No. 20-1077

IN THE

Supreme Court of the United States

AMAZON.COM INC., ET AL.,

Petitioners,

v.

BERNARD WAITHAKA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE RESPONDENT BERNARD WAITHAKA IN OPPOSITION TO CERTIORARI

Shannon Liss-Riordan, *Counsel of Record*
Harold Lichten
Adelaide H. Pagano
LICHTEN & LISS-RIORDAN, P.C.
729 Boylston Street, Suite 2000
Boston, Massachusetts 02116
sliss@llrlaw.com

Counsel for Respondent

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QUESTION PRESENTED

For more than 100 years, goods have been understood to be "in interstate commerce" any time they are being transported from one state to another, even during legs of that journey that occur entirely within a single state. Workers, therefore, have been understood to be "engaged in interstate commerce," while transporting such goods that are in the flow of interstate commerce—even if the worker is only responsible for a part of the interstate journey that occurs within a single state.

The Federal Arbitration Act's transportation worker exemption carves out "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). After undertaking a careful analysis of the statutory text and its "ordinary meaning at the time Congress enacted the statute", *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019), the First Circuit held that "last-mile delivery workers who haul goods on the final legs of interstate journeys are transportation workers "engaged in ... interstate commerce," regardless of whether the workers themselves physically cross state lines." *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 26 (1st Cir. 2020). Thus, the question presented is whether these "last-mile" drivers, who transport goods in the flow of interstate commerce on the last leg of their interstate journey, are engaged in interstate commerce for purposes of the FAA even when they themselves do not physically cross state boundaries, in accordance with the longstanding meaning of that phrase.

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INTRODUCTION

Only weeks ago, this Court denied another petition for certiorari from the same petitioner, presenting the same question, and making the same claims of intercircuit conflict and error by the Court of Appeals. *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020), *cert. denied,* No. 20-622, 2021 WL 666403 (U.S. Feb. 22, 2021). Just as the Court likely recognized in denying certiorari in *Rittmann*, and contrary to Amazon's repeated assertions, the First Circuit's decision in this case creates no intercircuit conflict and properly applies this Court's guidance and reasoning in *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019). As *New Prime* requires, the panel here (just like the panel in *Rittmann*) gave effect to the ordinary meaning of Section 1's statutory text "engaged in interstate commerce" at the time of its enactment in 1925 by looking to persuasive federal precedent existing at the time of its passage. The First Circuit correctly concluded that Amazon's "last-mile" delivery drivers, who Amazon concedes perform the same job duties as FedEx and UPS drivers, *see* D. Ct. Dkt. 31-2, ¶ 4, are exempt transportation workers engaging in interstate commerce. The decision is in line with the way courts in 1925 interpreted the phrase "engaged in interstate commerce" at the time of the FAA's passage, as well as the way similar language has been interpreted in other statutory schemes throughout the years. *See infra*, pp. 25-28. These courts have consistently recognized that goods that are within the continuous flow of an interstate journey are in "interstate commerce," even with respect to legs of that journey that are wholly within one state's boundaries.

Moreover, the Courts of Appeals are fully in agreement that workers like the plaintiffs here, who deliver goods within the flow of interstate commerce, are covered by the exemption. Indeed, the Ninth Circuit reached the same conclusion, finding that the same class of last-mile delivery drivers working for the same defendants, were "engaged in interstate commerce" within the meaning of Section 1. *Rittmann*, 971 F.3d at 907. Nothing material has changed since this Court's recent consideration and denial of Amazon's petition for certiorari in *Rittmann*, and there is nothing different about this case that would warrant further review here.

In its Supplemental Brief, Amazon points to a recent decision by the Seventh Circuit in *Saxon v. Sw. Airlines Co.*, 993 F.3d 492 (7th Cir. 2021), as evidence of an alleged circuit split and urges this Court to reverse course and grant certiorari here. But contrary to Amazon's contentions, *Saxon* is irrelevant to the issue presented here -- namely, whether a delivery driver must physically cross states lines in order to be "engaged in interstate commerce" for purposes of the Section 1 exemption. Instead, *Saxon* considers whether a worker who does not actually transport goods or passengers at all, but is only involved in the loading process, nevertheless qualifies for the Section 1 exemption. Indeed, *Saxon* itself explains that the First Circuit's decision in this case addresses an issue wholly distinct from the one in *Saxon*:

> [There are] at least two general categories of workers employed in interstate commerce, beyond the obvious worker who physically crosses state lines. The first category included those who

> worked on an intrastate leg of an interstate journey. … The First and Ninth Circuits recently relied on this line of cases to conclude that so-called "last mile" delivery drivers fit within the § 1 exemption. *See Rittmann*, 971 F.3d at 912; *Waithaka*, 966 F.3d at 20–21. ***Ramp supervisors and cargo loaders do not resemble this category, so we have no need to decide whether we agree with that position today***. Cargo loaders fit cleanly into the second category—those whose work was "so closely related to [interstate transportation] as to be practically a part of it." *Shanks v. Del., Lackawanna & W.R.R.*, 239 U.S. 556, 558, 36 S.Ct. 188, 60 L.Ed. 436 (1916).

Saxon, 993 F.3d at 492 (emphasis added). To the extent there is any tension between *Saxon's* holding and that of other courts (like the Fifth Circuit in *Eastus* v. *ISS Facility Servs., Inc.*, 960 F.3d 207 (5th Cir. 2020)), this case does not provide a vehicle to resolve it, as the Seventh Circuit itself recognized.

