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

BRIEF OF THE RESPONDENTS BERNADEAN RITTMANN, ET AL. IN OPPOSITION TO CERTIORARI

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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 journey 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 Ninth Circuit joined the First Circuit and other circuits in ruling that "§ 1 exempts transportation workers who are engaged in the movement of goods in interstate commerce, even if they do not cross state lines," as long as the goods they are transporting are still on their journey to their final destination. *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 915 (9th Cir. 2020). The question presented is whether "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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

The Court should deny certiorari. The panel's decision in this case plows no new ground, creates no intercircuit conflict, and properly applies this Court's recent guidance and reasoning in *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019). As *New Prime* requires, the panel gave effect to the ordinary meaning of Section 1's statutory text, which was taken virtually verbatim from another federal statute that existed at the time the FAA was passed in 1925. The panel's conclusion that Amazon's "last-mile" delivery drivers, performing the same job duties as FedEx and UPS drivers, are exempt transportation workers engaging in interstate commerce, is beyond reproach: 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. 8-9, 21-22, 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.

The Ninth Circuit simply recognized the obvious: that drivers delivering packages, most of which come from out of state, are quintessential transportation workers working in the transportation industry, just like the other two enumerated categories of workers covered by the exemption, seamen and railroad em-

ployees. The fact that Plaintiffs happen to be responsible for the last (usually but not always, intrastate) leg of the packages' interstate journey does not detract from the essential character of the work performed, transporting goods that are going from one state to another.

Amazon's effort to manufacture a circuit-split on the issues presented by this case is unavailing. Both appellate courts to consider the status of Amazon's last-mile delivery drivers have reached the exact same conclusion that "last-mile" deliveries of interstate shipments qualify as "engaging in interstate commerce" for purposes of Section 1 of the FAA—even if the "last mile" is within a single state. *See Waithaka v. Amazon.com, Inc.*, 966 F.3d 10 (1st Cir. 2020); *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 915 (9th Cir. 2020). Indeed, with the exception of a lone dissent by a single member of the panel below, no court has criticized the reasoning or holding of the First or Ninth Circuit's decisions against Amazon in *Waithaka* 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 recent decision in *Wallace* v. *Grubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020), is incorrect. *Wallace* cited the First Circuit's decision in *Waithaka* approvingly. It distinguished that decision on the basis that the takeout food the drivers in *Wallace* were delivering was not on a journey from one state to another, unlike the packages delivered by Amazon delivery drivers. The journey of the meals was entirely local. *Id.* at 802-

803. Thus, as the Ninth Circuit noted in its decision below, *see* App., *infra*, at 26a, n. 6, *Wallace* does *not* stand for the proposition that a worker must physically cross state lines while transporting goods in order to qualify for the exemption. It stands for the same proposition the decision below stands for: that the goods a worker is transporting must be on a journey from one state (or country) to another.

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 gate-agent supervisor at an airport, *see Eastus* v. *ISS Facility Servs., Inc.*, 960 F.3d 207 (5th Cir. 2020). None of these distinct issues is implicated by the Ninth Circuit's decision below, and none of the cited decisions conflict with the Ninth Circuit's holding.

The Court should 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 petition distorts the sound reasoning of this Court's *New Prime* decision that courts must look to the meaning of the phrase at the time Congress enacted it. The Ninth 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 a critically important role in ensuring delivery of interstate shipments on the final leg of their interstate journeys, lest they lie fallow in warehouses. There is no reason for this Court to disturb this sound ruling, particularly given that there is no 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. 83, at

¶¶ 14, 19. 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. 105-2; *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.").

Plaintiffs are AmazonFlex delivery drivers who worked for Amazon Logistics, Inc. delivering goods to Amazon customers. D. Ct. Dkt. 37-1; D. Ct. Dkt. 37-2; D. Ct. Dkt. 83, at ¶¶ 6-10. These drivers perform the exact same type of deliveries that are performed by package delivery drivers for UPS and FedEx. *See* D. Ct. Dkt. 37, at ¶ 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 providers (*e.g.*, Peach, Inc.) 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. *See* D. Ct. Dkt. 20-2, ¶ 6.

