No. 15-2364

UNITED STATES COURT OFAPPEALS
FOR THE FIRST CIRCUIT

DOMINIC OLIVEIRA
On Behalf of Himself and All Others Similarly Situated
Plaintiff-Appellee,

v.

NEW PRIME, INC.,
Defendant-Appellant.

BRIEF OF *AMICUS CURIAE* PROFESSOR RICHARD H. FRANKEL IN SUPPORT OF PLAINTIFF-APPELLEE DOMINIC OLIVIERA

On Appeal from the U.S. District Court for the District of Massachusetts, Case No. 1:15-cv-10603-PBS, Honorable Patti B. Saris, District Judge

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INTRODUCTION AND STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Under Federal Rule of Appellate Procedure 29(b), *amicus curiae* Professor Richard H. Frankel proffers this brief to assist this Court in determining the meaning and scope of Section 1 of the Federal Arbitration Act (FAA) of 1925, 9 U.S.C. § 1. This appeal raises an important question of statutory interpretation that is one of first impression in the federal courts of appeal: whether the FAA's statutory exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" applies to all transportation workers engaged in the channels of commerce, or whether the exemption excludes independent contractors.

Amicus submits that the FAA's text, legislative history, and purposes all support the conclusion that exemption applies to all transportation workers. Congress wrote the § 1 exemption by identifying workers in specific industries, showing that it was concerned with the type of work that a person was doing rather than the worker's status. This view is consistent with how courts interpreted statutes that regulated workers in specific industries around the time of the FAA's enactment in 1925. Additionally, Congress's concern with maintaining consistency

[1] Pursuant to Fed. R. App. P. 29(c)(5), *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* has made any monetary contributions intended to fund the preparation or submission of this brief.

with the scope of regulation in other transportation-specific federal statutes—statutes which were read to cover all workers—show that Congress wanted the § 1 exemption to similarly apply to all workers within the transportation sectors of the economy. That interpretation also furthers the FAA's purposes of creating cost-effective alternatives to litigation and of treating arbitration clauses equally with other contracts.

The United States Department of Labor describes "the misclassification of employees as independent contractors" as "one of the most serious problems facing affected workers, employers and the entire economy."[2] Sadly, much of employers' misclassification is purposeful rather than accidental. By labeling a hired worker as an independent contractor, employers can cut costs because they can bypass important statutory protections for workers. "Misclassified employees often are denied access to critical benefits and protections to which they are entitled," including health benefits, overtime pay, unemployment compensation, family and medical leave, minimum wage protections, and safe workplaces."[3] Studies estimate between 10% and 30% of employers misclassify workers and that millions of

[2] United States Department of Labor, Wage and Hour Division, *Misclassification of Employees as Independent Contractors, available at* https://www.dol.gov/whd/workers/misclassification/ (last visited June 8, 2016).
[3] *Id.*

workers are wrongly labeled as independent contractors.[4] There is "pervasive misclassification in the trucking industry in particular," resulting from industry deregulation and the heavy use of purportedly "self-employed drivers."[5]

Although the problem of using independent contractors to cut costs and avoid compliance with labor and workplace laws is both serious and widespread, it is not new. Before the adoption of the FAA, Congress enacted various industry-specific statutes that were designed to promote labor peace in those industries by protecting workers and by creating specific dispute resolution procedures. In *Circuit City Stores v. Adams*, the U.S. Supreme Court found that Congress exempted transportation workers from the FAA because it already had enacted specific legislation covering transportation sectors such as railroads and maritime shipping. 532 U.S. 105, 120-21 (2001). As this brief discusses, federal laws protecting "seamen," one of the categories of worker specifically enumerated in the § 1 exemption, covered anyone doing the work of a seaman, without regard to the worker's status as a contractor. Thus, if the FAA was intended to respect existing regulation of transportation workers, and if that regulation did not exclude

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[4] National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (July 2015), *available at* http://www.nelp.org/content/uploads/Independent-Contractor-Costs.pdf; Francoise Carré, Economic Policy Institute, *(In)Dependent Contractor Misclassification*, EPI Briefing Paper #403, 11 (June 8, 2015), *available at* http://www.epi.org/files/pdf/87595.pdf.

[5] Economic Policy Institute, *supra* note 4, at 11.

independent contractors, then the FAA's exemption for transportation workers naturally should not exclude independent contractors either.

