No. 17-340

In The Supreme Court of the United States

NEW PRIME, INC.,

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR RESPONDENT

ANDREW SCHMIDT
ANDREW SCHMIDT LAW, PLLC
97 India Street
Portland, ME 04101
(207) 619-0320

HILLARY SCHWAB
FAIR WORK, P.C.
192 South Street, Suite 450
Boston, MA 02111
(617) 607-3261

JENNIFER BENNETT
Counsel of Record
PUBLIC JUSTICE, P.C.
475 14th Street, Suite 610
Oakland, CA 94612
(510) 622-8150
jbennett@publicjustice.net

LEAH M. NICHOLLS
PUBLIC JUSTICE, P.C.
1620 L Street NW,
Suite 630
Washington, DC 20036
(202) 797-8600

Counsel for Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

By its terms, the Federal Arbitration Act (FAA) does not apply to the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. When the Act was passed, the ordinary meaning of the phrase "contracts of employment" was agreements to perform work. Nevertheless, Petitioner argues that for purposes of the FAA, "contracts of employment" should be defined as agreements to perform work that evidence on their face a master-servant relationship under the common law of agency, regardless of the actual nature of the employment relationship. The questions presented are:

1. Must a court compel arbitration under the FAA before determining whether the contract at issue is a transportation worker's "contract of employment" to which the FAA does not apply?

2. Should the phrase "contracts of employment" as used in the FAA be given its ordinary meaning at the time the Act was passed—agreements to perform work—or should it be defined as agreements to perform work that evidence on their face a master-servant relationship under the common law of agency, regardless of the actual nature of the employment relationship?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

INTRODUCTION

"The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017). The Federal Arbitration Act prohibits courts from applying the statute to the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. When the FAA was passed, the ordinary meaning of these words was that the statute does not apply to transportation workers' agreements to perform work. Case law, statutes, administrative rulings, treatises, even actual contracts, contemporary with the passage of the FAA all used the phrase "contract of employment" as a general term for *any* work agreement—including that of an independent contractor.

Petitioner New Prime, Inc. is a trucking company. Respondent Dominic Oliveira is a long-haul truck driver. The contract between them—for Oliveira to work for Prime hauling freight—is indisputably a transportation worker's agreement to perform work. The FAA, therefore, does not apply.

Prime attempts to avoid this outcome by asking this Court to do a series of extraordinary things. First, Prime argues the Court should avoid the issue altogether by holding that courts must rely on the FAA to compel arbitration of the question whether the FAA applies in the first place. That makes no sense. Courts can't rely on laws that don't apply. So of course, they

must determine whether the FAA applies *before* using it to compel arbitration.

Next, Prime asks this Court to adopt an interpretation of the FAA that has no basis in what its words meant when the law was enacted. Rather than giving the phrase "contracts of employment" its ordinary meaning at the time the statute was passed—agreements to perform work—Prime argues that for purposes of the FAA, "contracts of employment" should be defined as agreements to perform work that describe a master-servant relationship, regardless of whether such a relationship in fact exists. Accepting Prime's argument would require this Court to set aside longstanding black-letter law that statutory text is to be given its ordinary meaning at the time it was enacted.

And, as if that weren't enough, Prime's interpretation would also require this Court to hold that employers can avoid the transportation-worker exemption simply by labeling—or mislabeling—their workers independent contractors, regardless of whether they actually are. No federal law permits employers to circumvent its strictures by illegally misclassifying their workers. There is no reason the FAA should be any different.

This Court should decline Prime's invitation to rewrite the principles of statutory interpretation. And it should decline its invitation to rewrite the FAA.

STATEMENT OF THE CASE

A. Statutory Background

The FAA governs arbitration provisions in maritime contracts and contracts involving commerce. 9 U.S.C. § 2. Such provisions, the Act states, "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* But there's an exception to this mandate: The Act provides that "nothing" in the statute "shall apply to the contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

The historical and statutory context in which the FAA was enacted is essential to understanding Congress' concern with transportation workers and why it specifically exempted them from the statute.

Beginning in the late nineteenth century, labor disputes in the transportation industry had repeatedly crippled interstate commerce and endangered the public. During the Pullman Strike of 1894, for example, tens of thousands of workers went on strike, and violence broke out in several cities, paralyzing the railroad system. *See* A.P. Winston, *The Significance of the Pullman Strike*, 9 J. Polit. Econ. 540, 541-42 (1901); Almont Lindsey, The Pullman Strike 239-40, 254 (1942). In 1921, a nationwide strike by sailors and longshoremen shut down ports for weeks. *See* David Montgomery, The Fall of the House of Labor: The Workplace, the State, and American Labor Activism 1865-1925 403

(1987). In 1922, a railroad strike threatened to shut down major industries as 400,000 railroad shopmen refused to work. Margaret Gadsby, *Strike of the Railroad Shopmen*, 15 Monthly Lab. Rev., no. 6, Dec. 1922, at 2, 6.

And these were not the only incidents of labor unrest. The early twentieth century saw over one hundred strikes in the railroad industry alone. *See* Paul Stephen Dempsey, *Transportation: A Legal History*, 30 Transp. L.J. 235, 273 (2003).

In an attempt to mitigate this ongoing strife, Congress repeatedly enacted dispute resolution statutes governing transportation workers that it hoped would obviate the need for strikes. These statutes defined the workers to whom they applied by their function in the industry—not their employment status. The Shipping Commissioners Act, for example, authorized shipping commissioners to resolve disputes between a "master, consignee, agent, or owner" of a ship "and *any* of his crew." Shipping Commissioners Act of 1872, ch. 322, § 25, 17 Stat. 262, 267 (emphasis added). Similarly, the Erdman and Newlands Acts provided dispute resolution procedures applicable to "all persons actually engaged in *any* capacity in train operation or train service of any description." Erdman Act, ch. 370, 30 Stat. 424, 424 (1898) (emphasis added); Newlands Act, ch. 6, 38 Stat. 103, 104 (1913).

Of particular relevance is the Transportation Act of 1920, which governed dispute resolution in the railroad industry when the FAA was passed. The

Transportation Act created a federal Railroad Labor Board to resolve labor disputes, with the goal of preventing the unrest that had previously gripped the industry. *See* §§ 304, 307, 41 Stat. 456, 470-71; *Railway Employees' Dep't, A.F.L. v. Indiana Harbor Belt R.R. Co.*, Decision No. 982, 3 R.L.B. 332, 337 (1922).

Like previous railway dispute resolution statutes, the Transportation Act applied to *all* "those engaged in the customary work directly contributory to the operation of the railroads"—including independent contractors. *Indiana Harbor*, 3 R.L.B. at 337; *see United Bhd. of Maint. of Way Emps. & Ry. Shop Laborers v. St. Louis-San Francisco Ry. Co.*, Decision No. 1230, 3 R.L.B. 700, 702 (1922). In fact, the Railroad Labor Board repeatedly *rejected* the contention that railroads could avoid the Act by outsourcing work to contractors. *See, e.g.*, *Indiana Harbor*, 3 R.L.B. at 337; *St. Louis-San Francisco Ry. Co.*, 3 R.L.B. at 702.

As the Board explained, it would be "absurd to say that" railroads and their workers could not "interrupt commerce by labor controversies unless the operation of the roads was turned over to contractors, in which event the so called contractors and the railway workers might engage in industrial warfare ad libitum." *Indiana Harbor*, 3 R.L.B. at 337. A strike by independent contractors or their employees "would as effectually result in an interruption to traffic as if the men were the direct employees of the carrier." *Id.* at 338.

It was against this backdrop that Congress passed the FAA—a statute that requires courts to enforce

private contracts between individual workers and their employers about how they will resolve their disputes. *See* 9 U.S.C. § 2. Congress exempted transportation workers from the FAA's coverage "to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation," *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001). Thus, the FAA provides that it "shall" not apply to "*any* . . . class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added).

This language ensured that *all* transportation workers would continue to be subject to the dispute resolution statutes Congress had so painstakingly enacted in the years preceding the FAA—and open to any dispute resolution procedures Congress might pass in the future.

B. Factual Background.

1. Prime is a national trucking company that recruits workers by advertising a "paid apprenticeship" in which new recruits haul goods alongside experienced Prime drivers. J.A. 154. Federal regulations limit the number of hours one person may drive in a single stretch, so by putting two drivers in each truck, Prime's apprentice program allows Prime trucks to remain on the road for longer periods of time—and therefore operate more efficiently. J.A. 154 n.2.

Prime, however, does not pay its "apprentices" for their work. J.A. 136. In fact, Prime actually *charges*

drivers to work as "apprentices"—debt that's only forgiven if a driver works for the company for at least a year. J.A. 155.

After driving 10,000 miles as "apprentices," Prime drivers are then labeled "driver trainees." J.A. 154-55. "Trainees" are paid only fourteen cents per mile—far less than minimum wage. J.A. 136.

Only once "driver trainees" have completed 30,000 miles (and a week of unpaid orientation), are they finally eligible to become regular Prime drivers. J.A. 136. Prime classifies its regular drivers as either "company drivers" or "independent contractors." *Id.* Although these drivers perform identical work, Prime offers a $100 bonus to be labeled an "independent contractor." J.A. 118-19, 136.

2. Oliveira first joined Prime through its apprenticeship program. After completing 10,000 miles as an apprentice—paid nothing—and 30,000 miles as a driver trainee—paid far less than minimum wage—Oliveira finally became a regular Prime driver. J.A. 154-57. Although his work was the same as that of a company driver—drivers Prime admits are common-law servants—Prime classified Oliveira as an independent contractor. J.A. 157-58.

To make this happen, Prime first directed Oliveira to Abacus Accounting, which created an LLC on his behalf. J.A. 155. It then directed him to Success Leasing, which leased him a truck. J.A. 156. And finally, Success directed him to Prime's company store to purchase fuel and necessary equipment—equipment that cost

roughly $5,000. J.A. 138. Although Abacus, Success, and Prime are ostensibly separate companies, they are all in Prime's building, and Oliveira made all payments to Prime via deductions from his paycheck—even if they were technically owed to one of these other companies. J.A. 138-39, 155-56.

