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THE FEDERAL ARBITRATION ACT AND  
INDEPENDENT CONTRACTORS

*Richard Frankel*<sup>†</sup>

ABSTRACT

*The misclassification of employees as independent contractors is one of the most serious problems affecting the American workforce. It deprives workers of important employee benefits, civil rights, and wage and hour protections, and deprives the federal and state governments of billions of dollars in tax revenue annually. While workers can seek redress in the courts, businesses are trying to take away that right as well by forcing workers to submit their disputes to binding mandatory arbitration under the Federal Arbitration Act (FAA). Section 1 of the FAA, however, creates an exemption for transportation workers, stating that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in interstate commerce.”*

*This term, the Supreme Court is poised to decide whether businesses can evade this exemption by labeling their workers as independent contractors. In other words, it will consider whether the phrase “contracts of employment” is limited to contracts with workers who satisfy the legal definition of employee, or if it was intended to apply to all transportation workers, including independent contractors. Although the Court’s recent history of consistently issuing pro-arbitration decisions may suggest that it is inclined to limit the exemption to employees, this article argues that would be a mistake. The commonly-understood meaning of “contracts of employment” at the time of the FAA’s adoption in 1925, the Act’s legislative history, and policy concerns of preventing companies from intentionally mislabeling*

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<sup>†</sup> Associate Professor, Drexel University Thomas R. Kline School of Law. I wish to thank Tabatha Abu el-Haj, Bret Asbury, Jennifer Bennett, Alex Geisinger, Mike Santos, Sachin Pandya and Victoria Ni for their support, guidance and assistance. I also wish to thank Lindsay Steussy for her wonderful research help.

*employees as independent contractors all favor interpreting Section 1 to apply to all transportation workers, regardless of their status. Such a result is both consistent with the FAA and can mitigate the ongoing exploitation of workers by their employers.*

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## INTRODUCTION

More than 160 million Americans are part of the labor force.<sup>1</sup> One of the most significant questions affecting their livelihood is whether they are considered employees or independent contractors. Whether a worker is classified as an employee or an independent contractor affects their access to employee benefits, health insurance and unemployment compensation.<sup>2</sup> Employees, but not independent contractors, receive the

<sup>1</sup> *Labor Force Statistics from Current Population Survey*, U.S. BUREAU OF LAB. STATS. <https://data.bls.gov/timeseries/LNS11000000> (last visited Sept. 10, 2018), archived at <https://perma.cc/S8MB-RDH8>.

<sup>2</sup> *Misclassification of Employees as Independent Contractors*, U.S. DEP’T OF LAB., <https://>

protections of anti-discrimination laws, the Family and Medical Leave Act (FMLA), and federal labor law.<sup>3</sup> The classification of workers also has larger macroeconomic effects. Employers must withhold and pay payroll taxes for their employees but need not do so for independent contractors.<sup>4</sup>

In most circumstances, whether a worker is an employee or an independent contractor is a question of law based on a variety of factors that address the employer's degree of control over the worker.<sup>5</sup> Unfortunately, employers have strong incentives to classify workers as independent contractors, even if the workers meet the legal definition of an employee. By labeling a hired worker as an independent contractor, employers can avoid taxes, exempt themselves from civil rights and labor laws, and deny their workers many important protections including "the minimum wage, overtime compensation, family and medical leave, unemployment insurance, and safe workplaces."<sup>6</sup>

According to the United States Department of Labor, "the misclassification of employees as independent contractors" is "one of the most serious problems facing affected workers, employers and the entire economy."<sup>7</sup> Some studies estimate between ten and thirty percent of employers misclassify workers and that millions of workers are mislabeled as independent contractors.<sup>8</sup> The federal government estimates that misclassification likely has deprived it of over a billion dollars annually in lost tax revenue.<sup>9</sup>

For the tens of millions of individuals who work in the transportation

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[www.dol.gov/whd/workers/misclassification](http://www.dol.gov/whd/workers/misclassification) (last visited Sept. 10, 2018), *archived at* <https://perma.cc/7MST-8HC5>.

<sup>3</sup> *See infra* notes 67–69 and accompanying text.

<sup>4</sup> *Id.*

<sup>5</sup> *See, e.g.*, Internal Revenue Service, Rev. Rul. 87-41, 1987-1 C.B. 296, 298–299 (describing the IRS's test for determining employee or independent contractor status for tax purposes).

<sup>6</sup> *Misclassification of Employees as Independent Contractors*, U.S. DEP'T OF LAB., <https://www.dol.gov/whd/workers/misclassification> (last visited Sept. 10, 2018), *archived at* <https://perma.cc/54PM-88EV>.

<sup>7</sup> *Id.* This language originally appeared on the Department of Labor's website. *See* <https://web.archive.org/web/20161219231838/https://www.dol.gov/whd/workers/misclassification>, *archived at* <https://perma.cc/54ZN-QRLF>. The Trump administration has since removed it.

<sup>8</sup> NAT'L EMP'T LAW PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES 1–2 (July 2015), <http://www.nelp.org/content/uploads/Independent-Contractor-Costs.pdf>, *archived at* <https://perma.cc/G3FC-829L>; FRANCOISE CARRÉ, EPI BRIEFING PAPER #403: (IN)DEPENDENT CONTRACTOR MISCLASSIFICATION 1, 10 (ECON. POL'Y INST. June 8, 2015), <http://www.epi.org/files/pdf/87595.pdf>, *archived at* <https://perma.cc/E2SL-TBV5>.

<sup>9</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-656, EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 2 (2006), <http://www.gao.gov/new.items/d06656.pdf>, *archived at* <https://perma.cc/2T5J-ABL8>; *The Cost of Misclassification: Government*, MBO PARTNERS (Oct. 5, 2017), <https://www.mbopartners.com/blog/the-cost-of-misclassification-government>, *archived at* <https://perma.cc/TW55-7LDP> (describing how federal and state governments estimate losses caused by employee misclassification).

sector,<sup>10</sup> one additional and important effect of classifying workers as independent contractors is that those workers can lose their constitutional right to go to court.<sup>11</sup> Under a federal law known as the Federal Arbitration Act (FAA),<sup>12</sup> mandatory arbitration agreements that require parties to give up their right to bring a dispute in court and instead resolve it through private arbitration are generally enforceable and binding.<sup>13</sup> However, Section 1 of the Act provides an exemption for “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>14</sup> Although it is likely that Section 1 was intended to exempt all workers,<sup>15</sup> the U.S. Supreme Court has limited the reach of the provision to workers engaged in the channels of commerce—i.e. transportation workers.<sup>16</sup>

What the Supreme Court left undecided was the question of which transportation workers were exempt from the Act: in other words, whether the phrase “contracts of employment” in Section 1 covers only contracts with employees or whether it covers contracts with all transportation workers, including both employees and independent contractors. The Supreme Court recently granted certiorari on that question and will decide it during the Court’s upcoming 2018–19 term.<sup>17</sup>

This question is of great importance. If Section 1 is limited to employees, then transportation companies can rely on the FAA to force

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<sup>10</sup> According to the U.S. Department of Transportation, 13 million people worked in the transportation sector in 2016, comprising nearly 9% of the U.S. labor force. U.S. DEP’T OF TRANSP., BUREAU OF TRANSP. STATISTICS, TRANSPORTATION ECONOMIC TRENDS 2017 46 (2017), <https://www.bts.gov/sites/bts.dot.gov/files/docs/browse-statistical-products-and-data/bts-publications/215901/transportation-economic-trends-2017.pdf>, archived at <https://perma.cc/M4BE-7CJR>.

<sup>11</sup> The Seventh Amendment guarantees a right to a trial by jury in civil lawsuits in most circumstances. U.S. CONST., amend. VII.

<sup>12</sup> 9 U.S.C. § 1, *et seq.*

<sup>13</sup> 9 U.S.C. § 2 (stating that written agreements to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”); *see also* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018) (“In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms.”).

<sup>14</sup> 9 U.S.C. § 1.

<sup>15</sup> *See, e.g.*, IMRE SZALAI, OUTSOURCING JUSTICE 191–92 (2013) (examining the history surrounding the adoption of the FAA and concluding that the drafters intended to exempt all workplace disputes from the Act); Matthew W. Finkin, “Workers’ Contracts” Under the United States Arbitration Act: An Essay in Historical Clarification, 17 BERKELEY J. EMP. & LABOR L. 282 (1996) (same). *But see* William F. Kolakowski III, Note, *The Federal Arbitration Act and Individual Employment Contracts: A Better Means to an Equally Just End*, 93 MICH. L. REV. 2171 (1995) (arguing that Section 1 should be limited to transportation workers).

<sup>16</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

<sup>17</sup> *See* *New Prime, Inc. v. Oliveira*, 138 S. Ct. 1164 (2018) (granting certiorari of the U.S. Court of Appeals for the First Circuit in *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017), which held that Section 1’s exemption applies to both employees and independent contractors). Disclosure: I submitted an *Amicus Curiae* brief in support of *Oliveira* when the case was before the First Circuit, and I serve as co-counsel for *amici curiae* historians before the Supreme Court. *See* Brief of Amici Curiae Historians in Support of Respondent, *New Prime, Inc. v. Oliveira*, No. 17-340, (U.S. July 25, 2018). The statements in this article are my own.

their workers into binding arbitration simply by labeling them as independent contractors. Mandatory arbitration clauses in employment contracts are both quite common and quite controversial.<sup>18</sup> They are particularly common in contracts with transportation workers, such as truckers.<sup>19</sup> Moreover, misclassification of workers as independent contractors is “pervasive” in the transportation sector.<sup>20</sup> Business groups, including the American Trucking Association and the U.S. Chamber of Commerce, have exclaimed that the question of whether independent contractors in the transportation sector are bound by the FAA is “an exceptionally important issue,”<sup>21</sup> and that it “will have far-reaching impact”<sup>22</sup> and “sweeping implications for the transportation industry.”<sup>23</sup>

Despite the high stakes involved and the U.S. Supreme Court’s involvement, this issue has received scant attention from the academic community. While scholars have addressed whether Section 1 should cover all employment sectors rather than just transportation,<sup>24</sup> and have addressed whether mandatory arbitration tends to put workers at a disadvantage vis-à-vis litigation,<sup>25</sup> almost no academics or interest groups have addressed whether the Act’s exemption for “contracts of employment” should cover independent contractors.<sup>26</sup>

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<sup>18</sup> See, e.g., Richard Frankel, *The Arbitration Clause as Super Contract*, 91 Wash. U. L. Rev. 531, 551–52 (2014) (describing arguments made in favor and against binding mandatory arbitration).

<sup>19</sup> See, e.g., Brief of Am. Trucking Ass’n, Inc. as Amicus Curiae in Support of Petition for Rehearing or Rehearing En Banc at 1, *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017) (No. 17-340) (stating that “many” trucking companies utilize mandatory arbitration provisions in their contracts with truck drivers).

<sup>20</sup> CARRÉ, *supra* note 8, at 11 (stating that industry deregulation and the heavy use of purportedly “self-employed drivers” has resulted in a “pervasive misclassification in the trucking industry in particular”); see also Brief of Am. Trucking Ass’n, *supra* note 19, at 4 (stating that the practice of treating truck drivers as independent “owner-operators” or independent contractors is “widespread and economically crucial”).

<sup>21</sup> Brief of Amicus Curiae the Chamber of Commerce of the U.S. in Support of Defendant-Appellant’s Petition for Rehearing or Rehearing En Banc at 11, *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017) (No. 15-2364).

<sup>22</sup> Brief of Am. Trucking Ass’n, *supra* note 19, at 4.

<sup>23</sup> Petition for Rehearing or Rehearing En Banc at 15, *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017) (No. 15-2364).

<sup>24</sup> See *supra* note 15 and accompanying text.

<sup>25</sup> See, e.g., Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1312 (2015) (contending that “employees win less often and less money in arbitration”); Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71 (2014) (finding that employees fare worse in arbitration than in litigation); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998) (suggesting that employees may prevail more frequently in arbitration than in litigation).

<sup>26</sup> Of course, that has changed slightly since the Supreme Court granted certiorari on this issue. Several interest groups have submitted *amicus curiae* briefs to the Court and have published arguments about why they think that Section 1’s exemption should or should not cover independent contractors. See, e.g., Andrew Grossman & Ilya Shapiro, *Original Meaning Should Decide Arbitration Act Case on Independent Contractors*, CATO INSTITUTE (May 21, 2018 4:06 PM), <https://www.cato.org/blog/original-meaning-should-decide-arbitration-act-case-independent-contractors>, archived at <https://perma.cc/DRD2-5YAE>.

In the courts, several district courts have assumed, without analysis, that the phrase “contracts of employment” refers to contracts with employees only, and thus that only employees (and not independent contractors) are exempt from the FAA.<sup>27</sup> By contrast, the First Circuit, the only circuit court to yet address the issue, held that the term “contracts of employment” encompasses both employees and independent contractors and that both groups are exempt from the FAA.<sup>28</sup>

The First Circuit’s decision is the one that the Supreme Court granted certiorari to review. Given that the First Circuit was the first federal court of appeals to address this question, and that there is no circuit split, the fact that Court took the case at all suggests that it is skeptical of the First Circuit’s reasoning and is inclined to hold that the Section 1 exemption applies only to employees and not to independent contractors.

However, this Article argues that such an approach would be misguided, both as a matter of doctrine and as a matter of policy. A close examination of the meaning of the term “contract of employment,” at the time that the FAA was enacted, along with the Act’s legislative history, indicates that the exemption was intended to apply to all contracts for work without regard to whether the worker in question satisfied the common-law definition of an employee or an independent contractor. Although it might be natural to initially assume that “contract of employment” refers to contracts with employees, this Article explains that interpreting that phrase to apply to all transportation workers, both employees and independent contractors alike, is most faithful to the statutory text, the legislative history, and the FAA’s purposes.

