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John David Dufort

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Comment

NAVIGATING THE ARBITRATION SPEEDWAY: GIG ECONOMY DRIVERS BLINDLY SWERVE THROUGH OBSTACLES CREATED BY THE UNEVEN APPLICATION OF THE FEDERAL ARBITRATION ACT

John David DuFort*

I. Starting Positions: Paving the Way for Local Drivers on the Arbitration Speedway

Have you ever felt so exhausted after a day of work that you are just too tired to cook? Once you sit down, the fatigue sets in, and the thought of cooking or even going out for a meal seems like a daunting task. But you know you need to eat. Starving and impatient, you pull out your phone and with a few swift taps and swipes, you summon a beacon of hope—a warm meal that will arrive at your doorstep, courtesy of a local delivery driver. As you stare at the screen, eagerly tracking the driver’s progress, you are caught in the spell of the gig economy.

The gig economy, also known as the platform economy, is a digital system that links customers and service providers through apps and websites.1 The gig economy has rapidly expanded in the wake of digital advancements with millions of individuals taking advantage of rideshare, food delivery, and package drop-off services.2 This increased demand

* J.D. Candidate, 2025, Villanova University Charles Widger School of Law; B.S., 2022, Cornell University. This Comment is dedicated to my parents (Laura and David) and my sister (Julia) who inspire me every day through their unwavering love, support, and humor. This Comment is also dedicated to my friends (Cole, Hanna, Michael, Morgan, and Sydney) for the constant laughs and making law school memorable. Finally, I would like to thank my colleagues at the Villanova Law Review for making this publication possible.


2. See Ridesharing, Dictionary.com, https://www.dictionary.com/browse/ride-sharing [https://perma.cc/K7HE-8VKG] (last visited May 6, 2024) (defining ridesharing as “a car service that allows a person to use a smartphone app to arrange a
has created a surplus of job opportunities with anywhere from 50 to 70 million people engaging in gig economy work in 2022.\(^3\) While the promise of autonomy and flexibility are marketed by companies like Uber and Amazon, a closer examination reveals a troubling trend of exploitation.\(^4\) Companies may try to pay workers below the minimum wage, but an equally significant concern arises when such workers are classified as independent contractors.\(^5\) This affords them fewer workers’

rights compared to those employed full time in traditional nine-to-five roles.\(^6\)

Labeling workers as independent contractors permits employers to exercise the broad scope of the Federal Arbitration Act (FAA or the Act)\(^7\) to enforce arbitration clauses, effectively allowing companies to settle disputes behind closed doors.\(^8\) While the FAA generally permits judicial enforcement of written arbitration agreements, Section 1 of the Act (the Exclusion) provides an exemption for certain categories of workers.\(^9\) In part, it states that “nothing [within the FAA] shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”\(^10\) Utilizing this language, companies have successfully enforced arbitration clauses because independent contractors were not considered employees under Section 1.\(^11\)

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6. See Ben Zipperer, Celine McNicholas, Margaret Poydock, Daniel Schneider & Kristen Harknett, *National Survey of Gig Workers Paints a Picture of Poor Working Conditions, Low Pay*, ECON. POL’Y INST. (June 1, 2022), https://www.epi.org/publication/gig-worker-survey/ [https://perma.cc/J36U-DSE6] (“Individuals who are classified as independent contractors are not covered by federal or state wage and hour, anti-discrimination, health and safety, collective bargaining, or other worker protection laws.”). These individuals also do not receive retirement benefits nor qualify for medical-based leave. *Id.*

7. See 9 U.S.C. §§ 1–2 (2024). For the text of Section 1, see text accompanying infra note 10. For the text of Section 2, see infra note 38.


9. See Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 111 (2001) (finding that because the FAA was enacted to counteract judicial hostility to enforcement agreements, courts have given effect to this purpose by generally compelling judicial enforcement over a wide range of arbitration clauses); 9 U.S.C. § 1 (permitting seamen, railroad workers, and other workers engaged in interstate commerce to be exempt from arbitration). On the benefits of arbitration, see Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 Vand. L. Rev. 1119, 1141–50 (2019) (highlighting how arbitration is commonly thought to benefit the employer because it is speedy, economical, and informal). Because courts often lean towards enforcing arbitration agreements, the stance tends to favor employers by providing them with a streamlined and favorable resolution process compared to traditional litigation. *Id.* at 1125.

10. 9 U.S.C. § 1. This provision will be referred to as “the Exclusion” or “Section 1” throughout this Comment.

This was a common practice until the Supreme Court’s decision in *New Prime Inc. v. Oliveira*, where the Court held that the Exclusion did cover independent contractors as long as they were engaged in interstate commerce as transportation workers. In theory, *New Prime* should have provided stability for platform workers and given them an opportunity to argue their claims in court. However, the Court’s decision failed to offer explicit guidance on whether local delivery drivers are classified as transportation workers, resulting in a split among federal circuit courts in applying Section 1. There are two competing tests to determine qualification for the Exclusion: (1) the worker-based approach, which examines the worker’s participation in interstate commerce; or (2) the transportation-based approach, in which an individual must be engaged in an industry that is centered around transportation.

13. See id. at 539, 544 (holding both independent contractors and employees were covered by the Exclusion, making it inconsequential for the purposes of arbitration whether drivers are classified as independent contractors).
Among the courts that apply the worker-based approach, there is a lack of consensus on several factors. These factors include whether the Exclusion is limited to those directly involved in the transportation of goods, the necessity for workers to cross state borders, and the frequency of engagement in interstate commerce. The inconsistent application of these factors has resulted in varied arbitration-related outcomes for gig economy drivers. Generally, drivers who transport people or goods from a transportation hub to their final destination (last-leg drivers or last-mile drivers) have been exempt from arbitration, whereas rideshare and food delivery drivers have been compelled to arbitrate.

This Comment argues that the worker-based approach applied by the Ninth Circuit in Capriole v. Uber Technologies, Inc. is the correct method to determine whether gig economy drivers are exempt from the FAA. This approach involves three elements that must be met for a worker to be exempt—the worker must be: (1) part of a class of workers (2) that frequently transport (3) a good or person in their interstate journey. This Comment then applies that test to three types of gig economy drivers to find that last-leg drivers are exempt from arbitration while...
rideshare and food delivery drivers are not. Part II explains the background of the FAA. Part III details the application of the worker-based approach used by the Ninth Circuit and contrasts it with the transportation-based approach. Part IV draws on the FAA’s legislative intent, a historical analysis of Section 1’s text, and Supreme Court precedent to explain why the worker-based approach is correct. Part V then applies the approach to gig economy drivers, and Part VI briefly concludes.

II. RACERS! START YOUR ENGINES: TRACING THE LEGISLATIVE JOURNEY AND EVOLUTIONARY GEAR SHIFTS OF THE FEDERAL ARBITRATION ACT

Arbitration’s historical struggle for enforcement during the early twentieth century set the stage for the creation of the FAA.\(^\text{24}\) Section A explores the legislative history behind the FAA, tracing its origins from the challenges posed by the revocability of arbitration agreements. Section B outlines the FAA’s evolution, navigating through some of the interpretative challenges faced by the courts. Section C focuses on landmark cases that have sculpted the FAA’s current landscape.

A. 3 . . . 2 . . . 1 . . . GO! The Legislative History of the FAA

While arbitration was popular during the early twentieth century, arbitration agreements were weak because courts considered them revocable at any time.\(^\text{25}\) This meant that arbitration agreements were seldom enforced compared to other contracts.\(^\text{26}\) The lack of judicial enforcement grew from English courts viewing arbitration agreements as a means to bypass the established court system.\(^\text{27}\) When American courts adopted this same sentiment and routinely revoked the growing number

14–16 (2020) (noting that courts commonly evaluate whether workers need to frequently engage in interstate commerce).

24. See infra Section II.A for a discussion of how the FAA was needed to enforce arbitration agreements.


26. See H.R. Rep No. 110-894, at 2 (2008) (stating the FAA was enacted because arbitration contracts were not being enforced in comparison to other contracts at the time); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991) (“[T]he FAA’s purpose was to place arbitration agreements upon the same footing as other contracts.”).

27. See Gilmer, 500 U.S. at 24 (commenting the FAA was enacted to “to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts”); Russell D. Feingold, Mandatory Arbitration: What Process Is Due?, 39 Harv. J. on Legis. 281, 284–86 (2002) (reporting on the origins of the judicial hostility toward arbitration). English judges sought to protect their jurisdiction over disputes and this method was later adopted by American courts. Id. at 285; Preston Douglas Wigner, Comment, The United States Supreme Court’s Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2, 29 U. Rich. L. Rev. 1499 (1995) (noting that
of arbitration agreements, the backlog in courts grew, subsequently delaying the resolution of commercial disputes. This prompted action by the business community to seek legislative routes to allow merchants to engage in an expeditious, economical means of resolving their disputes.

The first success in combating judicial hostility towards arbitration came in 1920 when the New York Bar Association encouraged the state legislature to adopt the New York Arbitration Law. This revolutionary law, holding that all written arbitration contracts were “valid, enforceable and irrevocable,” led to the enforcement of all current and future arbitration agreements within the state. Using this momentum, the American Bar Association (ABA) directed the Committee on Commerce, Trade, and Commercial Law to report on an extension to commercial arbitration. The Committee completed a first draft of the FAA and presented it to the Senate. Notably, the Exclusion was absent from this first draft of the FAA, which caused concern among the labor unions of seamen.
and railroad workers. To address their apprehensions, then-Secretary of Commerce Herbert Hoover suggested that the FAA should include a provision that read, “but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.”

In 1924, the updated legislation with then-Secretary Hoover’s exclusionary language was reintroduced to Congress and passed with virtually no opposition. While this Comment focuses on Section 1, the primary, substantive element of the FAA lies within Section 2. Echoing the 1920 New York Arbitration Act, Section 2 of the FAA makes written arbitration agreements in contracts that “evidenc[e] a transaction involving commerce . . . . valid, irrevocable, and enforceable.” In an attempt to

94. See Kolakowski, supra note 32, at 2184 (reporting the Seaman Union’s argument that “seaman’s wages came within admiralty jurisdiction and should not be subject to an agreement to arbitrate” (quoting Tenney Eng’g, Inc. v. United Elec., Radio & Mach. Workers, 207 F.2d 450, 452 (3d Cir. 1953))); Janel A. DeCurtis, Note, 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, 529 (2021) (stating labor unions presented concerns that the FAA would conflict with existing statutes that already governed labor disputes). The author explains that the concerns stemmed from the fact that union disputes were already governed by the Transportation Act of 1920 and the upcoming Railway Labor Act of 1926. Id. For further discussion of how courts have interpreted the meaning of “seamen” in Section 1, see infra note 195 and accompanying text (first citing McDermott Int’l, Inc. v. Wilander, 498 U.S. 337, 346 (1991); then citing Brown v. Nabors Offshore Corp., 339 F.3d 391, 395 (5th Cir. 2003); and then citing Veliz v. Cintas Corp., No. C 03-1180, 2004 WL 2452851, at *4 (N.D. Cal. Apr. 5, 2004)). For further discussion of how courts have interpreted the meaning of “railroad workers” in Section 1, see infra note 199 and accompanying text.

35. See, e.g., Cir. City Stores, 532 U.S. at 127 (Stevens, J., dissenting) (arguing Hoover’s statement precluded the use of employment contracts). See generally Kolakowski, supra note 32, at 2182–86 (recounting the history of the FAA). The chairman of the ABA declared that the Act was not intended to apply to all labor disputes, and maintained that exclusionary language should be adopted to protect certain classes. Id. at 2185. The author also posits that this statement could further be interpreted to infer that the drafters wanted to exclude employment contracts from the scope of FAA. Id. For further discussion of how courts have interpreted the phrase “engaged in interstate commerce” in statutes other than the FAA, see infra note 207 and accompanying text (citing Phila. & Reading Ry. Co. v. Hancock, 253 U.S. 284, 286 (1920)).

