**No. 20-15689**

**IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

JOHN ROGERS, AMIR EBADAT, HANY FARAG, on behalf of themselves and all others similarly situated,

*Plaintiffs-Appellants*,

v.

LYFT, INC.,

*Defendant-Appellee*.

On Appeal from the U.S. District Court for the Northern District of California, No. 3:20-cv-01938 (Hon. Vince Chhabria)

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

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062

Archis A. Parasharami
Daniel E. Jones
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000
aparasharami@mayerbrown.com

*Counsel for* Amicus Curiae

## 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. No publicly held corporation owns ten percent or more of its stock.

## TABLE OF CONTENTS

Page

RULE 26.1 CORPORATE DISCLOSURE STATEMENT........................i

TABLE OF AUTHORITIES....................................................iii

INTEREST OF THE *AMICUS CURIAE* ................................................ 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT ................. 3

ARGUMENT ........................................................................... 9

I. The FAA's Section 1 Exemption Does Not Encompass Rideshare Drivers. ........................................................... 9

  A. 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.................................................... 9

  B. The Phrase "Other Class Of Workers Engaged In * * * Interstate Commerce" Requires That Interstate Movement Be A Central Part Of The Activities Of The Group Of Workers As A Whole. ........................................... 16

  C. Section 1 Also Does Not Apply To Rideshare Drivers For The Additional And Independent Reason That They Primarily Transport Passengers Rather Than Goods. ................................................................... 19

II. Plaintiffs' Overbroad Reading Of Section 1 Would Harm Businesses And Workers............................................................22

CONCLUSION ......................................................................26

CERTIFICATE OF COMPLIANCE..............................................27

CERTIFICATE OF FILING AND SERVICE .......................................28

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Allied-Bruce Terminix Cos. v. Dobson*,
513 U.S. 265 (1995) .......... 3, 23, 26

*Asplundh Tree Expert Co. v. Bates*,
71 F.3d 592 (6th Cir. 1995) .......... 21

*Atl. Coast Line R. Co. v. Standard Oil Co. of Kentucky*,
275 U.S. 257 (1927) .......... 14

*Aurora Taxi Co. v. Yellow Cab Mfg. Co.*,
229 Ill. App. 641 (Ill. Ct. App. 1923) .......... 12

*Capriole v. Uber Techs., Inc.*,
460 F. Supp. 3d 919 (N.D. Cal. 2020) .......... 10

*Circuit City Stores, Inc. v. Adams*,
532 U.S. 105 (2001) .......... *passim*

*Cole v. Burns Int'l Sec. Servs.*,
105 F.3d 1465 (D.C. Cir. 1997) .......... 20

*EEOC v. Waffle House, Inc.*,
534 U.S. 279 (2002) .......... 3

*Epic Sys. Corp. v. Lewis*,
138 S. Ct. 1612 (2018) .......... 18

*Gonzalez v. Coverall N. Am., Inc.*,
754 F. App'x 594 (9th Cir. 2019) .......... 5

*Grice v. Uber Techs., Inc.*,
2020 WL 497487 (C.D. Cal. Jan. 7, 2020) .......... 19

*In re Grice*,
974 F.3d 950 (9th Cir. 2020) .......... *passim*

**TABLE OF AUTHORITIES**
**(continued)**

**Page(s)**

*Heller v. Rasier LLC*,
2020 WL 413243 (C.D. Cal. Jan. 7, 2020) .................................. 19, 21

*Higgins v. Carr Bros. Co.*,
317 U.S. 572 (1943) ............................................................. 14

*Hill v. Rent-A-Center, Inc.*,
398 F.3d 1286 (11th Cir. 2005) ............................................. 18

*Jewel Tea Co. v. Williams*,
118 F.2d 202 (10th Cir. 1941) ............................................... 14

*KPMG LLP v. Cocchi*,
565 U.S. 18 (2011) ............................................................... 3

*Lamps Plus, Inc. v. Varela*,
139 S. Ct. 1407 (2019) .......................................................... 23

*Marmet Health Care Ctr., Inc. v. Brown*,
565 U.S. 530 (2012) ............................................................... 3

*McCluskey v. Marysville & Northern Railway*,
243 U.S. 36 (1917) ................................................................ 16

*Microsoft Corp. v. Baker*,
137 S. Ct. 1702 (2017) ............................................................ 5