The remainder of Amazon's effort to manufacture a circuit-split on the issues presented by this case is unavailing, as this Court already concluded in rejecting the *Rittmann* petition for certiorari. Indeed, with the exception of a lone dissent by a single member of the panel in *Rittmann*, no court has criticized the reasoning or holding of the First or Ninth Circuit's decisions against Amazon in this case and *Rittmann*. The supposed "deep divisions" among the Courts of Appeals that Amazon cites are nonexistent. In particular, Amazon's claim that these decisions are inconsistent with then-Judge Barrett's decision in *Wallace* v. *Grubhub Holdings, Inc.*, 970 F.3d 798 (7th

Cir. 2020), is incorrect. *Wallace* cited the First Circuit's decision in this case approvingly. It distinguished the decision below on the basis that the takeout food that the drivers in *Wallace* were delivering was not on a journey from one state to another, unlike the packages delivered by Amazon delivery drivers. *Id.* at 802-03. *Wallace* does *not* hold that a worker must physically cross state lines while transporting goods in order to qualify for the exemption. *See infra*, pp. 13-14. Instead, it stands for the same proposition that the First Circuit's decision below stands for: A worker transporting goods on a journey from one state (or country) to another is engaged in interstate commerce.

The other decisions cited by Amazon as evidence of a circuit split do not even interpret the operative phrase "engaged in interstate commerce" or address whether the exemption requires workers to transport goods across state lines. Instead, these cases involve completely distinct questions about the Section 1 exemption: whether workers employed outside the transportation industry, such as an account manager for a furniture rental company, can qualify for the exemption, when making deliveries is not the focus of their work, *see Hill* v. *Rent-A-Center, Inc.*, 398 F.3d 1286, 1289 (11th Cir. 2005); whether the exemption covers the transportation of passengers as well as goods and how it applies in the different factual context of ride-sharing service drivers, *see Singh* v. *Uber Technologies Inc.*, 939 F.3d 210, 228 (3d Cir. 2019); and whether the exemption covers workers who are one or more steps removed from the transportation of goods, such as a ramp or gate-agent supervisor at an airport, *see Saxon*, 993 F.3d 492; *Eastus*, 960 F.3d

207. None of these distinct issues is implicated by the decision below, and none of the cited decisions conflict with its holding.

The Court should again reject Amazon's attempt to inject uncertainty into what has otherwise been a consistent line of decisions interpreting the Section 1 transportation worker exemption both before and after this Court's recent guidance in *New Prime*. The First Circuit's careful analysis is wholly consistent with the text and structure of the statute. The Court considered how the phrase "engaged in commerce" was understood at the time of the FAA's passage and how that language had been used in other statutory schemes. The decision gives the category of workers "engaged in commerce" a scope consistent with that of the other enumerated categories of workers exempted by Section 1. It also comports with Congress's concern regarding disrupting the free flow of goods: "last-mile" delivery drivers like the plaintiffs play the same critically important role in ensuring delivery of interstate shipments on the final leg of their interstate journeys as do the drivers taking the goods from the factory to the warehouse, or to the retail stores, lest they lie fallow in those stores and warehouses. There is no reason for this Court to disturb this sound ruling, particularly given the absence of disagreement among the Courts of Appeals.

COUNTER-STATEMENT OF THE CASE

A. Factual Background

Petitioners Amazon.com, Inc., and its subsidiary, Amazon Logistics, Inc., ("Amazon") are based out of Seattle, Washington, and provide online retail and delivery of a wide array of consumer goods to Amazon's customers across the country. D. Ct. Dkt. 1-1, ¶¶5-6; *see also* D. Ct. Dkt. 31-2, ¶ 3. Amazon Logistics advertises that its "Delivery Station teams ensure that millions of packages reach their final destination as efficiently as possible" and help to "implement[] innovative delivery solutions." *See* D. Ct. Dkt. 34-4; *see also id.* ("At Amazon Logistics (AMZL), our goal is to provide customers with an incredible package delivery experience through the last mile of the order.").

Respondent Bernard Waithaka is an AmazonFlex delivery driver who contracted with Defendants to perform deliveries to Amazon customers. D. Ct. Dkt. 1-1, ¶3. AmazonFlex drivers perform the exact same type of deliveries that are performed by package delivery drivers for UPS and FedEx. D. Ct. Dkt. 31-2, ¶ 4 ("Products purchased through Amazon historically have been delivered by large third-party delivery providers (*e.g.*, Federal Express, UPS and the U.S. Postal Service). More recently, Amazon has begun to supplement its use of large providers by contracting with smaller delivery service partners, and, now, independent contractors crowdsourced through a smartphone-application-based program known as Amazon Flex."). Specifically, these drivers transport packages on the "last-mile" of their shipment to their final destination.

B. Procedural Background

Waithaka filed this putative class action case on August 28, 2017, in Massachusetts state court, alleging that Amazon has misclassified its AmazonFlex delivery drivers as independent contractors under Massachusetts law, Mass. Gen. L. c. 149 § 148B. D. Ct. Dkt. 1-1. Waithaka alleged that the drivers had not been paid at least minimum wage for all hours worked and had been improperly required to bear expenses necessary to perform their jobs in violation of Massachusetts state law, Mass. Gen. L. c. 151 §§ 1, 7, Mass. Gen. L. c. 149 § 148. *Id.*

After Amazon's second attempt to remove the case to federal court succeeded, Amazon filed a Motion to Compel Arbitration, or in the Alternative, to Transfer or Stay. D. Ct. Dkt. 26, D. Ct. Dkt. 29. Following thorough briefing and oral argument by the parties, the District Court issued an Order denying Amazon's Motion to Compel Arbitration and finding that Waithaka and the putative class are exempt from the FAA's coverage. App., *infra*, at 54a-65a. The court held that AmazonFlex delivery drivers were "engaged in interstate commerce" as that term is understood in Section 1 of the FAA because they transport goods that are within the flow of interstate commerce on one intrastate leg of their continuous interstate shipment. App. at 57a.

