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Capriole v. Uber Technologies Inc.: The Court Split over the Interstate Commerce Worker Exemption of the Federal Arbitration Act

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NOTE

CAPRIOLE V. UBER TECHNOLOGIES INC.: THE COURT SPLIT OVER THE INTERSTATE COMMERCE WORKER EXEMPTION OF THE FEDERAL ARBITRATION ACT

*SPENCER SELLERS**

INTRODUCTION

Uber and Lyft are the two largest examples of what are colloquially known as ride-share companies.[1] Put simply, these companies operate by connecting ride share drivers ("Drivers") with customers who request a ride from one location to another.[2] Customers download an application, typically to their phone, and a Driver gives them a ride in exchange for money.[3]

Most Drivers are not considered employees by the companies for whom they work.[4] Rather, ride share companies consider them independent contractors.[5] Significant legal differences exist between employees

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[1] Brett Helling, *List of Ridesharing Companies* RIDESTER (June 22, 2022) https://www.ridester.com/list-of-ridesharing-companies/ (Other ride share companies include Juno, Gett, and Wingz).

[2] *Id*.

[3] *Id*.

[4] Dara Kerr, *Uber Has Long Plotted Its National Push over Gig Worker Status*, CNET (Nov. 20, 2020, 12:49 p.m. PT), http://www.cnet.com/tech/mobile/uber-has-long-plotted-its-national-push-over-gig-worker-status.

[5] *Id*.

and independent contractors.[6] A number of these differences encourage companies like Uber to classify their Drivers as independent contractors.[7] Because Drivers are not employees, Uber does not have to pay for their Drivers' health insurance or sick leave.[8] As the Coronavirus pandemic demonstrated, due to their independent contract status Drivers are frequently unable to rely upon governmental emergency aid such as "cash payments, unemployment benefits, emergency refundable tax credits, and sick pay."[9] Similarly, although Drivers' greatest complaint is their poor pay, ride share companies do not have to pay their Drivers minimum wage.[10] One California State Assemblymember has claimed that this independent contractor classification has effectively forced the state to subsidize these companies: because companies do not need to pay into state unemployment funds for independent contractors, state taxpayers had to "cover 100% of the cost of unemployment" for Drivers who lost their ability to work during the pandemic.[11] In the words of one Lyft driver, "I still work 50 hours a week and my earnings are still barely enough to get by. I don't make enough money, so I'm on Medi-Cal."[12]

Ride-share companies place great importance on their Drivers' non-employee status.[13] They spent a collective $205 million in California to pass Proposition 22, legislation which classified Drivers as independent contractors.[14] Later, that same proposition was found to be unconstitutional.[15] Despite this setback, ride-sharing companies including Uber and Lyft have stated that they plan to use Proposition 22 as a template for similar measures in different states.[16]

Ride-share companies need a large number of Drivers to maintain their programs.[17] Current estimates suggest Uber relies upon approxi-

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[6] *What's the Difference Between an Independent Contractor and an Employee?*, OFFICE OF CHILD SUPPORT ENFORCEMENT (Oct. 23, 2018), https://www.acf.hhs.gov/css/training-technical-assistance/whats-difference-between-independent-contractor-and-employee.

[7] Kerr, *supra* note 4.

[8] *Id*.

[9] Rogers v. Lyft, Inc., 452 F. Supp. 3d 904, 909 (N.D. Cal. 2020).

[10] Amir Efrati, *How Uber Will Combat Rising Driver Churn,* THE INFORMATION (Apr. 20, 2017, 7:02 AM), https://www.theinformation.com/articles/how-uber-will-combat-rising-driver-churn.

[11] Levi Sumagaysay*, Uber, Lyft Drivers Say New California Law Isn't Solving their Healthcare Needs*, MARKETWATCH (June 16, 2021, 7:47 a.m. ET), https://www.marketwatch.com/story/uber-lyft-drivers-say-new-california-law-isnt-solving-health-care-needs-11623788327.

[12] *Id*.

[13] Kerr, *supra* note 4.

[14] *Id*.

[15] Brian Chen and Laura Padin, *Prop 22 Was a Failure for California's App-Based Workers.?Now, It's Also Unconstitutional*, THE NATIONAL EMPLOYMENT LAW PROJECT, (Sept. 16, 2021), https://www.nelp.org/blog/prop-22-unconstitutional/.

[16] Kerr, *supra* note 4. .

[17] *See* Efrati, *supra* note 10.

mately one million Drivers to support its ride-share application.[18] An estimated seven million workers performed in what has been termed the "gig economy"[19] in 2019. Furthermore, Uber experiences a very high rate of Driver turnover.[20] At any given time, only roughly twenty-five percent of Uber drivers stay with the company longer than a year.[21] As such, the distinction between an employee and an independent contractor has the potential to affect a great number of people.

Lyft updated its terms of service on February 6, 2018.[22] Following this update, all Lyft Drivers had to accept the updated terms of service to qualify as Drivers.[23] These new terms included an arbitration agreement.[24] An arbitration agreement is a clause in a contract in which the parties to the contract agree to resolve legal disputes through a private arbitrator and not the court system.[25] As dictated by the new terms of service, Lyft's Drivers could only opt out of the arbitration agreement within a thirty-day period.[26]

Uber Drivers are subject to similar arbitration agreements.[27] Relevant to the considerations of this Note are Uber's 2015 Technology Services Agreement and the 2020 Platform Services Agreement.[28] Both Uber agreements require that Drivers' legal claims be resolved in arbitration rather than litigated in court, either individually or as a class action.[29]

Courts throughout the United States are divided over the question of whether ride-share Drivers qualify as "interstate commerce workers" for the purposes of the section-one exemption to the Federal Arbitration Act ("FAA").[30] The FAA is a long-standing statute enacted to legitimize the

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[18] Kerr, *supra* note 4. .

[19] *See, e.g*., IRS, *Gig Economy Tax Center*, https://www.irs.gov/businesses/gig-economy-tax-center (last visited Feb. 18, 2023).(stating that the gig economy is typically conceptualized as the sector of jobs wherein people perform work on an on-demand basis, generally through a website or application).

[20] *Id*.

[21] Efrati, *supra* note 10.

[22] Cunningham v. Lyft, Inc., 450 F. Supp. 3d 37, 39 (D. Mass. 2020) *rev'd in part*, 17 F.4th 244 (1st Cir. 2021).

[23] *Id*.

[24] *Cunningham*, 450 F. Supp. at 40.

[25] Katie Shonk, *What is an Arbitration Agreement?*, HARV. L. SCH. DAILY BLOG (May 23, 2022), https://www.pon.harvard.edu/daily/conflict-resolution/what-is-an-arbitration-agreement/.

[26] *Cunningham*, 450 F. Supp. at 39.

[27] Capriole v. Uber Techs., Inc., 460 F. Supp. 3d 919, 923-25 (N.D. Cal. 2020) *aff'd*, 7 F.4th 854 (9th Cir. 2021).

[28] *Id*. at 923.

[29] *Id.* at 924.