In fact, it was Success that presented Oliveira with his employment paperwork—labeled by Prime "Independent Contractor Operating Agreement." J.A. 156. Oliveira was not permitted to negotiate this agreement, and he "felt pressure" to sign it quickly because Prime told him it already had a load waiting for him. J.A. 118, 156.[1]

The Operating Agreement required Oliveira to lease the truck he had just leased from Success *back* to Prime for free for Prime's "exclusive" use and to drive that truck for Prime, with the rate of payment for such work set by the company. J.A. 64-65. The Agreement also contained an arbitration provision, which stated that disputes between the parties, including disputes about "arbitrability," would be resolved by arbitration. J.A. 82.

Although the Operating Agreement labeled Oliveira an independent contractor, Prime exercised substantial control over his work. The company controlled Oliveira's schedule; required him to take its

[1] The following year, Oliveira and Prime entered into another Operating Agreement. J.A. 156 n.3. Because the relevant language in these agreements is identical, this brief refers to them together as the "Operating Agreement."

training courses and follow its procedures; limited which shipments Oliveira could take; set the rate of payment for those shipments; retained the right to fire Oliveira without cause; and rendered him unable to work for any other trucking company. J.A. 119, 138, 157.

Still, Prime did not pay Oliveira minimum wage. J.A. 110. Prime made regular deductions from Oliveira's paycheck—for fuel, "lease payments" on the truck, and equipment the company required him to buy. J.A. 138. Due to these deductions, Oliveira's paycheck was, on several occasions, actually negative. J.A. 120-21. That is, Prime sometimes *charged* Oliveira hundreds of dollars to work for the company. *Id.*

Because Prime did not consistently pay him minimum wage, Oliveira eventually left the company. J.A. 157. The following month, however, Prime re-hired Oliveira, this time labeling him a "company driver." J.A. 157-58. Oliveira's work—and Prime's control over that work—was no different than when he was labeled an "independent contractor." J.A. 158. And because Prime continued to deduct "lease payments" from his paycheck, Oliveira continued to be paid less than minimum wage. J.A. 139.

C. Proceedings Below

On March 4, 2015, Oliveira sued Prime under state and federal law for failing to pay him—and other similarly situated Prime drivers—minimum wage. J.A. 28, 127-30. Prime moved to compel arbitration of

Oliveira's claims. J.A. 158. The company relied solely on the FAA, expressly disclaiming any reliance on state law. *See* First Circuit Appendix 157, *Oliveira v. New Prime, Inc.*, No. 15-2364 (1st. Cir. Mar. 10, 2016).

The district court denied Prime's motion. J.A. 151. The court held that before it could rely on the FAA to enforce any arbitration provision in the Operating Agreement, it must first determine whether the Agreement is a transportation worker's "contract of employment" to which the FAA does not apply. J.A. 150-51. The court assumed that this determination depended on whether Oliveira was, in fact, an independent contractor. J.A. 141, 151. It therefore denied Prime's motion to compel arbitration without prejudice to permit discovery on that issue. J.A. 151.

The First Circuit affirmed, but held that no discovery was required. J.A. 187. Like the district court, the Court of Appeals held that before compelling arbitration pursuant to the FAA, courts must first determine whether the contract containing the arbitration provision is subject to the statute. J.A. 168. To determine whether the Operating Agreement is a "contract of employment" exempt from the FAA, the court reviewed in depth the text and history of the transportation-worker exemption. J.A. 177-86. After considering numerous sources contemporary with the statute, the court concluded that, when the FAA was enacted, the phrase "contracts of employment" meant agreements to perform work—including the work agreements of independent contractors. *Id.* Because the Operating Agreement is indisputably a transportation worker's

agreement to perform work, the First Circuit held that it is a "contract of employment" exempt from the FAA. J.A. 187.

Judge Barbadoro concurred in part and dissented in part. J.A. 187. He agreed with his co-panelists that a court, not an arbitrator, must decide whether the FAA applies. *Id.* He also stated that he did not "dissent . . . to take issue with the [panel's] reasoning" in interpreting the FAA. J.A. 192. In his view, however, the panel should have waited to determine whether the transportation-worker exemption applies to independent contractors until *after* the district court had determined whether Oliveira was, in fact, an independent contractor. J.A. 191-92.

SUMMARY OF ARGUMENT

The FAA is emphatic: "*[N]othing* herein contained shall apply 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 (emphasis added).

Courts, of course, may not rely on laws that don't apply. A court, therefore, must determine whether a contract is a transportation worker's "contract of employment"—and thus whether the FAA applies to it—*before* relying on the statute to enforce any arbitration provision the contract contains.

Prime attempts to evade this requirement by asking this Court to enforce its delegation clause—an agreement to arbitrate disputes about arbitrability—rather than its substantive arbitration provision. But a delegation clause is nothing more than a specific kind of arbitration clause. And the FAA prohibits courts from using the statute to enforce *any* arbitration clause contained in a transportation worker's contract of employment. There is no exception for delegation clauses. Thus, Prime's contention that courts must rely on the FAA to enforce a delegation clause before determining whether the statute even applies not only defies logic—it defies the plain text of the FAA. Like any other statute, courts must decide whether the FAA applies *before* they apply it.

The FAA does not apply here. The fundamental principle of statutory interpretation is that a statute must be given its "ordinary, contemporary, common meaning at the time Congress enacted" it. *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (quotation marks and alteration omitted). The FAA does not apply to transportation workers' "contracts of employment." 9 U.S.C. § 1. In 1925, when the statute was passed, the ordinary meaning of the phrase "contracts of employment" was agreements to perform work. Case law, statutes, administrative decisions, treatises, and even actual contracts, contemporary with the passage of the statute, all used "contracts of employment" as a general term to refer to *all* work agreements—including those of independent contractors.

Prime does not cite a single source contemporary with the FAA that says otherwise. Instead of looking to the ordinary meaning of the statutory text when the FAA was enacted in 1925, Prime relies on a dictionary published in *2014*. And rather than the actual phrase Congress used—"contracts of employ*ment*"—Prime relies on a different term—the word "employ*ee*." But statutes are interpreted according to their ordinary meaning *at the time they were enacted*—not a century later. And they are interpreted in accordance with the meaning of the words Congress *actually used*, not similar-sounding words it didn't. While the word "employee" in 1925 had multiple common meanings, the phrase "contracts of employment" had only one: agreements to perform work. The employment status of the worker was irrelevant.

The history, purpose, and statutory context of the transportation-worker exemption all support the conclusion that the FAA incorporates this ordinary meaning. By the time Congress passed the FAA, it had—for years—been trying to rein in the oftentimes violent and destructive labor unrest that plagued the transportation industry. To do so, Congress passed a series of dispute resolution statutes governing maritime and railroad workers. These statutes applied to *all* workers in the regulated industries, regardless of their employment status—after all, independent contractors can disrupt commerce just as well as common-law servants can. Congress exempted transportation workers from the FAA to avoid unsettling these dispute resolution schemes and to reserve for itself the ability to regulate

other transportation workers' disputes in the future. Given this purpose, it makes perfect sense that Congress exempted all transportation workers' agreements to perform work—not just those of common-law servants. If it hadn't, it would have disrupted the preexisting dispute resolution schemes it had worked so hard to enact—and limited its ability to regulate future disputes.

Prime recites an imaginary parade of horribles it claims will result if this Court does not limit the transportation-worker exemption to agreements that describe on their face a common-law master-servant relationship. But there's no reason to believe that enforcing the FAA's narrow exemption for transportation workers' employment agreements as written will have any negative impact whatsoever. Prime's countertextual interpretation, on the other hand, will cause a host of problems that the ordinary meaning avoids. For example, Prime's reading would require courts to apply the test for common-law servitude—ordinarily applied to the actual employment *relationship*—to the employment *contract* itself. This would be a difficult and, in many cases, impossible task. It would also allow employers who illegally misclassify their workers as independent contractors to circumvent the transportation-worker exemption, while companies that obey the law must abide by it. The plain meaning of the statute avoids these problems.

And, in any event, this Court's role is to enforce the text of statutes as written. If Prime believes it would be good policy to rewrite the FAA, it must direct its arguments to Congress, not this Court. The FAA means what it says: It does not apply to transportation workers' agreements to perform work. Prime's Operating Agreement is indisputably a transportation worker's agreement to perform work. The FAA, therefore, does not apply.

ARGUMENT

I. COURTS MUST DETERMINE WHETHER THE FAA APPLIES BEFORE RELYING ON IT TO COMPEL ARBITRATION.

Must a court determine whether the FAA applies before relying on the Act to compel arbitration? To state the question is to answer it. Courts can't rely on laws that don't apply.

A. This obvious truism is no different for the FAA. Indeed, this Court has repeatedly made clear that courts may not rely on the FAA to enforce an arbitration clause in a contract that isn't subject to the Act in the first place. *See, e.g.*, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201-02 (1956). Under this Court's precedent, the "first question" a court must answer—*before* it can rely on the FAA to compel arbitration—is whether the FAA applies at all. *See Prima Paint*, 388 U.S. at 401.

The FAA commands that "*nothing* herein contained shall apply to contracts of employment" of transportation workers. 9 U.S.C. § 1 (emphasis added). Therefore, before a court can rely on the statute to enforce an arbitration provision, it must "first" determine whether the contract containing that arbitration provision is a transportation worker's "contract of employment." *See Prima Paint*, 388 U.S. at 401.

Prime cannot circumvent this requirement by asking this Court to enforce its delegation clause—an agreement to arbitrate questions about arbitrability—rather than its substantive arbitration provision. As Prime itself admits, a delegation clause is just a species of arbitration clause. *See Rent-A-Ctr., West, Inc. v. Jackson*, 561 U.S. 63, 70 (2010). And the FAA "operates"—or, in this case, doesn't operate—on "this additional arbitration agreement just as it does on any other." *Id.* Courts cannot rely on the FAA to enforce *any* arbitration provision contained in a transportation worker's contract of employment. The statute makes no exception for delegation clauses. Therefore, just as with any other arbitration clause, a court cannot use the FAA to enforce a delegation clause without "first" determining whether the contract that contains that delegation clause is a transportation worker's "contract of employment."

