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 PETITIONER

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QUESTIONS PRESENTED

Section 1 of the Federal Arbitration Act ("FAA") provides that the FAA does not 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. Respondent is an independent contractor whose agreement with interstate trucking company New Prime, Inc. ("New Prime") includes a mandatory arbitration provision requiring respondent to arbitrate all workplace disputes with New Prime on an individual basis. Respondent does not challenge the validity of the arbitration agreement he signed nor the delegation clause contained therein, which mandates that all disputes regarding arbitrability be decided by an arbitrator. Nonetheless, respondent filed a putative class action in court and opposed arbitration on the basis of the Section 1 exemption.

The questions presented are:

1. Whether a dispute over applicability of the FAA's Section 1 exemption is an arbitrability issue that must be resolved in arbitration pursuant to a valid delegation clause.

2. Whether the FAA's Section 1 exemption, which applies on its face only to "contracts of employment," is inapplicable to independent contractor agreements.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner New Prime, Inc. has no parent corporation and no publicly held corporation owns ten percent (10%) or more of its stock. New Prime, Inc. is a privately owned company.

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BRIEF FOR PETITIONER

Petitioner New Prime, Inc. respectfully requests that the Court reverse the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 857 F.3d 7 (1st Cir. 2017). J.A. 152. The order of the Court of Appeals denying rehearing and rehearing en banc is unpublished. J.A. 193. The order of the district court is reported at 141 F. Supp. 3d 125 (D. Mass. 2015). J.A. 134.

JURISDICTION

The First Circuit entered judgment on May 12, 2017, and denied New Prime's timely petition for rehearing and rehearing en banc on June 27, 2017. New Prime filed a petition for a writ of certiorari on September 6, 2017, and this Court granted it on February 26, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 1 of the Federal Arbitration Act, 9 U.S.C. § 1, provides:

> "Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy,

> would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in the Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

The decision below reflects the latest effort by a lower court to avoid the dictates of the Federal Arbitration Act ("FAA") and invalidate an arbitration

agreement containing a class waiver. This time, the feat was accomplished through a nonsensical interpretation of the FAA itself.

Section 1 of the FAA exempts a narrow class of transportation workers from the purview of the statute—those who have signed "contracts of employment." 9 U.S.C. § 1. This Court has instructed that the Section 1 exemption must be given a "precise reading" and "a narrow construction," in order to ensure the FAA accomplishes its purpose of "overcom[ing] judicial hostility to arbitration agreements." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118–19 (2001) (citation omitted).

The First Circuit did the opposite. It read the Section 1 exemption expansively and effectively eliminated arbitration as a viable means of dispute resolution for the entire transportation industry. According to the court of appeals, the term "contracts of employment" in Section 1 should be read to include contracts of *non*-employment—that is, independent contractor agreements—notwithstanding the plain language of Section 1 to the contrary. J.A. 182.

This Court should reverse the First Circuit and compel arbitration, in accordance with the plain language of the parties' agreements and the FAA.

1. Petitioner New Prime, Inc. ("New Prime") is an interstate trucking company that engages both company drivers and independent contractors to operate vehicles. Respondent Dominic Oliveira is a former New Prime truck driver who chose to become an independent contractor.

Prior to becoming an independent contractor, respondent took part in New Prime's Student Truck Driver Program, which allowed him to work under the

supervision of a licensed truck driver as he gained the 30,000-plus miles of driving experience necessary to obtain a commercial driver's license under federal regulations. After completing the program, respondent had the option of becoming a New Prime employee, but chose instead to establish an independent business, Hallmark Trucking LLC, that contracted to perform services for New Prime. On behalf of Hallmark Trucking LLC, respondent entered into two separate "Independent Contractor Operating Agreements" with New Prime, the purpose of which was "to establish an independent contractor relationship at all times." J.A. 65; *see also id.* at 86. Both Agreements provided that "[a]ny disputes arising under, arising out of or relating to [the] agreement, including . . . the arbitrability of disputes between the parties, shall be fully resolved by arbitration[.]" J.A. 82; *id.* at 102–03.

As an independent contractor working with New Prime, respondent enjoyed substantial freedoms and opportunities he would not otherwise have had as a New Prime employee. He was able to "determine the means and methods of performance of all transportation services undertaken under the terms of th[e] Agreement, including driving times and deliver[y] routes," to "refuse to haul any load offered . . . by [New] Prime," and "to provide services for another carrier during the term of th[e] Agreement." J.A. 65; *id.* at 86. Respondent was also permitted to hire other drivers to provide shipping services under the Agreements. J.A. 70–71; *id.* at 91–92. Each of these features of respondent's independent-contractor relationship with New Prime allowed him the flexibility to make independent business decisions that would have been unavailable to him as an employee.

2. Notwithstanding the plain directive of the Independent Contractor Operating Agreements to arbitrate all disputes arising under them, respondent filed a putative class action in federal district court, asserting claims for unpaid wages, misclassification, and breach of contract. When New Prime moved to compel arbitration, respondent opposed. He did not dispute that he freely executed the Independent Contractor Operating Agreements, nor did he dispute that his claims fell within the scope of the arbitration provisions. Instead, respondent insisted that the Operating Agreements were "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, such that New Prime could not enforce the arbitration provisions under the FAA.

