# Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

SJC-13228

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VERONICA ARCHER & others,
Plaintiffs-Appellees,

v.

GRUBHUB HOLDINGS, INC.,
Defendant-Appellant.

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ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

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**BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF THE DEFENDANT-APPELLANT**

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NEW ENGLAND LEGAL FOUNDATION,

By its attorneys,

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Dated: April 1, 2022

## CORPORATE DISCLOSURE STATEMENT

Amicus curiae New England Legal Foundation ("NELF") states, pursuant to S.J.C. Rule 1:21, that it is a 26 U.S.C. § 501(c)(3) nonprofit, public interest law foundation, incorporated in Massachusetts in 1977, with its headquarters in Boston. NELF does not issue stock or any other form of securities and does not have any parent corporation. NELF is governed by a self-perpetuating Board of Directors, the members of which serve solely in their personal capacities.

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## ISSUE PRESENTED

New England Legal Foundation (NELF) addresses the following issue presented by the Court in its amicus announcement of January 21, 2022:

> Where § 1 of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, provides that the act does not apply to contracts of employment of "workers engaged in . . . interstate commerce" and where delivery drivers for an online and mobile food ordering and delivery service, such as Grubhub, sometimes deliver prepackaged food items or non-food items that have traveled through interstate commerce, whether the delivery drivers are workers engaged in interstate commerce and therefore exempt from the act.

## INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. NELF's membership consists of corporations, law firms, individuals, and others who believe in its mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include a cross-section of large and small businesses and other organizations from all parts of the Commonwealth, New England, and the United States.

NELF is committed to the enforcement of arbitration agreements according to their terms, as Congress has required in the Federal Arbitration Act (FAA), consistently with foundational principles of contract law. NELF is also committed to the enforcement of the Supremacy Clause of the United States Constitution, which in this case should require a decision that is consistent with the United States Supreme Court's decisions interpreting (1) the scope of activity that is within interstate commerce, and (2) the narrow "transportation worker" exception to the FAA's otherwise broad mandate to enforce arbitration agreements.

NELF has appeared as amicus curiae before this Court in several other cases involving the application of the FAA to Massachusetts contracts.[1] This is such a case, and NELF believes that its brief will assist the Court in deciding the legal issue presented here.[2]

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[1] *See, e.g.*, *Kauders v. Uber Techs., Inc.*, 486 Mass. 557 (2021); *McInnes v. LPL Fin., LLC*, 466 Mass. 256 (2013); *Machado v. System4 LLC*, 465 Mass. 508 (2013); *Feeney v. Dell Inc.*, 465 Mass. 470 (2013); *Joule, Inc. v. Simmons*, 459 Mass. 88 (2011).

[2] Pursuant to Mass. R. App. P. 17(a)(1)(5), NELF states that neither the defendant-appellant, nor its counsel, nor any individual or entity other than amicus, has authored this brief in whole or in part, or has made

## ARGUMENT

### I. DELIVERY DRIVERS FOR ONLINE AND MOBILE FOOD ORDERING AND DELIVERY SERVICES, SUCH AS THE GRUBHUB PLAINTIFFS IN THIS CASE, ARE NOT EXEMPT FROM THE FEDERAL ARBITRATION ACT BECAUSE THEY ARE NOT ENGAGED IN INTERSTATE COMMERCE WHEN THEY DELIVER GOODS FROM LOCAL MERCHANTS TO LOCAL CUSTOMERS.

The plaintiffs in this case are local delivery drivers for Grubhub Holdings, Inc., an online and mobile platform that connects customers with the offerings of various local restaurants and stores in the Commonwealth. In addition to delivering meals prepared by local restaurants, the drivers also deliver certain goods from local retail stores, such as packaged food items, household products, and pharmaceuticals. The parties have assumed, for the purpose of deciding the legal issue in this case, that many of those goods came from other states. Notably, the plaintiffs do not allege that they cross state lines when they deliver meals and goods to their customers.