36. See, e.g., Cir. City Stores, 532 U.S. at 127 (Stevens, J., dissenting) (stating Hoover’s amendment effectively “eliminated organized labor’s opposition to the proposed law”); Barbara Ann Atwood, Issues in Federal-State Relations Under the Federal Arbitration Act, 37 U. Fla. L. Rev. 61, 61 (1985) (reporting the Act was passed in 1925 with no objections).

align with the drafters’ perspective that arbitration offers a significantly superior method of resolving commercial disputes, the Supreme Court has embraced a pro-arbitration stance when addressing arbitration conflicts.\textsuperscript{39}

B. Kicking into High Gear: The Evolution of the FAA

In the years following the legislative success of the FAA, courts faced challenges surrounding its interpretation and application.\textsuperscript{40} Even though Congress failed to identify its underlying authority in enacting the FAA, for the first thirty-five years of the FAA’s existence, the Supreme Court determined that Congress possessed the authority to instruct federal courts on its procedures.\textsuperscript{41} This meant that the Act’s constitutional foundation derived from Congress’s ability to regulate procedures within the federal system rather than its power to exert authority over commerce.\textsuperscript{42} Consequently, until the 1960s, the FAA operated as a procedural statute applicable within federal courts.\textsuperscript{43}

The Supreme Court’s decision in \textit{Southland Corp. v. Keating}\textsuperscript{44} marked a shift in the Act, helping it transform from a procedural statute to a substantive federal law applicable in both state and federal courts.\textsuperscript{45}

Id.

\textsuperscript{39} See \textit{Southland Corp. v. Keating}, 465 U.S. 1, 14 (1984) (adopting a liberal federal policy when deciding arbitration disputes). The Court held “[t]o confine the scope of the Act to arbitrations sought to be enforced in federal courts would frustrate what we believe Congress intended to be a broad enactment appropriate in scope to meet the large problems Congress was addressing.” \textit{Id.}; \textit{see also} \textit{Atwood}, supra note 36, at 73–74 (stating the drafters viewed arbitration as a vastly “superior means of commercial dispute resolution,” and therefore courts ought to reflect the drafters’ intentions).

\textsuperscript{40} See Cohen & Dayton, supra note 28, at 275 (acknowledging questions regarding the interpretation of the FAA in relation to congressional authority).

\textsuperscript{41} \textit{See} \textit{Ian R. MacNeil, American Arbitration Law: Reformation – Nationalization – Internationalization} 148 (1992) (“From birth through its first thirty-five years or more, the [FAA] was a procedural statute applicable only in the federal courts.”); \textit{Atwood, supra note 36, at 75–76 (describing that Congress failed to address the question of underlying authority); see also id. (describing the three possible congressional bases for interpreting the FAA). These three bases include “power to regulate interstate . . . commerce, power to legislate in the admiralty and maritime field, and power to establish procedures for lower federal courts.” \textit{Id.} (footnotes omitted). Because the FAA is a federal law, each of the three bases provides a source of power for congressional enactment and enforcement. \textit{Id.}

\textsuperscript{42} \textit{See} \textit{MacNeil, supra note 41, at 148–50 (describing the Act’s constitutional foundation). The procedural foundation gave courts a way to enforce arbitration agreements as they were intended by the parties. \textit{Id.} at 148.}

\textsuperscript{43} \textit{See id. (finding the FAA was a procedural statute applied only in federal courts); Bradley, supra note 31, at 592 (detailing the history behind the FAA’s procedural origins).}

\textsuperscript{44} 465 U.S. 1 (1984).

\textsuperscript{45} \textit{See id. at 12–15 (finding the FAA created substantive law); see also MacNeil, supra note 41, at 139–40 (tracing how the \textit{Keating} decision was a crucial step in
Keating also reflected a shift in the understanding of the Act’s constitutional underpinning, moving from a reliance on procedural aspects to a recognition of congressional authority to regulate commerce. In this landmark case, the Supreme Court held that the FAA preempts state law, and as such, elevated the FAA to a substantive legal principle. The Court abandoned the Act’s purely procedural treatment when it reasoned that the Section 2 phrase “involving commerce” was not a limitation on federal courts’ power but rather a “qualification on a statute intended to apply in state and federal courts.”

The Court continued its liberal interpretation of the FAA by extending its application past contract disputes to statutory claims. In Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., a case involving an international arbitration dispute, Justice Blackmun looked to the legislative history behind the FAA to find that the Act provides “no basis for disfavoring agreements to arbitrate statutory claims.” Six years later, the Court in Gilmer v. Interstate/Johnson Lane Corp. determined the FAA (transforming the FAA into substantive law). Macneil first notes that in Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 420 (1967), the Court held that the FAA governed diversity cases in federal court where the arbitration clause was a transaction involving interstate commerce. See Macneil, supra note 41, at 138. However, the Court did not directly address whether federal or state law governed, and, as a result, numerous cases were litigated under the assumption that state law controlled. Id. at 138–39. To remedy this erroneous assumption, the Keating Court held that the FAA “is a regulatory federal statute superseding state law and, hence, governs in state courts.” Id. at 139.

46. See Keating, 465 U.S. at 11 (“The Federal Arbitration Act rests on the authority of Congress to enact substantive rules under the Commerce Clause.”); Bradley, supra note 31, at 532 (noting the shift in view relating to the constitutional power behind the Act).

47. See Keating, 465 U.S. at 14–15 (ruling Congress created a substantive rule applicable in state courts). The main question in Keating was whether the Act preempted a provision of the California Franchise Investment Law that guaranteed a judicial forum for franchisees’ claims. Id. at 3; Atwood, supra note 36, at 84 (describing the Supreme Court’s view that the California Franchise Investment Law directly conflicted with the Act and was therefore preempted by the federal statute).

48. See Keating, 465 U.S. at 14–15 (“We therefore view the ‘involving commerce’ requirement in § 2, not as an inexplicable limitation on the power of the federal courts, but as a necessary qualification on a statute intended to apply in state and federal courts.”). But see Atwood, supra note 36, at 83 (criticizing the Court’s approach). Atwood stated: “By focusing exclusively on the commerce and admiralty foundation for the Act and refusing to acknowledge Congress’s original perception of the Act as procedural, the Court cleared the way for a finding of broad preemptive design.” Id.

49. See DeCurtis, supra note 34, at 530 (tracing the evolution of the FAA and noting that after Keating, the next major step in moving the FAA to substantive law came from Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)).


51. See id. at 627–28 (concluding that when a party agrees “to arbitrate a statutory claim, [the] party does not forgo the substantive rights afforded by the statute”). The Court stated that if Congress intended a statute to protect against the waiver of the right to a judicial forum, such intent would be evident from the text or legislative history. Id. at 628.

applied to employment cases by invoking the statutory precedent set forth in *Mitsubishi*. The *Gilmer* majority held that courts must compel parties to honor arbitration agreements unless Congress expressly intended to forbid the relinquishment of judicial remedies for statutory rights in dispute. The Court concluded that by agreeing to arbitrate a statutory claim, parties do not surrender their substantive rights under the Act; they merely alter the forum for resolving their claim from a judicial one to an arbitral one.

C. *Pit Stop: Examining Landmark Cases That Shaped the FAA*

The evolution of the FAA into a substantive law culminated in the Supreme Court’s decision in *Allied-Bruce Terminix Cos. v. Dobson*. The question before the Court was whether an arbitration clause was enforceable even though the parties did not anticipate engaging in activities related to interstate commerce. By ruling in favor of compelling arbitration, the Court conveyed that the presence of the words “involving commerce” in Section 2 of the FAA indicated Congress’s intention to fully exercise its commerce authority.

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53. See id. at 35 (holding a claim under the Age Discrimination in Employment Act (ADEA) could be subject to compulsory arbitration); see also id. at 43 (Stevens, J., dissenting) (criticizing the majority because until *Gilmer*, the Court had not broadly construed Section 2 of the FAA to encompass employment disputes). Justice Stevens further condemned the majority for ignoring the inequality of bargaining power that was common in a contract between employee and employer. Id.


55. See *Gilmer*, 500 U.S. at 26 (citing *Mitsubishi Motors Corp.*, 473 U.S. at 628) (extending arbitration beyond commercial disputes). The majority notes that parties still maintain their rights and the only difference is the forum where the dispute is settled. Id.; see also DeCurtis, supra note 34, at 530–31 (explaining the *Gilmer* decision, noting that arbitration agreements are enforceable even if there is an inequality in bargaining power).

56. 513 U.S. 265 (1995); see Bradley, supra note 31, at 532–33 (highlighting that the *Allied-Bruce* decision marked the end of the FAA’s thirty-year journey to substantive law).

57. See *Allied-Bruce*, 513 U.S. at 268–69 (recounting the facts from the dispute). The lower court held that the connection between the contract and interstate commerce was “too slight,” causing the Supreme Court to contemplate whether Section 2 should be interpreted broadly to align with the full extent of the Commerce Clause. Id.

58. See id. at 273–74 (examining the statute’s language, background, and structure to conclude that the word “involving” is broad and is the “functional equivalent of ‘affecting’”). The Court also read the statute to apply to cases that do not contemplate “interstate commerce,” giving the FAA a far-ranging scope. Id. at 281; see also Nicolas Enrique O’Connor, Note, *The Insurmountable Textual Obstacle*: A Narrow Interpretation of the Federal Arbitration Act, 32 Geo. J. Legal Ethics 855, 862 (2019) (outlining the four arguments taken by the majority in *Allied-Bruce*).
The Allied-Bruce decision created an obvious problem for interpreting Section 1.\(^59\) Given that Section 2 broadly applied to all transactions “involving commerce,” the scope of Section 1 would similarly be broad due to the operative phrase “engag[ing] in . . . commerce.”\(^60\) This interpretation would render almost every arbitration agreement in an employment contract unenforceable, essentially nullifying the primary substantive provision of the Act.\(^61\) Presented with an opportunity to resolve this, the Court in Circuit City Stores, Inc. v. Adams\(^62\) ruled that only some contracts were exempt from the FAA.\(^63\) The Court examined the language in both Sections 1 and 2 and noticed that Congress used different modifiers before the word “commerce”—“involv-” was used in Section 2 while “engaged in” was used in Section 1.\(^64\) With “involving” historically having an all-encompassing meaning compared to the limiting phrase “engaged in,” the Circuit City Court ruled Section 1 had a narrow scope.\(^65\) After establishing the meaning of each Section, the Court concluded that “Section 1 exempts from the FAA only contracts of employment of transportation workers.”\(^66\)

59. See Bradley, supra note 31, at 533 (analyzing the implications that Allied-Bruce had on interpreting Section 1 of the FAA). “The decision in Allied-Bruce indicated that the FAA’s reach was coextensive with the Congress’s commerce power. If this principle were applied to the section 1 exemption, it would mean that nearly every employment contract was ineligible for arbitration under the FAA.” Id.

60. See 9 U.S.C. § 1 (2024); id. § 2; see also Bradley, supra note 31, at 533 (reflecting on the problem of the Act’s scope).

61. See Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 114 (2001) (finding that if the phrase “engaged in interstate commerce” was construed to exclude all employment contracts, it would not “give independent effect to the statute’s enumeration of the specific categories of workers which precedes it”).


63. See id. at 109 (confining the Exclusion to transportation workers).

64. See id. at 115 (reasoning the Section 1 phrase “engaged in commerce” is “understood to have a more limited reach” than the Section 2 phrase “involving commerce”). Citing Allied-Bruce, the Court concluded that the term “involving commerce” is similar to “affecting commerce,” and conveys Congress’s intent to fully exercise its commerce authority. Id. In contrast, when the phrases “in commerce” and “engaged in commerce” have been used in other federal statutes, they indicated a more limited jurisdictional scope. Id.; see also DeCurtis, supra note 34, at 533 (summarizing the Court’s reasoning in Circuit City).

65. See Cir. City Stores, 532 U.S. at 113–14 (justifying the narrow scope of Section 1). The Court also looked to the terms “seamen” and “railroad employee” to find that the Section 1 phrase “engaged in” is narrower than the Section 2 phrase “involved in.” Id. “[T]here would be no need for Congress to use the phrases ‘seamen’ and ‘railroad employees’ if those same classes of workers were subsumed within the meaning of the ‘engaged in . . . commerce’ residual clause.” Id. (second alteration in original); see also Bradley, supra note 31, at 533 (“The Court further concluded that the section 1 phrase ‘any other class of workers engaged . . . in interstate commerce’ was a residual clause limited by the references to ‘railroad employees’ and ‘seamen’ in the same sentence.” (alteration in original) (quoting Cir. City Stores, 532 U.S. at 114–15)).

66. See Cir. City Stores, 532 U.S. at 119 (exempting only contracts of employment of transportation workers from the FAA). The Court referred to transportation workers as those “actually engaged in the movement of goods in interstate commerce.” Id. at 112 (quoting Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465, 1471
The scope of the Exclusion was not addressed again until 2019, when the Court finally determined who qualified as a “transportation worker.”

