HOW THE FEDERAL ARBITRATION ACT'S "TRANSPORTATION WORKERS EXEMPTION" PROTECTS LAST-MILE DELIVERY DRIVERS

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I. INTRODUCTION

Imagine you are a delivery driver for Amazon. You work long hours, delivering packages from warehouses to local customers. You collect checks that barely make ends meet. After several months, an attorney informs you that Amazon has withheld overtime pay in violation of the Fair Labor Standards Act. You join a class of over 5,000 similarly situated drivers seeking to recover their withheld wages. You later learn that a judge has thrown the lawsuit out of court. You are incredulous. Doesn't every person have a right to their day in court? You signed yours away, the attorney informs you, in your initial contract. The individual arbitration clause to which you are bound compels you to resolve your individual claim in a confidential proceeding before an Amazon-appointed arbitrator. Given your claim's low monetary value, your attorney can no longer represent you. Discouraged and unable to hire a lawyer, you drop your claim.

Last-mile delivery drivers, who transport goods from warehouses or production centers to final consumers, are indiscriminately subjected to individual forced arbitration clauses.[1] Yet, drivers' claims are uniquely ill-suited to individual arbitration due to their low individual monetary value and identical

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1. *See* Andrew Garin, Emilie Jackson, Dmitri Koustas & Alicia Miller, *The Evolution of Platform Gig Work, 2012-2021*, National Bureau of Economic Research (May 2023) https://www.nber.org/system/files/working_papers/w31273/w31273.pdf [https://perma.cc/3YK8-YXSM] (representing the gig workforce in 2021 as consisting of about 4.5 million transportation and delivery platform workers and about 500,000 non-delivery gig workers); Sudha Chandrasekharan, *How and Why Should Businesses Democratize the Last Mile?*, FORBES (Jan. 26, 2023, 9:45 AM), https://www.forbes.com/sites/forbesbusinesscouncil/2023/01/26/how-and-why-should-businesses-democratize-the-last-mile/ [https://perma.cc/MDC4-PD32].

theories of harm.[2] Such workers fight the enforcement of individual arbitration clauses in growing numbers, typically to no avail.[3] Yet the Federal Arbitration Act's "transportation workers exemption" may offer them some relief.[4] The exemption provides that federal courts cannot enforce arbitration agreements that bind "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[5] It applies uniformly to contracts of employment, regardless of whether the worker is an employee or independent contractor.[6]

The complication: there is a four-way circuit split regarding the scope of the exemption's protections. Using what I term the "flow of commerce test," the First and Ninth Circuits ask whether the claimants "transport goods or people within the flow of interstate commerce."[7] The Fifth, Seventh, and Eleventh Circuits apply what I call the "job description test," which considers "whether the interstate movement of goods is a central part of the class members' job description."[8] The Third and Eighth Circuits apply complex and indeterminate multifactor tests to decide whether the exemption applies to a class of workers.[9] The Supreme Court recently struck down the Second Circuit's "industry test," which inquired as to whether "the industry in which the individual works pegs its charges chiefly to the movement of goods or passengers, and the industry's predominant source of commercial revenue is generated by that movement."[10] It's unclear which test the Circuit will adopt on remand. Each test yields different results regarding whether and which last-mile delivery drivers qualify for the exemption's protections. While the courts continue to issue conflicting opinions and perpetuate uncertainty regarding drivers' rights, thousands of claims hang in the balance.

2. *See* Cheryl Wilson, *Mass Arbitration: How the Newest Frontier of Mandatory Arbitration Jurisprudence has Created a Brand New Private Enforcement Regime in the Gig Economy Era*, 69 U.C.L.A. L. REV. 372, 387 (2022).

3. *See, e.g.*, Erin Mulvaney, *DoorDash Ordered Into Individual Arbitration with 5,000 Workers*, BLOOMBERG L. NEWS (Feb. 10, 2020, 8:24 PM), https://news.bloomberglaw.com/daily-labor-report/doordash-ordered-into-individual-arbitration-with-5-000-workers [https://perma.cc/35EC-MNAY].

4. A minority of gig workers, independent contractors who engage in short-term work for multiple clients, are not last-mile delivery drivers; they perform non-transporting tasks like housekeeping and maintenance. Lauren Wingo, *What is a Gig Worker?*, U.S. CHAMBER OF COM. (Mar. 16, 2021), https://www.uschamber.com/co/
run/human-resources/what-is-a-gig-worker [https://perma.cc/T9KQ-NDDQ]. Although they suffer similar consequences of forced arbitration, their contracts are beyond the scope of this paper, which focuses specifically on the reach of the FAA transportation worker's exemption. *Id.* One cannot reasonably construe gig workers who do not transport goods or passengers as exempted "transportation workers." *Id.*

5. 9 U.S.C. § 1.

6. *See* New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019).

7. Waithaka v. Amazon.com, Inc., 966 F.3d 10, 13 (1d Cir. 2020), *cert. denied*, 141 S. Ct. 2794 (2021); *see also* Rittmann v. Amazon.com, Inc., 971 F.3d 904, 915 (9th Cir. 2020).

8. Wallace v. Grubhub Holdings, Inc., 970 F.3d 798, 801 (7th Cir. 2020).

9. *See* Singh v. Uber Tech. Inc., 939 F.3d 210, 227–28 (3d Cir. 2019); Lenz v. Yellow Transp., Inc., 431 F.3d 348, 352 (8th Cir. 2005).

10. Bissonnette v. LePage Bakeries Park St., LLC, 49 F.4th 655, 661 (2d Cir. 2022), *denied rehearing en banc*, 59 F.4th 594 (2d Cir. 2023), *cert. granted*, 144 S. Ct. 479 (2023); Bissonnette v. LePage Bakeries Park St., LLC, 601 U.S. 246 (2024).

The magnitude and urgency of legal conflict over the exemption necessitate a swift resolution of the circuit split. The Supreme Court's recent decision in *Bissonnette v. LePage Bakeries* focused on the narrow question of the "industry test's" validity.[11] However, the Court will continue to receive petitions that prompt it to definitively resolve the broader debate regarding the exemption's scope. It should seize such an opportunity and adopt an approach that is consistent with the statutory text, reflects the FAA's original scope, and accommodates the vast disparity in bargaining power between employers and gig workers.

Specifically, the Court should abide by the exemption's ordinary meaning at the time of its enactment,[12] and exclude from the FAA's reach contracts involving all workers.[13] If the Court declines and instead cites its precedent establishing the FAA's applicability to most employment disputes,[14] it should apply the *ejusdem generis* canon and hold that exempted "transportation workers" must relate to commerce in the same way in which "seamen" and "railroad employees" do.[15] Exploring the contemporary meanings of "seamen" and "railroad employees," the Court would find that, at the time of the FAA's passage, any person working on a vehicle transporting goods or passengers in foreign or interstate commerce qualified for the exemption's protections.[16] The Court should reinstate what I call the "vehicle test" and thereby restore the FAA's initial scope, avoid arbitration by coercion, and provide lower courts with clear guidance. Alternatively, Congress should pass legislation that either exempts all workplace disputes from the FAA's reach or updates the FAA's text to reflect contemporary working arrangements.

This Essay explores the circuit split and its potential resolution. Although some scholars have discussed the exemption's contested scope,[17] this Essay is the first to provide a fulsome, up-to-date account of the circuit split and to offer comprehensive judicial and legislative resolutions.[18] It is also the only piece, as

11. *See generally Bissonnette* (U.S. 2024), 601 U.S.

12. *See* Waithaka v. Amazon.com, Inc., 966 F.3d 10, 17 (1d Cir. 2020) (quoting New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019)) (noting that courts should interpret the exemption according to the "fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary [meaning] at the time Congress enacted the statute").

13. *See generally* Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, FLA. ST. U. L. REV. 99, 147 (2006) [hereinafter Moses, *Statutory Misconstruction*) (explaining that the FAA's drafters intended for the Act to exclude all employment contracts).

14. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991).

15. *See* Cir. City Stores v. Adams, 532 U.S. 105, 114 (2001).

16. *See infra* Subsection IV.A.2.

17. *See, e.g.*, Janel A. DeCurtis, *The Federal Arbitration Act's Section 1 Exemption and Last-Mile Delivery Drivers of the Gig Economy: Why a New Approach is Necessary*, 54 SUFFOLK U. L. REV. 521 (2021); Brett C. Donahe, *Full Speed Ahead: Compulsory Employment Arbitration and the Transportation Workers Exemption to the Federal Arbitration Act*, 70 DRAKE L. REV. 901 (2023).

18. *See, e.g.*, Donahe, *supra* note 17, at 953 (lamenting the absence of a feasible judicial or legislative resolution); DeCurtis, *supra* note 17, at 541–46 (concluding that "Looking to the Judiciary for Further Solutions Will Not Work," neglecting to suggest amending the FAA, and proposing that Congress craft a dispute resolution scheme for gig workers).

of publication, to discuss the exemption's future in light of the Supreme Court's recent decision in *Bissonnette*. The first section reviews the current state of mandatory employment arbitration and the implications for last-mile delivery drivers, a rapidly expanding segment of the workforce. The second section provides an overview of the history of employment arbitration. The third section analyzes the four-way circuit split. The fourth section discusses how the Court and Congress should establish a unified approach to the exemption's application.

II. BACKGROUND

A. What's at Stake: Consequences of Forced Arbitration for Last-Mile Delivery Drivers

Critics of employment arbitration have spilled an enormous amount of ink on the myriad problems of forced arbitration, ranging from concerns regarding consent to procedural disadvantages and a lack of public scrutiny.[19] This Section aims to provide only a brief overview of these criticisms, laying the groundwork for a subsequent discussion of how the Court or Congress could insulate last-mile delivery drivers from forced arbitration.

1. The Contemporary Controversy Regarding Forced Arbitration

As of 2018, almost 55% of the non-union private sector workforce was subject to "forced arbitration" clauses, which require workers to waive their rights to litigate claims of rights violations, such as harassment or wage theft, in court as a condition of employment.[20] Critics argue that most workers do not meaningfully consent to arbitration clauses, as workers are rarely aware that they have signed them or what they actually mean.[21] The clauses are typically written in complex legal jargon, buried in long documents, or hiding behind links to "Terms and Conditions."[22] Additionally, a 2015 study found that a majority of employees who were aware they signed arbitration clauses did not understand that the clauses precluded them from litigating their claims.[23]

Employer-designated arbitrators are not bound by rules of procedure or evidence.[24] Consequent procedural disadvantages reduce the number of total

19. *See, e.g.*, Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1635 (2005).

20. *See* Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. 1 (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/ [https://perma.cc/V2QA-LE9M] [hereinafter Colvin, *Growing Use*].

21. *See generally*, Sternlight, *supra* note 19.

22. *See id.* at 1648–49.

23. *See* Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, & Yuxiang Liu, *"Whimsy Little Contracts" With Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 4 (2015).

24. *See* Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECON. POL'Y INST. (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/ [https://perma.cc/BV4W-SWY7].

claims against employers and the median damage awards for employees who win.[25] These lesser damages awards and lower success rates mean that attorneys are less likely to take on arbitrations on a contingency basis.[26] Without legal representation, most workers cannot bring complex employment claims.[27] Arbitration also systematically disadvantages all employees by insulating employers from public scrutiny.[28] Information about arbitrations is typically confidential, barring parties' consent to public release.[29] Arbitration, therefore, hinders public awareness of rights violations in workplaces, undermining collective action by employees and removing an incentive for employers to fix the root causes of legal claims to avoid bad press.[30]

Employees subjected to arbitration often face an additional hurdle: an inability to aggregate their claims. Over 30% of employers that require mandatory arbitration include class action waivers in their arbitration agreements, precluding workers from addressing systemic rights violations through collective legal action.[31] Court and arbitration records demonstrate that most complainants drop their claims entirely when confronted with an enforceable class action waiver.[32]

2. Consequences for "Last-Mile" Delivery Drivers

The last decade witnessed a dramatic shift from traditional employment patterns to "alternative, contingent work arrangements."[33] The "gig economy" is a multibillion dollar economic sector that relies upon independent contractors to

25. *See* Alexander Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 9–10 (2011), (finding a 21.4% employee arbitration win rate, $36,500 median award amount, and $23,548 average award amount) [hereinafter Colvin, *Empirical Study*]. *See also* David Horton & Andrea Cann Chandrasekher, *Employment Arbitration after the Revolution*, 65 DEPAUL L. REV. 457, 496 (2016).

26. Alexander Colvin & Mark Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 69 ILR REV. 1019 (2015).

27. Colvin, *Growing Use*, *supra* note 20, at 10.

28. Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. LEGAL F. 205, 208–09 (2018).

29. Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L. J. 2804, 2853–54 (2015).

30. *See, e.g.*, Steven Davidoff Solomon, *Arbitration Clauses Let American Apparel Hide Misconduct*, THE N. Y. TIMES (July 15, 2014, 4:00 PM), https://archive.nytimes.com/dealbook.nytimes.com/2014/07/15/arbitration-clauses-let-american-apparel-hide-misconduct/ [https://perma.cc/PU8P-EUVM] (describing how mandatory confidential arbitration of sexual harassment claims facilitated a several-years-long campaign of sexual harassment by an American Apparel executive).

31. *See* Colvin, *Empirical Study*, *supra* note 25, at 2. One can analogize gig workers' engagement in collective legal action to unionization and collective bargaining, another method of mitigating the discrepancy in bargaining power between employers and workers. Since gig workers are classified as independent contractors, they do not enjoy the protection of labor laws. *See* Naomi B. Sunshine, *Labor Rights for Platform Workers: A Response to Social Change's 2016 Symposium*, 41 HARBINGER 241, 241–42 (2016).

32. *Id.*

33. *See* Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1536 (2016).

provide services.[34] Approximately 90% of these workers are "last-mile delivery drivers," who transport goods from warehouses, production centers, and restaurants to individual final consumers.[35] The number of these independent contractors has skyrocketed in recent years: between 2019 and 2021, the transportation and delivery platform workforce grew by 170% from 1.8 to 4.9 million people.[36] However, the legal implications of this growth are fiercely contested.[37] Indeed, "the digital economy has begun to collide with laws designed for the analog age, raising important questions in the process about the relationship between these gig-economy companies and their workers."[38]

Arbitration clauses are one such category of "laws designed for the analogue age."[39] Since their inception two decades ago, platforms reliant on last-mile delivery drivers have indiscriminately subjected those drivers to forced individual arbitration clauses to limit litigation costs as the ranks of drivers swelled.[40] Yet, drivers' claims are particularly ill-equipped to resolve through arbitration. They generally earn low wages; a 2022 analysis found that 29% of gig workers made less than their state's minimum wage and 64% made less than $15 an hour.[41] Gig workers' claims, therefore, "provide vast numbers of prospective plaintiffs with modest damage figures."[42] Low potential damages awards and the inability to aggregate claims depress the possibility that the attorney will accept claims on a contingency basis.[43]

Marginalized workers bear the brunt of forced arbitration's prevalence in the gig economy. Gig workers are disproportionately Hispanic, Black, and low-income.[44] Some claims against platforms concern wage theft under the Fair

34. *See id.* at 1513.

35. *See* Garin, Jackson, Koustas & Miller, *supra* note 1, at 36 (representing the gig workforce in 2021 as consisting of about 4.5 million transportation and delivery platform workers and about 500,000 non-delivery gig workers); Chandrasekharan, *supra* note 1.

