbitration clause was governed by the Federal Arbitration Act, and from there jumped to the conclusion that the parties intended for no state's law to apply to the arbitration clause at all. *See Rittmann*, 971 F.3d at 920-21. But that conclusion makes no sense under general contract and choice-of-law principles. *Some* law must apply to the contract. And when there is no valid choice-of-law clause (even assuming that's the case here, *but see Waithaka*, 966 F.3d at 27), courts do not treat a contract as wholly invalid. Rather, they apply the forum's conflicts-of-law principles to determine which state's law governs the contract's validity or enforceability.

New Jersey, for instance, calls for application of "the law of the state with the greatest interest in resolving the particular issue." *Gantes v. Kason Corp.*, 679 A.2d 106, 109 (N.J. 1996). The New Jersey Supreme Court also recently held, in the arbitration context, that the New Jersey Arbitration Act applies "automatically as a matter of law" to arbitration agreements not exempted under that statute—including, as in that case, arbitration agreements that "designate the FAA as the 'sole and exclusive governing law.'" *Arafa v. Health Exp. Corp.*, 233 A.3d 495, 502, 506 (N.J. 2020).[5]

[5] *Arafa* also makes clear that the class-action waiver in Amazon's arbitration agreement is fully enforceable under New Jersey state law. *See* 233 A.3d at 500, 509.

Finally, *Rittmann*'s interpretation is anathema to the pro-arbitration policies reflected in either of the state laws applicable here. *See, e.g.*, *Arafa*, 233 A.3d at 508; *Marcus & Millichap Real Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc.*, 369 P.3d 503, 507 (Wash. Ct. App. 2016).

In short, rather than denying Amazon's motion to compel arbitration outright pending discovery not relevant to the enforceability of the arbitration agreement under state law, the district court at a minimum should have engaged in the choice-of-law analysis and evaluated the enforceability arbitration agreement under the resulting state's law.

III. An Overbroad Reading Of Section 1 Harms Businesses And Workers.

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

And 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);[6] *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

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

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-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 an atextual and ahistorical approach that focuses on the origin and movement of goods rather than the activity of the class of workers 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).

CONCLUSION

The district court's decision should be reversed, or in the alternative vacated.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,118 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: October 13, 2020 /s/ *Archis A. Parasharami*

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify pursuant to Third Circuit Rule 46.1 that I was admitted to the Bar of the United States Court of Appeals for the Third Circuit on April 16, 2003 and remain a member in good standing of the Bar of this Court.

Dated: October 13, 2020

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CERTIFICATE OF SERVICE

I certify that on October 13, 2020, I filed the foregoing via the CM/ECF system and the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

Dated: October 13, 2020 /s/ *Archis A. Parasharami*