This Article proceeds as follows. Part I briefly reviews the history of the FAA’s exemption for “contracts of employment” and discusses how the Supreme Court limited that exemption to transportation workers. Part II addresses the significance and implications of determining whether the exemption covers all transportation workers or is limited to employees. Part III examines why the clearest meaning of the Act’s text is that the exemption covers all workers and is not limited to employees. Part IV addresses why the legislative history and the historical context surrounding labor disputes in the transportation industry also support reading Section 1 to cover employees and independent contractors. Part V explains why interpreting Section 1 to exempt all transportation workers would be most faithful to the policies underlying the FAA, in

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<sup>27</sup> 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).

<sup>28</sup> *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017). In the interest of full disclosure, the author notes that he filed an *amicus curiae* brief in that case, as well. Brief of Amicus Curiae Professor Richard H. Frankel in Support of Plaintiff-Appellee Dominic Oliveira, *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017) (No. 15-2364).

general, and Section 1, in particular, and would reduce the incentives for transportation companies to misclassify employees as independent contractors.

Misclassifying employees as independent contractors is a serious problem with substantial economic consequences. While some misclassification is accidental, much of it, unfortunately, is intentional. Employers should not get the double benefit of mislabeling their employees as independent contractors and then using that label to insulate themselves from judicial accountability for their actions.

### I. THE FEDERAL ARBITRATION ACT'S ENACTMENT AND THE SUPREME COURT'S DECISION TO LIMIT SECTION 1 TO TRANSPORTATION WORKERS

The Federal Arbitration Act, relatively speaking, is an ancient statute. It was enacted in 1925, before the New Deal and the rise of the modern administrative state, before the advent of most federal labor and civil rights laws, before the widespread growth in the use of non-negotiable adhesion contracts,<sup>29</sup> and before the Supreme Court decided in *Erie Railroad Co. v. Tompkins*<sup>30</sup> that federal courts exercising diversity jurisdiction must apply state substantive law and federal procedural law. Many scholars believe that the intended scope of the Act was quite narrow: to allow sophisticated commercial merchants to have their contractual disputes with other sophisticated commercial merchants resolved by mutually-agreed upon experts in their field rather than by federal judges.<sup>31</sup>

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<sup>29</sup> While the use of adhesion contracts was not as widespread as it is today, even at the time of the Act's adoption, some labor activists were concerned about the rise of adhesion contracts in the employment arena. See *infra* notes 159, 160, and accompanying text.

<sup>30</sup> 304 U.S. 64 (1938).

<sup>31</sup> See, e.g., Christopher Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 269 (2015) ("Congress was exclusively concerned with the enforceability of arbitration agreements between sophisticated businesses in commercial disputes."); *id.* at 302–07, (describing Congressional hearings on the FAA); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 106 (2006) ("The hearings make clear that the focus of the Act was merchant-to-merchant arbitrations, never merchant-to-consumer arbitrations."); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking The Supreme Court's Preference for Arbitration*, 74 WASH. U. L.Q. 637, 647 (1996) ("Most commentators have concluded that the FAA was envisioned as applying to consensual transactions between two merchants of roughly equal bargaining power and not necessarily to transactions between a large merchant and a much weaker and less knowledgeable consumer."); David S. Schwartz, *Enforcing Small Print To Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33,75–81 (1997) (arguing that the framers intended for the FAA to be limited to commercial disputes between business entities). One of the drafters and major proponents of the Act, Julius Henry Cohen, testified before Congress in hearings regarding the FAA that "the bar associations of the country" were aligned with the community in supporting arbitration as a way "to make the disposition of business in the commercial world less expensive . . ." *Arbitration of Interstate Commercial Disputes: Joint Hearing on S. 1005 and H.R. 646 Before the Subcomm. of the Comm. on the Judiciary*, 68th Cong. 13 (1924) [hereinafter "*Joint Hearing*"] (statement of Julius Henry Cohen); see also *Gilmer v.*

In the early 1900s, merchants who used arbitration agreements with other merchants became frustrated because federal courts were refusing to enforce arbitration provisions through the remedy of specific performance.<sup>32</sup> Their refusal derived from two doctrines that the drafters concluded reflected a hostility toward arbitration vis-à-vis courts. The first was the “ouster” doctrine, under which federal courts refused to enforce any provision that would “oust” them of jurisdiction and transfer it to private arbitrators.<sup>33</sup> The second was the “dual agency doctrine,” which “maintained that an arbitrator was merely a dual agent of the parties, and as such, either party could revoke his authority at any time.”<sup>34</sup> As a result, arbitration clauses were essentially “revocable at will by either party to the agreement.”<sup>35</sup>

In response, several members of the American Bar Association devised and drafted the Federal Arbitration Act, which would make certain arbitration agreements enforceable in federal court.<sup>36</sup> They submitted their bill to Congress and revised it over several years.

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Interstate/Johnson Lane Corp., 500 U.S. 20, 39 (1991) (Stevens, J., dissenting) (“There is little dispute that the primary concern animating the FAA was the perceived need by the business community to overturn the common-law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities.”). Although the Supreme Court has rejected this view, Justice Ginsburg has emphasized the narrow scope of the FAA in several recent dissents. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1642–43 (2018) (Ginsburg, J., dissenting) (“The legislative hearings and debate leading up to the FAA’s passage evidence Congress’ aim to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate commercial disputes.”) (emphasis in original); *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463, 477–78 (2015) (Ginsburg, J., dissenting) (asserting that Congress was intending to allow for arbitration of commercial disputes and that “Congress in 1925 could not have anticipated that the Court would apply the FAA to render consumer adhesion contracts invulnerable to attack by parties who never meaningfully agreed to arbitration in the first place”).

<sup>32</sup> Frankel, *supra* note 18, at 538 (describing the courts’ treatment of arbitration clauses prior to the enactment of the FAA).

<sup>33</sup> *Bernardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 210–11 & n.5 (1956); *see also* Schwartz, *supra* note 31, at 74 (1997); *Joint Hearing*, *supra* note 31 (discussing the need for an arbitration statute in order to overcome problems created by the ouster doctrine). The ouster doctrine was criticized for being overly formalistic, reflecting an irrational judicial hostility to arbitration, and in unduly interfering with the freedom of contract. *See, e.g., Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982–84 (2d Cir. 1942); *Park Constr. Co. v. Indep. Sch. Dist. No. 32*, 296 N.W. 475, 477 (Minn. 1941) (“Arbitration simply removes a controversy from the arena of litigation. It is no more an ouster of judicial jurisdiction than is compromise and settlement or that peculiar offspring of legal ingenuity known as the covenant not to sue. Each disposes of issues without litigation. One no more than the other ousts the courts of jurisdiction.”); *Ezell v. Rocky Mtn. Bean & Elevator Co.*, 232 P. 680 (Colo. 1925); *see also* Kenneth R. Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 *BUFF. L. REV.* 49, 60–63 (1997) (describing some criticisms of the ouster doctrine).

<sup>34</sup> Schwartz, *supra* note 31, at 74; Sternlight, *supra* note 31, at 645 n.32.

<sup>35</sup> *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 32 (1984) (O’Connor, J., dissenting) (noting that judicial “hostility [to arbitration agreements] was reflected in two different doctrines: ‘revocability,’ which allowed parties to repudiate arbitration agreements at any time before the arbitrator’s award was made, and ‘invalidity’ or ‘unenforceability,’ equivalent rules that flatly denied any remedy for the failure to honor an arbitration agreement”); *Moses*, *supra* note 31, at 101; Schwartz, *supra* note 31, at 74.

<sup>36</sup> *See, e.g., Moses*, *supra* note 31, at 101–03; *see generally* SZALAI, *supra* note 15, Chs. 2–3.



Congress held hearings on the Act in both 1923 and 1924. During those hearings, the proponents of the Act who testified emphasized the benefits of arbitration for business-to-business contract disputes and explained that allowing those disputes to be arbitrated would reduce judicial backlog and free up courts to deal with other types of legal questions.<sup>37</sup> There was never any indication given at the hearing that the Act would apply to labor and employment relationships.<sup>38</sup>

As others have argued, the legislative history of Section 1 suggests that it was intended to exempt all workers from the Act, not just transportation workers.<sup>39</sup> The Act was originally introduced in Congress in 1922, though it was not enacted until 1925.<sup>40</sup> The original bill did not have any provision relating to contracts of employment. In January, 1923, the arbitration bill “drew the attention of Andrew Furuseth, President of the International Seaman’s Union (ISU),” and a towering labor figure at the time.<sup>41</sup> He expressed opposition to the bill on the ground that it could be used to force all workers, including his union members, into arbitration.<sup>42</sup> Based on his analysis, organized labor opposed the bill.

Around the same time, and shortly before the scheduled Senate Hearing on the bill, Senator Thomas Sterling of South Dakota—an important Senator on the arbitration bill—informed one of the ABA drafters of the bill that a prominent railroad lawyer and one of his most prominent constituents expressed several concerns about the bill, including its applicability to labor agreements.<sup>43</sup> The drafters decided that “to leave out labor disputes and seamen” would be “simpler” and proposed adding the following language to the bill: “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.”<sup>44</sup> Thus, it appears that the reason the amendment identified

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<sup>37</sup> See Leslie, *supra* note 31, at 302–06 (describing testimony); Moses, *supra* note 31, at 102–05 (describing statements by Bernheimer and Cohen about how arbitration would reduce judicial backlog and help commercial merchants resolve disputes).

<sup>38</sup> See Moses, *supra* note 31, at 147 (“no one in 1925—not the drafters, the Secretary of Commerce, organized labor, nor members of Congress—believed that the FAA applied to employment contracts.”). Rather, the Congressional floor testimony on the bill reinforced that the Act only applied to commercial contracts. See 65 Cong. Rec. 1931 (Feb. 5, 1924) (statement of Rep. Graham, Chair of the House Judiciary Committee) (“It creates no new legislation; grants no new rights, except a remedy to enforce an agreement in *commercial contracts* and in admiralty contracts.”) (emphasis added); 65 Cong. Rec. 11080 (June 6, 1924) (“This bill provides that where there are *commercial contracts* and there is disagreement under the contract, the court can force an arbitration agreement in the same way as other portions of the contract.”) (emphasis added).

<sup>39</sup> See SZALAI, *supra* note 15, at 191–92 (2013); Finkin, *supra* note 15. *But see* Kolakowski, *supra* note 15 (arguing that Section 1 should be limited to transportation workers).

<sup>40</sup> Finkin, *supra* note 15, at 284.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 284–85, 287–89 (citing PROCEEDINGS OF THE TWENTY-SIXTH ANNUAL CONVENTION OF THE INTERNATIONAL SEAMAN’S UNION OF AMERICA (1923) (Appendix to Convention Proceedings)); SZALAI, *supra* note 15, at 132.

<sup>43</sup> SZALAI, *supra* note 15, at 133–35.

<sup>44</sup> *Id.*

“seamen” and “railroad employees” in addition to all other classes of workers was because the two people who expressed concern about subjecting labor to arbitration agreements came from the seamen’s union and the railroad industry.

Less than a week after Senator Sterling submitted his letter, the Senate Judiciary Committee held hearings on the bill on January 31, 1923. At the hearing, W.H.H. Piatt, the Chair of the American Bar Association Committee testified that he was not aware of Sterling’s constituent’s letter but that he did want to address Mr. Furuseth’s concerns by proposing to eliminate all labor disputes from the bill:

Senator Sterling: Has your attention been called to the letter I received from a constituent of mine, Mr. C.O. Bailey, a lawyer at Sioux Falls?

Mr. Piatt: No, sir; but there is another matter I should call to your attention. Since you introduced this bill there has been an objection raised against it that I think should be met here, to wit, the official head, or whatever he is, of that part of the labor union that has to do with the ocean—the seamen—

Senator Sterling: Mr. Furuseth?

Mr. Piatt: Yes; some such name as that. He has objected to it, and criticized it on the ground that the bill in its present form would affect, in fact compel, arbitration of the matters of agreement between the stevedores and their employers. Now, it was not the intention of the bill to have any such effect as that. 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.” It is not intended that this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.<sup>45</sup>

Notably, Mr. Piatt’s proposed language for the exemption refers to “seamen”—likely in reference to Mr. Furuseth’s position as head of the seaman’s union—and “any other class of workers,” thus suggesting a broad reading applicable to all workers. It is also notable that Mr. Piatt’s proposed language does not mention “contracts of employment” at all but just says broadly that it will not apply to workers in interstate commerce.

Immediately following Mr. Piatt’s testimony on this specific point, Senator Thomas Sterling submitted a letter from Secretary of Commerce

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<sup>45</sup> *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearings on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 4th Sess. 9 (1923)* [hereinafter 1923 Senate Hearing] (statement of W.H.H. Piatt, Representative, ABA).

Herbert Hoover.<sup>46</sup> 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 the language that was ultimately added to Section 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 foreign or interstate commerce.’”<sup>47</sup> This was the same language that the drafters proposed in response to the concerns of Senator Sterling’s constituent. As Professor Szalai explains, it appears that the letter may have been written by the bill’s drafters, who then persuaded Hoover to sign it.<sup>48</sup>

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. Indeed, Hoover’s letter was written by the other members of the ABA that were working with Piatt in support of the bill. Both Mr. Piatt and Secretary Hoover 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. The language contained in Secretary Hoover’s letter was added to Section 1. After that, organized labor dropped its opposition, and the Act was adopted in 1925.<sup>49</sup>

Following the Act’s enactment, the question arose whether the exemption applied to all workers or only those who were directly “engaged in interstate or foreign commerce,” i.e. transportation workers. Those arguing for a narrow reading point out that the Act refers specifically to “seamen, railroad employees,” and “any other class of worker *engaged in interstate or foreign commerce*.”<sup>50</sup> Some have argued that the specific references to transportation workers along with workers “engaged” in commerce shows that the provision was limited to workers who were directly involved in moving goods through interstate commerce, i.e. transportation workers.<sup>51</sup> However, while Section 1’s text is perhaps more ambiguous than Mr. Piatt’s statements at the Senate

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<sup>46</sup> *Id.* at 14.

