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## Seamen, Railroad Employees, and Uber Drivers: Applying the Section 1 Exemption in the Federal Arbitration Act to Rideshare Drivers

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**SEAMEN, RAILROAD EMPLOYEES, AND UBER DRIVERS?:  
APPLYING THE SECTION 1 EXEMPTION IN THE FEDERAL  
ARBITRATION ACT TO RIDESHARE DRIVERS**

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Conor Bradley\*

ABSTRACT

*Section 1 of the Federal Arbitration Act (FAA or the Act) exempts “seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce” from arbitration. In 2019, the Supreme Court held in New Prime Inc. v. Oliveira that this provision exempted independent contractors as well as employees. This decision expanded the reach of the section 1 exemption and may affect the relationship between ridesharing companies, such as Uber, and their drivers. Previously, ridesharing companies argued that courts must enforce the arbitration clauses in their employment contracts because their workers were independent contractors and, therefore, section 1 was inapplicable. Since this argument is now prohibited by the holding in New Prime, rideshare drivers have an opportunity to avoid arbitration using the section 1 exemption. But they still face legal difficulties because of the narrow construction of the exemption employed by courts. This Note argues that the current interpretation of the exemption, which focuses on the physical movement of goods across state lines, is incongruent with the text and history of the FAA and that courts should broaden the exemption to include rideshare drivers.*

TABLE OF CONTENTS

INTRODUCTION.....	526
I. HISTORY OF THE SECTION 1 EXEMPTION .....	528
A. <i>Legislative History of the Section 1 Exemption</i> .....	529
B. <i>Switch from Procedure to Substance</i> .....	532
II. INTERPRETATION AND APPLICATION OF THE SECTION 1 EXEMPTION .....	535
A. <i>Development of the Section 1 Exemption Framework</i> .....	535
1. <i>Pre-Circuit City Interpretation of the Section 1                 Exemption</i> .....	536
2. <i>Circuit City Decision</i> .....	538

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3. Aftermath of the *Circuit City* Decision..... 540

B. *Application of the Post-Circuit City Framework to Rideshare Drivers*..... 545

III. DETERMINING THE HISTORIC ORDINARY MEANING OF THE SECTION I EXEMPTION ..... 547

A. *Clues from the FAA’s Legislative History*..... 548

B. *Ordinary Meaning of “Seamen” and “Railroad Employees”*..... 550

1. Definition of Seamen..... 550

2. Definition of Railroad Employees..... 552

C. *Historic Understanding of “Engaged in . . . Interstate Commerce”*..... 553

D. *Exclusion of Rideshare Drivers from the FAA as a Positive Policy Outcome*..... 558

CONCLUSION ..... 561

INTRODUCTION

The “sharing” (or “platform”) economy—the system that utilizes online platforms to connect laborers and sellers with consumers and buyers—has drastically changed the business landscape.<sup>1</sup> This disruption has come with significant legal and regulatory challenges for the companies operating within the platform economy, their employees, and lawmakers. For example, ridesharing companies<sup>2</sup> have radically altered the transportation industry,<sup>3</sup> but also faced scrutiny regarding the way their business models avoid traditional

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1. Brett Harris, Note, *Uber, Lyft, and Regulating the Sharing Economy*, 41 SEATTLE U. L. REV. 269, 269 (2017).

2. “Ridesharing” is defined as “a car service that allows a person to use a smartphone app to arrange a ride in a usually privately owned vehicle.” *Ridesharing*, DICTIONARY.COM, <https://www.dictionary.com/browse/ridesharing> (last visited Oct. 14, 2020) [<https://perma.cc/E985-4XRP>]. The rideshare industry in the United States is dominated by Uber and Lyft. See Rani Molla, *Lyft Has Eaten into Uber’s U.S. Market Share, New Data Suggest*, VOX (Dec. 18, 2018, 11:36 AM), <https://www.vox.com/2018/12/12/18134882/lyft-uber-ride-car-market-share> [<https://perma.cc/HT8Q-58KN>] (explaining that in 2018 Uber and Lyft comprised 98% of the consumer rideshare market in the United States). Driven by these two companies, the industry has grown substantially since its inception in the early 2010s. One study found that the number of Uber drivers in mid-2012 was basically zero; by 2015 there were 465,000 drivers employed by Uber. Katherine G. Abraham, John Haltiwanger, Kristin Sandusky & James Spletzer, *The Rise of the Gig Economy: Fact or Fiction*, 109 AEA PAPERS & PROC. 357, 359 (2019).

3. See *Meet the 2018 CNBC Disruptor 50 Companies*, CNBC (May 22, 2018, 6:00 AM), <https://www.cnbc.com/2018/05/22/meet-the-2018-cnbc-disruptor-50-companies.html> [<https://perma.cc/H4DB-2LB4>] (ranking Uber as number two and Lyft as number five on a list of the fifty companies whose innovations are changing the world).

workplace laws.<sup>4</sup> Indeed, numerous plaintiffs have sued Uber, one of the leading ridesharing platforms, alleging that the company misclassified its drivers as independent contractors, rather than employees, to avoid paying them minimum wage and providing certain benefits.<sup>5</sup>

By classifying their workers as independent contractors, Uber and other ridesharing companies also took advantage of an expansive application of the Federal Arbitration Act (FAA or the Act), the federal law governing the enforceability of arbitration agreements, to avoid litigating their disputes in court.<sup>6</sup> Employment contracts between rideshare platforms and their drivers often include provisions that settle disputes through private arbitration rather than the court system.<sup>7</sup> Agreements to arbitrate employment disputes are generally enforceable in both federal and state court under the FAA.<sup>8</sup> However, section 1 of the Act exempts “contracts of employment of seamen, railroad employees, [and] any other class of workers engaged in foreign or interstate commerce.”<sup>9</sup> Rideshare companies had, sometimes successfully, argued that their workers did not qualify under this exemption because they are independent contractors and therefore do not operate under

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4. See, e.g., Elizabeth J. Kennedy, *Employed by an Algorithm: Labor Rights in the On-Demand Economy*, 40 SEATTLE U. L. REV. 987, 989 (2017).

5. Megan Rose Dickey, *Uber Agrees to Pay Drivers \$20 Million to Settle Independent Contract Lawsuit*, TECHCRUNCH (Mar. 12, 2019, 12:17 PM), <https://techcrunch.com/2019/03/12/uber-agrees-to-pay-drivers-20-million-to-settle-independent-contractor-lawsuit> [<https://perma.cc/B9J2-6N4V>]. Suits have also been filed against other platform economy companies such as Amazon, GrubHub, Lyft, DoorDash, and Postmates. *Id.*

6. At the time it was drafted and passed, the FAA was known as the United States Arbitration Act. See Matthew W. Finkin, “Workers’ Contracts” Under the United States Arbitration Act: An Essay in Historical Clarification, 17 BERKELEY J. EMP. & LAB. L. 282, 282 (referring to the Act as the United States Arbitration Act). For clarity’s sake, however, this Note will uniformly refer to the law as the Federal Arbitration Act.

7. For example, Uber uses an arbitration clause in its employment contract. See *Capriole v. Uber Techs., Inc.*, 460 F. Supp. 3d 919, 923–26 (N.D. Cal. 2020) (quoting language from the arbitration agreement contained in Uber’s employment contracts). As a result, more than 60,000 Uber drivers have filed arbitration claims against the company. Joel Rosenblatt, *Uber Gambled on Driver Arbitration and Might Have Come Up the Loser*, L.A. TIMES (May 8, 2019, 10:22 AM), <https://www.latimes.com/business/la-fi-uber-ipo-arbitration-miscalculation-20190508-story.html> [<https://perma.cc/EAY3-6J8V>]. Partly because of the increased prevalence of arbitration agreements in standard form employment contracts, the House of Representatives passed a bill in September 2019 that would invalidate all arbitration agreements contained in employment contracts. Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019).

8. See *Southland Corp. v. Keating*, 465 U.S. 1, 14 (1984) (“To confine the scope of the Act to arbitrations sought to be enforced in federal courts would frustrate what we believe Congress intended to be a broad enactment appropriate in scope to meet the large problems Congress was addressing.”).

9. 9 U.S.C. § 1. This Note will refer to this provision as “the exemption,” “the section 1 exemption,” and “the transportation worker exemption.”

“contracts of employment.”<sup>10</sup> But the Supreme Court in *New Prime Inc. v. Oliveira* foreclosed this argument by holding that the FAA’s section 1 exemption included independent contractors.<sup>11</sup>

In light of *New Prime*, if rideshare drivers are “workers engaged in . . . interstate commerce,” they qualify for the exemption.<sup>12</sup> But the Supreme Court has held that this provision only applies to “transportation workers.”<sup>13</sup> And most lower courts have adopted a narrow definition of this term that excludes rideshare drivers, creating a legal hurdle for these workers even after *New Prime*.<sup>14</sup>

This Note argues that courts should adopt a broader definition of “transportation worker” that includes rideshare drivers within the section 1 exemption. Part I provides a general overview of the FAA’s history as it relates to the exemption. Part II more specifically analyzes the doctrinal development of the section 1 exemption and concludes that the narrow construction of the statutory language unnecessarily excludes rideshare drivers. Part III proposes a broader interpretation that includes rideshare drivers and aligns the exemption with the text and legislative history of the FAA.

## I. HISTORY OF THE SECTION 1 EXEMPTION

Section 2 of the FAA, the law’s main substantive provision, makes written arbitration agreements in contracts “evidencing a transaction involving commerce . . . valid, irrevocable and enforceable . . . .”<sup>15</sup> The Supreme Court has explained that the FAA re-

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10. See, e.g., *Singh v. Uber Techs. Inc.*, 939 F.3d 210, 217 (3d Cir. 2019) (explaining that Uber had previously argued that its agreement with their driver was not a contract of employment).

11. 139 S. Ct. 532, 541 (2019). In 2020, California voters passed Proposition 22 which exempts Uber and Lyft from Assembly Bill 5—a California law that reclassified rideshare drivers as employees. Sara Ashley O’Brien, *Prop 22 Passes in California, Exempting Uber and Lyft from Classifying Drivers as Employees*, CNN BUS. (Nov. 4, 2020, 4:02 PM), <https://www.cnn.com/2020/11/04/tech/california-proposition-22/index.html> [<https://perma.cc/P9FD-3E4U>]. Thus, in California at least, Uber and Lyft may continue to classify their drivers as independent contractors. *Id.* While this development certainly matters in determining the benefits to which rideshare drivers are entitled, whether rideshare drivers are classified as independent contractors or employees is inconsequential for the purposes of the section 1 exemption because *New Prime* held that both independent contractors and employees were covered by the exemption. 139 S. Ct. at 541.

12. See 139 S. Ct. at 541, 544 (citing 9 U.S.C. § 1).

13. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

14. See *infra* Sections II.A.3, II.B.

15. 9 U.S.C. § 2; see also *Moses H. Cone Mem’l Hosp. v. Mercury Contr. Corp.*, 460 U.S. 1, 24 (1983). More fully, section 2 states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable,

quires courts to resolve disputes about the scope of an arbitration agreement in favor of arbitration.<sup>16</sup> Despite this, section 1 of the FAA, which generally defines terms relevant to the Act, states that “nothing herein contained shall apply to contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>17</sup> This clause exempts certain contracts from the FAA, prohibiting arbitration in those contexts.

Section I.A traces the historical underpinnings of the FAA and the insertion of the exemption into the Act. Section I.B provides a brief summary of the main Supreme Court jurisprudence interpreting the FAA to place the subsequent discussion of the section 1 exemption in Parts II and III in context.

#### A. *Legislative History of the Section 1 Exemption*

At the turn of the twentieth century, arbitration was a common practice in the United States.<sup>18</sup> Nevertheless, arbitration encountered various legal obstacles during this period.<sup>19</sup> The most important weakness of the law governing early arbitration was its “relative lack of enforceability of . . . agreements before an award was made.”<sup>20</sup> Courts considered agreements to arbitrate future disputes revocable at any time.<sup>21</sup> This meant that courts “would not stay [a judicial] action or suit pending arbitration,” even if the parties had previously agreed to arbitrate the dispute.<sup>22</sup>

As arbitration became more prevalent, reformers pushed for statutory remedies to combat this “rule of revocability” pertaining to agreements to arbitrate future disputes.<sup>23</sup> In 1920, New York be-

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save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

16. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25. Indeed, the Court has explained that the FAA “declare[s] a national policy favoring arbitration.” *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

17. 9 U.S.C. § 1.

18. IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION – NATIONALIZATION – INTERNATIONALIZATION* 15 (1992).

19. *Id.* at 19–20.

20. *See id.* at 20.

21. WESLEY A. STURGES, *COMMERCIAL ARBITRATION AND AWARDS* § 15, at 45 (1930) (“It is an elementary proposition of the common law cases, and is almost universally accepted by the American courts, that future disputes clauses and provisions for arbitration are revocable.”).

22. MACNEIL, *supra* note 18, at 20.

23. *Id.* at 25–30. Julius Henry Cohen and Charles Bernheimer led the reformist movement. Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 302 (2015). Both men worked for the New York State Chamber of Commerce. *Id.* Bernheimer was the chair of

came the first state to enact such a law. The New York legislature made “written contract[s] to settle a controversy thereafter arising . . . valid, enforceable, and irrevocable, save upon such grounds as exist at law or equity for the revocation of any contract.”<sup>24</sup> After the success in New York, reformers advocated for similar changes in other states and on the national level.<sup>25</sup> This push culminated in the FAA’s enactment.

The American Bar Association’s Committee on Commerce, Trade and Commercial Law (the Committee) largely handled the drafting of the FAA. The drafting process was formally initiated at the ABA’s annual meeting in 1920.<sup>26</sup> In 1922, the Committee reported to the ABA general body that it had finished drafting a federal arbitration statute as part of a proposed package including a uniform state arbitration statute and an international treaty.<sup>27</sup> The Committee opined that the package would “put the United States in the forefront in this procedural reform,” promoting commercial ethics, reducing litigation, speeding the resolution of disputes, and conserving judicial resources.<sup>28</sup> After adoption by the ABA, the draft federal statute was introduced in both chambers of the Sixty-Seventh Congress in December 1922.<sup>29</sup>

The bill’s treatment of labor disputes sparked criticism from two interested parties. First, the International Seamen’s Union adopted two resolutions against the federal arbitration bill.<sup>30</sup> The Union’s President saw the bill as a mechanism for the reintroduction of involuntary labor.<sup>31</sup> He predicted that the bill would “take away from all citizens except those who have the knowledge and the money to hire the best of lawyers and who can afford to wait, the present right to a day in court.”<sup>32</sup> Second, Senator Thomas Sterling of South Dakota raised concerns based on a letter he received from one of his constituents, a lawyer who worked for one of the largest firms in the state.<sup>33</sup> The lawyer’s firm had “significant clients involved in interstate transportation,” including several large railroad

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the organization’s arbitration committee. *Id.* Cohen was the general counsel and a member of the ABA’s Committee on Commerce, Trade, and Commercial Law. *Id.*

24. MACNEIL, *supra* note 18, at 35.

25. *Id.* at 34–47.

26. 43 A.B.A. Rep. 75 (1920); *see also* IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* 104 (2013).

27. 45 A.B.A. Rep. 293–95 (1922).

28. *Id.* at 295.

29. *See* 67 Cong. Rec. 732, 797 (1922) (noting the introduction of H.R. 13522 and S. 4214 “to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts . . .”).

30. SZALAI, *supra* note 26, at 132; Finkin, *supra* note 6, at 284.

31. SZALAI, *supra* note 26, at 132; Finkin, *supra* note 6, at 284.

32. *Seamen Condemn Arbitration Bill*, N.Y. TIMES, Jan. 14, 1923, at 21.

33. SZALAI, *supra* note 26, at 132–35.

companies, and he expressed concerns about the applicability of the proposed legislation to labor disputes involving interstate commerce.<sup>34</sup>

A subcommittee of the Senate Judiciary Committee addressed the concerns about the inclusion of labor in the proposed arbitration statute at a hearing in January 1923. At that hearing, W.H.H. Piatt, the chairman of the ABA Committee that drafted the bill, testified that:

It was not the intention of this bill to make an industrial arbitration in any sense; and so I suggest that in as far as the committee is concerned, if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce." It is not intended that this shall be an act referring to labor disputes, at all.<sup>35</sup>

In a similar vein, the hearing record contained a letter from then-Secretary of Commerce Herbert Hoover.<sup>36</sup> In the letter, Hoover advocated for passing the FAA, pointing to the New York Arbitration Act's ability to relieve congestion within the New York court system.<sup>37</sup> But he also recognized the objection to the "inclusion of workers' contracts in the law's scheme."<sup>38</sup> Thus, he recommended that the following language be added to the proposed bill: "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."<sup>39</sup> This language differed from Piatt's proposed exemption in two ways. First, Hoover's suggestion included railroad employees and, second, his language used the phrase "engaged in interstate . . . commerce," rather than "in interstate . . . commerce."<sup>40</sup>

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34. *Id.*

35. *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing Before the Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 79 (1923) [hereinafter 1923 Hearings] (statement of W.H.H. Piatt, Chairman, A.B.A. Comm'n).

36. *Id.* at 14; see also Finkin, *supra* note 6, at 297. Indeed, Hoover was a proponent of the legislation because "arbitration fit perfectly with Hoover's philosophy of industrial self-governance and the elimination of waste." SZALAI, *supra* note 26, at 108.

37. 1923 Hearings, *supra* note 35, at 14.

38. *Id.*

39. *Id.*

40. Although this choice of language may not have mattered to anyone at the time, see Finkin, *supra* note 6, at 297, the decision to use the phrase "engaged . . . in commerce" would matter for future interpretations of the Act. See *infra* Sections I.B, II.A.

The bill did not receive any hearings in the House and was never reported out of committee in either chamber during the Sixty-Seventh Congress.<sup>41</sup> In the meantime, the ABA Committee made one substantive change to the draft bill.<sup>42</sup> In section 1 of the bill, the Committee adopted Hoover's suggested language and inserted "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."<sup>43</sup> This is the language of the section 1 exemption today.<sup>44</sup> The ABA general body approved the draft of the bill containing the exemption language at its annual meeting in 1923, and the bill became law with very few changes in 1925.<sup>45</sup>

### B. *Switch from Procedure to Substance*

For most of the first thirty-five years of the FAA's existence, the Supreme Court viewed the FAA as resting on Congress's constitutional power to regulate federal court procedure.<sup>46</sup> In the 1960s, however, the Supreme Court's understanding of the FAA's constitutional underpinnings began to change.<sup>47</sup> The Court started to apply the FAA as substantive law under Congress's power to regulate commerce.<sup>48</sup> This doctrinal change culminated in *Allied-Bruce*

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41. MACNEIL, *supra* note 18, at 91. The bill did not progress out of committee in either chamber because of the "lateness of the session and the pressure of other important business." 46 A.B.A. Rep. 287 (1923). Nonetheless, the ABA received the assurance of "hearty cooperation in pressing the bill to passage in the next Congress" from the sponsors of the bill in both chambers. *Id.*

42. MACNEIL, *supra* note 18, at 91.

43. 46 A.B.A. Rep. 287 (1923); *see also* MACNEIL, *supra* note 18, at 91. In its report, the Committee stated that this change was made "[i]n order to eliminate th[e] opposition" of the International Seamen's Union. 46 A.B.A. Rep. 287 (1923). Indeed, after the exemption was inserted in 1923, one of the leading proponents of the bill, Charles Bernheimer, stated that "we are not . . . convinced that it would not be in the interests of labor to have them included." SZALAI, *supra* note 26, at 153. Even so, he conceded that "all industrial questions have been eliminated" in order to appease labor's concerns. *Id.*

44. *See* 9 U.S.C. § 1.

45. *See* MACNEIL, *supra* note 18, at 91, 101.

46. *Id.* at 148. This understanding of the law was consistent with the intent of the drafters. *See* H.R. REP. NO. 68-96, at 1 (1924) ("Whether an agreement for arbitration shall be enforced or not is a question is a question of procedure . . ."); *see also* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 202-03 (1956) (holding that under the *Erie* doctrine, state law applicable to arbitration governed an arbitration agreement in a contract relating to intrastate commerce).

47. *See* MACNEIL, *supra* note 18, at 148-49.

48. *See, e.g.,* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967) ("[I]t is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.');" *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (holding that the FAA creates substantive law applicable in both state and federal court);

*Terminix Cos. v. Dobson*, where the Court held that the words “involving commerce” in section 2 of the FAA “signal[ed] an intent to exercise Congress’ commerce power to the full.”<sup>49</sup>

The shift in FAA jurisprudence had implications for the interpretation of the section 1 exemption. The decision in *Allied-Bruce* indicated that the FAA’s reach was coextensive with the Congress’s commerce power. If this principle were applied to the section 1 exemption, it would mean that nearly every employment contract was ineligible for arbitration under the FAA.<sup>50</sup> The federal courts of appeals eventually split as to whether the FAA applied to employment contracts at all.<sup>51</sup> In 2001, the Supreme Court in *Circuit City Stores, Inc. v. Adams* held that only some employment contracts were exempted from the FAA.<sup>52</sup> The Court reasoned that the phrase “engaged in commerce” in section 1 was “understood to have a more limited reach” than the phrase “involving commerce” in section 2.<sup>53</sup> The Court further concluded that the section 1 phrase “any other class of workers engaged . . . in interstate commerce” was a residual clause limited by the references to “railroad employees” and “seamen” in the same sentence.<sup>54</sup> The Court effectively limited the scope of the exemption to “contracts of employment of transportation workers.”<sup>55</sup>

The Supreme Court did not directly address the scope of the exemption again until *New Prime Inc. v. Oliveira* in 2019.<sup>56</sup> There, a truck driver entered into an independent contractor relationship with New Prime, an interstate trucking company.<sup>57</sup> The driver brought a wage suit against New Prime, and the company argued that the dispute should be resolved through arbitration.<sup>58</sup> The driver contended that he was ineligible for arbitration, relying on the FAA’s section 1 exemption.<sup>59</sup> New Prime contested this point, asserting that the exemption only applied to “contracts of em-

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*Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (holding that the FAA preempts state laws hostile to arbitration).

49. 513 U.S. 265, 277 (1995). See Nicolas Enrique O’Connor, Note, *The “Insurmountable Textual Obstacle”: A Narrow Interpretation of the Federal Arbitration Act*, 32 GEO. J. LEGAL ETHICS 855 (2019), for a critique of the decision in *Allied-Bruce* arguing that the “involving commerce” interpretation adopted by the Court was too broad.

50. See Brief for Respondent at 18–20, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (No. 99-1379), 2000 WL 1369473, at \*19–20.

51. See *Circuit City*, 532 U.S. at 110–11 (detailing the disagreement in the lower courts).

52. *Id.* at 119.

53. *Id.* at 115–16.

54. *Id.* at 114–15.

55. *Id.* at 119.

56. 139 S. Ct. 532, 538, 543–44 (2019).

57. *Id.* at 536.

58. *Id.* at 536–37.

59. *Id.*

ployment,” and the truck driver, an independent contractor, should be made to arbitrate his claims.<sup>60</sup>

Justice Gorsuch, writing for the majority, first held that, as a procedural point, courts should decide whether the section 1 exemption applies, rather than sending that question to the arbitrator.<sup>61</sup> Next, the Court concluded that the statutory term “contracts of employment” included all agreements to perform work.<sup>62</sup> Justice Gorsuch explained that “words generally should be ‘interpreted as taking their ordinary meaning at the time Congress enacted the statute.’”<sup>63</sup> He concluded that when Congress adopted the FAA in 1925, the term “contract of employment” meant “nothing more than an agreement to perform work” and therefore included “agreements that require independent contractors to perform work.”<sup>64</sup> Thus, by broadening the reach of the section 1 exemption, the *New Prime* decision countered the Court’s expansion of the scope of the FAA under Congress’s commerce powers.

