Articles

The Arbitration Hack: The Push to Expand the FAA's Exemption to Modern-Day Transportation Workers in the Gig Economy

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Introduction

THE "GIG ECONOMY"[1] is a multi-billion dollar sector of the United States economy that relies upon independent contractors to offer goods and services, including transportation services, such as so-called "ride-sharing"[2] (e.g., Uber and Lyft); meal delivery (e.g., Postmates, Doordash, and Grubhub); grocery delivery (e.g., Instacart, Prime Now, and Amazon Fresh); and delivery of virtually everything under the sun (e.g., Amazon Flex). However, these tech platforms do not employ a single driver. Instead they claim to be technology companies that simply provide software to allow willing parties to connect with one another.[3] These tech platforms are so popular that in 2016, it was

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1. The "gig economy," also referred to as the "sharing economy" or "on-demand economy," is an economy where businesses rely on temporary or freelance workers, contracted on a short-term basis to provide services such as delivery of goods. In this context, the word "gig" refers to a one-off job that an individual is paid to do on a casual basis.

2. "Ride-sharing" is an arrangement in which a passenger travels in a private vehicle driven by its owner, for a fee, especially as arranged by means of a website or mobile application.

3. Joel Rosenblatt, *Uber's Future May Depend on Convincing the World Drivers Aren't Part of its 'Core Business,'* TIME (Sept. 12, 2019), https://time.com/5675637/uber-business-future/ [https://perma.cc/33NC-HCEU].

estimated that forty-four percent of adults in the United States (more than ninety million people) participated (as either a worker or a consumer) in these tech platforms, greater than the number of Americans who identify as either Democrat or Republican.[4] It is for this reason that Amazon Prime currently has over 100 million paying subscribers, all of whom are promised two-day, same-day, and even one-hour delivery on millions of goods and products.[5]

The emergence of this new segment of the American workforce has sparked a great deal of litigation as gig economy workers bring wage and hour claims contending they have been deprived of the benefits and legal protections of state and federal labor laws by virtue of being misclassified as independent contractors rather than employees.[6] Yet, there exists a major impediment to resolving the complicated legal issues surrounding worker misclassification in the gig economy: The Federal Arbitration Act ("FAA").[7]

The FAA is by no means a modern statute. It was enacted in 1925, before the Supreme Court dramatically expanded the meaning of interstate commerce and before the widespread growth of the use of non-negotiable adhesion contracts in the employment arena. Since the 1980s, the United States Supreme Court has radically expanded the scope of the FAA.[8] Today, courts interpret the statute to apply to disputes of all types, and the Supreme Court has held the FAA preempts any state law that runs counter to the FAA's pro-arbitration policy.[9] In addition, courts have permitted employers to couple mandatory arbitration agreements with class action waivers, thereby preventing workers from joining together to challenge systemic corpo-

4. Katy Steinmetz, *Exclusive: See How Big the Gig Economy Really Is*, TIME (Jan. 6, 2016), https://time.com/4169532/sharinf-economy-poll [https://perma.cc/FQA7-PKSE]. This figure excludes adults who are not internet users.

5. Don Reisinger, *Amazon Prime Has More than 100 Million U.S. Subscribers*, FORTUNE (Jan. 17, 2019), https://fortune.com/2019/01/17/amazon-prime-subscribers [https://perma.cc/Z796-V3M3].

6. Michelle MacDonald, *Risky Business: Misclassifying Gig Employees*, AM. BAR ASS'N: L. PRAC. MAG. (May 1, 2019), https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2019/MJ2019/MJ19MacDonald/ [https://perma.cc/JUW5-CG7P]; FREDRIC C. LEFFLER, MISCLASSIFYING WORKERS AS INDEPENDENT CONTRACTORS 1 (2010), https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/083.authcheckdam.pdf [https://perma.cc/B7YF-38KR].

7. 9 U.S.C. § 1 (2018).

8. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (establishing the FAA's preemptive effect on state law).

9. *Id.*

rate wrongdoing and undermining decades of achievements in workers' rights.[10]

Contracts that impose mandatory arbitration are commonplace in the gig economy, with workers waiving their right to a jury trial with just a few taps on a mobile application.[11] In addition, statistics submitted by the nation's leading tech firms show that mandatory arbitration agreements in employment contracts serve as a barrier to workers seeking redress against large tech companies.[12] The data shows that a trivial number of employees pursue arbitration against the likes of Google and Amazon.[13] For example, Google reported that between the years 2014 and 2019, independent contractors at Google initiated a grand total of three arbitration claims in that five-year period—less than one per year.[14]

Even when workers do pursue arbitration, tech companies have found ways to delay litigation and have even attempted to back out of their own arbitration agreements.[15] For example, the San Francisco-based meal delivery startup, DoorDash, Inc.—like most employers—includes an individual arbitration provision and class action waiver in the contracts its delivery drivers must sign before they can begin making deliveries.[16] These arbitration provisions state that its delivery drivers, known as "Dashers," waive their right to bring legal disputes against DoorDash in a court of law and instead can only resolve their disputes through private arbitration.[17] The contract also precludes Dashers from combining their claims, thereby preventing class actions.[18] This increasingly common condition of employment becomes a problem when low-wage workers' individual claims are not worth as much money as they would cost to arbitrate. An employer, for in-

10. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624–29 (2018) (finding the National Labor Relations Act, which guarantees workers the right to engaged in concerted activities, did not displace the FAA's ability to outlaw class and collective action waivers).

11. Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECON. POL'Y INST. (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/ [https://perma.cc/5XRG-USNA].

12. David Dayen, *Tech Companies' Big Reveal: Hardly Anyone Files Arbitration Claims*, AM. PROSPECT (Nov. 26, 2019), https://prospect.org/power/tech-companies-hardly-anyone-files-arbitration-claims [https://perma.cc/9F2K-PE6M].

13. *Id.*

14. *Id.*

15. Nicholas Iovino, *Judge Accuses DoorDash of Trying to 'Squirm Out' of Arbitration*, COURTHOUSE NEWS SERV. (Nov. 25, 2019), https://www.courthousenews.com/judge-accuses-doordash-of-trying-to-squirm-out-of-arbitration/ [https://perma.cc/7LFV-MS4U].

16. *Id.*

17. *Id.*

18. *Id.*

stance, that fails to pay reimbursements of business expenses[19] under California law may only owe each of its workers a few thousand dollars; thus by eliminating class actions, companies can effectively use individual arbitration clauses and class action waivers to make workers' claims disappear.

That is, unless workers decide to call their employers' bluff. In 2019, thousands of Dashers filed claims in arbitration against DoorDash, causing DoorDash to face millions in arbitration filing fees and attorney's fees.[20] In response, DoorDash refused to pay its arbitration fees, introduced new arbitration terms so only ten arbitration cases could proceed at one time when more than thirty cases are filed, and mandated ninety-day mediation sessions and other conditions which would have delayed some cases for years.[21] As a result, in November 2019, over 2000 Dashers took their cases to federal court and filed a motion to compel arbitration against DoorDash.

During a ninety-minute hearing, Judge William Alsup, a federal Judge for the Northern District of California, admonished DoorDash's attorneys and accused DoorDash of attempting to "squirm out" of its own arbitration agreements:

> Your law firm and all your firms have tried for 20 years to keep plaintiffs out of court, and you've gotten a lot of success in the courts . . . . Then someone says, "OK. We'll take you to arbitration," and suddenly it's not in your interest anymore. Now you're wiggling away, trying to find a way to squirm out of your agreement.[22]

In the meantime, disputes over the classification of DoorDash's meal delivery drivers as independent contractors are stalled while the parties argue over unpaid arbitration fees. Even if the issue of worker misclassification is eventually addressed in binding arbitration, the arbitrator's decision will not change any legal precedent because arbitration decisions are not public, nor are they binding on any state or federal courts.

Nevertheless, there is a way to keep mandatory arbitration from serving as a barrier to justice for millions of gig economy workers, and it begins by instituting a uniform legal framework for determining the classes of workers exempt from the FAA. Section 1[23] of the FAA exempts from its coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or inter-

19. CAL. LAB. CODE § 2802 (West 2016).
20. *Id.*
21. *Id.*
22. *Id.*
23. All mention of "Section 1" herein refers to Section 1 of the FAA: 9 U.S.C. §1.

state commerce,"[24] commonly known as the "transportation worker exemption." Unfortunately, even though the Supreme Court proclaimed in 2001 that the FAA's only exemption applies exclusively to "transportation workers," the Court never defined the term "transportation worker," nor did it provide a legal framework to aid in resolving the question.[25] As a result, state and federal courts throughout the country have taken it upon themselves to create and apply varying, inconsistent, and often times flawed legal frameworks for determining the classes of workers exempt from the FAA.

This Article argues that workers performing transportation services in the gig economy are modern-day transportation workers and should therefore be exempt from the FAA under the transportation worker exemption. For that reason, this Article proposes and advocates for a modern, uniform legal framework for determining FAA exemption that takes into consideration the practical implications of today's interconnected global economy, as well as the impact of the gig economy on America's workforce.

Specifically, Part I of this Article briefly reviews the legislative history behind the enactment of the FAA and the key Supreme Court decisions that led to the narrow interpretation of the FAA's only exemption. Part II provides a detailed look at how litigants and courts throughout the country have interpreted the classes of workers exempt from the FAA and the varying, inconsistent, and often times flawed legal frameworks courts have created for determining who is a "transportation worker." Part III addresses the unresolved issues arising from the division among the federal courts in their interpretation of the FAA and highlights the importance of creating a uniform legal framework. Finally, Part IV proposes a modern, uniform legal framework for determining the classes of workers exempt from the FAA, which incorporates judicial reasoning from the Supreme Court and adopts the most practical aspects of the varying legal frameworks instituted by courts around the country.

I. The History of the FAA's Transportation Worker Exemption

The FAA[26] was enacted in response to widespread judicial hostility to arbitration agreements and reflects a liberal policy favoring arbi-

24. 9 U.S.C. § 1 (2018).
25. *See generally* Circuit City, Inc. v. Adams, 532 U.S. 105 (2001).
26. 9 U.S.C. § 1.

tration.[27] However, despite its pro-arbitration policy, the FAA excludes certain classes of workers from its ambit.[28] Under its explicit terms, Section 1 of the FAA directly exempts from its coverage: "[C]ontracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[29]

This single sentence has become the subject of decades of litigation surrounding the interpretation of what it means to be in a "class of workers engaged in foreign or interstate commerce." Although a review of the legislative history shows the FAA was never meant to apply to labor disputes at all, the Supreme Court has interpreted the FAA's only exemption narrowly to cover exclusively "transportation workers."[30]

A. The Enactment of the FAA and the Legislative History Behind Its Only Exemption

The FAA was enacted in 1925, before the Supreme Court dramatically expanded the meaning of "interstate commerce" and before the widespread growth of the use of non-negotiable adhesion contracts in the employment arena. The legislative history of the Act, which is "extensive and well documented,"[31] demonstrates the FAA was enacted in response to longstanding judicial hostility toward arbitration agreements between merchants in the commercial industry.[32] In fact, the original draft of the bill, which was drafted by the American Bar Association's ("ABA") Committee on Commerce, Trade, and Commercial Law,[33] did not even include the exemption provision that would later be known as the "Transportation Worker Exemption."[34]

Furthermore, the legislative history behind the FAA shows the statute was not meant to apply to labor disputes. At the Senate hearing

27. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (internal citations and quotation marks omitted).

28. *See* 9 U.S.C. § 1.

29. *Id.*

30. *Circuit City*, 532 U.S. at 119 ("Section 1 exempts from the FAA only contracts of employment of transportation workers.").

31. *Id.* at 125 (Stevens, J., dissenting).

32. *See* Local 205, United Elec. Workers v. Gen. Elec. Co., 233 F.2d 85, 99 (1st Cir. 1956) (noting that "congressional attention was being directed at the time solely toward the field of commercial arbitration"), *aff'd on other grounds,* 353 U.S. 547 (1957).

