No. _____

In The

Supreme Court of the United States

AMAZON.COM, INC.,
and AMAZON LOGISTICS, INC.,

Petitioners,

v.

BERNARD WAITHAKA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act's exemption for classes of workers engaged in foreign or interstate commerce, 9 U.S.C. 1, prevents the Act's application to local transportation workers who, as a class, are not engaged to transport goods or passengers across state or national boundaries.

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 (D. Mass.):

Waithaka v. *Amazon.com, Inc.*, No. 18-cv-40150 (Aug. 20, 2019)

Waithaka v. *Amazon.com, Inc.*, No. 18-cv-40150 (Mar. 5, 2019) (order denying second motion to remand)

Waithaka v. *Amazon.com, Inc.*, No. 17-cv-40141 (Aug. 28, 2018) (order granting first motion to remand)

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

Waithaka v. *Amazon.com, Inc.*, No. 19-cv-1320 (Nov. 30, 2020) (order granting motion to extend stay pending appeal)

United States Court of Appeals (1st Cir.):

Waithaka v. *Amazon.com, Inc.*, No. 19-1848 (July 17, 2020), petition for reh'g denied, Sept. 1, 2020

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INTRODUCTION

This case presents the same question as *Amazon.com, Inc.* v. *Rittmann*, No. 20-622 (filed Nov. 4, 2020). Like the Ninth Circuit in *Rittmann*, the First Circuit here refused to enforce an arbitration agreement by taking an overbroad interpretation of a narrow exemption in the Federal Arbitration Act (FAA). That provision 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. Both courts held that Amazon Flex drivers, who make local deliveries within individual metropolitan areas, are engaged in interstate commerce under the exemption even though they are not in a class of workers hired to transport goods or people across state lines.

This expansive interpretation conflicts with other circuits' decisions, this Court's precedent, and the FAA's text, structure, and purposes. To fall within the FAA's "narrow exception," properly construed, the plaintiffs in both cases "had to demonstrate that the interstate movement of goods is a central part of the job description of the class of workers to which they belong." *Wallace* v. *Grubhub Holdings, Inc.*, 970 F.3d 798, 803 (7th Cir. 2020) (Barrett, J.). Yet the First and Ninth Circuits required no such showing. Their approach, as Judge Bress noted in his *Rittmann* dissent, is "plainly inconsistent" with the Seventh Circuit's reasoning in *Wallace*. *Rittmann* v. *Amazon.com, Inc.*, 971 F.3d 904, 934 n.3 (9th Cir. 2020). And it conflicts with other circuits' decisions as well.

The Court should resolve lower courts' disagreement about how to construe the FAA exemption and reject the First and Ninth Circuits' misinterpretation. To that end, the Court should either grant the *Rittmann* petition and hold this petition pending *Rittmann*'s resolution, or grant this petition. Both cases present excellent vehicles to address this exceptionally important and pressing question about the applicability of the FAA.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-53a) is reported at 966 F.3d 10. The opinion of the district court (App., *infra*, 54a-83a) is reported at 404 F. Supp. 3d 335.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2020. A petition for rehearing was denied on September 1, 2020 (App., *infra*, 84a). Under this Court's March 19, 2020 order, the time for filing a petition for a writ of certiorari was extended to January 29, 2021. 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. Background

Enacted in 1925, the FAA's "purpose was to reverse the longstanding judicial hostility to arbitration agreements" and place those agreements "upon the same footing as other contracts." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). It expresses "a liberal federal policy favoring arbitration agreements" and authorizes courts to "create a body of federal substantive law of arbitrability." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); 9 U.S.C. 2. And it provides procedures for staying litigation and compelling arbitration. See 9 U.S.C. 3, 4.

Sections 1 and 2 together establish which arbitration agreements fall within the FAA's coverage. See *Bernhardt* v. *Polygraphic Co. of Am.*, 350 U.S. 198, 201-202 (1956). Section 2 uses expansive language—"contract[s] evidencing a transaction involving commerce"—that shows Congress's "intent to exercise its Commerce Clause powers to the full." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 273 (1995) (citation omitted). In addition, "a broad interpretation of this language is consistent with the Act's basic

purpose" because it ensures the FAA's wide availability to enforce agreements to arbitrate. *Id.* at 275.