<sup>47</sup> *Id.* The amendment received little, if any, discussion outside of these passages. When hearings were next held in 1924, the current exemption was written into Section 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.

<sup>48</sup> SZALAI, *supra* note 15, at 145.

<sup>49</sup> *See, e.g.,* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 127 & n.8 (2001) (Stevens, J., dissenting) (describing legislative history). Directly following Congress’s passage of the Act, organized labor groups reinforced their understanding that Section 1 eliminated all labor agreements from the FAA’s purview. *See id.* at n.8 (citing PROCEEDINGS OF THE FORTY-FIFTH ANNUAL CONVENTION OF THE AMERICAN FEDERATION OF LABOR 52 (1925)).

<sup>50</sup> 9 U.S.C. § 1 (emphasis added).

<sup>51</sup> *See, e.g.,* Kolakowski, *supra* note 15, at 2175–82.

Hearing, the legislative history lends strong support to the argument that the drafters intended to exempt all labor disputes from the Acts' reach.

Additionally, it is important to remember that the FAA was enacted in 1925, before the Supreme Court's New Deal era expansion of the Commerce Clause's scope.<sup>52</sup> At that time, the Supreme Court had restricted the Commerce Clause's ability to regulate workers to only those workers directly engaged in the channels of commerce.<sup>53</sup> Thus, even if Congress believed that Section 1 would apply only to workers directly engaged in the channels of commerce, this was because those were the only workers Congress had the power to regulate under the Commerce Clause at the time. In other words, Congress intended Section 1 to apply to every worker it had the power to regulate.<sup>54</sup> Although one might believe that Section 1 (and indeed the entire FAA) should only extend to the workers Congress believed it could regulate under the Commerce Clause in 1925, the Supreme Court has held that the FAA should extend to the full reach of the Commerce Clause as it has expanded over time.<sup>55</sup> For consistency, the Section 1 exemption should similarly expand to the full reach of the Commerce Clause as it has expanded over time, and thus it should not be limited to employees directly engaged in the channels of commerce, but extend to all workers.

Nonetheless, the Supreme Court held in 2001 that Section 1 should be given "a narrow construction" and exempt only transportation workers from the Act.<sup>56</sup> The Court determined that the text was clear, relying on Section 1's reference to workers "engaged in foreign or interstate commerce" and its listing of transportation workers, specifically "seamen [and] railroad employees" as examples of workers covered by the exemption.<sup>57</sup> Because it found the text unambiguous, the Court refused to consider the legislative history described above,<sup>58</sup> and in any event cautioned that the relevant legislative history came not from the members

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<sup>52</sup> See, e.g., *United States v. Lopez*, 514 U.S. 549, 556 (1995) (noting that the New Deal era Commerce Clause decisions "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause").

<sup>53</sup> See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 136 (2001) (Souter, J., dissenting).

<sup>54</sup> See, e.g., Brief for the U.S. as Amicus Curiae Supporting Respondent at 9–19, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2000) (No. 99-1379) (describing the scope of the Commerce Clause in 1925 and how the FAA exemption was intended to reach co-extensively with the Commerce Clause's reach). Several scholars have addressed this question in more detail. See *supra* note 15 and accompanying text.

<sup>55</sup> See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268, 273-77 (1995) (holding that the FAA should be interpreted broadly to apply to all matters within the scope of the Commerce Clause, and that the FAA's applicability should expand in line with the expansion of the scope of the Commerce Clause).

<sup>56</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) ("We now decide that the better interpretation is to construe the statute, as most of the Courts of Appeals have done, to confine the exemption to transportation workers.").

<sup>57</sup> *Id.* at 111–19.

<sup>58</sup> *Id.* at 119 ("As the conclusion we reach today is directed by the text of § 1, we need not address the legislative history of the exclusion provision.").

of Congress who voted on the bill, but from third-party witnesses like the ABA committee chair, Mr. Piatt.<sup>59</sup>

Finally, the Court identified possible policy reasons why Congress might have limited the exemption to transportation workers. It noted that Congress had already created grievance procedures for certain transportation workers, including railroad workers and seamen, in order to prevent labor disruptions that would restrict “the free flow of goods.”<sup>60</sup> Given that those workers were already subject to a Congressionally-defined dispute resolution mechanism, the Court reasoned, Congress may have chosen to exclude them from the FAA so that they weren’t subject to overlapping or conflicting dispute resolution schemes.<sup>61</sup>

But the decision in *Circuit City Stores, Inc. v. Adams* addressed only whether Section 1 covered all “contracts of employment” or only “contracts of employment” with transportation workers. It did not address, or purport to address, whether the exemption covered all transportation workers, or whether it is limited only to employees. That important question is what the Court is now poised to answer this term.

## II. THE SIGNIFICANCE OF THE EMPLOYEE-INDEPENDENT CONTRACTOR DISTINCTION

The conventional employer-employee relationship is losing its hold on the American economy. With the growth of the gig economy,<sup>62</sup> and as more companies and individuals have the flexibility to design their own working relationships, more work relationships are taking the form of an independent contractor model rather than an employer-employee model.<sup>63</sup> The number of independent contractors “is expected to continue to grow at a steady clip.”<sup>64</sup> The use of independent contractors is

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<sup>59</sup> *Id.* at 120.

<sup>60</sup> *Id.* at 121.

<sup>61</sup> *Id.* (“It is reasonable to assume that Congress excluded ‘seamen’ and ‘railroad employees’ from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers.”).

<sup>62</sup> “Gig economy” has been defined as one where “temporary, flexible jobs are commonplace and companies tend toward hiring independent contractors and freelancers instead of full-time employees. A gig economy undermines the traditional economy of full-time workers who rarely change positions and instead focus on a lifetime career.” *Gig Economy*, INVESTOPEDIA, [www.investopedia.com/terms/g/gig-economy.asp](http://www.investopedia.com/terms/g/gig-economy.asp) (last visited Sept. 10, 2018), *archived at* <https://perma.cc/MPK6-ZXZH>.

<sup>63</sup> One recent study found the number of independent contractors increased by 2.1 million workers from 2010–2014, accounting for nearly thirty percent of all jobs added during that period. *See* Will Rinehart & Ben Gitis, *Independent Contractors and the Emerging Gig Economy*, AMERICAN ACTION FORUM (July 29, 2015), <https://www.americanactionforum.org/research/independent-contractors-and-the-emerging-gig-economy>, *archived at* <https://perma.cc/BMF7-A7CM>.

<sup>64</sup> Brendan Schrader, *Here’s Why the Freelancer Economy is on the Rise*, FAST COMPANY (Aug. 10, 2015), <https://www.fastcompany.com/3049532/heres-why-the-freelancer-economy-is-on-the-rise>, *archived at* <https://perma.cc/XWB4-53AM>; *see also* Brief of the Chamber of

particularly prevalent in the transportation sector, in which more than thirteen million people work. Just as small-scale transportation like ride-sharing services label their drivers as independent contractors,<sup>65</sup> large-scale transportation like long-haul and interstate trucking has also moved toward labeling drivers as independent contractors rather than employees.<sup>66</sup>

This is not surprising. Businesses have significant incentives to call their workers independent contractors. A worker who is an independent contractor rather than an employee does not receive the benefit of civil rights and labor laws, many of which cover only “employees.” Similarly, independent contractors, unlike employees, are not entitled to overtime pay and minimum wage protections, unemployment compensation, and family and medical leave.<sup>67</sup> Employers are also not responsible for payroll taxes for independent contractors, but they are for employees.<sup>68</sup>

A number of federal worker protection laws that were enacted well after the FAA, including Title VII, the Fair Labor Standards Act (FLSA), and the National Labor Relations Act (NLRA), expressly apply to employees and have been interpreted to not apply to independent contractors.<sup>69</sup> The question whether a worker is an employee or an independent contractor for purposes of these statutes is a question of law that is based on several factors related to the level of control the employer exerts over the worker.<sup>70</sup>

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Commerce of the U.S. and the Society for Human Resource Management as Amici Curiae in Support of Petitioner at 2, *New Prime, Inc. v. Oliveria*, No. 17-340 (U.S. May 21, 2018).

<sup>65</sup> In fact, ride-sharing companies like Uber and Lyft provide another example of workers being mislabeled by their employers as independent contractors. Earlier this year, the California Supreme Court affirmed certification of a class of ride-sharing drivers and indicated that the drivers should likely be treated as employees rather than as independent contractors under California law. *Dynamex Operations W. v. Superior Court*, 416 P.3d 1 (Cal. 2018). The ruling leaves open whether the drivers would be considered employees or independent contractors under federal law or under other states’ laws.

<sup>66</sup> Brief for Am. Trucking Ass’n, Inc. as Amicus Curiae Supporting Petitioner, *New Prime, Inc. v. Oliveria*, 857 F.3d 7 (1st Cir. 2017) (No. 17-340) (stating that independent contractor agreements are widespread throughout the trucking industry); Brief for Customized Logistics and Delivery Ass’n as Amicus Curiae Supporting Petitioner, *New Prime, Inc. v. Oliveria*, 857 F.3d 7 (1st Cir. 2017) (No. 17-340) (stating that independent contractor agreements are common in the delivery and logistics arenas).

<sup>67</sup> U.S. DEP’T OF LAB., *supra* note 6.

<sup>68</sup> *Id.*

<sup>69</sup> *See, e.g.*, *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992) (noting that ERISA does not apply to independent contractors); *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256–57 (1968) (noting that the NLRA does not apply to independent contractors); *Alberty-Velez v. Corporacion de Puerto Rico Para La Difusion Publica*, 361 F.3d 1 (1st Cir. 2004) (noting that Title VII does not apply to independent contractors); Rev. Rul. 87-41, 1987-1 C.B. 296, 298–29 (exempting independent contractors from Title VII protections); Rev. Rul. 87-41, 1987-1 C.B. 296, 298–299 (exempting independent contractors from tax law).

<sup>70</sup> A common test for determining if someone is an employee is that used by the Internal Revenue Service, which applies a twenty-factor test. *See* Rev. Rul. 87-41, 1987-1 C.B. 296, 298–299; *see also* *Nationwide Mut. Ins. Co.*, 503 U.S. at 323–24 (discussing some of the factors relevant to determining “employee” status under the Employee Retirement Income Security Act (ERISA)).

Nonetheless, employers frequently treat their workers as independent contractors, even when the workers satisfy the legal definition of an employee. According to the United States Department of Labor, “the misclassification of employees as independent contractors” is “one of the most serious problems facing affected workers, employers and the entire economy.”<sup>71</sup> Some studies estimate that between 10% and 30% of employers misclassify workers and that millions of workers are mislabeled as independent contractors.<sup>72</sup> The federal government estimates that misclassification likely deprives it of billions of dollars in lost tax revenue.<sup>73</sup> In the transportation section in particular, misclassification of workers as independent contractors is “pervasive.”<sup>74</sup>

Perhaps not surprisingly, a regime of widespread misclassification or purported misclassification of employees as independent contractors results in widespread litigation, as workers bring wage-and-hour claims and other lawsuits contending that they have been deprived of benefits and legal protections by virtue of being mislabeled as independent contractors rather than employees.<sup>75</sup> Many of these claims are brought as class actions or other forms of collective litigation,<sup>76</sup> and thus whether workers are subject to mandatory arbitration clauses is critically important. This is particularly true for misclassification claims because arbitration clauses often prohibit workers from proceeding in class actions or collective litigation. The Supreme Court has held that bans on class actions and collective litigation in employment contracts can be enforced under the FAA, even where individual actions are prohibitively expensive or otherwise infeasible and thus where enforcing the bans effectively deprives workers of any meaningful ability to pursue their

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<sup>71</sup> See *supra* note 6.

<sup>72</sup> NAT’L EMP’T LAW PROJECT, *supra* note 8; CARRÉ, *supra* note 8, at 11.

<sup>73</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 9.

<sup>74</sup> CARRÉ, *supra* note 8, at 11 (stating that there is “pervasive misclassification in the trucking industry” in particular, resulting from industry deregulation and the heavy use of purportedly “self-employed drivers”).

<sup>75</sup> See, e.g., FREDRIC C. LEFFLER, MISCLASSIFYING WORKERS AS INDEPENDENT CONTRACTORS, 1 (2010), [https://www.americanbar.org/content/dam/aba/administrative/labor\\_law/meetings/2011/ac2011/083.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/083.authcheckdam.pdf), archived at <https://perma.cc/Z2FF-68VE> (stating that “[l]awsuits alleging improper classification of workers as independent contractors are on the rise” and that litigation in this area “will continue to grow”).

<sup>76</sup> See, e.g., *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017) (addressing whether trucking workers bringing a putative wage-and-hour class action were required to arbitrate their dispute); *In re Swift Trans. Co., Inc.*, 830 F.3d 913 (9th Cir. 2016) (per curiam) (putative class action of trucking workers alleging that they were wrongly classified as independent contractors); see also LEFFLER, *supra* note 75, at 1 (stating that wrongful classification claims involve individual, collective, and class actions). Even the *Circuit City* court noted that the amount in dispute in individual employment cases is relatively small, which suggests that many employment claims must be brought as class actions or not at all. 532 U.S. at 123 (“Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.”).

claims.<sup>77</sup> This gives transportation companies a vested interest in having their workers classified as independent contractors. Not only does misclassification mean that employers can give their workers fewer protections, it also arguably allows them to require their workers to arbitrate any disputes that arise—an opportunity that is meaningless where the arbitration clause prohibits class actions or otherwise makes it infeasible to utilize the arbitration process.