Congress enacted the FAA to remedy the judiciary’s hostility towards arbitration agreements.<sup>65</sup> Thus, the original purpose of the FAA was mainly procedural—to make federal courts hold parties to their agreements to arbitrate future disputes.<sup>66</sup> Because of this limited purpose, the drafters of the FAA were cognizant of the law’s potential effects on employment arrangements and inserted language to deal with this concern. Despite this history, the Supreme Court expanded the FAA’s reach and correspondingly narrowed the exemption, reasoning that Congress enacted the FAA using its commerce power.<sup>67</sup> The Court’s decision in *New Prime*, however, has slowed the expansion of the law—at least regarding the interpretation of the section 1 exemption—and provides workers, such as rideshare drivers, an opportunity to potentially avoid arbitration.

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60. *Id.*

61. *Id.* at 537.

62. *Id.* at 543–44.

63. *Id.* at 539 (quoting *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)).

64. *Id.*

65. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118–19 (2001) (citing *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 272–73 (1995)).

66. See MACNEIL, *supra* note 18, at 148.

67. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967) (reasoning that the FAA is based in Congress’ commerce power); *Circuit City*, 532 U.S. at 119 (narrowing the scope of the exemption to only include transportation workers).

## II. INTERPRETATION AND APPLICATION OF THE SECTION 1 EXEMPTION

*New Prime* may have profound effects on rideshare drivers' ability to avoid arbitration. A worker must meet two statutory conditions to qualify under the FAA exemption: (1) he must have a "contract of employment" and (2) he must be a seaman, railroad employee, or "any other class of worker[] engaged in foreign or interstate commerce."<sup>68</sup> Rideshare drivers, as independent contractors, now satisfy the first prong of this test since contracts of employment are not limited to employer-employee relationships.<sup>69</sup> Moreover, the Supreme Court's conclusion that courts, rather than arbitrators, should determine whether the exemption applies effectively leaves the remaining statutory interpretation question to lower courts.<sup>70</sup> Thus, after *New Prime*, more and more courts will be asked to decide whether rideshare drivers qualify as "any other class of workers engaged in foreign or interstate commerce."<sup>71</sup>

Section II.A traces the development of the analytical framework employed by lower courts to define the exemption's boundaries. This framework originated in a line of decisions before *Circuit City* and narrowly construes the exemption's language to include only those who move goods across state lines. Section II.B explains how this narrow application may prohibit rideshare drivers from qualifying under the exemption.

### A. *Development of the Section 1 Exemption Framework*

The framework governing the applicability of the section 1 exemption evolved in three stages of jurisprudence. First, before *Circuit City*, many courts limited the section 1 exemption to transpor-

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68. 9 U.S.C. § 1.

69. See *New Prime*, 139 S. Ct. at 543–44; *Singh v. Uber Techs. Inc.*, 939 F.3d 210, 217 (3d Cir. 2019) (explaining that *New Prime* eliminated the "contract of employment" argument made by Uber in the suit under consideration by the court); Michele W. Berger, *Supreme Court Decision a Boon for Truck Drivers and, Potentially, the Gig Economy*, PENN TODAY (Feb. 4, 2019), <https://penntoday.upenn.edu/news/supreme-court-decision-boon-truck-drivers-and-potentially-gig-economy> [<https://perma.cc/N2ZP-LPTV>].

70. Previously, some courts concluded that arbitration clauses in some employment contracts utilized by ridesharing companies left the determination of the exemption's applicability to the arbitrator. *E.g.*, *Richmond v. Uber Techs., Inc.*, 263 F. Supp. 3d 1312, 1317–18 (S.D. Fla. 2017); *Sienkaniec v. Uber Techs., Inc.*, No. 17-CV-4489 (PJS/FLN), 2017 WL 7791193, at \*1 (D. Minn. Dec. 18, 2017).

71. See *Singh*, 939 F.3d at 219–26 (considering whether an Uber driver is exempted from the FAA); Rick Bales, "*New Prime*" and the *Gig Economy*, ARB. INFO, <https://mulaw.missouri.edu/arbitrationinfo/new-prime-gig-economy> (last visited Oct. 14, 2020) [<https://perma.cc/Y2S4-ACK3>].

tation workers and defined transportation workers as those who moved *goods* in interstate commerce. Next, in *Circuit City*, the Supreme Court sided with the majority of lower courts and limited the exemption to transportation workers but did not explicitly define that term. Finally, in the aftermath of *Circuit City*, courts continued to apply roughly the same pre-*Circuit City* framework. This has led to arbitrary and accidental distinctions between different classes of workers. The following discussion traces these three stages of evolution.

### 1. Pre-*Circuit City* Interpretation of the Section 1 Exemption

Before the decision in *Circuit City*, the main question lower courts faced was whether the exemption applied to all employment contracts. Most of the pre-*Circuit City* cases involved plaintiffs who did not work in the transportation industry at all.<sup>72</sup> In deciding these cases, most courts of appeals held that the exemption did not reach all employment contracts and limited its applicability to only transportation workers. These courts defined transportation workers with explicit reference to their role in the movement of goods in interstate commerce.<sup>73</sup> For example, in *Asplundh Tree Expert Co. v. Bates*, the Sixth Circuit held that the exemption did not apply to a corporate executive for a consulting company.<sup>74</sup> The court reasoned that the exemption only applied to workers “actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are.”<sup>75</sup> The court concluded that the executive had to arbitrate the dispute with his employer because he did not qualify under this definition.<sup>76</sup>

The Third Circuit also limited the exemption to transportation workers, but did not explicitly define transportation workers with

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72. *Singh*, 939 F.3d at 224 (collecting cases prior to *Circuit City* and explaining that, in those cases, the courts “were confronted with the same question: whether the residual clause of § 1 covered the contracts of employment of those who were not in the transportation industry at all”).

73. *E.g.*, *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600–01 (6th Cir. 1995); *see also* *Paladino v. Avnet Comput. Techs., Inc.*, 134 F.3d 1054, 1060–61 (11th Cir. 1998); *O’Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997); *Cole v. Burns Int’l. Sec. Servs.*, 105 F.3d 1465, 1470–72 (D.C. Cir. 1997); *Rojas v. TK Commc’ns, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Erving v. Va. Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Dickstein v. DuPont*, 443 F.2d 783, 785 (1st Cir. 1971).

74. 71 F.3d at 602.

75. *Id.* at 600–01.

76. *Id.* at 602.

reference to the movement of goods in interstate commerce.<sup>77</sup> In *Tenney Engineering, Inc. v. United Electric Radio & Machine Workers of America*, the court applied the *ejusdem generis* canon in interpreting section 1 and concluded that the exemption included “only those . . . 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.”<sup>78</sup> The court explained that the manufacturing employees were not exempted because they were “not acting directly in the *channels* of interstate commerce itself.”<sup>79</sup> Notably, the court distinguished prior Third Circuit cases holding that commercial bus drivers were exempt from the FAA.<sup>80</sup> The court explained that “the bus line employees in those cases [were] directly engaged in the channels of interstate transportation just as are railroad workers.”<sup>81</sup>

Finally, in *Craft v. Campbell Soup Co.*, the Ninth Circuit held that all employment contracts were exempted under section 1, creating a circuit split.<sup>82</sup> The court explained that Congress’s commerce power when the FAA was enacted in 1925 only reached employees who transported goods or people in interstate commerce.<sup>83</sup> By exempting transportation workers, the FAA was effectively exempting all employment contracts that could possibly be covered under the Act.<sup>84</sup> Therefore, under the expanded contemporary understand-

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77. *Tenney Eng’g, Inc. v. United Elec. Radio & Mach. Workers Local 437*, 207 F.2d 450, 453 (3d Cir. 1953).

78. *Id.* at 452. *Ejusdem generis* is “[a] canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.” *Ejusdem generis*, BLACK’S LAW DICTIONARY (11th ed. 2019). The Third Circuit’s application of the *ejusdem generis* canon to the exemption language provided the framework for the Supreme Court’s analysis in *Circuit City* almost fifty years later. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001); *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 593 (3d Cir. 2004) (explaining that the decision in *Tenney* “presag[ed]” the decision in *Circuit City*).

79. *Tenney*, 207 F.2d at 453 (emphasis added); see also *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998) (holding that the section 1 exemption includes only “employees actually engaged in the channels of foreign or interstate commerce”).

80. *Tenney*, 207 F.2d at 453.

81. *Id.* (citing *Amalgamated Ass’n of Street, Elec. Ry. & Motor Coach Emps. v. Pa. Greyhound Lines, Inc.*, 192 F.2d 310 (3d Cir. 1951); *Pa. Greyhound Lines, Inc. v. Amalgamated Ass’n of Street, Elec., Ry., & Motor Coach Emps.*, 193 F.2d 327 (3d Cir. 1952)). The *Circuit City* Court cited *Tenney* along with other lower court decisions holding that the exemption did not apply to all employment contracts. See *Circuit City*, 532 U.S. at 111. But grouping *Tenney* with these other cases ignores the fact that the *Tenney* definition of “transportation workers” also embraced those workers who move passengers. While that distinction may not have been consequential when the main question faced by lower courts was whether all employment contracts were exempted from the FAA, it is especially crucial now that the Supreme Court has limited the reach of the exemption to transportation workers. See *infra* Section II.A.3.

82. 177 F.3d 1083, 1094 (9th Cir. 1998) (per curiam), *abrogated by Circuit City*, 532 U.S. at 105.

83. *Id.* at 1087.

84. *Id.* at 1087, 1092.

ing of Congress's commerce power, the section 1 exemption had similarly broadened to include all employment contracts.<sup>85</sup> The court also determined that the legislative history of the FAA "demonstrate[d] that the Act's purpose was solely to bind merchants who were involved in commercial dealings."<sup>86</sup> Finally, the court reasoned that the FAA's requirement that a valid arbitration agreement "arise out of" a "contract evidencing a transaction involving commerce" illustrated that Congress did not intend for the Act to apply to employment contracts at all.<sup>87</sup> The court noted that, when the FAA was passed, a "transaction" was "an act of buying and selling" and, therefore, the term did not encompass employment relationships.<sup>88</sup>

Thus, before *Circuit City*, lower courts mostly addressed whether employment contracts, as a category, fell within the scope of the FAA. The courts split on the question, with the majority holding that only employment contracts of transportation workers were exempted from the FAA. Of those courts exempting only transportation workers, most defined the term as those who move goods in interstate commerce. In the minority, the Ninth Circuit held that all employment contracts were exempt from the FAA.

## 2. *Circuit City* Decision

The Supreme Court resolved the split between the courts of appeals in *Circuit City*. In that case, a sales counselor at Circuit City sued the company in federal district court in California.<sup>89</sup> Circuit City sought and was granted a motion to compel arbitration based

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85. *Id.* at 1086–88. Other courts and scholars interpreting the exemption adopted similar reasoning. For example, in *Arce v. Cotton Club of Greenville, Inc.*, the Northern District of Mississippi stated:

[I]nterstate commerce at the time the FAA was enacted was generally understood to be limited to maritime and railroad transactions. Thus, when Congress excluded employment contracts of maritime and railroad workers, it resulted in voiding the power to enforce arbitration clauses of most employment contracts. With the addition of the catch-all phrase "or any other class of worker engaged in foreign or interstate commerce," all employment contracts would have been excluded from the arbitration enforcement power of the FAA.

883 F. Supp. 117, 123 (N.D. Miss. 1995). See also Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 U. MO. K.C. L. REV. 449, 468 (1996); Archibald Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591, 598 (1954).

86. *Craft*, 177 F.3d at 1089.

87. *Id.* at 1085, 1092.

88. *Id.* at 1085; see also *id.* at 1089 (concluding that the narrow interpretation of the word "transaction" is supported by the legislative history of the FAA).

89. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109–11 (2001).

on a provision in their employment application.<sup>90</sup> While the plaintiff's appeal of the district court decision was pending, the Ninth Circuit decided *Craft*, holding that all employment contracts were exempt from the FAA.<sup>91</sup> Therefore, in *Circuit City*, the Ninth Circuit simply applied *Craft* and reversed the lower court decision.<sup>92</sup> *Circuit City* petitioned the Supreme Court for certiorari, highlighting the fact that the Ninth Circuit's interpretation of the exemption split from all other courts of appeals to consider the issue.<sup>93</sup>

The Supreme Court held that section 1 exempted only transportation workers, rejecting the Ninth Circuit's interpretation. Justice Kennedy, writing for the majority, explained that:

Construing the residual phrase ["any other class of workers engaged in . . . commerce"] to exclude all employment contracts fails to give independent effect to the statute's enumeration of the specific categories of workers which precedes it; there would be no need for Congress to use the phrases "seamen" and "railroad employees" if those same classes of workers were subsumed within the meaning of the "engaged in . . . commerce" residual clause.<sup>94</sup>

The Court then applied the *ejusdem generis* and surplusage canons<sup>95</sup> to conclude that the application of the residual clause in section 1 should be limited to workers who are similar to railroad employees and seamen.<sup>96</sup> Thus, the Court held that section 1 exempts only the contracts of transportation workers rather than all employment contracts.<sup>97</sup>

In limiting the exemption's reach to transportation workers, the Court also rejected the Ninth Circuit's argument that Congress intended the exemption's reach to be coextensive with its commerce power. For the Court, the plain meaning of section 1's "engaged in commerce" foreclosed this reading because that phrase was nar-

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90. *Id.* at 110.

91. *Id.*

92. *Id.* at 110–11.

93. *Id.*

94. *Id.* at 114.

95. The surplusage canon, or the presumption against surplusage, holds that "every word and every provision in a legal instrument is to be given effect." *Surplusage canon*, BLACK'S LAW DICTIONARY (11th ed. 2019).

96. *Circuit City*, 532 U.S. at 115 (explaining that the residual clause "should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the[se] enumerated categories").

97. *Id.* at 119.

rower than the section 2's "involving commerce."<sup>98</sup> Whereas "involving commerce" signaled Congressional intent to regulate to the full extent allowed by the Commerce Clause, "engaged in commerce" was not meant to reach the outer limits of Congress's commerce power.<sup>99</sup>

Thus, the decision in *Circuit City* clarified two pieces of section 1 exemption jurisprudence. First, the Court held that the exemption only reached the contracts of employment of transportation workers rather than all employment contracts. Second, the Court explained that the exemption only covered those "engaged in commerce"—a narrower category than those involved in commerce.

### 3. Aftermath of the *Circuit City* Decision

The *Circuit City* decision indicated that only transportation workers who are engaged in interstate commerce qualify for the exemption. The contested cases are now those in which courts are asked to define the scope of this requirement. Unfortunately, "little consensus has been realized" in *Circuit City*'s aftermath.<sup>100</sup> Some patterns have emerged, however, as courts use fact-based distinctions to decide the cases before them. Courts have distinguished between: (1) workers who are involved in the transportation industry and those who are not, (2) workers who move goods and those who move passengers, and (3) workers who travel across state lines and those who make purely intrastate trips.<sup>101</sup>

First, courts have held that workers must be employed in the transportation industry to qualify under the exemption.<sup>102</sup> For ex-

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98. *Id.* at 118. The Court had endorsed an expansive interpretation of "involving commerce" in *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 277 (1995); see also *supra* Section I.B.

99. *Circuit City*, 532 U.S. at 117 (quoting *United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 283 (1975)).

100. *Muller v. Roy Miller Freight Lines, LLC*, 246 Cal. Rptr. 3d 748, 753 (Ct. App. 2019) (internal quotation omitted).

101. To be sure, courts do not employ these distinctions as a strict test nor do all courts make these distinctions. Rather, these distinctions are based on an analysis of messy caselaw encompassing many different fact patterns across many different courts. Moreover, the following discussion does not capture all of the distinguishing characteristics that have been used by lower courts in the aftermath of *Circuit City*. Instead, this Note focuses on those characteristics that may prove relevant as lower courts are increasingly tasked with determining whether rideshare drivers are exempt from the FAA. See *infra* Section II.B (explaining that some of these distinguishing factors may prove to be obstacles for rideshare drivers' ability to take advantage of the exemption). For a broader discussion of relevant factors, see *Lenz v. Yellow Transportation, Inc.*, 431 F.3d 348, 352 (8th Cir. 2005), which synthesized the universe of section 1 exemption cases and determined that there are eight factors that are relevant for determining whether a worker is exempted.

102. *Adkins v. Labor Ready*, 303 F.3d 496, 505–06 (4th Cir. 2002) (holding that a temporary employee of a company that provides manual day laborers was not exempted from

ample, in *Hill v. Rent-A-Center, Inc.*, the Eleventh Circuit held that an account manager for a company that rented furniture and appliances to customers was not exempt from the FAA even though he delivered goods across state lines as part of his employment.<sup>103</sup> The court explained that *Circuit City* emphasized a “class of workers in the transportation industry, rather than . . . workers who incidentally transported goods interstate as part of their job.”<sup>104</sup> The court concluded that merely interstate transportation was insufficient on its own for qualification under the exemption.<sup>105</sup> The worker also must “be employed in the transportation industry” for the section 1 exemption to apply.<sup>106</sup>

Second, courts have sometimes defined transportation workers as only those workers who move goods, and therefore declined to exempt passenger-centric workers.<sup>107</sup> For example, in rejecting a section 1 exemption claim by drivers for a car service company, the Southern District of New York explained that “transporting passengers interstate as part of a car service is too far removed from the type of work engaged in by seamen and railroad workers—that is, being a member of an industry that primarily involves the actual, physical movement of goods through interstate commerce.”<sup>108</sup> That same court found that the “involvement of physical goods [is] an indispensable element” for qualification as a transportation worker.<sup>109</sup> Furthermore, one state court concluded that a commercial airline pilot was not exempt from the FAA, even after acknowledging that he moved cargo as part of his job, because his participation in the movement of goods was incidental to his transportation of passengers.<sup>110</sup>

By exempting only those who move goods, these courts have read *Circuit City* as a confirmation of the previous, judicially-

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the FAA since neither “a majority or . . . plurality of [the worker’s] daily assignments were in transportation-related industries”); *Tran v. Texan Lincoln Mercury, Inc.*, No. H-07-1815, 2007 WL 2471616, at \*1–2, \*5 (S.D. Tex. Aug. 29, 2007) (holding that an employee of a car dealership was not a transportation worker because he worked in the automobile industry, not the transportation industry).

103. 398 F.3d 1286, 1289–90 (11th Cir. 2005).

104. *Id.* at 1289 (emphasis added).

105. *Id.* at 1290.

106. *Id.*

107. *See, e.g.*, *Gadson v. SuperShuttle Int’l*, No. 10-cv-01057-AW, 2011 WL 1231311 (D. Md. Mar. 30, 2011), *vacated on other grounds by* *Murithi v. Shuttle Express, Inc.*, 712 F.3d 173 (4th Cir. 2013); *Kowalewski v. Samandarov*, 590 F. Supp. 2d 477 (S.D.N.Y. 2008).

108. *Kowalewski*, 590 F. Supp. 2d at 484.

109. *Id.*

110. *JetBlue Airways Corp. v. Stephenson*, No. 650691/2010, 2010 WL 6781684, at \*3 (N.Y. Sup. Ct. Nov. 22, 2010). *But see* *Lepera v. ITT Corp.*, No. 97-1461, 1997 WL 535165, at \*7 (E.D. Pa. Aug. 12, 1997) (holding that an airline pilot who transported passengers interstate is exempt from the FAA).

imposed definition of transportation workers.<sup>111</sup> *Circuit City*, however, did not affirmatively endorse a definition of transportation workers that focuses on the movement of goods. Because the plaintiff was a sales counselor with no connection to the transportation industry, the Court did not need to define the term. At one point in the opinion, the Court noted that “[m]ost courts of appeals conclude the exclusion provision is limited to transportation workers, defined, *for instance*, as those workers ‘actually engaged in the movement of goods in interstate commerce.’”<sup>112</sup> The Court’s use of “for instance” indicates that it did not mean to clarify the entire field of transportation workers but merely provide an example.<sup>113</sup> Lower courts have read *Circuit City* as confirmation that the term “transportation worker” includes only those who move goods, even though the decision did not formally endorse a definition of the term.

Reading the goods-centric definition of transportation workers into *Circuit City* without the Supreme Court’s endorsement extends the definition beyond its useful application. The goods-centric definition was meant to demarcate a boundary between workers who had no connection to the transportation industry and those who did.<sup>114</sup> It was not intended to answer the question courts now face: the strength of the connection to interstate commerce necessary for classification as a transportation worker.<sup>115</sup> Therefore, by including only those who move goods without considering these changed circumstances, courts are using a tool that was built for a different purpose.

Third, courts have held that only workers who actually move across state lines are engaged in commerce and exempt from the

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111. See, e.g., *Brown v. Nabors Offshore Corp.*, 339 F.3d 391, 394 (5th Cir. 2003) (explaining that the Court’s analysis in *Circuit City* was consistent with the Fifth Circuit’s prior decision limiting the transportation worker exemption to include only those who move goods in interstate commerce); *Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280, 1284, 1284 n.1 (11th Cir. 2001) (explaining that in *Circuit City*, the Court “affirmed the validity” of the circuit’s prior opinion holding that the exemption only applies to transportation workers engaged in the movement of goods in interstate commerce). For a discussion of lower court decisions prior to *Circuit City*, see *supra* Section II.A.1.

112. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001) (emphasis added) (quoting *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1471 (D.C. Cir. 1997)).

113. See *Cunningham v. Lyft, Inc.*, 450 F. Supp. 3d 37, 44 (D. Mass. 2020) (reasoning that the Supreme Court’s use of “for instance” in *Circuit City* indicated that the Court did not intend to define the term “transportation workers”).

114. *Singh v. Uber Techs. Inc.*, 939 F.3d 210, 224 (3d Cir. 2019).

115. See *Cunningham*, 450 F. Supp. 3d at 43 (“*Circuit City* and each of the earlier appellate decisions . . . addressed whether the exemption excluded contracts of non-transportation workers and did not address the nuances between different types of transportation workers.”).

FAA.<sup>116</sup> For example, in *Wallace v. Grubhub Holdings, Inc.*, the Seventh Circuit considered whether couriers for a food-delivery service were “engaged in interstate commerce.”<sup>117</sup> There, the plaintiff-workers delivered food to customers from local restaurants when requested through a smartphone application.<sup>118</sup> They argued that they were transportation workers because they facilitated the transportation of food that may have originated out of state or been previously transported in interstate commerce.<sup>119</sup> The court rejected this “stream of commerce” argument and held that the plaintiffs did not qualify for the exemption because they did not move goods across state lines.<sup>120</sup> The court reasoned that the plaintiffs’ argument was foreclosed by *Circuit City*’s instruction to narrowly construe the exemption.<sup>121</sup>

Other courts, including the First Circuit and the Ninth Circuit, have not required that workers move across state lines when the workers in question are part of a broader distribution system that transports goods in interstate commerce.<sup>122</sup> Often these cases involve last-mile delivery truck drivers—truckers who deliver goods that have previously moved across state lines, but do not themselves move across state lines during the course of their work.<sup>123</sup> On their face, last-mile delivery truck drivers are identical to food service couriers since both make purely local deliveries. Yet, courts have been more receptive to the stream of commerce conception of interstate commerce in the last-mile delivery truck driver cas-

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116. *Int’l Brotherhood of Teamsters Local 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 957–58 (7th Cir. 2012). In *Kienstra Precast*, a union representing concrete mixer drivers alleged that Kienstra violated their collective bargaining agreement and the company tried to compel arbitration. *Id.* at 955. Even though some of the drivers had made interstate deliveries, the company argued that their employees did not qualify for the exemption because the interstate trips were an insubstantial part of their business. *Id.* at 958. The court rejected this argument and held that even a minimal proportion of interstate trips was sufficient for exemption under the FAA. *Id.*

117. 970 F.3d 798, 800 (7th Cir. 2020).

118. *Id.* at 799.

119. *Id.* at 802–03.