Taking cues from *Allied-Bruce*, the Court held in *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 109 (2001), that Section 1's exemption does not exclude all employment contracts from the FAA. Two of the statute's features required that conclusion: First, "the words 'any other class of workers engaged in * * * commerce' constitute a residual phrase, following, in the same sentence, explicit reference to 'seamen' and 'railroad employees,'" and if that residual phrase excluded all employment contracts, the enumerated categories of seamen and railroad employees would be superfluous. *Id.* at 114 (citation omitted). Second, Section 1's "engaged in * * * commerce" phrasing contrasts with the broader "involving commerce" phrasing in Section 2. *Id.* at 115-118. The FAA's pro-arbitration purposes also "compel that the § 1 exclusion provision be afforded a narrow construction"—much as those purposes support a broad construction of Section 2's general coverage. *Id.* at 118.

Circuit City rejected the view that Section 1 exempts all contracts of employment, "whether or not the worker is engaged in transportation." 532 U.S. at 109. The Court explained that Congress excluded seamen and railroad employees from the FAA because those workers were already covered by specialized dispute-resolution legislation. *Id.* at 121. Congress likely created the residual category to "reserv[e] for itself" the ability to enact future legislation for other groups of transportation workers—like airline employees,

whom Congress subjected to the specialized dispute-resolution provisions in 1936. *Ibid.* (citing Act of April 10, 1936, Pub. L. No. 74-487, 49 Stat. 1189).

The Court reaffirmed the exemption's purposes in *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532 (2019). By 1925, the Court explained, "Congress had already prescribed alternative employment dispute resolution regimes for many transportation workers" that "Congress 'did not wish to unsettle' * * * in favor of whatever arbitration procedures the parties' private contracts might happen to contemplate." *Id.* at 537 (citation omitted).

New Prime did not address the scope of the residual clause. "Happily," the Court noted, the parties agreed that the long-haul truck driver in that case "qualifie[d] as a 'worker[] engaged in * * * interstate commerce.'" 139 S. Ct. at 539. The case instead turned on the meaning of the exemption's use of the phrase "contracts of employment." *Ibid.* The question that was not at issue in *New Prime*—what qualifies as a class of workers engaged in interstate commerce?—is now before the Court here and in *Rittmann*.

B. Facts And Procedural History

1. Petitioner Amazon.com, Inc. offers a variety of products for sale through websites and smartphone applications. D. Ct. Dkt. 31-2, at 2. For the past few years, some products have reached customers through the Amazon Flex program. *Ibid.*

Using the Amazon Flex smartphone application, individuals can sign up with petitioner Amazon Logistics, Inc. and become eligible to make Flex deliveries in certain cities around the country. D. Ct. Dkt. 31-2, at 2. Flex drivers do not drive large trucks or Amazon-branded vehicles for these deliveries; they generally use their own cars. See *id.* at 6.

Flex deliveries might include brown-boxed items picked up at an Amazon Logistics delivery station or household or grocery items picked up at a retail location. D. Ct. Dkt. 34-5, at 13, 20-21. Some Flex drivers have also delivered restaurant orders. *Id.* at 21. Flex drivers do not perform long-haul transportation. They perform local deliveries in the specified metropolitan area during a "delivery block" that generally lasts a few hours. D. Ct. Dkt. 3, at 2.

2. Respondent worked as an Amazon Flex driver in Massachusetts. D. Ct. Dkt. 1-1, at 6. On behalf of himself and a putative class, he alleges that petitioners have misclassified Amazon Flex drivers as independent contractors and owe wages and expense reimbursement under Massachusetts law. *Id.* at 5-10.

To participate in the program, respondent agreed to the Amazon Flex terms of service. D. Ct. Dkt. 32, at 2. The terms include a provision agreeing to resolve all disputes related to the drivers' participation in the Amazon Flex program through individualized arbitration. D. Ct. Dkt. 31-2, at 14-15. Petitioners moved to compel arbitration.

