No. 20-1077

In The
Supreme Court of the United States

AMAZON.COM, INC.,
and AMAZON LOGISTICS, INC.,

Petitioners,

v.

BERNARD WAITHAKA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR REHEARING

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

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PETITION FOR REHEARING

In accordance with this Court's Rule 44.2, petitioners respectfully seek rehearing of the Court's order denying certiorari based on the intervening decision in *Hamrick* v. *Partsfleet, LLC*, ___ F.3d ___, 2021 WL 2546405 (11th Cir. June 22, 2021). The Eleventh Circuit's ruling—one day after the denial of certiorari here—directly conflicts with the First and Ninth Circuits' rulings on the same legal question and facts. Indeed, the Eleventh Circuit expressly endorsed the dissenting view in the Ninth Circuit, eliminating any doubt about whether a circuit split exists.

1. This case asks whether the Federal Arbitration Act's exemption for classes of workers engaged in foreign or interstate commerce, 9 U.S.C. 1, covers classes of local workers not engaged to transport goods or passengers across state or national boundaries. Pet. i. The workers here are so-called "last mile" delivery drivers. Pet. App. 3a. In respondent's words, they "transport packages on the 'last-mile' of their shipment to their final destination." Br. in Opp. 6. They make these deliveries in their own personal vehicles. Pet. App. 4a. And while the delivered goods may travel across state lines to reach the customer, the drivers in this class of workers often do not. Br. in Opp. 7-8; see also Pet. App. 7a.

Yet the First Circuit held below that it does not matter whether the class of workers crosses state lines. In its view, the FAA's "exemption encompasses the contracts of transportation workers who transport

goods or people within the flow of interstate commerce, not simply those who physically cross state lines in the course of their work." Pet. App. 3a; see also *id.* at 31a. The Ninth Circuit, over a dissent by Judge Bress, has drawn the same conclusion about "last mile" delivery drivers. *Rittmann* v. *Amazon.com, Inc.*, 971 F.3d 904, 909 (2020), cert. denied, 141 S. Ct. 1374 (2021).

2. But in *Hamrick*, the Eleventh Circuit has now ruled to the contrary. Like the First and Ninth Circuits, the Eleventh Circuit addressed "final-mile delivery drivers—drivers who make local deliveries of goods and materials that have been shipped from out-of-state to a local warehouse." 2021 WL 2546405, at *1. And like the First and Ninth Circuit plaintiffs, the *Hamrick* plaintiff "used his personal car to pick up [goods] from [local] warehouses that had been manufactured in, and shipped from, other states and countries." *Id.* at *2. In finding these drivers exempt from the FAA, the *Hamrick* district court relied on the *Rittmann* district court ruling, which the Ninth Circuit would later affirm. *Hamrick* v. *Partsfleet, LLC*, 411 F. Supp. 3d 1298, 1302 (M.D. Fla. 2019) (citing *Rittmann* v. *Amazon, Inc.*, 383 F. Supp. 3d 1196, 1200 (W.D. Wash. 2019)). But the Eleventh Circuit disagreed with that position and reversed the *Hamrick* district court. *Hamrick*, 2021 WL 2546405, at *11.

The Eleventh Circuit's decision eliminates respondent's only objection to certiorari (beyond his misguided defense of the First and Ninth Circuits' view on the merits). He contended that "the Courts of Appeals are fully in agreement that workers * * * who deliver

goods within the flow of interstate commerce[] are covered by the exemption." Br. in Opp. 2. And he boasted that "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." *Id.* at 31. But those claims are true no more, if they ever were. Nor does any support remain for respondent's prediction that a "consensus [would] 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." *Ibid.* The Eleventh Circuit has dashed such expectations.

Under the Eleventh Circuit's framework, the exemption has two requirements: the class of workers (1) must be "employed in the transportation industry" and (2) must "'actually engage' in the transportation of goods in interstate commerce." *Hamrick*, 2021 WL 2546405, at *7 (citations omitted); cf. Pet. 13; Pet. Reply Br. 5, 10 n.3. Last-mile delivery drivers implicate the second of these requirements, which the Eleventh Circuit calls the "interstate transportation factor." *Hamrick*, 2021 WL 2546405, at *7 (citation omitted). A class of workers satisfies that factor when it "is engaged in 'transport[ing] goods across state lines.'" *Ibid.* (citation omitted).

The Eleventh Circuit therefore rejected the plaintiff's contention "that drivers performing intrastate trips" can satisfy the interstate transportation factor if "they transport items which had been previously

transported interstate." *Hamrick*, 2021 WL 2546405, at *7. The plaintiff based that theory on the same "flow of interstate commerce" standard that undergirded the First and Ninth Circuit rulings. Compare Pet. App. 3a, 19a, 23a-28a, 31a, and *Rittmann*, 971 F.3d at 917, with *Hamrick*, 2021 WL 2546405, at *4.

