No. _____

In The
Supreme Court of the United States

AMAZON.COM, INC., et al.,

Petitioners,

v.

BERNADEAN RITTMANN, et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

RICHARD G. ROSENBLATT
MORGAN, LEWIS & BOCKIUS LLP
502 Carnegie Center
Princeton, NJ 08540

DAVID B. SALMONS
Counsel of Record
MICHAEL E. KENNEALLY
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 739-3000
david.salmons@morganlewis.com

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Congress extended the Federal Arbitration Act's strong support for arbitration to the full reach of its powers to regulate foreign and interstate commerce, with a limited exception 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 (emphasis added). Recognizing that Congress included this exemption to preserve specialized arbitration regimes for seamen and railroad employees, the Court has held that the exemption requires "a narrow construction." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 118 (2001).

In a divided decision, the Ninth Circuit ruled that Amazon Flex drivers who use their personal vehicles to make local deliveries in a single state are exempt interstate workers because Amazon sells goods that travel in interstate commerce before Flex drivers pick them up for delivery.

The question presented is whether the Federal Arbitration Act's exemption for classes of workers engaged in foreign or interstate commerce 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.

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 Bernadean Rittmann, Freddie Carroll, Julia Wehmeyer, Raef Lawson, and Iain Mack 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.):

Rittmann v. *Amazon.com, Inc.*, No. 16-cv-1554 (Apr. 23, 2019)

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

Rittmann v. *Amazon.com, Inc.*, No. 19-35381 (Aug. 19, 2020), petition for reh'g denied, Sept. 25, 2020

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION

The Federal Arbitration Act (FAA) applies broadly, "to the limits of Congress' Commerce Clause power." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 268 (1995). But it excludes from its broad coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. 1. Congress created this exemption not because it opposed arbitration for these workers, but because it wished to protect other arbitration regimes that it specifically created for them. *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 121 (2001); see *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 537 (2019). In its two prior decisions construing the exemption, this Court clarified the meaning of the phrase "contracts of employment," *New Prime*, 139 S. Ct. at 536, and held that the residual clause—"any other class of workers engaged in foreign or interstate commerce"—is narrowly limited to transportation workers, *Circuit City*, 532 U.S. at 109. But the Court has never explained how to determine when transportation workers are "engaged in foreign or interstate commerce."

The courts of appeals are split over this question. In particular, they disagree about whether the exemption includes classes of workers who perform purely local transportation activities. For the First and Ninth Circuits, the critical factor is whether the workers work for *businesses* that depend on the movement of goods or passengers across state lines. For the Fifth, Seventh, and Eleventh Circuits, the exemption's plain

language turns on whether *the class of workers* itself is engaged in interstate transportation of goods or passengers. The Third and Eighth Circuits lie in between, considering the workers' activities as one factor among many.

This case provides a striking illustration of the resulting inconsistency. As Judge Bress noted in dissent, one of the plaintiffs here, Raef Lawson, performed essentially the same type of local transportation services using his personal car and smartphone for several different companies. App., *infra*, at 76a. That includes (1) Amazon, whose Flex drivers deliver goods from local distribution facilities or Whole Foods grocery stores, (2) Grubhub, whose drivers deliver goods from local restaurants, and (3) Uber, whose drivers provide local transportation to passengers and deliver goods from local restaurants. See *ibid.* Mr. Lawson is hardly alone in having worked for all these companies. The nature of the work—using one's own car and smartphone to drive goods or passengers around town—is largely consistent from one company to the next. In recent years, some of these workers have brought worker-misclassification lawsuits against these companies, despite having agreed to arbitrate such disputes.

Here, the Ninth Circuit held Mr. Lawson's agreement exempt from the FAA because Amazon sells goods shipped from around the country. In contrast, a Seventh Circuit decision authored by then-Judge Barrett looked past the origins of the delivered goods and ruled that Grubhub drivers' agreements are not exempt. Meanwhile, the Third Circuit adopted a

multifactor approach requiring fact discovery to determine whether Uber drivers' agreements are exempt. So today, as a result of these decisions, "the same person performing the same type of work at the same time through the same means is required to arbitrate against some [putative] employers but not others." App., *infra*, at 77a (Bress, J., dissenting).

This conflict and confusion frustrate the FAA's very purpose. The FAA exists to allow parties to structure their dealings to avoid litigation's costs and delays. Contracting parties cannot do that if they are consigned to litigate in certain courts because of basic disagreement over when the FAA applies. The FAA's applicability must be uniform and predictable nationwide. And the decision below—which broadens the FAA's exemption based on criteria that have no grounding in the statute's text, history, or purposes—is wrong on the merits, as Judge Bress explained in his dissent. Because the Ninth Circuit's decision below conflicts with decisions of other circuits and this Court, as well as the statute's language, structure, history, and purposes, this Court should grant certiorari and reverse.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-77a) is reported at 971 F.3d 904. The opinion of the district court (App., *infra*, at 78a-90a) is reported at 383 F. Supp. 3d 1196.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2020. A petition for rehearing was denied on September 25, 2020 (App., *infra*, 91a). 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). Section 2 of FAA 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. Sections 3 and 4 provide procedures for staying litigation and compelling arbitration. 9 U.S.C. 3, 4.