120. *Id.* at 803–04; *see also* *Levin v. Caviar, Inc.*, 146 F. Supp. 3d 1146, 1152 (N.D. Cal. 2015); *Magana v. DoorDash, Inc.*, 343 F. Supp. 3d 891, 899–900 (N.D. Cal. 2018) (holding that a driver for DoorDash, a similar food-delivery service, was not exempt from the FAA because he did not “allege that he either moved or supervised the movement of goods across state lines”); *Lee v. Postmates Inc.*, No. 18-cv-03421-JCS, 2018 WL 6605659, at \*7 (N.D. Cal. Dec. 17, 2018) (rejecting plaintiffs’ argument that they were transportation workers because they did not “cite any case holding that making only local deliveries, for a company that does not hold itself out as transporting goods between states, constitutes engaging in interstate commerce within the meaning of the statute”).

121. *Wallace*, 970 F.3d at 800–03.

122. *See, e.g.,* *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 26 (1st Cir. 2020); *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 915 (9th Cir. 2020); *Diaz v. Mich. Logistics*, 167 F. Supp. 3d 375, 380 n.3 (E.D.N.Y. 2016); *Nieto v. Fresno Beverage Co.*, 245 Cal. Rptr. 3d 69, 76–77 (Ct. App. 2019).

123. *See Waithaka*, 966 F.3d at 26; *Rittmann*, 971 F.3d at 907.

es.<sup>124</sup> One district court distinguished the last-mile delivery truck driver cases from the food service courier cases by explaining that the interstate journey of the food delivered by the courier ends when the ingredients are delivered to the restaurant before the courier's involvement.<sup>125</sup> The ingredients that moved interstate become a new, purely local product when they are turned into a finished meal.<sup>126</sup> Thus, the finished product delivered by the food service courier is not a good in interstate commerce.<sup>127</sup> On the other hand, the packages delivered by last-mile delivery truck drivers are continually in interstate commerce until the worker delivers the goods to the consumer.<sup>128</sup>

The last-mile delivery truck driver cases also indicate that the three distinctions are interrelated. That is, courts are more likely to require the movement of goods across state lines where the worker is not clearly involved in the transportation industry.<sup>129</sup> Indeed, one court holding that last-mile delivery drivers are exempt from the FAA began its discussion by explaining that truck drivers were the quintessential example of a transportation worker.<sup>130</sup> Perhaps, where the trucking industry is involved, courts are less likely to require that the worker physically move goods across state lines.<sup>131</sup>

Even though the *Circuit City* Court did not endorse a specific definition of transportation workers, lower courts have drawn dis-

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124. *E.g.*, *Waithaka*, 966 F.3d at 26 (concluding that “last-mile delivery workers who haul goods on the final legs of interstate journeys are transportation workers”); *Rittmann*, 971 F.3d at 915 (holding that last-mile delivery drivers are exempt from the FAA).

125. *Waithaka v. Amazon.com, Inc.*, 404 F. Supp. 3d 335, 341 (D. Mass. 2019), *aff'd*, 966 F.3d 10 (1st Cir. 2020).

126. *Id.*; *see also* *Rittman v. Amazon.com, Inc.*, 383 F. Supp. 3d 1196, 1201–02 (W.D. Wash. 2019), *aff'd*, 971 F.3d 904 (9th Cir. 2020).

127. *Waithaka*, 404 F. Supp. 3d at 341.

128. *Id.* at 341–42.

129. *See Veliz v. Cintas Corp.*, No. C 03-1180 SBA, 2004 WL 2452851, at \*7 (N.D. Cal. Apr. 5, 2004) (observing that “the more related to the transportation industry an enterprise is, the less necessary it becomes for the employee to be directly transporting goods”).

130. *See Waithaka*, 404 F. Supp. 3d at 340.

131. Indeed, some courts have held that those who merely supervised the movement of goods in interstate commerce were exempt from the FAA. But these cases are also limited to the trucking industry. *See Zamora v. Swift Transp. Co.*, No. EP-07-CA-00400-KC, 2008 WL 2369769, at \*7 (W.D. Tex. June 3, 2008) (finding that a terminal manager for an interstate trucking company whose job duties included monitoring the productivity of the fleet, monitoring revenue, improving driver retention, managing costs, reducing expenses, and monitoring full utilization of equipment was exempted from the FAA). *But see Fuentes v. Rush Truck Ctrs. of Cal., Inc.*, No. EDCV 18-10446 (SPx), 2019 WL 3240100, at \*4–5 (C.D. Cal. Mar. 11, 2019) (acknowledging that a worker need not be personally involved in the interstate movement of goods to qualify under the exemption, but holding that a mechanic must arbitrate his disputes because he is not a transportation worker); *Bell v. Ryan Transp. Serv., Inc.*, 176 F. Supp. 3d 1251, 1254–56 (D. Kan. 2016) (holding that a carrier sales representative employed by a third-party logistics company whose duties included locating trucking companies for transport and negotiating the price for trucking goods was not exempt from the FAA).

inctions that generally narrow the categories of workers that qualify for the section 1 exemption. Courts have required that workers be employed in the transportation industry, move goods, and physically move across state lines.

B. *Application of the Post-Circuit City Framework to Rideshare Drivers*

To date, there have not been many cases involving rideshare drivers. But from existing case law, it is clear that the post-*Circuit City* distinctions create multiple obstacles for rideshare drivers. The first obstacle is the requirement that the worker move goods to qualify as a transportation worker. Federal district courts in New Jersey, Ohio, Florida, California, and the District of Columbia<sup>132</sup> have all held that rideshare drivers are not exempt from the FAA because they move primarily passengers in interstate commerce rather than goods. However, the Third Circuit recently held that the “FAA . . . operate[s] to exclude from FAA coverage the contracts of employment of all classes of transportation workers, so long as they are engaged in interstate commerce,” overturning the District of New Jersey.<sup>133</sup> Additionally, the District of Minnesota recently held that rideshare drivers may qualify for the exemption even though they do not primarily move goods in interstate commerce.<sup>134</sup> Thus, although the application of the “goods-centric” framework to passenger-oriented workers is an ominous sign for rideshare drivers, the few courts to recently address the issue are split as to whether that framework should be applied in this new context.

Second, the requirement that a worker “engage” in interstate commerce by moving across state lines is a potential obstacle for rideshare drivers. For example, the District Court of Minnesota held that passenger-centric rideshare drivers could be exempted from the FAA, but would not exempt the individual plaintiff because he had never driven a passenger across state lines.<sup>135</sup> Instead, the court asked for additional briefing to determine whether the

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132. *Grice v. Uber Techs., Inc.*, No. CV 18-2995 (GJSx), 2020 WL 497487, at \*6 (C.D. Cal. Jan. 7, 2020); *Scaccia v. Uber Techs., Inc.*, No. 3:18-cv-00418, 2019 WL 2476811, at \*5 (S.D. Ohio June 13, 2019); *Gray v. Uber, Inc.*, No. 8:18-cv-3093-T-30SPF, 2019 WL 1785094, (M.D. Fla. Apr. 10, 2019); *Tyler v. Uber Techs., Inc.*, No. 19-3492, 2020 WL 5569948, at \*6 (D.D.C. Sept. 17, 2020); *Singh v. Uber Techs. Inc.*, 235 F. Supp. 3d 656, 671 (D.N.J. 2017), *vacated by Singh v. Uber Techs. Inc.*, 939 F.3d 210 (3d Cir. 2019).

133. *Singh*, 939 F.3d at 226.

134. *Sienkaniec v. Uber Techs., Inc.*, 401 F. Supp. 3d 870, 871–72 (D. Minn. 2019).

135. *Id.* at 872.

plaintiff was part of a class of workers who move across state lines.<sup>136</sup> This request revealed that the court's definition of transportation workers was still focused on the need to move across state lines. Relatedly, the Third Circuit remanded the question of whether the Uber driver-plaintiff was "engaged" in interstate commerce.<sup>137</sup> Finally, two separate district judges in the Northern District of California recently held that rideshare drivers are not part of a class of workers engaged in interstate commerce.<sup>138</sup> Therefore, the few courts to address this issue have largely been unwilling to find that rideshare drivers are engaged in interstate commerce as a class, and some courts have required individual rideshare drivers to move across state lines to qualify for the section 1 exemption.<sup>139</sup>

Given the dearth of cases involving rideshare drivers, courts have a unique opportunity to rethink the post-*Circuit City* conception of the transportation worker exemption. *New Prime's* holding that independent contractors qualify under the exemption removes one legal barrier for rideshare drivers. Yet, given the current doctrinal focus on the movement of goods across state lines, rideshare drivers still may not be exempt from the FAA. The doctrine applied to rideshare drivers is evolving, however, giving courts the opportunity to adapt the section 1 exemption analysis to match technological development.

The lower courts have largely declined to change the analytical framework in the aftermath of *Circuit City*. Not doing so, however, will create random demarcations between classes of workers. For example, the focus on goods means that a rideshare driver who regularly makes trips on interstate highways to drive passengers to airports is not a transportation worker. Meanwhile, for some courts, a last-mile delivery truck driver who makes purely local deliveries is a transportation worker.<sup>140</sup> These arbitrary and accidental boundaries will become unworkable as more rideshare drivers seek exemption from the FAA. Courts must recognize that the current

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136. *See id.* at 872–73. The court specified that the parties' briefing should focus on Uber's national operations and the number of trips that Uber drivers, as a whole, make across state lines. *Id.*

137. *Singh*, 939 F.3d at 226–27.

138. *Rogers v. Lyft, Inc.*, 452 F. Supp. 3d 904, 914–17 (N.D. Cal. 2020) (holding that, although section 1 is not limited to those workers who move goods in interstate commerce, Lyft drivers, as a class, are not engaged in interstate commerce and therefore do not qualify for the exemption); *Capriole v. Uber Techs., Inc.*, 460 F. Supp. 3d 919, 929–32 (N.D. Cal. 2020) (finding that Uber drivers are not engaged in interstate commerce because they rarely make interstate trips).

139. *But see* *Cunningham v. Lyft, Inc.*, 450 F. Supp. 3d 37, 46–47 (D. Mass. 2020) (holding that Lyft drivers, as a class, are engaged in commerce because "some of [their] passengers are in continuity of motion in interstate travel").

140. *See supra* Section II.A.3.

framework is unsuitable for the questions posed by rideshare drivers and take a broader approach to the section 1 exemption.

### III. DETERMINING THE HISTORIC ORDINARY MEANING OF THE SECTION 1 EXEMPTION

The two legal obstacles rideshare drivers still face in seeking exemption under the FAA—the “goods” requirement and the “interstate travel” requirement—can both be traced to the text of section 1. The Supreme Court in *Circuit City* reasoned that the statutory references to “seamen” and “railroad employees” limited the reach of the exemption.<sup>141</sup> Lower courts have concluded that, when the FAA was passed in 1925, seamen and railroad employees moved only goods and therefore contemporary workers must also move goods to qualify for the exemption.<sup>142</sup> The Court in *Circuit City* explained that the term “engaged in . . . commerce” in the residual clause should be narrowly construed.<sup>143</sup> Lower courts have determined that this language encompasses only workers who move across state lines.<sup>144</sup> In *New Prime*, Justice Gorsuch stressed that the FAA “should be interpreted as taking [its] ordinary meaning . . . [which is the] meaning at the time Congress enacted the statute.”<sup>145</sup> These narrow interpretations of the FAA are only correct if they are supported by the historical understanding of the statutory terms.

This Part undertakes a historical and textual analysis of the statute and argues that it does not support the current interpretation of the exemption. Rather, the legislative history and the historic ordinary understanding of the FAA’s terms demonstrate that the exemption embraces passenger-oriented transportation workers who are in the flow of commerce, even if they only move intrastate. Section III.A briefly discusses legislative history, which indicates that section 1 of the FAA should be construed more broadly. Section III.B analyzes the historic, ordinary meaning of the terms “seamen” and “railroad workers” to show that neither term limits the residual clause of the exemption to only those who move

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141. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001).

142. *E.g.*, *Kowalewski v. Samandarov*, 590 F. Supp. 2d 477, 484 (S.D.N.Y. 2008) (holding that passenger transportation was “too far removed” from the type of work undertaken by seamen and railroad workers when the FAA was passed). *But see Singh*, 939 F.3d at 222 (holding that passenger-centric transportation workers may qualify under the exemption).