B. Prime asserts that its delegation clause demonstrates that the parties agreed to arbitrate disputes about whether the Operating Agreement is a "contract of employment" within the meaning of the

FAA. Pet. Br. 11-12. This assertion is both false and irrelevant.[2]

By its terms, Prime's delegation clause applies only to questions about the "arbitrability of disputes." J.A. 82. Arbitrability questions, this Court has explained, are questions about "whether the parties have submitted a particular dispute to arbitration." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). But whether the Operating Agreement is a "contract of employment" is not a question about whether the parties have submitted a particular dispute to arbitration; it's a question about whether the FAA applies to any such agreement.[3]

---

[2] Prime falsely claims that "[n]either respondent nor the courts below disputed" this assertion. Pet. Br. 12. To the contrary, Oliveira argued below—and both lower courts agreed—that Prime's delegation clause does *not* cover the question whether the Operating Agreement is a transportation worker's "contract of employment." *See* J.A. 146-51, 161-68.

[3] Prime also argues that the mere statement in its Agreement that arbitration will be conducted under the rules of the American Arbitration Association further demonstrates that the parties agreed to arbitrate the question of whether the FAA applies. Pet. Br. 11. But these rules *do not* state that the arbitrator shall decide whether the FAA applies. They state that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction." American Arbitration Association, Comm. Arbitration Rules & Mediation Procedures, R-7. Whether the FAA applies is not a question of the *arbitrator's* jurisdiction. It's a question of the *court's* authority to compel arbitration.

Moreover, even if the court's authority could somehow be considered a question of the arbitrator's jurisdiction, a mere statement that arbitrators have the power to rule on a question—that is, that they *can* rule on a question *if* it is delegated to them—is

But even if the parties had agreed to arbitrate this question, it wouldn't change the outcome here. As this Court made clear in *Hall Street*, courts cannot ignore the limits the FAA places on their authority—even if the parties agree otherwise. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). The scope of the statute is determined by the words Congress wrote, not the preferences of the litigants. *See id.*

Were it otherwise, parties could not only override the transportation-worker exemption; they could override *any* of the FAA's limits. Parties could force courts to compel arbitration in cases where the contract did not involve interstate commerce, or where the statute does not provide district courts jurisdiction. *See* 9 U.S.C. §§ 2, 4. That cannot be the law. *Cf. Vaden v. Discover Bank*, 556 U.S. 49, 62-63 (2009) (explaining that a federal court cannot compel arbitration unless it has subject matter jurisdiction over the underlying controversy).

Indeed, this Court has repeatedly decided for itself questions about whether it has the authority to compel arbitration under the FAA—even where the contract at issue contained a delegation clause. *See, e.g.*, *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 101-02 (2012) (deciding whether Credit Repair Organizations Act contained "a 'congressional command' that the FAA shall not apply"); Pets. Br. 7-8, *CompuCredit v.*

---

not "clear and unmistakable" evidence that the parties in any particular case have, *in fact*, delegated that question, *Rent-A-Ctr.*, 561 U.S. at 79.

Greenwood, No. 10-948, 2011 WL 2533009, at *7-*8 (U.S. June 23, 2011) (quoting arbitration provision, including delegation clause); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (reversing order compelling arbitration because "nothing in the statute authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement"); *id.* at 282 n.1 (reprinting arbitration provision, including delegation clause).

This case is no different. The whole point of the transportation-worker exemption is to *prohibit* courts from using the FAA to enforce arbitration clauses in transportation workers' contracts of employment. It doesn't matter, therefore, whether Prime's delegation clause covers questions about the applicability of the statute or not. If Prime's contract is a "contract of employment," its delegation clause—whatever its scope—is an arbitration provision in a transportation worker's employment contract. And the FAA prohibits courts from using the statute to enforce it.

C. Prime contends that regardless of what the statute says, this Court's case law prohibits courts from applying the transportation-worker exemption unless the arbitration provision—here, Prime's delegation clause—is "*itself* a 'contract of employment.'" *See* Pet. Br. 15-16. On this view, the exemption doesn't actually exempt anything at all. After all, no arbitration provision is *itself* a contract of employment.

Prime attempts to defend rendering the transportation-worker exemption a nullity by invoking the so-called "severability rule." This rule provides

that *where the FAA applies*, courts may not refuse to enforce an arbitration clause solely because the contract in which it is located is invalid. *See Prima Paint*, 388 U.S. at 403-04. But the issue here is not whether Prime's Operating Agreement is *invalid*. The issue here is whether the Agreement is subject to the FAA.

And the text of the FAA itself makes clear that the severability rule does not govern that question. The severability rule stems from § 2 of the statute, which provides that an arbitration provision "*in any maritime transaction or a contract evidencing a transaction involving commerce* . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2 (emphasis added). *See Rent-A-Center*, 561 U.S. at 70. As this Court explained in *Rent-A-Center*, this provision mandates that arbitration clauses in certain kinds of agreements are enforceable, without "mention of the validity of" those agreements. *Id.*

But, by its terms, § 2 applies only to certain kinds of contracts. *See* 9 U.S.C. § 2. And thus, a court must determine whether the contract at issue is subject to § 2 *before* applying the severability rule. *See, e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 354 (2008) (holding severability rule applied because contract was subject to FAA); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) ("The effect of [§ 2] is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement *within the coverage of the Act*." (emphasis added)); *Prima Paint*, 388 U.S. at 402-04 (applying severability rule only after

"[h]aving determined that the contract in question is within the coverage of the Arbitration Act").

The transportation-worker exemption mandates that the contracts to which § 2 (and the rest of the FAA) applies "shall" *not* include the "contracts of employment" of transportation workers. 9 U.S.C. § 1. Thus, a court must determine whether Prime's Operating Agreement is a transportation worker's "contract of employment" *before* applying § 2—and before applying its severability rule. Prime's argument to the contrary—that this Court must sever the delegation clause to determine whether the FAA applies in the first place—"puts the cart before the horse and makes no sense." J.A. 165 (quotation marks omitted).[4]

---

[4] Prime also misunderstands the way the severability rule works, even where it does apply. The rule prohibits courts from invalidating arbitration provisions *solely* because the contract as a whole is invalid. But the rule does not require courts to enforce arbitration provisions that are themselves invalid, just because the contract as a whole—or another contractual provision—is *also* invalid for the same reason. Were it otherwise, a delegation clause within an arbitration provision that expressly required a biased arbitrator would be unchallengeable, because the bias would apply both to the delegation clause and to the substantive arbitration provision. A person forced to enter a contract at gunpoint could not argue that its arbitration provision was unenforceable because its argument against the validity of the arbitration clause—the gun to the head—would apply equally to the contract as a whole. Nothing in this Court's case law requires that absurd outcome. *See Rent-A-Center*, 561 U.S. at 74 (distinguishing argument that arbitration clause is unenforceable because contract as a whole is invalid from argument that a ground of invalidity—that might also apply to the contract as a whole—"as applied to" the specific arbitration clause at issue renders *that arbitration clause* unenforceable); *Granite Rock Co. v. Int'l Bhd. of Teamsters*,

This Court's decision in *Kindred* is not to the contrary. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017). *Kindred* held that, by its terms, the FAA applies to questions about whether an arbitration agreement was validly formed. *See id.* at 1428. That case has nothing to do with this one. By its terms, the FAA does *not* apply to arbitration provisions in the "contracts of employment" of transportation workers.

D. Prime wrongly asserts that *all* threshold issues go to whether the FAA applies—and so, Prime suggests, if courts were always required to determine whether the FAA applies before using the statute to enforce a delegation clause, courts could never enforce delegation clauses. Pet. Br. 12. Prime's own case law demonstrates this contention is meritless: In the very cases Prime cites, courts confirmed the FAA applied *before* enforcing a delegation clause. *See, e.g.*, *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 208 (2d Cir. 2005); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 472 (1st Cir. 1989).

Prime's mistake is that it assumes that if there is "no *enforceable* arbitration agreement," the FAA does not apply at all. Pet. Br. 12 (emphasis added). Based on this false assumption, Prime argues that any threshold issue that could render an arbitration agreement unenforceable would also render the FAA "inapplicable." *Id.* But the FAA is not limited to *enforceable*

---

561 U.S. 287, 297, 299 (2010) (formation issues—which often affect the contract as a whole in the same way as the arbitration agreement—are always for the court to decide).

arbitration agreements. The point of the FAA is to provide a rule for determining *whether* arbitration clauses in certain kinds of contracts are enforceable. If an arbitration clause turns out to be invalid, that doesn't mean the FAA didn't apply in the first place. It merely means that the FAA applies, but it does not require the arbitration agreement to be enforced.

Most threshold issues are not about whether the FAA applies. They are about whether, *under the FAA*, an arbitration provision must be enforced. The issue here is different. The issue here is whether the FAA applies *at all*.

The text of the FAA, this Court's case law—and common sense—require that courts must decide whether the FAA applies before they can look to the statute to compel arbitration.

II. THE FAA DOES NOT APPLY TO TRANSPORTATION WORKERS' AGREEMENTS TO PERFORM WORK.

The FAA exempts the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. When the statute was enacted, all agreements to perform work—including those of independent contractors—were "contracts of employment." By its plain terms, then, the FAA exempts all transportation workers' agreements to perform work—including those of independent contractors. *See Wisconsin Cent.*, 138 S. Ct. at 2074 (statutory text should be given its

"ordinary, contemporary, common meaning at the time Congress enacted the statute" (quotation marks and alteration omitted)).

A. When the FAA was Passed, the Ordinary Meaning of the Phrase "Contracts of Employment" was Agreements to Perform Work.

In 1925, when Congress enacted the FAA, the phrase "contracts of employment" had but one common meaning: agreements to perform work.