36. *See* Juliana Kaplan & Madison Hoff, *The Number of People Doing Gig Work on Apps like Uber and DoorDash More than Doubled During the Pandemic*, BUS. INSIDER (July 20, 2023 12:06 PM), https://www.businessinsider.com/gig-economy-trends-workers-delivery-ride-hailing-apps-uber-doordash-2023-7#:~:text=Gig%20workers%20became%20younger%20and,risk%22%20than%20their%20older%20counterparts [https://perma.cc/95T7-DAQP**]**.

37. *See* Rachel Childers, *Arbitration Class Waivers, Independent Contractor Classification, and the Blockade of Workers' Rights in the Gig Economy*, 69 ALA. L. REV. 533, 534 (2017).

38. Capriole v. Uber Tech., Inc., 7 F.4th 854, 861 (9th Cir. 2021).

39. Noel D. Humphreys, *Why Every Employer Needs Arbitration Agreements with its Workers*, U.S. L. MAG. 6, 7 (Winter 2021/2022).

40. *See* Patrick Ouellette, *Mandatory Arbitration: A Time Bomb for the Gig Economy?*, PENN ST. L. ARB. L. REV. BLOG (Dec. 18, 2020), https://sites.psu.edu/arbitrationlawreview/2020/12/18/mandatory-arbitration-a-time-bomb-for-the-gig-economy/#_ftn2 [https://perma.cc/V23Y-M2LT]; *see also* Garden, *supra* note 28.

41. *See* Ben Zipperer, Celine McNicholas, Margaret Poydock, Daniel Schneider & Kristen Harkness, *National Survey of Gig Workers Paints a Picture of Poor Working Conditions, Low Pay*, ECON. POL'Y INST., https://files.epi.org/uploads/250647.pdf [https://perma.cc/V7FX-NDZT].

42. Wilson, *supra* note 2, at 387.

43. *See* Garden, *supra* note 28, at 205–06.

44. *See* Risa Gelles-Watnick & Monica Anderson, *Racial and Ethnic Differences Stand out in the U.S. Gig Workforce*," PEW RSCH. CTR. (Dec. 15, 2021) https://www.pewresearch.org/short-reads/2021/12/15/racial-and-ethnic-differences-stand-out-in-the-u-s-gig-workforce/ [https://perma.cc/RL3M-VXT9].

Labor Standards Act, which similarly affects all low-wage workers. However, other common claims disproportionately or only affect marginalized workers. For instance, forced arbitration agreements pertain to employment discrimination claims under Title VII of the Civil Rights Act of 1965, protections for disabled workers under the Americans with Disabilities Act, and disabled and pregnant workers' rights to medical and maternity leave under the Family and Medical Leave Act.[45] Those committed to economic justice, therefore, should appreciate the importance of ensuring that courts enforce employment arbitration clauses in a uniform and fair manner.

B. The History of Employment Arbitration

1. The FAA's Enactment

Congress adopted the Federal Arbitration Act ("FAA" or the "Act") in 1925 "as a response to the reluctance of some judges to enforce commercial arbitration agreements between merchants with relatively equal bargaining power."[46] The Act provides that arbitration provisions "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[47] It allows any party that entered into such an agreement to request a court order compelling the parties to proceed with arbitration.[48]

The Act also provides for constrained exceptions. For instance, it includes a provision specifying that its terms do not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[49] A court must determine whether this "transportation workers exemption" applies before ordering arbitration.[50] If it applies, a court lacks the authority to order arbitration.[51] Determining whether the exemption applies is not always a straightforward task. "Seamen" and "railroad employees" are discreet, enumerated categories; however, the Act itself offered no guidance regarding to whom the "residual exemption" ("any other class of workers engaged in foreign or interstate commerce") refers.[52]

There was no occasion to contest the scope of the "transportation workers exemption" until recent decades, as courts understood the FAA to be limited to commercial disputes until 1974. Beginning in 1974, however, the Supreme Court began expanding the FAA's reach: first, to international antitrust and securities

45. Sw. Airlines Co. v. Saxon, 596 U.S. 450, 453 (2022).

46. DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 70 (2015) (Ginsburg, J., dissenting) (citing Margaret Moses, *Arbitration Law: Who's in Charge?*, 40 SETON HALL L. REV. 147, 170–171 (2010) (hereafter Moses, *Arbitration Law*)).

47. 9 U.S.C. § 2.

48. *See id.* § 4.

49. *Id.* § 1.

50. *See* New Prime Inc. v. Oliveira, 139 S. Ct. 532, 537 (2019).

51. *See id.* at 544 (affirming the court of appeals' determination that it lacked the authority to order arbitration because the contract fell within the bounds of the exemption).

52. *See* 9 U.S.C. § 1.

disputes;[53] next to domestic securities claims;[54] and, finally, to employment disputes.[55] In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court determined that arbitration was a valid mechanism for resolving claims under the Age Discrimination in Employment Act (ADEA).[56] Reasoning that "the FAA's purpose was to place arbitration agreements on the same footing as other contracts," the Court held that arbitration agreements in the employment context are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[57]

2. Supreme Court Precedent Regarding the Exemption's Scope

The Supreme Court has addressed the scope of the "transportation workers exemption" three times.[58] First, in *Circuit City Stores, Inc. v. Adams* (2001), the Court held that the FAA covers most contracts of employment; Section 1 exempts only the contracts of workers "actually engaged in the movement of goods in interstate commerce."[59] It based this conclusion on three modes of analysis. First, it invoked the *ejusdem generis* interpretive canon, which instructs that, when a statute lists specific categories and then a general phrase, one should interpret the general phrase to "embrace only objects similar" to the specifically enumerated categories.[60] Since the "linkage" between "seamen" and "railroad employees" is their status as transportation workers, the "other workers" to which the exemption applies must also be transportation workers.[61] Second, "[t]he plain meaning of the words 'engaged in commerce' is narrower than other, more comprehensive jurisdictional phrases [that appear in other statutes] such as 'affecting commerce' and 'involving commerce.'"[62] Therefore, although Section 2 of the FAA provides that the Act "encompasses a wider range of transactions than those actually . . . 'within the flow of interstate commerce,'"[63] the "transportation workers exemption" does not cover all contracts governing employment activities subject to Congress' Commerce Clause powers.[64] Third,

53. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

54. *See* Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987).

55. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

56. *See id.* at 35.

57. *Id.*

58. The Court also addressed the exemption's applicability in *New Prime v. Oliveira*, concluding that it applies uniformly to employees and independent contractors. *See* New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019).

59. Cir. City Stores v. Adams, 532 U.S. 105, 112 (2001) (quoting Cole v. Burns Intern. Sec. Services, 105 F.3d 1465, 1471 (D.C. Cir. 1997).

60. *See id.* at 114.

61. *See id.*

62. *Id.* at 118 (quoting Gulf Oil Corp. v. Copp. Paving Co., Inc., 419 U.S. 186, 195 (1974), which notes that the "phrase 'engaged in commerce' 'appears to denote only persons or activities within the flow of interstate commerce.'").

63. Perry v. Thomas, 482 U.S. 483, 490 (1987) (citing Allied-Bruce Terminix Cos., 513 U.S. 265, 273 (1995)).

64. *See* Cir. City Stores v. Adams, 532 U.S. 105, 117–19 (2001).

the Court noted that, at the time of the FAA's enactment, specific federal legislation governed the resolution of disputes between seamen and railroad employees and their employers.[65] It concluded that Congress likely excluded only particular classes of workers from the FAA because "it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers."[66]

The Court revisited the residual exemption in *Southwest Airlines v. Saxon*, addressing what it means for a class of workers to be "engaged in commerce." It noted that "[t]he word 'workers' directs the interpreter's attention to 'the *performance* of work.'"[67] Therefore, a worker's "class" is "based on what she does at [the company], not what [the company] does generally."[68] "A class of workers need not necessarily "physically move goods or people across foreign or international boundaries" to be "actually engaged in the movement of goods in interstate commerce."[69] Accordingly, a class of "ramp supervisors" tasked with loading and unloading airplanes qualified for the exemption's protections.[70]

This past April, the Court again addressed the scope of the exemption, reviewing the Second Circuit's denial of the exemption's protections to independent contractors employed as truck drivers for a food production company.[71] It issued a narrow ruling, striking down the Second Circuit's "industry test," which required that a covered worker be employed in an industry that "pegs its charges chiefly to the movement of goods or passengers, and the industry's predominant source of commercial revenue is generated by that movement."[72] The Court refrained from otherwise addressing the exemption's scope.[73] It solely reaffirmed its assertion in *Circuit City*, reiterated in *Saxon,* that an exempted worker "must at least play a direct and 'necessary role in the free flow of goods' across borders."[74] It did not opine on the application of this principle to gig workers.