3. The district court denied New Prime's motion to compel arbitration. The court concluded that although the delegation clause was valid, the applicability of the Section 1 exemption could not be adjudicated by an arbitrator. The district court acknowledged that Section 1's reference to "contracts of employment" refers to employer-employee arrangements only, not independent contractor agreements, explaining that "[t]his construction comports well" with the FAA's purpose and this Court's decision in *Circuit City*. J.A. 141. But because the contract terms and factual record did not, in the district court's view, make clear whether New Prime and respondent were engaged in an employer-employee or independent-contractor relationship under state law, the district court ordered discovery and announced its intention to hold a mini-trial on that question before it would determine whether the Section 1 exemption applies.

4. New Prime immediately appealed the district court's order denying its motion to compel arbitration. 9 U.S.C. § 16. The First Circuit affirmed. The court agreed with the district court that despite the existence of an indisputably valid delegation clause, the applicability of the Section 1 exemption was not for an arbitrator to decide. J.A. 168; *id.* at 186. The First Circuit acknowledged that this conclusion conflicted with a prior decision of the Eighth Circuit, which found that applicability of the Section 1 exemption is an arbitrable issue. *See Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011). *Contra In re Van Dusen*, 654 F.3d 838, 843 (9th Cir. 2011) (holding that a court is required to assess whether the Section 1 exemption applies before ordering arbitration).

Two members of the panel went further, however, holding—contrary to the district court's decision below—that there was no need for discovery or a mini-trial to determine respondent's employment status because the phrase "contracts of employment" in Section 1 of the FAA simply means "an agreement to perform work of a transportation worker." J.A. 182. Thus, according to the First Circuit, the parties' Independent Contractor Operating Agreements were exempt from the FAA *irrespective* of whether respondent was an employee or independent contractor. In so ruling, the panel majority acknowledged that "the weight of district-court authority to consider the issue ha[d] concluded that the § 1 exemption does not extend to contracts that establish or purport to establish an independent-contractor relationship." J.A. 172. And in a footnote, the panel majority conceded that the Ninth Circuit—the only other circuit court to address the issue—had embraced the opposite interpretation. J.A. 173–74 (quoting *In re Swift Transp. Co., Inc.*, 830 F.3d

913 (9th Cir. 2016) ("*Van Dusen III*")); *see also Performance Team Freight Sys., Inc. v. Aleman*, 241 Cal. App. 4th 1233 (2015).

Judge Barbadoro, sitting by designation, dissented from the second part of the panel's decision. J.A. 187.

SUMMARY OF ARGUMENT

I. Where, as here, a contract contains a valid delegation clause, the question whether the contract is a "contract of employment" within the meaning of Section 1 of the FAA is an arbitrability issue that must be submitted to arbitration. This Court has explained that delegation clauses are simply "additional, antecedent agreement[s]" to arbitrate that must be enforced the same as any other arbitration agreement. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010).

The FAA must be interpreted against the background principle that a bargained-for arbitration agreement is enforceable so long as the agreement is "susceptible of an interpretation that covers the asserted dispute." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986). This exacting standard is necessary because courts must pay "due regard" to the liberal "federal policy favoring arbitration." *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (citation omitted); *see also Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 338 (2011). The First Circuit's refusal to enforce the parties' bargained-for delegation clause in this case flouts this Court's commands, usurping the authority to decide an important arbitrability issue notwithstanding the parties' express agreement that an arbitrator should resolve the issue.

II. The text, historical context, and purpose of the FAA leave no doubt that "contracts of employment" exempted from arbitration under Section 1 include only those agreements that purport to establish an employer-employee relationship under common-law agency principles, and not independent-contractor agreements.

A. At the time the FAA was enacted, just as today, the plain meaning of the term "contracts of employment" encompassed only contracts between an *employer* and an *employee* that stated the terms and conditions of *employment*. The distinction between employees and independent contractors goes back centuries and was well understood when Congress enacted the FAA. In fact, Congress used terms such as "employer," "employee," and "employment" in numerous contemporaneous statutes for the express purpose of distinguishing common-law employees from independent contractors. Reading "contracts of employment" to include independent contractor agreements contradicts the plain language of the statute, frustrates the statute's purpose, and violates the Court's admonition that the Section 1 exemption be given a narrow and precise reading.

B. The determination of whether a contract is a "contract of employment" or something else (such as an independent-contractor agreement) for purposes of Section 1 of the FAA must be made by looking only at the relationship described within the four corners of the contract. No discovery or mini-trial into the nature of the parties' interactions is necessary or appropriate under the FAA.

C. The Independent Contractor Operator Agreements executed between New Prime and respondent plainly are *not* contracts of employment—not only by

virtue of their express declaration of intent "to establish an independent contractor relationship at all times," J.A. 65; *see also id.* at 86, but also because they grant respondent the authority to choose the method and manner in which he performs his work, to refuse any work at his discretion, to hire others to perform his work for him, and to work for other trucking companies. In fact, respondent entered into the agreements as proprietor of his own limited liability company, Hallmark Trucking LLC. Because the Section 1 exemption is inapplicable to the contracts between New Prime and respondent, the court below should have compelled arbitration of the parties' dispute under the FAA.

ARGUMENT

I. APPLICABILITY OF THE FAA SECTION 1 EXEMPTION IS AN ARBITRABILITY ISSUE THAT THE PARTIES DELEGATED TO AN ARBITRATOR

It is undisputed that New Prime and respondent agreed to arbitrate all disputes arising out of their relationship, "including the arbitrability of disputes between the parties." J.A. 82; *id.* at 103. The question whether the FAA Section 1 exemption applies is a delegable arbitrability issue. Thus, the courts below should have enforced the parties' delegation clause and compelled the Section 1 dispute to an arbitrator.