Businesses and other arbitration supporters tout that arbitration is a faster, cheaper alternative to litigation, and that it helps consumers by reducing litigation costs, a benefit that is passed on to customers in the form of lower prices for goods and services.<sup>78</sup> However, detractors of arbitration have taken the position that businesses like arbitration because it systematically disfavors consumers and employees relative to the corporations that stand on the other side of the contract. Arbitration opponents assert that many corporations draft arbitration clauses with terms that are designed to favor them by barring plaintiffs from proceeding in class actions, shortening statutes-of-limitations for filing

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<sup>77</sup> Arbitration clauses in consumer and employment contracts often prohibit class action claims and require arbitration on an individual basis. *See, e.g.*, CONSUMER FIN. PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) 10 (Mar. 2015), [https://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf), archived at <https://perma.cc/7N4X-DAPU> (finding that more than 85% of arbitration clauses banned class actions in a study of six sectors of the consumer financial services market); Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Non-Consumer Contracts*, 41 U. MICH. J.L. REFORM 871 (2008) (conducting survey and finding that virtually all business-consumer arbitration clauses it studied prohibited class actions). Many have criticized class action bans as *de facto* immunity provisions for companies because many claims brought as class actions involve small individual damages claims or are sufficiently expensive to litigate, making them infeasible to bring on an individual basis, either in court or in arbitration. *See, e.g.*, *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1101 (Cal. Ct. App. 2002) (describing a class action ban as a “get out of jail free card” for the defendant); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 242 (2012) (“Nothing is more claim-suppressing than a ban on class actions, particularly in cases where the economics of disputing make pursuit of individual cases irrational.”). However, the Supreme Court has repeatedly sanctioned the use of class action bans, including in labor contracts, regardless of whether the underlying claims could not be brought on an individual basis. *See Epic Sys., Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (finding that collective action bans did not violate the National Labor Relations Act); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236–39 (2013) (finding that an arbitration clause prohibiting collective action could be enforced even if it prevented the plaintiffs from pursuing their federal statutory claims); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344–52 (2011) (striking down state law that prohibited the use of class action bans as preempted by the FAA).

<sup>78</sup> *See, e.g.*, Dwight Golann, *Developments in Consumer Financial Services Litigation*, 43 BUS. LAW. 1081, 1091 (1988) (“The primary advantage for consumers in binding arbitration is that it offers at least the possibility of a faster and cheaper decisionmaking mechanism for their complaints.”); *The “Arbitration Fairness Act of 2007”*: Hearing on H.R. 3010 Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary, 110th Cong. 95, 105–06 (2007) (prepared statement of Peter B. Rutledge) 13 (arguing that eliminating mandatory arbitration would “increase the costs of dispute resolution, and a portion of these costs would be passed onto employees (in the form of lower wages), consumers (in the form of higher prices) and investors (in the form of lower share prices).”).



suits, requiring the parties to keep the arbitration proceedings secret, and limiting the ability of parties to seek discovery or obtain necessary evidence to support their claims.<sup>79</sup> They also argue that arbitration creates a “repeat player bias” whereby arbitrators are inclined to support the repeat player—most often the corporations—out of fear that they will not be chosen by the corporations for future cases if they rule against the corporations.<sup>80</sup> Though the evidence regarding repeat-player bias so far appears inconclusive,<sup>81</sup> there is evidence that when workers are required to bring claims in arbitration they fare worse than they do in court.<sup>82</sup> Finally, detractors point out that arbitrators act in secret, that arbitrators are not bound to apply the law in the way that judges are, and that the FAA provides for only extremely limited judicial review of an arbitrator’s decision.<sup>83</sup> Thus, it is hardly surprising that in recent years, transportation companies have become frequent users of mandatory arbitration clauses in their contracts with workers.<sup>84</sup>

As workers have brought misclassification claims, businesses have frequently moved to compel arbitration under the FAA. That, in turn, has raised the question as to whether the FAA’s exemption for transportation workers applies to all workers including independent contractors, or whether the exemption is limited to those workers who meet the traditional legal definition of an employee. Most district courts have reflexively assumed, without analysis, that the exemption for “contracts of employment” applies only to employer-employee relationships and

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<sup>79</sup> See, e.g., F. PAUL BLAND, JR. ET AL., *CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS*, 4–14 (NCLC 6th ed. 2011) (canvassing the various criticisms of binding mandatory arbitration).

<sup>80</sup> See e.g., Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998); BLAND ET AL., *supra* note 79, 5–6 (“There is some empirical evidence and a good deal of commentary to suggest that arbitrators do, in fact, have a tendency to favor ‘repeat player’ clients.”).

<sup>81</sup> See SEARLE CIVIL JUSTICE INS., *CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION PRELIMINARY REPORT 1*, 3–16 (Mar. 2009), [https://www.adr.org/sites/default/files/document\\_repository/Searle%20Civil%20Justice%20Institute%20Report%20on%20Consumer%20Arbitration.pdf](https://www.adr.org/sites/default/files/document_repository/Searle%20Civil%20Justice%20Institute%20Report%20on%20Consumer%20Arbitration.pdf), archived at <https://perma.cc/UNU4-TFRW> (describing no statistically significant repeat-player effect in its analysis of American Arbitration Association data and ascribing any repeat-player effect to better case screening by repeat-players than to arbitrator bias).

<sup>82</sup> See *supra* note 25 and accompanying text.

<sup>83</sup> Section 10 of the FAA provides the grounds for vacating an arbitrator’s award. Those grounds are mostly limited to whether the award resulted from corruption or fraud, or if the arbitrators grossly exceeded their powers. 9 U.S.C. § 10. The Supreme Court has interpreted the grounds for vacating an award extremely narrowly. See, e.g. *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 509 (2001).

<sup>84</sup> See e.g., Brief of Am. Trucking Ass’ns, *supra* note 19, at 1 (stating that “many” trucking companies utilize mandatory arbitration provisions in their contracts with truck drivers); Brief of Amicus Curiae the Chamber of Commerce of the U.S., *supra* note 21, at 12 (asserting that “numerous businesses have indeed relied on the FAA in including arbitration provisions in their agreements with independent contractors”); Brief for Customized Logistics and Delivery Ass’n, *supra* note 66, at 1–2 (asserting that delivery logistics companies “frequently rely on arbitration provisions” in their contracts with independent contractors).

excludes independent contractors.<sup>85</sup>

Last year, the First Circuit became the first federal court of appeals to address this issue. It concluded, based on an analysis of how the phrase “contracts of employment” was used around the time the FAA was enacted in 1925, that the phrase referred to all contracts for work, not just to contracts with employees.<sup>86</sup> The First Circuit then held that all transportation workers, employees and independent contractors alike, are exempt from the FAA under Section 1.<sup>87</sup>

Recognizing the significance of the First Circuit’s ruling and its potential effect on the transportation industry, the defendant trucking company, New Prime, Inc., enlisted the help of several business groups and sought *en banc* review, claiming that the decision “will have far-reaching impact”<sup>88</sup> with “sweeping implications for the transportation industry.”<sup>89</sup> After the First Circuit declined to rehear the case, the company, again with the help of numerous business groups as *Amici Curiae*, petitioned the U.S. Supreme Court for a *writ of certiorari* to review the First Circuit’s decision.<sup>90</sup> On February 26, 2018, the Court granted the petition and scheduled the case for its 2018–19 term.<sup>91</sup>

That the Court agreed to hear the case is striking and suggests that it is inclined to reverse the First Circuit and hold that Section 1’s exemption is limited to contracts with workers who meet the legal definition of an employee. The First Circuit was the first court of appeals to rule on whether Section 1’s exemption applies to independent contractors, and no other circuit court had weighed-in when the Supreme Court granted *cert.*<sup>92</sup> Because the First Circuit was the only circuit to rule on the issue,

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<sup>85</sup> 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); *Port Drivers Fed’n 18, Inc. v. All Saints*, 757 F. Supp. 2d 463, 472 (D.N.J. 2011); *Owner-Operator Indep. 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); *Performance Team Freight Sys., Inc. v. Aleman*, 194 Cal. Rptr. 3d 530, 536–37 (Cal. Ct. App. 2015); *Johnson v. Noble*, 608 N.E.2d 537, 540 (Ill. App. 1992); see also *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 17–18 & n.16 (1st Cir. 2017) (citing prior cases and stating that most prior decisions “simply assume, explicitly or implicitly, that independent-contractor agreements are not contracts of employment under § 1” of the FAA).

<sup>86</sup> *Oliveira*, 857 F.3d at 20–22.

<sup>87</sup> *Id.*

<sup>88</sup> Brief of Am. Trucking Ass’ns, *supra* note 19, at 4.

<sup>89</sup> Petition for Appellant for Rehearing En Banc at 15, *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017) (No. 15-2364).

<sup>90</sup> See Docket Sheet, *New Prime, Inc. v. Oliveira*, No. 17-340 (U.S.), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-340.html>, archived at <https://perma.cc/MY4T-VAFH> (last visited Sept. 10, 2018).

<sup>91</sup> 138 S. Ct. 1164 (2018) (granting certiorari). Oral argument in the case is scheduled for October 3, 2018. See Docket Sheet, *supra* note 90.

<sup>92</sup> The issue of Section 1’s applicability to independent contractors in the transportation industry also has come up indirectly before the Ninth Circuit, but the Court did not address or decide the question because of the unusual procedural posture of the case. See *In re Swift Transp. Co, Inc.*, 830 F.3d 913 (9th Cir. 2016). There, like in *Oliveira*, a class of truck drivers (many of whom were subject to arbitration clauses) asserted that they were wrongly classified as independent

there was no circuit split on whether Section 1’s exemption is limited to common-law employees.<sup>93</sup> The Court normally prefers to take cases where it can resolve a split among the circuits and establish a uniform rule.<sup>94</sup> Absent a split, it is less common for the Court to take a case without giving more circuits a chance to weigh in, unless the case is of unusually exceptional importance. If the Court approved of the First Circuit’s decision, one would ordinarily expect it to deny *cert* and allow the First Circuit’s decision to stand.

It may be that the Court is inclined to believe that the phrase “contracts of employment” refers only to employer-employee relationships and therefore excludes independent contractors. While that might seem natural at first blush, it would be a mistake for the Court to determine that just because the statute uses the term “employment” the exemption is limited to employees and excludes independent contractors. Rather, as explained below, as a matter of both statutory interpretation and sensible policy, the term “contracts of employment” should be understood as meaning “contracts for work,” and thus should encompass all transportation workers, not just common-law employees.

### III. THE MEANING OF THE PHRASE “CONTRACTS OF EMPLOYMENT”

The term “contracts of employment” should be understood to cover

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contractors, and the district court ordered discovery on their status as employees or independent contractors as a predicate for determining whether they were exempt from the FAA. *Id.* at 915. The trucking company filed a petition for a writ of mandamus with the Ninth Circuit seeking to block discovery and an order requiring the district court to decide Section 1’s applicability without examining extrinsic evidence, which the Ninth Circuit denied on the relatively narrow ground that the high standard for issuing a writ of mandamus had not been satisfied. *Id.* at 915–17. The court did not address whether independent contractors fell within the scope of the FAA’s exemption. In dissent, Judge Ikuta argued that the court should not have ordered discovery and that whether a “contract of employment” exists should be determined based on the contract alone—i.e. whether or not the contract labels the worker an independent contractor. *Id.* at 919–20 (Ikuta, J., dissenting). That latter question of how a court determines whether a worker is an employee or an independent contractor for purposes of the FAA could confront the Supreme Court if it decides that Section 1’s exemption is limited to employees only.

<sup>93</sup> The First Circuit’s decision arguably created a split with the Eighth Circuit on a subsidiary question of whether the arbitrator or the court should decide whether the dispute falls within Section 1’s exemption. Compare *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 12–15 (1st Cir. 2017) (holding that the court must decide) with *Green v. SuperShuttle Int’l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011) (holding that the parties can delegate the question to an arbitrator). That question was also raised in *New Prime’s cert* petition, and it is possible that the Court could decide that an arbitrator must determine the scope of Section 1’s exemption and avoid reaching the merits. Whether a court or an arbitrator is the proper tribunal to decide whether Section 1 is limited to common-law employees is beyond the scope of this paper.

<sup>94</sup> See, e.g., Kevin Russell, *Commentary: Writing a Convincing Cert. Petition When There is No Direct Circuit Split*, SCOTUSBLOG (May 17, 2007), 11:50 AM, <http://www.scotusblog.com/2007/05/commentary-writing-a-convincing-cert-petition-when-there-is-no-direct-circuit-split>, archived at <https://perma.cc/M5JF-TAP4> (stating that the presence of a circuit split is “the Supreme Court’s most important criteria for granting certiorari”).

all transportation workers, including independent contractors. This is true for two reasons. First, the term “employment” and the phrase “contract of employment,” as they were used around the time the FAA was enacted in 1925, were broader than the term “employee.” The terms referred to all manner of work. Second, this conclusion is reinforced by looking at the latter part of the exemption, referring to “seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>95</sup> At the time of the FAA’s enactment, whether someone qualified as a seaman or a railroad employee was determined by the type of work they performed, not by whether they were employees or contractors. Whether someone was a seaman or a railroad employee was determined by federal law specific to that area, either by admiralty principles or specific rules pertaining to railroads. Because neither type of work was typically governed by common law rules, the fact that those examples were included in the exemption suggests that Congress did not intend Section 1’s exemption to be governed by common law principles distinguishing an employee from an independent contractor.

