COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13228

VERONICA ARCHER and others,

Plaintiffs-Appellees,

v.

GRUBHUB HOLDINGS, INC.,

Defendant-Appellant.

On Appeal from the Suffolk Superior Court

BRIEF OF AMICI CURIAE JONATHAN ASKIN, VIVEK KRISHNAMURTHY, CHRISTOPHER MORTEN, AND JASON SCHULTZ IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

Dated: April 11, 2022

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae[1] are scholars and clinicians engaged in research concerning the impact of technology on society. Amici have no direct interest in the outcome of this litigation. Rather, amici have academic and professional interests in the subject as to how workers resolve issues with platform ventures in the emerging gig economy. As such, amici join this case to comment on the appropriate role of the law in governing emerging technologies, especially those that alter the legislated balance between employers' and workers' rights.

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[1] Pursuant to Rule 17(c)(5) of the Massachusetts Rules of Appellate Procedure, amici certifies that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than amici or their counsel—contributed money that was intended to fund preparing or submitting this brief. Amici and their counsel have not represented any party to the present appeal in another proceeding involving similar issues, or been a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

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ARGUMENT

I. MODERN TECHNOLOGY AND BUSINESS PRACTICES HAVE OUTPACED PROTECTIONS FOR WORKERS' RIGHTS.

Over the past two decades, communication infrastructure has expanded rapidly across the United States; the vast majority of the population now has access to broadband internet service. *Computer and Internet Use in the United States: 2018*, U.S. Census Bureau (Apr. 21, 2021).[2] Technological changes have in turn enabled new business practices, including short-term, technologically-mediated temporary work engagements—popularly known as "gig work." *See* Torpey & Hogan, *Working in a Gig Economy*, Bureau of Labor Statistics (May 2016).[3] Platforms that facilitate gig work often structure their business models to avoid extending traditional employee protections to gig workers. *See* Pinto, Smith, & Tung, *Rights at Risk: Gig Companies' Campaign to Upend Employment as We Know It*, National Employment Law Project (March 25, 2019).[4] In doing so, such platforms take advantage of legal concepts that developed long before the advent of the internet, cell phones, or the gig economy.

[2] https://www.census.gov/newsroom/press-releases/2021/computer-internet-use.html.
[3] https://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm.
[4] https://www.nelp.org/publication/rights-at-risk-gig-companies-campaign-to-upend-employment-as-we-know-it/.

Companies trying to minimize responsibility and maximize profits is nothing new. Many businesses have avoided directly employing many people by subcontracting work through agencies, using a franchise model, or by classifying workers as independent contractors. Rogers, *The Law and Political Economy of Workplace Technological Change*, 55 Harv. C.R.-C.L. L. Rev. 531, 569–70 (2020). Advances in technology have exacerbated this problem. High-speed, portable, always-on internet access allows for efficient monitoring of a dispersed, temporary workforce. This in turn enables gig platforms to exercise control of workers without accepting the responsibility and liability that comes with more traditional employment arrangements. *Id.* at 569–73. In essence, gig platforms like GrubHub want to have their cake and deliver it too.

These legal loopholes are not mere accidents, though. Companies that rely on gig workers, GrubHub included, have worked to maintain an exceptional place for themselves in the employment marketplace by actively shaping the legal landscape. Gig work platforms have fronted well-organized and well-funded initiatives to codify the imbalanced relationship between gig platforms and gig workers. In California, gig work platforms spent hundreds of millions of dollars supporting the highly-contested Proposition 22, ensuring that rideshare and delivery drivers would remain independent contractors, rather than employees. *See* O'Donovan, *Uber and Lyft Spent Hundreds of Millions to Win Their Fight Over*

Workers' Rights. It Worked., Buzzfeed (Nov. 21, 2020).[5] With its passage, not only are drivers foreclosed from employment protections, they are also paid less, as the definition of what qualifies as a working hour has narrowed. Sainato, *'I Can't Keep Doing This': Gig Workers Say Pay Has Fallen After California's Prop 22*, The Guardian (Feb. 18, 2021).[6] Now, gig work platforms have come calling with similar ballot initiatives in other states, Massachusetts included. Ruckstuhl, *Companies Promise New Benefits for Drivers Under Mass. Ballot Proposal. Labor Advocates See Attempt to Skirt Wage Laws*, WBUR (Dec. 10, 2021).[7]