Other aspects of Act's legislative history and context support this view. Congress's "concern with transportation workers and their necessary role in the free flow of goods" shows a focus on the type of work being performed rather than a worker's status. *Adams*, 532 U.S. at 121. Independent contractors can just as easily disrupt the "free flow of goods" through work stoppages and protests as other workers can, and in fact many labor disputes involve workers labeled as independent contractors who claim to be misclassified.

The text of § 1's exemption, which focuses on specific transportation industries, also supports the conclusion that the exemption applies to any worker performing transportation work. Prior to the FAA's enactment, statutes that regulated workers in specific industries were interpreted to apply to all workers in that industry. For example, the Supreme Court held states that a miners' statute giving a lien to all persons "employed and working in and about the mines" applied to individuals working for contractors or for the mine itself. *Vane v. Newcombe*, 132 U.S. 220, 234-25 (1889). In light of that understanding at the time, the most natural reading of the statutory text is that it applies based on whether the person is performing transportation work, not based on the worker's status.

Amicus Curiae Professor Richard H. Frankel has an interest in this case. He has an interest in the interpretation and application of the Federal Arbitration Act because of his background as an arbitration scholar. Professor Frankel is an Associate Professor of Law at the Drexel University Thomas R. Kline School of Law. He has written several articles on the Federal Arbitration Act and on arbitration agreements, and is a co-author of the treatise, "Consumer Arbitration Agreements" (NCLC 7th ed. 2014).[6] He also has testified before the U.S. Congress and the Consumer Financial Bureau regarding arbitration. He has authored *amicus curiae* briefs on behalf of organizations, law professors and arbitrators in several arbitration cases before the U.S. Supreme Court.[7] Appellee has consented to the filing of an *amicus* brief but Appellant has not consented. Therefore, *amicus* seeks permission to file via motion, which accompanies this proposed brief.

[6] *See, e.g.*, Richard Frankel, *The Arbitration Clause as Super Contract*, 91 Wash. U. L. Rev. 531 (2014); Richard Frankel, Concepcion *and Mis*-Concepcion: *Why Unconscionability Survives the Supreme Court's Arbitration Jurisprudence*, 17 J. Disp. Resol. 225 (2014); *Bootstraps on the Ground: A Response to Professor Leslie*, 94 Tex. L. Rev. See Also _ (forthcoming 2016).

[7] *See, e.g.*, Br. of Arbitration and Contracts Scholars as *Amici Curiae* in Support of Respondents, *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); Br. of Professional Arbitrators and Arbitration Scholars as *Amici Curiae* in Support of Respondents, *Am. Express Co. v. Italian Colors Restaurant, Inc.*, 133 S. Ct. 2304 (2013); Br. of the National Consumer Law Center and Consumer Action as *Amici Curiae* Supporting Respondents, *Rent-a-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010).

ARGUMENT

Section 1's Exemption Applies to All Transportation Workers and Does Not Exclude Independent Contractors.

Section 1 of the FAA expressly states that the Act 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. Several federal courts have treated § 1 as excluding independent contractors. *See, e.g.*, *Carney v. JNJ Express, Inc.*, 10 F. Supp. 3d 848, 852-53 (W.D. Tenn. 2014); *Villalpando v. Transguard Ins. Co. of Am.*, 17 F. Supp. 3d 969, 982 (N.D. Cal. 2014); *Owner-Operator Independent Drivers, Inc. v. C.R. England, Inc.*, 325 F. Supp. 2d 1252, 1258 (D. Utah 2004); *Gagnon v. Serv. Trucking, Inc.*, 266 F. Supp. 2d 1361, 1363-65 (M.D. Fla. 2003). However, in all of these cases, the court simply assumed that the exemption excludes independent contractors, without analyzing whether the FAA's text, history and purpose support such a result. As explained below, the conclusion that § 1's exemption applies to all transportation workers is supported by the Act's text, legislative history, and purposes and policy objectives.