[30] *Compare* Islam v. Lyft, Inc., 524 F. Supp. 3d 338 (S.D.N.Y. 2021), Gonzalez v. Lyft, Inc., No. 2:19-cv-20569-BRM-JAD, 2021 U.S. Dist. LEXIS 17188, sip op. at *1 (D.N.J. Jan. 29, 2021), and *Cunningham*, 450 F. Supp. At 48 (holding that ride-share are exempted from the FAA), *with*

practice of alternative dispute resolution.[31] However, section one of the FAA expressly exempts from the act workers engaged in interstate commerce transportation.[32] In *Cunningham v. Lyft*, a Massachusetts district court ("Massachusetts District") held that Drivers did qualify for the exemption.[33] However, the United States Court of Appeals for the First Circuit (the "First Circuit") recently reversed this decision.[34] Similarly, in the United States District Court for the Northern District of California ("Northern District") both *Capriole v Uber Technologies Inc.* and *Rogers v. Lyft, Inc.* determined that the same class of Drivers did not qualify for the FAA exemption.[35] However, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") has recognized that "there are some tensions" between decisions that deny Drivers qualification under the FAA and "recent circuit cases addressing the scope and application of the FAA transportation worker exemption clause."[36] New York district courts have cases that favor both sides of this issue.[37] While the opinion in *Osvatics v. Lyft, Inc.*, correctly notes that the majority of rulings have concluded that Drivers do not meet the requirements of the FAA exemption, the courts nevertheless remain divided.[38]

This Note establishes that the court in *Capriole v. Uber Technologies, Inc.* reached a conclusion supported by law, and seated firmly within the majority of jurisdictions, despite the continued circuit split regarding the interstate commerce status of Drivers.[39] However, either Congress or the United States Supreme Court should decisively settle this issue both because courts have reached contrary opinions through reasonable analysis and because these decisions affect a great number of people. First, this Note presents background information on the FAA and legislative proposals to modify the act. After providing this background information, this Note turns to the decision in the Northern District in *Capriole*, followed by the cases *Capriole* cites to support its conclusion. Next, this Note discusses cases and authorities that disagree with *Capri-*

Capriole, 460 F. Supp. at 932, Rogers v. Lyft, Inc., 452 F. Supp. 3d 904, 917 (N.D. Cal. 2020), and Grice v. Uber Techs., Inc., No. CV182995PSGGJSX, 2020 WL 497487, slip op. at *26 (C.D. Cal. Jan. 7, 2020) (holding that they are not).

[31] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018).

[32] 9 U.S.C. § 1.

[33] *Cunningham*, 450 F. Supp. at 37.

[34] Cunningham v. Lyft, Inc., 17 F.4th 244, 244 (1st Cir. 2021).

[35] *Capriole*, 460 F. Supp. at 932; *Rogers*, 452 F. Supp. at 917.

[36] *In re* Grice, 974 F.3d 950, 959 (9th Cir. 2020).

[37] *Compare* Aleksanian v. Uber Techs. Inc., 524 F. Supp. 3d 251, 258 (S.D.N.Y. 2021), *reconsideration denied,* No. 1:19-CV-10308 (ALC), 2021 WL 6137095, slip op. (S.D.N.Y. Dec. 29, 2021) (holding that ride-share drivers are not exempt from the FAA) *with* Islam v. Lyft, Inc., 524 F. Supp. 3d 338, 359 (S.D.N.Y. 2021) (ruling that they are).

[38] Osvatics v. Lyft, Inc., 535 F. Supp. 3d 1, 21 (D.D.C. 2021).

[39] *Id*.

ole's conclusion that Drivers do not qualify under the transportation worker exemption. Finally, this Note weighs the competing standards and authorities offered by each side and suggests how the holding in *Capriole* will affect future developments in the law.

I. THE FEDERAL ARBITRATION ACT AND CIRCUIT CITY STORES

The FAA, enacted in 1925, was intended to legitimize the practice of arbitration.[40] The current language of the FAA states that "[a] written provision" in a contract "to settle by arbitration" controversies related to that contract "shall be valid, irrevocable, and enforceable" unless there are equitable or legal grounds supporting revocation of the contract.[41] Courts have consistently interpreted this provision as a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[42] The stated goal of favoring arbitration agreements over the court system is that they offer the "promise of quicker, more informal, and often cheaper resolutions for everyone involved."[43] In addition, arbitration can reduce the burden on both federal and state courts by redirecting potential litigation.[44]

Under the FAA, a party can request an order to compel arbitration when they have a written agreement to arbitrate.[45] A court must determine if the parties have a valid arbitration agreement.[46] As a part of this process, the court must find that none of the exemptions listed in section one of the FAA apply.[47] When considering if an exception or exemption exists, the party attempting to resist the arbitration agreement bears the burden of proof.[48]

The FAA has always contained express limitations and exemptions.[49] Relevant to this Note, the first paragraph of the 1925 bill that introduced the FAA stated that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or *any* other class of workers engaged in foreign or interstate commerce."[50] Identical

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[40] Epic Sys. Corp. v. Lewis, 200 L. Ed. 2d 889, 138 S. Ct. 1612, 1621 (2018).

[41] 9 U.S.C. § 2 (2022).

[42] Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F. 2d 402, 410 (2d Cir. 1959).

[43] *Epic*, 138 S. Ct. at 1621.

[44] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001).

[45] 9 U.S.C. § 4 (1947).

[46] *Id*.

[47] New Prime Inc. v. Oliveira, 139 S. Ct. 532, 537 (2019).

[48] Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 227 (1987).

[49] 9 U.S.C. § 1 (1947).

[50] 9 U.S.C. § 1 (1947) (emphasis added).

language is replicated in the current section one of the FAA.[51] The Supreme Court has interpreted the phrase "engaged in commerce" somewhat narrowly; it denotes "only persons or activities within the flow of interstate commerce."[52] Furthermore, as decided by the Supreme Court, the section one exemption to the FAA for "any other class of worker" is limited to "transportation workers."[53] Additionally, "contracts of employment" include those with independent contractors because they refer to agreements to perform work.[54]

Circuit City Stores, Inc. v. Adams is foundational to understanding the FAA's section one exemption for interstate commerce workers and offers insight into the reasoning behind the transportation worker exemption.[55] The Court reasoned that there is a "permissible inference" that transportation workers engaged in interstate commerce were "excluded" from the FAA because Congress already possessed the well-established authority, through the commerce clause, to govern their employment relationships by enacting specific statutes.[56] In support of this argument, the Court noted that Congress has already passed an arbitration statute relating to sailors[57] and is in the process of enacting a similar bill for railroad workers.[58] The Court further clarified that the statute's generic, residual exemption "for any other class of workers" is explained as due to Congress's reserving its authority to issue specific legislation for "those engaged in transportation."[59]

In recent years, members of Congress have repeatedly brought forward bills aimed at limiting the scope of the FAA.[60] For example, on March 3, 2022, President Joe Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act ("Ending Harassment Act"), which nullifies mandatory arbitration agreements for sexual harassment or assault claims.[61] An additional bill, the Forced Arbitration Injustice Repeal Act ("FAIR Act"), aims to broadly nullify

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[51] 9 U.S.C. § 1 (1947).

[52] Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186, 195 (1974).

[53] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001).

[54] New Prime Inc. v. Oliveira, 139 S. Ct. 532, 544 (2019).

[55] *See Cir. City*, 532 U.S. at 117-21.

[56] *Cir. City*, 532 U.S. at 120-21.

[57] *Id*. at 121.

[58] *Id*.

[59] *Id*.

[60] *E.g.,* Daniel Wiessner, *House Passes Bill to End Mandatory Arbitration of Legal Disputes*, REUTERS (March 17, 2022, 3:34 PM PDT), https://www.reuters.com/legal/transactional/house-passes-bill-end-mandatory-arbitration-legal-disputes-2022-03-17/.

