No. 23-

IN THE

Supreme Court of the United States

JASWINDER SINGH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

UBER TECHNOLOGIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Arbitration Act exempts the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

The Seventh Circuit has held that this exemption applies to any member of a class of workers that is engaged in the transportation of goods or passengers across state lines. The Ninth, First, and Third Circuits have added additional requirements: The class of workers must be primarily engaged in interstate work rather than in intra-state work and the transportation performed must primarily be long-distance rather than short or local.

The question presented is:

Does the residual clause in Section 1 of the FAA exempt a class of transportation workers that directly transports passengers across state lines, but primarily performs intra-state transportation?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner Jaswinder Singh was a plaintiff in the district court in *Singh v. Uber Tech., Inc.* and an appellant in the consolidated appeal before court of appeals.

Respondent Uber Technologies Inc. was the defendant in the district court in *Singh v. Uber Tech., Inc.* and *Calabrese, et al. v. Uber Tech, Inc., et al.*, which were consolidated, and an appellee in the consolidated appeal in the court of appeals.

Respondent Rasier, LLC was a defendant in the district court in *Calabrese, et al. v. Uber Tech., Inc., et al.* and an appellee in the consolidated appeal in the court of appeals.

Respondents James Calabrese, Gregory Cabanillas, and Matthew Mechanic were plaintiffs in the district court in *Calabrese, et al. v. Uber Tech., Inc., et al.* and appellants in the consolidated appeal in the court of appeals.

RELATED PROCEEDINGS

This case arises out of the following proceedings:

- *Singh v. Uber Technologies, Inc.*, No. 3:16-cv-03044 (D.N.J.) (judgment entered Nov. 23, 2021)

- *Calabrese, Cabanillas, and Mechanic v. Uber Technologies, Inc. and Rasier, LLC*, No. 3:19-cv-18371 (judgment entered Nov. 23, 2021)

- *Singh v. Uber Technologies, Inc.*, No. 21-3234 (3d Cir.) (judgment entered April 26, 2023)

- *Calabrese, Cabanillas, and Mechanic v. Uber Technologies, Inc. and Rasier, LLC*, No. 21-3363 (3d Cir.) (judgment entered April 25, 2023)

There are no related proceedings within the meaning of this Court's Rule 14.1(b)(iii).

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INTRODUCTION

The circuit courts have found themselves entangled in varying interpretations of the Federal Arbitration Act and specifically the 9 U.S.C. § 1 clause that exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." This Court has, on multiple occasions, granted certiorari to address persistent ambiguities regarding Section 1's scope, including: (1) whether Section 1's catchall clause exempts all employment contracts or only those with transportation workers, *Circuit City Stores v. Adams*, 532 U.S. 105 (2001); (2) whether 'contracts of employment' encompasses independent contractors, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019); (3) whether a class of workers must physically cross state lines to be "engaged in interstate commerce", *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1791-92 (2022); and recently, (4) whether workers must work for an employer in the transportation industry to qualify for the Section 1 exemption, *Bissonette v. Lepage Bakeries Park St. LLC, et al.* (No. 23-51).

However, a larger legal dispute, impacting millions of workers in the U.S., remains unresolved: whether the Exemption's catchall clause covers a class of workers that performs interstate transportation but primarily performs local intra-state work. Millions of Americans work as rideshare drivers for Uber and Lyft, which classify them as independent contractors not covered by various employee-protection laws. Many more Americans work as transportation workers, such as last-mile delivery drivers, directly involved in the movement of goods or passengers across state lines albeit via short, local trips. When these drivers seek legal relief for alleged

employment law violations, their putative employers seek to enforce arbitration contracts pursuant to the FAA.

The Third Circuit below, along with the First and Ninth Circuits, have concluded that a class of workers cannot meet the requirements of Section 1 unless their work is "primarily devoted to the movement of goods and passengers" interstate, making their jobs "centered on" such work. App. 11a-12a. Thus, though rideshare drivers, the class of workers directly at issue here, perform more than 30 million interstate trips annually, the Third Circuit held the Exemption's catchall clause does not cover the class because the class performed substantially more intra-state trips, making them not "engaged in interstate commerce" under the Exemption.

Meanwhile, the Seventh Circuit interpreted Section 1 in line with its text. Finding "no basis in the text of [the Exemption] for drawing a line between workers who do a lot of interstate transportation work and those who cross state lines only rarely," the Seventh Circuit held "both sorts of workers are 'engaged in foreign or interstate commerce' under the FAA exemption. *Int'l Bhd. of Teamsters Local Union No. 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 958 (7th Cir. 2012).

The Third Circuit's reasoning, despite constituting the majority view, is based upon numerous legal errors. First, the majority view, unlike the Seventh Circuit's analysis, does not determine and apply the ordinary meaning of the Section 1's plain text, contradicting this Court's repeated command to do so. Second, each of the majority circuits narrowly construed the FAA exemption to serve the FAA's supposed policy, which runs afoul of this Court's express rejection of that interpretive canon, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019), and this Court's

clarification that the FAA's policy is not about fostering arbitration but about treating arbitration agreements like any other contract. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022).

Finally, the majority circuits fumbled in the application of *ejusdem generis* by either not examining the work of "railroad employees" during the 1920s, when the FAA was enacted, or, when presented with evidence that railroad workers primarily performed intra-state transportation then, ignoring the evidence in contradiction with this Court's holding against reading a limitation into a catchall clause that is not shared by all the preceding enumerated categories. *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1791-92 (2022).

Only this Court can resolve the circuit split over whether the Exemption covers a class of transportation workers that is directly involved in the movement of goods or passengers across state borders despite primarily engaging in for-hire intra-state transportation. Congress passed the FAA to establish a consistent, nationwide standard for the enforceability of arbitration agreements. Given the national significance and the recurring nature of this issue, coupled with the current divide among the circuit courts of appeals, it is imperative that the Court grant certiorari to provide much-needed clarity.

OPINIONS BELOW

The Third Circuit's opinion is reported at 67 F.4th 550, 553 (3d Cir. 2023) and is reproduced at App. 1a. The district court's decision granting the motion to dismiss in favor of arbitration is reported at 571 F. Supp. 3d 345, 347 (D.N.J. 2021) and reproduced at App. 29a.

JURISDICTION

The Third Circuit entered its decision on April 26, 2023. App. 1a. A timely petition for rehearing was denied by the Third Circuit on July 6, 2023. On September 22, 2023, Justice Alito extended the time within which to file a petition for a writ of certiorari to November 3, 2023. This Court has jurisdiction pursuant to 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.

STATEMENT

A. Statutory Background

The Federal Arbitration Act ("FAA") requires courts to enforce arbitration agreements. 9 U.S.C. §2. However, the FAA does not "apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §1.[1]

1. This Court has considered the FAA's exemption (the "Exemption" or "FAA Exemption") in three cases, *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019), and *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783 (2022). In each case, the Court began with and focused on the meaning of the Exemption's plain text.

In *Circuit City*, the Court decided whether the Exemption's catchall clause—"any other class of workers engaged in interstate commerce—encompassed all workers or a subset of workers involved in the transportation of goods or passengers across state lines. 532 U.S. at 109. The Court determined the catchall clause covered only the "contracts of employment of transportation workers. *Id.* The Court reached this conclusion by applying the canon *ejusdem generis*: Where

1. For simplicity, this brief omits ellipses when shortening "engaged in foreign or interstate commerce" to "engaged in commerce" or "engaged in interstate commerce." Citations to "JA" are to the joint appendix filed in the Third Circuit, and citations to "Doc." are to the Third Circuit docket. In addition, unless otherwise specified, all internal quotation marks, alterations, and citations are omitted from quotations throughout.

a catchall phrase is preceded by a list of specific categories, the catchall phrase "embrace[s] only objects similar" to the enumerated categories. *Id.* at 114-15. The Court found the application of *ejusdem generis* appropriate given the enumeration of "seamen and railroad employees" before the Exemption's catchall clause. *Id.* Finding that the key "linkage" between "seamen" and "railroad employees" is that both are "transportation workers," the Court held the catchall clause's "class of workers" must likewise be involved in the transportation of goods or passengers across state lines. *Id.* at 121.

2. This Court next interpreted the Exemption in *New Prime*, determining whether the Exemption covered contracts with independent contractors or just employees. 139 S. Ct. at 539-43. In doing so, the Court stressed that the Exemption's terms should be given the meaning they had at "the time of the Act's adoption in 1925," not what comes to mind "today." *Id.* at 539. The Court investigated what the terms "employee" and "employed" meant at that time and determined they encompassed independent contractors. *Id.* at 539-41. The Court also observed that many of the Exemption's terms—including "railroad employees"—"swept more broadly at the time of the Act's passage than might seem obvious today." *Id.* at 543.

New Prime also aligned with this Court's holdings in other cases regarding the interpretation of statutory exemptions, *see, e.g., Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019), rejecting the argument that the Exemption must be narrowly construed to serve the FAA's pro-arbitration policy. *Id.* at 543. "By respecting" the Exemption's plain meaning, the Court "respect[s] the limits up to which Congress was prepared to go when adopting the Arbitration Act." *Id.*

3. In *Saxon*, the Court again emphasized its mandate that statutory interpretation be guided by the plain text. 142 S. Ct. at 1783. There, the Court answered whether the Exemption covered a worker who loaded and unloaded airplane cargo. *Id.* at 1787. The Court did so by conducting a two-step analysis: "We begin by defining the relevant 'class of workers' to which [the plaintiff] belongs. Then, we determine whether that class of workers is 'engaged in foreign or interstate commerce.'" *Id.* (quoting 9 U.S.C. §1).

As to the first step, the Court relied on early-1900s dictionaries to define the catchall clause's relevant terms (*i.e.*, "workers" and "engaged") to conclude that the class to which an individual worker belongs is determined by the actual work she frequently or typically performs. *Id.* at 1788. As the plaintiff frequently loaded/unloaded airplane cargo, the Court held she belonged to a class of workers who "typically carr[ied] out" such work. *Id.* at 1788-89.

Having defined the relevant class of workers, the Court turned to whether that class is engaged in interstate commerce under the Exemption. Again, the Court focused on the meaning of the relevant text, "engaged in interstate commerce" at the time of the FAA's enactment. *Id.* at 1788-89. The Court found that "to be 'engaged' in something means to be 'occupied,' 'employed,' or 'involved' in it" and that "commerce" "includes, among other things, the transportation of … goods." *Id.* Thus, the Court concluded, "any class of workers directly involved in transporting goods across state … borders falls within §1's exemption." *Id.* at 1789. As workers who load/unload airplane cargo, as a class, are directly involved in the transportation of property across state lines, the Court held the Exemption covered that class. *Id.* at 1791.

Furthermore, the Court rejected the argument that *ejusdem generis* required the catchall clause to be limited to classes of workers who physically worked aboard the relevant vehicle since "seamen" included only workers working aboard ships and that it was ambiguous whether "railroad employees" was similarly limited. *Id.* at 1791-92. This ambiguity precluded the proposed requirement as, this Court explained, *ejusdem generis* does not permit limiting "a broadly worded catchall phrase based on an attribute that inheres in only of the list's preceding specific terms." *Id.*

B. Factual and procedural background

1. Uber is multibillion-dollar transportation company that provides, *inter alia*, automobile transportation to customers throughout the United States and the world. The plaintiff worked for Uber in New Jersey as a rideshare driver. JA30. He worked full-time in the tri-state area, frequently transporting passengers between New Jersey and New York. *Id.* Uber argues plaintiff, like all its rideshare drivers, was an independent contractor rather than an employee, excusing it from complying with various employee protection laws, including New Jersey's wage laws.

2. In 2016, the plaintiff filed this putative class action lawsuit, alleging Uber had misclassified him and other New Jersey drivers as independent contractors and violated New Jersey wage laws. App. 41-51. At the district court, Uber moved to compel arbitration under the FAA based on an arbitration clause in its "Technology Services Agreement," the company's employment contract with its rideshare drivers. App. 3a-4a. The plaintiff opposed

the motion, arguing the FAA Exemption covered the arbitration contract. App. 30a. Specifically, the plaintiff argued belonged to a "class of workers engaged in interstate commerce" under the Exemption's catchall clause. *Id.*

Whether the Exemption covers Uber's arbitration contract has twice gone before the Third Circuit. App. 4a-6a. Following the first appeal, the court ordered discovery on whether the plaintiff belonged to a "class of workers engaged in interstate commerce" under Exemption's catchall clause before Uber again moved to compel arbitration. App. 4a.

3. Discovery established that Uber drivers carried passengers across state borders more than 140 million times from the 2011 (when Uber had only 1,600 drivers) to May 2020 (when it had millions of drivers) and an average of more than 30 million times per year (2017, 2018, 2019) once the company and the rideshare industry were established. JA197. The average distance of all rideshare trips is 6.1 miles. JA261-JA262. The entire class of rideshare drivers, including drivers for Lyft, which currently has 26% of the U.S. rideshare market, likely crosses state borders with passengers more than 40 million times every year. *See* JA197; *See* Catherine Thorbecke, *How Uber left Lyft in the dust*, CNN (March 29, 2023), https://perma.cc/8JPX-8SUF; Akash Sriram, *Uber shares fall as fears over Lyft's pricing eclipse first operating profit*, Reuters (Aug. 1, 2023), https://perma.cc/A7P7-HXA9 (explaining that Uber's number of rideshare rides have all but returned to pre-pandemic levels).

Nevertheless, the district court held rideshare workers are not a class of workers engaged in interstate commerce because they primarily perform intra-state trips (interstate trips comprise around 2.5% of total trips) and their interstate trips mostly are "short and local," which, according to the district court, is unlike the type of interstate work performed by the Exemption's enumerated classes, "seamen and railroad employees." App. 49a-50a. Therefore, the court reasoned, the canon of *ejusdem generis* precluded the Exemption's catchall clause from covering rideshare drivers. *Id.*

3. The Third Circuit affirmed, adopting the district court's reasoning that, as "the scope of the [Exemption's catchall] clause is controlled and defined by reference to the enumerated categories", App. 2a, if seamen and railroad workers are primarily engaged in long-distance interstate trips, the Exemption's catchall clause covers only classes of workers who likewise primarily engage in long distance interstate trips. App. 7a-8a, 12a.

In doing so, the court did not perform a close reading of the Exemption's text to discern the meaning of its terms at the time the FAA was adopted in 1925 and declined to adopt this Court's determination of what relevant terms and phrases meant in *Saxon*, preferring to rely on pre-*Saxon* sister circuit decisions. App. 11a. Moreover, in support of its application of *ejusdem generis*, the court asserted that "railroad employees" *primarily* engaged in interstate work without citation to any facts, let alone facts about the work performed by railroad workers in the 1920s at the time the FAA was passed, taking it as a given based, presumably, on its modern intuition regarding railroad workers. App. 2a, 7a. Worse still, the

court further disregarded, but did not refute, the evidence the plaintiff cited showing that "railroad employees" primarily performed short, intra-state trips in the 1920s, which Uber expressly conceded (*see* Doc. 68, p. 3). App. 15a. Instead, the court improperly relied on the FAA's policy goal to justify narrowing the Exemption further than its plain text allowed. App. 3a; *see Saxon*, 142 S. Ct. at 1792-93 (rejecting argument that the FAA's purpose justifies narrowing the Exemption further than the plain text supports); *New Prime*, 139 S. Ct. at 543 (same).

The court therefore affirmed the district court's grant of Uber's motion to dismiss and compel arbitration and, thereafter, denied the plaintiff's petition for rehearing.

REASONS FOR GRANTING THE PETITION

I. This case presents an important issue over which there is a clear circuit split.

This case presents an opportunity to resolve an issue that has split the circuit courts: whether a class of transportation workers, who transport tens of millions of passengers across state lines each year, are nevertheless not "engaged in interstate commerce" under the Exemption due to its predominant engagement in intra-state transportation. *See Cunningham v. Lyft, Inc.*, 17 F.4th 244, 252 (1st Cir. 2021) (noting that, as of 2021, "[t]he two circuits that have considered this question reached opposite results"); *see also* App. 16a n.8 (finding the Seventh Circuit's decision in *Kienstra* to be in conflict with "the majority approach of our sister courts"); *see also Golightly v. Uber Techs., Inc.*, 2022 U.S. Dist. LEXIS 229911, at *20-21 (S.D.N.Y. 2022) (detailing how courts of appeals "have come out on both sides" of the issue).

A. The Seventh Circuit was the first circuit court to address this question. *See Int'l Bhd. of Teamsters Loc. Union No. 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 956 (7th Cir. 2012). In *Kienstra*, concrete mixer drivers delivered mostly to intra-state work sites located within three Illinois counties. *Id.* at 956. Suspecting the drivers may have crossed state lines since "those three counties … are in a region of Illinois … directly across the Mississippi River from St. Louis, Missouri", the Seventh Circuit ordered discovery on whether they did so. *Id.* at 956. Based on the testimony of just two of the drivers that their deliveries to Missouri represented just over 2% of each of their total deliveries, the court held the workers were engaged in interstate commerce under the Exemption over the companies' objection that the low proportion of interstate work was insufficient to trigger the Exemption. *Id.* at 958. "[T]here is no basis in the text of [the Exemption] for drawing a line between workers who do a lot of interstate transportation work and those who cross state lines only rarely; both sorts of worker are "engaged in foreign or interstate commerce." *Id.* at 958.

Importantly, the court held the drivers were engaged in interstate commerce even though only two drivers testified and only about their own experiences. *Id.* at 956-58. In other words, the Seventh Circuit treated the concrete mixer drivers as a unit or class and inquired whether the workers, as a class, engaged in interstate commerce rather than whether each driver or some percentage of the drivers crossed state lines. *Id.* at 956-58.

Accordingly, the Seventh Circuit's plain reading of the Exemption's text rejected the argument that whether workers are engaged in interstate commerce under the Exemption can turn on the extent of their intra-state work.

B. Since *Kienstra*, the Ninth Circuit, First Circuit, and Third Circuit (in this matter) reached the opposite conclusion in cases involving rideshare drivers. *Capriole v. Uber Techs., Inc.*, 7 F.4th 854, 863-67 (9th Cir. 2021); *Cunningham v. Lyft, Inc.*, 17 F.4th 244, 250-53 (1st Cir. 2021); App. 10a-23a.

In *Capriole*, the Ninth Circuit focused its analysis "on the inherent nature of the work performed and whether the nature of the work primarily implicates inter- or intrastate commerce." 7 F.4th at 862. Where the Seventh Circuit found "no basis" in the Exemption's text for requiring a class of workers to be primarily engaged, instead of simply engaged, in the transportation of goods or passengers across state lines, the Ninth Circuit found one hidden in the enumeration of "seamen and railroad employees." Those classes, the Ninth Circuit surmised, primarily engaged in "the interstate movement of goods and passengers over long distances and across national or state lines." *Id.* at 865. The court evidently reached this conclusion of fact based on its common knowledge of what those workers do today as it did not cite to any facts or record regarding the work of seamen or railroad workers let alone what those workers were doing in 1925.[2] *Cf. New*

2. All three circuits on this side of the split, in *Capriole*, *Cunningham*, and *Singh*, relied on erroneous assumptions about the work performed by seamen and railroad workers—that they primarily engage in long distance and interstate work—based, apparently, on modern intuition rather than an investigation of the facts as they stood in 1925. As this Court has made clear, the meaning of a statute's terms at the time of its passage is the relevant inquiry. *New Prime*, 139 S. Ct. At 539. As discussed *infra*, an examination of railroad transportation in the 1920s demonstrates railroad workers primarily engaged in the intra-state transportation not interstate.

