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***New Prime Inc. v. Oliveira*: Putting the Wheels Back on the FAA's Section 1 Exemption for Transportation Workers**

Reed C. Trechter

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New Prime Inc. v. Oliveira: Putting the Wheels Back on the FAA's Section 1 Exemption for Transportation Workers

I. Introduction

Arbitration is ubiquitous in modern-day America.¹ Since the early twentieth century, there has been a burgeoning trend of consumer contracts and employment agreements containing provisions that require disputes arising under the agreement to be resolved in an arbitral forum.² Today, millions of American consumers³ and approximately a quarter of American nonunion employees⁴ are subject to mandatory arbitration agreements. However, the wide use—and, often, blind acceptance—of arbitration agreements is not without controversy. According to its largely corporate proponents, arbitration is viewed as a means to wholly control adjudication of disputes arising out of contract.⁵ Antagonists, however, maintain that the often one-sided mandatory arbitration agreements deny customers and employees the unique advantages that a judicial proceeding affords.⁶

1. See *Knepp v. Credit Acceptance Corp.* (*In re Knepp*), 229 B.R. 821, 828 (Bankr. N.D. Ala. 1999) (“Arbitration was innocuous when limited to negotiated commercial contracts, but it developed sinister characteristics when it became ubiquitous.”).

2. See KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POLICY INST., *THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS* 3–4 (2015), <http://www.epi.org/files/2015/arbitration-epidemic.pdf>.

3. CONSUMER FIN. PROT. BUREAU, *ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) 9* (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

4. STONE & COLVIN, *supra* note 2, at 15.

5. Corporate drafters can structure arbitration agreements to achieve a litany of goals such as: confidentiality, avoiding adherence to the Federal Rules of Evidence and Civil Procedure, immunity from class action, avoidance of jury trial, avoidance of appeal, etc. See, e.g., *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 565 (2013) (“Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them.”); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011) (“[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”) (citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009)); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (noting that under the Federal Arbitration Act, courts may vacate an arbitrator’s decision “only in very unusual circumstances”); *Mitsubishi Motors*, 473 U.S. at 628 (“By agreeing to arbitrate a statutory claim, a party . . . trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”).

6. See STONE & COLVIN, *supra* note 2, at 26; see also Taylor J. Freeman Peshehonoff, *Title VII’s Deficiencies Affect #MeToo: A Look at Three Ways Title VII Continues to Fail*

This Note will analyze *New Prime Inc. v. Oliveira*, in which the Supreme Court examined the scope of the Federal Arbitration Act's ("FAA" or "Act") section 1 exemption and, for the first time in modern arbitration jurisprudence, seized back some of the power that it had historically relinquished in light of a supposed federal policy in favor of arbitration.⁷ Part II provides a background of the Act, the Court's historical treatment of cases in which questions of arbitrability arise, and the circuit split that gave rise to the Court's review of the section 1 exemption. Part III describes the facts surrounding *New Prime Inc. v. Oliveira* and analyzes the Court's reasoning. Part IV argues that courts have historically misapplied Congress's intent behind enacting the FAA and gone too far in allowing arbitrators the authority to decide the limits of their own jurisdiction but have now appropriately seized the opportunity to set forth a clear and correct interpretation of the Act. Finally, Part V briefly concludes by setting forth a few key questions that can only be answered through time and further judicial interpretation.

II. Law Before *New Prime*

A. The Federal Arbitration Act

Before 1925, both state and federal courts showed great hostility towards the enforcement of arbitration agreements.⁸ Evidencing this trend, the

America's Workforce, 72 OKLA. L. REV. 479, 515–16 (2020) (arguing that the often secretive nature of arbitration eliminates many of the protections employment statutes, such as Title VII, sought to create).

7. Compare *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (noting "a liberal federal policy favoring arbitration" and establishing the principle that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration") (emphasis added), with H.R. REP. NO. 68-96, at 1 (1924) (noting that the purpose of enacting the FAA was to place agreements to arbitrate disputes "upon the *same footing* as other contracts, where it belongs") (emphasis added).