The District Court noted that a consensus had emerged among courts (including the Supreme Court after its *New Prime* decision) that truck drivers were transportation workers, like railroad employees and seamen, and therefore fell under the exemption. App. at 57a-58a. The court noted that unlike truck driv-

ers, "last-mile drivers" like AmazonFlex drivers do not necessarily carry goods across state lines; however, the court rejected Defendants' argument that this fact was dispositive and that transportation workers must necessarily cross state lines or great distances to qualify as engaging in interstate commerce. App. at 59a-62a. The court noted that a number of other courts had found that drivers performing intrastate delivery of goods within the continuous flow of interstate commerce still qualified for the exemption. App. at 61a-62a. The court distinguished a line of cases involving local takeout food delivery workers in the "gig economy," finding that the "goods" delivered by those workers were not within the flow of interstate commerce and had come to rest at the local restaurant where they were transformed into meals, whereas there was a continuity of movement of the packages being delivered by AmazonFlex drivers from out-of-state to the customer's doorstep. App. at 59a-60a.

The District Court then considered the enforceability of Amazon's agreement under state law. The District Court ultimately concluded that under Massachusetts law, Amazon's arbitration agreement is unenforceable because class action waivers embedded in arbitration agreements violate state public policy in a case such as this. App. at 70a-76a.

On appeal, the First Circuit agreed with the District Court's reasoning and affirmed. Following this Court's recently enunciated guidance in *New Prime*, which likewise interpreted Section 1 of the FAA, the First Circuit looked to the statutory text and its "ordinary meaning at the time congress enacted the

statute." App. 12a (citing *New Prime*, 139 S. Ct. at 539). The court began by considering contemporaneous statutes using the phrase "engaged in interstate commerce" at the time of the FAA's passage in 1925. App. 14a-23a. The court undertook a careful and lengthy analysis of decisions under the Federal Employees Liability Act ("FELA") of 1908, 45 U.S.C.A. § 51, which interpreted the phrase "engaged in interstate commerce" with respect to railroad workers in the years leading up to the FAA's passage. *Id.* at 16a-23a. The court noted that "[w]hether a worker had moved across state lines was not dispositive" for purposes of FELA. App. 17a. Instead, workers "engaged in interstate commerce" were found to include "at least two other categories of people: (1) those who transported goods or passengers that were moving interstate, and (2) those who were not involved in transport themselves but were in positions so closely related to interstate transportation as to be practically a part of it." *Id.* at 17a-18a (internal citations omitted). The court focused its analysis on the former category or workers, reserving any decision about the second category of workers for another day and another case that presented that distinct issue. App. at 18a, n. 9.

Thus, the First Circuit observed that a worker operating a train exclusively within the state of Pennsylvania was nonetheless "engaged in interstate commerce" because the coal on the train was being shipped interstate, and the worker was performing an intrastate leg of the larger interstate journey. App. at 17a-18a (discussing *Philadelphia & Reading Railway Co. v. Hancock*, 253 U.S. 284, 40 S.Ct. 512, 64 L.Ed. 907 (1920)). Like the railroad workers under

FELA, last-mile delivery drivers like AmazonFlex drivers here make intrastate deliveries of goods on the final leg of their interstate shipment. Ultimately, the Court held that "[c]onsistent with the Supreme Court's focus on 'the flow of interstate commerce' in *Circuit City*, these cases show that workers moving goods or people destined for, or coming from, other states -- even if the workers were responsible only for an intrastate leg of that interstate journey -- were understood to be 'engaged in interstate commerce' in 1925." App. 23a.

Amazon made a litany of arguments against considering the FELA cases as a guide to interpreting the Section 1 exemption, each of which the First Circuit carefully considered and properly rejected. App. at 20a-23a. The First Circuit also considered the structure of the residual clause and found that it supported its interpretation rather than Amazon's. The Court noted that the nature of the business employing the transportation workers in question is relevant insofar as the residual clause should be interpreted in light of the preceding categories of workers—seamen and railroad employees—which refer to workers employed by particular industries involved in the interstate movement of goods. App. at 24a-25a.

Having concluded that Amazon delivery drivers were exempt from the FAA, the Court considered what state law should apply in the absence of the FAA and whether the contract was enforceable under state law. The Court concluded that "Massachusetts would treat the class waiver provisions in the Agreement as contrary to the Commonwealth's fundamental public policy …" App. 32a. Thus, the

Court concluded that "individual arbitration cannot be compelled pursuant to state law here." *Id.; see also* discussion at App. 33a-52a.

Amazon petitioned for rehearing en banc, and the full First Circuit denied the petition.

REASONS FOR DENYING THE WRIT

A. There is No Circuit Split Regarding the Correct Interpretation of the Phrase "Engaged in Foreign or Interstate Commerce" in Section 1 of the FAA

Although the Circuits are in agreement on the issue raised by this case, Amazon attempts to manufacture a circuit split by arguing that some courts considering Section 1 (such as the First Circuit below and the Ninth Circuit in *Rittmann*) have focused their analysis on the nature of a business's activities while other courts have focused their analysis on the workers' activities and whether they physically transport goods across state lines. Pet. at 9-10. According to Amazon, this alleged inconsistency has led to confusion and inconsistent results.

Amazon's argument is wrong. First, the argument rests on a mischaracterization of the First Circuit's analysis in this case as focusing only on the nature of the company's activities rather than the workers' activities; in reality, the Court considered *both* the nature of the business for which Amazon drivers perform their work (the interstate shipment and delivery of goods) and the nature of the work the drivers themselves perform (the "last-mile" delivery of inter-

state shipments to their final destination). As the First Circuit explained:

> Although our ultimate inquiry is whether a class of workers is 'engaged in ... interstate commerce,' … [t]he nature of the business for which a class of workers perform their activities must inform that assessment. After all, workers' activities are not pursued for their own sake. Rather, they carry out the objectives of a business, which may or may not involve the movement of persons or activities within the flow of interstate commerce… [T]he language of the residual clause does not foreclose taking into account the company's business when considering how to classify the nature and activities of the workers at issue.

