No. 20-622

In the
Supreme Court of the United States

AMAZON.COM, INC., ET AL.,
Petitioners,

v.

BERNADEAN RITTMANN, ET AL.,
Respondents.

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

BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA AND THE CALIFORNIA CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Federal Arbitration Act's exemption for classes of workers engaged in foreign or interstate commerce include local transportation workers who are not engaged to transport goods across state or national boundaries?

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INTEREST OF AMICI[1]

The Civil Justice Association of California ("CJAC") is a nonprofit organization whose members are businesses, professional associations and financial institutions. CJAC's principal purpose is to educate the public and its governing bodies about how to make laws determining who gets paid, how much, and by whom when the conduct of some occasions harm to others – more fair, certain, and economical. Toward this end, CJAC regularly appears as amicus curiae in numerous cases of interest to its members, including those that concern the scope and application of the Federal Arbitration Act ("FAA").

CJAC's members collectively employ many thousands of people in California and hundreds of thousands nationally to provide various products and services. Most of CJAC's members have elected, as have many employers throughout the country,[2] to resolve disputes with their employees over employment matters through binding arbitration. CJAC supports the FAA's protective umbrella for voluntary, binding arbitration and believes arbitration preferable to

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[1] Counsel of record for the parties received timely notice of the intent to file this brief and consented to its filing. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from *amici* made a monetary contribution to the preparation or submission of this brief.

[2] According to one study, approximately 55% of the workforce, or 60 million employees, are covered by employment arbitration agreements. Alexander J.S. Colvin, *Economic Policy Institute* (Sept. 27, 2017), available at https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/.

litigation for maintenance of a viable economy, including jobs for local, independently contracted transportation workers.[3]

The California Chamber of Commerce ("CalChamber") is a nonprofit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state. For more than a century, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, 75% of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and employment climate by representing business on a broad range of legislative, regulatory, and legal issues, including support for voluntary binding arbitration under the aegis of the FAA. CalChamber participates as amicus curiae only in cases, like this one, that have a significant impact on businesses.

Amici believe the Ninth Circuit majority opinion injects another conflicting opinion into the already mixed Circuit stew of discordant ones on the

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[3] "With the growth of the gig economy, and as more companies and individuals have the flexibility to design their own working relationships, more work relationships are taking the form of an independent contractor model rather than an employer-employee model. The number of independent contractors 'is expected to continue to grow at a steady clip.' The use of independent contractors is particularly prevalent in the transportation sector, in which more than thirteen million people work." Richard Frankel, *The Federal Arbitration Act and Independent Contractors*, 2018 CARDOZO L. REV. DE NOVO 101, 113-114 (2018) (footnotes omitted).

compelling question presented. The uncertainty exacerbated by the Ninth Circuit heightens the need for clarity and certainty on this issue; and this Court is best suited to provide that guidance for uniformity of decision.

IMPORTANCE OF ISSUE AND SUMMARY OF ARGUMENT

The Ninth Circuit majority opinion answered "yes" to the question presented here, a conclusion it reached by a strained and stretched interpretation of section 1 of the FAA that lacks any contextual consideration of section 2.

Section 1 exempts from the FAA "contracts of employment of seaman, railroad employees, or any other class of workers engaged in *foreign or interstate commerce*." 9 U.S.C. § 1; emphasis added. The Court describes this provision as a "residual clause," and instructs that it be given a "narrow" construction and application. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114, 118 (2001) ("*Circuit City*"). Section 2, however, provides that arbitration "contract[s] evidencing a transaction *involving commerce*" . . . shall be *valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; emphasis added. *Circuit City* calls this section the FAA's "coverage provision," instructing that it be read "broadly to overcome judicial hostility to arbitration agreements," and given an "expansive" application. *Id.* at 111, 118. To give true meaning to these two sections they must, *Circuit City* shows, be read together and harmonized, not read in isolation as the Ninth Circuit does with § 1.

The Ninth Circuit's parsing of the FAA's text ignored this Court's guidance on what it means, holding instead that respondents, class action plaintiffs who entered into agreements to resolve "all disputes" they had about their work with Amazon "through final and binding arbitration," were judicially excused from their promise to individually arbitrate.