II. MANDATORY ARBITRATION AGREEMENTS EXACERBATE THE IMBALANCE OF POWER BETWEEN GIG PLATFORMS AND GIG WORKERS.

Mandatory arbitration agreements, like the one at issue in this case, are part and parcel of gig companies' campaign to maintain the power imbalance between platforms and workers. Platforms like GrubHub make assent to arbitration a condition of working through the platform, a condition which individual workers have no meaningful ability to negotiate. Bradley, *Seamen, Railroad Employees, and Uber Drivers: Applying the Section 1 Exemption in the Federal Arbitration*

[5] https://www.buzzfeednews.com/article/carolineodonovan/uber-lyft-proposition-22-workers-rights.
[6] https://www.theguardian.com/us-news/2021/feb/18/uber-lyft-doordash-prop-22-drivers-california.
[7] https://www.wbur.org/news/2021/12/10/uber-lyft-instacart-doordash-massachusetts-ballot-q-explainer.

Act to Rideshare Drivers, 54 U. Mich. J. L. Reform 525, 558 (2021). These agreements often incorporate collective action waivers as well. *Id.* at 559. Such agreements insulate gig companies from accountability to their workers by deterring claims, reducing recovery, and shielding companies from public scrutiny. This opens the door for worker abuse, leading to higher rates of wage theft and other workplace violations. Baran & Campbell, *Forced Arbitration Helped Employers Who Committed Wage Theft Pocket $9.2 Billion in 2019 From Workers in Low-Paid Jobs*, National Employment Law Project (June 7, 2021).[8]

Arbitration agreements disincentivize workers from bringing claims against employers. Left to bear the time, cost, and risks of arbitration on their own, workers are much less likely to challenge abusive practices by employers. *See* Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 696 (2018) (estimating that as many as 98% of workers decide not to bring claims against employers when faced with individual arbitration). In addition, arbitration agreements with collective action waivers prevent workers from bringing any claims as a class, whether in court or in arbitration, barring workers from availing themselves of the advantages of collective action. Workers who do go through arbitration win less often and, when they do win, recover less than employees who

[8] https://www.nelp.org/publication/forced-arbitration-cost-workers-in-low-paid-jobs-9-2-billion-in-stolen-wages-in-2019/.

bring claims in state or federal court. *See* Bradley, *supra*, at 560. Arbitration also avoids the fee-shifting provisions common in employment statutes, further reducing effective recovery. *See* Leslie, *Conspiracy to Arbitrate*, 96 N.C. L. Rev. 381, 397–98 (2018).

Arbitration also shields disputes between workers and platforms from public scrutiny. Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. Chi. Legal F. 205, 208–09 (2017). As one scholar notes,

> Private arbitration of disputes mitigates the effectiveness of individual litigation in three ways. First, arbitration is often confidential, meaning that only the parties to the dispute are aware of the ultimate outcomes. This secrecy hampers general deterrence goals and does little to educate the public about the law. Second, and relatedly, the development of precedent is hampered because arbitrators do not formulate legal rules and obligations applicable to other parties or the public as a whole. Finally, public adjudication imparts a sense of right and wrong, of acceptable and unacceptable conduct in a way that private arbitration simply cannot.

Bradley, *supra*, at 560 (internal quotation omitted). By confining worker claims to a private forum, arbitration reduces the reputational costs that platforms would accrue from having wage, worker classification, or other claims resolved in a public forum.

These concerns are amplified in the gig economy. The nature of gig work and the level of control exerted by platform companies provide fertile ground for abusive employment practices. For example, Uber drivers are unable to set their rate, choose performance targets, or even see the destination of a ride. *See*

Sainato, *'I Don't Like Being Treated Like Crap': Gig Workers Aim To Retool a System They Say Is Rigged*, The Guardian (Aug. 27, 2021)[9]; Rosenblat, *The Truth About How Uber's App Manages Drivers*, Harv. Bus. Rev. (Apr. 6, 2016).[10] Despite platforms touting independence as a perk, gig workers often are unable to negotiate their schedules for fear of retaliation. Uber drivers reported retaliatory measures such as limited jobs or even deactivation if they declined undesirable rides. *See* Said, *Uber, Lyft Drivers Fear Getting Booted From Work*, San Francisco Chronicle (Oct. 14, 2018).[11] In addition, though drivers can choose when to turn their app on, they are completely dependent on companies for actual work—only the app may assign a rider. Simonite, *When Your Boss Is an Uber Algorithm*, MIT Tech. Rev. (Dec. 1, 2015). Other gig platforms have been accused of misleading workers about payment practices. *See* Canales, *DoorDash Is Paying $2.5 Million To Settle a Lawsuit That Accused the Food Delivery Company of Stealing Drivers' Tips*, Business Insider (Nov. 25, 2020).[12]