App. at 24a.

Thus, the First Circuit looked to *both* the nature of the business for which the workers performed services *and* the activities of the workers—an approach that is fully consistent with that of every other court to consider the contours of Section 1.

Amazon insists that other courts in the Fifth, Eleventh, and Seventh Circuits have looked exclusively to the activities of the class of workers in question and not to the nature of the business for which the work is performed. But again, Amazon mischaracterizes the cases to create the appearance of disagreement where none exists. None of the decisions Amazon cites holds that a court must ignore the nature of an employer's business in considering whether an employee is "engaged in commerce."

For instance, Amazon argues that the Seventh Circuit's decision in *Wallace* is "inconsistent" with the First Circuit's decision below because *Wallace* focuses on "what the worker does" and whether the workers' activities involve "the act of moving [] goods across state or national borders." Pet. at 11. But Amazon grossly mischaracterizes the holding of *Wallace* by implying that *Wallace* held that workers must physically cross state lines to qualify for the Section 1 exemption. The decision held nothing of the sort.[1] The *Wallace* court distinguished between workers who transport goods or people as one leg of a larger interstate chain of commerce (i.e. workers "connected…to the act of moving [] goods across state or national borders" like the last-mile delivery drivers at issue here) and workers who deliver goods or people that happen to at some time in the past have originated out of state (such as "dry cleaners who deliver pressed shirts" that happen to be "manufactured in Taiwan" and "ice cream truck drivers selling treats" that happen to be "made with milk from an out-of-state dairy."). *Wallace*, 970 F.3d at 802. Thus,

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[1] Indeed, the Seventh Circuit has since clarified that "[a]ctual transportation is not limited to the precise moment either goods or the people accompanying them cross state lines." *Saxon*, 993 F.3d at 498. If *Wallace* had held otherwise, the *Saxon* panel would have been bound by its holding. Likewise, prior decisions by the Seventh Circuit do *not* hold that crossing state lines is required to qualify for the Section 1 exemption but only that doing so may be *sufficient* to render delivery drivers exempt, even when they only "occasionally" cross state lines in the course of their deliveries. *See, e.g.*, *Int'l Broth. of Teamsters Local Union No. 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 957 (7th Cir. 2012); *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Cartage Co.*, 84 F.3d 988, 993 (7th Cir. 1996).

Wallace affirmed an order compelling arbitration with respect to local takeout food delivery drivers -- the very drivers that the district court persuasively distinguished from AmazonFlex drivers who are more akin to FedEx and UPS last-mile delivery drivers, completing an interstate delivery of goods to their final destination. App. at 59a-60a; *see also Rittmann*, 971 F.3d at 916 (distinguishing "local food delivery drivers" like those at issue in *Wallace* "because the prepared meals from local restaurants are not a type of good that are indisputably part of the stream of commerce").

Nothing in *Wallace's* analysis is inconsistent with the "flow of commerce" formulation embraced by the First and Ninth Circuits. Indeed, *Wallace* was decided after the First Circuit's decision in this case and cited it approvingly. 970 F.3d at 801-02, n. 2.[2] *Wallace's* test for determining whether Section 1 applies–which asks whether interstate movement of goods is a central part of the workers' job description–is fully consistent with the decision below because here, the drivers' job description of delivering goods on the final leg of their interstate journey shows that "the interstate movement of goods is a central part of the job description." *Wallace*, 970 F.3d at 803. As set forth above, the First Circuit considered both the

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[2] Amazon dismisses this fact, arguing that *Wallace* simply made a "passing comment about a fact pattern not before the court" which "does not show that the Seventh Circuit agrees with the First Circuit." Pet. at 12. But nothing in the *Wallace* decision suggests that the Seventh Circuit *disagrees* with the First Circuit. It is Amazon that is attempting to imply a disagreement between the Seventh and First Circuits that is simply not there.

workers' job duties *and* the nature of the business for which they were performed, only insofar as it helps to define the "activities of the workers at issue." App. at 24a; *see also Saxon*, 993 F.3d at 497 (agreeing that "[t]he employer's business might well inform the 'ultimate inquiry' whether its employees are engaged in commerce … but the employer is not itself the inquiry") (citing *Rittmann*, 971 F.3d at 917; *Waithaka*, 966 F.3d at 22–23).

Similarly, Amazon claims that the Fifth Circuit's decision in *Eastus*, finding that a supervisor of gate and ticketing agents at an airport was not exempt under Section 1, turns on the activities of the workers rather than the business of the airlines, which are clearly involved in interstate transportation of goods and passengers. Pet. at 12-13. But as explained above, *Waithaka* and *Rittmann* do *not* hold that the nature of the business is paramount; if that were so, then presumably *any* employee of Amazon, from a call center representative assisting with orders to a janitor to an executive, would be exempt under Section 1 simply because the company is engaged in the interstate shipment of goods, without regard to the actual activities performed by the workers. But *Waithaka* and *Rittmann* hold nothing of the sort; instead, these cases merely make the (uncontroversial) observation that "the nature of the business for which a class of workers perform their activities *must inform* th[e] assessment." App. at 24a.

This observation that the nature of the business must inform the Section 1 analysis accords with the approach taken by the other courts cited by Amazon as well. For example, in *Hill v. Rent-A-Ctr., Inc.*, cit-

ed by Amazon at p. 13 of the Petition, the Eleventh Circuit held that an account manager for a furniture rental company was not exempt under Section 1, noting that "[t]he emphasis…[i]s on a class of workers *in the transportation industry*, rather than on workers who incidentally transported goods interstate as part of their job in an industry that would otherwise be unregulated." 398 F.3d at 1289 (emphasis added). By considering the industry in which the plaintiff worked, as well as his actual job duties, the Eleventh Circuit, like the First and Ninth Circuits, concluded that *both* the nature of the business *and* the activities of the worker were relevant to the inquiry; there, the plaintiff had occasion to make some interstate deliveries of furniture, but it was only one small part of his duties as an account manager, and the furniture rental company he worked for was not involved in the interstate shipment of goods, unlike Amazon in this case.