3. The district court denied petitioners' request to compel arbitration, concluding that Amazon Flex drivers are exempt from the FAA. App., *infra*, 65a, 83a. In its view, Flex drivers fall within the exemption's residual clause because "there is a 'continuity of movement' of the goods delivered by Amazon interstate until they reach customers." *Id.* at 60a. The class of workers need not "cross[] state lines" if the *goods* that the workers transport "previously moved interstate." *Id.* at 63a.[1]

4. The court of appeals affirmed. App., *infra*, 3a. It concluded "that the exemption encompasses the contracts of transportation workers who transport goods or people within the flow of interstate commerce, not simply those who physically cross state lines in the course of their work." *Id.* at 2a-3a.

The court's main consideration was precedent interpreting the Federal Employers' Liability Act (FELA), ch. 149, 35 Stat. 65 (1908). App., *infra*, 16a. Petitioners argued that FELA, a remedial statute enacted to provide relief to injured railroad workers, is an improper source of guidance in construing the FAA's exemption. FELA has different language, different purposes, and a different history. But the court of appeals disagreed. *Id.* at 20a-23a. Using FELA jurisprudence as its guide, it held that "moving goods or people

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[1] Separate from the arbitration issue, the district court transferred the action to the U.S. District Court for the Western District of Washington under the "first-to-file" rule because the earlier-filed *Rittmann* action was pending in that forum. App., *infra*, 79a-83a.

destined for, or coming from, other states" sufficed to place workers within the FAA's exemption. *Id.* at 23a.

After reaching this conclusion "based on the FELA precedents," the court of appeals turned to the particular language, structure, and purposes of the FAA. App., *infra*, 23a. Although the exemption turns on whether the relevant *class of workers* is engaged in foreign or interstate commerce, the court determined that "the nature of the business for which the workers perform their activities is important" to the exemption's application. *Id.* at 25a.

Having concluded that respondent's agreement to arbitrate was exempt from the FAA, the court of appeals considered whether the agreement was enforceable under state law. App., *infra*, 32a. The court held it was not: because the arbitration agreement waived the right to bring a class action, the court determined that Massachusetts public policy trumped the parties' choice-of-law provision and rendered the agreement unenforceable. *Ibid.*; see *id.* at 32a-52a.

5. The court of appeals denied petitioners' petition for rehearing. App., *infra*, 84a.

REASONS FOR GRANTING THE PETITION

Since *Circuit City*, seven circuits have expressed conflicting views about the question presented. The First and Ninth Circuits apply a broad standard that looks to the businesses for which the workers provide

services to determine whether the workers transport goods in the "flow" or "stream" of commerce. In contrast, the Fifth, Seventh, and Eleventh Circuits focus on the activities of the class of workers and limit the exemption to workers who are themselves hired to perform interstate transportation. Meanwhile, the Third and Eighth Circuits apply multifactor inquiries that rely on a hodgepodge of factual variables often requiring pre-arbitration discovery.

No amount of additional percolation in the lower courts can resolve this multifaceted disagreement over how to apply the exemption in Section 1 of the FAA. Besides, such litigation thwarts the FAA's purposes. The FAA seeks certainty over the enforceability of arbitration agreements, not forcing parties to litigate before they can enforce a promise to arbitrate. The Court should resolve these important issues now, either here or in *Rittmann*.

A. The Circuits Are Deeply Divided Over How To Construe The FAA's Exemption

1. The First Circuit held that the exemption "encompasses the contracts of transportation workers who transport goods or people within the flow of interstate commerce, not simply those who physically cross state lines in the course of their work." App., *infra*, 3a. Under this test, "the nature of the business for which the workers perform their activities is important." *Id.* at 25a.