[61] Emily T. Patajo, "President Biden Signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021," The National Law Review (March 8, 2022), https://www.natlawreview.com/article/president-biden-signed-ending-forced-arbitration-sexual-assault-and-sexual

mandatory arbitration agreements as applied to both employees and consumers.[62] The FAIR Act is fundamentally a Democratic Party objective, as it passed in the House of Representatives on March 17, 2022 without any Republican Party sponsors.[63] As a result, it is dubious that the FAIR Act can pass under the current Senate—the act was initially proposed in 2019, and that version of the bill stalled in the Senate.[64]

II. *CAPRIOLE V. UBER, INC.*

Uber's history with arbitration underlines the fact that the benefits of arbitration come at a cost.[65] For example, in *O'Connor v. Uber Technologies, Inc.*, the court granted Uber's motion to compel arbitration in response to a class action suit alleging that Uber illegally misclassified Drivers as independent contractors rather than employees.[66] Nevertheless, many members dutifully responded by filing individual arbitration claims.[67] More than three months after these claims were filed, Uber had paid the arbitrators' initial retainer fees for six of the more than 12,000 arbitration claims.[68]

The *O'Connor* plaintiffs represent only a fraction of the arbitration claims issued against Uber.[69] By 2019, Uber faced over 60,000 arbitration claims.[70] Experts noted that resolving so many claims would "take decades" and "cost Uber at least $600 million."[71] As an example, the American Arbitration Association requested that Uber pay $91 million in exchange for arbitration services; Uber responded by calling the bill an "extortionate scheme."[72]

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[62] Wiessner, *supra* note 60.

[63] *Id*.

[64] *Id*.

[65] *See* Alison Frankel, *Forced into Arbitration, 12,500 Drivers Claim Uber Won't Pay Fees to Launch Cases*, REUTERS (December 6, 2018, 12:17 PM), https://www.reuters.com/article/legal-us-otc-uber/forced-into-arbitration-12500-drivers-claim-uber-wont-pay-fees-to-launch-cases-id USKBN1O52C6.

[66] O'Connor v. Uber Techs., Inc., 904 F.3d 1087, 1090-91 (9th Cir. 2018).

[67] Frankel, *supra* note 65.

[68] *Id*.

[69] *See* Joel Rosenblatt, *Uber Gambled on Driver Arbitration and Might Have Come Up the Loser*, L.A. TIMES (May 8, 2019, 10:22 AM PDT), https://www.latimes.com/business/la-fi-uber-ipo-arbitration-miscalculation-20190508-story.html.

[70] *Id*.

[71] *Id*.

[72] Andrew Strickler, *Uber Wrote the Script It Now Attacks in Arbitration Suit*, LAW360 PULSE (Oct 4, 2021, 1:00 PM EDT), https://www.law360.com/pulse/articles/1427278/uber-wrote-the-script-it-now-attacks-in-arbitration-suit.

Capriole v. Uber, Inc. began as a class action lawsuit filed by Uber Drivers against Uber.[73] The principal named plaintiff was John Capriole, who worked as an Uber Driver starting in April 2016.[74] Mr. Capriole was joined by Martin El Koussa and Vladimir Leonidas, who worked as Uber Drivers starting in July 2014 and May 2016, respectively.[75] The plaintiffs' central complaint was that they were not properly classified as employees, in violation of Massachusetts labor law.[76] As a result of the misclassification, they alleged, they were denied minimum wage, overtime pay, and paid sick leave.[77]

The plaintiffs initially filed their claim in the United States District Court for the District of Massachusetts.[78] Uber's Driver agreement contract contained a forum selection clause which requires that Driver claims be litigated in California's Northern District.[79] As a result, Uber successfully transferred the case to the Northern District.[80] As expected, Uber filed a motion to compel arbitration.[81]

In considering the motion to compel arbitration, the Northern District evaluated the extent that Uber rides could constitute interstate commerce.[82] First, the court noted that the "relevant inquiry" is if Uber Drivers, as a class, have a relationship with interstate commerce.[83] Uber provided evidence that two and a half percent of Uber ride services ended in different states than where they started.[84] Uber drivers complete an estimated 650 million to 700 million trips in the United States per year.[85] In addition, approximately 10.1 percent of all Uber rides either start or end at an airport.[86] The Northern District concluded that these figures did not support the conclusion that Uber Drivers were engaged in interstate commerce.[87] Therefore, the FAA transportation worker exemption did not apply, so Drivers were bound by the signed arbitration agreements.[88]

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[73] Capriole v. Uber Techs., Inc., 460 F. Supp. 3d 919, 922 (N.D. Cal. 2020), *aff'd*, 7 F.4th 854 (9th Cir. 2021).

[74] *Id*.

[75] *Id*.

[76] *Id*.

[77] *Id*.

[78] *Id*.

[79] *Id*.

[80] *Id*.

[81] *Id*.

[82] *Id* at 929.

[83] *Id*.

[84] *Id.*

[85] Efrati, *supra* note 10.

[86] *Capriole* 460 F. Supp. at 930.

[87] *Id*.

[88] *Id*. at 932.

The Northern District reasoned that the decisions in *United States v. Yellow Cab Co*.[89] and *Rogers v. Lyft, Inc*.[90] compelled this finding. In *Yellow Cab,* the Supreme Court found that Chicago taxicabs only engaged in "casual and incidental" interstate commerce when they occasionally transported passengers to and from Chicago's railroad stations.[91] In *Rogers*, the Northern District applied *Yellow Cab* to ride-share Drivers, an application with which the court in *Capriole* agreed.[92]

III. ROGERS, YELLOW CAB CO., AND THE CASUAL AND INCIDENTAL STANDARD

The central issue in *Rogers* was whether Lyft Drivers were "engaged in interstate commerce" as required to meet the FAA transportation worker exemption.[93] If the Drivers qualified as "transportation workers . . . engaged in interstate commerce," then Lyft would not be able to compel Drivers to arbitrate.[94] Ultimately, the Northern District held that Lyft Drivers were not sufficiently engaged in interstate commerce for them to qualify for an FAA exemption.[95]

Lyft's first argument in favor of non-exempt status was that the statute requires workers under the exemption to transport goods.[96] The court emphatically rejected this argument.[97] Rather, the court noted that precedent overwhelmingly favored interpreting transportation of people as a form of commerce.[98]

However, the Northern District found Lyft's second argument—that their Drivers were not engaged in interstate commerce—persuasive.[99] The court noted that being "*engaged* in interstate commerce" is more narrow than merely being *involved* in interstate commerce.[100] Rather, the exemption requires the worker to be acting "within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer."[101] The court thus concluded that this narrow ex-

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[89] U.S. v. Yellow Cab Co., 332 U.S. 218 (1947).

[90] *Rogers*, 452 F. Supp.

[91] *Yellow Cab,* 332 U.S. at 231.

[92] *Capriole*, 460 F. Supp. at 931-32.

[93] Rogers v. Lyft, Inc., 452 F. Supp. 3d 904, 913 (N.D. Cal. 2020), *aff'd*, No. 20-15689, 2022 WL 474166, slip op. (9th Cir. Feb. 16, 2022).

[94] *Id*.

[95] *Id*. at 916.

[96] *Id*. at 913.

[97] *Id*. at 914.

[98] *Id*.

[99] *Id*. at 915.

[100] *Id*.