Together, Sections 1 and 2 establish the range of arbitration agreements 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*, 513 U.S. at 273 (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* that Section 1's exemption does not exclude all employment contracts from the FAA. 532 U.S. at 109. 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 therefore rejected the Ninth Circuit's 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 and that Congress likely created the residual category to "reserv[e] for itself" the ability to enact future legislation specifically for other groups of transportation workers—like airline employees, whom Congress subjected to the specialized dispute-resolution provisions in 1936. *Id.* at 121 (citing Act of April 10, 1936, Pub. L. No. 74-487, 49 Stat. 1189).

The Court revisited the exemption in *New Prime*. It echoed *Circuit City*'s explanation for why Congress included the exemption: by 1925, "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." *New Prime*, 139 S. Ct. at 537 (citation omitted).

New Prime did not address the scope of the residual clause. "Happily," the parties agreed that the long-haul truck driver in that case "qualifie[d] as a 'worker[] engaged in * * * interstate commerce.'" *Id.* at 539. The case instead turned on the meaning of the exemption's use of the phrase "contracts of employment." *Ibid.* Applying the ordinary meaning of the statutory language at the time of enactment, the Court

concluded that "in 1925, the term 'contracts of employment' referred to agreements to perform work," and so the exemption extended to independent contractors as well as employees. *Id.* at 543-544.

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. 37, 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. 37, at 2. Flex drivers do not drive large trucks or Amazon-branded vehicles for these deliveries; they generally use their own cars. D. Ct. Dkt. 50, at 4 ("2013 Kia Optima"); D. Ct. Dkt. 52, at 3 ("2005 Toyota Highlander").

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. 49, at 2. Some Flex drivers have also delivered restaurant orders. *Ibid.* Flex drivers do not perform long-haul transportation. *Ibid.* They perform local deliveries in the specified metropolitan area during a "delivery block" that generally lasts a few hours. *Id.* at 2-3.

2. Respondents worked as Amazon Flex drivers in different cities. D. Ct. Dkt. 83, at 3. On behalf of themselves and other Flex drivers, they allege that petitioners have misclassified Flex drivers as independent contractors and consequently owe Flex drivers wages and expense reimbursement under federal and state law. *Id.* at 5-14.

To participate in the Flex program, respondents agreed to the Amazon Flex terms of service. D. Ct. Dkt. 37, at 9. The terms of service include an arbitration provision agreeing to resolve all disputes related to the drivers' participation in the Flex program through individualized arbitration. D. Ct. Dkt. 37-2, at 5-6. Petitioners moved to compel arbitration.

3. The district court denied petitioners' motion. App., *infra*, at 78a. It concluded that Amazon Flex drivers are exempt from the FAA. *Id.* at 81a-82a. In its view, Flex drivers fall within the exemption's residual clause because they "deliver packaged goods that are shipped from around the country and delivered to the consumer untransformed." *Id.* at 82a. And petitioners "are in the business of shipping goods across state lines." *Id.* at 84a; see also *id.* at 85a.

4. A divided panel of the court of appeals affirmed. App., *infra*, at 4a-5a.

a. The majority concluded "that transportation workers need not cross state lines to be considered 'engaged in foreign or interstate commerce' pursuant to § 1." App., *infra*, at 11a. It found that the definitions of "engaged" and "commerce" can "reasonably be read

to include workers employed to transport goods that are shipped across state lines." *Id.* at 12a. It also noted that the First Circuit had held that Amazon Flex drivers are exempt from the FAA. *Id.* at 12a-13a. In addition, the majority invoked Third Circuit case law exempting transportation work that is "so closely related [to interstate and foreign commerce] as to be in practical effect part of it." *Id.* at 13a (citation omitted).

Those First and Third Circuit decisions, and the "so closely related" standard, derive from cases interpreting the Federal Employers' Liability Act (FELA), ch. 149, 35 Stat. 65 (1908), a statute enacted to provide relief to injured railroad workers. The panel majority found it instructive that "courts interpreting FELA have held that workers were employed in interstate commerce even when they did not cross state lines." App., *infra*, at 15a. It also cited two 1970s cases from this Court construing Sections 3 and 7 of the Clayton Act, 15 U.S.C. 14, 18, and Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), which the majority read as holding "that the actual crossing of state lines is not necessary to be 'engaged in commerce' for purposes of" these two antitrust statutes. App., *infra*, at 18a-19a.

Rather than focusing on Flex drivers' local, intrastate activities, the majority focused on the nature of Amazon's business as "one of the world's largest online retailers." App., *infra*, at 22a. Flex drivers "pick up packages that have been distributed to Amazon warehouses * * * across state lines." *Id.* at 23a. Hence the "packages they carry are goods that remain in the stream of interstate commerce until they are

delivered." *Ibid.* The majority believed there was no meaningful separation between the antecedent interstate movement of the goods to the last-mile delivery station and the local transportation that Flex drivers perform. Even though Section 1 does not refer to the geographic footprint of the business for which workers perform services, the majority stressed that "[t]he interstate transactions between Amazon and the customer do not conclude until the packages reach their intended destinations." *Id.* at 25a.

