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IN THE SUPREME COURT OF THE UNITED STATES
- - - - -
NEW PRIME INC.,)
Petitioner,)
v.) No. 17-340
DOMINIC OLIVEIRA,)
Respondent.)
- - - - -

Washington, D.C.

Wednesday, October 3, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:09 a.m.

APPEARANCES:
THEODORE J. BOUTROUS, JR., ESQ., Los Angeles, California; on behalf of the Petitioner.
JENNIFER D. BENNETT, ESQ., Oakland, California; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 17-340, New Prime versus
5 Oliveira.

6 Mr. Boutrous.

7 ORAL ARGUMENT OF THEODORE J. BOUTROUS, JR.

8 ON BEHALF OF THE PETITIONER

9 MR. BOUTROUS: Mr. Chief Justice, and
10 may it please the Court:

11 The First Circuit held that
12 independent contractor agreements are contracts
13 of employment and, therefore, they were exempt
14 from the Federal Arbitration Act. This reading
15 of Section 1's exemption is contrary to the
16 plain meaning of the statute and its structure,
17 purpose, history, and context.

18 This Court, for many years going back
19 to before when the Federal Arbitration Act was
20 enacted, has said over and over again that if
21 Congress uses words like "employment" or
22 "employee" or "employer" in a statute without
23 further helpful definition, it intends for the
24 common law agency rules to govern that govern
25 an employer and employee relationship.

1 In the Section 1 exemption, Congress
2 did not define or suggest it was coming up with
3 a new, creative interpretation of the word
4 "employment" or "employees," which was also
5 used in that clause. The First Circuit's
6 decision --

7 JUSTICE SOTOMAYOR: How about the word
8 "work" -- "worker" in the very clause? Shall
9 apply to contracts of employment of seamen,
10 railroad employees, or any other class of
11 workers engaged in foreign or interstate
12 commerce.

13 Congress didn't use the word
14 "employees" if it meant employees. It used a
15 much broader term, "workers."

16 MR. BOUTROUS: But it --

17 JUSTICE SOTOMAYOR: Shouldn't that
18 inform what it meant by "contract of
19 employment"?

20 MR. BOUTROUS: I think it does, Your
21 Honor. A contract of employment of a worker.
22 So, if the worker had a different type of
23 contract, a contract that's an independent
24 contractor agreement, it would fall squarely
25 outside the statute.

1 JUSTICE SOTOMAYOR: No. But it said
2 it shall apply to any other class of workers,
3 not employees. It used a much broader term.

4 MR. BOUTROUS: It's -- Your Honor,
5 it's a residual clause that follows contracts
6 of employment of any other class of worker.

7 JUSTICE SOTOMAYOR: But what we're
8 trying to decide is what employment --
9 "contract of employment" means. And if it
10 meant only employees, Congress naturally, I
11 would assume, would have used the word "any
12 other class of employees," but instead it chose
13 a much broader word, "workers."

14 MR. BOUTROUS: Well, Your Honor, I
15 think, as we have -- have argued, the fact that
16 the railway -- railroad employees is also -- is
17 mentioned right before that, seamen, which are
18 traditionally common law master-servant
19 employees, demonstrates the --

20 JUSTICE SOTOMAYOR: Well, except your
21 adversary has pointed out that under the Seamen
22 Act, it covered people who were not contracts
23 of -- seamen are not just people who are
24 employees; it also is the tugboat operator
25 who's on the boat guiding it. It's other

1 people who are not simply employees.

2 MR. BOUTROUS: But Congress, just five
3 years earlier in the Jones Act, defined seamen
4 under the Jones Act as actions in the course of
5 their employment, and as employees, this
6 Court's Chandris decision also uses the common
7 law definition of substantial connection.

8 JUSTICE GINSBURG: What -- what do you
9 make of the other side that says in the seamen
10 category, the -- the ship's surgeon, the pilot
11 qualify as seamen who are outside the Federal
12 Arbitration Act, even though they're
13 independent contractors, not common law
14 employees?

15 MR. BOUTROUS: Justice Ginsburg, I
16 think the -- the physician example is a good
17 one. The case that has been cited by the
18 Respondent didn't involve a question of
19 independent contractor or anything like that.
20 It was -- the question was could the captain,
21 basically, override the Hippocratic oath in
22 terms of the physician exercising his
23 independent judgment.

24 And I don't think the Court has to
25 determine whether every seaman is -- is an

1 employee or not. The question is whether they
2 had a contract of employment.

3 And under this Court's decision in
4 Circuit City, the Court emphasized that the
5 exemption to the Federal Arbitration Act for
6 contracts of employment should be given a
7 narrow construction and a precise reading in
8 order to defer to the pro-arbitration policies
9 of the Federal Arbitration Act.

10 JUSTICE GINSBURG: More narrow in the
11 sense that it was limited to transportation
12 workers?

13 MR. BOUTROUS: In -- in that case,
14 yes, Your Honor, that was -- that was the
15 issue. But the overall thrust, if -- on page
16 120 to 121 of Circuit City, the Court in
17 talking about seamen, railroad employees, air
18 carrier -- the air carrier employees who were
19 added to the Railway Labor Act in 1935, I
20 believe, this Court said over and over again
21 these were employment relationships, talking
22 about the relationship between employees and
23 employers. So this Court in Circuit City was
24 clearly contemplating exactly what the statute
25 says, that a contract of employment is a

1 contract of employment. It's not an
2 independent contractor agreement.

3 CHIEF JUSTICE ROBERTS: Well, you keep
4 in your brief -- and the other side raises this
5 concern -- you -- you quickly shift the
6 discussion of -- of contracts of employment to
7 whether or not there's an employee/employer
8 relationship.

9 And simply because someone would be
10 considered or not considered an employee
11 doesn't necessarily answer the question of
12 whether it's a contract of employment. People
13 think naturally of employing an independent
14 contractor.

15 So I don't know why -- the question is
16 not employee/employer. It's employment. And
17 employment in -- in many of these contexts has
18 a broader scope than the existence of an
19 employee/employer relationship.