[101] Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195 (1974).

emption requires that the class of workers actually transport goods or passengers across state lines.[102] While the court acknowledged that some Lyft Drivers do sometimes cross state lines as part of their job, it found that the work "predominately entails intrastate trips," and that Lyft "is in the general business of giving people rides, not the particular business of offering interstate transportation to passengers."[103]

In support of this argument, the court referenced *Hill v. Rent-A-Center*.[104] In that case, an account manager who transported merchandise across the border between Georgia and Alabama as a part of his job attempted to assert that the FAA transportation worker exemption applied to him.[105] The United States Court of Appeal for the Eleventh Circuit ("Eleventh Circuit") emphasized that the transportation worker exemption is limited to those engaged in transportation.[106] Congress was concerned only with "'classes' of transportation workers within the transportation industry."[107] Additionally, the Eleventh Circuit noted that a theoretical pizza delivery person who "incidentally" delivered a pizza to a customer across state lines would not qualify for the transportation worker exemption.[108]

Similarly, the *Rogers* court found that Lyft Drivers' transportation of passengers to and from networks of interstate commerce—such as train stations and airports—did not qualify as interstate commerce.[109] The court emphasized that Lyft "allow[s] people to 'hail' rides from its Drivers from pretty much anywhere to pretty much anywhere."[110] Lyft, as a company, is not "focused" on direct interstate transportation or transportation to interstate transportation hubs.[111] The court supported its assertion by analogizing to *Yellow Cab*.[112]

In *Yellow Cab*, the Supreme Court considered whether taxicab drivers could qualify as being engaged in interstate commerce.[113] In short,

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[102] *Rogers*, 452 F. Supp. at 915.
[103] *Id*. at 916.
[104] *Rogers*, 452 F. Supp. at 916.
[105] Hill v. Rent-A-Ctr., Inc., 398 F.3d 1286, 1289 (11th Cir. 2005).
[106] *Id*.
[107] *Id*. at 1290.
[108] *Id*.
[109] *Rogers*, 452 F. Supp. at 916.
[110] *Id*.
[111] *See id*.
[112] *Id*. at 916-17.
[113] *Yellow Cab*, 332 U.S. at 220-21 (stating that Yellow Cab Co., et. al. had been charged with violating the Sherman Anti-Trust Act under two different theories, the relevant claim here being that Yellow Cab Co., et. al., had restrained interstate trade by monopolizing taxi services in and around Chicago; that prior to the anti-trust complaint (starting in 1929 and continuing throughout the 1930s) Morris Markin, president and general manager of Checker Cab Manufacturing Corporation, had begun acquiring an increasing interest in companies that owned taxicab licenses in

the Supreme Court concluded that transportation to a channel of interstate commerce could be too "casual and incidental" to qualify as "interstate commerce" under the Sherman Anti-Trust Act.[114] At the time, Chicago railways constituted an important nexus of interstate travel in the United States.[115] Unsurprisingly, a number of passengers on railroads had relied upon taxis to reach these train stations or, after passengers disembarked the trains, relied upon cabs to reach their destinations within Chicago.[116] The Court ruled that such transportation is "too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act."[117] Instead, the Court reasoned, the taxicabs offered what was fundamentally an intra-state service that only had a "casual and incidental" relationship with interstate commerce.[118] In coming to this conclusion, the Court reasoned "[f]rom the standpoints of time and continuity, the taxicab trip may be quite distinct and separate from the interstate journey" and "not a constituent part of the interstate movement."[119] However, not all courts have found the logic of *Yellow Cab* controlling.[120]

IV. MASSACHUSETTS DISTRICT'S CONTRARY OPINION IN *CUNNINGHAM V. LYFT*

Similar to *Capriole, Cunningham* centered upon a class action suit brought against a ride-share company for illegally misclassifying its Drivers as independent contractors.[121] Again, and also as in *Capriole,* the ride-share company responded with a motion to compel arbitration owing to an arbitration agreement the plaintiffs had previously accepted.[122] Both named plaintiffs picked up customers traveling to and from Boston's Logan Airport.[123] In addition, one of the named plaintiffs occasion-

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Chicago, Pittsburgh, New York, and Minneapolis; that by 1937, Markin's two companies held 2,595 of the 3,000 taxi licenses available in Chicago; that consequently, when the city of Chicago desired to institute a government program that issued taxi licenses to armed service veterans, they could not do so without first pulling licenses from Markin's companies; and that Markin's companies responded with a lawsuit to prevent the loss of their licenses).

[114] *Id*. at 230-31.

[115] *Id*. at 228.

[116] *Id*. at 230.

[117] *Id*.

[118] *Id*. at 231.

[119] *Id*. at 232.

[120] *See*, *e.g.*, Cunningham v. Lyft, Inc., 450 F. Supp. 3d 37, 39 (D. Mass. 2020), *rev'd*, 17 F.4th 244 (1st Cir. 2021) (holding that Drivers' interactions with interstate commerce are not so casual and incidental to prevent them from qualifying for the FAA exemption).

[121] *Id*.

[122] *Id*.

[123] *Id*. at 41.

ally drove customers across state lines from Massachusetts to New Hampshire.[124] Like Uber in *Capriole*, Lyft argued that their Drivers "were not engaged in interstate commerce."[125]

As in *Rogers,* Lyft attempted to argue that interstate commerce workers must transport goods to qualify for the FAA.[126] As the Northern District had done in *Rogers,* the Massachusetts District rejected this argument[127] The court concluded that there was no basis under the FAA to distinguish between those who transport goods and those who transport people.[128] The Massachusetts District noted that many courts include bus drivers and truck drivers in the term "transportation workers."[129]

Unlike the courts in *Capriole* and *Rogers,* the *Cunningham* court concluded that Drivers did engage in interstate commerce. First, the Massachusetts District noted that "[a] worker can be engaged in interstate commerce even if he doesn't personally cross a state border."[130] In support of this conclusion, the court noted two precedents.[131] First, it noted the factors for determining if a contract involves a worker involved in interstate commerce established in *Lenz v. Yellow Transportation, Inc.*:[132]

> [f]irst, whether the employee works in the transportation industry; second, whether the employee is directly responsible for transporting the goods [or passengers] in interstate commerce; third, whether the employee handles goods [or transports passengers] that travel interstate; fourth, whether the employee supervises employees who are themselves transportation workers, such as truck drivers; fifth, whether, like seamen or railroad employees, the employee is within a class of employees for which special arbitration already existed when Congress enacted the FAA; sixth, whether the vehicle itself is vital to the commercial enterprise of the employer; seventh, whether a strike by the employee would disrupt interstate commerce; and eighth, the nexus that exists between the employee's job duties and the vehicle the employee uses in carrying out his duties . . . .[133]

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[124] *Id*.

[125] *Id*. at 45.

[126] *Id*. at 43.

[127] *Id*. at 45.

[128] *Id*. (reaching a conclusion supported by the analysis in Singh v. Uber Techs. Inc., 939 F.3d 210 (3d Cir. 2019), which came to the same conclusion).

[129] *Id*. at 44 (noting *Singh*, 939 F.3d, Lenz v. Yellow Transp., Inc., 431 F.3d 348 (8th Cir. 2005), and Am. Postal Workers' Union, AFL-CIO v. U.S. Postal Serv., 646 F. Supp. 2d 1 (D.D.C. 2009) in support of this argument).

[130] *Id*. at 46.

[131] *Id*. at 46.

[132] *Lenz*, 431 F.3d.

[133] *Cunningham*, 450 F. Supp. at 46.