Although plaintiffs here drive their own vehicles to make deliveries of goods they pick up from local Amazon warehouses and other local businesses to deliver them to local customers, that common sense "intrastate" activity was instead deemed by the majority opinion to be "interstate commerce" and, hence, exempt from the FAA under section 1. Why? Because, the Ninth Circuit tells us, Amazon is "one of the world's largest online retailers," (App. at 22a) and the "packages [plaintiffs] carry are goods that [have been distributed to Amazon warehouses across state lines and] remain in the *stream of interstate commerce until they are delivered*." *Id.* at 23a; emphasis added.

In other words, the Ninth Circuit holds that if a national company's warehouse located in say, Chicago, receives goods shipped to it from some other state, and later has those goods picked-up at its Chicago warehouse by locally contracted independent drivers who deliver them to Chicago customers—the entire transaction is "interstate commerce," and those independently contracted transportation workers are exempt from coverage by the FAA and may ignore the arbitration agreements they signed. This conclusion conflicts squarely with other Circuit Court holdings that the "last leg" of the trip – from local warehouse to

the local customer – is not "interstate commerce" exempt from the FAA's coverage protecting enforcement of agreements to arbitrate disputes over job conditions between the company and its local delivery drivers.

The majority opinion misreads the plain language of the FAA contrary to opinions of this Court and of sister Circuit courts. If left undisturbed, the opinion removes from the FAA's protective umbrella a huge swath of arbitral disputes that will now be consigned to litigation.[4] This result contravenes "the FAA's objective of overcoming judicial hostility to arbitration," "undermining [its] . . . pro-arbitration purposes [by] breeding litigation from a statute that seeks to avoid it." *Circuit City*, *supra*, 532 U.S. at 123.

As the dissenting opinion by Judge Bress explains, "[O]n the metrics that matter—statutory text, precedent, and the workability of the competing regimes under the FAA's contemplated objectives . . . Amazon has the better of the argument, in some instances by a leg and in others by a length." App. at 37a.

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[4] "Delivery, warehousing and trucking operators added a combined 131,400 jobs last month [November] . . .." Jennifer Smith, *E-Commerce Demand Fuels Hiring*, THE WALL ST. J., December 7, 2020, p. B2, c. 3.

REASONS TO GRANT THE WRIT

I. REVIEW IS NECESSARY TO SECURE UNIFORMITY OF DECISION BETWEEN THIS OPINION AND OTHER IRRECONCILABLY CONFLICTING CIRCUIT COURT OPINIONS OVER THE SCOPE AND APPLICATION OF THE FEDERAL ARBITRATION ACT.

The majority opinion here adds "confusion worse confounded"[5] over the proper scope of the FAA's exemption from its protective orbit for "contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. That confusion results from inconsistent holdings by different Circuit Courts on the question of which transportation workers are exempt from the FAA.

A. Conflicts Amongst the Circuit Courts of Appeals on the Question Presented.

Of course, "[c]onflict has long been considered one of the primary reasons for granting certiorari because conflict offends the principle that, under one national law, people who are similarly situated should be treated similarly." Emily Grant, Scott A. Hendrickson & Michal S. Lynch, *The Ideological Divide: Conflict and the Supreme Court's Certiorari Decision*, 60 CLEV. ST. L. REV. 559, 561 (2012).

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[5] *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 404 (2010).

Ironing out compelling conflicts to achieve more consistent, uniform fairness is a paramount duty of the Court. "[J]urisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given to the Court in order 'to secure uniformity of decision.'" *Ruhlin v. New York Life Ins. Co.,* 304 U.S. 202, 206 (1938).

This need is especially acute when, as here, the "conflict involves an important question of [federal] statutory construction," (*Shapiro v. United States*, 335 U.S. 1, 4 (1948)), and one "over which the Circuits are divided." *Lehman v. Lycoming County Children's Services*, 458 U.S. 502, 507 (1982). "[C]ircuit splits are one of the primary reasons the Court grants certiorari." William Baude, *Precedent and Discretion*, 2019 *SUP. CT. REV.* 313, 324, citing Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 *TEX. L. REV.* 1711, 1730 (2013); and SUP. CT. R. 10.