A. *“Contract of Employment” as “Contract for Work”*

Unless otherwise defined, a statutory term should be given its ordinary, common meaning as of the time of enactment.<sup>96</sup> Additionally, the meaning of a statutory term is not determined by reading the term in isolation, but “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.”<sup>97</sup>

Although the historical record is not free of ambiguity, and while many members of Congress may not have been thinking about the meaning and scope of the phrase “contracts of employment” when voting on the FAA, I believe that the better argument is that at the time the FAA was enacted, the term “employment” and the phrase “contracts of employment” most likely referred to all contracts for work, not just work by those who meet the legal definition of employee. The reasons for this conclusion are fleshed out below.

1. The Exemption’s Focus on the Type of Work a Person Performs Rather Than That Person’s Legal Status

I am not arguing that in 1925 the law never made any distinctions

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<sup>95</sup> 9 U.S.C. § 1.

<sup>96</sup> See, e.g. *Perrin v. United States*, 444 U.S. 37, 42–43 (1979) (looking at “the ordinary meaning of the term ‘bribery’ at the time Congress enacted [the Travel Act] in 1961”).

<sup>97</sup> *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

between employees and independent contractors. Such a distinction existed at the time, and dates back earlier than the Nineteenth Century. But it originally arose not for purposes of regulating labor relationships, but as an agency principle for determining the scope of the master-servant relationship.<sup>98</sup> Under principles of agency law, masters were liable for torts committed by their servants within the scope of their employment. If the servant was considered a contractor, then the master was not vicariously liable for the worker's misconduct. If the worker was an employee, then vicarious liability attached. In other words, this doctrine governed how to apportion liability for torts committed by workers. It did not pertain to defining the rights that workers had to collect wages or obtain other protections in the course of their work.

As the Nineteenth Century progressed and the nature of labor changed following the industrial revolution, states began to protect workers through statute, rather than through the common-law doctrine of master-servant agency law.<sup>99</sup> When states began adopting worker-protective statutes in the wake of the industrial revolution, they employed a variety of different terms with different meanings and scope. These statutes did not singularly focus on employees versus independent contractors. Statutes used terms like "workman," "laborer," "wage earner," "operative," or "hireling."<sup>100</sup> These terms were not necessarily synonymous with "employee" and may have had a broader or narrower reach.

Just because a statute sought to protect employees does not mean that it excluded independent contractors. In particular, laws that covered a specific industry or category of employees often 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," which is one of the critical factors for determining whether a person is an employee or a contractor.<sup>101</sup>

Although the Supreme Court did not have many occasions to address state worker-protection statutes prior to 1925, its 1889 decision in *Vane v. Newcombe* is instructive in showing how statutes that covered

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<sup>98</sup> See, e.g., Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 302–06 (2001) (discussing how "the 'master-servant' relationship" was "widely regarded as the pre-industrial precursor of the 'employer-employee' relationship" and explaining its role in determining an employer's vicarious liability for a worker's negligence"); Micah Prieb Stolfus Jost, Note, *Independent Contractors, Employees and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach*, 68 WASH. & LEE L. REV. 311, 313–14 (2011) (stating that in the Nineteenth Century, the employee-independent contractor question "was largely confined to the realm of tort law and the question of a master's vicarious liability for the conduct of a servant").

<sup>99</sup> See, e.g., Carlson, *supra* note 98, at 306–10.

<sup>100</sup> See *id.*

<sup>101</sup> *Id.* at 308.

particular classes of workers included contractors, and also how the terms “employment” or “employed” might have had a broader meaning than the term “employee.”<sup>102</sup> In *Vane*, 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.”<sup>103</sup> 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.<sup>104</sup> 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.”<sup>105</sup>

The case supports the principle that during this period of time, statutes written to protect specific classes of workers were understood to protect anyone working in that area, regardless of their status. Given that Section 1 specifically identifies types of workers, including seamen, railroad employees, and workers “engaged in interstate and foreign commerce,” and that the Supreme Court has found that those references show that Congress was specifically trying to exempt the particular work areas associated with transportation, Section 1 should be read to apply to all transportation workers, regardless of whether they are classified as employees or independent contractors.

Another textual clue supporting this reading is that Section 1’s residual clause exempts “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.

The natural counter-argument to this inference is that the exemption also refers to “railroad employees” (rather than, say, “railroad workers”), which arguably indicates that Congress wanted to limit the exemption to workers who qualify as employees. However, I believe that is the less persuasive reading. First, even if accepted, at most that makes the second

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<sup>102</sup> 132 U.S. 220, 233–36 (1889).

<sup>103</sup> *Id.* at 233–35.

<sup>104</sup> *Id.* at 234.

<sup>105</sup> *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 statutes for logging workers covered those employed by the logging company and those hired by contractors). Although the case was decided more than 35 years before the FAA’s enactment, it is possible that Congress was aware of the decision, or the principles emanating from the decision, when debating 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.”).

part of the clause ambiguous, as there is one reference to “employees” and another reference to “workers.” Second, examining the exemption as a whole supports the view that the exemption applies to all transportation workers. A statutory term is known “by the company it keeps.”<sup>106</sup> Here, the terms immediately preceding and immediately following “railroad employees” are not limited to employees. Whether workers qualify as “seamen,” (the term preceding “railroad employees”), is determined by the type of work they do rather than by how they were hired to do it.<sup>107</sup> And the term “any other class of workers” similarly signifies a broader reach than just employees. 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.<sup>108</sup> The phrase “railroad employees” should be understood in that context.

## 2. The Meaning of the Phrase “Contracts of Employment”

It might seem natural to think of the phrase “contracts of employment” as referring to employees only. But as the First Circuit persuasively explained, at the time of the FAA’s enactment, “the phrase ‘contracts of employment’ contained in § 1 means simply ‘agreements to do work.’”<sup>109</sup> Crucially, the Act exempts “contracts of employment,” not “contracts with employees.” Whether or not the term “employee” is a legal term of art referring to those workers fitting within certain legally-defined parameters, the term “employment” is more general and is more ordinarily understood as referring to all kinds of work. Indeed, there is ample historical evidence indicating that prior to 1925, the terms “employment” and “contracts of employment” encompassed all workers, including independent contractors.<sup>110</sup> For example, contemporaneous legal sources defined an “independent contractor” as someone who engaged in “independent employment.”<sup>111</sup> Similarly, numerous contemporary sources use the term “contracts of employment” as

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<sup>106</sup> *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

<sup>107</sup> *See infra* Part IV.B.

<sup>108</sup> *See, e.g., In re New York Locomotive Works*, 26 N.Y.S. 209, 211–13 (N.Y. Gen. Term 1893) (finding that in a statute covering “employees, operatives, and laborers” the meaning of “employee” was determined in part by the term “laborer,” and therefore did not cover salaried managers and administrators).

<sup>109</sup> *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 20 (1st Cir. 2017).

<sup>110</sup> Much of the historical research cited in this subsection was originally conducted by Jennifer Bennett, of the law firm Public Justice, P.C., who is counsel for the Respondent Dominic Oliveira in the case now before the Supreme Court, and is cited here with her permission.

<sup>111</sup> *See, e.g., Kreipke v. Comm’r of Internal Revenue*, 32 F.2d 594, 596 (4th Cir. 1929) (citing treatise and case law); *Pierson v. Chicago R.I. & P. Ry. Co.*, 170 F. 271, 274 (8th Cir. 1909) (citing both a treatise and cases).

encompassing contracts with independent contractors.<sup>112</sup> Other cases from the period refer to independent contractors as being “employed” or having an “employer.”<sup>113</sup> Finally, dictionaries from that period support

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<sup>112</sup> See, e.g., *Annotation, Teamster as Independent Contractor Under Workmen's Compensation Acts*, 42 A.L.R. 607, 617 (1926) (“When the contract of employment is such that the teamster is bound to discharge the work himself, the employment is usually one of service, whereas, if, under the contract, the teamster is not obligated to discharge the work personally, but may employ others to that end and respond to the employer only for the faithful performance of the contract, the employment is generally an independent one.”); THEOPHILUS J. MOLL, *A TREATISE ON THE LAW OF INDEPENDENT CONTRACTORS & EMPLOYERS' LIABILITY* 47–48 (1910) (“It has been laid down that the relation of master and servant will not be inferred in a case where it appears that the power of discharge was not an incident of the contract of employment.”); *id.* at 334 (“[The independent contractor] . . . is especially liable for his own acts when he assumes this liability in his contract of employment.”); *Tankersley v. Webster*, 243 P. 745, 747 (Okla. 1925) (“[T]he contract of employment . . . conclusively shows that Casey was an independent contractor.”); *Lindsay v. McCaslin*, 122 A. 412, 413 (Me. 1923) (“When the contract of employment has been reduced to writing, the question whether the person employed was an independent contractor or merely a servant is determined by the court as a matter of law.”); *Waldron v. Garland Pocahontas Coal Co.*, 109 S.E. 729, 729 (W. Va. 1921) (“Whether a person performing work for another is an independent contractor depends upon a consideration of the contract of employment, the nature of the business, the circumstances under which the contract was made and the work was done.”); *U.S. Fid. & Guar. Co. of Balt., Md. v. Lowry*, 231 S.W. 818, 822 (Tex. Civ. App. 1921) (explaining that whether a person is an independent contractor or employee depends upon whether the “contract of employment” gives the employer the right “to control the manner and continuance of the particular service and the final result”); *Luckie v. Diamond Coal Co.*, 183 P. 178, 182 (Cal. Dist. Ct. App. 1919) (explaining that a person working under a “written contract of employment” could be either “an independent contractor or [a] servant,” depending on how the work was actually performed); *Hamill v. Territilli*, 195 Ill. App. 174, 176 (Ill. App. Ct. 1915) (“Appellant strongly contends that under the contract of employment Territilli and Scully were independent contractors for whose negligence it was not responsible, while appellee urges the contrary.”). Many of these sources were also cited by the First Circuit in *Oliveira v. New Prime, Inc.* 857 F.3d at 20–21, n.20. It is also interesting that courts, including the Supreme Court, used the term “contract of employment” to refer to contracts with attorneys. See, e.g., *Watkins v. Sedberry*, 261 U.S. 571, 575 (1923); *Calhoun v. Massie*, 253 U.S. 170, 179 (1920) (McReynolds, J., dissenting); *Taylor v. Bemiss*, 110 U.S. 42, 44 (1884). While attorneys may be “employed” by their clients, they are not likely to qualify as “employees” of their clients.

<sup>113</sup> See, e.g., *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922) (“[T]he Court of Common Pleas held that the party employed was an independent contractor.”); *Arthur v. Tex. & P. Ry. Co.*, 204 U.S. 505, 516–17 (1907) (referring to “an independent contractor” as “employed . . . to do work upon the freight”); *John L. Roper Lumber Co. v. Hewitt*, 287 F. 120, 121 (4th Cir. 1923) (“[W]hen a person contracts with another to do work not in itself a nuisance per se nor unlawful, or attended with danger to others, and not subject to the employer’s control or direction, except as to the results to be obtained, the employer is not answerable to a third person for injuries resulting from the negligence of the contractor.”); *Woodward Iron Co. v. Limbaugh*, 276 F. 1, 2 (5th Cir. 1921) (“[T]he moving of the coal by tramcars was not included in the work which Waters was employed to do as an independent contractor . . . .”); *James Griffith & Sons Co. v. Brooks*, 197 F. 723, 725 (6th Cir. 1912) (“For this purpose the company . . . employed him as an independent contractor.”); *Pierson v. Chicago, R.I. & P. Ry. Co.*, 170 F. 271, 274 (8th Cir. 1909) (“An independent contractor is one who renders service in the course of an occupation representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished.”); *The Indrani*, 101 F. 596, 598 (4th Cir. 1900) (“If an independent contractor is employed to do a lawful act, and in the course of the work does some casual act of negligence, the common employer is not answerable.”) (internal quotation marks omitted); *Toledo Brewing & Malting Co. v. Bosch*, 101 F. 530, 531 (6th Cir. 1900) (“[T]his right was denied upon the ground that the acts complained of as negligent were those of an independent contractor, for which the defendant, as employer, was not responsible.”).



the reading that “contracts of employment” would encompass all workers, not just people who meet the legal definition of employee.<sup>114</sup>

At the same time, there are many contemporaneous cases and references to employees and independent contractors indicating that they occupy separate legal categories. In fact, New Prime focuses its Supreme Court briefing almost exclusively on arguing that, by 1925, the law clearly distinguished an “employee” from an “independent contractor.”<sup>115</sup> But that seems beside the point. The FAA does not refer to “contracts with employees” or use the words “employee” or “independent contractor” anywhere. Even if the word “employee” was a term of art that had a specialized legal meaning at the time, it does not appear that the same was true for terms like “employment,” “employed,” or “employer,” which were used more broadly to refer to a variety of work arrangements. For example, even sources that distinguish employee from independent contractor also define an independent contractor as someone who is not controlled by “his employer.”<sup>116</sup> Similarly, while an employee was considered to be equivalent to a servant in the old master-servant relationship, and thus distinct from an independent contractor, an independent contractor was someone who undertook “independent employment.”<sup>117</sup> In short, the fact that the law may have distinguished between employees and independent contractors has little bearing on the meaning of the term “employment,” which appears to have encompassed work relationships with independent contractors.<sup>118</sup>

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<sup>114</sup> See WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 488 (W.T. Harris & F. Sturges Allen eds., 1923) (defining “contract” when used as a noun as “[a]n agreement between two or more persons to do or forbear something”); *id.* at 718 (defining “employment” as “[a]ct of employing, or state of being employed” and listing “work” as a synonym for “employment”); *id.* (defining “employ” as “[t]o make use of the services of; to have or keep at work; to give employment to”); see also WEBSTER’S COLLEGIATE DICTIONARY 329 (3d ed. 1925) (providing similar definition of “employment” and similarly listing “work” as a synonym for “employment”); *id.* (defining “employ” as “[t]o make use of; use” and “[t]o give employment or work to” and explaining “[e]mploy is specifically used to emphasize the idea of service to be rendered”).