1. Dictionaries contemporary with the FAA defined the word "employment" broadly as a synonym for "work." *See, e.g.*, 3 The Century Dictionary and Cyclopedia 1904 (1914) (defining employment as "[w]ork or business of any kind"); Webster's New International Dictionary of the English Language 718 (1st ed. 1909) (listing "work" as synonym for employment); Webster's Collegiate Dictionary 329 (3d ed. 1916) (listing "work" as synonym for employment); *id.* at 1100 (offering as one definition of "work": "employment; occupation"); Black's Law Dictionary 422 (2d ed. 1910) ("Employment. This word does not necessarily import an engagement or rendering services for another. A person may as well be 'employed' about his own business as in the transaction of the same for a principal.").

These definitions did not distinguish between different kinds of work—or the work done by different kinds of workers. *All work*, under the definitions common at the time, was "employment." Thus, a "contract

of employment" was simply an agreement to perform work. *Cf.* Webster's New International Dictionary 488 (defining "contract" as "an agreement . . . to do or forbear something").

Prime does not dispute the accuracy of these definitions. Instead, it chastises the lower court for relying on them. Prime argues that the phrase "contracts of employment" is indivisible—that its meaning cannot be determined by combining the definitions of the words "contract" and "employment." Pet. Br. 23-24. Given its insistence, one would expect the company to cite sources contemporary with the FAA demonstrating that the phrase "contracts of employment" was used differently than its constituent words would suggest. But Prime doesn't even attempt to do so. Presumably that's because—as detailed below—there's overwhelming evidence that when the FAA was enacted, the ordinary meaning of the phrase "contracts of employment" was *precisely* that suggested by combining the definitions of "contracts" and "employment": agreements to perform work. The employment status of the worker was irrelevant.

2. Sources contemporary with the FAA demonstrate that the phrase "contracts of employment" was ordinarily used as a general term for agreements for work—as opposed to, for example, contracts for the sale of real estate or goods. The phrase was *not* ordinarily used to distinguish between different kinds of work agreements. To the contrary, over and over again in the early twentieth century, across a wide range of sources, the phrase "contract of employment" was used

to describe *any* agreement to perform work—including that of an independent contractor.

a. This Court's case law. This Court, for example, repeatedly called independent contractors' work agreements "contracts of employment." In *Watkins v. Sedberry*, for instance, this Court described as a "contract of employment" an attorney's agreement to represent a bankruptcy trustee in a lawsuit "to recover [the bankrupt's] property." 261 U.S. 571, 575 (1923). And in *Owen v. Dudley*, this Court called an agreement by attorneys to represent the Eastern Cherokee tribe in pursuing claims against the United States a "contract of employment." 217 U.S. 488, 494 (1910). Attorneys hired for "a single suit" or a "particular transaction" are not, of course, servants of their clients—they're independent contractors. *Louisville, E. & St. LR Co. v. Wilson*, 138 U.S. 501, 505-06 (1891). And yet this Court consistently characterized their agreements to perform work as "contract[s] of employment." *See, e.g.*, *Calhoun v. Massie*, 253 U.S. 170, 179 (1920) (McReynolds, J., dissenting); *Consaul v. Cummings*, 222 U.S. 262, 272 (1911); *Taylor v. Bemiss*, 110 U.S. 42, 44 (1884); *see also King v. Putnam Inv. Co.*, 248 U.S. 23, 23 (1918) (calling land-owner's contract with a real estate brokerage company to find a purchaser for his land a "contract of employment"); *Putnam Inv. Co. v. King*, 96 Kan. 109 (1915) (describing contract).

b. Other courts' case law. These cases are not outliers. Courts across the country used the phrase "contract of employment" as a general term for *any* agreement to perform work—including that of an

independent contractor. In *Luckie v. Diamond Coal*, for example, the California Court of Appeal used "contract of employment" to describe an agreement very similar to Prime's Operating Agreement: The contract stated that a truck driver—who had leased his truck from his employer—was responsible for gas, oil, repairs, and insurance; and it provided that the driver bore all "responsibility" and liability "for the operation of the truck." 41 Cal. App. 468, 472-73 (1919). Nevertheless, the court repeatedly characterized the contract as a "contract of employment." *Id.* at 475, 477-79, 481-82. And, the court held, whether the driver was a servant of the company or an independent contractor could not be determined "solely from the written contract of employment," because a worker's status depends on the "true relation" between the worker and his employer, not the terms of the contract. *Id.* at 477, 479.

This analysis makes clear that, in ordinary usage, there was a distinction between workers' *status*—which depended on their relationship with their employer—and their *contracts*—which were "contracts of employment" regardless. *See also Teamster as Independent Contractor Under Workmen's Compensation Acts*, 42 A.L.R. 607, 617 (1926) (citing cases from between 1916 and 1925 and calling teamsters' agreements to perform work "contract[s] of employment" regardless of whether the contract suggests a master-servant relationship or an "independent" "employment").

Countless cases from this time period refer to agreements to perform work as "contracts of employment," without regard to the worker's employment

status. *See, e.g.*, *Tankersley v. Webster*, 116 Okla. 208 (1925) (describing the "contract of employment" of "an independent contractor"); *Lindsay v. McCaslin*, 123 Me. 197 (1923) ("When the contract of employment has been reduced to writing, the question whether the person employed was an independent contractor or merely a servant is determined by the court[.]"); *Waldron v. Garland Pocahontas Coal Co.*, 89 W. Va. 426 (1921) ("Whether a person performing work for another is an independent contractor depends upon a consideration of the contract of employment, the nature of the business, the circumstances under which the contract was made and the work was done."); Appendix 1a-12a (citing additional cases).

c. Statutes. Myriad state and federal statutes contemporary with the FAA also used the term "contract of employment" in this way. For example, a federal appropriations statute prohibited the United States Shipping Board from using the appropriated funds to compensate special counsel "unless the *contract of employment* has been approved by the Attorney General." Act of Aug. 24, 1921, ch. 89, 42 Stat. 192, 192 (emphasis added). These special counsel, whose "contract[s] of employment" had to be approved, included private law firms hired by the Shipping Board to litigate specific cases—in other words, independent contractors. *See* 61 Cong. Rec. 4917, 4925 (1921).

Similarly, a federal statute, passed just a year before the FAA, provided for the payment of attorneys "employed" by the Cherokee Tribe to litigate claims against the United States, and limited the amount of

such payments to those "stipulated in the *contract of employment*." Act of Mar. 19, 1924, ch. 70, § 5, 43 Stat. 27, 28 (emphasis added). Again, these were attorneys hired to prosecute specific claims—i.e. independent contractors. *See, e.g.*, *Indian Appropriation Bill: Hearings Before a Subcomm. of the H. Comm. on Indian Affairs*, 64th Cong. 24-25 (1916) (reprinting contract between principal chief of Cherokee Nation and attorney); *see also* Appendix 12a-13a (citing additional statutes).

State statutes, too, frequently used the term "contract of employment" to refer to agreements with independent contractors. *See, e.g.*, Act of Mar. 10, 1909, ch. 70, § 1, 1909 Kan. Sess. Laws 121, 121 ("contracts of employment of auditors, accountants, engineers, attorneys, counselors and architects for any special purpose"); Act of Feb. 10, 1913, ch. 7, § 2, 1913 N.Y. Sess. Laws 9, 9-10 ("contract[s] of employment" of agents of insurance underwriters, where "agents" was defined to *exclude* "officers and salaried employees"); Appendix 14a-15a (citing additional statutes).

d. Other sources. So too did a wide range of other sources, including agency documents, treatises, scholarly articles, and ordinary newspapers. *See, e.g.*, I.T. 2036, III-1 C.B. 117, 119 (1924) (federal Income Tax Unit ruling calling agreement of attorney held to be an independent contractor a "contract of employment"); *Sam W. Eskridge Sues Frisco for Seventy-Five Thousand Dollars*, The Monett Times, Apr. 6 1917 ("contract of employment" with attorney to prosecute

single claim); Theophilus J. Moll, A Treatise on the Law of Independent Contractors and Employers' Liability 47-48 (1910) ("It has been laid down that the relation of master and servant will not be inferred in a case where it appears that the power of discharge was not an incident of the *contract of employment*." (emphasis added)); Appendix 15a-23a (citing additional sources).

Even *actual work agreements* of independent contractors were labeled—in the text of the contracts themselves—"contract[s] of employment." *See, e.g.*, *Survey of Conditions of the Indians in the United States: Hearings Before a Subcomm. of the S. Comm. on Indian Affairs*, 71st Cong. 13242-43 (1932) (reprinting 1925 contract described in the body of the agreement itself as a "contract of employment," even though contract labeled worker "independent contractor"); *Survey of Conditions of the Indians in the United States: Hearings Before a Subcomm. of the S. Comm. on Indian Affairs*, 70th Cong. 1139-1141 (1929) (reprinting 1926 agreement of attorneys to represent client in litigation involving trust agreement, where agreement was entitled "contract of employment"); *see also Calhoun*, 253 U.S. at 172-73 (reprinting text of contract stating attorney was "employed"); *Owen*, 217 U.S. at 488 (same).

* * *

Thus, at the time the FAA was enacted, the use of the term "contracts of employment" to refer to independent contractors' agreements to perform work was not an exception. It was the rule. The appendix to this

brief lists over one hundred representative sources, contemporary with the passage of the FAA, that demonstrate that the ordinary meaning of the phrase "contracts of employment" encompassed all agreements to perform work—including those of independent contractors. The FAA should be interpreted in accordance with this "ordinary, contemporary, common meaning." *Wisconsin Cent.*, 138 S. Ct. at 2074.

B. Congress Did Not Silently Incorporate into the FAA an Idiosyncratic Definition of "Contracts of Employment" that Differs from Its Ordinary Meaning.

Prime does not—and cannot—dispute that when the FAA was passed, the phrase "contracts of employment" was commonly used as a general term meaning agreements to perform work. Nevertheless, Prime argues that for purposes of the FAA, "contracts of employment" should be given a different meaning: agreements to perform work that, on their face, purport to establish a master-servant relationship under common-law agency principles, regardless of whether such a relationship actually exists. *See* Pet. Br. 8. Even if the phrase "contracts of employment" were "*capable* of bearing" this meaning—which it is not—this definition was certainly not the phrase's "*ordinary* meaning" in 1925, *Wisconsin Cent.*, 138 S. Ct. at 2072. Prime offers no "persuasive proof"—indeed, it offers no proof at all—that "Congress sought to invoke [this] idiosyncratic definition," *id.* at 2073.