The majority went on to hold that because the exemption applied, the arbitration provision was completely unenforceable. App., *infra*, at 31a. It refused to give effect to the agreement's choice-of-law provision, which expressly selects the FAA to govern the parties' arbitration provision. *Id.* at 31a-33a. Yet it read the same choice-of-law provision as precluding enforcement through Washington law, the body of law that the parties chose for the remainder of their agreement and that applies by default to diversity-jurisdiction matters in Washington federal court. *Id.* at 33a-36a. The majority recognized that this latter conclusion directly conflicted with the First Circuit's interpretation of the same contract and meant that "there is no law that governs the arbitration provision." *Id.* at 35a & n.11. The majority cited no authority suggesting that "no law" is ever the correct answer to a choice-of-law question. It is hard to imagine a court going to such lengths to nullify a contract provision that was not an arbitration provision.

b. Judge Bress dissented. App., *infra*, at 36a. He also consulted contemporaneous dictionary definitions, but rather than using the definition of "commerce," as the majority had done, he cited the definition of "interstate commerce," the actual statutory phrase. *Id.* at 47a. Judge Bress explained that combining *that* definition with the definition of "engaged" indicated 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). Relying on then-Judge Barrett's Seventh Circuit opinion addressing local Grubhub delivery drivers, Judge Bress determined that Section 1 focuses on what the class of workers does. *Id.* at 48a-49a.

That conclusion was bolstered by the enumerated categories of exempt workers. The statute singles out seamen and railroad employees at a high level of generality based on "the broad type of work they perform," not the activities of their purported employer. App., *infra*, at 50a-51a. Because " 'seamen' and 'railroad employees' traditionally operate across international and state boundaries," the *ejusdem generis* canon of construction counsels against including "local delivery persons" within the residual clause. *Id.* at 51a-53a.

Judge Bress identified several problems with the majority's approach. It depended on factors with "no apparent basis in the statute." App., *infra*, 56a. And FELA and the Clayton and Robinson-Patman Acts did not justify using those factors because those other statutes "do not share the FAA's text, 'context,' or

'purpose.'" *Id.* at 60a. The resulting standard was also less workable and "treat[ed] similarly situated workers unequally." *Id.* at 71a. In many cases, it might require "extensive discovery on where goods originated" and motions practice and appeals over "whether the interstate transaction was 'continuous,' or whether the items 'came to rest' earlier." *Id.* at 72a-73a. The net result would be "more complex civil litigation over the availability of a private dispute resolution mechanism that is supposed to itself reduce costs." *Id.* at 74a. It would also yield "the inequitable result that workers performing the same work are subject to different legal regimes": drivers who provide essentially the same transportation services in their personal vehicles through Amazon Flex, Grubhub, and Uber would have to arbitrate with some of these companies but not others. *Id.* at 74a-77a. Nothing in the text or purpose of the FAA justifies such incongruous results.

5. The court of appeals denied petitioners' petition for rehearing, again over Judge Bress's dissent. App., *infra*, at 91a.

REASONS FOR GRANTING THE PETITION

Since *Circuit City*, seven courts of appeals have expressed conflicting views about the question presented. That question has only grown in importance since *New Prime*—particularly in wage-and-hour lawsuits over the classification of workers as employees or independent contractors. Many courts have had to decide

whether a class of workers is engaged in foreign or interstate commerce under the FAA. But they fundamentally disagree over how to answer that question. In particular, courts disagree over whether the inquiry turns on the activities of the class of workers—as the plain statutory text requires—or on the nature of the businesses that benefit from the workers' activities.

This disagreement has tremendous implications for the enforceability of arbitration provisions—particularly with locally based transportation workers. Courts, like the Ninth Circuit here, that find it immaterial whether the class of workers engages in interstate transportation will readily classify local workers for certain businesses as exempt based on the businesses' connections to foreign or interstate transportation. Courts that adhere to the exemption's text will not. Congress wrote the exemption to turn solely on whether the "class of workers" is "engaged in foreign or interstate commerce," 9 U.S.C. 1, and this language requires treating the entire class of local transportation workers as non-exempt based on those workers' own activities, regardless of the nature of the businesses that benefit from their services.

No amount of additional percolation in the lower courts can resolve this disagreement. Besides, such litigation itself undermines the FAA's purposes, which require certainty over the enforceability of agreements to arbitrate and disfavor forcing parties to litigate before they can enforce a promise to arbitrate. This case is an excellent vehicle to address these important issues, and the Court should do so without delay.

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

1. The Ninth Circuit majority held Amazon Flex drivers exempt from the FAA because of facts about Amazon's business. It characterized Amazon as "one of the world's largest retailers" and as "work[ing] closely with freight and transport companies" so that "Amazon's business includes not just the selling of goods, but also the delivery of those goods." App., *infra*, at 22a, 29a (citation omitted). In its view, "[t]he interstate transactions between Amazon and the customer do not conclude until the packages reach their intended destinations." *Id.* at 25a.

For the Ninth Circuit, these claims about the nature of Amazon's business eclipsed the localized nature of Amazon Flex drivers' own activities: "Although Amazon contends that [Flex] delivery providers are 'engaged in local, intrastate activities,' the Amazon packages they carry are goods that remain in the stream of interstate commerce until they are delivered." App., *infra*, at 23a.