That approach mirrors the Ninth Circuit's approach. In *Rittmann* v. *Amazon.com, Inc.*, 971 F.3d 904, 910 (9th Cir. 2020), a divided panel relied on the First Circuit's decision here and likewise applied the exemption to Amazon Flex drivers. Echoing the First Circuit's flow-of-commerce test, the *Rittmann* majority reasoned that Amazon Flex drivers are exempt because "the Amazon packages they carry are goods that remain in the stream of interstate commerce until they are delivered." *Id.* at 915.

2. Three circuits reject this focus on the provenance of the transported goods and nature of the businesses that benefit from the workers' services. Adhering to the plain terms of the exemption, they hold that the workers' job responsibilities supply the critical factor.

In *Wallace* v. *Grubhub Holdings, Inc.*, 970 F.3d 798, 802 (7th Cir. 2020) (Barrett, J.), the court found it irrelevant that Grubhub drivers "carry goods that have moved across state and even national lines." The Seventh Circuit rejected the argument, which prevailed here and in *Rittmann*, that the exemption is "about where the goods have been." *Ibid.* The exemption instead turns on "what the worker does": the workers must be connected "to the act of moving those goods across state or national borders." *Ibid.* Under the Seventh Circuit's test, plaintiffs must "demonstrate that the interstate movement of goods is a central part of the job description of the class of workers to which they belong." *Id.* at 803.

True, *Wallace* cited the decision below when it stated that it is "harder" to apply the exemption to "truckers who drive an intrastate leg of an interstate route" than to "truckers who drive an interstate route." 970 F.3d at 802. But that passing comment about a fact pattern not before the court does not show that the Seventh Circuit agrees with the First Circuit. After all, Amazon Flex drivers are not "truckers who drive an intrastate leg of an interstate route." They use their own cars to make deliveries from local delivery stations and retail stores. In any event, as Judge Bress recognized, "the reasoning of *Wallace* is plainly inconsistent with both [*Rittmann*] and *Waithaka*." *Rittmann*, 971 F.3d at 934 n.3 (Bress, J., dissenting). Under *Wallace*, the key question is whether "the interstate movement of goods is a central part of the job description of the class of workers to which they belong." 970 F.3d at 803. The First and Ninth Circuits' approach, in contrast, squarely rejects the suggestion that the workers' "crossing state lines" is "the touchstone of the exemption's test." App., *infra*, 30a.

Like *Wallace*, the Fifth Circuit also ties the exemption to the workers' own activities. In *Eastus* v. *ISS Facility Services, Inc.*, 960 F.3d 207, 212 (5th Cir. 2020), the court held that "loading and unloading airplanes" with passengers and goods does not trigger the exemption because such workers are not "engaged in an aircraft's actual movement in interstate commerce." Rather than treat the airline's interstate or foreign transportation business as the critical factor, the Fifth Circuit framed the "key question" in terms of the work

the "worker" was hired to do—specifically, whether her "job required her to engage 'in the movement of goods in interstate commerce in the same way [as] seamen and railroad workers.'" *Id.* at 209-210 (citation omitted). And rather than focus on the flow of commerce through various intra- and interstate phases, the Fifth Circuit held that "[l]oading or unloading a boat or truck with goods" breaks the continuity. *Id.* at 212. Such loading and unloading "prepares the goods for or removes them from transportation." *Ibid.* Under this standard, Amazon Flex deliveries come after, and are separate from, whatever interstate transportation may precede their local activities.

Workers' "job duties" are likewise dispositive under *Hill* v. *Rent-A-Center, Inc.*, 398 F.3d 1286, 1289 (11th Cir. 2005). The worker in *Hill* was an account manager for a national rent-to-own company and delivered "goods to customers out of state in his employer's truck * * * across the Georgia/Alabama border." *Id.* at 1288-1289. The court held that his agreement to arbitrate was not exempt from the FAA. *Id.* at 1290. Contrary to the First and Ninth Circuits' holdings that the workers' engagement in interstate transportation is unnecessary, the Eleventh Circuit held that "the interstate transportation factor is a *necessary but not sufficient* showing for the purposes of the exemption." *Ibid.* (emphasis added). According to the Eleventh Circuit, the Rent-A-Center worker was not "in the transportation industry" the way that seamen and railroad employees are; he was more like "a pizza delivery

person who delivered pizza across a state line to a customer in a neighboring town." *Hill*, 398 F.3d at 1289.