In sum, the decisions of the Seventh, Fifth, and Eleventh Circuits in *Wallace, Eastus*, and *Hill* do not conflict with the holding in this case. Each involved very different facts, but their analyses were wholly consistent with the approach taken here of considering both the Plaintiff's work and the nature of the business for which it was performed. There is no inter-Circuit conflict.

Amazon also contends that the Third and Eighth Circuits have adopted "multifactor standards" to determine Section 1's applicability, which are inconsistent with the standard applied by the Ninth Circuit here. Pet. at 14-15 (citing *Singh* v. *Uber Technologies Inc.*, 939 F.3d at 228, and *Lenz* v. *Yellow*

Transp., Inc., 431 F.3d 348, 352 & n.2 (8th Cir. 2005)). But Amazon is incorrect on both counts. The Eighth Circuit in *Lenz* simply applied criteria to determine if the worker in question was a "transportation worker," even though the worker did not personally perform any transportation activities. *Lenz* was focused on a different question, and in analyzing that question, it harmonized various factors considered by other circuit courts in applying the transportation worker exemption. Thus, *Lenz's* analysis is not at all inconsistent with the First Circuit's decision here.

Likewise, the Third Circuit in *Singh* articulated a test for determining whether workers are "engaged in interstate commerce" that is entirely consistent with the First Circuit's decision here, finding that to qualify for the exemption, a class of workers must be engaged in commerce or work so closely related as to be in practical effect a part of interstate transportation. 939 F.3d at 219. However, the *Singh* court remanded the case because it concluded that it had inadequate facts to address "the engaged-in-commerce" inquiry, which the district court did not reach below. *Id.* at 214, 226-27.[3] Moreover, *Singh* was addressed more to the question of whether transportation of *passengers* could qualify for the exemption. To the extent it addressed what it means to be "engaged in interstate commerce," its vision is entirely consistent

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[3] The district court in *Singh* dismissed the case on a motion to dismiss, prior to any discovery, based on the court's conclusion that a class of workers transporting passengers (as opposed to goods) could not qualify for the Section 1 exemption. *Id.* at 214. The bulk of the Third Circuit's decision was devoted to resolving this issue and ultimately reversing the district court.

with *Waithaka* insofar as the court focused on whether the worker's job is so inextricably linked to interstate commerce as to be in practical effect a part of it.

Neither *Lenz* nor *Singh* had occasion to consider whether Section 1 requires that workers physically cross state lines. In other words, neither of these cases are on point with respect to the issue addressed in this case. Because they addressed different issues, the asserted difference between their "approach" and that of the First Circuit's here, even if it existed, would not amount to a Circuit split, as Amazon asserts.

In a Supplemental Brief, filed after its Petition, Amazon now also cites the Seventh Circuit's recent decision in *Saxon*, 993 F.3d 492, as further evidence that a "circuit split [exists] over whether intrastate transportation workers are exempt from the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq*." *See* Suppl. Br. at 1. Ironically, in light of the Petition's assertion that the decision below and the Ninth Circuit's decision in *Rittmann* are in conflict with the position of the Seventh Circuit (in *Wallace*), the Supplemental Brief tries to *align* the Seventh Circuit with the First and Ninth and in opposition to the Fifth. Both arguments *cannot* be correct, and in fact *neither* is. *Saxon* does not address the intrastate transportation of goods that are traveling on an interstate journey. Like *Eastus*, it concerned workers who did not actually transport goods at all but were instead involved in the loading and unloading process. To the extent *Saxon* and *Eastus* are in tension with one another, this case offers no opportunity to resolve the disa-

greement as it simply does not raise the central issue of when a worker who does not transport goods or passengers at all can qualify for the exemption. By the same token, neither *Saxon* nor *Eastus* speak to the central issue here: whether a driver transporting goods within the flow of interstate commerce must literally cross state lines in order to qualify for the Section 1 exemption. *See* App. at 18a ("[W]e do not determine whether the second category of workers considered to be 'engaged in interstate commerce' for purposes of the FELA -- those who were 'engaged in interstate commerce' by virtue of the close relationship between their work and interstate transportation -- are also transportation workers 'engaged in . . . interstate commerce' for purposes of the FAA."); *Saxon*, 993 F.3d at 501 ("The FELA cases identify at least two general categories of workers employed in interstate commerce, beyond the obvious worker who physically crosses state lines. The first category included those who worked on an intrastate leg of an interstate journey….Cargo loaders fit cleanly into the second category—those whose work was 'so closely related to [interstate transportation] as to be practically a part of it.'").[4] In short, the Seventh Circuit acknowledged that its decision in *Saxon* did not consider the issue presented here because it was irrelevant to the issue before it.

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[4] Amazon argues that "[b]ecause Justice Barrett sat on the original Seventh Circuit panel, see *Saxon* v. *Sw. Airlines Co.*, No. 19-3226 (7th Cir. July 8, 2020), ECF No. 36, it is doubtful the full Court could consider that case" and that this case would therefore provide "a better vehicle" for the full court to consider. Suppl. Br. at 3. But this argument misses the mark because this case concerns a fundamentally different and distinct issue from *Saxon*.

Amazon stretches to find any difference in these cases that it can spin into a "deep division" warranting this Court's intervention. But as set forth above, there is no Circuit split here that would require this Court's extraordinary intervention. To the contrary, every appellate court to have considered the question has agreed: workers who transport goods that are traveling from one state to another within the flow of interstate commerce are exempt from the FAA.