In *New Prime*, a truck driver claimed he was exempt from arbitration because he was an independent contractor for New Prime. New Prime argued that based on *Circuit City*, an independent contractor agreement is not a traditional form of an employment contract and therefore cannot be exempt from the FAA. Ruling in favor of the plaintiff, the Court found that when the Act was originally passed, the term “contract of employment” was not limited to contracts solely between “employer” and “employee,” and as such, it encompassed independent contractors. Therefore, with the *New Prime* decision, the Court gave a larger class of workers (including gig economy drivers) the means to avoid Section 2 of the FAA.

In 2022, the Supreme Court in *Southwest Airlines Co. v. Saxon* applied Section 1 to workers closely engaged in interstate commerce. The plaintiff was a ramp supervisor who frequently assisted in loading and unloading planes, which raised the question of whether her role qualified as “engag[ing] in interstate commerce.” The Court concluded that ramp supervisors fell within Section 1 because they played a direct and necessary role in transporting goods across state or international borders. The decision established that individual workers need (D.C. Cir. 1997)). The Court implies this definition was only an example of how to define the term. Id.

67. See *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537–38 (2019) (holding that independent contractors fall within the definition of a transportation worker); see also *Bradley*, supra note 31, at 533 (arguing that while the Court limited the scope of the Exclusion to transportation workers, it did not define its scope until *New Prime*).

68. See *New Prime Inc.*, 139 S. Ct. at 536–37 (describing the facts of the case).

69. See id. at 537 (outlining New Prime’s argument). New Prime also contended that given the breadth of the arbitration agreement, any questions regarding the Section 1 exemption should be handled by an arbitrator. Id.

70. See id. at 539 (adopting the canon of statutory construction that words are to be interpreted according to their ordinary meaning at the time of enactment). The Court concluded that, at the time of the FAA’s enactment in 1925, the term “contract of employment” meant an agreement to perform work. Id. As such, it reasoned that contracts of employment encompass independent contractors. Id.

71. See *Bradley*, supra note 31, at 534 (noting the decision in *New Prime* slowed the expansion of the FAA).

72. 142 S. Ct. 1783 (2022).

73. See id. at 1787 (ruling a ramp supervisor qualified for the Exclusion even though the class of workers did not cross state lines); see also *Meshel*, supra note 23, at 14–16 (noting the federal court split on whether a worker needs to cross state lines to be engaged in interstate commerce prior to *Saxon*).

74. See *Saxon*, 142 S. Ct at 1787 (quoting 9 U.S.C. § 1 (2024)) (discussing the facts). Ramp supervisors are defined as those “who train and supervise teams of ramp agents.” Id. Ramp agents are those “who physically load and unload baggage, airmail, and freight.” Id. The plaintiff in *Saxon*, though a ramp supervisor, filled in for ramp agents up to three times per week by unloading boxes. Id.

75. See id. at 1789 (starting its analysis with the ordinary meaning of the statute). The Court defined “engaged” as “to be ‘occupied,’ ‘employed,’ or ‘involved’ in” and “commerce” as “the transportation of . . . goods, both by land and by sea.”
not physically cross state boundaries; rather, they must play a crucial role in moving goods in interstate commerce.\textsuperscript{76} However, the Court expressly declined to extend its rationale to local drivers, leaving the application of the Section 1 test unresolved in those cases.\textsuperscript{77}

III. Raising the Yellow Flag: Federal Courts Collide When Interpreting Section 1

\textit{New Prime} established a loose framework for how a gig economy driver may avoid arbitration under Section 1.\textsuperscript{78} First, an individual must prove they have a contract of employment.\textsuperscript{79} However, this element is not commonly discussed in gig-related arbitration disputes because \textit{New Prime} made the distinction between employees and independent contractors inconsequential when the Court expanded the definition of employment contracts.\textsuperscript{80} Second, an individual must prove they are part of a class engaged in interstate commerce.\textsuperscript{81} But, because of the lack

\textit{Id.} (alteration in original) (quoting \textsc{Black's Law Dictionary} 220 (2d ed. 1910)). The Court also relied on Circuit City, finding transportation workers are those who play an active role in moving goods between borders. \textit{Id.} at 1790 (citing Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 121 (2001)).

\textsuperscript{76} See \textit{id.} at 1789 ("[A]ny class of workers directly involved in transporting goods across state or international borders falls within §1’s exemption.").

\textsuperscript{77} See \textit{id.} at 1789 & n.2 (recognizing the answer to the question of whether one is “engag[ing] in . . . interstate commerce” will not always be clear—especially when dealing with drivers—while also noting “we need not address those questions to resolve this case”); Khorri Atkinson, Circuit Splits Cloud Transportation Worker Arbitration Carveout, \textit{Bloomberg L.} (Oct. 24, 2022, 5:00 AM), https://news.bloomberglaw.com/daily-labor-report/circuit-splits-cloud-transportation-worker-arbitration-carveout [https://perma.cc/3CBG-RRY6] (criticizing the Court’s failure to apply the ruling to local drivers because it will “further muddy the legal landscape”).


\textsuperscript{79} See Bradley, \textit{supra} note 31, at 535 (noting the first requirement that drivers must meet after the Court’s holding in \textit{New Prime}).

\textsuperscript{80} See, e.g., Islam v. Lyft, Inc., 524 F. Supp. 3d 338, 344 & n.1 (S.D.N.Y. 2021) (holding Lyft drivers, as independent contractors, are engaged in active employment under the Exclusion); Rittmann v. Amazon.com, Inc., 971 F.3d 904, 915 (9th Cir. 2020) (ruling Amazon Flex drivers, as independent contractors, still fall within Section 1); see also Bradley, \textit{supra} note 31, at 528 n.11 (finding \textit{New Prime} made inconsequential the independent contractor label).

\textsuperscript{81} See Wallace v. Grubhub Holdings, Inc., 970 F.3d 798, 800 (7th Cir. 2019) (overgoing an analysis on the employment contract issue and instead directing the inquiry to whether “the class of workers to which the complaining worker belonged engaged in interstate commerce” (quoting Bacashihua v. U.S. Postal Serv., 859 F.2d 402, 405 (6th Cir. 1988))); Capriole v. Uber Techs., Inc., 7 F.4th 854, 862 (9th Cir. 2021) (identifying the relevant class of workers and then determining whether they were engaged in interstate commerce). The \textit{Capriole} court determined that the relevant class of workers were all Uber drivers within the U.S., not just those working in the state of Massachusetts. \textit{Id.} at 862–63. The court then held that Uber drivers nationwide are not engaged in foreign or interstate commerce and therefore are not exempt from arbitration. \textit{Id.} at 863.
of Supreme Court guidance on how to interpret Section 1, courts have adopted two disparate approaches in analyzing this requirement.\(^{82}\)

The first is the worker-based approach, best exemplified by the Ninth Circuit’s application.\(^{83}\) This approach evaluates an individual by looking to the job duties of employees with analogous roles to determine if the class is engaged in the channels of interstate commerce.\(^{84}\) Under this analysis, courts vary in the test’s application depending on three key factors: (1) whether the Exclusion is limited to those directly involved in transporting goods; (2) whether workers need to cross borders; and (3) how frequently workers engage in interstate commerce.\(^{85}\) The second is the transportation-based approach.\(^{86}\) This framework forgoes the worker-based approach considerations and instead mandates that a worker be engaged in a transportation-based industry to be eligible for Section 1 exclusion.\(^{87}\)

This Part parses out the two competing approaches and the reasoning behind each. Section A discusses how the Ninth Circuit in Capriole interpreted and applied the worker-based approach. Section B examines how other circuits interpret the worker-based approach. Section C evaluates the Second and Eleventh Circuit’s reasoning behind the transportation-based approach.

A. Champion in the Making: The Ninth Circuit’s Application of Section 1

In Capriole, the Ninth Circuit applied the worker-based approach to hold that the plaintiff Uber driver did not qualify for the Exclusion and was therefore compelled to arbitrate.\(^{88}\) In concluding that Uber drivers do not frequently engage in interstate commerce, the court examined three factors to assist in its decision.\(^{89}\) First, the Exclusion is not limited

\(^{82}\) For each of the different approaches applied by courts, see infra Sections III.B–C.

\(^{83}\) See Capriole, 7 F.4th at 861–67. For further discussion of the Ninth Circuit’s application, see infra Section III.A.

\(^{84}\) For further discussion of the worker-based approach, see infra Sections III.A–B.

\(^{85}\) See Aparcio, supra note 16, at 420–32 (listing the factors commonly disputed under the worker-based approach); Bradley, supra note 31, at 535–45 (same). However, neither Aparcio nor Bradley breaks the analysis into a worker-based or transportation-based approach as done in this Comment and instead, both authors compile a list of different factors used by the courts. Id. For discussion of the differing applications of these factors, see infra Section III.B.

\(^{86}\) See sources cited supra note 16; see also Bradley, supra note 31, at 540–41 (noting some courts require that the worker must be engaged in a transportation-based industry to qualify for the Exclusion).

\(^{87}\) For further discussion of the application of the transportation-based approach, see infra Section III.C.

\(^{88}\) See Capriole, 7 F.4th at 861, 867 (compelling the driver to arbitrate the claim). The driver filed a putative class action lawsuit against Uber, alleging that Uber violated state wage and hour laws. Id. at 859.

\(^{89}\) See id. at 861–67 (identifying three factors that must be considered when evaluating a Section 1 claim). The Ninth Circuit determined Section 1 applies to
to workers who only transport goods; it extends to workers who transport passengers.\textsuperscript{90} While the Ninth Circuit did not directly discuss this element, it cited one of its earlier cases which noted that at the time of Section 1’s enactment, Congress’s Commerce Clause power encompassed both goods and passengers.\textsuperscript{91}

Second, the court determined that the Exclusion does not depend on whether the class of workers physically crosses state lines.\textsuperscript{92} While the Ninth Circuit did not provide a lengthy analysis on this point, it did examine Uber drivers’ intrastate trips to transportation hubs when deciding if the drivers were engaged in interstate commerce.\textsuperscript{93} A case from the First Circuit, \textit{Waithaka v. Amazon.com, Inc.},\textsuperscript{94} provides a more robust explanation of why individuals supervising the transportation of goods or people engaged in interstate commerce could still meet the criteria for Section 1 even if their duties are confined to an intrastate segment of the overall interstate journey.\textsuperscript{95} The court looked to how the Supreme Court historically interpreted the phrase “engaged in interstate commerce”
and found that in 1925, “even if the workers were responsible only for an intrastate leg of that interstate journey,” they were considered to be a part of interstate commerce.\footnote{96} Additionally, through an analysis of the structure and text of the FAA, the First Circuit supported its conclusion that crossing state lines is not a prerequisite for qualifying for Section 1.\footnote{97}

Third, the Ninth Circuit held that the workers must primarily engage in interstate commerce to qualify for the Exclusion.\footnote{98} To support its conclusion, the court referenced a Third Circuit case that required a consideration of how frequently the driver engaged in interstate commerce.\footnote{99} However, neither the Ninth nor Third Circuit provided an in-depth analysis on this factor, so it is instructive to look at how another court came to this same conclusion.\footnote{100} In \textit{Osvatics v. Lyft, Inc.},\footnote{101} the District Court for the District of Columbia referenced the classifications enumerated in Section 1 (seamen and railroad workers) and found both class of workers engaged in . . . interstate commerce.” (second alteration in original) (quoting Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 118 (2001))).