3. The Third and Eighth Circuits exemplify a third approach to the FAA exemption. They do not zero in on the flow of commerce or workers' own responsibilities. Instead, they use multifactor standards that make the exemption's reach especially murky and difficult to predict.

In *Singh* v. *Uber Technologies Inc.*, 939 F.3d 210, 228 (3d Cir. 2019), the court declined to decide whether Uber drivers fall within the exemption and instead remanded the issue for discovery. In so doing, the Third Circuit rejected the argument that the residual clause "hinge[s] on any one particular factor, such as the local nature of the work." *Id.* at 227. It directed trial courts to consult "a wide variety of sources, including, but not limited to and in no particular order, the contents of the parties' agreement(s), information regarding the industry in which the class of workers is engaged, information regarding the work performed by those workers, and various texts—*i.e.*, other laws, dictionaries, and documents—that discuss the parties and the work." *Id.* at 227-228. *Singh* reaffirmed earlier Third Circuit precedent that considers not just the workers' own activities but also aspects of the broader business. See *Palcko* v. *Airborne Express, Inc.*, 372 F.3d 588, 593 (3d Cir. 2004) (holding that a supervisor who worked for a shipping company but did not "physically move the packages" was exempt).

And in *Lenz* v. *Yellow Transportation, Inc.*, 431 F.3d 348, 352 (8th Cir. 2005), the court identified eight "non-exclusive" factors for determining when the exemption applies. Among other things, these factors consider the business for which the workers perform services ("whether the vehicle itself is vital to the commercial enterprise of the employer") and the goods being transported ("whether the employee handles goods that travel interstate"). *Ibid.* But the Fifth Circuit, consistent with its focus on the workers' own activities, expressly refused to "adopt [*Lenz*'s] multiple-factor test," illustrating the open disagreement between the circuits. *Eastus*, 960 F.3d at 211 (citing *Lenz*, 431 F.3d at 352).

The courts of appeals have developed fundamentally different approaches to the exemption. Under the current patchwork, a single "gig economy" worker using his or her car to make trips around town does not have to arbitrate claims against Amazon, *Rittmann*, 971 F.3d at 915, does have to arbitrate claims against Grubhub, *Wallace*, 970 F.3d at 802, and may or may not have to arbitrate claims against Uber, *Singh*, 939 F.3d at 228. "[I]t is hard to locate such a regime in the language Congress used in § 1." *Rittmann*, 971 F.3d at 938 (Bress, J., dissenting). Nor will further percolation bring the lower courts into harmony. The Court's review is needed to resolve this circuit conflict.

B. The Decision Below Is Incorrect

Besides conflicting with other circuits' decisions, the First and Ninth Circuits' approach conflicts with the statute's language, structure, and purposes, as well as this Court's decisions. This Court has already explained that the exemption turns on "whether or not the worker is engaged in transportation." *Circuit City*, 532 U.S. at 109. It should now make clear that the FAA only exempts classes of workers who, considered as a class, are engaged in non-local transportation across state or national boundaries.

1. The exemption's scope depends on the "ordinary" meaning of its language "at the time Congress enacted the statute." *New Prime*, 139 S. Ct. at 539 (citation omitted). There is no real doubt about the ordinary meaning of the phrase "class of workers engaged in foreign or interstate commerce" when Congress enacted the FAA. 9 U.S.C. 1. Citing contemporaneous dictionaries, Judge Bress explained that the word "engaged" shows a focus on what the class of workers is hired to do. *Rittmann*, 971 F.3d at 926 (Bress, J., dissenting). And "interstate commerce," as it relates to transportation activities, refers to transporting goods or persons between different states. *Ibid.* Putting the relevant "definitions together most reasonably indicates" that the exemption "applies to workers '[o]ccupied' or 'employed' in the 'transportation of * * * property * * * between points in one state and points in another state.'" *Ibid.* (citation omitted).