Plaintiffs report to Amazon's warehouses where Amazon assigns them a route and provides them with a number of packages, which they must scan and deliver from the warehouse to customers' doorsteps. *Id.* ("At the beginning of a shift, I go to the Amazon warehouse to pick up my assigned packages and then I drive my assigned route, delivering all of

the packages I am assigned for that shift to Amazon's customers at their homes."); *see also* D. Ct. Dkt. 83, ¶ 20. Drivers occasionally cross state lines to make their required deliveries, *see, e.g.*, D. Ct. Dkt. 106; however, most of the drivers' "last-mile" package deliveries take place intrastate.

B. Procedural Background

Plaintiffs filed this case on October 4, 2016, alleging that Amazon misclassified its AmazonFlex delivery drivers as independent contractors under federal and state law. D. Ct. Dkt. 1. Plaintiffs alleged that the drivers have not been paid overtime for hours worked beyond 40 per week and that drivers have not received at least minimum wage each week, in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207 *et seq*, and state law. *Id.*

Plaintiffs filed a Motion for Conditional Certification and Amazon filed a Motion to Dismiss, or in the Alternative, Compel Arbitration. D. Ct. Dkt. 20, D. Ct. Dkt. 36. After entertaining supplemental briefing regarding the "transportation worker exemption" to the Federal Arbitration Act, 9 U.S.C. § 1, the district court issued an Order denying Defendants' Motion to Compel Arbitration and finding that the Plaintiffs are exempt from the FAA's coverage. App., *infra*, at 78a-90a. 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. The court rejected Amazon's argument that the delivery drivers had to routinely cross state lines in order to qualify for the

exemption, noting that such a requirement was arbitrary:

> A distribution center in Northern California receives a shipment of mattresses from New York, some of which are then transported by a long-haul driver to a distribution center in Southern California, others of which are delivered by a short-haul driver to a customer in Southern Oregon. The long-haul truck driver would not be any less subject to the transportation worker exemption than the short-haul truck driver, whose route happens to cross state lines. If an employer's business is centered around the interstate transport of goods and the employee's job is to transport those goods to their final destination—even if it is the last leg of the journey—that employee falls within the transportation worker exemption.

App. at 84a-85a.

The district court further concluded that Amazon's arbitration agreement is unenforceable because it specifically provides that the FAA, and *not* Washington state law must apply to the arbitration provision. Because the agreement's choice-of-law clause selects Washington law, but the agreement specifically states that Washington law does not apply to the arbitration provision, the court was left with no body of law to apply to the arbitration provision. The court concluded that the arbitration provision could not be effectuated without impermissibly rewriting the agreement, which ordinary principles of Wash-

ington state contract law do not allow. App. at 86a-90a.

On appeal, the Ninth 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 Ninth Circuit looked to the statutory text and its "ordinary meaning at the time congress enacted the statute." App. 11a (citing *New Prime*, 139 S. Ct. at 539). The court began by considering the dictionary definitions of the terms "engaged" and "commerce" at the time of the FAA's passage in 1925. App. 12a. The court concluded that "[t]aken together, those definitions can reasonably be read to include workers employed to transport goods that are shipped across state lines" even if those workers themselves do not physically cross state lines. *Id.*

The court found ample support for its reasoning in the recent decision of the First Circuit Court of Appeals, which considered the exact same issue—whether AmazonFlex last-mile delivery drivers are exempt from the FAA under the transportation worker exemption—and reached the same conclusion. *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10 (1st Cir. 2020). There, the First Circuit 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 18-23. The *Waithaka* court noted that "[w]hether a worker had moved across state lines was not dispositive" for purposes of the FELA. *Id.* at

20. 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.* (internal citations omitted). Thus, 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. *Id.* at 20-21 (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 the FELA, last-mile delivery drivers like the Plaintiffs here make intrastate deliveries of goods on the final leg of their interstate shipment.

