UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPEAL NOS. 20-15689, 20-15700

JOHN ROGERS, AMIR EBADAT, and HANY FARAG,
individually and on behalf of others similarly situated,
Plaintiffs - Appellants/Cross-Appellees

v.

LYFT INC.,

Defendant - Appellee/Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 3:20-cv-01938-VC
The Honorable Vince Chhabria

FIRST BRIEF ON CROSS-APPEAL OF PLAINTIFFS-APPELLANTS/CROSS-APPELLEES

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and Local Rule 34(a), Plaintiff-Appellants respectfully request oral argument. The issue in this case is extremely important and will impact many pending cases, and Appellants believe that oral argument will greatly assist the Court.

INTRODUCTION

Several courts, including the District Court below, have now recognized that Defendant-Appellee Lyft, Inc. is violating the California Labor Code by misclassifying its drivers as independent contractors.[1] Plaintiffs brought this case, along with an emergency motion for preliminary injunction, seeking an order that Lyft be required to classify its drivers properly as employees, including providing them with sick pay during the global COVID-19 pandemic. The District Court denied the injunction and granted Lyft's motion to compel arbitration, thereby dismissing the case. Plaintiffs appealed both aspects of the Court's ruling. While this appeal was pending (and since Plaintiffs filed their original opening brief in this Court),

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[1] See Rogers v. Lyft, ER6 ("While the status of Lyft drivers was previously uncertain, it is now clear that drivers for companies like Lyft must be classified as employees."); People of the State of California v. Uber Techs. Inc., et al., Case No. CGC-20-584402 (Cal. Sup. Ct. Aug. 10, 2020) (ordering Uber and Lyft to reclassify their drivers as employees), stayed pending appeal A160706 (Cal. App. 1st Dist.); see also People of the State of California v. Maplebear, Inc., Case No. 2019-48731, at *4 (Cal. Sup. Ct. Feb. 18, 2020) (ordering Instacart to reclassify its shoppers as employees), stayed pending appeal, Case No. D077380 (Cal. App. 4th Dist.); Cotter v. Lyft, 60 F.Supp.3d 1067, 1069 (N.D. Cal. 2015) ("[T]he argument that Lyft is merely a platform, and that drivers perform no service for Lyft, is not a serious one"); O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1144 (N.D. Cal. 2015) ("it strains credulity to argue that Uber is not a 'transportation company' or otherwise is not in the transportation business.").

a state court has granted the California Attorney General's motion for a preliminary injunction, ordering Lyft to reclassify its drivers as employees. See People of the State of California v. Uber Techs. Inc., et al., Case No. CGC-20-584402 (Cal. Sup. Ct. Aug. 10, 2020). In light of that injunction, Plaintiffs no longer appeal the District Court's denial of their request for a preliminary injunction.

But Plaintiffs maintain this appeal of the District Court's erroneous ruling compelling the claims brought here to arbitration.[2] Indeed, prior to the California Attorney General's recent enforcement action, Lyft managed to evade compliance with the California Labor Code for years through repeatedly using its arbitration agreement to block drivers' pursuit of their

[2] Although the state court has decided in the Attorney General's case that Uber and Lyft have misclassified their drivers and must change their practices going forward, the defendants, Uber and Lyft have made the argument in that case that its arbitration agreements preclude drivers from recovering damages in court for any Labor Code violations, even in a case brought on their behalf by the state and local officials. See People of the State of California v. Uber Techs. Inc., et al., Case No. 20-584402 (Cal. Sup. Ct., Aug. 10, 2020), at *3. Thus, the enforceability of the arbitration clauses against Lyft drivers remains a live issue. And this private class action brought on behalf of Lyft drivers (filed prior to the State's action) may still proceed in parallel with the Attorney General's action. See James v. Uber Techs., Inc., 2020 WL 3544982 (N.D. Cal. June 30, 2020) (federal court agreed that private class action may proceed against Uber for misclassification and resulting Labor Code violations, concurrent with Attorney General's action).

Labor Code claims in court.[3] However, as a federal court has concluded across the country in Massachusetts, Lyft drivers are transportation workers who are exempt from the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, pursuant to the Section 1 transportation worker exemption. See Cunningham v. Lyft, Inc., 2020 WL 1503220, at *7 (D. Mass. March 27, 2020), appeal pending Case No. 20-1357 (1st Cir.). This decision is the correct result here as well, as this Court recently agreed that drivers do not themselves need to cross state lines to fall within the exemption. See Rittmann v. Amazon.com, Inc., 2020 WL 4814142 (9th Cir. Aug. 19, 2020); see also Waithaka v. Amazon.com, Inc., 2020 WL 4034997 (1st Cir. July 17, 2020) (same).[4]

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[3] The undersigned Plaintiffs' counsel has been challenging Lyft for misclassifying its drivers in California since 2013. See Cotter v. Lyft, Inc., C.A. No. 13-cv-04065-VC (N.D. Cal.); Talbot v. Lyft, Inc., Case No. 18-566392 (Cal. Sup. Ct.) (filed in the wake of Cotter); Seifu v. Lyft, Inc., Case No. 712959 (Cal. Sup. Ct. Los Angeles) (PAGA letter filed the day Dynamex was decided), stayed pending appeal, Case No. B301774 (Cal 2d App.). Although Seifu was filed as a PAGA-only claim, which the California Supreme Court has ruled cannot be thwarted through arbitration, see Iskanian v. CLS Transp. Los Angeles, LLC 59 Cal.4th 348 (2014), Lyft nevertheless moved to compel that case to arbitration. When the court correctly denied Lyft's frivolous motion to compel arbitration, Lyft then proceeded to file a frivolous appeal, simply to delay the proceeding and thereby obtained a stay of the Seifu action.

[4] Lyft cannot enforce its arbitration agreement under state law because no state law applies in the absence of the FAA or, as the Cunningham court concluded, the applicable state law would not permit the enforcement of the

Thus, this Court should now reverse the District Court's erroneous conclusion that Lyft drivers do not fall within the Section 1 transportation worker exemption. The District Court's conclusion hinged on its decision that the drivers are not engaged in interstate commerce based upon a case it found (that Lyft had not cited), United States v. Yellow Cab Co., 332 U.S. 218 (1947), overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984), which held cab drivers not to be engaged in interstate commerce for purposes of certain antitrust provisions. However, this Court in Rittmann (like the First Circuit in Waithaka) recognized that the words "engaged in interstate commerce" must be interpreted in accordance with the ordinary meaning of those words as Congress would have understood them at the time of the FAA's enactment. See also Oliveira v. New Prime, Inc., 139 S. Ct. 532, 539 (2019) ("[I]t's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute.") (internal citation omitted). Yellow Cab was decided decades later. Under the caselaw interpreting "engaged in interstate commerce" at the time the FAA was passed, workers were recognized to be "engaged in interstate

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arbitration agreement because its class action waiver violates state public policy.

commerce" when what they were moving passed across state lines. And moreover, only a small portion of what was moved needed to pass across state lines. Thus, Yellow Cab is inapposite, and as discussed further below, it is distinguishable on its facts. There can be no question that a portion of the work performed by the class of workers which includes Lyft drivers involves transporting passengers on the first or last leg of interstate journeys.