This "stream of commerce" standard follows the First Circuit's approach in another Amazon Flex case, which relied heavily on cases interpreting a jurisdictional provision in FELA, an entirely different statute. See *Waithaka* v. *Amazon.com, Inc.*, 966 F.3d 10 (1st Cir. 2020). There, the court 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." *Id.* at 13; see also *Nieto* v. *Fresno Beverage Co.*, 245 Cal. Rptr. 3d 69, 77 n.3 (Cal. Ct. App. 2019) (finding a local delivery driver for an in-state beverage distributor exempt under a "flow of interstate commerce" standard). For these courts, "the nature of the business for which the workers perform their activities is important in determining whether the contracts of a class of workers are covered by Section 1." *Waithaka*, 966 F.3d at 23; App., *infra*, at 28a (citation omitted). In fact, the nature of the business is not just important; it is "the critical factor." *In re Grice*, 974 F.3d 950, 956 (9th Cir. 2020) (summarizing *Rittmann* and *Waithaka* in the context of a request for mandamus relief).

2. Other circuits reject this focus on the nature of the businesses that benefit from the workers' activities. Adhering to the plain terms of the exemption, they hold that the nature of the workers' responsibilities is the critical factor.

a. For example, one court of appeals found it irrelevant that Grubhub drivers "carry goods that have moved across state and even national lines." *Wallace* v. *Grubhub Holdings, Inc.*, 970 F.3d 798, 802 (7th Cir. 2020) (Barrett, J.). The Seventh Circuit rejected the argument that the exemption is "about where the goods have been" rather than "what the worker does." *Ibid.* The workers' connection to goods that come from out of state is insufficient; they must be connected "to the act of moving those goods across state or national borders." *Ibid.* The Grubhub drivers in *Wallace* were not exempt because they failed "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." *Id.* at 803.

Although the majority below described *Wallace* as consistent with its decision, Judge Bress recognized that "the reasoning of *Wallace* is plainly inconsistent with both the majority opinion here and *Waithaka*." App., *infra*, at 67a n.3. While the Seventh Circuit held that transporting goods that moved across state lines is not enough to trigger the exemption, the majority below expressly extended the exemption to "workers employed to transport goods that are shipped across state lines." App., *infra*, at 12a. And even though *Wallace* cited *Waithaka* in observing that it is "harder" to determine whether "truckers who drive an intrastate leg of an interstate route" are exempt, 970 F.3d at 802, it did not adopt *Waithaka*'s rationale or legal standard. In addition to rejecting the First and Ninth Circuits' focus on the goods' origins, the Seventh Circuit did not consider the geographic footprint of Grubhub or the restaurants or other companies that benefit from its drivers' deliveries. Nor did it suggest that the FELA cases that guided *Rittmann* and *Waithaka* bear any relevance to the exemption's interpretation.[1]

---

[1] It is difficult to see why the First and Ninth Circuits' "flow" or "stream" of commerce standard does not exempt food delivery drivers. Those drivers reasonably argue that they "are involved in the flow of interstate commerce because they facilitate the transportation of goods that originated across state lines." *Magana* v. *DoorDash, Inc.*, 343 F. Supp. 3d 891, 900 (N.D. Cal. 2018). For instance, Grubhub drivers deliver many kinds of prepackaged items from convenience stores like 7-Eleven, including the same

b. Another recent case that hinged on the activities of the workers, not the business, is *Eastus* v. *ISS Facility Services, Inc.*, 960 F.3d 207 (5th Cir. 2020). There, the Fifth Circuit held that "loading and unloading airplanes" with passengers and goods is insufficient to trigger the exemption because such work does not make the workers "engaged in an aircraft's actual movement in interstate commerce." *Id.* at 212. That conclusion makes no sense if, as this case and *Waithaka* hold, the operations of the airline are paramount. Yet instead of treating the airline's interstate or foreign transportation business as the critical factor, the Fifth Circuit framed the "key question" in terms of the work that the "worker" was employed to perform—specifically, whether her "job required her to engage 'in the movement of goods in interstate commerce in the same way that seamen and railroad workers [do].'" *Eastus*, 960 F.3d at 209-210 (citation omitted).

Eastus also shows the circuits' disagreement over the relationship between the different legs of an interstate journey. The Ninth Circuit determined that Flex "drivers' transportation of goods wholly within a state

---

sorts of soft drinks and jarred tomato sauce that, as Judge Bress noted, are sold through Amazon.com, see App., *infra*, at 58a-59a—as well as batteries, yard waste bags, over-the-counter pain relievers, and much else. See, *e.g.*, *7-Eleven Delivery—504 K St NW Washington*, GRUBHUB, https://www.grubhub.com/restaurant/7-eleven-504-k-st-nw-washington/2114891 (last visited Nov. 3, 2020). Judge Bress also noted that Amazon Flex drivers often deliver food items that they pick up from local retail locations, including Whole Foods grocery stores. App., *infra*, at 73a-76a. Under a "flow" or "stream" of commerce standard, Grubhub drivers are not qualitatively different from Amazon Flex drivers.