C. The Circuit Split

Despite the Court's extensive analysis of the "transportation workers exemption" in *Circuit City*, the opinion did not resolve disputes regarding the scope of the residual clause. To the contrary, "[i]n concluding that the residual clause does not encompass all employment contracts, but only those of transportation workers, the Court left it to the lower courts to assess which workers fall within that category. Doing so unavoidably requires the line-

65. *See id.*
66. *Id.*
67. Sw. Airlines Co. v. Saxon, 596 U.S. 450, 458–60 (quoting New Prime Inc. v. Oliveira, 139 S. Ct. 532, 541 (2019)).
68. *Id.* at 1790.
69. *Id.* at 1791.
70. *Id.* at 1783.
71. *See* Bissonnette v. LePage Bakeries Park St., LLC, 49 F.4th 655, 661 (2d Cir. 2022).
72. Bissonnette v. LePage Bakeries Park St., LLC, 49 F.4th 655, 661 (2d Cir. 2022).
73. Bissonnette v. LePage Bakeries Park St., LLC, 601 U.S. 246 (2024).
74. *Id.* (quoting *Saxon*, 596 U.S. at 458 and *Circuit City*, 532 U.S. at 121).

drawing that courts often do."[75] This "line-drawing" has resulted in a four-way circuit split. The First and Ninth Circuits inquire as to whether the workers in question "transport goods or people within the flow of interstate commerce," regardless of whether they actually cross state lines.[76] I term this the "flow of commerce test." The Fifth, Seventh, and Eleventh Circuits focus on "whether the interstate movement of goods is a central part of the class members' job description."[77] I call this the "job description test." The Third and Eighth Circuits employ complex, multi-factor tests to evaluate the relationship between a class of workers and "interstate and foreign commerce."[78] Lastly, the Second Circuit used what I term the "industry test," which granted a worker the exemption's protections only if "the industry in which the individual works pegs its charges chiefly to the movement of goods or passengers, and the industry's predominant source of commercial revenue is generated by that movement."[79] The U.S. Supreme Court rejected the "industry test" this past April in *Bissonnette v. LePage Bakeries*,[80] and the future of the Second Circuit's "transportation workers" exemption jurisprudence is unclear at this time. This section reviews the current circuit split, laying the groundwork for Part IV's discussion of potential solutions.

Circuit(s)	Test	Key Case(s)	Central Factor(s)	Inconsequential Factor(s)
First, Ninth	"Flow of Commerce"	*Capriole* (9th Cir. 2021); *In re Grice* (9th Cir. 2020); *Waithaka* (1d Cir. 2020); *Rittmann* (9th Cir. 2020)	• Whether the nature of the work primarily implicates inter- or intrastate commerce • The nature of the business or industry • Whether the position is "so closely related to interstate transportation as to be practically a part of it"	• The nature of the item transported • Whether workers themselves cross state lines
Fifth, Seventh, Eleventh	"Job Description"	*Hamrick* (11th Cir. 2021) *Wallace* (7th Cir. 2020); *Eastus* (5th Cir. 2020); *Hill* (11th Cir. 2005)	• Whether the interstate movement of goods is a central part of the job description • Whether the work is fundamentally interstate or international	• The nature of the item transported • Whether workers themselves cross state lines

75. Waithaka v. Amazon.com, Inc., 966 F.3d 10, 13 (1d Cir. 2020); *see also* Rittmann v. Amazon.com, Inc., 971 F.3d 904, 918 (9th Cir. 2020).

76. *Waithaka*, 966 F.3d at 13; *see also Rittmann*, 971 F.3d at 915 ("§ 1 exempts transportation workers who are engaged in the movement of goods in interstate commerce, even if they do not cross state lines.").

77. Wallace v. Grubhub Holdings, Inc., 970 F.3d 798, 801 (7th Cir. 2020).

78. Singh v. Uber Tech. Inc., 939 F.3d 210, 227–28 (3d Cir. 2019); Lenz v. Yellow Transp., Inc., 431 F.3d 348, 352 (8th Cir. 2005). The Fourth, Sixth, Tenth, and D.C. Circuits have all applied the exemption. *See, e.g.*, Amos v. Amazon Logistics, Inc., 74 F.4th 591 (4th Cir. 2023). However, none have developed general applicability tests.

79. Bissonnette v. LePage Bakeries Park St., LLC, 49 F.4th 655, 661 (2d Cir. 2022).

80. Bissonnette v. LePage Bakeries Park St., LLC, 601 U.S. 246 (2024).

Third, Eighth	Multifactor	*Singh* (3d Cir. 2019); *Lenz* (8th Cir. 2005); *Palcko* (3d Cir. 2004); *Tenney* (3d Cir. 1953)	• The industry in which the worker is engaged • The substance of the work • Whether the employee is directly responsible for transporting the goods in interstate commerce • Whether the employee handles goods that travel interstate • Whether the employee supervises employees who are transportation workers • Whether the employee is within a class of employees for which special arbitration already existed when Congress enacted the FAA • Whether the vehicle is vital to the commercial enterprise of the employer • Whether a strike by the employee would disrupt interstate commerce • The nexus that exists between the employee's job duties and the vehicle the employee uses	
Second (Rejected in *Bissonnette v. LePage Bakeries*, Apr. 12, 2024)	Industry	*Bissonnette* (2d Cir. 2023)	• Whether one works in the transportation industry	

1. The "Flow of Commerce Test" (First and Ninth Circuits)

The First and Ninth Circuits focus their inquiry on "the inherent nature of the work performed and whether the nature of the work primarily implicates inter- or intrastate commerce."[81] "The critical factor [is] not the nature of the item transported in interstate commerce (person or good), but the nature of the business or industry."[82] The First and Ninth Circuits note that the specific enumerated categories of covered workers, seamen and railroad employees, are defined by the industries in which they work; employing the *ejusdem generis*

81. Capriole v. Uber Tech., Inc., 7 F.4th 854, 862 (9th Cir. 2021).
82. *In re* Grice, 974 F.3d 950, 956 (9th Cir. 2020).

canon, courts should likewise define other classes of employees according to the industries in which they operate.[83]

These circuits explain that the test's coverage of all workers involved in the "flow of interstate commerce" abides by the Court's instruction that "we must interpret the Section 1 exemption according to the 'fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary [meaning] at the time Congress enacted the statute.'"[84] They note that statutes contemporaneous to the FAA pertaining to transportation workers did not cover only "those workers who themselves carried goods across state lines," but also "those who transported goods or passengers that were moving interstate" and "those who were not involved in transport themselves but were in positions 'so closely related to interstate transportation as to be practically a part of it.'"[85] Contemporary Supreme Court cases also "show that workers moving goods or people destined for, or coming from, other states–even if the workers were responsible only for an intrastate leg of that interstate journey–were understood to be 'engaged in interstate commerce' in 1925."[86]

The "flow of commerce" test compels the result that Amazon Flex package delivery drivers qualify for the exemption, regardless of the frequency at which each driver crosses state lines to make deliveries.[87] Amazon drivers' intrastate trips "are still a part of a continuous interstate transportation, and those drivers are engaged in interstate commerce for § 1's purposes."[88] In contrast, drivers for Uber or Lyft, whose work "only occasionally implicate[s] interstate commerce" due to the relative infrequency of interstate trips, do not categorically qualify for the exemption.[89]

2. The "Job Description Test" (Fifth, Seventh, and Eleventh Circuits)

In contrast to the First and Ninth Circuits' focus on a class of workers' industry and involvement in the "flow of commerce," the Fifth, Seventh, and Eleventh Circuits perseverate on the job description of the class of workers to which one belongs. Their inquiry focuses on "the worker's active engagement in the enterprise of moving goods across state lines."[90] To determine whether a class of workers is actively engaged, courts typically consider "whether the

83. Waithaka v. Amazon.com, Inc., 966 F.3d 10, 23 (1d Cir. 2020); Rittmann v. Amazon.com, Inc., 971 F.3d 904, 918 (9th Cir. 2020).