33. The bill that eventually became the FAA was drafted by the ABA Committee on Commerce, Trade, and Commercial Law. *See* Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers, (U.E.) Local 437, 207 F.2d 450, 452 (3d Cir. 1953).

34. *Tenney Eng'g, Inc.,* 437 F.2d at 452 ("The bill was drafted by the Committee on Commerce, Trade and Commercial Law of the American Bar Association and sponsored by the Association.").

discussion of the FAA bill, the chair of the ABA committee and drafter of the bill, W.H.H. Piatt, testified that the bill was drafted partly in reaction to intense judicial hostility toward arbitration of disputes between merchants.[35] Despite this stated purpose, union officials, such as the President of the International Seamen's Union of America, expressed concern that employment contracts entered into by his organization's workers (seamen) would fall under the ambit of the FAA.[36] In response to these objections, Piatt emphasized the bill was not intended to apply to any labor disputes and suggested that if Congress felt "there [was] any danger of that," they should add the following language to the bill: "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce."[37] Another supporter of the bill, then-Secretary of Commerce Herbert Hoover, suggested: "If objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'"[38]

The FAA bill was reintroduced in the next session of Congress with the exact language Secretary Hoover suggested in Section 1.[39] After that, organized labor dropped its opposition and the FAA was adopted in 1925.[40] Therefore, it appears the reason Section 1 of the FAA specifically enumerates "seamen" and "railroad employees" was to appease objections from organized labor in the seamen and railroad industries. Despite this evidence of legislative intent, courts today interpret the FAA to apply to disputes of all types, including labor and employment actions.

B. Key Supreme Court Decisions Favoring Enforceability of the FAA

Beginning in the 1980s, the Supreme Court issued a series of decisions favoring enforceability of arbitration agreements, effectively turning the tide on the "longstanding judicial hostility to arbitration agreements" that Congress sought to overcome with the FAA.[41] In

35. Craft v. Campbell Soup Co., 177 F.3d 1083, 1089 (9th Cir. 1998), *abrogated by* Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).
36. *Circuit City*, 532 U.S. at 126–27 (2001) (Stevens, J., dissenting).
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

1984, the Court decided *Southland Corp. v. Keating*,[42] which established the FAA's preemptive effect on state law, holding that the FAA strips states of the authority to "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." There, the Supreme Court, for the first time, held that the FAA applies not only in federal courts but in state courts as well.[43] As a result, the FAA now preempts all state laws that are hostile to arbitration or that impose conditions on the enforceability of arbitration agreements.[44]

In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court again issued a strong endorsement of arbitration agreements.[45] The Court rejected various arguments about the intrinsic unfairness of arbitration proceedings, calling them "far out of step with [the Court's] current strong endorsement of the federal statutes favoring this method of resolving disputes."[46] In rejecting the suggestion that arbitration was inferior to a judicial remedy, the Court stated that, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."[47]

Then in 1995, the Supreme Court in *Allied-Bruce Terminix Cos., Inc. v. Dobson*[48] took on the interpretative question of the meaning of the words "involving commerce" within Section 2 of the FAA. After examining the statute's language, background, and structure, the Court held that the word "involving" is broad and "the functional equivalent of the word 'affecting,'" which "normally signals Congress' intent to exercise its Commerce Clause powers to the full[est]."[49] In other words, the Court held the FAA applies to all disputes governed under Congress's expansive commerce clause powers. Notably, however, the Court made clear the words "in commerce" located in Sec-

42. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

43. *Id.* at 16.

44. *Id.*

45. *Gilmer*, 500 U.S. at 30.

46. *Id.*

47. *Id.* at 26.

48. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273 (1995); *see also* 9 U.S.C. § 2 (2018) ("[W]ritten 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 . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.") (emphasis added).

49. *Allied-Bruce Terminix*, 513 U.S. at 273–74.

tion 1 of the FAA are "often found words of art" that cover "only persons or activities *within the flow* of interstate commerce."[50]

This line of pro-arbitration Supreme Court decisions made clear that few arbitration agreements would escape the expansive reach of the FAA.

C. The Supreme Court's Landmark Decision Narrowing the FAA Exemption to Cover Only "Transportation Workers"

In 2001, the Supreme Court finally interpreted the Section 1 exemption to the FAA.[51] In *Circuit City Stores, Inc. v. Adams*, the Supreme Court held that Section 1 "exempts from the FAA only contracts of employment of transportation workers," rejecting an interpretation of Section 1 by the Ninth Circuit that would have exempted *all* employment contracts from the FAA.[52]

1. The Ninth Circuit's Broad Interpretation

In October 1995, Plaintiff Saint Clair Adams applied for a job at Circuit City Stores, Inc., a national retailer of consumer electronics.[53] Circuit City hired Adams as a sales counselor.[54] However, as a condition to his employment, Adams had to sign an employment contract which contained a mandatory arbitration provision that bound Adams to resolve any employment disputes with Circuit City by final and binding arbitration.[55] Two years later, Adams sued Circuit City for employment discrimination, and Circuit City responded by filing a motion to compel arbitration of Adams's claims.[56] The district court concluded that Adams was obligated to submit his claims against Circuit City to binding arbitration pursuant to the arbitration agreement.[57] Adams appealed to the United States Court of Appeals for the Ninth Circuit.[58]

50. *Id.* at 273 (citing United States v. Am. Bldg. Maint. Indus., 422 U.S. 271, 276 (1975)) (defining "in commerce" as related to the "flow" and defining the "flow" to include "the generation of goods and services for interstate markets and their transport and distribution to the consumer").
51. Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).
52. *Id.* at 112.
53. *Id.* at 109.
54. *Id.* at 110.
55. *Id.* at 109–10.
56. *Id.* at 110.
57. *Id.* at 109–10.
58. Circuit City Stores, Inc. v. Adams, 194 F.3d 1070, 1071 (9th Cir. 1999).

While Adams's appeal was pending, the Ninth Circuit in *Craft v. Campbell Soup Co.*[59] ruled that the FAA did not apply to employment agreements altogether. The Ninth Circuit then reversed the district court's decision in *Circuit City*, citing its own precedent from *Craft* which interpreted the exclusion of Section 1 as applying to *all* employment agreements.[60] In other words, the Ninth Circuit ruled that all employment contracts were beyond the reach of the FAA, and since "the arbitration agreement in this case was an employment contract," the FAA was inapplicable.[61] The Ninth Circuit's decision was especially significant at the time as it "conflict[ed] with every other Court of Appeals to have addressed the question."[62]

2. The Supreme Court's Narrow Interpretation

Acknowledging the division among the federal courts of appeal, the Supreme Court granted certiorari in *Circuit City* to resolve the question of whether the FAA was applicable in the employment context.[63] Adams, endorsing the Ninth Circuit's reasoning, argued that the language in Section 1 (referring to "contracts of employment . . . of workers ***engaged in*** foreign or interstate commerce") should be interpreted similarly to the language in Section 2 of the FAA (referring to all "transaction[s] ***involving*** commerce"), which the Supreme Court previously held was evidence of Congress's intent to regulate to the full extent of its commerce power.[64] Based on this reasoning, Adams argued that Section 1 exempts from the FAA all employment contracts falling within Congress's commerce power.[65] In a five-to-four decision, the Supreme Court disagreed.[66]

In reversing the Ninth Circuit decision, the Supreme Court's conservative majority (Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas) relied on traditional statutory construction principles to conclude the FAA's exemption in Section 1 should be construed narrowly to exempt only "transportation workers."[67] The Court took a

59. *See generally* Craft v. Campbell Soup Co., 177 F.3d 1083, 1085 (9th Cir. 1998).

60. *Circuit City*, 194 F.3d at 1071.

61. *Id.*

62. *Circuit City*, 532 U.S. at 110–11 (citing cases from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Tenth, and District of Columbia Circuits).

63. *Id.* at 110–11.

64. *Id.* at 112, 114.

65. *Id.* at 114.

66. *Id.* at 109, 114.

67. *Id.* at 109 ("We now decide that the better interpretation is to construe the statute, as most of the Courts of Appeals have done, to confine the exemption to transportation workers.").

textualist approach and relied on a general rule 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.[68] Applying that reasoning, the Court determined that, unlike the "involving commerce" language in Section 2, the words "any other class of workers engaged in . . . commerce" is a "residual phrase" because it follows "explicit references to 'seamen' and 'railroad employees.'"[69]

The Court also noted that phrases such as "in commerce" or "engaged in commerce" were "often-found words of art" that should not be read as expressing congressional intent to regulate to the outer limits of its Commerce Clause authority.[70] The Court thus contrasted the broad language of Section 2 with the narrower residual clause of Section 1 and concluded that Section 2's "involving commerce" language embodied Congress's full Commerce Clause powers, while Section 1's "engaged in interstate commerce" language was intended to be narrower in scope.[71] As such, the Court held that Congress intended the term "other class of workers" in Section 1 to be limited in scope to "transportation workers," like the enumerated preceding class of workers "seamen" and "railroad employees."[72]

Since the Court found the language in Section 1 unambiguous, it refused to consider the legislative history behind the enactment of the FAA.[73] The Court acknowledged the existence of relevant legislative history, which suggested that Section 1 was added to the FAA in response to the objections of powerful labor unions.[74] Nevertheless, it refused to consider it and cautioned that the relevant legislative history did not come from a member of Congress, but from certain interest groups opposing the legislation.[75]

Lastly, the Supreme Court identified potential policy reasons why Congress may have limited the Section 1 exemption to transportation workers.[76] The Court noted that by the time the FAA was enacted, Congress had already created federal grievance procedures for certain

68. *Id.* at 114–15.
69. *Id.* at 114.
70. *Id.* at 115–16.
71. *Id.* at 114–18.
72. *Id.* at 114.
73. *Id.* at 119–20 ("As the conclusion we reach today is directed by the text of § 1, we need not assess the legislative history of the exclusion provision.").
74. *Id.* at 119–20.
75. *Id.* at 120.
76. *Id.* at 120–21.

transportation workers, such as seamen and railroad workers.[77] It reasoned that Congress may have opted to exclude transportation workers so they would not be subject to overlapping and conflicting statutory dispute resolution schemes.[78]

Since this landmark decision, *Circuit City*'s holding has been the law of the land, and courts throughout the country regularly affirm that the FAA exemption applies only to so-called "transportation workers."[79] However, the Supreme Court has yet to shed light on the classes of workers it considers to be "transportation workers."

D. The Supreme Court Clarifies the Meaning of the Term "Contracts of Employment"

In 2019, the Supreme Court clarified another highly disputed question regarding the interpretation of the FAA's Section 1 exemption: What does the term "contracts of employment" mean?[80] In *New Prime v. Oliveira,* Plaintiff Dominic Oliveira worked as a truck driver for New Prime Inc., an interstate trucking company.[81] Oliveira worked for New Prime under an operating agreement that classified him as an independent contractor and contained a mandatory arbitration provision.[82] When Oliveira filed a class action in federal court alleging New Prime misclassified its truckers as independent contractors and thus denied them lawful wages, New Prime petitioned the court to compel arbitration.[83]

In response, Oliveira argued that New Prime could not compel arbitration because he was exempt from the FAA under the transportation worker exemption.[84] Although the parties agreed that as an interstate trucker, Oliveira fell within a class of workers engaged in interstate commerce, New Prime argued the term "contract of employment" in Section 1 refers only to contracts establishing an employee-employer relationship, and not contracts establishing an

77. *Id.* at 121.

78. *Id.*

79. *Id.* at 109 ("We now decide that the better interpretation is to construe the statute, as most of the Courts of Appeals have done, to confine the exemption to transportation workers."); *see also* New Prime v. Oliveira, 139 S. Ct. 532, 538 (2019) ("In *Circuit City,* we acknowledged that 'Section 1 exempts from the [Act] . . . contracts of employment of transportation workers.'").

80. *New Prime,* 139 S. Ct. at 539.

81. *Id.* at 536.