8. The House Report, generated as part of Congress's enactment of the Federal Arbitration Act, summarizes the history of judicial hostility as:

Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it. The

Supreme Court affirmed in *Insurance Co. v. Morse* that “[e]very citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him.”⁹ Further, while a citizen is free to bind himself to arbitration, “[h]e cannot . . . bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.”¹⁰ In response to this hostility, and with an express intent to place arbitration agreements on the same footing as any other contract,¹¹ Congress promulgated the United States Arbitration Act,¹² which was codified in 1947,¹³ and is known today as the Federal Arbitration Act.¹⁴ The FAA contains fifteen distinct sections with the most widely cited provisions being sections 1, 2, 3, and 4.

While this Note will focus on the jurisdictional exemption contained within section 1 of the Act, a cursory overview of each of the first four sections is necessary to appreciate the judicial analysis required to resolve disputes in which one party moves to compel arbitration.

Section 1 establishes the Act’s scope of application.¹⁵ The FAA applies to contracts that contain arbitration agreements in two areas of federal jurisdiction: “[m]aritime transactions” and “commerce.”¹⁶ The text of section 1, however, expressly exempts “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”¹⁷

Section 2 of the FAA “is the primary substantive provision,”¹⁸ and substantively provides that “[a] written provision . . . to settle by arbitration

bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.

H.R. REP. NO. 68-96, at 1–2.

9. 87 U.S. (20 Wall.) 445, 451 (1874).

10. *Id.*

11. The House Report accompanying the FAA states plainly that “[a]rbitration agreements are purely matters of contract,” and that the purpose of enacting the legislation was to place agreements to arbitrate disputes “upon the same footing as other contracts, where it belongs.” H.R. REP. NO. 68-96, at 1.

12. United States Arbitration Act, ch. 213, 43 Stat. 883, 886 (1925).

13. Federal Arbitration Act, ch. 392, 61 Stat. 669, 669 (1947).

14. 9 U.S.C. §§ 1–16 (2018).

15. *Id.* § 1; *see, e.g.*, *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56–57 (2003); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274–76 (1995).

16. 9 U.S.C. § 1.

17. *Id.*

18. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁹ Section 2 validates arbitration agreements as contracts and expressly manifests Congress’s intent to ensure that arbitration agreements would hold “the same footing as [all] other contracts.”²⁰

Sections 3 and 4 direct courts to stay the proceedings before them and compel arbitration.²¹ Section 3 provides, in part, that “the court . . . upon being satisfied that the issue involved . . . is referable to arbitration under [the underlying contract], shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement.”²² Section 4 furnishes that “upon being satisfied that the making of the agreement for arbitration . . . is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.”²³ These sections specify the action the court must take upon satisfaction that a controversy is, in fact, arbitrable.

In short, section 1 sets forth the scope of the Act; section 2 validates arbitration agreements as legally binding; and sections 3 and 4 direct courts to abdicate their jurisdiction upon satisfaction that the underlying contract is valid, and that the dispute falls within the range of issues contemplated by the text of the agreement.

While the Act clearly and unambiguously delineates Congress’s intent to place arbitration agreements on equal footing with all other contracts, it is not without limits. The Act’s boundaries are primarily shown through two distinct considerations. First, the FAA in itself does not create a basis for federal jurisdiction. A federal court must find some independent basis of jurisdiction before adjudicating a claim involving an arbitration dispute.²⁴ Second, the FAA is limited by section 1, which exempts from the FAA

19. 9 U.S.C. § 2.

20. H.R. REP. NO. 68-96, at 1 (1924).

21. 9 U.S.C. §§ 3, 4.

22. *Id.* § 3.

23. *Id.* § 4.

24. *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984) (“While the Federal Arbitration Act creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 (1976) or otherwise.”) (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983)); *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 25 n.32 (noting that the FAA requires “diversity of citizenship or some other independent basis for federal jurisdiction”).

“contracts of employment of transportation workers.”²⁵ This Note focuses on the latter.

B. The Court’s Treatment of Arbitrability Disputes

Following the enactment of the FAA, United States federal courts refined their analysis and interpretation of disputes arising under contracts containing an agreement to arbitrate. Slowly but surely, courts began to uphold and enforce agreements to arbitrate. Over time, however, the judiciary’s willingness to scrutinize arbitration agreements prior to relinquishing jurisdiction to an arbitrator diminished to the point where courts’ interpretation of the FAA appeared to place arbitration agreements on a pedestal.²⁶

Two fundamental questions have arisen in modern arbitration jurisprudence. The first asks whether the dispute is “arbitrable.” This question turns on “whether the parties have agreed to submit a particular grievance to arbitration.”²⁷ Should the adjudicator determine that the parties agreed to arbitrate a given dispute within the language of the contract, it is referred to an arbitral forum. If they did not, the dispute is decided in a court of law.