The *Rittmann* court found the First Circuit's careful analysis of the FELA precedents persuasive. App. at 12a, 15a-17a. The panel also noted that other statutes that employ the same "engaged in commerce" statutory language have likewise been interpreted by this Court to mean that "the actual crossing of state lines is not necessary." App. at 18a (discussing the Clayton and Robinson-Patman Acts). Thus, the Court declined to follow Amazon's cramped interpretation of the phrase "engaged in interstate commerce" as requiring workers to physically cross state lines, as there is no contemporaneous support for such a reading, and nothing in the plain text of the statute allows such an interpretation.

In reaching this decision, the *Rittmann* court distinguished a line of cases involving takeout food delivery drivers for so-called "gig economy" companies like GrubHub, Postmates, Caviar, and DoorDash, because "prepared meals from local restaurants are not a type of good that are indisputably part of the stream of commerce." App. at 25-26a (internal citation omitted). Now-Justice Barrett recognized the same distinction in *Wallace v. Grubhub Holdings, Inc.*, where the Seventh Circuit held that, to fall within the Section 1 exemption, workers "must themselves be 'engaged *in the channels* of foreign or interstate commerce.' " 970 F.3d at 802 (emphasis in original). Under these cases, takeout food delivery drivers are not engaged in the channels of interstate commerce simply because some ingredients in the takeout meals they deliver were once grown or harvested out of state, because the meals themselves are not traveling from one state to another. By contrast, Amazon delivery drivers who perform the last leg of an interstate shipment are engaged in the channels of interstate commerce because the goods they deliver *are* on a journey from one state to another. *Wallace* makes this very distinction, citing approvingly to *Waithaka* and contrasting the facts presented there ("truckers who drive an intrastate leg of an interstate route") with those of takeout food delivery drivers who deliver meals whose ingredients happen to have been cultivated out-of-state. 970 F.3d at 802.

The Ninth Circuit also 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 28a. The Ninth Circuit correctly recognized that Amazon is involved in the interstate shipment of goods in the same manner as FedEx, UPS, and other delivery companies, whose drivers have consistently been found exempt from the FAA. App. at 29a (citing *Harden v. Roadway Package Systems Inc.*, 249 F.3d 1137, 1140 (9th Cir. 2001) (holding delivery driver for predecessor company of FedEx fell within the § 1 exemption)).

Having concluded that Amazon delivery drivers were exempt from the FAA, the court considered the text of Amazon's contract with the drivers, including the severability and choice-of-law clauses. The court agreed that the choice-of-law provision expressly states that Washington law would *not* apply to the arbitration provision. The court noted that there was no way to construe the contract so as to allow Washington law to apply to the arbitration provision without impermissibly rewriting the parties' agreement. Because there was no body of law that applied to the arbitration provision, the Ninth Circuit agreed that no valid arbitration agreement existed, and it affirmed the district court's decision to deny Amazon's motion to compel arbitration.

Amazon petitioned for rehearing en banc, and the full Ninth 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 Ninth Circuit below) 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 15. 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 Ninth 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 perform (the "last-mile" delivery of interstate shipments to their final destination). As the Ninth 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.

App. at 28a (quoting *Waithaka*, 966 F.3d at 22).

Thus, the Ninth Circuit and First Circuit have 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 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, "makes no sense if, as this case and *Waithaka* hold, the operations of the airline are paramount" because airlines are clearly involved in interstate transportation of goods and passengers. Pet. at 18. 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 28a (quoting *Waithaka*, 966 F.3d at 22) (emphasis added).

This observation that the nature of the business must inform the Section 1 analysis accords with the approach taken by other courts. For example, in *Hill v. Rent-A-Ctr., Inc.*, another case cited by Amazon, 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 1286, 1289 (11th Cir. 2005) (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, as Amazon is in this case.[1]

Likewise, Amazon's repeated assertion that an inter-circuit conflict exists based on tension between the Ninth Circuit's decision in *Rittmann* and the Seventh Circuit's decision in *Wallace* is plainly incorrect given that the *Rittmann* court expressly considered *Wallace* and affirmed that its analysis and outcome was consistent with *Wallace*, and *Wallace* cited approvingly to *Waithaka*. App25a-26a (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"); *Wallace*, 970 F.3d at 802 & n. 2 (*Wallace* citing *Waithaka* approvingly). Moreover, *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 in *Rittmann* because here, the drivers' job description of delivering goods on the final leg of their interstate