Therefore, for these reasons set forth further below, this Court should reverse the District Court's order dismissing this case and compelling arbitration.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this case pursuant to the Class Action Fairness Act of 2005 because diversity of citizenship exists between the proposed class of California Lyft drivers and Lyft Inc., a Delaware corporation with its principal place of business in California, the number of, proposed class members is 100 or greater, and the amount in controversy exceeds $5 million. See 28 U.S.C. § 1332(d).

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because this is an appeal from a final judgment. ER5.[5] Plaintiffs' appeal is

[5] An order compelling arbitration and dismissing the action is immediately appealable. Green Tree Financial Corp. Alabama v. Randolph,

timely under Rule 4(a) of the Federal Rules of Appellate Procedure, because Plaintiffs filed their Notice Appeal with the District Court on April 14, 2020, ER1-2, within 30 days of the entry of the Orders denying the preliminary injunction and dismissing the case. ER5-23.

STATEMENT OF THE ISSUES

1. Whether Plaintiffs' claims cannot be compelled to arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, because Lyft drivers are exempt from the FAA under the Section 1 transportation worker exemption.

2. Whether, if the FAA does not apply to Lyft's arbitration provision, the arbitration agreement is unenforceable because, as drafted, there is no state law that governs the arbitration provision.

3. Whether California law, stripped of the overlay of the federal preemption, renders the class action waiver in Lyft's arbitration agreement unenforceable.

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531 U.S. 79, 89 (2000); Johnmohammadi v. Bloomingdale's, Inc., 755 F.3d 1072, 1073-73 (9th Cir. 2014).

STATEMENT OF THE CASE

Plaintiff John Rogers filed this case on March 11, 2020, in San Francisco Superior County Superior Court, on behalf of himself and other individuals who have worked as Lyft drivers in California, alleging that Lyft has misclassified them as independent contractors in violation of the Labor Code, Cal. Lab. Code § 2750.3. See ER235-36, ¶33.[6] After Lyft removed the action to federal court, ER239, Plaintiff filed an Emergency Motion for Preliminary Injunction, ER239, and Lyft moved to compel arbitration of Plaintiff's claim, ER241. One of the grounds on which Plaintiff opposed Lyft's motion was that Lyft drivers are exempt from the Federal Arbitration Act, 9 U.S.C. § 1, under the Section 1 transportation worker exemption.[7]

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[6] Plaintiff filed this case at the onset of the COVID-19 pandemic, focusing on Lyft's failure to provide paid sick leave to its drivers. The complaint was later amended to add additional named plaintiffs and additional claims under the Labor Code, including for expense reimbursement, overtime pay, and minimum wage violations. See ER148-158, adding claims for Cal. Lab. Code §§ 2802, 1194, and 1197, and Unlawful and/or Unfair Business Practices, Cal. Bus. & Prof. Code §§ 17200-17208.

[7] Plaintiffs also argued their request for injunctive relief constituted public injunctive relief within the meaning of McGill v. Citibank, N.A., 2 Cal. 5th 945 (2017). Given that Plaintiffs are not appealing the denial of the injunction, the Court need not address this issue.

Following a hearing held on April 2, 2020, ER243, the court issued its decision on April 7, 2020, ER6-23, granting Lyft's motion to compel arbitration.[8] This appeal followed.

SUMMARY OF THE ARGUMENT

The District Court erred in granting Lyft's Motion to Compel arbitration of Plaintiffs' claims. The District Court should have recognized that Lyft drivers fall within the "transportation worker exemption" to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, and are therefore exempt from the FAA. The District Court correctly concluded that drivers who engage in interstate transportation of passengers, as opposed to goods, may still qualify for the Section 1 exemption. See infra, Part II(A).

However, the District Court erred in concluding that Lyft drivers are not "engaged in interstate commerce" within the meaning of Section 1. As this Court's recent decision in Rittmann v. Amazon.com, Inc., 2020 WL 4814142, at *12 (9th Cir. Aug. 19, 2020), makes clear, the District Court should have looked to the plain meaning of the statute and the way the phrase "engaged in interstate commerce" was understood at the time of the FAA's passage by considering its usage in other statutes passed in the years

[8] The court did not grant Lyft's motion to compel arbitration with respect to Plaintiffs' claim for public injunctive relief but instead remanded that claim to the state court. ER23.

leading up to the FAA's enactment. The District Court's reliance on a single, distinguishable Supreme Court ruling decided decades after the FAA was passed was reversible error. See infra, Part II(B).

Because the FAA does not apply to Plaintiffs' claims, Lyft's arbitration provision is unenforceable. Because the agreement specifically carves out the arbitration provision from the California choice-of-law provision, California state law does not apply to the arbitration provision either. Indeed, this Court in Rittmann reached this very conclusion. Ritmann v. Amazon.com, Inc., 2020 WL 4814142, at *11-12 (9th Cir. Aug. 19, 2020). The District Court could not re-write the contract to provide otherwise, particularly given that the contract must be construed against the drafter, Lyft. Because neither federal nor state law apply to the arbitration provision, the District Court lacked authority to compel arbitration at all. However, even if California state law were to apply, Lyft's arbitration provision is unenforceable because (just as the court held in Massachusetts, Cunningham v. Lyft, Inc., 2020 WL 1503220, at *8-9), California law, stripped of the overlay of the FAA and federal preemption, precludes the enforcement of arbitration agreements containing a class action waiver such as that contained in Lyft's arbitration agreement. See infra, Part II(C).

For all these reasons, the District Court should have denied Lyft's

motion to compel arbitration.

ARGUMENT

I. Standard of Review

In the Ninth Circuit, an order granting or denying a motion to compel arbitration is also subject to *de novo* review. Bushley v. Credit Suisse First Boston, 360 F.3d 1149, 1152 (9th Cir. 2004). An order compelling arbitration and dismissing the action is immediately appealable. Johnmohammadi v. Bloomingdale's, Inc., 755 F.3d 1072, 1073-73 (9th Cir. 2014). Thus, the order granting of the motion to compel and dismissing the action, ER5, is immediately appealable and subject to *de novo* review.