20 MR. BOUTROUS: It's absolutely true,
21 Your Honor, there are many different
22 definitions of employment out there, but as I
23 said, the Court's decision in National Mutual
24 Insurance Company versus Darden, which we've
25 cited, and in the Community -- Community for

1 Creative Non-violence versus Reid case, which
2 Darden cites, says that Congress -- we're going
3 to assume that when Congress uses "employee" in
4 Darden but in Reid the Court used "employment"
5 and said when those terms are used by Congress,
6 we -- we -- we assume Congress intended for the
7 ordinary terms to be used.

8 And here --

9 JUSTICE SOTOMAYOR: Except the problem
10 is that we don't really assume that because the
11 other side has prevented us -- presented us
12 with multiple cases, many of them in which
13 we've used "contract of employment" to mean
14 employees and independent contractors.

15 It's all contextual, isn't it?

16 MR. BOUTROUS: Not really, Your Honor.
17 Most of the cases, the vast -- I'll give them
18 this: They did a -- they did a good job of
19 cataloguing haphazard, in passing, uses of
20 "contract of employment" where it wasn't an
21 issue. So, in describing a case about an
22 attorney and a client, a court years ago called
23 it a contract of employment.

24 JUSTICE GORSUCH: Well, what do we do
25 about the fact that, less haphazardly, your --

1 your colleague on the other side has documented
2 that back in 1925, which is when the statute
3 was enacted, and I think you'd agree that we
4 have to interpret it as a reasonable reader
5 would have at that time, didn't necessarily
6 distinguish between independent contractors and
7 employees with the degree of care that the law
8 has subsequently come to use.

9 And maybe even that your own client
10 doesn't use. According to its website, it
11 speaks of employing, I believe -- I can't
12 remember the exact variation of the word -- but
13 it treats these independent contractors as
14 employing them.

15 So what do we -- what do we do about
16 the fact that that is at least an available
17 reading still today and that there's a lot of
18 historical evidence at the time of the statute
19 in question that "contract of employment" may
20 have swept more broadly?

21 MR. BOUTROUS: A couple things,
22 Justice Gorsuch. First, I don't agree with
23 Respondent that -- that the independent
24 contractor/contract of employment distinction
25 was not well established.

1 It was deeply embedded. This Court's
2 decision in the Coppage case, which we cite in
3 our reply brief, specifically, rhetorically
4 acts as if everyone would know about this
5 distinction. We cited the Conyngton treatise
6 from 1920. It had an entire chapter called
7 Contracts of Employment, and it made the
8 explicit distinction -- and this Court has over
9 the years cited Mr. Conyngton in its cases --
10 that contracts of employment were different
11 than independent contractor agreements.

12 JUSTICE SOTOMAYOR: But other
13 treatises didn't?

14 MR. BOUTROUS: We cited another
15 treatise, Your Honor.

16 JUSTICE SOTOMAYOR: But other --
17 you're not -- you're not denying other
18 treatises -- other treatises didn't treat them
19 differently?

20 MR. BOUTROUS: Well, they didn't
21 really -- to the extent they addressed the
22 issue, the distinction was well established,
23 Your Honor. Again, Respondent has cited a lot
24 of authorities where it just wasn't a
25 discussion or an issue.

1 In the -- the need for a narrow
2 construction of Section 1 in order to further
3 the pro-arbitration policies of the Act, plus
4 the presumption that Congress meant what it
5 said when it said employment, that means even
6 if we come to a draw or even if they come up
7 with some other authorities, the background
8 presumption is that Congress meant contract of
9 employment.

10 And I think it's also important that
11 it's been nearly 100 years, and no court had
12 ever decided that the words "contracts of
13 employment," which are pretty clear, mean
14 something completely different.

15 The First Circuit and Mr. Oliveira
16 contend that those words mean agreement to
17 work. But if Congress, Justice Sotomayor, had
18 wanted to say agreement to work, it could have
19 said that. It said contracts of employment.

20 So I think it's just very clear from
21 the language of the statute that Congress
22 intended traditional employment agreements to
23 be the subject of the exemption. Clearly --

24 JUSTICE SOTOMAYOR: Can you address
25 the gateway question? Who decides this?

1 MR. BOUTROUS: Your Honor, we believe
2 that the Court's cases like Rent-A-Center and
3 First Options and that talk about whether you
4 have a valid delegation clause, in the first
5 instance, the issue goes to the arbitrator
6 because the parties agree to -- to arbitrate
7 issues concerning what's arbitrable. And
8 that's what this is.

9 We -- we admit, we concede, that it's
10 a bit different than some of the Court's cases,
11 so the -- the Kindred Nurseries case that --
12 that ruled -- where the Court ruled that the
13 Federal Arbitration Act did apply to a
14 contract, one that there was a dispute about
15 formation, and the party there had argued that
16 because there was a dispute as to whether an --
17 an agreement was formed, the FAA hadn't been
18 triggered. But --

19 JUSTICE GINSBURG: But if Section 1
20 puts an entire category, even if you say it's a
21 narrow category, outside the arbitration act
22 entirely, it's exempt from the Federal
23 Arbitration Act, then how can you use the
24 arbitration act? The delegation clause would
25 never come into play because agreements that

1 fit the description, contracts of employment,
2 they're outside the Federal Arbitration Act.
3 That can't -- you can't use the Act to enforce
4 any arbitration.

5 MR. BOUTROUS: Yes, Your Honor, that
6 -- that's Respondent's argument. And -- and I
7 recognize it is a bit different than Kindred
8 Nurseries, but it's -- it's very similar in the
9 sense that the party there was arguing the
10 Federal Arbitration Act isn't triggered because
11 the agreement's invalid from the get-go.

12 But the main point I would like to
13 make on this issue about delegation is we trust
14 courts too. Our main concern about what the
15 district court did originally was to -- to rule
16 that correct -- first ruled correctly that
17 contracts of -- this was not a contract of
18 employment, so the -- that issue needed to be
19 looked at.

20 And -- but then the court said there
21 would be discovery and then a trial to
22 determine whether the exemption applied. And
23 we respectfully submit that the -- if a -- if a
24 court -- whoever decides this, an arbitrator or
25 a court, it should be done based on the four

1 corners of the contract and based on what the
2 -- whether it's a contract of employment or an
3 independent contractor agreement.