B. The First Circuit's Approach Correctly Gives Effect to the Language and Purpose of the Statute and Follows Well Established Precedent

Amazon also argues that review is required because the First Circuit reached the wrong conclusion in finding Amazon's last-mile package delivery drivers were exempt from the FAA's coverage. In the absence of a conflict, such a factbound claim of error would not warrant review by this Court, even if it had merit. Here, the claim of error is baseless: the decision below is sound, as the full court recognized in denying Amazon's petition for *en banc* rehearing (and as this Court evidently also recognized in denying the petition for certiorari in *Rittmann*, which was decided after this case and adopted its sound analysis).

i. The First Circuit Properly Looked to the Ordinary Meaning of the Text of Section 1 at the Time of the FAA's Passage

According to Amazon, the statutory text of Section 1 is clear that the exemption only covers "workers who, considered as a class, are engaged in nonlocal transportation across state or national boundaries." Pet. at 16.[5] But in fact, it is Amazon's reading of the statute that is not supported by its text; nowhere does the exemption refer to "nonlocal" transportation or mention state or national boundaries. Amazon argues that dictionary definitions of "interstate commerce" and "engage" prove that the exemption applies only to workers occupied or employed in the transportation of goods between one state and another, citing the dissent in *Rittmann*. *See* Pet. at 16. But, as the *Rittmann* majority pointed out, the dissent relied upon the "the same dictionaries we use to ascertain the FAA's meaning at its enactment." *Rittmann*, 971 F.3d at 918, n. 9.

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[5] Amazon drivers *do* cross state lines at times to make deliveries and sometimes travel lengthy distances to make deliveries. *See Rittmann*, Civ. A. No. 16-1554, D. Ct. Dkt. 106; D. Ct. Dkt. 83, ¶ 22. The factual record does not include information about how often drivers, as a class, cross states lines or the average distance of a delivery. Plaintiff does not believe that these facts are relevant or should have any bearing on the outcome, but the fact that the record here is silent on these issues further counsels against granting the petition. As set forth *infra*, Part C, this case would not be the right vehicle for the Court to take up these questions.

Dictionary definitions from the years prior to the FAA's enactment in 1925 make clear that being engaged in interstate commerce at the time included carrying out intrastate legs of the transport of goods that were being shipped from one state to another. *See, e.g.*, Bouvier's Law Dictionary and Concise Encyclopedia 532 (8th ed. 1914) (explaining that goods were in interstate commerce from the time they were "actually shipped or started in the course of transportation to another state or foreign country" until reaching their final destination, even if the final leg of that journey was entirely within a single state; "[A]n express company taking goods from a steamer or railroad and transporting them through the street of the city to the consignee is still engaged in interstate commerce"). Amazon's interpretation requires this Court to ignore the widely understood meaning of "interstate commerce" in 1925.

The First Circuit's analysis is consistent with this Court's recent guidance in *New Prime* "that words generally should be 'interpreted as taking their ordinary ... meaning ... at the time Congress enacted the statute." 139 S. Ct. at 539 (quoting *Wisconsin Central Ltd. v. United States,* 138 S.Ct. 2067, 2074 (2018)). The First Circuit, like many courts before it, looked to the FELA cases that predated Congress's enactment of the FAA for guidance regarding how to interpret the FAA, and in particular, the phrase "engaged in interstate commerce" in Section 1. *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., (U.E.) Local 437*, 207 F.2d 450, 453 (3d Cir. 1953). In cases decided under FELA, this Court held that workers who performed only intrastate transportation and who never crossed state lines were

nonetheless "engaged in interstate commerce". For example, in *Philadelphia & R R Co v. Hancock*, 253 U.S. 284, 285 (1920), the Court held that even where "[t]he duties of the [train crew member] never took him out of Pennsylvania," and he solely transported coal to a destination two miles away, he was nonetheless engaged in interstate commerce because the coal he was transporting was bound for another state. *Id.* at 286. The FELA decisions are directly analogous and provide clear support for the First Circuit's decision below.

ii. The First Circuit's Opinion Gives "Engaged in Commerce" a Meaning Consistent with the Other Enumerated Categories of Workers in Section 1: Railroad Employees and Seamen

Amazon also argues that the First Circuit's opinion is flawed because Amazon's "last-mile" delivery drivers are not similar to the other enumerated categories of workers in the statute, railroad employees and seamen. Pet. at 17-18. But nothing about the terms "seamen" and "railroad employees" implies that these categories of workers *only* perform long-distance deliveries across state lines. Indeed, this Court recognized this fact in *New Prime* when it looked to statutes such as the Transportation Act of 1920, 66 Cong. Ch. 91 (1920), 41 Stat. 456, and the Erdman Act, 55 Cong. Ch. 370 (1898), 30 Stat. 424, to better understand how the term "railroad employees" was understood when the FAA was passed. *New Prime*, 139 S. Ct. at 542-43 ("In 1922, for example, the Railroad Labor Board interpreted the word 'em-

ployee' in the Transportation Act of 1920 to refer to anyone 'engaged in the customary work directly contributory to the operation of the railroads.' "). For instance, the Erdman Act "defined 'employees' as 'all persons actually engaged in any capacity in train operation or train service of any description.' " *Id.* at 543, n. 12. Similarly, the term "seamen" was understood to encompass "shipboard surgeons who tended injured sailors." *Id.* at 543; *see also The Sea Lark*, 14 F. 2d 201, 201-02 (W.D. Wash 1926) (describing cooks, surgeons, and bartenders as seamen, and holding that musicians on a boat used for excursions were seamen).

