No. 23-424

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

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.

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REPLY BRIEF FOR THE PETITIONERS

Respondents insist that there is no circuit split and that all circuits would resolve this dispute in their favor. That claim does not withstand scrutiny. In *Lopez* v. *Cintas Corp.*, 47 F.4th 428, 432-433 (5th Cir. 2022), the Fifth Circuit declined to follow the Ninth and First Circuits' analyses of Amazon Flex drivers in *Rittmann* v. *Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020), and *Waithaka* v. *Amazon.com, Inc.*, 966 F.3d 10 (1st Cir. 2020). And since then, the Ninth Circuit has expressly "recognize[d] 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). Both sides of this split acknowledge their mutual disagreement.

Any objective observer would acknowledge it, too. As just one example, the district court judge who authored the original trial court decision in *Rittmann*, which the Ninth Circuit later affirmed, has himself noted that "the Fifth and Ninth Circuit are split on this issue." *Rittmann* v. *Amazon.com, Inc.*, No. 16-cv-1554, 2023 WL 8544145, at *1 (W.D. Wash. Dec. 11, 2023). Other courts have noticed the split, too. See, *e.g.*, *Brock* v. *Flowers Food, Inc.*, No. 22-cv-2413, 2023 WL 3481395, at *6 (D. Colo. May 16, 2023) (acknowledging *Lopez*'s split from the First and Ninth Circuits).

That split is outcome-determinative here. Courts that follow the Fifth Circuit's approach in *Lopez* hold that so-called "last-mile" drivers—specifically, those who pick up items from local warehouses to complete deliveries in state—are not exempt from the FAA. *E.g.*, *Lopez*, 47 F.4th at 431-433 (concluding that

"drivers [who] enter the scene after the goods have already been delivered across state lines" are not exempt because "[o]nce the goods arrived at the [in-state] warehouse and were unloaded, anyone interacting with those goods was no longer engaged in interstate commerce"); *Nunes* v. *LaserShip, Inc.*, No. 22-cv-2953, 2023 WL 6326615, at *3 (N.D. Ga. Sept. 28, 2023) (citing *Lopez* to reject plaintiffs' argument "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"). One court has even followed *Lopez* to hold that *Amazon Flex drivers* are not exempt from the FAA. *Pettie* v. *Amazon.com, Inc.*, No. CIVDS1908923, 2023 WL 4035015, at *1 (Cal. Super. Ct. May 25, 2023) ("Amazon Flex delivery drivers * * * perform the role of local delivery drivers, similar to those at issue in *Lopez*[.]"). Respondents have no answer to, and never even mention, these recent rulings demonstrating the practical importance of the circuit split.

Beyond denying a split that is plain to everyone else, respondents contend that the First and Ninth Circuits correctly interpret this Court's precedent. That is not true. But even if it were, these merits arguments would provide no reason for the Court to let the circuit split persist. As the petition explained (at 25-26), a circuit split on the meaning of the Section 1 exemption undermines the FAA's core purposes by making the enforceability of arbitration agreements vary across jurisdictions and by breeding unnecessary litigation over the statute's application. See also CJAC Amicus Br. 2. Respondents agree (at 20 n.6)

that this Court's pending case on the FAA's exemption, *Bissonnette* v. *LePage Bakeries Park St., LLC*, No. 23-51, 2023 WL 6319660 (U.S. Sept. 29, 2023), does not provide an opportunity to address the question presented here. Because the circuits are clearly split on the question presented here, the Court should take this opportunity to address it.

A. The circuit split is widely acknowledged and undeniable.

As noted above, the Fifth Circuit, the Ninth Circuit, and trial courts have acknowledged the circuits' open disagreement on the question presented. Commentators have likewise recognized *Lopez*'s split from the Ninth Circuit. *E.g.*, Khorri Atkinson, *Circuit Splits Cloud Transportation Worker Arbitration Carveout*, Bloomberg Law (Oct. 24, 2022), https://news.bloomberglaw.com/daily-labor-report/circuit-splits-cloud-transportation-worker-arbitration-carveout (describing *Lopez*'s divergence from *Rittmann* and noting practitioners' and scholars' concerns about the lack of uniformity and predictability); see also CJAC Amicus Br. 3-4.