4 JUSTICE GINSBURG: I thought the --
5 the trial handler was supposed to determine
6 whether this was an independent contractor and,
7 therefore, outside the Section 1 exemption?

8 MR. BOUTROUS: Exactly, Your Honor.
9 And -- and our point is that's the really
10 merits of the case. The -- Mr. Oliveira's
11 argument is -- is that in -- in actual fact, he
12 was -- he was an employee in the way the
13 relationship in practice functioned.

14 So that's the merits. So, if we're
15 required to have a trial in federal district
16 court about that issue, and -- and if New Prime
17 prevails and it's determined that he's actually
18 an independent contractor, the right to
19 arbitrate that issue would have basically been
20 defeated.

21 JUSTICE GORSUCH: Mr. Boutrous, you --
22 you moved nicely to the merits, but just so we
23 haven't ignored where we've moved so quickly in
24 response to Justice Ginsburg's question, and I
25 share the same concern, so perhaps you can help

1 me.

2 Before a court can do anything, issue
3 an order under Section 4 compelling
4 arbitration, that's what you want, is an order
5 from the district court compelling arbitration,
6 I would have thought it would have had to
7 satisfy itself that it had the power to issue
8 such an order.

9 And Section 1 has this carve-out. And
10 why isn't it more like a challenge to the
11 delegation provision itself if you want to use
12 Rent-A-Center as your authority, as I believe
13 you do, rather than a challenge to the
14 underlying contract? If we're going to make an
15 analogy, I would have thought the analogy would
16 have worked the other way. Help me.

17 MR. BOUTROUS: I -- I -- I think, Your
18 Honor, I have to say that is another analogy.
19 And it's -- and it's one that -- it's another
20 way the Court could go.

21 But, here, the -- the presumption's
22 kind of been flipped on us. We have an
23 agreement that was in commerce. Everyone
24 agrees with that. It's not a contract of
25 employment. It's an independent contractor

1 agreement.

2 On the face of the Federal Arbitration
3 Act, the district court had jurisdiction. The
4 plaintiff -- Mr. Oliveira is asking for an
5 exception. We agreed that if we had a dispute
6 over an issue, any issue arising from the
7 agreement, it would go to an arbitrator.

8 And so it's not a question of
9 jurisdiction. The federal district court, I
10 think, had the power, inherent power, to stay
11 or specifically -- order specific performance
12 of an agreement, aside from the Federal
13 Arbitration Act. But I do recognize that we're
14 asking on that issue for the Court to take
15 another step.

16 And pivoting back to the merits, on
17 that point, it's the Respondent who's asking
18 for an upheaval. Basically, they argue that
19 every word in the exemption is a surprise word.
20 Contract means agreement. Employment means
21 work or business of any kind. Seamen means
22 everything.

23 And in the Wisconsin Central case from
24 last term, where the question was what does
25 "money" mean, the Court said the government had

1 made a decent case that "money" could be
2 interpreted more broadly. But that wasn't the
3 ordinary usage.

4 And the Court said: Does money -- is
5 it really ordinary to say money means
6 everything? Here, the -- Mr. Oliveira is
7 basically arguing that "contract of employment"
8 means every type of work arranged --

9 CHIEF JUSTICE ROBERTS: Now, but just
10 so you -- saying that the arbitrator will
11 decide arbitrability, there are different
12 degrees of arbitrability. It's one thing to
13 say, for example, if you have an agreement,
14 we'll arbitrate all disputes on the plant
15 floor. And then, you know, the company builds
16 another extension of it and the question is
17 whether it applies there. That's sort of
18 within the four corners of the arbitration
19 agreement.

20 But if the issue is does the Act apply
21 at all, that seems to be on a different order
22 of magnitude. And it seems quite another thing
23 to say that the arbitrator gets to decide
24 whether a court can decide -- compel
25 arbitration at all.

1 MR. BOUTROUS: It is a different
2 thing, Your Honor. And -- and we -- as I said,
3 if the -- if the question is whether a district
4 court would decide this, we'd be happy to have
5 the federal district court interpret the
6 contract or this Court could -- could do it.

7 The contract is an independent
8 contractor agreement on its face. So -- so I
9 -- I do think it is a different inquiry. We --
10 and this Court has never held that interpreting
11 that provision is an arbitrability issue that
12 can be sent up --

13 JUSTICE BREYER: Well, the -- the
14 reason that it's different is that when you
15 decide whether parties have agreed to arbitrate
16 arbitrability, is there an arbitration clause
17 or not, you're looking to their intent in a
18 contract document. When you decide whether
19 there are procedural bars to this arbitration,
20 you're looking to interpret a contract again,
21 which will have the thing there. All right?

22 Here, we are not doing that. We are
23 interpreting a statute. And there is no reason
24 -- well, all right. You see, I mean, it is, it
25 seems to me, very different.

1 As to the general question, if you
2 read this just off the bat, you might think
3 there is a whole category of arbitration called
4 labor arbitration, and labor arbitration even
5 in 1925 and before worked pretty well.

6 And so you might have thought that
7 Congress had in mind we're not talking here
8 about labor arbitration. We're talking about
9 business arbitration. And particularly labor
10 arbitration where we don't have constitutional
11 authority to act because that's what people
12 thought in 1925.

13 And so that is not just a dictionary
14 word. That's saying what they're after is
15 trying to exclude arguments between employees
16 not in interstate commerce, et cetera, and
17 their employers from this statute. The NLRB or
18 its predecessors or early other methods are
19 available for labor arbitration.

20 If you take that as a kind of
21 framework --

22 MR. BOUTROUS: Yes.

23 JUSTICE BREYER: It's hard to do with
24 Circuit City, I grant you. But still --

25 MR. BOUTROUS: I was about to say

1 that, Your Honor.

2 JUSTICE BREYER: Yeah, yeah, yeah, of
3 course. But still Circuit City is -- it says
4 what it says, but it does -- I don't know if we
5 want to go further than -- than necessary.

6 MR. BOUTROUS: Well, Your Honor, and I
7 do think if we look at the -- the dissent in
8 Circuit City, was making the point that this
9 was about labor statutes. But the labor
10 statutes apply to employees, and the unions are
11 bargaining for employees, not for independent
12 contractors.