II. Lyft's Motion to Compel Arbitration Should Have Been Denied Because Lyft Drivers Fall Under the Transportation Worker Exemption to the Federal Arbitration Act

The District Court should have recognized that Lyft drivers fall within the "transportation worker exemption" to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, and are therefore exempt from the FAA. In the absence of the FAA, Lyft's arbitration provision is unenforceable; the agreement does not supply an alternate state law to apply in lieu of the FAA, rendering the agreement unenforceable, and even if California law were applied to the agreement, it would be unenforceable under California law.

See infra, Part II(C). Accordingly, the District Court should have denied Lyft's motion to compel arbitration.

Indeed, a federal court addressing this exact same issue with respect to Lyft drivers in Massachusetts recently agreed that Lyft drivers fall under the Section 1 exemption and cannot have their claims compelled to arbitration under state law, which renders Lyft's agreement unenforceable. See Cunningham v. Lyft, Inc., No. 2020 WL 1503220, at *6-7 (D. Mass. Mar. 27, 2020), appeal pending, Case No. 20-1357 (1st Cir.). Likewise, this Court recently embraced a reading of the transportation worker exemption that encompassed "gig economy" delivery drivers for Amazon, in which the Court rejected a narrow reading of the Section 1 exemption that would require workers to physically cross state lines in order to qualify. See Rittmann v. Amazon.com, Inc., No. 19-35381, 2020 WL 4814142, at *7 (9th Cir. Aug. 19, 2020). As in Cunningham and Rittmann, here, Lyft drivers are exempt from the Federal Arbitration Act, and the District Court erred in concluding otherwise.

The Section 1 transportation worker exemption provides that the FAA shall not "apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." See 9 U.S.C. § 1. Thus, to qualify for this exemption, an individual: (1)

must work for a business pursuant to a "contract of employment"; (2) be a "transportation worker"; and (3) be "engaged in interstate commerce." Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1140 (9th Cir. 2001) (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 118 (2001)).[9] Here, Lyft did not contest that Plaintiffs worked pursuant to a "contract of employment" as that phrase was interpreted by the Supreme Court in New Prime, Inc., 139 S. Ct. at 538, 543-44 (holding that "contracts of employment" include contracts of both employees and independent contractors). Thus, the court focused on the second and third prongs of this test – namely, whether Lyft drivers qualify as "transportation workers" who are "engaged in interstate commerce."[10]

[9] The law is now clear that the applicability of this exemption is for a court to determine, not an arbitrator. See Oliveira v. New Prime, Inc., 139 S. Ct. 532, 538 (2019).

[10] Whether Lyft drivers are "engaged in interstate commerce" must be analyzed in reference to the class of workers that the individual belongs to, rather than the particular work of the individual plaintiff. See Singh v. Uber Technologies, Inc., 939 F.3d 210, 222 (3d Cir. 2019); Bacashihua v. U.S. Postal Service, 859 F.2d 402, 405 (6th Cir. 1988). The District Court recognized as much in its order below. ER15-16 ("The plaintiffs' personal exploits are relevant only to the extent they indicate the activities performed by the overall class.").

A. The District Court Correctly Found That Lyft Drivers Are Transportation Workers Within The Meaning of Section 1 Even Though They Transport Passengers, Not Goods

The District Court correctly rejected Lyft's argument below that only workers who "transport goods (as opposed to people)" can qualify as "transportation workers" under Section 1. ER13. The Third Circuit recently reached the same conclusion, holding that Uber drivers who transport passengers may also qualify for the exemption. Singh v. Uber Technologies, Inc., 939 F.3d 210, 227 (3d Cir. 2019) ("[N]othing in the residual clause of § 1 suggests that it is limited to those who transport goods, to the exclusion of those who transport passengers" and "[i]n fact, the text indicates the opposite."). The Singh court noted that the other two enumerated categories of workers in Section 1 − railroad employees and seamen − routinely transport both goods and passengers. Id. at 221-22. Like the Supreme Court in its recent decision in New Prime, the Singh Court looked to statutes regulating railroad employees and seamen in effect at the time of the FAA's passage in 1925. Id. at 222 (noting that the New Prime court looked to "the Transportation Act of 1920's definition of 'railroad employees' and the 1898 Erdman Act's 'equally broad understanding' of the term…") (quoting New Prime, 139 S.Ct. at 543, n. 12). These statutes plainly encompassed workers who transported passengers as well as goods, such as employees working on

railway passenger cars and "cooks, surgeons, and bartenders" working on passenger vessels. Id. Thus, there was no basis for limiting the exemption to only those transportation workers who transport goods in interstate commerce as opposed to passengers.

This Court approvingly cited the Third Circuit's decision in Singh. See Rittmann v. Amazon.com, Inc., 2020 WL 4814142, at *7, n. 4 ("For the reasons the Third Circuit persuasively articulated in Singh, 939 F.3d at 225, we refuse to rely on speculation in Circuit City as to Congress's intent…"). The Rittmann Court noted that the Singh court had "expanded its test to include workers who transport people, like rideshare services". Id. at *4, n. 1.

The First Circuit recently joined the Third Circuit in this conclusion as well, noting that "those who transported goods or passengers that were moving interstate" were considered to be "engaged in interstate commerce" at the time of the FAA's passage in 1925. Waithaka v. Amazon.com, Inc., 966 F.3d 10, 20 (1st Cir. 2020) (emphasis added). The First Circuit echoed the logic of the Third Circuit, looking to statutes in effect at the time of the FAA's passage and considering how courts interpreted the same terms in those laws. Id. The district court in Massachusetts likewise reached this same conclusion in deciding that Lyft drivers are exempt from the FAA.

See Cunningham, 2020 WL 1503220, at *6 ("[S]eamen and railroad employees transport not just goods in interstate commerce, but also passengers. Defendants offer neither caselaw, other statutory schemes, or legislative history supporting different considerations for arbitration for seamen and railroad employees who transport goods and those who transport passengers.").[11]

Here, the District Court correctly followed the reasoning adopted in Singh, Waithaka, and Cunningham, and with which this Court has now cited approvingly in Rittmann, in concluding that "the goods-passengers distinction is nowhere to be found in the statutory text [of Section 1], which refers to 'foreign or interstate commerce'" and thus, "Section 1 is not limited

[11] As recognized in Singh, 939 F.3d at 223, and Cunningham, 2020 WL 1503220, at *5, the Supreme Court's references to the "movement of goods in interstate commerce" and to the workers' "necessary role in the free flow of goods" in Circuit City, 532 U.S. at 112, 121, were dicta. The Supreme Court was simply quoting another decision in noting 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.' " Circuit City, 532 U.S. at 112 (quoting Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1471 (D.C. Cir. 1997)) (emphasis added). Indeed, the question of whether a transportation worker must transport "goods" in order to qualify for the exemption was not at issue in Circuit City at all. Instead, Circuit City addressed the question of whether the Section 1 exemption should be read to apply to all employment contracts, regardless of the industry.

to classes of workers who transport goods in interstate commerce." ER13.