And divided they are; as the dissenting opinion and petitioner's brief show, the First and Ninth Circuits disagree with the Fifth, Seventh and Eleventh Circuits as to the critical factor for determining whether § 1's exemption includes "classes of workers" who perform purely local transportation activities. The former two Circuits focus on whether the *businesses* for whom the workers are engaged depend on the movement of goods or passengers across state lines, while the latter three Circuits focus on whether the *class of workers* is engaged in interstate transportation of goods or passengers. Adding to these conflicting holdings, the Third and Eighth Circuits adopt yet a different multi-factor approach that takes into consideration what the

other Circuits emphasize plus "non-exclusive" factors. Viewed together, these discordant opinions constitute a jurisprudential muddle warranting the Court's guidance.

A comparison of holdings from these opinions shows incompatibility on the correct test for determining which transportation workers are exempt from the FAA's protective sweep. The First Circuit, for example, echoes the "go with the flow" test adopted by the Ninth: "[T]he [§ 1] 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." *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 13 (1st Cir. 2020); emphasis added.

But the Seventh Circuit disagrees, finding it of little moment that local delivery drivers "carry goods that have moved across state and even national lines." *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 802 (7th Cir. 2020) (Barrett, J.). What matters in determining if local delivery drivers are exempt from the FAA is not "about where the goods have been" before they are picked up and delivered locally, but "what the worker does," and whether "the interstate movement of goods is a central part of the job description of the class of workers to which they belong." *Id.* at 802-803. The plaintiffs in *Wallace* argued, sophist like, that "either they are engaged in commerce" and "exempt from the FAA under § 1, or they are not engaged in commerce, in which case their contracts are still exempt from the FAA under § 2." *Id.* at 803. *Wallace* rejected this "Catch-22" contention,

explaining that it works "*only if* [the phrase] 'engaged in [foreign or interstate] commerce' [in § 1] and 'involving commerce' [in § 2] mean the same thing . . . which the Supreme Court has squarely held they do not." *Id.*; emphasis added, citing *Circuit City, supra,* 532 U.S. at 115. "[W]hile § 2 *expands* the FAA's reach to the full extent of Congress's commerce power [citation omitted], § 1 carves out a *narrow exception* from the FAA for a small number of workers who otherwise would fall within § 2's ambit." *Id.*; emphasis added.

The Fifth Circuit sides with the Seventh. *Eastus v. ISS Facility Services, Inc.*, 960 F.3d 207 (5th Cir. 2020) holds, for instance, that "loading and unloading airplanes" of passengers and goods does not qualify for section 1's exemption because those workers are not "engaged in an aircraft's actual movement in interstate commerce."*Id.* at 212. The focus should be, *Eastus* explains, on whether the job in question "require[s] [the workers] to engage 'in the movement of goods in interstate commerce in the *same way* that seaman and railroad workers [do].'" *Id.* at 209-210; emphasis added. This analytical approach also applies in the Eleventh Circuit per *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1289 (11th Cir. 2005). There, an account manager for a national rent-to-own company delivered goods to customers out-of-state in his employer's truck. Even though that plaintiff worked for a business that was involved not just in the selling of goods, but also the delivery of those goods to which he contributed, *Hill* found "the interstate transportation factor is a necessary but *not sufficient* showing for the purposes of the exemption," and held him not exempt by the FAA

from the arbitration agreement he signed. *Id.* at 1290; emphasis added.

Finally, the Third and Eighth Circuits have adopted their own multi-factor tests (different from those of the other Circuit Courts) for determining what transportation workers are outside the FAA. *Singh v. Uber Technologies Inc.*, 939 F.3d 210, 228 (3d Cir. 2019) deems the test for § 1's exemption turns on whether the plaintiff "belongs to a class of transportation workers engaged in interstate commerce or in work *so closely related* thereto as to be in practical effect part of it." *Id.* at 227; emphasis added. How one determines when the work at issue is "so closely related" to interstate commerce as to be exempt from the FAA requires a weighing of numerous factors, including the language of the arbitration agreements, information about the industry in which the class of workers is engaged, information regarding the work performed by these workers and various texts that range from other laws, dictionaries and documents that discuss the parties and the work they perform. *Id.* at 227-228.