143. *Circuit City*, 532 U.S. at 115.

144. *See, e.g.*, *supra* note 116 and accompanying text.

145. *New Prime v. Oliveira*, 139 S. Ct. 532, 539 (2019) (alterations in original) (quoting *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)).

goods. Section III.C asserts that the original understanding of the term “engaged in . . . interstate commerce” does not require that the worker move across state lines. Section III.D concludes that the inclusion of rideshare drivers in the exemption is a positive policy outcome.

#### A. Clues from the FAA’s Legislative History

Although there is very little legislative history addressing the section I exemption itself, the majority of the statements made by the FAA’s drafters indicate that the exemption should be construed more broadly than it is currently interpreted. In particular, the legislative history strongly suggests that the FAA was only meant to apply to contracts between merchants.<sup>146</sup> W.H.H. Piatt, the chairman of the ABA Committee on Commerce, Trade, and Commercial Law, explained that the FAA was “purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it.”<sup>147</sup> He added that the FAA only implicated “contract[s] between merchants one with another, buying and selling goods.”<sup>148</sup> Other witnesses described the bill solely with reference to disputes between businessmen.<sup>149</sup> One witness explained that an identical state bill was successful because “business men have adopted the practice of getting together and settling their business differences.”<sup>150</sup> Additionally, the New York arbitration law upon which the FAA was based was designed to promote arbitration between merchants.<sup>151</sup>

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146. See Leslie, *supra* note 23, at 305 (“The most important fact about the testimony, hearings, and reports leading up to congressional enactment of the FAA is that every witness, every Senator, and every Representative discussed one issue and one issue only: arbitration of contract disputes between merchants.”); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 106 (2006) (“The hearings make clear that the focus of the Act was merchant-to-merchant arbitrations.”).

147. 1923 Hearings at 9 (statement of W.H.H. Piatt).

148. *Id.* at 10.

149. See Leslie, *supra* note 23, at 306–07 (explaining that various witnesses provided examples which only pertained to disputes between businessmen and that the discussion of the bill focused on the commercial world); Moses, *supra* note 146, at 106 (“All of the examples given by [one witness] as to cases he knew about or cases he had personally been involved with through the New York Chamber of Commerce were cases between merchants.”).

150. *Arbitration of Interstate Commercial Disputes: Hearing on S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary*, 68th Cong. 31 (1924) [hereinafter 1924 Hearings] (statement of William J. Vance).

151. See Julius Henry Cohen, *Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147, 150–52 (1921) (analyzing the benefits of the New York law that pre-dated the FAA and explaining that “men of commercial expertise . . . know whether the contract is of a kind under which disputes can be better disposed of by trade committees or by twelve in-expert strangers to the trade”); see also Leslie, *supra* note 23, at 305–06.

Presumably because of this focus on arbitration between merchants, the bill's main support came from a number of merchant and trade associations.<sup>152</sup>

The little legislative history that is specific to the section 1 exemption suggests that the drafters intended to exclude all labor contracts from the FAA. As discussed in Part I, the FAA's drafters inserted the exemption as a response to criticism brought by the International Seamen's Union, among others.<sup>153</sup> Relatedly, the American Federation of Labor later explained to its members that it lifted its objection to the bill because the text added to section 1 "exempted labor from the provisions of the law."<sup>154</sup> In the hearings, Piatt explained that the bill was "not intended [to] be an act referring to labor disputes at all."<sup>155</sup>

Before the decision in *Circuit City*, the academic and judicial debate regarding the section 1 exemption concerned whether or not *all* employment contracts were exempted from the FAA.<sup>156</sup> In *Circuit City*, the Supreme Court held that the exemption applied only to transportation worker contracts.<sup>157</sup> The Court reasoned that, because the FAA was meant to overcome judicial hostility to arbitration, Congress intended the Act to apply broadly.<sup>158</sup> For the Court, a narrow construction of the exemption left very few arbitration agreements outside the FAA's scope, thereby vindicating Congress's intent.<sup>159</sup> Post-*Circuit City*, courts have sometimes declined to exempt rideshare drivers from the FAA, pointing to the Court's reasoning about the purpose of the statute.<sup>160</sup>

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152. See *id.* at 21–22 (listing the various groups supporting the bill).

153. See *supra* Section I.A.

154. Proceedings of the Forty-Fifth Annual Convention of the American Federation of Labor 52 (1925), cited in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 127 n.8 (2001) (Stevens, J., dissenting); see also Moses, *supra* note 146, at 147.

155. 1923 Hearings at 10 (statement of W.H.H. Piatt); see also *supra* note 43 (explaining that Charles Bernheimer, an ABA member and one of the leading proponents of the bill, believed that the provision eliminated employment contracts from the scope of the Act).

156. Compare Finkin, *supra* note 6, at 298–99 (arguing that Congress intended to exempt all employment contracts from the FAA), with William F. Kolakowski III, Note, *The Federal Arbitration Act and Individual Employment Contracts: A Better Means to an Equally Just End*, 93 MICH. L. REV. 2171, 2175 (1995) (arguing that most employment contracts should not be exempted from the FAA). Notably, Kolakowski did not argue that the legislative history of the FAA supported a narrow interpretation of the exemption. Instead, he did not draw any "firm conclusions . . . about congressional intent regarding the exception's scope" and contended that the text of the Act favors a narrow reading. Kolakowski, *supra*, at 2175. Some scholars still argue that the decision in *Circuit City* was inconsistent with the legislative history of the FAA. See Leslie, *supra* note 23, at 305; Moses, *supra* note 146, at 146.

157. 532 U.S. at 118–19.

158. *Id.*; see also *supra* Section I.A (explaining that the FAA was enacted in response to the judiciary's unwillingness to enforce arbitration agreements in court).

159. See *Circuit City*, 532 U.S. at 118–19.

160. E.g., *Grice v. Uber Techs., Inc.*, No. CV 18-2995 (GJSx), 2020 WL 497487, at \*6 (C.D. Cal. Jan. 7, 2020); see also *supra* Sections II.A.3, II.B (discussing the lower courts' inter-

The legislative history of the FAA suggests, however, that lower courts have narrowed the exemption *too far* and ignored the drafters' reservations regarding the inclusion of labor within the scope of the Act. At the very least, the legislative history indicates that the law was only meant to apply in specific circumstances (disputes between merchants) and certainly does not prohibit the courts from applying the exemption more broadly. Courts should not shy away from broadly construing the exemption within the confines of the *Circuit City* decision, if the language of the statute allows such a reading. The next two sections of this Note analyze the history and text of the exemption and conclude that the language supports a broader reading.

### B. Ordinary Meaning of "Seamen" and "Railroad Employees"

In *Circuit City*, the Supreme Court held that the statute's "explicit reference to 'seamen' and 'railroad employees'" limits the reach of the section 1 exemption.<sup>161</sup> Thus, looking at the definition of these terms is helpful in determining what "other class[es] of workers engaged in foreign or interstate commerce" look like.<sup>162</sup> The following discussion analyzes the statutory and judicially-proscribed definitions of these terms, and concludes that both include workers who move passengers. Rideshare drivers are therefore squarely within the boundaries demarcated by these terms.

#### 1. Definition of Seamen

The term "seamen" is not limited to only those who move goods. Because the FAA does not define "seamen," courts interpreting section 1 typically look to judicial interpretations of "seamen" from the Jones Act.<sup>163</sup> The Jones Act provides a cause of action for seamen "injured in the course of employment" against their employer.<sup>164</sup> The Jones Act does not provide a definition for "seamen" either but the Supreme Court has interpreted the term broadly to mean "a person . . . employed on board a vessel in furtherance of

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pretation of the exemption after *Circuit City* as applied to rideshare drivers and in the context of other employment relationships).

161. 532 U.S. at 114.

162. Federal Arbitration Act, 9 U.S.C. § 1.

163. *E.g.*, *Brown v. Nabors Offshore Corp.*, 339 F.3d 391, 393 (5th Cir. 2003); *Buckley v. Nabors Drilling USA Inc.*, 190 F. Supp. 2d 958, 964 n.2 (S.D. Tex. 2002); *Veliz v. Cintas Corp.*, No. C 03-1180 SBA, 2004 WL 2452851, at \*4 (N.D. Cal. Apr. 5, 2004).

164. 46 U.S.C. § 30104.

[the vessel's] purpose.”<sup>165</sup> Importantly, the Court has explained that this was the definition of seamen under maritime law when Congress passed the Jones Act in 1920—only five years before enacting the FAA.<sup>166</sup> Some courts have applied this definition of seamen to the FAA, exempting workers who were employed on vessels that did not move goods at all.<sup>167</sup>

Additionally, the historical understanding of seamen clearly contemplated those who worked on passenger ships. For example, the Shipping Commissioner's Act of 1872 (SCA) defined seamen to include “every person . . . who shall be employed or engaged to serve in any capacity on board” a ship covered by the SCA.<sup>168</sup> This broad definition is consistent with late nineteenth and early twentieth century judicial interpretations of the term. Maritime cases both before and around the time the FAA was passed held that firemen,<sup>169</sup> surgeons,<sup>170</sup> cooks,<sup>171</sup> musicians,<sup>172</sup> and bartenders<sup>173</sup> were all seamen.<sup>174</sup> None of these workers are involved in the movement of goods. For some of these workers, such as bartenders and musicians, their presence is only necessary on passenger vessels. Indeed, the test of whether one is a seaman has historically depended on (1) whether the vessel is in navigation, (2) the permanency of the person's connection to the vessel, and (3) whether the services rendered are maritime in nature.<sup>175</sup> These characteristics make no distinction between employment on a vessel that moves passengers and a vessel that moves goods. Thus, at the time the FAA was passed, the term “seamen” did not require that the worker participate in the movement of goods instead of passengers.

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165. *McDermott Int'l., Inc. v. Wilander*, 498 U.S. 337, 346 (1991).

166. *See id.* at 342.

167. *E.g., Brown*, 339 F.3d at 393 (holding that an employee on an offshore drilling rig was a seaman and therefore exempt from the FAA).

168. *See Veliz*, 2004 WL 2452851, at \*4 (quoting the Shipping Commissioners Act of 1872).

169. *E.g., Wilson v. The Ohio*, 30 F. Cas. 149, 150 (E.D. Pa. 1834) (No. 17,825) (holding that a fireman on a ship carrying passengers and merchandise could sue in admiralty for his wages).

170. *E.g., Hoof v. Pac. Am. Fisheries*, 284 F. 174, 176 (W.D. Wash. 1922).

171. *E.g., Allen v. Hallet*, 1 F. Cas. 472, 472–74 (S.D.N.Y. 1849) (No. 223).

172. *E.g., The Sea Lark*, 14 F.2d 201, 201–02 (W.D. Wash. 1926).

173. *E.g., The J.S. Warden*, 175 F. 314, 314 (S.D.N.Y. 1910).

174. Notably, in *New Prime*, the Supreme Court recognized these early definitions of seamen. There, defendant *New Prime* argued that when the FAA was passed in 1925, the terms “seamen” and “railroad employees” included only employees, and not independent contractors. *New Prime v. Oliveira*, 139 S. Ct. 532, 542 (2019). But Justice Gorsuch rejected this argument, explaining that the terms swept broadly as a historical matter, and cited to the various cases defining seamen to include basically any employee on board a vessel in navigation. *Id.* at 543–44.

175. 1 MARTIN J. NORRIS, *THE LAW OF SEAMEN* 6 (2d ed. 1962).