84. *Waithaka*, 966 F.3d at 17 (quoting New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019)).

85. *Id.* at 18–19 (internal citation marks omitted); *see also Rittmann*, 971 F.3d at 912–13.

86. *Waithaka*, 966 F.3d at 22.

87. *See id.* at 26; *Rittmann*, 971 F.3d at 915.

88. *Rittmann*, 971 F.3d at 914.

89. Capriole v. Uber Tech., Inc., 7 F.4th 854, 864 (9th Cir. 2021).

90. Wallace v. Grubhub Holdings, Inc., 970 F.3d 798, 802 (7th Cir. 2020); *see also* Eastus v. ISS Facility Servs., Inc., 960 F.3d 207, 209 (5th Cir. 2020) (abrogated by Sw. Airlines Co. v. Saxon, 596 U.S. 450 (2022)).

interstate movement of goods is a central part of the class members' job description."[91] "Incidental" engagement is insufficient.[92]

A member of a class engaged in interstate commerce qualifies for the exemption even if he does not personally travel interstate.[93] Indeed, "the question is 'not whether the *individual worker* actually engaged in interstate commerce, but whether the *class of workers* to which the complaining worker belonged engaged in interstate commerce.'"[94] "By the same token, someone whose occupation is not defined by its engagement in interstate commerce does not qualify for the exemption just because she occasionally performs that kind of work."[95]

These circuits hold that the "job description test" is most faithful to the FAA's text, as it mirrors Section 1's "focus on what a class of worker must be engaged in doing and not the goods."[96] In contrast, they explain, applying the exemption to drivers who make intrastate deliveries of goods from out-of-state exhibits a misplaced focus on the goods.[97] In addition, in a nod to the *ejusdem generis* canon, the courts contend that the relevant question is whether a worker's "job required her to engage 'in the movement of goods in interstate commerce in the same way [as] seamen and railroad workers.'"[98] Seamen and railroad employees' work is fundamentally interstate and international.[99] Therefore, those qualifying as "other employees" under Section 1 must also engage in fundamentally interstate or international work.[100] Accordingly, the Fifth Circuit declared that last-mile delivery drivers do not engage in interstate commerce because they perform only intrastate legs of the delivery journey.[101]

The Court's ruling in *Saxon v. Southwest Airlines* overturned the Fifth Circuit's application of the "job description test."[102] The Fifth Circuit had determined that an employee tasked with loading airplanes was not engaged in interstate commerce because loading a vehicle with goods just "prepares the goods for or removes them from transportation."[103] The Supreme Court reversed, holding that ramp supervisors qualified for the exemption's protections because they are "actively engaged" in transporting goods across borders.[104] The fact that they do not "physically move goods or people across foreign or international

91. *Wallace*, 970 F.3d at 801.

92. *See, e.g.*, Hill v. Rent-A-Center, 398 F.3d 1286, 1288–89 (11th Cir. 2005) (holding that an employee did not qualify for the exemption because his "interstate transportation activity" delivering goods to customers was "incidental" to his employment as an account manager for a furniture and appliance rental business").

93. *Wallace*, 970 F.3d at 800.

94. *Id.* (quoting Bacashihua v. U.S. Postal Serv., 859 F.2d 402, 405 (6th Cir. 1988) (emphasis added)).

95. *Id.* at 800 (citing *Hill*, 398 F.3d at 1289–90).

96. Hamrick v. Partsfleet, LLC, 1 F.4th 1337, 1349 (11th Cir. 2021).

97. *See id;* Wallace v. Grubhub Holdings, Inc., 970 F.3d 798, 802 (7th Cir. 2020).

98. *Wallace*, 970 F.3d at 802.

99. *See Hamrick*, 1 F.4th at 1351.

100. *See id.*

101. *See* Lopez v. Cintas Corp., 47 F.4th 428, 432–33 (5th Cir. 2022).

102. 142 S. Ct. 1783, 1787 (2022).

103. *See* Eastus v. ISS Facility Servs., Inc., 960 F.3d 207, 212 (5th Cir. 2020) (abrogated by Sw. Airlines Co. v. Saxon, 596 U.S. 450 (2022)).

104. *See Sw. Airlines*, 596 U.S. at 453.

boundaries" was not determinative.[105] Although the Court overturned the Fifth Circuit's application of the "job description test," it did not explicitly object to the test's main thrust, namely, that the exemption's application turns on whether a class of workers' job description involves "engage[ment] in . . . interstate commerce."[106] Therefore, a version of the "job description test" that incorporates a broader conception of "engagement in interstate commerce" could be consistent with the Court's holding.

3. The Multifactor Tests (Third and Eighth Circuits)

In contrast to the single-question inquiries pursued by other circuits, the Third and Eighth Circuits have developed complex, multifactor tests to determine whether a class of workers qualifies for the residual exemption. These circuits hold that actual "transporters of goods" are indisputably exempt under Section 1 but "[a] more difficult question arises when an employee. . . works for a transportation company but is not a truck driver or transporter of goods."[107] The factors each circuit considers differ; however, they agree that a court need not look solely to "what the contract of employment between the parties contemplates as determinative on the engage-in-interstate-commerce inquiry," nor "must its analysis hinge on any one particular factor, such as the local nature of the work."[108]

The Third Circuit provides that a court should consult, among other sources, "the contents of the parties' agreement(s), information regarding the industry in which the class of workers is engaged, information regarding the work performed by those workers, and various texts—*i.e.*, other laws, dictionaries, and documents—that discuss the parties and the work."[109] It considered, for instance, the case of a field supervisor for a shipping company tasked with monitoring truck drivers making interstate and international deliveries.[110] It examined the aforementioned sources and industry information and found that her direct supervision of package shipments made her work "so closely related [to interstate and foreign commerce] as to be in practical effect part of it."[111]

The Eighth Circuit likewise prescribes a "non-exclusive list of factors" to determine whether one is an exempt transportation worker.[112] However, as opposed to the Third Circuit test, the Eighth Circuit's factors concern specific facts, rather than sources, a court should examine. The factors are as follows:

105. *Id.*
106. *Id.*
107. Lenz v. Yellow Transp., Inc., 431 F.3d 348, 351 (8th Cir. 2005).
108. Singh v. Uber Tech. Inc., 939 F.3d 210, 227 (3d Cir. 2019).
109. *Id.* at 227–28.
110. *See* Palcko v. Airborne Express, Inc., 372 F.3d 588, 590 (3d Cir. 2004).
111. *Id.* at 593 (quoting Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., 207 F.2d 450, 452 (3d Cir. 1953)).
112. Lenz v. Yellow Transp., Inc., 431 F.3d 348, 352 (8th Cir. 2005).

