No. 19-1848

In the

United States Court of Appeals

for the

First Circuit

BERNARD WAITHAKA,

Plaintiff-Appellee,

– v. –

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

Defendants-Appellants.

On appeal from the
United States District Court for the District of Massachusetts
Case No. 17-cv-40141-TSH (Hon. Timothy S. Hillman)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

The National Association of Manufacturers is a non-profit organization. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

Statutes and Rules and Regulations

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents 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 ("FAA"), 9 U.S.C. §§ 1-16.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25

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

trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM regularly submits *amicus* briefs in cases presenting issues of importance to the manufacturing community.

Many of *amici*'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 FAA, *amici*'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.

Amici therefore have a significant interest in the proper interpretation of the FAA and in reversal of the decision below. The district court's decision holding that Section 1 of the FAA exempts from that statute's

coverage the arbitration agreement of a purely local, intrastate delivery driver cannot be squared with either the text or historical context of the FAA. And the district court's ad hoc, ahistorical approach, if adopted, threatens substantial litigation costs resulting both from future disputes over the FAA's application and from conclusions, like the one below, 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 FAA 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 FAA thus embodies an "'emphatic federal policy in favor of arbitral dispute resolution.'" *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (quoting *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011)).

The FAA's principal substantive provision, Section 2, applies to any "contract evidencing a transaction involving commerce." 9 U.S.C. § 2. The Supreme Court has held that the phrase "involving commerce" "signals an intent to exercise Congress' commerce clause power to the full." *Allied-Bruce*, 513 U.S. at 277.

The exemption from the FAA's reach in Section 1, by contrast, requires a "precise reading." *Circuit City Stores, Inc. v. Adams*, 532 U.S.

105, 118, 119 (2001). Section 1 excludes "contracts of employment of seamen, railroad employees, or any other *class of workers engaged in foreign or interstate commerce*." 9 U.S.C. § 1 (emphasis added). As the Supreme Court recently explained in interpreting the phrase "contracts of employment," courts must interpret the language of Section 1 based on the "ordinary meaning" of the words "at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (alterations and quotation marks omitted).

Here, the district court held that a plaintiff making local deliveries through the Amazon Flex program is "engaged in * * * interstate commerce" within the meaning of Section 1 and thus not subject to the FAA. Notwithstanding the purely local nature of the plaintiff's deliveries, the district court held that the exemption applies when the goods being transported have travelled interstate and there is a "continuity of movement" until they reach customers, and the defendants' overall "distribution system," in the district court's view, "is centered around the interstate transport of goods." ADD8 (JA269).

The district court's approach flouts the plain meaning of the statute—which focuses on the activities of "workers" rather than the origin of

goods or the overall nature of a business—and it also violates the original understanding of what it meant to be a worker "engaged in * * * interstate commerce" at the time of the FAA's enactment in 1925. That phrase, according to both contemporaneous dictionaries and case law, refers to the actual movement of goods across state or national borders—not intrastate delivery of goods.

The district court's 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. "The wording of § 1 calls for the application of the maxim *ejusdem generis*" to "give effect to the terms 'seamen' and 'railroad employees'"—groups that were already subject at the time of the FAA's enactment to separate federal dispute-resolution procedures that Congress "did not wish to unsettle." *Id.* at 114-15, 121. Modern-day local delivery drivers are not analogous to the maritime and railway workers of 1925. They neither facilitate the movement of goods across state lines nor are they subject to other special federal regulation. And although local courier jobs existed in 1925, no contemporaneous sources suggest that those local

workers were engaged in interstate commerce or intended to be excluded from the FAA's reach.

The district court's contrary interpretation, if permitted to stand, would significantly increase litigation costs and generate disputes over the FAA's application to a potentially broad array of quintessentially local workers. If the fact that goods transported locally originated in another state were potentially enough to transform purely local courier activity into "interstate commerce," 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 district court's approach would require fact-specific inquiries into both the origin and "continuity of movement" of the transported goods—undermining the very simplicity, informality, and expedition of arbitration to which the parties agreed and that the FAA is designed to protect. And the increased costs of litigating both the merits in court and the applicability of the Section 1 exemption would be passed on in the form of decreased payments to employees and independent contractors or increased costs to consumers.

The decision of the district court should be reversed.