A. The FAA's Plain Language Does Not Exclude Independent Contractors.

Any question of statutory interpretation starts with the Act's language. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). The meaning of statutory language "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.*

Section 1's language centers on individuals doing a specific type of work. The language focuses on categories of transportation work—railroad work, maritime work, shipping work—rather than on the status of the person doing the work. In its only decision interpreting the § 1 exemption, the Supreme Court found that the exemption was focused contracts of employment for "specific categories of workers" such as "seamen," "railroad employees," and "any other class of workers" engaged in transportation activities. *Adams*, 532 U.S. at 114. Because the plain language centers on the type of work being performed rather than the status of the person performing it, the exemption should apply to all transportation workers and should not exclude independent contractors.

That focus on specific industries and types of work is significant when considered in the context of the time the FAA was adopted. States first started adopting statutes to protect workers or provide workers' compensation in the late Nineteenth and early Twentieth Centuries. *See* Richard Carlson, *Why the Law Still Can't Tell an Employee When it Sees One and How it Should Stop Trying*, 22 Berkeley J. Emp. & Labor L. 295, 306-10 (2001). At the time, the distinction between independent contractors and other workers was relatively well-known, as it derived from master-servant law for determining when a master was liable for a servant's negligence. *See id.* at 302-06. When states first began adopting worker-protective statutes in the wake of the industrial revolution, they employed a variety

of different terms with different meanings and scope. Statutes used terms like "workman," "laborer," "wage earner," "operative," or "hireling." *See id.* These terms were not synonymous with "employee," and may have had a broader or narrower reach. Thus, just because a statute sought to protect workers does not mean that it excluded independent contractors.

In particular, laws that covered a particular industry or category of worker applied to all workers in that area. With respect to those statutes, "[i]f the worker did a particular type of work or worked in a particular industry, then he enjoyed the benefit of the law's protection without regard to the extent of the employer's control over the performance of the work." *Id.* at 308.

The Supreme Court's decision in *Vane v. Newcombe*, issued prior to the FAA's enactment, is instructive in explaining how statutes that covered particular classes of workers included contractors. 162 U.S. 220, 233-35 (1889). There, the Court compared an Indiana statute giving a lien against any corporation "to its employees, for all work and labor done and performed by them for the corporation," with an Indiana statute giving a lien on coal mines and mining machinery to "the miners and other persons employed and working in and about the mines." *Id.* at 233-34. The Court found that the former statute, which covered employees doing any work for a corporation, without identifying any particular type of work, excluded independent contractors. *Id.* at 234. It found that under the

latter statute, which was specific to mining, the mine owners would be obligated not just to their own employees, but to anyone "employed by contractors doing work under contract for the owners of the mine." *Id.* at 235; *see also id.* at 236 (citing *Munger v. Lenroot*, 32 Wis. 541 (1873), in which the Wisconsin Supreme Court held that wage statute for logging workers covered those employed by the logging company and those hired by contractors). Congress may have been aware of the Supreme Court's interpretation at the time it enacted the FAA. *See Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent."). But even if not, the case demonstrates the general principle that statutes written to protect specific classes of workers were understood at that time to protect anyone working in that area, regardless of their status.

Appellant New Prime, Inc. ("New Prime") appears to rely solely on the fact that § 1 uses the phrase "contracts of employment" to argue that the exemption excludes independent contractors. Appellant's Br. 7. Appellees explain in extensive detail why "contracts of employment" covers independent contractors. Appellees' Br. 12-19. *Amicus* will not repeat those arguments but wishes to add only two short points. First, the term "employment" was understood at the time of the FAA's enactment as a general term that covered working relations with independent contractors. Indeed, contemporary legal sources defined an

"independent contractor" as someone who engaged in "independent employment." *See, e.g.*, *Pierson v. Chicago R.I. & P. Ry. Co.*, 170 F. 271, 274 (8th Cir. 1909) (citing both a treatise and cases); *Kreipke v. Comm'r of Internal Revenue*, 32 F.2d 594, 596 (4th Cir. 1929) (citing treatise and case law).

