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**

## REPLY BRIEF FOR THE PETITIONERS


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## CORPORATE DISCLOSURE STATEMENT

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

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

CASES

**TABLE OF AUTHORITIES**—Continued

**TABLE OF AUTHORITIES**—Continued

## REPLY BRIEF FOR THE PETITIONERS

There is no papering over lower courts' disagreements about the FAA exemption. Two circuits, counting the Ninth Circuit below, broadly extend the exemption to workers who transport goods in the flow of interstate commerce. Three circuits narrowly limit the exemption to workers hired to perform interstate transportation. Two other circuits have murky multifactor frameworks falling somewhere in-between.

Respondents predictably try to downplay the differences in the circuits' legal tests. But they ignore that there is already an acknowledged circuit split over the proper test. See *Eastus* v. *ISS Facility Servs., Inc.*, 960 F.3d 207, 211 (5th Cir. 2020). And other courts also construe the FAA exemption in irreconcilable ways. Respondent Lawson's Amazon Flex driving counts as interstate commerce under the Ninth Circuit's expansive test, but his Grubhub driving does not count under the Seventh Circuit's narrow test. That latter test supports the same result for Amazon Flex drivers, who are not hired to move goods between states any more than Grubhub drivers are. In any event, the FAA's applicability should not turn on which smartphone application a driver has open at any given time. With so much uncertainty over the proper construction of the exemption, the Court should not stay on the sidelines.

Especially on this issue. Day in and day out, litigants spar over whether the FAA applies to countless varieties of local transportation work. And courts

fill case reports with fine distinctions. Thanks to the latest developments, for instance, the law now distinguishes intrastate deliveries *to* fast-food chains from intrastate deliveries *from* fast-food chains. *Carmona* v. *Dominos Pizza LLC*, No. 20-cv-1905, 2020 WL 7979174, at *4 (C.D. Cal. Dec. 9, 2020). It also distinguishes delivering packages *and* groceries, as Amazon Flex drivers do, from delivering groceries only. *O'Shea* v. *Maplebear Inc.*, No. 19-cv-6994, 2020 WL 7490371, at *6 (N.D. Ill. Dec. 21, 2020).

The Court should end this costly litigation over a statute for avoiding litigation costs. It should take up the question left unanswered in its two prior decisions on the exemption and provide definitive guidance about the sorts of transportation work that lie beyond the FAA.

### A. Respondents Fail To Explain Away The Circuit Conflicts

The petition mapped seven circuits' varying approaches to the exemption's "interstate commerce" standard. Pet. 15-22. Respondents fail to grapple with these differences and their decisive effect on this case.

1. To start, respondents are wrong to insist (at 3, 10) that the Ninth Circuit here and First Circuit in *Waithaka* v. *Amazon.com, Inc.*, 966 F.3d 10 (2020), follow "the same" approach as the Seventh Circuit in *Wallace* v. *Grubhub Holdings, Inc.*, 970 F.3d 798 (2020) (Barrett, J.). Not even the Ninth Circuit made that claim—even after Judge Bress's remark that "the

reasoning of *Wallace* is plainly inconsistent with both the majority opinion here and *Waithaka*." Pet. App. 67a n.3 (dissenting opinion). A district court in the Ninth Circuit recently acknowledged the divergence. See *Carmona*, 2020 WL 7979174, at *4 (explaining that *Waithaka* and *Rittmann* "focused on '[t]he nature of the business for which a class of workers perform[ed] their activities,'" while *Wallace* "focused on whether the 'interstate movement of goods is a central part of the class members' job description'" (citations omitted)). And commentators have noticed inconsistency, too.[1]