A. Congress enacted the FAA in 1925 "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The Act "embodies [a] national policy favoring arbitration and places arbitration agreements on an equal footing with all other contracts." *Buckeye Check*

Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006). In fact, this Court's "cases place it beyond dispute that the FAA was designed to *promote* arbitration." *Concepcion*, 563 U.S. at 345 (emphasis added).

In light of this "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), "where [a] contract contains an arbitration clause, there is a presumption of arbitrability," and "'[a]n order to arbitrate [a] particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *AT&T Techs.*, 475 U.S. at 650. "The burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies," *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 227 (1987), and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983).

A delegation clause is an "additional, antecedent agreement," and "the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70. This "flow[s] inexorably from the fact that arbitration is simply a matter of contract between the parties." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *Id.* So long as the delegation is "clear and unmistakable," the court must enforce it. *Id.* at 944.

B. Here, it is undisputed that the parties agreed to a valid, clear, and unmistakable delegation clause:

> Any disputes arising under, arising out of or relating to this agreement, including . . . any disputes arising out of or relating to the relationship created by the agreement, and any disputes as to the rights and obligations of the parties, *including the arbitrability of disputes between the parties*, shall be fully resolved by arbitration.

J.A. 82 (emphasis added); *see also id*. at 102–03. As the district court found, "the parties do not contest that the two operating agreements [respondent] signed . . . contain valid delegation provisions," which encompass "the arbitrability of disputes between the parties." J.A. 145. And this Court has found similar language sufficiently clear and unmistakable to require arbitration of threshold questions of arbitrability. *See Rent-A-Center*, 561 U.S. at 66 (enforcing a delegation clause that provided that "[t]he Arbitrator . . . shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement . . . .").

Moreover, the Independent Contractor Operating Agreements expressly incorporate the AAA's Commercial Arbitration Rules. J.A. 82–83; *id.* at 103. Those rules provide that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." American Arbitration Association, *Commercial Arbitration Rules and Mediation Procedures* R-7 (Oct. 1, 2017).

This Court has repeatedly enforced AAA rules that are incorporated into an arbitration contract, as they are here. *See C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 419 n.1 (2001) (AAA rules "are not secondary interpretive aides that supplement [a] reading of the contract; they are prescriptions incorporated by the express terms of the agreement itself"); *AT&T Techs.*, 475 U.S. at 649.

Neither respondent nor the courts below disputed that the delegation clause at issue here covers, by its plain terms, the question whether the Operating Agreements are "contracts of employment" for purposes of Section 1. Nevertheless, both the district court and the First Circuit held that applicability of the Section 1 exemption is a non-delegable issue that cannot be submitted to arbitration no matter how clearly the parties intend to delegate the question. In the words of the First Circuit, the issue is "an 'antecedent determination' for the district court to make before it can compel arbitration" because "the district court can [compel arbitration] only if it has authority to act under the FAA," and if the Operating Agreements are "contracts of employment" within the meaning of Section 1, then "the FAA does not apply." J.A. 165–66 (quotation marks omitted).

The First Circuit's circular logic proves far too much. Threshold arbitrability issues are *always* questions that go to the court's authority to compel arbitration under the FAA—if they are decided against the party seeking to compel arbitration, then there is no enforceable arbitration agreement and the FAA is inapplicable. Yet courts routinely enforce delegation clauses and order arbitration of such threshold issues. For example:

- Where a party is coerced into signing an arbitration agreement, or where the arbitration agreement is unconscionable or otherwise invalid under state law, the agreement is null and void and the FAA does not apply. 9 U.S.C. § 2. Yet this Court and other courts routinely enforce delegation clauses to allow an arbitrator to decide whether an arbitration agreement is invalid by reason of coercion, unconscionability, or other state-law grounds. *See Buckeye Check Cashing*, 546 U.S. at 446 (compelling arbitration of threshold contention that arbitration agreement was void as illegally usurious); *Edwards v. Doordash, Inc.*, ___ F.3d ___, 2018 WL 1954090, at *5 (5th Cir. Apr. 25, 2018) ("[Plaintiff's] unconscionability arguments . . . should be addressed by the arbitrator").

- Where the underlying dispute between the parties falls outside the scope of the parties' arbitration agreement, the FAA has no force with respect to that dispute. Yet this Court and other courts routinely enforce delegation clauses to allow an arbitrator to decide whether the parties' underlying dispute falls within the scope of the arbitration agreement. *See Rent-A-Center*, 561 U.S. at 68–69 ("[P]arties can agree to arbitrate . . . whether their agreement covers a particular controversy."); *Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co.*, 862 F.3d 981, 985–86 (9th Cir. 2017) ("question[] of the scope of the arbitration agreement . . . [is] delegated to the arbitrators"); *In re Checking Account Overdraft Litig. MDL No. 2036*, 674 F.3d 1252, 1256–57 (11th Cir. 2012) ("Under the delegation provision . . . the decision of whether Given's

claims are within the scope of the arbitration agreement is a decision for an arbitrator.")