Second, while zeroing in on the phrase, "contracts of employment," New Prime overlooks the exemption's residual clause. It is worth noting that Congress exempted "any other class of workers" engaged in the channels of commerce, not "any other class of employees." The use of the term "worker" rather than "employee" reinforces that Congress was focused on the type of work being performed rather than on the status of the worker. It suggests that Congress intended to exempt anyone working in the transportation sector, not that Congress was focused on whether or not that worker was a contractor.[8]

[8] Although the exemption also mentions "railroad employees," 9 U.S.C. § 1, this hardly supports the conclusion that the entire exemption is limited only to employees. A statutory term is known "by the company it keeps." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Here, the terms immediately preceding and immediately following "railroad employees" are not limited to employees. Whether workers qualify as "seamen," as explained in Section B.2, *infra*, is determined by the type of work they do rather than by who hired them to do it. And the term "any other class of workers" similarly signifies a broader reach than just employees. The phrase "railroad employees" should be understood in that context. Indeed, in the period preceding the adoption of the FAA, courts addressing worker protection statutes that used the term "employee" alongside other categories of workers defined the term "employee" by reference to those other categories covered by the statute. *See, e.g.*, *In re New York Locomotive Works*, 26 N.Y.S. 209, 211-12 (N.Y. Supreme Ct. 1893) (finding that in a statute covering "employees, operatives, and laborers" the meaning of "employee" was determined

Accordingly, the text of § 1's exemption, especially when considered in the context of its time of enactment, supports the conclusion that the exemption covers transportation workers, regardless of whether they would be classified as independent contractors.

B. The Legislative History and Historical Context Surrounding the FAA's Enactment Show that Congress Did Not Intend to Exclude Independent Contractors from § 1's Exemption.

Both the legislative history of the FAA itself and the historical context surrounding the adoption of the Act reinforce that § 1's exemption covers all transportation workers, regardless of status, and that it does not specifically exclude independent contractors. This is true for three reasons. First, the legislative history of the adoption of the § 1 exemption shows that Congress wanted to exempt all transportation workers. Second, the history of regulation of "seamen," a category of worker specifically enumerated in § 1, shows that Congress protected anyone working as a seaman, regardless of the person's status. Third, Congress's interest in preserving the free flow of goods applies to all transportation workers.

1. The Legislative History of the Exemption Indicates that It Was Not Intended to Exclude Independent Contractors.

The amendment that ultimately became the § 1 exemption was proposed in two different forms. Both were proposed with the same purpose and with the

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in part by the term "laborer," and therefore did not cover salaried managers and administrators).

intention of having the same meaning. Importantly, one proposal used the phrase "contracts of employment" while the other did not, suggesting that the phrase was not intended to have legally significant meaning, or envisioned as a limitation to only certain classes of workers.

The original version of the FAA that a committee of the American Bar Association drafted and submitted in Congress in 1922 did not contain the current exemption for transportation workers. That version of the bill drew opposition from unions and labor leaders. The opposition was expressed most publicly by Andrew Furuseth, the President of the International Seaman's Union, who worried about arbitration clauses being imposed in adhesive contracts with workers. *See* Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. & Labor L. 282, 284 (1996).

In a Senate Hearing on January 31, 1923, W.H.H. Piatt, the chairman of the ABA committee that drafted the bill, raised that "there has been an objection raised against" the bill by the head of the seaman's union, Mr. Furuseth. *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. On the Judiciary*, 67th Cong., 4th Sess., 9 (1923) ("*Senate Hearing*"). Mr.

Piatt proposed language to address the objection, language that used the term "worker" and did not contain any reference to "employee:"

> It was not the intention of this bill to make an industrial arbitration in any sense; and so I suggest that in as far as the committee is concerned, if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, 'but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce.'

Id.

Importantly, Mr. Piatt's proposal does not include the phrase "contracts of employment," nor does it mention "railroad employees." Rather, it was broader, covering "any class of workers" engaged in the channels of commerce without limitation. Further, his statements that the bill would not require "an industrial arbitration in any sense" reinforces the amendment's focus on particular industries—and "any class of workers" within those industries—not on distinguishing workers based on their status.

Immediately following Mr. Piatt's testimony on this specific point, Senator Thomas Sterling submitted a letter from Secretary of Commerce Herbert Hoover. *Id.* at 14. In that letter, Secretary Hoover expressed his general support for the bill, and also responded to the same labor opposition that Mr. Piatt had, proposing language that was ultimately added to § 1:

> If objection appears to the inclusion of workers' contracts in the law's scheme, it might well be amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad

> employees, or any other class of workers engaged in interstate or foreign commerce.'