are still a part of a continuous interstate transportation." App., *infra*, at 24a. It did not matter that the packages they carry must first be unloaded from long-haul carriers, warehoused, sorted, and packaged before being loaded into the Flex driver's car. The Fifth Circuit, in contrast, held that "[l]oading or unloading a boat or truck with goods prepares the goods for or removes them from transportation." *Eastus*, 960 F.3d at 212. That is why the court found that merely moving goods around an airport "preceded" the goods' movement in interstate commerce. *Id.* at 211. If the Ninth Circuit measured continuity using the Fifth Circuit's standard, it would have held that Flex drivers' local services come after, and are separate from, the preceding interstate transportation.

c. Workers' "job duties" are also the critical factor 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 in that role 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 he was not exempt. *Id.* at 1290. In direct contradiction to the First and Ninth Circuits' holdings that engaging in interstate transportation is not even a necessary condition for the exemption, 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); cf. *Waithaka*, 966 F.3d at 26; App., *infra*, 31a. The Rent-A-Center worker was not exempt even though he worked for a national

company whose business—to borrow the majority's words here—"includes not just the selling of goods, but also the delivery of those goods." App., *infra*, at 29a. According to the Eleventh Circuit, the 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. While the First and Ninth Circuits focus on the businesses' operations and the Fifth, Seventh, and Eleventh Circuits focus on the workers' responsibilities, two circuits lie in between those approaches. Their multifactor standards make the exemption's reach especially murky and difficult to predict—further undermining Congress's and the FAA's objectives.

a. 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 the process, 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. The Third Circuit instead instructed 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 asking whether a plaintiff "belongs to a class of transportation workers engaged in interstate commerce *or in work so closely related thereto as to be in practical effect part of it*." 939 F.3d at 227 (emphasis added); see *id.* at 220. That formulation—which as Judge Bress recognized is simply "an expansion of the actual language in § 1," App., *infra*, at 69a—derives from the FELA case law that the majority here and the *Waithaka* panel invoked. See *Tenney Eng'g, Inc.* v. *United Elec. Radio & Mach. Workers of Am.*, 207 F.2d 450, 452-453 (3d Cir. 1953). And because of this standard, the Third Circuit has also endorsed considering not just the workers' 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).[2]

---

[2] Although the Third Circuit improperly refuses to focus its inquiry on the workers' own activities, it also rejects the broad flow-of-commerce standard of the First and Ninth Circuits. In *Singh*, the Uber driver plaintiff contended that he dropped off and picked up airport passengers and thus played a role in passengers' interstate travels. 939 F.3d at 232 (Porter, J., concurring in part and concurring in the judgment). Had the Third Circuit believed that transporting goods or persons in the flow of interstate commerce is dispositive, it would have viewed these airport trips as sufficient to exempt Uber drivers. See App., *infra*, at 69a-70a (Bress, J., dissenting) ("The Third Circuit thus appears to have

b. One final circuit also uses the Third Circuit's "so closely related to interstate commerce" standard. *Lenz* v. *Yellow Transp., Inc.*, 431 F.3d 348, 352 & n.2 (8th Cir. 2005). In *Lenz*, however, the Eighth Circuit fleshed out that standard through eight "non-exclusive" factors. *Id.* at 352. 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.*

Consistent with its focus on the workers' own activities, the Fifth Circuit has expressly refused to "adopt [*Lenz*'s] multiple-factor test," which the Fifth Circuit criticized for unduly complicating the analysis. *Eastus*, 960 F.3d at 211 (citing *Lenz*, 431 F.3d at 352). The Court's review is needed to resolve the open disagreement between the circuits.

B. The Decision Below Is Incorrect

In addition to conflicting with other circuits' decisions, the Ninth Circuit majority's ruling conflicts with the statute's language, structure, history, and purposes, as well as this Court's own precedent. This Court has already explained that the exemption turns on "whether or not the worker is engaged in

---

recognized that when it comes to workers who make deliveries (of people or goods), * * * the analysis under § 1 turns on the extent to which the class of workers crosses state lines in the course of their deliveries.").

transportation." *Circuit City*, 532 U.S. at 109. It should now make clear, as the plain statutory language requires, that the exemption is confined to classes of workers who, considered as a class, are engaged in non-local transportation across state or national boundaries.[3]

1. In construing the exemption, courts should adhere to the words' "ordinary" meaning "at the time Congress enacted the statute." *New Prime*, 139 S. Ct. at 539 (citation omitted). As contemporaneous dictionaries show, there is no real doubt about the ordinary meaning, in 1925, of the phrase "class of workers engaged in foreign or interstate commerce." 9 U.S.C. 1. The word "engaged" indicates an emphasis on what the class of workers is hired to do. App., *infra*, at 47a (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).

---

[3] Because "the operative unit is a 'class of workers[,]' * * * someone whose occupation is not defined by its engagement in interstate commerce does not qualify for the exemption just because she occasionally performs that kind of work." *Wallace*, 970 F.3d at 800. In particular metropolitan areas, for example, a local delivery might cross state lines, but that does not mean the delivery driver belongs to an exempt *class* of workers. The exemption applies only if "the interstate movement of goods is a central part of the class members' job description." *Id.* at 801.