<sup>115</sup> Brief for Petitioner at 16–24, *New Prime, Inc. v. Oliveira*, 138 S. Ct. 1164 (2018) (No. 17-340) (2018 WL 2278112).

<sup>116</sup> See *id.* at 17 (“Strictly and etymologically, [employee] means ‘a person employed,’ but in practice . . . and as generally used with us, though perhaps not confined to any official employment, it is understood to mean *some permanent employment or position.*”) (emphasis in original) (quoting BOUVIER’S LAW DICTIONARY 1533 (8th ed. 1914)).

<sup>117</sup> See Brief for Petitioner, *supra* note 115, at 22. (citing Carlson, *supra* note 98, at 309–10).

<sup>118</sup> As one of Petitioner’s Amici, the CATO Institute noted that many states, in their early workers’ compensation statutes from the late Nineteenth and early Twentieth Century, did appear to use the term “employer” in a more specialized way than to refer to someone who hires employees. Brief for the CATO Institute as Amicus Curiae in Support of Petitioner at 9–13, *New Prime, Inc. v. Oliveira*, 138 S. Ct. 1164 (2018) (No. 17-340). Those statutes imposed one set of remedial schemes for employees, and another set for independent contractors. *Id.* While these statutes might provide some support for giving a narrower reading to the term “employer,” at least within the context of those specific statutes, they do not compel a different reading of FAA Section 1. First, at most, that argument pertains to the meaning of the term “employer,” not the term “employment,” which is the word the FAA uses. Second, it is important to note that these early

Finally, if “contract of employment” was meant to cover only employees, then the reference to “railroad employees” between “seamen” and “other workers” would be redundant. There would be no need to limit the exemption’s reach to railroad “employees” if the term “employment” already limited the class of excluded workers to employees only. Given that “[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant,” this further supports the conclusion that the term “contracts of employment”<sup>119</sup> covered all transportation workers, without regard to their technical legal status as an employee or a contractor.<sup>120</sup>

#### IV. THE EXEMPTION’S LEGISLATIVE HISTORY ALSO SUPPORTS INTERPRETING THE EXEMPTION TO COVER ALL TRANSPORTATION WORKERS, NOT JUST EMPLOYEES

The FAA’s legislative history provides additional support for interpreting Section 1’s exemption to cover all workers. Unfortunately, the Supreme Court has often given short-shrift to the Act’s history in a variety of ways, as other scholars have pointed out,<sup>121</sup> including in its only previous decision interpreting Section 1. Despite legislative history indicating that Section 1 was intended to exclude all contracts of employment, not just those with transportation workers, the Court refused

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statutes provided a compensation framework for both employees and contractors. In other words, the legislatures adopting these statutes considered both employees and independent contractors as workers deserving of protection. This supports the position that both employees and contractors were engaged in some form of employment to warrant similar protections. By contrast, most worker compensation statutes today do not protect independent contractors. *See, e.g.*, AN OVERVIEW OF WORKERS’ COMPENSATION INDEPENDENT CONTRACTOR REGULATORY APPROACHES, NAT’L ASS’N OF INS. COMM’RS 2–3 (Mar. 17, 2009), [www.naic.org/store/free/OWC-OP.pdf](http://www.naic.org/store/free/OWC-OP.pdf), *archived at* <https://perma.cc/38MY-TNYS> (explaining that in most jurisdictions, independent contractors are not eligible for workers’ compensation). Third, several of those statutes impose responsibility for contractors’ injuries on the “primary employer” (i.e. the person who directly hires the contractors), which directly undercuts any argument that the term “employer” excludes people who hire independent contractors.

<sup>119</sup> *Hobbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06, at 181–86 (rev. 6th ed. 2000)).

<sup>120</sup> In recent years, the Supreme Court has adopted a presumption that “when Congress has used the term ‘employee’ without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.” *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992). However, that modern presumption concerning statutes enacted recently bears little on what presumptions the 1925 Congress was operating under when adopting the FAA. Additionally, even if one thought that presumption should apply, the evidence that the common understanding of the meaning of “contract of employment” at the time should be sufficient to rebut the presumption.

<sup>121</sup> *See, e.g.*, SZALAI, *supra* note 15, at 191–98 (discussing ways in which the Supreme Court has misinterpreted the FAA by ignoring legislative history, and specifically asserting that the Court has misinterpreted Section 1 of the Act); Schwartz, *supra* note 31, at 75–78; Frankel, *supra* note 18, at 537–54 (describing how the Court has created a federal policy favoring arbitration that is inconsistent with Congress’s legislative intent).

to consider the legislative history on the ground that the statutory language was purportedly unambiguous and noting that the legislative history was “problematic” and “speculat[ive].”<sup>122</sup> The Court did, however, invoke its own history-based rationale for limiting the exemption to transportation workers, although not one that derives from the Act’s legislative history. The Court explained that at the time the FAA was passed, Congress had already enacted separate legislation creating dispute resolution structures for seamen and railroad workers.<sup>123</sup> Regarding seamen, Congress had passed the Shipping Commissioners Act of 1872.<sup>124</sup> Regarding railroad workers, Congress had passed the Transportation Act of 1920<sup>125</sup> and then the Railway Labor Act in 1926, one year after the FAA.<sup>126</sup> The Court surmised that it would be “reasonable to assume” that Congress excluded seamen and railroad workers because “it did not wish to unsettle established or developing statutory dispute resolution schemes covering [those] specific workers.”<sup>127</sup> In other words, according to the Court, Congress had decided that anyone who was subject to railroad or seamen dispute resolution schemes should not also be subject to the FAA.<sup>128</sup> And under the statutory construction canon of *ejusdem generis*, which states that a general term in a list should be interpreted similarly to the more specific terms that precede it,<sup>129</sup> Congress intended that similarly-placed “workers engaged in foreign or interstate commerce” would also be excluded.<sup>130</sup>

Given the Court’s prior disdain for the Act’s legislative history, it would be no surprise if the Court again ignores it here. In my view, that would be unfortunate, because the legislative history is illuminating in at least two ways. First, the legislative history surrounding Section 1’s exemption indicates that the drafters appeared to see no distinction between “contracts of employments” and contracts affecting all workers. Second, even taking at face value the Court’s conclusion that Congress excluded seamen and railroad employees because it did not want to subject them to overlapping schemes under both the FAA and the more specific laws Congress had already enacted,<sup>131</sup> that reasoning supports

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<sup>122</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119–20 (2001) (stating that because the text was clear, “we need not assess the legislative history of the exclusion provision”).

<sup>123</sup> *Id.* at 120–21.

<sup>124</sup> Shipping Commissioners Act of 1872, ch. 322, 17 Stat. 262.

<sup>125</sup> Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456.

<sup>126</sup> Railway Labor Act, Pub. L. No. 69-257, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151–165 (2012)); Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14 (2012)).

<sup>127</sup> *Circuit City*, 532 U.S. at 121.

<sup>128</sup> *Id.*

<sup>129</sup> *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1625 (2018) (defining the canon); 2A N. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 47.17 (7th ed. Supp. 2017).

<sup>130</sup> *Id.* (quoting 9 U.S.C. § 1) (internal quotation marks omitted).

<sup>131</sup> *See supra* notes 123–128 and accompanying text.

the conclusion that Section 1's exemption is not limited to employees. That is because the dispute resolution schemes Congress created for those industries did not turn on the common law notions of employee or master-servant liability to determine eligibility. Instead, the determination of whether an individual was a seaman or a railroad employee was based on the kind of work they did rather than on who hired them or the degree of control they exercised. This supports the conclusion that Section 1's exemption should turn on the kind of work a person does (i.e. transportation work) and not the person's status as an employee or an independent contractor.

A. *The Legislative History of Section 1 Supports Exempting All Transportation Workers*

The exemption's legislative history suggests that the drafters of the Act thought of "contracts of employment" as interchangeable with contracts affecting workers. As discussed in Section III, about the legislative history of the FAA, the Act was drafted primarily by several members of the American Bar Association's Committee on Commerce, Trade, and Commercial Law.<sup>132</sup> In particular, the two main drafters were Julius Cohen and Charles Bernheimer, while William H.H. Piatt served as chair of the ABA committee and worked closely with Bernheimer and Cohen to support the bill.<sup>133</sup> When Chairman Piatt testified on the bill to the U.S. Senate, he did not propose to use the term "contracts of employment" at all.<sup>134</sup> Rather, he proposed that the Act simply exempt workers and suggested the following language: "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce."<sup>135</sup> He further elaborated that his language was meant to show that the Act would not address "labor disputes" at all.<sup>136</sup>

At the same time, Cohen and Bernheimer, with whom Piatt was working closely, were addressing concerns by an influential constituent to a Senator whose support was important, and also lobbying Commerce Secretary Herbert Hoover to write a letter to support the bill.<sup>137</sup> They suggested making the same changes to the bill that Piatt suggested in his testimony, but using slightly different language—the language that ultimately ended up as the text of Section 1's exemption. When an influential constituent of South Dakota Senator Thomas Sterling wrote to Sterling prior to the 1923 Senate hearing to express various concerns

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<sup>132</sup> See generally SZALAI, *supra* note 15, ch. 4 (describing the history of the efforts to enact a federal arbitration law); Moses, *supra* note 31, at 101–10, 127 n.186.

<sup>133</sup> See SZALAI, *supra* note 15, at 103, 107, 109, 118–20; Moses, *supra* note 31, at 101–10.

<sup>134</sup> See generally 1923 Senate Hearing, *supra* note 45.

<sup>135</sup> See *id.* at 9.

<sup>136</sup> See *id.*

<sup>137</sup> SZALAI, *supra* note 15, at 145.

about the bill, including its applicability to railroad workers, Cohen responded by suggesting the following language: “[b]ut 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.”<sup>138</sup> There is no indication that Cohen intended anything substantively different than Piatt. In fact, “Cohen and Piatt likely communicated with each other in advance of the [Senate] hearing and discussed adding this language to the bill to address this labor concern.”<sup>139</sup>

At the same time, right before the Senate hearing, Bernheimer prevailed on Secretary Hoover to submit a letter (which may actually have been drafted in part by Bernheimer) in support of the bill.<sup>140</sup> In expressing his support for the bill, Hoover suggested “virtually the same language” for Section 1 as Cohen had used in responding to Senator Sterling, which was the language that ultimately was added to the bill.<sup>141</sup> In short, all three had the same goal in mind, and there is no indication that any of them intended to insert the phrase “contracts of employment” as a way of restricting the categories of workers who could claim the exemption.

To be sure, one could argue that this legislative history cuts the other way. In other words, because Piatt’s proposed language excluded the phrase “contracts of employment,” but the adopted language included “contracts of employment,” that indicates that the inclusion of that language was intentional.<sup>142</sup> While that is one possible reading, it does not seem persuasive. The history suggests that Piatt, Cohen, and Bernheimer were all working together with a common goal for both the Act and the exemption, and that all three were attempting to exclude disputes with workers from the bill—without regard to the worker’s legal status as a common-law employee—in order to address the concerns that various parties had expressed.<sup>143</sup> Similarly, Secretary Hoover, who supported arbitration because he thought it was appropriate for the commercial setting to resolve business disputes,<sup>144</sup> likely was not deliberately seeking to rein in the scope of the exemption to apply only to common-law employees and not to other workers. Moreover, the fact

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<sup>138</sup> *Id.* at 133–35.

<sup>139</sup> *Id.* at 143.

<sup>140</sup> *See id.* at 144–45 (“[I]t is very likely that Bernheimer suggested this amendment [to Hoover], which is virtually the same amendment Cohen had drafted a few days earlier.”).

<sup>141</sup> *See id.* at 135, 144–45; Federal Arbitration Act, Pub. L. No. 68-401, § 1, 43 Stat. 883, 883 (1925) (codified as amended at 9 U.S.C. § 1 (2012)).

<sup>142</sup> *Cf.* *Bowen v. Yuckert*, 482 U.S. 137, 149–51 (1988) (looking to legislative history of amendment process in interpreting the Social Security Act).

<sup>143</sup> *See supra* notes 132–136 and accompanying text.

<sup>144</sup> *See* SZALAI, *supra* note 15, at 108–09 (quoting Hoover’s support for “the arbitration of commercial disputes” and describing how the Commerce Department, under then-Secretary of Commerce Hoover, had experimented with voluntary arbitration of disputes between British and American merchants).

that when Hoover proposed the amendment, he said that it was intended to address objections about including “workers’ contracts” within the FAA,<sup>145</sup> strongly supports the idea that none of the drafters intended to limit the exemption to only certain classes of workers, such as common-law employees. Thus, while the legislative history may not be crystal clear, the fact that the drafters treated “contracts of employment” synonymously with “workers” suggests that the phrase was not intended to limit the reach of the exemption to common-law employees only.

### B. “Railroad Employees” and “Seamen”

The two types of workers specifically mentioned in the exemption are “railroad employees” and “seamen.” Under the statutory canon of *ejusdem generis*, which the Court has already said is an appropriate canon for construing Section 1,<sup>146</sup> the remaining term “workers engaged in interstate or foreign commerce” should be interpreted in a similar vein to those two more specific terms. Accordingly, if the terms “railroad employees” and “seamen” were understood by Congress in 1925 to include a wider range of workers than just common-law employees, the term “workers” should also be read to include a wider range of workers than just common-law employees. And an examination of the historical record reveals that the terms “railroad employees” and “seamen” were not limited to common-law employees.