## 2. Definition of Railroad Employees

The understanding of the term “railroad employees” at the time the FAA was passed also included workers who transported both goods and passengers.<sup>176</sup> Although the FAA does not define the term railroad employees, other acts provide definitions that include both passenger and freight railroad workers.<sup>177</sup> For example, in 1898, Congress defined railroad employees in the Erdman Act as “all persons actually engaged in any capacity in train operation or train service of any description.”<sup>178</sup>

The Supreme Court’s historical discussion in *Circuit City* further indicates that railroad employees who transported passengers were exempt from the FAA. The Court speculated that railroad employees and seamen were exempted from the FAA because, at the time of the Act’s passage, there were statutory dispute resolution schemes already in place for those workers.<sup>179</sup> The Court cited the Transportation Act of 1920 and the Railway Labor Act of 1926 as examples of pre-existing federal railroad employee dispute resolution regulations.<sup>180</sup> At the time the FAA was passed, both of these laws covered “carriers” and defined this term to include “sleeping car compan[ies].”<sup>181</sup> Furthermore, the Railway Labor Act’s jurisdiction over “carriers” referenced railroads subject to the Interstate Commerce Act (ICA).<sup>182</sup> The ICA exercised jurisdiction over “common carriers engaged in . . . the transportation of passengers or property.”<sup>183</sup>

In short, the Transportation Act and the Railway Labor Act—the laws that created the dispute resolution mechanisms for railroad employees—covered workers who moved both passengers and goods.<sup>184</sup> Extending the Court’s logic that these dispute resolution mechanisms and the FAA were mutually exclusive, these passenger-

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176. See *Singh v. Uber Techs. Inc.*, 939 F.3d 210, 222 (3d Cir. 2019) (arguing that the historical understanding of the term railroad employee supports the conclusion that the definition of the term “transportation worker” extends to “workers who transport goods as well as those who transport passengers”).

177. See, e.g., *New Prime*, 139 S. Ct. at 543 (discussing the Railroad Labor Board’s broad construction of the term “employee” in the Transportation Act of 1920 and concluding that the Erdman Act “evinces an equally broad understanding of ‘railroad employees’”).

178. Act of June 1, 1898, § 370, 30 Stat. 424.

179. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001) (“It is reasonable to assume that Congress excluded ‘seamen’ and ‘railroad employees’ from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers.”)

180. See *id.*

181. Transportation Act of 1920, § 209, 41 Stat. 464; Railway Labor Act of 1926, § 1, 44 Stat. 577.

182. Railway Labor Act of 1926, § 1, 44 Stat. 577.

183. Interstate Commerce Act of 1887, § 104, 24 Stat. 379.

184. See *Singh v. Uber Techs. Inc.*, 939 F.3d 210, 221–22 (3d Cir. 2019).

centric employees must have been exempt from the FAA at the time the Act was passed.

The prevalence of passenger railroad transportation when the FAA was passed in 1925 further illustrates that Congress intended to exempt railroad employees who moved passengers. Indeed, in 1915, railroads carried over one million passengers with 55,000 passenger cars.<sup>185</sup> Over the course of the 1920s, the use of railroads declined with the increasing growth of automobile travel.<sup>186</sup> In 1929, however, there were still 20,000 passenger trains.<sup>187</sup> If the FAA drafters wanted to make a distinction between the two sets of workers, they would have made this clear. But they made no such indication. Instead, the definition of railroad employee at the time included both freight and passenger railroad workers.

Finally, more recent judicial interpretations of “railroad employees” include workers who move passengers. In 1936, Congress amended the Railway Labor Act to include “every common carrier by air engaged in interstate or foreign commerce.”<sup>188</sup> In response, multiple courts have interpreted the provision to apply to passenger airlines.<sup>189</sup>

### C. *Historic Understanding of “Engaged in . . . Interstate Commerce”*

In *Circuit City*, the Supreme Court held that the phrase “engaged in . . . interstate commerce” in section 1’s residual clause did not make the reach of the exemption coextensive with the reach of Congress’s commerce power.<sup>190</sup> Instead, the Court explained that workers “engaging” in commerce constitute a narrower category than those “affecting” or “involving” commerce.<sup>191</sup> Lower courts

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185. Paul Stephen Dempsey, *Transportation: A Legal History*, 30 *TRANSP. L.J.* 235, 275 (2003).

186. *Id.*

187. *Id.*

188. 45 U.S.C. § 181; *see also* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001).

189. *See, e.g.,* *Melanson v. United Air Lines, Inc.*, 931 F.2d 558 (9th Cir. 1991).

190. *Circuit City Stores, Inc.*, 532 U.S. at 115.

191. *Id.* Prior to *Circuit City*, there was some academic debate as to whether Congress intended any distinction between these statutory terms. *Compare* Finkin, *supra* note 6, at 294 n.55 (arguing that the drafters of the FAA could not have intended this distinction where the early Supreme Court cases did not recognize the distinction between “engaging in commerce” and “involving” or “affecting” commerce), *with* Kolakowski, *supra* note 156, at 2177–79 (arguing that the early Supreme Court cases indicated that the term “engaged” in commerce was narrower than the term “affecting” commerce). One scholar has recently reinvigorated this debate by arguing that Congress intended section 2’s “involving commerce” language to be narrower than the meaning eventually given to it by the Supreme Court. *See* O’Connor, *supra* note 49, at 857. For O’Connor, this narrower interpretation of “involving commerce” means that *Circuit City* “never needed to address whether the section 1 exemption applies to all contracts of employment because the only

have largely read *Circuit City* to indicate that the worker must move across state lines in order to qualify under the exemption.<sup>192</sup> But this interpretation is unnecessary and inconsistent with the historical interpretation of the phrase “engaged in . . . commerce,” which does not impose this requirement.

Historically, the term “engaged in . . . commerce” has embraced the entire stream of commerce, including intrastate movement.<sup>193</sup> Courts have interpreted federal statutes passed around the same time as the FAA that use the “engaged in commerce” language to embrace a stream-of-commerce conception of interstate commerce. For example, the Clayton Act,<sup>194</sup> passed in 1914, applies to the “flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer.”<sup>195</sup> In *Circuit City*, the Supreme Court approvingly cited the Clayton Act definition in arguing that “engaging” in commerce was narrower than “affecting” commerce.<sup>196</sup> If the Court intended to limit the exemption to only those workers who move across state lines, it would not have cited a definition of “engaged in commerce” that explicitly uses a flow of commerce understanding of the phrase. Moreover, as far back as 1870, the Supreme Court has held that purely intra-

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contracts of employment which could be covered by the FAA would be those of transportation workers.” *Id.* This Note does not argue that any of the Supreme Court’s prior arbitration jurisprudence was wrongly decided, so it takes the conclusion that “engaged in . . . commerce” is narrower than “affecting . . . commerce” or “involving commerce” as given.

192. See *supra* Section II.A.3.

193. See Brief of the Ass’n of Trial Lawyers of America as Amici Curiae in Support of the Respondent at 5, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (No. 99-1379) [hereinafter Brief of Ass’n of Trial Lawyers] (explaining that “several dozen” federal laws that use the term “engaged in commerce” and many others using the term “in commerce” “have been construed to apply to the entire stream of commerce, from the production of goods or services which pass through interstate channels until their distribution”). Recently, both the First Circuit and the Ninth Circuit have canvassed many of the same historical statutes discussed in the subsequent pages of this Note, concluding that the exemption encompassed delivery drivers that were in the stream of commerce even though the drivers only moved intrastate. See *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 18–26 (1st Cir. 2020); *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 909–15 (9th Cir. 2020).

194. See 15 U.S.C. § 13 (“It shall be unlawful for any person engaged in commerce . . .”), § 18 (“No person engaged in commerce . . .”).

195. *United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 283 (1975) (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974)). The Court has applied similar interpretations to the Federal Trade Commission Act (also passed in 1914) and the Lanham Act (passed in 1946), among others. See Brief of Ass’n of Trial Lawyers, *supra* note 193, at 6–8.

196. See *Circuit City*, 532 U.S. at 115–17. The Supreme Court also endorsed the flow of commerce understanding of the exemption in *Allied-Bruce*. *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 273 (1995) (holding that the words “involving commerce” are broader than simply activities in the flow of commerce) (citing *United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 276 (1975)).

state trips are in the flow of commerce as long as they are a component part of an interstate movement.<sup>197</sup>

Even early Supreme Court cases interpreting the Federal Employers Liability Act of 1908 (FELA), which is specific to the transportation industry, did not require that workers move across state lines. That Act makes “every common carrier by railroad while *engaging in commerce* . . . liable in damages to any person suffering injury while he is employed by such carrier in such commerce.”<sup>198</sup> The Court held that the statute covered, for example, a repairman on a bridge regularly used in interstate transportation<sup>199</sup> and a yard worker who inspected trains moving in interstate commerce.<sup>200</sup> Because these workers were related to interstate travel without ever themselves physically moving across state lines, the conception of “engaging” in interstate commerce adopted in these cases was broader than the conception now used by the majority of lower courts interpreting the FAA.<sup>201</sup>

Thus, the term “engaged in . . . commerce” should not impose the requirement that rideshare drivers must move across state lines to qualify for the exemption, but rather should encompass the entire stream of commerce. Rideshare drivers, as a class, are a component part of the flow of commerce because they frequently drive passengers to and from airports, railroad stations, bus stations, and other points of interstate travel.<sup>202</sup> In fact, rideshare drivers are like the last-mile delivery truck drivers—they mostly travel intrastate, but are a component part of the passenger’s interstate travel (ei-

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197. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 565 (1870) (holding that a ship that traveled entirely intrastate but that carried goods intended for, and imported from, other states was “engaged in commerce between the States”).

198. 45 U.S.C. § 51. Because the FELA’s statutory language is almost identical to the FAA’s, Congress probably had the FELA in mind when drafting the FAA. *See Tenney Eng’g, Inc. v. United Elec. Radio & Mach. Workers of Am.*, 207 F.2d 450, 453 (3d Cir. 1953); *Waithaka*, 966 F.3d at 19. Moreover, when interpreting the FELA after its enactment, courts needed to determine both whether the railroad-employer was engaged in interstate commerce and whether the injured employee was engaged in interstate commerce. *See Mondou v. New York, New Haven, & Hartford R.R. Co.*, 223 U.S. 1, 51–52 (1912) (“The present act . . . deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employees while engaged in such commerce.”). The second prong of this inquiry—focusing on the injured employee—overlaps with the FAA’s emphasis on workers engaged in interstate commerce thereby making the early FELA cases relevant in the FAA context. *Waithaka*, 966 F.3d at 19–20.

199. *Pederson v. Del. Lackawanna, & W. R.R. Co.*, 229 U.S. 146, 153 (1913).

200. *St. Louis, S.F. & Tex. Ry. Co. v. Seale*, 229 U.S. 156, 161 (1913).

201. *See supra* Section II.A.3 (explaining that most lower courts require that the worker move across state lines to qualify for the exemption).

202. For example, in 2019, rideshare platforms provided approximately eight million rideshare trips to or from Logan Airport in Boston. Rides to or from the airport comprised about sixteen percent of the total rides with rideshare companies in the Boston area and about nine percent of rides in all of Massachusetts. *Rideshare in Massachusetts: 2019 Data Report*, MASS.GOV, <https://tnc.sites.digital.mass.gov/#footnotemsg3> [<https://perma.cc/DN4F-BBS3>] (last visited Nov. 10, 2020).

ther at the beginning of the trip or the end) and are therefore in the stream of interstate commerce.

The Supreme Court has held that purely local passenger transportation can be in the flow of commerce in other contexts. For example, in *United States v. Capital Transit Co.*, the Court held that Interstate Commerce Commission (ICC) could regulate the fares of a bus line that carried passengers purely within the District of Columbia.<sup>203</sup> The Court reasoned that the bus line's operations were "an integral part of interstate movement" because government workers who lived in the District used the bus line either at the beginning or end of their travel to and from work in Virginia.<sup>204</sup>

Furthermore, flow of commerce jurisprudence has rejected efforts to isolate purely local rides when those rides are in the stream of interstate commerce. The Supreme Court has explained that:

The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress.<sup>205</sup>

Also, the FELA cases recognized that the stream of commerce could not be broken down into component parts.<sup>206</sup> Thus, the flow of commerce includes all the modes of transportation that combine to create interstate movement, even if those modes are purely intrastate.