With reference to these factors, the Massachusetts District made two findings.[134] First, the plaintiffs worked in the transportation industry.[135] Second, the plaintiff's vehicles were "central" to the plaintiff's job and "vital" to Lyft's commercial enterprise, forming a "complete nexus" between the plaintiff's duties and the vehicle they use to accomplish their duties.[136]

The court in *Cunningham* also found the reasoning of *Walling v. Jacksonville Paper Co.* persuasive.[137] In *Walling*, the court concluded that transporting goods to a warehouse once they crossed state lines did not prevent the goods from being related to interstate commerce.[138] Rather, there is "a practical continuity of movement of the goods until they reach the customers for whom they are intended."[139] Similarly, in *Rittman v. Amazon.com,* the Ninth Circuit rejected the argument that Amazon delivery drivers were only engaged in "local, intrastate activities" when they delivered Amazon packages to consumers.[140] In coming to this conclusion, the court noted that the delivery drivers carry goods "that remain in the stream of interstate commerce until they are delivered," even if the delivery drivers are only involved in the "last leg" of the journey.[141] Applying this standard, the court in *Cunningham* concluded that there was similarly a "practical continuity of movement" when Lyft Drivers transport passengers to and from the airport.[142] In combination, the *Lenz* factors and the "practical continuity of movement" standard led the Court to conclude that the "[p]laintiffs' engagement in interstate commerce is not incidental, but essential to their work."[143] As a result, the Court found that the FAA does not apply to Lyft Drivers' agreement with Lyft.[144]

Like in *Rogers,* the court in *Cunningham* discussed the holding in *Hill.*[145] *However, unlike the court in Rogers*, the court in *Cunningham* found the *Hill* opinion distinguishable.[146] Here, the *Cunningham* court emphasized that *Hill's* holding was that an account manager is not a

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[134] *Id*.
[135] *Id*.
[136] *Id*.
[137] *Id*.
[138] Walling v. Jacksonville Paper Co., 317 U.S. 564, 567-68 (1943).
[139] *Id*. at 568.
[140] Rittmann v. Amazon.com, Inc., 971 F.3d 904, 915 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1374 (2021).
[141] *Id*.
[142] *Cunningham*, 450 F. Supp. at 46.
[143] *Id*. at 47.
[144] *Id*.
[145] *Id*.
[146] *Id*.

"transportation worker" even if he or she "periodically" transports goods to out-of-state customers.[147] Rather, the court stated that "in *Hill*, transportation work was incidental to the plaintiff's employment as an account manager."[148] In contrast, Lyft Drivers are fundamentally transportation workers.[149]

The district court in *Rogers* also came to a reasonably contrary conclusion from the court in *Capriole* in assessing *International Brothers of Teamsters Local Union No. 50 v. Kienstra Precast, LLC.*[150] In *Teamsters*, the court determined that although a group of truckers were engaged in operations within Illinois, they still qualified under the FAA exemption because they were affiliated with a group whose truckers occasionally transported loads into Missouri.[151] The court in *Capriole* rejected the conclusion in *Teamsters* as having come from only one of "a small number of courts" to consider workers who only occasionally traversed state lines to be interstate transportation workers.[152] In contrast, the court in *Rogers* attempted to co-opt *Teamster*'s holding into its own argument.[153] To the court in *Rogers*, the fact that the named party only incidentally engaged with interstate was acceptable because truckers, as a class, do engage in interstate commerce.[154]

V. CUNNINGHAM AT THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

In November 2021, the First Circuit reversed the Massachusetts District's holding that Uber Drivers qualified under the interstate commerce worker exemption.[155] In coming to this conclusion, the First Circuit identified, then rejected, two arguments that could support a finding that Drivers qualify for the FAA interstate transportation worker exemption.[156] First, the First Circuit considered whether Lyft rides to Logan Airport could be sufficient to qualify Lyft Drivers for the FAA exemp-

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[147] *Id*.

[148] *Id*.

[149] *Id*.

[150] *Compare* Capriole v. Uber Techs., Inc., 460 F. Supp. 3d 919, 930 (N.D. Cal. 2020), *aff'd*, 7 F.4th 854 (9th Cir. 2021) *with* Rogers v. Lyft, Inc., 452 F. Supp. 3d 904, 915 (N.D. Cal. 2020), *aff'd*, No. 20-15689, 2022 WL 474166, slip op. (9th Cir. Feb. 16, 2022).

[151] Int'l Bhd. Teamsters Loc. Union No. 50 v. Kienstra Precast, LLC, 702 F.3d 954, 957 (7th Cir. 2012).

[152] *Capriole*, 460 F. Supp. at 930.

[153] *Rogers*, 452 F. Supp. at 915.

[154] *Id.* at 915, 917.

[155] Cunningham v. Lyft, Inc., 17 F.4th 244, 246 (1st Cir. 2021).

[156] *Id*. at 250.

tion.[157] Second, the First Circuit evaluated whether Lyft Drivers' direct interstate travel qualifies them for the FAA exemption.[158]

The First Circuit's conclusion that Lyft Drivers do not qualify for the FAA interstate commerce worker exemption is centered upon the holding in *Yellow Cab*.[159] The First Circuit stated that plaintiffs' argument in this area "runs headlong into the instruction supplied" by *Yellow Cab*.[160] Referencing *Capriole*, the First Circuit found that Lyft Drivers who pick up or drop off parties at an airport are more like a local taxicab service than an integrated component of interstate commerce.[161] The First Circuit also held that taxicabs would not be engaged in interstate commerce under the FAA exemption where they are not affecting interstate commerce under the Sherman Act, the law at issue in *Yellow Cab*.[162] In coming to this conclusion, the First Circuit noted that the Sherman Act is to be construed broadly, but the FAA transportation worker exemption is to be construed narrowly.[163] Consequently, the First Circuit reasoned that a situation that failed to satisfy the Sherman Act requirements would also clearly fail to qualify for the FAA transportation worker exemption.[164]

The First Circuit concluded that Lyft Drivers' direct interstate trips were insufficient to qualify them for the FAA interstate commerce worker exemption.[165] The First Circuit concluded that Lyft Drivers conducted intrastate trips with much greater frequency than interstate trips."[166] In support of this position, the court stated that "fewer than 2% of Lyft rides nationwide cross state lines."[167] In addition, the First Circuit noted that of the four named plaintiffs in the case, one of the Lyft Drivers had failed to conduct a single interstate trip over the five-year period they had worked for the company.[168] These facts led the First Circuit to conclude that the "nature of the business" of Lyft is "clearly primarily in the business of facilitating local, intrastate trips."[169] Furthermore, the First Circuit determined that the holding in *Circuit City* dictates that the FAA

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[157] *Id*.
[158] *Id*.
[159] *Id*.
[160] *Id*.
[161] *Id*. at 251.
[162] *Id*.
[163] *Id*.
[164] *Id*.
[165] *Id*. at 252.
[166] *Id*.
[167] *Id*.
[168] *Id*. at 252-53.
[169] *Id*. at 253.

transportation worker exemption is to be construed "narrowly."[170] As a result, the First Circuit concluded that Lyft Drivers did not qualify as interstate commerce workers.[171] In coming to this decision, the First Circuit noted the disagreement between *Capriole* and *Teamsters*, and aligned itself with *Capriole.*[172]

VI. ARGUMENT: THE REASONABLE DISAGREEMENT EXPRESSED BY THE VARIOUS COURTS INDICATES A NEED FOR DECISIVE AUTHORITY

The myriad competing interpretations of courts throughout the United States regarding concepts central to Drivers' qualification for the FAA exemption indicate that Congress or the United States Supreme Court should take steps to resolve this ongoing circuit split. Courts disagree with respect to the possibility that Drivers' direct or indirect interstate travel could qualify them for the FAA exemption. They disagree over whether the holding in *Yellow Cab*[173] should be determinative. Courts disagree over the correct reading of Drivers as a class, as indicated by their responses to the holdings in *Hill*[174] *and Teamsters.*[175] Specifically, they disagree over whether Drivers take enough interstate trips to qualify as interstate commerce workers.[176] In fact, they even disagree over what qualifies as a trip.[177] Courts disagree as to the weight that should be accorded the *Lenz*[178] factors.