Id.[9] While Secretary Hoover's letter refers to "contracts of employment," there is no indication that he intended to create a different exemption than that proposed by Mr. Piatt and his ABA Committee that drafted the bill. Both were responding to the same objection and addressed it in a similar way. Nor is there any indication that Secretary Hoover was intending to usurp or supplant Mr. Piatt and his committee, the very people who drafted the bill and brought it to Congress. Moreover, Secretary Hoover's preface that he was responding to objections about "the inclusion of workers' contracts" suggests that he, like Mr. Piatt, thought the amendment would place all transportation workers outside of the FAA's scope. By all indications, Mr. Piatt and Secretary Hoover had the same purpose and objective in mind. There is no reason to think that Secretary Hoover purposely tried to limit the exemption to apply to some "workers' contracts" but not others.[10]

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[9] The amendment received little, if any, discussion outside of these passages. When hearings were next held in 1924, the current exemption was written into § 1. *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomm. of the Comms. of the Judiciary*, 68th Cong., 1st Sess., 1 (1924). The issue received no further discussion prior to the law's enactment in 1925.

[10] While the Supreme Court placed little weight on this legislative history when deciding whether § 1's exemption applied to all contracts of employment or only to contracts of employment in transportation-related industries, *Adams* 532 U.S. at 119-20, its reasoning demonstrates why that legislative history is relevant to the question presented here. In *Adams*, the Court found that it need not consider the legislative history because the text was clear and pointed in the opposite direction.

2. The Protections Provided to Other Classes of Transportation Workers at the Time of the FAA's Enactment, Such as Seamen, Covered Independent Contractors.

Second, the fact that other federal laws Congress enacted regarding transportation workers around the time of the FAA's enactment covered independent contractors bolsters the conclusion that Congress also intended that § 1's exemption for transportation workers would cover independent contractors. Specifically, statutes pertaining to "seamen," one of the categories of workers specifically enumerated in § 1, focused on whether an individual performed the work of a seaman, not on whether the person was a contractor. In *Adams*, the Supreme Court explained that "[b]y the time the FAA was passed, Congress already had enacted legislation governing disputes with seamen, and similar legislation governing railroad workers." 532 U.S. at 121. It then concluded that "[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

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Id. at 119. Here, the text supports the legislative history and both point toward the same conclusion. Further, the Court discounted the Senate Hearing testimony on the ground that it conflicted with other historical evidence showing why Congress would have wanted to specifically exclude transportation workers. *Id.* at 121. Here, however, the historical evidence showing an interest in excluding transportation industries and the discussions about § 1 at the Senate Hearing are in harmony with one another and support the conclusion that Congress intended to exempt all transportation workers.

established or developing statutory dispute resolution schemes covering specific workers."

The statutes and regulations governing railroad workers and seamen did not exclude independent contractors, but covered all workers performing a specific type of work. As Appellees have explained, federal railroad legislation covered independent contractors. Appellees' Br. 20-23.

Similarly, statutory protections for "seamen," including the Merchant Marine Act of 1920, 41 Stat. 988, focus on whether an individual performs the work of a seaman rather than on whether or not the person is an independent contractor. Specifically, the Act gave seamen the right to demand a portion of their earned wages when a ship docked in port. 41 Stat. at 1006. The FAA's legislative history shows that § 1's exemption was intended to cover wage disputes with seamen because those disputes were subject to admiralty jurisdiction. In an early decision addressing § 1's exemption, the Third Circuit addressed this legislative history, explaining that the FAA was drafted by an ABA committee, and that in a 1923 ABA report, that committee stated:

> Objections to the bill were urged by Mr. Andrew Furuseth as representing the Seamen's Union, Mr. Furuseth taking the position that seamen's wages came within admiralty jurisdiction and should not be subject to an agreement to arbitrate. In order to eliminate this opposition, the committee consented to an amendment to Section 1 as follows: '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.'

Tenney Eng'g, Inc. v. United Elec. & Radio Machine Workers of Am., (U.E. Local 437), 207 F.2d 450, 452 (3d Cir. 1953) (quoting 48 Am. Bar Ass'n Rep. 287 (1923)).