B. The District Court Erred in Holding That Lyft Drivers Are Not "Engaged in Interstate Commerce" Within the Meaning of Section 1

The District Court erred in concluding that Lyft drivers are not "engaged in interstate commerce" as that phrase is used in Section 1 of the FAA, notwithstanding the fact that many Lyft drivers routinely transport passengers to and from airports, bus terminals, and the like as part of the passengers' continuous interstate journeys. Numerous courts, including this Court in Rittmann v. Amazon, 2020 WL 4814142, at *10, have now recognized that workers are "engaged in interstate commerce" within the meaning of Section 1, even if they themselves do not cross state lines but instead transport goods (or passengers) who cross state lines "within the flow of interstate commerce."[12]

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[12] See, e.g., Muller v. Roy Miller Freight Lines, LLC, 23 Cal. App. 5th1056, 1065-69 (Cal. Ct. App. 2019); Nieto v. Fresno Beverage Co., Inc., 33 Cal. App. 5th 274, 281-85 (Cal. Ct. App. 2019), reh'g denied (Mar. 27, 2019) (intrastate liquor delivery driver who transported items solely within California found to be exempt under Section 1); Bacashihua v. U.S. Postal Serv., 859 F.2d 402, 405 (6th Cir. 1988) (postal worker, who made only intrastate deliveries, was engaged in interstate commerce); Palcko v. AirborneExpress, Inc., 372 F.3d 588, 593-94 (3rd Cir. 2004) (supervisor who merely supervised drivers making intrastate deliveries in the "Philadelphia area" was exempt); Hamrick,et al. v. US Pack Holdings, LLC, et al., Civ. A. No.6:19-cv-137 (M.D. Fla. August 15, 2019) Dkt. 88, at *4; Christie v. Loomis Armored US, Inc., 2011 WL 6152979, *3 (D. Colo. Dec.

In Rittmann, this Court held that so-called "gig economy" delivery drivers for Amazon, who used an application on their phone to arrange for the delivery of packages to customers, were exempt from the FAA under the Section 1 exemption even if they never crossed state lines in the course of their deliveries. Following the Supreme Court's directive in New Prime to look to the "ordinary meaning at the time Congress enacted the statute", the Rittmann Court considered the meaning of the phrase "engaged in commerce" in 1925, at the time of the FAA's passage. Rittmann, 2020 WL 4814142, at *4 (quoting New Prime, 139 S.Ct. at 539). The Court noted that the ordinary meaning of the terms "engaged" and "commerce", "[t]aken together…can reasonably be read to include workers employed to transport goods that are shipped across state lines", regardless of whether the workers themselves crossed state lines. Id. In other words, the operative question was whether the goods (or passengers) were within the flow of interstate commerce, not whether the workers themselves crossed state lines.

The Rittmann Court found that the ordinary meaning of the text was reinforced by the decisions of other courts interpreting the Section 1 exemption. For instance, in a nearly identical case involving Amazon

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9, 2011); Ward v. Express Messenger Sys. Inc. dba Ontrac, Civ. A. No. 1:17 -cv-02005 (D. Co. Jan. 28, 2019), Dkt. 118.

drivers, the First Circuit likewise found that the drivers fell within the Section 1 exemption. See Waithaka v. Amazon.com, Inc., 966 F.3d 10 (1st Cir. 2020).[13] Like this Court in Rittmann, the First Circuit held that it had to "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.'" Id. at 17 (quoting New Prime Inc., 139 S. Ct. at 539). The First Circuit looked to the Supreme Court's "interpretation of a similar jurisdictional phrase in the Federal Employers' Liability Act (the 'FELA')", which was passed in 1908 and interpreted by the courts in the years leading up to the FAA's passage in 1925. Id. at 19. This Court in Rittmann likewise looked to FELA cases to

[13] In Wallace v. GrubHub Holdings, Inc., 2020 WL 4463062 (7th Cir. Aug. 4, 2020), the Seventh Circuit recently held that food delivery drivers did not fall within the exemption. In reaching this conclusion, however, the court in Wallace cited approvingly to the First Circuit's decision in Waithaka and agreed that drivers do not need to physically carry deliveries across state lines in order to be "engaged in interstate commerce." As this Court noted in Rittmann, "the Seventh Circuit did not adopt the … interpretation[] that workers must actually cross state lines to be considered 'engaged in interstate commerce' for purposes of § 1." Rittmann, 2020 WL 4814142, at *8 (emphasis added). It is not clear, however, why the Wallace court then held that GrubHub's drivers were not engaged in interstate commerce. The Court's short opinion is not clear in this analysis, and Plaintiffs there have moved for rehearing *en banc*. In any event, this decision, involving food delivery drivers, has no relevance here, particularly in light of this Court's holding that drivers need not cross state lines in order to be engaged in interstate commerce.

inform its understanding of the phrase "engaged in interstate commerce", noting that by "incorporating almost exactly the same phraseology [used in the FELA] into the Arbitration Act of 1925 its draftsmen and the Congress which enacted it must have had in mind this current construction of the language which they used." Rittmann, 2020 WL 4814142, at *5 (quoting Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., 207 F.2d 450, 453 (3d Cir. 1953)).

As this Court and the First Circuit both acknowledged in Rittmann, 2020 WL 4814142, at *5, and Waithaka, 966 F.3d at 20-22, cases decided under the FELA illustrate that, at the time it enacted the FAA, Congress's understanding of the phrase "engaged in interstate commerce" included intrastate transportation of goods that were bound for out-of-state or coming from out-of-state (or even work that did not involve the physical transportation of goods at all where that work was "so closely related to" interstate transportation "as to be practically a part of it.", see Baltimore & O. S. W. R. Co. v. Burtch, 263 U.S. 540, 542, 544 (1924)). Thus, a "class of workers engaged in foreign or interstate commerce" in 1925 would be understood to include workers transporting goods or passengers within the flow of interstate commerce even if they themselves did not physically cross

state lines (i.e. workers transporting passengers within a single state as part of a larger interstate journey).

For example, in Philadelphia & R.R. Co. v. Hancock, 253 U.S. 284, 285 (1920), the Supreme Court held that that even where "[t]he duties of [a train crew member] never took him out of Pennsylvania", and he solely transported coal to a destination two miles away, he was nonetheless engaged in interstate commerce under FELA because the coal he was transporting was bound for another state. Similarly, in Burtch, the Supreme Court held that workers who unloaded freight from trains that had transported the freight from out of state were engaged in interstate commerce because the work was "so closely related to" interstate transportation "as to be practically a part of it." 263 U.S. at 544. Both Burtch and Hancock demonstrate that the analysis (as Congress would have understood when it enacted the FAA) focuses *on the flow* of goods or passengers interstate and does not require that the workers physically cross state lines.