\footnote{96. See id. at 18–22 (looking to the Supreme Court’s decision in \textit{Circuit City} to determine how to interpret the phrase “engaged in”). The First Circuit determined that because the \textit{Circuit City} Court looked to other statutes passed around the same time as the FAA, it would be appropriate to employ the same contemporaneous examination. \textit{Id.} at 18–19. In doing so, the First Circuit turned to the Federal Employer’s Liability Act (FELA) because it was passed around the same time as the FAA and used the phrase “engaged in interstate commerce.” \textit{Id.} at 19. After examining how the Supreme Court interpretated this phrase under FELA through a consideration of different cases, the First Circuit held that Section 1 includes workers who do not cross state lines. \textit{Id.} at 19–22.}

\footnote{97. See id. at 22–24 (examining how the sequence of words in Section 1 and the structure of the FAA support the fact that workers do not have to cross state lines to be engaged in interstate commerce). With regard to the sequence of words in Section 1, the First Circuit rejected Amazon’s argument that because the phrase “engaged in . . . interstate commerce” follows “any class of workers,” only the activities of the workers themselves must be considered. \textit{Id.} at 22 (alteration in original). Instead, the First Circuit held that the nature of the employer’s business should be considered to determine if the workers are transporting people or goods “within the flow of interstate commerce.” \textit{Id.} at 22–23 (quoting \textit{Cir. City Stores}, 532 U.S. at 118). The First Circuit then explored the structure of the FAA and how the phrase “engaged in” is narrower than the phrase “involved in.” \textit{Id.} at 23–24. In doing so, the court determined that “nothing in the structure of the FAA alters our understanding of the original meaning of the ‘engaged in . . . interstate commerce’ language of the residual clause.” \textit{Id.} at 24 (alteration in original) (quoting 9 U.S.C. § 1 (2024)).}

\footnote{98. See \textit{Capriole}, 7 F.4th at 865 (finding that interstate movement was not a central part of the ‘Uber drivers’ job description).}

\footnote{99. See id. at 864 (finding that the Third Circuit’s opinion in \textit{Singh v. Uber Technologies Inc.} stood “for the proposition that any interstate commerce exemption inquiry must focus on the district court’s factual findings regarding the extent of interstate work” (citing Singh v. Uber Techs. Inc., 939 F.3d 210, 227–28 (3d Cir. 2019))).}

\footnote{100. See id. (mentioning the frequency requirement but not providing a robust discussion of its applicability to the facts of the case). \textit{Singh}, 939 F.3d at 226–27 (remanding the case for discovery on “whether Singh belongs to a class of transportation workers engaged in interstate commerce” based on his claim that he frequently engaged in interstate commerce).}

\footnote{101. 535 F. Supp. 3d 1 (D.D.C. 2021).}
groups were employed in roles central to the interstate conveyance of goods and passengers.102 As a result, the court deemed it appropriate to apply this “primary” criterion to the “any other class of workers engaged . . . in interstate commerce” listed in Section 1 (the residual clause).103

In applying the above factors, the Ninth Circuit found Uber drivers to offer services that are primarily local and intrastate in nature.104 Consequently, any interstate trips undertaken by Uber drivers were considered incidental, arising from geographical happenstance.105 Additionally, the court examined the significant volume of trips to hubs of interstate commerce, such as airports and railways, and concluded that these journeys were also incidental.106 This determination was based on the unilateral nature of passenger-driver interactions and the lack of contractual arrangements between Uber and airports.107 Therefore, there was no “practical, economic continuity” with interstate hubs as required by Section 1.108

102. See id. at 17 (“Thus, to fall within the scope of the residual clause, the class of workers must ‘perform[] work analogous to that of seamen and railroad employees, whose occupations are centered on the transport of goods [or persons] in interstate or foreign commerce.’” (alterations in original) (quoting Wallace v. Grubhub Holdings, Inc., 970 F.3d 798, 802 (7th Cir. 2020))).

103. See id. at 13 (quoting 9 U.S.C. § 1 (2024)). The court looked to other circuits’ decisions to support its reasoning here. Id. at 16; see also Cir. City Stores, Inc., v. Adams, 532 U.S 105, 114–15 (2001) (identifying the residual clause of Section 1).

104. See Capriole, 7 F.4th at 865 (referencing a district court opinion to support its conclusion); see also Rogers v. Lyft, Inc., 452 F. Supp. 3d 904, 916 (N.D. Cal. 2021) (“Their work predominantly entails intrastate trips, an activity that undoubtedly affects interstate commerce but is not interstate commerce itself.”), aff’d, No. 20-15689, 2022 WL 474166 (9th Cir. Feb. 16, 2022).

105. See Capriole, 7 F.4th at 864 (considering the interstate trip statistics provided by Uber and concluding that they are skewed by drivers who live close to state borders); see also Rogers, 452 F. Supp. 3d at 916 (“Interstate trips that occur by happenstance of geography do not alter the intrastate transportation function performed by the class of workers.”).

106. See Capriole, 7 F.4th at 864 (finding that intrastate trips to transportation hubs were local in nature and did not always involve interstate commerce because “some trips to and from the airport are taken by airport employees and passengers traveling solely on intrastate flights”). The court also examined Supreme Court precedent in United States v. Yellow Cab Co., 332 U.S. 218 (1947), which concerned taxi drivers, and applied the holding to Uber drivers in the present case. See Capriole, 7 F.4th at 863. Referencing Yellow Cab Co., the court stated: “[T]he Supreme Court also held that ‘when local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service, that service is not an integral part of interstate transportation.’” Id. (quoting Yellow Cab Co., 332 U.S at 233).

107. See Capriole, 7 F.4th at 865–65 (highlighting that the taxis the Supreme Court considered in Yellow Cab Co. also did not have contractual arrangements with airports; therefore, the lack of practical continuity with interstate commerce led the court to find that the Uber drivers did not qualify for the Exclusion).

108. See id. at 865–66 (quoting Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195 (1974)) (“[T]here must be an established link between such intrastate rideshare trips and the channels of commerce that are designed to facilitate
B. **Increasing the Drag: The Uneven Application of the Worker-Based Approach**

While several circuits have adopted a worker-centric approach, their application of the three factors diverges from that of the Ninth Circuit. These courts maintain varying stances, stipulating that to meet the Exclusion, an individual needs to transport goods (not passengers), cross state lines, or only occasionally engage in interstate commerce. Consequently, this section delineates the disparate interpretations and applications of each factor across different circuits and district courts.

1. **The “Goods-Only” Requirement**

Both the Eleventh Circuit and the Southern District of New York have barred workers from the Exclusion due to their exclusive transportation of passengers. These courts relied on Circuit City dicta to support this “goods-only” requirement. The Eleventh Circuit found that the Supreme Court’s language confirmed that Section 1 exclusively pertains to transportation workers engaged in the movement of goods in interstate commerce. Similarly, the Southern District of New York stated that the involvement of physical goods is “an indispensable element” for qualifying as a transportation worker. In justifying this stance, the court emphasized that because the jobs of seamen and railroad workers—who are explicitly listed in Section 1—are centered on transporting goods, the qualification must extend to the other workers referenced in the residual clause of the Exclusion.

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109. For further discussion of the different applications of the worker-based approach, see infra Section III.B.

110. See Aparcio, supra note 16, at 415–32 (discussing the varying applications).

111. See Perez v. Globe Airport Sec. Servs., Inc., 253 F.3d 1280, 1284 (11th Cir. 2001) (holding that only workers who transport goods qualify for the Exclusion), vacated, 294 F.3d 1275 (11th Cir. 2002); Kowalewski v. Samandarov, 590 F. Supp. 2d 477, 484 (S.D.N.Y. 2008) (analyzing the arbitration claims of a car-service provider); see also Bradley, supra note 31, at 545 (compiling a list of certain courts that require drivers to be engaged in the transportation of goods rather than the transportation of passengers to qualify for the Exclusion).

112. See Perez, 253 F.3d at 1284 & n.1 (adopting the Circuit City language where the Supreme Court required workers to engage in the movement of goods to qualify for the Exclusion); Kowalewski, 590 F. Supp. 2d at 483 (finding that because seamen and railroad workers primarily transported goods, the residual clause must apply to workers who only transport goods).

113. See Perez, 253 F.3d at 1284 (determining that the language in Circuit City supported the proposition that Section 1 only pertains to workers who transport goods).

114. Kowalewski, 590 F. Supp. 2d at 484 (examining Circuit City to come to the conclusion “that the interstate shipment of physical goods is central to the [Section 1] analysis” (emphasis omitted)).

115. See id. 481–82 (looking to precedent to find that the central job of seamen and railroad workers is the transportation of goods, whereas transporting passengers was only incidental to their jobs).
2. **The “Crossing State Border” Requirement**

Some courts hold that interstate transportation (i.e., crossing state lines) is necessary for qualifying for the Exclusion.\(^\text{116}\) For example, in *Rogers v. Lyft, Inc.*,\(^\text{117}\) the Northern District of California held that Lyft drivers are not engaged in interstate commerce because their work “predominantly entails intrastate trips.”\(^\text{118}\) The court noted that an intrastate trip “undoubtedly affects interstate commerce but is not interstate commerce itself.”\(^\text{119}\) Similarly, in *Magana v. DoorDash, Inc.*,\(^\text{120}\) the same court placed substantial weight on the fact that the plaintiffs (who were a class of food delivery drivers) only performed intrastate trips and thus did not qualify for the Exclusion; interstate trips were needed.\(^\text{121}\)

Other courts, like the Seventh Circuit in *Wallace v. Grubhub Holdings, Inc.*,\(^\text{122}\) aligned with the Ninth Circuit’s approach but provided additional clarification regarding the eligibility of drivers in purely intrastate trips for the Exclusion.\(^\text{123}\) In its interpretation, workers can qualify for the Exclusion when they contribute to the transportation of goods across state borders if the goods have not reached their final destination or underwent substantial alterations en route.\(^\text{124}\) To illustrate, delivering a pizza to...

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116. See Aparicio, supra note 16, at 420 (“[T]he most popular argument amongst employers seeking to enforce an arbitration agreement is that a worker must literally transport goods or passengers across state lines . . . .”); Bradley, supra note 31, at 542–43 (noting some courts require passage across state lines to be considered for the Exclusion). For further discussion of courts that have adopted this approach, see infra notes 117–126 and accompanying text.

117. 452 F. Supp. 3d 904 (N.D. Cal. 2021), aff’d, No. 20-15689, 2022 WL 474166 (9th Cir. Feb. 16, 2022).

118. Id. at 916 (noting that the incidental effect on interstate commerce is not enough for nationwide Lyft drivers to qualify for the Exclusion).

119. See id. In reaching this conclusion, the court turned to two Supreme Court cases from the 1970s that examined the meaning of “engaged in interstate commerce.” Id. at 915–17. Both cases held intrastate commerce does not affect interstate commerce. Id. (first citing Gulf Oil Corp. v. Cott Paving Co., 419 U.S. 186, 195 (1974); and then citing United States v. Am. Bldg. Maint. Indus., 422 U.S. 271, 278 (1975)). *Gulf Oil Corp.* defined interstate commerce as “the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer.” *Am. Bldg. Maint. Indus.*, 422 U.S. at 278. The *American Building Maintenance Industries* Court stated: “No similar concern for the impact of intrastate conduct on interstate commerce is evident in § 7’s ‘engaged in commerce’ requirements.” *Am. Bldg. Maint. Indus.*, 422 U.S. at 279.

120. 343 F. Supp. 3d 891 (N.D. Cal. 2018).

121. See id. at 899 (requiring more than intrastate trips for one to be considered engaged in interstate commerce); see also Lee v. Postmates Inc., No. 18-cv-05421, 2018 WL 6605659, at *1, *7 (N.D. Cal. Dec. 17, 2018) (“Postmates couriers do not fall within the transportation worker exception to the FAA because they do not engage in interstate commerce.”).

122. 970 F.3d 798 (7th Cir. 2020).

123. See id. at 800 (recognizing a worker does not need to cross state lines to be exempt from arbitration). The Seventh Circuit noted that the transportation of the goods must be continuous and cannot be taken out of the stream of interstate commerce. Id. at 801–05.

124. See id. at 800–03 (holding a food delivery driver did not qualify for Section 1 because the driver was not engaged in the channels of interstate commerce). The driver made local trips from the restaurant to the customer’s home. Id. at 799.
a customer does not qualify as engaging in interstate commerce; although the pizza ingredients might have entered the state through interstate means, their journey concludes upon delivery at a restaurant. On the other hand, a driver who delivered the ingredients to the restaurant may qualify for the Exclusion because they participated in interstate commerce by moving the ingredients in a continuous journey across state lines.

3. The “Frequency” Requirement

The last point of contention under the worker-based approach centers around the frequency with which workers engage in interstate commerce. Unlike the Ninth Circuit, which requires workers to frequently engage in interstate commerce, the Seventh Circuit holds that occasional trips are enough for a worker to qualify for the Exclusion. In *International Brotherhood of Teamsters Local Union No. 50 v. Kienstra Precast, LLC,* the court explained that truckers who occasionally make trips across state lines qualify for Section 1 because there is “no basis in the text of § 1 for drawing a line between workers who do a lot of interstate transportation work and those who cross state lines only rarely; both sorts of worker are ‘engaged in foreign or interstate commerce.’”

Likewise, the Southern District of New York declined to follow the “primary” standard adopted by the Ninth Circuit. In determining that Uber drivers are exempt from arbitration under Section 1, the court asserted that a worker qualifies for the Exclusion as long as they have an occasional involvement in interstate commerce, irrespective of whether their job primarily entails crossing state lines. The court also found no

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The ingredients had reached their final destination (i.e., the restaurant) and were remade into a different good (i.e., the food the customer ordered) so that they were no longer connected to interstate commerce. See *id.* at 802–03 (finding the goods transported by food delivery drivers were taken out of the stream of commerce).