The statutes and cases cited by this Court in *New Prime* make clear that seamen are individuals employed on a boat, and railroad employees are individuals employed (in any capacity) by railroads; nothing about these terms suggest that seamen and railroad employees must, by definition, physically transport goods across state lines or over long distances. By extension, workers who are drivers, delivering interstate goods, employed as part of an interstate supply chain, are plainly in the same general category of transportation workers engaged in interstate commerce, whether or not they themselves physically cross state lines. Thus, the First Circuit's decision is true to the text of the statute and properly gives effect to the other enumerated categories of workers in Section 1.

iii. The First Circuit's Reliance on the FELA Cases Was Sound (and Consistent with the Way Many Other Courts Have Interpreted Similar Language)

Next, Amazon attacks the First Circuit's reliance on the FELA cases, Pet. at 18-20, but its arguments misfire for a number of reasons. First, the Court of Appeals' analysis is directly in step with this Court's analysis in *New Prime* – to glean the meaning of the words in the FAA exemption by looking at the meaning of those words *at the time of enactment*. *See New Prime*, 139 S. Ct. at 539. Likewise, it is consistent with the Court's approach in *Circuit City*, where the Court likewise "examined how the[] respective phrases… 'in commerce' and 'engaged in commerce'… had been interpreted in other statutory contexts." App. at 11a (*quoting Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 115-17 (2001)).

Amazon argues that, because the statutory language in FELA is not identical to that used in Section 1 of the FAA, the First Circuit erred in looking to the FELA precedents. Pet. at 19. But this argument is nonsensical. Indeed, as set forth above, this Court in *Circuit City* repeatedly looked to the way similar (though not identical) language was used in other statutes. *See Circuit City*, 532 U.S. at 117-18 (discussing how the phrases "in commerce" and "engaged in commerce" have been interpreted under the Federal Trade Commission Act, the Clayton Act, and the Robinson-Patman Act). Indeed, the language of the FELA is interchangeable with the language of the FAA insofar as courts have repeatedly held that

the inquiry under the FELA is whether the worker in question is "engaged in interstate commerce." *Philadelphia, B. & W. R.R. v. Smith*, 250 U.S. at 102, 104 (1919); *Philadelphia & R. Ry. Co v. Di Donato*, 256 U.S. 327, 329–331 (1921) (using phrases interchangeably).

Amazon also argues that "FELA's jurisdictional provision requires that the *rail carrier* be 'engaging in commerce between any of the several States'" and is therefore "oriented more around the work of the common carrier" than the worker. Pet. at 19. But this Court's case law makes clear that the inquiry under the FELA is whether *the employee* was engaged in interstate commerce. *See, e.g.*, *Philadelphia, B. & W. R.R.*, 250 U.S. at 104 (stating that question is whether employee was "engaged in interstate commerce within the meaning of the statute" and answering that question by stating that employee "was employed . . . in interstate commerce"). The First Circuit correctly rejected this very argument, noting that "the FELA applied only when both the carrier and the injured employee had been engaged in interstate commerce." App. at 21a. "That is, the FELA was concerned with the activities of employees, just as the FAA is." *Id.* at 21a-22a.

Amazon also argues that FELA's purposes are the opposite of the FAA exemption's purposes in that FELA was a broad remedial statute that should be interpreted liberally construed, such that the FELA precedents are inapposite. Pet. at 19-20. But at the time of the FELA's passage, the phrase "engaged in commerce" had to be construed narrowly because this Court had held that Congress's Commerce Clause

power was narrow. *See, e.g. The Employers' Liability Cases*, 207 US 463 (1908). Regardless of the purpose of FELA, that phrase itself was given a very strict, narrow construction or the statute would have exceeded Congress's authority. The First Circuit therefore correctly rejected Amazon's argument, noting that "there is no indication that the remedial purpose of the FELA affected the Supreme Court's conclusion that injured railroad workers who were transporting within one state goods destined for or coming from other states—activities comparable to those performed by Waithaka—were engaged in interstate commerce." App. at 22a. Instead, in "the FELA precedents that we have discussed, the question before the Court was the same as it is here: whether certain transportation workers engaged in interstate commerce." *Id.*

Finally, Amazon argues that the reliance on the FELA decisions is inappropriate insofar as the FELA was later amended in 1939, and it insists that the First Circuit is "breathing new life into this repudiated precedent." Pet. at 19-20. But the fact that the FELA statute was subsequently amended does not detract from the fact that it provides invaluable insight into the way the phrase "engaged in commerce" was interpreted at the time of the FAA's passage. Moreover, the FELA cases' interpretation of "engaged in commerce" as embracing movement of goods "within the flow of interstate commerce" is consistent with the way other statutory schemes have interpreted the same language. *Circuit City*, 532 U.S. at 118 (*citing Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974) (noting that the phrase "engaged in commerce" in the Clayton and Robinson-

Patman Acts "appear[] to denote only persons or activities within the flow of interstate commerce.")). There is simply no support for the notion that this interpretation of the phrase "engaged in interstate commerce" has been "abrogated" as Amazon claims; on the contrary, as the court in *Rittmann* noted, "the Supreme Court has held that the actual crossing of state lines is not necessary to be "engaged in commerce" for purposes of the Clayton and Robinson-Patman Acts" and other statutes. *Rittmann*, 971 F.3d at 913.[6]

Amazon insists that its favored interpretation of Section 1 is more administrable and truer to the FAA's pro-arbitration purposes. Pet. at 20. But as this Court recognized in *New Prime*, "[i]f courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we would risk failing to 'tak[e]...account of' legislative compromises essential to a law's passage and, in that way, thwart rather than honor 'the effectuation of

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[6] Amazon cites *People of State of New York ex rel. Pennsylvania R. Co. v. Knight*, 192 U.S. 21, 26, 24 S. Ct. 202, 202, 48 L. Ed. 325 (1904), at n. 2 of its Petition, arguing that "more factually similar decisions from the pre-FAA era undercut" the First Circuit's decision. But *Knight* actually supports Plaintiff's position. The Court acknowledged that "a single act of carriage or transportation wholly within a state may be part of a continuous interstate carriage or transportation," and observed that a leg of an interstate shipment from New York to Pennsylvania which occurs "only within the limits of New York" is nonetheless interstate in nature. *Knight* supports the First Circuit's interpretation here, as *Rittmann* correctly recognized. *See Rittmann*, 971 F.3d at 915-16.

congressional intent.'" *New Prime Inc.*, 139 S. Ct. at 543.