82. *Id.*

83. *Id.*

84. *Id.*

independent contractor relationship like the one Oliveira signed.[85] Since courts across the country had disagreed on the answer to this question, the Supreme Court took on the issue to resolve it.[86]

In a unanimous decision, the Supreme Court agreed with Oliveira. The Court held that "contracts of employment," as ordinarily understood in 1925 when Congress passed the FAA, "mean[s] nothing more than an agreement to perform work," which encompasses "not only agreements between employers and employees but also agreements that require independent contractors to perform work."[87] The Supreme Court found support for this conclusion in Congress's use of the term "workers" (as in "any . . . class of workers") as opposed to "employees" or "servants," and rejected the notion that "contracts of employment" necessarily meant employer-employee relationships.[88]

II. The Characteristics of a "Transportation Worker"

Since the Supreme Court's landmark decision in *Circuit City*, state and federal courts throughout the country have struggled to determine what types of workers are "transportation workers" for purposes of the Section 1 exemption. Despite its pronunciation in *Circuit City* that Section 1 should be construed narrowly to apply only to "transportation workers," the Supreme Court never defined the term, nor did it provide a legal framework to aid the resolution of the question. As a result, it is currently unclear to what degree the employer's industry must be related to transportation, if at all. It also remains unclear to what degree the worker's job duties or responsibilities must involve the transportation of goods or passengers. Or if the employer's industry and worker's job responsibilities must be considered together or separately. And for the workers who deal in the movement of goods, it remains unresolved to what degree the term "transportation worker" is limited to one who delivers the products of third parties on behalf of their employer (such as third party couriers or truckers) and to what degree may it include individuals who deliver goods sold by their employer as well. This uncertainty in the meaning of the term "transportation worker" has prompted courts throughout the country to come up with varying, inconsistent, and often times flawed legal frameworks for determining who is a transportation worker under the FAA. This line of post-*Circuit City* decisions each place a special em-

85. *Id.* at 536–37.
86. *Id.* at 536.
87. *Id.* at 539.
88. *Id.* at 539–44.

phasis on a different aspect of transportation and seldom provide a bright-line test for determining exemption from the FAA.

A. The Eleventh Circuit's Two-Part Test

The Eleventh Circuit has adopted a two-part test to aid in determining the classes of workers exempt from the FAA.[89] In *Hill v. Rent-A-Ctr., Inc.*, the court tackled the question of whether an account manager "who as part of his job duties transported merchandise across the Georgia/Alabama border" was a transportation worker exempt from the FAA.[90] The *Hill* court looked to the Supreme Court's reasoning in *Circuit City*, wherein the Court inferred that "Congress intended the term 'other class of workers' to be limited in scope by the terms 'seamen' and 'railroad employees.'"[91] Applying that reasoning, the Eleventh Circuit found: "The emphasis, therefore, was on a class of workers in the transportation industry, rather than on workers who incidentally transported goods interstate as part of their job in an industry that would otherwise be unregulated."[92]

In addition, the *Hill* court explained that "the interstate transportation factor is a necessary but not sufficient showing for the purposes of the exemption" and held "that in addition to the interstate transportation of goods requirement . . . the employee seeking application of § 1's exemption must also be employed in the transportation industry."[93] The Eleventh Circuit essentially created a two-part test that requires an individual to show: (1) their employer is in the transportation industry; and (2) their particular position is engaged in the interstate transportation of goods.[94]

The *Hill* court, however, stopped short of delineating the contours of the transportation industry.[95] Rather, it simply held that a business that rented furniture and appliances to customers on a rent-to-own basis did not fall within the transportation industry.[96]

89. *See* Hill v. Rent-A-Ctr., Inc., 398 F.3d 1286, 1288, 1290 (11th Cir. 2005) ("[W]e hold that in addition to the interstate transportation of goods requirement . . . the employee seeking application of § 1's exemption must also be employed in the transportation industry.").

90. *Id.* at 1289.

91. *Id.* (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 120–21 (2001)).

92. *Id.*

93. *Id.* at 1290.

94. *See id.*

95. Muro v. Cornerstone Staffing Sols., Inc., 20 Cal. App. 5th 784, 791 (2018).

96. *Hill*, 398 F.3d at 1288.

B. The Eighth Circuit's Eight *Lenz* Factors

In *Lenz v. Yellow Transp., Inc.*,[97] the Eighth Circuit synthesized the factors courts often consider in determining whether the transportation worker exemption applies. It identified eight "non-exclusive" factors for consideration when assessing whether an employee "is so closely related to interstate commerce that he or she fits within the § 1exemption of the FAA."[98] Those eight factors consist of:

> [1] whether the employee works in the transportation industry;
> [2] whether the employee is directly responsible for transporting goods in interstate commerce;
> [3] whether the employee handles goods that travel interstate;
> [4] whether the employee supervises employees who are themselves transportation workers, such as truck drivers;
> [5] 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;
> [6] whether the vehicle itself is vital to the commercial enterprise of the employer;
> [7] whether a strike by the employee would disrupt interstate commerce; and
> [8] the nexus that exists between the employee's job duties and the vehicle the employee uses in carrying out his duties (i.e., a truck driver whose only job is to deliver goods cannot perform his job without a truck).[99]

Although the Eighth Circuit does an admirable job of compiling the relevant factors courts often consider, the problem with imposing "non-exclusive" factors without, or in lieu of, a clear test results in the exclusion of certain workers whose work is critical to the interstate transportation of goods. For example, although the fourth *Lenz* factor addresses workers who "supervise employees who are themselves transportation workers, such as truck drivers," it is essentially the only factor that applies to workers who are not directly involved in the transportation of goods. As a result, even if the subject worker supervised drivers who are "transportation workers," and their work was found critical to the interstate transportation of goods, that worker may only be able to satisfy one of the eight factors, which likely would not be sufficient to meet their burden.

In addition, there is an issue with the way the fourth *Lenz*[100] factor is worded. By requiring that the worker supervise "transportation workers, such as truck drivers," it assumes there are some professions

97. Lenz v. Yellow Transp., Inc., 431 F.3d 348, 352 (8th Cir. 2005).
98. *Id.*
99. *Id.*
100. *See generally id.*

that are *per se* transportation workers (like truck drivers), which is not necessarily the case, and in fact, is what the factors are intended to resolve. Under this logic, if the plaintiff were to be a supervisor of delivery drivers, the court would need to first show the drivers they supervise satisfy the *Lenz*[101] factors before applying the same analysis to the supervisory employee, which as previously explained, does not lend themselves to workers who are not directly involved in transporting goods.

C. The Northern District of California's Competing Federal Decisions

With the gig economy originating in California's Silicon Valley, it is no surprise that California's federal district courts have presided over much of the litigation surrounding the transportation worker exemption. In 2004, Judge Armstrong in *Veliz v. Cintas Corp.*[102] reviewed the legislative history and case law concerning the transportation worker exemption and summarized the "general trend amongst the circuits," in relevant part, as follows:

> Plaintiffs who are personally responsible for transporting goods, no matter what industry they are in, are "transportation workers" under the FAA exemption. Plaintiffs who oversee the transportation of goods in the transportation industry itself are also "transportation workers" under the FAA exemption. Plaintiffs who both (1) are not directly transporting goods; and (2) are not in the transportation industry itself, are not exempt.

However, Judge Armstrong's legal framework is somewhat incomplete. First, the suggestion that all workers who are personally responsible for transporting goods are transportation workers, no matter the industry, ignores the interstate commerce aspect of the exemption. For instance, what if a worker is only personally responsible for moving local goods entirely intrastate—how would that driver be engaged in interstate commerce? The second framework is more complete and avoids the inherent exclusion of workers who supervise transportation workers associated with the *Lenz* factors. Still, the second framework also ignores the "engaged interstate commerce" aspect of the exemption.

Judge Chesney in the federal Northern District of California reevaluated the Section 1 exemption in the context of "[l]ast mile deliv-

101. *Id.*

102. Veliz v. Cintas Corp., No. C 03-1180 SBA, 2004 WL 2452851, at *6 (N.D. Cal. Apr. 5, 2004), *modified on reconsideration*, No. 03-01180 SBA, 2005 WL 1048699 (N.D. Cal. May 4, 2005).

ery drivers"[103] in *Champion v. NEA Delivery, LLC, Amazon.com, LLC.*[104] In *Champion*, the court provided a detailed analysis of the case law and opined that there are only two ways to establish that the transportation worker exemption applies.[105] First, Judge Chesney found that the Section 1 exemption applies when the employer at issue is an interstate transportation company, regardless of whether the individual driver crosses state lines.[106] Second, the exemption applies to a driver who crosses state lines regardless of whether their employer is an interstate transportation company.[107]

Judge Chesney's legal framework improves on Judge Armstrong's analysis by focusing on whether the employer is an interstate transportation company, thereby inherently including last-mile delivery drivers responsible for performing the last leg of an interstate delivery. However, it leaves out those workers who, even if not "drivers" personally responsible for transporting goods, are integral to the transportation of goods in interstate commerce, such as those workers who supervise interstate drivers addressed in Judge Armstrong's analysis.

In addition, the second application of the exemption is overbroad because it encompasses any driver who crosses state lines regardless of the industry in which they work. This is the exact concern raised by the Eleventh Circuit in *Hill* when it provided the example of "a pizza delivery person who delivered pizza across a state line to a customer in a neighboring town."[108] The *Hill* court noted they would not fall under the exemption because, although the pizza delivery person performs deliveries across state lines, the driver does not do so as part of the "transportation industry" in the same way as a seamen and railroad employee.[109]

103. Last-mile delivery drivers are workers who perform deliveries that, even if wholly intrastate, are essentially the last leg of a continuous journey of goods or packages that originated out of state.

104. Champion v. Amazon.com LLC, No. 18-cv-05222-MMC, 2019 WL 4345915 (N.D. Cal. Sept. 12, 2019).

105. *Id.* at *1; *see* Hearing Transcript at 20:23–21:08, 21:13–15, *Champion*, 2019 WL 4345915 (incorporating by reference the transcript from the June 14, 2019 hearing where Judge Chesney granted Amazon's Motion to Compel Arbitration).

106. Hearing Transcript at 20:23–21:08, *Champion*, 2019 WL 4345915 (No. 18-cv-05222).

107. *Champion*, 2019 WL 4345915, at *2; *see* Hearing Transcript at 21:13–15, *Champion*, 2019 WL 4345915 (No. 18-cv-05222).

108. Hill v. Rent-A-Ctr., Inc., 398 F.3d 1286, 1290 (11th Cir. 2005).

109. *Id.*

D. The Third Circuit's Expansion to Drivers Who Transport Passengers

In 2019, the Third Circuit expanded the scope of Section 1 by holding that a transportation worker is not limited to only a class of workers who transport *goods*, but "may extend" to a class of workers "who transport *passengers*, so long as they are engaged in interstate commerce or in work so closely related thereto as to be in practical effect part of it."[110] In *Singh v. Uber Technologies, Inc.*, Plaintiff filed a class action lawsuit alleging the popular ride-sharing company, Uber Technologies, Inc. ("Uber"),[111] misclassified its drivers as independent contractors rather than employees, causing them to be denied overtime and proper reimbursement for business expenses.[112] Uber sought to compel arbitration of the dispute, and the district court granted Uber's motion.[113] However, while the district court granted the motion, it did not reach the "engaged-in-interstate commerce inquiry."[114] Instead, the district court went down a path that others have considered—holding that under *Circuit City*, the Section 1 exemption *only* applies to transportation workers who transport *goods*, not passengers.[115] The Third Circuit disagreed.

In reversing the district court's ruling, the Third Circuit relied on *Circuit City*'s reference to two statutes: the Transportation Act of 1920 and the Railway Labor Act of 1926, each of which "purported to resolve disputes between carriers and their employees," and each of which "defined 'carrier' to include 'sleeping car compan[ies],' which are railway passenger cars."[116] The *Singh* court also relied on the Supreme Court's reasoning in *New Prime v. Oliveira*, which found the Transportation Act of 1920 and the 1898 Erdman Act both defined "railroad employees" as "all persons actually engaged in any capacity in train operation or *train service of any description*."[117] Based on such

110. Singh v. Uber Techs. Inc., 939 F.3d 210, 214, 219 (3d Cir. 2019) (emphasis added).

111. Singh v. Uber Techs Inc., 235 F. Supp. 3d 656, 661 (D.N.J. 2017) ("Uber is a technology company that serves as a conduit between riders looking for transportation and drivers seeking riders . . . . Uber provides this technology through its smartphone application . . . that allows passengers and drivers to connect based on their geographic location.").