- Where a non-signatory to an arbitration agreement seeks to enforce the agreement, and a party argues that the non-signatory is without such authority, a ruling against the non-signatory would mean the FAA does not apply. Yet this Court and other courts routinely enforce delegation clauses to allow an arbitrator to decide whether the non-signatory may enforce the agreement. *See Rent-A-Center*, 561 U.S. at 68–69 ("[P]arties can agree to arbitrate . . . whether the parties have agreed to arbitrate."); *Contec Corp. v. Remote Sol'n, Co.*, 398 F.3d 205, 209–10 (2d Cir. 2005) (considering "whether a non-signatory can compel a signatory to arbitrate under an agreement where the question of arbitrability is itself subject to arbitration," and concluding that the "purported right to enforce the 1999 Agreement is a matter of the Agreement's continued existence, validity and scope, and is therefore subject to arbitration under the terms of the arbitration clause"); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473–74 (1st Cir. 1989) ("Whether the right to compel arbitration . . . was validly assigned to the defendants and whether it can be enforced by them against Apollo are issues relating to the continued existence and validity of the agreement," which "[t]he arbitrator should decide").

Indeed, the First Circuit's reasoning flies in the face of this Court's recent decision in *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017). In that case, the Kentucky Supreme Court refused to enforce an arbitration agreement entered into under a power of attorney, holding that "a power of

attorney could not entitle a representative to enter into an arbitration agreement without *specifically* saying so." *Id.* at 1426. The plaintiff defended the state court's clear-statement rule on the ground that it "affect[ed] only contract formation," and "the FAA has no application to contract formation issues" because the Act operates only once a court determines that a valid arbitration agreement has been formed. *Id.* at 1428 (quotation marks omitted). The Court disagreed, reasoning that the FAA "cares not only about the 'enforce[ment]' of arbitration agreements, but also about their initial 'valid[ity].'" *Id.* But if the FAA applies in determining whether an arbitration agreement *exists*, surely it must also apply in determining whether such an agreement is *enforceable* under Section 1. That is precisely the question at issue here.

These holdings follow from the settled fact that a delegation clause is an "additional, antecedent agreement" that must be enforced as a standalone contract. *Rent-A-Center*, 561 U.S. at 70. Because a delegation clause is a freestanding and severable agreement to arbitrate questions of arbitrability, a challenge to the enforceability of such an agreement must be "specific to" the delegation clause itself. *Id.* at 74. Where a party challenges a delegation clause *only* on grounds that would "render[] the *entire* Agreement invalid," the delegation clause is unaffected and the threshold arbitrability dispute must be compelled to arbitration. *Id.*

In this case, the only challenge to the delegation clause is that it falls within a "contract of employment" such that the entire agreement is exempted from the FAA under Section 1. But it is beyond dispute that the standalone delegation clause is not *itself* a "contract of employment." Thus, the FAA applies to

the delegation clause even if it ultimately does not apply to the parties' broader contract.

The First Circuit was correct that some issues cannot be delegated to the arbitrator. But those issues are identified *in the FAA itself*. *See* 9 U.S.C. § 4 (court must compel arbitration only once it is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue"). Respondent here does not challenge the elements of contract formation nor dispute that he has refused to submit his claims to arbitration. As a result, the district court was required to compel the parties to submit their threshold arbitrability dispute to arbitration under the plain terms of the delegation clause.

II. SECTION 1 DOES NOT EXEMPT INDEPENDENT CONTRACTOR AGREEMENTS FROM THE FAA

Section 1 exempts certain "contracts of employment" in the transportation sector from the provisions of the FAA. 9 U.S.C. § 1. Independent contractor agreements are not "contracts of employment" and thus do not fall within the Section 1 exemption.

A. Independent Contractor Agreements Are Not "Contracts of Employment"

The term "contracts of employment" in Section 1 means what it says: agreements that purport to establish an employer-employee relationship, not an independent contractor relationship. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985). "When statutory

language is plain . . . , that is ordinarily the end of the matter." *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 552–53 (1987) (quotation marks omitted).

1. The FAA provides that "nothing herein contained shall apply to *contracts of employment* of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added). The meaning of the term "contracts of employment" was as plain in 1925, when the FAA was enacted, as it is today. Indeed, *Black's Law Dictionary* treats the term "contract of employment" as synonymous with "employment contract," a term that it traces back to 1927 and which means "[a] contract between an *employer and employee* in which the terms and conditions of *employment* are stated." *Black's Law Dictionary* 393 (10th ed. 2014) (emphasis added).

Moreover, at the time the FAA was enacted, it was well established that independent contractors were *not* employees, and that an independent contractor agreement did *not* establish employment. Bouvier's Law Dictionary explained this important distinction: "Strictly and etymologically, [employee] means 'a person employed,' but in practice . . . and as generally used with us, though perhaps not confined to any official employment, it is understood to mean *some permanent employment or position*." *Bouvier's Law Dictionary* 1035 (8th ed. 1914) (emphasis added). By contrast, "independent contractor" was defined as "[o]ne who . . . contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of his work." *Id.* at 1533.

When Congress chose the words "contracts of employment" in Section 1, it did so with full awareness

of the distinction between an employee and an independent contractor, and with an appreciation of the important legal consequences that attach to a worker's classification. "[T]he distinction between employees and independent contractors has deep roots in our legal tradition." *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721–22 (1996). And although the contours along which the law distinguishes these classes of workers have evolved with the economy, the distinction itself goes back centuries and has been a crucial element of regulations seeking both to promote growth and protect workers.