See *Carmona v. Domino’s Pizza, LLC,* 73 F.4th 1135, 1136, 1139 (9th Cir. 2023) (holding the food ingredient drivers who made solely intrastate trips were exempt from the FAA), *cert. denied,* No. 23-427, 2024 WL 1706016 (2024) (mem.). The drivers were engaged in the channels of interstate commerce by moving ingredients from an intrastate warehouse to its final destination. *Id.* at 1138.

Compare *Capriole v. Uber Techs., Inc.*, 7 F.4th 854, 865 (9th Cir. 2021) (looking to rideshare drivers’ primary job responsibilities), with *Int’l Bhd. of Teamsters Loc. Union No. 50 v. Kienstra Precast, LLC,* 702 F.3d 954, 957–58 (7th Cir. 2012) (finding interstate trips that occur outside the worker’s primary job responsibilities are enough to qualify the worker as being engaged in interstate commerce).

See *Kienstra Precast, LLC,* 702 F.3d at 957–58 (analyzing the history and text of Section 1 to determine that there is no frequency requirement).

702 F.3d 954 (7th Cir. 2012).

Id. at 958 (holding that even a few dozen trips across state lines qualifies the worker for the Exclusion).


See *id.* at 351 (“[A] class of transportation workers must perform more than a de minimis amount of interstate transportation . . . . But . . . the Court rejects
justification to read the terms “predominantly engaged in” or “primarily engaged in” interstate commerce into Section 1.133

C. Slipping Off the Track: The Transportation-Based Approach

In contrast to the worker-based approach adopted by the Ninth Circuit, the Second and Eleventh Circuits focus on the nature of the employer’s work to evaluate whether a worker is engaged in interstate commerce.134 An employee is categorized as a “transportation worker” when the job pertains to the transportation industry, which is defined as one that derives revenue primarily from the movement of goods or passengers.135 However, in 2024, the U.S. Supreme Court in Bissonnette v. LePage Bakeries Park St., LLC136 clarified that a worker does not need to be in the transportation industry to qualify for the Exclusion, thus undermining the Second and Eleventh Circuit’s prior reliance on the transportation-based approach.137 Despite this recent pronouncement, the Supreme Court did not endorse the worker-based approach, so understanding the reasoning behind the Second and Eleventh Circuit’s adoption of the transportation-based approach is crucial to contextualizing its flawed basis.138

The Second Circuit adopted the transportation-based approach in its now vacated Bissonnette v. LePage Bakeries Park St., LLC139 opinion by evaluating the wording of Section 1 contextually.140 Section 1 the notion that crossing state lines must be the primary, daily function of a class of transportation workers . . . .

133. See id. (emphasis omitted) (looking to the text of Section 1 and the reasoning employed by the Seventh Circuit in Kienstra). The court used the example of a judge to demonstrate that there is no need make transportation workers meet a “primary” requirement: A judge is “engaged in” conducting criminal trials despite the predominant focus on civil cases and the common resolution of criminal prosecutions through guilty pleas. Id.

134. Compare Capriole v. Uber Techs., Inc., 7 F.4th 854, 863–67 (9th Cir. 2021) (looking to the work the class performed), with Bissonnette v. LePage Bakeries Park St., LLC, 49 F.4th 655, 662 (2d Cir. 2022) (examining the work the employer is engaged in to determine whether a transportation worker qualifies for the Exclusion), cert. granted, 144 S. Ct. 479 (2023), vacated and remanded, No. 23-51 (U.S. Apr. 12, 2024); Hill v. Rent-A-Center, Inc., 398 F.3d 1286, 1288–90 (11th Cir. 2005) (same); and Hamrick v. PartsFleet, LLC, 1 F.4th 1337, 1344–52 (11th Cir. 2021) (same).

135. See Bissonnette, 49 F.4th at 661 (“[O]nly a worker in a transportation industry can be classified as a transportation worker.”).


137. See id. at 9 (“A transportation worker need not work in the transportation industry to fall within the exemption from the FAA provided by § 1 of the Act.”).

138. See id. at 3–9 (examining the flaws in the transportation-based approach by analyzing the previous Second Circuit opinion).

139. 49 F.4th 655 (2d Cir. 2022), cert. granted, 144 S. Ct. 479 (2023), vacated and remanded, No. 23-51 (U.S. Apr. 12, 2024).

140. See id. at 660 (finding that neither Congress nor the Supreme Court has defined “transportation worker”). Therefore, the court engaged in a contextual reading rather than a historical or ordinary-word meaning of Section 1. Id. The court also examined other case law from the Second and Eleventh Circuits to support its using of the transportation-based approach. Id. at 660–62.
provides specific examples of exempt workers, such as seamen and railroad employees, and importantly, both classes of workers are employed in the transportation sector. Therefore, the Second Circuit explained that the term “other” in the residual clause must also have the same industry-based limitation. As such, the Second Circuit held that a truck driver who engaged in interstate trips as a bakery employee was not involved in interstate commerce—a bakery does not derive the majority of its profits from interstate deliveries.

The Eleventh Circuit in Hill v. Rent-A-Center, Inc. followed a similar line of reasoning when adopting the transportation-based approach. The court noted that Congress’s intent was to limit the Exclusion only to those in the transportation industry due to its goal of specifically protecting transportation workers. In support, the court relied on the Supreme Court’s “permissible inference” that Section 1 was limited to any worker within the transportation industry. In applying this reasoning, the court found that an account manager who, as part of his job duties, transported merchandise across the Georgia-Alabama border was not exempt from arbitration; he simply rented products to customers in the surrounding area, so he was not part of the transportation industry.

IV. LAPPING THE COMPETITION: THE NINTH CIRCUIT TAKES THE LEAD WITH ITS APPLICATION OF THE WORKER-BASED APPROACH

A review of the varying standards and interpretations exemplify the challenges in the judicial system regarding gig economy drivers: there is

141. See id. 660 (explaining that “‘seamen’ constitute a ‘subset of workers engaged in the maritime shipping industry’” (quoting Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 1791 (2022))).
142. See id. (finding Congress’s purpose of protecting statutory dispute resolution schemes for workers does not “delineate” the transportation industry principle).
143. See id. at 661–62. To remain consistent with the controlling Saxon opinion, the Second Circuit held that because the plaintiff in Saxon was engaged in the transportation industry, there was no need for the Supreme Court to consider whether being in the transportation industry was a prerequisite. Id. at 661.
144. 398 F.3d 1286 (11th Cir. 2005).
145. See id. at 1288–90 (evaluating the legislative history of the FAA).
146. See id. at 1290 (“To broaden the scope of §1’s arbitration exemption to encompass any employment disputes of a worker employed by a company whose business dealings happen to cross state lines, would allow § 1’s exception to swallow the general policy requiring the enforcement of arbitration agreements as pronounced in § 2 of the FAA.”).
147. See id. at 1289 (quoting Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 120–21 (2001)) (interpreting Circuit City to support the notion that Congress intended to limit the Exclusion to workers in the transportation industry).
148. See id. at 1289–90 (applying the transportation-based approach to the facts of the case).
not a standardized framework that applies to such workers. To resolve this issue, this Comment proposes the adoption of the worker-based approach as applied by the Ninth Circuit. Because the Supreme Court in Bissonnette did not endorse the worker-based approach this Comment argues for and instead only rejected the transportation-based approach, there is still uncertainty as to how gig economy drivers fit within the scope of Section 1. Widespread adoption of the Ninth Circuit’s worker-based approach would provide much-needed clarity, as an individual would qualify for Section 1 only when they are part of a class of workers that frequently engages in the channels of interstate commerce. To support this, Section A asserts that even before the transportation-based approach was overruled, the worker-based approach was and still is better supported by the legislative history. Then, Section B contends that the historical understanding of the Exclusion and current jurisprudence align with the Ninth Circuit’s application of the three factors within the worker-based approach.

A. Overtaking the Pack: The Worker-Based Approach Proves Superior

This section analyzes the Ninth Circuit’s correct application of the worker-based approach through an examination of the legislative history behind the FAA and the flawed reasoning employed by other circuit courts that support the transportation-based approach.

1. Legislative History

The commentary associated with the drafting of the FAA, coupled with the understanding of “any other class of workers engaged in foreign or interstate commerce,” supports the conclusion that any transportation worker, regardless of the industry that the employee works in, is exempt from the Act. The FAA was modeled after the New York Arbitration Act, which itself was heavily supported by tradesman and merchants to facilitate the resolution of disputes. These businesspeople worked in

149. See Bradley, supra note 31, at 545–47 (arguing the current interpretation of Section 1 needs to be amended to include rideshare drivers); Meshel, supra note 23, at 12–13, 16–17 (finding the major issue regarding courts’ interpretations of Section 1 is how it is applied inconsistently across several jurisdictions).

150. For a discussion of why the worker-based approach adopted and applied by the Ninth Circuit is the correct approach, see infra Section III.A.

151. See Bissonnette v. LePage Bakeries Park St., LLC, No. 23-51, slip. op. at 9 (U.S. Apr. 12, 2024) (holding that the transportation-based approach is incorrect without casting an opinion on the worker-based approach).

152. See supra Section III.A for the Ninth Circuit’s application.


various industries, such as land development, construction, and sales, which were not tied to transportation industries.\footnote{155}{See William Catron Jones, \textit{Three Centuries of Commercial Arbitration in New York: A Brief Survey}, 1956 Wash. U. L. Q. 193, 212–13 (charting the different types of labor disputes between commercial groups entering New York courts through the decades). Prior to the passage of the New York Arbitration Act, many cases were not commercial based; arbitration-related cases were real estate matters and construction contracts. \textit{Id.}}

In a similar light, when the bill was before Congress, the original drafters asserted that bar associations throughout the country supported arbitration as “a way ‘to make the disposition of business in the commercial world less expensive.’”\footnote{156}{Leslie, \textit{supra} note 29, at 302 (emphasis added) (quoting Joint Hearings, \textit{supra} note 29, at 15 (statement of Julius Henry Cohen, Member, Comm. on Com., Trade, & Com. L. of the Am. Bar Ass’n)) (detailing the roles of Julius Cohen and Charles Bernheimer in the passage of both the New York Arbitration Act and the FAA). Cohen was a member of the American Bar Association’s Committee on Commerce, Trade, and Commercial Law and Bernheimer was the chair of its organization’s arbitration committee. \textit{Id.}} The head of the ABA Committee of Commerce, Trade, and Commercial Law, Julius Cohen, emphasized the pro-business stance in a statement to Congress when he explained that the FAA was designed to give merchants the right to discuss damages.\footnote{157}{See \textit{Joint Hearings, supra} note 29, at 13 (statement of Julius Henry Cohen, Member, Comm. on Com., Trade, & Com. L. of the Am. Bar Ass’n) (comparing the differences between litigation and arbitration). Arbitration was viewed by the businesspeople at the time as superior due to the relatively cheap cost and its efficiency in resolving disputes. \textit{Id.}}

Most importantly, the record indicates that every witness or member who spoke leading up to the enactment of the FAA focused on one issue: arbitration between businesspeople and merchants.\footnote{158}{See \textit{generally Arbitration Hearings, supra} note 35 (providing statements of those who spoke at the hearings); Leslie, \textit{supra} note 29, at 305–06 (noting the business-related discussions that surrounded the FAA). According to Leslie, Cohen referenced judicial opinions that involved disputes between businesses, and the American Bankers Association praised the benefits of arbitration because it linked bankers’ interests with those of businesspeople. \textit{Id.} at 305. Leslie also notes that Bernheimer even spoke in support of “73 business men’s organizations that have added their names in formal indorsement’ of the FAA.” \textit{Id.} at 302 (quoting \textit{Joint Hearings, supra} note 29, at 5–6 (statement of Charles L. Bernheimer, Chairman, Comm. on Arb., Chamber of Com. of the State of N.Y.).}} Similar to the New York Arbitration Act, a wide range of associations that were not engaged in transportation industries supported the bill, from wholesale grocers to music publishers.\footnote{159}{See Leslie, \textit{supra} note 29, at 306 (detailing the “wide range of merchant associations [that] endorsed the FAA”). “These included fruit jobbers; wholesale grocers; raisin growers; poultry, dairy, and egg producers; peach and fig growers; canners; music publishers; and coffee, sugar, and lumber producers.” \textit{Id.}}

The FAA was undeniably designed to encompass businesspeople and merchants from a wide array of industries, as evident in the Act’s primary, substantive Section 2 provision.\footnote{160}{See Margaret L. Moses, \textit{Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress}, 34 Fla. St. U. L. Rev. 99, 101–13 (2006) (detailing how Congress intended the Act to protect businesspersons). The
implication because it underscores the need for a similar legislative examination of Section 1.\(^{161}\) The history underlying Section 1 indicates that it was enacted to address concerns raised by two distinct groups: seamen and railroad workers—both of whom were subject to existing legislation governing dispute resolution.\(^{162}\) Section 1 was intended to protect these workers and, more broadly, similarly situated workers who were not intended to fall under the FAA’s purview because they were not merchants.\(^{163}\) Therefore, the text coupled with the intended protections sought by Congress suggests that courts’ interpretations of Section 1 should be guided by an individual’s type of work—not their industry.\(^{164}\) Had Congress intended to restrict the scope of Section 1 to the transportation industry, it could have explicitly articulated such limitations within the statute.\(^{165}\)

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\(^{162}\) See sources cited *supra* notes 32–33 and accompanying text for background; *see also* Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 114–15 (2001) (applying the maxim of ejusdem generis to interpret Section 1). By interpreting the word “other” in the context of seamen and railroad workers, the Circuit City Court determined that “the residual clause should be read to give effect to the terms ‘seamen’ and ‘railroad employees,’ and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it.” *Id.*

\(^{163}\) See Leslie, *supra* note 29, at 310–11 (“[The FAA] is not intended . . . [to] be an act referring to labor disputes, at all.” (quoting *Arbitration Hearings, supra* note 35, at 9 (statement of W.H.H. Piatt, Chairman, Comm. on Com., Trade, & Com. L. of the Am. Bar Ass’n))); Bradley, *supra* note 31, at 550 (“At the very least, the legislative history indicates that the law was only meant to apply in specific circumstances (disputes between merchants) and certainly does not allow the courts from applying [the Exclusion] more broadly.”).