112. *Singh,* 939 F.3d at 215–16.

113. *Id.* at 216.

114. *Id.* at 226.

115. *Id.* at 225.

116. *Id.* at 221 (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 121 (2001)).

117. *Id.* at 222 (citing New Prime v. Oliveira, 139 S. Ct. 532, 542–43 (2019)).

reasoning, the Third Circuit broadened the meaning of transportation worker to also include individuals who transport people.[118]

III. Unresolved Issues Arising from the Division Among the Federal Courts

Although the federal circuit courts created various tests and factors to aid in determining the applicability of Section 1, there remains no uniform legal framework. As such, the characteristics that make up a transportation worker vary depending on the jurisdiction. This split of authority has created inconsistent results and shaped a number of derivative issues arising from the applicability of each of these legal frameworks. For example, if individuals working for an employer in the transportation industry are transportation workers, what exactly is the scope of the "transportation industry"? Also, what about individuals who work for a company in the transportation industry but are not personally responsible for transporting goods or passengers? Conversely, if individuals who are personally responsible for transporting goods or passengers are transportation workers, is it necessary for the worker to physically cross state lines to be "engaged in interstate commerce"? And if crossing state lines is not necessary, to what extent is a worker who transports goods or passengers exclusively *intra*state "engaged in interstate commerce"? These are questions that courts grappled with since the *Circuit City* decision was issued. To date, there is very little consensus among courts on the answers to these questions.

A. Workers in the "Transportation Industry"

The Eleventh Circuit in *Hill v. Rent-A-Center, Inc.*[119] is one of the earliest post-*Circuit City* decisions to place a specific emphasis on an individual working for a company in the transportation industry. However, since *Hill* did not define the term, the real problem is in defining what it means to be in the "transportation industry." Black's Law Dictionary defines "transportation" as "[t]he movement of goods or persons from one place to another, by a carrier."[120] Similarly, courts interpreting Section 1 have defined the transportation industry as "an industry directly involved in the movement of goods,"[121] or "an indus-

118. *Id.*
119. Hill v. Rent-A-Ctr., Inc., 398 F.3d 1286 (11th Cir. 2005).
120. *Transportation*, BLACK'S LAW DICTIONARY (10th ed. 2014).
121. Zamora v. Swift Transp. Corp., No. EP-07-CA-00400-KC, 2008 WL 2369769, at *6 (W.D. Tex. June 3, 2008).

try whose mission it is to move goods."[122] California's Industrial Wage Order No. 9, which seeks to regulate the hours, wages, and working conditions of "all persons employed in transportation industry," defines "transportation industry" as "any industry, business, or establishment operated for the purpose of conveying persons or property from one place to another whether by rail, highway, air, or water."[123] Some courts also consider whether an employer's business requires a commercial driver's license and/or is regulated by the federal Department of Transportation to determine whether an employer is within the transportation industry.[124] Other courts have found that a company that provides "regional same-day and overnight package delivery services"[125] and a company that is a "carrier of general commodities"[126] were in the transportation industry.

However, if there is one area of consensus when it comes to the types of businesses in the transportation industry, it is that trucking and courier companies are almost indisputably within the transportation industry. For example, there is a long line of post-*Circuit City* decisions that hold interstate trucking is an enterprise unquestionably performing work within the transportation industry.[127] The Eighth

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122. Tran v. Texan Lincoln Mercury, Inc., No. H-07-1815, 2007 WL 2471616, at *5 (S.D. Tex. Aug. 29, 2007).

123. CAL. CODE REGS. tit. 8, § 11090(2)(N) (2001) (defining "Transportation Industry").

124. *See e.g.*, Muller v. Roy Miller Freight Lines, LLC, 34 Cal. App. 5th 1056, 1068 (2019) (finding employer was in the transportation industry because it was "a licensed motor carrier company in the business of transporting freight"); Christie v. Loomis Armored US, Inc., No. 10-CV-02011-WJM-KMT, 2011 WL 6152979, at *3 (D. Colo. Dec. 9, 2011) (finding employer was in the transportation industry because it was "registered with the Department of Transportation").

125. Ward v. Express Messenger Sys., Inc., No. 17-CV-2005-NYW, 2019 WL 6333709, at *6 (D. Colo. Jan. 28, 2019).

126. Lenz v. Yellow Transp., Inc., 431 F.3d 348, 349 (8th Cir. 2005).

127. *See, e.g.*, Muro v. Cornerstone Staffing Sols., Inc., 20 Cal. App. 5th 784, 792 (2018) (finding a trucker is a transportation worker); Int'l Bhd. of Teamsters Local Union No. 50 v. Kienstra Precast, LLC, 702 F.3d 954, 957 (7th Cir. 2012) (same); Kowalewski v. Samandarov, 590 F. Supp. 2d 477, 482–83 (S.D.N.Y. Oct. 23, 2008) ("If there is one area of clear common ground among the federal courts to address this question, it is that truck drivers . . . have been found to be 'transportation workers' for purposes of the residuary exemption in Section 1 of the FAA."); Zamora v. Swift Transp. Corp., No. EP-07-CA-00400-KC, 2008 WL 2369769, at *7 (W.D. Tex. June 3, 2008) ("Zamora, an employee for large trucking company, works in the transportation industry."); Carr v. Transam Trucking, Inc., No. 3-07-CV-1944-BD, 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."); *Lenz*, 431 F.3d at 351 (finding that drivers of delivery trucks for a company in the transportation industry are "indisputably . . . transportation worker[s]"); Palcko v. Airborne Express, 372 F.3d 588, 593–94 (3d Cir. 2004) (assuming that truck drivers fall within the scope of the exemption); Veliz v. Cintas Corp., No. C 03-1180 SBA, 2004 WL 2452851,

Circuit in *Lenz* noted: "Indisputably, if [the worker] were a truck driver, he would be considered a transportation worker under § 1 of the FAA."[128] In addition, California and the Seventh Circuit held that "a trucker is a transportation worker regardless of whether he transports his employer's goods or the goods of a third party."[129] Similarly, in *Gagnon v. Service Trucking Inc.,*[130] a federal district court in Florida held that a class of owner-operators of tractor trailers who had contracted with a motor carrier company for the express purpose of transporting goods across state lines were exempt from the FAA for the sole reason of being truck drivers. In fact, truckers are so engaged in interstate commerce that in the Supreme Court's *New Prime* decision, the parties agreed that interstate truckers were engaged in interstate commerce and only disputed whether the plaintiffs were subject to a "contract of employment."[131]

Comparably, there are also a number of decisions holding that courier companies and postal workers are within the transportation industry.[132] For instance, in *Harden v. Roadway Package Sys.*,[133] the Ninth Circuit held that a delivery driver providing courier services was an exempt transportation worker. Similarly, the Sixth and Eleventh Circuits[134] have made clear that "[i]f any class of workers is engaged in interstate commerce, it is postal workers"[135] because "[t]hey are responsible for dozens, if not hundreds, of items of mail moving in 'in-

at *5 (N.D. Cal. Apr. 5, 2004) ("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.").

128. *Lenz*, 431 F.3d at 351.

129. *Muro*, 20 Cal. App. 5th at 792; *Kienstra Precast*, 702 F.3d at 957.

130. Gagnon v. Serv. Trucking Inc., 266 F.Supp.2d 1361, 1363–64 (M.D. Fla. 2003) ("Having determined that truck drivers fall within the class of transportation workers that are exempt from the FAA.").

131. New Prime v. Oliveira, 139 S. Ct. 532, 539 (2019).

132. *See e.g.*, Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1140 (9th Cir. 2001) (holding that a delivery driver who provided courier service to deliver packages was exempt from the FAA); Bacashihua v. U.S. Postal Serv., 859 F.2d 402, 405 (6th Cir. 1988) ("If any class of workers is engaged in interstate commerce, it is postal workers."); Am. Postal Workers Union, AFL–CIO v. U.S. Postal Serv., 823 F.2d 466, 473 (11th Cir. 1987) (determining that postal workers, who are "responsible for dozens, if not hundreds, of items of mail moving in 'interstate commerce' on a daily basis," fall within the purview of the FAA's exemption).

133. *Harden*, 249 F.3d at 1140.

134. The Sixth and Eleventh circuits' rulings were decided before *Circuit City* in 2001, and thus it is unclear to what degree these cases remain good law.

135. *Bacashihua*, 859 F.2d at 405.

terstate commerce' on a daily basis. Indeed, without them, 'interstate commerce' as we know it today would scarcely be possible."[136]

As such, it follows that the transportation industry encompasses all businesses directly involved in the movement of goods or passengers. However, a more difficult question arises when an individual works for an employer that is clearly in the transportation industry, such as a trucking or courier company, but the worker is not directly responsible for the movement of goods or passengers.

B. Workers in the Transportation Industry Who Are Not Directly Responsible for Transporting Goods or Passengers

When it comes to the term "transportation worker," some courts contemplate more than drivers—they also contemplate supervisors or other workers who oversee the delivery of goods in interstate commerce.[137] For example, in *Palcko v. Airborne Express, Inc.*,[138] the plaintiff worked as a Field Services Supervisor for Airborne Express, Inc., a courier service in Philadelphia that engaged in intrastate, interstate, and international shipping. Although Palcko did not perform deliveries herself, her job duties included supervising between thirty and thirty-five delivery drivers to "ensure timely and efficient delivery of packages" from Airborne's facility in Philadelphia to their ultimate destinations within the Philadelphia area.[139] Based on these facts, the Third Circuit found Palcko was a transportation worker because "[s]uch direct supervision of package shipments ma[de] Palcko's work 'so closely related to interstate and foreign commerce as to be in practical effect part of it.'"[140] The next year, the Eighth Circuit went on to adopt *Palcko*'s holding by incorporating it as the fourth factor in its eight-factor legal framework established in *Lenz v. Yellow Transportation, Inc.*[141]

136. *Am. Postal Workers Union*, 823 F.2d at 473.

137. Palcko v. Airborne Express, Inc., 372 F.3d 588, 590 (3d Cir. 2004).

138. *Id.*

139. *Id.*

140. *Id.* at 593 (citing Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers ., 207 F.2d 450, 452 (3d Cir. 1953)).

141. Lenz v. Yellow Transp., 431 F.3d 348, 353 (8th Cir. 2005) ("Fourth, unlike the field service supervisor in *Palcko,* Lenz did not directly supervise the drivers in interstate commerce; instead, his job was to provide information services to customers calling Yellow.").

Similarly, in *Zamora v. Swift Transp. Corp.*,[142] the plaintiff worked as a Terminal Manager for a trucking company. His primary job responsibilities included "monitoring the productivity of the fleet [of truck drivers], including miles and revenue, monitoring the revenue per truck per day, improving driver retention, managing cost centers of trucks and drivers, reducing safety related expenses, [and] ensuring and monitoring full utilization of equipment."[143] The *Zamora* court, applying the *Lenz* factors, held Zamora was a transportation worker exempt from the FAA.[144] In so holding, the court found that "Zamora's [job] responsibilities . . . were critical to the operation of the trucks, the trucking terminal, and the trucking company, significant instrumentalities of interstate commerce."[145] The *Zamora* court also made several comparisons to *Palcko*, finding that "[b]oth Zamora and the plaintiff in *Palcko* were employed in supervisory positions, overseeing terminal operations," and both of their "job responsibilities included the monitoring and improving of performance of the operation of the transportation company."[146] Based on this analysis, the court held Zamora's work was "in practical effect part of interstate commerce."[147]

On the other hand, some workers with duties only tangentially related to the movement of goods have been determined to not be exempt from the FAA. For example, the Eleventh Circuit held that a pre-departure security agent at the Miami International Airport who inspected goods, materials, and people that were headed to locations around the world was not a transportation worker.[148] The court in *Perez v. Globe Airport Security Services, Inc.*, found that the airport security agent "merely inspected or guarded such goods prior to their transport," and thus neither participated in, nor engaged in, the transportation of goods in commerce.[149]

142. Order Denying Motion to Stay Court Proceedings Pending Arbitration and Motion to Compel at 1, Zamora v. Swift Transp. Corp., EP-07-CA-00400-KC (W.D. Tex. June 3, 2008), *aff'd*, 319 F. App'x 333 (5th Cir. 2009).