On top of disregarding the ordinary meaning of the statutory language, the First and Ninth Circuits misconstrued important structural features of the statute. Most notably, the phrase "any other class of workers engaged in foreign or interstate commerce" is a residual clause whose meaning is "controlled and defined by reference to the enumerated categories of workers which are recited just before it." *Circuit City*, 532 U.S. at 115. This phrasing "calls for the application of the maxim *ejusdem generis*." *Id.* at 114. That means courts should consider "the listed elements, as well as the broad term at the end, and ask what category would come into the reasonable person's mind." *Rittmann*, 971 F.3d at 927 (Bress, J., dissenting) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* 208 (2012)). Here, the canon supports limiting the residual clause to long-distance transportation workers because the statute mentions seamen and railroad employees "at a high level of generality" and they "commonly (if not prototypically) * * * operate across international and state boundaries." *Ibid.*

Confining the clause to workers hired to perform interstate transportation also promotes the FAA's purposes. As this Court has observed, the exemption ensures that specialized arbitration regimes for seamen and railroad employees apply to those employees' employment disputes regardless of "whatever arbitration procedures the parties' private contracts might happen to contemplate." *New Prime*, 139 S. Ct. at 537; see also *Circuit City*, 532 U.S. at 121 (discussing the Shipping Commissioners Act of 1872, ch. 322, 17 Stat. 262, and

the Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456). By 1925, it was clear that these specialized statutes centered on long-distance sea or rail transportation and did not apply to "relatively short voyages" along a single American coastline or on an "interurban" or "suburban" electric railway. *Inter-Island Steam Navigation Co.* v. *Byrne*, 239 U.S. 459, 462-463 (1915) (describing the scope of the Shipping Commissioners Act as amended by the Act of June 9, 1874, ch. 260, 18 Stat. 64); *Bhd. of Locomotive Eng'rs* v. *Spokane & E. Ry. & Power Co.*, No. 33, 1 R.L.B. 53, 56-58 (1920) (explaining that the Railroad Labor Board's jurisdiction under the Transportation Act did not extend to the quintessentially "local" operations of electric railroads). In all events, it is more faithful to the FAA's overarching "proarbitration purposes" to adopt a "narrow construction" of the exemption when such a construction is at hand. *Circuit City*, 532 U.S. at 118, 123.

2. Against these arguments, the First Circuit relied on a mistaken view of the historical record. It viewed pre-FAA decisions construing the jurisdictional provision in FELA as supporting a broader reading of the exemption—as though Congress wrote the exemption to adopt the FELA cases' standards. App., *infra*, 16a-23a.

The court's reliance on FELA is unsound for many reasons. There is no colorable argument here for applying the prior-construction canon of interpretation, which can support interpreting statutory language in line with prior judicial decisions if "a statute uses the very same terminology as an earlier statute." Scalia

& Garner, *supra*, at 323; see *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 330 (2015). The FAA's language differs from FELA's. While the FAA focuses on the activities of the "class of workers," FELA requires that the *rail carrier* be "engaging in commerce between any of the several States" and that the individual employee be "employed by such carrier in such commerce" at the time of injury. 45 U.S.C. 51. FELA's language is thus "oriented more around the work of the 'common carrier.'" *Rittmann*, 971 F.3d at 931 (Bress, J., dissenting). If Congress had wished to import FELA's standards into the FAA, it would have put FELA's language into the FAA. But it did not.

Another problem is that FELA's jurisdictional standard rests on FELA's distinct purposes. See *Shanks* v. *Del., Lackawanna & W. R.R. Co.*, 239 U.S. 556, 558 (1916) (construing FELA's jurisdictional standard based on "the evident purpose of Congress in adopting the act" rather than the "technical legal sense" of the statutory language). Those purposes are the opposite of the FAA exemption's: FELA is a "broad remedial statute" that must be "construed liberally" to compensate injured workers, while the exemption must be construed narrowly to protect the FAA's support for arbitration. *Rittmann*, 971 F.3d at 932 (Bress, J., dissenting) (citation omitted).