\(^{164}\) *See, e.g.*, Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 1788–91 (2022) (exemplifying this approach by recounting the legislative intent and the plain language of Section 1). The Court held that “transportation workers”—those “actively engaged in transportation”—are excluded from the Act. *Id.* at 1790 (quoting Cir. City Stores, 532 U.S. at 121).

\(^{165}\) See Cir. City Stores, 532 U.S. at 119 (explaining that Congress often includes explicit wording in a statute if it so chooses). Therefore, it is important to analyze the words that are included in the statute according to their ordinary meaning. *Id.*
2. The Flawed Reasoning Behind the Transportation-Based Approach

The Second and Eleventh Circuits both adopted the transportation-based approach, but their reliance on this framework was reached by flawed reasoning.166 The Second Circuit in Bissonnette made two critical errors.167 First, the court cited two cases, Erving v. Virginia Squires Basketball Club168 and Maryland Casualty Co. v. Realty Advisory Board on Labor Relations,169 which predate the Supreme Court’s 2001 Circuit City decision that shifted the focus to whether individuals were transportation workers rather than part of the transportation industry.170 Additionally, neither case examined workers engaged in moving goods or passengers, which was the central issue decided by the Second Circuit in Bissonnette.171

The more significant misstep occurred when the Second Circuit downplayed the significance of Saxon, which the Supreme Court highlighted in its 2024 Bissonnette decision.172 Initially, the Second Circuit rendered its decision prior to the Supreme Court’s release of Saxon.173

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166. See Bissonnette v. LePage Bakeries Park St., LLC, No. 23-51, slip. op. at 9 (U.S. Apr. 12, 2024) (overruling the Second Circuit’s decision to use the transportation-based industry approach). For further analysis of the flawed reasoning used by the Second Circuit, see sources cited infra notes 170–178. For further analysis of why the Eleventh Circuit’s approach was incorrect, see sources cited infra notes 179–184.

167. See infra notes 170, 172 and accompanying text for a discussion of the two errors made by the Second Circuit.

168. 468 F.2d 1064 (2d Cir. 1972).

169. 107 F.3d 979 (2d Cir. 1997).

170. See Bissonnette v. LePage Bakeries Park St., LLC, 49 F.4th 655, 661–62 (2d Cir. 2022) (examining whether truck drivers were engaged in a transportation-based industry), cert. granted, 144 S. Ct. 479 (2023), vacated and remanded, No. 23-51 (U.S. Apr. 12, 2024); Erving, 468 F.2d at 1069 (exploring whether a basketball player can qualify for Section 1 because the player crossed interstate lines); Md. Cas. Co., 107 F.3d at 982 (considering whether employees of a commercial cleaner were covered by the Exclusion). Both Erving (decided in 1974) and Maryland Casualty Co. (decided in 1977) held that the Exclusion was not applicable because Section 1 is limited to workers involved in the transportation industries. Id.; Erving, 468 F.2d at 1069; see also Cir. City Stores, 532 U.S. at 112 (“[T]he exclusion provision is limited to transportation workers, defined, for instance, as those workers ‘actually engaged in the movement of goods in interstate commerce.’” (quoting Cole v. Burns Int’l Sec. Servs., 105 F.3d 1465, 1471 (D.C. Cir. 1997))).

171. See Bissonnette, 49 F.4th at 672 (Pooler, J., dissenting) (“These cases tell us little about people like the plaintiffs, who actually transport goods through interstate commerce every day.”); id. (criticizing the majority’s opinion because both cases it relied on predate Circuit City’s “transportation worker” language); see also Erving, 468 F.2d at 1069 (noting Erving, a professional basketball player, was not in the transportation industry); Md. Cas. Co., 107 F.3d at 980–82 (concluding commercial cleaners were not in the transportation industry).

172. See Bissonnette, slip op. at 6–9 (criticizing the Second Circuit for ignoring Saxon’s instruction to ignore an industry-wide approach); see also Brock v. Flowers Food Inc., 673 F. Supp. 3d 1180, 1185 (D. Colo. 2023) (criticizing the Second Circuit’s decision in Bissonnette because the Second Circuit viewed Saxon as “a speedbump” and ignored the steps required for an analysis).

173. See Bissonnette, slip op. at 2–4 (discussing the procedural history of Bissonnette).
After Saxon, the Second Circuit granted a panel rehearing but ultimately upheld its original decision to use the transportation-based approach. In its amended opinion post-Saxon, the Second Circuit claimed that Saxon’s employment with an airline made it unnecessary for the Supreme Court to clarify that only those employed by transportation industry employers can be considered transportation workers. However, the Second Circuit’s interpretation misconstrues the Court’s central argument. Even though airline workers fall within the transportation industry, the Court’s emphasis on scrutinizing the actual tasks performed by the workers implied that individuals engaged in transportation work qualify as transportation workers. As such, the Supreme Court in Bissonnette found that the transportation-based approach employed by the Second Circuit ran counter to the requirements it set forth in Saxon.

The Eleventh Circuit in Hill also utilized the transportation-based approach when it ruled that a worker did not qualify for the Exclusion because he was not employed by a traditional transportation industry. The Eleventh Circuit based its decision on Circuit City, erroneously interpreting it as advocating for a transportation-based-industry analysis. The court misunderstood the Supreme Court’s discussion of Congress’s rationale for the Exclusion; Circuit City never focused on the type of industry but rather on the workers themselves. Specifically, Circuit

174. See id. at 4 (discussing the Second Circuit’s rehearing following Saxon).
175. See Bissonnette, 49 F.4th at 671 (reasoning Saxon indicated that only a worker in a transportation industry can be considered a transportation worker under the Exclusion). “That point needed no elaboration in Saxon because there the plaintiff worked for an airline. An airline, an analog to transport by rail and sea, is in the business of moving people and freight, and its charges are for activity related to that movement.” Id.
176. See Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 1788 (2022) (emphasizing that to determine whether a worker is engaged in the transportation industry, “the actual work that the members of the class, as a whole, typically carry out” must be evaluated).
177. See id. (“Saxon is therefore a member of a ‘class of workers’ based on what she does at Southwest, not what Southwest does generally.”); Bissonnette, slip op. at 4 (noting the Saxon decision focused on the performance of work rather than the industry of the employer); see also Fraga v. Premium Retail Servs., Inc., 61 F.4th 228, 235 (1st Cir. 2023) (“Saxon’s repeated and emphasized command to focus on what the workers themselves actually do strongly suggests that workers who do transportation work are transportation workers.”).
178. See Bissonnette, slip op. at 4–9 (finding the Second Circuit failed to look at the performance of the worker as was required by Saxon); Saxon, 142 S. Ct. at 1788 (evaluating the work performed by the airline workers).
180. See id. at 1289–90 (concluding Circuit City restricted the inquiry to the industry a worker is a part of). The court noted: “The [Supreme] Court made the ‘permissible inference’ that Congress’ intent when it created the exception was to reserve regulation of such employees for separate legislation more specific to the transportation industry.” (quoting Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 120–21 (2001)).
181. See Cir. City Stores, 532 U.S. at 121 (focusing on the worker, not the worker’s industry). The Circuit City Court stated: ‘Congress’ demonstrated concern with
City emphasized that the Exclusion was necessary to avoid disrupting the preestablished dispute resolution mechanisms for specific groups of workers.\textsuperscript{182} Furthermore, \textit{Circuit City} clarified that Congress intended the Section 1 phrase “other class of workers” to apply to workers who transported goods.\textsuperscript{183} This affirms that the Exclusion extends beyond the narrower industry-wide standard and encompasses workers who are involved in moving products in interstate commerce.\textsuperscript{184}

Both the Second and Eleventh Circuits also failed to consider the negative policy implications of the transportation-based approach—something the Supreme Court made note of in its 2024 \textit{Bissonnette} decision.\textsuperscript{185} The Court found that when such an approach is applied, courts are put in the position to decide what constitutes a transportation industry, leading to extensive discovery before deciding a simple motion to compel arbitration.\textsuperscript{186} The uncertainty and complexity surrounding the transportation-industry issue would “breed[] litigation from a statute that seeks to avoid it.”\textsuperscript{187} In short, the Supreme Court’s rejection of the transportation-based approach aligned with the legislative history of the FAA and past precedent.\textsuperscript{188}
B. Executing the Pre-Race Strategy: The Ninth Circuit Correctly Applied the Factors Considered Under the Worker-Based Approach

By embracing the worker-based approach, the Ninth Circuit adeptly employed three pivotal factors in determining that Uber drivers are not exempt from the FAA.\(^{189}\) The court held that Section 1 extends to passengers and goods, confirmed that purely intrastate trips are eligible for the Exclusion, and emphasized that workers must be primarily engaged in interstate commerce.\(^{190}\) This section delves into the historical context surrounding the FAA and the current jurisprudence, which affirms the Ninth Circuit’s interpretation of these factors.

1. The Exclusion Applies to Both Passengers and Goods

By analyzing the job responsibilities of seamen and railroad workers at the time of Section 1’s passage, it is apparent that Section 1 extends to passengers.\(^{191}\) First, the term “seamen” has been historically understood to include those engaged in the transportation of passengers.\(^{192}\) Because the FAA does not define seamen, courts look to the Jones Act for a definition of the term.\(^{193}\) Using this guidance, the Supreme Court has defined a “seaman” as “a person . . . employed on board a vessel in furtherance of [the vessel’s] purpose.”\(^{194}\) Lower courts have applied this language to FAA-related cases by exempting workers “who were employed on vessels that did not move goods at all.”\(^{195}\) The subsequent interpretation of

\(^{189}\) See Capriole v. Uber Techs., Inc., 7 F.4th 854, 861, 863–65 (9th Cir. 2021) (discussing the three factors used in the worker-based approach).

\(^{190}\) See id. (applying these three factors to Uber drivers to find that they do not qualify for the Exclusion). For a more detailed discussion of how the court applied the three factors, see supra Section III.A.

\(^{191}\) See infra notes 193–198 and accompanying text.

\(^{192}\) See Bradley, supra note 31, at 550–51 (scrutinizing the historical understanding of seamen).

\(^{193}\) See id. at 550 n.163 (listing the courts that use the Jones Act’s definition of “seamen” and apply it to other statutes); Jones Act, 46 U.S.C. § 30104 (2024) (providing a cause of action for seamen “injured in the course of employment” against their employer); McDermott Int’l, Inc. v. Wilander, 498 U.S. 337, 346 (1991) (holding that under the Jones Act, a seaman is one who assists in a vessel’s purpose); Brown v. Nabors Offshore Corp., 339 F.3d 391, 395 (5th Cir. 2003) (applying the definition of seamen under the Jones Act to the FAA); Veliz v. Cintas Corp., No. C 03-1180, 2004 WL 2452851, at *4 (N.D. Cal. Apr. 5, 2004) (concluding “seamen, whether they are in the business of transporting goods or not, have been found to be exempted from arbitration under the FAA § 1”).