Against all this, respondents insist that the cases are consistent. They do so, however, only by rewriting *Lopez*'s reasoning to fit their narrative. They assert (at 12) that the delivery driver in *Lopez* "was not taking pre-ordered packages on the last leg of their journey to designated customers." That assertion is pure fiction. The Fifth Circuit noted that the driver "describe[d] himself as a 'last-mile driver.'" *Lopez*, 47 F.4th at 431-432. And the record showed that the driver delivered, among other things, his customers' work uniforms, which Cintas had previously shipped

to Texas from other states. See Lopez Supp. Br. at 3, *Lopez* v. *Cintas Corp.*, 47 F.4th 428 (5th Cir. 2022) (No. 21-20089), 2022 WL 2317958. Cintas is a well-known supplier of customized corporate uniforms and work apparel. See Cintas, https://www.cintas.com/ (last visited Dec. 21, 2023). Contrary to respondents' suggestion, these customized work uniforms were undoubtedly "pre-ordered" by "designated customers." That is why the delivery driver asked the Fifth Circuit to follow *Rittmann* and *Waithaka* and reject *Wallace* v. *Grubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020) (Barrett, J.). See Lopez Supp. Br. at 3-6, *Lopez*, *supra* (No. 21-20089). But the Fifth Circuit declined his request. *Lopez*, 47 F.4th at 432.

Revealing the strain in their description of the case, respondents turn (at 12) to critiquing *Lopez* for "fail[ing] to recognize the important distinction between the workers in *Rittmann* and *Wallace*." But respondents' criticism merely reflects *their* substantive view of how the FAA's exemption should be analyzed, which differs from the Fifth Circuit's. The Fifth Circuit did not distinguish between so-called "last-mile" drivers and restaurant drivers because it viewed both sorts of local drivers as performing functionally identical work: they "enter the scene after the goods have already been delivered across state lines." *Lopez*, 47 F.4th at 432. Under the Fifth Circuit's understanding of this court's precedent, there was no basis to apply the FAA to the one category of local delivery drivers but not the other.[1]

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[1] Respondents' criticism of *Lopez* echoes respondents' criticism of petitioners (at 7 n.2) for supposedly "blur[ring] the clear

The square, acknowledged split between the Fifth Circuit and the First and Ninth Circuits is a compelling reason to grant certiorari. But the reasoning of two other circuits aligns with the Fifth Circuit and provides even further reason for this Court's review.

First, as *Lopez* noted, the Seventh Circuit's decision in *Wallace* contrasts with the First and Ninth Circuits' rulings by confining the Section 1 exemption to workers connected with "the act of moving * * * goods across state or national borders." 970 F.3d at 802. For this very reason, the dissenting judge in *Rittmann* contended that his understanding of the exemption "align[ed]" with *Wallace*. *Rittmann*, 971 F.3d at 928 (Bress, J., dissenting).

And the Eleventh Circuit expressly aligned itself with both *Wallace* and the *Rittmann* dissent on this point. See *Hamrick* v. *Partsfleet, LLC*, 1 F.4th 1337, 1350 (11th Cir. 2021). Respondents perplexingly assert (at 13-14) that *Hamrick* did not address "the issue in this case." But again, the opinion itself refutes their characterization of it. *Hamrick*, 1 F.4th at 1340-1341 ("The issue in this case is whether * * * final-mile delivery drivers—drivers who make local deliveries of goods and materials that have been shipped from out-of-state to a local warehouse—are * * * exempt under the Federal Arbitration Act. * * * The

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distinction that has been articulated by the circuit courts between" different categories of local delivery drivers. But again, whether such a distinction is valid is the crux of the substantive dispute between the parties and the circuits and thus part of the reason to grant certiorari. In any event, as the petition explained (at 8-9, 24-25), this case *does* involve local delivery drivers who pick up and deliver restaurant orders as well as groceries and retail items from local stores. See also p. 10, *infra*.

drivers' job[] was to then continue th[e] products' journey to the local destinations." (alteration omitted)). True, the Eleventh Circuit did remand the case so the district court could apply the Eleventh Circuit's new articulation of the statutory framework. *Id.* at 1352. But it is common for appellate courts that clarify a legal standard to remand for a trial court to apply it. Respondents cannot deny that the standard the Eleventh Circuit announced is consistent with petitioners' view of the exemption, and not their own. See *id.* at 1351 (rejecting "[t]he drivers' view" that the exemption "applies to a class of workers that only makes 'intrastate trips' transporting goods that have moved in interstate commerce"); see also, *e.g.*, *Nunes*, 2023 WL 6326615, at *1-3 (applying *Hamrick* and *Lopez* to conclude that a driver for a "'last mile' courier company" was not exempt from the FAA).