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any monetary contribution to its preparation or submission. Pursuant to Mass. R. App. P. 17(c)(5)(D), NELF also states that neither amicus nor its counsel has ever represented any party to this appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in this appeal.

The issue is whether the plaintiffs' handling of goods that originated from other states brings them under the Federal Arbitration Act's exemption, which applies to "contracts of employment of seamen, railroad employees, or any other *class of workers engaged in foreign or interstate commerce*." 9 U.S.C. § 1 (FAA) (emphasis added). Moreover, the United States Supreme Court has interpreted this residual category narrowly and has "limited [it] to *transportation workers*, defined, for instance, as those workers actually engaged in *the movement of goods in interstate commerce*," comparable to the interstate activity of seamen and railroad employees. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001) (cleaned up) (emphasis added).[3]

[3] In particular, the Court in *Circuit City* held that this residual category should be interpreted narrowly, for three essential reasons: (1) to give effect to § 1's listing of seamen and railroad employees that precedes the residual phrase, thereby limiting the meaning of that phrase to comparable interstate transportation workers, under the rule of *ejusdem generis*; (2) to give effect to Congress's use of the specific term "engaged in commerce" in the residual phrase, rather than broader terms like "affecting commerce" or "involving commerce," which indicate Congress's intent to regulate to the full extent of its powers under the Commerce Clause; and (3) to remain consistent with the FAA's *broad* mandate, in § 2, to enforce arbitration agreements according to their terms, thereby overcoming traditional judicial

In other words,

> [T]he workers must be connected not simply to the goods, but to the act of moving those goods across state or national borders. . . . [They] must themselves be engaged *in the channels* of foreign or interstate commerce. That, after all, is what it means to be a transportation worker who performs work analogous to that of seamen and railroad employees . . . .

*Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798, 802 (7th Cir. 2020) (Barrett, J.) (cleaned up) (emphasis in original) (Grubhub drivers are not exempt from FAA because they merely provide local delivery of goods that are no longer in interstate commerce).

Under this clear standard, the plaintiffs do not qualify for the FAA exemption because they do not move goods in interstate commerce whatsoever, let alone move goods in interstate commerce to a degree comparable to the work of seamen and railroad employees. Instead, the drivers merely provide Massachusetts customers with shopping and delivery services for merchandise obtained from local retailers. Those products are *no longer* in interstate commerce. Instead, the interstate transport of those

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hostility to such agreements. *See Circuit City*, 532 U.S. at 111-16 (discussing same).

goods ended when Massachusetts merchants received the goods from out-of-state sources, pursuant to prior contracts or arrangements between *those* parties. "The contract or understanding pursuant to which goods are ordered, like a special order, indicates *where it was intended that the interstate movement should terminate*." *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 569 (1943) (emphasis added).

Under *Walling*, the interstate movement of the goods ended when the goods arrived on the shelves of the Massachusetts retailers, according to the terms of the transactions between the retailers and the out-of-state sources of the goods. Those transactions are altogether separate from the subsequent local sale of the goods to Massachusetts customers, via delivery drivers such as the plaintiffs in this case. *See Walling*, 317 U.S. at 568-70 (to determine whether employees were "engaged in commerce," under language of FLSA then in effect, when they delivered to local customers goods that had arrived from another state, test is whether "there is a practical continuity of movement of the goods until they reach the customers for whom they are intended" under the terms of a prior contract, understanding, or special order, *or* whether

goods were merely "acquired and held by *a local merchant* for *local disposition*" to local customers in subsequent sales) (emphasis added).

