No.

In the Supreme Court of the United States

AMAZON.COM, INC., ET AL.,

Petitioners,

v.

JENNIFER MILLER, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act's exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. 1, extends to delivery drivers who make local deliveries of goods, including locally stocked food and items, because those goods were shipped from other states at some prior point in time.

PARTIES TO THE PROCEEDING

Petitioners Amazon.com, Inc. and Amazon Logistics, Inc. were defendants in the district court and appellants in the court of appeals.

Respondents Jennifer Miller, Emad Al-Kahlout, Jose Grinan, Kelly Kimmey, Juma Lawson, Hamady Bocoum, Philip Sullivan, Kimberly Halo, Christopher Cain, Gary Gleese, Clarence Harden, Steven Morihara, and Sharon Paschal were plaintiffs in the district court and appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Amazon.com, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock. Amazon Logistics, Inc. is a wholly owned subsidiary of parent company Amazon.com, Inc.

RELATED PROCEEDINGS

United States District Court (W.D. Wash.):

Miller v. *Amazon.com, Inc.*, No. 21-cv-204 (Dec. 9, 2021)

United States Court of Appeals (9th Cir.):

Miller v. *Amazon.com, Inc.*, No. 21-36048 (Sept. 1, 2023)

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INTRODUCTION

The lower courts are in a real muddle over the reach of the Federal Arbitration Act (FAA). The statute exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. 1. Recently, this Court granted certiorari to resolve one circuit split over this exemption: whether it is limited to workers "employed by a company in the transportation industry." Pet. at i, *Bissonnette* v. *LePage Bakeries Park St., LLC*, No. 23-51, 2023 WL 6319660 (Sept. 29, 2023). But that is only the start of the confusion. There is an even broader acknowledged circuit split over the test for being "engaged in foreign or interstate commerce" and, in particular, whether this language encompasses local delivery drivers who pick up and deliver goods—including, as in this case, food and other items stocked and supplied locally—that distinct classes of transportation workers have previously moved across state lines.

This Court flagged this issue in *Southwest Airlines Co.* v. *Saxon*, 596 U.S. 450, 457 n.2 (2022), but had no need to resolve it. The time has come to do so. Since *Saxon*, the courts of appeals have openly rejected one another's positions on whether local delivery drivers, who have had no role in the goods' transportation across state lines at some prior point in time, can nevertheless be exempt from the FAA. This disagreement is wholly separate from the disagreement in *Bissonnette* over whether the statute contains a transportation-industry requirement, and it has generated far more confusion.

Applying *Saxon*'s general framework, the Fifth Circuit has determined that local delivery drivers are not exempt merely because they deliver goods previously shipped from other states. *Lopez* v. *Cintas Corp.*, 47 F.4th 428, 432 (5th Cir. 2022). In so ruling, the Fifth Circuit acknowledged, but declined to follow, contrary pre-*Saxon* decisions from the First and Ninth Circuits. *Id.* at 432-433; see *Rittmann* v. *Amazon.com, Inc.*, 971 F.3d 904, 909 (9th Cir. 2020); *Waithaka* v. *Amazon.com, Inc.*, 966 F.3d 10, 13 (1st Cir. 2020).

The Ninth Circuit, in turn, "recognize[s] that the Fifth Circuit disagrees with *Rittmann*." *Carmona* v. *Domino's Pizza, LLC*, 73 F.4th 1135, 1137 & n.1 (9th Cir. 2023) (citing *Lopez*, 47 F.4th at 432-434). Yet the Ninth Circuit refuses to revise its *Rittmann* line of precedent in light of *Saxon*, even after this Court remanded one such case for further consideration in light of *Saxon*. *Ibid.*; see also *Domino's Pizza, LLC* v. *Carmona*, 143 S. Ct. 361 (2022); App., *infra*, 2a-3a. The First Circuit likewise continues to treat *Waithaka* as good law after *Saxon*. *Fraga* v. *Premium Retail Servs., Inc.*, 61 F.4th 228, 238-242 (1st Cir. 2023).

These recent decisions widen pre-*Saxon* rifts over how to interpret the FAA exemption. Before *Saxon*, several courts recognized that local delivery drivers do not belong to a "class of workers engaged in foreign or interstate commerce" merely because *other* classes of workers have transported the goods across state lines in *other* vehicles. See, *e.g.*, *Hamrick* v. *Partsfleet, LLC*, 1 F.4th 1337, 1340 (11th Cir. 2021); *Wallace* v. *Grubhub Holdings, Inc.*, 970 F.3d 798, 802-803 (7th Cir. 2020) (Barrett, J.). As these courts recognized, it is not enough to "carry goods that have moved across

state and even national lines." *Wallace*, 970 F.3d at 802. "[T]o fall within the exemption, the workers must be connected not simply to the goods, but to the act of moving those goods across state or national borders." *Ibid.*

Only this Court can settle the circuits' entrenched disagreement over local delivery drivers' status under the FAA. And it is clearly deserving of the Court's attention. Until the Court resolves the question, the enforceability of local delivery drivers' arbitration agreements will hinge on the plaintiff's choice of circuit. Such circuit-to-circuit variability defeats the FAA's objectives. The FAA aims to create a uniform standard, nationwide, for the enforceability of arbitration agreements. In addition, arbitration is supposed to be a speedy and efficient alternative to litigation, not an invitation to years of litigation just to see whether a given arbitration agreement is enforceable. Because this important and frequently recurring issue is not teed up in *Bissonnette*, the Court should grant certiorari and provide much-needed clarity here.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is not published in the Federal Reporter but is available at 2023 WL 5665771. The opinion of the district court (App., *infra*, 5a-18a) is not published in the Federal Supplement but is available at 2021 WL 5847232.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Federal Arbitration Act, 9 U.S.C. 1, provides:

> "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

A. Statutory background

Congress passed the FAA in 1925 "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Morgan* v. *Sundance, Inc.*, 596 U.S. 411, 418 (2022) (citation omitted). FAA Sections 3 and 4 create procedures to enforce arbitration agreements through orders staying litigation and orders compelling parties to arbitrate. 9 U.S.C. 3, 4. Sections 1 and 2 together determine the scope of the FAA's enforcement mechanisms by determining which arbitration agreements fall within the FAA's coverage. See, *e.g.*, *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 537 (2019). Section 2 generally extends the FAA to written provisions in a "maritime transaction" or "contract[s] evidencing a transaction involving commerce." 9 U.S.C. 2. Section 1 clarifies Section 2's meaning by defining "[m]aritime transactions" and "commerce," but also specifically excludes "contracts

of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. 1.

This Court has long recognized that Congress deliberately used expansive language for the FAA's general scope in Section 2 and narrow language for the carveout in Section 1. By ordinarily encompassing any "contract evidencing a transaction involving commerce," 9 U.S.C. 2, Congress signaled an "intent to exercise its Commerce Clause powers to the full." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 273-274 (1995). In contrast, Congress chose a noticeably narrower formulation, "class of workers engaged in foreign or interstate commerce," 9 U.S.C. 1, in exempting certain workers' contracts. *Cir. City Stores, Inc.* v. *Adams*, 532 U.S. 105, 118 (2001). The aim of this exemption, the Court has explained, was to avoid unsettling alternative employment dispute resolution regimes that Congress had already prescribed for certain transportation workers. *New Prime*, 139 S. Ct. at 537.

On three occasions, this Court has stepped in and resolved lower court disagreements over the exemption.

First, in *Circuit City*, the Court held that the exemption does not apply to all employment contracts. 532 U.S. at 109. Rather, it applies only to contracts with transportation workers who are akin to "seamen" and "railroad employees," the two categories that Section 1 mentions specifically. *Id.* at 114-115.

Next, in *New Prime*, the Court held that Section 1's reference to "contracts of employment" does not limit the exemption to employees. 139 S. Ct. at

541. Independent contractors can be covered as well. *Ibid.* The Court noted that it, "[h]appily," *id.* at 539, did not need to resolve any dispute in that case over whether the individual at issue belonged to a "class of workers engaged in foreign or interstate commerce."