Recently, some lower courts have reasoned that intrastate trips using ridesharing platforms to and from airports and other points of interstate travel were not in the flow of commerce by pointing to

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203. The Supreme Court heard two cases involving the ICC's jurisdiction over Capital Transit. See *United States v. Capital Transit Co.*, 325 U.S. 357 (1945) [hereinafter *Capital Transit I*]; *United States v. Capital Transit Co.*, 338 U.S. 286 (1949) (per curiam) [hereinafter *Capital Transit II*]. Initially, Capital Transit operated an intra-District of Columbia bus and streetcar route, which dropped passengers off at a bus stop in the central business district and was also one of four bus companies to offer passage from the District of Columbia to Virginia from that bus station. *Capital Transit I*, 325 U.S. at 359. After the Supreme Court upheld the ICC's jurisdiction under this arrangement, Capital Transit stopped operating the interstate route. See *Capital Transit II*, 338 U.S. at 288–89. But, in the second case, the Court found that the change, which meant that Capital Transit only operated purely intrastate routes, did not take the bus company's operations out of the stream of commerce. See *id.* at 290.

204. *Capital Transit II*, 338 U.S. at 290.

205. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 565 (1870).

206. See *Pederson v. Del. Lackawanna, & W. R.R. Co.*, 229 U.S. 146, 151–52 (1913) (rejecting an argument that "proceeds upon the assumption that interstate commerce by railroad can be separated into several elements, and the nature of each determined regardless of its relation to others"); see also Finkin, *supra* note 6, at 294 n.55.

the Supreme Court's decision in *United States v. Yellow Cab Co.*<sup>207</sup> In that case, decided in 1947, the Court held that transportation between two rail stations in Chicago was in the flow of commerce and covered under the Sherman Act, but taxicab transportation from hotels, businesses, and residences to rail stations was not in the flow of commerce.<sup>208</sup> Even at the time, however, this strict boundary separating intrastate movement between rail stations and intrastate movement to rail stations was arbitrary and lacked any coherent principle.<sup>209</sup>

Lower courts have drawn even more arbitrary lines. Some courts have held that taxi companies that offer pre-scheduled trips to the airport are in the flow of commerce, while others have held that companies that have a special arrangement with an airport, railroad station, or other mode of interstate travel are in interstate commerce.<sup>210</sup> When applied to rideshare drivers, this line of reasoning does not hold up because rideshare platforms can meet all of these distinctions. Indeed, it would be an impossible task for courts to inquire as to how many Uber rides are between railroad stations and airports, or how many Uber rides to the airport are pre-scheduled. And the task is further complicated by the fact that the FAA requires courts to analyze the class of workers to which the worker belongs, rather than the worker as an individual.<sup>211</sup>

Finally, there is room to expand the exemption beyond its current scope without making its reach coextensive with the full reach of Congress's commerce power. The category of workers that "affect" interstate commerce is much different than those workers who are in the flow of commerce.<sup>212</sup> Certain back-office employees

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207. See *Rogers v. Lyft, Inc.*, 452 F. Supp. 3d 904, 917 (N.D. Cal. 2020); *Capriole v. Uber Techs., Inc.*, 460 F. Supp. 3d 919, 931–32 (N.D. Cal. 2020).

208. *United States v. Yellow Cab Co.*, 332 U.S. 218, 228–34 (1947), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984).

209. See John A. Yeager, *Antitrust Law—“Incidental Effect” and Jurisdiction Under the Sherman Act*, 21 WAYNE L. REV. 965 (1975) (arguing that the *Yellow Cab* Court “arbitrarily” placed a boundary on the flow of commerce); Milton A. Kallis, *Local Conduct and the Sherman Act*, 1959 DUKE L.J. 236, 251–53 (explaining that the *Yellow Cab* Court “failed completely to analyze all of the issues,” making the decision “of uncertain meaning and questionable soundness”).

210. See, e.g., *Exec. Town & Country Servs., Inc. v. City of Atlanta*, 789 F.2d 1523, 1525–26 (11th Cir. 1986); *Packard v. Pittsburgh Transp. Co.*, 418 F.3d 246, 256–58 (3d Cir. 2005).

211. *Singh v. Uber Techs. Inc.*, 939 F.3d 210, 226 (3d Cir. 2019) (remanding the case to the district court to determine whether the plaintiff belongs to a class of workers engaged in interstate commerce).

212. For example, courts have held that when a good or passenger comes to rest, it is no longer in the flow of commerce. See *supra* text accompanying notes 125–27. Yet even an object or action that is completely “at rest,” and therefore not in the flow of commerce, can still “affect” commerce. See Kevin S. Anderson, *The Confusing World of Interstate Commerce and Jurisdiction Under the Sherman Act – A Look at the Development and Future of the Currently Deployed Jurisdictional Tests*, 21 VILL. L. REV. 721, 733 (1976).

at transportation companies may substantially affect commerce. But these employees are not also in the flow of commerce since, unlike the actual drivers at these companies, they do not actively participate in the stream of transportation that gets the passenger or goods from one point to another. Thus, the courts need not be worried about running afoul of *Circuit City*'s holding that only transportation workers are included in the exemption, because the flow of commerce understanding of the exemption would not reach back-office employees at transportation companies or workers outside of the transportation context.<sup>213</sup>

D. *Exclusion of Rideshare Drivers from the FAA as a Positive Policy Outcome*

As a policy matter, rideshare drivers should be exempt from arbitration because it can adversely affect workers and hinder regulatory schemes designed to protect their interests. To start, most employment contracts are contracts of adhesion, whereby employees have very little bargaining power to negotiate specific terms.<sup>214</sup> Arbitration agreements in standard-form contracts rob the courts of their role in enforcing statutory rights.<sup>215</sup> Indeed, the drafters of the FAA recognized that arbitration could be unfair in certain employment contracts where the parties do not have equal bargaining power. At the 1923 hearings on the proposed arbitration bill, Senator Walsh of Montana stated that:

The trouble about the matter is that a great many of these contracts that are entered into are really not voluntarily things at all . . . . You can take that or you can leave it . . . . It is the same with a good many contracts of employment. A man says "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by

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213. See *supra* Section II.A.3 (discussing the link between the requirement that the worker be in the transportation industry and their connection to interstate commerce).

214. Black's Law Dictionary defines adhesion contracts as "standard-form contract[s] prepared by one party, to be signed by another party in a weaker position . . . who adheres to the contract with little choice about the terms." *Adhesion Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019).

215. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1633 (2005).

the court, and has to have it tried before tribunal in which he has no confidence at all.<sup>216</sup>

Some scholars have suggested that the drafters of the FAA never meant to include adhesion contracts within the scope of the Act because of the unequal bargaining power between the two parties.<sup>217</sup> At the very least, the drafter's concerns should make courts more skeptical of enforcing arbitration clauses in situations where the bargaining power between the parties may be unequal, such as standard employment contracts used by ridesharing platforms.

Furthermore, for rideshare drivers, arbitration often comes with class action waivers precluding workers from banding together to sue the company in arbitration. For example, Uber includes an arbitration clause with a class action waiver in its employment contracts.<sup>218</sup> Mandating individual arbitration makes it more difficult for Uber's employees to bring suit when the value of their individual claims are small.<sup>219</sup> This effectively diminishes the opportunity for Uber drivers to use the public court system to hold Uber accountable and enforce the law.<sup>220</sup>

Perhaps because of the inequities discussed above, arbitration may have harmful consequences in individual cases. Arbitrators may be biased towards companies, like Uber or Lyft, who appear frequently before them.<sup>221</sup> Not surprisingly, employees fare much worse in arbitration than they do in litigation. Data from 2013 to

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216. 1923 Hearings at 9 (statement of W.H.H. Piatt). Julius Henry Cohen, another ABA member who was integral in advancing the FAA through Congress, expressed similar reservations about adhesion contracts during Congressional hearings in 1924. *See* 1924 Hearings at 15 (statement of Julius Henry Cohen).

217. *See* Moses, *supra* note 146, at 107. Modern-day proponents of arbitration clauses in standard form contracts point out that these provisions often allow employees to opt out of the arbitration agreement and, further, that employees need not enter into the contracts at all. *E.g.*, Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (with a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 201 (1998) (arguing that consumers still enter into standard form contracts voluntarily). Indeed, Uber has discontinued its use of mandatory arbitration for its drivers—the company now allows its employees to opt-out of arbitration within thirty days of signing their contract with the ridesharing company. *See* Capriole v. Uber Techs., Inc., 460 F. Supp. 3d 919, 923–26 (N.D. Cal. 2020). But even allowing employees to opt out of the agreement ignores the practical reality of the situation. It is unrealistic to assume that an individual rideshare driver will even read the contract he signs when he starts working for a ridesharing platform.

218. *See* Capriole, 460 F. Supp. 3d at 923–26 (explaining that Uber's arbitration agreement also includes a class action waiver).

219. *See generally* Jeremy McManus, Note, *A Motion to Compel Changes to Federal Arbitration Law: How to Remedy the Abuses Consumers Face when Arbitrating Disputes*, 37 B.C. J.L. & SOC. JUST. 177, 180–81 (2017) (discussing the unfairness of mandatory individual arbitration in the consumer context).

220. Sternlight, *supra* note 215, at 1633.

221. *See* McManus, *supra* note 219; Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL. J. 189, 208–13 (1997) (concluding that outcomes for employees are worse when the employer is a "repeat player" in arbitration).

2017 from the American Arbitration Association shows that employees were awarded monetary damages in only 1.8% of arbitration cases.<sup>222</sup> When employees do win, the monetary awards tend to be much lower than those given in litigation.<sup>223</sup>

These harmful byproducts of arbitration can also have a corrosive effect on federal regulatory schemes as a whole. In the employment context, litigation of individual disputes plays an important role in vindicating broader public policy goals.<sup>224</sup> Remediation of individual wrongs allows a plaintiff to act as a “private attorney general” by deterring potential wrongdoers, educating the public about their rights and obligations, creating precedent and developing uniform law, and shaping public values.<sup>225</sup> Private arbitration of disputes mitigates the effectiveness of individual litigation in three ways. First, arbitration is often confidential, meaning that only the parties to the dispute are aware of the ultimate outcomes.<sup>226</sup> This secrecy hampers general deterrence goals and does little to educate the public about the law.<sup>227</sup> Second, and relatedly, the development of precedent is hampered because arbitrators do not formulate legal rules and obligations applicable to other parties or the public as a whole.<sup>228</sup> Finally, public adjudication “imparts a sense of right and wrong, of acceptable and unacceptable conduct” in a way that private arbitration simply cannot.<sup>229</sup> Thus, arbitration between ridesharing companies and their drivers harms the individual workers involved, and can have broader negative effects on the public justice systems upon which statutory employment regulation schemes depend.

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222. Alexia Fernández Campbell & Alvin Chang, *There's a Good Chance You've Waived the Right to Sue Your Boss*, VOX (Sept. 7, 2018), <https://www.vox.com/2018/8/1/16992362/sexual-harassment-mandatory-arbitration> [<https://perma.cc/8HYE-XV4S>].

223. Alexander Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 7 (finding that median awards in employment litigation are around five to ten times greater than median awards in employment arbitration).

224. See Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 422 (1999) (“The achievement of the public goal depends upon the success of individuals in redressing their injury. And the individual’s interest in remediation gains legitimacy and support from the public policy goals of the statutes.”).

225. *Id.* at 426–27; see also William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 261 (1979) (arguing that the court system plays a critical role in formulating rules with future effect and that this function is stifled by private dispute resolution).

226. Moohr, *supra* note 224, at 431.

227. *Id.* at 432.

228. *Id.* at 435.

229. *Id.* at 438; see also Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (explaining that adjudication of disputes “explicates and gives force to the values embodied in authoritative texts such as the Constitution and statutes”).

## CONCLUSION

The FAA, as originally enacted, was a procedural statute applicable only in federal court. As the jurisprudence interpreting the FAA evolved, the scope of law widened. To accommodate this widening, courts have narrowly interpreted the section 1 exemption to only include those who (1) work in the transportation industry, (2) move goods, and (3) physically move across state lines. This interpretation excludes rideshare drivers who bring suit against their employers. The narrow conception of the exemption is inconsistent with the legislative history of the FAA, inapposite to the historical understanding of its text, and violative of the public policy reasons for statutorily regulating labor relationships. Courts should instead interpret the exemption to be congruent with the text and history of the FAA. This interpretation would include passenger centric drivers who are in the flow of commerce within the scope of section 1, exempting rideshare drivers from the FAA.