Lenz v. Yellow Transp., Inc., 431 F.3d 348 (8th Cir. 2005) likewise employs the "so closely related to interstate commerce" test coupled with a weighing of eight "non-exclusive factors." *Id.* at 352. The inevitable result of such multi-factor tests is that they jettison relative predictability for the open-ended rough and tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal. See *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995). "When an appellate judge says

that the . . . issue must be decided . . . by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989).

B. The Dissenting Opinion's Tripartite Taxonomy Illustrates the Circuit Courts' Conflicting Positions.

The dissenting opinion here also analyzes the conflicts between the Ninth and other Circuit Court opinions on the scope of section 1's exemption in terms of three categorical "options." The first option treats "anyone making deliveries as 'engaged in' interstate commerce. Even when a delivery is *purely intrastate*, that delivery must *inevitably* have an *interstate* nexus." App. at 42a; emphasis added. This test is nothing more than an attempt at verbal legerdemain, where "*intrastate* commerce" is, by being touched and infected from a "nexus" to "*interstate* commerce," somehow swallowed up and obliterated, leaving only "interstate commerce" in its place. But calling "intrastate" commerce "interstate" does not convert the former to the latter, no more than calling a dog's tail a leg gives it five legs. More importantly, as the dissent aptly remarks, this test "faces serious resistance from Supreme Court precedent," specifically *Circuit City*. App. at 43a and discussion *post* at pp. 14-17.

The dissent's second option exempts some intrastate delivery workers depending upon certain factors – *e.g.*, nature of the company they work for, nature of the goods transported and/or whether the goods are delivered as part of a "continuous" interstate

transportation. While the dissenting opinion maintains the majority adopts this second option, it concedes significant doubt about this by recognizing that "in principle the majority's option 2 is *not different than option* 1" because, depending upon the "selection of factors it deems relevant to 'interstate commerce,' the majority's approach equally permits *any* delivery person to fall within § 1." App. at 59a; emphasis added.

And the third option, the one favored by petitioner, the dissenting opinion and petitioner's supporting amici, is — "delivery persons are a 'class of workers engaged in foreign or interstate commerce' *if* the class of workers *crosses state or international lines* in the course of their deliveries." *Id*.; emphasis added.

The result of these conflicting Circuit Court approaches about how to determine the scope of the FAA's "interstate commerce" exemption is that, depending on the jurisdiction in which the worker happens to be engaged, "the same person performing the same type of work at the same time through the same means is required to arbitrate against some [putative] employers but not others." App. at 77a (Bress, J., dissenting). This crazy-quilt patchwork of law is neither fair nor sensible. Accordingly, review is justified "on account of the importance of the federal question raised [the interpretative scope of the FAA exemption from coverage] and asserted conflicts in the circuits." *United Brotherhood v. United States*, 330 U.S. 395, 400 (1947).

II. THE NINTH CIRCUIT OPINION SHOULD BE REVERSED BECAUSE IT DISTORTS THE PLAIN MEANING OF THE FAA BY READING SECTION 1 OUT OF CONTEXT WITH SECTION 2, IGNORES CONTROLLING OPINIONS OF THIS COURT, AND BORROWS INTERPRETATIONS OF SIMILAR LANGUAGE TO SECTION 1 FROM OTHER INAPPOSITE STATUTES TO REACH AN ABSURD RESULT.

We begin at the beginning, "away from open-ended policy appeals and speculation about legislative intentions and toward the traditional tools of interpretation judges have employed for centuries to elucidate the law's original public meaning"[6]—the text of the FAA. When, as here, that text is informed by High Court precedent, our task is further eased. Both text and precedent join in this case to refute the Ninth Circuit's interpretation on the scope of section 1's exemption.

The provisions of the FAA must, of course, be read in context. "Statutory language has meaning only in context." *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 125 S. Ct. 2444, 2449 (2005). "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used. . .." *Shell Oil*

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[6] *Kisor v. Wilkie*, 139 S. Ct. 2400, 2442 (2019) (concurring opinion by Gorsuch, J.).

Co. v. Iowa Dept. of Revenue, 488 U.S. 19, 25, n. 6 (1988). This good sense requires parsing the language of section 1, the "residual clause" of the FAA, in context with the "coverage clause" of section 2. The Ninth Circuit majority opinion fails to do this; in fact, it does not even mention section 2 in its explication on the scope of section 1, in contrast to the dissenting opinion which provides the proper contextual reading of the two sections. Fortunately, as mentioned (*ante* at pp. 3-4), the Court has previously done this contextual parsing in *Circuit City*, *supra*, 532 U.S. 105.