But in *Southwest Airlines Co.* v. *Saxon*, 596 U.S. 450 (2022), the Court did have to explain how to decide such a question. A court should "begin by defining the relevant 'class of workers' to which [the individual] belongs." *Id.* at 455. Then, the court should "determine whether that class of workers is 'engaged in foreign or interstate commerce'" for purposes of Section 1. *Ibid.* The *Saxon* plaintiff belonged to a class of workers who physically load and unload cargo on and off interstate-bound airplanes on a frequent basis. *Id.* at 456. And this class of workers was engaged in foreign or interstate commerce under Section 1 because it was "directly involved in transporting goods across state or international borders." *Id.* at 457

At the same time, the *Saxon* Court "recognize[d] that the answer will not always be so plain when the class of workers carries out duties further removed from the channels of interstate commerce or the actual crossing of borders." 596 U.S. at 457 n.2. As examples, the Court contrasted the Ninth Circuit's holding that so-called last-mile delivery drivers were exempt with the Seventh Circuit's holding that food delivery drivers were not. *Ibid.* (citing *Rittmann* v. *Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020), and *Wallace* v. *Grubhub Holdings, Inc.*, 970 F.3d 798, 803 (7th Cir. 2020)).

B. Facts and procedural history

1. Respondents are thirteen individuals who made local deliveries through the Amazon Flex program. C.A. E.R. 174, 178-179. Using the Amazon Flex smartphone application, individuals can perform local delivery services as independent contractors in certain cities around the country. *Id.* at 80.

To sign up, an individual must download the Amazon Flex application, log in with an individual account, and agree to the Amazon Flex Independent Contractor Terms of Service. C.A. E.R. 80-81. These terms include an arbitration provision through which the parties agree to resolve all disputes related to the Amazon Flex program in arbitration. *Id.* at 93. Respondents had an opportunity to opt out of the arbitration provision, but none did so. *Id.* at 82-84, 94.[1]

Amazon Flex drivers do not use big trucks or Amazon-branded vehicles for these deliveries. They use their personal vehicles and deliver goods within their local area. C.A. E.R. 65, 69, 73, 77. These deliveries occur during "delivery blocks" that Amazon Flex drivers select using the smartphone application. *Id.* at 86.

2. Respondents filed this litigation on behalf of a putative nationwide class of Amazon Flex drivers. C.A. E.R. 174. They contend that petitioners violated various state laws by allegedly withholding tips from Amazon Flex drivers between 2016 and 2019. *Id.* at 174-175, 181. This dispute implicates the subset of

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[1] Eleven of the thirteen respondents also assented to updated terms of service years after their initial signup. App., *infra*, 9a. The different contract versions contain no differences material to the question presented to this Court.

Amazon Flex deliveries that are eligible for customer-provided tips. Only certain Amazon Flex delivery blocks (designated "Global Specialty Fulfillment" or "GSF") are eligible for such tips. *Id.* at 86. In these blocks, drivers deliver only items that are stocked locally—such as groceries sold through Amazon Fresh, groceries picked up at Whole Foods Market stores, items available for same-day delivery, and, for a time, items picked up at area restaurants. *Ibid.*; see also *id.* at 53-78.

Petitioners moved to compel respondents to arbitrate. C.A. E.R. 147-173. Respondents did not deny that they had agreed to arbitrate such claims. Rather, they contended that the arbitration agreements were unenforceable under the FAA, because of Section 1's exemption, and also unenforceable under state law.

3. The district court agreed with respondents. App., *infra*, 5a. As relevant here, the court concluded that respondents' arbitration agreements are exempt from the FAA. *Id.* at 17a. This determination relied heavily on the Ninth Circuit's prior ruling in *Rittmann*, which also addressed Amazon Flex drivers. *Id.* at 14a-17a.

Petitioners had argued that *Rittmann* was inapplicable because this dispute centers exclusively on the category of tip-eligible GSF deliveries of locally stocked grocery, restaurant, and same-day-delivery items. App., *infra*, 14a-15a. *Rittmann* had focused on a distinct category of delivery blocks (designated "AMZL") for items warehoused in Amazon fulfillment centers. C.A. E.R. 86. Because AMZL delivery blocks have no connection to the parties' dispute, and because some Amazon Flex drivers never perform any

AMZL delivery blocks at all, the pertinent question here, unlike *Rittmann*, was whether GSF deliveries qualify as engagement in foreign or interstate commerce. App., *infra*, 15a; see also C.A. E.R. 86-87.

The district court found *Rittmann* controlling. App, *infra*, 15a. Even accepting that certain respondents performed GSF delivery blocks exclusively, the court decided that "the work actually performed by Plaintiffs is not relevant to defining the class of workers to which they belong." *Ibid.* More relevant, in the district court's view, was the interstate nature of Amazon's business. *Id.* at 11a, 16a-17a.

4. Petitioners appealed the denial of their motion to compel arbitration. By the time of the appeal, this Court had provided new guidance about the exemption in *Saxon*. Petitioners' opening appellate brief contended that *Saxon*'s new guidance was incompatible in several respects with the Ninth Circuit's pre-*Saxon* decision in *Rittmann* and with the district court's decision as well. Pet. C.A. Br. 1-3, 18-24, 29-38. Then, on reply, petitioners highlighted, as added support, the Fifth Circuit's then-recent holding in *Lopez* v. *Cintas Corp.*, 47 F.4th 428 (5th Cir. 2022). As petitioners noted, the Fifth Circuit had declined to follow *Rittmann* because of *Saxon*'s new framework. Pet. C.A. Reply 1-2. Petitioners also highlighted this Court's decision to grant certiorari, vacate, and remand in *Domino's Pizza, LLC* v. *Carmona*, 143 S. Ct. 361 (2022), which involved a recent Ninth Circuit decision that had found in-state delivery drivers exempt based on *Rittmann*. Pet. C.A. Reply 2.

Before the panel decided this case, though, another Ninth Circuit panel addressed the remand in

Carmona. It concluded, in just a few sentences, that *Rittmann* remained binding Ninth Circuit precedent after *Saxon*. See *Carmona*, 73 F.4th at 1137-1138. The *Carmona* panel did not ask whether *Rittmann* would be correct if it were writing on a blank slate. Rather, it decided that *Rittmann* survives so long as it is not "clearly irreconcilable" with *Saxon*. *Id.* at 1137 (citation omitted). And it found that *Saxon* is "not inconsistent, let alone clearly irreconcilable, with *Rittmann*." *Id.* at 1138. The panel did note, however, the Fifth Circuit's contrary view about *Rittmann* in *Lopez*. *Id.* at 1137 n.1.

Here, the panel used *Carmona* to summarily reject petitioners' request to revisit *Rittmann*: "we recently held that *Rittman*[*n*] remains binding precedent after *Saxon*." App., *infra*, 3a. In addition, the court found it irrelevant that the parties' underlying dispute centers exclusively on tip-eligible deliveries of goods locally stocked at grocery stores, retail stores, restaurants, and other nearby, in-state locations. *Ibid.* The court found it irrelevant, too, that Amazon Flex drivers can and sometimes do perform only those categories of deliveries. *Ibid.* Like the district court, the court of appeals treated all Amazon Flex drivers as the same "class of workers" regardless of differences in the actual work they perform. *Ibid.*

The court of appeals therefore affirmed the denial of petitioners' motion to compel arbitration. *Id.* at 4a. It nonetheless granted petitioners' motion to stay the mandate pending disposition of this petition.

REASONS FOR GRANTING THE PETITION

The courts of appeals are intractably divided over what the FAA's language means for local delivery drivers. Three circuits—the Fifth, Seventh, and Eleventh—hold that local delivery drivers are not an exempt class of workers because they have no active involvement in the goods' transportation across state lines. Two circuits—the First and Ninth—hold that the prior interstate travels of the delivered goods can make local drivers exempt, even when those local drivers have no role in the cross-border transportation, which is separately accomplished by other workers using other vehicles.

This Court's intervention is urgently needed. The existing 3–2 circuit split cannot repair itself. Despite *Southwest Airlines Co.* v. *Saxon*, 596 U.S. 450 (2022), the First and Ninth Circuits have continued adhering to views they formed before that decision. The Fifth Circuit, in contrast, has decided that *Saxon* compels the opposite conclusion, and the Seventh and Eleventh Circuits' pre-*Saxon* rulings take the same basic view. Courts on both sides have acknowledged the other side's contrary position. Yet neither side is moving any closer to the other. Only this Court can decide between them. And the language of the statute—particularly as interpreted by this Court in *Saxon*—shows that the decision below rests on the wrong approach.