\(^{194}\) McDermott Int’l, Inc., 498 U.S. at 346 (defining a “seaman” under the Jones Act); see Brown, 339 F.3d at 395 (looking to how courts defined “seaman” under the Jones Act); see also New Prime Inc. v. Oliveira, 139 S. Ct. 532, 542–43 (2019) (discussing a historically broad interpretation of seamen). “At the time of the Act’s passage, shipboard surgeons who tended injured sailors were considered ‘seamen . . . .’” Id.

\(^{195}\) Bradley, supra note 31, at 551 & n.167 (providing a detailed examination of seamen to argue that the Section 1 exemption applies to the inclusion of goods (citing Brown, 339 F.3d at 393)). The author also notes that the Jones Act was enacted five years before the FAA, so both Congress and the Supreme Court were familiar with the definition. Id.
what it meant to be a seamen shows there was no prerequisite for them to be engaged in the transportation of goods or passengers. A seaman simply must have had some permanence on a vessel that was in navigation and provided services that were maritime in nature. Seamen consistently transported both goods and people, showing that both these services were integral to being a seaman.

Similarly, the term “railroad employee” included those who transported both goods and passengers. The Circuit City Court identified the Transportation Act of 1920 and the Railway Labor Act of 1926 (RLA) as the two avenues for railroad workers to settle disputes. The term “carriers” was covered by both of these statutes and notably, the RLA extended to “common carrier[s] . . . engaged in the transportation of passengers or property.” Railroad employees moved both goods and passengers, and as such, the Ninth Circuit correctly applied Section 1 to passengers.

196. See New Prime Inc., 139 S. Ct. at 542–43 (providing an example of what it meant to be seamen). The Court stated that any employee on board a vessel in navigation was a seaman no matter their specific job description. Id.; Singh v. Uber Techs. Inc., 939 F.3d 210, 222 (3d Cir. 2019) (interpreting New Prime’s definition of seamen to reach the same conclusion).

197. See Bradley, supra note 31, at 551 (looking to the Shipping Commissioner’s Act (SCA) of 1872 to provide an alternative definition of “seamen,” which included “every person . . . who shall be employed or engaged to serve in any capacity on board” (alteration in original) (quoting Veliz, 2004 WL 2452851, at *4)). Under this definition, the author notes a broad range of professions were considered seamen, from cooks to musicians, even though they never directly transported goods. Id.

198. See id. (holding the traditional test for determining which workers could be considered seamen never distinguished “between employment on a vessel that moves passengers and a vessel that moves goods”).

199. See Singh, 939 F.3d at 219–23 (examining the railroad labor dispute statutes at the time the FAA was passed). The Third Circuit highlighted that both the Transportation Act of 1920 and the 1898 Erdman Act broadly understood the term “railroad employee” to encompass “all persons actually engaged in any capacity in train operation or train service of any description.” Id. at 222 (quoting New Prime, 139 S. Ct. at 543 n.12).


201. See Singh, 939 F.3d at 221 n.5 (quoting Interstate Commerce Act, Pub. L. No. 49-104, § 1, 24 Stat. 379, 379 (1887)) (discussing the Interstate Commerce Act (ICA), which established jurisdiction for the RLA); see also Bradley, supra note 31, at 552 (making the connection that the RLA’s “jurisdiction over ‘carriers’ referenced railroads subject to the Interstate Commerce Act” (quoting § 1, 44 Stat. 577)). It was the ICA that exercised its jurisdiction to the carriers of passengers. Id.

202. See Bradley, supra note 31, at 552–53 (“The prevalence of passenger railroad transportation when the FAA was passed in 1925 further illustrates that Congress intended to exempt railroad employees who moved passengers.”).
2. The Exclusion Applies to Drivers Making Solely Intrastate Trips

The Ninth Circuit’s holding that drivers who make solely intrastate trips are still engaged in interstate commerce is in line with the historical understanding of Section 1 and Supreme Court precedent. Courts have generally interpreted the phrase “engaged in interstate commerce” broadly. This started after the passage of Section 1, as courts looked to a nearly identical jurisdictional phrase within the Federal Employer’s Liability Act (FELA) and the jurisprudence surrounding it. Courts have permitted workers engaged in purely intrastate trips to qualify for FELA’s “engaging in commerce” requirement. For example, the Supreme Court held that a worker operating a train was “engaged in interstate commerce” even though the extent of his journey covered a two-mile span in Pennsylvania. The First Circuit in Waithaka also approvingly referenced FELA to find that Amazon Flex workers who completed solely intrastate package deliveries were exempt from the FAA. This historical understanding of Section 1 supports the argument that crossing state lines is not required to “be engaged in interstate commerce.”

203. See infra notes 205–211 and accompanying text (examining the phrase “engaged in interstate commerce”).
204. See Bradley, supra note 31, at 554 (“Historically, the term ‘engaged in . . . commerce’ has embraced the entire stream of commerce, including intrastate movement.” (alteration in original)).
205. See 45 U.S.C. § 51 (“Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . .”) The notable difference between FELA and Section 1 of the FAA is that FELA applies only to the transportation industry. See Tenney Eng’g, Inc. v. United Elec., Radio & Mach. Workers of Am., 207 F.2d 450, 453 (3d Cir. 1953) (detailing the history of FELA and using it to understand the FAA’s phrase “engaged in commerce”). The Tenney Engineering court thus reasoned that when drafting the FAA, Congress must have had the “engaged in” language in mind. Id.; see also Waithaka v. Amazon.com, Inc., 966 F.3d 10, 19–22 (1st Cir. 2020) (discussing the interplay between FELA and the FAA). The Waithaka court also applies FELA to the FAA to determine the meaning of “engaged in.” Id. at 21–22.
206. See, e.g., Tenney Eng’g, 207 F.2d at 452–54 (applying FELA to the FAA to find that railroad employees were not exempt from arbitration because they only produced goods and were not involved in the channels of interstate commerce). For other cases applying FELA, see infra notes 208–209 and accompanying text.
207. See Phila. & Reading Ry. Co. v. Hancock, 253 U.S. 284, 286 (1920) (finding that the train worker was engaged in interstate commerce even though the coal never left the state because “[t]here was no interruption of the movement; it always continued towards points as originally intended”). This is distinguishable from a worker who “was working on a railroad car that was not carrying goods destined for or coming from another state” because that individual was not engaged in the interstate movement of goods. Waithaka, 966 F.3d at 21 (emphasis omitted).
208. See Waithaka, 966 F.3d at 22, 26 (“[T]he FELA cases concerning workers directly involved in transport advance our understanding of the Section 1 exemption.”).
209. See Bradley, supra note 31, at 553–58 (reaching a similar conclusion through a deep examination of the phrasing in the FAA). The author notes that the Supreme Court in Circuit City used this “flow” definition from the Clayton Act (which was enacted to prevent monopolistic conduct) to aid in its analysis of
Such an interpretation also aligns with Supreme Court precedent in both *Circuit City* and *Saxon*.210 *Circuit City* held that Section 1 covers “only persons or activities within the flow of interstate commerce.”211 There was no requirement that workers cross state lines, but rather, the Court directed its inquiry to whether the actual goods or passengers traveled interstate.212 More recently, the Supreme Court reemphasized this framework in *Saxon* where it determined that airline supervisors were engaged in interstate commerce because they were “so closely related to interstate [commerce] as to be practically a part of it.”213 These supervisors never crossed state lines and were found to be participating in the free flow of goods.214 As such, the Ninth Circuit properly aligned itself with Supreme Court precedent when examining the connection between the intrastate trips of Uber drivers and interstate commerce.215

3. *Drivers Must Be Frequently Engaged in Interstate Commerce*

Finally, the Ninth Circuit properly established that to qualify for Section 1, an individual must be part of a class that primarily engages in interstate commerce.216 This is supported by drawing parallels between the functions of seamen and railroad workers and extending those similarities to Section 1’s residual clause.217 The primary, daily functions
of seamen and railroad workers directly involve engaging in interstate commerce.\textsuperscript{218} Seamen were those “whose occupation [was] to assist in the management of ships at sea,”\textsuperscript{219} and railroad workers were those “persons actually engaged in any capacity in train operation or train service of any description.”\textsuperscript{220} These definitions underscore that at the time of the FAA’s enactment, it was understood that both groups’ occupations centered around the transportation of goods in foreign or interstate commerce.\textsuperscript{221}

Therefore, the same statutory analysis should be applied to Section 1’s residual clause.\textsuperscript{222} As discussed in Section I.A, the residual clause was added to provide other groups akin to seamen and railroad workers an opportunity to arbitrate their disputes if they participate in interstate commerce.\textsuperscript{223} While some courts note Section 1 does not include the phrase “predominantly” or “primarily,” the residual clause still needs to be controlled and defined by reference to Section 1’s

\begin{itemize}
\item to justify this canon of interpretation, the Circuit City Court said, “the rule \textit{ejusdem generis} in this case . . . is in full accord with other sound considerations bearing upon the proper interpretation of the clause.” \textit{Id.} at 115; see also \textit{Saxon}, 142 S. Ct. at 1789–90 (adopting the \textit{ejusdem generis} canon to define the residual clause as applying both to both seamen and railroad employees); Rittmann \textit{v. Amazon.com}, Inc., 971 F.3d 904, 924–25 (9th Cir. 2020) (“[T]he residual clause should be read to give effect to the terms ‘seamen’ and ‘railroad employees,’ and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it.” (quoting \textit{Cir. City Stores}, 532 U.S. at 115)). See generally \textit{Ejusdem generis}, \textit{Black’s Law Dictionary} (11th ed. 2019) (“A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.”).
\item 218. See \textit{infra} notes 219–221 (discussing the roles of seamen and transportation workers).
\item 219. See \textit{Saxon}, 142 S. Ct. at 1791 (alteration in original) (quoting \textit{Webster’s New International Dictionary of the English Language} 1906 (1922)). The Court also used \textit{Black’s Law Dictionary} to define seamen as: “[s]ailors; mariners; persons whose business is navigating ships.” \textit{Id.} (alteration in original) (quoting \textit{Seamen}, \textit{Black’s Law Dictionary}, \textit{supra} note 75, at 1063).
\item 220. Bradley, \textit{supra} note 31, at 552 (quoting \textit{Act of June 1, 1898}, \S 370, 30 Stat. 424) (defining “railroad employee” based on Congress’s definition provided in the Erdman Act); see also \textit{id.} at 550–53 (elaborating on the background of seamen). “[T]he test of whether one is a seaman has historically depended on (1) whether the vessel is in navigation, (2) the permanency of the person’s connection to the vessel, and (3) whether the services rendered are maritime in nature.” \textit{Id.} at 551.
\item 221. See, e.g., \textit{Wallace v. Grubhub Holdings, Inc.}, 970 F.3d 798, 802–03 (7th Cir. 2020) (“[A] transportation worker who performs work analogous to that of seamen and railroad employees [is one] whose occupations are centered on the transport of goods in interstate or foreign commerce.”); \textit{Islam v. Lyft, Inc.}, 524 F. Supp. 3d 338, 344 (S.D.N.Y. 2021) (considering whether the employee engages in interstate work frequently); \textit{Capriole v. Uber Techs., Inc.}, 7 F.4th 854, 865 (9th Cir. 2021) (finding the interstate movement of goods and passengers of seamen and railroad employees over long distances and across national or state lines is an “indelible and ‘central part of the job description’” (quoting \textit{Wallace}, 970 F.3d at 803)).
\item 222. See \textit{supra} notes 217, 220 and accompanying text (justifying the use of the \textit{ejusdem generis} canon of interpretation).
\item 223. See \textit{supra} notes 30–35 (looking at the legislative history of the FAA); see also Bradley, \textit{supra} note 31, at 529–32 (same).
enumerated categories of workers to maintain consistency with legislative intent.\textsuperscript{224}

The Supreme Court has supported this interpretation in two landmark cases.\textsuperscript{225} Circuit City specifically endorsed that a worker qualifying for Section 1 should perform similar work to seamen and railroad workers, which is that of frequently engaging in interstate commerce.\textsuperscript{226} Saxon explicitly reiterated this interpretation; for a worker to be exempt from arbitration, the worker must perform the interstate work frequently.\textsuperscript{227} Therefore, because seamen and railroad workers were understood to primarily engage in interstate commerce, the "primary" requirement should be extended to the "other class of workers" referenced in the Exclusion.\textsuperscript{228}

V. CROSSING THE FINISH LINE: APPLYING THE NINTH CIRCUIT’S FRAMEWORK TO LAST-LEG, FOOD DELIVERY, AND RIDE-SHARE DRIVERS

The widespread adoption of the Ninth Circuit’s application of the worker-based approach would establish consistency in evaluating gig economy disputes.\textsuperscript{229} This section applies the test to last-leg, food delivery, and rideshare drivers.\textsuperscript{230} Similar to the prevailing views of most courts, last-leg drivers should be able to avoid arbitration while rideshare and food delivery drivers should be compelled to arbitrate.\textsuperscript{231}

The primary challenge for last-leg drivers will be demonstrating that their purely intrastate trips qualify as engaging in interstate commerce.