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[1] See, *e.g.*, George H. Friedman, *SCOTUS Review Sought of Split Ninth Circuit Decision Holding That FAA Section 1 Carveout Does Not Require That Worker Have Moved Goods Across State Lines*, Securities Arbitration Alert (Nov. 13, 2020), https://www.secarbalert.com/blog/scotus-review-sought-of-split-ninth-circuit-decision-holding-that-faa-section-1-carveout-does-not-require-that-worker-have-moved-goods-across-state-lines/ ("There is a clear Circuit Court split on whether the section 1 exemption embraces only workers actually moving goods or people in interstate commerce (Fifth, Seventh, and Eleventh Circuits) or is to be construed more broadly to cover those who are part of the 'flow' or 'stream' of interstate commerce (First and Ninth Circuits)."); Cleary Gottlieb, *Class & Collective Action Group Newsletter* 12 (Nov. 13, 2020), https://www.clearygottlieb.com/-/media/files/class-and-collective-action/class-and-collective-action-newsletter-november-2020.pdf ("[W]hile the [*Rittmann*] panel characterized the Seventh Circuit's reasoning in *Wallace* as consistent with its opinion, an argument could be made that under *Rittman*[*n*], Grubhub delivery drivers are engaged in interstate commerce because they deliver food items that incorporate products, or are themselves, sent to local restaurants from out-of-state suppliers."); Peter B. "Bo" Rutledge & Jacob Bohn, *Could the Gig Economy Send Another FAA Disagreement to the Supreme Court?*, Law.com Daily Report (Nov. 5, 2020, 12:58 PM), https://www.

Under *Wallace*, "the inquiry is always focused on *the worker's* active engagement in the enterprise of moving goods across interstate lines." 970 F.3d at 802 (emphasis added). So the Seventh Circuit asks whether "the interstate movement of goods is a central part of the job description *of the class of workers*." *Id.* at 803 (emphasis added). It is not enough to "carry goods that have moved across state and even national lines." *Id.* at 802. "[T]he workers must be connected not simply to the goods, but to the act of moving those goods across state or national borders." *Ibid.*

That is not how the First and Ninth Circuits see it. They deny that the workers' "crossing [of] state lines [is] the touchstone of the exemption's test." *Waithaka*, 966 F.3d at 25. For them, it is enough for the workers to deliver goods that did not "originate in the same state" but were "distributed * * * across state lines" by other workers. Pet. App. 23a. This test asks whether the business—not the class of workers—centers on the interstate movement of goods. *Waithaka*, 966 F.3d at 22-23; Pet. App. 28a. If so, the workers are exempt because they "transport goods or people within the flow of interstate commerce." *Waithaka*, 966 F.3d at 13; see also Pet. App. 23a.

Respondents embellish *Wallace*'s fleeting mention of *Waithaka*. *Wallace* did not "approv[e]" *Waithaka*'s rationale or holding. Br. in Opp. 2, 10, 15. It included

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law.com/dailyreportonline/2020/11/05/could-the-gig-economy-send-another-faa-disagreement-to-the-supreme-court/ (noting the "tensions between[] *Waithaka*, *Rittmann* and *Wallace*").

*Waithaka* in a string citation, *Wallace*, 970 F.3d at 801 n.2, and cited *Waithaka* again in noting that a *different* fact pattern—"truckers who drive an intrastate leg of an interstate route"—poses a "harder" case than "truckers who drive an interstate route," *id.* at 802. But Amazon Flex drivers are not truckers; nor do they perform segments of interstate trucking routes. They pick up items from local delivery stations and retail stores (like Whole Foods), and drive those items around town in their cars. See Pet. 8.

Of course, the record here was not before the *Wallace* court. But the Seventh Circuit's framework shows it would have decided this case differently than the First and Ninth Circuits. Unlike those courts, *Wallace* steered clear of FELA cases and the "stream" or "flow of commerce" standard. See Pet. 10-11, 15-16, 21, 31. And no court—not even the majority below—has made respondents' current claim (at 15-16) that the interstate movement of goods is a central part of Amazon Flex drivers' job description. That view is untenable: to meet *Wallace*'s test, "the workers must be connected not simply to the goods, but to the act of moving those goods across state or national borders." 970 F.3d at 802. Amazon Flex drivers are indeed connected to *goods* that others moved across borders. But they are not connected to those interstate *acts*. Those actions are "irrelevant to the actual work the AmFlex workers perform." Pet. App. 49a (Bress, J., dissenting). Under *Wallace*'s standard, the FAA does not exclude Amazon Flex drivers.