Capriole, Rogers, and *Cunningham* all analyze ride-share Drivers' qualifications for the FAA exemption in two ways. First, they address whether the Drivers directly transported passengers across state lines to an extent sufficient for qualification. The Massachusetts District Court in *Cunningham* concluded the extent was sufficient, while the courts in *Capriole, Rogers*, and the First Circuit concluded the extent was not suf-

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[170] *Id*.

[171] *Id*.

[172] *Id*. at 252.

[173] United States v. Yellow Cab Co., 332 U.S. 218, 220-21 (1947), *overruled by* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, (1984).

[174] Hill v. Rent-A-Ctr., Inc., 398 F.3d 1286, 1289 (11th Cir. 2005).

[175] Int'l Bhd. Teamsters Loc. Union No. 50 v. Kienstra Precast, LLC, 702 F.3d 954, 957 (7th Cir. 2012).

[176] *Compare Capriole* 460 F. Supp. at 930 (holding that percentage of Drivers who travel interstate are insufficient to qualify the class for the FAA exemption) *with Cunningham*, 450 F. Supp. at 46-47 (holding that they are sufficient to qualify for the FAA exemption).

[177] *Compare Cunningham*, 450 F. Supp. at 46 (reasoning that a trip to an airport, through a plane, and then to a destination after disembarking can be considered one trip) *with Capriole* 460 F. Supp. at 930-31 (reasoning that multi-stage travel to, through, and away from airports should be considered multiple trips).

[178] Lenz v. Yellow Transp., Inc., 431 F.3d 348, 348 (8th Cir. 2005).

ficient. Second, each court considered whether ride-share trips to and from interstate transportation networks could constitute engagement in interstate commerce. The Massachusetts District Court concluded that trips could constitute engagement in interstate commerce, while the courts in *Capriole, Rogers,* and the First Circuit in *Cunningham* concluded trips could not constitute engagement in interstate commerce. Some courts have agreed with the Massachusetts District court's conclusion in *Capriole*, while others prefer the holding in *Rogers*.[179]

In a sense, this split in opinions is unsurprising. Reasonable minds could disagree over whether Drivers directly engage in interstate commerce through directly transporting passengers across state lines. In fact, courts have issued rulings acknowledging that they are unsure as to the correct categorization for Drivers.[180] In *Singh v. Uber Techs. Inc.,* the United States Court of Appeals for the Third Circuit ("Third Circuit") reversed a district court ruling compelling arbitration until the parties could go through discovery to determine if Uber drivers should qualify as "interstate commerce transportation workers."[181] Similarly, the Minnesota District court in *Sienkaniec v. Uber Techs., Inc.* noted that Drivers' statuses presented "a gap in the case law" between classes of workers with no members engaged in interstate commerce and classes of workers that all engage in interstate commerce.[182]

It is understandable that the courts that issued holdings in alignment with *Capriole* also found *Yellow Cab* persuasive.[183] Drivers can easily be likened to taxicab drivers.[184] They provide similar, even competing, services.[185] In addition, *Yellow Cab's* railroad station analysis provides a framework for considering ride-share trips to the airport in the context of interstate commerce.[186]

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[179] *Compare* Islam v. Lyft, Inc., 524 F. Supp. 3d 338, 350 (S.D.N.Y. 2021) *and* Gonzalez v. Lyft, Inc., No. 2:19-cv-20569

BRM-JAD, 2021 U.S. Dist. LEXIS 17188, slip op. at *6 (D.N.J. Jan. 29, 2021) (favoring the Massachusetts District conclusion) *with* Grice v. Uber Techs., Inc., No. CV 18-2995 PSG (GJSx), 2020 U.S. Dist. LEXIS 14803, slip op. at *26 (C.D. Cal. Jan. 7, 2020) (holding alongside *Capriole.* 460 F.Supp.).

[180] Singh v. Uber Techs. Inc., 939 F.3d 210, 227-28 (3d Cir. 2019); Sienkaniec v. Uber Techs., Inc., 401 F. Supp. 3d 870, 872 (D. Minn. 2019).

[181] *Singh*, 939 F.3d at 227-28.

[182] *Sienkaniec*, 401 F. Supp. at 872.

[183] *Capriole*, 460 F. Supp. at 931; *Rogers*, 452 F. Supp. at 916-17.

[184] *See, e.g.,* Cunningham v. Lyft, Inc., 17 F.4th 244, 250 (1st Cir. 2021).

[185] Liane Yvkoff, *To Compete with Uber and Lyft, Taxis Make the Switch to Upfront Pricing*, FORBES (Sept. 10, 2020, 10:45 AM), https://www.forbes.com/sites/lianeyvkoff/2020/09/10/to-compete-with-uber-and-lyft-taxis-make-the-switch-to-upfront-pricing/?sh=1fca92d86b70.

[186] United States v. Yellow Cab Co., 332 U.S. 218, 228 (1947), *overruled by* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984).

While the circumstantial similarities between *Capriole* and *Yellow Cab* are clear, there is an issue with relying upon *Yellow Cab*'s ruling to decide if Drivers should qualify for the FAA transportation worker exemption. The Supreme Court issued their holding in *Yellow Cab* on June 23, 1947, so it is an old decision.[187] Ride-share driving did not exist at the time,[188] nor would it exist for another sixty-two years.[189] Moreover, the Supreme Court overruled *Yellow Cab* on June 19, 1984, with their decision in *Copperweld Corp. v. Independence Tube Corp*.[190] The court in *Capriole* correctly noted that the Supreme Court overruled *Yellow Cab* on grounds not directly related to the "casual and incidental" standard[191]—*Copperweld* is a rejection of the intra-enterprise conspiracy doctrine, a doctrine not otherwise related to the topic of this Note.[192] Still, it is at least somewhat unsatisfying to reach a decision that can affect millions of workers by relying upon a seventy-three-year-old case that has been overruled in part for thirty-six years.[193]

The Massachusetts District Court also disagreed with the *Capriole* court's application of the ruling in *Hill*.[194] *Cunningham* summarizes *Hill*'s holding: "[b]ecause Hill was not within a class of workers within the transportation industry," his contract is not exempted from the FAA's mandatory arbitration.[195] The Massachusetts District court concluded that because Drivers, unlike account managers, are clearly within the transportation industry, they should be exempted.[196] In contrast, the courts in both *Capriole* and *Rogers* focus on *Hill's* commentary rejecting "incidental" interstate commerce from qualifying transportation workers.[197] Put simply, the courts in *Capriole* and *Rogers* concluded that while Drivers may be "transportation workers," they are not transportation workers *engaged in interstate commerce* within the meaning of the FAA.[198]

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[187] *See Id*.