As the slew of recent decisions shows, local delivery drivers' status under the FAA is an extremely important and frequently recurring issue. It is imperative that the Court settle this issue quickly. The FAA

prescribes a uniform nationwide standard for the enforceability of arbitration agreements, to enable contracting parties to choose a speedy and efficient means of resolving their disputes. But under current law, plaintiffs who wish to escape arbitration can select litigation forums that they know will construe the exemption broadly. And even in circuits where this question remains open, litigants will have to waste considerable time and resources fighting over this disputed issue, through years of proceedings that can only add to the existing circuit split. This case cleanly presents the issue, and the Court should not pass up the opportunity to decide it.

A. This case implicates a recognized circuit conflict over the scope of the FAA.

The circuits are staunchly divided over whether local delivery drivers belong to a "class of workers engaged in foreign or interstate commerce" under Section 1 of the FAA.

1. The Fifth, Seventh, and Eleventh Circuits hold that delivering goods that have previously been transported across state lines, by different classes of workers in completely different vehicles, does not make a class of local delivery drivers exempt from the FAA. In their view, a class of workers must play an active role in transporting goods (or persons) across state lines to qualify as exempt.

The Fifth Circuit has reached that conclusion by faithfully following this Court's framework in *Saxon*. In *Lopez* v. *Cintas Corp.*, 47 F.4th 428, 431 (5th Cir. 2022), the court held that the exemption does not extend to so-called "last-mile drivers." The driver in *Lopez* "picked up items from a Houston warehouse

(items shipped from out of state) and delivered them to local customers." *Id.* at 430. Under *Saxon*, the court had to "determine the relevant 'class of workers' by the work that [the plaintiff] actually did." *Id.* at 431. When a worker "picks up items from a local warehouse and delivers those items to local customers," those work activities place the worker in a class of local delivery drivers. *Id.* at 432. While acknowledging that the First and Ninth Circuits had previously found such drivers to be exempt, the Fifth Circuit nonetheless concluded that "local delivery drivers are not so 'engaged' in 'interstate commerce' as § 1 contemplates." *Ibid.* As *Saxon* explains, an exempt class of workers must be "actively engaged in transportation of [the] goods across borders." *Id.* at 433 (quoting *Saxon*, 596 U.S. at 458). The *Lopez* plaintiff did not belong to such a class of workers. Rather, "[o]nce the goods arrived at the Houston warehouse and were unloaded, anyone interacting with those goods was no longer engaged in interstate commerce" under the FAA. *Ibid.*

The Eleventh Circuit adopted a similar reading of the FAA exemption even before *Saxon*. *Hamrick* v. *Partsfleet, LLC*, 1 F.4th 1337 (11th Cir. 2021). That case likewise involved "final-mile delivery drivers," who made "local deliveries of goods and materials that have been shipped from out-of-state to a local warehouse." *Id.* at 1340. The drivers contended that "their job was to transport goods and materials that had moved in the flow of interstate commerce." *Id.* at 1343. The Eleventh Circuit disagreed. It ruled that the proper question, given the exemption's language, was whether the drivers were "engaged in transporting goods across state lines." *Id.* at 1346 (citation

omitted). Merely "performing intrastate trips" did not qualify, even when delivering "items which had been previously transported interstate." *Id.* at 1349 (citation omitted). The text of Section 1 requires a "focus on what a class of *worker* must be engaged in doing and not the *goods*." *Ibid.* So the Eleventh Circuit confined the exemption to classes of workers that "actually engage[] in the transportation of persons or property between points in one state (or country) and points in another state (or country)." *Id.* at 1350.

Then-Judge Barrett made similar points about Section 1's textual focus in *Wallace* v. *Grubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020). The plaintiffs there made local deliveries of prepared and prepackaged food items from area restaurants. *Id.* at 802. Their arguments did not focus on whether they belonged to a class of workers that is "actively engaged in the movement of goods across interstate lines." *Id.* at 802. Their arguments stressed, instead, that "they carry goods that have moved across state and even national lines." *Ibid.* In their view, the exemption is "not so much about what the worker does as about where the goods have been." *Ibid.* But the Seventh Circuit disagreed: "to fall within the exemption, the workers must be connected not simply to the goods, but to the act of moving those goods across state or national borders." *Ibid.*

2. The First and Ninth Circuits construe the exemption very differently. For them, an exempt class of workers need not be actively engaged in transporting goods (or persons) across state lines if the class of workers delivers goods that other classes of workers,

in other vehicles, had transported across state lines for the same company.

A fractured Ninth Circuit panel adopted that position in *Rittmann* v. *Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020). That decision ruled that Amazon Flex delivery drivers were exempt because they "complete the delivery of goods that Amazon ships across state lines." *Id.* at 917. It did not matter that the drivers pick up those goods at in-state warehouses—after different classes of workers have already completed the cross-border segment of the packages' journey—and use different vehicles to perform local, in-state transportation. *Id.* at 916. For the Ninth Circuit, it was enough that "the Amazon packages they carry are goods that remain in the stream of interstate commerce until they are delivered." *Id.* at 915.

In dissent, Judge Bress contended that the majority's approach was incompatible with the textual focus of the exemption. *Id.* at 926. He argued that "the out-of-state nature of the goods is irrelevant to the actual work the AmFlex workers perform," *ibid.*, and that the exemption's "coverage does not depend on the company for whom the delivery person works," *id.* at 929. But the majority rejected both arguments. *Id.* at 917. It defended focusing on "[t]he nature of the business for which [the] class of workers perform their activities." *Ibid.* (citation omitted). In fact, after *Rittmann*, the Ninth Circuit would repeatedly proclaim that "[t]he nature of the business" is the "critical factor" in its approach to the exemption. *In re Grice*, 974 F.3d 950, 956 (9th Cir. 2020) (citation omitted); *Capriole* v. *Uber Techs., Inc.*, 7 F.4th 854, 861 (9th Cir. 2021) (citation omitted); *Carmona* v. *Domino's Pizza, LLC*, 21

F.4th 627, 629 (9th Cir. 2021), *cert. granted*, *judgment vacated*, 143 S. Ct. 361 (2022).

The First Circuit espoused the same view in *Waithaka* v. *Amazon.com, Inc.*, 966 F.3d 10 (1st Cir. 2020). It ruled that Amazon Flex delivery drivers were exempt from the FAA because they "transport[] goods that had come from out of state." *Id.* at 20. Like the *Rittmann* majority, the First Circuit rejected the argument "that the activities of the workers themselves are the crux of the exemption, without consideration of the geographic footprint and nature of the business for which they work." *Id.* at 22. In the First Circuit's view, "[t]he nature of the business for which a class of workers perform their activities must inform th[e] assessment." *Ibid.* To support that interpretation, the court invoked the *ejusdem generis* canon of construction, on the premise that the two enumerated categories of worker—"seamen" and "railroad employees"—were groups "defined by the nature of the business for which they work." *Id.* at 23.

The First and Ninth Circuits have continued to adhere to *Waithaka* and *Rittmann* after *Saxon*. See *Immediato* v. *Postmates, Inc.*, 54 F.4th 67, 74-80 (1st Cir. 2022) (following *Waithaka*); *Fraga* v. *Premium Retail Servs., Inc.*, 61 F.4th 228, 234-235, 237-241 (1st Cir. 2023) (same); *Carmona* v. *Domino's Pizza, LLC*, 73 F.4th 1135, 1137-1139 (9th Cir. 2023) (following *Rittmann* after this Court's remand in light of *Saxon*); App., *infra*, 2a-3a (same).

Even so, the First and Ninth Circuits are not in total agreement with each other. The First Circuit has distinguished so-called "last-mile" deliveries from deliveries of goods from restaurants and grocery

stores, on the ground that restaurant and grocery orders involve goods that are already in the same state as the customer at the time the customer orders them. *Immediato*, 54 F.4th at 78. Such orders, on this view, are intrastate transactions that are "separate" from any prior interstate transportation. *Ibid.* The Ninth Circuit, on the other hand, construes the exemption more expansively. Even when customers "do not order the goods until after they arrive at the [in-state] warehouse," the Ninth Circuit treats those goods as remaining in a continuous "stream of interstate commerce" unless the goods are "transformed" into new products after arriving in state. *Carmona*, 73 F.4th at 1138. No other circuit has gone that far.