ARGUMENT

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

A. In 1925, The Plain Meaning Of Workers "Engaged In * * * Interstate Commerce" Referred To Their 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) (internal quotation marks omitted); *accord New Prime*, 139 S. Ct. at 539. "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law." *Wisconsin Cent.*, 138 S. Ct. at 2074; *see also New Prime*, 139 S. Ct. at 539 (recognizing the "reliance interests in the settled meaning of a statute").

Here, the district court erred at the outset by focusing on the origin and continuity of movement of the delivered goods, rather than the activities of the "class of *workers*" (9 U.S.C. § 1 (emphasis added))—*i.e.*, drivers in the Amazon Flex program. Both common and legal usage of the phrase

"engaged in foreign or interstate commerce" (9 U.S.C. § 1) at the time of the FAA's enactment point in the same direction: That phrase meant—and means—the actual transportation of goods across state or national borders. Because drivers in the Amazon Flex program do not engage in such transportation, the district court erred in holding them exempt from the FAA.

1. Drivers in the Amazon Flex program 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, *see* Amazon Br. 19) 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 employed to perform.

"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 "worker[] engaged in interstate commerce" in 1925 meant to be an individual "employed" or "occupied" in "traffic" or "transportation" of goods "between or among the several states."

Drivers in the Amazon Flex program are therefore not "engaged in * * * interstate commerce" as understood in these contemporary sources. As Amazon's brief details (at 8-9), participants in the Amazon Flex program are engaged in the purely local transportation of goods within a particular city-area or state—rather than between points in different states.

"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) (internal quotation marks omitted).

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

Several early cases prior to the enactment of the FAA involved litigation under the Federal Employers' Liability Act of 1908 (FELA), 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 requires an analysis of the particular service the employee was providing at the time of the injury. Notwithstanding that railroads are an instrumentality of interstate commerce and that the carrier was engaged in such commerce, the Court ex-

plained, 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 equally here—the "particular service" performed by drivers in the Amazon Flex program—purely intrastate deliveries within a local area—is not "a part of interstate commerce" either.

Indeed, 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 the constitutional principles applied at the time) was that the statute purported to subject 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 in-

volved in interstate activity. *See id.* at 499-502. Section 1 of the FAA's use of the term "workers engaged in * * * interstate commerce" should be interpreted to reflect the Congress's recognition in 1925 of the same then-applicable constitutional problem that had led it to revise the FELA in 1908. That statutory phrase also underscores why the district court was mistaken in analyzing the nature of the hiring company's business rather than the specific conduct of the workers. *See Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am.*, 207 F.2d 450, 453 (3d Cir. 1953) ("In incorporating almost exactly the same phraseology into the Arbitration Act of 1925 [as in "the Federal Employers' Liability Act of 1908,"] its draftsmen and the Congress which enacted it must have had in mind this current construction of the language which they used.").

To be sure, the analogy to the FELA has limits in interpreting the Section 1 exemption. 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). 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). But that revision highlights that the text of FELA at the time of the FAA's enactment confirms that Section 1's use of the term "workers engaged in * * * interstate commerce" requires focusing on the particular activity performed by those workers.

The Court has continued to emphasize 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 (1975). 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, "every circuit to consider this [language has] * * * found 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). As the Third Circuit

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*, 207 F.2d at 452; *see also, e.g.*, *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."); *Pietro Scalzitti Co. v. Int'l Union of Operating Eng'rs, Local No. 150*, 351 F.2d 576, 580 (7th Cir. 1965) (agreeing with *Tenney* that Section 1's exclusion "relate[s] only to workers engaged in the movement of interstate or foreign commerce").[2]

This interpretation also is consistent with this Court's decisions interpreting analogously worded criminal statutes, which hold that phrases

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[2] The Third Circuit's recent decision in *Singh v. Uber Technologies, Inc.*, held that the transportation of passengers rather than goods can qualify as interstate commerce. 939 F.3d 210, 219-26 (3d Cir. 2019). Although *amici* disagree with that holding, that issue is not presented by this case, which undisputedly involves the transportation of goods. The Third Circuit did not decide whether the driver in that case belonged to a class of workers engaged in interstate commerce, instead remanding to the district court to conduct that inquiry in the first instance. *Id.* at 226-28. Moreover, as Amazon's brief explains (at 25-26 & n.6), the Third Circuit's decision to remand supports Amazon's position, not Waithaka's.

such as "in interstate or foreign commerce" "require actual crossing of a state or national border." *United States v. Lewis*, 554 F.3d 208, 213 (1st Cir. 2009).