2. Beyond *Wallace*, respondents cannot reconcile their preferred standard with the Fifth Circuit's ruling in *Eastus*. They just ignore the Fifth Circuit's open rejection of the Eighth Circuit's approach. *Eastus*, 960 F.3d at 211 ("[W]e reject Eastus' urging that we adopt a multiple-factor test used in another circuit." (citing *Lenz* v. *Yellow Transp., Inc.*, 431 F.3d 348, 352 (8th Cir. 2005))). As the petition recounted (at 22), the *Lenz* court designed its multifactor test to implement the "so closely related" standard deriving from the FELA case law. Although the majority below did not use *Lenz*'s eight-factor framework, it approved of the underlying "so closely related" standard. Pet. App. 13a-14a, 16a-18a & n.1 (citing, among other cases, *Singh* v. *Uber Techs. Inc.*, 939 F.3d 210 (3d Cir. 2019)). The Fifth Circuit did not even imply that this "so closely related" standard asks the right question.

Respondents also ignore other aspects of the Fifth Circuit's decision. For example, *Eastus* focused on the workers' own job responsibilities, and it concluded that loading and unloading interstate vehicles marks the endpoint to the interstate leg of a longer trip. Pet. 18-19.

Under *Eastus*, too, the outcome here would have been different. A district court in the Fifth Circuit recently cited *Eastus* in rebuffing a plaintiff's argument that workers "do[] not need to cross a state line" if they deliver goods coming from other states. *Lopez* v. *Cintas Corp.*, No. 20-cv-3490, 2021 WL 230335, at *1 & n.1 (S.D. Tex. Jan. 21, 2021). The court followed *Eastus* and earlier Fifth Circuit precedent in holding that

truck drivers who "did not pick up or deliver items out of state" or "cross state lines" are not exempt. *Id.* at *1.

3. Respondents mischaracterize *Hill* v. *Rent-A-Center, Inc.*, 398 F.3d 1286 (11th Cir. 2005). True, the Eleventh Circuit did not focus exclusively on whether the workers' duties required them to cross state lines. But that was because it imposed a second requirement—being in the transportation industry—on top of the threshold requirement that the workers "transport goods across state lines." *Id.* at 1290. As the petition explained (at 19), that threshold "interstate transportation factor" was "necessary but not sufficient" for the Eleventh Circuit. *Ibid.* The First and Ninth Circuits, on the other hand, impose no such requirement at all. And it would be dispositive here.

## B. Respondents' Merits Arguments Confirm The Need For This Court's Review

Although respondents pen a long defense of the Ninth Circuit's reading of the FAA, these merits arguments hardly weigh against review. On the contrary, they confirm that the Ninth Circuit's reading rests on doubtful assumptions.

Respondents claim support from this Court's injunction to apply the FAA's contemporaneous ordinary meaning. Br. in Opp. 21 (citing *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 539 (2019)). But the Ninth Circuit more nearly did the opposite: it construed the statutory language as a lawyerly term of art using,

among other things, Supreme Court decisions from the 1970s. Pet. App. 18a-19a; see Pet. 29 n.4. These post-enactment rulings shed no light on ordinary meaning in 1925.

Respondents' portrayal of the pre-FAA landscape is inaccurate as well. There is no truth to their claim (at 29) that this Court has held the First and Ninth Circuits' view "for more than a century." This Court "has never directed that the FAA be interpreted in light of FELA." Pet. App. 63a (Bress, J., dissenting). There are many reasons not to. Pet. 27-30, 31-32.

Indeed, the full historical record paints a different picture. The separate dispute-resolution regimes for seamen and railroad workers often did not apply to local versions of that work. Pet. 25. And this Court viewed the precursors of last-mile drivers as "intrastate" rather than "interstate." *Id.* at 30-31. Respondents' short discussion of *New York ex rel. Pennsylvania Railroad Co.* v. *Knight*, 192 U.S. 21 (1904), misses the case's main lesson: even in a "continuous interstate transportation," there is a legal distinction between the intrastate and interstate components. *Id.* at 26. In many contexts, including *Knight* itself, an intrastate leg of an interstate trip may have a "relation to interstate commerce" but should not "be regarded as a part of it." *Id.* at 28.