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[1] Though framed differently, *Wallace v. GrubHub Holdings Inc.*, makes a similar point by noting that "dry cleaners who deliver pressed shirts manufactured in Taiwan and ice cream truck drivers selling treats made with milk from an out-of-state dairy" are not covered by the exemption simply because the products they deliver originated out-of-state. 970 F.3d at 802. These workers do not deliver goods that are traveling from one state to another, but they also do not work for companies involved in the interstate shipment of goods like Amazon; their job duties do not involve the "channels of foreign or interstate commerce" in the same way that a last-mile delivery driver completing an interstate shipment is directly involved in the channels of interstate commerce.

journey shows that "the interstate movement of goods is a central part of the job description." *Wallace*, 970 F.3d at 803. It is clear that *Wallace* and *Rittmann* are in accord with one another.

Contrary to Amazon's contentions, *Wallace* did *not* hold that drivers must cross state lines in order to qualify for the exemption. Likewise, prior decisions by the Seventh Circuit do *not* hold that crossing state lines is required to qualify for the 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).

In sum, the decisions of the Fifth, Eleventh, and Seventh Circuits in *Eastus*, *Hill*, and *Wallace* 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 Plaintiffs' 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 20-22 (citing *Singh* v. *Uber Technologies Inc.*, 939 F.3d 210, 228 (3d Cir. 2019), 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 Ninth 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 Ninth 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. 939 F.3d at 214, 226-27.[2] Moreover, *Singh* was addressed more to the question of whether transportation of passengers could qualify for the exemption, but its vision of what it means to be "engaged in interstate commerce" is entirely consistent with

[2] 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 *Singh* decision was devoted to resolving this issue and ultimately reversing the district court.

Rittmann by its focus on whether the worker's job is so inextricably linked to interstate commerce as to be in practical effect a part of it.

Neither the court in *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 to the issue addressed in this case, and to the extent their "approach" departed from the Ninth Circuit's here, the courts' analyses addressed different issues. Again, 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 traveling from one state to another within the flow of interstate commerce, are exempt from the FAA.

B. The Ninth 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 Ninth 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.

i. The Ninth 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 23.[3] 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 Judge Bress's dissenting opinion below. *See* Pet. at 23. But, as the majority pointed out, Judge Bress relied upon the "the same dictionaries we use to ascertain the FAA's meaning at is enactment." App. at 30a-31a, n. 9.

Dictionary definitions from the years prior to the FAA's enactment in 1925 make clear that being en-

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[3] Amazon drivers *do* cross state lines at times to make deliveries and sometimes travel lengthy distances to make deliveries. 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. Plaintiffs do 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 further *infra*, Part III, this case is not the right vehicle for the Court to take up these questions.

gaged in interstate commerce included the intrastate 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.

Moreover, the other enumerated categories of workers in Section 1, seamen and railroad employees, cover broad categories of workers, including individuals who do not physically transport goods across state boundaries. Contrary to Amazon's contentions, the plain language of the statute and cases interpreting similar language at the time of the FAA's passage make clear that workers engaged in transportation of goods shipped interstate would qualify for the Section 1 exemption, even when their particular leg of the interstate journey occurs entirely within one state's boundaries. This interpretation does not read the word "interstate" out of the statute, as Amazon erroneously claims, but instead gives effect to the words as they were understood in 1925, when it already was well established that the word interstate focuses on the journey of the goods.

The Ninth 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 Ninth 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 Ninth Circuit's decision below.