Prime, 139 S. Ct. at 541-43 (rejecting argument that the present-day understanding of the terms "employees" and "employment" as being distinct from independent contractors should control the interpretation of those terms in the Exemption rather than their meaning in 1925, which encompassed all workers). Relying on the fact that 2.5% of Uber rideshare trips cross state lines, the court concluded that Uber drivers, "as a class, are not engaged in interstate commerce because their work predominantly entails intrastate trips[.]" *Capriole*, 7 F.4th at 864. The court further supported its conclusion by determining not all interstate work is equal. The trips rideshare drivers make across state lines, the court reasoned, "are inherently local in nature" and occur due to "happenstance of geography" (*i.e.,* involving passengers who live near state lines) unlike the long-distance work performed by seamen/railroad workers. *Id.* at 864-65. Thus, the court determined, the interstate trips performed by rideshare drivers "do not alter the intrastate transportation function performed by the class of workers." *Id.* at 864.

In *Cunningham*, the First Circuit framed the question as follows: "Does a class of workers qualify under [the Exemption] if many but not all of the workers cross state lines on a very small percentage of their trips?" *Id.* at 252. After analyzing the circuit split on the question created by *Kienstra* and *Capriole*, the court followed the *Capriole*'s reasoning and adopted its creation of a (false) dichotomy between classes of workers primarily engaged in interstate work and those primarily engaged in intra-state work. *Id.* at 252-53. The court held that Lyft drivers are not engaged in interstate commerce under the Exemption because "[t]hey are among a class of workers engaged *primarily* in *local* intrastate

transportation." *Id.* (emphasis added). The First Circuit, like *Capriole*, minimized the interstate trips performed by drivers by distinguishing between the local nature of that work and the work performed by the Exemption's enumerated classes, finding rideshare drivers' work to be "fundamentally unlike seamen and railroad employees." *Id.* at 253.

The Third Circuit below followed *Capriole*/*Cunningham*, holding that, as with the Exemption's enumerated classes, seamen and railroad workers, the catchall clause's "class of workers" must be "*primarily* devoted to the movement of goods and people beyond state boundaries" to be engaged in interstate commerce under the Exemption. App. 12a (emphasis added). The court also followed *Capriole* and *Cunningham*, *see* App. 7a-8a, in negating the interstate trips performed by rideshare drivers (around 30 million per year by Uber drivers alone) as "inherently local in nature" and interstate only due to "happenstance of geography" thus making them, for purposes of the Exemption, intra-state rather than interstate. App. 16a-17a. The court expressly declined to follow *Kienstra*, finding it conflicted with "the majority approach of our sister courts." App. 16a n.8.

C. This Court should settle this circuit split. Millions of Americans work as rideshare drivers. In 2017 alone, 3.75 million people worked for Uber in the U.S. JA197. In 2018, 2019, and 2020 (through May), 3.6, 3.3, and 2.4 million people worked for Uber, respectively. *Id.* Today, rideshare trips have returned to pre-COVID-19 pandemic levels. *See* Akash Sriram, *Uber shares fall as fears over Lyft's pricing eclipse first operating profit*, Reuters (Aug. 1, 2023), https://perma.cc/A7P7-HXA9. The question here,

worthy of granting the Petition on its own, is whether these companies can enforce, via the FAA, arbitration agreements against a significant and growing segment of the American workforce.

Moreover, the split's impact extends beyond rideshare drivers. It affects last-mile delivery drivers and other "inherently local" transportation workers who, despite their localized work, nevertheless "play a direct and necessary role" in the transportation of goods or passengers across state borders. *Saxon*, 142 S. Ct. at 1790. The Ninth, First, and Third Circuits, as discussed *supra*, distinguish between "inherently local" interstate work and long-distance interstate work, and held the Exemption covers only long-distance interstate work. *See, e.g.*, App. 3a, 12a. These courts reached this conclusion by surmising the Exemption's enumerated categories of workers (seamen and railroad workers) primarily engage in long-distance, interstate journeys.

Pertinently, "last mile" or "last leg" delivery drivers, despite their necessary role in the final intra-state segment of an interstate journey, *see, e.g., Carmona v. Domino's Pizza, LLC*, 73 F.4th 1135, 1138 (9th Cir. 2023), find themselves in a similar situation as rideshare drivers in not transporting goods or passengers over long distances, which seamen and railroad workers, according to *Capriole*, *Cunningham*, and *Singh*, primarily engage in. Under these cases, the Exemption's catchall clause does not cover the class of last-mile delivery drivers and other classes of transportation workers whose engagement in interstate commerce is local in nature and characterized by short trips.

Accordingly, this Court should grant the Petition to settle the circuit split on this important issue.

II. The Third Circuit's decision conflicts with this Court's precedent.

The decision below holds that a class of transportation workers, who perform over 30 million interstate passenger trips annually, is not a "class of workers engaged in interstate commerce" under the Exemption. This holding conflicts with this Court's Exemption cases, *Saxon*, *New Prime*, and *Circuit City*. It also conflicts with this Court's decision in *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022), which clarifies the FAA's federal policy.

The Third Circuit deviated from this Court's precedents due to several errors. First, the court failed to perform a textual analysis of the Exemption's text to determine its ordinary meaning at the time of enactment in 1925 as required by *Saxon*, *New Prime*, and *Circuit City*. Second, the court narrowly construed the Exemption to further the FAA's supposed purpose in contradiction of this Court's express rejection of that canon of interpretation. *See e.g., New Prime*, 139 S. Ct. at 543. Third, the court's application of *ejusdem generis* conflicts with *Saxon*'s holding that *ejusdem generis* does "not permit ... limit[ing] a broadly worded catchall phrase based on an attribute that inheres in only one of the list's preceding specific terms." 142 S. Ct. at 1792. Finally, the court conflated this Court's two separate analyses in *Saxon* in contradiction of *Saxon*.

In short, the court failed to follow the guidance issued in *Saxon* or *New Prime*, opting instead to follow a line of pre-*Saxon* circuit court cases. As the decision below risks

cementing the *Capriole*, *Cunningham*, and *Singh* side of the circuit split as the law of the land regarding rideshare drivers, this Court should also grant the Petition to correct the Third Circuit's errors of law.

A. Despite this Court's repeated directive to begin an interpretation "with the text", *see, e.g., Saxon*, 142 S. Ct. at 1789, the Third Circuit did not perform a close analysis of the Exemption's text. The court didn't determine the ordinary meaning of a single word of the Exemption as of 1925 and, compounding its error, disregarded this Court's analysis of the *same* text in *Saxon*.

In *Saxon*, this Court explained nearly word-by-word the meaning of the Exemption's phrase "engaged in foreign or interstate commerce." 142 S. Ct. at 1788-89. Relying on early-1900s dictionaries, the Court held that "to be 'engaged' in something means to be 'occupied,' 'employed,' or 'involved' in it" and that "commerce" "includes, among other things, 'the transportation of … goods[.]"[3] *Id*. The meanings of "foreign" and "interstate" being too obvious to warrant citation to dictionaries, the Court concluded, "[t]hus, any class of workers directly involved in transporting goods across state or international borders falls within §1's exemption." *Id.* at 1789.

This Court looked beyond the "engaged in commerce" phrase solely to show that statutory "context confirm[ed] this reading." *Id.* at 1785. It also clarified that the requirement to be "directly" involved in transportation pertains to the proximity of the work in question to the physical movement of goods/passengers across state lines.

3. The quoted phrase in full is "the transportation of persons as well as goods[.]" Black's Law Dictionary 221 (2d ed. 1910).

While the *Saxon* airplane cargo loaders didn't physically transport the cargo, their loading/unloading activities were, "as a practical matter, part of the interstate transportation of goods." *Id.* at 1789. *Saxon* distinguished such work from other "activities far more removed from interstate commerce" like the intra-state sale of asphalt used on interstate highways. *Id.* at 1792.

Under *Saxon*, rideshare drivers plainly belong to a class of workers "directly involved in transporting" passengers across state borders. As a class, rideshare drivers perform more than 30 million trips that cross state borders each year.[4] There is no more *direct* engagement in interstate commerce than physically moving passengers/goods across state lines.

The court declined to adopt *Saxon*'s determination of the meaning of "engaged in interstate commerce" under the Exemption. Instead, the court independently explored the phrase's meaning, leaning on pre-*Saxon* sister circuit decisions from to assert the Exemption covers only classes of workers "primarily devoted to the movement of goods and passengers" interstate, making their jobs "centered on the transport" of goods or passengers interstate. App. 11a-12a (internal quotation marks omitted) (citing, *e.g.*, *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020)[5]).

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4. 30 million interstate trips includes only Uber rideshare trips and excludes Uber's largest competitor, Lyft. Uber currently has 74% of the U.S. rideshare market to Lyft's 26%. *See* Catherine Thorbecke, *How Uber left Lyft in the dust*, CNN (March 29, 2023), https://perma.cc/8JPX-8SUF.

5. Notably, *Wallace*, the origin of the "central part" requirement, did not involve workers who alleged they crossed

The Exemption's text doesn't contain "primarily" or any other qualifier requiring a class to be primarily engaged in interstate commerce. Congress has demonstrated, including in legislation pre-dating the FAA, its ability to qualify actions, including being "engaged", when it wishes to require that a certain activity be the predominant, most important, or central activity. *See, e.g.,* Bankruptcy Act of 1898, 30 Stat. 544, §4 (protecting "any corporation engaged principally in manufacturing, [et al.] …."); Meat Inspection Act, as amended, 52 Stat. 1235 (definitions of "farmer," *et al.* requiring person to be "chiefly engaged"). The Third Circuit said it found the requirement to be primarily engaged requirement not in the Exemption's plain text but in its enumeration of "seamen and railroad employees." App. 12a. Invoking this Court's mandate in *Circuit City*, 532 U.S. at 115 that pursuant to *ejusdem generis* the scope of the catchall clause is "controlled and defined by reference to the enumerated categories," the court reasoned that because "[s]eamen and railroad workers are primarily devoted to the movement of goods and people beyond state boundaries," the Exemption's catchall clause covers only classes of workers sharing this characteristic. *Id.*

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state lines. *Wallace v. GrubHub Holdings Inc.*, 2019 U.S. Dist. LEXIS 52629, at *7 (N.D. Ill.2019) ("Plaintiffs here do not argue that they crossed state lines."). Instead, the drivers argued they engaged in interstate commerce because they delivered meals prepared using items that previously traveled interstate. *Wallace*, 970 F.3d at 802. Moreover, *Wallace*, being a Seventh Circuit decision, is controlled by and cannot overrule *Kienstra*, which involved workers who did travel across state lines. *See* Circuit Rule 40(e).

As explained below in detail, the court's *ejusdem generis* application is flawed. First, this Court already identified the key characteristic shared by seamen and railroad employees in *Circuit City* and *Saxon* based on *ejusdem generis*—they are classes *directly* involved in the transportation of goods and passengers. *Circuit City*, 532 U.S. at 114-15; *Saxon*, 142 S. Ct. at 1789-90. Second, the Third Circuit's application of *ejusdem generis* relies on a misconception that "railroad employees" primarily perform long-distance interstate trips. Maybe that's true today, "[b]ut this modern intuition isn't easily squared with evidence" of the work railroad workers performed in 1925. *Cf. New Prime*, 139 S. Ct. at 539-40 (rejecting modern meaning of employment, which excludes independent contractor, in interpreting "employment" in the Exemption). In reality, as demonstrated to the Third Circuit and *infra*, railroad workers at that time were primarily engaged in intra-state transportation. Below, Uber conceded this, *see* Doc. 68, p. 3, and the court did *not* refute it, demonstrating the court didn't apply *ejusdem generis* so much as it presumed *Capriole* and *Cunningham* did it right and adopted their conclusion without analysis.

These errors resulted in the court erroneously adding a requirement to *Saxon*'s test and the Exemption's text: not only must a class of workers be directly involved in transporting goods/passengers across borders, it also must primarily be involved in long-distance interstate transportation.

The superficiality of this analysis is highlighted by the court contradicting its test right after stating it, allowing that it's possible "[a]n occurrence may be central

to a worker's job description even if it is rare," curiously quoting *Islam v. Lyft, Inc.*, 524 F. Supp. 3d 338, 351 (S.D.N.Y. 2021), where the court held rideshare drivers, as a class, are engaged in interstate commerce under the Exemption. App. 19a.

Despite this hedge, the court held rideshare drivers are not engaged in interstate commerce under the Exemption—despite performing more than 30 million interstate trips per year—simply because they performed a significantly higher number of intra-state trips. App. 17a-19a. Specifically, the court disregarded rideshare drivers' performance of interstate trips, deeming them merely "local rides that sometimes—as a happenstance of geography—cross state borders" and found relevant that many drivers never performed an interstate trip. App. 16a-17a. In reaching this erroneous conclusion, the court again failed to examine the plain meaning of the Exemption's text, neglecting to apply the ordinary meaning of the Exemption's terms "interstate" and "class."

First, the court's minimizing of drivers' trips across state lines as something other than interstate commerce conflicts with the meaning of that term in 1925 (or any other time), which is "between places … in different states." Black's Law Dictionary 651 (2d ed. 1910) ("Black's"). Moreover, although *Saxon* did not expressly define "interstate," this Court left no doubt it means no more than crossing state borders. 142 S. Ct. at 1789. After defining "engaged" to mean "involved" and "commerce" to mean the transportation of goods, as explained *supra*, the Court defined the entire phrase "engaged in interstate commerce" to mean "involved in transporting goods across state … borders." *Id.*

Furthermore, prior to 1925 and after, this Court repeatedly rejected similar attempts to characterize short interstate trips as "local commerce" or something other than interstate commerce. *See, e.g., Kirmeyer v. Kansas*, 236 U.S. 568, 572 (1915); *U.S. v. Hubbard*, 266 U.S. 474, 476 (1925); *W. Union Tel. Co. v. Speight*, 254 U.S. 17, 18 (1920); *Cent. Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 659-61 (1948).

In *Kirmeyer*, a Leavenworth, Kansas beer distributor opened an office across the river in Stillings, Missouri to evade Kansas' prohibition law. 236 U.S. at 570-71. He received the beer in Stillings and transported it across the river to customers in Leavenworth via wagons. *Id.* This Court held he was engaged in interstate commerce, stating, "[t]hat the traffic moved by horse-drawn wagons from a point near the state line, instead of by railroad from a greater distance, does not change the applicable rule." *Id.* at 572.

In *Hubbard*, this Court reversed rulings in two cases that held interurban railroads, primarily operating in Ohio except for a section extending to a neighboring state's city, were not subject to the Interstate Commerce Act, rejecting the dissent's objection that the railroads were "essentially local in nature." *Hubbard*, 266 U.S. at 478-89, 81.

In *Speight*, the appeals court ruled a telegraph company's transmission of a telegram between points within North Carolina didn't qualify as interstate commerce even though the transmission traversed lines that ran into Virginia before re-entering North Carolina. 254 U.S. at 18-19. The court reasoned that because the telegram technically could have been transmitted via

lines entirely within North Carolina, it didn't constitute interstate commerce. *Id.* at 19. This Court dismissed the notion that only commerce that necessarily crossed, rather than happened to cross (*e.g.,* as a happenstance of geography), state lines is interstate commerce; "the transmission of a message through two states was interstate commerce as a matter of fact." *Id.*

Finally, in *Mealey*, this Court held bus travel in the New York/Pennsylvania/New Jersey tri-state area that crossed state lines was "of course" interstate commerce. 334 U.S. at 661. "To call commerce in fact interstate 'local commerce' … is to indulge in a fiction." *Id.* at 659.

The only case from this Court the Third Circuit relied upon in determining that rideshare drivers' substantial provision of interstate transportation did not constitute engagement in interstate commerce due to its local nature was *Omaha & Council Bluffs St. Ry. Co. v. Interstate Com. Comm'n*, 230 U.S. 324, 335-36 (1913). App. 22a. The court misconstrued *Omaha*, interpreting it as "holding that street railroads are not engaged in interstate commerce because they 'are local … and for the use of a single community even though that community be divided by state lines.'" *Id.* (quoting *Omaha*, 230 U.S. at 335-36). But *Omaha* didn't address whether a street railroad that operated within a community and extended over a state line was engaged in interstate commerce since "[w]hen these street railroads carry passengers across a state line they are, *of course*, engaged in interstate commerce." *Omaha*, 230 U.S. at 336 (emphasis added)). Instead, the question was whether the street railroad's engagement in interstate commerce was subject to the Interstate Commerce Act ("ICA"). It was not, as the street

railroad's interstate commerce were "not the commerce which Congress had in mind when" it enacted the ICA. *Id.* at 335-36 (holding the term "railroad" in the ICA did not encompass street railroads based on the statute's context). Accordingly, *Omaha* further supports the conclusion that transportation of goods/passengers across state lines, whether long distance or local in nature, is interstate commerce.

Finally, the Third Circuit also failed to apply the meaning "class" in the Exemption. Specifically, the court's focus on the number of drivers who never crossed state lines fails to give effect to the term. App. 17a. "Class" is defined as "a group of persons or things, taken collectively, having certain qualities in common, and constituting *a unit* for certain purposes." Black's 206 (emphasis added). Investigating how many individual workers in a class cross state lines definitionally is not treating the workers *as a unit* when determining whether *it*, the class, is engaged in interstate commerce.

B. The lack of a close analysis of the Exemption's text below may have resulted from the Third Circuit's adherence to an interpretive canon this Court has held invalid: narrowly construing a statutory exemption to further the statute's overall policy goal. The court's Exemption analysis was "guid[ed]" by its conviction that "the FAA's statutory context and *purpose* compel[ed]" it to narrowly construe the Exemption. App. 3a (emphasis added). Both grounds conflict with this Court's precedents.

As to narrowly construing the Exemption to serve the FAA's purpose, this Court has "made clear that statutory exceptions are to be read fairly, not narrowly." *See, e.g.*,

Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019). Statutory "exemptions are as much a part of [a statute's] purposes and policies as" the rest of a statute's provisions. *Food Mktg. Inst.* 139 S. Ct. at 2366 (refusing to constrict a FOIA exemption to further FOIA's purpose "by adding limitations found nowhere in its terms").

In recent Exemption cases, this Court has held to this rule, rejecting the argument that it should "err[] on the side of" narrowing the Exemption's scope to serve the FAA's supposed purpose. *Saxon*, 142 S. Ct. at 1792-93; *New Prime*, 139 S. Ct. at 543. In both cases, the Court stated it was "not free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal." *Saxon*, 142 S. Ct. at 1782; *New Prime*, 139 S. Ct. at 543. "By respecting the qualifications of §1 today, we respect the limits up to which Congress was prepared to go when adopting the [FAA]." *New Prime*, 139 S. Ct. at 543. Accordingly, the Third Circuit had "no warrant to elevate vague invocations of statutory purpose over the words Congress chose." *Saxon*, 142 S. Ct. at 1792-93.

Even if the Third Circuit had such warrant, the court misconstrued and therefore failed to serve the FAA's actual policy. The court evidently believed the FAA's policy was to favor cases proceeding in arbitration rather than court. This Court has clarified that the FAA's "policy is about treating arbitration contracts[6] like all others, *not* about fostering arbitration." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022) (emphasis added). Thus, this Court rejects the argument that the FAA's purpose

6. Except, of course, for "contracts of employment of any … class of workers engaged in interstate commerce." 9 U.S.C. 1.

gives license to putting a thumb on the scale in favor of arbitration. *Id.* (overruling requirement that a party demonstrate prejudice to establish waiver of the right to arbitration, which is not required to establish waiver of other contractual rights); *see Saxon*, 142 S. Ct. at 1792-93; *New Prime*, 139 S. Ct. at 543.