The majority rejected this straightforward analysis. Without explanation, it substituted a dictionary definition of "commerce" for the same dictionary's narrower definition of "*interstate* commerce." App., *infra*, at 12a. Of course, the statute does not say "class of workers engaged in commerce." It contains additional limiting words: "foreign or interstate." Courts lack authority to read this limiting language out of a statute. They "must give effect, if possible, to every clause and word." *Loughrin* v. *United States*, 573 U.S. 351, 358 (2014) (citation omitted). Here, it is plainly possible to give meaning to the phrase "foreign or interstate," but the Ninth Circuit majority did not even try to do so.

2. The majority's interpretation also conflicts with two important structural features of the statute that this Court has previously highlighted: the phrase "any other class of workers engaged in foreign or interstate commerce" is a residual clause following the enumerated categories of seamen and railroad employees; and this wording is notably narrower than that of Section 2's general coverage provision. *Circuit City*, 532 U.S. at 114-118.

a. Under the *ejusdem generis* canon, the residual clause 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 canon operates by considering "the listed elements, as well as the broad term at the end, and ask[ing] what category would come into the reasonable person's mind." App., *infra*, at 51a (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 seamen and railroad employees are cast "at a high level of generality" and "commonly (if not prototypically) * * * operate across international and state boundaries." *Ibid.*

Congress's specialized arbitration regimes for seamen and railroad employees reinforce that conclusion. The exemption helps ensure that these specialized regimes govern seamen and railroad 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, however, it was already 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).

The Ninth Circuit majority's contrary discussion does not withstand scrutiny. It treated the *ejusdem generis* canon as supporting an emphasis on "the hiring company's business." App., *infra*, at 28a (citation omitted). In its view, the categories of "seamen" and "railroad employees" are "defined by the nature of the business for which they work." *Ibid.* (citation omitted). That is incorrect. The two enumerated categories denote workers connected to particular methods of (characteristically long-distance) transportation: ship and rail. *Black's Law Dictionary* 989, 1063 (2d ed. 1910) (defining "seamen" as "[s]ailors; mariners; persons whose business is navigating ships" and defining "railroad" as "[a] road or way on which iron or steel rails are laid for wheels to run on, for the conveyance of heavy loads in cars or carriages propelled by steam or other motive power"); see also *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 346 (1991) (explaining that the traditional definition of "seamen" refers to persons "employed on board a vessel in furtherance of its purpose"); *New Prime*, 139 S. Ct. at 543 (discussing the original meaning of "railroad employees" in terms of their contribution to the operation of railroads and trains). It thus does not matter whether the putative seaman works for a construction company or a shipping company. But it does matter whether the putative seaman performs job duties at sea or on land: land-based workers, by definition, are not seamen. *See McDermott*, 498 U.S. at 348. That is in large measure why the Fifth Circuit's approach to the exemption focuses on the activities of the class of workers rather

than the businesses for which they work. *Eastus*, 960 F.3d at 211-212.

b. Another structural feature of the FAA that the Ninth Circuit failed to respect is the notable difference in phrasing between Sections 1 and 2. Section 2 makes the FAA's general coverage depend on the relationship between particular "transaction[s]" and foreign or interstate commerce. 9 U.S.C. 2. Section 1's interrelated exemption, on the other hand, "focuses on the work that a 'class of workers' performs." App., *infra*, at 56a (Bress, J., dissenting).

Congress's clear decision not to phrase the Section 1 exemption in Section 2's transactional terms weighs strongly against the majority's approach. If Congress had wanted the exemption to turn on the geographic footprint of the "interstate transactions between Amazon and the customer," App., *infra*, at 25a, it would have written the exemption using such terms. See, *e.g.*, *Babb* v. *Wilkie*, 140 S. Ct. 1168, 1177 (2020) (noting that when Congress uses particular language in one provision of a statute but "eschew[s]" that language in a nearby provision, courts "generally ascribe significance to such a decision").

3. Rather than following the ordinary meaning of the statutory language in light of the statutory structure, the Ninth Circuit majority placed great weight on a mistaken view of the historical record. The majority viewed pre-FAA decisions construing the jurisdictional provision in FELA as supporting the majority's reading of the exemption—as though Congress

wrote the exemption to adopt the standards articulated in the FELA case law. App., *infra*, 15a-18a. The court's use of history is unsound for several reasons.

For one thing, there is no colorable argument for applying the relevant canon of interpretation that authorizes courts to construe statutory language in line with prior judicial decisions. That canon, often called the prior-construction canon, applies when "a statute uses the very same terminology as an earlier statute." Scalia & Garner, *supra*, at 323. Here, Congress did not repeat "the same language" from FELA when it enacted the FAA. *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 330 (2015) (citation omitted). In stark contrast to the FAA exemption's focus on the "class of workers," the language in FELA's jurisdictional provision 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, therefore, "is oriented more around the work of the 'common carrier.'" App., *infra*, at 61a (Bress, J., dissenting). FELA also lacks the two structural features of the FAA just discussed: Section 1's residual-clause construction and the contrasting language of Section 2's broad general-coverage provision. *Ibid.* So it is "hard to understand" the majority's belief that "the language of FELA and the FAA are 'nearly identical.'" *Ibid.* (citation omitted).