Decisions interpreting the phrase, "engaged in interstate commerce" in other statutes are likewise in accord with the FELA cases. For example, as the Rittmann court noted, decisions interpreting the Clayton Act and Robinson-Patman Act demonstrate that "the term 'engaged in commerce' …

denote[d] only persons or activities within 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." Rittmann, 2020 WL 4814142 at *6 (quoting Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186, 195 (1974) (emphasis added)).[14] The Rittmann court held that while the phrase "engaged in commerce" may not have a uniform meaning across every statute, it is clear that the phrase has never been read to require the literal crossing of state lines to qualify as being "engaged in interstate commerce." Rittmann, 2020 WL 4814142, at *6.

Here, as in Rittmann, Waithaka and the FELA and Clayton Act decisions cited above, Lyft drivers routinely transport passengers "within the flow of interstate commerce" by taking them to or picking them up from the airport, train stations, or bus terminals as one part of a larger, continuous interstate journey. ER153, ¶ 31; ER118, ¶ 6 ("I often take rides to and from the San Jose Airport. Recently, I have had Lyft and Uber riders returning from Japan, New York City, and several Canadian riders …"); see also

[14] When interpreting the Section 1 exemption in Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 116 (2001), the Supreme Court cited favorably to a pair of cases interpreting the Clayton Act, which was passed in 1914, some years prior to the FAA. The Circuit City court noted that "the phrase 'engaged in commerce'…'means *engaged in the flow of interstate commerce*…'" Id. at 117; see also id. at 118.

ER131, ¶ 6; ER128, ¶ 6; cases cited infra, p. 27-28 (noting that even where drivers only occasionally crossed state lines, they were "engaged in interstate commerce" under Section 1).[15] Thus, Lyft drivers plainly transport passengers "within the flow of interstate commerce" and are "engaged in interstate commerce" as that phrase was understood by the drafters of the FAA.

Likewise, in Cunningham, the court noted that "passengers traveling to or from Logan International Airport, … are in the 'continuity of movement' of a longer trip." Id. at *7. The court concluded that Lyft drivers "help facilitate [passengers'] movement, as the first or last leg of the

[15] It cannot be doubted that Lyft drivers frequently pick up and drop off passengers at the airport (as well as bus terminal and train stations) and account for a large amount of the ground transportation at airports in California. See "California airport information for drivers," (last accessed July 21, 2020), available at: https://help.lyft.com/hc/en-us/articles/115013081008-California-airport-information-for-drivers (describing detailed regulations and instructions for picking up or dropping off at 45 different California airports); see also Susan Carpenter, "Los Angeles Rethinks Taxis as Uber and Lyft Dominate the Streets" N.Y. Times (Jan. 12, 2020), available at: https://www.nytimes.com/2020/01/12/business/los-angeles-taxis-uber-lyft.html (noting that "taxis handled just 22 percent of pickups at [LAX in 2019]; Ride-hailing businesses [like Lyft and Uber] claimed the rest."). Moreover, it is not disputed that Lyft drivers sometimes cross state lines in the course of their duties. See, e.g., Keane, Sean "Lyft's longest ever ride was a 639-mile drive from Colorado to Iowa" (Sept. 19, 2018), available at: https://www.cnet.com/news/lyft-reveals-disneyland-happy-hour-stats-to-celebrate-1-billion-rides/ (describing Lyft ride across state lines); Scalzi, John, "My 300 Mile Lyft Ride From Chicago to Bradford" (July 23, 2019), available at: https://whatever.scalzi.com/2019/07/23/my-300-mile-lyft-ride-from-chicago-to-bradford/ (same).

journey, including into or out of Massachusetts", and thus, "the Lyft drivers are part of the chain of interstate commerce, enabling their passengers to leave or enter Massachusetts" much like a last-mile delivery driver for Amazon who enables the last leg of an interstate shipment. Id. (internal citation omitted).[16]

However, notwithstanding the highly persuasive reasoning of the Cunningham court and the numerous decisions cited above, the District

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[16] In Cunningham, the court also considered the eight factors set forth by the Eighth Circuit in Lenz v. Yellow Transp., Inc., 431 F.3d 348 (8th Cir. 2005), as modified to consider transportation of passengers, and found "a number of the factors" were met: "Plaintiffs works in the transportation industry. The vehicles that Plaintiffs use are central to Plaintiffs' job duties and are vital to Lyft's commercial enterprise. There is also a complete nexus between Plaintiffs' duties and the vehicle they respectively use to carry out those duties." 2020 WL 1503220, at *7. Because the court found that Lyft drivers directly continued the flow of interstate commerce (that facilitating the flow of interstate commerce through intrastate trips was not "incidental" to the work of Lyft drivers but "essential to their work"), the court found that the Lenz factors weighed in favor of finding that the drivers engaged in interstate commerce. Id. (holding that for transportation workers who transport passengers, the "critical question" is "whether they transport passengers that travel interstate."). Plaintiffs further submit that, with the growing importance of the "gig economy", a strike by Lyft drivers (and other similar gig workers) could very well now disrupt the national economy (seventh Lenz factor), further bolstering the court's conclusion in Cunningham.

Here, the District Court erroneously held that "[e]ven assuming that the Lenz factors are relevant in this context, ... there is no need for recourse to an indeterminate balancing test in light of the Supreme Court's analysis in Yellow Cab." ER18, n. 3. As set forth infra, pp. 24-31, the District Court's reliance on United States v. Yellow Cab Co., 332 U.S. 218 (1947), was misplaced, and its dismissal of the Lenz factors was error.

Court here nonetheless concluded that Lyft drivers are not "engaged in interstate commerce", relying exclusively on a single, distinguishable Supreme Court decision decided *decades after* the FAA was passed, United States v. Yellow Cab Co., 332 U.S. 218 (1947), overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984). There, in the context of a decision under the Sherman Anti-Trust Act, the Supreme Court concluded that Chicago taxicabs were not involved in the stream of interstate commerce "when local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service." Yellow Cab Co., 332 U.S. at 233.