The second question considers the procedure for determining the first by asking whether a court or an arbitrator should make the “merits” determination. While the outcome should conceivably be the same regardless of who makes the arbitrability determination, the procedural question of who decides may, in fact, be dispositive of the merits dispute²⁸—most simply because arbitrators possess a perverse incentive to determine a dispute’s arbitrability in a manner that allows them to retain jurisdiction.²⁹ As such, the procedural question has been hotly disputed and

25. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

26. *See Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24–25 (noting the “liberal federal policy favoring arbitration” and establishing the principle that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”).

27. *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 649 (1986).

28. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (“Hence, who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration.”).

29. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 416 (1967) (Black, J., dissenting) (“The only advantage of submitting the issue . . . to arbitration is for the arbitrators. Their compensation corresponds to the volume of arbitration they perform.”).

heavily litigated throughout the life of the Act,³⁰ and a brief discussion of its historical treatment is warranted.

From the enactment of the FAA until the late 2000s, the established principle regarding questions of arbitrability was that they were “an issue for judicial determination Unless the parties clearly and unmistakably provide otherwise.”³¹ The premise during this period was to give effect to the parties’ intent by first answering the question of “who has the primary power to decide arbitrability” by determining “what the parties agreed about *that* matter.”³² Nonetheless, Congress originally reserved two issues for the judiciary’s exclusive determination: (1) whether a given arbitration clause bound the parties to a dispute and (2) whether a binding arbitration clause applied to a particular type of controversy.³³ In 2010, however, the Supreme Court announced that parties had the right to have arbitrators determine all questions of arbitrability should they so choose, by declaring that “parties can agree to arbitrate ‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.”³⁴

Today, because the Court broadly granted authority to arbitrators, cases based on a contract containing an agreement to arbitrate are routinely stayed and arbitration is compelled pending the arbitrator’s decision of its own jurisdiction to decide the matter. Therein lies the fundamental issue that has given rise to copious litigation in the twenty-first century: whether an arbitrator should have the authority to determine its own—and, in turn, the courts’—jurisdiction under the FAA.³⁵ The Court’s decision to abdicate responsibility for deciding its own jurisdiction has effectively extirpated the right of those on the wrong end of a contract containing an arbitration agreement to be heard by a court of law.

30. See, e.g., *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67–70 (2010); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *First Options*, 514 U.S. at 943–44.

31. *AT&T Techs.*, 475 U.S. at 649; see also *First Options*, 514 U.S. at 943 (“Just as the arbitrability of the merits of a dispute depends on whether the parties agreed to arbitrate that dispute, so the question ‘who has the primary power to decide arbitrability’ turns upon what the parties agreed about *that* matter.”) (citations omitted).

32. *First Options*, 514 U.S. at 943.

33. See *Howsam*, 537 U.S. at 84.

34. *Rent-A-Ctr.*, 561 U.S. at 68–69.

35. For where the arbitrator determines they properly have jurisdiction to resolve a dispute, they necessarily subjugate the court’s jurisdiction over the same. See 9 U.S.C. §§ 3, 4.

C. The Circuit Split—Who Should Determine the Question of Arbitrability

When determining issues of arbitrability, the United States Supreme Court has routinely held that where a valid arbitration agreement exists and the parties have delegated issues of arbitrability to an arbitrator, a court should stay an action and compel arbitration.³⁶ The Court has not, however, answered the question of who—an arbitrator or a court—should determine whether a disputed contract falls within the section 1 exemption of the FAA. The Court similarly has not determined whether the form or the substance of a contractual relationship is the guiding principle behind determining whether the contract is exempted from the FAA's coverage. Prior to *New Prime*, two circuits addressed the issue and decidedly split, reaching different conclusions as to the ability of an arbitrator to determine the court's jurisdiction.