13 The labor strife and the labor peace
14 issues were employees striking and the battles
15 between the -- the railroads and -- and the --
16 the unions. But our --

17 JUSTICE GINSBURG: What about the
18 argument that the independent contractor status
19 here was a sham, that it was a label rigged to
20 make this person appear on the face, as you
21 said, an independent contractor when, in fact,
22 the -- the -- New Prime calls all the shots,
23 the -- whether you label this driver an
24 independent contractor or an employee, he is
25 subject to New Prime's control as to a lot more

1 than just the result of the work?

2 MR. BOUTROUS: Yeah, Justice
3 Ginsburg --

4 JUSTICE GINSBURG: That argument, that
5 this person, this is a -- a phony label and, in
6 fact, this person is an employee, not an
7 independent contractor?

8 MR. BOUTROUS: We disagree, obviously,
9 on the merits. That's the merits question that
10 would be arbitrated. And if Mr. Oliveira is
11 correct, he'd be entitled to further relief
12 under the Fair Labor Standards Act, which is
13 one of the provisions he's suing under. We --
14 we disagree with that.

15 And -- and the other point, Justice
16 Ginsburg, is that, here, it's undisputed that
17 Mr. Oliveira had the choice, the free -- at his
18 choice could -- to be either an independent
19 contractor or an employee.

20 JUSTICE GINSBURG: But he was told
21 it's your -- he was -- he was told by New
22 Prime's representative, you could be one or the
23 other, but it's to your benefit if you elect
24 the independent contractor format.

25 MR. BOUTROUS: But -- yes, Your Honor,

1 that's what he alleges. But the -- the --
2 there's evidence, some of the amicus briefs
3 talk about this, that independent contractors
4 make, net out, much more in pay. They have
5 freedom and flexibility.

6 And it may be that it didn't turn out
7 well for Mr. Oliveira, and if he's right -- I
8 want to make this clear. The arbitration
9 process needs to be fair. And he would have --
10 Mr. Oliveira and New Prime would put their
11 cases on to an arbitrator. And if he's right,
12 he'll prevail. If New Prime's correct, it will
13 prevail.

14 And these arbitration proceedings can
15 produce significant awards. Multiple people
16 will bring the actions. I -- I've seen it
17 happen with great frequency. There is
18 effective relief.

19 And so the theory that this is a sham,
20 that goes to the -- the merits and to the
21 function and how the relationship was in
22 practice.

23 JUSTICE SOTOMAYOR: On this --

24 CHIEF JUSTICE ROBERTS: Counsel, did I
25 understand -- I've been pondering your answer

1 to the question I asked a while ago. Did I
2 understand you'd be perfectly happy to have a
3 court decide the arbitrability issue here?

4 MR. BOUTROUS: Your Honor, we -- we
5 think that the -- that there's a -- as we've
6 argued, that this falls within Rent-A-Center,
7 maybe one step beyond, but if the Court were to
8 rule that independent contractor agreements are
9 not contracts of employment, but we need a
10 court, either this Court or the district court
11 to decide that, as I said, we trust courts too
12 to make that determination.

13 CHIEF JUSTICE ROBERTS: Well, I must
14 have missed it. I thought there was a lot of
15 fighting over the question of whether a court
16 or an arbitrator should decide the
17 arbitrability in this case. I thought that was
18 the first question presented.

19 MR. BOUTROUS: That -- that is the
20 first question presented. We stand on it, Your
21 Honor. I'm not abandoning it. But the -- the
22 main problem we have with what the district
23 court ordered, the principal problem, was that
24 it was going to be a trial on the main issue,
25 in fact, the issue Justice Ginsburg mentioned,

1 that is this really an independent contractor
2 agreement; is it a contract of employment?

3 The statute focuses on the contract,
4 not on the activities. And so the first step
5 we would respectfully submit, if the Court
6 rejects our argument about arbitrability, would
7 be to rule that this goes back to the district
8 court or this Court rules on -- as a matter of
9 law based on the contract, and then the case,
10 if -- if we're correct that it is an
11 independent contractor agreement, I think it's
12 -- on the undisputed facts, it is, it has all
13 the elements, then we go to arbitration and
14 then we litigate the issue --

15 JUSTICE SOTOMAYOR: Is there any other
16 area of law where we take the party's label,
17 "employee" versus "independent contractor," and
18 give it binding effect? I -- I -- I thought,
19 for virtually every other purpose in tax law,
20 labor law -- I just don't know another area
21 where we take the form of the contract as
22 dispositive of a legal issue, of whether you're
23 an employee or an independent contractor?

24 MR. BOUTROUS: Your Honor, I -- I -- I
25 can't think of one. But here we have the

1 unique circumstance where the statute focuses
2 on the contracts. And as I think Justice
3 Breyer is making the point, this was back in
4 1925 where there was a real sensitivity about
5 commerce power.

6 And so, here, the statute focuses on
7 the contracts. And I go back to Darden and
8 Reid and -- and the 1915 decision that's cited
9 in those cases, Robinson, which I think that
10 tee up --

11 JUSTICE SOTOMAYOR: But that only gets
12 you as far as letting the arbitrator decide
13 whether the arbitrability clause controls. I
14 don't think that gets to the legal
15 responsibility --

16 MR. BOUTROUS: But -- but, Your Honor,
17 in --

18 JUSTICE SOTOMAYOR: -- to the merits
19 question, whether he was an employee or an
20 independent contractor entitled to more pay or
21 not.

22 MR. BOUTROUS: And -- and, Your Honor,
23 I -- I hear what you're saying. We're not
24 arguing that if you just slapped the label
25 "independent contractor" on a contract, game

1 over.

2 The terms of the agreement give
3 Mr. Oliveira the power to work for others, to
4 -- to determine how to do the job. It -- it
5 has all the features of an independent
6 contractor.

7 JUSTICE SOTOMAYOR: I don't want to
8 argue the merits. I'm arguing meaning -- that
9 you can argue.

10 MR. BOUTROUS: Yes.

11 JUSTICE SOTOMAYOR: You argued to the
12 court --

13 MR. BOUTROUS: Yes.

14 JUSTICE SOTOMAYOR: -- and lost on
15 that, on at least the arbitrability.

16 MR. BOUTROUS: Yes. And there -- and
17 -- and on that point, Your Honor, in terms of
18 determining whether it -- it's arbitrable, my
19 only point was that whether it's the arbitrator
20 or the court, the inquiry should be, what is
21 this agreement? Is it a contract of employment
22 on its face, the four corners of the agreement?