1. The Use of the Word "Employee" as a Term of Art is Irrelevant to the Ordinary Meaning of the Phrase "Contracts of Employment."

Prime does not cite a single source contemporary with the FAA that defines—or even uses—the phrase "contracts of employment." Instead, Prime offers a lengthy disquisition on the meaning of the word "employ*ee*." But the FAA exempts "contracts of employ*ment*," not "contracts of employ*ees*." And although "employee" and "employment" obviously have the same root, by 1925, the word "employ*ee*" had multiple common meanings, while the phrase "contracts of employ*ment*" had only one: agreements to perform work.

Originally, *all* words with the root "employ" had a general meaning. "Employ" originally comes from the Latin "implicāre," which, taken literally, meant to "enfold" or, less literally, to "involve." *See* Barnhart Dictionary of Etymology 326 (Robert K. Barnhart, ed. 1988). The less literal meaning became the basis for the French word "emploier," which meant "to involve in or apply to a particular purpose"—to use. John Ayto, Employ, Word Origins (2d ed. 2005). And "emploier" became the basis for the English word "employ." *See id.*; Barnhart Dictionary 326. Thus, to "employ" workers is literally to use them or to apply them to a particular purpose. There is no etymological basis for using the word "employ"—or other words that take "employ" as their root—to distinguish between different kinds of workers.

"Strictly and etymologically," therefore, the word "employee" means simply one who is employed—a worker. *See* Black's Law Dictionary 421 (2d ed. 1910). But, by 1925, "employee" no longer consistently bore this meaning; it had come to be used in a multitude of different ways. Prime seizes on the fact that one of the ways in which "employee" was used was as a term of art denoting a common-law master-servant relationship. Pet. Br. 20-21. But this was not the word's only usage. When the FAA was passed—and even long after—"employee" was still often used as a synonym for the word "worker." *See, e.g.*, *Prince v. Schwartz*, 180 N.Y.S. 703, 704 (App. Div. 1920) ("[I]t must be held that the employé was an independent contractor."); Black's Law Dictionary 951 (3d ed. 1933) ("If the employee is merely subject to the control or direction of the employer as to the result to be obtained, he is an independent contractor."). Of particular relevance here, in dispute resolution statutes governing the railroad industry at the time, "employee" was used to mean *any* railroad worker—not just common-law servants. *See infra* page 41.

The word "employee"—with its multiplicity of meanings—was an outlier amongst "employ"-rooted words: Although "employee" was, in some areas of the law, commonly used as a term of art to mean common-law servant, other forms of the word "employ" were not ordinarily used that way. *See, e.g.*, 2 The Century Dictionary 1232 (1914) (defining independent contractor "as distinguished from servant or employee, a person following a regular independent *employment*, who

offers his services to the public to accept orders and execute commissions for all who may *employ* him" (emphasis added)); *Jackman v. Rosenbaum Co*., 260 U.S. 22, 30 (1922) ("[T]he party employed was an independent contractor."); *Arthur v. Tex. & P. Ry. Co.*, 204 U.S. 505, 516-17 (1907) (referring to "an independent contractor" as "employed").[5]

Indeed, independent contractors were often *defined* as workers "exercising an independent employment." *See, e.g.*, 2 Bouvier's Law Dictionary and Concise Encyclopedia 1533 (8th ed. 1914); 2 The Century Dictionary 1232; *General Discussion of the Nature of the Relationship of Employer and Independent Contractor*, 19 A.L.R. 226, 227-32, 243 (1922) (citing numerous cases).[6]

---

[5] In arguing otherwise, *Amicus* The Cato Institute misreads this Court's decision in *Robinson v. Baltimore & Ohio R.R. Co.*, 237 U.S. 84 (1915). Cato Br. 5-6. There, this Court held that—in the Federal Employers' Liability Act—"Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee." *Id.* at 94. But the question in *Robinson* was not whether the worker was an independent contractor or a servant. It was whether he was the "employee" of the defendant railroad, even though he actually worked for a different company. *Id.* at 92. The "natural sense" to which the case refers, therefore, is that workers are "employed" by the company for which they actually work. *See id.* at 94.

[6] *Bouvier's Law Dictionary* is the only source Prime cites for its contention that "at the time the FAA was enacted, it was well established . . . that an independent contractor agreement did not establish employment." Pet. Br. 17 (emphasis omitted). But *Bouvier's*, like so many sources at the time, defined "independent contractor" as "[o]ne who, exercising an independent *employment*,

It is unsurprising, therefore, that independent contractors' agreements to perform work were called "contracts of employment." *See supra* Part II.A.

On the rare occasion when someone even attempted to argue that the word "employee"—when used as a term of art to mean common-law servant—shared the same meaning as other "employ"-rooted words, the argument was soundly rejected. For example, an architect who worked for a Minnesota state agency as an independent contractor tried to convince the U.S. Board of Tax Appeals that he didn't have to pay taxes under the Revenue Act of 1926, which exempted state "officer[s] or employee[s]"—an exemption the Board held did not apply to independent contractors. *Johnston v. C.I.R.*, 14 B.T.A. 605, 607 (1928) (quotation marks omitted). The Minnesota statute authorizing the architect's work provided that the state agency "shall employ an architect," and so, the architect argued, he must be an "employee." *Id.* at 608 (quotation marks omitted). If Prime were correct—and all words with the root "employ" referred only to common-law servants—the architect should have won.

But the Board of Tax Appeals rejected his argument. Referring to the architect's contract with the state as a "contract of employment," the Board held

---

contracts to do a piece of work according to his own methods[.]" 2 Bouvier's Law Dictionary 1533 (emphasis added). In quoting this definition, Prime misleadingly omits the key words "exercising an independent employment." *See* Pet. Br. 17. The full definition makes clear that the dictionary says precisely the opposite of what Prime says it does: that the work of independent contractors *was* "employment."

that a person "employed" under such a contract could be *either* an independent contractor *or* an "officer or employee." *Id*. at 606-09. "To employ," the Board explained, is a general term, meaning "'to make use of the services of; to have or keep at work; to give employment to; [or] to intrust with some duty or behest.'" *Id.* at 608 (quoting Webster's New International Dictionary). Any worker could be "employed." *See id.* But the word "employee" was a term of art. *See id.* Therefore, the Board held, a worker who was "employed" under a "contract of employment" was not necessarily an "employee." *See id.* at 606-09.

A statutory phrase is interpreted according to the ordinary meaning of the *actual* words it uses, not the meaning, of other, similar-sounding words it doesn't use—even if those similar-sounding words share the same root. *See FCC v. AT & T Inc.*, 562 U.S. 397, 403 (2011) (rejecting argument that the word "personal" should be interpreted in accordance with the legal definition of the word "person" rather than its ordinary meaning, because two words from the same root "may have meanings as disparate as any two unrelated words"). The phrase "contracts of employ*ment*" should be interpreted in accordance with its ordinary meaning in 1925—not the meaning of the word employ*ee*.

In its entire brief, Prime cites only a single source that even mentions the actual statutory phrase at issue, "contracts of employ*ment*." That source is the *2014* edition of *Black's Law Dictionary*—published nearly a century after the FAA was passed. *See* Pet. Br. 17. That dictionary cannot possibly shed light on the ordinary

meaning of the phrase "contract of employment" in 1925. *See Wisconsin Cent.*, 138 S. Ct. at 2074 ("[E]very statute's meaning is fixed at the time of enactment." (emphasis omitted)).[7]

Relying on sources contemporary with the FAA is particularly important here because the usage patterns of the phrase "contract of employment" have shifted over time. Unlike in 1925, "contract of employment" is today sometimes used to refer exclusively to common-law servants' agreements to perform work. *See, e.g.*, Pet. Br. 17. But even now, the more general usage of the term to refer to *any* work agreement remains common. *See, e.g.*, *Lucky Capital Mgmt., LLC v. Miller & Martin, PLLC*, No. 16-16161, 2018 WL 3239281, at *4 (11th Cir. July 3, 2018) ("contract of employment" between attorney and client); *Ward v. DirecTV LLC*, 342 Ga. App. 69, 71 (2017) ("contract of employment" labeling worker independent contractor); *Griffin v. Compass Grp. USA, Inc.*, No. 3:16-CV-917-JAG, 2017 WL 2829619, at *2 n.2 (E.D. Va. June 30, 2017) (quoting Virginia statute referring to independent contractor's "contract of employment"); *see also* Prime Inc., https://www.primeinc.com/ (last visited July 12, 2018) (Prime's own website calling its

[7] Prime contends that because *Black's* states that the term "employment contract" was first used in 1927, it must have had the same definition back then as it does now. Pet. Br. 17. It didn't. Like the phrase "contracts of employment," the phrase "employment contract" was used to refer to any work agreement—including that of an independent contractor. *See, e.g.*, *Kelly v. Hanson*, 109 Okla. 248 (1925) (describing independent contractor's agreement as an "employment contract").

application for "driving position[s]" an "application for *employment*," though Prime's driver positions include those it contends are independent contractors (emphasis added)).

And in 1925—the only point in time that matters for purposes of this case—that was its *only* common meaning. *See supra* Part II.A.

2. There is No Canon of Statutory Construction that Justifies Ignoring the Ordinary Meaning of the Text.

Unable to rely on the ordinary meaning of the statute, Prime asks this Court to rewrite it. In doing so, the company purports to rely on the canons of statutory interpretation. But there is no canon of statutory interpretation that permits courts to rewrite the law.

a. First, Prime argues that although the FAA exempts the "contracts of employment of . . . *any* other class of *workers* engaged in" commerce, it should be interpreted to exempt only common-law servants. Pet. Br. 26-27. Prime doesn't even attempt to argue that its interpretation has any basis in the actual words Congress used. After all, the statute does not exempt any "class of servants" or even any "class of employees." It exempts any "class of *workers*"—language that, by its terms, does not distinguish between different kinds of workers. *Cf.* Webster's New International Dictionary 2350 (defining worker broadly as "[o]ne that works").