> [F]irst, whether the employee works in the transportation industry; second, whether the employee is directly responsible for transporting the goods in interstate commerce; third, whether the employee handles goods that travel interstate; fourth, whether the employee supervises employees who are themselves transportation workers, such as truck drivers; fifth, whether, like seamen or railroad employees, the employee is within a class of employees for which special arbitration already existed when Congress enacted the FAA; sixth, whether the vehicle itself is vital to the commercial enterprise of the employer; seventh, whether a strike by the employee would disrupt interstate commerce; and eighth, the nexus that exists between the employee's job duties and the vehicle the employee uses in carrying out his duties (i.e., a truck driver whose only job is to deliver goods cannot perform his job without a truck).[113]

In the case from which the test originates, the Eighth Circuit considered a customer service representative for a truck delivery company. Although the representative worked for a transportation company, he did not fulfill the other seven factors indicating work "so closely related [to interstate and foreign commerce] as to be in practical effect part of it."[114] Accordingly, the Eighth Circuit denied him the exemption's protections.[115]

4. The "Industry" Test (Second Circuit)

As opposed to the previously described, longstanding tests, the Second Circuit's now-defunct "industry test" only dates back to 2022. In *Bissonnette v. LePage Bakeries*, the Second Circuit declared that working in the transportation industry is necessary, but not sufficient, for a worker to qualify for the exemption's protections.[116] "[A]n individual works in a transportation industry if the industry in which the individual works pegs its charges chiefly to the movement of goods or passengers, and the industry's predominant source of commercial revenue is generated by that movement."[117] The court concluded that independent contractors working as truck delivery drivers for a bakery production company did not qualify for the exemption's protections because its customers pay for the baked goods, but not for the transportation thereof.[118] This past April, the Supreme Court rejected this approach, noting that it had expressly declined to adopt an industry-focused approach in *Saxon* and that the exemption's text does not exhibit a focus on industry.[119] In addition, the Court expressed concern regarding the test's complexity, concluding that trial courts may need to conduct a resource-intensive "mini-trial" each time it must decide whether an industry's revenue model classifies it as a "transportation

113. *Id.*

114. *Id.* at 352–53; Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., 207 F.2d 450, 452 (3d Cir. 1953).

115. *See Lenz*, 431 F.3d at 353.

116. *See* Bissonnette v. LePage Bakeries Park St., LLC, 49 F.4th 655, 661 (2d Cir. 2022).

117. *Id.*

118. *See id.* at 661–62.

119. *Bissonnette* (U.S. 2024), at 911–12.

industry."[120] It is unclear which test of the exemption's applicability, either existing or new, the Second Circuit will adopt in *Bissonnette*'s wake.

III. ANALYSIS

The circuit split canvassed above creates uncertainty regarding last-mile delivery drivers' procedural rights and the likelihood of obtaining legal recourse. This uncertainty harms workers, employers, and the court system. It deters workers who should qualify for the exemption from asserting their procedural rights. It encourages workers who should not qualify for the exemption to squander their limited resources in doomed attempts to access the courts. It engages employers, arbitrators, and the courts in resource-intensive, unnecessary, and duplicative disputes over the scope of the residual exemption.

When prompted to rule on the exemption's application to gig workers this past term in *Bissonnette v. LePage Bakeries*, the Court opted not to resolve the circuit split, instead focusing on the narrow question of the "industry test's" validity.[121] However, the threat to workers' procedural rights and judicial inefficiency caused by the exemption's uncertain scope will compel interested parties to continue to request that the Court hear pertinent cases. The Court should seize such an opportunity and adopt a flexible, workable approach reflective of the FAA's statutory text and original construction. Namely, it should hold that a worker qualifies as an exempted "transportation worker" if his job involves working on a vehicle that transports goods or passengers traveling in interstate commerce. In addition, Congress should pass legislation that reverts to the original purpose of the FAA and protects the procedural rights of disempowered workers.

A. Legislative History: What Was the FAA's Original Intended Scope?

The legislative history demonstrates unequivocally that the FAA initially did not cover any disputes between parties with unequal bargaining power, including workers' claims against their employers.[122] The FAA is grounded in the "basic precept" that arbitration "is a matter of consent, not coercion."[123] When asked in a congressional hearing whether the Act might apply to parties with unequal bargaining power, W.H.H. Piatt, the chairman of the ABA committee that wrote the bill, responded, "I would not favor any kind of legislation that would permit forcing a man to sign that kind of [sic] a

120. *Id.* at 912.

121. *See generally* Bissonnette v. LePage Bakeries Park St., LLC, 601 U.S. 246 (2024).

122. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 22 (1991).

123. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681 (2010) (quoting Volt Information Sciences, Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) (internal quotation marks omitted).

contract."[124] Indeed, "it is the primary end of this contract that it is a contract between merchants with one another, buying and selling goods."[125]

Due to the drafters' concerns regarding bargaining power disparities, they excluded workers from the Act's coverage.[126] Immediately following the FAA's announcement, unions expressed a fear that the Act would force courts to enforce unfair contracts between employers and workers who were powerless to negotiate better terms.[127] In response, then-Secretary of Commerce Herbert Hoover wrote to the committee drafting the Act, highlighting unions' objection to the inclusion of workers' contracts and proposing an exemption therefor.[128] Subsequently, the drafters assured Congress and organized labor that the FAA would not apply to employment disputes. When asked about the AFL and Seaman's Union's opposition to the bill, Piatt replied, "It is not intended that this shall be an act referring to labor disputes, at all."[129] In 1925, most workers were understood not to be engaged in interstate commerce unless they were transportation workers.[130] Since the Act only applied to contracts in interstate commerce, the drafters and Congress considered most workers excluded from the Act's coverage.[131] Therefore, despite the exemption's relatively specific wording, the drafters intended for the "transportation workers exemption" to ensure that no workers, even those engaged in interstate commerce, would be subject to arbitration.[132]

As the FAA initially did not encompass any workplace disputes, the construction of the exemption most consistent with legislative history would exempt contracts involving all workers, including last-mile delivery drivers. Last-mile delivery drivers are an emblematic case of coercively subjecting disempowered parties to forced arbitration. Platforms subject drivers to adhesion contracts that include almost-identical mandatory arbitration clauses,[133] and labor law does not entitle them to bargain collectively for the clauses' removal.[134] Thus, any approach consistent with the FAA's original scope will exclude last-mile delivery drivers from its reach.

B. Original Statutory Meaning: Who Was "Engaged in Interstate

124. *Id.*

125. *Id.*

126. *See* Moses, *Arbitration Law*, *supra* note 46, at 148 (2010). *See also* Moses, *Statutory Misconstruction*, *supra* note 13, at 101–13.

127. *See, e.g.*, *Seamen Condemn Arbitration Bill*, N.Y. TIMES at 21 (Jan. 14, 1923), https://timesmachine.nytimes.com/timesmachine/1923/01/14/100818102.html?pageNumber=21 [https://perma.cc/X3AX-5MLB].

128. *See The Federal Arbitration Act: Hearing on S. 4213 and S. 4214 Before the S. Subcomm. of the Judiciary*, 67th Cong. 14 (1923) (letter of Secretary of Commerce Herbert Hoover).

129. *The Federal Arbitration Act: Hearing on S. 4213 and S. 4214 Before the S. Subcomm. of the Judiciary*, 67th Cong. 9 (1923).

130. *See* Cir. City Stores v. Adams, 532 U.S. 105, 136 (2001) (Souter, J., dissenting).

131. *See id.*

132. Tamar Meshel, *If Apps Be the Food of the Future, Arbitrate On!: Mobile-Based Ride Sharing, Transportation Workers, and Interstate Commerce*, 15 VA. L. & BUS. REV. 1, 36 (2010).

133. *See* Ouellette, *supra* note 40.

134. *See* Naomi B. Sunshine, *Labor Rights for Platform Workers: A Response to Social Change's 2016 Symposium*, 41 HARBINGER 241, 241–42 (2016).

Commerce?"