23 If -- if it -- if it is, then it's
24 exempt from the Act. If it's an independent
25 contractor agreement, it's subject to the Act.

1 And then the arbitrator would do, Your Honor,
2 what you were suggesting: Probe the arguments,
3 was this a legitimate agreement, what was it,
4 and is Mr. Oliveira entitled to relief?

5 With that, Mr. Chief Justice, I'd like
6 to reserve my time. Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Ms. Bennett.

10 ORAL ARGUMENT OF JENNIFER D. BENNETT
11 ON BEHALF OF THE RESPONDENT

12 MS. BENNETT: Mr. Chief Justice, and
13 may it please the Court:

14 It's black-letter law that statutes
15 are interpreted according to their ordinary,
16 common meaning, not now but at the time they
17 were passed. And there's overwhelming evidence
18 that in 1925, when the Federal Arbitration Act
19 was passed, the words "contract of employment"
20 were a general category for agreements to
21 perform work. They included the agreements of
22 common law servants, as well as independent
23 contractors.

24 Whether you look at statutes, case
25 law, newspaper articles, even actual contracts

1 themselves, the result is the same: The vast
2 majority of sources call independent
3 contractors' agreements to perform work
4 "contracts of employment."

5 And perhaps most relevantly, Congress
6 itself repeatedly used the phrase that way.
7 Congress passed multiple statutes
8 contemporaneous with the FAA that all used the
9 phrase "contracts of employment" to refer to
10 independent contractors' agreements to perform
11 work.

12 Prime has said nothing about these
13 statutes at all. Instead, Prime dismisses the
14 mountain of sources that use the phrase
15 "contracts of employment" to refer to
16 independent contractors' agreements to perform
17 work as people unthinkingly using the term that
18 way.

19 But that's, in fact, precisely the
20 point. Without even thinking about it,
21 everyone, from this Court to Congress, to
22 newspaper articles, to ordinary contract
23 drafters themselves, everyone understood the
24 category "contracts of employment" to include
25 the agreements of independent contractors, as

1 well as other workers. That --

2 JUSTICE ALITO: Does the concept of a
3 -- a contract of employment involving a class
4 of workers -- and Justice Sotomayor focused on
5 the term "workers" -- a class of workers
6 engaged in foreign or interstate commerce,
7 apply to all independent contractors who are
8 engaged to perform some type of work?

9 MS. BENNETT: It would apply to all
10 independent contractors who are engaged in
11 foreign or interstate commerce. And this --
12 this Court has said that the class of workers
13 engaged in foreign or interstate commerce is
14 quite narrow, actually. It's people who are
15 directly involved in transporting goods or so
16 closely associated to it to be assumed to be
17 essentially directly involved.

18 JUSTICE ALITO: So anybody who's
19 involved? It doesn't -- there are no
20 distinctions among the -- the types of
21 independent contractors who might be covered?

22 MS. BENNETT: No, Your Honor. As long
23 as they're a worker, then -- then anybody is --

24 JUSTICE ALITO: For that -- but
25 anybody who does work is a worker?

1 MS. BENNETT: Correct. That's
2 correct, Your Honor. And this makes sense if
3 you look at the historical context and the
4 statutory context when this exemption was
5 enacted.

6 So Circuit City says that the
7 exemption was trying to achieve two goals. The
8 first goal is Congress was trying to avoid
9 conflicts with preexisting dispute resolution
10 statutes. And the preexisting dispute
11 resolution statutes in force at the time define
12 their scope functionally in terms of the work
13 that was performed, not in terms of the
14 worker's employment status.

15 And so, if the exemption depended on a
16 worker's employment status, it would create
17 exactly the kinds of conflicts that Congress
18 was trying to avoid.

19 So, if you look, in fact, at the
20 Transportation Act, which was the statute that
21 governed railroad workers at the time, and if
22 you look, in fact, at every dispute resolution
23 statute that preceded the Transportation Act,
24 they all define the phrase "railroad employees"
25 to mean a worker engaged in the work of the

1 railroad; that is, they defined it based on the
2 work that you did, not your technical
3 employment status.

4 JUSTICE KAGAN: May I -- may I go back
5 to Justice Alito's question --

6 MS. BENNETT: Sure.

7 JUSTICE KAGAN: -- and just give you a
8 hypothetical --

9 MS BENNETT: Sure.

10 JUSTICE KAGAN: -- and say whether
11 your argument includes this too? So suppose
12 that Amazon contracts with FedEx or UPS to ship
13 all its products and they want to send their
14 disputes to arbitration.

15 Does that fall within the Act or does
16 that fall within this exemption?

17 MS. BENNETT: It would not fall within
18 the exemption. It would be subject to the FAA.
19 And the reason for that is because the FAA
20 requires -- applies -- exempts, rather, a class
21 of workers engaged in foreign or interstate
22 commerce, not companies engaged in foreign or
23 interstate commerce. And FedEx isn't --
24 wouldn't be considered a worker. They would be
25 considered a company.

1 And I want to return to what Circuit
2 City said about the goals of this exemption.

3 JUSTICE KAGAN: So -- so --

4 MS. BENNETT: Sorry.

5 JUSTICE KAGAN: -- just give me a
6 little bit more on that.

7 MS. BENNETT: Sure.

8 JUSTICE KAGAN: In -- in every case,
9 we have to figure out whether a worker is
10 involved or a company is involved?

11 MS. BENNETT: That's correct. And in
12 most cases, that won't be difficult. Here, for
13 example, that's not a disputed issue. And I've
14 seen very, very few cases where that is, in
15 fact, a disputed issue.

16 But it's true that if in the rare case
17 where it is, the court would have to figure
18 that out. And that's based on the text of the
19 FAA. The FAA says we exempt these kinds of
20 contracts.

21 And so, if there are questions about
22 whether a contracted issue is the kind of
23 contract that's exempted, then a court has to
24 figure it out to determine whether the FAA
25 applies before applying it.