1. Arbitrators Should Determine the Applicability of the Section 1 Exemption: Green v. SuperShuttle International, Inc.

On one side of the split, the Eighth Circuit found that arbitrators could decide the applicability of the section 1 exemption in a case considering a contract between a busing corporation and a driver-franchisee. In *Green v. SuperShuttle International, Inc.*, a bus driver brought suit on behalf of himself and other similarly situated individuals who had entered into Unit Franchise Agreements (“UFAs”) with a shared-ride shuttle service, alleging violations of state labor laws.³⁷ The defendant owned and operated a shuttle service in which it classified its shuttle bus drivers as franchisees, as opposed to employees, and required them to sign UFAs that contained an arbitration agreement binding both parties to arbitrate any controversy arising out of the UFA.³⁸

The shuttle service removed the action to federal court and moved to compel arbitration against the drivers.³⁹ After finding that “it did not need to decide whether [the] Section 1” exemption applied to the UFAs, the district court granted the defendant's motion to compel arbitration and dismissed the action.⁴⁰ Petitioner appealed, claiming the district court erred in granting the motion.⁴¹ The bus driver argued that “the district court lacked subject matter jurisdiction to compel arbitration” under section 4 of

36. *See supra* Section II.B.

37. 653 F.3d 766, 767 (8th Cir. 2011).

38. *Id.* at 767–68.

39. *Id.* at 768.

40. *Id.*

41. *Id.*

the FAA because the UFAs were not subject to the FAA due to section 1's exemption.⁴²

The Eighth Circuit rejected this argument in a succinct opinion, holding that because "the UFAs specifically incorporated the Rules of the American Arbitration Association (AAA)," the "arbitrator has the power to determine his or her own jurisdiction over a controversy between the parties."⁴³ Further, the driver "agreed to have the arbitrator decide whether the" section 1 exemption applied to the UFA.⁴⁴ As was to be expected in light of the misplaced favoritism toward compelling arbitration when there is any semblance of a valid arbitration agreement, the Eighth Circuit surrendered its own jurisdiction in favor of allowing an arbitrator to handle the dispute.⁴⁵

2. The Judiciary Should Determine the Applicability of the Section 1 Exemption: In re Van Dusen

On the other side of the split, the Ninth Circuit answered the question of whether an arbitrator should decide the applicability of the section 1 exemption in the negative.

In *In re Van Dusen*, two interstate truck drivers who had previously entered into Independent Contractor Operating Agreements ("ICOAs") with a transportation company, brought a class action against the company alleging various violations of state and federal labor laws.⁴⁶ The defendant transportation company "moved to compel arbitration pursuant to arbitration clauses contained in the ICOAs,"⁴⁷ and petitioners opposed, arguing "that the ICOAs were exempt from arbitration under Section 1 of the FAA."⁴⁸ After finding that the ICOAs contained valid arbitration clauses, "the District Court declined to rule on the applicability of the exemption" to the present case, "holding that the question of whether an employer/employee relationship existed between the parties was a question for the arbitrator to decide in the first instance."⁴⁹ The petitioners then

42. *Id.*

43. *Id.* at 769.

44. *Id.*

45. *Id.* at 770.

46. 654 F.3d 838, 840 (9th Cir. 2011).

47. *Id.*

48. *Id.*

49. *Id.*

moved for certification of an interlocutory appeal and, upon denial, sought mandamus relief before the Ninth Circuit.⁵⁰

The defendant argued that whether a contract was exempted by the FAA is a “question of arbitrability,” and thus subject to determination by the arbitrator.⁵¹ Petitioners advanced a novel argument, framing the question of section 1’s applicability as an “antecedent determination.”⁵² Under this theory, a court must first determine that a contract is, in fact, arbitrable under section 1 of the FAA before it has jurisdiction to stay the action and compel arbitration pursuant to sections 3 and 4 of the Act.⁵³

Although the Ninth Circuit ultimately refused to extend mandamus relief because mandamus relief is only available upon a showing of clear error by the lower court,⁵⁴ they did so only after stating unequivocally that “the best reading of the law requires the district court to assess whether a section 1 exemption applies before ordering arbitration.”⁵⁵

Citing Supreme Court precedent, the Ninth Circuit began with a textual analysis of the FAA and found that the issue before it was not a “question of arbitrability,” which would be sent to the arbitrator to decide,⁵⁶ but rather an “antecedent agreement [that] the party seeking arbitration asks the federal court to enforce.”⁵⁷ The Ninth Circuit reasoned “that a district court has no authority to compel arbitration under Section 4 where Section 1 exempts the underlying contract from the FAA’s provisions.”⁵⁸ The *Van Dusen* Court averred that holding otherwise “puts the cart before the horse”

50. *Id.*

51. *Id.* at 843.