The Ninth Circuit also considered how similar statutory language has been interpreted in other statutes after the FAA's passage, such as the Clayton Act and the Robinson Patman Act, which also supported its interpretation below. App. at 18a-19a. Indeed, in interpreting Section 1 of the FAA, this Court in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105,

117 (2001), cited approvingly to cases decided under the Clayton Act and the Robinson Patman Act, which construed the phrases "employed in commerce" or "engaged in commerce" not "to require businesses or employees to cross state lines." App. at 19a. *See Circuit City*, 532 U.S. at 118 (citing *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 195 (1974), and noting that the "engaged in commerce" language "denote[s] only persons or activities within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer."). By contrast, Amazon has not supplied any case law from the time of the FAA's passage or since that would support its interpretation of the phrase "engaged in interstate commerce" as requiring a worker to physically cross state borders as part of a long-distance, nonlocal, trip.

ii. The Ninth 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 Ninth 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 24-25. But the Ninth Circuit correctly rejected this argument. 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* where 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 'employee' 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 Ninth 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 Ninth Circuit's Opinion is True to the Structure of Sections 1 and 2 of the FAA

Amazon also argues that the Ninth Circuit's decision "conflicts with…important structural features of the statute." Pet. at 24, 27-28. Specifically, Amazon alleges that the language of Section 2 extends the FAA's general coverage to all transactions involving foreign or interstate commerce, while the language of Section 1 focuses on the work the class of workers performs, and Amazon insists that the Ninth Circuit here failed to properly focus on the work performed by the Plaintiffs as Section 1 requires. Pet. at 27. But, again, the Ninth Circuit *did* look at the work the class of workers performs – namely, last-mile deliveries of interstate shipments of consumer goods – and it correctly concluded that this activity constitutes engaging in interstate commerce under Section 1. Amazon attempts to malign the Ninth Circuit's approach as having focused on Amazon's business rather than the workers' activities, but, as set forth *supra*, pp. 12-13, this characterization of the decision is inaccurate. In reality, Amazon simply disagrees with the Ninth Circuit's interpretation of what it means to be engaged in interstate commerce. The crux of the issue boils down to whether crossing state lines by the workers is necessary, and as the FELA cases make clear, neither Congress—or the ordinary American—would have understood Section 1's language to require that workers physically cross state

lines in order to be engaged in interstate commerce. Thus, the Ninth Circuit's reasoning is sound, and Amazon's efforts to argue otherwise are unavailing.

iv. The Ninth 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 Ninth Circuit's reliance on the FELA cases, Pet at 27-30, 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.

Second, Amazon argues that, because the statutory language in FELA is not identical to that used in Section 1 of the FAA, the court is precluded from looking at the FELA precedents. Pet. at 27. This argument is nonsensical. Indeed, 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 and the Clayton 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).

Third, Amazon 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 28. But Supreme Court 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, on which the Ninth Circuit relied below, correctly rejected this very argument in *Waithaka*, noting that "the FELA applied only when both the carrier and the injured employee had been engaged in interstate commerce." *Waithaka*, 966 F.3d at 21. "That is, the FELA was concerned with the activities of employees, just as the FAA is." *Id.*

Fourth, Amazon argues that the 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 28-29. 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 exceed Congress's authority. The First Circuit in *Waithaka* correctly rejected this 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." *Id.* at 22. 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.* at 21.

Finally, Amazon argues that the FELA precedents are inapposite because they address rail transportation, which is different than the last-mile package deliveries performed here. Pet. at 29-30. Amazon's argument is curious, given that railroad workers are one of the other two enumerated categories of workers in the exemption, and thus, statutes addressing what it means for railroad workers to be engaged in interstate commerce at the time of the FAA's passage are among the most apt sources of authority available. 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), in support of its contrary interpretation of Section 1, but that case actually supports Plaintiffs' 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 Ninth Circuit's interpretation here, as the court correctly recognized below. App. at 23a-24a (discussing *Knight*).

v. Amazon's Policy Arguments Are Unavailing

Finally, Amazon resorts to policy arguments, insisting that its favored interpretation of Section 1 is more administrable and more true to the FAA's pro-arbitration purposes. 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 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 below. 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* 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 in order 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 Illini 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*. However, the work performed by Amazon drivers is materially different insofar as they are delivering packages that have clearly traveled interstate, like FedEx, UPS, or

USPS delivery people. If GrubHub drivers are modern-day pizza delivery 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 believed 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*, 372 F.3d 588 ("[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*, 823 F.2d 466.

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 form transporting goods can qualify for the exemption, *see Eastus*, 960 F.3d 207, 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 disagreement Amazon manufactures in its petition does not even relate to the question presented here, this case is not the right vehicle to decide the issues Amazon describes.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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