143. *Id.* at 12.

144. *Id.*

145. *Id.* at 15.

146. *Id.*

147. *Id.* at 15–16.

148. Perez v. Globe Airport Sec. Serv., Inc., 253 F.3d 1280, 1284 (11th Cir. 2001).

149. *Id.*

C. Workers Directly Responsible for Transporting Goods or Passengers

The class of workers who are arguably most "engaged in interstate commerce" are those directly responsible for transporting goods or passengers, especially the drivers who do so across state lines. However, although a driver who transports goods or passengers across state lines is almost certainly engaged in interstate commerce, that does not mean that crossing state lines is a necessary condition to proving exemption from the FAA. In fact, as the Supreme Court explained in *Circuit City*, "the phrase engaged in [interstate] commerce" means "persons or activities within the flow of interstate commerce."[150] Therefore, the most accurate analysis of the transportation worker exemption examines the "practical continuity of movement" of the goods in transit—that is, whether the subject workers' handling of the goods contributes to their movement through interstate commerce at any point from the inception of their journey to their local destination.[151]

1. No Need to Cross State Lines to Be "Engaged in Interstate Commerce"

Without question, the most popular argument amongst employers seeking to enforce an arbitration agreement is that a worker must literally transport goods or passengers across state lines in order to qualify as one of the "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." However, this interpretation of the FAA is largely unsupported by relevant case law. Neither the Supreme Court's *Circuit City*[152] decision interpreting the FAA exemption nor any appellate decision has held the FAA exemption extends only to those workers who transport goods or passengers across state lines. In fact, following *Circuit City*, numerous courts found that workers who never transported goods or passengers across state lines nonetheless fell within the transportation worker exemption.[153]

150. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 117–18 (2001).

151. *See* Walling v. Jacksonville Paper Co., 317 U.S. 564, 569 (1943).

152. *See Circuit City*, 532 U.S. at 109.

153. *See, e.g.*, Rittmann v. Amazon.com, Inc., 383 F. Supp. 3d 1196, 1201 (W.D. Wash. 2019); Waithaka v. Amazon.com, Inc., 404 F. Supp. 3d 335, 340 (D. Mass. 2019); Order Motion to Compel Individual Arbitration and Stay Action at *4, Hamrick v. US Pack Holdings, LLC, 6:19-cv-137 (M.D. Fla. Aug. 15, 2019); Order on Motion to Compel Arbitration at 11, Ward v. Express Messenger Sys. Inc., 1:17-cv-02005 (D. Co. Jan. 28, 2019); Nieto v. Fresno Beverage Co., Inc., 33 Cal. App. 5th 274, 281–85 (Cal. Ct. App. 2019), *reh'g denied* [REPORTER INFO] (Mar. 27, 2019); Christie v. Loomis Armored US, Inc., 2011 WL

Indeed, as one court put it, had Congress intended the exemption "to cover only those workers who physically transported goods across state lines, it would have phrased the FAA's language accordingly."[154]

Nonetheless, that does not mean that crossing state lines is a fact that should be ignored. Indeed, when a worker transports goods or passengers across state lines, that worker is almost certainly engaged in interstate commerce. The point is that while transporting goods or passengers across state lines is sufficient to warrant inclusion under Section 1, it is in no way a necessary condition. And limiting the analysis of the transportation worker exemption to only those workers who cross state lines ignores today's global economy, wherein a vast interstate network of workers contributes to a continuous delivery chain that transports goods from around the world to their intended destination.

In fact, imposing such an unstated statutory requirement is what has led to a host of inconsistent results. For example, it would be nonsensical in the context of a class of persons where, while working for the same transportation company and performing the exact same duties, the FAA exemption would apply only to a worker who—by chance—was assigned to make a delivery which crossed a state line, but would be inapplicable to all others whose routes did not cross state boundaries. In addition to being inconsistent with the case law, the argument that only those workers who cross state lines are exempt from the FAA is similarly unsupported by the text of the statute or its original meaning when the FAA was enacted in 1925.

a. Seamen and Railroad Workers Do Not Necessarily Cross State Lines

Seamen and railroad employees, which are enumerated in the Section 1 exemption, do not necessarily cross state lines or travel long distances as part of their job duties. In fact, it is well recognized the term "'[s]eamen' is a term of art," meaning "a person employed on board a vessel in furtherance of the vessel's purpose."[155] Likewise "'railroad employee' includes every person in the service of a carrier

6152979 (D. Colo. Dec. 9, 2011); *see also* 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."); Zamora v. Swift Transp. Co., 2008 WL 2369769, at *6 (W.D. Tex. June 3, 2008).

154. *Palcko,* 372 F.3d at 593–94.

155. Tran v. Texan Lincoln Mercury, Inc., 2007 WL 2471616, at *5 (S.D. Tex. Aug. 29, 2007) (citing McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 346 (1991)). In applying the

(subject to its continuing authority to supervise and direct the manner of rendition of his service)."[156] In other words, seamen are individuals employed on a boat, and railroad employees are individuals employed (in any capacity) by railroads. These are categories of workers that are involved in the transportation of goods in a general sense, but nothing about these terms of art suggest that seamen and railroad employees must themselves physically transport goods across state lines.

In addition, two federal statutes both codified around the same time as the FAA, the Federal Employers' Liability Act ("FELA"),[157] enacted to protect railroad workers, and the Jones Act,[158] enacted to protect seamen, provide some insight into the original meaning of the phrase "engaged in commerce."[159] FELA protects railroad workers by imposing liability on their employer for workplace injuries sustained while "engaged in commerce."[160] Several courts interpreting FELA have held that railroad workers on local trains handling interstate freight were considered to be "engaged in commerce."[161] So too were local workers on the ground who delivered baggage from interstate trains,[162] as well as local construction workers conducting repairs on freight sheds, depots, and warehouses.[163] Railroad employees were even considered to be "engaged in commerce" when exiting the railroad yard while going home from work.[164]

FAA, courts use the definition of "seamen" found in the Jones Act, 46 U.S.C. §§ 30104 *et seq.*

156. *Id.* at *5 (using the term "Railroad employee" as defined in the Railway Labor Act of 1926, 45 U.S.C. §§ 151 *et seq.*).

157. 45 U.S.C. § 5160 (2012).

158. 46 U.S.C. §§ 30104–30106 (2012).

159. FELA (45 U.S.C. § 51) was enacted in 1908, the Jones Act (46 U.S.C. § 30104) was enacted in 1920, and the FAA (9 U.S.C. § 1) was enacted in 1925.

160. 45 U.S.C. § 51 (2012).

161. *See* Chi. & E. R. Co. v. Feightner, 114 N.E. 659 (Ind. App. 1916) (holding that a brakeman on a local freight train was engaged in interstate commerce where the train contained interstate cars and he was injured while adding additional cars to the train); Miller v. Kan. City W. Ry. Co., 168 S.W. 366 (Mo. Ct. App. 1914) (holding that a local railway employee working on an interstate car was engaged in interstate commerce); Erie R.R. Co. v. Welsh, 105 N.E. 189 (Ohio 1913) (holding that an employee working wholly within a state was "engaged in commerce" where handling or assisting in handling interstate cars).

162. Carberry v. Del., L. & W.R. Co., 108 A. 364, 366 (N.J. 1919) (holding that a baggage agent whose duty was to remove baggage from trains to the station was "engaged in commerce"); Hines v. Wicks, 220 S.W. 581, 581 (Tex. App. 1920) (holding that a worker delivering baggage from a train to the station's baggage room was covered by FELA).

163. Eng. v. S. Pac. Co., 210 F. 92, 94 (D. Or. 1913).

164. Erie R.R. Co. v. Winfield, 244 U.S. 170, 173 (1917).

The Jones Act was codified to protect seamen injured in the course of their employment and is similarly instructive.[165] The definition of "seaman" as used in both the FAA and the Jones Act historically extended to local workers. The Supreme Court affirmed this liberal approach when identifying workers "engaged in commerce" in holding that Congress had intended the term "seaman" to include local workers employed on the docks who loaded and unloaded cargo—also known as stevedores.[166]

Thus, it is evident that seamen and railroad workers do not maintain a strong nexus with interstate transportation because they cross state lines; instead they are engaged in interstate commerce because the goods they transport, or facilitate the transportation of, have travelled interstate. As a result, if the class of workers exempt from the FAA are to be engaged in interstate commerce in the same or similar manner as seamen and railroad employees, the engaged-in-interstate commerce inquiry should focus on whether the goods travelled interstate, not whether the worker did.

b. The Original Meaning of the Term "Engaged in Commerce" Did Not Require Workers to Cross State Lines

As the Supreme Court recently held in *New Prime Inc. v. Oliveira*,[167] the FAA must be interpreted in accordance with the ordinary meaning of its terms at the time Congress enacted the FAA in 1925. In the early 1900s, Black's Law Dictionary defined "commerce" as

> [i]ntercourse by way of trade and traffic between different peoples or states and the citizens or inhabitants thereof, including not only the purchase, sale and exchange of commodities, but also the instrumentalities and agencies by which it is promoted and the means and appliances by which it is carried on, and the transportation of persons as well as of goods, both by land and by sea.[168]

Nothing about the meaning of these words require that a worker personally cross state lines to be considered engaged in commerce. In fact, in the years preceding the passage of the FAA, the Supreme

165. 46 U.S.C.A. § 30104 (2012).

166. Int'l Stevedoring Co. v. Haverty, 272 U.S. 50, 52 (1926).

167. New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019) ("It's a fundamental canon of construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute.") (internal quotation marks omitted).

168. *Commerce*, BLACK'S LAW DICTIONARY 220 (2d ed. 1910).

Court decided several cases involving FELA using "almost exactly the same phraseology" that would later be incorporated into the FAA.[169]

Specifically, there were two categories of workers the Court repeatedly held were engaged in interstate commerce, even though they did not cross state lines. First, the Court consistently held that workers who did not personally transport goods or passengers across state lines, but whose jobs were "so closely related to" interstate transportation "as to be practically a part of it," were "engaged in interstate commerce."[170] The Court held that a worker unloading freight from a train that had come from out of state, a railroad clerk who examined trains arriving from out of state, a worker who repaired a bridge on which interstate trains travelled, and a brakeman who assisted in removing cars from an interstate train all were "engaged in interstate commerce."[171]

Second, the Court held that workers who transport goods that are destined for, or arriving from, another state are engaged in interstate commerce, even if the specific leg of the journey for which the worker is responsible falls entirely within a single state.[172] For example, in *Philadelphia & Reading Railway Co. v. Hancock*, the Court held that a railroad worker whose duties never took him out of Pennsylvania was nevertheless engaged in interstate commerce because the coal he transported within Pennsylvania was eventually destined for other states.[173]

Therefore, the interpretation of the phrase "engaged in interstate commerce" in the FAA follows directly from years of Supreme Court precedent holding that moving goods within a single state still constitutes interstate commerce if the in-state transportation is part of a

169. Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers, (U.E.) Local 437, 207 F.2d 450, 453 (3d Cir. 1953).

170. Balt. & Ohio. S.W. R.R. Co. v. Burtch, 263 U.S. 540, 542, 544 (1924).

171. *Id.* at 544; *see* Shank v. Del., L. & W.R. Co., 239 U.S. 556, 558 (1916); *see also* Phila. & R. Ry. Co. v. Di Donato, 256 U.S. 327, 329–31 (1921) (holding that workers who protect safety of interstate commerce by repairing bridges or watching dangerous intersections, even if they did not cross state lines, are "engaged in interstate commerce"); Phila., Balt. & Wash. R.R. Co. v. Smith, 250 U.S. 101, 102–04 (1919) (holding that an employee who cooked meals for workers repairing bridges used by interstate trains was "engaged in interstate commerce"); S. Ry. Co. v. Puckett, 244 U.S. 571, 573 (1917) (holding that a worker clearing obstruction from railroad tracks was "engaged in interstate commerce").