Respondents give the Court no reason to disagree with the many judges and observers who have recognized the circuit split presented in this case. Such a split on the proper interpretation of an important federal statute calls out for this Court's resolution.

B. Respondents' merits-related arguments are unsound and no basis to deny review.

As the petition detailed (at 19-22), the decision below conflicts with the framework announced in *Southwest Airlines Co.* v. *Saxon*, 596 U.S. 450 (2022), in two ways. First, the Ninth Circuit's approach violates *Saxon*'s instruction to focus on the activities of the class of workers, rather than the business with which they contract. Second, the Ninth Circuit's approach fails to faithfully apply *Saxon*'s test for engagement in foreign or interstate commerce.

Respondents maintain (at 14-18) that petitioners have exaggerated the Ninth Circuit's conflict with *Saxon*. But they never even respond to petitioners' second point. *Saxon* confines the exemption to classes of workers who, at a minimum, "play a direct and 'necessary role in the free flow of goods' across borders" or, said differently, are "actively 'engaged in transportation' of those goods across borders via the channels of foreign or interstate commerce." *Saxon*, 596 U.S. at 458. *Rittmann*, in contrast, did not limit the exemption to classes of workers who actively and directly contribute to the transportation of goods across borders. It extended the exemption to workers that contract with a *company* that is actively engaged in shipping goods across state lines. *Rittmann*, 971 F.3d at 917 ("AmFlex workers complete the delivery of goods that *Amazon ships across state lines* and for which Amazon hires AmFlex workers to complete the delivery." (emphasis added)); cf. *Immediato* v. *Postmates, Inc.*, 54 F.4th 67, 74 (1st Cir. 2022) (admitting that Amazon Flex drivers are "not involved in the shipment of packages across state lines").

Respondents' response to petitioners' first point fares no better. In respondents' view (at 15), *Rittmann* does not "overly emphasize[] the broader activities of the business." But petitioners noted (and respondents ignore) the Ninth Circuit's repeated recognition, in later cases, 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." *In re Grice*, 974 F.3d 950, 957 (9th Cir. 2020) (emphasis added); see also, *e.g.*, *Capriole* v. *Uber Techs., Inc.*, 7 F.4th 854, 866 (9th Cir. 2021) ("*Rittmann* * * * held that Amazon Flex

('AmFlex') workers did fall under the interstate commerce exemption due to the interstate nature of Amazon's business.").

It is not shocking that the Ninth Circuit devised a test that failed to anticipate this Court's later decision in *Saxon*. But after *Saxon*, the Ninth Circuit should have reevaluated its prior reasoning in light of this Court's new guidance. It did not. It instead determined that it would adhere to *Rittmann* unless it found that prior case "clearly irreconcilable" with *Saxon*. *Carmona*, 73 F.4th at 1137 (citation omitted); see also Pet. App. 2a-3a. Only direct instructions from this Court will suffice to get the Ninth Circuit to apply *Saxon* without a thumb on the scale in favor of the Ninth Circuit's pre-*Saxon* rulings. See Pet. 22.

Respondents next challenge petitioners' discussion of how this Court's pre-FAA authority distinguished the historical precursor of last-mile transportation from transportation across state lines. Cf. Pet. 22-23. Respondents argue (at 18) that those cases "involve[d] situations in which there is a continuous interstate journey and then a *separate* intrastate transport, often at an indefinite delay."