Contrary to Prime's contention, the company's countertextual interpretation cannot be justified by the canon of statutory interpretation *ejusdem generis*. That canon holds that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City*, 532 U.S. at 114-15 (alterations omitted). The "specific words" that precede the general phrase "any other class of workers" are "seamen" and "railroad employees." The link between these categories of workers is not employment status. As this Court held in *Circuit City*, the link between these workers is that they are transportation workers. 532 U.S. at 121 ("Congress' demonstrated concern with transportation workers and their necessary role in the free flow of goods explains the linkage[.]").

Indeed, the statute itself says so. The text of the FAA specifies that the link between "seamen, railroad employees" and the other "workers" whose employment contracts are exempt from the Act is that they are all "engaged in foreign or interstate commerce"—not that they are all common-law servants. *See* 9 U.S.C. § 1; *cf. Paroline v. United States*, 134 S. Ct. 1710, 1720-21 (2014) (holding that catchall phrase at end of enumerated list "is most naturally understood as a summary of the type of [objects] covered" by the statute).

Ejusdem generis is a tool to ensure that "a general word will not render specific words meaningless." *See CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277,

295 (2011). There is no danger of that happening here. This Court has already limited the "class of workers" exempt from the FAA to workers like seamen and railroad employees—transportation workers. *Circuit City*, 532 U.S. at 121. Prime cannot justify rewriting the statute to solve a problem this Court has already solved. *See CSX*, 562 U.S. at 295 (declining to apply *ejusdem generis* when there was no concern about rendering specific words meaningless).

Moreover, even without this Court's decision in *Circuit City*, Prime's argument would not withstand scrutiny, for "seamen" and "railroad employees" were *not* all common-law servants.

Seamen were defined functionally—by their work aboard a vessel—not their employment status. *See, e.g.*, *The Buena Ventura*, 243 F. 797, 799 (S.D.N.Y. 1916) (seamen are all those who "contribute to and labor about the operation and welfare of the ship when she is upon a voyage"). A ship's surgeon, for example, was an independent contractor—"not the ship owner's servant." *Allan v. State S.S. Co.*, 132 N.Y. 91, 99-100 (1892). But surgeons on board vessels were still "seamen." *See, e.g.*, *The Sea Lark*, 14 F.2d 201, 201 (W.D. Wash. 1926); *The Buena Ventura*, 243 F. at 799; *Holt v. Cummings*, 102 Pa. 212, 215 (1883). Pilots—skilled sailors who came aboard ships to navigate them through difficult waters or into or out of ports—were also "seamen." *See, e.g.*, *Pac. Mail S.S. Co. v. Joliffe*, 69 U.S. 450, 456 (1864) ("The object of the" statute regulating pilots in the port of San Francisco "was to create a body of hardy and skilful seamen."); *United States v.*

Thompson, 28 F. Cas. 102, 102 (C.C.D. Mass. 1832) (Story, J.) ("[A] pilot, a surgeon, a ship-carpenter, and a boatswain, are deemed seamen, entitled to sue in the admiralty."). But they, too, were not necessarily common-law servants. *See Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique*, 182 U.S. 406, 413-14 (1901).

Similarly, "railroad employees," at least in the context of dispute resolution statutes, were defined functionally by their work on the railroad, not their employment status. In the years leading up to the FAA, Congress had repeatedly passed dispute resolution statutes governing railroad "employees." But in all of these statutes—including the Transportation Act, which was in effect when the FAA was passed—the term railroad "employees" was defined to mean *all* those whose work contributed to the operation of the railroads, *including* independent contractors. *See Indiana Harbor*, 3 R.L.B. at 337 (rejecting contention that "railroad employees" were limited to servants of the railroad and holding "[w]hen Congress in [the Transportation Act] speaks of railroad employees, it undoubtedly contemplates those engaged in the customary work directly contributory to the operation of the railroads"); Erdman Act, 30 Stat. at 424 (defining "employees" as all workers "actually engaged in any capacity in train operation or train service of any description"); Newlands Act, 38 Stat. at 104 (same).

Thus, like "seamen," "railroad employees" were not limited to common-law servants. In arguing otherwise, Prime and its amici rely on the Federal Employers'

Liability Act (FELA) and other workmen's compensation statutes that used the word "employee" as a term of art to mean common-law servant. But as the Railroad Labor Board explained at the time, the phrase "railroad employees" meant something different in dispute resolution statutes than it did in statutes like FELA. *Indiana Harbor*, 3 R.L.B. at 337-38. Statutes like FELA govern "the *private* relations between the employer and the employee." *Id.* at 338-39 (emphasis added). The point of these statutes was (and is) to compensate workers injured in their employers' "service." *Id.* If an employer lacks control over the manner in which a worker performs their job, it makes sense that the employer might not be required to compensate that worker if they are injured doing it.

In contrast, the "paramount purpose" of dispute resolution statutes was "to [e]nsure to the *public* . . . efficient and uninterrupted railway transportation," *id.* at 339 (emphasis added). And, for that purpose, the Board explained, the worker's technical employment status was "immaterial." *Id*. "[T]he loss and suffering incident to the interruption to traffic growing out of controversies" between railroad companies and their workers is not diminished simply because the workers are not servants of the railroad. *See id.*

Thus, *none* of the categories of workers whose "contracts of employment" are exempt from the FAA are limited to common-law servants. This Court should not rewrite the statute to hold otherwise. *Cf. Cleveland v. United States*, 329 U.S. 14, 18 (1946) ("[W]e could not give the words a faithful interpretation if we confined

them more narrowly than the class of which they are a part.").

b. But even if this Court agreed to redefine the word "workers" to mean common-law servants, that would not be enough to arrive at Prime's proposed reading of the law. Prime does not ask this Court to hold that the transportation-worker exemption applies to the agreements to perform work of common-law servants engaged in commerce. It asks this Court to hold that the exemption applies to agreements to perform work that on their face *describe* a master-servant relationship, *regardless* of whether the worker is, in fact, a common-law servant engaged in commerce. And so to arrive at that interpretation, it is not enough to redefine the word "workers." The phrase "contracts of employment" itself must be redefined. But Prime offers no legitimate justification for doing so.

As an initial matter, the phrase "contracts of employment" is *not* a general term following a list of more specific terms—and so *ejusdem generis* does not apply. *See CSX*, 562 U.S. at 294-95. Nevertheless, Prime attempts to import its flawed *ejusdem generis* analysis of "any other class of workers" into the phrase "contracts of employment." Having misread the transportation-worker exemption to apply only to common-law servants, the company then argues that the phrase "contracts of employment" should be *defined* to mean only those contracts a common-law servant would have signed—which Prime asserts includes only those contracts that, on their face, describe a master-servant relationship. *See* Pet. Br. 27. This argument fails both as

a factual matter and as a matter of statutory interpretation.

As a factual matter, it's simply not true that common-law servants would never sign an agreement labeling them an independent contractor. To the contrary, in 1925, as now, there were (and are) workers classified as independent contractors, who were, in fact, servants. *See, e.g.*, *Nelson v. Am. Cement Plaster Co.*, 84 Kan. 797 (1911); Jennifer Pinsof, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 Mich. Telecomm. & Tech. L. Rev. 341, 349 (2016) (noting misclassification is "especially prevalent" in the trucking industry). And so even if "contracts of employment" is redefined to mean only contracts a common-law servant would sign, that category would still include contracts that misclassify workers as independent contractors.

And as a matter of statutory interpretation, Prime's argument that the *definition* of the phrase "contracts of employment" should change based on the kinds of workers whose employment contracts are exempt from the statute is contrary to the way English ordinarily works. "Contracts of employment of seamen, railroad employees, or any other class of workers engaged in" commerce is another way of writing "contracts of employment" *belonging to* these enumerated workers. *See* Webster's New International Dictionary 1492 (defining "of" as "[i]ndicating the relationship of possession . . . belonging or pertaining to"). Nouns do not change meaning based on the people to whom they belong.

Imagine, for example, that instead of "contracts of employment," there was a statute that exempted "the *pets* of seamen, railroad employees, or any other class of workers"—or their "real estate contracts." Nobody would argue that because the exemption only applies to transportation workers, the *definition* of the word "pet" or the term "real estate contract" changes. "Pet" would still mean domestic animal kept for companionship, and "real estate contract" would still mean property agreement. It's just that the statute would only exempt those domestic animals or those property agreements *belonging to* transportation workers.

So too here. Regardless of *whose* "contracts of employment" are exempt from the statute, the *definition* of "contracts of employment" remains the same: agreements to perform work.

c. Prime attempts to salvage its counterintuitive reading of the statute by arguing that the canon against surplusage somehow requires that the applicability of the transportation-worker exemption be determined solely by the terms of the contract. Pet. Br. 30-31. As explained below, that argument is meritless. And—if "contracts of employment" is given its ordinary meaning—the argument is also irrelevant.

If "contracts of employment" is defined to mean agreements to perform work—in accordance with the phrase's common meaning at the time the statute was enacted—it's unlikely ever to matter whether courts must look solely to the terms of the agreement or whether they may consider facts beyond the four

corners of the contract. It's difficult to imagine a situation—especially in the transportation industry—in which one party, in fact, performs work for the other, but the contract does not purport to describe a work arrangement, and instead describes, say, the sale of real estate or the purchase of goods.

Only if this Court were to reject the ordinary meaning of "contracts of employment"—and adopt Prime's contention that for purposes of the FAA the phrase should be redefined to mean contracts of common-law servitude—would the Court have to decide whether the FAA exempts agreements to perform work that is, *in fact*, common-law servitude, or agreements to perform work that *describe* common-law servitude, regardless of the actual employment relationship. Prime, of course, argues for the latter.