Finally, Amazon's brief convincingly explains (at 36-43) why the district court misread the handful of decisions on which it relied. The principal case, *Palcko v. Airborne Exp., Inc.*, 372 F.3d 588 (3d Cir. 2004), involved whether supervisor or managerial employees are subject to the Section 1 exemption when they oversee workers who in fact move goods across state lines. But *Palcko* has no bearing on this case, because this Court need not decide whether such a managerial employee is engaged in interstate commerce: The drivers who have contracted to make *intrastate* deliveries as part of Amazon Flex are not supervising or managing other drivers who cross state lines.

In short, both the plain text of Section 1 and the overwhelming weight of authority point to the conclusion that workers must engage 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 FAA was enacted also strongly supports limiting Section 1's exemption to workers actually engaged in interstate transportation of goods.

The Supreme Court in *Circuit City* explained at length that the residual category 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. The Court determined that "seamen" and "railroad employees" were excluded from the FAA 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).[3]

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[3] In declining to place any weight on Furuseth's objections to the FAA, 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 ability to regulate separately "those engaged in transportation" in the same manner as seamen and railroad workers. *Id.*

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 FAA 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 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 employees: "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 over decades to address the specific needs of participants in the railroad and maritime industries hardly supports the exemption of purely local delivery drivers—who share no such similar history and for whom Congress has not provided any comparable, industry-specific means of dispute resolution. Indeed, neither the district court nor plaintiffs below pointed to any comparable dispute-

resolution regimes for local couriers and in-state delivery drivers at the time the FAA was enacted, or any time thereafter.

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

The failure to give Section 1 a proper construction carries significant practical consequences. The decision below creates uncertainty for many businesses and workers, threatening to prevent those entities and individuals from obtaining the benefits of arbitration secured by the FAA.

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 "employ-

ee-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 earlier this 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 employ-

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

ees 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 local workers into Section 1's exemption would impose real costs on businesses. Not only is litigation more expensive than arbitration for businesses, but the uncertainty stemming from the district court's atextual and 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, business would, in turn, pass on these litigation expenses to consumers (in the form of higher prices) and workers (in the form of lower compensation).

III. Even If The FAA Did Not Apply Here, Massachusetts Law Does Not Prohibit Class Action Waivers Outside Of The Context Of Small-Dollar Claims.

Finally, as Amazon's brief explains, the arbitration agreement in this case is also enforceable under state law. Amazon Br. 43-50. To the extent that the FAA does not control here, Amazon explains why the district court should have applied Washington law. But even if Massachusetts law applies here, the district court should have enforced the agreement under that law.

The district court relied on *Feeney v. Dell Inc.*, 908 N.E.2d 753 (Mass. 2009), which concluded that state public policy "in favor of the aggregation of *small* consumer protection claims" is a "generally applicable State law contract defense[]" that prevents the enforcement of class action waivers

"in a consumer protection case." *Id.* at 201, 209 (emphasis added). But after the U.S. Supreme Court decided *Concepcion*, the Massachusetts court recognized that *Feeney*'s overbroad prohibition of class-action waivers was preempted in cases involving the FAA. Accordingly, it refined" and "limit[ed]" *Feeney* to stand for the proposition that the plaintiff must show a "demonstrated inability * * * to pursue their statutory claim under the individual claim process required by the arbitration agreement." *Machado v. System4, LLC*, 989 N.E.2d 464, 470 (Mass. 2013) (quotation marks omitted). The court in *Machado* upheld the arbitration agreement at issue, including its class action waiver, under that "refined" public policy doctrine, explaining that the "potential damages of approximately $10,000 or greater" (plus possible attorneys' fees)—*less* than the amount Waithaka seeks in this case—made it feasible for the plaintiff in *Machado* to arbitrate on an individual basis. The same is true here.

Contrary to the district court's conclusion that *Machado* is limited to situations when the FAA applies, the *Machado* court was refining the purportedly generally applicable *state-law* public policy defense announced in *Feeney*. And when a State creates or modifies what purports to be a general state-law contract defense, the contours of that defense do not change

depending on whether the FAA applies or not. Under *Machado* (and *Feeney*, as refined by *Machado*), Waithaka's arbitration agreement is fully enforceable as a matter of Massachusetts law.

CONCLUSION

The district court's decision should be reversed.

Dated: November 20, 2019

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

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

(i) complies with the type-volume limitations of Rule 29(a)(5) because it contains 5,130 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 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

/s/ Archis A. Parasharami
Archis A. Parasharami

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2019, I electronically filed the foregoing with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users, who will be served by the appellate CM/ECF system.

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