3. In sum, the Fifth, Seventh, and Eleventh Circuits all confine the exemption to classes of workers who are actively engaged in transporting goods (or persons) across state lines. The First and Ninth Circuits, by contrast, extend the exemption to classes of workers who perform in-state deliveries of goods that other classes of workers previously transported across state lines.

Only this Court can settle this disagreement, which the *Saxon* decision did not settle on its own. The Ninth Circuit has reaffirmed and expanded its *Rittmann* line of cases even after this Court remanded one such case for further consideration in light of *Saxon*, and even while "recogniz[ing] that the Fifth Circuit disagrees with *Rittmann*." See *Carmona*, 73 F.4th at 1137 & n.1. This circuit split will not go away without this Court's intervention. It will only grow bigger.

B. The decision below conflicts with the statute's text and this Court's precedent.

The Ninth Circuit's interpretation of the FAA, both in this case and in its prior cases, is erroneous. Although *Saxon* did not directly address the status of local delivery drivers, it announced a general framework based on this Court's interpretation of the statutory language. That framework rejects several key tenets of the Ninth Circuit's rulings and exposes the errors in its interpretation of the FAA exemption.

1. The Ninth Circuit has misconstrued Section 1 of the FAA as allowing courts to place heavy weight on the broader activities of the business for which the workers perform their services. Starting in *Rittmann*, the Ninth Circuit zeroed in on its understanding of what "Amazon's business includes," rather than the actual services performed by Amazon Flex drivers. 971 F.3d at 918. The dissent objected to this willingness to let Amazon's broader business activities overshadow "the actual work the AmFlex workers perform." *Id.* at 926 (Bress, J., dissenting). But the majority made Amazon's business the critical factor in its analysis, as the Ninth Circuit has repeatedly noted. See, *e.g.*, *Capriole*, 7 F.4th at 866 ("*Rittmann* * * * held that Amazon Flex ('AmFlex') workers did fall under the interstate commerce exemption due to the interstate nature of Amazon's business."); *Grice*, 974 F.3d at 957 (stating that *Rittmann* "emphasized the interstate nature of an employer's business as the critical factor for determining whether a worker qualifies for the § 1 exemption[.]").

Saxon rejects this focus on the business's activities. Consistent with Judge Bress's reading of the

statutory language, this Court has interpreted Section 1 as focusing on "workers" and the work in which they are "engaged." 596 U.S. at 456. The statutory text thus supported Southwest's view that Section 1 "exempts classes of workers based on *their* conduct, not their *employer's*." *Ibid.* (citation omitted). And the *Saxon* plaintiff was "a member of a 'class of workers' based on what she does at Southwest, not what Southwest does generally." *Ibid.*

Saxon even rejects the Ninth Circuit's specific rationale for focusing on Amazon's business. *Rittmann*, like *Waithaka* before it, sought to justify consideration of Amazon's business through the *ejusdem generis* canon—on the premise that the statute's enumerated categories of "seamen" and "railroad employees" were "defined by the nature of the business for which they work." *Waithaka*, 966 F.3d at 23; *Rittmann*, 971 F.3d at 917-918. The *Saxon* Court explained, however, that this premise is false. 596 U.S. at 460. The category of "seamen" does *not* "include all those employed by companies engaged in maritime shipping." *Ibid.* It includes "only those who work on board a vessel," who "constitute a subset of workers engaged in the maritime shipping industry." *Ibid.* So even if "railroad employees" is a category defined by working for a particular business (a railroad), the category of "seamen" is not. *Ibid.*

Here, the Ninth Circuit doubled down on its disregard for the workers' actual activities. It refused to correct the district court's statement that "the work actually performed by [respondents] is not relevant to defining the class of workers to which they belong"—

even on the assumption that "one or more [respondents] exclusively made GSF deliveries" of locally stocked goods. App., *infra*, 6a, 15a. In *Saxon*, however, this Court explained that the plaintiff *was* "a member of a 'class of workers' based on what she does at Southwest." 596 U.S. at 456. The Ninth Circuit and district court violated *Saxon*'s instructions by refusing to classify drivers based on their actual work.[2]

2. The court below also disregarded *Saxon*'s test for engaging in foreign or interstate commerce. Under that test, the exemption extends to "any class of workers directly involved in transporting goods across state or international borders." *Saxon*, 596 U.S. at 457. "[A]ny such worker must at least play a direct and 'necessary role in the free flow of goods' across borders" or, said another way, "must be actively 'engaged in transportation' of those goods across borders via the channels of foreign or interstate commerce." *Id.* at 458. But the Ninth Circuit never even recited this test. See App., *infra*, 2a-4a.

Had the court of appeals applied *Saxon*'s test, it would have reached the opposite conclusion. Local delivery drivers "do not have such a 'direct and necessary role' in the transportation of goods across borders." *Lopez*, 47 F.4th at 433. The First Circuit has

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[2] The court of appeals did quote part of *Saxon*'s statement that the FAA's language "emphasizes the actual work that the members of the class, as a whole, typically carry out." *Saxon*, 596 U.S. at 456; see App., *infra*, 3a. But the court ignored *Saxon*'s very next sentence, which says to define the relevant "'class of workers' based on what [the plaintiff] does." *Saxon*, 596 U.S. at 456. Under *Saxon*, Amazon Flex drivers who never perform last-mile deliveries of out-of-state packages do not belong to a class of workers that typically performs such deliveries.

practically conceded the point. It admits that Amazon delivery drivers are "not involved in the shipment of packages across state lines." *Immediato*, 54 F.4th at 74. But that is precisely the question *Saxon* poses: Are the class of workers "directly involved in transporting goods across state or international borders"? *Saxon*, 596 U.S. at 457. And even at oral argument below, one panel member expressed some doubt about *Rittmann*'s consistency with *Saxon*. See Oral Argument Recording at 20:05-12, 20:40-51 (Mar. 27, 2023), https://www.youtube.com/watch?v=bW_hyv03edY&t=1205s ("If I were going to predict how *Rittmann* would come out at the Supreme Court today, I would not have absolute confidence. * * * [I]n *Rittmann*, we focused on the nature of Amazon's business, and *Saxon* at least tells us that's not the correct analytical approach."). Only by placing a thumb on the scale in favor of preserving its precedent could the Ninth Circuit reach the conclusion it reached here.

3. The ruling below also conflicts with the relevant history. Before the FAA's enactment in 1925, this Court had several occasions to consider whether the precursors of last-mile delivery should be treated as a constituent part of the interstate transportation of people or goods who had been on a multi-state railway journey. This Court determined that the local transportation services, provided by different transportation workers in different vehicles, were distinct from the interstate rail transportation.

One such case is *New York ex rel. Pennsylvania Railroad Co.* v. *Knight*, 192 U.S. 21, 21 (1904). The railroad in *Knight* offered passengers, who were arriving in New York from other states, a horse-drawn cab

service to take them the proverbial last mile to their hotels or homes in the city. The Court ruled that "the cab service [was] an independent local service" and "subsequent to any interstate transportation" rather than a constituent part of the interstate transportation. *Id.* at 28. Even though the passengers' journey with the railroad did not end until they reached their ultimate New York destination, there was "a separation in fact" between the "transportation service wholly within the state and that between the states." *Id.* at 27; see also *Rittmann*, 971 F.3d at 933 (Bress, J., dissenting) (discussing *Knight*).

In *Knight*, the Court relied on its prior decision in *Interstate Commerce Commission* v. *Detroit, Grand Haven & Milwaukee Railway Co.*, 167 U.S. 633 (1897). There, the Court considered a "cartage" service that a railroad made available to transport goods arriving from out-of-state for the one-and-a-quarter-mile distance between the Grand Rapids train station and the city's business district. *Id.* at 635-636. This Court agreed with the lower court that the interstate rail transportation ended when the goods reached the train station and were unloaded: the railroad's "delivery of goods [was] a separate and distinct business from that of railway carriage." *Id.* at 643-644. After the goods were unloaded at the train station, their "subsequent history * * * would not concern the interstate commerce commission." *Id.* at 644. Congress passed the FAA in 1925 against this background understanding of the line between interstate and intrastate transportation.

4. Under the statutory text, precedent, and history, there is no basis to distinguish between different

categories of local delivery drivers. Judged on the nature of the work performed—as *Saxon* directs—none of these local drivers are engaged in foreign or interstate commerce under Section 1 of the FAA.