52. *Id.*

53. *Id.*

54. *Id.* at 846; *see also* *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (“[O]nly exceptional circumstances amounting to a ‘judicial usurpation of power,’ or a ‘clear abuse of discretion,’ will justify the invocation of this extraordinary remedy.”) (internal citations omitted) (quoting *Will v. United States*, 389 U.S. 90, 95 (1967); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953)); *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947) (noting the writ of mandamus is a “drastic and extraordinary” remedy “reserved for really extraordinary causes”).

55. *Van Dusen*, 654 F.3d at 846.

56. *Id.* at 845. The *Van Dusen* Court looked to Supreme Court precedent in upholding the proposition that “the law clearly permits parties to delegate ‘questions of arbitrability’ to an arbitrator.” *Id.* at 844 (citing *AT&T Techs., Inc. v. Comm’n Workers of Am.*, 475 U.S. 643, 649 (1986)). The court then used the Supreme Court’s definition of “questions of arbitrability” as questions of “whether the parties have submitted a particular dispute to arbitration.” *Id.* (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

57. *Id.* at 845 (quoting *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 69 (2010)).

58. *Id.* at 843.

and that “private contracting parties cannot, through the insertion of a delegation clause, confer authority upon a district court that Congress chose to withhold.”⁵⁹

For seemingly the first time in the twenty-first century, a federal circuit court was willing to analyze, in-depth, the text of the FAA prior to compelling arbitration. The Ninth Circuit diverged from the status-quo by holding that it is for the federal courts, and not arbitrators, to interpret federal statutes and determine whether a court has appropriate jurisdiction before applying federal law to the matter presently before it. The divergence of the circuits and the prevalence of arbitration provisions necessitated a clear resolution to the question of which adjudicator is bound to resolve antecedent determinations of compliance with the FAA exemptions. In *Oliveira v. New Prime*, the Supreme Court sought to do just that.

III. Statement of the Case

A. Facts

New Prime, Inc. (“Prime”) “operates an interstate trucking company.”⁶⁰ As part of its business model, Prime recruits and trains new drivers under its Student Truck Driver Program (the “Program”).⁶¹ Under the Program, recruits are required to attend a four-day orientation; “log 10,000 miles as a driver or passenger” with an established Prime truck driver; pass an examination to obtain a Commercial Driver’s License; log “30,000 more miles as a B2” trainee; and, finally, attend one week of additional orientation classes.⁶² Students are compensated at the rate “of \$200 per week for food[,]which . . . must be repaid[.]” upon completion, and “fourteen cents per mile” for the 30,000 miles logged as a B2 trainee.⁶³ Prime charges tuition for the Program; however, Prime forgives this debt for drivers who remain with the company for one year following successful completion of the Program.⁶⁴

Upon completion, new drivers are given a choice between entering into either an employer-employee or independent contractor relationship with

59. *Id.* at 844.

60. *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 9 (1st Cir. 2017), *affirmed*, 139 S. Ct. 532 (2019).

61. *Id.*

62. *Id.*

63. *Id.*

64. *See id.* at 10.

Prime.⁶⁵ By offering a \$100 bonus, informing new drivers that they will make more money as contractors, and providing streamlined access to accounting and leasing services, Prime spurs drivers to serve as independent contractors.⁶⁶

Plaintiff, Dominic Oliveira, graduated from Prime's Program.⁶⁷ Over the course of the Program, Oliveira was paid according to Prime's standard compensation protocol.⁶⁸ Prime, however, reduced Oliveira's per-mile pay during his time as a B2 trainee to recover the \$200 per week that it paid him for food and other expenses.⁶⁹ After successfully completing the Program and being promised, among other things, higher pay and the freedom to set his hours and haul freight for any company he pleased, Oliveira elected to enter into an independent contractor relationship with Prime.⁷⁰ Oliveira was assisted by firms that Prime recommended in forming a limited liability company, leasing a truck, and purchasing fuel—all things he would need to complete before he would be allowed to haul freight for Prime.⁷¹ Oliveira then signed an Independent Contractor Operating Agreement ("ICOA"), officially entered into a working relationship with Prime, and began hauling freight.⁷²