The *Circuit City* Court concluded that Congress used the terms “railroad employees” and “seamen” because it had already created dispute resolution structures for railroad workers and seamen and thus excluded those categories to avoid any duplication or overlap between those statutory schemes.<sup>147</sup> However, the scope of each of those dispute resolution systems was not determined by whether the worker was a common-law employee but swept more broadly to encompass contractors, as well. This supports the conclusion that the Section 1 exemption is not limited to common-law employees.

#### 1. Railroad Employees

First, with respect to “railroad employees,” Congress created a dispute resolution scheme for them in the Transportation Act of 1920.<sup>148</sup>

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<sup>145</sup> 1923 Senate Hearing, *supra* note 45, at 14 (printing Hoover’s letter).

<sup>146</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001).

<sup>147</sup> *Id.* at 121. Of course, as explained above, it is equally likely that those two categories were included because two of the primary individuals who expressed concern about the Act’s applicability to workers were an influential lawyer who represented railroad companies and the President of the International Seaman’s Union.

<sup>148</sup> Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456.

The Transportation Act established the Railroad Labor Board (RLB), an administrative body created to resolve wage disputes and other grievances between railroad companies and their “employees” that could not be resolved on an informal basis.<sup>149</sup> Naturally, it was not long before the question arose of who constituted an “employee” subject to the Railroad Labor Board’s jurisdiction. Specifically, the Railroad Labor Board was called on to determine whether workers who were not hired directly by the railroad but were hired by a third-party contractor of the railroad nonetheless constituted “employees.” The Board held unequivocally that whether someone is an employee depends on the type of work they do—i.e. whether their work contributes to the functioning of the railroad—and not on who hires them.<sup>150</sup> The Board specifically rejected the argument that contract workers are not railroad employees, stating:

When Congress in this Act speaks of railroad employees, it undoubtedly contemplates those engaged in the customary work directly contributory to the operation of the railroads. It is absurd to say that carriers and their employees would not be permitted to interrupt commerce by labor controversies unless the operation of the roads was turned over to contractors, in which event the so-called contractors and the railway workers might engage in industrial warfare ad libitum . . . . A strike by the employees of a contractor or contractor-agent of a carrier would as effectually result in an interruption to traffic as if the men were the direct employees of the carrier.<sup>151</sup>

Thus, the Board clearly indicated that the phrase “railroad employees” in the Transportation Act of 1920 was not limited to those who were hired directly by the railroad and would satisfy the common-law definition of an employee, but that it applied equally to any worker who “engaged in the customary work directly contributory to the operation of the railroads” regardless of how they were labeled. This directly supports the conclusion that the term “railroad employees” in Section 1 was not meant to exclude independent contractors and limit itself to those workers who meet the traditional definition of employee. Rather, it reinforces the idea that Section 1 was focused on protecting those workers who performed transportation work, regardless of how their work relationship was characterized.

Indeed, reading the FAA to encompass independent contractors and conclude that they fall outside Section 1’s exemption would cause the very disruption that the *Circuit City* Court concluded Congress wanted to prevent by excluding some categories of workers from Section 1. If independent contractors were subject to the FAA, but also fell within the Railroad Labor Board’s jurisdiction, then any dispute between railroad

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<sup>149</sup> *Id.* at §§ 300–316.

<sup>150</sup> *Ry. Emps.’ Dep’t v. Ind. Harbor Belt R.R.*, No. 982, 3 R.L.B. 332 (1922).

<sup>151</sup> *Id.* at 336–37.

workers and their bosses would have been simultaneously subject to two different dispute resolution schemes: the Railroad Labor Board process and private arbitration. Allowing railroad companies or other businesses to bypass the Railroad Labor Board simply by inserting an arbitration clause in hiring contracts would have undermined the role Congress intended the Railroad Labor Board to play in resolving railroad labor disputes.

Moreover, Congress was likely aware of the Railroad Labor Board's decisions because the railroad strikes of the early Twentieth Century were among the most public and pressing issues of the time, including in the early 1920s right before the passage of the FAA.<sup>152</sup> Indeed, Secretary Hoover, whose letter in support of the FAA contained the language that is now the Section 1 exemption, met with railroad leaders in 1922 to try and resolve one such strike.<sup>153</sup>

While this is not the only possible interpretation of the term “railroad employees,” it is more persuasive than the alternative. One possible counter-argument is that other federal statutes relating to railroad workers were limited to common-law employees and did not cover independent contractors. For example, the Federal Employers' Liability Act (FELA), enacted in 1908, allowed railroad employees to sue railroad companies for injuries caused by the companies.<sup>154</sup> Soon after its enactment, the Supreme Court concluded that the statute did not extend to workers hired by a third-party contractor.<sup>155</sup> Similarly, the Railway Labor Act of 1926, which replaced the Transportation Act of 1920, was limited to railroad “employees.”<sup>156</sup> But FELA is not relevant because it did not create a separate dispute resolution scheme that would have interfered with the FAA.<sup>157</sup> Rather, it simply allowed railroad employees to use the courts to seek a tort remedy against the railroad companies.<sup>158</sup> And while the

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<sup>152</sup> See, e.g., Paul Stephen Dempsey, *Transportation: A Legal History*, 30 *TRANSP. L.J.* 235, 273 (2003); DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM 1865–1925* 403 (1987) (describing railroad strike of 1921); Margaret Gadsby, *Strike of the Railroad Shopmen*, 15 *MONTHLY LAB. REV.* 6 (Dec. 1922) (describing railroad strike of 1922).

<sup>153</sup> COLIN J. DAVIS, *POWER AT ODDS: THE 1922 NATIONAL RAILROAD SHOPMEN'S STRIKE* 104–09 (1997).

<sup>154</sup> Federal Employers' Liability Act, Pub. L. No. 60-100, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51–60 (2012)) (stating that “every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier”).

<sup>155</sup> See *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 92–94 (1915) (holding that porters hired by the Pullman company to work on the Railroad could not sue under FELA because they were not employees of the railroad and concluding that the statutory terms “employee” and “employed” were “intended to describe the conventional relation of employer and employee”).

<sup>156</sup> Railway Labor Act of 1926, c. 347, § 1, 44 Stat. 577 (codified as amended at 45 U.S.C. § 151 (2012)) (“The term ‘employee’ as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Surface Transportation Board . . .”).

<sup>157</sup> See *supra* note 154. *Cf. supra* notes 123–126 and accompanying text.

<sup>158</sup> See *supra* note 154.



Railway Labor Act was mentioned by the *Circuit City* Court, it was adopted in 1926, a year after the FAA became law. Given that the Railway Labor Act was not the law at the time of the FAA's passage, it is questionable to assume that Congress would have intended for the term "railroad employees" to be defined by reference to a statute not yet in existence rather than by the Transportation Act, which still existed in 1925.<sup>159</sup>

In short, because (1) whether an individual was a "railroad employee" subject to the Railroad Labor Board's jurisdiction turned on the type of work the person performed rather than on whether the person met the legal definition of employee, and (2) the Board's jurisdiction extended equally to direct employees of a railroad as well as contractors, the inclusion of "railroad employees" in Section 1's exemption was intended to cover all transportation workers and not just those that met the common-law definition of an employee.

## 2. Seamen

The inclusion of "seamen" within Section 1's exemption provides further evidence that the exemption should not be limited to common-law employees but should include anyone who does transportation work regardless of whether that person would be considered an employee or an independent contractor. The most likely reason that "seamen" were specifically mentioned in the exemption is that the main labor opposition to the bill came from Andrew Furuseth, the head of the International Seamen's Union, who worried that seamen could be exploited and forced into arbitration by the inclusion of arbitration clauses in shipping articles.<sup>160</sup> But his concern for all seamen, and Congress's response in

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<sup>159</sup> Transportation Act of 1920, Pub. L. No. 66-152, 41 Stat. 456. Similarly, one could argue that the Railroad Labor Board's interpretation that its jurisdiction extended to workers hired by third-party contractors in addition to workers hired directly by the railroads does not support applying the FAA's Section 1 exemption to independent contractors. That is because in both cases, the workers were *somebody's* employees, either the railroad or the contracting party, and thus were not truly independent contractors. But the Railroad Labor Board also determined that individual contractors, in addition to contracting companies, were within its jurisdiction when those contractors performed railroad-related work. *See* *United Bhd. of Maint. of Way Employees & Ry. Shop Laborers v. St. Louis-San Francisco Ry. Co.*, No. 1230, 3 R.L.B. 700 (1922) (holding that individual workers who contracted with railroads to serve as water pumpers were still the railroad's "employees" under the Transportation Act).

<sup>160</sup> *See, e.g.*, SZALAI, *supra* note 15, at 131-32 (describing Furuseth's public opposition to the bill and concern for seamen being required to go to arbitration); *Analysis of H.R. 13522 Submitted by President Andrew Furuseth to the Convention Which Was Adopted*, in PROCEEDINGS OF THE TWENTY-SIXTH ANNUAL CONVENTION OF THE INTERNATIONAL SEAMAN'S UNION OF AMERICA 204 (1923) (quoting statement from Mr. Furuseth). The term "shipping articles" is a maritime term of art that refers to the written terms of work between a seaman and a master. Federal law requires that written shipping articles are provided and signed by a seaman before a voyage commences, presumably as a way of limiting exploitation of seamen by their employers. *See* ROBERT FORCE & MARTIN J. NORRIS, *THE LAW OF SEAMEN* § 6.1 (5th ed. & Supp. 2017).

excluding all seamen from the reach of the FAA, is instructive in several ways. First, as with railroad employees, whether an individual is considered a seaman is defined by the type of work the person does—work contributing to the functioning of a vessel in navigation—and not by the nature of the employment relationship. Accordingly, workers who were hired by third-party contractors or who might qualify as independent contractors under statutes in place at the time like the Jones Act could still be considered seaman as long as they performed maritime-related work. Second, the dispute resolution system that Congress created for seamen in the Shipping Commissioners Act of 1872 was not limited to common-law employees but covered any member of a ship’s crew. Because the term “seamen” can encompass all different types of work relationships and is not limited to common-law employees, Section 1’s exemption similarly should not be limited to common-law employees.

Just as with “railroad employees,” whether an individual qualified as a seaman depended on the type of work that person did and not on who hired them. The common understanding of the term “seaman” was that it included anyone who did work contributing to the functioning of the vessel.<sup>161</sup> Thus, the term seaman encompassed any member of a ship’s crew.<sup>162</sup>

In other words, any person working aboard a ship was a seaman. It did not matter whether the person was hired directly by the shipowner or by a third-party contractor, nor what the specific terms of the employment relationship were. Indeed, like in the railroad context, early cases demonstrate that workers hired by third-parties rather than by shipowners were still seamen. For example, in 1916, a wireless operator who worked and was paid for by the Marconi company and who worked on a ship “in pursuance of a contract between [the ship’s] owners and the Marconi Wireless Telegraph Company of America” was determined to be a seaman.<sup>163</sup> That court cited to an earlier decision that explained that a seaman’s status was determined by the work the person performs, “without reference to the nature of the arrangement under which they are on board.”<sup>164</sup> Because it was the nature of the work, rather than the nature of the contract, that determined seaman status, anyone working in furtherance of a vessel, pursuant to any type of contractual arrangement, qualified as a seaman.<sup>165</sup> The term seaman was not restricted to those

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<sup>161</sup> In *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337 (1991), the Supreme Court extensively reviewed the historical understanding of the term seaman and concluded from those historical sources that in the early Twentieth Century, around the time the FAA was passed, the term “seaman” included anyone who contributed to the functioning of a vessel. *Id.* at 346–49.

<sup>162</sup> See *id.* at 348 (explaining that a “member of a crew” and “seaman” were “closely-related terms” that “were often used interchangeably in general maritime cases”).

<sup>163</sup> *The Buena Ventura*, 243 F. 797, 798–99 (S.D.N.Y. 1916).

<sup>164</sup> *Id.* at 798 (quoting *The Bound Brook*, 146 F. 160, 164 (D. Mass. 1906)).

<sup>165</sup> See *The Marie*, 49 F. 286, 287 (D. Or. 1892). In that case, the court explained that the type of contract involved was irrelevant. *Id.* (“The crew of a vessel,—the ship’s company,—in a general sense comprises all persons who, in pursuance of some contract or arrangement with the owner or

persons meeting the common-law definition of an employee.

This broad interpretation of “seaman” is consistent with the way federal statutes in various contexts define seaman—namely as not limited to employees only. Current maritime statutes define seaman broadly to encompass individuals “engaged *or* employed in any capacity on board a vessel.”<sup>166</sup> Similarly, at the time the FAA was passed, the Shipping Commissioners Act stated that “every person (apprentices excluded) who shall be employed or engaged to serve in any capacity on board the [vessel] shall be deemed and taken to be a ‘seaman.’”<sup>167</sup> The fact that the definition refers to those “employed or engaged” (rather than just “employed”), and working “in any capacity,” indicates that the term “seaman” was not limited to employees or persons “employed” on the vessel.<sup>168</sup>

The structure of the Shipping Commissioners Act of 1872 supports this conclusion.<sup>169</sup> This statute created a dispute resolution scheme for disputes involving seamen that, according to the *Circuit City* court, Congress intended to preserve when crafting the Section 1 exemption. The statute created a shipping commissioner and authorized that commissioner to arbitrate disputes and issue final, binding decisions. The scope of disputes that the shipping commissioner could hear was broad, as the statute covered “any question whatsoever . . . between a master, consignee, agent or owner, and any of his crew.”<sup>170</sup> The Act did not limit the Commissioner’s jurisdiction to employees, nor did it use the term “employee.”<sup>171</sup> Rather, it covered any dispute involving a member of the crew, which as explained above, was synonymous with seaman and included anyone who worked in support of the vessel’s function. Given that the Shipping Commissioners Act did not distinguish between common-law employees and other maritime workers, and given that Congress did not want the FAA to interfere with Shipping Commissioner arbitration, it stands to reason that Congress also did not intend Section 1’s exemption to distinguish between common-law employees and other transportation workers.