1 And to return to the goals of the Act
2 expressed in Circuit City, so we have not
3 conflicting with preexisting statutes, and we
4 know that those statutes applied functionally.
5 They applied to people's role in work.

6 And I'll note also on -- on that first
7 goal, even if we interpret those other statutes
8 narrowly to apply solely to common law
9 employees, on Prime's interpretation, the FAA
10 would still conflict with the -- with those
11 other statutes, because even if those other
12 statutes applied only to common law employees,
13 what Prime is saying is the exemption doesn't
14 apply to common law employees. It applies to
15 whatever -- to people whose contracts say they
16 are common law employees, even if they're not.

17 And so you'd have a whole class of
18 people, even on Prime's interpretation, that
19 would be subject both to these alternative --
20 preexisting alternative dispute resolution
21 statutes, as well as the FAA. So anybody whose
22 contract was silent, anybody who was illegally
23 misclassified.

24 And so there would be a conflict even
25 on Prime's own interpretation of these

1 statutes. And, again, we know that these
2 statutes, in fact, were applied functionally.

3 The Historian's brief describes dozens
4 of cases in which the Transportation Act was
5 applied to independent contractors or people
6 working for independent contractors.

7 And -- and the second goal of the
8 statute, as Circuit City explains, beyond these
9 specific conflicts, is that Congress was
10 concerned generally with transportation
11 workers' role in the free flow of goods. The
12 FAA was enacted in the wake of years of labor
13 unrest in the transportation industry that had
14 repeatedly shut down commerce.

15 And I want to note that this labor
16 unrest, Prime says that it was only common law
17 employees of the railroads. That's, in fact,
18 not true.

19 The Shopmen's Strike, which happened
20 just before the FAA was passed, was caused in
21 large part by workers who were not common law
22 servants of the railroads that they were
23 striking against. And so, given these years of
24 labor unrest and the havoc that Congress had
25 seen that people who are not common law

1 servants could wreak, it makes perfect sense
2 that Congress would exempt workers based on
3 their role in the transportation of goods, that
4 is, their ability to shut down commerce, rather
5 than their technical employment status that was
6 listed in their contract.

7 It would make no sense at all for
8 Congress to treat workers who had the same
9 ability to disrupt commerce differently simply
10 because of what their contract said.

11 And I want to note that if we take
12 Prime's interpretation, that would also lead us
13 to absurd results in at least two ways. First,
14 on Prime's interpretation, if a worker's
15 contract is silent, that is, if it doesn't say
16 what your employment status is or not, then it
17 would be impossible to determine whether to
18 apply the contract at all.

19 And, second, if a contract
20 misclassified a worker, illegally misclassified
21 a worker as an independent contractor, then the
22 FAA, unlike any other federal statute, would
23 depend on that illegal misclassification,
24 rather than the actual worker's status.

25 And so we have the text of the

1 statute, the context of the statute, and the
2 absurd results that would result, all leading
3 us, pointing us in the same direction.

4 And on -- quickly just on the first
5 question, I want to note that, I think, as Your
6 Honors understand, in general, we don't apply
7 statutes that don't apply. And so, if a court
8 is going to apply a statute, it has to figure
9 out first whether it applies.

10 JUSTICE GINSBURG: But what of the --

11 CHIEF JUSTICE ROBERTS: Well, I
12 understand -- Justice, please.

13 JUSTICE GINSBURG: What of the
14 Petitioner's argument that, forget about the
15 FAA, that a court has inherent authority to
16 stay a proceeding pending utilization of an
17 alternate dispute resolution mechanism chosen
18 by the parties?

19 MS. BENNETT: Your Honor, as this
20 Court has repeatedly explained, courts have a
21 duty to exercise the jurisdiction that Congress
22 has granted them. The exceptions to that duty
23 are really under exceptional circumstances.

24 And one of those exceptions could be
25 an ongoing proceeding, but there is no ongoing

1 proceeding here. Courts generally don't have
2 the duty -- the authority to just stay a
3 proceeding just because they want to or because
4 there might be some proceeding that happens in
5 the future.

6 And I'll note that Prime did not ask
7 the court to use its inherent authority. Prime
8 solely asked the court to rely on the FAA. And
9 so the court has to decide whether the FAA
10 applies to know whether it can grant Prime's
11 request.

12 CHIEF JUSTICE ROBERTS: Well, I
13 understand your friend on the other side not to
14 care about that. Did I --

15 MS. BENNETT: That -- that is how I
16 understood the argument as well, that's
17 correct.

18 (Laughter.)

19 MS. BENNETT: And I just want to --
20 yes?

21 JUSTICE GORSUCH: Well, while we have
22 you here, you -- you -- in response to Justice
23 Alito and Justice Kagan, you raised a very
24 interesting point about the difference between
25 workers and companies.

1 And similar to the kind of question we
2 have here presented between employees and
3 independent contractors, there are going to be
4 fact issues in either circumstance where a
5 district court's going to have to sort them
6 out.

7 Courts disagree over how summary those
8 procedures should be. Let's say we're just in
9 -- in a world of workers versus companies. How
10 would you expect the district court to sort
11 that out?

12 I mean, the FAA is supposed to resolve
13 these things quickly in a summary fashion.
14 Section 4 says if there's a dispute over
15 whether there is a contract to arbitrate, it's
16 supposed to go to a summary trial, not five
17 years of discovery and all the glories that
18 entails that we're familiar -- all painfully
19 familiar with these days.

20 But how -- how would you advise us to
21 write that portion of the opinion?

22 MS. BENNETT: Your Honor, at first
23 blush, you could look at the contract, and it
24 would only require factual -- any sort of
25 factual inquiry, if there was a dispute about

1 it, you know, say the contract was a subterfuge
2 or the contract doesn't say anything at all.

3 And in the few cases where this has
4 come up, I believe courts have resolved it
5 largely on declarations. And very limited
6 discovery would be needed to determine whether
7 a person performed the work himself.

8 The question would be did the parties
9 contemplate that the individual who is suing
10 performed the work himself -- him or herself,
11 or did they contemplate that it would be a
12 company? And so that inquiry would require
13 very limited discovery, if any at all.

14 JUSTICE GORSUCH: So is it safe to say
15 that we have at least common ground on one
16 thing, maybe a few things today, but at least
17 on this, that the proceedings may not be
18 limited to the form of the document before us
19 but should be summary in nature?

