No. 19-35381

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BERNADEAN RITTMANN, individually and on behalf of all others similarly situated; FREDDIE CARROLL, individually and on behalf of all others similarly situated; JULIA WEHMEYER, individually and on behalf of all others similarly situated; RAEF LAWSON, individually and on behalf of all others similarly situated and in his capacity as Private Attorney General Representative; IAIN MACK, in his capacity as Private Attorney General Representative,

Plaintiffs-Appellees,

v.

AMAZON.COM, INC.; AMAZON LOGISTICS, INC.,

Defendants-Appellants.

On Appeal from the U.S. District Court for the Western District of Washington No. 2:16-cv-01554 (Hon. John C. Coughenour)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS' PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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

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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

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[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 have 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 local delivery services.

The Chamber therefore has a significant interest in proper interpretation of the Federal Arbitration Act and rehearing of the decision by the divided panel in this case. That decision, if permitted to stand, 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.

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 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)).

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). The divided panel here held that

even though Amazon Flex drivers make predominantly local deliveries, they belong to a class of workers engaged in interstate commerce within the meaning of Section 1. The panel majority recognized that not all local delivery drivers fall within the Section 1 exemption, but concluded that Amazon Flex drivers do so primarily because the *goods* being transported have traveled across state lines and "remain in the stream of interstate commerce." Op. 21.

As the dissent persuasively explains, that approach finds no support in the plain language of the statute, which focuses on the activities performed by a "class of workers"—that is, their work—rather than the origin or continuity of movement of goods. The panel's decision also violates the original meaning of an "other class of workers engaged in * * * interstate commerce" at the time of the Federal Arbitration Act's enactment in 1925. The dissent details that both contemporaneous dictionaries and the fact that the phrase "other class of workers" is a "residual clause," following explicit reference to "seamen" and "railroad employees," yields the conclusion that "the best reading of the statute" is that the class of workers must "cross[] state lines in the course of making deliveries." Dissent 34, 38-39.

The dissent's conclusion aligns with the Seventh Circuit's recent opinion in *Wallace v. Grubhub Holdings, Inc.*, --- F.3d ----, 2020 WL 4463062 (7th Cir. Aug. 4, 2020). *See* Dissent 48; *see also* pages 6-7, *infra*. And it also aligns with this Court's recent opinion rejecting the argument that transporting "persons or goods traveling across state lines (i.e., in the flow of foreign or interstate commerce)" is enough to bring a class of workers within the Section 1 exemption—explaining that reading Section 1 in that manner "would allow the exception to swallow the rule." *In re Grice*, --- F.3d ----, 2020 WL 5268941, at *5 (9th Cir. Sept. 4, 2020) (denying mandamus sought in putative class action against Uber).

There is therefore at minimum tension—if not an outright conflict—between the panel's decision here and the decisions in *Grice* and *Wallace*. That intra- and inter-circuit tension calls out for en banc review.

Review is also critical to address the negative practical consequences of the panel majority's interpretation of Section 1. That interpretation "creates difficult problems of application" (Dissent 37), and would require fact-specific inquiries into the origin and movement

of the transported goods—undermining the very simplicity, informality, and speed of arbitration to which the parties agreed and that the Federal Arbitration Act is designed to protect. And the panel majority's conclusion threatens to eliminate—in unpredictable ways—the well-established benefits of arbitration, including lower costs and greater efficiency. Businesses would inevitably pass on the increased costs of litigating both the merits and the applicability of the Section 1 exemption to workers in the form of decreased compensation or to consumers as increased prices.

ARGUMENT

I. Review Is Warranted Because The Panel Majority's Interpretation Of Section 1 Conflicts With The Decisions Of Other Courts And Lacks Support In The Statute.

1. The petition persuasively explains (at 2-6) that, by focusing on the origin and movement of the *goods* being transported rather than the relevant *work*—*i.e.*, the activity of the class of workers—the panel majority's interpretation of Section 1 conflicts with the decisions of other circuits.

For example, as Judge Bress observed, the majority's reasoning is "plainly inconsistent" (Dissent 60 n.3) with the Seventh Circuit's decision in *Wallace*, which 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.* That is not the case for the local delivery drivers in the Amazon Flex program—making the panel majority's decision difficult to reconcile with *Wallace*.