Applying *Walling* to this case, it is clear that the plaintiffs merely provide the local delivery of goods "acquired and held by *a local merchant* for *local disposition*." *Walling*, 317 U.S. at 570 (emphasis added). There was simply no contract or arrangement between the out-of-state source of the goods and *Grubhub itself* to deliver the goods all the way to the Massachusetts end customers. Under *Walling*, there was only a "practical continuity of movement until [the goods] reach[ed]" the *Massachusetts retailers*, according to the prior arrangements between the out-of-state sources and the Massachusetts retailers. The subsequent local sale of the goods to Massachusetts customers was an altogether separate arrangement among the Massachusetts retailers, the Massachusetts customers, and the plaintiffs. In short, "[t]here [wa]s a break in the channels of commerce between the [interstate] transportation of goods to a local retail store and the *subsequent* local purchases from that store by [the online and mobile service's] customers." *Young v. Shipt, Inc.*, 2021 WL 4439398, at *5 (N.D.

Ill. Sept. 27, 2021) (local delivery drivers for service comparable to Grubhub were not exempt from FAA) (emphasis in original).

Indeed, the Supreme Court has held repeatedly, and for several decades, that the local transport of goods (or passengers) arriving from another state is not part of interstate commerce, *unless* that local transport is the intended and integrated final leg of a unitary and continuous delivery route that was fully established, by contract or other arrangement, when the goods (or passengers) began their interstate journey. *See Walling*, 317 U.S. at 569-70; *United States v. Yellow Cab Co.*, 332 U.S. 218, 228-32 (1947), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984) (dismissing, under Commerce Clause, Sherman Act claim in which Chicago cab drivers *fortuitously* drove local passengers home from local train stations after they had completed their interstate trips, while allowing another Sherman Act claim to proceed on merits, in which local cab drivers had entered *prior arrangement* with railroads to drive interstate rail passengers between Chicago train stations to continue their cross-country rail trips); *A.L.A. Schechter Poultry*

*Corp. v. United States*, 295 U.S. 495, 542-44 (1935) (criminal antitrust regulation did not apply to Brooklyn slaughterhouse operators, because interstate shipment of live poultry ended when poultry arrived in city and was consigned to "commission men" for subsequent local resale, according to terms of contract; subsequent purchase of poultry by slaughterhouse operators was "for *local disposition*. *The interstate transactions in relation to that poultry then ended*. Defendants held the poultry at their slaughterhouse markets for slaughter and *local sale* to retail dealers and butchers who in turn sold directly to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce.") (emphasis added).

Consistent with this clear Supreme Court precedent, several lower federal courts have held that delivery drivers for Grubhub and comparable online and mobile companies are not exempt from the FAA. Courts in these recent decisions have recognized that the delivery drivers merely provide the local transport of goods "acquired and held by *a local merchant* for *local disposition*." *Walling*, 317 U.S. at 570 (emphasis added). *See Wallace*, 970 F.3d at 801-02 (Grubhub

drivers not exempt from FAA because they are not engaged in interstate commerce when they deliver merchandise from local stores to local customers); *Bean v. ES Partners, Inc.*, 533 F. Supp.3d 1226, 1236 (S.D. Fla. 2021) (driver for prescription medication courier service not exempt from FAA because he merely made local deliveries of pharmaceuticals and medical devices delivered from other states to local vendors); *Young*, 2021 WL 4439398, at *3-4 (holding same for Shipt delivery drivers); *Austin v. DoorDash, Inc.*, 2019 WL 4804781, at *4 (D. Mass. Sept. 30, 2019) (holding same for comparable delivery drivers); *Lee v. Postmates Inc.*, 2018 WL 6605659, at *7 (N.D. Cal. Dec. 17, 2018) (delivery driver for comparable online and mobile service not exempt from FAA merely because she delivered goods produced out of state; all deliveries were from local merchants to local customers in California). *See also Cunningham v. Lyft, Inc.*, 17 F.4th 244, 250-51 (1st Cir. 2021) (relying on *Yellow Cab*, discussed above, to conclude that local rideshare service drivers are not exempt from FAA when they fortuitously drive passengers home from Logan airport after completing their interstate trips).

Consistent with *Walling* and these recent lower court decisions, this Court should decide that the plaintiffs are not engaged in interstate commerce, and are therefore not exempt from the FAA, when they deliver goods that were "acquired and held by a local merchant for local disposition." *Walling*, 317 U.S. at 570. Accordingly, the Court should reverse the Superior Court's decision and grant Grubhub's motion to compel the individual arbitration of the plaintiffs' claims, as is required by the terms of the parties' arbitration agreements.