Regarding the court's reference to statutory context as a justification for narrowly construing the Exemption, *see* App. 3a, the court misinterpreted *Circuit City* and once again failed to follow *Saxon*. In *Circuit City*, this Court scrutinized the Exemption to ascertain if its "engaged in commerce" phrase carried the same expansive scope as Section 2's "involving commerce," which would have broadened the Exemption to encompass all employment contracts, not just those of transportation workers. 532 U.S. at 109. This Court concluded it did not, drawing on an application of *ejusdem generis* to the enumeration of "seamen and railroad employees" preceding the Exemption's catchall clause and Congress's choice of the narrower term "engaged" over "involving." *Id.* at 114-16. Only then did the Court venture into other considerations to probe if any provided a "reason to abandon the precise reading of" the Exemption. *Id.* at 118-19. Finding none, this Court assessed the "engaged in commerce" phrase "with reference to the statutory context in which it is found" and reaffirmed that "the location of the phrase 'any other class of workers engaged in commerce' in a catchall provision following the enumeration of specific categories of workers, undermines any attempt to give the provision a sweeping, open-ended construction." *Id.* at 118. In *Saxon*, this Court declined, at the urging of several amici curiae, including Uber and Lyft, to construe the Exemption more narrowly than the plain meaning of its text by adopting

a requirement that engaging in interstate commerce be "a central part of the class members' job description." Instead, *Saxon* reiterated that the enumeration of "seamen and railroad employees" "showed that §1 exempted only contracts with transportation workers" engaged in interstate commerce. *Id.* at 1789-90 (citing *Circuit City*, 532 U.S. at 119).

Accordingly, this Court twice has confirmed that the key shared characteristic between "seamen and railroad employees" is that they are transportation workers. This Court's application of *ejusdem generis*, in contrast to the Third Circuit's application, heeds common advice for applying *ejusdem generis*. "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." *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 207-08 (2012); *Victoria's Secret Direct, L.L.C. v. United States*, 769 F.3d 1102, 1107 (Fed. Cir. 2014) (applying same). *Ejusdem generis* "rests … on practical insights about everyday language usage" and is not "an abstract exercise in semantics and formal logic." 2A Norman Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* §47:18 (7th ed. 2007).

A reasonable person, in 1925, if asked to define the shared characteristic between seamen and railroad employees would have answered in line with *Circuit City* and *Saxon*—transportation workers. As sea and rail comprised nearly all transportation at that time, there would be no reason to further specify.

C. Even if *ejusdem generis* could be employed to narrow the Exemption further than *Circuit City* and

Saxon outlined, the Third Circuit's application is flawed. As demonstrated *infra*, conceded by Uber, and not refuted by the court below, in the 1920s, railroad workers predominantly provided local intra-state, rather than long-distance interstate, transportation via electric railroads, including interurban and street railroads. Accordingly, *ejusdem generis* provides no basis to conclude the catchall clause covers only classes of workers primarily engaged in long-distance interstate transportation. *See Saxon*, 142 S. Ct. at 1792 (holding *ejusdem generis* does not permit limiting the Exemption's catchall clause based on a characteristic that only one of the two enumerated classes features).

In *Omaha*, this Court established that Congress' usage of the term "railroad" in a statute encompassed electric railroads, including street and interurban railroads, unless the statute's context excluded them from the term's meaning. 230 U.S. at 336. There, the Court evaluated whether the ICA, which covered, in relevant part, "carriers engaged in the transportation of passengers … by railroad" between states, 24 Stat. 379 §1, covered a street railroad that extended across a state line. *Id.* The Court held the ICA's term "railroad" excluded street railroads because "every provision … is applicable to" town-to-town railroads while "[o]nly a few of its requirements are applicable to street railroads," which operate within single communities. *Id.* at 336-37.

In accordance with *Omaha*, Congress has excluded interurban and/or street railroads from the definition of "railroad" when it desired to do so. *See, e.g.,* Newland Act (1918), 40 Stat. 452, Ch. 25, §1; Locomotive Inspection Act ("LCA"), as amended, 43 Stat. 659, Ch. 355, §1;

Railway Labor Act ("RLA"), 69 Stat. 577, Ch. 347, §1. Notably, in 1924, Congress amended the LCA, which covered common carriers by railroad, to expressly limit its coverage to carriers "subject to the [ICA] … excluding street, suburban, and interurban electric railways." 43 Stat. 659, Ch. 355, §1. And in 1926, Congress passed the RLA, which included a near-identical exclusion. 69 Stat. 577, Ch. 347, §1.

Moreover, in January 1925, this Court held two Ohio interurban railroads, one of which spanned only 16 total miles,[7] that each extended interstate to a town abutting Ohio's border, were covered by the ICA's term "railroad" over the dissent's objection that they were "essentially local in nature." *Hubbard*, 266 U.S. at 478-89, 491; *Hubbard v. U.S.*, 278 F. 754, 757 (N.D. Ohio 1922) (describing the railroad's extension into Pennsylvania as "a fractional part of a mile")). The Court rested its conclusion on the text of the ICA, which stated it applied to "any common carrier … engaged in the transportation of passengers or property … by railroad." *Hubbard*, 266 U.S. at 478-89 (citing cases where this Court held other statutes that covered "common carrier[s] by railroad", such as the Federal Employers' Liability Act, covered interurban railroads when such railroads spanned across a state line).

Within this context, in February 1925, Congress passed the FAA and declined to include any language

7. Uber rideshare drivers' average trip distance of 6.1 miles, *see* JA261, indicates the class performs hundreds of millions of interurban trips, as trips exceeding 6 miles often span the distances between towns and from cities to their surrounding suburban towns.

limiting the scope of the term "railroad employees." 9 U.S.C. §1. Accordingly, "railroad employees" includes interurban and street railroad workers. Together these workers provided 15.3 billion passenger trips in 1922. *See* U.S. Bureau of the Census, *Census of Electric Industries, 1922: Electric Railways, Vol. 2*, Table: Census of Electric Railways, 1922: United States[8] (U.S. Government Printing Office, 1925), https://perma.cc/9CNZ-ZSJM[9] (showing that, in 1922, 15.3 billion passenger trips were done on electric railways). Class I trains, in contrast, provided only 967 million passenger trips in the same year, the great majority of whom also traveled intra-state as the average journey was only 36.66 miles. *Scientific and Technical Mobilization, Hearings Before a Subcomm. of the S. Committee on Military Affairs*, Part 15, Exhibit 390, p. 1780, Table V (Aug. 17, 1944), https://perma.cc/M3X6-VXUX (showing, for 1922, only 967,409,000 passenger trips for Class I trains).

Under *Saxon*, determining conclusively whether the Exemption's "railroad employees" predominantly carried out intra-state work as of 1925 isn't necessary. The mere ambiguity suffices to reject being primarily engaged in interstate commerce as a requirement of the Exemption based on *ejusdem generis* since "railroad employees" do "not necessarily share that attribute." *See Saxon*, 142 S. Ct. at 1791-92. In *Saxon*, this Court rejected Southwest's claim that the Exemption covered only classes of workers who worked aboard a vehicle because

8. The Census of Electric Railways also provides tables of data for each state. The cited table, which provides data for the entire U.S., is the final table of the document.

9. All links for citations last visited on November 2, 2023.

it was at least ambiguous whether one of the two classes, "railroad employees", shared this attribute. *Id.* at 1792 (emphasis added). "*Ejusdem generis* neither necessitates nor permits limit[ing] a broadly worded catchall phrase based on an attribute that inheres in only one of the list's preceding specific terms." *Id.*

Presented with this evidence, Uber conceded the point below. *See* Doc. 68, p. 3 (falling back on a *new* argument that interstate work can still be a "central part of railroad employees' job description even if it does not constitute the majority of trips by rail" (internal quotation marks and emphasis omitted)). The Third Circuit did not refute or otherwise express any doubt about the conclusion that, in the 1920s, railroad workers primarily engaged in intra-state rather than interstate work. The court simply waved the fact aside, revealing it was not truly applying *ejusdem generis* but rather relying on the catchall clause's reference to "engaged in interstate commerce":

> We are unpersuaded by Singh's argument that there is no way to know that the key shared characteristic of "seamen" and "railroad employees" is having a job centered on interstate commerce. Congress meant to identify engagement in interstate commerce as the enumerated categories' key shared characteristic. The FAA's text makes it explicit—the residual clause requires that a class of workers is "engaged in interstate commerce" This text is the best evidence of Congress' intent.

App. 15a. The court did not cite any case in which a court relied on the catchall clause's language to interpret

the meaning of the enumerated "seamen and railroad employees" so that it could then return to and interpret the catchall clause's meaning. This is textbook example of circular reasoning rather than the application of *ejusdem generis*. Nor does the court explain how, after determining that being engaged in interstate commerce is the shared trait between seamen and railroad workers, it arrived at its conclusion that the Exemption requires classes to be *primarily* or *predominantly* engaged in interstate commerce. Again, the Exemption does not contain those words or any other adverb qualifying "engaged in interstate commerce."

D. To reconcile its holding that a class must be "primarily devoted" to moving goods/passengers interstate, App. 12a, with *Saxon*'s straightforward interpretation, which requires a class be directly involved in the transportation of goods or passengers across state lines, the Third Circuit muddled this Court's two, distinct analyses in *Saxon*.

In *Saxon*, this Court addressed two distinct issues regarding the Exemption: 1) how to define the relevant class of workers to which an individual belongs, and 2) how to determine whether a class of workers is engaged in interstate commerce. 142 S. Ct. at 1788-90. As to the first issue, the Court held that the class to which an individual belongs is determined by the actual work typically performed. *Id.* at 1788. As the worker at issue frequently loaded and unloaded airplane cargo, the Court held she belonged to a class of workers who "typically carr[ied] out" such work. *Id.* at 1788-89.

Only *after* defining the relevant class of workers did this Court turn to whether those workers, as a class,

were engaged in interstate commerce. *Saxon* did so by examining whether the work performed by the class qualified as being "directly involved in transporting goods across state or international borders." *Id.* at 1789-90.

Below, the court improperly merged the two, separate analyses, misconstruing this Court's metric for determining class membership (*i.e.*, the work an *individual* worker "typically" or "frequently" performs) as a requirement that the workers in a class must "typically" or "frequently" cross state lines. App. 16a. Specifically, the court asserted *Saxon* required rideshare drivers to frequently or "typically carry out" transporting passengers across borders, reasoning that would make the activity "central" to each rideshare driver's work. *Id.* Importantly, the court repeated its mistake, explained *supra*, of considering what each individual driver does rather than what the class of workers, as a unit, does. *Id.* As the class in this matter continuously—more than once per second every second of the year—crosses state borders, even under the Third Circuit's erroneous reasoning, the *class* would meet the court's requirement.

Moreover, if the court's reasoning on this point stood, it follows that a class of workers could be defined not only by the physical work they performed but also by how often they cross state lines. This would mean the plaintiff here, who worked in the Newark, New Jersey/New York City, New York region and frequently transported passengers between the two states, would belong to a class of workers comprised of interstate rideshare drivers, as opposed to drivers who do not frequently cross state lines (intrastate rideshare drivers).

The Third Circuit's decision is palpably incorrect as the plain language of the Exemption does not contain the requirement that a class of workers, such as rideshare drivers, be primarily engaged in interstate commerce. This Court thus should grant the petition to correct this misinterpretation.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED APRIL 26, 2023

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-3234

JASWINDER SINGH, ON BEHALF OF HIMSELF AND ALL THOSE SIMILARLY SITUATED,

Appellant,

v.

UBER TECHNOLOGIES, INC.

No. 21-3363

JAMES CALABRESE; GREGORY CABANILLAS; MATTHEW MECHANIC, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Appellants,

v.

UBER TECHNOLOGIES, INC.; RAISER, LLC.

Appendix A

On Appeal from the United States District Court for the District of New Jersey. (D.C. Civil Action Nos. 3-16-cv-03044 and 3-19-cv-18371). District Judge: Honorable Freda L. Wolfson.

November 8, 2022, Argued
April 26, 2023, Filed

Before: JORDAN, SCIRICA, and RENDELL, Circuit Judges.

OPINION OF THE COURT

SCIRICA, *Circuit Judge.*

The Federal Arbitration Act (FAA) compels federal courts to enforce a wide range of arbitration agreements. But it does not apply to arbitration agreements contained in the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. These consolidated appeals ask us to decide whether Uber drivers belong to such a class of workers. We conclude, as have our sister circuits, that they do not. The work of Uber drivers is centered on local transportation. Most Uber drivers have never made a single interstate trip. When Uber drivers do cross state lines, they do so only incidentally, as part of Uber's fundamentally local transportation business. As a result, they are not "engaged in foreign or interstate commerce" for the purposes of § 1 of the FAA. The District Court reached this conclusion in a detailed and carefully reasoned opinion. We will affirm.

Appendix A

I.

The FAA, enacted "in response to a perception that courts were unduly hostile to arbitration," *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621, 200 L. Ed. 2d 889 (2018), requires courts to "'rigorously enforce' arbitration agreements according to their terms," *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013) (citation omitted). But the FAA's scope is not limitless. Expressly exempted from its coverage are arbitration agreements within the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001). Our decision addresses the scope of that final phrase—"any other class of workers engaged in foreign or interstate commerce"—otherwise known as the "residual clause."

Two principles guide our analysis. First, the FAA's statutory context and purpose compel us to give § 1 "a narrow construction." *Circuit City*, 532 U.S. at 118. Second, the scope of the residual clause is "controlled and defined by reference to the enumerated categories" of seamen and railroad workers designated in the statute. *Id.* at 115.

A.

This consolidated appeal arises out of two cases filed against Uber by its drivers—*Singh v. Uber Technologies*

and *Calabrese v. Uber Technologies*. In each case, Uber successfully moved to compel arbitration under the terms of its agreements with the drivers. We described the facts of Singh's case in our previous decision, *Singh v. Uber Technologies, Inc.*, 939 F.3d 210 (3d Cir. 2019), and briefly review them here.

Plaintiffs are current or former Uber drivers from many different states—New Jersey, New York, Ohio, Pennsylvania, Missouri, and Nevada. At one time or another, each agreed to a contract Uber calls its "Technology Services Agreement" as a condition of using Uber's platform. The content of the relevant provisions of the agreement is not in dispute.

The agreement requires drivers to "resolve disputes with [Uber] on an individual basis through final and binding arbitration unless [the driver] choose[s] to opt out." JA3, 168 (emphasis omitted). This includes "every claim or dispute that lawfully can be arbitrated," save a few specific exceptions. JA153. Under the agreement, an arbitrator—not "a court or judge"—is to decide any dispute "relating to interpretation or application" of the provision, including its "enforceability, revocability or validity." JA4, JA82. Drivers who do not wish to be bound by the arbitration provisions may opt out by sending Uber an email or letter to that effect.

Singh's case began six years ago as a putative class action in New Jersey state court. *Singh*, 939 F.3d at 215. Singh alleged Uber had violated New Jersey wage and hour laws by misclassifying drivers as independent

contractors, had failed to pay them the minimum wage, and had failed to reimburse them for business expenses. Uber removed the action and then successfully moved to dismiss the case and compel arbitration pursuant to the terms of its arbitration agreement with Singh. *Id.* at 216. The District Court held that § 1 applied only to transportation workers who move goods, not those who carry passengers. *Id.* at 216-17. Singh appealed to this Court and we reversed, holding that the exception applies equally to "transportation workers who transport passengers, so long as they are engaged in interstate commerce or in work so closely related thereto as to be in practical effect part of it." *Id.* at 214. We reaffirmed our longstanding view of the residual clause as including those classes of workers "actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it." *Id.* at 220 (quoting *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., (U.E.) Local 437*, 207 F.2d 450, 452 (3d Cir. 1953) (en banc)).

We remanded to the District Court to determine whether Singh belonged to a class of transportation workers "engaged in interstate commerce." *Id.* at 226-27. Because this question could not be answered from the complaint alone, we directed that "discovery must be allowed before entertaining further briefing on the question." *Id.* at 226. We encouraged the District Court to consider "various factors," including but not limited to "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 227-28.

Calabrese filed his case in the District of New Jersey in September 2019, just a few weeks after our decision in *Singh*. The District Court consolidated the case with Singh's and ordered joint discovery. Like Singh, Calabrese claimed that Uber had violated various labor and employment laws. He also sought to proceed collectively under the Fair Labor Standards Act.[1]

The District Court ordered that joint discovery before again ruling in Uber's favor and compelling arbitration. The court defined the relevant class as Uber drivers nationwide. Based on the record developed in discovery and the factors listed above, the court determined that neither the arbitration agreement nor the total number of cross-border trips was dispositive. More significant, the court found, was "evidence that [interstate] rides constitute just 2% of all rides, resemble in character the other 98% of rides, and likely occur due to the happenstance of geography." JA32.

The District Court compelled arbitration in a thorough and well-reasoned opinion.

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1. Several additional plaintiffs opted in to Calabrese's case. The suit originally included himself (James Calabrese), Gregory Cabanillas, and Matthew Mechanic as plaintiffs. Several more plaintiffs opted-in later: Bulent Tasdemir, Salvador Delgado, Vernon Small, Shane Golden, Shyidah Johnson, Corey Wims, Denis Odom, Robin Rienerth, and Scott Tucker. We refer to all these plaintiffs collectively as "Calabrese."

B.

Two other appeals courts have concluded that rideshare drivers[2] do not constitute a "class of workers engaged in foreign or interstate commerce" under § 1. In *Capriole v. Uber Technologies, Inc.*, 7 F.4th 854, 865 (9th Cir. 2021), the Ninth Circuit found that "interstate movement" was not a "central part of [Uber drivers'] job description." The court noted that Uber drivers primarily made "short and local" trips and crossed state lines "infrequently." *Id.* Even these infrequent trips across state lines were still "inherently local in nature"—any interstate component was a mere "happenstance of geography" which did not alter Uber drivers' fundamentally "*intra*state transportation function." *Id.* at 864 (emphasis added) (citations omitted).

The First Circuit charted a similar course in *Cunningham v. Lyft, Inc.*, 17 F.4th 244 (1st Cir. 2022). The court pointed out that "not all Lyft drivers engage in any interstate transportation." *Id.* at 252. The court recognized that the residual clause must be given a "narrow construction," and that its meaning was controlled by the enumerated categories of "seamen" and "railroad workers," who were "primarily devoted to the movement of goods and people beyond state boundaries." *Id.* at 253. Lyft drivers, the court found, were not. *Id.* Lyft

2. By "rideshare drivers," we mean those who use "a mobile app or website" in order "to collect and transport a fare-paying customer to a chosen destination." *Ride-Share*, Oxford English Dictionary (3d ed. updated Mar. 2022), https://www.oed.com/view/Entry/165647#eid179399275.

as a company was "primarily in the business of facilitating local, intrastate trips." *Id.* The court concluded for these reasons that "Lyft drivers are not among a class of transportation workers engaged in interstate commerce within the meaning of section 1 as narrowly construed." *Id.*

II.[3]

To decide whether Plaintiffs are members of a "class of workers engaged in foreign or interstate commerce," a court must first define the "class of workers" at issue. We agree with the District Court that the class should be defined as nationwide Uber drivers.[4] *See Capriole*, 7 F.4th at 862.

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3. The District Court had jurisdiction over Plaintiffs' claims under 28 U.S.C. §§ 1367, 1453, and 29 U.S.C. § 216. We have appellate jurisdiction over the final judgment of the District Court compelling arbitration under 28 U.S.C. § 1291. We review the court's order compelling arbitration de novo. *Singh*, 939 F.3d at 217. As "the party resisting arbitration," Plaintiffs bear the burden of showing "that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91-92, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000).