Worse still, the FELA cases' fine distinctions between different types of railroad workers created "much confusion" and prompted Congress to rewrite FELA in 1939 to abrogate those cases. *Rittmann*, 971 F.3d at 933 (Bress, J., dissenting) (quoting *S. Pac. Co.* v.

Gileo, 351 U.S. 493, 497 (1956)). The First Circuit erred in breathing new life into this repudiated precedent—especially in this context. This Court's FAA cases have consistently condemned interpretations that would inject "complexity and uncertainty" into the FAA's applicability, as FELA standards do. *Circuit City*, 532 U.S. at 123. Courts must avoid any "test that risks the very kind of costs and delay through litigation * * * that Congress wrote the Act to help the parties avoid." *Allied-Bruce*, 513 U.S. at 278. The First Circuit did not dispute that its preferred standard is less predictable than a rule that would simply recognize that local drivers in specific metropolitan areas are not exempt. There is no reason to reinvigorate confusing FELA standards abandoned over eighty years ago.[2]

C. These Important And Recurring Issues Warrant The Court's Review Now

Rittmann and this case present an often-recurring question of substantial legal and practical importance. Enforcing arbitration agreements is important to the functioning of the country's legal system, as this

[2] Even if one were willing to consult FELA cases, they still would not justify the First and Ninth Circuits' holdings. None of the FELA cases addresses analogous local deliveries that take place after goods have come into a state by a separate means of long-distance transportation. Other, more factually similar decisions from the pre-FAA era undercut the First and Ninth Circuits' holdings by showing that courts did *not* view distinct local segments in a longer interstate trip as interstate commerce in their own right. *E.g.*, *New York ex rel. Pa. R.R. Co.* v. *Knight*, 192 U.S. 21, 28 (1904); *ICC* v. *Detroit, Grand Haven & Milwaukee Ry. Co.*, 167 U.S. 633, 643-644 (1897).

Court's frequent granting of certiorari in FAA cases reflects. Here, the necessary threshold question—whether the FAA is available to enforce such agreements in the first place—merits this Court's attention in a special way. The scope of the FAA exemption presents a pure question of statutory interpretation, and only this Court can resolve the fundamental differences in lower courts' approaches. A defendant's prospects for enforcing an arbitration agreement should not hinge on a plaintiff's choice of forum.

Such uncertainty is especially pernicious in the FAA context. As this Court has recognized, parties often write contracts relying on the availability of the FAA and this Court's precedent applying it. See *Allied-Bruce*, 513 U.S. at 272. This case highlights that there may be no way to enforce an arbitration agreement that is exempt from the FAA. App., *infra*, 32a-52a (holding that Massachusetts public policy overrides the parties' agreement to arbitrate these claims). When lower courts sow confusion about the FAA's reach, they upset contracting parties' reasonable expectations.

The time is ripe for addressing these questions. The courts of appeals have addressed these issues extensively since *Circuit City*, and further percolation would serve no useful purpose. Worse, it would defeat the FAA's purposes by encouraging further litigation over the applicability of the FAA. Contracting parties should not have to spend resources on discovery or extensive briefing—including in as-of-right appeals, 9 U.S.C. 16—just to get courts to enforce their promises to *avoid* the costs and delays of litigation.

This case, like *Rittmann*, is an excellent vehicle for addressing the question presented. There are no relevant factual disputes to distract from the statutory-interpretation question before the Court. And the lower courts' opinions, including the dueling opinions in *Rittmann*, forcefully present the competing perspectives on that question. The Court should not postpone the resolution of these critical issues for another day. It should grant the earlier-filed petition in *Rittmann*, and hold this "nearly identical" petition. *Rittmann*, 971 F.3d at 910. Or it should grant this petition regardless of *Rittmann*'s disposition.

CONCLUSION

The Court should hold the petition for a writ of certiorari pending this Court's disposition of the petition for a writ of certiorari, and the conclusion of any further proceedings, in *Amazon.com, Inc.* v. *Rittmann*, No. 20-622 (filed Nov. 4, 2020). Alternatively, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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JANUARY 2021