Contrary to the District Court's conclusion below, Yellow Cab does not control the transportation worker exemption analysis in this case. As set forth supra, pp. 17-20, at the time Congress enacted the FAA in 1925, the ordinary meaning of the statutory language "engaged in interstate commerce" as well as case law under the FELA interpreting that phrase, demonstrate that intrastate transportation that is one part of a continuous interstate journey or had a strong nexus with the interstate journey would be covered by the Section 1 exemption. See, e.g., Baltimore & O. S. W. R. Co. v. Burtch, 263 U.S. 540, 542, 544 (1924); Philadelphia & R.R. Co. v. Hancock, 253 U.S. 284, 285 (1920); see also Philadelphia & R R Co v. Polk,

256 U.S. 332, 334 (1921). Because these FELA cases were decided shortly *before* the enactment of the FAA, they provide the relevant guidance as to what Congress intended when it enacted the FAA, not Yellow Cab, which was decided several decades later. The Supreme Court in New Prime expressly noted that it is "a 'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary ... meaning ... *at the time Congress enacted the statute*.'" New Prime Inc, 139 S. Ct. at 539 (quoting Wisconsin Central Ltd. v. United States, 138 S.Ct. 2067, 2074 (2018)) (emphasis added). The recent decisions in Rittmann and Waithaka reinforce this conclusion, by resting their conclusions on the "original meaning of the phrase 'engaged in ... interstate commerce,' [in 1925 as] revealed by the FELA precedents…" Waithaka, 2020 WL 4034997, at *11; see also Rittmann, 2020 WL 4814142, at *5.[17] The District Court in this case erred by placing more weigh on Yellow Cab than on decisions that directly informed Congress's understanding of the phrase "engaged in interstate commerce" when the FAA was passed.

Furthermore, Yellow Cab is distinguishable on the facts. There, the Chicago ordinance explicitly limited the cab drivers to transportation within

[17] See also id. at *10, n. 9 (noting "the longstanding reliance on th[e] [FELA] statute to interpret the FAA's text, dating back to the 1950s").

the city limits, see Yellow Cab, 332 U.S. at 230-31, whereas here, it is undisputed that Lyft drivers provide service anywhere and routinely cross city limits, sometimes even crossing state lines. See supra, n. 15. Indeed, the District Court itself admitted that Lyft allows "people to 'hail' rides from its drivers from pretty much anywhere to pretty much anywhere." ER17 (emphasis added). Thus, Lyft drivers are not providing the same type of purely "local" service as the cab drivers in Yellow Cab.[18]

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[18] In this sense, the purely local cab drivers in Yellow Cab may more closely resemble the local takeout food delivery drivers that the Rittmann court distinguished as not being part of the "channels of interstate commerce." Rittmann, 2020 WL 4814142, at *8. By contrast, Lyft drivers have no similar geographic limitations on their service, and drivers sometimes travel great distances, cross state lines, and are clearly part of the "channels" of interstate commerce insofar as they provide a major source of ground transportation for airline travelers and other interstate travelers, as the Cunningham court correctly recognized.

Moreover, this Court in Rittmann distinguished a case involving purely local cab drivers, not unlike the drivers at issue in Yellow Cab. Rittmann, 2020 WL 4814142, at *8. In Rittmann, the defendant cited to People of State of New York ex rel. Pennsylvania Railroad Co. v. Knight, 192 U.S. 21 (1904), which involved an "intrastate cab service that transported railroad passengers to and from the ferry…" Id. The Knight court found that the service "was subject to state taxation because the cab service was 'exclusively rendered within the limits of the city' and 'contracted and paid for independently of any contract or payment for strictly interstate transportation.'" Id. (quoting Knight, 192 U.S. at 26). The Rittmann court distinguished Knight, noting that the intrastate nature of the trip might "be relevant for taxation purposes", but holding that "AmFlex drivers' transportation of goods wholly within a state are still a part of a continuous interstate transportation, and those drivers are engaged in interstate commerce for § 1's purposes." Id. Here, as in Rittmann, passengers coming from the airport at the end of a longer interstate journey

Finally, the District Court erred in discounting the fact that some Lyft drivers do transport passengers across state lines, which further distinguishes them from the taxi drivers in Yellow Cab who never left the Chicago city limits (and were not even permitted to leave the city limits). Indeed, courts have held that even if a small amount of the drivers' work involves commerce across state lines, that minor amount of interstate transportation is sufficient to qualify them for the Section 1 exemption. See Int'l Bhd. of Teamsters Local Union No. 50 v. Kienstra Precast, LLC, 702 F.3d 954, 957 (7th Cir. 2012) (where truckers estimated making a few dozen interstate deliveries out of 1500 to 1750 deliveries each year, the court held that "[a]lthough Illini Concrete was primarily engaged in operations within Illinois, its truckers occasionally transported loads into Missouri. This means that the truckers were interstate transportation workers within the meaning of § 1 of the FAA.") (emphasis added); Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Cartage Co., 84 F.3d 988, 993 (7th Cir. 1996) (Section 1 exemption applied even where defendant was "primarily engaged in local trucking and *occasionally* transports cartage across state lines") (emphasis added); Siller v. L & F Distributors, Ltd., 109 F.3d 765, *2 (5th

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are "still a part of a continuous interstate transportation", even if the last leg of their journey by Lyft takes place within the state of California.

Cir. 1997) (finding interstate commerce where only "approximately 39% of the truckloads … contained some out-of-state products"); Vargas v. Delivery Outsourcing, LLC, 2016 WL 946112, at *4 (N.D. Cal. Mar. 14, 2016) ("Delivery drivers may fall within the exemption for 'transportation workers' even if they make interstate deliveries only 'occasionally.'").[19] Here, Lyft does not deny that its drivers do sometimes cross state lines; Lyft does not restrict cross-state trips and contemplates that riders will seek long trips. See supra, n. 15. It was error for the District Court to wholly ignore the fact that Lyft drivers do make interstate trips, unlike the purely local cab drivers at issue in Yellow Cab.[20]

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[19] See also Burlaka v. Contract Transport Services LLC, 2020 WL 4915630 (7th Cir. Aug. 21, 2020) (finding drivers who drove purely intrastate were "engaged in interstate commerce" for the purposes of the Motor Carrier Act ("MCA") exemption to the FLSA, 29 U.S.C. § 213(b)(1)) (citing Morris v. McComb, 332 U.S. 422, 423 (1947) (holding that the exemption applies to drivers of a carrier that only devoted approximately 4% of its total services to interstate commerce)). While Lyft may argue that "engaged in interstate commerce" has different meanings for purposes of the FAA and the MCA, in Rittmann, this Court declined to read the term "engaged in commerce" as requiring a different outcomes in different statutory provisions, see Rittmann, 2020 WL 4814142, at *6 (citing Swift & Co. v. United States, 196 U.S. 375, 398–99 (1905) ("[C]ommerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.")).