C. The question presented is important and warrants review in this case.

The Court should grant review to resolve the circuits' diverging standards for the Section 1 exemption. Otherwise, the enforceability of a particular arbitration agreement will turn on where the plaintiff files suit, contrary to the FAA's core purpose.

Had this case arisen in the Fifth or Eleventh Circuits, it would now be in arbitration. See, *e.g.*, *Pettie* v. *Amazon.com, Inc.*, No. CIVDS1908923, 2023 WL 4035015, at *1 (Cal. Super. Ct. May 25, 2023) (following *Lopez*'s reading of *Saxon* to conclude that the Amazon Flex agreement is not exempt from the FAA); *Nunes* v. *LaserShip, Inc.*, No. 22-cv-2953, 2023 WL 6326615, at *2-3 (N.D. Ga. Sept. 28, 2023) ("Plaintiffs here make the same argument that was rejected in *Hamrick* and *Lopez*—that last-mile delivery drivers are engaged in interstate commerce because the goods they transport have traveled interstate and remain in the stream of commerce until delivered. They do not." (footnote omitted)). Likewise, under the Seventh Circuit's approach, delivering locally stocked restaurant, grocery, and same-day items plainly does not trigger the exemption. See, *e.g.*, *O'Shea* v. *Maplebear Inc.*, 508 F. Supp. 3d 279, 287 (N.D. Ill. 2020) (applying *Wallace* to grocery deliveries); *Bean* v. *ES Partners, Inc.*, 533 F. Supp. 3d 1226, 1234, 1236 (S.D. Fla. 2021) (applying *Wallace* to "same day pharmaceutical deliv-

eries"). In fact, even under the First Circuit's approach, delivering locally stocked goods from restaurants, grocery stores, or other local pickup points does not trigger the exemption. See *Immediato*, 54 F.4th at 79.

Given the divisions of authority, lower courts are constantly issuing decisions that either send cases to arbitration, or not, based solely on which line of cases they follow. This court-to-court variability frustrates Congress's main objective in passing the FAA. Congress exercised its broad commerce powers to create a uniform nationwide framework for the enforcement of arbitration agreements. It did not "create a right to enforce an arbitration contract" only to "make the right dependent for its enforcement on the particular forum in which it is asserted." *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 (1984); see also *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995) ("Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases.").

The current lack of a uniform answer to the question presented here will only "encourage and reward forum shopping." *Southland*, 465 U.S. at 15. When a plaintiff wants to litigate rather than arbitrate, that plaintiff will rationally gravitate toward forums that read the Section 1 exemption expansively, like the Ninth Circuit.

And even if future local delivery drivers cannot simply choose the most favorable circuits, any circuit yet to answer the question presented will need to expend considerable judicial resources to pick a side.

That will just generate more litigation and delay before the parties can even begin to resolve the merits of their dispute. Orders denying motions to compel arbitration under the FAA are immediately appealable as of right. 9 U.S.C. 16(a)(1)(A)-(B). Such appeals trigger an automatic stay of district court proceedings. *Coinbase, Inc.* v. *Bielski*, 599 U.S. 736, 738 (2023). And there is no guarantee that the outcome of such an appeal will conclusively resolve the exemption issue. On the contrary, the appeal may just prolong the dispute further.

For example, an appellate ruling may order that the parties engage in exemption-related discovery. Consider *Singh* v. *Uber Technologies, Inc.*, 67 F.4th 550, 558 (3d Cir. 2023). That decision culminated *nearly seven years* of proceedings over the enforceability of Uber's arbitration agreement with drivers. After the district court initially granted Uber's motion, the Third Circuit vacated and remanded for further discovery about the nature of the drivers' work activities. *Singh* v. *Uber Techs. Inc.*, 939 F.3d 210, 214 (3d Cir. 2019). Two years later, the district court again compelled arbitration, which merely prompted a second appeal. *Singh* v. *Uber Techs., Inc.*, 571 F. Supp. 3d 345, 348 (D.N.J. 2021), *aff'd*, 67 F.4th 550.

Parties should not have to spend years litigating the threshold question of whether the FAA requires them to arbitrate. Arbitration is supposed to promise "lower costs" and "greater efficiency and speed." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). So the FAA "calls for a summary and speedy disposition of motions or petitions to enforce arbitration clauses." *Moses H. Cone Mem'l Hosp.* v.

Mercury Constr. Corp., 460 U.S. 1, 29 (1983). Allowing a clear circuit conflict over the meaning of the FAA's exemption to linger will have exactly the opposite effect: "breeding litigation from a statute that seeks to avoid it." *Allied-Bruce*, 513 U.S. at 275.

This case is an ideal vehicle to address the question presented. Respondents are the type of local delivery driver that lies at the heart of the current circuit conflict. The issues are squarely presented. And were the Court to agree with petitioners' interpretation of the statute, the result below would flip.

Although this Court recently granted certiorari to resolve a different circuit split over the FAA exemption, *Bissonnette* v. *LePage Bakeries Park St., LLC*, No. 23-51, 2023 WL 6319660 (U.S. Sept. 29, 2023), there are compelling reasons to grant this case also. In *Bissonnette*, the Second Circuit explicitly refused to decide the question presented here. *Bissonnette* v. *LePage Bakeries Park St., LLC*, 49 F.4th 655, 663 (2d Cir. 2022). Acknowledging the circuit split presented in this case, the Second Circuit stated that it had "no occasion to hazard answers to [the] questions" dividing the First and Ninth Circuits from the Seventh and Eleventh Circuits (and now the Fifth Circuit as well) including the status of "[w]orkers for major retailers who transport goods intrastate within a larger transportation network that is interstate." *Ibid.* The Second Circuit sidestepped those questions by ruling that a class of workers cannot be exempt from the FAA if it does not "work in the transportation industry." *Id.* at 662. Whether the exemption contains a transportation-industry prerequisite is the only question that this Court has agreed to decide.

The *Bissonnette* defendants, meanwhile, deny that their case implicates the question here (although they agree that it is a "hot topic" worthy of certiorari). Br. in Opp. at 21, *Bissonnette*, *supra* (No. 23-51). In reply, the plaintiffs floated the idea of adding a second question in that case "to consider the application of the Federal Arbitration Act to last-mile drivers." Pet. Reply at 5, *Bissonnette*, *supra* (No. 23-51). But the Court opted not to do so. See *Bissonnette*, 2023 WL 6319660, at *1. There is no need to squeeze this circuit split into a case that does not present it. It is squarely presented as the sole question here.

In short, the Court's decision in *Bissonnette* seems unlikely to resolve the distinct circuit split over local delivery. And the Ninth Circuit has already shown that it will not reconsider its *Rittmann* line of cases without the clearest of directions from this Court. See *Carmona*, 73 F.4th at 1137. The Court should grant certiorari in this case and put an end to the lower courts' ever-deepening disagreements over local delivery drivers' status under the FAA.[3]

[3] Although petitioners believe that the Court should grant this petition now, petitioners alternatively request that the Court hold this petition pending a decision in *Bissonnette*. See *Fraga*, 61 F.4th at 234-235 (concluding that *Waithaka* would have come out differently under the Second Circuit's ruling in *Bissonnette* because Amazon is "an online retailer (*i.e.*, not a transportation company)").

CONCLUSION

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

Respectfully submitted,

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OCTOBER 2023

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-36048
D.C. No. 2:21-cv-00204-BJR

JENNIFER MILLER; EMAD AL-KAHLOUT; JOSE GRINAN; KELLY KIMMEY; JUMA LAWSON; HAMADY BOCOUM; PHILIP SULLIVAN; KIMBERLY HALO; CHRISTOPHER CAIN; GARY GLEESE; CLARENCE HARDEN; STEVEN MORIHARA; SHARON PASCHAL, PLAINTIFFS-APPELLEES,

v.

AMAZON.COM, INC.; AMAZON LOGISTICS, INC., DEFENDANTS-APPELLANTS.

Argued and Submitted: Mar. 27, 2023
Seattle, Washington
Filed: Sept. 1, 2023

Appeal from the United States District Court
for the Western District of Washington
Barbara Jacobs Rothstein, District Judge, Presiding

MEMORANDUM*

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: NGUYEN and HURWITZ, Circuit Judges, and EZRA,** District Judge.