This Court drew a similar conclusion in *ICC* v. *Detroit, Grand Haven & Milwaukee Railway Co.*, 167 U.S. 633 (1897), which *Knight* cited. See Pet. 31 n.5. The Court held that a railroad company's local delivery of

goods that had just arrived from out of state was "a new and distinct service" from the company's interstate rail transportation. *Detroit, Grand Haven*, 167 U.S. at 643-644. That separation placed the local deliveries, unlike the interstate rail service, beyond the ICC's jurisdiction. *Id.* at 644. Respondents are wrong to imply (at 22) that petitioners' reading of the FAA lacks historical support.[2]

Respondents also fail to counter the greater predictability of petitioners' reading of the statute. They imply some doubt over whether Amazon Flex deliveries are truly local. Br. in Opp. 28. But there is no doubt on that score. The only support respondents muster are allegations about the *aggregate* distance one respondent drove one week, D. Ct. Dkt. 83, ¶ 22, and a *single occasion* on which a driver traveled out of state during "several years" of Amazon Flex deliveries, D. Ct. Dkt. 106, ¶¶ 3-4.

In any event, respondents mischaracterize petitioners' position. See Pet. 32-33. Petitioners read the FAA as covering the many transportation workers who, considered as a class, do not have interstate job

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[2] Respondents mistakenly quote *Bouvier's Law Dictionary* to suggest that "an express company taking goods from a steamer or railroad" always engages in interstate commerce. Br. in Opp. 20 (quoting *Bouvier's Law Dictionary and Concise Encyclopedia* 532 (8th ed. 1914)). The quoted passage summarizes the holding in *Barrett* v. *City of New York*, 189 F. 268, 269-270 (C.C.S.D.N.Y. 1911), rev'd in part on other grounds, 232 U.S. 14 (1914). But that case does not support respondents because the express company's vehicles constantly crossed state lines. See *Barrett*, 232 U.S. at 28.

duties. That includes the class of drivers that provides transportation within a metropolitan area. This reading views these local drivers as a class and thus does not treat particular drivers in near-border cities (like the District of Columbia) differently than drivers in other cities (like Dallas). *Id.* at 33. By promoting predictability, and arbitration, far better than the First and Ninth Circuits' flow-of-commerce standard or the Third and Eighth Circuits' assorted factors, petitioners' reading is more "consistent with the FAA's purpose." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 118 (2001).

The ruling below raises fundamental questions over how to construe the FAA's exemption. The arguments on both sides are well developed and were fully aired below. This Court should be the one to decide between them.

### C. The Court Should Not Postpone Addressing This Exceptionally Important Issue

Respondents do not dispute that this case is an excellent vehicle for the question the petition presents. They merely repurpose their support for the Ninth Circuit's holding as a supposed vehicle problem. Br. in Opp. 30-31. Naturally, respondents prefer the Court not to decide whether local transportation workers, as a class, fall outside the exemption. But they effectively concede there are no obstacles to deciding that question here.

Nor do they identify a reason for this Court to prefer further percolation to immediate resolution. There is no realistic hope that the circuits' legal standards will converge once they see enough fact patterns.

Courts already approach the endless varieties of local transportation work in an unpredictable, ad hoc way. The petition explained courts' distinctions between respondent Lawson's gig-economy work for Amazon, Grubhub, and Uber. Pet. 2. That is just the tip of the iceberg. Since the petition's filing, courts have made diverging rulings on a wide range of local drivers. See, *e.g.*, *O'Shea*, 2020 WL 7490371, at *5 (grocery store drivers for Instacart are not exempt from the FAA under *Wallace*); *Carmona*, 2020 WL 7979174, at *1 (local truck drivers for Domino's Pizza are exempt under *Rittmann*); *Lopez*, 2021 WL 230335, at *1 (local truck drivers for Cintas are not exempt under *Eastus*); *Gonzalez* v. *Lyft, Inc.*, No. 19-cv-20569, 2021 WL 303024, at *6 (D.N.J. Jan. 29, 2021) (discovery is needed to tell whether Lyft rideshare drivers are exempt under *Singh*); *Farah* v. *Logisticare Sols., LLC*, No. 20-cv-578, 2020 WL 7233355, at *1 (W.D. Mo. Dec. 8, 2020) (discovery is needed to tell whether drivers who transport patients to medical appointments are exempt under *Lenz*). It is hard to make sense of a world where the FAA covers grocery deliveries through Instacart but not Whole Foods. See Pet. App. 73a-74a & n.4 (Bress, J., dissenting).

The status quo is not working. Litigants and judges are spending vast resources to find the contours of a statute that promises an alternative to litigation.

This Court can, and should, provide guidance so they ask the right questions and reach consistent results.

## CONCLUSION

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

Respectfully submitted,

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