The exemption's original meaning demonstrates that, at the time of the FAA's enactment, neither the ownership of the vehicle a worker-operated nor whether one crossed state lines determined whether one was an exempted "transportation worker." As a reminder, the "transportation workers exemption" provides that federal courts cannot enforce arbitration agreements that bind "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[135] At the time of the FAA's enactment, to be "engaged" in interstate commerce meant to be "occupied," "employed," or "involved" in it.[136] "Commerce" meant "the transportation of . . . goods, both by land and by sea."[137] In sum, to be "engaged in foreign or interstate commerce" meant to be "occupied," "employed," or "involved" in the foreign or interstate transportation of. . .goods." Additionally, as the Court has noted, the exemption's language is concerned with "what [a worker] does, not what [their employing company] does generally."[138] Therefore, both the exemption's plain language and precedent indicate that neither the industry in which one works, nor how that industry pegs its charges or generates its revenue, bears on whether one is an exempted "transportation worker."

In accordance with the *ejusdem generis* canon, for one to qualify for the residual exemption's protections, one must be engaged in commerce in the same manner as "seamen" and "railroad employees."[139] In 1925, "seamen" and "railroad employees" were defined by the setting and nature of their work, not by whether they worked in the transportation industry.[140] "Seamen" included "any person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship."[141] Other contemporary statutes governing seamen applied to all those working on ships, regardless of whether they were employed in the transportation industry.[142]

"Railroad employees" is, as the Court has acknowledged, a more ambiguous term.[143] The only apparent contemporary statute that used the term, the Railway Labor Act of 1926, defined "railroad employee" as "every person in the service of a carrier" by railroad.[144] Black's Law Dictionary affirms the

135. 9 U.S.C. § 1.

136. Sw. Airlines Co. v. Saxon, 596 U.S. 450 (2022) (quoting *Commerce*, BLACK'S LAW DICTIONARY 220 (2d ed. 1910) and other dictionaries contemporary with the FAA).

137. *Id.*

138. *Id.*

139. *See* Cir. City Stores v. Adams, 532 U.S. 105, 114 (2001).

140. *See* Sw. Airlines Co. v. Saxon, 596 U.S. 450 (2022).

141. *Id.* (quoting *Seamen*, WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1906 (1922)); *see also, e.g., id.* (quoting BLACK'S LAW DICTIONARY 1063 (seamen: "[s]ailors; mariners; persons whose business is navigating ships")).

142. *See, e.g.*, the Merchant Marine (Jones) Act of 1920, 41 Stat. 66-261 (defining seamen as all workers "employed on board a vessel in furtherance of its purpose"); The Shipping Commissioners Act of 1872, ch. 322, 17 Stat. 262 (defining seamen as "every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board" any American-owned ship).

143. *See* Sw. Airlines Co. v. Saxon, 596 U.S. 450 (2022).

144. Railway Labor Act of 1926, ch. 347, § 1, 44 Stat. 577.

ordinary meaning of "railroad employee:" any person working on the railroad.[145] Although there is limited historical evidence regarding the existence of railroad employees who worked outside of the transportation industry, there were proprietary railroads in the early twentieth century, typically used by commodities manufacturers to transport goods around their property or link into a larger railroad.[146] The existence of these proprietary railroads indicates that, even if most railroad employees worked for the railways themselves, employment in the transportation industry has never been necessary to qualify one as a "railroad employee."

Contemporary precedent underscores that, in 1925, neither one's industry of employment nor the ownership of the vehicles used in the course of one's work informed the analysis of whether one was an exempted "transportation worker."[147] The Court reinforced the notion that a transaction could constitute foreign or interstate commerce, regardless of whether sellers charged for shipping.[148] Precedent likewise affirms that the ownership of vehicles used to transport goods or passengers did not affect the analysis of whether a transaction constituted foreign or interstate commerce.[149] The Court also consistently dismissed arguments that a transaction ceased to be interstate commerce if a worker performed only intrastate legs of the journey[150] or transported goods just barely over state lines.[151] In sum, any approach consistent with the FAA's original meaning and contemporary precedent will not consider a worker's industry, the interstate or intrastate nature of the worker's journeys, or the ownership of the vehicles used to transport goods or passengers when determining whether one is an exempted "transportation worker."

145. BLACK'S LAW DICTIONARY 989 (defining "employee" as a "person employed" and "railroad" as a "road or way on which iron or steel rails are laid for wheels to run on, for the conveyance of heavy loads").

146. *See* Aluminum Co. of Am. v. Ramsey, 222 U.S. 251, 254 (1911) (involving railway "maintained" by mining company); Brief for Petitioners, Bissonnette v. LePage Bakeries, (No. 23-512023), 2023 WL 6319660, at 29–30 (citing state court cases involving railroads owned by mining, manufacturing, and lumber companies).

147. *See* Bissonnette v. LePage Bakeries Park St., LLC, 49 F.4th 655, 661 (2022).

148. *See, e.g.*, Holder v. Aultman, Miller & Co., 169 U.S. 81, 82–87 (1898) (agricultural machine was "an interstate commerce business," even though it did not charge for shipping or storage); Kirmeyer v. Kansas, 236 U.S. 568, 571 (1915) (beer seller transporting goods engaged in interstate commerce, even though he did not charge for shipping).

149. *See, e.g.*, United States v. Simpson, 252 U.S. 465, 466 (1920) (federal law prohibiting transporting liquor in interstate commerce applied to man transporting whiskey across state lines in his own car); Wagner v. City of Covington, 251 U.S. 95, 99–101 (1919) (soft drink manufacturers engaged in interstate commerce when transporting goods in their own vehicle).

150. *See, e.g.*, Texas & N.O.R. Co. v. Sabine Tram Co., 227 U.S. 111, 122–30 (intrastate leg of international lumber delivery constituted interstate commerce); Fed. Trade Comm'n v. Pacific States Paper Trade Ass'n, 273 U.S. 52, 60–61 (goods sent from one state to another "are in interstate commerce until delivered to the purchaser"); Rearick v. Pennsylvania, 203 U.S. 507, 512–13 (1906) (worker employed by Ohio-based broom manufacturer engaged in interstate commerce when delivering merchandise shipped to Pennsylvania to in-state customers).

151. *See, e.g.*, Eichholz v. Pub. Serv. Comm'n of Mo., 306 U.S. 268, 274 (1939) (hauling merchandise just over the Kansas/Missouri state line "directly affected interstate commerce"); Caskey Baking Co. v. Virginia, 313 U.S. 117, 882–83 (1941) (transportation of bread across the Virginia-West Virginia state line was interstate commerce).

IV. RECOMMENDATIONS

A. A Judicial Resolution: How Should the Court Rule in Bissonnette?

Given the uncertainty and inefficiency caused by the circuit split, it is imperative that the Court seize a timely opportunity to definitively resolve the split in a manner consistent with the FAA's original scope, statutory text, and the Court's precedents. The Court's approach must also properly balance the interests of workers and employers, give lower courts clear guidance regarding the procedural rights of last-mile delivery drivers, and reflect Section 1's intended function: exempting all workplace contractual disputes from the FAA.[152] Now, too, it should exempt the contracts of all workers otherwise subject to FAA enforcement. This would preserve the original scope of the FAA, namely, to commercial disputes between merchants. The bright-line rule would provide clear guidance to drivers, employers, and lower courts. It would also account for the FAA drafters' concerns regarding the abuse of bargaining power disparities.

If, as is more likely, the Court cites *stare decisis* and declines to hold that no employment contracts fall within the FAA's scope,[153] it should apply the *ejusdem generis* canon as it did in *Circuit City*. It would, accordingly, find that "transportation workers" engage in foreign or interstate commerce in the same way as do "seamen" and "railroad employees" when they work on vehicles transporting goods in foreign or interstate commerce. This "vehicle test" would include all people working on vehicles that transport goods traveling in interstate commerce, no matter the industries in which they work, the ownership of the vehicles they operate, or whether they actually move interstate. It would include both workers who travel on vehicles, like drivers, and those who prepare vehicles for transportation, like mechanics and the "ramp supervisor" in *Saxon v. Southwest Airlines*.[154] It would grant most, but not all, last-mile delivery drivers the protections of the residual exemption. Limiting the scope of covered workers to those transporting goods that travel in foreign or interstate commerce would mean, for instance, that a last-mile delivery driver hired by a restaurant to make in-state deliveries would not qualify for the exemption, but an Amazon Flex driver that makes solely in-state deliveries from warehouses to customers would.