In any case, Amazon's proposed reading of Section 1 would not result in a rule that is any clearer or more administrable than the one adopted by the First and Ninth Circuits. Even if this Court were to require workers to physically cross state lines to qualify for the exemption, there would still be debate about who qualifies. For instance, Amazon refers to "local deliveries" as falling outside the exemption, but some AmazonFlex drivers have traveled long distances to make deliveries or have crossed state lines to deliver a package. *See Rittmann*, Civ. A. No. 16-1554-JCC, D. Ct. Dkt. 106; D. Ct. Dkt. 83, ¶ 22. The test focuses on the "class of workers", rather than individual workers. *See Singh*, 939 F.3d at 227; *Bacashihua v. U.S. Postal Service*, 859 F.2d 402, 405 (6th Cir. 1988). If crossing state lines were the touchstone of the test, parties would be plunged into discovery regarding how often this type of delivery happened, and there would be litigation about how often a class of workers must cross state lines to be "enough" to qualify for the exemption. *See Kienstra*, 702 F.3d at 957 (where truckers estimated making a few dozen interstate deliveries out of 1500 to 1750 deliveries each year, the court held that "[a]lthough Illinois Concrete was primarily engaged in operations within Illinois, its truckers occasionally transported loads into Missouri. This means that the truckers were interstate transportation workers within the meaning of § 1 of the FAA.") (emphasis added); *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Cartage Co.*, 84 F.3d 988, 993 (7th Cir. 1996) (Section 1 exemption applied even where defendant

was "primarily engaged in local trucking and *occasionally* transports cartage across state lines") (emphasis added). Likewise, what constitutes a "local delivery"–a phrase that appears nowhere in the statute –would no doubt be the subject of heated debate.

Contrary to Amazon's contentions, there is nothing arbitrary about the result of the First and Ninth Circuit's test below; it is precisely how this Court has interpreted what it means to be engaged in interstate commerce for more than a century. Amazon attempts to compare the work of the drivers here to that of other so-called gig economy workers like the takeout food delivery drivers at issue in *Wallace* and the Uber drivers at issue in *Singh*. Pet. at 15. However, the work performed by AmazonFlex drivers is materially different insofar as they are delivering packages that have clearly traveled interstate, like FedEx, UPS, or USPS deliveries. If GrubHub drivers are modern-day pizza delivery drivers and Uber drivers modern-day cab drivers, then the Amazon drivers here are modern-day UPS drivers. Courts have long distinguished between such work.

C. This Case is a Poor Vehicle for the Court to Interpret the Meaning of "Engaged in Interstate Commerce" in Section 1 of the FAA

Finally, even if this Court believes that the proper interpretation of the transportation worker exemption may at some point warrant review by this Court, this is not the right case or the right time for this Court to take up this question.

First, every circuit to have considered the question presented here has agreed that workers do not have to physically cross state lines in order to fall under Section 1's exemption. *See Waithaka*, 966 F.3d 10; *Rittmann*, 971 F.3d 904; *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 593-94 (3d Cir. 2004) ("[H]ad Congress intended the residual clause of the exemption to cover only those workers who physically transported goods across state lines, it would have phrased the FAA's language accordingly."); *Bacashihua*, 859 F.2d 402*; Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 823 F.2d 466, 473 (11th Cir. 1987).

Given that the Courts of Appeals that have considered the issue are in agreement that a worker need not personally cross state lines to be "engaged in commerce" under Section 1—and their conclusion faithfully adheres to the text of the statute and this Court's precedent—this Court will likely not need to weigh in at all. Indeed, as more courts confront this issue and have occasion to grapple with the same question, a consensus will likely continue to grow that drivers like the Amazon drivers here, who transport goods on the "last mile" of their interstate journey, are engaged in interstate commerce under Section 1 for the reasons noted above. Thus, the Court should at least wait until it has obtained "the benefit it receives from permitting several courts of appeals to explore a difficult question before [it] grants certiorari." *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

Moreover, as set forth above, Amazon conflates different questions about the proper contours of the

transportation worker exemption in its effort to create the illusion of a current circuit-split among the courts of appeals. In reality, the cases cited by Amazon turn on distinct questions, not presented by this case, such as whether workers who are a step removed from transporting goods can qualify for the exemption, *see Eastus*, 960 F.3d 207; *Saxon*, 993 F.3d 492, or whether the exemption covers the transportation of passengers as well as goods and how it applies in the different factual context of ride-sharing service drivers, *see Singh*, 939 F.3d 210. There are only a handful of appellate decisions that actually speak to the question presented by this case: whether being "engaged in interstate commerce" for purposes of Section 1 requires that a worker physically transport goods across state lines, and those decisions all consistently agree that it does not.

Because the disagreements Amazon attempts to manufacture do not even involve the question presented here, this case is plainly not the right vehicle to decide the issues Amazon describes. This Court recognized as much in denying certiorari in the *Rittmann* case, which employs the same reasoning to reach the same conclusion as the First Circuit in this case. The recent *Saxon* decision changes nothing. Thus, there is no reason for this Court to depart from its own sound decision to deny certiorari on this very subject earlier this year.

CONCLUSION

The petition should be denied.

Respectfully submitted,

Shannon Liss-Riordan, *Counsel of Record*
Harold Lichten
Adelaide H. Pagano
LICHTEN & LISS-RIORDAN, P.C.
729 Boylston Street, Suite 2000
Boston, Massachusetts 02116
sliss@llrlaw.com

Counsel for Respondent

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