Amazon.com and Amazon Logistics ("Amazon") appeal the district court's order denying Amazon's motion to compel arbitration because plaintiffs were a "class of workers engaged in . . . interstate commerce" under § 1 of the Federal Arbitration Act ("FAA"). 9 U.S.C. § 1. We have jurisdiction under 9 U.S.C. § 16(a)(1)(A) and (B) and 28 U.S.C. § 1292(a)(1). We review the denial of a motion to compel arbitration de novo. *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008). We affirm.

Plaintiffs worked as Amazon Flex delivery drivers making last-leg deliveries of goods shipped from other states or countries to consumers, as well as deliveries of food, groceries, and packages stored locally that may be eligible for tips. Plaintiffs allege that, between 2016 and 2019, Amazon failed to honor its promise that workers would receive 100% of the tips that customers added for tip-eligible deliveries, in violation of the Washington Consumer Protection Act and various other state consumer protection laws.

1. We previously held in *Rittmann v. Amazon.com, Inc.* that Amazon Flex delivery drivers, like plaintiffs here, are workers engaged in interstate commerce because they deliver goods moving in interstate commerce to their final destination. 971 F.3d 904 (2020), *cert. denied*, 141 S. Ct. 1374 (2021). Amazon argues that *Rittmann* is no longer good law after the Supreme Court's decision in *Southwest Airlines Co. v.*

** The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

Saxon, which held that airplane cargo workers were within a "class of workers engaged in foreign or interstate commerce" even though they did not physically move goods across borders. 142 S. Ct. 1783 (2022). But we recently held that *Rittman* remains binding precedent after *Saxon*. *See Carmona Mendoza v. Domino's Pizza, LLC*, 73 F.4th 1135 (9th Cir. 2023).

2. Amazon next argues that even if *Rittmann* remains good law, the drivers here are different from those in *Rittmann* because Amazon Flex drivers can schedule two types of delivery blocks: last-mile deliveries and tip-eligible local deliveries—and the latter do not involve interstate commerce. But this is the exact same class of workers we discussed in *Rittmann*: Amazon Flex delivery drivers who "are engaged to deliver packages from out of state or out of the country, even if they also deliver food from local restaurants." 971 F.3d at 917 n.7. We concluded that these drivers are "engaged in interstate commerce, even if that engagement also involves intrastate activities." *Id.* As the Supreme Court made clear in *Saxon*, the relevant question is what work "the members of the class, as a whole, typically carry out," which here includes last-mile deliveries. 142 S. Ct. at 1788.

Amazon further argues that the only relevant work for purposes of § 1 is the tip-producing deliveries. But under the FAA, "class of workers" is defined by their "contracts of employment." 9 U.S.C. § 1. Amazon Flex delivery drivers' "contracts of employment" include last-mile deliveries. The nature of their individual claims does not change this analysis. These drivers have one contract of employment which gov-

erns all their work, including shifts for last-mile deliveries and shifts for tip-producing deliveries. Accordingly, we find that, as in *Rittmann*, Amazon Flex delivery drivers are exempt under § 1 of the FAA.

3. Finally, Amazon argues that even if Amazon Flex delivery drivers are exempt under the FAA, the arbitration provision should be enforced under state law. Again, *Rittmann* controls. In examining the identical 2016 Terms of Service that plaintiffs agreed to here, we held that no state law applies to the arbitration provision. 971 F.3d at 920. Amazon argues that the 2019 and 2021 Terms of Service supersede the 2016 Terms of Service and require enforcement of the arbitration provision under Delaware state law.[1] Amazon's argument fails. The 2016 Terms of Service state that "any modifications to Section 11 [the arbitration provision] will not apply to claims that accrued or to disputes that arose prior to such modification." Plaintiffs allege that the practices they challenge started in 2016 and ended in about August 2019, before the 2019 Terms of Service became effective. Therefore, according to plaintiffs, the modifications to the arbitration provision cannot apply to their claims. We agree. *Rittmann* controls, and Amazon cannot enforce the arbitration provision under state law.

AFFIRMED.

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[1] These Terms of Service state, in sum, that if the FAA is found by any court not to apply to Section 11—the arbitration provision—then the law of the state of Delaware will govern. Most of the plaintiffs accepted the 2019 Terms of Service by using the app or performing services after receiving an email in October 2019 notifying them that Amazon was updating the agreement. Two plaintiffs accepted the 2021 Term of Service.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON AT SEATTLE

Civil Action No. 2:21-cv-00204-BJR

JENNIFER MILLER, ET AL., PLAINTIFFS,

v.

AMAZON.COM, INC., ET AL., DEFENDANTS.

Filed: Dec. 9, 2021

ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION

I. INTRODUCTION

Thirteen Plaintiffs who served as delivery drivers for Defendants Amazon.com and Amazon Logistics (together, "Amazon") filed this lawsuit claiming that Defendants unlawfully withheld portions of their drivers' tips, in violation of the Washington Consumer Protection Act. Dkt. 35. Defendants filed a motion to compel arbitration, claiming that Plaintiffs' contracts require that this dispute be resolved by an arbitrator. Dkt. 40. Having reviewed the motion, the record of the case, and the relevant legal authorities, the Court will deny Defendants' motion to compel arbitration. The reasoning for the Court's decision follows.

II. BACKGROUND

For varying periods between 2015 and 2021, Plaintiffs worked as delivery drivers through Defendants' "Amazon Flex" program. Dkt. 35 ¶ 2. Amazon Flex is a program by which Defendants engage drivers as independent contractors to make two broad categories of deliveries using their personal vehicles: (1) delivery of items from grocery stores, restaurants, and other local businesses (know as "Global Specialty Fulfillment" ("GSF") deliveries) and (2) delivery of packages from Amazon fulfillment centers that customers ordered from Amazon's website (known as "AMZL" deliveries). Dkt. 41, ¶¶ 46, 48.1[1] In making AMZL deliveries, Amazon Flex drivers supplement traditional parcel-delivery carriers like FedEx and UPS in performing what are referred to as "last-mile" deliveries—the final and relatively short segments of shipments that very often originate out of state. *See id.* ¶ 5. Drivers are eligible for customer tips on GSF deliveries, but not on AMZL deliveries. *Id.* ¶¶ 47, 49; *see also e.g.*, Dkt. 42-1 ¶ 9.

Amazon Flex does not require drivers to make a certain number of (or any) deliveries; rather, drivers sign up to make individual deliveries by reserving a particular "delivery block" in the Amazon Flex app. *Id.* ¶ 6, Dkt. 41-1 at 2. Participants may elect to make GSF deliveries, AMZL deliveries, or both. Dkt. 41 ¶ 51; *see also e.g.*, Dkt. 42-1 ¶ 7. It appears that one or more Plaintiffs exclusively made GSF deliveries.[2]

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[1] Facts taken from Defendants' supporting declaration (Dkt. 41) are not disputed.

[2] Defendants' supporting declaration states that "some delivery partners have scheduled GSF delivery blocks exclusively" but

As Plaintiffs are claiming that Defendants withheld tips, and only GSF deliveries are eligible for tips, the Court assumes that all Plaintiffs made at least some GSF deliveries.

In order to use the Amazon Flex app, participants must create an account and agree to the Amazon Flex terms of service ("TOS"). Dkt. 41 ¶ 7. Although there are three different versions of the TOS at issue in this case, they all contain a nearly identical arbitration provision. *See id.* ¶ 10; Dkt. 40 at 5-6. In order to create an account and become an Amazon Flex driver, participants "had to click twice on buttons stating 'I AGREE AND ACCEPT.' The first time was to accept the TOS, and the second was to specifically accept the arbitration provision of the TOS, which is on the first page of the TOS and in Section 11." *Id.* ¶ 10. In the version of the TOS that was operative from 2016 to 2019 (the "2016 TOS"), the arbitration provision reads:

> SUBJECT TO YOUR RIGHT TO OPT OUT OF ARBITRATION, THE PARTIES WILL RESOLVE BY FINAL AND BINDING ARBITRATION, RATHER THAN IN COURT, ANY DISPUTE OR CLAIM, WHETHER BASED ON CONTRACT, COMMON LAW, OR STATUTE, ARISING OUT OF OR RELATING IN ANY WAY TO THIS AGREEMENT, INCLUDING TERMINATION OF THIS AGREEMENT, TO YOUR PARTICIPATION IN THE PROGRAM OR TO YOUR PERFORMANCE OF SERVICES. TO THE EXTENT

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does not clarify whether "delivery partners" refers to Plaintiffs or to Amazon Flex drivers generally. *See* Dkt. 41 ¶ 51.