Congress therefore excluded all "seamen" from the FAA's reach. Importantly, the term "seamen" does not exclude independent contractors. Whether an individual is a "seaman," and thus entitled to the protections of the Merchant Marine Act, depends on the nature of the work the person performed rather than the person's status. Federal law defines "seaman" broadly to encompass individual "engaged *or* employed in any capacity on board a vessel." 46 U.S.C. § 10101(3)[11] (emphasis added); *see also* Robert Force & Martin J. Norris, 1 The Law of Seamen § 2.24 (5th ed.) ("Under this statute, it would seem clear that any person who performs duties aboard a vessel in navigation should be classed a 'seaman.'"). That definition expressly covers more workers than just those "employed" on a vessel.

This broad definition also follows general admiralty principles. "As a matter of general maritime law, the term 'seamen' includes a broad range of marine workers whose work on a vessel on navigable waters contributes to the functioning

[11] The definition excludes "scientific personnel, a sailing school instructor, or a sailing school student." 46 U.S.C. § 10101(3).

of the vessel, to accomplishment of its mission, or to its operation or welfare."[12] *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1412 (9th Cir. 1990). The critical question is the type of connection the person bears to a maritime vessel, not the worker's status. Since the term "seamen" encompasses independent contractors, and since "seamen" are specifically enumerated in § 1's exemption, it stands to reason that the exemption encompasses independent contractors.[13]

This reading is reinforced by principles of admiralty jurisdiction, as admiralty jurisdiction over contract disputes is determined by the subject-matter of the dispute rather than the status of the disputants. As explained above, the § 1 exemption was enacted to respond to the concern about subjecting to arbitration matters that fall within admiralty jurisdiction, such as contractual wage disputes with seamen. *Tenney*, 207 F.2d at 452. In other words, the exemption was intended to keep the FAA from encroaching into matters that fall within admiralty jurisdiction.

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[12] Some statutes, such as the Fair Labor Standards Act, define "seaman" more narrowly, but still by reference to the nature of the work performed rather than the individual's status. *See* 29 C.F.R. § 783.31; *Aubry*, 918 F.2d at 1412.

[13] The Jones Act also provided a cause of action for seamen who suffered injury "in the course of his employment." 41 Stat. at 1007 (now codified at 46 U.S.C.A. App. § 688(a)). By contrast, the provision referring to wage claims, the exact type of claim that the drafters intended to exempt from the FAA, applies to all seamen and does not include any reference or limitation to employees or employment. 41 Stat. at 1006. Moreover, as previously explained, "employment" has a broader meaning that "employee." *See* pp. 9-10, *supra*.

Under standard principles of admiralty law, admiralty jurisdiction over contractual disputes is based on "the subject matter of the contract" and whether it relates to maritime transactions. *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 610 (1991) (quoting *Ins. Co. v. Dunham*, 11 Wall. 1, 20 (1871)). "It is inappropriate, therefore, to focus on the status of a claimant to determine whether admiralty jurisdiction exists." *Id.* at 612.

In *Exxon*, the Court determined that the fact that a maritime service is performed by a contractor does not take the case out of admiralty jurisdiction. Exxon Corporation entered into a contract with a shipping company to supply it gas and bunker fuel oil around the world. *Id.* at 605. In some ports, Exxon supplied the fuel directly, and in other ports it had to contract with a third party to buy the fuel and deliver it to the ship. *Id.* When a dispute arose over unpaid bills for a shipment provided by the third-party contractor rather than by Exxon itself, the shipping company argued that maritime jurisdiction did not exist because of the fact that the fuel was provided by the third party, even though jurisdiction would exist if Exxon provided the fuel directly. *Id.* at 606-07.

The Supreme Court rejected that argument, relying on precedent dating back to the Nineteenth Century stating that jurisdiction is determined by the subject matter. *Id.* at 609-13. It held that if maritime jurisdiction exists for fuels supplied directly by Exxon, then it also exists when fuel is supplied by a third-party

contractor. *Id.* at 612-13. Because § 1's exemption was intended to avoid any encroachment on traditional maritime jurisdiction over seaman's disputes, and because jurisdiction does not depend on a party's status as a contractor, § 1's exemption also should not depend on a party's status as a contractor.[14]

Additionally, because Congress had already enacted dispute resolution systems for seamen and railroad workers that covered independent contractors, applying the FAA to contractors in those areas would subject those individuals to two different dispute resolution schemes. There is no indication that Congress desired such a messy and inconsistent outcome.