Another problem is the FELA standard's dependence on FELA's distinct purposes. This Court expressly grounded its interpretation of FELA's jurisdictional

provision in "the evident purpose of Congress in adopting the act." *Shanks* v. *Del., Lackawanna & W. R.R. Co.*, 239 U.S. 556, 558 (1916). But FELA's purposes are the opposite of the FAA exemption's purposes. The Court has long understood FELA as a "broad remedial statute" that must be "construed liberally to fulfill the purposes for which it was enacted"—namely, compensating injured workers. App., *infra*, at 61a-62a (Bress, J., dissenting). The FAA's pro-arbitration purposes, in contrast, "compel that the § 1 exclusion provision be afforded a *narrow* construction." *Circuit City*, 532 U.S. at 118 (emphasis added). For this reason, too, FELA is an improper guide.[4]

But even if one looks to the FELA case law, it does not justify the majority's conclusion. FELA cases do not address transportation of goods that are transported a long distance by one method of transportation, unloaded, loaded onto another form of transportation, and then transported a short further distance.

---

[4] Similar problems inhere in the majority's reliance on judicial decisions construing the Clayton Act and Robinson-Patman Act. See App., *infra*, at 18a-21a. The language and structure of these antitrust statutes differ from the FAA's, and they pursue "entirely different objectives, such as thwarting monopolistic practices and price discrimination." *Id.* at 63a (Bress, J., dissenting). The Court's interpretations of those statutes accordingly reflected "the economic realities of interstate markets" and "intensely practical concerns" of antitrust law, which have no connection to the FAA's purposes. *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 198 (1974). And of course the two 1970s antitrust rulings on which the majority relied, as well as the Robinson-Patman Act itself, postdate the 1925 enactment of the FAA and thus cannot possibly shed light on the FAA's meaning at the time of enactment.

Instead, they address factually distinguishable rail operations, like transporting train cars that were loaded with coal at a coalmine and not unloaded again until after they reached their destination in a different state. *Phila. & Reading Ry. Co.* v. *Hancock*, 253 U.S. 284, 285-286 (1920). Flex deliveries, in contrast, occur only after goods are unloaded upon arrival from out of state and loaded anew into the Flex drivers' cars. This difference is significant, for in the Fifth Circuit's view, "[l]oading or unloading" severs the link between the local and interstate legs of the journey. *Eastus*, 960 F.3d at 212.

The Ninth Circuit's reliance on FELA cases is even less defensible given non-FELA cases that predate the FAA and directly undermine the majority's conclusions. The "closest case from this period," factually, is *New York ex rel. Pennsylvania Railroad Co.* v. *Knight*, 192 U.S. 21 (1904). App., *infra*, at 64a (Bress, J., dissenting). In *Knight*, the Court held that local cab drivers were *not* "engaged in interstate commerce" even when they were transporting railroad passengers the last leg of their interstate journeys. 192 U.S. at 28. The majority below dismissed *Knight* as "relevant for taxation purposes" only. App., *infra*, at 24a. But this Court has already recognized that *Knight*'s significance extends further and "illustrate[s] the normal and accepted concept of the outer limits of this type of interstate journey." *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 232 (1947). Under *Knight*, like *Eastus*,

the goods that Amazon sells end their interstate journey before Flex drivers load them into their cars.[5]

4. In addition to all its other problems, the Ninth Circuit's interpretation furthers no conceivable purpose of the FAA. On the contrary, it thwarts the FAA's purposes in multiple ways.

A "flow" or "stream" of commerce standard is unpredictable—particularly when it draws fine distinctions between interstate sales of different goods by different businesses. There is no need to speculate about this problem. The First and Ninth Circuit rooted their approach in this Court's FELA case law, which is likewise the source for the Third and Eighth Circuits' "so closely related to interstate commerce" standard. See *supra* Section A.3. These FELA standards were so unpredictable and created so "much confusion" that Congress abrogated them by rewriting FELA in 1939. App., *infra*, at 64a (Bress, J., dissenting) (quoting *S.*

[5] Other pre-FAA decisions further undercut the majority's assessment of the historical record. For instance, in *ICC* v. *Detroit, Grand Haven & Milwaukee Railway Co.*, 167 U.S. 633, 643-644 (1897), the Court determined that a railroad company's operation of a local delivery service was legally "separate and distinct" from its railway service that brought the delivered goods to the local train station, even when the company charged only a "consolidated" fee covering both services. For that reason, the ICC's statutory jurisdiction did not extend to last-mile deliveries of goods that had just arrived by rail from other states. *Id.* at 644. The ICC's jurisdiction ended once the goods "reached and were discharged from the cars at the company's warehouse" in the city of their final destination. *Ibid.*

Pac. Co. v. *Gileo*, 351 U.S. 493, 497 (1956)).[6] Similarly, the majority's focus on "determining whether an interstate transaction is 'continuous,' or where an item in transit 'came to rest,' is more a matter of metaphysics than legal reasoning." *Id.* at 73a.