172. Phila. & R. Ry. Co. v. Hancock, 253 U.S. 284, 285 (1920) (holding he was engaged in interstate commerce because his job "was but a step in the transportation of the coal to real and ultimate destinations" outside of Pennsylvania).

173. *Id.* at 285–86.

good's journey from one state to another.[174] As the foregoing cases demonstrate, in 1925 when the FAA was enacted, it was clear that workers need not personally cross state lines to be engaged in interstate commerce and qualify for the Section 1 exemption.

2. Delivery of Goods "Within the Flow" of Interstate Commerce

Not only have courts held that crossing state lines is not a necessary condition to apply the transportation worker exemption, they have actually held that transporting goods that have previously moved *inter*state can be sufficient to apply the exemption so long as the persons or activities involved are "*within the flow* of interstate commerce."[175] This interpretation of the "engaged in interstate commerce" language in Section 1 is not only grounded in the text of the statute, but also supported by the Supreme Court's interpretation of the FAA.[176] In *Circuit City*, the Court noted that the words "in commerce" or "engaged in commerce" were "often-found words of art" that "mean[ ]engaged in the flow of interstate commerce."[177] Therefore, rather than focusing on whether a worker physically delivered goods or passengers across state lines, the relevant inquiry should be whether the worker is engaged "in the flow of interstate commerce," meaning the worker delivered goods or passengers that travelled in interstate commerce as part of a continuous interstate delivery chain.

a. The FLSA Interpretation of "Engaged in Commerce" Is Instructive

Since the term "engaged in commerce" is a term of art employed by Congress, the analysis need not end with its original meaning and may extend to subsequent uses such as in the Fair Labor Standards Act ("FLSA").[178] While the FELA and Jones Act decisions illustrate

174. *See, e.g.*, Tex. & New Orleans R.R. Co. v. Sabine Tram Co, 227 U.S. 111, 123 (1913); R.R. Comm'n of La. v. Tex. & Pac. Ry. Co., 229 U.S. 336, 341 (1913).

175. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273 (1995) (holding that the "in commerce" language in Section 1 of the FAA covers "only persons or activities *within the flow* of interstate commerce"); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 836 (8th Cir. 1997) (emphasis added); *see also* Christie v. Loomis Armored US, Inc., 2011 WL 6152979, at *3 (D. Colo. Dec. 9, 2011) (quoting Siller v. L & F Distribs., Ltd., 109 F.3d 765 (5th Cir. 1997) (Workers who remain within the boundaries of a state are "engaged in interstate commerce" so long as they transport goods "in the flow of interstate commerce.'").

176. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115–17 (2001).

177. *Id.* (citing *Allied-Bruce,* 513 U.S. at 273).

178. Nieto v. Fresno Beverage Co., 245 Cal. Rptr. 3d 69, 75 (Ct. App. 2019) (citing Bell v. H.F. Cox, Inc. 146 Cal. Rptr. 3d 723 (Ct. App. 2012) (finding that Congress's use of the

that local workers delivering goods in commerce to warehouses, train stations, or docks are "engaged in commerce," the FLSA provides additional insight into the status of workers who handle those goods after they have reached an intermediate hub. In determining whether goods themselves are in commerce for the purposes of the FLSA, the Supreme Court has held that a good's interstate journey does not end when they enter the warehouse of a distributor, but rather when the goods reach their intended customer.[179]

As explained by the Supreme Court in *Circuit City*, the assumption is that Congress's use of "engaged in commerce" ascribes a single, overarching meaning that encompasses many statutes, including FELA, the Jones Act, the Clayton Act, the FAA, and the FLSA.[180] Therefore, the most accurate analysis of the Section 1 exemption examines the "practical continuity of movement" of the goods in transit—whether the subject workers' handling of the goods contributed to their movement through commerce at any point from the inception of their journey to their final destination.[181] As such, a warehouse, dock, or rail station is not to be considered to be the goods' ultimate destination but rather an intermediate hub.[182] This uniform interpretation of Section 1's language follows the Supreme Court's interpretation that "engaged in commerce" "means engaged in the flow of interstate commerce."[183]

b. Last-Mile Delivery Drivers Are Engaged "in the Flow of Interstate Commerce"

Based on the FLSA principles described above, last mile delivery drivers are engaged "in the flow of interstate commerce." In fact, the California Court of Appeal has held that a last-mile delivery driver making wholly intrastate deliveries of beverages was a transportation

phrase "engaged in commerce" in the FLSA provides guidance as to its meaning in the FAA)).

179. Walling v. Jacksonville Paper Co., 317 U.S. 564, 569 (1943); *see also* Walling v. Harris, 68 F. Supp. 146, 147 (E.D. Tenn. 1946) (holding that workers are "engaged in interstate commerce" if they "contribute labor to assist in the movement of a commodity designated for an interstate journey from the time it leaves the depository of the actual consignor until the time it reaches the depository of the ultimate consignee").

180. *See Circuit City*, 532 U.S. at 117 ("A variable standard for interpreting common, jurisdictional phrases would contradict our earlier cases and bring instability to statutory interpretation.").

181. *See Walling*, 317 U.S. 564 at 569.

182. *Id.*

183. *Circuit City*, 532 U.S. at 115–17 (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273 (1995)).

worker exempt from the FAA.[184] In *Nieto v. Fresno Beverage Company Co.*, the defendant-employer was a beverage distributor located in the state of California that sold beer, wine, and other related beverages and products throughout Central California.[185] The beverages originated from out of state (and foreign countries) and were delivered to the defendant's "warehouse where they [were] held for a short period before delivery to [the employer's] customers" by last-mile delivery drivers.[186] The *Nieto* court's holding relied on cases interpreting the FLSA, such as *Bell v. H.F. Cox, Inc.*,[187] which observed the following well-established principle:

> Intrastate deliveries of goods are considered to be part of interstate commerce if the deliveries are merely a continuation of an interstate journey. Goods arriving from out of state that are unloaded and held in a warehouse before being loaded onto trucks and delivered to customers do not terminate their interstate journey if "there is a practical continuity of movement of the goods until they reach the customers for whom they are intended."[188]

Accordingly, the *Nieto* court found that "Nieto's deliveries, although intrastate, were essentially the last phase of a continuous journey of the interstate commerce (i.e., beer and other beverages delivered to [the defendant's] warehouse from out-of-state) being transported until reaching its destination(s) to [the defendant's] customers."[189] As a result, in California, last-mile delivery drivers are transportation workers exempt from the FAA "through their participation in the continuation of the movement of interstate goods to their destinations."[190]

Other courts are in accord. In particular, the litigation surrounding Amazon.com, Inc.'s "Amazon Flex" program is driving the push to expand the FAA exemption to last-mile delivery drivers in the gig economy.[191] Amazon Flex is a delivery service platform in which e-commerce giant Amazon.com pays gig economy workers to perform deliveries from their personal vehicles.[192] These so-called "flex driv-

184. Nieto v. Fresno Beverage Co., 245 Cal. Rptr. 3d 69, 73–74, 76–77 (Ct. App. 2019).
185. *Id.* at 284.
186. *Id.*
187. *Nieto*, 245 Cal. Rptr. 3d at 75 (citing Bell v. H.F. Cox, Inc., 146 Cal. Rptr. 3d 723, 737 (Ct. App. 2019)).
188. *Bell*, 146 Cal. Rptr. 3d at 77 (quoting Walling v. Jacksonville Paper Co., 317 U.S. 564, 568 (1943) (internal citations omitted)).
189. *Nieto,* 245 Cal. Rptr. 3d at 76.
190. *Id.*
191. *See generally* Rittmann v. Amazon.com, Inc., 383 F. Supp. 3d 1196, 1201 (W.D. Wash. 2019); Waithaka v. Amazon.com, Inc., 404 F. Supp. 3d 335 (D. Mass 2019).
192. *Waithaka,* 404 F. Supp. 3d at 339.

ers" are classified as independent contractors, and as a result, must supply their own vehicles and pay expenses necessary to perform their jobs, such as insurance, gas, smartphone, and data plan.[193] Consequently, flex drivers throughout the country have brought class action lawsuits against Amazon.com alleging they are misclassified as independent contractors and denied protections under applicable labor laws.[194]

In 2019, two federal district courts found that Amazon's flex drivers are transportation workers exempt from the FAA.[195] In *Rittmann v. Amazon.Com, Inc.*, the Western District of Washington held that Amazon's last-mile delivery drivers qualified for the Section 1 exemption even though their deliveries all occurred within a single state.[196] The district court held: "If an employer's business is centered around the interstate transport of goods and the employee's job is to transport those goods to their final destination—even if it is the last leg of the journey—that employee falls within the transportation worker exemption."[197]

Similarly, a federal district court in Massachusetts came to the same conclusion.[198] In *Waithaka v. Amazon.Com, Inc.*, the court adopted the reasoning from *Nieto*[199] and *Rittmann*[200] and held that, "while last-mile drivers themselves may not cross state lines, they are indispensable parts of Amazon's distribution system."[201] That system, of course, transports goods in interstate commerce.[202] Based on the foregoing, the *Waithaka* court found that Amazon's last-mile delivery drivers are "so closely related to interstate commerce as to be part of it."[203] Amazon.com has since appealed the rulings denying its motions to compel arbitration in both *Rittmann* and *Waithaka* to the Ninth and First Circuit Courts of Appeal.[204] If the Ninth and First Circuits issue

193. *Id.*
194. *Id.*
195. *Rittmann,* 383 F. Supp. 3d at 1202 ("Plaintiffs fall within the FAA's transportation worker exemption."); *Waithaka,* 404 F. Supp. 3d at 343 ("I find that Plaintiff falls within the Section 1 transportation worker exemption.").
196. *Rittmann*, 383 F. Supp. 3d at 1201 (finding last-mile delivery drivers for Amazon within the Section 1 exemption because Amazon is in the business of shipping good across state lines).
197. *Id.*
198. *Waithaka*, 404 F. Supp. 3d at 343.
199. *See generally* Nieto v. Fresno Beverage Co., 245 Cal. Rptr. 3d 69 (Ct. App. 2019).
200. *See generally Rittmann*, 383 F. Supp. 3d 1196.
201. *Waithaka*, 404 F. Supp. 3d at 343.
202. *Id.*
203. *Id.*
204. *See Rittman*, 383 F. Supp. 3d 1196; *Waithaka*, 404 F. Supp. 3d 335.

conflicting opinions, this issue may be ripe for appeal to the Supreme Court.

c. The Goods Delivered Must Not End Their Continuous Interstate Journey

In the federal Northern District of California, there exists a group of decisions applying the transportation worker exemption framework to workers responsible for the local delivery of locally prepared meals on behalf of companies in the gig economy, including Caviar, DoorDash, Postmates, and GrubHub.[205] These decisions focus less on the company's industry or the worker's job duties, and more on the nature of the goods delivered by the drivers. These so-called "meal delivery drivers" all worked for one of several online meal delivery service companies that compensate drivers for picking up and delivering prepared meals (and other items) from local restaurants and merchants to customers who ordered through a website or mobile application.[206]

Since these decisions deal specifically with the delivery of locally prepared meals entirely intrastate, a central issue is whether the interstate journey of the subject goods ends when they reach the intended restaurants and are transformed or reconstructed into a locally prepared meal. For example, in *Levin v. Caviar, Inc.*, the court found that meal delivery drivers were not engaged in interstate commerce despite the fact that the ingredients that went into preparing the meals had travelled interstate.[207] In reaching this conclusion, the *Levin* court relied on cases interpreting the FLSA and found that "[t]he mere fact that the food may have passed in interstate commerce prior to arriving at the restaurant does not mean that the Plaintiff was engaged in commerce."[208] Accordingly, *Levin* held that the "ingredients con-

205. *See generally* Levin v. Caviar, Inc., 146 F. Supp. 3d 1146, 1154 (N.D. Cal. 2015); Magana v. DoorDash, Inc., 343 F. Supp. 3d 891 (N.D. Cal. 2018); Lee v. Postmates Inc., No. 18-CV-03421-JCS, 2018 WL 6605659 (N.D. Cal. 2018); *see also* Wallace v. GrubHub Holdings Inc., No. 18-CV-04538, 2019 WL 1399986 (N.D. Ill. Mar. 28, 2019).