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[14] Other decisions similarly suggest that attempting to label an individual as an independent contractor is not sufficient to eliminate admiralty jurisdiction. In *Parks v. Dowell Div. of Dow Chemical Corp.*, a vessel owner and offshore drilling contractor appealed an order awarding money damages to a well worker who was injured in a fire aboard an oil rig. 712 F.2d 154, 156 (5th Cir. 1983). The appellants argued the worker's "employment contract" categorized him as "an independent contractor" and contained an indemnification clause waiving all claims based on negligence and unseaworthiness. *Id.* at 159. The court rejected this argument, finding that the contract's label was not dispositive, as there was no evidence that he was actually a contractor, and also finding that the waiver clause was invalid in the absence of separate compensation for his agreement to waive his rights. *Id.* at 160. But what is important about the case is that neither the parties nor the court thought that labeling the worker as an independent contractor had any effect on the court's maritime jurisdiction, or on the worker's status as a seaman. The court addressed both issues, over the appellants' objections. *Id.* at 157-58. Yet, the contract was only raised as evidence that the worker agreed not to bring negligence claims, and no one argued that the contract's labeling of the plaintiff as independent contractor was relevant to jurisdiction or to seaman status. Finally, the fact that the contract defining the worker as an independent contractor was called an "employment contract" reinforces that the phrase "contract of employment" covers independent contractors as well as employees.

3. Congress's Concern About Preserving the Free Flow of Goods Applies to Independent Contractors.

Finally, it makes sense that Congress would not have excluded independent contractors, given its interest in promoting labor peace. As the *Adams* Court found, the § 1 exemption grew out of "Congress' demonstrated concern with transportation workers and their necessary role in the free flow of goods." 532 U.S. at 121. Transportation workers who are independent contractors can disrupt "the free flow of goods" just as easily as can any other transportation worker. Indeed, many labor disputes involve independent contractors, or involve the very question of whether particular workers are wrongly classified under applicable law as independent contractors rather than employees. This is certainly true in the trucking industry. *See, e.g.*, *Slayman v. FedEx Ground Package Syst., Inc.*, 763 F.3d 1033 (9th Cir. 2014); Economic Policy Institute, *supra*, at 11 (describing trucking practices and ensuing labor disputes). If § 1's exemption was motivated to promote labor peace and thereby ensure the "free flow of goods" that purpose would not be fulfilled if it excluded independent contractors.

Thus, the legislative history supports the conclusion that § 1's exemption covers transportation workers generally and does not exclude independent contractors.

C. Adopting New Prime's Position that Independent Contractors are Subject to the FAA, and that the Terms of the Contract Determine Whether a Worker is an Independent Contractor, Would Undermine the FAA's Purposes of Simplifying Dispute Resolution and of Not Treating Arbitration Clauses Differently from Other Contracts.

Treating § 1's exemption to exclude all transportation workers from the FAA advances the FAA's basic purposes. New Prime takes the position that independent contractors are covered by the FAA, and that label contained in the employment contract is the primary piece of evidence as to the worker's status. Appellant's Br. 8-12. This position runs afoul of the FAA's purposes in two ways.

1. Making the FAA's Applicability Turn on the Language in the Contract Risks Treating Arbitration Agreements Differently from Other Contracts.

First, hinging independent contractor status on the language of the contract violates the FAA's cardinal principle of not singling out arbitration agreements for differential treatment. In all other contexts, a worker's status is not determined by the contract but is a question of law. The FAA was enacted to prevent arbitration clauses from being singled out for differential treatment and to place them "upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). But making independent contractor status, for purposes of arbitration agreements, depend primarily on the language in the contract, singles out arbitration agreements for differential treatment. In virtually every other legal context—employment discrimination, equal pay, fair labor standards, collective

bargaining, unemployment compensation, tax requirements, minimum wage laws—a worker's status is not determined by the label given in the employment contract, but is determined as a matter of law based on the nature of the relationship between the worker and the party hiring the worker.[15] In effect, New Prime argues that such a regime should apply to contracts for every purpose *except* for determining whether a party is subject to a contractual arbitration agreement. This view cannot be squared with the FAA's purposes.

2. Interpreting § 1's Exemption to Apply to All Transportation Workers Furthers the Purpose of Promoting Streamlined Alternatives to Litigation.