[20] The District Court erroneously concluded that "[i]nterstate trips that occur by happenstance of geography do not alter the intrastate transportation function performed by the class of workers." Id. In support of this assertion, the District Court cited the Eleventh Circuit's decision in Hill v. Rent-A-Ctr., Inc., 398 F.3d 1286, 1290 (11th Cir. 2005). But the Hill case is

The District Court apparently concluded that the fact that Lyft drivers frequently make trips to airports as part of a larger interstate journey does not qualify them as "engaged in interstate commerce" because Lyft's transportation business is not specifically directed at "interstate" travel; according to the District Court "if Lyft's focus were the service of transporting people to and from airports", the plaintiffs might qualify for the exemption. ER16. But this reasoning is contrary to numerous decisions, including the district court's well-reasoned decision in Cunningham. Indeed, the only case the District Court cites in support of its dubious

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clearly distinguishable; the case involved an "account manager" for a business that rented furniture and appliances to customers on a 'rent-to-own' basis. Id. at 1288. The briefing in Hill makes clear that Hill's job duties included "calling customers when their accounts were past due[,]… answering phone calls, reviewing past due accounts, cleaning the showroom, restroom, work areas, and merchandise, making the merchandise available for rent after return from customers, and distributing brochures." See Brief of Defendant-Appellee, Hill v. Rent-A-Ctr., Inc., 2004 WL 3314614, *6 (C.A.11). Making "deliver[ies] of goods to customers out of state in his employer's truck" was merely one "incidental" part of his overall job duties. Hill, 398 F.3d at 1288-89. Thus, the Hill decision speaks to whether a worker qualifies as a "transportation worker" at all -- not whether he or she is "engaged in interstate commerce." See Zamora v. Swift Transp. Corp., 2008 WL 2369769, at *9 (W.D. Tex. June 3, 2008), aff'd, 319 F. App'x 333 (5th Cir. 2009) (describing the basis for the court's holding in Hill as being "that the employee was not employed in the transportation industry" and Hill was therefore "not relevant to the instant case," where plaintiff was a truck terminal manager). By contrast, there can be no question that Lyft drivers are transportation workers employed in the transportation industry. Thus, Lyft drivers are far more like the delivery drivers in Int'l Bhd. of Teamsters Local Union No. 50, 702 F.3d at 957, whose occasional interstate deliveries were sufficient to render them exempt under Section 1, than they are like the account manager in Hill who was not a transportation worker at all.

reasoning is Yellow Cab, which is distinguishable for the reasons described above. Under the recent decision in Rittmann, it is clear that Lyft drivers are engaged to provide transportation within the flow of interstate commerce, even if some of their transportation work is local in nature. As the Rittmann court noted with respect to Amazon drivers:

> [T]he fact remains that AmFlex workers are engaged to deliver packages from out of state or out of the country, even if they also deliver food from local restaurants. They are thus engaged in interstate commerce, even if that engagement also involves intrastate activities. See Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1140 (9th Cir. 2001) (delivery driver who "*contracted* to deliver packages throughout the United States" (emphasis added) was engaged in interstate commerce for purposes of § 1, even where there was no indication the driver himself actually crossed state lines).

Rittmann, 2020 WL 4814142, at *8 n. 7. Here, as in Rittmann, Lyft drivers contract to provide services within the flow of interstate commerce, even if they also transport passengers on purely local trips.

In sum, the District Court erred in finding that Lyft drivers are not transportation workers engaged in interstate commerce and therefore exempt from the FAA. As in Cunningham, Rittmann, and Waithaka, the District Court should have found that Lyft drivers are "engaged in interstate commerce" because they are integral to modern-day interstate transportation, and they perform vital "last-mile" transportation of passengers on their interstate journeys. Contrary to the District Court's ruling below, the

Supreme Court's decision in Yellow Cab does not mandate a different result. That case, decided two decades after the FAA's passage, does not inform the Court what Congress intended at the time the FAA was enacted. Moreover, Yellow Cab itself makes clear that whether particular transportation of goods or passengers is within the flow of interstate commerce is highly contextual and will be marked by "practical considerations." 332 U.S. at 231. Here, a practical approach counsels in favor of recognizing that in this day and age, like the "seamen" and "railroad employees" enumerated in Section 1, Lyft drivers are a critical part of the interstate transportation system, and they perform work that goes far beyond the purely local trips of Chicago cab drivers, which the Supreme Court never could have foreseen at the time of the Yellow Cab decision. For all these reasons, this Court should hold that Lyft drivers are exempt from the FAA under the Section 1 exemption.

Indeed, if the Court were to hold that Lyft drivers are not engaged in interstate commerce since they transport passengers primarily intrastate, then their contracts would not fall under the FAA's coverage at all (and arbitration could not be compelled under the FAA), because Section 2 of the FAA makes clear that any contracts must "involve interstate commerce" even to fall under the coverage of the FAA in the first place. American

Postal Workers Union, AFL-CIO v. U.S. Postal Service, 823 F.2d 466 (11th Cir. 1987). While the Supreme Court stated in Circuit City that Section 1's "engaged in commerce" language is narrower than Section 2's "involved in commerce", the Supreme Court reopened the issue in New Prime when it explained that the "interstate commerce" requirement in Sections 1 and 2 must be defined in relation to each other. See 139 S. Ct. at 537.

Moreover, in Rittmann, this Court built on the Supreme Court's statement in New Prime that the meaning of "commerce" in Sections 1 and 2 of the FAA need to be read in relation to one another, stating that "[w]e see no way to meaningfully distinguish between the word 'commerce' used in § 2, defined as 'commerce among the several States or with foreign nations,' with the 'foreign or interstate commerce' referenced in § 1." Rittmann, 2020 WL 4814142, at *6. Thus, this Court declined to read the term "engaged in commerce" as requiring a different outcome in the different sections, citing Swift & Co. v. United States, 196 U.S. 375, 398–99 (1905) ("[C]ommerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.").

Thus, the Court should hold that Lyft drivers are workers engaged in interstate commerce and therefore exempt from the FAA. If the Court were to hold that interstate commerce is not involved here, then the FAA does not

apply at all and cannot be used as the basis to enforce Lyft's arbitration agreement.

C. In the Absence of the FAA, Lyft's Arbitration Agreement Cannot Be Enforced Under State Law

Finally, while that the FAA cannot be used here as a basis to compel arbitration, the Court also cannot enforce Lyft's arbitration agreement under state law. Because Lyft's agreement does not provide for any state's arbitration law to govern in the absence of the FAA, Lyft cannot compel arbitration of the drivers' claims. Specifically, Lyft's agreement specifies that "[e]xcept as provided in Section 17, this Agreement shall be governed by the laws of the State of California." ER203, § 21. Section 17 is the arbitration agreement. ER192. Thus, although the agreement provides that California law will apply to the rest of the agreement, it specifically carves out the arbitration agreement from the California choice-of-law provision.