This would be a radical interpretation of the statute. No other federal law—including those that apply only to common-law servants—permits the description of the employment relationship in the contract to control whether the statute applies. *See* Miriam A. Cherry, *The Sharing Economy and the Edges of Contract Law: Comparing U.S. and U.K. Approaches*, 85 Geo. Wash. L. Rev. 1804, 1815 (2017) ("U.S. law does not depend simply on the label assigned by the parties[.]"); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992) (under common law, "all of the incidents of the relationship must be assessed"). And with good reason. Doing

so would allow employers to override Congress' intent by illegally misclassifying their workers.[8]

There is nothing in the FAA that suggests they should be able to do so. Prime emphasizes that the object of the transportation-worker exemption is "contracts of employment." Pet. Br. 30. But that doesn't say anything about what the phrase "contracts of employment" *means*. Indeed, this Court rejected a near-identical argument in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995). The respondents in that case argued that because § 2 of the FAA applies to "contract[s] evidencing a transaction involving commerce," courts determining whether that Section applies must look to the contract itself (or the parties' intentions thereunder)—not to whether the resulting transaction, in fact, involved commerce. *See id.* at 278. This Court disagreed, holding that "the transaction (that the contract 'evidences') must turn out, *in fact*, to have involved interstate commerce." *Id.* at 277, 281. "[T]he validity of an arbitration clause," the Court explained, should not turn "on what, from the perspective of the statute's basic purpose, seems happenstance,

[8] This is not a new concept. Courts at the time the FAA was passed also refused to credit contractual terms that diverged from the "actual relation" between the parties. *See, e.g.*, *Nelson*, 84 Kan. 797; *McKenna v. Snare & Triest Co.*, 147 A.D. 855, 869 (N.Y. App. Div. 1911).

namely, whether the parties happened to think to insert a reference to interstate commerce in the document." *Id.* at 278.

So too here. It would defy logic to conclude that the FAA's applicability turns on the "happenstance" of "whether the parties happened to think to"—or, more likely, whether an employer thought it was in its best interest to—describe in the contract itself factors that would suggest a master-servant relationship. *See id.* at 278-79.

Perplexingly, Prime's argument to the contrary relies on *Allied-Bruce*. Prime contends that it is the phrase "evidencing a transaction" in § 2 of the FAA "that authorize[d]" the Court in *Allied-Bruce* "to look beyond the four corners of the contract." Pet. Br. 30. In Prime's view, because the transportation-worker exemption does not contain this phrase, its applicability must hinge solely on the terms of the contract. Otherwise, Prime argues, the "evidencing a transaction" language in § 2 would be superfluous.

Allied-Bruce itself refutes this reasoning. This Court concluded § 2 requires courts to look beyond the contract not *because* of the "evidencing" language but *despite* it. *See Allied-Bruce*, 513 U.S. at 279. The Court "concede[d]" that its interpretation meant that the "evidencing" language does "little work." *Id.* And, indeed, this Court has repeatedly used the phrase "contracts involving commerce" and "contracts evidencing a

transaction involving commerce" interchangeably in describing the scope of § 2. *See, e.g.*, *Vaden*, 556 U.S. at 58; *Hall St.*, 552 U.S. at 590.

Thus, there is no grand significance to § 2's use of the phrase "evidencing a transaction." Nor, therefore, can there be any grand significance to § 1's omission of that phrase. Presumably, the reason the transportation-worker exemption does not contain the phrase "evidencing a transaction" is because including that phrase would render the exemption nonsensical. "Contracts of employment" is—and was in 1925—a common English phrase. "Contracts evidencing a transaction of employment" is—and was—not.[9]

In addition to being unsupported by the text, Prime's interpretation would also lead to absurd results. If, as Prime argues, the "applicability of the § 1 exemption" truly must be determined "*only*" from the terms of the contract, the contract itself would have to describe not just employment but engagement in commerce for the exemption to apply. Pet. Br. 33 (emphasis added and quotation marks omitted). After all, there's no dispute that the exemption applies only to the contracts of "workers engaged in commerce."

But many employment contracts do not specify whether the worker is engaged in commerce. Here, for example, although Oliveira is a long-haul trucker, his contract does not specify that he crossed state lines.

---

[9] Neither Westlaw nor Google produces any search results for the phrase "contract evidencing a transaction of employment."

Worse, Prime's interpretation would enable parties to evade the transportation-worker exemption's limits entirely. If, for some reason, an employer wanted to exclude a retail worker from the FAA, all it would have to do is label that worker a "seaman" in the contract. And courts could look no further. Conversely, if a railroad wanted to avoid the exemption, it could just call its workers hairdressers in their employment contracts. And, again, the court would have to accept that characterization.

This is precisely the haphazard application of the FAA that *Allied-Bruce* warned against. Nothing in the statute—or in the canons of statutory interpretation—requires this absurd result.

C. The Purpose and Statutory Context of the Transportation-Worker Exemption Confirm that It Should Be Given Its Ordinary Meaning.

As this Court explained in *Circuit City*, it is "reasonable to assume that Congress excluded 'seamen' and 'railroad employees' " from the FAA "for the simple reason that it did not wish to unsettle" the pre-existing dispute resolution schemes governing these workers. *Circuit City*, 532 U.S. at 121. And Congress excluded "any other class of workers engaged in" commerce because it was concerned not just with seamen and railroad employees, but with *all* "transportation workers and their necessary role in the free flow of goods." *Id*. By the time the FAA was enacted, there had been a long history of violent, disruptive strikes in the

transportation industry. *See supra* pages 3-4. It would be "rational," therefore, "for Congress to ensure that workers in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation." *Circuit City*, 532 U.S. at 121.

The ordinary meaning interpretation of the FAA—as exempting all transportation workers' agreements to perform work—satisfies these twin purposes: ensuring that the Act does not conflict with other dispute resolution statutes in effect at the time and reserving for Congress the ability to specifically regulate transportation workers' disputes. Prime's interpretation, on the other hand, undermines these goals.

1. Contrary to Prime's contention, the dispute resolution statutes in effect in the maritime and railroad industries when the FAA was passed applied to all workers in the regulated industries—not just common-law servants.

In the maritime industry, the Shipping Commissioners Act authorized government-appointed commissioners to resolve disputes between a "master, consignee, agent, or owner" of a ship "and *any* of his crew"—not just those whose contracts happened to describe a master-servant relationship. § 25, 17 Stat. at 267 (emphasis added); *see The Bound Brook*, 146 F. 160, 164 (D. Mass. 1906) (defining "crew" as those who work aboard a vessel "without reference to the nature of the arrangement under which they are on board").

Similarly in the railroad industry, the Transportation Act established a Railroad Labor Board to hear disputes between railroads and their "employees" or "subordinate officials." Transportation Act § 307. The "employees" to whom the Act applied were not limited to common-law servants, but instead were defined as *all* workers "engaged in the customary work directly contributory to the operation of the railroads." *Indiana Harbor*, 3 R.L.B. at 337. As the Railroad Labor Board explained, it would be "absurd" for common-law servants to be prohibited from disrupting commerce, while contractors could "engage in industrial warfare ad libitum." *Id.*

And, in fact, the Act was repeatedly applied to workers who were *not* common-law servants of the railroad. *See, e.g.*, *id.*; *American Federation of R.R. Workers v. Erie R.R. Co.*, Decision No. 1962, 4 R.L.B. 615, 616 (1923); *St. Louis-San Francisco Ry. Co.*, 3 R.L.B. at 702 (applying Transportation Act to independent contractors).

Thus, it would make no sense for the transportation-worker exemption to be limited to common-law servants—such a limitation would create precisely the conflict between the FAA and pre-existing dispute resolution statutes that Congress was trying to avoid.

In arguing to the contrary, Prime relies heavily on the Railway Labor Act—a statute passed more than a year *after* the FAA. *See* Railway Labor Act, ch. 347, 44 Stat. 577 (1926). This Act applied to "every person in the service of a [railroad] carrier (subject to its

continuing authority to supervise and direct the manner of rendition of his service)"—a narrower set of workers than those governed by either the Transportation Act or the Shipping Commissioners Act. *Id.* § 1. Prime argues that the FAA should be interpreted to exempt only the kind of workers subject to the Railway Labor Act (which, Prime contends, are only common-law servants). Pet. Br. 25.

But that too makes no sense. Congress' goal was to avoid disrupting "developing" *and* "*established*" dispute resolution schemes. *Circuit City*, 532 U.S. at 121 (emphasis added). If it had limited the transportation-worker exemption to just those workers covered by the Railway Labor Act—a law that didn't even exist yet—it would have disrupted the *existing* dispute resolution schemes, which covered all workers in the relevant industries.

Moreover, on Prime's interpretation, the FAA wouldn't even exempt all of the workers subject to the Railway Labor Act. That Act defines the workers to whom it applies based on their *actual* relationship with the railroad. *See* Railway Labor Act § 1. But Prime argues that the FAA only exempts workers whose contracts *say* they are common-law servants—regardless of their *actual* relationship with their employer. Thus, even on Prime's own account, its interpretation of the FAA would bring the statute into conflict with the Railway Labor Act—as well as every dispute resolution statute governing the transportation industry when the FAA was passed, none of which defined

their scope by what a worker's employment contract said.

The exemption's ordinary meaning, on the other hand, poses no such problem.

2. Prime's interpretation also undermines Congress' more general goal in exempting transportation workers' employment contracts from the FAA: to reserve for itself the ability to regulate the disputes of workers integral to the "free flow of goods." Conductors or sailors or truck drivers are just as "necessary" to "the free flow of goods"—and just as able to interrupt that "free flow of goods" by striking—if they are (or their contracts say they are) independent contractors as they are if their contracts say they are common-law servants. Congress was concerned with workers vital to commerce, not workers vital to commerce whose contracts also happened to evidence on their face sufficient indicia of a common law master-servant relationship.

D. Prime's Meritless Policy Concerns Cannot Override the Statute's Plain Meaning.

Unable to ground its interpretation in the text or purpose of the FAA, Prime resorts to arguing that the plain-text reading of the statute is bad policy. *See* Pet. Br. 28-29, 31-32. But "[p]olicy arguments are properly addressed to Congress, not this Court." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018). And, in any event, Prime's policy concerns are meritless—in fact,

worse than meritless. Prime's countertextual interpretation actually *causes* difficult problems that are avoided by adhering to the plain meaning of the statute.

1. It is Prime's interpretation of the statute—not its ordinary meaning—that "would create countless complexities every time a putative employer moves to compel arbitration," Pet. Br. 32. Prime argues that to determine whether an agreement is a "contract of employment" exempt from the FAA, courts must apply the same factors they ordinarily use to determine whether a worker is a common-law servant—but to the contract itself rather than the actual employment relationship. Pet. Br. 29, 33. This would often be a difficult—if not impossible—task.