As early as the Ordinance of Labourers, enacted in 1349 in response to the labor-market dislocations occasioned by the bubonic plague, English law recognized fundamental differences between ordinary laborers and independent craftsmen and, consequently, subjected them to different regulatory schemes. For example, although that statute required "every man and woman" to work until age 60 and established strict wage controls, it exempted those "living in merchandise, []or exercising any craft, []or having of his own whereof he may live, []or proper land." *See* 23 Edw. III (1349).

By the time of Blackstone, an intricate taxonomy had developed, distinguishing master-servant relationships from other work relationships, and further distinguishing among master-servant relationships. *See* 1 William Blackstone, *Commentaries on the Laws of England* *422–32. These distinctions had profound legal importance. For example, a master could be held vicariously liable for the acts of his servants, but not for others with whom he contracted, and a master could "abet and assist his servant in any action at law

against a stranger; whereas, in general, it [wa]s an offense against public justice to encourage suits and animosities by helping to bear the expense of them." *See id.* at *429, 431.

With industrialization and its "accompanying explosion of new occupations and ways of organizing work," there came "a number of new or newly important issues that required differentiation between categories of workers whose degree of dependence made them more or less needful of protection, or made the public more or less needful of the employer's financial responsibility for risks associated with the work." 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. of Emp. & Lab. L. 295, 303–04 (2001). It was during this period of rapid commercial development that the modern concept of the "independent contractor" took form.

The more specific legal "conception of an independent contractor, not so-called until later, dates back not much before *Bush v. Steinman*[, 126 Eng. Rep. 978], in 1799." James H. Wolfe, *Determination of Employer-Employee Relationships in Social Legislation*, 41 Col. L. Rev. 1015, 1020–21 (1941).[1] At that time, the distinction was largely relevant "in determining the scope of vicarious liability," and so courts naturally "embraced Blackstone's control rationale of *respondeat superior* as the logical test of the master-

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[1] "The definition of independent contractor originated from the phrase, 'independent calling' in the late 1800's," and "referred to the fact that an independent contractor was his own master." Jane P. Kwak, Note, *Employees versus Independent Contractors: Why States Should Not Enact Statutes That Target the Construction Industry*, 39 J. Legis. 295, 296 (2013).

servant relationship." John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose Is Not Always A Rose*, 8 Hofstra Lab. L. J. 337, 338–39 (1991). Thus, "[t]he right-to-control test" for distinguishing employees from independent contractors "was first developed in the mid-nineteenth century by English courts and was soon adopted by American courts." *Id.* at 339 (discussing *Boswell v. Laird*, 8 Cal. 469 (1857)).

By the turn of the twentieth century, the distinction between employees and independent contractors was omnipresent. As the Second Circuit observed in 1897, "[t]he fact of a distinction between the liability of an employer for an injury caused by the negligence of his employe[e] or his servant, and the liability of an owner for an injury caused by the negligence of an independent contractor . . . , was formerly not well recognized, but is now distinctly understood." *Atl. Transp. Co. v. Coneys*, 82 F. 177, 178 (2d Cir. 1897); *see also, e.g.*, *Nyback v. Champagne Labor Co.*, 109 F. 732, 741 (7th Cir. 1901) ("[U]pon the facts stated, and as they appear in this record, Barber was not an independent contractor, but a servant of the defendant."); *Thompson Caldwell Constr. Co. v. Young*, 294 F. 145, 146–47 (4th Cir. 1923) (distinguishing precedent on the ground that "[t]he defendant admits that its status was that of an independent contractor," and "[i]n the [earlier case], the defendant was an employee of the county, and not an independent contractor"); *Underwood Contracting Corp. v. Davies*, 287 F. 776, 780 (5th Cir. 1923) ("We do not think that [the contract] created the relation of master and servant between said bank and said defendant. The District Court did not err in construing it as constituting the Underwood Contracting Corporation an independent contractor."); *Swift & Co. v. Bowling*, 293 F. 279, 281 (4th Cir.

1923) ("Th[e] contract on its face made Cox an independent contractor" but "there was evidence on the part of the plaintiff tending to show that in the actual work the contract was disregarded, and that Cox acted and was treated by defendant as an employee.").

When the FAA was enacted in 1925, the distinction between employees and independent contractors—and the importance of that distinction—was so well recognized that it was shortly thereafter memorialized in the Restatements of Law. *See* Restatement (First) of Agency § 2, cmt. a (1933) ("The words 'master' and 'servant' are herein used to indicate the relationship from which arises the tort liability of an employer to third persons for the tort of an employee, and the special duties and immunities of an employer to the employee."); Restatement (First) of Torts § 409, cmt. a (1934) ("The words 'independent contractor' are used throughout this Topic as describing any person who does work for another under conditions which are not sufficient to make him a servant of the other.").

Even today, there are material differences between employees and independent contractors, "[w]hether it is a familiar claim such as an employer's liability for the tort of his alleged employee . . . or a less known advantage such as a preference under insolvency statutes or exemption of employees' wages from garnishment; or a comparative innovation such as the duty to pay social security taxes or to pay a statutory minimum wage." Gerald M. Stevens, *The Test of the Employment Relation*, 38 Mich. L. Rev. 188, 188 (1939). Indeed, "[t]he question of whether a worker is in fact an agent, servant, employee, or independent contractor is crucial in determining the hiring party's potential liability exposure in tort and under Title VII, as well as other federal statutes." Deanne M. Mosley &

William C. Walter, *The Significance of the Classification of Employment Relationships in Determining Exposure to Liability*, 67 Miss. L. J. 613, 642 (1998).