The gig economy is also heavily dependent on vulnerable populations who are less likely to prevail in arbitration. In New York City, nearly 90 percent of app-

[9] https://www.theguardian.com/business/2021/aug/27/gig-workers-massachusetts-lawsuit-independent-contractor-status.
[10] https://hbr.org/2016/04/the-truth-about-how-ubers-app-manages-drivers.
[11] https://www.sfchronicle.com/business/article/Uber-Lyft-drivers-fear-getting-booted-from-work-13304052.php.
[12] https://www.businessinsider.com/doordash-25-million-settlement-lawsuit-tipping-model-2020-11.

based drivers were immigrants, and only 15 percent held a college degree. Parrott & Reich, Center for New York City Affairs, *An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment* 5 (2018).[13] According to a report by the Federal Reserve, 58 percent of full-time gig workers would face difficulty in covering a $400 emergency expense—compared to 38 percent of the general population. Board of Governors of the Federal Reserve System, *Report on the Economic Well-Being of U.S. Households in 2018* 20 (May 2019).[14] Low-income workers, including gig workers, often rely on litigation to vindicate their rights. *See* Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 Emory L.J. 1531, 1548 (2016). Gig platforms seek to take this option off the table. *See* Garden, *supra*, at 211–12.

Given the particular vulnerability of gig workers, commentators have suggested that, "as a policy matter, rideshare drivers should be exempt from arbitration because it can adversely affect workers and hinder regulatory schemes designed to protect their interests." Bradley, *supra*, at 558. This view is consistent with Congressional and judicial recognition of power imbalances in labor relations. *See* Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*,

[13] https://www.centernyc.org/an-earnings-standard.
[14] https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf.

1991 J. Disp. Resol. 259, 296–97 (1991) ("[T]he legal community since 1925 has shown a far more sensitive appreciation of the problems attending contracts between parties of vastly unequal bargaining power where contract terms are essentially dictated by the party with more leverage."). While exempting *all* gig workers from arbitration is beyond the scope of the instant case, this Court should affirm that the Federal Arbitration Act's Section 1 exemption, *see* 9 U.S.C. § 1, applies to all transportation workers engaged in interstate commerce, even if their "gig" only covers the last mile.

III. THE COURT SHOULD INTERPRET THE FAA TO EXEMPT GIG TRANSPORTATION WORKERS FROM MANDATORY ARBITRATION.

The Federal Arbitration Act of 1925, 9 U.S.C. § 1 *et seq.*, was intended to address the inefficiency of litigation by allowing parties to agree to resolve disputes outside the courts. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). Over time, though, the FAA has been "construed to preempt state law, eliminate the requirement of consent to arbitration, permit arbitration of statutory rights, and remove the jury trial right from citizens without their knowledge or consent." Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 Fla. St. U. L. Rev. 99, 99–100 (2006). The result is a law that is far more expansive than Congress likely intended at the time or would countenance now. *See* Stempel, *supra*, at 297 ("In

[the current] environment, it is unlikely that Congress, if asked to interpret Section 1 or to write it from scratch would take the narrow view of 'workers engaged in commerce' that has dominated since the 1950s.").

However, there are still many open questions about the scope of the FAA, including the one before this Court today: are gig workers who provide local delivery of prepared and pre-packaged items, many of which travel in interstate commerce, engaged in interstate commerce? The Court should approach this question with practical, real-world consequences in mind. As businesses evolve, so does the understanding of interstate transportation work—and gig work is no exception. The judicial tradition of interpreting statutes in line with changing technology and business practices is more than broad enough to accommodate such an interpretation.

A. The Court should interpret the FAA Section 1 exemption in light of changing technologies and business practices.

The long history of dynamic statutory interpretation in response to societal and technological change supports a dynamic interpretation of the FAA Section 1 exemption in line with the modern realities of gig work. The Supreme Court has often recognized the need to interpret the law in accordance with changes in society. "Words in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic." *West v. Gibson*, 527 U.S. 212, 218 (1999). This

practice, sometimes called "dynamic statutory interpretation," is not just permissible; it is essential to the judiciary's role in the balance of powers. *See generally* Eskridge, *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479 (1987). Dynamic statutory interpretation allows courts to give full effect to the purpose of existing statutes in the face of a developing society. Dynamic statutory interpretation is particularly appropriate where, as here, the statute is both very old and broadly worded. *See id.* at 1516–17.