[188] Alison DeNisco Rayome, *Uber vs. Lyft: We Compare the Two Ride-Hailing Apps*, CNET (Feb. 27, 2020, 4:00 AM), https://www.cnet.com/tech/services-and-software/uber-vs-lyft-we-compare-the-two-ride-hailing-apps/.

[189] Rayome, supra note 188.

[190] Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 752 (1984).

[191] Capriole v. Uber Techs., Inc., 460 F. Supp. 3d 919, 931 (N.D. Cal. 2020), *aff'd*, 7 F.4th 854 (9th Cir. 2021).

[192] *Copperweld*, 467 U.S. at 752; *Capriole* 460 F. Supp. at, 931.

[193] Kerr, *supra* note 4.

[194] *Compare* Cunningham v. Lyft, Inc., 450 F. Supp. 3d 37, 47 (D. Mass. 2020), *rev'd*, 17 F.4th 244 (1st Cir. 2021) *with Capriole* 460 F. Supp. at 931.

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

[196] *Cunningham*, 450 F. Supp. at 47.

[197] *Capriole*, 460 F. Supp. at 930; Rogers v. Lyft, Inc., 452 F. Supp. 3d 904, 916-17 (N.D. Cal. 2020), *aff'd*, No. 20-15689, 2022 WL 474166, slip op. (9th Cir. Feb. 16, 2022).

[198] *Capriole*, 460 F. Supp. at 933; *Rogers*, 452 F. Supp. at 916.

The evaluation that truckers engage in interstate commerce, as discussed in *Teamsters*[199] and as analyzed in *Rogers* and *Capriole*, is purely conceptual.[200] The courts in *Rogers*, *Capriole*, and *Teamsters* did not evaluate the degree to which truckers, as a class, engage in interstate commerce.[201] The courts simply assumed that truckers do because of the type of work they typically perform.[202] These courts did not consider that truckers may consist of multiple distinct classes of workers, some that operate interstate, and others that operate intrastate.[203] Different jurisdictions set different standards for both truck drivers and the vehicles they operate.[204] It may have been plausible for courts to split truckers into multiple classes when considering their potential qualification for the FAA exemption, but they did not. In contrast, Drivers are not given the same latitude. All the cases provide at least some statistics for what percentage of ride-share trips are interstate.[205]

Courts have also exhibited reasonable disagreement over what exactly constitutes a trip.[206] The Massachusetts District Court preferred the reasoning of *Walling*: a segment of a trip can be considered interstate commerce, even when entirely intrastate, as long as it is a part of a "practical continuity of movement" which includes interstate travel.[207] Put another way, Drivers are a part of the "chain of interstate commerce" when they pick up or drop off customers at the airport.[208] The Ninth Circuit's holding in *Rittman* demonstrates a similar line of logic.[209] Under that ruling, Amazon delivery drivers did not engage in "local, intrastate activities" when they delivered Amazon packages to consumers.[210] Rather,

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[199] Int'l Bhd. of Teamsters Loc. Union No. 50 v. Kienstra Precast, LLC, 702 F.3d 954, 957 (7th Cir. 2012).

[200] *See generally Rogers*, 452 F. Supp. at 915-16; *Capriole*, 460 F. Supp. at 929-30; *Cunningham*, 450 F. Supp. at 47.

[201] *Id.*

[202] *Id.*.

[203] *Id*.

[204] Paul Cannon, *What is the Difference Between Interstate vs. Intrastate Trucking?*, SIMMONS AND FLETCHER, P.C., https://www.simmonsandfletcher.com/truck-accident-lawyer/interstate-vs-intrastate-trucking (last visited Sept. 2, 2022).

[205] *See, e.g.*, *Capriole*, 460 F. Supp. at 929-30.

[206] *Compare Cunningham*, 450 F. Supp. at 46-47 (holding that a multistage trip in which drivers take passengers to locations such as airports where the passengers leave the state is part of interstate commerce), *with Capriole* 460 F. Supp. at 929-31 (holding that the trips are separate and therefore not a part of interstate commerce).

[207] *Cunningham*, 450 F. Supp. at 46.

[208] *Id*.

[209] Rittmann v. Amazon.com, Inc., 971 F.3d 904, 921 (9th Cir. 2020) (including Bress, J., dissenting).

[210] *Id.* at 915.

the Ninth Circuit held that the transported goods remain in the "stream of interstate commerce" until they were delivered.[211]

In contrast, *Capriole* follows the *Yellow Cab* formulation that describes the role of Drivers as participants in a discrete, "casual[,] and incidental" intrastate trip whenever those Drivers pick up or drop off a customer at an airport.[212] Under this formulation, a person who gets a ride to a train station, rides the train across state lines, then gets a ride to a hotel *should* be considered to have taken two intrastate trips and one interstate trip.[213] Arguably, this linked action seems entirely within the flow of commerce described by *Gulf Oil* and endorsed by *Rogers*.[214] Notably, the Court in *Yellow Cab* conceded that refusing to transport passengers to and from railroad stations connected with interstate journeys "might have [a] sufficient effect upon interstate commerce" to justify employing the Sherman Anti-Trust Act.[215] If burdening interstate commerce by limiting transportation to and from a railroad station constitutes an infringement of interstate commerce, then providing transportation to those same stations should constitute an engagement with interstate commerce.[216]

Approximately 2.5% of Uber rides begin and end in different states.[217] Even courts that have come to conclusions holding that Drivers qualify for the FAA exemption recognize that this is a small percentage of trips.[218] However, these same statistics may be framed in a different way. Drivers take many trips.[219] In fact, when one considers that Uber Drivers average an estimated 650 million to 700 million trips a year, that 2.5% figure corresponds with 16,250,000 to 17,500,000 engagements with interstate commerce every year on a class basis.[220] And, as the court in *Capriole* noted, the relevant inquiry is "whether the class of drivers crosses state lines."[221] It is somewhat difficult to believe that a class of

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[211] *Id*.

[212] Capriole v. Uber Techs., Inc., 460 F. Supp. 3d 919, 931 (N.D. Cal. 2020), *aff'd*, 7 F.4th 854 (9th Cir. 2021).

[213] *See* United States v. Yellow Cab Co., 332 U.S. 218, 231 (1947), *overruled by* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, (1984).

[214] Rogers v. Lyft, Inc., 452 F. Supp. 3d 904, 914 (N.D. Cal. 2020), *aff'd*, No. 20-15689, 2022 WL 474166, slip op. (9th Cir. Feb. 16, 2022) (citing Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195 (1974)).

[215] *Yellow Cab,* 332 U.S. at 233.

[216] *Id*.

[217] *Capriole*, 460 F. Supp. at 929.

[218] *See Capriole,* 460 F. Supp. at 929-30; *see also Cunningham*, 17 F.4th at 252.

[219] Efrati, *supra* note 10.

[220] *Id*.