Given the long-entrenched and legally significant distinction between employees and independent contractors, it is generally assumed that a statute's use of the term "employee" is meant to incorporate the common-law master-servant relationship. As one commentator explained:

> "Employee," being derived from the verb "to employ," might have suggested application to persons engaged to render services. Instead "employee" served mainly as a near substitute for "servant," and it seems always to have been accepted by the courts that neither term extends to persons of "independent employment" or "independent contractors" as such persons came to be known.

Carlson, *supra*, 22 Berkeley J. Emp. & Lab. L. at 309–10.

Most notably, this Court declared in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), that "when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Id.* at 322–23. In fact, courts apply a "*presumption* that Congress means an agency law defini-

tion for 'employee' unless it *clearly indicates* otherwise." *Id.* at 325 (emphases added).[2] There is no such indication here.

The First Circuit brushed aside this overwhelming weight of authority, instead relying on contemporaneous case law in which courts used the term "contracts of employment" loosely to include any service arrangement. *See* J.A. 178–82. But the court acknowledged that those cases "d[id] not deal with the FAA." J.A. 181; *see Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) ("Where the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different . . . the meaning well may vary to meet the purposes of the law.").

The First Circuit also cited lay dictionaries that, in its view, "confirm that the ordinary meaning of 'contracts of employment' in 1925 was agreements to perform work." J.A. 177–78. But those dictionaries did not purport to define the term "contracts of employment" at all. Rather, the court deconstructed the statutory term and cobbled together a meaning from the atomized definitions of its constituent parts. *See id.* (noting that one dictionary "defin[ed] 'contract' . . . as

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[2] *Darden* overruled earlier case law holding that the term "employee" might sweep more broadly than the common-law definition of a master-servant relationship. *Darden*, 503 U.S. 325. But notably, even those overruled cases did not entirely abandon the distinction between employees and independent contractors, as the First Circuit did here. *See, e.g.*, *NLRB v. Hearst Pubs.*, 322 U.S. 111, 124 (1944) ("Congress, on the one hand, was not thinking solely of the immediate technical relation of employer and employee. . . . It cannot be taken, however, that the purpose was to include all other persons who may perform service for another or was to ignore entirely legal classifications made for other purposes.").

'[a]n agreement between two or more persons to do or forbear something,'" "'employment' as '[a]n act of employing, or state of being employed,'" and "'employ' as '[t]o make use of the services of; to have or keep at work; to give employment to'") (citing *Webster's New Int'l Dictionary of the English Language* 488, 718 (1923)). This "technique of defining individual words in a vacuum fails to view the entire provision in context." *Chamber of Commerce of U.S. of Am. v. U.S. Dep't of Labor*, 885 F.3d 360, 372 (5th Cir. 2018).

2. The context in which the FAA uses the term "contracts of employment" bolsters the plain meaning of the text—that "contracts of employment" refers only to agreements that purport to create an employer-employee relationship.

Section 1 exempts only *certain* "contracts of employment" from the FAA: those of "seamen, railroad employees, and any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. As this Court has explained, Section 1 was drafted in that manner to preserve other statutory schemes that already contained alternative dispute resolution mechanisms for particular workers. "By the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001). Similarly, "grievance procedures existed for railroad employees under federal law, and the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent." *Id.* Consequently, "[i]t 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 established or developing statutory

dispute resolution schemes covering specific workers." *Id.*

Crucially, the alternative dispute resolution mechanisms established by these other statutes applied only to employees—and *not* independent contractors. For example, the Railway Labor Act expressly invokes the right-of-control test that distinguishes employees from independent contractors at common law: "The term 'employee' as used herein includes every person in the service of a carrier (*subject to its continuing authority to supervise and direct the manner of rendition of service*) who performs any work defined as that of an employee or subordinate official in the orders of the Surface Transportation Board." Railway Labor Act of 1926, May 20, 1926, c. 347, § 1, 44 Stat. 577, 45 U.S.C. § 151 (emphasis added). To avoid any doubt on that score, Congress drafted Section 1 of the FAA to apply only to "contracts of employment of . . . railroad *employees*." 9 U.S.C. § 1 (emphasis added).

Similarly, the Transportation Act provides that "[i]t shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort . . . to avoid any interruption to the operation of any carrier growing out of *any dispute between the carrier and the employees or subordinate officials thereof*." Transportation Act of 1920, § 301, 41 Stat. 469 (emphasis added). Tellingly, the Act imposes this duty not only on employees but also "agents" of the carrier—a term capacious enough to include independent contractors—yet limits the scope of the duty to disputes between "carrier[s] and the[ir] employees"—*not* agents or independent contractors.

The list goes on: The Federal Employers' Liability Act states that "every common carrier by railroad . . .

shall be liable in damages to any person suffering injury *while he is employed by such carrier*." Apr. 22, 1908, c. 149, § 1, 35 Stat. 65, 45 U.S.C. § 51 (emphasis added). The Jones Act provides that "any seaman who shall suffer personal injury *in the course of his employment* may, at his election, maintain an action for damages at law . . . and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply." June 5, 1920, c. 250, § 33, 66 Stat. 988, 1007, 46 U.S.C. § 30104 (emphasis added). And the Shipping Commissioners Act of 1872 commands that "every shipping-commissioner shall hear and decide any question whatsoever between a master, consignee, agent, or owner, and any of his crew, which both parties agree in writing to submit to him." June 7, 1872, c. 322, § 25, 17 Stat. 262, 267.