There, the Court reversed the Ninth Circuit's holding that an employee who sued his employer – Circuit City – under state law for discrimination was not bound by his pre-dispute agreement to decide work disputes with the employer by arbitration because his job duties involved his engagement "in foreign or interstate commerce" and thus fell within § 1's exemption. Though this Court's *Circuit City* opinion found the plaintiff was not a "transportation worker" and therefore not exempt on that basis alone from FAA coverage, it explained in detail the relationship between sections 1 and 2. That explanation shows why the Ninth Circuit's opinion here also deserves to be reversed.

Circuit City turned first to the phrase "involving commerce" in § 2, which it said "implement[ed] Congress' intent 'to exercise [its] commerce power to the full.'" *Id*. at 112, citing *Allied–Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 277 (1995). It next compared that phrase to the phrase "any other class of workers engaged in . . . commerce" found in § 1's exemption,

which is modified in the same sentence by express reference to "seamen" and "railroad employees." *Circuit City*, *id.* at 114. The plaintiff argued that these two phrases were sufficiently alike that they should be treated the same, that the "involving commerce" provision in § 2 brings within the FAA's scope all contracts within Congress' commerce power, and the "engaged in . . . commerce" language in § 1 "in turn exempts from the FAA all employment contracts falling within that authority." *Id.*

But the Court rejected this argument, explaining that construing the "residual clause" of section 1 to be "coterminous" with that of "involving commerce" in § 2 "fails to give independent effect to the statute's enumeration of the specific categories of workers which precedes it." *Id.* Quite obviously the Court was cognizant that in wrestling with the meaning of the FAA's or any statute's text, "our problem is to construe what Congress has written. Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort." *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States,* 340 U.S. 593, 596 (1951). "T]here is no warrant for seeking refined arguments to show that the statute does not mean what it says." *United States v. Wurzbach,* 280 U.S. 396, 398 (1930) (per Holmes, J.). "[T]here would be no need for Congress to use the phrases 'seaman' and 'railroad employees' if those same classes of workers were subsumed with the meaning of the 'engaged in . . . commerce' residual clause." *Circuit City*, 532 U.S. at 114.

Circuit City emphasized that "the rule *ejusdem generis* . . . is in full accord with other sound considerations bearing upon the proper interpretation of the [residual] clause" that is § 1. *Id.* at 115.[7] And under "this rule of construction the residual clause should be read to give effect to the terms 'seaman' and 'railroad employees,' and should itself be controlled and defined by reference to enumerated categories of workers which are cited just before it." *Id.* Hence the Court concluded that the "plain meaning of the words 'engaged in commerce' [§ 1] is *narrower* than the more open-ended formulations 'affecting commerce' and 'involving commerce' [§ 2]." *Id.* at 118; emphasis added.

That the Court's reading of the FAA in *Circuit City* is correct is fortified by the existence of specific federal arbitration mechanisms for railroad employees and seaman when the FAA became law. Congress exempted these "classes of workers" from the FAA to clarify that they remained subject to their own federally enacted systems of alternative dispute resolution. See, *e.g.*, the Railway Labor Act of 1926, 45 U.S.C. § 155, and the Shipping Commissioners Act of 1872, 17 Stat. 262, 267, § 25. The carve-out in FAA § 1 for "other class[es] of workers in foreign or interstate commerce" applies to analogous transportation workers who had or were expected to get their own federally enacted arbitration mechanisms. *Circuit City* acknowledges this: "Congress excluded 'seamen' and 'railroad employees' from the

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[7] This statutory canon provides that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects enumerated by the preceding specific words." *Id.*; citation omitted.

FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers." 532 U.S. at 121.