The ICOA contained the following conditions: (1) the specification that the relationship between Prime and Oliveira was one "of carrier and independent contractor and not an employer/employee relationship;" (2) a provision allowing Oliveira "to provide transportation services to companies besides Prime;" (3) a provision providing that Oliveira would be able to "refuse to haul any load offered by Prime[] and determine his own driving times and delivery routes;" (4) an obligation for Oliveira to pay all expenses associated with and "incurred in connection with his use of the truck leased" to him; and (5) an arbitration clause which obligated the parties "to arbitrate 'any disputes arising under, arising out of or relating to'" the ICOA.⁷³

Shortly after Oliveira entered into the working relationship, the wheels fell off. Almost immediately, Prime began significantly controlling

65. *Id.*

66. *Id.*

67. *Id.* at 9.

68. *Id.* at 9–10.

69. *Id.* at 10.

70. *See id.*

71. *Id.*

72. *Id.*

73. *Id.* (quoting language from provisions of the contract).

Oliveira's work by requiring him to transport its shipments, complete company training, and abide by all company rules and procedures.⁷⁴ Oliveira was unable to set his hours, refuse Prime shipments, or haul freight for any other transportation company.⁷⁵ Further, Oliveira was underpaid for the jobs he was required to take.⁷⁶ Tired of being overworked and under-compensated, he "stopped driving for Prime" altogether.⁷⁷ Less than a month later, however, Oliveira entered into a new working relationship with Prime—this time as an employee.⁷⁸ Following his rehire, Oliveira's job responsibilities were "'substantially identical' to those he had as an independent contractor."⁷⁹

B. Issue

Oliveira filed a class action suit against Prime, alleging violations of federal and state labor laws.⁸⁰ "Prime moved to compel arbitration," asserting that because Oliveira had elected to enter into an independent contractor relationship with Prime, as opposed to an employee-employer relationship, he was not exempted from arbitration under section 1 of the FAA.⁸¹ Oliveira countered, asserting "that the motion to compel arbitration should be denied" for two reasons: (1) because the contract as a whole was exempted from the FAA under section 1; and (2) because the question of whether his ICOA was exempted under section 1 was for the court to decide, not an arbitrator.⁸²

The district court denied Prime's motion to compel, holding that the court should decide the applicability of the section 1 exemption and determining that it could not answer the question of whether the exemption applied in this case until after the parties conducted further discovery on Oliveira's employment status.⁸³ Prime moved for interlocutory appeal of the district court's ruling, and the First Circuit granted review of two distinct issues raised below: (1) whether a dispute over the applicability of the section 1 exemption must be resolved by an arbitrator or by a court and

74. *Id.* at 11.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 11–12.

(2) whether the section 1 exemption encompasses independent contractor agreements.⁸⁴

C. Decision Below

The First Circuit began its analysis of the first issue by considering out-of-circuit precedent cited by each party.⁸⁵ New Prime championed the Eighth Circuit's holding in *Green v. SuperShuttle International, Inc.* to argue that the question of section 1's applicability is an "issue of arbitrability" and thus one for an arbitrator.⁸⁶ Oliveira, however, cited the Ninth Circuit's holding in *In re Van Dusen* to support the contention that the applicability question did not fit squarely within "questions of arbitrability" and was therefore an "antecedent determination" for the court to decide.⁸⁷

The court dismissed *Green*'s premise by framing the present issue as an "antecedent determination" and stating that "[w]here . . . the parties dispute whether the district court has the authority to compel arbitration under the FAA, the extent of the arbitrator's jurisdiction is of no concern."⁸⁸ The First Circuit reasoned that the holding in *Green* was illogical because it would require a federal court to act under section 4 of the FAA—at the direction of two private contracting parties—even though Congress plainly and unambiguously withheld that exact authority from the courts in section 1.⁸⁹

The First Circuit adopted the reasoning of the Ninth Circuit, deciding that "the question of the court's authority to act under the FAA is an 'antecedent determination' for the district court to make before it can compel arbitration under the Act."⁹⁰ Ultimately, the court held that "[n]othing . . . purports to allow the arbitrator to decide whether a federal district court has the authority to act under a federal statute" when Congress has expressly withheld that authority.⁹¹ This finding allowed the First Circuit to decide the second issue on appeal: whether the section 1 exemption applies to all agreements to do work or solely to "contracts of employment."