Emerging technologies, and their attendant effects on society, often drive dynamic statutory interpretation.[15] The advent of radio and television broadcasting led to significant changes in copyright doctrine, even though the text of the Copyright Act remained the same. *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156–58 (1975) (explaining that "[w]hen technological change has

[15] While the instant case is one of statutory interpretation, it is helpful to note that changing technology also drives constitutional interpretation. The Supreme Court attributed its shift from the "strict territorial" personal jurisdiction of *Pennoyer* v. *Neff*, 95 U.S. 714 (1878) to the "less rigid understanding" of *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945), to "'changes in the technology of transportation and communication, and the tremendous growth of interstate business activity,'" *Daimler AG v. Bauman*, 571 U.S. 117, 125–26 (2014) (quoting *Burnham v. Super. Ct. of Cal., Cty. of Marin*, 495 U.S. 604, 617 (1990)). In *Carpenter v. United States*, a case about the constitutionality of cell phone tracking, the Court emphatically declared that "[w]hen confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents." 138 S. Ct. 2206, 2222 (2018) (citing *Riley v. California*, 573 U.S. 373, 386 (2014)). Changes in the status quo demand caution, especially when applying anachronistic interpretations create illogical or unfair outcomes.

rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose"). The proliferation of cell phones has forced courts to reinterpret surveillance-authorizing statutes. *See* Pell & Soghoian, *A Lot More Than a Pen Register, and Less Than a Wiretap: What the Stingray Teaches Us About How Congress Should Approach the Reform of Law Enforcement Surveillance Authorities*, 16 Yale J. L. & Tech. 134, 149–54 (2013). The overwhelming shift to online commerce has prompted courts to reexamine the meaning of "public accommodation" under the Americans with Disabilities Act. *See Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19–20 (1st Cir. 1994); *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200–01 (D. Mass. 2012) ("[T]he legislative history of the ADA makes clear that Congress intended the ADA to adapt to changes in technology.").

Questions of interstate commerce in particular demand a dynamic, functionalist approach that grapples with the practical effects of technological change. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), embodies this approach. At issue in *Wayfair* was whether the Commerce Clause prohibited a state from taxing commercial goods shipped by an online, out-of-state retailer with no physical presence in the state to an in-state consumer. *Id.* at 2087–88. Eschewing legal formalism in favor of pragmatic concerns about "functional, marketplace dynamics," *id.* at 2095, the Court considered the practical effects of the existing

doctrine: an "online sales tax loophole," *id.* at 2092 (internal quotation omitted), that "puts both local businesses and many interstate businesses with physical presence at a competitive disadvantage relative to remote sellers," *id.* at 2094. The Court also noted the changing facts on the ground—specifically, that "[t]he Internet's prevalence and power have changed the dynamics of the national economy." *Id.* at 2097. The Court held that a rigid conception of interstate commerce in the face of changing technology could enable businesses to unfairly avoid regulation. *See id.* at 2093–96.

In *Wayfair*, emerging technology and the concomitant changes in business practices were sufficient to overcome even the weight of *stare decisis*. *See id.* at 2097 (explaining that "the far-reaching systemic and structural changes in the economy . . . caused by the Cyber Age" warranted change) (internal quotation omitted). The present case presents an opportunity to apply the same principles to a question left open by precedent.

The Supreme Court's FAA jurisprudence does not preclude this approach. It is true that the Supreme Court's recent FAA cases have taken a largely textualist slant. *See Circuit City*, 532 U.S. at 114 (applying canon of *ejusdem generis*); *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (applying "ordinary meaning" rule of construction). However, "[c]anons of construction need not be conclusive and are often countered . . . by some maxim pointing in a different direction."

Circuit City, 532 U.S. at 115. Not every question of interpretation can be answered by the text alone.