4. Companies other than Uber employ rideshare drivers. The parties' arguments in this case have understandably focused on Uber, and they have not discussed the practices of other companies offering similar services. The District Court defined the class as "Uber drivers nationwide," JA12, but elsewhere in its opinion referred more generally to "rideshare drivers nationwide," JA15. The parties' arguments—and our decision—encompass those who do substantially similar work for different companies. The precise framing of the class as either Uber drivers or rideshare drivers makes no difference to our opinion. *See Osvatics v. Lyft, Inc.*, 535 F. Supp. 3d 1, 16 n.8 (D.D.C. 2021) (Brown Jackson, J.) (following the same practice for Lyft drivers).

We begin, as the Supreme Court has instructed, by examining the types of workers specifically mentioned in the FAA's text—"seamen" and "railroad employees." *See Circuit City*, 532 U.S. at 115. "As those terms contain 'no geographic limitations,' 'the most natural inference is that Congress intended those terms to encompass *all* seamen and railroad employees nationwide.'" *Capriole*, 7 F.4th at 862 (quoting *Osvatics v. Lyft, Inc.*, 535 F. Supp. 3d 1, 15 (D.D.C. 2021) (Brown Jackson, J.)). We give the residual clause the same national scope. The parties do not dispute this approach. Accordingly, the relevant "class of workers" must cover the whole country.

In addition, the class of workers must include all Uber drivers.[5] In interpreting the FAA, the Supreme Court has repeatedly emphasized the Act's use of the term "workers." *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1788, 213 L. Ed. 2d 27 (2022) (quoting *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 540-41, 202 L. Ed. 2d 536 (2019)). This word "directs the interpreter's attention to 'the *performance* of work,'" and, when coupled with the word "engaged," "emphasizes the actual work that the members of the class, as a whole, typically carry out." *Id.* This work must be defined specifically. *See Circuit City*, 532 U.S. at 118 (emphasizing that the § 1 exception must be given "a narrow construction").[6]

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5. The *Calabrese* Plaintiffs, for their part, do not appear to contest either part of this definition.

6. Singh argues that we would be wrong to construe the § 1 exception narrowly, as the "Supreme Court has since abandoned the rule that statutory exemptions should be narrowly construed." Singh

Accordingly, we reject Singh's proposed class of "motor carrier workers" as too broad to be sustained. The Supreme Court recently rejected a similar class of airline employees. *Saxon*, 142 S. Ct. at 1788-89. Like "airline employees," "motor carrier workers" is too general a description to explain much about class members' actual work. *See Saxon*, 142 S. Ct. at 1788.[7]

After defining the proper scope of the class at issue, we next consider what it means for a class of workers

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Br. 20. But *Circuit City* did not depend on a general principle that all statutory exemptions should be narrowly construed. Rather, the Court determined that § 1 should be narrowly construed because of the FAA's "statutory context" and "purpose." 532 U.S. at 118. More specifically, the statute's designation of "specific categories of workers" before the residual clause "undermines any attempt to give [the residual clause] a sweeping, open-ended construction." *Id.* The Court also relied on the FAA's purpose, which "seeks broadly to overcome judicial hostility to arbitration agreements." *Id.* (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272-73, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995)). These FAA-specific considerations, and not any general principle, drove the result in *Circuit City*. Singh's cases, which attack only the latter, are therefore inapplicable. *See BP P.L.C. v. Mayor & City Council of Balt.*, 141 S. Ct. 1532, 1538-39, 209 L. Ed. 2d 631 (2021) (rejecting a general principle of narrow construction for statutory exceptions). Regardless, we would be obligated to follow the specific holding of the Court in *Circuit City* even if its justifications were undermined by "some other line of decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989). Fairly construed, the § 1 exception has a narrow scope.

7. On remand, the District Court collected decisions from district courts that likewise defined the class as Uber (or Lyft) drivers nationwide.

to be "engaged in interstate commerce" for purposes of § 1. Plaintiffs argue that rare engagement is enough. We instead conclude, in line with our sister circuits, that a class of workers comes within the exception only if "interstate movement of goods" or passengers is "a central part" of the job description of the class. *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 803 (7th Cir. 2020) (Barrett, J.); *accord Capriole*, 7 F.4th at 864 (adopting the same standard); *Cunningham*, 17 F.4th at 253 (similar); *see also Saxon*, 142 S. Ct. at 1789-90 (explaining that the residual clause only applies to "transportation workers"—those who are "actively engaged in transportation" of goods or people "via the channels of foreign or interstate commerce"). Put another way, the class must either be "actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it." *Singh*, 939 F.3d at 220 (quoting *Tenney*, 207 F.2d at 452).

We have suggested a non-exhaustive list of factors to structure the residual clause inquiry: "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 227-28. As the District Court recognized, these factors are useful guides but do not change the core question of whether interstate commerce is central to the class's job description.

Our focus on the centrality of interstate work is compelled by the principle that the scope of the residual clause is "controlled and defined by reference to the enumerated categories" of seamen and railroad workers. *Circuit City*, 532 U.S. at 115. Seamen and railroad workers are "primarily devoted to the movement of goods and people beyond state boundaries." *Cunningham*, 17 F.4th at 253. Their jobs are "centered on the transport of goods in interstate or foreign commerce." *Wallace*, 970 F.3d at 802. The residual clause must be similarly limited.

The FAA's text and structure lead to the same result. Compare the language of the FAA's operative provision, contained in § 2, with the language of the § 1 exception at issue here. Section 2 applies to any "contract evidencing a transaction involving commerce." 9 U.S.C. § 2. This broad language "reach[es] to the limits of Congress' Commerce Clause power." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995). By contrast, § 1 uses the narrower formulation "engaged in interstate commerce." *See Circuit City*, 532 U.S. at 118. This formulation limits the clause's scope to workers employed "in the channels" of interstate commerce. *Great W. Mortg. Corp. v. Peacock*, 110 F.3d 222, 227 (3d Cir. 1997); *Wallace*, 970 F.3d at 802. Accordingly, the clause only applies to those whose jobs are centered on "interstate transportation routes through which persons and goods move." *United States v. Morrison*, 529 U.S. 598, 613 n.5, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000) (citation omitted).

Workers "who are actually engaged in the movement of interstate or foreign commerce"—for example, interstate truckers—easily qualify under the residual clause. *Singh*, 939 F.3d at 220 (quoting *Tenney*, 207 F.2d at 452); *New Prime*, 139 S. Ct. at 536, 539 (observing that interstate truck drivers are plainly a class of workers engaged in interstate commerce). But the exception is not limited to such workers.

A class of workers that does not regularly cross state lines will qualify if their work is "so closely related" to interstate commerce "as to be in practical effect part of it." *Singh*, 939 F.3d at 220 (quoting *Tenney*, 207 F.2d at 452). Work meets this standard if it is a "constituent part" of the interstate movement of goods or people rather than a "part of an independent and contingent intrastate transaction." *Immediato v. Postmates, Inc.*, 54 F.4th 67, 77 (1st Cir. 2022) (citing *Cunningham*, 17 F.4th at 251).

It is not always easy to tell whether work is a "constituent part" of the flow of interstate commerce or occurs outside of it. *See Immediato*, 54 F.4th at 79 (observing that "[i]t may be possible that goods can change hands several times during transport without exiting the flow of interstate commerce" and that a class of workers need not be "employed by a company of any particular size or geographic scope"). Our analysis focuses on "practical, economic continuity." *Osvatics*, 535 F. Supp. 3d at 18-19 (quotation marks omitted) (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195, 95 S. Ct. 392, 42 L. Ed. 2d 378 (1974)).

Some recent decisions help clarify the line between classes of workers who qualify under the residual clause and classes of workers that do not. On one side of the line are those whose work occurs within the flow of interstate commerce. In *Saxon*, for example, the Supreme Court held a class of Southwest Airlines baggage handlers fell under § 1. As loaders of interstate cargo, these baggage handlers performed work which was part of an unbroken stream of interstate commerce. *Saxon*, 142 S. Ct. at 1790. Similarly, in *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 13 (1st Cir. 2020), the First Circuit held that Amazon delivery drivers who "locally transport[ed] goods on the last legs of interstate journeys," fell under § 1 because their work occurred "within the flow of interstate commerce." On the other side of the line are workers who engage in primarily local economic activity with only tangential interstate connections. Food delivery drivers, for example, can be distinguished from Amazon delivery drivers, as the former deliver food only after it has left the stream of interstate commerce. *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 916 (9th Cir. 2020); *Wallace*, 970 F.3d at 802-03. Similarly, Chicago taxi drivers provide "independent local service" which is "not an integral part of interstate transportation." *United States v. Yellow Cab Co.*, 332 U.S. 218, 233, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984).

Plaintiffs argue along various lines to reach the conclusion that even a trivial amount of interstate transportation work suffices to bring a worker within the exception. This conclusion must be rejected. It is

contrary to the principles described above and would contravene the basic policy of the FAA, which is to broadly place arbitration agreements on equal footing with other contracts. *See Circuit City*, 532 U.S. at 115, 118-19. Plaintiffs' interpretation would cover even "a pizza delivery person who delivered pizza across state lines to a customer in a neighboring town." *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1290 (11th Cir. 2005). There is no evidence to suggest that Congress meant to cover such workers. *See Wallace*, 970 F.3d at 802-03; *Immediato*, 54 F.4th at 77-78; *Archer v. Grubhub, Inc.*, 490 Mass. 352, 190 N.E.3d 1024, 1031-33 (Mass. 2022). Congress' use of the enumerated categories of "seamen" and "railroad employees," when coupled with the narrow construction due the exception, convinces us that the residual clause includes only those workers whose jobs are centered on interstate commerce.

We are unpersuaded by Singh's argument that there is no way to know that the key shared characteristic of "seamen" and "railroad employees" is having a job centered on interstate commerce. Congress meant to identify engagement in interstate commerce as the enumerated categories' key shared characteristic. The FAA's text makes it explicit—the residual clause requires that a class of workers is "engaged in interstate commerce." *See* 9 U.S.C. § 1. This text is "[t]he best evidence of Congress' intent." *United States v. Schneider*, 14 F.3d 876, 879 (3d Cir. 1994).

This approach is consistent with *Saxon*. Singh emphasizes a single sentence—the Court's statement that

"any class of workers directly involved in transporting goods across state or international borders falls within § 1's exemption." *Saxon*, 142 S. Ct. at 1789. As the rest of the opinion makes clear, this does not mean that rare border crossings are enough to make interstate transportation central to a class of workers' job description. Rather, we consider the "actual work" that class members "typically carry out." *Id.* at 1788. Incidental border crossings are insufficient if a class of workers is not typically involved with the channels of interstate commerce. *Wallace*, 970 F.3d at 800 ("[S]omeone 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."); *Waithaka*, 966 F.3d at 25 (noting that crossing state lines is not the "touchstone of the exemption's test").[8]

III.

We now turn to the key question: Is engagement with interstate commerce central to the work of Uber drivers? The District Court found that it was not. We agree. As a

8. Both Singh and Calabrese urge us to follow *International Brotherhood of Teamsters Local Union No. 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 956 (7th Cir. 2012), which they read to hold that crossing a state line even once means that a worker is engaged in interstate commerce for purposes of § 1. As explained above, this position is at odds with *Saxon*, our precedents, and the majority approach of our sister courts. The duties of seamen and railroad employees are defined by interstate commerce—remove interstate commerce from the equation, and the fundamental character of their work changes. So too must the work of any class of workers covered by § 1. *See, e.g., Waithaka*, 966 F.3d at 22-24.

class, Uber drivers are in the business of providing local rides that sometimes—as a happenstance of geography—cross state borders. Remove interstate commerce from the equation, and the work of Uber drivers remains fundamentally the same. Plaintiffs have not shown that drivers' infrequent interstate trips are, on the whole, an essential part of their job. Indeed, their statistics demonstrate that most Uber drivers have never made a single interstate trip. Neither have Plaintiffs shown that drivers' intrastate duties, such as driving riders to and from airports, are a "constituent part" of the interstate movement of goods or people. *Immediato*, 54 F.4th at 77. As a result, we conclude that Uber drivers are not a class of workers engaged in interstate commerce and, accordingly, that they do not fall under the § 1 exception.

The other appeals courts to consider this question have reached the same conclusion. Plaintiffs, however, encourage us to disregard these decisions on the grounds that those courts had insubstantial evidentiary records before them. *See Singh*, 939 F.3d at 226-27. Without the benefit of more evidence, Plaintiffs argue, courts have routinely placed undue emphasis on a single statistic: that 2.5 percent of Uber trips are interstate. *See Cunningham*, 17 F.4th at 252-53 (noting only 2 percent of Lyft trips cross state lines). Through discovery, Plaintiffs have developed their own statistics which they say provide a more accurate picture of Uber drivers' engagement with interstate commerce. But the District Court considered Plaintiffs' new evidence and still found the 2.5 percent statistic persuasive. The core problem with Plaintiffs' evidence, which the District Court identified, is that it stresses the

total volume of interstate trips to the exclusion of other types of evidence.

Singh focuses directly on the "141.5 million total interstate trips" Uber drivers made from 2010 through May 2020. Singh Br. 30. This statistic, however, cannot shed much light on Uber drivers' typical duties. A high number of interstate trips does not mean that a class of workers is engaged in interstate commerce for purposes of § 1 if a small proportion of the class is responsible for most of the trips. Rather, to be central to a class of workers' job description, engagement with interstate commerce must be typical of the work that class members generally do.

Calabrese suggests a different statistic: the percentage of drivers who "provide 50 or more trips in a year." Calabrese Br. 4. Calabrese justifies his focus on drivers who make more than 50 trips by arguing that the § 1 analysis must take turnover into account. Since a minority of Uber drivers use the Uber app for more than six months, he contends, an accurate picture of Uber drivers' engagement with interstate commerce requires adjusting the raw statistics for turnover. He proposes we consider the 40 percent of drivers who work long enough to complete at least 50 trips in a year. Of this 40 percent, 35.1 percent have made at least one interstate trip.

We need not address how, or whether, the § 1 analysis should take turnover into account. Calabrese's statistics taken at face value undermine his point. His numbers reveal that even among the most active Uber drivers, a majority—nearly 65 percent—have never made a single

interstate trip. On such evidence, it is easy to conclude that interstate trips are not a typical feature of class members' work.

We stress that this statistic is not dispositive. An occurrence may be central to a worker's job description even if it is rare. *See, e.g., Islam v. Lyft, Inc.*, 524 F. Supp. 3d 338, 351 (S.D.N.Y. 2021) (observing that criminal trials are central to the work of district court judges even though they are infrequent occurrences). Uber drivers' interstate trips, however, are incidental—take away interstate trips, and the fundamental character of Uber drivers' work remains the same. One trip may influence another tangentially, but each is discrete. *See Cunningham*, 17 F.4th at 251 (distinguishing engagement with the flow of interstate commerce from participation in independent transactions). Because it is not the act of crossing a state border alone that qualifies as engagement with interstate commerce for purposes of § 1, and drivers' interstate trips are largely unrelated to one another, Plaintiffs cannot show that drivers' rare trips across state lines are anything more than incidental to their intrastate work.

In addition to driver and trip data, Plaintiffs offer evidence of Uber's policies from the Technology Services Agreement. An employer's policies can be relevant to the § 1 analysis if they tend to show that the employer directed a single, unbroken stream of interstate commerce. Plaintiffs argue that Uber did just that. Plaintiffs' argument has an intriguing implication: that millions of discrete interstate trips, directed by one employer, can together form an unbroken stream of commerce. But § 1's focus is on a

"class of workers," not employers. An employer's policies are only relevant insofar as they illuminate something about a class of workers' typical duties.

Accordingly, Plaintiffs' evidence of Uber's policies misses the mark. Stating that interstate trips are "integral to Uber's business and the fulfillment of its mission goals," Calabrese Br. 9, without more, does not explain much about drivers' actual work. A business undeniably engaged in interstate commerce may employ workers who are not so engaged. *See Saxon*, 142 S. Ct. at 1789 n.1 (leaving open the question of whether a class of workers who only supervise cargo unloading would be exempt under § 1). If an individual worker is not personally engaged in interstate commerce, that worker must belong to a class of workers "whose occupation is . . . defined by its engagement in interstate commerce" in order to be exempt under § 1. *See Wallace*, 970 F.3d at 800.

Plaintiffs' evidence that Uber organizes drivers into multistate "territories" based on where they live and does not allow drivers to opt out of interstate trips shows that Uber anticipates at least some drivers crossing state lines. It does not demonstrate, however, that interstate trips are essential to drivers' activities.

When drivers sign up with Uber, they are assigned to either a multistate or a single-state territory, depending on where they live. Uber created these territories in response to variation in state and local regulations. Drivers assigned to multistate territories can pick up passengers in other states, while drivers assigned to

single-state territories can only pick up passengers in that state. Drivers in a single-state territory will not receive ride requests while driving outside that state, unlike drivers in a multistate territory. All drivers must accept a ride request before learning the trip destination. Although drivers may cancel a trip, Uber may deactivate a driver's account if her cancellation rate is higher than average for her area. Drivers may not opt out of receiving ride requests that require interstate travel.

The existence of multistate territories and the lack of an opt-out feature could show that interstate travel is essential to drivers' work if paired with evidence that these policies impact drivers' actual work. Plaintiffs do not provide that extra evidence. It is unclear, for example, whether the day-to-day work of drivers in multistate territories differs from that of drivers in single-state territories. It is also unclear whether the lack of an opt-out feature pressures drivers into taking interstate trips, given that only 17 percent of all Uber drivers completed one or more interstate trips in 2019.

In addition to arguing that interstate transport is integral to Uber's business, Plaintiffs challenge the idea that interstate trips can be local for § 1 purposes. Plaintiffs point to the fact that Uber authorizes would-be passengers to request a trip exceeding 100 miles. But they do not seriously contest Uber's claim that the average trip is far shorter—6.1 miles for all trips and 13.5 miles for interstate trips. Although average trip length is not dispositive, a short average trip length makes it more likely that drivers serve local communities that

may, by happenstance of geography, cross state lines. *See Capriole*, 7 F.4th at 864 (citing *Rogers v. Lyft Inc.*, 452 F. Supp. 3d 904, 916 (N.D. Cal. 2020) ("Interstate trips that occur by happenstance of geography do not alter the intrastate transportation function performed by the class of workers.")); *Omaha & C. B. S. R. Co. v. Interstate Commerce Com.*, 230 U.S. 324, 335-36, 33 S. Ct. 890, 57 L. Ed. 1501 (1913) (holding that street railroads are not engaged in interstate commerce because they "are local . . . and for the use of a single community, even though that community be divided by state lines").

Finally, we reject Plaintiffs' argument that drivers who ferry passengers to and from airports are part of an integrated interstate transport effort. Plaintiffs point out that Uber has agreements with major airports authorizing drivers to drop off and pick up passengers at terminals. They also argue that airport trips are so closely related to interstate commerce as to bring rideshare drivers within the ambit of § 1. They connect these arguments to the Supreme Court's decision in *United States v. Yellow Cab Co.*, which found that certain station-to-station taxi rides implicated interstate commerce. *See* 332 U.S. at 228-29.

We find this analogy unconvincing. The rides in *Yellow Cab* were part of an exclusive contract between a taxi service and the railroad—passengers bought a single ticket which included both the train and taxi portions of their journey. *Id.* at 228 Plaintiffs have pointed to no examples of a rideshare app which allows passengers to buy a single ticket that includes both flight and rideshare. Rather, rideshare trips to airports are done as part of

drivers' "independent local service." *Yellow Cab*, 332 U.S. at 232-33. Such rides are not "part of interstate transportation." *Id.* at 233. *Yellow Cab* therefore seriously undermines Plaintiffs' argument, as our fellow courts have found. *See Capriole*, 7 F.4th at 863-64 (citing *Yellow Cab*, 332 U.S. at 228-29); *Cunningham*, 17 F.4th at 250-52 (same); *Osvatics*, 535 F. Supp. 3d at 19 (same); *Immediato*, 54 F.4th at 79 (same).

IV.

Plaintiffs also object to the District Court's decision to compel arbitration on various contractual grounds. We reject these arguments.

A.

Singh argues at length that "no contract to arbitrate" was formed between himself and Uber. Singh Br. 41-47. Singh could have raised this issue in his first appeal but did not. *See* Singh Br. 2, 5-6, 27, *Singh*, 939 F.3d 210 (2018). In fact, Singh told us that Uber "required" him to accept the agreement. *Id.* at 27; *see also id.* at 5 ("Singh had to click a button that said, 'YES, I AGREE.'"). Having explicitly conceded the point in his first appeal, Singh may not now challenge the formation of the arbitration agreement. *See Beazer E., Inc. v. Mead Corp.*, 525 F.3d 255, 263 (3d Cir. 2008) ("It is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand." (quoting *Nw. Ind. Tel. Co. v. FCC*, 872 F.2d 465, 470, 277 U.S. App. D.C. 30 (D.C. Cir. 1989))).

Singh objects that Uber has failed to produce admissible evidence that he assented to the arbitration agreement. But Singh has admitted that he was presented with the agreement, and the court found that he accepted it. We discern no error in this finding, and no abuse of discretion in the court's evidentiary rulings.

B.

None of Plaintiffs' challenges to the validity of the arbitration clause are cognizable in this court. The contract says that all disputes "relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision . . . shall be decided by an Arbitrator and not by a court or judge." JA182-83. Courts call this type of provision a delegation clause—"an agreement to arbitrate threshold issues concerning the arbitration agreement." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010). In the presence of a delegation clause, we "cannot reach the question of the arbitration agreement's enforceability" unless the clause itself "is not enforceable." *MacDonald v. CashCall, Inc*, 883 F.3d 220, 226 (3d Cir. 2018). "A party contesting the enforceability of a delegation clause," as Singh does, "must 'challenge the delegation provision specifically.'" *Id.* (quoting *Rent-A-Center W.*, 561 U.S. at 70, 72).

Singh specifically challenges the delegation clause on two bases. We reject both. First, he argues the agreement has not made a "clear and unmistakable delegation of authority to the arbitrator," as is required.

Singh Br. 57. This argument is based on the agreement's separate forum selection clause, which provides that disputes arising out of the agreement "shall be subject to the exclusive jurisdiction" of San Francisco's courts. Singh Br. 56; JA180. The Ninth Circuit, construing these precise provisions, rejected this argument. *Mohamed v. Uber Techs.*, 848 F.3d 1201, 1208-09 (9th Cir. 2016). So do we. The language in the two provisions is easily reconciled, and any conflict is "artificial." *Id.* at 1209. "It is apparent" that the forum selection clause here "was intended" to identify the proper venue for "an action in court to enforce" the agreement, and "to identify the venue for any other claims that were not covered by the arbitration agreement." *Id.* "That does not conflict with or undermine the agreement's unambiguous statement identifying arbitrable claims and arguments." *Id.*

Second, Singh claims the delegation clause is invalid because it is "subject to unilateral modification" and is "illusory." Singh Br. 45. The agreement, however, provides that any modifications will be conveyed in writing to the driver and become effective only if the driver consents by continuing to use the Uber app. These limitations on Uber's right to modify the agreement are sufficient to save it from being illusory. *Jaworski v. Ernst & Young U.S. LLP*, 441 N.J. Super. 464, 119 A.3d 939, 947-49 (N.J. Super. Ct. App. Div. 2015) (holding that an employee's continued employment after the amendment of an arbitration policy constituted consent to the policy); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 604 (3d Cir. 2002) (approving arbitration agreement as not illusory when employer's right to modify was conditional on "putting the

change in writing, providing a copy to the employees, and allowing the employees to accept the change by continuing employment").[9]

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9. Whether or not a contractual provision is illusory—and the other contractual issues raised by the parties—are questions of state law. *See Collins v. Mary Kay, Inc.*, 874 F.3d 176, 182 (3d Cir. 2017); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54, 136 S. Ct. 463, 193 L. Ed. 2d 365 (2015) ("[T]he interpretation of a contract is ordinarily a matter of state law . . . ."). But which state's law applies? Singh argues that California law applies to the arbitration agreement. But his brief often makes arguments—including on this issue—based solely on the law of other states with no reference to California law. And in his previous appeal, Singh wrote to this Court that "New Jersey law controls" this case. Letter of Jan. 28, 2019, *Singh* (17-1397). Uber argues that the applicable law is the law of the various states where each Plaintiff lived and worked: Missouri, Nevada, New York, Ohio, Pennsylvania, and New Jersey.

To resolve this dispute, we apply the choice-of-law rules of New Jersey. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941) (holding federal courts should apply the choice of law rules of the forum state). Under those rules, "the first step is to determine whether an actual conflict exists" between the potentially applicable laws. *P.V. ex rel. T.V. v. Camp Jaycee*, 197 N.J. 132, 962 A.2d 453, 460 (N.J. 2008). The parties have pointed out no relevant differences in state law with respect to this issue. Instead, they all argue from general principles, typically with reference to federal and New Jersey cases. Our own examination of the cases similarly reveals no relevant distinctions. *See Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 776-77 (Mo. 2014); *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 194 P.3d 96, 105-06 & n.39 (Nev. 2008); *Bassett v. Elec. Arts, Inc.*, 93 F. Supp. 3d 95, 106-08 (E.D.N.Y. 2015) (applying New York law); *Jones v. Carrols, LLC*, 2019- Ohio 211, 119 N.E.3d 453, 464-65 (Ohio Ct. App. 2019); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 603-04 (3d Cir. 2002) (applying Pennsylvania law); *Jaworski v. Ernst & Young U.S. LLP*, 441 N.J. Super. 464, 119

C.

Calabrese argues that some of his fellow FLSA plaintiffs "opted out of arbitration with Uber" and thus cannot be compelled to arbitrate. True enough, three plaintiffs did purport to exercise their right to opt out of arbitration under contracts with Uber in 2019, and one plaintiff did so in 2019 and 2020. But both of those agreements made clear that Plaintiffs would be "bound by an existing arbitration agreement" with Uber if they had accepted one in the past. Uber Br. 9; JA357-59. All three of the opt-out plaintiffs previously agreed to arbitration with Uber in 2015. They remain bound by that agreement notwithstanding their subsequent opt-out. *See Capriole*, 7 F.4th at 859 n.2.[10]

The parties' contract forecloses Calabrese's argument. The agreement says that the driver can "opt out of *this* Arbitration Provision," but may be "bound by an existing agreement to arbitrate disputes." Calabrese Br. 23-24; JA450 (emphasis added). Calabrese argues that our interpretation makes opting out of arbitration illusory. We disagree. Plaintiffs had a meaningful right to opt out of every agreement that they were presented with. We are sympathetic to Plaintiffs' point. No doubt Uber's

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A.3d 939, 948-49 (N.J. Super. Ct. App. Div. 2015). As such, we see "no choice-of-law issue to be resolved." *Camp Jaycee*, 962 A.2d at 460.

10. We take no position on whether plaintiffs must arbitrate claims arising after they exercised their right to opt out. As plaintiffs are bound in some sense by the 2015 agreement, which delegates the question of arbitrability to the arbitrator, we must compel arbitration and leave the determination of whether any particular dispute is within the scope of the agreement to the arbitrator.

requirement that they opt out of each new agreement is "more burdensome" than a permanent opt-out right. *Mohamed*, 848 F.3d at 1211. Ultimately, though, we agree with the Ninth Circuit that "the contract bound Uber to accept opt-outs from those drivers who followed the procedure it set forth. There were some drivers who did opt out and whose opt-outs Uber recognized. Thus, the promise was not illusory." *Id.*

***

We will affirm the judgment of the District Court.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED NOVEMBER 23, 2021

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

No. 16-3044 (FLW)

JASWINDER SINGH, ON BEHALF OF HIMSELF AND ALL THOSE SIMILARLY SITUATED,

Plaintiff,

v.

UBER TECHNOLOGIES, INC.,

Defendant.

No. 19-18371 (FLW)

JAMES CALABRESE, GREGORY CABANILLAS, AND MATTHEW MECHANIC, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED,

Plaintiffs,

v.

UBER TECHNOLOGIES, INC., and RASIER, LLC,

Defendants.

OPINION

Appendix B

WOLFSON, Chief Judge:

Jaswinder Singh, James Calabrese, Gregory Cabanillas, and Matthew Mechanic (collectively, "Plaintiffs") were drivers with the rideshare company Uber Technologies, Inc., who allege individually, and on behalf of a class of similarly situated New Jersey drivers,[1] that Uber misclassified them as independent contractors, thereby depriving them of overtime pay and other benefits afforded to employees. Uber moves to compel arbitration under the Federal Arbitration Act ("FAA") pursuant to a clause in Plaintiffs' contracts. 9 U.S.C. § 1, *et. seq.* Plaintiffs argue that arbitration is inappropriate because they fall within an exemption to the FAA as transportation workers who move riders across state lines. Uber responds that Plaintiffs do not belong to such a class of workers because interstate rides constitute a small fraction of all rides, and in any event, I should order arbitration under the New Jersey Arbitration Act ("NJAA"), which embodies the same pro-arbitration policy as the FAA without the exemptions. For the following reasons, I **GRANT** Uber's motions, **COMPEL** arbitration under the FAA, and **DENY** Plaintiffs' motion for class certification as moot.

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1. A motion for class certification is also pending. Case No. 16-3044, ECF No. 61. It appears that Plaintiffs filed this motion based on the misunderstanding that certain language in the Federal Arbitration Act requires it. However, the FAA uses the term "class" to refer to a category or group of workers, not in the sense of class action litigation or in connection with Fed. R. Civ. P. 23. In any event, since I compel arbitration in this Opinion and accompanying Order, the motion is moot.

Appendix B

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Uber is a billion-dollar technology company whose ridesharing app enables drivers to connect with riders, based on location, at the click of a button. Def. Statement of Material Facts I ("SUMF"), ¶¶ 1, 9. Plaintiffs are gig-economy workers who used the Uber app to provide rides between 2014 and 2020. They allege that Uber must reimburse certain business expenses (*e.g.*, the cost of maintaining cars, gas, insurance, and phone/data expenses), comply with guaranteed minimum wage laws, and pay overtime, as state law requires for employees. The present dispute centers on the validity of an arbitration provision in their contracts.

A. The Arbitration Provision

Drivers who sign up with Uber must accept the company's Technology Services Agreement ("TSA") before completing any rides. *Id.* ¶¶ 2, 28, 30, 41. Uber presents the TSA to drivers as soon as they login to the app by populating a "TERMS AND CONDITIONS" screen with a hyperlink. *Id.* ¶¶ 3-4. Clicking the hyperlink opens the TSA. *Id.* ¶ 5. After drivers scroll through the document for as long as they need to review it, *id.* ¶ 6, the app prompts them to click "YES, I AGREE." *Id.* ¶ 8. As this screen makes clear, "[b]y clicking below, you represent that you have reviewed all the documents above and that you agree to all the contracts above." *Id.* ¶ 9. Once a driver indicates agreement, the app generates another screen, which reads: "PLEASE CONFIRM THAT YOU HAVE

REVIEWED ALL THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS." *Id.* ¶ 11. At this point, drivers may select buttons reading "NO" or "YES, I AGREE." *Id.* ¶ 12. If drivers select yes, Uber stores the executed TSA in an online portal, reviewable to this day. *Id.* ¶ 13. Singh joined Uber on June 21, 2014. *Id.* ¶¶ 16, 25. Mechanic joined on December 11, 2015. Def. SUMF II, ¶ 61. Calabrese joined on June 8, 2017. *Id.* ¶ 55. Cabanillas joined on August 18, 2017. *Id.* ¶ 56. Each driver accepted the TSA as a condition of signing up. Def. SUMF I, ¶¶ 14-15; Def. SUMF II, ¶¶ 55, 57-59, 61.

The applicable version of the TSA contains an arbitration provision visible on the first page, which provides:

> **IMPORTANT: PLEASE NOTE THAT TO USE THE UBER SERVICES, YOU MUST AGREE TO THE TERMS AND CONDITIONS SET FORTH BELOW. PLEASE REVIEW THE ARBITRATION PROVISION SET FORTH BELOW CAREFULLY, AS IT WILL REQUIRE YOU TO RESOLVE DISPUTES WITH THE COMPANY ON AN INDIVIDUAL BASIS THROUGH FINAL AND BINDING ARBITRATION UNLESS YOU CHOOSE TO OPT OUT OF THE ARBITRATION PROVISION.... IF YOU DO NOT WISH TO BE SUBJECT TO ARBITRATION, YOU MAY OPT OUT OF THE ARBITRATION PROVISION BY FOLLOWING THE INSTRUCTIONS PROVIDED IN THE ARBITRATION**

PROVISION BELOW.

WHETHER TO AGREE TO ARBITRATION IS AN IMPORTANT BUSINESS DECISION. IT IS YOUR DECISION TO MAKE, AND YOU SHOULD NOT RELY SOLELY UPON THE INFORMATION PROVIDED IN THIS AGREEMENT AS IT IS NOT INTENDED TO CONTAIN A COMPLETE EXPLANATION OF THE CONSEQUENCES OF ARBITRATION. YOU SHOULD TAKE REASONABLE STEPS TO CONDUCT FURTHER RESEARCH AND TO CONSULT WITH OTHERS—INCLUDING BUT NOT LIMITED TO AN ATTORNEY—REGARDING THE CONSEQUENCES OF YOUR DECISION, JUST AS YOU WOULD WHEN MAKING ANY OTHER IMPORTANT BUSINESS OR LIFE DECISION.

Def. SUMF I, ¶ 18. The arbitration provision specifies the FAA as the governing law and contains a class action waiver:

> This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (the "FAA") and evidences a transaction involving commerce. This Arbitration Provision applies to any dispute arising out of or related to this Agreement or termination of the Agreement and survives after the Agreement terminates . . . .

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> **Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action**.

Id. ¶ 19. The arbitration provision also contains a delegation clause, which encompasses a wide range of potential disputes between drivers and Uber, including threshold questions such as whether a particular dispute is arbitrable:

> **Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision. All such matters shall be decided by an Arbitrator and not by a court or judge**.

Id. ¶ 20. At the same time, the TSA offers an opt-out provision, which drivers may exercise for up to 30 days after accepting the TSA by emailing Uber. It states:

Appendix B

> **Your Right To Opt Out Of Arbitration**.
>
> **Arbitration is not a mandatory condition of your contractual relationship with the Company. If you do not want to be subject to this Arbitration Provision, you may opt out of this Arbitration Provision by notifying the Company in writing of your desire to opt out of this Arbitration Provision . . . .**
>
> **Should you not opt out of this Arbitration Provision within the 30-day period, you and the Company shall be bound by the terms of this Arbitration Provision. You have the right to consult with counsel of your choice concerning this Arbitration Provision. You understand that you will not be subject to retaliation if you exercise your right to assert claims or opt-out of coverage under this Arbitration Provision**.

Id. ¶ 21. Though thousands of drivers exercised their opt-out rights, Plaintiffs did not.[2] *Id.* ¶ 23-24; Def. SUMF II, ¶¶ 56, 60, 62.

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2. Uber required Plaintiffs to agree to its TSA in 2015, 2019, and 2020. Each TSA is materially identical with respect to the arbitration provision, Def. SUMF II, ¶¶ 41, 52-54, except that the 2019 and 2020 TSAs clarify that drivers could not opt out of arbitration then if they had not done so initially. *Id.* ¶ 40. As one court explained, "this section provides that, despite any opt out of the 2019 TSA's arbitration provision, any existing agreement to arbitrate disputes concerning use of the Uber App remains binding." *Nicholas v. Uber Techs., Inc.*, No. 19-08228, 2020 U.S. Dist. LEXIS 126442, 2020 WL 4039382, at *6 (N.D. Cal. July 17, 2020).

B. The FAA

While state law forms the substantive basis for most of Plaintiffs' claims, the present arbitration dispute arises under the FAA. Congress enacted the FAA in 1925 "in response to a perception that courts were unduly hostile to arbitration." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621, 200 L. Ed. 2d 889 (2018). The statute provides that "agreements to arbitrate [are] 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) (quoting 9 U.S.C. § 2). In this sense, the FAA places arbitration agreements on equal footing with all other contracts and requires courts to enforce them according to their terms. *Epic Sys.*, 138 S. Ct. at 1621 (describing "a liberal federal policy favoring arbitration agreements") (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) (describing the policy as "emphatic"). Not only must "questions of arbitrability [ ] be addressed with a healthy regard for the federal policy favoring arbitration," but "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses*, 460 U.S. at 24-25. The FAA "establishes procedures by which federal courts implement" this "substantive rule." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010). Specifically, § 4 permits litigants to seek a court order "directing the parties to proceed to arbitration in

accordance with the terms of the agreement," while § 3 requires courts to stay litigation "until such arbitration has been had in accordance with the terms of the agreement" if the court concludes that the action involves "any issue referable to arbitration." *Id.*

The FAA does not "extend to *all* private contracts, no matter how emphatically they may express a preference for arbitration." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537, 202 L. Ed. 2d 536 (2019). As such, "a court's authority . . . to compel arbitration . . . isn't unconditional." *Id.* For example, "[a]rbitration is strictly a matter of consent, and thus is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration." *Granite Rock Co. v. Int'l B'hd of Teamsters*, 561 U.S. 287, 299, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010) (emphasis in original). This typically includes "'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center*, 561 U.S. at 68-69. Likewise, certain contracts are exempt from the FAA's coverage entirely. Chief among these are "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1; *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001). This is commonly called the "residual clause," *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 16 (1st Cir. 2020), and the Supreme Court has limited its scope to transportation workers whose jobs are akin to seamen and railroad workers. *Circuit City*, 532 U.S. at 118-20 (explaining that the history of § 1 is "quite sparse"

yet very "particular," that the exemption is reserved for "transportation workers and their necessary role in the free flow of goods," and that it must otherwise be "afforded a narrow construction" to further the FAA's "purpose of overcoming judicial hostility to arbitration"). The Supreme Court has also cautioned that "[t]he plain meaning of the words 'engaged in commerce' is narrower than the more open-ended formulations 'affecting commerce' and 'involving commerce.'" *Id.* at 118-19. "[A] court should decide for itself whether § 1's 'contracts of employment' exclusion applies before ordering arbitration," even if an otherwise valid delegation clause in the arbitration agreement gives the arbitrator the authority to decide that threshold question. *New Prime*, 139 S. Ct. at 537-38.

C. Litigation History

i. The Court's Prior Decision

Notwithstanding the arbitration provision in the TSA and the federal policy in the FAA, Singh filed suit in this Court alleging that Uber misclassified him as an independent contractor (a status conferring flexibility but little security) and owes, *inter alia*, overtime pay plus reimbursement for business expenses under the Fair Labor Standards Act ("FLSA"), the New Jersey Hour and Wage Law, and the New York Labor Law. Case No. 16-3044, ECF No. 7. Uber moved to dismiss and to compel arbitration pursuant to the TSA. *Id.*, ECF No. 5. Singh opposed, arguing that he fell under the § 1 exemption described above for transportation workers on par with seaman and railroad employees. I granted

Uber's motion. *Id.*, ECF No. 15, at 8-9. In doing so, I found the TSA's arbitration provision to be valid and enforceable. *Id.* at 8-14, 23-26. I also found that the TSA's class waiver provision is permissible under the National Labor Relations Act ("NLRA") because Singh could opt out within thirty days without consequence, and that the delegation clause is lawful under *Rent-A-Center*. Further, I construed the FAA to exempt only transportation workers engaged in moving goods across state lines, not people, and ordered the parties to arbitrate. *Id.* at 14-15. I did not address any state law questions.

ii. The Third Circuit Decision

On appeal, the Third Circuit vacated and remanded. *Singh v. Uber Techs. Inc.*, 939 F.3d 210 (3d Cir. 2019). Fundamentally, the court held that the FAA's exemption for transportation workers is not limited to those engaged in moving interstate goods, but may encompass those who move interstate passengers, like Uber drivers, or whose work is "so closely related [to interstate commerce] as to be in practical effect part of it." *Id.* at 214. The court then instructed me to consider, upon remand, whether Singh belongs to such a class of workers and directed the parties to engage in "limited discovery" on that issue. *Id.* at 219. If not, the court explained, then the FAA applies and all remaining issues are reserved for the arbitrator, pursuant to the TSA's delegation clause. *Id.* at 219, 228 ("[T]he District Court shall . . . decide only this aspect of the § 1 residual clause inquiry, which will be dispositive as to whether the FAA applies."). The court also identified certain guideposts to inform the inquiry, "including, but

not limited to and in no particular order, the contents of the parties' agreement, 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 227-28. The court upheld my determination that the arbitration provision (including the delegation clause) is valid and enforceable, and that the class waiver is permissible, while declining to reach other issues raised by the parties, such as state law arbitrability questions, to the extent that they "are contingent on the FAA's applicability." *Id.* at 219.

Calabrese, Cabanillas, and Mechanic subsequently filed a separate suit seeking unpaid wages and unreimbursed expenses under the FLSA, the New Jersey Wage and Hour Law, and the New York Labor Law.[3] Case No. 19-18471, ECF No. 1; Def. SUMF II, ¶¶ 66-81. When Uber moved to dismiss, I noted identical issues to Singh's case, terminated the motion, and ordered limited discovery on the question whether Plaintiffs are exempt under the FAA. Case No. 19-18371, ECF No. 33, at 2. Discovery has closed, and Uber has renewed dismissal motions in both cases. As before, Plaintiffs seek to avoid arbitration under the FAA based on the residual clause, compel Uber to comply with state labor laws, and classify them as employees not independent contractors.

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3. This case was originally assigned to the Hon. Madeline Cox Arleo, U.S.D.J., but was transferred to this Court to be decided with *Singh*.

iii. Other Third Circuit Decisions

While this matter was on remand and in discovery, the Third Circuit decided another FAA case, *Harper v. Amazon.com Services, Inc.*, 12 F.4th 287 (3d Cir. 2021). There, a divided panel held that a court facing an arbitrability dispute in a case such as this one must proceed as follows: (1) consider, *based on the face of the complaint and related documents alone*, whether the FAA governs or whether the residual clause applies; (2) if the answers to those questions are "murky," consider whether the dispute must be arbitrated under applicable state law; and (3) if state law does not compel arbitration, go back to the FAA for limited discovery. *Id.* at 296. The stated logic for resolving state law arbitrability before turning to "questions of fact and discovery" under the FAA is that doing so "honors the principles of federalism" while preventing "delays, costs, and uncertainty," since "the parties might still have an enforceable agreement to arbitrate under state law." *Id.* at 294. The majority also explained that FAA fact-finding "can always come later." *Id.* at 296. This conclusion appears to center on doubt regarding "the judicially created presumptions atop both §§ 1 and 2 of the FAA," as well as a desire to place "everyone back to the starting line in the text of the law." *Id.* at 297-98 (Matey, J., concurring).

It is difficult to reconcile *Harper* with the sequence of decisions in *Singh*, where the Third Circuit advised that discovery should be ordered before "leav[ing] it to the District Court to address" state-law arguments as to arbitrability, if necessary. 939 F.3d at 228. As the dissent

noted, this is the usual approach in both the Third Circuit and other circuits. Notwithstanding federalism principles, it respects the parties' "chosen law," effectuates the "plain language" of their agreement to specify the FAA as the rule of decision, and avoids potentially "tricky" state issues. *Harper*, 12 F.4th at 303-06 (Shwartz, J., dissenting). Nevertheless, since the Third Circuit ordered discovery in *Singh* before deciding *Harper*, and discovery is now complete, the *Harper* three-step analysis is not applicable here. That is, I need not set aside the evidentiary record the parties have developed and proceed to state law questions before adjudicating fact issues. Following *Singh*, at least one other court in this district ordered the parties to engage in discovery to determine whether the FAA's residual clause is triggered, notwithstanding pending state law arbitrability questions. *Gonzalez v. Lyft, Inc.*, No. 19-20569, 2021 U.S. Dist. LEXIS 17188, 2021 WL 303024, at *5-6 (D.N.J. Jan. 29, 2021). I thus continue with the FAA, and find that it applies, though I nonetheless conclude that state law would yield the same result—arbitration is compelled.

II. LEGAL STANDARD

On remand, I apply the standard for summary judgment. *Singh*, 939 F.3d at 219 ("If Uber chooses to reassert its motion after this discovery is completed, the District Court shall apply the summary judgment standard under Federal Rule of Civil Procedure 56."); *Aliron Int'l, Inc. v. Cherokee Nation Indus., Inc.*, 531 F.3d 863, 865, 382 U.S. App. D.C. 134 (D.C. Cir. 2008) (same). Summary judgment is appropriate where "the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, . . . demonstrate the absence of a genuine issue of material fact" and that the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (quotations omitted). An issue is "genuine" when "a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A fact is "material" when it "might affect the outcome of the suit under the governing law." *Id.* I construe all facts in the light most favorable to the nonmoving party, *Boyle v. Cty. of Allegheny Pa.*, 139 F.3d 386, 393 (3d Cir. 1998), whose evidence "is to be believed," and I make "all justifiable inferences . . . in [its] favor." *Marino v. Indus. Crating Co.*, 358 F.3d 241, 247 (3d Cir. 2004); *Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007).

The moving party "always bears the initial responsibility of informing the district court of the basis for its motion." *Celotex*, 477 U.S. at 323. That party may discharge its burden by "showing — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case when the nonmoving party bears the ultimate burden of proof." *Singletary v. Pa. Dep't of Corr.*, 266 F.3d 186, 192 n.2 (3d Cir. 2001) (quotations and citations omitted). The nonmoving party must then identify, by affidavits or otherwise, specific facts showing that there is a triable issue. *Celotex*, 477 U.S. at 324. To do so, the nonmoving party "may not rest upon the mere allegations or denials of the . . . pleading[s]." *Saldana v. Kmart Corp.*, 260 F.3d 228, 232, 43 V.I. 361

(3d Cir. 2001) (quotations omitted). Instead, "[it] must make a showing sufficient to establish the existence of [every] element essential to [its] case, and on which [it] will bear the burden of proof at trial." *Cooper v. Sniezek*, 418 Fed. App'x. 56, 58 (3d Cir. 2011) (quotations and citations omitted). "While the evidence that the non-moving party presents may be either direct or circumstantial, and need not be as great as a preponderance, [it] must be more than a scintilla," *Hugh v. Butler Cnty. Family YMCA*, 418 F.3d 265, 267 (3d Cir. 2005), and conclusory declarations, even if made in sworn statements, will not suffice. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990).

III. DISCUSSION

A. The Scope of the Dispute

At the outset, it is critical to clarify what is *not* in dispute, as I do not write on a blank slate. First, the FAA governs the TSA. This is so because the TSA is a contractual provision evincing an intention to settle certain (if not all) disputes by arbitration, *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1208-09 (9th Cir. 2016), and because the TSA indicates that the FAA governs it, *i.e.*, stipulates to the statute's application. *Uhl v. Komatsu Forklift Co., Ltd.*, 512 F.3d 294, 302-03 (6th Cir. 2008). There is also no remaining doubt as to the validity or enforceability of the TSA's arbitration provision (or its class waiver or delegation clause), which I upheld in my prior decision and the Third Circuit affirmed. To the extent that Plaintiffs continue to argue to the contrary, I do not consider it. *See, e.g.*, Pl. Rep. Br. I, at 6-10.

Next, as many courts have held, I define the relevant class of transportation workers as Uber drivers nationwide, not in any particular state, region, or locality.[4] *See, e.g.*, *Davarci v. Uber Techs., Inc.*, No. 20-9224, 2021 U.S. Dist. LEXIS 157948, 2021 WL 3721374, at *8 (S.D.N.Y. Aug. 20, 2021); *Osvatics v. Lyft, Inc.*, No. 20-1426, 535 F. Supp. 3d 1, 2021 U.S. Dist. LEXIS 77559, 2021 WL 1601114, at *11 (D.D.C. Apr. 22, 2021) (Ketanji, J.) (holding that contrary position "would undermine the underlying purposes of the FAA"); *Islam v. Lyft, Inc.*, 524 F. Supp. 3d 338, 350 (S.D.N.Y. 2021) ("[I]t would be illogical if Lyft drivers performing the same work for the same company in different cities were to have completely different rights and obligations."); *Sienkaniec v. Uber Techs., Inc.*, 401 F. Supp. 3d 870, 872 (D. Minn. 2019) ("Uber drivers [nationwide] perform the same job for the same company pursuant to the same agreement."); *Aleksanian v. Uber Techs. Inc.*, 524 F. Supp. 3d 251, 261 (S.D.N.Y. 2021) (rejecting argument attempting to "frame the class of workers as 'New York City Uber drivers'"); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006) ("The FAA

4. At one point, Singh confusingly states that Uber drivers belong to a nationwide class that includes "all other transportation workers employed in the transportation industry who work . . . [on] public interstate highways and roads[]," such as "bus line workers." Pl. Rep. Br. I, at 3-4. Singh provides no legal authority for this proposition, and if it were true, then seemingly every transportation worker (except perhaps airline workers) would be exempt under § 1—an exception that would swallow the rule and contravene the plain text of the residual clause requiring courts to take each "class" of transportation workers on its own terms and to exempt only those on par with seamen and railroad employees.

embodies a "national policy favoring arbitration."). Both parties accept a class definition at this level of generality. Pl. Br. I, at 9 ("Viewing Uber rideshare drivers nationwide is an appropriately bounded class to determine application of the FAA [ ] exemption."); Def. Br. I, at 13-14 (same). Importantly, along these lines, "the inquiry regarding § 1's residual clause asks a court to look to classes of workers rather than particular workers," so Plaintiffs' individual driving histories are not relevant, except to the extent that they reflect the work of the class on the whole. *Singh*, 939 F.3d at 227; *Capriole v. Uber Techs., Inc.*, 460 F. Supp. 3d 919, 929 (N.D. Cal. 2020) ("[T]he relevant inquiry is not whether an individual driver has crossed state lines, but whether the *class* of drivers crosses state lines."); *Rogers v. Lyft, Inc.*, 452 F. Supp. 3d 904, 915-16 (N.D. Cal. Apr. 7, 2020) ("The plaintiffs' personal exploits are relevant only to the extent they indicate the activities performed by the overall class."). In other words, a member of a class of transportation workers who never personally crosses a border may still be "engaged in interstate commerce," so long as the class on the whole is defined by such engagement, and conversely, a class of transportation workers may not qualify for the residual clause exemption even if its members occasionally or often perform that kind of work. The focus is always the overall class.

While Plaintiffs further dispute which party has the burden of proof, there is no question that Plaintiffs bear it, because they are challenging the applicability of the TSA. *See, e.g., Singh*, 939 F.3d at 231-32 (Porter, J., concurring in part and concurring in the judgment) ("Singh bears the burden on remand to show why the District Court should not compel arbitration under the FAA."); *Green*

Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000) ("[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration."); *Capriole*, 460 F. Supp. 3d at 928 ("As the party opposing arbitration, Plaintiffs have the burden of proving that the exemption applies."); *Osvatics*, 2021 U.S. Dist. LEXIS 77559, 2021 WL 1601114, at *6. Under the FAA, once a party seeking to enforce an arbitration agreement carries its initial burden as to the agreement's validity, as Uber has done, the burden shifts to the opposing party to show that § 1 applies. *See, e.g., Bean v. ES Partners, Inc.*, No. 20-62047, 533 F. Supp. 3d 1226, 2021 U.S. Dist. LEXIS 65261, 2021 WL 1239899, at *2 (S.D. Fla. Apr. 4, 2021) ("The party resisting arbitration bears the burden of showing that [the residual clause] exemption applies."); *Smith v. AllState Power Vac, Inc.*, 482 F. Supp. 3d 40, 45 (E.D.N.Y. 2020) ("A plaintiff opposing arbitration under the FAA has the burden of demonstrating the exemption.") (citation omitted).

Finally, I reject Uber's contention that, because the TSA is merely a software license, the arbitration provision does not appear in a "contract of employment" in the sense of the FAA. In *Singh*, the Third Circuit stated that "*New Prime* eliminated Uber's 'contract of employment' argument, so we are left with its transportation-of-goods and 'engaged in interstate commerce' arguments." 939 F.3d at 217; *New Prime*, 139 S. Ct. at 541 ("Congress used the term 'contracts of employment' in a broad sense to capture any contract for the performance of *work* by *workers*.") (emphasis in original). The Third Circuit also stated that whether Plaintiffs are engaged in interstate

commerce or "sufficiently related work" is "dispositive as to whether the FAA applies," an implicit acknowledgement that the FAA's "contract of employment" criteria is satisfied here. *Singh*, 939 F.3d at 219. And, "[b]y now, it is axiomatic that on remand for further proceedings after decision by an appellate court, the trial court must proceed in accordance with the mandate and the law of the case as established on appeal." *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 949 (3d Cir. 1985) (quotations omitted). Lyft, another rideshare company, has conceded this point in similar litigation, notwithstanding the underlying dispute about whether drivers are employees or independent contractors. *Osvatics*, 2021 U.S. Dist. LEXIS 77559, 2021 WL 1601114, at *8 n.5. Further, Uber has failed to identify any court that has found its contrary position availing. *Davarci*, 2021 U.S. Dist. LEXIS 157948, 2021 WL 3721374, at *9 n.20 (concluding same). As the purported software license provides, Plaintiffs may use it "solely for the purposes of providing transportation services." Def. SUMF I, ¶ 19; Def. SUMF II, ¶¶ 24-25. That is, for "the performance of work." *New Prime*, 139 S. Ct. at 541 (emphasis omitted). Having resolved these issues, I turn to the question before me: what it means to be "engaged" in interstate commerce under the FAA, which I answer based on the record the parties developed in discovery.

B. The Legal Landscape

Since my decision in 2019, many district courts have decided similar FAA cases based on varying levels of factual development. The majority view is that rideshare

drivers nationwide do not engage in interstate commerce and are not covered by the residual clause in the FAA. *See, e.g., Davarci*, 2021 U.S. Dist. LEXIS 157948, 2021 WL 3721374; *Osvatics*, 2021 U.S. Dist. LEXIS 77559, 2021 WL 1601114; *Capriole*, 460 F. Supp. 3d 919; *Aleksanian*, 524 F. Supp. 3d 251, 2021 WL 860127; *Rogers*, 452 F. Supp. 3d 904; *Sienkaniec*, 401 F. Supp. 3d 870; *Hinson v. Lyft, Inc.*, 522 F. Supp. 3d 1254, 2021 WL 838411 (N.D. Ga. 2021); *Heller v. Rasier, LLC*, No. 17-8545, 2020 U.S. Dist. LEXIS 14288, 2020 WL 413243 (C.D. Cal. Jan. 7, 2020); *Tyler v. Uber Techs., Inc.*, No. 19-3492, 2020 U.S. Dist. LEXIS 170021, 2020 WL 5569948 (D.D.C. Sept. 17, 2020); *see also In re Grice*, 974 F.3d 950, 954 (9th Cir. 2020) (denying plaintiff's petition for a writ of mandamus and holding that district court's decision that Uber drivers did not fall within residual clause of Section 1 exemption was not "clearly erroneous as a matter of law"). These courts reason that nationwide rideshare drivers complete a small percentage of cross-border rides (*e.g.*, just over 2%), and their overall driving activities demonstrate that they serve a fundamentally local transportation function.

The majority view culminated in a recent Ninth Circuit decision, where a court of appeals directly addressed the issue for the first time, found in favor of Uber, and compelled arbitration. *Capriole v. Uber Techs., Inc.*, 7 F.4th 854 (9th Cir. 2021). Specifically, the Ninth Circuit found Uber drivers nationwide not to be "engaged in interstate commerce" in the sense of the FAA because "Uber trips are often short and local" as well as "primarily . . . intrastate in nature," crossing state lines just a fraction of the time largely as a result of geography, they "only

infrequently involve . . . a trip to a transportation hub" such as an airport, and interstate movement "cannot be said to be" central to what drivers do. *Id.* at 864-65. A few months later, the First Circuit rejected the same twin arguments as the Ninth Circuit, finding that drivers do not "fit within the section 1 exemption [just] because some of them occasionally transport passengers across state lines" and because they occasionally transport passengers to Logan International Airport. *Cunningham v. Lyft, Inc.*, Nos. 20-1373, 20-1379, 20-1544, 20-1549, 20-1567, 17 F.4th 244, 2021 U.S. App. LEXIS 33010, 2021 WL 5149039, at *3 (1st Cir. Nov. 5, 2021). According to that court, drivers are "among a class of workers engaged primarily in local intrastate transportation, some of whom infrequently find themselves crossing state lines, and are thus fundamentally unlike seamen and railroad employees when it comes to their engagement in interstate commerce." 2021 U.S. App. LEXIS 33010, [WL] *6-7.

Two district courts have bucked this trend, holding that rideshare drivers *are* transportation workers engaged in interstate commerce under the FAA. *Islam*, 524 F. Supp. 3d 338; *Haider v. Lyft, Inc.*, No. 20-2997, 2021 U.S. Dist. LEXIS 62690, 2021 WL 1226442 (S.D.N.Y. Mar. 31, 2021). What matters to these courts is that rideshare drivers nationwide complete tens of millions of interstate trips per year, regardless of whether that equals just 2% of all rides, and frequently pick up and drop off passengers at airports.

C. Residual Clause Analysis

Notwithstanding the limited momentum (in the Southern District of New York) for Plaintiffs' theory, I agree with the majority view that nationwide rideshare drivers are not a class of transportation workers engaged in interstate commerce.

i. The Standard

The Third Circuit has construed the FAA's residual clause to cover workers "actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it." *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., (U.E.) Local 437*, 207 F.2d 450, 452 (3d Cir. 1953) (en banc) (citing *Shanks v. Del., Lackawanna & W.R. Co.*, 239 U.S. 556, 558, 36 S. Ct. 188, 60 L. Ed. 436 (1916)). The Third Circuit declared *Tenney* good law in *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 226-27 (3d Cir. 1997), and again in *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 593 (3d Cir. 2004). *Singh* followed suit, describing *Tenney* as requiring at a minimum active engagement in work that is "sufficiently related" to interstate commerce. 939 F.3d at 219. *Singh* also set forth multiple factors calculated to determine whether a class of transportation workers satisfies *Tenney*. *Id.* at 227. The factors include "the contents of the parties' agreement, 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.* ("The District Court must be equipped with a wide variety of sources."). The factors are co-equal and nonexhaustive. *Id.* ("Nor must its analysis hinge on any one particular factor, such as the local nature of the work.").

Singh squares with the inquiry in the First and Ninth Circuits. *See, e.g., Waithaka*, 966 F.3d at 22 (analyzing the "geographic footprint and nature of the business for which [delivery drivers] work," among other things, because "workers' activities are not pursued for their own sake" but to "carry out the objectives of a business," and because seamen and railroad employees are "defined by the nature of the business for which they work"); *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 917-18 (9th Cir. 2020) (focusing on same); *Grice*, 974 F.3d at 956 (same). The Seventh Circuit has summed up the inquiry in its own words: "actual engagement in interstate commerce" means that the interstate work must be a "central part" of the overall work of the class. *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 801 (7th Cir. 2020) (Barrett, J.) ("That is the inquiry that *Circuit City* demands."). Though somewhat different in form, the centrality test in *Wallace* is not different in substance from the approach in other circuits. The Ninth and First Circuits relied on *Wallace* when they found that rideshare drivers are subject to arbitration under the FAA. *Capriole*, 7 F.4th at 865; *Cunningham*, 2021 U.S. App. LEXIS 33010, 2021 WL 5149039, at *6. The same goes for virtually every district court to consider the issue, including those holding the minority view. *Davarci*, 2021 U.S. Dist. LEXIS 157948, 2021 WL 3721374, at *11 (focusing on "whether a

central feature of class members' jobs involves interstate commerce"); *Osvatics*, 2021 U.S. Dist. LEXIS 77559, 2021 WL 1601114, at *12 ("[W]hether a worker is 'engaged in . . . interstate commerce' turns on whether 'interstate movement' is 'a central part of the class members' job description.'") (citation omitted); *Aleksanian*, 524 F. Supp. 3d at 260-61 (holding "cases out of the First, Third, and Ninth Circuit," including *Singh*, "support rather than contradict" the Seventh Circuit's holding as to the centrality of the interstate work); *Islam*, 524 F. Supp. 3d at 344 ("Put another way, as the Seventh Circuit did in *Wallace*, the relevant inquiry is whether the 'interstate movement of goods [or people] is a central part of the class members' job description.'") (citation omitted).

The centrality of the interstate work is likewise implicit in the *Singh* factors, particularly *Singh*'s focus on "the information regarding the [rideshare] industry," "the work performed by [rideshare] workers," and the "*extent* to which [drivers'] activities constitute engagement in interstate commerce." 939 F.3d at 227 & n.11 (emphasis added). It also inheres in *Tenney*, whose benchmark is work "so closely related" or "sufficiently related" to interstate travel. If driving for Uber does not, *at its core*, involve transporting riders across state lines, then I would be hard-pressed to find that drivers could "actually engage[] in the movement of interstate or foreign commerce" or that their work could be "sufficiently related" to it. *Tenney*, 207 F.2d at 453. Most importantly, comparing a class of workers to seamen and railroad employees necessarily implicates the centrality of the interstate work, for a core feature of those jobs is interstate movement. *Davarci*,

2021 U.S. Dist. LEXIS 157948, 2021 WL 3721374, at *9 ("The transportation of goods or passengers in the flow of interstate commerce must be a definitional feature of the workers' job duties, such that the work of the class can be deemed analogous to that of seamen and railroad employees, whose occupations center on the transportation of goods or persons in interstate commerce."); *Osvatics*, 2021 U.S. Dist. LEXIS 77559, 2021 WL 1601114, at *12 (same); *Eastus v. ISS Facility Servs., Inc.*, 960 F.3d 207, 210 (5th Cir. 2020) (examining whether a class of workers is "engage[d] in the movement of goods in interstate commerce in the same way that seamen and railroad workers are") (quotations and citation omitted). Or, as the concurrence put it in *Harper*, the inquiry turns on whether the interstate work forms an "ordinary and regular part of the class of work." 12 F.4th at 302.

The case law teaches that one other principle bears on the residual clause analysis: crossing state lines is not the "touchstone of the exemption's test." *Waithaka*, 966 F.3d at 25. Indeed, crossing state lines is not a *necessary* condition because, for instance, "workers moving goods or people destined for, or coming from, other states" may be "engaged in interstate commerce" even if the workers are "responsible only for an intrastate leg of that interstate journey." *Id.* at 22; *Rittmann*, 971 F.3d at 915; *Osvatics*, 2021 U.S. Dist. LEXIS 77559, 2021 WL 1601114, at *12. By the same token, crossing state lines by itself may not be *sufficient* to trigger the residual clause because, as the Eleventh Circuit has described, "a pizza delivery person who deliver[s] pizza across a state line to a customer in a neighboring town" cannot claim the FAA's exemption

solely for that reason. *Hill v. Rent-A-Ctr., Inc.*, 398 F.3d 1286, 1289-90 (11th Cir. 2005). All told, what matters is "[t]he nature of the business for which a class of workers perform[s] their activities" and other industry-related factors under *Singh*, rather than whether the workers actually "cross[] state lines." *Grice*, 974 F.3d at 956 (quotations and citation omitted). With these principles in hand, and having defined the contours of the analysis, I turn to the *Singh* factors.

ii. The Factors

1. The TSA

I begin with the TSA. While both parties point to it as evidence of the type of work in which Uber drivers engage, it hardly settles the issue. The TSA provides for "Transportation Services," which, Uber points out, are defined as the "provision of [peer to peer] passenger transportation [ ] to Users via the Uber Services in the Territory using the Vehicle." Def. SUMF I, ¶ 27. "Territory" refers to "the city or metro area in the United States in which [drivers] are enabled by the Driver App to provide [rides]." *Id.* ¶ 28. Uber's "operations are organized on a city-by-city basis" and its business is "very city-oriented" to comply with the disparate patchwork of ridesharing regulations governing drivers. *Id.* ¶¶ 33, 37. Uber adds that, when drivers sign up to use its app, they input "the city in which they want that account associated to," which becomes the "home city" and whose regulations control where they may pick up passengers. *Id.* ¶¶ 34-35. Thus, in some territories, drivers may not make pick-ups

in states other than the state in which their home city is located. *Id.* ¶ 36.

At the same time, Plaintiffs note, Uber has created many multi-state territories. Pl. Br. II, at 31. This is true in parts of 34 states, and 47% of Uber's 217 territories span borders. Pl. SUMF II, ¶¶ 28, 32. Likewise, many purportedly single state territories come with exceptions. For instance, in Pennsylvania, there are 11 territories in which drivers are limited to pick-ups within the state, but in the Philadelphia territory, some drivers may pick up riders in New Jersey and Delaware, while in the Lehigh Valley territory, some drivers can pick up riders in New Jersey, and in the New York territory, some drivers may pick up riders in New Jersey, but not vice versa. Pl. Br. II, Ex. D. Plaintiffs also reasonably point out that Uber's territory system did not exist before 2016, during which time drivers could begin trips anywhere, and at present it only limits where drivers can *receive* ride requests. Drivers may *complete* rides to any place a car can go. As well, Uber designs its service to facilitate interstate travel; its fare schedule contemplates interstate travel in that it is based in part on time and distance; its deactivation policy penalizes drivers for declining interstate pick-ups in multi-state territories; and it markets its business as "transportation as reliable as running water everywhere for everyone." Because this evidence weighs equally on both sides, and because I cannot substitute general notions about Uber's business for actual data in the record, the TSA alone does not answer the question whether rideshare drivers are engaged in interstate commerce.

2. The Rideshare Industry

What matters are driving statistics for Uber.[5] The parties rely on this information, indeed some of the same data points, to reach opposite conclusions about the nature of Uber's business and whether the residual clause applies. Uber argues that its drivers do not engage in interstate commerce because fewer than 2.5% of all trips cross state lines, and those that do cover on average only 13.5 miles, last on average 30 minutes, and occur largely by the happenstance of geography, such as when a rider needs to travel from Arlington, Virginia, to Washington, D.C., or Hoboken, New Jersey, to Manhattan in New York City. Def. SUMF I, ¶¶ 39-42, 104. In this sense, Uber maintains, "the way drivers use [the app] is very, very localized." *Id.* ¶ 38.

While in Uber's estimation the *proportion* of interstate rides is relatively rare, according to Plaintiffs, such rides are nevertheless *numerically* many: 2% of all Uber rides nationwide nets to 140 million interstate rides since 2010, equal to one interstate ride every second for the last three years and an average of 32 million interstate rides per year from 2017 to 2019. Pl. SUMF I, ¶¶ 12-14. Plaintiffs also respond that Uber skews the data, and elides the true character of the class work, by emphasizing the ratio of interstate to intrastate *rides*. If any ratio matters, Plaintiffs propose, it is that in any given year approximately 16% of *drivers* cross state lines

5. All statistics run through May 2020. Def. SUMF I, ¶ 43 nn.1-2.

to complete a ride, which equals 500,000 drivers per year from 2017 to 2019. According to Plaintiffs, this is a much more revealing datapoint than Uber's "2% of all rides" statistic. Pl. Br. II, Ex. A.

Plaintiffs further rely on the activity of drivers who complete the most rides, drive the most miles, and spend the most time "on the clock," or drivers with 50 or more rides per year, which they argue offer the best picture of what rideshare drivers nationwide actually do. Pl. Br. I, at 22. This cohort must be the focal point, Plaintiffs contend, because 60% of drivers leave within 6 months of signing up for Uber, 59% average less than 2 hours of driving prior to ending their employment, 50% work less than 10 hours per week, and 5% perform 45% of all rides. Pl. SUMF I, ¶¶ 18-21. Viewed through the lens of Plaintiffs' "most active drivers" measure, 27% of drivers with 50 or more annual trips completed an interstate ride between 2010 and 2020, comprising 99.3% of all interstate rides. *Id.* ¶ 19; Pl. Br. II, at 23. Finally, according to Plaintiffs, Uber drivers frequently pick up/drop off passengers at airports who are heading to/returning from interstate travel, which is sufficiently related to interstate commerce. For instance, 10% of all Uber rides start or end at an airport, and 15 percent of Uber's gross bookings are airport trips, which nets to more than 500 million airport rides from 2016 to 2020. Pl. Br. II, Ex. C.

a. Driver/Ride Data

Plaintiffs' argument that 140 million interstate rides is sufficient to qualify all Uber drivers as "actually engaged in interstate commerce" has a certain surface-

level appeal, especially when Plaintiffs characterize these rides as happening every second of every day. Similar arguments have persuaded a minority of district courts in the Southern District of New York. *Islam*, 524 F. Supp. 3d 338, 2021 WL 871417, at *8 (finding that rideshare drivers conduct tens of millions of interstate rides each year, meaning rideshare drivers "perform sufficient numbers of interstate rides, with sufficient regularity, to make them 'engaged in' interstate commerce," "even if interstate transportation is not the predominant daily service provided by rideshare drivers"); *Haider*, 2021 U.S. Dist. LEXIS 62690, 2021 WL 1226442, at *3-4 (finding that "the sheer number of interstate trips rideshare drivers make places them 'within the flow of interstate commerce'") (quoting *Circuit City*, 532 U.S. at 118). And, admittedly, the circumstances of this case fall into a grey area on the interstate commerce spectrum. Courts have long recognized that "there is no[] clear definition or consensus of what constitutes a 'transportation worker' who is 'engaged in interstate commerce,'" *Heller*, 2020 U.S. Dist. LEXIS 14288, 2020 WL 413243, at *6, and there is "a gap in the case law . . . between cases in which *no* member of a class transported goods or services across a state line and cases in which *all* members of a class did so." *Sienkaniec*, 401 F. Supp. 3d at 872 (emphasis in original).

I nevertheless agree with the majority view (espoused in both the First and Ninth Circuits) that focusing solely on the number of cross-border trips produces a simple but incorrect answer. Plaintiffs first falter by assigning too much weight to this metric. The lynchpin is not "the frequency *vel non* with which a type of worker traverses state boundaries," *Davarci*, 2021 U.S. Dist. LEXIS

157948, 2021 WL 3721374, at *12, because crossing state lines is neither necessary nor sufficient to trigger § 1. *Osvatics*, 2021 U.S. Dist. LEXIS 77559, 2021 WL 1601114, at *12; *Rogers*, 452 F. Supp. 3d at 915 ("[T]he fact that some workers cross state lines in the course of their duties does not mean that the class of workers as a whole is engaged in interstate commerce."); *Aleksanian*, 524 F. Supp. 3d at 262 ("[J]ust because Uber is set up to handle the occasional interstate trip does not mean that 'interstate movement of goods is a central part of the job description of the class of workers to which [Plaintiffs] belong.'") (quoting *Wallace*, 970 F.3d at 800). In fact, insofar as Plaintiffs rely on cases holding that traversing borders is not the *sine qua non* of the residual clause, they tacitly concede that that the total tally of interstate trips cannot be dispositive and should not bear the most significance. *Davarci*, 2021 U.S. Dist. LEXIS 157948, 2021 WL 3721374, at *12 ("[T]hose cases, in this Court's opinion, directly call into question the minority view's reliance on the raw number of trips rideshare drivers purportedly take across state borders."). "The raw number of cross-border trips conducted by Uber drivers is [thus] irrelevant to the ultimate inquiry."[6] U.S.

6. Two examples helpfully illustrate this point. As the *Davarci* Court wrote, a bartender who spends all of his or her time giving advice to patrons is not "engaged in" therapy or counseling as the Supreme Court has construed that term. 2021 U.S. Dist. LEXIS 157948, 2021 WL 3721374, at *12 & n.21. Conversely, as the *Islam* Court observed, "any federal district judge would answer in the affirmative if asked whether or not she was 'engaged in' conducting criminal trials, notwithstanding that most federal judges' dockets consist primarily of civil actions and the majority of criminal prosecutions are resolved by a guilty plea. Overseeing criminal trials is unquestionably a 'central part of [a federal district judge's]

Dist. LEXIS 157948, [WL] at *11.

Even accepting Plaintiffs' argument on its terms, it still runs headlong into the disparity at the heart of this case: interstate trips, albeit numerically many, do not constitute a central part of what Uber does when placed in the context of its drivers' overall work activities. *Capriole*, 7 F.4th at 865-66. For one thing, *tens of billions* of rides are local, never crossing a border, equal to *dozens* of rides per second, as almost any Uber rider would attest. *Davarci*, 2021 U.S. Dist. LEXIS 157948, 2021 WL 3721374, at *9 ("The vast majority [97.5%] of Uber drivers' trips are purely intrastate."); *Osvatics*, 2021 U.S. Dist. LEXIS 77559, 2021 WL 1601114, at *13 (holding that rideshare drivers "offer services that are primarily local and intrastate in nature"); *Capriole*, 460 F. Supp. 3d at 932 ("Uber drivers do not perform an integral role in a chain of interstate transportation."); *Rogers*, 452 F. Supp. 3d at 916 ("[Drivers'] work predominantly entails intrastate trips, an activity that undoubtedly affects interstate commerce but is not interstate commerce itself."). The fact that drivers completed 140 million interstate rides over the last 10 years is more likely a function of Uber's popularity or the rapidly growing "scope of its operations," *Harper*, 12 F.4th at 302, than the *nature* of its business and the *centrality* of interstate rides to the work of the class.

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job description,' even if it is not something that she does every day or even every month." 524 F. Supp. 3d at 351 (citation omitted). These affirm that the focus of the residual clause inquiry must remain on the nature of the business and the centrality of the interstate work, not numerical tallies.

Also problematic for Plaintiffs: their total rides tally is "likely influenced by the fact that many interstate trips are performed by drivers (or for riders) who live close to state borders, especially on the East Coast," thereby eliding the *nationwide* character of the class. *Capriole*, 7 F.4th at 864. Similarly, interstate trips largely resemble intrastate trips in time and distance, suggesting that when they do happen, they result from a combination of geography plus routine travel patterns, buttressing the fundamentally local transportation function provided by drivers and the nominal or incidental character of the interstate trips, no matter how numerous they are. *See, e.g.*, Def. SUMF I, ¶ 39 (finding that interstate trips average 13.5 miles and 30 minutes, while intrastate trips average 6.1 miles and 16.6 minutes); *Davarci*, 2021 U.S. Dist. LEXIS 157948, 2021 WL 3721374, at *9 (relying on these statistics and holding that "[o]nce the Court concludes that interstate trips are merely incidental to Uber drivers' local transportation function, there is no raw number of interstate trips that can transform them into workers who are engaged in interstate commerce"); *Rogers*, 452 F. Supp. 3d at 916 (same). In other words, "Uber drivers, even when crossing state lines . . ., are 'merely convey[ing] interstate . . . passengers between their homes and [their destination] in the normal course of their independent local service.'" *Capriole*, 7 F.4th at 865 (citation omitted). Contrast this with seamen and railroad workers, for whom the interstate movement of people and things over long distances and across state lines is intrinsic to the type of work they perform. *Wallace*, 970 F.3d at 803.

Plaintiffs' alternative interpretation of the data only underscores this point: though they make much of the fact that 16% of all drivers gave at least one interstate ride from 2010 to 2020, the flip side is that 84% of drivers never did so, and New Jersey and New York drivers gave almost 8 million interstate trips in 2019, or nearly one-fourth of all such trips that year. Insofar as Plaintiffs eschew these statistical nuances, their position is at once overinclusive of "Uber's service in metropolitan markets" nearby other states, yet underinclusive of its service in major markets far from other state borders—for example, San Francisco, which is 200 miles from Nevada, or Austin, which is 125 miles from Oklahoma, or even Massachusetts, where 99.7% of percent of rides begin and end in-state despite its proximity to other states in the dense New England region. *Capriole*, 460 F. Supp. 3d at 929. In any event, accepting *arguendo* Plaintiffs' focus on 16% of all drivers, interstate trips still constitute a fraction of their workload, not a central or definitional feature. For half of this cohort, not more than 4.2% of rides crossed state lines between 2015 and 2020, while for 80%, it was fewer than one-fifth, and 5% completed 80% of all trips. Def. SUMF I, ¶¶ 43-44, 46.

Plaintiffs further "inexplicably" limit their analysis to the most active drivers, or those with 50+ trips per year. *Capriole*, 7 F.4th at 866; *cf. Haider*, 2021 U.S. Dist. LEXIS 62690, 2021 WL 1226442, at *3 (focusing on "full-time" divers). Their basis for doing so is that most Uber drivers work for a short period of time, then quit. Assuming that is true, it still does not permit the inference that the work patterns of the most active drivers transform the entire

class into one engaged in interstate commerce. For one thing, the crux of the inquiry is not whether a certain proportion of a specific kind of driver's work is out-of-state, but whether the *entire category* of workers to which the driver belongs is a part of the stream of interstate commerce based on its *overall* work. *See, e.g., Hinson*, 522 F. Supp. 3d at 1261. To glean the nature of Uber's business and the core of all ridesharing jobs from a narrow subset of drivers, and to assume their experience is universal to the class, risks undermining the well-established rule that "the idiosyncratic patterns of [ ] drivers . . . are largely irrelevant," *Davarci*, 2021 U.S. Dist. LEXIS 157948, 2021 WL 3721374, at *9 (collecting cases), and "personal exploits" matter only insofar as "they indicate the activities performed" by workers overall. *Rogers*, 452 F. Supp. 3d at 915.