> PERMITTED BY LAW, THE PRECEDING SENTENCE APPLIES TO ANY DISPUTE OR CLAIM THAT COULD OTHERWISE BE ASSERTED BEFORE A GOVERNMENT ADMINISTRATIVE AGENCY.

Dkt. 41-1 at ECF 6. The wording of this provision in the versions of the TOS introduced in 2019 (the "2019 TOS") and 2021 (the "2021 TOS") is slightly different, but the parties agree that its effect is the same.[3] Plaintiffs all had to accept the arbitration provision in order to finish creating their Amazon Flex accounts.[4]

The 2016 TOS contained a modification provision that ostensibly gave Defendants the ability to update the terms in the 2019 and 2021 TOS.[5] The provision

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[3] The 2019 and 2021 TOS arbitration provisions read:

> THE PARTIES WILL RESOLVE BY FINAL AND BINDING ARBITRATION, RATHER THAN IN COURT OR TRIAL BY JURY, ANY DISPUTE OR CLAIM, WHETHER BASED ON CONTRACT, COMMON LAW, OR STATUTE, ARISING OUT OF OR RELATING IN ANY WAY TO THIS AGREEMENT, INCLUDING TERMINATION OF THIS AGREEMENT, TO YOUR PARTICIPATION IN THE PROGRAM, OR TO YOUR PERFORMANCE OF SERVICES. TO THE EXTENT PERMITTED BY LAW, THE PRECEDING SENTENCE APPLIES TO ANY DISPUTE OR CLAIM THAT OTHERWISE COULD BE ASSERTED BEFORE A GOVERNMENT ADMINISTRATIVE AGENCY.

Dkt. 41-1 at ECF 7; Dkt. 41-3 at ECF 7.

[4] The 2016 TOS allowed Plaintiffs to opt out of arbitration by sending an email to an address specified in the contract within two weeks of accepting the TOS. *Id.* at ECF 7. No Plaintiff claims to have opted out. *See* Dkt. 42, Exhs. 1-7.

[5] The modification provision states:

clarifies that "any modifications to [the arbitration provision] will not apply to claims that accrued or to disputes that arose prior to such modification." *Id.* at ECF 8. According to Defendants, and not disputed by Plaintiffs, Amazon sent Plaintiffs emails in 2019 and 2021 indicating that it had modified the TOS and reiterating that Plaintiffs' continuing to use the Amazon Flex app would signify acceptance of the modifications. Dkt. 41 ¶¶ 41, 43-44. Eleven Plaintiffs continued to use the app after being notified of the 2019 TOS, and two Plaintiffs continued to use the app after being notified of the 2021 TOS. *Id.* ¶¶ 28, 42. The only relevant modification Amazon made in these later versions of the TOS was to the choice-of-law provision.[6] The 2016 TOS states that it is governed by Washington law, except for the arbitration provision, "which is governed by the Federal Arbitration Act and

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> Amazon may modify this Agreement, including the Program Policies, at any time by providing notice to you through the Amazon Flex app or otherwise providing notice to you. You are responsible for reviewing this Agreement regularly to stay informed of any modifications. If you continue to perform the Services or access Licensed Materials (including accessing the Amazon Flex app) after the effective date of any modification to this Agreement, you agree to be bound by such modifications.

Dkt. 41-1 at ECF 7.

[6] As Defendants point out, the 2019 and 2021 versions of the TOS also changed the delegation provision of the arbitration agreement to require the parties to arbitrate questions of arbitrability. *See* Dkt. 40 at 6; Dkt. 41-2 at ECF 8; Dkt. 41-3 at ECF 8. The 2016 TOS stated that arbitrability disputes would be resolved by a court. Dkt. 41-1 at ECF 7. However, Defendants do not argue that that provision applies to this case or that the Court lacks the power to determine arbitrability.

applicable federal law." Dkt. 41-1 at ECF 7. In contrast, the 2019 and 2021 versions of the TOS select Delaware law to govern the contract generally. Dkt. 41-2 at ECF 8-9; Dkt. 41-3 at ECF 9. Although the 2019 and 2021 choice-of-law provisions also contained an exception for the arbitration provision, both specifically state that "[i]f, for any reason, the Federal Arbitration Act is held by a court of competent jurisdiction not to apply to Section 11, the law of the state of Delaware will govern Section 11 of this Agreement." Dkt. 41-2 at ECF 8-9; Dkt. 41-3 at ECF 9.

III. DISCUSSION

Defendants have moved to compel arbitration, citing the agreement Plaintiffs accepted as part of the Amazon Flex terms of service. Dkt. 40. Defendants assert that the Federal Arbitration Act ("FAA") applies to their contracts with Plaintiffs and compels arbitration, and that, even if the FAA does not apply, state law applies and also compels arbitration. *Id.* Plaintiffs counter that neither the FAA nor any state law applies to the relevant terms of service, and that the arbitration provision is invalid. Dkt. 42. The Court will first address the FAA.

A. Applicable Law

1. The Federal Arbitration Act

The FAA states that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . 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. The Act was passed in

1925 at a time when courts were hostile to arbitration, and thus it represents a "national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). However, the FAA exempts certain employment contracts. Specifically, the FAA "[does not] apply to contracts of employment of seamen, railroad employees, or," most germane to this case, "*any other class of workers engaged in foreign or interstate commerce.*" 9 U.S.C. § 1.

Whether Plaintiffs' contracts are exempt from the FAA depends on whether Plaintiffs qualify as a "class of workers engaged in . . . interstate commerce." Making this determination involves looking at the "inherent nature of the work performed," as illustrated by their job description or primary duties. *Capriole v. Uber Technologies, Inc.*, 7 F.4th 854, 865 (9th Cir. 2021); *Rittman v. Amazon, Inc.*, 971 F.3d 904, 911 (9th Cir. 2020). If interstate commerce is a "central part of the [workers'] job description," as opposed to being merely incidental or "tangentially related" to their responsibilities, then the employee falls within the exemption. *Capirole*, 7 F.4th at 865 (first quote); *Rittman*, 971 F.3d at 911 (second quote) (citation omitted). Courts also weigh other factors, such as whether the business or entity for which the employee works is clearly engaged in interstate commerce, and whether a strike by the class of workers at issue would disrupt interstate commerce. *See In re Grice*, 974 F.3d 950, 956 (9th Cir. 2020); *Lenz v. Yellow Transp., Inc.*, 431 F.3d 348, 352 (8th Cir. 2005).

The analysis does not focus on whether individual plaintiffs themselves actually engaged in work affecting interstate commerce, but rather whether the class of workers to which they belong, based primarily on their job description, generally engages in that type of work. *In re Grice*, 974 F.3d at 956; *Capirole*, 7 F.4th at 861-62. For example, "a truck driver for an interstate trucking company may be exempt even if the particular trucker only occasionally . . . crosses state lines." *In re Grice*, 974 F.3d at 956 (citations omitted).

Importantly, the nature of the claims or controversies in a particular case is *not* relevant to ascertaining whether a claimant belongs to an exempt class of workers. For example, if a railroad conductor who transported passengers across state lines brought sexual harassment claims based on events that took place in the railroad company's corporate office, the conductor would be exempt from the FAA as a transportation worker. Although neither the locus nor the nature of the claims implicates interstate commerce, the nature of a railroad conductor's job does, and thus disputes arising out of his or her employment contract would be exempt. *See generally Palcko v. Airborne Express, Inc.*, 372 F.3d 588 (3d Cir. 2004) (finding that transportation worker who brought gender discrimination claims was part of an exempt class of workers).

2. The Rittman Decision

In the 2020 case *Rittman v. Amazon, Inc.*, the Ninth Circuit considered whether a group of Amazon Flex drivers belonged to a class of workers engaged in interstate commerce and were thus exempt from the FAA. *See generally* 971 F.3d 904. The facts and applicable law in *Rittman* are very similar to those at

issue here, but the parties disagree on whether the differences between the two cases are legally significant.