The precise limit of the Section 1 exemption is one such question. While the Supreme Court has held that the surrounding words restrict the exemption to transportation workers, *Circuit City*, 532 U.S. at 114–15, it has not held that the exemption only reaches types of transportation work that existed in 1925. Though the majority and the dissents disputed in dicta the best practices for interpreting century-old references to commerce, the Court's holding does not conclusively address how to determine *which* transportation workers are engaged in interstate commerce. Absent clear precedent, this Court is free to consider how apps like GrubHub and the rise of the gig economy have transformed the delivery industry.

On that point, the residual phrase "any other class of workers" strongly suggests that the statute was intentionally drafted to evolve with changing technology and business practices. *See New Prime*, 139 S. Ct. at 544 (Ginsburg, J., concurring) (noting that Congress "may design legislation to govern changing times and circumstances"). The language of the FAA Section 1 exemption is more than broad enough to encapsulate the shift from integrated delivery services to gig work. *See Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 26 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 2794 (2021), *reh'g denied*, 141 S. Ct. 2886 (2021) (holding that local, temporary delivery drivers are engaged in interstate commerce); *Rittmann v.*

Amazon.com, Inc., 971 F.3d 904, 919 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1374 (2021) (same). As such, the Court should interpret the exemption dynamically, with the modern realities of gig work in mind. *See* Stempel, *supra*, at 295–97.

B. Dynamic interpretation supports applying the FAA Section 1 exemption to Plaintiffs-Appellees.

The Superior Court's interpretation of the FAA is consistent with the modern delivery market and gives effect to the purpose of the Section 1 exemption. To be sure, the purpose of the FAA as a whole is pro-arbitration. *See Circuit City*, 532 U.S. at 115; *New Prime*, 139 S. Ct. at 543. As the Supreme Court has recognized, though, the Section 1 exemption evinces Congress's "concern with transportation workers and their necessary role in the free flow of goods." *Circuit City*, 532 U.S. at 121. GrubHub, by offering delivery of pre-packaged goods that have undoubtedly traveled in interstate commerce, has inserted itself into that free flow of goods. The fact that GrubHub seeks to carve out only the last mile of this flow in no way lessens their workers' impact on interstate commerce. *See Waithaka*, 966 F.3d at 23 ("[W]e do not hold that a class of workers must be employed by an interstate transportation business or a business of a certain geographic scope to fall within the Section 1 exemption.").

This view is consistent with the Supreme Court's dynamic approach to other statutory invocations of interstate commerce. For example, in interpreting the term "engaged in commerce" in the Fair Labor Standards Act of 1938, the Supreme

Court held that "[t]he question whether an employee is engaged 'in commerce' within the meaning of the present Act is determined by practical considerations." *Mitchell v. C. W. Vollmer & Co.*, 349 U.S. 427, 429 (1955). Later decisions followed the Court's practical approach; as the realities of the marketplace changed, the class of workers held to be "engaged in commerce" was expanded to include draftsmen, fieldmen, clerks and stenographers, *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 212 (1959), constructors of local post offices, *Wirtz v. R. E. Lee Elec. Co.*, 339 F.2d 686, 694 (4th Cir. 1964), and workers on purely intrastate roadways, *Archer v. Brown & Root, Inc.*, 241 F.2d. 663, 668 (5th Cir. 1957). These decisions not only looked at practical changes, but also referenced notions of fairness.

Dynamic interpretations of interstate commerce can be found outside the labor law context as well. In an early case interpreting the Sherman Anti-Trust Act's prohibition on restraint of trade, 15 U.S.C. § 1, the Supreme Court explained that "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905). In a case interpreting the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, the Court rejected "hypertechnical distinctions" in concluding that "the crucial question is whether any part of [an employee's] duties . . . furthers interstate commerce." *S. Pac. Co. v. Gileo*, 351 U.S. 493, 499 (1956).

Appellate courts have expressly relied on such interpretations when assessing the scope of the FAA Section 1 exemption. *See Waithaka*, 966 F.3d at 19–22 (collecting FELA cases); *Rittmann*, 971 F.3d at 912–13 (same).

This is not to say that there are no limits on the dynamic interpretation of interstate commerce. In *Circuit City*, the Supreme Court held, by a slim majority, that the Section 1 exemption covers only transportation workers, rather than *any* worker employed in interstate commerce. 532 U.S. at 119. In doing so, it reasoned that Congress did not intend the exemption to reach the outer limits of the Commerce Clause power. *See id.* at 117–18. Within those limits, though, the Court has avoided overly narrow constructions of the exemption. *See New Prime*, 139 S. Ct. at 543 (noting the need to "'respect the limits up to which Congress was prepared' to go when adopting the [FAA]") (quoting *United States v. Sisson*, 399 U.S. 267, 298 (1970)). Even when examining Section 1 through an originalist lens, the Court noted that the term "railroad employees" could refer to anyone "engaged in the customary work directly contributory to the operation of the railroads." *Id.* (internal quotation omitted). The residual clause should be read with similar scope, extending to workers who, like the Plaintiffs-Appellees, are engaged in work "directly contributory" to the modern last-mile delivery market.