Indeed, the Court addressed this very issue in Rittmann. There, Amazon's terms of service specified that:

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

Rittman, 2020 WL 4814142, *11. The court noted that ambiguity in a contract should be construed against the drafter and held that,

notwithstanding the severability clause in Amazon's agreement, the Court could not apply Washington law to the arbitration provision without impermissibly "rewrit[ing] the contract under the guise of severability." Id. "Because there is no law that governs the arbitration provision, [the court] agree[d] with the district court that there is no valid arbitration agreement." Id. at *12. The same is true here where Lyft's agreement specifically provides that California law applies to its contract, "[e]xcept as provided in Section 17…" ER203, § 21 (emphasis added). Any ambiguity in the contract must be construed against Lyft as the drafter, see Cal. Civ. Code § 1654, and this Court cannot salvage the contract without impermissibly rewriting it. See Abramson v. Juniper Networks, Inc., 115 Cal. App. 4th 638, 660 (2004) (Courts have no authority to "cure illegality by reform[ing] or augment[ing]" the terms of the parties' contract).[21] As in Rittmann, without any state law to apply to Lyft's agreement absent the FAA, there is no enforceable arbitration provision.

Indeed, a number of courts have concluded that, if a contract specifies that the FAA will apply to the arbitration provision and does not supply an alternate state's law to govern if the FAA does not apply, there is no meeting

[21] See also Travelers Cas. & Sur. Com. of Am. v. Dunmore, 2014 WL 6886004, at *7 (E.D. Cal. Dec. 4, 2014) (noting that "the Court will not rewrite the parties' contract after the fact to facilitate a different result").

of the minds and no clear intent to arbitrate at all in the event the FAA does not apply. See Nieto, 33 Cal. App. 5th at 285-86; Hamrick, et al. v. US Pack Holdings, LLC, et al., Civ. A. No. 6:19-cv-137 (M.D. Fla. August 15, 2019), Dkt. No. 88 at *5 (holding that where "the Arbitration Provision itself specifically elects to apply the FAA[,]…the more specific provision controls, [and] the Arbitration Provision cannot be interpreted pursuant to applicable state law and must rise or fall on the application of the FAA."); Ward, Civ. A. No. 1:17-cv-02005, Order on Motion to Compel Arbitration, Dkt. 118 at 11-12 (D. Co. Jan. 28, 2019) (denying motion to compel arbitration because plaintiffs fell within transportation worker exemption); see also Easterday v. USPack Logistics, LLC, Civ. Act. No. 1:15-cv-07559, Order at *14-18, Dkt. 194 (D.N.J. April 27, 2020) (holding that where an arbitration clause states that the FAA shall govern, but does not provide for what state's arbitration law will govern in the event that the FAA is held not to apply, then the arbitration agreement will not be enforceable).

Lyft has waived any argument that its agreement is enforceable under California law. The District Court recognized in its decision below that "Lyft hasn't argued here that the plaintiffs can be compelled to arbitrate under California law if they are exempt transportation workers." See ER12, n. 2. However, even if the Court were to apply California law, in the

absence of the overlay of federal preemption under the FAA, Lyft's arbitration agreement cannot be enforced under the California Arbitration Act ("CAA"), Cal. Code Civ. P. § 1281, *et seq*., because it contains a class waiver that would not pass muster under California law.

In both Waithaka and Cunningham, the courts held that, where drivers were exempt from the FAA under Section 1, Massachusetts state law would not allow the enforcement of the arbitration agreements because they contained class action waivers. See Waithaka, 2020 WL 4034997, at *17 (noting that Massachusetts "would [] invalidate a class waiver in an employment contract, like that of Waithaka, not covered by the FAA. … Notwithstanding the Supreme Court's view that such state policies must give way when the FAA governs a dispute, the policies remain intact where, as here, the FAA does not preempt state law."); Cunningham, 2020 WL 1503220, at *8-9 (concluding that Lyft's arbitration agreement is unenforceable under Massachusetts law) (emphasis added).

The same is true here; in the absence of the FAA, California law, would not permit the enforcement of Lyft's arbitration agreement because it contains a class action waiver. As with Massachusetts law, stripped of the overlay of federal preemption, California public policy, as set forth in Gentry v. Superior Court, 42 Cal. 4th 443, 466 (2007), would not allow the

enforcement of Lyft's arbitration clause containing a class action waiver. Specifically, the factors set forth in Gentry – "the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' right to [wages]" – all lead to the conclusion that Lyft's class action waiver is unenforceable under California law. Id. at 463. Here, Lyft drivers could individually expect to receive a modest recovery, particularly considering that – as Lyft likes to emphasize - most Lyft drivers have worked very little. Further, as in many employment cases, the fear of retaliation against drivers is high, and drivers may be reluctant to bring their own individual cases absent a class procedure. Indeed, Lyft has publicly taken positions against the strengthened law in California as codified in Assembly Bill 5 and has supported efforts to repeal the law, and many drivers would be reluctant to challenge its employer's stated position by seeking to enforce the very law that it publicly opposes. ER226-27, ¶ 27. Likewise, absent members of the class are almost certainly ill-informed about their rights given that Lyft classifies them as contractors, and many drivers likely do not realize that they are potentially entitled to benefits like

expense reimbursement and paid sick leave under state law.[22] Thus, under Gentry, California law, stripped of the overlay of federal preemption, renders Lyft's arbitration agreement unenforceable.[23]

CONCLUSION

For the reasons discussed here, this Court should reverse the District Court's order below dismissing this case and compelling arbitration. Lyft drivers are exempt from the FAA under the Section 1 transportation worker exemption. In the absence of the FAA, Lyft's arbitration clause does not contain a state law under which arbitration could be enforced. In any event, Lyft waived any argument that it could compel arbitration under California law, and California law would not allow enforcement of an arbitration clause containing a class action waiver.

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[22] See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 813 (1985) (a potential class may be "so unfamiliar with the law" that he will not sue individually or affirmatively request to be included in a legal action); Moscarelli v. Stamm, 288 F.Supp. 453, 461 (E.D.N.Y. 1968) ("One of the purposes of a class action is to provide a remedy for those who have been injured by a fraudulent course of conduct but who, because of their economic situation or ignorance, are unable to protect themselves by separate lawsuits.").

[23] The Court could not sever the class waiver from Lyft's arbitration agreement in order to allow a class proceeding in arbitration, given that the Supreme Court has ruled that class actions may only proceed in arbitration where the arbitration agreement expressly allows for class proceedings. See Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1418, 203 L. Ed. 2d 636 (2019).

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the Ninth Circuit
Appeal Nos. 20-15689, 20-1570

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Nos. 20-15689, 20-15700

CERTIFICATE OF SERVICE

I, Shannon Liss-Riordan, hereby certify that this brief was filed through the United States Court of Appeals for the Ninth Circuit ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), including the following counsel of record for Defendants –Appellants:

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Dated: August 25, 2020