Respondents' claim of "indefinite delay" is yet another fictional account of the cases. In *New York ex rel. Pennsylvania Railroad Co.* v. *Knight*, 192 U.S. 21, 26 (1904), passengers were traveling across state lines by railroad, and the railroad arranged for a cab service to take them from the railroad drop-off point to their homes or hotels in the city. If the cabs came after an "indefinite delay," the passengers surely would not have waited for them. Nor is there any indication in *ICC* v. *Detroit, Grand Haven & Milwaukee Railway*

Co., 167 U.S. 633 (1897), that the goods delivered from the train station to their local destinations were indefinitely delayed at the train station. If such delay existed and were at all relevant to the Court's reasoning, the Court would have mentioned it.

And respondents' view that these pre-FAA cases involved *separate* within-state transportation just proves petitioners' point. When goods arrive in state by airplane, long-haul trucking, or other means, and are then unloaded from those border-crossing vehicles, batched for local delivery, and loaded into vehicles that stay within a single state, there is a separation between the interstate and intrastate transportation. The correct interpretation of the FAA recognizes the separation, just as this Court did in *Knight* and in *Detroit, Grand Haven*.

Respondents highlight (at 19) different pre-FAA cases that treated the loading and unloading of *interstate* vehicles as itself part of the interstate transportation. But that conclusion is fully consistent with petitioners' view. Unlike the ramp workers in *Saxon*, Amazon Flex drivers play no part in the loading or unloading of airplanes, tractor trailers, or other long-range vehicles. They pick up batches of goods from a nearby location (and in this case specifically, restaurants and grocery and retail stores), load them into their cars, and drive them to local customers' homes or businesses. Given the lines that this Court has previously drawn, these within-state deliveries do not qualify as transportation across state lines.

C. Respondents do not dispute that this case is an excellent vehicle to resolve the question presented.

Aside from denying the split and defending the decision below on the merits, respondents make no other argument against granting the petition. They do not dispute that this case is an excellent vehicle for deciding the question presented. And as petitioners explained (at 24-25), this case is particularly well suited for the Court's review because the record reflects that while some Amazon Flex drivers perform so-called "last-mile" deliveries of goods that Amazon previously shipped across state lines, other Amazon Flex drivers deliver food items and other goods stocked at local restaurants and grocery and retail stores. So even if the Court were inclined to draw a distinction between these different categories of local delivery drivers, this case gives it an opportunity to do so.

Respondents further concede (at 20 n.6) that the Court's pending *Bissonnette* case does not present the question in this case. Although the parties here disagree over the need for this Court to address the question presented in this case, they do not disagree that this would be the case in which to address it.

Finally, respondents do not deny that unpredictability and uncertainty over the scope of the FAA exemption is bad for all concerned. See Pet. 25-27. Litigants as well as judges lament that under the current state of the law, it can take years and multiple rounds of motion practice and appeals to resolve the FAA exemption's application in any given case. See, *e.g.*, *Harper* v. *Amazon.com Servs., Inc.*, 12 F.4th 287, 298-299 (3d Cir. 2021) (Matey, J., concurring) ("If hard

questions about the scope of the FAA arise from enjoying a six-pack, it seems fair to ask whether we are on the right road."); *Fraga* v. *Premium Retail Servs., Inc.*, No. 21-cv-10751, 2023 WL 8435180, at *10 (D. Mass. Dec. 5, 2023) ("Two and one half years have passed, resulting in three full scale judicial opinions and a two-day evidentiary hearing with 6 witnesses and hundreds of pages of exhibits (and Fraga may yet appeal this Court's determination)."). Such fights over where the dispute will be heard frustrate the purposes of arbitration and of the FAA.[2]

The issues presented in this case have been percolating in numerous courts for years and have received thoughtful consideration from many different judges. But the divisions have only widened. The time has come for the Court to resolve the questions that it noted, but left open, in *Saxon*. See 596 U.S. at 457 n.2.

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[2] See, *e.g.*, Jennifer Bennett, *Judge's Rare Arbitration Plea Gets Attention, but No Big Changes*, Bloomberg Law (Dec. 20, 2023), https://news.bloomberglaw.com/litigation/judges-rare-arbitration-plea-gets-attention-but-no-big-changes (quoting legal scholars who note that the lack of clear guidance on the scope of the exemption has created inconsistency and encouraged litigation that frustrates the potential benefits of arbitration).

CONCLUSION

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

Respectfully submitted,

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