206. *See Levin*, 146 F. Supp. 3d at 1149–50 (Caviar "provides food delivery services in cities throughout the country via an on demand dispatch system," and "[c]ustomers may request a courier to pick up and deliver food from local restaurants using a smartphone application or via Defendant's website."); *Lee*, 2019 WL 1864442, at *1 ("Plaintiffs work or worked as couriers who fulfilled orders placed through Postmates' platform to deliver food and other items from local restaurants and merchants to local customers."); *Wallace*, 2019 WL 1399986, at *1 ("Grubhub is an online food-delivery service that employs drivers to deliver prepared meals from restaurants to customers who order through its website or mobile.").

207. *Levin*, 146 F. Supp. 3d at 1154.

208. *Id.*

tained in the food that [the driver] ultimately delivered from restaurants ended their interstate journey when they arrived at the restaurant where they were used to prepare meals."[209]

The applicability of the transportation worker exemption to meal delivery drivers was again addressed in *Lee v. Postmates, Inc.*[210] There, the *Lee* court recognized that at least some of their deliveries included "'goods that were manufactured out-of-state,' including clothing, kitchenware, cigarettes, packaged food, and alcoholic beverages."[211] Despite that, *Lee* found that "items purchased by local customers from local merchants are not 'goods that travel interstate'" within the meaning of the transportation worker exemption.[212] Based on the holdings in *Lee* and *Levin,* it seems that in order for a delivery driver to qualify for the transportation worker exemption, the delivered good must have originated or transformed into its final condition in a different state than the state in which the product is ultimately delivered to the final consumer.

Employers seeking to compel arbitration have utilized these district court decisions to argue that there is no difference between the work performed by the meal delivery drivers who were denied exemption and the last-mile delivery drivers at issue in *Nieto*[213] and the Amazon litigation[214] who were granted exemption from the FAA. One reason for the comparison is that meal delivery drivers do not only deliver locally prepared meals, they also sometimes deliver bottled beverages or pre-packaged items that originated out of state and were not "transformed" or "reconstituted" into meals before reaching the customer.[215]

Nevertheless, this tension between the district court decisions denying exemption to meal delivery drivers and the decisions applying

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209. *Id.*

210. Lee v. Postmates Inc., No. 18-CV-03421-JCS, 2018 WL 4961802, at *6–10 (N.D. Cal. Oct. 15, 2018).

211. *Lee,* 2018 WL 4961802, at *8; *see also* Lee v. Postmates Inc., No. 18-CV-03421-JCS, 2019 WL 1864442, at *1 (N.D. Cal. Apr. 25, 2019) ("[A]t least some of their deliveries included 'goods that were manufactured out-of-state,' including clothing, kitchenware, cigarettes, packaged food, and alcoholic beverages.").

212. *Lee*, 2018 WL 6605659, at *7.

213. *See generally* Nieto v. Fresno Beverage Co., 245 Cal. Rptr. 3d 69, 73–74 (Ct. App. 2019).

214. "Amazon litigation" refers to Rittmann v. Amazon.com, Inc., 383 F. Supp. 3d 1196, 1201–02 (W.D. Wash. 2019); Waithaka v. Amazon.com, Inc., 404 F. Supp. 3d 335 (D. Mass 2019).

215. *Lee*, 2019 WL 1864442, at *1 (noting some meal delivery drivers deliver cigarettes, packaged food, and alcoholic beverages).

the exemption to last-mile delivery drivers can be harmonized with a clarification of when a good's continuous interstate journey ends. First, ingredients that are shipped in from out of state and reconstituted into meals have ended their interstate journey at the point at which they are cooked and transformed into meals.[216] Thus, when meal delivery drivers pick up and deliver locally prepared meals to customers, they are no longer delivering a good "in the flow of interstate commerce" because such good (the ingredients) has been combined to create an entirely new product.

Second, when bottled beverages or other pre-packaged items are sold to a final consignee (the restaurant), the items' interstate journey comes to an end because goods cease moving in interstate commerce once "they reach the customers for whom they are intended."[217] For example, when a restaurant in California orders a case of bottled water from an out-of-state company, the bottled water ends its interstate journey when it reaches the restaurant because the restaurant is the intended consumer.[218] As such, any pre-packaged items sold by restaurants end their interstate journey long before they are re-sold to patrons of the consignee-restaurant and delivered by meal delivery drivers.

Therefore, there is an important distinction between making local deliveries of goods that have arrived at a local restaurant and whose continuous interstate journey is broken, and goods such as the packages delivered by Amazon's last-mile delivery drivers, which are often shipped from out of state and do not end their interstate journey (even when they are held in a local warehouse)[219] until they reach the intended Amazon customer.

This is a necessary distinction in the engaged in interstate commerce analysis because "[a]ny other test would allow formalities to conceal the continuous nature of the interstate transit which consti-

216. *Waithaka*, 404 F. Supp. 3d at 341 (citing Magana v. DoorDash, Inc., 343 F. Supp. 3d 891, 895 (N.D. Cal. 2018)); Levin v. Caviar, Inc., 146 F. Supp. 3d 1146, 1154 (N.D. Cal. 2015) ("[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.").

217. Walling v. Jacksonville Paper Co., 317 U.S. 564, 568 (1943) (finding that goods cease moving in interstate commerce once "they reach the customers for whom they are intended").

218. *Id.*

219. *See* Bell v. H.F. Cox, Inc., 209 Cal. App. 4th 62, 77 (2012) (quoting *Walling*, 317 U.S. at 568 ("Goods arriving from out of state that are unloaded and held in a warehouse before being loaded onto trucks and delivered to customers do not terminate their interstate journey.")).

tutes commerce"[220] and would run counter to the Supreme Court's interpretation that the Section 1 exemption must be construed narrowly.[221] In fact, this is the exact question the Seventh Circuit Court of Appeals is set to tackle in *Wallace v. GrubHub Holdings Inc.*,[222] where the central issue is whether meal delivery drivers working for GrubHub are "engaged in interstate commerce" for the purposes of the transportation worker exemption.

IV. A Modern Test for the Modern Transportation Worker

This Article proposes a bright line three-part test that attempts to avoid the complexity and uncertainty in the enforceability of arbitration agreements, as intended by the Supreme Court in *Circuit City*.[223] In consideration of the inconsistencies and flaws surrounding the legal frameworks followed by courts throughout the country, this Article advocates for and proposes a uniform test that courts can utilize to determine whether a worker falls within the transportation worker exemption.

Recall that Section 1 of the FAA exempts from the Act's coverage "***contracts of employment*** of seamen, railroad employees, or any other ***class of workers engaged in foreign or interstate commerce***."[224] In considering the statutory language it is important to keep in mind two fundamental but often times competing aspects of statutory construction. First, words in a statute generally should be interpreted as taking their meaning at the time Congress enacted the statute.[225] Second, Congress may design legislation to govern changing times and circumstances.[226] Accordingly, this test incorporates the judicial guidance and reasoning set forth in *Circuit City* and *New Prime*, flawed as it may be,[227] and adopts the most logical aspects of the relevant case law ad-

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220. *Waithaka*, 404 F. Supp. 3d at 341 (citing *Walling*, 317 U.S. at 568).

221. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 117–18 (2001).

222. Brief for Plaintiffs-Appellants at 3, Wallace v. GrubHub Holdings Inc., 2019 WL 3240600 (N.D. Ill. 2019) (No. 19-1564).

223. *See Circuit City*, 532 U.S. at 123 (quoting Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 275 (1995)).

224. 9 U.S.C. § 1 (2012).

225. New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019) (quoting Perrin v. United States, 100 S. Ct. 311, 314 (1979)).

226. *Id.* at 544 (Ginsburg, J., concurring); *see also* Kimble v. Marvel Ent., LLC, 135 S. Ct. 2401, 2412 (2015) ("Congress . . . intended [the Sherman Antitrust Act's] reference to 'restraint on trade' to have 'changing content,' and authorized courts to oversee the term's 'dynamic potential.'").

227. Although this author disagrees with the Supreme Court's narrow interpretation of the Section 1 exemption applying only to transportation workers (in contradiction of clear

dressed above. This legal framework also takes into consideration the practical implications of today's interconnected global economy, as well as the impact the gig economy has had on America's workforce.

Logically, the easiest way to begin is by ensuring that all aspects of the statute are satisfied before moving into the nuances and intricacies of each subpart. Therefore, this legal framework consists of a simple three-prong approach. To qualify for the Section 1 exemption, an individual must: (1) work pursuant to a "contract of employment"; (2) be within a "class of workers" in the transportation industry; and (3) be "engaged in foreign or interstate commerce."[228]

A. First Element: Worked Pursuant to a "Contract of Employment"

An individual satisfies the first element of this test so long as they can show they worked pursuant to an agreement to perform work for the defendant.

Fortunately, there is no longer a controversy concerning the meaning of the term "contracts of employment" for purposes of the Section 1 exemption. As the Supreme Court made clear in *New Prime v. Oliveira*, the Section 1 exemption applies to any and all agreements to perform work, encompassing "not only agreements between employers and employees but also agreements that require independent contractors to perform work."[229] Therefore under *New Prime*, any labor dispute would satisfy this element, even those involving workers in the gig economy who tend to be classified as independent contractors.[230]

B. Second Element: Class of Workers in the Transportation Industry

A plaintiff satisfies the second element of this test by proving that *either*: (1) the defendant-employer operates a business for the purpose of transporting goods or passengers from one place to another via rail, highway, air, or water, *or* (2) the plaintiff's job duties primarily involve transporting goods or passengers from one place to another via rail, highway, air, or water.

legislative history), this proposed test will incorporate all guidance and reasoning from past Supreme Court decisions interpreting the Section 1 exemption, including *Circuit City* and *New Prime*.

228. 9 U.S.C. § 1 (2012).

229. *New Prime,* 139 S. Ct. at 539.

230. *See id.*

This legal framework would settle the unresolved question of whether to focus on the employer's industry or the worker's job responsibilities by permitting a plaintiff to show either party's involvement to satisfy the element. In addition, it provides a clear definition of the "transportation industry" that was missing from the Eleventh Circuit's *Hill*[231] decision, as well as borrows the holding from the Third Circuit's *Singh v. Uber*[232] decision by embracing the transportation of passengers in addition to the transportation of goods.

Also, providing a definition for the transportation industry is particularly helpful in the context of the gig economy, where companies often argue they are not in the transportation industry.[233] For example, Uber considers itself a "technology company" even though their entire business model arguably involves providing rides to passengers.[234] Similarly, although Amazon.com is known for revolutionizing the way consumers shop online by changing the manner in which goods are delivered to consumers, it considers itself a retail company that simply provides efficient delivery as a courtesy to its customers.[235]

A clear definition similarly aids in incorporating those workers who work for an employer in the transportation industry but who are not directly responsible for the transportation of goods or passengers, like the workers addressed *Palcko*[236] and *Zamora*.[237] These types of workers would satisfy this element so long as they could show their employer is in the transportation industry. This legal framework also helps resolve the issues with applying the Eighth Circuit's *Lenz* factors, which are inherently less applicable to those workers who are not directly engaged in the transportation of goods or passengers.

Furthermore, two of the Eighth Circuit's *Lenz*[238] factors can aid in resolving any uncertainty concerning whether a plaintiff or a defen-

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231. *See generally* Hill v. Rent-A-Ctr., Inc., 398 F.3d 1286 (11th Cir. 2005).

232. Singh v. Uber Techs. Inc., 939 F.3d 210, 226 (3d Cir. 2019) (holding that the Section 1 exemption applies to "all classes of transportation workers, so long as they are engaged in interstate commerce, or in work so closely related thereto as to be in practical effect part of it").