*New Prime Inc. v. Oliveira*,
139 S. Ct. 532 (2019) ...................................................... 4, 16, 17

*Packard v. Pittsburgh Transp. Co.*,
418 F.3d 246 (3d Cir. 2005) ................................................... 10

*New York ex rel. Pennsylvania Railroad v. Knight*,
192 U.S. 21 (1904) ........................................................... 12, 13

**TABLE OF AUTHORITIES**
**(continued)**

**Page(s)**

*Rittmann v. Amazon.com, Inc.*,
974 F.3d 904 (9th Cir. 2020) .................................................. 5, 6, 15, 16

*Singh v. Uber Techs., Inc.*,
939 F.3d 210 (3d Cir. 2019) ........................................................ 17, 22

*Stewart Taxi Serv. Co. v. Getz*,
84 A. 338 (Md. 1912) ........................................................................ 12

*Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*,
559 U.S. 662 (2010) .......................................................................... 23

*The Taxicab Cases*,
143 N.Y.S. 279 (N.Y. Sup. Ct., New York Cnty. 1913) ...................... 12

*United States v. Yellow Cab*,
332 U.S. 218 (1947) ................................................................ 6, 9, 10, 16

*Waithaka v. Amazon.com, Inc.*,
966 F.3d 10 (1st Cir. 2020) ............................................................ 5, 15

*Wallace v. Grubhub Holdings, Inc.*,
970 F.3d 798 (7th Cir. 2020) ...................................................... *passim*

*Walling v. Goldblatt Bros.*,
128 F.2d 778 (7th Cir. 1942) .............................................................. 14

*Walling v. Jacksonville Paper Co.*,
317 U.S. 564 (1943) .......................................................................... 14

*Whitman v. Am. Trucking Ass'ns*,
531 U.S. 457 (2001) .......................................................................... 13

*Wisconsin Cent. Ltd. v. United States*,
138 S. Ct. 2067 (2018) ................................................................. 16, 17

**TABLE OF AUTHORITIES**
**(continued)**

**Page(s)**

**Statutes**

9 U.S.C. § 1 ........ *passim*

9 U.S.C. § 2 ........ 3

Fed. R. App. P. 29(c)(5) ........ 1

**Other Authorities**

Harold Barger, *The Transportation Industries, 1889-1946: A Study of Output, Employment and Productivity* (1951) ........ 21

Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29 (1998) ........ 24, 25

Nat'l Workrights Inst., *Employment Arbitration: What Does the Data Show?* (2004) ........ 25

L.E. Peabody, *Forecasting Future Volume of Railway Traffic*, in 66 RAILWAY AGE 899 (Samuel O. Dunn et al. eds., 1924) ........ 20

Nam D. Pham, Ph.D. & Mary Donovan, *Fairer, Better, Faster: An Empirical Assessment of Employment Arbitration*, NDP Analytics (2019) ........ 23

David Sherwyn, Samuel Estreicher, and Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, Stanford L. Rev. 1557 (2005) ........ 24

Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1 (2017) ........ 24

*Thirty-Third Annual Report on the Statistics of Railways in the United States* (Interstate Commerce Comm., Bureau of Statistics 1933) ........ 20

## 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

[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, 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(c)(5). All parties consented to the filing of this brief.

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 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 affirmance of the decision below. The challenges plaintiffs and their amici have raised to the district court's decision holding that Section 1 of the Act does not exempt from that statute's coverage the arbitration agreements of rideshare drivers cannot be squared with the text and structure of the Act and seeks an unwarranted departure from the growing consensus among courts that rideshare drivers do not fall within the narrow Section 1 exemption. And plaintiffs' atextual and ahistorical approach, if adopted, threatens to create substantial uncertainty and deprive numerous businesses and workers of the benefits of the national policy favoring arbitration.

## 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, is far more limited and 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 correctly applied these principles and held that rideshare drivers are not "engaged in * * * interstate commerce" within the meaning of Section 1 and therefore are covered by the Act. That holding joins the growing consensus among courts that rideshare drivers, as a class, are not engaged in interstate commerce within the narrow meaning of Section 1.

As an initial matter, Lyft persuasively explains why this Court lacks jurisdiction to review that conclusion. *See* Lyft Br. 20-24. Orders compelling arbitration generally are not subject to immediate appellate review under the Act. And plaintiffs' attempt to manufacture

jurisdiction by urging the district court to dismiss their claims for purposes of securing appellate review is analogous to the voluntary dismissal tactic repudiated by the Supreme Court in *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017). Indeed, this Court has dismissed an appeal from an order compelling arbitration under similar circumstances. *See Gonzalez v. Coverall N. Am., Inc.*, 754 F. App'x 594, 595-96 (9th Cir. 2019).