Rittman dealt with Amazon Flex drivers using the same app and agreeing to the same contract—specifically, the 2016 TOS—as Plaintiffs here. *See id.* at 907-08. Neither the 2019 nor the 2021 TOS was at issue. *See id.* Like Plaintiffs, the drivers in *Rittman* had the option of performing GSF deliveries, AMZL deliveries, or both, and several drivers did indeed perform both. *See id.* at 937-38 (Bress, J., dissenting) (citing party declarations). However, their claims were not related to tips and not specific to tip-eligible GSF deliveries, and Amazon's argument in favor of FAA coverage did not center on the local nature of those deliveries, as it does here. *See id.* at 907-08; *Rittman v. Amazon, Inc.*, 383 F.Supp.3d 1196, 1199 (W.D. Wash. 2019). Rather, the defendants argued that intrastate AMZL deliveries from Amazon warehouses did not implicate the FAA's interstate-commerce exemption because the drivers did not cross state lines in making those deliveries. *See generally id.* ECF No. 103. The court disagreed and found that, even though the drivers did not cross state lines, they were still exempt from the FAA. *Rittman*, 971 F.3d at 909, 918-19. The majority reasoned that "[Amazon Flex] drivers' transportation of goods wholly within a state are still a part of a continuous interstate transportation, and those drivers are engaged in interstate commerce for § 1's purposes." *Id.* at 916.

Notably, the court "agree[d] with the district court that cases involving food delivery services like Postmates or Doordash are . . . distinguishable." *Id.* (citing

cases involving those and other services). Locally prepared restaurant meals "are not a type of good that are indisputably part of the stream of commerce." *Id.* (citation omitted). The parties never mentioned that Amazon Flex drivers could, and often did, make these same types of local food deliveries, in addition to the last-mile deliveries the court considered part of interstate commerce,[7] and the majority did not address the issue. *See id.* at 916-17; *Rittman*, C16-1554-JCC, ECF Nos. 36, 46, 68, 103, 104, 107, 108; *see also id.* at 937-38 (Bress, J., dissenting).

B. Plaintiffs' Amazon Flex Contracts Are Exempt from the FAA

Plaintiffs argue that *Rittman* squarely applies to this case, whereas Defendants contend that the different facts and claims at issue distinguish it. Plaintiffs' primary argument is that, although last-mile AMZL deliveries are not the subject of Plaintiffs' complaint, *Rittman* nevertheless considered the same class of workers at issue in this case—namely, Amazon Flex delivery drivers. Defendants, in contrast, urge the Court to define the class to include only Amazon Flex drivers performing local GSF deliveries. If the Court were to accept that definition, Defendants argue that the Ninth Circuit (following *Rittman*) would find GSF deliveries more akin to food delivery services like

[7] In fact, the plaintiffs in *Rittman* went as far as claiming "Amazon drivers are not delivering prepared meals from local restaurants but instead perform 'last-mile' delivery of packages." *Rittman*, C16-1554-JCC, ECF No. 104 at 10. However, Judge Bress's dissent noted that Amazon Flex allows drivers to perform local deliveries and that several of the plaintiffs' declarations confirmed that they had in fact delivered from local restaurants. 971 F.3d at 937-38.

Postmates or Doordash and thus not part of interstate commerce.

The Court recognizes that the structure of the Amazon Flex program makes ascertaining the job description or duties of Amazon Flex drivers more complicated than it would ordinarily be. Drivers are not required to choose between making AMZL (part of interstate commerce) or GSF (purely local) deliveries, and certain Plaintiffs made no AMZL deliveries at all. Thus, it could be argued (and was indeed argued by defense counsel during oral argument) that the job description of an Amazon Flex driver to some extent depends on choices made by individual drivers.

However, as previously stated, the work actually performed by Plaintiffs is not relevant to defining the class of workers to which they belong. Furthermore, the FAA exemption applies to "contracts of employment," and the Court must determine whether the Amazon Flex contract, not individual Amazon drivers, is exempt. Amazon has one contract under which drivers can perform both GSF and AMZL deliveries. Therefore, the contract contemplates both local and interstate activities as part of drivers' job description, even if some drivers do not actually perform AMZL deliveries. Defining Amazon Flex drivers as a class of workers engaged only in local GSF deliveries, and thus not exempt from the FAA, would essentially be redrawing the contract to exclude drivers' exempt activities. If this were the result Amazon had wanted, it could easily have used two different contracts for its drivers—one for AMZL deliveries and one for GSF deliveries. Then, only the GSF contract would be before the Court, and those who had agreed to it would not

have been engaged in interstate commerce. However, Amazon made a business decision to use one contract and enable drivers to perform both types of delivery, thereby maximizing Amazon's pool of potential workers to perform whichever of the two was most in demand at a particular time. In other words, by using a single contract, Amazon itself defined the class of Amazon Flex workers as encompassing both interstate and local activities. Defendants cannot now effectively split the contract in two because it serves their interests in this case. Accordingly, the Court finds that Plaintiffs' contract covers workers who do both interstate and locals deliveries and thus falls within *Rittman*'s holding that Plaintiffs' job description renders them exempt.

Defendants' arguments to the contrary are based on the assertion that the claims or controversies at issue in a particular case must play some role in how a class of workers is characterized for purposes of the FAA. *See* Dkt. 40 at 10 ("*Rittman*'s rationale is necessarily inapplicable here given the nature of Plaintiffs' claims."). However, none of the cases cited in Defendants' briefs support that assertion, and the Court's own research indicates that the nature of a plaintiff's claims is not what defines a class of workers for purposes of the FAA. Therefore, the fact that Plaintiffs' claims relate only to local GSF deliveries is not determinative. Plaintiffs' job description under the contract, which includes both AMZL and GSF deliveries, is what is determinative.

Other factors weigh in favor of finding Plaintiffs' contracts exempt from the FAA. For one, Amazon holds itself out as a company that can quickly ship

products throughout the country and thus is an entity engaged in interstate commerce. *See Rittman*, 971 F.3d at 915. Furthermore, a strike by Amazon Flex workers would cause disruptions not only to Amazon's local delivery service but also its interstate package delivery, as many drivers make at least some AMZL deliveries. Therefore, all of the factors relevant here indicate that Amazon Flex drivers as a class are engaged in interstate commerce, and the Court finds Plaintiffs' contracts are exempt from the FAA.

C. No State's Law Applies to the Arbitration Provision

The court in *Rittman*, after finding that the FAA did not apply to the 2016 TOS arbitration provision, determined that no other federal or state law applied, and thus that the provision was invalid and unenforceable. *Rittman*, 971 F.3d at 919-21. While, the 2016 TOS states that the "FAA and applicable federal law" applies to the arbitration provision, the *Rittman* court held that there is no "applicable federal law" apart from the FAA. *Id.* at 919. Additionally, the 2016 choice-of-law provision makes clear that Washington law does not apply to the arbitration provision, and it contains no substitute in the event the FAA does not apply. *Id.* at 920-21.

Although it is undisputed that *Rittman* is controlling as to the 2016 TOS, Defendants assert that the 2016 TOS is not the operative contract in this case. Dkt. 40 at 11-13. Rather, Defendants argue that the Court should look to the 2019 and 2021 TOS, both of which substitute Delaware law in the event the FAA does not apply. *Id.* However, Plaintiffs clarified in their opposition brief that all of their claims accrued

before the 2019 TOS became effective in November 2019. Dkt. 42 at 13. Defendants call this a "striking concession" but do not contest it. Dkt. 43 at 4. Defendants also do not claim that the 2019 TOS applies retroactively, nor could they, as the contract does not contain a provision to that effect. *See* Dkt. 41-1. Defendants' repeated arguments that Amazon properly modified the TOS in 2019 and 2021 according to the contract's modification provision is inapposite. *See* Dkt. 40 at 12; Dkt. 43 at 4-6. The modifications, even if valid, do not alter the fact that the 2016 TOS was the operative contract at all relevant times.

Therefore, as neither the FAA nor any state's law applies to the arbitration provision in the 2016 TOS, the Court finds that the provision is invalid and unenforceable, and thus the Court will not compel arbitration.

IV. CONCLUSION

For the foregoing reasons, the Court hereby DENIES Defendants' motion to compel arbitration (Dkt. No. 40).

DATED this 9th day of December, 2021.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE