No. 19-1848

In the United States Court of Appeals

FOR THE FIRST CIRCUIT

BERNARD WAITHAKA

Plaintiff-Appellee

v.

AMAZON.COM, INC.; AMAZON LOGISTICS, INC.

Defendants-Appellants

On Appeal from the U.S. District Court for the District of Massachusetts
No. 4:18-cv-40150 (Hon. Timothy S. Hillman)

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CORPORATE DISCLOSURE STATEMENT

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

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

This case presents an important question of first impression in this circuit: whether the Federal Arbitration Act ("FAA") covers arbitration agreements signed by workers engaged to perform services within a single state. The district court held that the FAA did not apply, contrary to the plain statutory language, weight of judicial authority, and overarching purposes of the FAA. The court also refused to enforce the parties' arbitration agreement under state law, even though, in the district court's words, "the parties clearly agreed to arbitrate." Oral argument is likely to assist the Court in addressing these issues, which hold tremendous importance for businesses and workers throughout the First Circuit.

INTRODUCTION

Congress passed the FAA to overcome widespread judicial hostility to arbitration agreements. *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001). To that end, the FAA extends to the outer limits of Congress's commerce power—subject only to a narrow exclusion (the "Exemption") for "contracts of employment of seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1; *see id.* § 2; *Circuit City*, 532 U.S. at 115.

This Court and the Supreme Court have held that the Exemption's language bears its "ordinary meaning . . . at the time Congress enacted the FAA in 1925." *Oliveira v. New Prime, Inc.* (*New Prime I*), 857 F.3d 7, 19 (1st Cir. 2017), *aff'd*, *New Prime Inc. v. Oliveira* (*New Prime II*), 139 S. Ct. 532, 539 (2019). In addition, the Exemption requires "a narrow construction" given its statutory context and the FAA's pro-arbitration purposes. *Circuit City*, 532 U.S. at 118.

The district court here, however, interpreted the Exemption broadly. It did so in contradiction of the original ordinary meaning of the Exemption's language and the FAA's purposes. Instead, the district court rooted its ruling on a "continuity of movement" standard that developed years after the FAA's enactment in case law interpreting an unrelated statute, the Fair Labor Standards Act of 1938 ("FLSA"). ADD5 & n.2 (JA266). The court did so even though the FLSA's provisions contain

different terms, sit in a different statutory context, and pursue markedly different policy objectives. Instead of allowing FLSA case law to control, the district court should have adhered to the ordinary meaning of the Exemption's language, found the FAA applicable, and compelled arbitration.

Plaintiff Bernard Waithaka does not belong to a "class of workers engaged in foreign or interstate commerce" as that phrase would ordinarily have been understood in 1925. By his own account, he performs purely *intra*state services as a gig-economy driver through the Amazon Flex ("AmFlex") program. AmFlex users can earn money as independent contractors performing delivery services in particular cities using their personal vehicles. As with Uber, DoorDash, Postmates, and many other gig-economy crowdsourcing apps, AmFlex drivers download the AmFlex smartphone app, establish a user account, and enter their scheduling availability, with no minimum work commitment required. Waithaka admitted in the district court that he and the class of AmFlex users he proposes to represent are "*Massachusetts* workers who performed all of their work in *Massachusetts*." JA111. As a matter of ordinary language, not to mention common sense, workers who perform all of their work in a single state are not engaged in interstate commerce because *intra*state activity is not *inter*state activity.

Besides departing from the statute's ordinary meaning, the district court's ruling also undermines the FAA's purposes. The Supreme Court has explained that

courts must read the Exemption with precision because the FAA "seeks broadly to overcome judicial hostility to arbitration agreements" and contains the Exemption to protect separate arbitration and alternative dispute resolution schemes governing certain classes of transportation workers. *Circuit City*, 532 U.S. at 118-21 (citation omitted). But Congress has never shown any interest in subjecting local delivery drivers to distinct dispute resolution statutes. Contrary to the ruling below, there is zero reason to think that Congress would have wanted such work categorically excluded from arbitration under the FAA, least of all when the language of the Exemption dictates the opposite conclusion.

Worse still, the district court's ruling further undermines the FAA's purposes by making the enforceability of arbitration agreements difficult to predict. Even more than the proposal rejected in *Circuit City*, the district court's preferred eight-factor framework would create "considerable complexity and uncertainty" concerning "the enforceability of arbitration agreements" and "would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the Nation's employers, in the process undermining the FAA's proarbitration purposes and 'breeding litigation from a statute that seeks to avoid it.'" *Id.* at 123 (citation omitted). The district court judged AmFlex workers distinguishable from drivers who make deliveries "from local restaurants or merchants to local customers," because of the court's belief that goods delivered by AmFlex workers "do not stop [at] a

restaurant where they are cooked and combined to create a new product." ADD5 (JA266). But that is no less true for many restaurant deliveries, which routinely include prepackaged drinks and food items that may be "in the flow of interstate commerce" but do not turn delivery drivers' intrastate activity into interstate commerce. *Magana v. DoorDash, Inc.*, 343 F. Supp. 3d 891, 900 (N.D. Cal. 2018); *see also Lee v. Postmates Inc.*, No. 18-cv-03421-JCS, 2018 WL 6605659, at *7 (N.D. Cal. Dec. 17, 2018) (rejecting plaintiff's argument that "she delivered packaged goods" for Postmates that were "presumably produced out of state"). The district court's approach would thus require courts to draw many fine lines—not just between food delivery drivers and e-commerce delivery drivers, but also between workers delivering purchases from grocery stores (including prepared foods and local produce) or brick-and-mortar retailers, Uber or Lyft drivers shuttling travelers and their purchases around many destinations, and countless other possible types of local drivers, many of whom engage in different types of deliveries for the same company. The FAA's language and objectives require rejecting this murky, *ad hoc* approach to materially indistinguishable intrastate activities.

Even if AmFlex users were exempt from the FAA, state law would nonetheless require enforcement of Waithaka's agreement to arbitrate. The district court incorrectly determined that Massachusetts law, rather than Washington law, governed the enforceability of the parties' arbitration provision. But while the parties

contracted for federal law to govern their agreement to arbitrate, they otherwise agreed to have Washington law govern their contract. And if their preference for federal law is unenforceable because of the Exemption, then that part of their choice-of-law provision is severed from the contract under the contract's severability provision, leaving Washington law to apply. Washington law, with its strong pro-arbitration policy, would enforce the parties' agreement to arbitrate even if the FAA cannot. And, contrary to the district court's conclusions, Massachusetts law would do so too for much the same reasons.

For these reasons and others discussed below, this Court should reverse the district court's order denying the motion to compel arbitration.

STATEMENT OF JURISDICTION

The district court had original subject matter jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d)(2), because: Amazon.com, Inc. and Amazon Logistics, Inc. (together, "Amazon") are Delaware corporations with their principal places of business in Washington; Waithaka is a Massachusetts citizen; there are at least 100 putative class members; and the amount in controversy exceeds $5 million. JA8; JA12-23; JA33; *Waithaka v. Amazon.com, Inc.*, 363 F. Supp. 3d 210, 210-14 (D. Mass. 2019).

This Court has appellate jurisdiction under 9 U.S.C. § 16(a)(1)(B), which permits appeal of "an order . . . denying a petition under [9 U.S.C. § 4] to order arbitration to proceed." The district court issued an order denying Amazon's request to compel arbitration under Section 4, and this Court's appellate jurisdiction extends to all issues disposed of in that order, including the enforceability of the arbitration agreement under state law. *See, e.g.*, *Omni Tech Corp. v. MPC Sols. Sales, LLC*, 432 F.3d 797, 800 (7th Cir. 2005) (citing *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996)).

The district court entered its order on August 20, 2019. ADD1-22 (JA262-83). Amazon filed a notice of appeal that same day. JA284-85. The appeal is timely under Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.[1]

STATEMENT OF THE ISSUES

1. Is the AmFlex arbitration agreement enforceable under the FAA because the class of workers here is not "engaged in foreign or interstate commerce"?

2. Assuming the AmFlex arbitration agreement is exempt from the FAA, is it nevertheless enforceable under state law?

[1] Although the district court ordered transfer of this case to the U.S. District Court for the Western District of Washington in its August 20, 2019 order, this Court is the proper venue for this appeal. 28 U.S.C. § 1294(1); *see, e.g.*, *Matrix Grp. Ltd., Inc. v. Rawlings Sporting Goods Co.*, 378 F.3d 29, 32 (1st Cir. 2004); *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1129-30 (9th Cir. 2012).

STATEMENT OF THE CASE

A. Statutory Background

"Congress enacted the FAA in response to widespread judicial hostility to arbitration." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 232 (2013). The statute makes arbitration agreements that fall within its compass "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "This provision establishes 'a liberal federal policy favoring arbitration agreements.'" *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (citation omitted). And it "require[s] courts to respect and enforce agreements to arbitrate," including by staying litigation pending an arbitration (under Section 3) or compelling the parties to arbitrate their claims (under Section 4). *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (citing 9 U.S.C. §§ 3, 4).

Whether the FAA applies to a given arbitration agreement depends, in the first instance, on Section 2. *New Prime II*, 139 S. Ct. at 537. Section 2 sweeps as broadly as possible, extending the FAA's enforcement mechanisms to any arbitration agreement that is "part of a written maritime contract or a contract 'evidencing a transaction involving commerce.'" *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984) (quoting 9 U.S.C. § 2). This expansive statutory language "signals an intent to exercise Congress' commerce power to the full." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995). The statute's broad sweep is limited only by Section

1, which includes the narrow Exemption at issue in this case: "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." 9 U.S.C. § 1; *see also Southland*, 465 U.S. at 11 n.5; *New Prime II*, 139 S. Ct. at 537-38.

B. Factual Background

Amazon offers various products for purchase, including through websites and smartphone applications. JA82 (¶ 3). Historically, Amazon has contracted with large third-party delivery providers to deliver those products to customers who purchase them. JA82 (¶ 4). More recently, Amazon has begun to contract with smaller delivery service providers as well. *Id.* And for the past few years, Amazon has also contracted with individuals using their personal cars for deliveries, crowdsourced through a smartphone-application-based program known as AmFlex. *Id.*

AmFlex participants differ from many sorts of delivery drivers. They sign up to perform work in a particular metropolitan area, like Austin or Dallas, Texas. JA209. They have significant control over the deliveries they make. There is no minimum amount or frequency of services. JA86 (¶ 17). After entering their availability into the AmFlex app, they are free to reject any opportunity offered to them. *Id.* They complete deliveries from a local delivery station or grocery or retail store using a personal vehicle, and are forbidden from using large delivery vehicles weighing over 10,000 pounds. JA86 (¶ 16); JA96. They are free to provide services to

other companies. JA86 (¶ 18). Although Amazon contracts with other companies to perform long-range transportation services, AmFlex is a separate program focused exclusively on local delivery services by drivers using personal vehicles. JA185; JA228. Participants in AmFlex have the opportunity to make deliveries for Amazon.com and to deliver groceries, household items, or other items from local stores. JA203; JA209; *see also Amazon Flex FAQs: Signing Up, Sessions, Earnings & More*, AMAZON FLEX, https://flex.amazon.com/faqs/ (last visited November 13, 2019).

To sign up for AmFlex, users must agree to the Amazon Flex Independent Contractor Terms of Service. JA82 (¶ 5). Waithaka accepted the Terms of Service in January 2017. *See* JA107 (¶ 6). Those Terms of Service include an agreement to arbitrate on an individual basis. Near the top, the Terms of Service state:

> YOU AND AMAZON AGREE TO RESOLVE DISPUTES BETWEEN YOU AND AMAZON ON AN INDIVIDUAL BASIS THROUGH **FINAL AND BINDING ARBITRATION**, UNLESS YOU OPT OUT OF ARBITRATION WITHIN 14 CALENDAR DAYS OF THE EFFECTIVE DATE OF THIS AGREEMENT, AS DESCRIBED BELOW IN SECTION 11.

JA89 (emphasis in original). Then, Section 11 expands upon the contracting parties' agreement to arbitrate:

11. Dispute Resolution, Submission to Arbitration.

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

b) TO THE EXTENT PERMITTED BY LAW, THE PARTIES AGREE THAT ANY DISPUTE RESOLUTION PROCEEDINGS WILL BE CONDUCTED ONLY ON AN INDIVIDUAL BASIS AND NOT ON A CLASS OR COLLECTIVE BASIS.

* * *

k) WHETHER TO AGREE TO ARBITRATION IS AN IMPORTANT BUSINESS DECISION. If you wish to opt out of this arbitration agreement—meaning, among other things, that you and Amazon would be free to bring claims against each other in a court of law—you can opt out by sending an e-mail to amazonflex-support@amazon.com before the end of the Opt-Out Period (defined below). The e-mail must include your name and a statement indicating that you are intentionally and knowingly opting out of the arbitration provisions of the Amazon Flex Independent Contractor Terms of Service. You will not be subject to retaliation for asserting claims or opting out of this agreement to arbitrate.

JA93-94.

In addition to agreeing to arbitrate their disputes, the contracting parties further agreed that their contract is governed by Washington law, except for Section 11, "which is governed by the Federal Arbitration Act and applicable federal law." JA94 (§ 12). Should any part of the agreement be unenforceable, the parties agreed that the remainder would "be enforced as if the unenforceable provisions were not present and that any partially valid and enforceable provisions be enforced to the fullest extent permissible under applicable law." JA95 (§ 16(a)).

Waithaka did not opt out of the arbitration agreement after accepting the Terms of Service. JA107 (¶ 7). According to his Complaint, he went on to "work[] as an Amazon delivery driver in Massachusetts." JA33 (¶ 3). He has never alleged, let alone provided evidence, that he ever crossed state lines to perform an AmFlex delivery.

C. Proceedings Below

On August 28, 2017, Waithaka filed this proposed class action lawsuit in Massachusetts state court, claiming that Amazon misclassified Massachusetts AmFlex users as independent contractors rather than employees. JA32-37. Amazon removed the action on October 29, 2017, but the district court remanded the case to state court on August 28, 2018, on the ground that the case did not satisfy the amount in controversy requirement for CAFA or traditional diversity jurisdiction. *Waithaka v. Amazon.com, Inc.*, No. 17-40141-TSH, 2018 WL 4092074, at *1 (D. Mass. Aug.

28, 2018). Amazon removed the case again on September 7, 2018. JA8-27. This time, the district court denied Waithaka's motion to remand, concluding that the passage of time since the first removal had undisputedly increased the amount in controversy past CAFA's $5 million threshold. *Waithaka*, 363 F. Supp. 3d at 214. The court rejected Waithaka's argument that the second removal was procedurally improper in light of the removal statute's time limits. *Id.* at 212-14; *see* 28 U.S.C. § 1446(b).

Waithaka alleges that Amazon's alleged misclassification of AmFlex users has violated Massachusetts's wage laws. JA35-36. He seeks to represent a class of similarly situated Massachusetts workers "who performed all of their work in Massachusetts." JA33 (¶ 2); JA111 (emphasis omitted).

Amazon moved to compel arbitration. The district court denied Amazon's motion on August 20, 2019. ADD1-22 (JA262-83). Although the court recognized that Waithaka is "[u]nlike truck drivers engaged in interstate commerce" because he "does not carry goods across state lines," it nonetheless held that he falls within the Exemption. ADD4 (JA265). The court believed that, unlike local gig-economy deliveries performed for restaurants, "there is a 'continuity of movement' of the goods delivered by Amazon interstate until they reach customers." ADD4-5 (JA265-66). The court acknowledged that this "continuity of movement" standard derives from FLSA precedent, but it found such cases to "provide valuable guidance to interpret

the phrase 'engaged in commerce.'" ADD5 n.2 (JA266). It emphasized that Am-Flex users "are indispensable parts of Amazon's distribution system," which "transports goods in interstate commerce." ADD8 (JA269). And it hypothesized that a strike by AmFlex workers "would almost certainly interrupt interstate commerce" because "Amazon is the largest online retailer in the United States." *Id.*

The court then turned to Amazon's alternative argument for compelling arbitration under state law. It rejected Amazon's argument that, if the FAA cannot apply, the parties' choice of Washington law should govern instead. ADD9-10 (JA270-71). Yet the court nonetheless recognized that "the parties clearly agreed to arbitrate," and under choice-of-law principles analyzed the arbitration agreement's enforceability under Massachusetts law. ADD11-12 (JA272-73). According to the district court's analysis, the parties' arbitration agreement is unenforceable because it contains a class action waiver that supposedly conflicts with Massachusetts public policy. ADD13-17 (JA274-78).

Finally, the district court granted Amazon's alternative request for transfer to the United States District Court for the Western District of Washington because of similar, earlier-filed litigation pending in that court. ADD17-22 (JA278-83).

SUMMARY OF THE ARGUMENT

I. The FAA's expansive reach is limited only by an Exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The Supreme Court has instructed courts to construe this language (1) in line with its ordinary meaning when the FAA was enacted in 1925 and (2) narrowly, consistent with the statute's structure and pro-arbitration purposes. *See New Prime II*, 139 S. Ct. at 539; *Circuit City*, 532 U.S. at 118. The residual clause in the Exemption turns on the activities that the particular class of workers are hired to perform, what they are "engaged in," and requires that those workers' activities themselves be "interstate commerce." In 1925, workers engaged in *intra*state activities—like AmFlex users—would not have qualified as workers engaged in *inter*state commerce. And nothing has changed: now, as then, intrastate activities by definition are not interstate activities and not interstate commerce within the meaning of the Exemption. The statute's plain meaning accordingly requires that the class of workers move goods or persons into a different state or country.

The statutory context reinforces that conclusion. The Exemption's residual clause derives its meaning in part from the two enumerated categories of workers—seamen and railroad employees—who characteristically perform interstate transportation. Moreover, unlike the Exemption laid out in Section 1, the FAA's general

coverage provision in Section 2 uses significantly more capacious terms. But those textual differences made no difference to the district court's interpretation. The court instead proceeded as though the language of Section 1 were no different than the broader language in Section 2, despite the statute's juxtaposition of strikingly different wording—"evidencing a transaction involving commerce" in contrast to "class of workers engaged in foreign or interstate commerce."

These statutory considerations have led several courts to holdings that are irreconcilable with the ruling below. For instance, the Eleventh Circuit has held that engaging in interstate transportation is a necessary condition for the Exemption's applicability. The Third Circuit has recently held that even frequent interstate trips by a driver are insufficient to show that the class of workers as a whole is engaged in interstate commerce. And a growing body of district court decisions addressing other gig-economy workers rightly recognizes that merely transporting goods that originated out of state is insufficient to trigger the Exemption.

The ruling below also thwarts the FAA's purposes. Those purposes include, first and foremost, upholding agreements to arbitrate. The Exemption merely preserves other statutes' arbitration or dispute-resolution schemes for certain interstate transportation workers who hold the power to profoundly affect the national economy. The purpose of the Exemption was not to impede arbitration, particularly not for classes of workers—like the local delivery drivers here—for whom there is no

statutorily created dispute-resolution alternative. Still less did Congress intend the Exemption to foster severe uncertainty about the FAA's applicability, which is what would result from the district court's hard-to-administer, eight-factor standard.

The district court's contrary conclusion rests on inapposite and unpersuasive case law. Many of these cases either directly interpret materially different statutory language to resolve the meaning of the FLSA or use the FLSA to distort the meaning of the FAA. Others address unrelated questions about the Exemption's application, without resolving whether intrastate transportation alone can trigger the Exemption. These decisions furnish no reason to ignore the FAA's language, structure, and purposes.

II. Even if the FAA did not apply, the parties' agreement would be enforceable under state law. The district court failed to apply the proper body of state law—Washington law—based on its misreading of the agreement's choice-of-law provision. That provision merely reflects the parties' expectation that they could enforce their arbitration agreement through federal law. It does not suggest that the parties opposed enforcing their agreement to arbitrate, in the alternative, under Washington law. On the contrary, the contract's severability clause commands giving effect to the parties' general preference for Washington law as a fallback. Under Washington law, moreover, the parties' arbitration agreement is readily enforceable.

But it is also enforceable under Massachusetts law, which the district court applied instead of Washington law. Like Washington and federal law, Massachusetts public policy supports arbitration. And while the Commonwealth formerly refused to apply certain class action waivers on policy grounds, now it does so only when the plaintiff's claims are worth so little money that the class action waiver effectively precludes any economically viable means to pursue relief. That description does not encompass Waithaka, whose claims are worth well more than the minimum amount that Massachusetts law requires.

STANDARD OF REVIEW

The Court "review[s] the denial of a motion to compel arbitration de novo." *New Prime I*, 857 F.3d at 12 n.10. "A plaintiff opposing arbitration under the FAA has 'the burden of demonstrating the exemption.'" *Vargas v. Delivery Outsourcing, LLC*, No. 15-CV-03408-JST, 2016 WL 946112, at *3 (N.D. Cal. Mar. 14, 2016) (citation omitted); *see also Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91 (2000) ("[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.").

ARGUMENT

I. AmFlex Users Are Not Engaged In Interstate Activities And Thus Are Not Engaged In Interstate Commerce.

AmFlex users are not exempt from the FAA's coverage because the defining feature of AmFlex is local, intrastate activity. In fact, according to Waithaka, the proposed class of AmFlex workers here "performed all of their work in Massachusetts." JA111 (emphasis omitted). Such workers are not "engaged in foreign or interstate commerce" within the ordinary meaning of those words, because in 1925 "interstate commerce" was limited to activities that extend between multiple states. Nor is there any reason to depart from that ordinary meaning here. On the contrary, the weight of judicial authority favors the same conclusion, as do the structure and purposes of the FAA, which preclude any broadening of the Exemption beyond its ordinary meaning. The district court's reliance on non-FAA case law was improper, and this Court should reverse.

A. The Statute's Language And Structure Require Limiting The Exemption To Workers Engaged In Interstate Transportation.

Section 1 exempts from the FAA's scope "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. By its plain terms, Section 1 requires determining whether the "class of workers" is "engaged in foreign or interstate commerce." Controlling precedent requires interpreting these words according to their ordinary

meaning at the time Congress enacted the FAA in 1925. *See New Prime I*, 857 F.3d at 19; *New Prime II*, 139 S. Ct. at 539.

Under the everyday meaning of "engaged"—both today and in 1925 when the FAA was enacted—whether workers are "engaged" in interstate commerce depends on the activities that the workers are hired to perform. *See, e.g.*, 5 OXFORD ENGLISH DICTIONARY 247-48 (2d ed. 1989) (defining "engage" as "[t]o hire, secure the services of," "[t]o enter into an agreement for service," or "[t]o provide occupation for, employ"); THE DESK STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 276 (new ed. 1922) (defining "engage" as "[t]o bind or obtain by promise"). The Exemption thus turns on the workers' activities, and those activities must be "foreign or interstate commerce."

Here, there is no argument that the workers are engaged in foreign commerce. The pivotal question is what sorts of activities qualify as "interstate commerce" as that phrase is ordinarily understood. But the answer to that question is clear: both in 1925 and today, "interstate commerce" means commercial activity extending between multiple states. *See, e.g.*, 7 OXFORD ENGLISH DICTIONARY, *supra*, at 1140 (defining "interstate" as "[l]ying, extending, or carried on between independent states"); DESK STANDARD DICTIONARY, *supra*, at 423 (defining "interstate" as "[b]etween different states, as of the American Union, or their citizens; as, *interstate* commerce"). When Congress passed the FAA, *Black's Law Dictionary* showed this

unmistakably: it defined "interstate commerce" as "[t]raffic, intercourse, commercial trading, or the transportation of persons or property *between or among the several states of the Union, or from or between points in one state and points in another state*," or "commerce *between two states, or between places lying in different states*." BLACK'S LAW DICTIONARY 651 (2d ed. 1910) (emphasis added).[2]

In contrast, when transportation activities take place within a single state, as the proposed class's activities do here, those activities are *not* "interstate commerce." They are "intrastate" activities. *See, e.g.*, 8 OXFORD ENGLISH DICTIONARY, *supra*, at 16 (defining "intra-state" as "occurring within a . . . state"); DESK STANDARD DICTIONARY, *supra*, at 424 (defining "intra-" as "[w]ithin"). By limiting the Exemption to classes of workers engaged in *inter*state commerce, Congress unambiguously excluded classes of workers, like the Massachusetts AmFlex users in this case, engaged in *intra*state transportation.

The district court acknowledged that Waithaka "does not carry goods across state lines" and so is "[u]nlike the truck drivers engaged in interstate commerce" that many courts have held to be within the Exemption. ADD4 (JA265). In the district

[2] *See also, e.g.*, 5 JAMES A.H. MURRAY, A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 421 (1901) (defining "interstate" as "[l]ying, extending, or carried on between states" or "pertaining to the mutual relations of the States of the American Union"); W.T. HARRIS, WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1130 (1911) (defining "interstate" as "pertaining to the mutual relations of States; existing between, or including, different States").

court's view, however, it sufficed that AmFlex users are an important part "of Amazon's distribution system" because that *system* "transports goods in interstate commerce." ADD8 (JA269). But the Exemption's language forecloses shifting the inquiry from the geographic footprint of the workers' activities to that of the engaging company's activities. The Exemption plainly turns on whether the *workers* are engaged in interstate commerce. The hiring company's activities are irrelevant.

The Exemption's statutory context and the structure of the FAA as a whole support the same conclusion. As the Supreme Court showed in *Circuit City*, the activities that the workers perform are critical to the Exemption's applicability. The Court squarely rejected the notion that the Exemption might apply "whether or not the worker is engaged in transportation." 532 U.S. at 109. Instead, according to the dissenting Justices' apt restatement of the majority's holding, Section 1 exempts only workers "engaged in interstate transportation." *Id.* at 130 (Stevens, J., dissenting). That holding rested on two main contextual considerations.

First, the key words in Section 1—"any other class of workers engaged in foreign or interstate commerce"—constitute a "residual clause." *Id.* at 114 (majority opinion). That residual clause's meaning is "controlled and defined by reference to the enumerated categories of workers which are recited just before it"—*i.e.*, seamen and railroad employees. *Id.* at 115. In other words, the workers carved out by the residual clause must be sufficiently similar to seamen and railroad employees. Here,

those two enumerated categories of workers are noteworthy because such workers characteristically perform *transportation* work, and such transportation work characteristically extends beyond a single state.

Second, Congress deliberately wrote the Exemption in Section 1 using more "limited" terms than the terms that appear in neighboring Section 2. *Circuit City*, 532 U.S. at 115. In particular, Congress used the formulation "engaged in foreign or interstate commerce," which has a narrower meaning than broader formulations like "affecting commerce" or "involving commerce." *Id.* (citation omitted). The latter formulations, which Congress adopted in Section 2, signal "Congress'[s] intent to regulate to the outer limits of its authority under the Commerce Clause." *Id.* Section 2 gives the FAA a broad reach by focusing on whether the arbitration agreement appears in "a contract *evidencing a transaction involving commerce*." 9 U.S.C. § 2 (emphasis added). In Section 1, on the other hand, Congress exempted a limited range of workers by using words whose "plain meaning . . . is narrower than [Section 2's] more open-ended formulation[]." *Circuit City*, 532 U.S. at 118.

The district court's emphasis on "Amazon's distribution system," rather than whether AmFlex users "themselves . . . cross state lines," ADD8 (JA269), improperly ignores the enumerated categories of interstate transportation workers and conflates Section 1 with Section 2. AmFlex users do not cross state or foreign borders on long maritime or railway journeys like seamen or railroad employees. Nor does

it matter whether they are connected to transactions involving commerce, as they certainly are, because that is the relevant question under Section 2, not Section 1. While Amazon *transactions* certainly *involve commerce* under Section 2, that fact does not show that the *workers* who make intrastate deliveries *engage in interstate commerce* under the narrower language of Section 1. Under basic principles of statutory interpretation, courts must give effect to these notable differences in the two neighboring provisions' language, which the district court ignored. *See, e.g.*, *Loughrin v. United States*, 573 U.S. 351, 358 (2014) ("We have often noted that when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning." (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

Because AmFlex users are not themselves engaged in interstate commerce, the FAA's language and structure establish that AmFlex users do not fall within the Exemption.[3]

[3] Waithaka argued below that *Circuit City* establishes that the Exemption is phrased as a "term of art" that extends to activities that are merely within the flow of commerce. That is a clear misreading of *Circuit City*. It holds only that when "commerce" follows the participial phrase "engaged in" rather than the participles "affecting" or "involving," Congress is signaling an intent *not* to exercise its commerce power to the full. *See* 532 U.S. at 106, 115. The Court expressly cautioned, moreover, that such linguistic constructions do not "necessarily have a uniform meaning whenever used by Congress." *Id.* at 118 (citation omitted).

B. The Weight Of Judicial Authority Holds That Exempted Workers Must Be Engaged In Interstate Transportation.

That result also comports with the weight of judicial authority. For instance, the Eleventh Circuit has held that performing "interstate transportation" is a "necessary but not sufficient" condition for applying the Exemption. *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1290 (11th Cir. 2005). In that case, the court faced a worker whose duties included making local deliveries for a rent-to-own business. *Id.* at 1288. Even though the items being delivered (and occasionally the workers themselves) crossed state lines, the Eleventh Circuit heeded *Circuit City*'s instructions to read the Exemption in light of the enumerated categories of seamen and railroad employees. *Id.* at 1289. It concluded that the delivery driver in that case, much like "a pizza delivery person," was far from the type of worker that Congress intended to exclude, regardless of whether the items being delivered cross state lines. *Id.* at 1290. In doing so, the Eleventh Circuit expressly rejected the notion that the geographic footprint of the hiring company's business could suffice to trigger the Exemption: "To broaden the scope of § 1's arbitration exemption to encompass any employment disputes of a worker employed by a company whose business dealings happen to cross state lines, would allow § 1's exception to swallow the general policy requiring the enforcement of arbitration agreements as pronounced in § 2." *Id.* The district court never addressed *Hill*, which directly contradicts its view of the Exemption.

The district court's ruling also conflicts with the Third Circuit's very recent decision in *Singh v. Uber Technologies Inc.*, 939 F.3d 210 (3d Cir. 2019). The *Singh* court first held that the transportation of passengers (rather than goods) can qualify as interstate commerce. *Id.* at 219-26. More relevant here, however, is the Third Circuit's analysis of whether Uber drivers' transportation services "constitute[d] engagement in interstate commerce." *Id.* at 226-27 & n.11. The Third Circuit found itself unable to determine whether Uber drivers were a class of workers engaged in interstate commerce even though the plaintiff had introduced evidence "that he *frequently* transported passengers on the highway across state lines." *Id.* at 226-27 (emphasis added); *see also id.* at 232 (Porter, J., concurring in part and concurring in the judgment) (stressing that the plaintiff's affidavit "assert[ed] only that *he* drove passengers from the Newark Airport to New York").

If engaging in interstate transportation were inessential to the Exemption, as the district court believed, the *Singh* court would have had no trouble ruling in the Uber driver's favor: evidence of one driver's "frequent[]" interstate trips between the Newark airport and New York would have been more than enough, particularly given the broad geographic scope of Uber's overall business and the airport passengers' multistate voyages. That plaintiff's evidence, of course, is far more than Waithaka has supplied here. He has not introduced *any* evidence of interstate Am-Flex trips, let alone frequent ones. Under *Singh*, then, the Third Circuit would not

uphold the denial of Amazon's motion to compel arbitration given the record in this case.[4]

A number of district courts likewise have refused to extend the Exemption to local delivery drivers who do not cross state lines. Consistent with the Exemption's plain language, these courts have "declined to find that a delivery driver engaged in interstate commerce where he did not allege that he made interstate deliveries." *Magana*, 343 F. Supp. 3d at 899; *see also Lee*, 2018 WL 6605659, at *7 (holding that "there [was] no evidence of [the plaintiff] actually engaging in interstate commerce" even though the plaintiff argued that "she delivered packaged goods presumably produced out of state"); *Bonner v. Mich. Logistics Inc.*, 250 F. Supp. 3d 388, 397 (D. Ariz. 2017) (holding that Section 1's "plain meaning" exempted "workers who are literally engaged in the process of moving goods across state and national boundaries—workers like seamen and railroad employees"); *Vargas*, 2016 WL 946112, at *4 (refusing to apply the Exemption where evidence did "not support the conclusion that Plaintiffs made interstate deliveries even occasionally").

[4] In his separate concurrence, Judge Porter persuasively criticized the *Singh* majority for remanding the case for discovery based on Third Circuit precedent addressing the propriety of discovery during a motion to compel arbitration. 939 F.3d at 230-31. Such a remand would be particularly inappropriate here, not only because Waithaka failed to introduce any evidence of interstate AmFlex trips despite bearing the burden of proof, but also because he has affirmatively conceded the point, stating that the class of workers in this case "performed all of their work in Massachusetts." JA111 (emphasis omitted).

Several of these cases, and others, involve gig-economy delivery drivers who perform local delivery services—for companies like DoorDash, Postmates, Caviar, and Grubhub—that are not meaningfully different from the services performed by AmFlex workers. *See Magana*, 343 F. Supp. 3d at 899; *Lee*, 2018 WL 6605659, at *7; *Levin v. Caviar, Inc.*, 146 F. Supp. 3d 1146, 1154 (N.D. Cal. 2015); *Wallace v. Grubhub Holdings Inc.*, No. 18 C 4538, 2019 WL 1399986, at *5 (N.D. Ill. Mar. 28, 2019). Although these delivery services typically involve food from standalone restaurants or restaurant chains, the actual job responsibilities are very similar to those of AmFlex users—particularly given programs like Amazon Fresh and Prime Now, which enable AmFlex users to make deliveries from grocery stores (including prepared food and local produce) or other local establishments. *See* JA203; JA209; *Amazon Flex FAQs*, *supra*. Whether they work for AmFlex or another gig-economy platform, workers sign up to make local deliveries through the internet and commonly even sign up to perform such services for multiple companies. *See*, *e.g.*, Harry Campbell, *Amazon Flex—What It's Like To Deliver Packages For Amazon*, THE RIDE SHARE GUY (July 6, 2018), https://therideshareguy.com/want-to-drive-for-amazon-flex-5-things-you-need-to-know/ ("If you're interested in signing up for Amazon Flex then you might also be interested in signing up to deliver for Postmates and Doordash."). Exempting some of these workers, but not others, would further no conceivable purpose of the FAA nor any rational public policy.

The district court nonetheless found the other gig-economy cases distinguishable, not because of any practical differences in the workers' job responsibilities—the activities in which they were engaged—but because Amazon is "in the business of shipping goods across state lines," and those goods "do not stop [at] a restaurant where they are cooked and combined to create a new product." ADD5 (JA266).

As discussed already, it is improper to redirect the inquiry away from the workers' activities to the engaging company's activities. Doing so contravenes the text of Section 1 and the surrounding statutory context as described in *Circuit City*. *See supra* pp. 20-23.

But even if the district court's inquiry were germane, it would scarcely distinguish all these other cases. Restaurant deliveries often include goods (like bottled beverages or prepackaged items) that originate across state lines and arrive unchanged to the consumer. Several of the food-delivery cases expressly recognize that the workers in those cases delivered such goods. *Magana*, 343 F. Supp. 3d at 900 (rejecting plaintiff's argument that "DoorDash drivers are involved in the flow of interstate commerce because they facilitate the transportation of goods that originated across state lines"); *Lee*, 2018 WL 6605659, at *7 (rejecting plaintiff's argument that "she delivered packaged goods" for Postmates that were "presumably produced out of state"). Conversely, grocery store deliveries can certainly include

meals or other products that are prepared locally, in-store, as well as locally grown produce.

As this Court has previously observed, some appellate courts have applied the Exemption's residual clause to truck drivers who cross state lines. *New Prime I*, 857 F.3d at 17 & n.14. For example, in *Harden v. Roadway Package Systems, Inc.*, 249 F.3d 1137 (9th Cir. 2001), the Ninth Circuit held that the Exemption applied to a truck driver because he was hired "to engage in 'providing a small package information, transportation and delivery service *throughout the United States*, with connecting international service.'" *Id.* at 1139-40 (emphasis added). But no circuit has held that a class of local delivery drivers who do not cross state lines are similarly engaged in interstate commerce. This Court should not be the first.

C. The Statute's Purposes Require Limiting The Exemption To Workers Engaged In Interstate Activities.

In addition to the statutory language and structure and relevant precedent, the FAA's purposes also require limiting the Exemption to workers actually engaged in interstate activity. Any other approach would clash with the statute's support for arbitration agreements and spawn wasteful litigation over their enforceability.

1. Congress Did Not Intend To Make It More Difficult To Arbitrate With The Class Of Workers At Issue Here.

First, expanding the Exemption to AmFlex users would unduly undermine the act's "proarbitration purposes." *Circuit City*, 532 U.S. at 123. As the Supreme Court

has stressed time and again, Congress passed the FAA to countermand "widespread judicial hostility to arbitration." *Italian Colors*, 570 U.S. at 232; *Epic Sys.*, 138 S. Ct. at 1621. The statute establishes "a liberal federal policy favoring arbitration agreements," and that is particularly true of Section 2, the FAA's expansive general coverage provision. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The fact that the statute "seeks broadly to overcome judicial hostility to arbitration agreements" counsels "in favor of an expansive reading of § 2." *Circuit City*, 532 U.S. at 118-19 (citation omitted). By the same token, the act's pro-arbitration purposes "compel that the § 1 exclusion provision be afforded a narrow construction." *Id.* at 118.

To be sure, Congress did not intend for the FAA to apply to the exempted groups of workers—seamen, railroad employees, and workers falling into the residual clause. But that is not because Congress thought arbitration improper for such employees; it is because, "[b]y the time the FAA was passed, Congress had already enacted federal legislation providing *for* the arbitration of disputes between seamen and their employers" as well as federal "grievance procedures . . . for railroad employees." *Id.* at 121 (emphasis added) (citing Shipping Commissioners Act of 1872, 17 Stat. 262, and Transportation Act of 1920, §§ 300-316, 41 Stat. 456). And "the passage of a more comprehensive statute providing for the mediation and arbitration

of railroad labor disputes was imminent" in the Railway Labor Act of 1926, 44 Stat. 577, which Congress extended to the airline industry in 1936. *Id.* As a result,

> [i]t is reasonable to assume that Congress excluded "seamen" and "railroad employees" from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers.

Id. Likewise, as for the residual clause, it was "rational for Congress to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation," which the Railway Labor Act's extension to the airline industry exemplifies. *Id.*

The statutes cited above reflect that the transportation workers subject to specialized dispute-resolution procedures were engaged in transportation over long distances—seamen, railroad employees, and airline workers. No one claims that Congress has taken a similar interest in local delivery drivers of any stripe.

And that makes sense, because in the mid-1920s when Congress passed the FAA and Railway Labor Act, its principal concern was potential disruption of commerce at a nationwide level. In 1922, there was a devastating railroad strike known as the Great Railroad Strike or Shopmen's Strike. It "partially paralyzed the transportation facilities of the Nation." Margaret Gadsby, *Strike of the Railroad Shopmen*, MONTHLY LAB. REV., Dec. 1922, at 1, 1. Given the country's dependence on the railroads—and the lack of alternative means of long-distance transit—the effects

were not confined to particular localities. On the contrary, the strike caused widespread paralysis and became a national "transportation emergency" because of the importance of the railway system to the country's overall economy:

> Industries were forced to close down through lack of fuel and raw materials. The fruit crop on the Pacific Coast was in danger of destruction because of car shortage. Such nonunion coal mines as were operating were unable to move the coal.

Id. at 6. This was the sort of interstate transportation crisis that led Congress to prefer specialized dispute-resolution procedures. *Cf. Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 381 (1969) ("Railway (and airline) labor disputes typically present problems of national magnitude. A strike in one State often paralyzes transportation in an entire section of the United States[.]" (footnote omitted)); *Union Pac. R.R. v. Price*, 360 U.S. 601, 609 (1959) ("The purpose of the Railway Labor Act was to provide a framework for peaceful settlement of labor disputes between carriers and their employees to 'insure to the public continuity and efficiency of interstate transportation service[.]'" (citation omitted)).

The role of gig-economy delivery drivers, or even local delivery drivers more broadly, pales in comparison. A strike by such workers would not strand natural resources or crops in isolated parts of the country or inhibit whole industries' ability to function. At most, it might have "ripple effect[s]," to use the district court's term. ADD8 (JA269) (citation omitted). But that alone could not justify extending the

Exemption to such workers, because it would be equally true of any sizeable group of workers in today's economy. If the computer programmers and technicians who maintain e-commerce marketplaces all went on strike, interstate commerce would undoubtedly suffer. But that does not mean that exempting them serves the FAA's purposes.

Besides, the point is not to make the Exemption turn on the degree of turmoil that would result from a strike among the class of workers. It is to identify the line between the groups of workers that occupied Congress's concern in enacting Section 1 and industry-specific dispute-resolution legislation like the Railway Labor Act. After all, *Circuit City* commands that the residual clause "be controlled and defined by reference to the enumerated categories of workers"—*i.e.*, seamen and railroad employees. 532 U.S. at 115. Congress's manifest concern in statutes like the Shipping Commissioners Act, Transportation Act, and Railway Labor Act was long-distance transportation. And particularly in light of Congress's legislative decision not to create industry-specific dispute resolution for local drivers, courts may not read the residual clause expansively, beyond its plain terms, to curb arbitration with such workers. Doing so would thwart the FAA's aim of making arbitration more widely available.

2. Applying The Exemption To AmFlex Users Will Foster Wasteful Litigation.

The Supreme Court has also emphasized the importance of clear legal rules for determining whether a particular arbitration agreement is enforceable. In *Circuit City*, for example, it rejected the plaintiff's reading of the Exemption because of "[t]he considerable complexity and uncertainty that [it] would introduce into the enforceability of arbitration agreements in employment contracts." 532 U.S. at 123. Such a reading would "undermin[e] the FAA's proarbitration purposes and 'breed[] litigation from a statute that seeks to avoid it.'" *Id.* (citation omitted). Extending the Exemption to AmFlex users would do likewise, especially under the district court's murky standard.

As discussed above, the district court distinguished between AmFlex users and drivers for local restaurants even though the job responsibilities of those workers are highly similar. It then factored in "Amazon's distribution system" and Amazon's share of the "e-commerce market." ADD8 (JA269). It even endorsed using an *eight-factor* test to determine when workers fit within the Exemption. ADD7 (JA268). Under this approach, courts will have to work out whether a given arbitration agreement is enforceable under the FAA on a case-by-case basis—often followed by appeals on *de novo* review—analyzing the companies' business models and market share at the time (or over time) and the breakdown of products being delivered.

Breeding endless litigation over such issues runs directly contrary to the FAA's purposes. *See Circuit City*, 532 U.S. at 123.

Nor is it sensible to imagine that Congress would have wanted the FAA's applicability to depend on considerations so far removed from what the workers are being engaged to do. The Supreme Court has previously explained that "the validity of an arbitration clause" should not turn "on what, from the perspective of the [FAA's] basic purpose, seems happenstance." *Allied-Bruce*, 513 U.S. at 278 (interpreting Section 2). There is zero reason to believe that Congress would have chosen to make transported goods' origins or engaging companies' characteristics dispositive. Workers may not be able to identify those attributes of the packages they deliver, and are not well situated to make judgments about the core of the hiring company's overall business. Any such standard would severely undermine contracting parties' certainty about whether their arbitration agreements are enforceable under the FAA.

The only sensible approach is to follow the bright-line rule that the statute itself adopts: to be exempted, the workers' transportation activities must extend past state lines.

D. The District Court's Departure From Ordinary Meaning, Relevant Precedent, And The FAA's Purposes Is Indefensible.

The district court's ruling departs from all the textual, contextual, precedential, and purposive considerations just discussed. The court did not examine, let

alone apply, the ordinary meaning of "interstate commerce." Nor did it identify any purpose of the FAA that might support its holding. Instead, at Waithaka's urging, the district court unsoundly rested its decision on a handful of cases that are irrelevant, incorrect, or both. Those cases provide no reason to disregard the FAA's language, structure, and purposes.

The district court placed great weight on *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568 (1943), a case involving the jurisdictional reach of the FLSA. Although the district court found this case and later FLSA cases to "provide valuable guidance to interpret the phrase 'engaged in commerce,'" ADD5 n.5 (JA266), that view is mistaken for many reasons—even if one overlooks the fact that *Walling* postdates the FAA by eighteen years and thus provides no evidence of the Exemption's original ordinary meaning. To start, contrary to the district court's suggestion, the Exemption does not use the phrase "engaged in commerce." It contains additional limiting language—the adjectives "foreign or interstate"—between "in" and "commerce." *See* 9 U.S.C. § 1. The inclusion of those words is particularly significant because the reference to commerce in Section 2 contains no similar words, and courts must respect such differences in neighboring provisions' wording. *See, e.g.*, *Loughrin*, 573 U.S. at 358.[5] But even without that statutory context, courts would

[5] The FLSA's statutory context, on the other hand, only confirms the breadth of its "engaged in commerce" language. The FLSA covers any employee who "is engaged in commerce *or* in the production of goods for commerce, *or* is employed

be obligated to give effect to "foreign or interstate" because they lack any authority to "read words out of the statute." *Barber v. Thomas*, 560 U.S. 474, 490 (2010). By relieving Waithaka of any obligation to show that AmFlex users perform *interstate* services, the district court did just that.

The district court's reliance on FLSA case law was still more inappropriate because the FLSA pursues entirely different purposes than the Exemption. Because the FLSA is a remedial statute, the courts construe its reach broadly. *See, e.g.*, *Jacksonville Paper*, 317 U.S. at 567 ("[T]he purpose of the [FLSA] was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce."). The Exemption, in contrast, must "be afforded a narrow construction" because it is the general applicability of the FAA—not that Exemption—that must be construed "broadly." *Circuit City*, 532 U.S. at 118 (citation omitted).

Besides FLSA cases, the district court leaned heavily on case law that does not even purport to resolve whether workers who perform local, intrastate delivery activities are nonetheless engaged in interstate commerce. For example, the court cited the Third Circuit's decision in *Palcko v. Airborne Express, Inc.*, 372 F.3d 588 (3d Cir. 2004) for the proposition that interstate transportation "is not a necessary condition to the application of the residual exemption." ADD6-7 (JA267-68). But

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in enterprise engaged in commerce *or* in the production of goods for commerce." 29 U.S.C. § 207(a) (emphasis added).

Palcko does not stand for any such proposition—even putting aside the significant question of whether *Palcko* was correctly decided. The question in *Palcko* was whether the Exemption included a managerial employee who supervised a shipping company's truck drivers but did not personally make deliveries. The company argued that the Exemption "should be limited to those truck drivers who physically move the packages." 372 F.3d at 593. And the Third Circuit concluded otherwise, disagreeing that the statutory language covered "only those workers who physically transported goods across state lines." *Id.* at 593-94. The district court wrests this line from its context to suggest that the crossing of state lines is irrelevant. But *Palcko* never addressed the geographic scope of the supervised truck drivers' deliveries. It simply does not resolve whether the actual drivers—as opposed to their supervisors—need to cross state lines to trigger the Exemption. *See, e.g.*, *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (citation omitted)).[6]

[6] It is likely that the supervised truck drivers did cross state lines, because the opinion notes that they operated "in the Philadelphia area." *Palcko*, 372 F.3d at 590. The Philadelphia area is adjacent to New Jersey and Delaware and is often described as including parts of those other states. *See, e.g.*, *Delaware Valley*, Wikipedia, https://en.wikipedia.org/wiki/Delaware_Valley (noting that "the Philadelphia metropolitan area" is often synonymous with the Delaware Valley Metro-

In any event, the district court's broad reading of *Palcko* is refuted by the Third Circuit's recent decision in *Singh*. As discussed above, the court found there that even "frequent" interstate trips by the plaintiff were insufficient to establish that the class of workers engaged in interstate commerce. *Singh*, 939 F.3d at 226-27 & n.11. Again, Waithaka has come nowhere close to making such a showing here. Under Third Circuit precedent, then, Waithaka has failed to establish that the Exemption applies to intrastate delivery drivers.

The district court also looked for guidance to *Lenz v. Yellow Transportation, Inc.*, 431 F.3d 348 (8th Cir. 2005). But the holding of that case establishes only when the Exemption does *not* apply: the court merely held that a customer service representative, who answered phone calls from the trucking company's customers, was not a "transportation worker" under *Circuit City*. *Id.* at 351. Because the plaintiff was not a "transporter of goods," the court considered eight "non-exclusive" factors—which it grounded not in the text of the FAA but rather in its reading of various cases, including *Palcko*—and concluded that the plaintiff could not satisfy any of them. *Id.* at 351-53. While *Lenz* thus stands for the proposition that a worker who does not fulfill any of those eight factors is outside the Exemption, it does not purport

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politan Area, which includes counties in Pennsylvania, New Jersey, and Delaware); *Overview of the Philadelphia Area*, STATISTICAL ATLAS, https://statisticalatlas.com/metro-area/Pennsylvania/Philadelphia/Overview (including parts of New Jersey and Delaware in the "Philadelphia Area").

to establish a definitive framework for other workers who fall outside the Exemption, too. *See Kowalewski v. Samandarov*, 590 F. Supp. 2d 477, 482 n.3 (S.D.N.Y. 2008) (declining to extend the *Lenz* factors to analyze whether the Exemption covered an actual driver). The district court read far too much into *Lenz* when it extended *Lenz*'s eight factors to the circumstances here.[7]

The district court's reliance on *Bacashihua v. United States Postal Service*, 859 F.2d 402 (6th Cir. 1988), is likewise misplaced. In *Bacashihua*, the court concluded with little analysis that the postal workers, as a class, engage in interstate commerce. *Id.* at 405. That conclusion rested on *American Postal Workers Union v. United States Postal Service*, 823 F.2d 466, 473 (11th Cir. 1987), which itself contained little analysis and even noted that the Postal Service did "not seriously argue" the point. Both cases were decided before *Circuit City*, and it is doubtful that they remain good law. *Circuit City* unequivocally "confine[s] the exemption to transportation workers"—*i.e.*, workers "engaged in transportation." 532 U.S. at 109.

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[7] The Eighth Circuit's list of eight "non-exclusive" factors is also a poor standard for applying the Exemption in this case. The simple, ordinary meaning of Section 1 and the FAA's broader purposes are incompatible with a complicated, multi-factor analysis that compromises predictability. *See Circuit City*, 532 U.S. at 123. Regardless, all but one of the factors support Amazon: AmFlex users are not "in the transportation industry" the way that professional truck drivers are; they are not responsible for transporting goods in interstate commerce; they do not supervise transportation workers; they are not subject to industry-specific arbitration legislation; they would not significantly threaten interstate commerce as a whole if they went on strike; and they need not use any specific form of vehicle or form of transportation. *See Lenz*, 431 F.3d at 352-53.

Some postal workers are not engaged in transportation, like those who merely process mail or sell stamps. Yet *Bacashihua* assumed, without explanation, that the relevant "class of workers" included the entirety of the Postal Service. 859 F.2d at 405. Even if postal workers as an undifferentiated whole are a class of workers engaged in interstate commerce, that hardly shows that a more narrowly defined class of workers who are not engaged in interstate transportation are engaged in interstate commerce. For good reason, then, more recent Sixth Circuit authority clarifies that *Bacashihua*'s cursory discussion "address[es] [neither] the interpretation, nor scope, of § 1's exclusionary clause," which "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." *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 597, 600-01 (6th Cir. 1995). And the Eleventh Circuit has similarly made clear that "interstate transportation" is "necessary" for the Exemption. *Hill*, 398 F.3d at 1290.

Finally, the district court erroneously relied on *Christie v. Loomis Armored US, Inc.*, No. 10-cv-02011-WJM-KMT, 2011 WL 6152979, at *3 (D. Colo. Dec. 9, 2011), *Nieto v. Fresno Beverage Co.*, 245 Cal. Rptr. 3d 69, 76 (Ct. App. 2019), and *Rittmann v. Amazon.com, Inc.*, No. 2:16-cv-01554, 2019 WL 1777725, at *3 (W.D.

Wash. Apr. 23, 2019). These cases add nothing to improve the district court's analysis. They too rest on irrelevant cases like *Walling*, *Palcko*, and *Lenz*. In addition, *Christie* and *Nieto* invoke a nonprecedential Fifth Circuit decision, *Siller v. L&F Distributors, Ltd.*, 109 F.3d 765, 1997 WL 114907 (5th Cir. 1997) (per curiam) (Table). But *Siller* is less relevant still, for it turned on the scope of the Transportation Department's authority under the current version of the Motor Carrier Act. *See* 49 U.S.C. §§ 13501, 31502. That statutory language, enacted many years after the FAA, hinges on the activities of the "motor carrier" rather than a discrete class of workers. *See id.* § 13501 (stating, in relevant part, that "[t]he Secretary and the Board have jurisdiction . . . over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier . . . between a place in . . . a State and a place in another State"). And beyond differing from the FAA's language, that provision "has not been applied literally by the courts," as *Siller* itself admits. 1997 WL 114907, at *1. That may be because the Motor Carrier Act, like the FLSA, "is remedial and . . . construed liberally." *McDonald v. Thompson*, 305 U.S. 263, 266 (1938). It is therefore hard to see what this non-precedential 1997 case, broadly applying different statutory language pursuing different purposes, can teach about the original ordinary meaning of the FAA's narrowly construed Exemption.

Instead of relying on far-flung and flawed case law, this Court should stick to the Exemption's original ordinary meaning, as the *New Prime* cases instruct, and hold that a class of workers that performs all its activities in one state is not engaged in interstate commerce.

II. State Law Also Requires Enforcement Of The Parties' Arbitration Agreement.

Even if the Court were to hold that arbitration may not be compelled under the FAA, it should reach the contrary conclusion under state law. An agreement's exemption from the FAA under Section 1 "has no impact on other avenues (such as state law) by which a party may compel arbitration." *New Prime I*, 857 F.3d at 24. On the contrary, enforcing arbitration agreements through state law, "as if the FAA 'had never been enacted,' does not contradict any language of the FAA, but in contrast furthers the general policy goals of the FAA favoring arbitration." *Palcko*, 372 F.3d at 596 (quoting *Mason-Dixon Lines, Inc. v. Local Union No. 560*, 443 F.2d 807, 809 (3d Cir. 1971)); *see also Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) (looking to state law to determine enforceability of arbitration agreement in diversity case where FAA did not govern).

The district court correctly recognized that "the parties clearly agreed to arbitrate." ADD11 (JA272). But it erred in refusing to analyze the enforceability of that

agreement under Washington law and in concluding that Massachusetts law would refuse enforcement.

A. Washington Law Requires Enforcement Of The Parties' Arbitration Agreement If The FAA Does Not Govern.

The district court's state-law discussion was marred by an incorrect choice-of-law determination at the threshold. The parties' agreement contains a choice of law provision, Section 12, that states:

> The interpretation of this Agreement is governed by the law of the state of Washington without regard to its conflict of laws principles, except for Section 11 of this Agreement, which is governed by the Federal Arbitration Act and applicable federal law.

JA94. Section 11, in turn, is the core arbitration provision. JA93-94. The district court read Section 12 as "explicitly indicat[ing] that Washington [law] *will not* apply to the arbitration agreement. ADD10 (JA271). But all that its language actually shows is that the contracting parties wished for Washington law to generally govern their agreement but for the FAA or other federal law to govern Section 11. It does not state what should happen if their choice of federal law for Section 11 proves unenforceable because of the Exemption.

To determine their intent on that question, one must look to the contract's severability provision. It says, "If any provision of this Agreement is determined to be unenforceable, the parties intend that this Agreement be enforced as if the unenforceable provisions were not present and that any partially valid and enforceable

provisions be enforced to the fullest extent permissible under applicable law." JA95 (§ 16). Read in conjunction with Section 12, this provision instructs courts to strike the parties' choice of federal law to the extent that the Exemption precludes it. The choice-of-law provision would then read:

> The interpretation of this Agreement is governed by the law of the state of Washington without regard to its conflict of laws principles~~, except for Section 11 of this Agreement, which is governed by the Federal Arbitration Act and applicable federal law~~.

This result is well supported by the parties' agreement to have Washington law generally apply to their agreement. After all, they agreed to arbitrate not only in Section 11 but also on the very first page of their contract, outside of Section 11. JA89. Surely Washington law could and should apply to that part of their contract, which is not within the one specific section (Section 11) that is supposed to be governed by federal law.

And under Washington law, the arbitration agreement is enforceable. "Washington courts apply a 'strong presumption in favor of arbitrability.'" *Marcus & Millichap Real Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc.*, 369 P.3d 503, 507 (Wash. Ct. App. 2016) (citation omitted). Indeed, Washington's "strong policy favoring arbitration" is "similar" to the FAA's pro-arbitration policy. *Romney v. Franciscan Med. Grp.*, 349 P.3d 32, 36 (Wash. Ct. App. 2015). Washington's pro-arbitration policy also extends to enforcement of arbitration agreements

between employers and employees. *Id.* at 36-37 (holding that arbitration agreement in employment agreement was not procedurally unconscionable and was indeed enforceable). Here, moreover, AmFlex users had 14 days to opt out of the updated Terms of Service's arbitration provision, removing any question of the agreement's procedural unconscionability. *See Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1211 (9th Cir. 2016) ("[A]n arbitration agreement is not adhesive if there is an opportunity to opt out of it."). Nor is there any sort of transportation exemption to the Washington Uniform Arbitration Act, which does not have any exemption for workers engaged in transportation. *See* WASH. REV. CODE ch. 7.04A.

The Washington Uniform Arbitration Act supports the enforcement of the parties' clear agreement to arbitrate and is available to enforce that arbitration agreement. If the Court does not find the agreement enforceable under the FAA, it should enforce the agreement under Washington state law.

B. Massachusetts Law Requires Enforcement Of The Parties' Arbitration Agreement As Well.

In addition to its erroneous refusal to apply Washington law, the district court also erred in refusing to hold the arbitration agreement enforceable under Massachusetts law. Like Washington, Massachusetts has enacted its own version of the Uniform Arbitration Act, *see* MASS. GEN. LAWS ch. 251, § 1. And "the purpose of submitting disputes to binding arbitration is heavily favored by [Massachusetts] statute and case law." *Miller v. Cotter*, 863 N.E.2d 671, 680 (Mass. 2007). The district

court found the arbitration agreement unenforceable under Massachusetts law because it supposedly contravened a state public policy against class action waivers. *See* ADD16-17 (JA277-78). But this view of Massachusetts arbitration law is fundamentally unsound.

The district court rooted its ruling in *Feeney v. Dell Inc.*, 908 N.E.2d 753 (Mass. 2009). There, the court concluded that Massachusetts public policy opposed enforcement of arbitration agreements with class action waivers because of the Commonwealth's "strong public policy in favor of the aggregation of small consumer protection claims." *Id.* at 762. That was because individual litigation of small-value consumer claims would not be a "realistic option" in some circumstances. *Id.* at 763. And it could undermine the public interest in deterrence and fail to vindicate the interests of those who declined to file suit. *Id.* at 764.

But the Supreme Court later held that the FAA forecloses using public policy considerations like these to invalidate arbitration agreements with class action waivers. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340 (2011). The Massachusetts Supreme Judicial Court therefore had to reevaluate *Feeney*. In *Machado v. System4 LLC*, 989 N.E.2d 464 (Mass. 2013), the court clarified that *Feeney* "survives *Concepcion* to the extent that a consumer plaintiff can demonstrate that he or she effectively cannot pursue a claim against a defendant in individual arbitration according to the terms of the arbitration agreement." *Id.* at 470 (cleaned up). The

court applied this analysis not only to consumer protection claims, but to wage claims as well. *Id.*

Critically, however, *Machado* found that *Feeney* will *not* preclude enforcing arbitration agreements with class action waivers where the plaintiff is seeking more than a small amount of damages. Indeed, *Machado* upheld the arbitration agreement because the plaintiffs were each seeking damages near or above $10,000. *Id.* at 471-72. That was a far greater claim than the damages sought in *Feeney* ($13.65 for one plaintiff and $215.55 for the other). *Id.* at 471.

Waithaka's claims are clearly on the *Machado* side of the line. He asserts that his individual claims, not counting attorney's fees and costs, are nearly $14,000. JA49-50. That is more than the amount the court found sufficient in *Machado* to support individual arbitration. *See* 989 N.E.2d at 471-72. Recent history supports the same conclusion. Waithaka's counsel has already filed 15 arbitrations against Amazon alleging the sort of misclassification claims Waithaka brings here. JA243. Similarly, Uber and Lyft face over 15,000 similar individual arbitrations based on similar claims. JA246; JA249. Individual arbitration will not impede Waithaka's ability to pursue his claims.

The district court distinguished *Machado* on the ground that the arbitration agreement in that case was governed by the FAA. ADD16 (JA277). Yet while *Machado* noted that some of *Feeney*'s public policy considerations carried over into

the employment setting, it never suggested that those considerations sometimes would, and sometimes would not, invalidate arbitration agreements with class waivers depending on whether the FAA governed. On the contrary, it sweepingly limited *Feeney*'s survival—without qualification—to circumstances in which the plaintiff needs the class action mechanism to pursue his or her claim. 989 N.E.2d at 470. Waithaka is not in that camp.

Nor is there any reason to think that the Massachusetts Supreme Judicial Court would depart from *Concepcion*'s holding when applying the Massachusetts Uniform Arbitration Act. That court has already made clear that the FAA language that produced *Concepcion* (9 U.S.C. § 2) is "remarkably similar" to language in the Massachusetts statute (MASS. GEN. LAWS ch. 251, § 1). *Miller*, 863 N.E.2d at 677. And the court has declared that "unless there is clear reason to do otherwise, [it will] interpret cognate provisions of State and Federal law similarly." *Id.* at 679; *see also Walker v. Collyer*, 9 N.E.3d 854, 859 (Mass. App. Ct. 2014) (explaining that Massachusetts courts' interpretations of the Massachusetts Uniform Arbitration Act "give strong weight to decisions in other jurisdictions," including "decisions apply-

ing the Federal Arbitration Act" (citation omitted)). Massachusetts would thus follow *Concepcion*, making *Feeney* no impediment to the enforcement of the class waiver in Waithaka's arbitration agreement.[8]

CONCLUSION

For all these reasons, the Court should reverse the district court's order denying Amazon's motion to compel arbitration.

Dated: November 13, 2019

Respectfully submitted,

s/ David B. Salmons

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[8] Even if *Feeney* governed in full, the public policy considerations it identified would not support invalidating the class action waiver here. As just discussed, the amount of damages claimed (as well as statutory attorney's fees) plainly make individual arbitration of gig-economy workers' claims a "realistic option." Such individual arbitrations amply vindicate the Commonwealth's interests in deterrence and compensation for all workers. *Cf. Feeney*, 908 N.E.2d at 763-64.

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 11,604 words.

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Dated: November 13, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of Appellants on this date with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the Appellate Electronic Filing system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished on the following counsel by the Appellate Electronic Filing system:

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ADDENDUM

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BERNARD WAITHAKA, on behalf of himself and others similarly situated,	**CIVIL ACTION**
Plaintiffs,	**NO. 18-40150-TSH**
v.	
AMAZON.COM, INC. and AMAZON LOGISTICS, INC.,	
Defendants.	

ORDER AND MEMORANDUM ON DEFENDANTS' MOTION TO COMPEL ARBITRATION OR, IN THE ALTERNATIVE, TO TRANSFER OR STAY

August 20, 2019

HILLMAN, D.J.

Bernard Waithaka ("Plaintiff"), commenced this class action lawsuit against Amazon.com Inc., and Amazon Logistics Inc. ("Defendants") alleging improper classification as independent contractors and violations of state wage laws. Defendants have moved to compel arbitration or, in the alternative, to transfer or stay this litigation. (Docket No. 29) For the reasons stated below, Defendants' motion is ***granted*** in part and ***denied*** in part.

Background

Plaintiff is a delivery driver for Defendants and classified as an independent contractor. As a result of that classification, Plaintiff (and other drivers similarly classified) must supply their own vehicles and pay expenses necessary to perform their jobs, such as insurance, gas, phone, and data plan. Consequently, Plaintiff alleges that his hourly wage fell below the minimum required by Massachusetts law.

The parties' agreement contained an arbitration agreement, which reads:

> YOU AND AMAZON AGREE TO RESOLVE DISPUTES BETWEEN YOU AND AMAZON ON AN INDIVIDUAL BASIS THROUGH **FINAL AND BINDING ARBITRATION**, UNLESS YOU OPT OUT OF ARBITRATION WITHIN 14 CALENDAR DAYS OF THE EFFECTIVE DATE OF THIS AGREEMENT, AS DESCRIBED BELOW IN SECTION 11.

(Docket No. 31-2, at 10) (emphasis in original). In addition, the agreement contained the following choice-of-law provision:

> **12. Governing Law.**
> The interpretation of this Agreement is governed by the law of the state of Washington, except for Section 11 of this Agreement, which is governed by the Federal Arbitration Act and applicable federal law.

(Docket No. 31-2, at 15).

Discussion

Written arbitration agreements are governed pursuant to the Federal Arbitration Act. 9 U.S.C. §§1-301. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (holding that the FAA extends to employees other than transportation workers in employment cases). The FAA was enacted to combat "longstanding judicial hostility to arbitration agreements and to 'place such agreements upon the same footing as other contracts.'" *United States ex rel. Hagerty v. Cyberonics, Inc.*, 146 F. Supp. 3d 337 (D. Mass. 2015) (quoting *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 271 (1995)). When "construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). The FAA institutes "a liberal federal policy favoring arbitration agreements" thus "establish[ing] . . . as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in

favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

1. FAA Transportation Worker Exemption

The FAA contains an exception for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Plaintiff contends that his employment as a last-mile delivery driver falls within this exception and consequently that the FAA does not apply.

In *Circuit City v. Adams*, the Supreme Court, interpreting the exemption, relied on the general principle of statutory interpretation *ejusdem generis*, which provides that general words following specific words in statutes should be interpreted to be similar in nature to the specific words they follow. 532 U.S. 105, 114-15 (2001). Accordingly, the Court held that "the residual clause should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it." *Id.* at 115. Therefore, the question presented is whether reading the residual clause to apply to last-mile delivery drivers gives effect to the enumerated categories of workers in the exception.

Although the Court narrowly interpreted the exemption, it did not provide any further guidance regarding which transportation workers fall within its scope. The First Circuit has not yet had the occasion to address how courts should interpret the residual clause. And "[a]lthough several other circuit courts throughout the country have addressed the topic, little consensus has been realized." *Kowalewski v. Samandarov*, 590 F. Supp. 2d 477, 484 (S.D.N.Y. 2008). There is one area, however, where a consensus has emerged: truck drivers.[1] "[T]hat is, drivers actually

[1] In *Oliveira v. New Prime, Inc.*, the First Circuit assumed, without deciding, that truck drivers engaged in interstate commerce fell within the scope of the residual clause. 857 F.3d 7, 17 (1st Cir. 2017) ("Prime does

involved in the interstate transportation of physical goods . . . have been found to be 'transportation workers' for purposes of the residuary exemption in Section 1 of the FAA." *Id.*; *see also Lenz v. Yellow Transp., Inc.*, 431 F.3d 348, 351 (8th Cir. 2005) ("Indisputably, if Lenz were a truck driver, he would be considered a transportation worker under § 1 of the FAA."); *Palcko v. Airborne Express*, 372 F.3d 588, 593-94 (3d Cir. 2004) (assuming that truck drivers fall within the scope of the exemption); *Harden v. Roadway Package Sys.*, 249 F.3d 1137, 1140 (9th Cir. 2001) ("As a delivery driver . . . Harden contracted to deliver packages 'throughout the United States, with connecting international service.' Thus, he engaged in interstate commerce that is exempt from the FAA."); *Carr v. Transam Trucking, Inc.*, 2008 WL 1776435, at *2 (N.D. Tex. Apr. 14, 2008) ("Truck drivers, like plaintiff, are considered 'transportation workers' within the meaning of this exemption."); *Veliz v. Cintas Corp.*, 2004 WL 2452851, at *5 (N.D. Cal. Apr. 5, 2014) ("The most obvious case where a plaintiff falls under the FAA exemption is where the plaintiff directly transports goods in interstate [commerce], such as [an] interstate truck driver whose primary function is to deliver mailing packages form one state into another.").

Unlike truck drivers engaged in interstate commerce, however, Plaintiff does not carry goods across state lines. Defendants argue that this distinction precludes application of the exemption to last-mile drivers. *See Magana v. Doordash, Inc.*, 343 F. Supp. 3d 891, 899 (N.D. Cal. 2018) (concluding exemption did not apply to a plaintiff who did "not allege that he ever crossed state lines as part of his work. As such, there is no allegation that he engaged in interstate commerce under the definition of the narrowly-construed term."). *Vargas v. Delivery Outsourcing, LLC*, 2016 WL 946112, at *4 (N.D. Cal. Mar. 14, 2016) (finding drivers not within the residual

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not dispute that Oliveira, whose work for Prime included driving a truck across state lines, is a 'transportation worker' within the meaning of the § 1 exemption, as interpreted by *Circuit City*. Thus, we have no need to definitively decide that issue.").

exemption because the evidence did "not support the conclusion that Plaintiffs made interstate deliveries even occasionally."); *Levin v. Caviar, Inc.*, 146 F. Supp. 3d 1146, 1152 (N.D. Cal. 2015) (finding a driver who delivered prepared meals did not fall within the exemption because he did "not shown that he or any other similarly situated delivery driver ever made trips across state lines" and because the defendant did "not identify itself as being engaged in the interstate transport of goods . . . nor are the prepared meals Plaintiff delivers a type of good . . . that is 'indisputably' part of the 'stream of commerce.'").

The cases above, however, are distinguishable from the facts here. The plaintiffs in *Magana* and *Levin*, for instance, delivered prepared meals from local restaurants or merchants to local customers. *See Magana*, 343 F. Supp. 3d at 895; *Levin*, 146 F. Supp. 3d at 1154 ("[I]ngredients contained in the food that Plaintiff ultimately delivered from restaurants ended their interstate journey when they arrived at the restaurant where they were used to prepare meals."). Here, however, the goods do not stop and a restaurant where they are cooked and combined to create a new product. Instead there is a "continuity of movement" of the goods delivered by Amazon interstate until they reach customers. *See Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568 (1943) ("A temporary pause in their transit does not mean that [goods] are no longer 'in commerce' within the meaning of [the Fair Labor Standards Act]. As in the case of an agency if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until the reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal the continuous nature of the interstate transit which constitutes commerce.").[2] In addition, in *Vargas*,

[2] Although *Walling* involved the Fair Labor Standards Act rather than the FAA, it does provide valuable guidance to interpret the phrase "engaged in commerce." *See also Merchants Fast Motor Lines, Inc. v.*

the plaintiff delivered delayed airline luggage to its owners. The luggage, however, "was not a 'good' to be delivered until it was delayed or lost by the airline and then discovered when it was already intrastate. Much like a food delivery service, a luggage delivery service is not engaged in interstate commerce because it is not in the business of shipping goods across state lines, even though it delivers good that once travelled interstate." *Rittmann v. Amazon.com, Inc.*, 2019 WL 1777725, at *3 (W.D. Wash. Apr. 23, 2019) (distinguishing delivery drivers in *Vargas* from last-mile delivery drivers for Amazon). Here, on the other hand, the goods are "goods" for their entire journeys across state lines.

Courts have also held that while physically transporting goods across state lines is a factor to be considered, it is not a necessary condition to the application of the residual exemption. *See Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 593-94 (3d Cir. 2004) ("[H]ad Congress intended the residual clause of the exemption to cover only those workers who physically transported goods across state lines, it would have phrased the FAA's language accordingly."); *Lenz v. Yellow Transp., Inc.*, 431 F.3d 348, 352 (8th Cir. 2005); *Bacashihua v. United States Postal Serv.*, 859 F.2d 402, 405 (6th Cir. 1988) (finding that the concern is "not whether the individual worker actual engaged in interstate commerce, but whether the class of workers to which the complaining worker belonged engaged in interstate commerce"); *Christie v. Loomis Armored US, Inc.*, 2011 WL 6152979, at *3 (D. Colo. Dec. 9, 2011) ("[A]n employee need not actually transport goods across state lines to be part of a class of employees engaged in interstate commerce."). *But see Magana*,

I.C.C., 5 F.3d 911, 917 (5th Cir. 1993) (holding that local drivers operate in interstate commerce "when a shipper ships goods into Texas from another state, temporarily stores the goods at a warehouse in Texas, then later ships the goods to the shipper's Texas customer" using local delivery drivers); *Ehrlich v. Rich Prod. Corp.*, 767 Fed. Appx. 845, 848 (11th Cir. 2019) ("We conclude that . . . the RSRs were engaged in interstate commerce when making their deliveries. Although the RSRs transported the products only in Florida, their deliveries were a part of a continuous stream of intestate commerce because there was a practical continuity of movement between the RSRs' deliveries to the retail stores and the overall interstate flow.").

343 F. Supp. 3d at 899 (finding exemption did not apply where plaintiff did "not allege that he ever crossed state lines as part of his work"). In *Palcko*, the plaintiff worked for Airborne, a package transportation and delivery company engaged in intrastate, interstate, and international shipping. 372 F.3d at 590. The plaintiff supervised truck drivers who "delivered packages from Airborne's facility near the Philadelphia International Airport to their ultimate destinations in the Philadelphia area, and picked up packages form customers in the Philadelphia area and brought them back to Airborne's facility for shipment." *Id.* Nonetheless, the Third Circuit held that the plaintiff fell within the residual exemption despite the fact there was no evidence that any of the drivers whom she supervised delivered packages across state lines because her work "was so closely related to interstate and foreign commerce as to be in practical effect part of it." *Id.* at 593.

In *Lenz*, the Eight Circuit provided the follow list of factors to assist courts in determining whether an employee fits within the § 1 exemption of the FAA:

> [F]irst, whether the employee works in the transportation industry; second, whether the employee is directly responsible for transporting the goods in interstate commerce; third, whether the employee handles goods that travel interstate; fourth, whether the employee supervises employees who are themselves transportation workers, such as truck drivers; fifth, whether, like seamen or railroad employees, the employee is within a class of employees for which special arbitration already existed when Congress enacted the FAA; sixth, whether the vehicle itself is vital to the commercial enterprise of the employer; seventh, whether a strike by the employee would disrupt interstate commerce; and eighth, the nexus that exists between the employee's job duties and the vehicle the employee uses in carrying out his duties.

431 F.3d at 352. Here, the Plaintiff clearly works in the transportation industry and handles goods that travel interstate. Further, the vehicle Plaintiff uses to deliver packages is vital to Amazon's commercial enterprise and central to Plaintiff's job duties.[3]

[3] It is true that Plaintiff does not supervise other employees, but as Plaintiff points out, this factor is meant to broaden the exemption to workers who do not directly engage in transporting goods. Consequently, the inapplicability of the fourth factor to Plaintiff does not preclude finding he falls within the scope of the exemption.

And while courts have held that crossing state lines is not necessary to apply the exemption, they have also held that transporting goods intrastate that have previously moved interstate can be sufficient to apply the exemption. *See, e.g., Nieto v. Fresno Beverage Co. Inc.*, 33 Cal. App. 5th 274, 284 (2019) ("Nieto's deliveries, although intrastate, were essentially the last phase of a continuous journey of the interstate commerce . . . being transported until reaching its destination(s) to VWB's customers. Accordingly, as a delivery truck driver for VWB, Nieto was engaged in interstate commerce through his participation in the continuation of the movement of interstate goods to their destinations."); *Rittmann*, 2019 WL 1777725, at *3 (finding last-mile delivery drivers for Amazon within the residual exemption because Amazon is in the business of shipping good across state lines); *see also Lenz*, 431 F.3d at 352 (instructing courts to consider whether employees handle goods that travel in interstate). Thus, while last-mile drivers themselves may not cross state lines, they are indispensable parts of Amazon's distribution system. That system, of course, transports goods in interstate commerce. In the end, Plaintiff's employment, like the plaintiff in *Palcko*, is so closely related to interstate commerce as to be part of it.

In addition, courts have considered whether a strike by the employee would disrupt interstate commerce. *See, e.g., Lenz*, 431 F.3d 348, 352. Here, I find that a strike by last-mile delivery drivers for Amazon would disrupt interstate commerce. Amazon is the largest online retailer in the United States, accounting for about half of the e-commerce market. *See* Docket No. 34-3. Accordingly, a strike would almost certainly interrupt interstate commerce. "A strike by Plaintiffs would be akin to local UPS or FedEx drivers striking—a strike by UPS or FedEx drivers, who only personally travel intrastate, would cause a ripple effect in interstate commerce because goods travelling interstate would still not make it to their final destination." *Rittmann*, 2019 WL

1777725, at *4 (considering the effects of a strike by Amazon last-mile drivers). Therefore, I find that Plaintiff falls within the Section 1 transportation worker exemption.

2. Choice of Law

"Section 1 [of the FAA] does not, however, in any way address the enforceability of employment contracts exempt from the FAA. It simply excludes these contracts from FAA coverage entirely." *Valdes v. Swift Transp. Co., Inc.*, 292 F. Supp. 2d 524, 529 (S.D.N.Y. 2003). Accordingly, "[w]hen a contract with an arbitration provision falls beyond the reach of the FAA, courts look to state law decide whether arbitration should be compelled nonetheless." *Breazeale v. Victim Servs., Inc.*, 198 F. Supp. 3d 1070, 1079 (N.D. Cal. 2016); *see also Shanks v. Swift Transp. Co.*, 2008 WL 2513056, at *4 (S.D. Tex. June 19, 2008) ("While the FAA does not require arbitration, the question remains whether the exemption of Section 1 operates as a form of reverse preemption, so as to prohibit arbitration of the dispute altogether. Plainly, it does not. The weight of authority shows that even if the FAA is inapplicable, state arbitration law governs."); *Oliveira*, 857 F.3d at 24 (noting that the transportation worker exemption "applies only when arbitration is sought under the FAA, and it has no impact on other avenues (such as state law) by which a party may compel arbitration").

Plaintiff argues that the Court should either find the arbitration agreement unenforceable or find that Massachusetts law applies. In *Rittmann*, the court found the plaintiffs were within the FAA's transportation worker exemption but was then unable to discern which state's law applied to govern the arbitration agreement. Accordingly, the court held: "Because it is not clear what law to apply to the Arbitration Provision or whether the parties intended the Arbitration Provision to remain enforceable in the event that the FAA was found to be inapplicable, the Court finds that there is not a valid agreement to arbitrate." 2019 WL 1777725, at *5.

Amazon contends that if federal law does not govern the arbitration agreement, the Washington choice-of-law provision requires the Court to apply Washington law. The choice-of-law provision reads:

> **12. Governing Law.**
> The interpretation of this Agreement is governed by the law of the state of Washington, except for Section 11 of this Agreement, which is governed by the Federal Arbitration Act and applicable federal law.

(Docket No. 31-2, at 15). The agreement, however, explicitly indicates that Washington *will not* apply to the arbitration agreement.[4] Had "the parties intended Washington law to apply if the FAA was found to be inapplicable, they would have said so or even remained silent on the issue. Instead, they did the opposite . . . [by] explicitly indicat[ing] that Washington law is not applicable to the Arbitration Provision. Indeed, it appears that it is precisely *against* the parties' intent to apply Washington law to the Arbitration provision." *Rittmann*, 2019 WL 1777725, at *5.[5] Accordingly, I find that Washington law does not apply.

[4] Amazon also argues that the severability provision nonetheless requires applying Washington law. That provision reads, in relevant part:

> **16. Entire Agreement and Severability; Survival**
> . . . If any provision of this Agreement is determined to be unenforceable, the parties intend that this Agreement be enforced as if the unenforceable provisions were not present and that any partially valid and enforceable provisions be enforced to the fullest extent permissible under applicable law.

(Docket No. 31-2, at PAGE). It is unclear, however, how the severability provision supports applying Washington law.

[5] In *Palcko*, for instance, the arbitration agreement read:

> Except as provided in this Agreement, the Federal Arbitration Act shall govern the interpretation, enforcement and all proceedings pursuant to this Agreement. *To the extent that the Federal Arbitration Act is inapplicable, Washington law pertaining to agreements to arbitrate shall apply.*

Palcko, 372 F.3d at 590 (emphasis added). If Amazon wanted Washington law to apply, it could have drafted a similar agreement. Thus, the court will not interpret the ambiguity here in Amazon's favor since it is responsible for the inartful drafting. *See Nadherny v. Roseland Prop. Company, Inc.*, 390 F.3d 44, 49 (1st Cir. 2004) (noting "the interpretive ground rule that ambiguous terms are usually to be construed against the drafter").

I also find, unlike in *Rittman*, the parties clearly agreed to arbitrate. The beginning of the agreement reads:

> YOU AND AMAZON AGREE TO RESOLVE DISPUTES BETWEEN YOU AND AMAZON ON AN INDIVIDUAL BASIS THROUGH **FINAL AND BINDING ARBITRATION**, UNLESS YOU OPT OUT OF ARBITRATION WITHIN 14 CALENDAR DAYS OF THE EFFECTIVE DATE OF THIS AGREEMENT, AS DESCRIBED BELOW IN SECTION 11.

(Docket No. 31-2, at 10) (emphasis in original). This provision evidences an intent to arbitrate independent of the choice-of-law provision. *See Diaz v. Michigan Logistics Inc.*, 167 F. Supp. 3d 375, 381 (S.D.N.Y. 2016) (finding that the "inapplicability of the FAA does not render the parties' arbitration provision unenforceable" because the "arbitration provision clearly demonstrates the parties' intent to arbitrate disputes").[6]

Accordingly, the Court must determine which state's laws apply. "A federal court sitting in diversity ordinarily must follow the choice-of-law rules of the State in which it sits." *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 65 (2013). "This applies to actions brought under the Class Action Fairness Act as well, since CAFA is based upon diversity jurisdiction." *In re Facebook Biometric Info. Privacy Litig.*, 185 F. Supp. 3d 1155, 1167-68 (N.D. Cal. 2016) (quoting *In re NVIDIA GPU Litig.*, 2009 WL 4020104, at *5 (N.D. Cal. Nov. 19, 2009)). Because Amazon removed to this Court pursuant to CAFA, I will apply Massachusetts choice-of-law rules.

In choice of law matters, Massachusetts courts "look to [their] established 'functional' choice of law principles and to the Restatement (Second) of Conflict of Laws, with which those principles generally are in accord." *Hodas v. Morin*, 814 N.E.2d 320, 324 (Mass. 2004). Pursuant

[6] In *Diaz*, the agreement read: "this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law, and therefore this Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial." 167 F. Supp. 3d at 381.

to the Restatement, "[t]he rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6." Restatement (Second) Conflict of Laws § 145(1).[7] Accordingly, the Restatement instructs courts to consider the following factors when making that determination: "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." Restatement (Second) Conflict of Laws § 145(2).[8]

Applying these factors to the facts of this case, the Court will apply Massachusetts law. As Plaintiff notes, "all critical facts concerning [his] work occurred in Massachusetts." (Docket No. 33, at 15).

3. Application of Massachusetts Law

"Where, as here, the plaintiff[ ] challenge[s] the enforceability of a class action prohibition embedded in a binding arbitration clause, they are 'plainly' challenging 'the validity of the parties' agreement to arbitrate,' and a court is the appropriate forum for such a challenge." *Feeney v. Dell*

[7] Section 6 instructs courts to consider "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied"). Restatement (Second) Conflict of Laws § 6.

[8] The Supreme Judicial Court has observed that wage laws sound in tort since they "effectuate[ ] a jurisdiction's interest in regulating behavior within its borders." *Melia v. Zenhire, Inc.*, 967 N.E.2d 580, 591 (Mass. 2012) (quotation marks and citation omitted); *see also* Black's Law Dictionary 1626 (9th ed. 2009) (defining "tort" as "civil wrong, other than breach of contract, for which a remedy may be obtained"). Other courts have interpreted Wage Act violations as sounding in contract and consequently applied the factors outlined in Restatement (Second) Conflicts of Laws § 188. *See, e.g.*, *Krause v. UPS Supply Chain Solutions, Inc.*, 2009 WL 3578601, at *5 (D. Mass. Oct. 28, 2009); *Lockley v. Studentcity.com, Inc.*, 2018 WL 6933374, at *3 (Mass. Sup. Ct. Dec. 5, 2018). Regardless, if the Court were to apply the factors set forth in Section 188, all roads in this case lead back to the Commonwealth.

Inc., 908 N.E.2d 753, 761 (Mass. 2009) (*Feeney I*) (quoting *In re Am. Express Merchants' Litig.*, 554 F.3d 300, 311 (2d Cir. 2009)).

Massachusetts courts generally respect parties' freedom to contract. *Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc.*, 662 N.E.2d 1015, 1017 (Mass. 1996); *see also* E.A. Farnsworth, Contracts § 5.1, at 345 (2d ed. 1990) (noting that freedom to contract "rests on the premise that it is in the public interest to accord individuals broad powers to order their affairs through legally enforceable agreements"). Nevertheless, that freedom is not absolute "for government cannot exist if the citizen may at will . . . exercise his freedom of contract to work . . . harm [to his fellow citizens]. Equally fundamental with the private right is [the right] of the public to regulate it in the common interest." *Commonwealth v. Henry's Drywall Co.*, 320 N.E.2d 911, 915 (Mass. 1974). Thus, "it is a principle universally accepted that the public interest in freedom of contract is sometimes outweighed by public policy, and in such cases the contract will not be enforced." *Beacon Hill*, 662 N.E.2d at 1017. In this context, public policy "refers to a court's conviction, grounded in legislation and precedent, that denying enforcement of a contractual term is necessary to protect some aspect of the public welfare." *Id.*

The Supreme Judicial Court has made clear that class action waivers embedded in arbitration agreements may violate public policy. In *Feeney I*, for instance, the SJC declined to enforce a prohibition on class actions in an arbitration agreement for several public policy reasons. First, permitting the class action waiver would "undermine[ ] the public interest in deterring wrongdoing" because requiring plaintiffs to proceed in individual arbitration would effectively bar recovery. 908 N.E.2d at 765; *see also Salvas v. Wal-Mart Stores, Inc.*, 893 N.E.2d 1187, 1215 (Mass. 2008) ("Class actions were designed not only to compensate victimized group members, but also deter violations of the law, especially when small individual claims are involved."

(quoting 2 A. Conte & H.B. Newberg, Class Actions § 4.36, at 314 (4th ed. 2002))); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("It would hardly be an improvement to have in lieu of this single class action 17,000,000 suits each searching damages of $15.00 to $30.00. . . . The *realistic* alternative to a class action is not 17,000,000 individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.00."). Second, the legislative history of Section 93A demonstrates "a strong public policy in favor of the aggregation of small consumer protection claims." 908 N.E.2d at 762; *see also id.* at 762-63 (describing the legislative history of Section 93A). Third, "the loss of an individual consumer's right to bring a class action negatively affects the rights of those unnamed class members on whose behalf the class action would proceed. In this sense, the right to participate in a class action under G.L. c. 93A is a public—not merely a private—right: it protects the rights of consumers as a whole." *Id.* at 764.

After *Feeney I* was decided, the Supreme Court, in *AT&T Mobility LLC v. Concepcion*, held that the FAA preempted California's rule that class waivers in arbitration agreements were unconscionable. 563 U.S. 333, 352 (2011). The SJC subsequently concluded that that "*Feeney I* survive[d] *Concepcion* to the extent that a consumer plaintiff 'can demonstrate that he or she effectively cannot pursue a claim against a defendant in individual arbitration according to the terms of the arbitration agreement.'" *Machado v. System4 LLC*, 989 N.E.2d 464, 470 (Mass. 2013) (brackets omitted) (quoting *Feeney v. Dell Inc.*, 989 N.E.2d 439, 441 (Mass. 2013) (*Feeney II*)). [9]

[9] The Supreme Court's subsequent decision in *American Express Co. v. Italian Colors Restaurant*, however, clarified that class action waivers in arbitration agreements are enforceable under the FAA even if a plaintiff demonstrates the waiver effectively precludes him or her from vindicating statutory rights. 570 U.S. 228, 238-39 (2013). Accordingly, the SJC since recognized that "*Concepcion* is not entitled to the reading we afforded it in *Feeney II* and that the analysis the Court set forth in *Concepcion* (and reinforced in *Amex*) applies without regard to whether the claim sought to be vindicated arises under Federal or State law." *Feeney v. Dell Inc.*, 993 N.E.2d 329, 331 (Mass. 2013) (*Feeney III*).

In other words, only the first rationale noted above would permit courts to invalidate class waivers in arbitration agreements where the FAA applied.

In *Machado*, the SJC assessed the validity of a class action waiver in an arbitration agreement in the context of a Wage Act claim. The Court noted that that there was "no principled reason to limit *Feeney I* . . . to consumer claims under G.L. c. 93A, because many of the same public policy arguments apply equally well to claims by employees under the Wage Act." 989 N.E.2d at 470. In that case, however, the plaintiff's claims were not small. *See id.* at 471 ("Unlike the plaintiffs in *Feeney II*, whose claimed damages totaled $13.65 and $215.55, respectively, the individual plaintiffs here claim damages that, in the form of improper franchise fees alone, total $21,818.38, $17,227,93, $14,949.73, and $9,541.83, respectively."). Consequently, individual arbitration did not bar them from recovery as a practical matter, and—because the first rationale did not apply—the SJC was forced to uphold the class waiver.

Importantly, the SJC noted that, while the second rationale applied with equal force to Wage Act claims, it was "of no avail." *Id.* at 470. The SJC recognized "the very legitimate policy rationales underlying the Legislature's decision to provide for class proceedings under the Wage Act, nor are we blind to the fact that the Legislature may find its purposes frustrated by this outcome." 989 N.E.2d at 470-71 (citation omitted); *see also* Mass. Gen. Laws ch. 149, § 150 ("An employee claiming to be aggrieved by a violation of [the Wage Act] may . . . institute and prosecute in his own name and on his own behalf, or for himself and others similarly situated, a civil action."). Further, the third rationale also applies with equal force. "[T]he loss of an individual [employee's] right to bring a class action negatively affects the rights of those unnamed class members on whose behalf the class action would proceed. In this sense, the right to participate in

a class action under [the Wage Act] is a public—not merely a private—right: it protects the rights of [workers] as a whole." *Feeney I*, 908 N.E.2d 753.

Amazon argues that that *Feeney I* and *Machado* are inapposite because the public policy rationales in those cases only applies when cases brought on an individual basis would be prohibitively expensive for plaintiffs and consequently chill enforcement. Amazon notes that here Plaintiff has asserted that his individual damages are nearly $14,000. (Docket No. 44, at 11). The SJC concluded, however, that *where the FAA applies* class action waivers can only be invalidated if a plaintiff is, as a practical matter, precluded from vindicating his or her rights in individual arbitration. *See Feeney II*, 989 N.E.2d at 455 ("We do not interpret the FAA so broadly as to deny a consumer any remedy, nor do we discern any such congressional intent. A State court's invalidation [where plaintiffs are effectively precluded from obtaining a remedy] survives not because it can be harmonized with the FAA, but because the FAA does not conflict with such a ruling and therefore does not preempt it."). Here, as noted above, the FAA does not apply because Plaintiff's employment as a last-mile driver falls within the scope of the Section 1 transportation worker exemption. Accordingly, the Supreme Court's holdings in *Concepcion* and *American Express* do not narrow state public policy rationales for prohibiting class action waivers in arbitration agreements. The requirement that plaintiffs must be effectively precluded from obtaining relief was a necessary condition to evade arbitration where the FAA governed the agreement based on the SJC's reading of *Concepcion*. *See Machado*, 989 N.E.2d at 470. It is not necessary here.

The Wage Act itself evidences an intent to permit plaintiffs to proceed as a class. Further, precluding class adjudication would negatively impact unnamed class members, especially those

who may have smaller claims than Plaintiff. Because the FAA does not apply, these public policy rationales are is sufficient to invalidate the agreement.

4. Transfer or Stay

Amazon argues that the Court should transfer this case based on the so-called "first-to-file" rule.[10] Alternatively, Amazon contends that the Court should transfer this case to the Western District of Washington under 28 U.S.C. § 1404(a) or stay the action. I find Amazon's arguments with respect to Section 1404 unconvincing. Nonetheless, transfer is warranted pursuant to the so-called "first-to-file" rule.

a. Section 1404

Amazon next contends that this case should be transferred pursuant to Section 1404. Under Section 1404(a), a court may transfer any civil action to any other district where it may have been brought "[f]or the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). In addition to convenience, courts must consider "various public-interest considerations." *Atl. Marine*, 571 U.S. at 62. Courts typically separate the relevant factors into public and private

[10] At least one district court in the First Circuit has declined to apply the rule because it is not well-established within this circuit. *See e.g.*, *Angela Adams Licensing, LLC v. Dynamic Rugs, Inc.*, 463 F. Supp. 2d 82, 86 (D. Me. 2006) (declining to apply the first-to-file rule where "[the defendant] does not cite, and I am unaware of, any First Circuit case law suggesting that the 'first-to-file' rule is well-settled law in this circuit. Furthermore, where recognized, the first-to-file rule is a matter of trail court discretion"). Other courts have concluded that the first-to-file rule is a factor to be considered in a Section 1404 analysis, but not alone sufficient to warrant transfer. *See Hecker v. Petco Animal Supplies, Inc.*, 2017 WL 2461564 at *3 (N.D. Ill. June 7, 2017) ("[T]he first-filed status of a particular suit, while relevant, is never dispositive of a party's request to dismiss, transfer, or stay a second-filed suit. Other district courts in [the Seventh Circuit] have adopted this approach, considering the first-filed nature of a suit in light of the other considerations relevant under § 1404(a), and have refrained from dismissing second-filed, related suits.").

Because several sessions of this Court have applied the rule, however, I will assume that Amazon may seek transfer under the first-to-file rule. *See e.g.*, *World Energy Alternatives, LLC v. Settlemyre Industries, Inc.*, 671 F. Supp. 2d 215, 218 (D. Mass. 2009). Further, the First Circuit has recognized the "obvious concerns" that arise "when actions involving similar subject matter are pending in different federal district courts" and emphasized that where "the overlap between the two suits is nearly complete, the usual practice is for the court that first had jurisdiction to resolve the issues and the other side to defer." *TPM Holdings, Inc. v. Intra-Gold Industries, Inc.*, 91 F.3d 1, 4 (1st Cir. 1996).

categories. 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3847 (4th ed.). "Factors relating to the parties' private interests include 'relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Atl. Marine*, 571 U.S. at 62 n.6 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981)). "Public-interest factors may include 'the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided and home; [and] the interest in having the trial of a diversity case in a forum that is at home with the law.'" *Id.* (quoting *Piper*, 454 U.S. at 241 n.6). "The Court must also give some weight to the plaintiffs' choice of forum." *Id.*

Amazon argues that convenience of the parties and witnesses supports transfer. According to Amazon, transfer to Washington "would be substantially more convenient for the many witnesses who otherwise would be forced to testify about similar claims in two separate actions pending at opposite ends of the country." (Docket No. 30, at 19). General proffers that convenience dictates transfer, however, is not sufficient. *See Princess House, Inc. v. Lindsey*, 136 F.R.D. 16, 18 (D. Mass. 1991) ("A party seeking transfer on this basis [convenience] must, therefore, specify the key witnesses to be called, accompanied by a general statement as to what their testimony will entail."). *Cf. Montoya v. CRST Expedited, Inc.*, 285 F. Supp. 3d 493, 501 (D. Mass. 2018) (declining to transfer where "the convenience factor remains difficult to evaluate because the witness list is not clear").

b. First-to-File

Under the first-to-file rule, "where the overlap between two suits is 'nearly complete,' the usual practice is for the court where the case was first filed to resolve the issues, and the other court to defer by either staying, transferring, or dismissing the action." *Thakkar v. United States*, 2019 WL 1993782, at *5 (D. Mass. May 6, 2019) (quoting *TPM Holdings v. Intra-Gold Indus.*, 91 F.3d 1, 4 (1st Cir. 1996)); *see also In re Telebrands Corp.*, 824 F.3d 982, 984 (Fed. Cir. 2016) (noting that the first-to-file "rule stands for the common sense proposition that, when two cases are the same or very similar, efficiency concerns dictate that only one court decide both cases"). When deciding whether to apply the rule, courts must consider: (1) which action was filed first; (2) the similarity of the parties; and (3) the similarity of the issues. *See Alltrade, Inc. v. Uniweld Prod., Inc.*, 946 F.2d 622, 625 (9th Cir. 1991).

However, "the first-to-file rule is not to be applied in a mechanical way. *EMC Corp. v. Parallel Iron, LLC*, 914 F. Supp. 2d 125, 127 (D. Mass. 2012). "By assessing the appropriateness of the first-filed rule on a case-by-case basis, without reference to rigid requirements regarding similarities between parties and claims, courts may exercise their discretion to promote efficiency and comity." *Palagano v. NVIDIA Corp.*, 2015 WL 5025469, at *2 (E.D. Pa. Aug. 25, 2015). For instance, "it is not unusual that class actions are resolved by settlement, and the settlement process can be complicated and made burdensome, and even frustrated, if two courts are attempting to deal with" the same subject matter. *Byerson v. Equifax Information Servs.*, 467 F. Supp. 2d 627, 636 (E.D. Va. 2006). "Thus, even if the claims in two separate class actions do not involve identical parties, it would be extremely difficult to ignore the efficiency gains that might result form consolidation." *Palagano*, 2015 WL 5025469, at *2. Further, "if application of the first-filed rule required complete identity of issues and parties, then defendants in the first-filed action may be incentivized to forum shop and commence similar but nonidentical actions in other venues,"

resulting in duplicative litigation and potentially inconsistent rulings. *Sinclair Cattle Co. Inc. v. Ward*, 80 F. Supp. 3d 553, 559 (M.D. Penn. 2015).

"Courts that transfer wage and hour actions under the first-filed rule generally do so when the collective identified in a state-law based second-filed action falls within the scope of a nationwide FLSA collective asserted in the first filed action." *Lloyd v. J.P. Morgan Chase & Co.*, 2012 WL 3339045, at * 2 (S.D.N.Y. Aug. 14, 2002).[11] For instance, in *Fryda v. Takeda Pharmaceuticals North America*, No. 1:11-cv-00339, 2011 WL 1434997 (N.D. Ohio Apr. 14, 2011), the plaintiffs in the second-filed suit alleged violations of Ohio wage laws and proposed a class composed entirely of Ohio citizens. Applying the first-filed rule, the court transferred the case, noting that the plaintiffs in the second-filed suit were a subset of the larger class and that the Ohio state law and federal statutes applied the same standards. *Id.* at *5.

On the other hand, in *Wilkie v. Gentiva Health Servs.*, 2010 WL 3703060 (E.D. Cal. Sep. 16, 2010), the first-filed action was brought in the Eastern District of New York, on behalf of a putative nationwide FLSA collective, and also North Carolina and New York subclasses. *Id.* at *1. The later-filed action was brought against the same defendant in the Eastern District of California and was also brought on behalf of a nation-wide collective, and also a California class. *Id.* at *1-2. The court declined to transfer pursuant to the first-to-file rule because the "California class is separate and distinct from any and all [of the first-filed actions] sub classes." *Id.* at *4. *But see Palagano v. NVIDIA Corp.*, 2015 WL 5025469 (E.D. Pa. Aug. 25, 2015) (applying first-to-file rule where later-filed action on behalf of a class of Pennsylvania residents and the first-filed action was brought on behalf of a nationwide collective, with subclasses representing several states but

[11] Multi-plaintiff actions under the FLSA are governed by 29 U.S.C. § 216(b) and are called "collective" or "representative" actions rather than class actions. Despite the difference in terminology, collective actions are like class actions insofar as they address a similar alleged wrong suffered by a group of similarly situated plaintiffs.

not Pennsylvania). Further, the *Wilke* court concluded that the "California law claims are dissimilar from both the [first-filed] action's FSLA claim and the North Carolina and New York state law claims." *Wilkie*, 2010 WL 3703060, at *4.

Here, I find that the parties are substantially similar. Defendants in both cases are identical and Plaintiff is—as well as other members of the putative Massachusetts class—are subsumed within the nationwide FLSA action in *Rittmann*. *See Fryda*, 2011 WL 1434997, at *5; *Weinstein v. Metlife, Inc.*, No. 06-04444, 2006 WL 3201045, at *4 (N.D. Cal. Nov. 6, 2006) ("In a class action . . . it is the class, not the representative, that is compared" when deciding whether to apply the first-to-file rule). It is true that the putative class in this action is composed entirely of Massachusetts citizens and, like in *Wilkie*, is entirely distinct from the California and Washington subclasses in *Rittman*. *Cf. Hoyt v. Amazon.com, Inc.*, 2019 WL 1411222, at *5 (N.D. Cal. Mar. 28, 2019) (finding similarity of the parties and granting motion to transfer to the *Rittmann* court where second action was entirely composed of a California class and the putative class in *Rittmann* had a California subclass). However, I do not agree that mutually exclusive subclasses preclude finding them similar. *See e.g.*, *Granillo v. FCA U.S. LLC*, 2016 WL 8814351, at *4 (C.D. Cal. 2016) (finding parties similar where two class actions involved same defendant and mutually exclusive classes); *Cadenasso v. Metropolitan Life Ins. Co.*, 2014 WL 1510853, at *10 (N.D. Cal. Apr. 15, 2014) (same). The first-to-file rule only requires similar parties, not identical ones. That requirement is satisfied here.

The issues are also substantially similar. In both actions, the plaintiffs allege that Amazon failed to pay minimum wages and reimburse business expenses. Indeed, many of the statements in Plaintiff's complaint "track[ ], virtually verbatim, statements form the complaint in the [*Rittmann*] action. *Wiley v. Gerber Prod. Co.*, 667 F. Supp. 2d 171, 172 (D. Mass. 2009) (granting

motion to transfer). And while Plaintiff does raise Massachusetts state law claims, the "[m]inor differences in potential damage relief between the FLSA and the Massachusetts state labor laws are insignificant for purposes of this analysis." *Mazzantini v. Rite Aid Corp.*, 829 F. Supp. 2d 9, 11 (D. Mass. 2011) (transferring Wage Act claim to the Middle District of Pennsylvania). Further, the Western District of Washington "is entirely capable of addressing the Massachusetts state law claims raised here." *Id.*

Conclusion

For the reasons stated above, Amazon's motion is ***granted*** in part and ***denied*** in part. I find that Plaintiff falls within the FAA's transportation worker exemption and that the arbitration agreement is unenforceable under Massachusetts law. Finally, pursuant to the first-to-file rule, I find that transfer to the Western District of Washington is warranted.

SO ORDERED

/s/ Timothy S. Hillman
TIMOTHY S. HILLMAN
DISTRICT JUDGE

9 U.S.C. § 1

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"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.

9 U.S.C. § 2

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

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

9 U.S.C. § 16

§ 16. Appeals

(a) An appeal may be taken from--

(1) an order--

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order--

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.