In short, although the First Circuit speculated that it would have been "strange" for Congress to draw a distinction in Section 1 between employees and independent contractors because both categories of workers "play the same necessary role in the free flow of goods," J.A. 181–82, Congress drew precisely that distinction in numerous contemporaneous statutes addressing alternative dispute resolution in the transportation sector, and the Section 1 exemption was drafted to preserve those statutes.

Because the "enumerated categories of workers" include only employees, the "other class of workers" addressed in Section 1's residual clause should similarly be limited to employees. *See Circuit City*, 532 U.S. at 114–15, 121 ("The wording of § 1 calls for the application of the maxim *ejusdem generis*"; thus, the residual clause—"any other class of workers engaged in foreign or interstate commerce"—"should be read to

give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it."). Consequently, it would make little sense to read the term "contracts of employment" to include independent contractor agreements—contracts those workers would not have signed.

3. This Court's two prior cases interpreting the Section 1 exemption further confirm this interpretation of "contracts of employment." In *Circuit City*, for example, the Court rejected the proposition that the term "contracts of employment of . . . any other class of workers engaged in foreign or interstate commerce" included *all* such workers, instead holding that "Section 1 exempts from the FAA only contracts of employment of *transportation* workers." 532 U.S. at 119, 121 (emphasis added). As the Court explained, the "proarbitration purposes of the FAA . . . compel that the § 1 exclusion provision be afforded a narrow construction." *Circuit City*, 532 U.S. at 115, 118. "[T]he fact that the provision is contained in a statute that 'seeks broadly to overcome judicial hostility to arbitration agreements'" demands a "precise reading of a provision that exempts contracts from the FAA's coverage." *Id.* at 118–19 (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272–73 (1995)). Indeed, "it would be incongruous to adopt . . . a conventional reading of the FAA's coverage in § 2 in order to implement proarbitration policies and an unconventional reading of the reach of § 1 in order to undo the same coverage." *Id.* at 122; *see also Gilmer*, 500 U.S. at 25 n.2 (interpreting the term "contract[] of employment" narrowly to include only the written agreement between the employer and employee and not a related agreement).

4. The First Circuit's broad interpretation of "contracts of employment" would have profound, deleterious consequences for both the trucking industry and the wider economy, upsetting reliance interests, depriving transportation workers of efficient dispute resolution, and increasing the cost of business in a field that touches every sector of the American economy. These are the very consequences the FAA is designed to avoid.

Independent contractors are a large and important part of the interstate trucking industry. Because "[d]emand for a motor carrier's services may fluctuate seasonally or day by day," independent contractors are critical to "[k]eeping expensive equipment operating at capacity, and avoiding the waste of resources attendant upon empty backruns and idleness." *Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys.*, 423 U.S. 28, 35 (1975). As a result, for decades "[c]arriers . . . have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands." *Am. Trucking Ass'n v. United States*, 344 U.S. 298, 303 (1953).

Today, more than half a million trucks are primarily operated by independent contractors. *See* U.S. Census Bureau, *2002 Vehicle Inventory and Use Survey* 15, 39 (Dec. 2004), http://www.census.gov/prod/ec02/ec02tv-us.pdf. Some of these independent contractors operate as sole proprietorships, some (like respondent) as small independent businesses, and others as larger corporations in which the owner who executes the independent contractor agreement does not personally perform any of the work under the agreement, but rather hires others to do so. Indeed, New Prime began as a single-truck operation and grew into an industry leader. *See* Prime

Inc. Company History, http://www.primeinc.com/company-history.

Although some independent contractors may find advantage in a rule that refuses to enforce their agreements to arbitrate, it is just as likely that such a rule would hurt those workers. The drafters of the FAA recognized that "[t]he settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests as well as to individuals." S. Rep. No. 68-536 at 3 (1924). But the First Circuit's rule would deprive all independent contractors engaged in transportation of a cost-effective means of resolving their disputes, instead forcing them to submit to a judicial process that is often "slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U.S. at 348. For many such individuals and small businesses, the cost of litigation in a judicial forum is prohibitive. For these independent contractors, "it looks like arbitration—or nothing." Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J. L. Reform 783, 792 (2008).

B. "Contracts Of Employment" Must Be Identified By The Terms Of The Contract Alone

In determining whether a particular agreement is a "contract of employment" for purposes of Section 1, the FAA compels a factfinder to take a "categorical approach that focuses solely on the words of the contract and the definition of the relevant category." *In re Swift Transp. Co.*, 830 F.3d at 920 (Ikuta, J., dissenting); *contra* J.A. 151 (district court ordering "factual discovery on the threshold question of the plaintiff's status as an employee or independent contractor"). If

the relationship described in the contract is that of an independent contractor, then the Section 1 exemption does not apply.

As noted above, Section 1 provides that "nothing herein contained shall apply to *contracts of employment*." 9 U.S.C. § 1 (emphasis added). The object of that sentence is the contract itself, not the de facto relationship between the parties. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 n.9 (1967) (noting that certain "*categories of contracts* otherwise within the Arbitration Act" are excluded under Section 1) (emphasis added). Had Congress meant for the Section 1 exemption to turn on the nature of parties' interactions, rather than the legal relationship described in their contract, it would have used far different language—just as it did in the very next section of the FAA. Unlike Section 1, Section 2 provides that "[a] written provision in any maritime transaction or a contract *evidencing a transaction* involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2 (emphasis added). It is this additional language in Section 2—"evidencing a transaction"—that authorizes a court to look beyond the four corners of the contract to the economic realities of the parties' interactions.