20 MS. BENNETT: Yes, I agree with that,
21 Your Honor. That's correct.

22 JUSTICE ALITO: What do you mean by --
23 what do you mean by "a company"?

24 MS. BENNETT: I mean anything that is
25 not a real person. So, for example, a

1 corporation would -- would be a company.

2 JUSTICE ALITO: A corporation would be
3 a company?

4 MS. BENNETT: Sure.

5 JUSTICE ALITO: What if it's a sole
6 proprietorship?

7 MS. BENNETT: Then the question would
8 be what did the parties contemplate, that the
9 person who owns the proprietorship would
10 perform the work himself? And if that's true,
11 then it would be an agreement to perform work
12 of a transportation worker.

13 If that's not true --

14 JUSTICE ALITO: So some independent --
15 I thought you said all independent contractors
16 would fall within this, provided that they were
17 engaged in foreign or interstate commerce in
18 the sense relevant under the FAA.

19 But now I think you're -- are you
20 modifying that? So are you modifying that?

21 MS. BENNETT: Yes, Your Honor, I'm
22 sorry, I misunderstood the initial question. I
23 was talking about people who would be
24 considered workers.

25 So independent contractors who are

1 businesses would not fall within the exemption.
2 And that's based on the text of the exemption.
3 It has --

4 JUSTICE ALITO: So, if they're
5 businesses, what does that mean? I mean, I've
6 got you on corporations, but beyond that, are
7 we getting into a difficult area?

8 MS. BENNETT: I -- I think the -- the
9 --

10 JUSTICE ALITO: If it's a sole
11 proprietorship, if it's a partnership, but it's
12 -- it's in business.

13 MS. BENNETT: I think it's easiest to
14 approach the question from the other direction,
15 which is to say, was this -- did the parties
16 contemplate that the person with whom they
17 agreed would personally perform the work? And,
18 if so, then it would be an agreement to perform
19 work with a transportation worker.

20 If the parties didn't contemplate that
21 the person who agreed to do the work would
22 personally do it, then it wouldn't fall within
23 the exemption.

24 And so we don't need to decide the
25 exact definition of business; solely just is

1 this an agreement for someone who is engaged in
2 commerce to personally perform the work.

3 JUSTICE KAGAN: But to take one -- an
4 opposite extreme from UPS or FedEx --

5 MS. BENNETT: Sure.

6 JUSTICE KAGAN: -- you know, suppose
7 it's like Joe Smith Truckers, and Joe Smith
8 Truckers is Joe Smith and his brother, and --
9 and the contract was with Joe Smith workers,
10 and he says "my brother will do the work."

11 MS. BENNETT: So, if -- if the parties
12 contemplated that the brother would do the work
13 -- if the brother -- if the brother is the one
14 suing, he's likely not bound by the arbitration
15 agreement at all because he won't have been the
16 one to sign it. The business will have been
17 the one to sign it.

18 If Joe Smith is suing and if -- then
19 the question would be, did the parties
20 contemplate that Joe Smith was agreeing to
21 perform work as a transportation worker, or did
22 the parties contemplate that Joe Smith was
23 agreeing that this company, somebody at this
24 company, would -- would perform work? And I
25 think that would be the question.

1 And this is a really rare -- as this
2 case shows, where it's undisputed, it's a
3 really rare situation in which it would come
4 up. And part of the reason for that is if a
5 company agrees to arbitration, then it's hard
6 to say that any individual who wasn't
7 contemplated in the contract would have agreed
8 to arbitration at all.

9 JUSTICE ALITO: It sort of sounds like
10 what you're saying is that if the person is a
11 real independent contractor, then the person is
12 outside of -- is -- is outside of the
13 exemption, but if the -- if the entity is not a
14 real independent contractor, which is your
15 argument here regarding Mr. Oliveira, it's
16 different.

17 MS. BENNETT: I -- I'm saying if there
18 are individual workers who are independent
19 contractors, and we know there were such
20 workers in 1925 as now, there are individuals
21 who are independent contractors, even if
22 they're bona fide independent contractors, they
23 would be covered within the scope of the
24 exemption.

25 What I'm saying is if there's an

1 agreement that's not of a specific person, a
2 worker, to perform work, then they're outside
3 the scope.

4 And I want to quickly address one
5 point that Prime said. Prime -- Prime says
6 that none of the sources that we have cited are
7 in the context of distinguishing between
8 independent contractors and common law
9 servants. And that's, in fact, not true.

10 We cite dozens of sources that are in
11 that context. In fact, we cited treatise that
12 is about the law of independent contractors.

13 The reason that's not the majority of
14 sources we've cited is because we've also cited
15 dozens of sources in which -- in a bunch of
16 different contexts. And so the overwhelming
17 weight of authority in all of these contexts is
18 that a contract of employment was an agreement
19 to perform work.

20 And we were talking about Wisconsin
21 Central before. What Wisconsin Central says is
22 we look at what the ordinary, common meaning
23 is. And it's very clear that what an ordinary,
24 common person would have understood this
25 exemption to mean in 1925 is that it applied to

1 all agreements to perform work.

2 We don't look at the rare, isolated
3 instance. We look at the overwhelming weight
4 of authority. And that means that the
5 agreement is an agreement to perform work.

6 If there are --

7 JUSTICE ALITO: Suppose you win on the
8 issue of arbitrability, the court says "I'm
9 going to decide whether the exemption applies,"
10 but then you lose on the issue of the
11 interpretation of the exemption, the court says
12 "it doesn't apply to an independent contractor,
13 Mr. Oliveira's an independent contractor;
14 therefore, I'm going to order arbitration."

15 Would the arbitrator then be bound by
16 the determination that he is an independent
17 contractor for purposes of applying the Fair
18 Labor Standards Act?

19 MS. BENNETT: No, Your Honor, for two
20 reasons. First, the -- it would just be an
21 initial decision of who the right decisionmaker
22 is. And if the court held that the right
23 decisionmaker is the arbitrator, then the
24 arbitrator could make that decision.