Just as the Court reversed the Ninth Circuit's holding in *Circuit City* that *all* contracts of employment are exempt from the protective ambit of the FAA under section 1's narrow residual clause, it should reverse its holding here that *all* transportation workers are exempt from the FAA because they are *all* necessarily engaged in interstate commerce. They are not and the Ninth Circuit's assertion that they are (based on an expansive definition of "interstate commerce") commits the logical fallacy of "begging the question" by assuming the truth of what one seeks to prove in the effort to prove it. See Ruggero J. Aldisert, *LOGIC FOR LAWYERS* 208 (3rd ed. 1997). After all, if Congress wanted to exempt all transportation workers from the FAA, it could easily have said that without specifying, as it did, that the exemption was only applicable to transportation workers who, like railroad employees and seaman, are "engaged in foreign or interstate commerce." "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Dean v. United States*, 556 U.S. 568, 573 (2009).

Neither is the Ninth Circuit's attempt to rationalize its holding based on similar language to the FAA in other statutes that have, through judicial gloss, been accorded an expansive view of "interstate commerce,"

persuasive. Specifically, the majority opinion states that "courts interpreting [the] Federal Employees Liability Act (FELA) have held that workers were employed in interstate commerce even when they did not cross state lines." App. at 15a. It also references the Clayton and Robinson-Patman Acts as examples where this Court has held "that the actual crossing of state lines is not necessary to be 'engaged in commerce." *Id.* at 18a.

But, reading these other federal statutes containing similar language to some of the FAA's text and then grafting onto the FAA's exemption the expansive definitions of "interstate commerce" found in judicial constructions of those statutes does not wash. Though the Ninth Circuit does not expressly identify its analysis as employing the statutory canon of *in paria materia* (on the same subject), that is in fact what it did. That interpretive guideline provides that "if two statutes are on the same subject, they must cohere, they must harmonize." Anuj C. Desai, *The Dilemma of Interstatutory Interpretation*, 77 WASH. & LEE L. REV. 177, 185 (2020).

The statutes the majority opinion cites, however, are neither on the same subject as the FAA nor contain the same structure or are intended for the same purpose. The FELA, as it existed at the time of the FAA's enactment, for instance, provided that "every common carrier by a railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce." 45 U.S.C. § 51 (1908). As the dissent points

out, the FELA is "oriented more around the work of the 'common carrier' . . . and lacks the FAA's specific structure and phrasing." App. at 61a. Moreover, the reference to "commerce" in "both [the] FELA and the antitrust statutes does not appear in a residual clause [like section 1 of the FAA], much less in an exception to a general coverage provision." *Id.*

Not only does the subject of the FAA differ from the other federal statutes the majority opinion relies on to buttress its conclusion, but the purposes and structure of these other statutes are distinct from the FAA. Extracting from them expansive judicial interpretations of what is meant by "interstate commerce" and applying that definition to the FAA § 1 exemption is a misuse of the *in pari materia* canon. See, *e.g.*, *Fort Stewart Schools v. FLRA,* 495 U.S. 641, 648 (1990) (observing that the Federal Labor Statute and the NLRA should not be read *in pari materia*); and *Wachovia Bank v. Schmidt*, 546 U.S. 303, 305 (2006) ("Although it is true that, under the *in pari materia* canon, statutes addressing the same subject matter generally should be read 'as if they were one law' [citation], venue and subject-matter jurisdiction are not concepts of the same order.").

Courts may depart from the text of a statute when literal application of it would lead to absurd results. *United States v. Brown*, 333 U.S. 18, 27 (1948). That is not, of course, the case with the plain, well-established meaning from reading sections 1 and 2 of the FAA in context. But allowing the Ninth Circuit's expansive out-of-context gloss on § 1's exemption to stand will saddle us with an absurd result—exemption of *all*

transportation workers, including those engaged in purely local customer deliveries of goods stored in local warehouses, from the FAA's protective coverage ambit. That result is based on the dubious proposition that if the initial origin of the goods is from out-of-state, any subsequent transportation of them solely within a state, *ipse dixit* makes those local transportation workers engaged in "interstate commerce." This bizarre spin on the FAA eviscerates it by allowing the "narrow" exemption in the residual clause of § 1 to swallow the "broad" protection in the "coverage" provision of § 2.

CONCLUSION

For the aforementioned reasons, amici urge the Court to grant the petition for writ of certiorari and provide needed clarification and uniformity that § 1's exemption from the FAA only applies to local delivery drivers if they cross state or international lines in the course of their deliveries.

Respectfully submitted,

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