If the Court reaches the merits, however, none of the arguments against enforcement of plaintiffs' arbitration agreements has merit.

*First*, both plaintiffs and their *amici* rely heavily on the argument that giving local rides to and from airports or train stations qualifies as being engaged in interstate commerce for Section 1 purposes. But binding Supreme Court precedent, both before and after the enactment of the Federal Arbitration Act in 1925, dictates that, during this local transportation, the passengers are *not* "within the flow of interstate commerce." *Rittmann v. Amazon.com, Inc.*, 974 F.3d 904, 917 (9th Cir. 2020) (quoting *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 19 (1st Cir. 2020)). In denying a petition for mandamus, this Court 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*, 974 F.3d 950, 958 (9th Cir. 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*, 974 F.3d at 958. It's also telling that although local passenger transportation jobs such as taxi drivers existed 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.

---

[2] For all of the reasons set forth in its briefs in *Rittmann*, 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*, 971 F.3d at 925-28 (Bress, J., dissenting). But that disagreement is immaterial here, because, as *Yellow Cab* makes clear, giving occasional rides to and from airports or train stations does not qualify as being "engaged in * * * interstate commerce" even under the flow of commerce theory. *See In re Grice*, 974 F.3d at 958.

*Second*, while plaintiffs appear to recognize that the relevant "class of workers" is rideshare drivers in the United States, they are mistaken in relying on anecdotal discussions of two specific interstate trips rather than examining the work performed by the class of rideshare drivers as a whole. After all, 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). And answering that question requires examining whether "interstate movement of goods is a *central part of the job description* of the class of workers." *Id.* at 803 (emphasis added). As the district court recognized, that is not the case for rideshare drivers, whose work instead "*predominantly* entails *intra*state trips." ER 16 (emphasis added).

*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. Although the district court reached a different conclusion, this ground provides an alternative basis on which this Court may affirm here.

Finally, plaintiffs' overbroad interpretation of Section 1, if adopted, would significantly increase litigation costs and generate disputes over the Act's application to a potentially broad array of quintessentially local workers. 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.

## ARGUMENT

### I. The FAA's Section 1 Exemption Does Not Encompass Rideshare Drivers.

#### A. 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.

Plaintiffs' and their *amici*'s rationale that giving rides to or from airports and train stations 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, the district court correctly followed *Yellow Cab* to its necessary conclusion: 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." ER 16; *accord Capriole v. Uber Techs., Inc.*, 460 F. Supp. 3d 919, 931 (N.D. Cal. 2020), *appeal pending*, No. 20-16030 (9th Cir. filed May 28, 2020). Indeed, this Court recently explained in a case involving Uber that "*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*, 974 F.3d at 958; *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 much broader Motor Carrier Act exemption to the Fair Labor Standards Act).[3]

Plaintiffs' *amici* point to agreements between Lyft and airports. Nat'l Employment Law Project Br. 31-33. But this Court already rejected the relevance of such agreements in *Grice*. The plaintiff in that case pointed to the fact that "Uber entered into agreements with [Alabama] airports (and many others) to allow Uber drivers like Grice to pick up arriving passengers and transport them to their final destinations." 974 F.3d at 954. This Court squarely considered and rejected the contention that these agreements sufficed to trigger the Section 1 exemption, explaining that "[a]lthough Uber entered into agreements with the Huntsville and Birmingham airports to allow Uber drivers like Grice to pick up arriving passengers, Grice does not contend that the *passengers contracted with the airlines to hire him*." *Id.* at 958 (emphasis added). The same is true here: local rides to and from

---

[3] As Lyft correctly explains, jurisdiction under the Motor Carrier Act is unrelated to the applicability of the Section 1 exemption. *See* Lyft Br. 51 n.12. But at a minimum it follows that if activity does not qualify as being engaged in interstate commerce even under the reach of the Motor Carrier Act, then that activity could not possibly trigger Section 1's much narrower exemption.

airports or train stations simply are not part of any single, integrated trip across state lines.

In addition, 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. 31-33.