## II. THE SUPERIOR COURT MISINTERPRETED THE UNITED STATES SUPREME COURT'S DECISION IN *WALLING V. JACKSONVILLE PAPER CO.*, WHICH CLEARLY DISTINGUISHES BETWEEN THE *INTEGRATED* LOCAL DELIVERY OF OUT-OF-STATE GOODS, AS PART OF A UNITARY AND CONTINUOUS TRANSACTION, AND THE *SEPARATE* LOCAL SALE AND DELIVERY OF GOODS THAT HAVE ENDED THEIR INTERSTATE TRANSPORT ON THE SHELVES OF LOCAL STORES.

*Walling* establishes that the plaintiffs, and all other local delivery drivers for comparable online and mobile services, are not a "class of workers engaged in . . . interstate commerce" under the FAA's residual exemption when they deliver merchandise "acquired and held by a local merchant for local disposition." *Walling*, 317 U.S. at 570. This class of workers merely provides the local delivery of goods that are

no longer in interstate commerce, because the goods have arrived at their intended final destination, i.e., the shelves of local retail stores, under a prior and separate transaction.

At the same time, *Walling* also establishes that so-called "last-mile" delivery drivers of companies such as Amazon.com may be exempt from the FAA, because they are part of a single, continuous and carefully arranged interstate transaction that was fully in place when the goods started their interstate journey. In this connection, the Supreme Court has recently *denied* certiorari in two prominent cases deciding that Amazon's last-mile drivers are exempt from the FAA. See *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10 (1st Cir. 2020) (Amazon last-mile drivers are interstate transportation workers and are therefore exempt from FAA), *cert. denied sub nom Amazon.com, Inc. v. Waithaka*, 141 S. Ct. 2794, *reh'g denied*, 141 S. Ct. 2886 (2021); *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020) (holding same), *cert. denied sub nom Amazon.com, Inc. v. Rittmann*, 141 S. Ct. 1374 (2021).

Unfortunately, the Superior Court in this case misinterpreted *Walling* to support its erroneous

conclusion that the plaintiffs were exempt from the FAA. In fact, *Walling* actually defeats the lower court's decision because it establishes that the plaintiffs are not engaged in interstate commerce when they deliver goods that were "acquired and held by a local merchant for local disposition." *Walling*, 317 U.S. at 570. In so misinterpreting *Walling*, the court also mistakenly aligned the plaintiffs with the Amazon last-mile drivers in *Waithaka* and *Rittmann,* discussed above. Appellant's Brief, Addendum (Add.) at 61-2 (Superior Court decision at 12-13).

In essence, the lower court failed to apprehend *Walling*'s crucial distinction between the *fortuitous* and the *specially arranged* local delivery of goods that have arrived from another state, in determining whether that local delivery constitutes activity in interstate commerce. In particular, the lower court misapplied the key language from *Walling*, quoted above, that '"there is a practical continuity of [interstate] movement of the goods until they reach the customers *for whom they are intended*."' Appellant's Brief, Addendum (Add.) at 60 (Superior Court decision at 11) (quoting *Walling*, 317 U.S. at 568) (emphasis added).

The Superior Court misinterpreted this italicized language from *Walling* to mean that goods remain in interstate commerce until they reach their *foreseeable* final destination, i.e., the end customer, rather than reaching their *contractually arranged* destination, such as the Massachusetts retailers in this case. *See* Appellant's Brief, Add. at 61. As amicus has discussed above, the Court in *Walling* distinguished carefully between those in-state deliveries of out-of-state goods that were *arranged* "pursuant to a pre-existing contract or understanding with the [end] customer," and those "goods [that were merely] acquired and held by a local merchant for local disposition." *Walling*, 317 U.S. at 569-70. Contrary to the Superior Court's opinion, *Walling* makes clear that, in the absence of a prior contract or arrangement between the out-of-state source of the goods and Grubhub itself, the plaintiffs are not engaged in interstate activity when they deliver merchandise from local stores to local customers.