But the Eleventh Circuit found this standard inconsistent with the FAA's text, structure, and purposes. *Hamrick*, 2021 WL 2546405, at *8-11. It expressly aligned itself with Judge Bress's *Rittmann* dissent—thus rejecting the contrary approach of the Ninth Circuit majority and of the First Circuit here. According to the Eleventh Circuit, the FAA exemption applies only when "the class of workers actually engages in the transportation of persons or property between points in one state (or country) and points in another state (or country)." *Id.* at *10 (citing *Rittmann*, 971 F.3d at 926 (Bress, J., dissenting)). That is precisely the view that petitioners have advanced and that the First and Ninth Circuits refused to accept. See Pet. 16; Pet. Reply Br. 7.

The Eleventh Circuit also rejected the plaintiff's reliance on statutes and case law that "have nothing to do with" arbitration. *Hamrick*, 2021 WL 2546405, at *8. Like the *Hamrick* plaintiff, the First and Ninth Circuits derived their "flow of commerce" standard from cases construing various unrelated federal statutes—despite petitioners' arguments that these statutes have different language and broad remedial purposes that are the opposite of the exemption's purposes. Pet. App. 21a-23a; *Rittmann*, 971 F.3d at

912-914. The Eleventh Circuit sided with petitioners on this question, too: differently worded remedial statutes shed no light on the exemption. *Hamrick*, 2021 WL 2546405, at *8-9. Unlike the Ninth Circuit, which found "no way to meaningfully distinguish between the word 'commerce'" and the exemption's more specific phrase "foreign or interstate commerce," *Rittmann*, 971 F.3d at 914, the Eleventh Circuit found this difference significant: "[t]hese extra words matter (as all words matter)," *Hamrick*, 2021 WL 2546405, at *9. Petitioners could not agree more. Pet. 18-19; Pet. Reply Br. 6-7.

The Eleventh Circuit thus came to the opposite bottom line as the First and Ninth Circuits about the same category of "last-mile" transportation work. And it did so by adopting the very principles that petitioners unsuccessfully advanced in both the First and Ninth Circuits. If this case had arisen in the Eleventh Circuit, the parties would be in individual arbitration right now. Instead, they are in the midst of briefing on respondent's motion for class certification. See D. Ct. Doc. 97 (May 14, 2021).

3. The Eleventh Circuit's new ruling justifies rehearing. "[I]n determining what intervening or other new circumstances would justify a petition for rehearing" from a denial of certiorari, the "most common type is a new and conflicting decision by another court of appeals." Stephen M. Shapiro et al., *Supreme Court Practice* § 15.6(b), at 15-18 (11th ed. 2019).

For example, the Court granted rehearing (and certiorari) on this ground in *Sanitary Refrigerator Co.* v. *Winters*, 280 U.S. 30, 34 n.1 (1929), and *Kent Recycling Services, LLC* v. *U.S. Army Corps of Engineers*, 136 S. Ct. 2427 (2016).[1] The Court has even granted *untimely* petitions for rehearing based on new lower court conflict. See, *e.g.*, *McGrath* v. *Mfrs. Trust Co.*, 338 U.S. 241, 245-246 (1949); *United States* v. *Ohio Power Co.*, 353 U.S. 98, 98 (1957) (per curiam).

The Court should grant rehearing for similar reasons here. It would be arbitrary to deny review in this case merely because the circuit conflict came into sharp relief one day after the Court denied certiorari. Rule 44.2 exists so the Court can prevent such arbitrariness—particularly when, as here, a petitioner promptly requests rehearing within the Rule's 25-day time limit.

Nor is there reason to wait for another case to resolve this clear circuit conflict. Respondent identified no barrier to addressing this question in this case, and none exists. The Court should grant review now on

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[1] In *Kent Recycling*, the Court held the petition for rehearing while it addressed the question presented in the intervening case. See *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807 (2016). Petitioners are unaware of any pending petitions for certiorari that implicate the scope of the FAA exemption. But if the Court does grant review in another case before addressing this rehearing petition, petitioners ask that the Court either grant review here too and consolidate (as in *Sanitary Refrigerator*) or, at a minimum, hold this petition pending the final disposition of any such case (as in *Kent Recycling*).

this fundamental and pressing question of federal arbitration law.

CONCLUSION

The Court should grant the petition for rehearing and grant the petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is restricted to the grounds specified in Rule 44.2 and presented in good faith and not for delay.

/s/ David B. Salmons
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