Take Prime's contract with Oliveira, for example. Many aspects of the contract are indicative of a master-servant relationship: Prime reserved the right to fire Oliveira without cause, J.A. 79. *See* Rev. Rul. 87-41, 1987-1 C.B. 296 (1987) ("An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions."). The contract shows Oliveira's work was part of Prime's "regular business," not a "distinct occupation," *Darden*, 503 U.S. at 324. *See* J.A. 64 (identifying Prime as a motor carrier and indicating that Oliveira agreed to haul freight). And Oliveira's contracts evidence a continuing relationship with Prime—not just one-off employment for a single delivery, J.A. 64. *See Darden*, 503 U.S. at 323 (listing "duration of the relationship between the parties" as a relevant factor).

The meaning of other aspects of Oliveira's contract, however, is disputed. For example, Prime argues that the Operating Agreement shows Oliveira provided the instrumentalities of his work. Pet. Br. 34. But, in fact, the Agreement sheds doubt on this assertion. Oliveira's contract shows that he leased his tractor from a Prime affiliate and that he was required to lease it right back to Prime—and Prime had control over it the whole time. J.A. 64, 76. Moreover, the contract states that Prime provided the trailers—the containers in which goods are hauled—an integral tool, without which Oliveira could not do his job. J.A. 66-67. So, was Prime the "source of the instrumentalities and tools" of Oliveira's work or was Oliveira? Based on the terms of the Operating Agreement, it appears to be Prime. But it's not indisputable. And how should this factor balance with all the others? Prime offers no answer.

Applying the common-law servant inquiry to an employment contract is likely to be at least as uncertain and difficult as applying the inquiry in the way it was intended—to the actual employment relationship. Litigating this issue as part of the determination as to whether the FAA applies, as Prime suggests, would be costly and time-consuming. And different judges could easily come to different conclusions evaluating the same contract.

In some cases, the inquiry Prime claims is required by the FAA wouldn't just be difficult; it would be impossible. Many contracts do not list all—or, sometimes, any—of the factors relevant to employment

status in the contract itself. *See* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 Berkeley J. Emp. & Lab. L. 295, 341 (2001) ("Most employees lack written contracts that would show clearly that they are subject to an employer's control as there is little, if any, incentive for an employer to make a written agreement that confirms a worker's employee status."). Prime offers no explanation for how a court, in that instance, should determine whether the FAA applies.

Moreover, Prime's interpretation threatens to enmesh courts in the merits of an employment dispute just so they can decide whether to compel arbitration. The terms of an employment contract are not dispositive in determining a worker's employment status, but they are often relevant. *See, e.g.*, *Weary v. Cochran*, 377 F.3d 522, 525 (6th Cir. 2004). So, on Prime's view, courts must conduct part of the inquiry on the merits just to decide whether to compel arbitration.

Applying the ordinary meaning of the statute, on the other hand, would require only that courts determine whether the contract is an agreement to perform work—a question that is unlikely to be contested at all, let alone prove relevant to the merits of a dispute.

2. Prime's interpretation would also permit employers who illegally misclassify their workers as independent contractors to circumvent the transportation-worker exemption if they so choose, while transportation companies that obey the law are unable to do

so. Prime offers no reason why Congress would want to disadvantage law-abiding companies in this way.

3. Prime makes the astounding claim—entirely unsupported by any evidence—that simply enforcing the transportation-worker exemption in accordance with its terms will "have profound, deleterious consequences for both the trucking industry and the wider economy." Pet. Br. 28. This claim is meritless.

For one thing, the exemption is narrow. It applies only to arbitration clauses in transportation worker's employment contracts—it doesn't apply to other kinds of contracts or other kinds of workers. And, even then, it doesn't bar a single arbitration clause. The exemption merely means that state law—rather than federal—applies to their enforcement. *See* Edward J. Brunet, et al., Arbitration Law in America: A Critical Assessment 56 (2006) ("Every state has enacted a comprehensive arbitration law."); *Diaz v. Michigan Logistics Inc.*, 167 F. Supp. 3d 375, 380-81 (E.D.N.Y. 2016) (holding FAA's transportation-worker exemption was irrelevant because the plaintiffs' claims were "subject to mandatory arbitration under New York arbitration law").[10]

[10] In fact, in proceedings that are currently stayed before the district court, Prime is seeking to compel arbitration of the class claims *in this case* under Missouri law. *See* Prime's Mot. to Deny Certification of Class/Collective Action at 8-9, *Oliveira v. New Prime, Inc.*, Civ. No. 15-10603 (D. Mass. Jan. 23, 2018), ECF No. 118.

Prime's sky-is-falling rhetoric is also belied by the fact that the trucking industry existed long before arbitration clauses in employment contracts became widespread, yet Prime points to no evidence—none—that the industry was unduly burdened (or, indeed, burdened at all) without them.[11] Nor does it point to any evidence that the industry has done any better because arbitration has become more prevalent. Thus, Prime's contention that enforcing the FAA's narrow exemption for transportation workers' employment agreements would somehow devastate the industry and "the wider economy" has no basis in reality.

4. Equally meritless is Prime's reliance on general platitudes about the federal policy favoring arbitration. The policy in favor of arbitration was established by the FAA—it therefore applies only where the FAA applies. Thus, "to rest this case on the general policy of treating arbitration agreements as enforceable as such would be to beg the question, which is whether the FAA has textual features at odds with" applying the law in this case. *See Hall St.*, 552 U.S. at 586. All of the textual features of the FAA are at odds with applying the law in this case: The statute explicitly states that it does not apply.

---

[11] The trucking industry was substantially deregulated in 1980. *See* Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. But the empirical literature on arbitration suggests that arbitration provisions in employment contracts were relatively uncommon until the early 2000s. *See, e.g.*, Mark D. Gough, *The High Costs of an Inexpensive Forum*, 35 Berkeley J. Emp. & Lab. L. 91, 95-96 (2014).

As this Court has recently reiterated, it would be "quite mistaken to assume . . . that whatever might appear to further the statute's primary objective must be the law"—regardless of what the actual text of the statute says. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (alterations and quotation marks omitted). "Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known pursues its stated purpose at all costs." *Id.* (alterations and quotation marks omitted).

This principle is particularly important in construing statutory exemptions, for "exemptions are as much a part" of the statute as the statute's affirmative commands. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018); *see Henson*, 137 S. Ct. at 1725. The text of the transportation-worker exemption cannot be disregarded simply because doing so might better suit the FAA's overall goals. The whole point of the exemption is to *exclude* transportation workers' employment contracts from those goals.

This Court's decision in *Circuit City* does not hold otherwise. *Circuit City* held that courts interpreting the exemption should not go "*beyond* the meaning of the words Congress used." 532 U.S. at 119 (emphasis added). It did not hold that they should ignore that meaning entirely. Courts must "presume . . . that the legislature says what it means and means what it says." *Henson*, 137 S. Ct. at 1725 (quotation marks and alterations omitted).

Here, Congress said that transportation workers' agreements to perform work are exempt. This Court should "presume" it meant what it said. *Id.*

III. THE OPERATING AGREEMENT IS A TRANSPORTATION WORKER'S CONTRACT OF EMPLOYMENT EXEMPT FROM THE FAA.

There's no dispute that Oliveira is a transportation worker engaged in interstate commerce. J.A. 160 n.9. Nor could there be any dispute that the Operating Agreement is an agreement to perform work. It is, therefore, a transportation worker's "contract of employment" exempt from the FAA.

Prime asserts, in passing, that the Operating Agreement is not between Oliveira and Prime, but rather between Prime and Hallmark Trucking—a company Prime set up for Oliveira. Pet. Br. 33; *id.* at 4 (asserting that though Oliveira signed the contract, he signed it on behalf of Hallmark). But throughout this litigation, Prime has "treated the contract as one between Prime and Oliveira." J.A. 156 n.4; *see* J.A. 171 n.15 (quoting Prime briefing stating that "*Oliveira* entered into an" agreement with Prime). It continues to do so before this Court. *See, e.g.*, Pet. Br. 34 (discussing the rights and responsibilities the contract "provides *respondent*"—i.e., Oliveira, not Hallmark (emphasis added)). Prime cannot now argue otherwise. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

And, in any event, these technicalities are irrelevant here. Regardless of who is technically party to the

Operating Agreement, the Agreement is indisputably an agreement to perform work, and therefore a "contract of employment." And Prime has long conceded that if its Operating Agreement is a "contract of employment" at all, it is a contract of employment of a transportation worker exempt from the FAA. *See* J.A. 160, 172.

Nor could it argue otherwise. Technicalities aside, the Agreement is obviously a contract for Oliveira *himself* to perform work. There are numerous contractual provisions that could not possibly apply to a company—they could only apply to a driver himself. *See, e.g.*, J.A. 67 (referring to "the next driver following You," making clear that "You" is a driver, not a company); J.A. 70 ("You shall (i) drive the Equipment Yourself[.]"); J.A. 72 (providing requirements for the purchase of insurance "against injuries sustained while in pursuit of Your business, for Yourself").

The Operating Agreement is an agreement of a long-haul truck driver to haul freight for a trucking company—a quintessential transportation worker's agreement to perform work. It is, therefore, exempt from the FAA.

CONCLUSION

The judgment for the Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

ANDREW SCHMIDT
ANDREW SCHMIDT LAW, PLLC
97 India Street
Portland, ME 04101
(207) 619-0320

HILLARY SCHWAB
FAIR WORK, P.C.
192 South Street, Suite 450
Boston, MA 02111
(617) 607-3261

JENNIFER BENNETT
Counsel of Record
PUBLIC JUSTICE, P.C.
475 14th Street, Suite 610
Oakland, CA 94612
(510) 622-8150
jbennett@publicjustice.net

LEAH M. NICHOLLS
PUBLIC JUSTICE, P.C.
1620 L Street NW,
Suite 630
Washington, DC 20036
(202) 797-8600

Counsel for Respondent

July 18, 2018