84. *Id.* at 9.

85. *Id.* at 12–14.

86. *Id.* at 12–13.

87. *Id.* at 14.

88. *Id.* at 15.

89. *See id.* ("[P]rivate contracting parties cannot, through the insertion of a delegation clause, confer authority upon a district court . . . that Congress chose to withhold.") (quoting *In re Van Dusen*, 654 F.3d 838, 844 (9th Cir. 2011)).

90. *Id.* at 14 (citing *Van Dusen*, 654 F.3d at 843).

91. *Id.* at 15 (footnote omitted).

According to the First Circuit, the applicability issue turned on whether the agreement between Oliveira and New Prime, which “establish[ed] or purport[ed] to establish an independent-contractor relationship,” fell within the statutory language of “contracts of employment.”⁹² Prime argued that, in light of a federal policy favoring arbitration, the court was compelled to find that the exemption should be narrowly applied only to those contracts which, on their face, give rise to an employer-employee relationship.⁹³ Oliveira disagreed, arguing that the section 1 exemption covers all agreements to do work, regardless of one’s classification as an employee or independent contractor.⁹⁴

In responding to Prime’s contention that federal policy favoring arbitration compelled the court’s decision, the First Circuit answered that policy, no matter how strong or at what judicial level, cannot override the meaning of the plain text of the statute.⁹⁵ The First Circuit began by analyzing the ordinary meaning of “contracts of employment” in light of dictionaries and secondary sources from the time of the enactment of the FAA.⁹⁶ The court concluded that the “ordinary meaning of the phrase” and “Prime’s concession that Oliveira is a transportation worker” allowed for only one finding: that Oliveira’s independent contractor agreement with Prime fell squarely within the section 1 exemption.⁹⁷ Moreover, the court noted that its holding here—that “contracts of employment” means “agreements to perform work and includes independent-contractor agreements”—aligned with “Congress’s demonstrated concern with transportation workers and their necessary role in the free flow of goods.”⁹⁸

D. Supreme Court Decision

1. Issue (1): Who Decides Whether the Section 1 Exemption Applies?

Prime timely filed a petition for writ of certiorari and the Supreme Court granted the same for the 2018–2019 term.⁹⁹ The Supreme Court initiated its analysis of the procedural issue by recognizing that “[w]hile a court’s authority under the Arbitration Act to compel arbitration may be

92. *Id.* at 16.

93. *Id.* at 10, 25.

94. *Id.* at 20.

95. *Id.* at 20–21.

96. *Id.*

97. *Id.* at 22.

98. *Id.* at 23 (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001)).

99. *New Prime Inc. v. Oliveira*, 138 S. Ct. 1164 (mem.) (2018).

considerable, it isn't unconditional."¹⁰⁰ The Court reasoned that "no matter how emphatically they may express a preference for arbitration," private contracting parties cannot bestow upon a court the authority to stay litigation and compel arbitration where the Act has expressly withheld as much.¹⁰¹

Delving into the text of the Act, the Court noted the importance of the statute's sequencing, citing precedent for the proposition that the first four sections of the Act "are integral parts of a whole."¹⁰² Here, the Court emphasized that enforceability under sections 3 and 4 depends on whether those provisions are part of a contract covered by sections 1 and 2, which "define the field in which Congress was legislating."¹⁰³ The Court concluded that a court may only use sections 3 and 4 to enforce an agreement to arbitrate "if the clause appears in a 'written provision in . . . a contract evidencing a transaction involving commerce' consistent with [section] 2. And only if the contract . . . doesn't trigger [section] 1's 'contracts of employment' exemption."¹⁰⁴ Agreeing with the First Circuit, the Court held "that a court should decide for itself whether [section] 1's 'contracts of employment' exclusion applies before ordering arbitration."¹⁰⁵

The Court then turned to Prime's contention that the combination of a delegation clause¹⁰⁶ and the severability principle¹⁰⁷ can serve as alternative authority for sending parties to an arbitral forum nonetheless. Under this theory, because Oliveira did not specifically challenge the delegation clause and instead challenged the contract as a whole, Prime argued "that any controversy should . . . proceed . . . before an arbitrator."¹⁰⁸ The Court quickly dismissed this contention as "overlook[ing] the necessarily

100. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537 (2019).