As the Court explained in *Allied-Bruce*, "'evidencing a transaction' mean[s] . . . that the transaction (that the contract 'evidences') must turn out, *in fact*, to have involved interstate commerce." 513 U.S. at 277 (emphasis in original). In reaching this decision, the Court relied on *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198 (1956), which concluded that a contract did not "evidence 'a transaction involving commerce' within the meaning of § 2 of the Act"

because "[t]here [wa]s no showing that petitioner *while performing his duties under the employment contract* was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce." *Id.* at 200–01 (emphasis added).

Reading the term "contracts of employment" in Section 1 to require the same inquiry into the economic realities of the parties' relationship, as the district court did below, would ignore this important textual distinction, rendering the "evidencing a transaction" language in Section 2—critical to this Court's holdings in *Bernhardt* and *Allied-Bruce*—mere surplusage. *See Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."). It also would undermine the FAA for several other reasons:

First, in the context of a misclassification suit (like this one), the employment status of the worker is the merits question at issue; once it is determined whether the worker is an employee or independent contractor, there is often nothing left to adjudicate. Thus, "requiring the parties to litigate the underlying substance of [a putative employee's] claim[s]" as part of the Section 1 inquiry "risks depriving [the defendant] of the benefits of its contract" and destroying the arbitration agreement. *In re Swift*, 830 F.3d at 920 (Ikuta, J., dissenting). Such an approach would contravene this Court's admonition that, "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claim." *AT&T Techs.*, 475 U.S. at 649.

Second, inquiring into the factual relationship between the parties under Section 1 could yield different results under the same contract. Although two workers may have signed the same independent contractor agreement, one may be compelled to arbitrate his claims whereas the other may not, based solely on the evidence of their interactions with the putative employer. In fact, the *same worker* may be compelled to arbitrate at one point in time, but allowed to proceed in court at another point in time, if his relationship with the putative employer is found to have evolved in the interim.

Third, an interpretation of Section 1 that requires a factfinder to evaluate the parties' underlying relationship would create countless complexities every time a putative employer moves to compel arbitration. "There is no question that the common-law agency test makes for difficult line drawing," *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 509 (D.C. Cir. 2009), and this Court has recognized that "[t]here are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor." *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968). Requiring a court or arbitrator to undertake this analysis simply to determine whether a dispute should be compelled to arbitration would create "considerable complexity and uncertainty" that "would call into doubt the efficacy of alternative dispute resolution procedures" and "undermin[e] the FAA's proarbitation purposes [by] 'breeding litigation from a statute that seeks to avoid it.'" *Circuit City*, 532 U.S. at 123 (quoting *Allied-Bruce*, 513 U.S. at 275).

Instead, applicability of the Section 1 exemption should be "clear on the face of the contract" and "require[] only the examination of its terms." *In re Swift*, 830 F.3d at 920 (Ikuta, J., dissenting).

C. Respondent's Operating Agreements Are Not "Contracts Of Employment"

Should this Court decide to adjudicate the applicability of the Section 1 exemption to the claims at issue here, rather than delegate that question to an arbitrator, it should hold that respondent's Independent Contractor Operating Agreements are not contracts of employment.

Because Congress did not articulate a specific meaning of the term "contracts of employment" in the FAA, "the conventional master-servant relationship as understood by common-law agency doctrine" applies. *Darden*, 503 U.S. at 322–23. "At common law the relevant factors defining the master-servant relationship focus on the master's control over the servant." *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003) (citing Restatement (Second) of Agency § 220(1) (1933)). These factors include, *inter alia*, "the extent of control which . . . the master may exercise over the details of the work," "whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work," and "the method of payment, whether by the time or by the job." Restatement (Second) of Agency § 220(2) (1933).

Under these common-law principles, the Operating Agreements—contractual arrangements between New Prime, Inc. and Hallmark Trucking LLC—

plainly set forth an independent contractor relationship. In addition to being captioned "Independent Contractor Operating Agreements," the contracts declare in no uncertain terms that their purpose is "to establish an independent contractor relationship at all times." J.A. 65; *see also id.* at 86. And the Operating Agreements' terms support that characterization. They provide respondent with broad control over the details of his work, stating that he "shall determine the means and methods of performance of all transportation services undertaken under the terms of this Agreement, including driving times and delivery routes." J.A. 86; *see also id.* at 65. They permit respondent either to "drive the Equipment Yourself," "employ . . . drivers for the Equipment," or "lease drivers for the Equipment." J.A. 70; *id.* at 91. They permit respondent to "refuse to haul any load offered to [him] by [New] Prime." J.A. 65; *id.* at 86. And they expressly reserve to respondent "the right to provide services for another carrier during the term of th[e] Agreement[s]." *Id.* Respondent also supplies the instrumentalities of work under the Independent Contractor Operating Agreements: "You are willing to lease the following-described tractor (the 'Equipment') to Prime for the purpose of hauling freight pursuant to the terms and conditions of the Agreement." J.A. 64; *id.* at 85. And respondent is paid by the job, rather than time worked. *See* J.A. 65–66; *id.* at 86–87.

Such terms are the hallmarks of an independent contractor agreement, not a "contract of employment."

CONCLUSION

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

Respectfully submitted.

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