In response, Plaintiffs contend that they are doing just that: identifying certain structural features of Uber's business *exemplified by* the most active drivers, not conveniently limiting the class to that group. Plaintiffs' position fails to persuade because high attrition and low productivity are *also* defining class characteristics, certainly as much as the fact that a small number of drivers do a large percentage of the work. This is the gig economy: on-demand jobs, supplemental income, tradeoffs between stability and flexibility, and a market where many drivers use multiple apps at once, such as Uber and Lyft, or multiple platforms, such as Uber Rides and Uber Eats, to earn the equivalent of full-time pay. *See, e.g.*, Christopher Mims, *In a Tight Labor Market, Gig Workers Get Harder to Please: Companies like Uber, Lyft,*

Postmates, and Instacart Could Run Out of Man Power As High Turnover Plagues the Side-Hustle Economy, WALL ST. J. (May 4, 2019) (describing turnover as high as 500% per year, workers who use as many as eight different apps to supplement income, and incentive programs to encourage drivers to stay); Sarah Kessler, GIGGED: THE END OF THE JOB AND THE FUTURE OF WORK (2018) (describing a structural shift away from permanent employment and to delivery services coordinated by apps). It is inappropriate to exclude this type of work and these kinds of drivers from the nature of Uber's business or the core activities of the class.

Finally, precedent teaches that "the residual clause must be interpreted in light of the specifically enumerated categories of workers that directly precede it, consistent with the *ejusdem generis* canon of statutory construction." *Waithaka*, 966 F.3d at 17 (citing *Circuit City*, 532 U.S. at 118); *Wallace*, 970 F.3d at 801-02 (holding that interstate transportation work under the residual clause must be on par with seamen and railroad employees); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995) (holding that § 1 "should be narrowly construed to apply to employment contracts of seamen, railroad workers, and any other class of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are"); *Harper*, 12 F.4th at 293. For seamen and railroad workers, interstate travel is a central, intrinsic, practically unavoidable task. *See, e.g., CSX Transp., Inc. v. Healey*, 861 F.3d 276, 278 (1st Cir. 2017) (referring to the railroad industry as a "quintessentially interstate business"); *Baker v. United*

Transp. Union, AFL-CIO, 455 F.2d 149, 153-54 (3d Cir. 1971) (stating that the railroads "remain the backbone of much of our interstate transportation system" and describing the railroads as a "vital link in our nation's commerce"). "Railroads are interstate at their core, regardless of the fact that some rail lines are entirely intrastate." *Davarci*, 2021 U.S. Dist. LEXIS 157948, 2021 WL 3721374, at *12. The same cannot be said for rideshare drivers, who close to 100% of the time give short, local rides, and whose interstate trips are generally of the same character as their intrastate trips. *Capriole*, 7 F.4th at 865 (contrasting Uber drivers with seamen and railroad workers in this respect, for whom "the interstate movement of goods and passengers over long distances and across national or state lines is an indelible and 'central part of the job description'") (quoting *Wallace*, 970 F.3d at 803).

b. Airport Data

What remains is data on Uber's airport trips. Plaintiffs' theory here is that, because Uber drivers occasionally transport riders to and from airports, where interstate travel frequently occurs, drivers themselves are "within the flow of interstate commerce" under *Circuit City* or at least they engage in work "sufficiently related" to it pursuant to *Tenney*. The text of the residual clause places a heavy thumb on the scale against Plaintiffs' argument from the start. Section 1 uses the phrase "engaged in commerce," while § 2 uses the phrase "involving" commerce. Section 2's open-ended phrasing "signals an intent to exercise Congress' commerce power to the full."

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 277, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995). By contrast, § 1 is written to capture a much narrower set of activities, *Circuit City*, 532 U.S. at 118, has a "more limited reach," *id.* at 115, and evinces "[n]o [ ] concern for the impact of intrastate conduct on interstate commerce." *United States v. American Building Maintenance Industries*, 422 U.S. 271, 278, 95 S. Ct. 2150, 45 L. Ed. 2d 177 (1975); *Capriole*, 460 F. Supp. 3d at 929 ("The plain meaning of the words 'engaged in commerce' includes not everyone whose work might generally *affect* commerce.") (quoting *Rogers*, 452 F. Supp. 3d at 915) (emphasis in original). To the extent that Uber drivers engage in fundamentally local conduct that is only tangentially or incidentally related to interstate movement, they are not within the flow of interstate commerce as courts have interpreted that term. Stated differently, as the Ninth Circuit held, "'the residual exemption is . . . about what the worker does,' not just 'where the goods [or people] have been,'" which is the main focus of Plaintiffs' "airport trips" argument. *Capriole*, 7 F.4th at 865 (quoting *Grice*, 974 F.3d at 958 (omission and alteration in original) (quoting *Wallace*, 970 F.3d at 802)).

The Supreme Court also foreclosed an argument like Plaintiffs' eighty years ago in *United States v. Yellow Cab Co.*, 332 U.S. 218, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984). The reasoning there is persuasive. In interpreting the language in the Sherman Act, which is

broader than the language in the FAA,[7] *Circuit City*, 532 U.S. at 118, the Court held that local taxicab operators in Chicago "merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service," which is "not an integral part of interstate transportation" but only "causal and incidental" to it. *Id.* at 233. At the same time, the Court held that a transportation service designed to transfer passengers between rail stations two miles apart *is* part of the stream of interstate commerce. *Id.* at 228-29. The Court found various factors important, including that the none of the cab companies "serve[d] only railroad passengers, all of them being required to serve 'every person' within the limits of Chicago," there was "no contractual or other arrangement with the interstate railroads," cab "fares [were not] paid or collected as part of the railroad fares," and passengers "contracted for" the cab rides "independently of the railroad journey." *Id.* at 231-32.

Multiple courts have held that Uber rides are technologically advanced "local taxicab transport," and have rejected Plaintiffs' "airport trips" argument to this extent. *See, e.g., Aleksanian*, 524 F. Supp. 3d 251, 2021 WL 860127, at *8 (explaining that *Yellow Cab*'s "reasoning is just as applicable" to rideshare drivers); *Rogers*, 452 F. Supp. 3d at 916-17 (summarizing *Yellow Cab*

7. Because the Sherman Act is broadly construed, whereas the FAA is narrowly construed, conduct that does not affect interstate commerce under the Sherman Act *a fortiori* is not conduct "engaged in interstate commerce" under the residual clause. *Cunningham*, 2021 U.S. App. LEXIS 33010, 2021 WL 5149039, at *5.

and concluding that the same analysis applies to "these modern-day taxi drivers"); *Hinson*, 522 F. Supp. 3d 1254, 2021 WL 838411, at *6 (analogizing Lyft drivers to taxi drivers, who "have been found to have an 'only casual and incidental' relationship to interstate transit"). Included in this consensus are the Ninth and First circuits, the latter of which explicitly reversed the district court's finding on this point. *Capriole*, 12 F.4th at 865; *Cunningham*, 2021 U.S. App. LEXIS 33010, 2021 WL 5149039, at *4-6. I agree as well.

At bottom, Uber drivers do not serve many—let alone only—airport passengers, anyone can hail an Uber from anywhere to just about everywhere, and passengers neither order nor pay for Ubers through their airline or as part of their plane tickets. *Accord Osvatics*, 2021 U.S. Dist. LEXIS 77559, 2021 WL 1601114, at *13-14 ("[T]his is especially so given the apparently undisputed fact in the instant case that passengers seeking a ride to or from an airport or railroad station use the Lyft application unilaterally to hail a driver, and there is no evidence that Lyft has a 'contractual or other arrangement' with airlines or railways for Lyft drivers to transport passengers who have taken trips with those companies."). Likewise, "even when transporting passengers to and from transportation hubs as part of a larger foreign or interstate trip, Uber drivers are unaffiliated, independent participants," called separately and on-demand. *Capriole*, 7 F.4th at 867; *Cunningham*, 2021 U.S. App. LEXIS 33010, 2021 WL 5149039, at *4 ("The Lyft driver contracts with the passenger as part of the driver's normal local service to take the passenger to the start (or from the finish) of

the passenger's interstate journey."). For at least these reasons, Uber drivers do not "participate in a single, unbroken stream of interstate commerce" in completing airport rides, *Capriole*, 7 F.4th at 863-65, and they lack the requisite "practical, economic continuity" with interstate air travel to satisfy the residual clause, *Gulf Oil Corp. v. Copp. Paving Co., Inc.*, 419 U.S. 186, 195, 95 S. Ct. 392, 42 L. Ed. 2d 378 (1974), even under *Tenney*'s (seemingly) more permissive "sufficiently related" or "so closely related" standard. Uber drivers are "but one, segmented part" of a rider's overall journey to, through, and beyond transportation hubs such as airports. *Davarci*, 2021 U.S. Dist. LEXIS 157948, 2021 WL 3721374, at *13-14.

Analogies buttress this conclusion. For instance, "[o]ne would not reasonably say that plaintiffs are engaged in interstate trucking merely because they sometimes give truck drivers rides to and from their garages." *Cunningham*, 2021 U.S. App. LEXIS 33010, 2021 WL 5149039, at *5. On the other hand, airport shuttle drivers *do* engage in interstate commerce because shuttle bus companies have "practical continuity of movement" with overall interstate journeys based on agreements with travel companies and the fact that customers typically buy travel packages that include shuttle service. *Abel v. So. Shuttle Servs., Inc.*, 631 F.3d 1210, 1216-17 (11th Cir. 2011); *Rogers*, 452 F. Sup. 3d at 916. Similarly, "last leg" drivers are an integral part of an unbroken stream of interstate commerce: the deliveries they make are coordinated and controlled by the shipping company for which they work from origin to destination, and they are hired specifically to complete that task—circumstances not present here.

Osvatics, 2021 U.S. Dist. LEXIS 77559, 2021 WL 1601114, at *15; *Hinson* 522 F. Supp. 3d 1254, 2021 WL 838411, at *6 ("Lyft drivers are more like taxi drivers than last-mile delivery drivers of Amazon products.") (alterations omitted); *Baltimore & Ohio Southwestern Railroad Co. v. Burtch*, 263 U.S. 540, 544, 44 S. Ct. 165, 68 L. Ed. 433 (1924) (discussing "the loading or unloading of an interstate shipment"); *Philadelphia & Reading Railroad Co. v. Hancock*, 253 U.S. 284, 286, 40 S. Ct. 512, 64 L. Ed. 907 (1920) (discussing first intrastate leg of interstate coal route); *Rittmann*, 971 F.3d at 916-18 (holding that last intrastate leg of interstate package delivery is intrinsic to interstate commerce); *Waithaka*, 966 F.3d at 26 & n.11 (same).

iii. Conclusion

In sum, I find that nationwide Uber drivers are not exempt from the FAA, consistent with holdings in virtually every other court to address the issue, including two circuits.[8] In doing so, I reject both pillars of Plaintiffs'

8. In fact, in the two cases reaching a different conclusion, each court has specifically noted that further evidence may compel the majority view. *Haider*, 2021 U.S. Dist. LEXIS 62690, 2021 WL 1226442, at *4 (describing Lyft's claim as resting on the "apparent instinct that [] trips across state lines must be vanishingly rare," while stating that "[n]othing . . . shall prejudice Lyft renewing its motion if a more developed factual record shows that [plaintiff] is not among a class of workers engaged in interstate commerce," as here); *Islam*, 524 F. Supp. 3d 338, 2021 WL 871417, at *8 (holding that Lyft's claim "presupposes that Lyft and Uber rides are necessary short, local trips . . . and Lyft has not produced evidence to support that presupposition," but with such evidence, "[t]he interstate nature of

argument: that they are engaged in interstate commerce because drivers have crossed state lines 140 million times in 10 years and because 10% of trips begin or end at an airport. This data (though certainly true) is not dispositive when viewed against uncontroverted evidence that such rides constitute just 2% of all rides, resemble in character the other 98% of rides, and likely occur due to the happenstance of geography; and that airport trips are unaffiliated with and independent from the interstate commerce in which passengers partake once at airports. Uber drivers nationwide are in the "general business of giving people [local] rides, not the particular business of offering interstate transportation to passengers," unlike railroad workers and seamen, whose jobs revolve around interstate travel/movement. *Rogers*, 452 F. Supp. 3d at 916. The FAA therefore applies and the parties must arbitrate pursuant to the TSA.

D. State Law Issues

Because I compel arbitration under the FAA and TSA, I need not decide the state law issues. *Cunningham*, 2021 U.S. App. LEXIS 33010, 2021 WL 5149039, at *7 ("Because we find that the FAA applies, we need not examine the role of the Massachusetts Uniform Arbitration Act."); *Smith Barney, Inc. v. Critical Health Sys. of N.C., Inc. of Raleigh, N.C.*, 212 F.3d 858, 860-61 (4th Cir. 2000) ("Once

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a trip [from Philadelphia to Camden to, for example, meet a friend for lunch] might indeed be considered an incidental byproduct of geography"). Thus, with a more complete record, I am not convinced that the courts in *Haider* and *Islam* would not reach the same conclusion as the majority of courts.

a dispute is covered by the [FAA], federal law applies to all questions of interpretation, construction, validity, revocability, and enforceability.") (alteration in original); *In re Salomon Inc. S'holders' Derivative Litig.*, 68 F.3d 554, 559 (2d Cir. 1995) (same).

In any case, state law would furnish an alternative basis to arbitrate. Plaintiffs begin by reading a nonexistent requirement into the TSA: it forecloses application of the arbitration provision (in the event that the agreement is taken outside the context of the FAA) because there is no express state law safe harbor. As the Third Circuit explained in *Harper*, however, "[f]inding the § 1 exemption applies does not mean all state law about arbitration vanishes," regardless of whether an arbitration provision mentions only the FAA. 12 F.4th at 295; *see also Palcko*, 372 F.3d at 595 ("There is no language in the FAA that explicitly preempts the enforcement of state arbitration issues."); *Diaz v. Michigan Logistics Inc.*, 167 F. Supp. 3d 375, 381 (E.D.N.Y. 2016) ("Plaintiffs argue that given the parties' explicit choice to apply the FAA, the FAA is the only law the Court should consider in determining whether to compel arbitration, effectively rendering the arbitration provision unenforceable . . . . the inapplicability of the FAA does not render the parties' arbitration provision unenforceable . . . . assuming that the FAA does not apply, state arbitration law governs.") (emphasis in original); *Islam*, 524 F. Supp. 3d 338, 2021 WL 871417, at *14 (collecting cases holding same).

The question is what state law governs. Plaintiffs propose California. This follows from § 15.1 of the TSA,

they claim, which provides that the "interpretation of [the TSA] shall be governed by California law." *Id.* But the TSA is not that straightforward. In the very same sentence, § 15.1 states that "[t[he choice of law provisions contained [herein] do not apply to the arbitration clause," which is subject to the FAA instead. *Id.* Although Uber certainly "could have specified more clearly what law applies," if any, when the FAA does not, *Waithaka*, 966 F.3d at 27 & n.13, I do not construe the arbitration provision as subject to the choice of law clause. *See, e.g., Rimel v. Uber Techs., Inc.*, 246 F. Supp. 3d 1317, 1324 (M.D. Fla. 2017) (concluding that "the Service Agreement's California choice of law provision has no effect on . . . the Arbitration Provision" because "the Arbitration Provision is severable from the Service Agreement" that contains the choice of law provision); *Carey v. Uber Techs., Inc.*, No. 16-1058, 2017 U.S. Dist. LEXIS 44340, 2017 WL 1133936, at *6 (N.D. Ohio Mar. 27, 2017) ("The Agreement generally provides that California law applies, but challenges to the validity of an arbitration provision are considered independently from the rest of the Agreement . . . . Neither the arbitration provision nor the delegation provision contain[s] a choice-of-law clause. 'Absent an effective choice of law provision, Ohio courts apply the law of the state with the most significant relationship to the contract.'") (citations omitted). The TSA treats the arbitration provision differently from the rest of the agreement in this regard, and I would respect that distinction. In fact, it appears that the parties specifically contracted that "California law should *not* apply to the arbitration [provision]." *Islam*, 524 F. Supp. 3d 338, 2021 WL 87147, at *14 (applying New York law to Lyft drivers under "standard choice of law principles")

(emphasis added). To nevertheless apply California law would run the risk of "rewrit[ing] the contract under the guise of [choice of law principles]," and doing so in a way contrary to the parties' intentions. *Rittmann*, 971 F.3d at 920 (declining to apply Washington law in the context of a similar arbitration provision for Amazon delivery drivers).

Notwithstanding the TSA's choice of law clause, a district court sitting in diversity (such as this Court, assuming Plaintiffs are exempt from the FAA) applies the choice of law rules of the forum state (here, New Jersey). *Collins v. Mary Kay, Inc.*, 874 F.3d 176, 183 (3d Cir. 2017). Under New Jersey choice of law rules, "the law of the state which has 'the most significant relationship' with the transaction would apply." *Polarome Mfg. Co. v. Commerce & Indus. Ins. Co.*, 310 N.J. Super. 168, 172, 708 A.2d 450 (App. Div. 1998). Again, that is New Jersey, where Plaintiffs live and work and where the bulk of the allegations arise. *Islam*, 524 F. Supp. 3d 338, 2021 WL 871417, at *14. And under New Jersey law, which does not contain a residual clause exemption, the arbitration provision in the TSA is lawful and controlling. N.J.S.A. § 2A:23B-6(a) ("An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid [and] enforceable."); *Angrisani v. Fin. Tech. Ventures, L.P.*, 402 N.J. Super. 138, 148, 952 A.2d 1140 (App. Div. 2008) ("[T]here is no material difference between the approach to the interpretation of arbitration agreements mandated by the FAA and the approach our courts have taken as a matter of State law even when the FAA does not apply."). Accordingly, while I need not

reach the issue, even if Plaintiffs' contract with Uber fell outside the FAA, I would apply New Jersey law and compel arbitration all the same.

IV. CONCLUSION

For the foregoing reasons, I **GRANT** Uber's motions and **COMPEL** arbitration under the FAA. In accordance with the Third Circuit's instruction in *Singh*, all other issues are reserved for the arbitrator. Plaintiffs' motion for class certification is **DENIED** as moot.

DATED: November 23, 2021

/s/ Freda L. Wolfson
Hon. Freda L. Wolfson
U.S. Chief District Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JULY 6, 2023

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-3234

JASWINDER SINGH, ON BEHALF OF HIMSELF AND ALL THOSE SIMILARLY SITUATED,

Appellant,

v.

UBER TECHNOLOGIES, INC.

(D.C. Civ. No. 3-16-cv-03044)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, GREENAWAY, Jr.†, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, SCIRICA*, and RENDELL*, *Circuit Judges*

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† The Honorable Joseph A. Greenaway, Jr. retired from the Court on June 15, 2023, after the voting period expired for this petition for rehearing, but before the Clerk's Office filed the order.

* As to panel rehearing only.

Appendix C

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Anthony J. Scirica
Circuit Judge

Date: July 6, 2023

APPENDIX D — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED APRIL 26, 2023

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-3234

JASWINDER SINGH, ON BEHALF OF HIMSELF AND ALL THOSE SIMILARLY SITUATED,

Appellant,

v.

UBER TECHNOLOGIES, INC.

No. 21-3363

JAMES CALABRESE; GREGORY CABANILLAS; MATTHEW MECHANIC, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Appellants,

v.

UBER TECHNOLOGIES, INC.; RAISER, LLC.

Appendix D

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action Nos. 3-16-cv-03044 and 3-19-cv-18371)
District Judge: Honorable Freda L. Wolfson

ARGUED: November 8, 2022

Before: JORDAN, SCIRICA, and RENDELL,
Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was argued on November 8, 2022. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the order of the District Court entered November 23, 2021, be, and the same is hereby AFFIRMED. Costs taxed against Appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATED: April 26, 2023