GrubHub wants to participate in and profit from the last-mile delivery of goods that traveled in interstate commerce while maintaining the legal protections

of a purely intrastate actor. If a national chain of pharmacies or convenience stores wanted to provide local delivery of pre-packaged goods from other states, it would be obligated to defend its employment practices in court, as Congress intended. *See Waithaka*, 966 F.3d at 24 ("[C]onstruing the exemption to include workers transporting goods within the flow of interstate commerce advances [congressional intent.]"). If GrubHub wants to make a business model out of providing that same local delivery, it should do the same. To hold otherwise would allow GrubHub to capitalize on a significant segment of the "flow of interstate commerce," *Circuit City*, 532 U.S. at 117 (internal quotation omitted), creating an uneven playing field where some delivery services enjoy the substantial benefits of forced arbitration while others do not. This would directly contradict the Supreme Court's admonition against "treat[ing] economically identical actors differently," *Wayfair*, 138 S. Ct. at 2094, elevating "anachronistic formalisms" above "functional, marketplace dynamics," *id*. at 2095.

These disparities directly impact workers' rights, with the burden falling disproportionately on marginalized groups. *See* Gilles, *supra*, at 1539–48; Anderson et al., *The State of Gig Work in 2021*, Pew Research Center (Dec. 8, 2021)[16] (noting that non-White and low-income workers make up larger

[16] https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/.

proportions of the gig economy). Moreover, if current trends are any indication, the problem will only become more pronounced in coming years. The gig economy is experiencing unprecedented growth. Zgola, *Will the Gig Economy Become the New Working-Class Norm?*, Forbes (Aug. 12, 2021)[17] (estimating that "by 2027, about half of the U.S. population will have engaged in gig work"). Absent a dynamic, modern interpretation of the FAA Section 1 exemption, the imbalance of power between gig platforms and gig work will continue to grow. This Court should consider the practical impacts of this instant case and hold that, if GrubHub wants to direct its workers to engage in interstate commerce, it must do so on the same terms as everyone else.

CONCLUSION

In light of the modern realities of the gig economy, Plaintiffs-Appellees are by any reasonable interpretation "engaged in interstate commerce." For this reason, and the reasons stated above, amici curiae respectfully request that the Court affirm the order of the Superior Court.

Dated: April 11, 2022

Respectfully Submitted,

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[17] https://www.forbes.com/sites/forbesbusinesscouncil/2021/08/12/will-the-gig-economy-become-the-new-working-class-norm/?sh=27df8c48aee6.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 17(c)(9) of the Massachusetts Rules of Civil Procedure, I, Mason A. Kortz, hereby certify that the foregoing **Brief of Amici Curiae Jonathan Askin, Vivek Krishnamurthy, Christopher Morten, and Jason Schultz in Support of Plaintiffs-Appellees and Affirmance** complies with the rules of court that pertain to the filing of amicus briefs, including, but not limited to:

Mass. R. A. P. 16(e) (references to the record);
Mass. R. A. P. 17(c) (cover, length, and content);
Mass. R. A. P. 20 (form and length of brief); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Times New Roman at size 14 points and contains 4,405 total non-excluded words as counted using the word count feature of Microsoft Word 365.

Dated: April 11, 2022

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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13228

VERONICA ARCHER and others,

Plaintiffs-Appellees,

v.

GRUBHUB HOLDINGS, INC.,

Defendant-Appellant.

CERTIFICATE OF SERVICE

Pursuant to Mass. R. A. P. 13(e), I hereby certify, under the penalties of perjury, that on this date of April 11, 2022, I have made service of a copy of the foregoing **Brief of Amici Curiae Jonathan Askin, Vivek Krishnamurthy, Christopher Morten, and Jason Schultz in Support of Plaintiffs-Appellees and Affirmance** in the above captioned case upon all attorneys of record by electronic service through eFileMA.

Dated: April 11, 2022

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