Second, making the threshold question of the FAA's applicability hinge on the fact-intensive question of whether or not a worker is an independent contractor undermines the FAA's goal of providing a simpler, more cost-effective alternative to litigation. *See Allied-Bruce Terminix Cos, Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (discussing the idea that arbitration could provide "a less expensive alternative to litigation"). Further, Congress created a mechanism for resolving challenges to arbitration agreements in § 4 of the Act, which provides for "a summary and speedy disposition of motions or petitions to enforce arbitration

[15] *See, e.g.*, *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992) (ERISA); *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256-57 (1968) (NLRA); *Alberty-Velez v. Corporacion de Puerto Rico Para La Difusion Publica*, 361 F.3d 1 (1st Cir. 2004) (Title VII); Rev. Rul. 87-41, 1987–1 Cum. Bull. 296, 298-299 (tax law).

clauses. " *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 29 (1983). Determining as a matter of law whether an individual is an independent contractor or an employee under various laws is a complex question that rests on a variety of fact-intensive criteria. The Internal Revenue Service (IRS), for example, examines twenty different factors in assessing whether an individual is an employee or an independent contractor. Rev. Rul. 87-41, 1987–1 Cum. Bull. 296, 298-299; *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992) (discussing some of the factors relevant to determining "employee" status under the Employee Retirement Income Security Act (ERISA)). Concluding that § 1 excludes independent contractors would require a court to address all of those factors, not as a matter of deciding the merits, but simply to decide whether the dispute is subject to the FAA. Rather than making arbitration a speedy and cost-effective process, it will make arbitration a time-consuming and expensive one. And it risks turning the "speedy disposition" envisioned by § 4 into drawn-out litigation over a particular worker's status.

By contrast, when § 1's exemption is properly interpreted to cover all transportation workers, there is no need to decide that question as a threshold question regarding the FAA's applicability. The FAA's applicability would rest simply on whether the dispute involves a transportation worker. The question of

the worker's status would be reserved for the merits determination, where it belongs.

The difficulties inherent in New Prime's approach are evident. New Prime argues that it is the worker's burden to prove that he is not an independent contractor, but also that workers are prohibited from conducting any discovery on that question because it relates to both the FAA's applicability and the merits. Appellant's Br. 22-28. That approach places workers in an impossible position by saddling them with the burden of proof while denying the means of satisfying it. And more importantly, that is a problem of New Prime's own making. But for New Prime's argument that independent contractors are not covered by § 1's exemption, the question would not be relevant to any threshold dispute about the FAA and there would be no need for arbitration-related discovery on that question. It is unfair to allow an employer to try and make the worker's status a relevant issue and then argue that because it is a relevant issue, the worker should be prohibited from conducting any discovery that would assist the court in resolving it.

Nor is it an answer to say that simply looking to the face of the contract would fulfill the FAA's purpose of promoting a more efficient alternative to litigation. To allow the contract's label to triumph over the substance of the working relationship would merely perpetuate the practice of purposeful

misclassification of employees as independent contractors. According to the federal government, "the misclassification of employees as independent contractors" is "one of the most serious problems facing affected workers, employers and the entire economy."[16] Millions of employees are wrongly classified as independent contractors. While some misclassification is accidental, much of it is intentional. Employers have strong incentives to misclassify employees as independent contractors. By labeling a hired worker as an independent contractor, employers can cut costs because they can bypass important statutory protections for workers. "Misclassified employees often are denied access to critical benefits and protections to which they are entitled," including health benefits, overtime pay, unemployment compensation, family and medical leave, minimum wage protections, and safe workplaces."[17] Of relevance to this case, there is "pervasive misclassification in the trucking industry in particular," resulting from industry deregulation and the heavy use of purportedly "self-employed drivers."[18]

Misclassification of employees as independent contractors denies workers important protections and benefits. This Court should not allow them to be deprived of an additional protection—the right to bring a dispute in court—on the

[16] United States Department of Labor, *supra* note 2.
[17] *Id.*
[18] Economic Policy Institute, *supra* note 4, at 11.

ground that § 1's exemption creates a distinction between independent contractors and other transportation workers. The FAA's text, legislative history, and purposes all support the conclusion that § 1's exemption covers independent contractors.

CONCLUSION

For the foregoing reasons, the district court's order denying the Appellant's motion to compel arbitration should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d). The brief contains 6,548 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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June 15, 2016

CERTIFICATE OF SERVICE

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