233. Rosenblatt, *supra* note 3.

234. *Id.*

235. Champion v. Amazon.com LLC, No. 18-CV-05222-MMC, 2019 WL 4345915, at *2 (N.D. Cal. 2019) ("Amazon is primarily engaged in the sale of merchandise, both its own products and, in some instances, those of others, and, in connection therewith, provides efficient delivery as a service to customers.").

236. *See generally* Palcko v. Airborne Express, Inc., 372 F.3d 588 (3d Cir. 2004).

237. *See generally* Zamora v. Swift Transp. Corp., 2008 WL 2369769 (W.D. Tex. June 3, 2008).

238. Lenz v. Yellow Transp., 431 F.3d 348, 352 (8th Cir. 2005).

dant is in the transportation industry. For instance, to determine whether a defendant-employer operates a business in the transportation industry, courts can apply the sixth *Lenz* factor: "whether the vehicle itself is vital to the commercial enterprise of the employer."[239] This is especially important when considering employers in the gig economy, which, like Uber, often consider themselves technology companies rather than transportation companies.[240] To determine whether a worker's job duties *primarily* involve transporting goods or passengers, courts can analyze the eighth *Lenz* factor: "the nexus that exists between the employee's job duties and the vehicle the employee uses in carrying out his duties (i.e., a truck driver whose only job is to deliver goods cannot perform his job without a truck)."[241]

Importantly, a litigant satisfies this element of the test regardless of whether they can show they are "engaged in interstate commerce." That analysis is reserved for the third element. The reason for breaking up the two analyses is that, in determining whether a worker is engaged in interstate commerce, courts and litigants often ignore the equally important question of whether plaintiffs are in a class of workers in the "transportation industry," like seamen and railroad employees enumerated in the statute.[242] That is precisely what the Eleventh Circuit sought to avoid in *Hill v. Rent-a-Center*.[243] By creating a two-part analysis, the Eleventh Circuit sought to preserve the narrow interpretation of the exemption to include only those workers in the transportation industry.[244] In fact, because of the nuances involved in the engaged-in-interstate commerce inquiry, a court should not bother analyzing the third element if the worker cannot satisfy the first two.

C. Third Element: Engaged in Interstate Commerce

A plaintiff satisfies the third element of this test by showing they are engaged in interstate commerce or in work so closely related thereto as to be in practical effect part of it.

For the purposes of this test, an individual is "engaged in interstate commerce" if they are delivering goods or passengers "within the flow of interstate commerce."[245] As such, the focus here is on whether

239. *Id.*
240. Rosenblatt, *supra* note 3.
241. *Lenz*, 431 F.3d at 352 (2005).
242. *See* 9 U.S.C. § 1 (2018).
243. *See generally* Hill v. Rent-A-Ctr., Inc., 398 F.3d 1286 (11th Cir. 2005).
244. *Id.* at 1290.
245. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 117–18 (2001).

the goods or passengers travelled interstate, not whether the worker did. As previously explained, a driver who transports goods or passengers across state lines is indeed engaged in interstate commerce. However, that does not mean that transporting goods or passengers across state lines is a necessary condition to proving exemption from the FAA—it is simply one way of satisfying the engaged-in-interstate-commerce element. In fact, it is the purely intrastate transportation of goods or passengers that will trigger a lengthier engaged-in-interstate-commerce analysis.

This interpretation of the "engaged in interstate commerce" language is consistent with the Supreme Court's interpretation in *Circuit City*, wherein the Court held that Section 1 of the FAA covers "only persons or activities *within the flow* of interstate commerce."[246] The focus on the journey of the goods also incorporates the holdings from the meal delivery driver litigation,[247] which makes an important distinction between goods that arrived at a local restaurant whose interstate journey is broken, and the goods delivered by Amazon's last-mile delivery drivers that are often shipped from out of state and do not end their interstate journey until they reach the intended Amazon customer.[248]

In addition, the inclusion of workers "so closely related to" interstate transportation "as to be practically a part of it" is in line with the Supreme Court's reasoning in *Circuit City* and adopts the exact language used by the Third Circuit in *Singh v. Uber* and *Palcko*.[249] Moreover, two of the *Lenz* factors will aid in resolving any uncertainty

246. *Id.* at 118 (noting the phrase "'engaged in commerce' appears to denote only persons or activities within the flow of interstate commerce").

247. The "meal delivery driver litigation" refers to: Levin v. Caviar, Inc., 146 F. Supp. 3d 1146, 1154 (N.D. Cal. 2015); Magana v. DoorDash, Inc., 343 F. Supp. 3d 891 (N.D. Cal. 2018); Lee v. Postmates Inc., No. 18-CV-03421-JCS, 2018 WL 6605659 (N.D. Cal. Dec. 17, 2018); Wallace v. GrubHub Holdings Inc., No. 18-CV-04538, 2019 WL 1399986 (N.D. Ill. Mar. 28, 2019.

248. Waithaka v. Amazon.com, Inc., 404 F. Supp. 3d 335, 341 (D. Mass 2019) (citing *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.")).

249. Singh v. Uber Tech. Inc., 939 F.3d 210, 226 (3d Cir. 2019) (holding that the Section 1 exemption applies to "all classes of transportation workers, so long as they are engaged in interstate commerce, or in work so closely related thereto as to be in practical effect part of it"); Palcko v. Airborne Express, Inc., 372 F.3d 588, 593 (3d Cir. 2004) (holding that Section 1 exemption applies to any "classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it"); *see also* Tenney Eng'g. Inc. v. United Elec. Radio & Mach. Workers, (U.E.) Local 437, 207 F.2d 450, 452 (3d Cir. 1953).

concerning whether a worker is "so closely related to" interstate transportation "as to be practically a part of it." The fourth and seventh *Lenz* factors, "whether the employee supervises employees who are themselves transportation workers" and "whether a strike by the employee would disrupt interstate commerce," aid in the inclusion of those workers who are so closely related to interstate transportation but who do not directly perform transportation services.[250]

The engaged-in-interstate-commerce analysis will almost certainly differ depending on whether the subject worker deals in transporting passengers or deals in transporting goods. For example, in *Singh v. Uber*, a New Jersey district court will soon decide whether Uber drivers are engaged in interstate commerce when they transport passengers to and from international airports.[251] On the other hand, the analysis regarding the transportation of goods will largely resemble the litigation surrounding the applicability of the Section 1 exemption to last-mile delivery drivers, including whether the intrastate delivery of goods is a continuation of the goods' interstate journey.

Applying this third element to the gig economy workers in the Amazon litigation shows that these last-mile delivery drivers are "engaged in interstate commerce" because they deliver goods that remain "in the flow of interstate commerce." For instance, when a driver drives to a warehouse and loads a package (shipped from out of state) into their vehicle, they are engaged in interstate commerce.[252] When they drive across the warehouse lot toward the exit, they are engaged in interstate commerce.[253] Naturally, as they continue their delivery of the package to the customer listed on the package's label, they remain engaged in commerce. If they stopped and tossed the package into a ditch or refused to continue working, the customer would not receive their package, and the entire "flow of commerce" would be disrupted. Therefore, there is no reason to think that the inclusion of last-mile delivery drivers under the Section 1 exemption is inconsistent with Congress's purpose in crafting the exemption. In fact, based on the exemption's inclusion of seamen and railroad workers, last-mile deliv-

250. Lenz v. Yellow Transp., 431 F.3d 348, 352 (8th Cir. 2005).

251. *See* Singh v. Uber Tech. Inc., 939 F.3d 219, 219, 226 (3d Cir. 2019) (vacated and remanded the question to the New Jersey District Court).

252. *See, e.g.*, Int'l Stevedoring Co. v. Haverty, 272 U.S. 50, 52 (1926) (finding that local dockworkers loading and unloading goods are "engaged in commerce").

253. *See* Erie R.R. Co. v. Winfield, 244 U.S. 170, 173 (1917) (finding that workers exiting instrumentalities of commerce, like railroad yards or warehouses, are "engaged in commerce").

ery drivers are likely exactly the type of workers Congress had in mind when enacting the FAA.

V. Conclusion

This Article portrays how a statute that was never meant to apply to labor disputes has ironically evolved into a major impediment for workers seeking redress of labor issues. Although Supreme Court interpretation of the FAA has mistakenly limited the statute's only exemption to transportation workers, this Article shows how courts can adopt a uniform legal framework to help expand the FAA exemption to modern-day transportation workers in the gig economy. Such application would have major practical implications for these workers as it would aid in resolving unsettled legal issues plaguing this sector of the American workforce, such as worker misclassification.

However, what is clear is that any reform to the FAA must arise from federal law or the Supreme Court. As hard as some states have tried, any state law that runs counter to the FAA's pro-arbitration policy or that attempts to impose conditions on the enforceability of arbitration agreements will face federal preemption challenges. In 2019, for example, the state of California passed Assembly Bill 51 ("AB 51"), which by its terms prohibits employers from requiring job applicants or employees to agree to arbitrate claims under the California Fair Employment and Housing Act ("FEHA") or the California Labor Code as a condition of employment.[254] In attempting to avoid federal preemption issues, California drafted AB 51 in such a way that it regulates only the formation of arbitration agreements rather than their enforcement.[255] AB 51 was set to take effect on January 1, 2020; however on December 9, 2019, the United States Chamber of Commerce sued the state of California seeking to enjoin California from enforcing AB 51.[256] In an order signed February 6, 2020, the United States District Court for the Eastern District of California issued a preliminary injunction enjoining the state of California and its agencies from enforcing the provisions of AB 51.[257] In so doing, the district court

254. Assemb. B. 51, 2019-2020 Reg. Sess. (Cal. 2019); CAL. LAB. CODE § 432.6 (West 2020).

255. *Id.*

256. Chamber of Commerce v. Becerra, No. 2:19-CV-02456-KJM-DB, 2020 WL 605877, at *2 (E.D. Cal. Feb. 7, 2020).

257. *Id.* at *20.

also determined that the Chamber of Commerce was likely to prevail at trial on their claim that AB 51 is preempted by the FAA.[258]

Reform to the FAA and the Section 1 exemption could also come via judicial authority from the Supreme Court. In fact, the transportation worker exemption could soon be headed toward Supreme Court review as the federal circuit courts are set to address the application of the Section 1 exemption to gig economy workers. The Ninth[259] and First[260] Circuits will soon decide whether last-mile delivery drivers working for Amazon.com and classified as independent contractors are transportation workers exempt from the FAA. Similarly, the Seventh Circuit[261] will decide whether meal delivery drivers working for GrubHub, Inc., are transportation workers exempt from the FAA. And the Third Circuit[262] will decide whether Uber drivers are "engaged in interstate commerce" and therefore exempt transportation workers.

This Article's proposed legal framework will hopefully aid these courts and litigants in applying a century-old statute to modern-day gig economy workers. The three-part test provides clear definitions for terms such as "transportation industry" to ensure the exemption is applied fairly and uniform to all workers in this sector of the economy. The test also exempts workers who, even if not directly responsible for transporting goods or passengers, are critical to the movement of goods in interstate commerce, such as an Amazon warehouse worker who sorts and packages goods to be delivered by last-mile delivery drivers. Finally, it provides clear parameters for what it means to be "engaged in interstate commerce," and for those workers who transport goods, it provides an important distinction between the transportation of goods that have travelled interstate and the transportation of goods whose interstate journey has been broken.

258. *Id.*

259. Rittman v. Amazon.com, Inc., No. 19-35381 (9th Cir. May 3, 2019).

260. Waithaka v. Amazon.com, Inc., No. 19-1848 (1st Cir. Aug. 30, 2019).

261. Wallace v. GrubHub Holdings Inc., Nos. 19-1564 & 19-2156 (7th Cir. July 10, 2019) (appeals from the United States District Court for the Northern District of Illinois Nos. 18-cv-04538 (Hon. Edmond E. Chang) & 16-cv-06720 (Hon. Charles R. Norgle)).

262. *See* Singh v. Uber Tech. Inc., 939 F.3d 210, 219, 228 (3d Cir. 2019) (vacated and remanded the question to the New Jersey District Court).