Because the Superior Court failed to grasp this crucial distinction in *Walling*, the lower court also erroneously relied on *Waithaka* and *Rittmann* to conclude that that the plaintiffs are no different

from Amazon's last-mile drivers. To the contrary, the plaintiffs are not at all like Amazon's last-mile drivers because they are not the last leg of a continuous and carefully arranged interstate transaction to deliver goods from their source all the way to the end customer. Unlike in the Amazon cases, there simply was no contract or arrangement establishing a practical continuity of interstate movement from the source of the goods to the end customer. Instead, the goods were "acquired and held by a local merchant for local disposition." *Walling*, 317 U.S. at 570.

In fact, the plaintiffs, and all other such local delivery drivers, resemble the cab drivers in *Yellow Cab*, discussed above, and the rideshare service drivers of the present day, who have no prior arrangement with the railroads or airlines, and who *just happen* to drive passengers and their luggage home from the train station or airport after they have completed their interstate travel. As the Supreme Court explained in *Yellow Cab*:

> These taxicabs, in transporting [local] passengers and their luggage to and from Chicago railroad stations, . . . have *no contractual or other arrangement* with the interstate railroads. . . . [T]heir

> relationship to interstate transit is only *casual and incidental*. . . . What happens prior or subsequent to that rail journey, at least *in the absence of some special arrangement*, is not a constituent part of the interstate movement. . . . It is *contracted for independently* of the railroad journey and may be utilized whenever the traveler so desires. From the standpoints of time and continuity, the taxicab trip may be quite *distinct and separate from the interstate journey*. To the taxicab driver, it is just another *local* fare.

*Yellow Cab*, 332 U.S. at 230-32 (emphasis added). *See also Cunningham*, 17 F.4th at 250-51 (relying on *Yellow Cab* to conclude that Boston-area Lyft drivers are not exempt from FAA when they fortuitously drive passengers home from Logan airport after completing interstate trips).

Just as the Supreme Court decided in *Walling* and in *Yellow Cab*, and just as the First Circuit decided in *Cunningham*, so should this Court decide in this case that the plaintiffs are not engaged in interstate commerce when they provide the local delivery of goods that have already completed their interstate journey. Accordingly, the plaintiffs do not belong to a "class of workers engaged in . . . interstate commerce" under § 1 of the FAA. They are therefore not exempt from

the FAA's mandate to comply with the terms of their arbitration agreements.

## CONCLUSION

For the foregoing reasons, NELF respectfully requests that the Court reverse the judgment of the Superior Court.

Respectfully submitted,

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By its counsel

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Dated: April 1, 2022

## CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. P. 16(k), I certify that this brief complies with the requirements of Mass. R. App. P. 17 and 20. I also certify that I ascertained compliance with the length limit of Mass. R. App. P. 20(a)(2)(C), by composing this brief on Microsoft Word 2010 in 12-point Courier New. Pursuant to Mass. R. App. P. 20(a)(2)(D), I further certify that the number of pages to be counted in this brief is 17.

/s/ Ben Robbins

Ben Robbins

## CERTIFICATE OF SERVICE

I, Ben Robbins, hereby certify that on this 1st day of April, 2022, I served the within Brief Of Amicus Curiae New England Legal Foundation In Support Of The Defendant-Appellant, in Veronica Archer & others vs. Grubhub Holdings, Inc., SJC-13228, by causing it to be delivered by eFileMA.com to counsel for the Plaintiffs-Appellees, Eric R. LeBlanc, eleblanc@bennettandbelfort.com, and Michaela C. May, mmay@@bennettandbelfort.com; and by emailing a pdf copy of the brief to counsel for the Defendant-Appellant, Daniel S. Field, dfield@morganbrown.com.

Signed under penalties of perjury.

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