[221] *Capriole,* 460 F. Supp. at 929.

workers that directly transports tens of millions of people across state lines every year is not engaged in interstate commerce.[222]

Uber provided evidence that 10.1% of trips arranged through their service began or ended at an airport.[223] When combined with the fact that Uber Drivers complete an estimated 650 million to 700 million trips in the United States per year, this means that some portion of the 65,565,000 to 70,700,000 times a year a Driver drops a customer off at an airport, that customer will end up in a different state.[224] Furthermore, these figures do not account for trips that begin or end at railroad stations or bus stops, which can also result in the customer crossing state lines.[225]

The *Lenz* factors, as modified by the Massachusetts District Court, could provide an analytical framework for determining a Driver's qualification under the FAA exemption.[226] As the Massachusetts District concluded, Drivers satisfy several *Lenz* factors.[227] They work in the transportation industry. They directly transport passengers in interstate commerce at an average rate of 2.5% of the time.[228] They transport passengers traveling interstate at least 10.1% of the time.[229] A Driver's vehicle is vital to a ride-share company's commercial enterprise.[230] A logical nexus exists between a Drivers' job duties and their vehicles: without vehicles, Drivers would not be able to do their jobs.[231]

On the other hand, there are *Lenz* factors that Drivers do not satisfy.[232] The Drivers do not supervise other transportation workers.[233] No special arbitration agreements for Drivers were in place before the FAA came into law.[234] Finally, it is unclear how a strike by Drivers would influence interstate commerce.[235] Unfortunately, neither *Capriole* nor *Rogers* offer a comparable *Lenz* factor analysis. *Capriole* is silent as to *Lenz*.[236] In contrast, the court in *Rogers* noted that it was aware of the

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[222] Efrati, *supra* note 10.

[223] *Capriole*, 460 F. Supp. at 930.

[224] Efrati, *supra* note 10.

[225] BUREAU OF TRANSP. STATS., U.S. DEP'T OF TRANSP., TRANSPORTATION STATISTICS ANNUAL REPORT (2018), https://www.bts.dot.gov/sites/bts.dot.gov/files/docs/browse-statistical-products-and-data/transportation-statistics-annual-reports/Preliminary-TSAR-Full-2018-a.pdf.

[226] Cunningham v. Lyft, Inc., 450 F. Supp. 3d 37, 46-47 (D. Mass. 2020), *rev'd*, 17 F.4th 244 (1st Cir. 2021).

[227] *Id.* at 46.

[228] *Capriole*, 460 F. Supp. at 929.

[229] *Id.* at 930.

[230] *Cunningham*, 450 F. Supp. at 46.

[231] *Id*.

[232] *See id*.

[233] *Id.*

[234] *Id.*

[235] *Id*.

[236] *See generally* Capriole v. Uber Techs., Inc., 460 F. Supp. 3d 919 (N.D. Cal. 2020), *aff'd*, 7 F.4th 854 (9th Cir. 2021).

Lenz test but would not consider the *Lenz* factors because *Yellow Cab*'s analysis was sufficient.[237]

There is an additional consideration in favor of the argument that Drivers do not qualify as transportation workers engaged in interstate commerce. The goal of the FAA is to further a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[238] The act was designed to discourage the courts from rejecting arbitration agreements.[239] One may argue that if the balance of factors is close, courts should drift towards supporting that policy goal and reject qualification under the transportation worker exemption.[240] The court in *Osvatics* expressly denied this argument[241] because the interstate transportation worker exemption is absolute: the FAA does not control for workers who qualify for the FAA exemption.[242] In the words of *Rogers*, "the FAA does not apply—at all—to whole industries of workers."[243] The Federal Arbitration Act may strongly favor arbitration agreements, but it also expressly maintains a field over which the act holds no sway.

There are several solutions to this circuit split. First, the Supreme Court could definitively resolve the issue.[244] Historically, the court has done so in approximately a third of such circuit splits.[245] The obvious benefit to this solution is that the Court could issue an ultimate resolution relatively quickly. Second, Congress could put forth a bill that modifies, clarifies, or replaces the FAA. If the FAIR Act passed, then Drivers would not need to prove that they qualify under the interstate commerce worker exemption to avoid arbitration because the act would nullify mandatory arbitration agreements in employment contracts.[246] The benefit of this solution is that it requires action by Congress, which is the branch of government best suited to investigating and weighing the potential social costs of the Drivers' classification. Given the widespread importance of the gig economy, this may be the most appropriate

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[237] Rogers v. Lyft, Inc., 452 F. Supp. 3d 904, 921 n. 3 (N.D. Cal. 2020), *aff'd*, No. 20-15689, 2022 WL 474166, slip op. (9th Cir. Feb. 16, 2022).

[238] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[239] *Id*.

[240] *Id*. at 24-26.

[241] Osvatics v. Lyft, Inc., 535 F. Supp. 3d 1, 14-16 (D.D.C. 2021).

[242] 9 U.S.C. § 1

[243] Rogers v. Lyft, Inc., 452 F. Supp. 3d 904, 913 (N.D. Cal. 2020), *aff'd*, No. 20-15689, 2022 WL 474166, slip op. (9th Cir. Feb. 16, 2022).

[244] DEBORAH BEIM & KELLY RADER, YALE U. DEP'T POL. SCI., LEGAL UNIFORMITY IN AMERICAN COURTS (2018), 1, https://sites.lsa.umich.edu/dbeim/wp-content/uploads/sites/739/2019/08/Legal-Uniformity-1o1gyn6.pdf.

[245] *Id*.

[246] Wiessner, *supra* note 60.

method. Third, the National Labor Relations Board ("NLRB") could issue a classification for Riders, affirmatively determining if they should be considered independent contractors or employees.[247] This solution could resolve this issue quickly but may shift subject to subsequent changes to the membership of the organization,[248] and is therefore of limited utility in finalizing the debate.

CONCLUSION

As this Note details, the status of Drivers has been a contentious legal issue for years. Disagreement over the Drivers' legal status has resulted in litigation, arbitration, and statutory amendments. Courts throughout the nation have come to conflicting conclusions over the application of the FAA to drivers. Nothing indicates that these legal issues will soon be resolved.

The status of Drivers as employees or independent contractors is hopelessly intertwined with their qualification as, or failure to qualify as, transportation workers engaged in interstate commerce.[249] The ongoing split of opinions in the courts[250] has produced uncertainty for millions of people. Congress should act to reduce this uncertainty. The federal legislature's proposed FAIR Act could be a solution to this ongoing problem, though the Act is expected to remain stalled. In the meantime, it would be appropriate for the Supreme Court to issue a definitive ruling on this issue.

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[247] Robert Iafolla, *Gig Economy Central to Labor Board Debate on Contractor Test (1)*, BLOOMBERG (Feb. 11, 2022, 7:06 AM) https://news.bloomberglaw.com/daily-labor-report/gig-economy-central-to-labor-board-debate-on-contractor-test.

[248] *See id*.

[249] *See, e.g*. Capriole v. Uber Techs., Inc., 460 F. Supp. 3d 919 (N.D. Cal. 2020), *aff'd*, 7 F.4th 854 (9th Cir. 2021).

[250] *Compare* Islam v. Lyft, Inc., 524 F. Supp. 3d 338 (S.D.N.Y. 2021), Gonzalez v. Lyft, Inc., No. 2:19-cv-20569-BRM-JAD, 2021 U.S. Dist. LEXIS 17188, slip op. (D.N.J. Jan. 29, 2021), *and* Cunningham v. Lyft, Inc., 450 F. Supp. 3d 37, 48 (D. Mass. 2020), *rev'd*, 17 F.4th 244 (1st Cir. 2021) (holding that ride-share drivers are exempted from the FAA), *with Capriole*, 460 F. Supp. at 932, Rogers v. Lyft, Inc., 452 F. Supp. 3d 904, 917 (N.D. Cal. 2020), *aff'd*, No. 20-15689, 2022 WL 474166, slip op. (9th Cir. Feb. 16, 2022).*and* Grice v. Uber Techs., Inc., No. CV 18-2995 PSG (GJSx), 2020 U.S. Dist. LEXIS 14803, slip op. at *26 (C.D. Cal. Jan. 7, 2020) (holding that they are not).