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 *Rittmann* or *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 dessert chocolate" over from Switzerland. *Id.*; *see also In re Grice*, 974 F.3d at 958 (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 this Court's).

Finally, in *Rittmann*, this Court looked to decisions involving the Federal Employers' Liability Act of 1908 (FELA). *See* 971 F.3d at 912-13. As Lyft's brief details (at 35-39), early FELA precedents support the same distinction between a single integrated interstate trip and independent local trips that separates this case from cases like

*Rittmann*. 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.

### B. The Phrase "Other Class Of Workers Engaged In * * * Interstate Commerce" Requires That Interstate Movement Be A Central Part Of The Activities Of The Group Of Workers As A Whole.

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, there does not appear to be any dispute that the Section 1 inquiry requires looking at the activities of the "*class* of workers" (9 U.S.C. § 1 (emphasis added))—*i.e.*, rideshare drivers in the United States. Indeed, this Court recently looked at "rideshare drivers, as a class." *In re Grice*, 974 F.3d at 957; *see also Wallace*, 970 F.3d at 800; *Singh v. Uber Techs., Inc.*, 939 F.3d 210, 227 (3d Cir. 2019).

Nonetheless, plaintiffs point to two anecdotal examples of specific drivers crossing state lines. Pls. Br. 22 n.15. But those examples do not support the broader inference about the class of workers that plaintiffs seek to draw. There is no doubt that, as the district court recognized, there are rare trips on rideshare platforms that will involve crossing state lines. But as a class, the work of rideshare drivers "predominantly entails intrastate trips," and those relatively infrequent

"[i]nterstate trips that occur by happenstance of geography do not alter the intrastate transportation function performed by the class of workers." ER 16 (citing *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1290 (11th Cir. 2005) (Section 1 does not apply to "incidental" interstate movement)). In other words, to trigger the Section 1 exemption, plaintiffs must show—and they have not—that interstate transportation is a "*central part* of the class members' job description." *Wallace*, 970 F.3d at 800 (emphasis added).

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).

The Seventh Circuit therefore explained that *Circuit City* "goes a long way toward providing an answer" to what it means "for a class of workers to be 'engaged in interstate commerce.'" *Wallace*, 970 F.3d at 800. Specifically, Section 1 exempts only those classes of workers who perform work "akin to 'seamen' and 'railroad employees.'" *Id.* at 801. That is, "interstate movement" must be "a central part of the class members' job description" for Section 1 to apply, just as it is for those enumerated groups of workers. *Id.* As the district court similarly put it in the case that this Court declined to disturb on mandamus review, rideshare drivers are not "part of a group that *routinely*" transports goods or persons across state lines; instead, they engage in "intensely local" activities. *Grice v. Uber Techs., Inc.*, 2020 WL 497487, at *8 (C.D. Cal. Jan. 7, 2020) (emphasis added), *mandamus denied sub nom. In re Grice*, 974 F.3d 950; *accord Heller v. Rasier LLC*, 2020 WL 413243, at *7 (C.D. Cal. Jan. 7, 2020).

### 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*, 2020 WL 413243, at *7; *see also, e.g.*, Lyft Br. 55 n.13 (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.").

Along with the district court here, 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 58-59), *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. 59.

## II. Plaintiffs' Overbroad Reading Of Section 1 Would Harm Businesses And Workers.

The failure to give Section 1 a proper construction carries significant practical consequences. The approach to the Section 1 inquiry urged by plaintiffs and their *amici* would create uncertainty for many businesses and workers, threatening to prevent those entities and individuals from obtaining the benefits of arbitration secured by the Federal Arbitration Act.

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);[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, 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-Life Crisis or New*

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

*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 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 * * *,

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

If the Court does not dismiss the appeal for lack of jurisdiction, then it should affirm the district court's decision granting Lyft's motion to compel arbitration.

Dated: November 20, 2020

Respectfully submitted,

/s/ *Archis A. Parasharami*

Archis A. Parasharami
Daniel E. Jones
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000
aparasharami@mayerbrown.com

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062

*Counsel for* Amicus Curiae

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g) and Circuit Rule 32-1(e), undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Rule 29(a)(5) and Circuit Rule 32-1(a) because it contains 5,116 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.

Dated: November 20, 2020

/s/ *Archis A. Parasharami*
Archis A. Parasharami
*Counsel for* Amicus Curiae

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 20, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Archis A. Parasharami*
Archis A. Parasharami
*Counsel for* Amicus Curiae