\textsuperscript{224} See Int’l Bhd. of Teamsters Loc. Union No. 50 v. Kienstra Precast, LLC, 702 F.3d 954, 958 (7th Cir. 2012) (“[T]here is no basis in the text of § 1 for drawing a line between workers who do a lot of interstate transportation work and those who cross state lines only rarely.”); Islam, 524 F. Supp. 3d at 351 (adopting the same approach); see also supra Section IV.A.1 (describing Congress’s intent that Section 1 protect workers similarly situated to seamen and railroad employees who engage in interstate commerce).

\textsuperscript{225} See infra notes 226–227 (discussing Circuit City and Saxon).

\textsuperscript{226} See Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001) (determining that the residual clause needs to be defined by what it meant to be a seamen and railroad worker).

\textsuperscript{227} See Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 1789–90 (2022) (defining what it meant to be a seamen and railroad worker).

\textsuperscript{228} See Wallace v. Grubhub Holdings, Inc., 970 F.3d 798, 802–03 (7th Cir. 2020) (discussing a policy consideration). If the “primary” requirement were removed, the court explained, “numerous categories of workers whose occupations have nothing to do with interstate transport” would be granted access to the Exclusion. Id. at 803. “[F]or example, dry cleaners who deliver pressed shirts manufactured in Taiwan and ice cream truck drivers selling treats made with milk from an out-of-state dairy. That result would run afoul of the Court’s instruction that the scope of the residual clause ‘be controlled and defined’ by the work done by seamen and railroad workers . . . .” Id. at 802 (quoting Cir. City Stores, 532 U.S. at 106).

\textsuperscript{229} For a discussion of the varying approaches and inconsistent results, see supra Sections III.B–C.

\textsuperscript{230} For application of the test, see infra Part V.

\textsuperscript{231} See infra notes 16, 20 and accompanying text (listing the courts that adopted the worker-based approach and found the same result).
commerce. Under the proscribed analysis, crossing state boundaries is not a requirement to meet the Exclusion; the only necessary criteria is that the good itself is engaged in an interstate trip. Therefore, as long as last-leg drivers are completing the journey of goods to their final destination, they will qualify for the Exclusion.

In contrast, food delivery drivers do not fall within the scope of Section 1 as their transportation of goods does not occur within the channels of interstate commerce. A driver is not engaged in the channels of interstate commerce by merely transporting food from a restaurant to a customer’s doorstep. The journey of food commences at the restaurant where it is assembled—representing the “good” in transit—and ends once the food is delivered to the customer. This, in isolation, is insufficient to qualify a worker for moving a good within the realm of interstate commerce.

232. See, e.g., Waithaka v. Amazon.com, Inc., 966 F.3d 10, 13 (1st Cir. 2020) (noting last-leg drivers must prove that their purely intrastate trips rise to the level of actively engaging in interstate commerce); Rittmann v. Amazon.com, Inc., 971 F.3d 904, 915–16 (9th Cir. 2020) (examining the journey of the goods delivered by last-leg drivers who make solely intrastate trips); see also Bradley, supra note 31, at 542–43 (“[C]ourts have held that only workers who actually move across state lines are engaged in commerce and exempt from the FAA.”).

233. See supra notes 206–215 and accompanying text (discussing how workers engaged in intrastate travel can still be engaged in interstate commerce).

234. See, e.g., Waithaka, 966 F.3d at 19–22 (clarifying that as long as goods move in a continuous trip, drivers making solely intrastate trips qualify for the Exclusion); Rittmann, 971 F.3d at 915–19, 921 (concluding Amazon Flex drivers who do not cross state lines are excluded from arbitration); Carmona v. Domino’s Pizza, LLC, 75 F.4th 1135, 1136 (9th Cir. 2023) (holding drivers that complete intrastate deliveries are exempt from the FAA), cert. denied, No. 23-427, 2024 WL 1706016 (2024) (mem.).

235. See, e.g., Wallace v. Grubhub Holdings, Inc., 970 F.3d 798, 802–03 (7th Cir. 2020) (holding GrubHub drivers do not qualify for the Exclusion because they are not in the act of moving goods across state borders); Magana v. DoorDash, Inc., 343 F. Supp. 3d 891, 899–900 (N.D. Cal. 2018) (holding the Exclusion did not apply because the plaintiff did not “allege that he either moved or supervised movement of goods across state lines”); Lee v. Postmates Inc., No. 18-cv-03421, 2018 WL 6605659, at *7 (N.D. Cal. Dec. 17, 2018) (“Postmates couriers do not fall within the transportation worker exception to the FAA because they do not engage in interstate commerce.”); Rittmann, 971 F.3d at 916 (distinguishing last-leg drivers from food delivery drivers). The Rittmann court found that food delivery drivers are not engaged in interstate commerce “because the prepared meals from local restaurants are not a type of good that are ‘indisputably part of the stream of commerce.’” Id. (quoting Levin v. Caviar, Inc., 146 F. Supp. 3d 1146, 1153 (N.D. Cal. 2015)).

236. For further discussion, see supra notes 123–126 and accompanying text.

237. See Wallace, 970 F.3d at 802 (observing that if Section 1 was construed broadly enough to encompass the journey of goods, scenarios such as “dry cleaners who deliver pressed shirts manufactured in Taiwan and ice cream truck drivers selling treats made with milk from an out-of-state dairy” would fall under the Exclusion).

238. See, e.g., id. at 803 (restating the court’s holding); see also Aparicio, supra note 16, at 429–32 (outlining the federal courts’ stance on the continuous transportation of goods). “[T]he mere fact that the food may have passed in interstate commerce prior to arriving at the restaurant does not mean that the [worker] was engaged in commerce.” Id. at 429 (quoting Levin, 146 F. Supp. 3d at 1154).
Finally, like the decision in *Capriole*, rideshare drivers should not be exempt under Section 1.\textsuperscript{239} Even though rideshare drivers occasionally engage in interstate commerce by either crossing state lines or dropping off passengers to interstate hubs of transport, rideshare drivers do not primarily engage in interstate transportation.\textsuperscript{240} Only roughly ten percent of the yearly trips made by Lyft and Uber drivers involve crossing state lines or making drop-offs at transportation hubs.\textsuperscript{241} While these actions may amount to millions of trips per year, they still only constitute a small percentage of total trips—many of which are predominately local.\textsuperscript{242} Additionally, rideshare drivers do not contribute to a continuous chain of cross-border transportation controlled or coordinated by these companies.\textsuperscript{243} Drivers’ roles are centered on providing local rides as independent transactions, which occasionally contribute to an interstate journey.\textsuperscript{244} Despite Uber and Lyft advertising for pickup services at airports on their website, this is not a contractual arrangement that evidences interstate commerce; rather, it is a marketing tactic to boost local

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\textsuperscript{239} See *supra* Section III.A (discussing the Ninth Circuit’s application of the worker-based approach).

\textsuperscript{240} Compare *Capriole* v. Uber Techs., Inc., 7 F.4th 854, 864–65 (9th Cir. 2021) (finding that even trips to intrastate hubs are not enough to qualify Uber drivers for the Exclusion because they are occasional and incidental), and *Cunningham* v. Lyft, Inc., 17 F.4th 244, 250–55 (1st Cir. 2021) (same), with *Islam* v. Lyft, Inc., 524 F. Supp. 3d 338, 355 (S.D.N.Y. 2021) (“[T]he role Lyft and Uber drivers play in ferrying passengers to and from airports and train stations at the very least lends additional support to the Court’s conclusion that they are, as a class of workers, ‘engaged in . . . interstate commerce.’” (second alteration in original)).

\textsuperscript{241} See, e.g., *Capriole*, 7 F.4th at 864 (reporting “10.1% of all [Uber] trips taken in the United States in 2019 began or ended at an airport” (quoting *Capriole* v. Uber Techs., Inc., 460 F. Supp. 3d 919, 930 (N.D. Cal 2020))). In addition, the *Capriole* court noted that that “[o]nly 2.5% of ‘all [Uber] trips . . . in the United States between 2015 and 2019 . . . started and ended in different states.’” Id. (fourth alteration in original) (quoting *Capriole*, 460 F. Supp. 3d. at 929); *Islam*, 524 F. Supp. 3d at 348 (“Plaintiff himself approximates that trips to airports, train stations, and bus stations constitute about 25 percent of his total trips for Lyft.”); *Golightly* v. Uber Techs., Inc., No. 21-cv-3005, 2021 WL 3539146, at *5–6 (S.D.N.Y. Dec. 21, 2021) (examining data for Uber trips taken in the New York metropolitan area). Even in 2021, the percentage of Uber trips in the New York metropolitan area to airports was just a tick above fifteen percent, leaving roughly eighty-five percent of trips to non-interstate hubs of transportation. Id. at *5–6.

\textsuperscript{242} See *supra* note 241 (providing data on these trips); see also *Capriole*, 7 F.4th at 864 (“Uber’s service is primarily local and intrastate in nature.”); *Osvatics* v. Lyft, Inc., 535 F. Supp. 3d 1, 22 (D.D.C. 2021) (“[T]rips provided by Lyft drivers are primarily local.”); *Cunningham*, 17 F.4th at 253 (“Lyft is clearly primarily in the business of facilitating local, intrastate trips.”).

\textsuperscript{243} See, e.g., *Osvatics*, 535 F. Supp. 3d at 16–21 (differentiating rideshare drivers from seamen and railroad workers); *Rogers* v. Lyft, Inc., 452 F. Supp. 3d 904, 916 (N.D. Cal. 2020) (finding Lyft drivers are in “the general business of giving people rides, not the particular business of offering interstate transportation to passengers”); aff’d, No. 20-15689, 2022 WL 474166 (9th Cir. Feb. 16, 2022).

\textsuperscript{244} See *Osvatics*, 535 F. Supp. 3d at 18 (stating that Lyft drivers primarily engage in local rides).
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trip volumes. Even when a significant portion of local trips involve transportation to an airport or train station, the local nature of these trips is not fundamentally altered. As such, rideshare drivers should not qualify for Section 1.

VI. Conclusion

The inconsistent application of Section 1 of the FAA has cast a shadow of uncertainty over gig economy drivers, leaving them in a state of ambiguity when pursuing legal action. To ensure a fair and predictable resolution for gig economy drivers navigating arbitration challenges, courts should adopt the Ninth Circuit’s approach in *Capriole*, which assesses whether an individual is part of a class of workers that frequently engages in interstate commerce. This worker-based approach aligns with the legislative history of the FAA, complies with the historical understanding of its text, and is consistent with Supreme Court precedent. Through the application of this interpretation, last-leg drivers should be exempt from the FAA but rideshare and food delivery drivers should not be.

245. See *Capriole*, 7 F.4th at 865 (“But nothing about the submitted materials indicates the type of commercial relationship . . . that would implicate interstate commerce.”); Davarci v. Uber Techs. Inc., 20-CV-9224, 2021 WL 3721374, at *35 (S.D.N.Y. Aug. 20, 2021) (finding no significant relationship between Uber and airports). The relationship “evidence[s] at most ‘mutually beneficial marketing arrangement[s]’ and further cement the conclusion that Uber drivers cannot be considered part of ‘an unbroken chain of interstate travel.’” *Id.* (second alteration in original) (quoting Defendant’s Reply Brief at 5 n.4, Davarci, No. 20-CV-9224).

246. See *Rogers*, 452 F. Supp. 3d at 916 (“[Uber is not in] the particular business of offering interstate transportation to passengers. Interstate trips that occur by happenstance of geography do not alter the intrastate transportation function performed by the class of workers.”).

247. See supra notes 239–247 and accompanying text (explaining why rideshare drivers should not be allowed to arbitrate).


249. See *Capriole*, 7 F.4th at 864–65 (analyzing Uber drivers nationwide, as a class, to hold that they were not frequently engaged in interstate commerce); see also supra Section III.A for an in-depth analysis of how the *Capriole* court applied the worker-based approach.

250. See supra Section IV.B for a discussion of these factors.

251. See supra Part V for a discussion of how the worker-based approach should be applied.