The same is true for this Court's opinion in *Grice*, which was issued after the petition was filed. This Court denied a mandamus petition challenging a district court's decision that drivers using Uber's platform are not "engaged in * * * interstate commerce" within the meaning of Section 1. Citing *Wallace* with approval, the *Grice* panel refused to hold that transporting "persons or goods traveling across state lines (i.e., in the flow of foreign interstate commerce)" brings a

class of workers within the narrow Section 1 exemption. *Grice*, 2020 WL 5268941, at *5. That contention is wrong, the Court explained, because the Section 1 "'exemption is * * * about what the worker does,' not just 'where the goods [or people] have been.'" *Id.* (quoting *Wallace*, 2020 WL 4463062, at *3) (alterations this Court's). Moreover, such an overbroad reading of Section 1 "would allow the exception to swallow the rule." *Id.*

Rehearing is therefore warranted to revisit the panel's decision and the tension it creates with other recent decisions from both this and other circuits. And that tension should be resolved in favor of the interpretation of Section 1 advanced by *Grice* and by the dissent here.

2. The panel majority's decision is not just out of step with other recent decisions, but also the text of the statute.

As the dissent explains, dictionaries 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." Dissent 42-44; *see also* Chamber Br. 9-10. And the enumerated terms "seamen" and "railroad employees" further support reading Section 1 to apply only when the "other class of workers"

likewise "traditionally operate[s] across international and state boundaries." Dissent 46-47. The dissent pointed out, for example, that "if the statute excluded 'seaman, railroad employees, and local delivery persons,' it seems clear that one is quite a bit less like the others." *Id.* at 47-48. That observation is consistent with ordinary norms of statutory interpretation.

3. The reasons offered by the panel majority for departing from the plain meaning of the Act are unpersuasive.

The panel majority looked to decisions involving other statutes, such as FELA and the antitrust laws. But as both the petition (at 8-13) and the dissent (at 54-59) detail, these other statutes cannot "overcome the more natural import of the FAA's text, structure, and purpose." Dissent 54. Moreover, as the dissent explains, "[i]t is also not apparent that these other statutes the majority cites even support the majority's approach." *Id.* at 57. For example, early FELA cases cited by the panel majority concluded that the railroad worker was *not* engaged in interstate commerce. *Id.* (discussing *Shanks v. Delaware, Lackawanna & Western Railroad*, 239 U.S. 556 (1916) and *Illinois Central Railroad*

Co. v. Behrens, 233 U.S. 473 (1914)); *see also* Chamber Br. 11-12 (discussing *Behrens*).

The panel majority appeared to deem it relevant that Amazon is "one of the world's largest online retailers." Op. 21. But that factor has "no apparent basis in the statute, which focuses on the *work* that a 'class of workers' performs." Dissent 50 (emphasis added). Simply put, Section 1's "coverage does not depend on the company for whom the delivery person works." *Id.* at 50-51.

Finally, the panel majority acknowledged that its approach requires "line-drawing" and that the interpretation offered by the dissent (and Amazon) is "relatively easier to apply." Op. 27-28 (quoting Dissent 48). But while the panel majority assigned responsibility to Congress and the Supreme Court for those difficulties (Op. 28), there is a better explanation: The "easier to apply" interpretation is simpler precisely because it accords with the plain meaning of the term "other class of workers engaged in * * * interstate commerce" as those terms were used when the Act was adopted in 1925.

II. Review Is Warranted Because The Panel Majority's Overbroad Reading Of Section 1 Harms Businesses And Workers.

Rehearing is essential for the additional reason that the panel majority's decision carries significant practical consequences. The decision creates uncertainty for businesses and workers, threatening to prevent those entities and individuals from obtaining the benefits of arbitration secured by the FAA.

To begin with, sweeping an unknown number of local workers into Section 1's exemption would impose real costs on businesses. Litigation is more expensive than arbitration for businesses. But in addition, as the dissent persuasively explains (at 48, 63-68), the uncertainty stemming from the panel's atextual approach would generate expensive disputes over the enforceability of arbitration agreements with workers. That result is 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, business would be compelled, in turn, to

pass on these litigation expenses to consumers (in the form of higher prices) and workers (in the form of lower compensation).

On the other side of the equation, the panel majority's overbroad interpretation of Section 1 offers businesses and workers nothing in return. On the contrary, 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" and "greater efficiency and speed." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019) (quotation marks omitted); *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).

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 conducted on behalf of 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);[2] *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 recent study 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 Golden Age?*, 32 Ohio St. J.

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

on Disp. Resol. 1, 16 (2017) (arbitration is "favorable to employees as compared with court litigation").

In short, the availability of predictably enforceable arbitration agreements is not only required by the Federal Arbitration Act, but also results in favorable outcomes for workers without squandering resources on the costly and less effective litigation system.

CONCLUSION

The petition for rehearing or rehearing en banc should be granted.

Dated: September 14, 2020

Respectfully submitted,

/s/ *Archis A. Parasharami*

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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(5) and Circuit Rule 32-1(a) because it contains 2,514 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: September 14, 2020

/s/ *Archis A. Parasharami*
Archis A. Parasharami

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 September 14, 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*
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