This Court has repeatedly criticized efforts to inject "complexity and uncertainty" into the FAA's applicability, as the Ninth Circuit's standard does. *Circuit City*, 532 U.S. at 123. If an "interpretive choice" about the FAA's scope "is difficult," it is "more faithful to the statute" to stick to the statute's "basic purpose." *Allied-Bruce*, 513 U.S. at 278. That means courts should avoid any "test that risks the very kind of costs and delay through litigation * * * that Congress wrote the Act to help the parties avoid." *Ibid.* And courts should recall that the FAA's aim of broadly overcoming judicial hostility to arbitration supports a more "precise reading of [the] provision that exempts contracts from the FAA's coverage." *Circuit City*, 532 U.S. at 119.

The Ninth Circuit majority did not dispute that its preferred standard is comparatively difficult to apply. Indeed, a bright-line rule that local drivers working in specific metropolitan areas are not exempt would minimize the need for further litigation to identify the

---

[6] These problems were apparent even before the FAA's enactment in 1925. By then, the Court had construed FELA's interstate commerce standard dozens of times, in addition to hundreds of lower-court cases construing the same interstate/intrastate distinction. See Lester P. Schoene & Frank Watson, *Workmen's Compensation on Interstate Railways*, 47 Harv. L. Rev. 389, 397-398, 407 & n.111 (1934).

residual clause's boundaries. By focusing on the type of work performed by the class of workers (local deliveries), the Court can create a straightforward test for the whole Nation. The FAA's applicability will not require case-by-case adjudication based on particular companies' business models or accidents of geography. Delivery drivers will not be treated differently because of the origins of the delivered goods. Nor will drivers in Dallas be treated differently than drivers in the District of Columbia merely because the D.C. metropolitan area includes sections of Virginia and Maryland.

In addition to its unpredictability, the Ninth Circuit's standard produces arbitrary results. Under that standard, a worker who performs the same basic local delivery tasks for Amazon and Grubhub must arbitrate with one company but not the other because of the supposed continuity of movement involved in some unspecified percentage of Amazon orders. App., *infra*, at 76a-77a (Bress, J., dissenting). At the same time, the arbitrability of disputes between such a worker and Uber will turn on the fruits of discovery and a court's considered judgment about the extent to which Uber passengers are traveling across state lines. *Singh*, 939 F.3d at 227-228.

These disparate results show that some courts' approach to the exemption is way off course. As *Allied-Bruce* explains, courts should not make "the validity of an arbitration clause" depend on a variable that, "from the perspective of the statute's basic purpose, seems

happenstance." 513 U.S. at 278. But that is what the Ninth Circuit's test does.[7]

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

This case presents a frequently recurring question of substantial legal and practical importance. Enforcing agreements to arbitrate is itself important to the functioning of the country's legal system, as this 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 clear fundamental differences in lower courts' approaches to that question. 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

---

[7] The Ninth Circuit also erred in holding that, if the exemption applies, contracting parties are precluded from agreeing to the FAA's application in a choice-of-law provision. App., *infra*, at 31a-33a. Under this Court's precedent, the FAA "creates a body of federal substantive law," *Southland Corp.* v. *Keating*, 465 U.S. 1, 12 (1984) (citation omitted), and there is no reason why contracting parties should not be able to choose to apply that federal substantive law just as they can choose to apply state substantive law—particularly where, as here, doing so does not frustrate any federal policy.

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. And this case itself illustrates that there may be no avenue to enforce an arbitration agreement if the FAA exemption applies. App., *infra*, at 31a-36a. Even where state law is in principle available to enforce the arbitration agreement, it might not support enforcement if the parties agreed to arbitrate on an individual, non-class basis only. See *Waithaka*, 966 F.3d at 26-35. When lower courts foster doubts about the FAA's reach, they defeat contracting parties' reasonable expectations.

The time is ripe for addressing these questions. As the foregoing discussion shows, the courts of appeals have addressed these issues extensively since *Circuit City*. Waiting for further percolation in the lower courts would serve no useful purpose. On the contrary, it would thwart the FAA's own purposes by encouraging further litigation over the applicability of the FAA. When the FAA does apply in such cases, the contracting parties should not have to spend resources on discovery or extensive briefing—including the possibility of as-of-right appeals, 9 U.S.C. 16—just to reach the conclusion that they made an enforceable promise to avoid the costs and delays of litigation. And such resources are hardly any better spent if the FAA does not apply. "Nothing is more wasteful than litigation about where to litigate." *Bowen* v. *Massachusetts*, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting).

This case is also 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 dueling opinions in the case offer forceful examples of the competing judicial perspectives on that question. The Court should not postpone the resolution of these critically important issues for another day.

CONCLUSION

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

Respectfully submitted,

RICHARD G. ROSENBLATT
MORGAN, LEWIS &
BOCKIUS LLP
502 Carnegie Center
Princeton, NJ 08540

DAVID B. SALMONS
Counsel of Record
MICHAEL E. KENNEALLY
MORGAN, LEWIS &
BOCKIUS LLP
1111 Pennsylvania
Avenue, N.W.
Washington, DC 20004
(202) 739-3000
david.salmons@
morganlewis.com

NOVEMBER 2020