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master, are on board the same, aiding in the navigation thereof. It matters not whether the contract is verbal or in writing, or for a long or short voyage or period.”). While the court was specifically talking about the length of the contract or oral versus written contracts, it also emphasized that anyone performing seaman’s duties pursuant to any type of contractual arrangement was a seaman. *Id.*

<sup>166</sup> 46 U.S.C. § 10101(3) (2012) (emphasis added). This definition excludes “scientific personnel, a sailing school instructor, or a sailing school student.” *Id.*

<sup>167</sup> Shipping Commissioners Act of 1872, ch. 322, § 65, 17 Stat. 262, 277.

<sup>168</sup> Some later-enacted statutes, such as the Fair Labor Standards Act (FLSA), define “seaman” more narrowly, but still by reference to the nature of the work performed rather than the individual’s employment status. *See* 29 C.F.R. § 783.31 (2018).

<sup>169</sup> Shipping Commissioners Act of 1872, ch. 322, § 25, 17 Stat. 262, 267.

<sup>170</sup> *Id.* For a more detailed look at the Shipping Commissioners Act, *see* Brief of Amici Curiae Historians in Support of Respondent, *New Prime, Inc. v. Oliveira*, No. 17-340 (U.S. July 25, 2018), at 16–25.

<sup>171</sup> Shipping Commissioners Act of 1872, ch. 322, 17 Stat. 262.

Notably, when Congress wanted to use employment-specific terminology in maritime statutes, it knew how to do so. In the Jones Act of 1920, Congress created a negligence cause of action for any “seaman who shall suffer injury in the course of his employment.”<sup>172</sup> Because the text of this provision incorporated the standards from FELA with respect to railroad employees,<sup>173</sup> the Jones Act has been held to apply only to employees. The Shipping Commissioners Act, by contrast, was not limited to conduct occurring in the course of employment.<sup>174</sup> Since that one section of the Jones Act is the only provision of the Act to explicitly reference an employee or “employment,” it follows that the rest of the Act, and the meaning of the term “seaman,” is not limited to employer-employee relationships.<sup>175</sup>

Although advocates of limiting Section 1’s exemption only to common-law employees have pointed to this provision of the Jones Act for support,<sup>176</sup> it may actually cut in the other direction by showing that independent contractors can be seamen. Because this one provision of the Jones Act uses employment-specific language, courts applying that portion of the Jones Act have been called on to determine whether particular seamen are employees (in which case they can sue under the Jones Act) or independent contractors (in which case they cannot). Courts have found various maritime workers to be independent contractors, even though they also qualify as seamen based on the work they perform. For example, several courts have found that harbor pilots—who have expertise in particular harbors and are brought on board to steer ships through those waters—are independent contractors under the Jones

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<sup>172</sup> Jones Act of 1920, 41 Stat. 988, 1007 (codified as amended at 46 U.S.C.A App. § 688(a) (2006)).

<sup>173</sup> *See id.* (stating that in any personal injury action brought under the Jones Act, “all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply”); *Evans v. United Arab Shipping Co. S.A.G.*, 4 F.3d 207, 215 (3d Cir. 1993) (“In this respect, the Act is the maritime equivalent of the Federal Employers’ Liability Act (‘FELA’) covering railroad employees.”).

<sup>174</sup> The Act covered “any question whatsoever” between a master and a crewmember. Shipping Commissioners Act of 1872, ch. 322, § 25, 17 Stat. 262, 267.

<sup>175</sup> *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (quoting *U.S. v. Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

<sup>176</sup> *See* Brief for Petitioner, *New Prime, Inc. v. Oliveira*, No. 17-340 (U.S. May 14, 2018), at 26.

Act.<sup>177</sup> Yet harbor pilots have long been recognized as seaman.<sup>178</sup> The same is true for divers, who qualify as seamen<sup>179</sup> but have been found to be independent contractors under the Jones Act.<sup>180</sup>

To be sure, one could argue that if using the term “employment” in conjunction with seamen (as in the Jones Act) is sufficient to limit a provision’s scope to common-law employees, then Section 1’s use of “contracts of employment” for “seamen” and other transportation workers should be similarly limited to common-law employees. That is possible, but that conclusion is undermined by two important facts. First, the term “contracts of employment” was not understood at the time to be limited to employees. Second, the scope of Shipping Commissioner arbitration was not limited to employer-employee disputes and Congress’s goal was to exempt anyone who could bring a dispute before the Shipping Commissioner.

Finally, the fact that admiralty jurisdiction is determined by the subject matter of the dispute rather than the status of the parties provides additional support for reading Section 1’s exemption to cover all transportation workers, regardless of whether they are contractors or common-law employees. The FAA’s legislative history suggests that Congress wanted, through Section 1, to keep the FAA from encroaching into matters that fall within admiralty jurisdiction. In an early decision addressing Section 1’s exemption, the Third Circuit examined 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

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<sup>177</sup> See, e.g., *Evans*, 4 F.3d at 217; *Harwood v. Partredereit* AF 15.5.81, 944 F.2d 1187, 1189 (4th Cir. 1991) (finding that a compulsory harbor pilot who was a member of the Virginia Pilots’ Association functioned as an independent contractor); *Bach v. Trident Shipping Co.*, 708 F. Supp. 772, 773–74 (E.D. La. 1988) (holding a compulsory pilot to be an independent contractor), *aff’d* on other grounds, 920 F.2d 322 (5th Cir. 1991), *vacated and remanded*, 500 U.S. 949, *reaff’d* on other grounds, 947 F.2d 1290 (5th Cir.); *Clark v. Solomon Navigation, Ltd.*, 631 F. Supp. 1275, 1277 (S.D.N.Y. 1986) (finding that the parties agreed that a compulsory river pilot who worked for his own company, which was in turn a member of a local pilots’ association, was an independent contractor and not employee of the shipowner in a suit brought by the pilot solely under general maritime law). *But see* *Guy v. Donald*, 203 U.S. 399, 407 (1906) (holding that, in a negligence action by a shipowner against members of a pilots’ association for negligence of the association’s compulsory pilot, the association was not liable because it had no control over the shipboard job performance of its members).

<sup>178</sup> See, e.g., *The China* 74 U.S. (7 Wall.) 53, 67 (1868) (referring to pilots as “seamen”).

<sup>179</sup> See, e.g., *The Murphy Tugs*, 28 F. 429 (E.D. Mich. 1886) (“There can be no question in this case that the services rendered by libellant were maritime in their nature . . .”); *The Highlander*, 12 F. Cas. 136, (D. Mass. 1859); *De Gaetano v. Merritt & Chapman Derrick & Wrecking Co.*, 196 N.Y.S. 573 (N.Y. App. Div. 1922).

<sup>180</sup> See, e.g., *Williamson v. Daspsit Bros. Marine Divers, Inc.*, 337 F.2d 337, 341 (5th Cir. 1964) (upholding jury verdict finding that diver hired by a third-party was an independent contractor).

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.”<sup>181</sup>

Under standard principles of admiralty law, admiralty jurisdiction over contractual disputes is based on “the subject matter of the contract” and whether it refers to maritime services or transactions.<sup>182</sup> “It is inappropriate, therefore, to focus on the status of a claimant to determine whether admiralty jurisdiction exists.”<sup>183</sup> Thus, if the subject matter of a contract brings the dispute within admiralty jurisdiction, it does not matter if the services are performed by a shipping company or by a third-party contractor.<sup>184</sup> Because Section 1’s exemption was intended to avoid any encroachment on traditional maritime jurisdiction over seaman’s disputes, and because jurisdiction does not disappear because of a party’s status as a contractor, Section 1’s exemption also should not exclude transportation workers just because of their status as contractors.

Just as with railroad employees, the inclusion of the term “seamen”—a term that was determined by the subject matter of the work performed rather than by the employment status of the worker—reinforces the idea that Section 1’s exemption was intended to cover all transportation workers, regardless of whether the person performing the transportation work would satisfy the legal definition of an employee or would be labeled an independent contractor.

## V. POLICY CONCERNS

In addition to the statutory text and the legislative history, policy concerns also favor applying Section 1’s exemption to all transportation workers. First, applying the exemption to common-law employees but not to independent contractors would thwart Congress’ concern with promoting labor peace in transportation industries and ensuring the free flow of goods. As the *Circuit City* Court found, the Section 1 exemption grew out of “Congress’ demonstrated concern with transportation workers and their necessary role in the free flow of goods.”<sup>185</sup> Transportation workers who are independent contractors can disrupt “the free flow of goods” just as easily as can any other transportation worker. That was precisely the reason that the Railroad Labor Board determined

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<sup>181</sup> *Tenney Eng’g, Inc. v. United Elec. & Radio Mach. Workers of Am., (U.E.) Local 437*, 207 F.2d 450, 452 (3d Cir. 1953) (quoting 48 Am. Bar Ass’n Rep. 287 (1923)).

<sup>182</sup> *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 610 (1991) (quoting *Ins. Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 26 (1871)).

<sup>183</sup> *Exxon Corp.*, 500 U.S. at 612.

<sup>184</sup> *See id.* at 609–13 (holding that fuel services supplied by a third-party contractor of Exxon fell within admiralty jurisdiction and were no different than maritime services provided by Exxon itself).

<sup>185</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001).

that its jurisdiction should cover all railroad workers.<sup>186</sup> Indeed, many labor disputes involve independent contractors, or involve the very question of whether particular workers are misclassified under applicable law as independent contractors rather than employees.<sup>187</sup> If Section 1’s exemption was motivated to promote labor peace and thereby ensure the “free flow of goods,” its purpose would not be fulfilled if it excluded independent contractors.

Second, applying the exemption to both employees and independent contractors reduces the incentives for companies to purposely mislabel their workers as independent contractors. “[T]he misclassification of employees as independent contractors” is “one of the most serious problems facing affected workers, employers and the entire economy.”<sup>188</sup> 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, such as the minimum wage, overtime compensation, family and medical leave, unemployment insurance, and safe workplaces.”<sup>189</sup> Of relevance to the *Oliveira* case now before the Supreme Court, there is especially “pervasive misclassification in the trucking industry,” resulting from industry deregulation and the heavy use of purportedly “self-employed drivers.”<sup>190</sup> The high-level of exploitation of truck drivers in particular and transportation workers in general has been well-documented.<sup>191</sup>

Make no mistake, that is what the case now before the Court is really about. Worker’s rights have taken a beating at the hands of the Supreme Court recently. Just this year, the Court has drastically curtailed the ability of unions to fund themselves through dues collection<sup>192</sup> and has held that companies can force employees to sign away their rights to engage in class actions or collective activity, even if it makes it impossible for them to vindicate their rights or collectively work to improve the terms and conditions of their employment.<sup>193</sup> With the

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<sup>186</sup> See *supra* note 150 and accompanying text.

<sup>187</sup> See, e.g., *Slayman v. FedEx Ground Package Syst., Inc.*, 765763 F.3d 1033 (9th Cir. 2014); CARRÉ, *supra* note 8, at 11–12 (describing trucking practices and ensuing labor disputes).

<sup>188</sup> U.S. DEP’T OF LAB., *supra* note 6.

<sup>189</sup> *Id.*

<sup>190</sup> CARRÉ, *supra* note 8, at 11.

<sup>191</sup> See, e.g., Trip Gabriel, *Alone on the Open Road: Truckers Feel Like ‘Throwaway People’*, N.Y. TIMES (May 22, 2017), <https://www.nytimes.com/2017/05/22/us/trucking-jobs.html>, archived at <https://perma.cc/EP9C-L5TB>.

<sup>192</sup> *Janus v. Am. Fed’n of State, Cty. & Mun. Emps.*, Council 31, 138 S. Ct. 2448 (2018).

<sup>193</sup> *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (finding that the FAA requires enforcement of arbitration clauses in employment contracts that ban collective actions, and that such clauses do

retirement of Justice Kennedy and the potential for a replacement who is not particularly sympathetic to the plight of workers, the prospect of future restrictions on workers' rights looms large. Although much of the case briefs and argument may focus on esoteric points about the historical meaning of certain statutory terms, the case represents another corporate attempt to expand arbitration, diminish workers' abilities to collect needed wages and benefits, and take advantage of a vulnerable sector of the American workplace. If we truly wish to combat employer misclassification of workers as independent contractors, then we should stop providing employers with incentives to do so. While it may not stop misclassification entirely, it will at least provide that certain misclassified workers can still challenge their treatment in a court of law instead of being forced by their employers into private arbitration against their will.

#### CONCLUSION

Congress exempted from the FAA all contracts of employment with workers engaged in interstate commerce. The Supreme Court has already narrowed the scope of the exemption once when it limited the exemption to transportation workers. It is now poised to decide whether the exemption is limited only to those transportation workers who meet the legal definition of an employee, excluding millions of transportation workers who are labeled independent contractors or who work in other non-traditional structures. If the Court so holds, it will enable and incentivize companies to purposely misclassify their workers as independent contractors, exacerbating a problem that is already endemic. However, and although the historical evidence is not ironclad, a close examination of the statute's text, legislative history, and policy concerns underlying the FAA support interpreting Section 1's exemption to cover all transportation workers, including independent contractors, more than it supports limiting the exemption to common-law employees.

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not violate the National Labor Relations Act's (NLRA) prohibition on restricting collective activity regarding the terms and conditions of employment).