25 But the second answer is that if a

1 court were to decide the question of -- if the
2 court were to hold that the exemption only
3 applies to common law servants, then it would
4 likely decide that question under the common
5 law. And the Fair Labor Standards Act has a
6 different standard.

7 And so the question on the merits of
8 whether a worker is an employee or an
9 independent contractor is different than the
10 question that would be if the court interpreted
11 the exemption to be limited to common law
12 servants.

13 And on that point, I do want to note
14 that Prime cites, you know, a handful of
15 isolated instances, but, in fact, none of the
16 sources that Prime cites, in fact, support its
17 position. None of those sources say that we
18 look just to the contract to see whether
19 someone is a common law servant.

20 At most, those sources use the phrase
21 "contract of employment" more narrowly than
22 what we would suggest the ordinary meaning is.
23 But none of them say that if there's reality
24 contrary to the contract, we would look at
25 that.

1 And, again, so the -- both the
2 structure of the statute, the text of the
3 statute, and the history, all of those factors
4 mean that, in 1925, the ordinary person would
5 have understood this exemption to apply to all
6 agreements to perform work of transportation
7 workers.

8 If there are no further questions.
9 Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Mr. Boutrous, you have five minutes
13 left.

14 REBUTTAL ARGUMENT OF THEODORE J. BOUTROUS, JR.
15 ON BEHALF OF THE PETITIONER

16 MR. BOUTROUS: Thank you, Mr. Chief
17 Justice.

18 I want to start by saying we agree
19 with Mr. Oliveira's position that a
20 determination that this was an independent
21 contractor agreement and, therefore, could go
22 to arbitration would not bind the arbitrator.
23 Then we'd go to the merits.

24 Since counsel left off with the
25 language and history of the statute, let me

1 just go back to the statute. It says
2 "contracts of employment." And this Court --
3 the Reid case, which is Community for Creative
4 Non-Violence versus Reid, this Court -- this
5 Court said, "Nothing in the text of the work
6 for hire provisions" -- it was the Copyright
7 Act -- "indicates that Congress used the words
8 'employee' and 'employment' to describe
9 anything other than the conventional
10 relationship of an employer and employee."

11 The Court then went on to say that
12 when Congress hasn't put anything in the
13 statute to suggest that -- something else like
14 any worker doing anything -- I'm paraphrasing
15 -- then we look to traditional common law
16 agency principles.

17 On pages 10 and 11 of our brief, we
18 responded to the -- the cases and authorities
19 that -- that Mr. Oliveira cited with, among
20 other things, this Court -- in the Coppage
21 case, the Court declared "does not the ordinary
22 contract of employment include an insistence by
23 the employer that the employee shall agree, as
24 a condition of the employment, that he will not
25 be idle and will not work for whom he pleases

1 but will serve his present employer, and him
2 only, so long as the relationship between them
3 shall continue."

4 JUSTICE GINSBURG: Was it Coppage v.
5 Kansas, shall not join a union? Was that the
6 contract at issue?

7 MR. BOUTROUS: I -- I -- I think so,
8 Your Honor. And it was -- yes, Coppage v.
9 Kansas. And -- and so the Court there was
10 clearly making the very distinction we're
11 talking about, that -- that it was well
12 established that a contract of employment was
13 what most people would think: I have a job. I
14 have an employer. They can tell me what to do.
15 They can tell me when I come to work. They can
16 -- they can order me to perform tasks.

17 That was --

18 JUSTICE GINSBURG: But the kind of
19 contract that was involved in Coppage v. Kansas
20 was outlawed by the -- the National Labor
21 Relations Act, wasn't it?

22 MR. BOUTROUS: Your Honor, the -- I
23 don't know, Your Honor, on that point, but --

24 JUSTICE GINSBURG: Or Norris-LaGuardia
25 before that?

1 MR. BOUTROUS: But -- but the -- the
2 -- the reason we cite it, Your Honor, is that
3 it was well established what a contract of
4 employment was.

5 And -- and -- and the -- the other
6 point I wanted to make was on the alternative
7 dispute resolution provisions that Circuit City
8 talked about. Again, the Court said, with
9 respect to each of them, first of all, Congress
10 with the exemption was not seeking to oust
11 certain parties from arbitration. It was
12 protecting arbitration because there were
13 alternative mechanisms.

14 So the exemption itself is
15 pro-arbitration. And in Circuit City, on page
16 120, 121, with respect to each of the
17 provisions it cited, the Court talked about
18 employment relationships, so with respect to
19 the Transportation Act that -- that counsel
20 mentioned; it talked about the employees under
21 the federal law, cited the Transportation Act;
22 Railway Labor Act, employees; the Shipping
23 Commissioner Act, employers and employees. So
24 this Court and Congress were anticipating the
25 traditional employment relationship based on

1 the language of the statute.

2 And with respect to the scope of the
3 provision, in this case, the independent
4 contractor agreement is between New Prime and
5 the limited liability corporation that
6 Mr. Oliveira formed. So it is an agreement
7 between two businesses.

8 And counsel's saying then we have to
9 look and see how the parties contemplated the
10 arrangement would function. But the agreement
11 itself says that Mr. Oliveira could hire other
12 employees, could work for other entities. It
13 gave him the right to do that. So, from the
14 face of the contract, it -- it gave him all of
15 those -- those rights.

16 And -- and, finally, just with respect
17 to the definition of, you know, who's an
18 employee and who's not, because I do think it's
19 relevant. To divorce -- what -- what counsel
20 -- what Mr. Oliveira did was take the word
21 "contract" and find the broadest definition of
22 contract; and then "employment," and find the
23 broadest definition of that and put them
24 together.

25 We cite Black's Law Dictionary, which

1 says, "A contract of employment," and this --
2 tracking it back to 1927 -- "was an agreement
3 between an employer and an employee that states
4 the terms and conditions of employment."

5 But the broadest, this Court has said,
6 has striking breath -- breadth. The broadest
7 definition in federal law of employees, in the
8 Fair Labor Standards Act, the very provision
9 that Mr. Oliveira is invoking here, and
10 independent contractors are not covered by that
11 definition.

12 So it would be anomalous in the
13 extreme to rule against us on these issues.

14 Thank you very much.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel. The case is submitted.

17 (Whereupon, at 11:58 a.m., the case
18 was submitted.)

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Official - Subject to Review

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