Concerns that implementing the "vehicle test" would exceed Congress' Commerce Clause power are unfounded. Section 2 specifies that the FAA only applies to contracts related to transactions in foreign or interstate commerce.[155] Therefore, if the employment relationship between a platform and a worker making intrastate deliveries does not implicate foreign or interstate commerce, it

152. *See infra* Sections IV.A. and IV.B.

153. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991) (holding that all arbitration agreements in the employment context are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract").

154. *See supra* Part I; *see also* Sw. Airlines Co. v. Saxon, 596 U.S. 450, 453–54 (2022).

155. *See* 9 U.S.C. § 2.

is otherwise exempted from the FAA. Additionally, opponents may protest that the "vehicle test" exhibits a misplaced focus on the goods being transported, rather than the worker's job description.[156] However, this concern has no basis in the legislative history or statutory text.

In fact, the "vehicle test" is similar to the "job description test" in that it focuses on the substance of a worker's *job*, even if it strays from the job *description*. The tests differ in that the "job description test" requires courts to establish "whether the interstate movement of goods is a central part of the class members' job description,"[157] an abstract determination that involves designating the class of workers to which one belongs and concluding whether one's work is fundamentally interstate or international.[158] The test's complexity leads to indeterminacy: in the most recent Supreme Court case regarding the scope of the residual exemption, the Court overturned the Fifth Circuit's application of the "job description test," concluding that the Fifth Circuit mistakenly determined that ramp supervisors were a class of workers that did not directly engage in interstate commerce.[159]

The "vehicle test" also resembles the "flow of commerce test" in that both focus on a worker's engagement in the "transport[ation of] goods or people within the flow of interstate commerce."[160] Both tests also insist that workers qualify for the exemption, regardless of whether they perform only intrastate legs of the transportation journey.[161] However, the tests differ in that the "flow of commerce test" consists of an abstract inquiry regarding "the inherent nature of the work performed and whether the nature of the work primarily implicates inter- or intrastate commerce."[162] The "vehicle test," in contrast, requires no such indeterminate analysis. A court need only determine whether one's job involves working on a vehicle that transports goods or passengers in interstate commerce.

Although the "vehicle test" ensures more consistent outcomes than existing tests, line-drawing issues may arise as courts attempt to determine how much of one's job must involve working on a vehicle transporting goods or passengers for one to qualify as a "transportation worker." This issue will likely not arise in the near future. Current disputes over the exemption's scope typically concern last-mile delivery drivers, who spend virtually all of their working hours driving goods from warehouses to final consumers. However, when confronted with this question, courts should recognize that it may be difficult for those in nontraditional, unpredictable jobs to accurately quantify the number or proportion of working hours they spend on a vehicle transporting goods or passengers. Therefore, rather than establish a minimum number or proportion of

156. *See, e.g.*, Hamrick v. Partsfleet, LLC, 1 F.4th 1337, 1349 (11th Cir. 2021).

157. Wallace v. Grubhub Holdings, Inc., 970 F.3d 798, 802 (7th Cir. 2020).

158. *Id.* at 800 (quoting Bacashihua v. U.S. Postal Serv., 859 F.2d 402, 405 (6th Cir. 1988)).

159. *See* Sw. Airlines Co. v. Saxon, 596 U.S. 450, 460–61 (2022).

160. Waithaka v. Amazon.com, Inc., 966 F.3d 10, 13 (1d Cir. 2020); *see also* Rittmann v. Amazon.com, Inc., 971 F.3d 904, 915 (9th Cir. 2020).

161. *Waithaka*, 966 F.3d at 22.

162. Capriole v. Uber Tech., Inc., 7 F.4th 854, 862 (9th Cir. 2021).

working hours that must occur on a vehicle, courts should just require that working on a goods-transporting vehicle be a mandatory aspect of one's job.

B. A Congressional Resolution: Clarifying the Scope of the Exemption and the FAA

Alternatively, a legislative solution would bypass the statutory interpretation issues entirely. Congress' option most true to the FAA's original purpose is to pass the Forced Arbitration Injustice Repeal (FAIR) Act. This proposed legislation, which is currently before both houses of Congress, would prohibit courts from enforcing agreements that require the arbitration of employment, consumer, or civil rights claims against corporations.[163] Although the FAIR Act passed the House in 2019 and 2021,[164] it is unlikely to fare well before the 118th Congress, as past votes have split along partisan lines.[165]

A more conservative and politically viable version of the FAIR Act would exempt a subset of workers' claims against their employers. The Ending of Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFASASHA), enacted with bipartisan support in March 2022,[166] is an instructive model. EFASASHA amended the FAA to proscribe the enforcement of mandatory arbitration agreements and class action waivers in cases related to sexual assault and sexual harassment disputes.[167] Congress should consider enacting a similarly structured law, which exempts from arbitration types of employment claims that are likely to involve extreme bargaining power disparities. For instance, the law could proscribe mandatory arbitration in cases related to allegations of discrimination and denials of disability accommodations. It could sweep more broadly, covering cases involving claims of wage theft or worker misclassification. The only limitation is Congress' political will.

A more restrained legislative approach would involve amending the FAA to define "transportation worker" in a manner consistent with modern employment patterns. Adopting a broad definition of "transportation workers" would serve the goals of remedying bargaining power disparities and reorienting the FAA to its initial purpose. Devising a workable definition that will remain useful as the structure of the workforce evolves requires balancing the need for specificity, to ensure clear guidance and consistent outcomes, with the flexibility to adapt to new working arrangements. This definition could mirror the "vehicle test" and include all those working on vehicles that transport goods traveling in interstate commerce, no matter the industry in which one works, the ownership

163. *See* Forced Arbitration Injustice Repeal ("FAIR") Act of 2022, H.R. 963, 117th Congress § 2 (2022).

164. *See* FAIR Act, H.R. 1423, 116th Congress (2019); FAIR Act of 2022, H.R. 1374, 117th Congress (2021).

165. *See supra* note 164.

166. *See* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, S. 2342, 117th Cong. (2021); Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, H.R 4445, 117th Cong. (2021).

167. *See* Ending of Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. Law 117-90, 117th Congress § 402(a) (Mar. 3, 2022).

of the vehicles one operates, or whether one performs interstate legs of the transportation journey.

VI. CONCLUSION

"[T]he digital economy has begun to collide with laws [like the FAA] designed for the analog age," creating uncertainty about last-mile delivery drivers' procedural rights.[168] However, the FAA set on this collision course long before the advent of the gig economy. Indeed, the Act's fifty-year-long steady expansion to encompass disputes regardless of subject matter or bargaining power disparities extended the FAA far beyond its initial intended scope, raising critical questions of consent and power. The gig workforce's novelty and rapid growth underscores the urgency of determining whether and which workers are entitled to litigate their grievances in court. Clarifying the proper scope of the "transportation workers exemption" is a necessary first step to ensure that last-mile delivery drivers are entitled to uniform procedural protections, regardless of the jurisdictions in which they file. Resolving the issue conclusively requires a comprehensive solution that either accepts the endpoint of the overgrown FAA–that powerful parties may effectively foreclose the disempowered from accessing the courts–or redeems the FAA's original intended scope and purpose–that is, permitting commercial parties with commensurate bargaining power to opt for an alternate method of dispute resolution. This article has advocated for the latter, with the interests of disempowered workers in mind. However, the former, while arguably less just or equitable, would prove similarly conclusive.

168. *See* Capriole v. Uber Tech., Inc., 7 F.4th 854, 861 (9th Cir. 2021).