101. *Id.*

102. *Id.* at 538 (quoting *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201–02 (1956)).

103. *Id.* (quoting *Bernhardt*, 350 U.S. at 201–02).

104. *Id.* (quoting 9 U.S.C. § 2 (2018)).

105. *Id.* at 537.

106. "A delegation clause gives an arbitrator authority to decide even the initial question whether the parties' dispute is subject to arbitration." *Id.* at 538 (citing *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010)).

107. "[U]nder the severability principle, we treat a challenge to the validity of an arbitration agreement (or a delegation clause) separately from a challenge to the validity of the entire contract in which it appears." *Id.* (citing *Rent-A-Ctr.*, 561 U.S. at 70–71). "Unless a party specifically challenges the validity of the agreement to arbitrate, both sides may be required to take all their disputes . . . to arbitration." *Id.* (citing *Rent-A-Ctr.*, 561 U.S. at 70–71).

108. *Id.*

antecedent statutory inquiry.”¹⁰⁹ The Court reiterated that “[a] delegation clause is merely a specialized type of arbitration agreement, and the Act ‘operates’” upon it in the same way as it does any other arbitration agreement.¹¹⁰

2. Issue (2): Whether the Section 1 Exemption Applies to Independent Contractors

After reciting the age-old adage “that words generally should be interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute,”¹¹¹ the Court began resolving the merits issue by analyzing the text of the Act and succinctly identifying the issue before it as: What did the term “contracts of employment” mean at the time of enactment?¹¹²

The Court noted that while the term “contracts of employment” today signals the relationship arising from the law of agency between master and servant, at the time of adoption, the phrase “usually meant nothing more than agreement to perform work.”¹¹³ To support this contention, the Court pointed to the fact that the term “contract of employment” was not defined in any of the popular or legal dictionaries at the time of the FAA’s enactment.¹¹⁴ The Court reasoned this lack of coverage signified that the phrase was not a term of art carrying a specialized meaning; therefore, it should be interpreted simply by analyzing the meaning of each word.¹¹⁵

The merits dispute was thus decided based on the meaning of the word “employment.”¹¹⁶ The Court found that dictionaries of the enactment era tended to treat “employment” as a synonym for “work” and did not “distinguish between different kinds of work or workers.”¹¹⁷ Moreover, the Court noted that its cases, as well as state court cases and federal and state statutes, commonly used the phrase to describe the relationship of independent contractor and principal.¹¹⁸ The Court found greater support for the notion that “employment” includes independent contractor relationships

109. *Id.*

110. *Id.* (quoting *Rent-A-Ctr.*, 561 U.S. at 70).

111. *Id.* at 539 (internal citations omitted) (quoting *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)).

112. *Id.* at 539–44.

113. *Id.* at 539.

114. *Id.*

115. *See id.* at 539–40.

116. *See id.* at 539–41.

117. *Id.* at 539–40.

118. *Id.* at 540.

when analyzing the text surrounding the phrase.¹¹⁹ In drafting section 1’s language, Congress refrained from using the word “employees” or “servants” and instead spoke of “workers.”¹²⁰ This choice, explained the Court, “easily embraces independent contractors.”¹²¹

Noting Prime’s inability to explain away the plain meaning of the phrase at the time of enactment, the Court then considered Prime’s policy argument that federal policy favoring arbitration compelled the Court to send the case to an arbitral forum.¹²² Without negating this contention, the Court reasoned that it must nonetheless “‘respect the limits up to which Congress was prepared’ to go when adopting the Arbitration Act.”¹²³ The Court held that the plain text of the Act, coupled with the judiciary’s inability to override the boundaries set by Congress, could only lead to one conclusion: the section 1 exemption encompasses *all* agreements to do work—even those that purport to, or in fact do, establish an independent contractor-principal relationship.¹²⁴

IV. Getting the FAA Back on the Road

Through legal doctrine and failure to independently interpret federal statutes, courts have historically allowed businesses to draft contractual agreements for workers in such a manner that abolishes the ability of those who perform services from seeking redress for violations of law and for breach of contract in a judicial forum. *New Prime* radically departs from the status quo and brings arbitration jurisprudence back in accord with the purpose for which the Federal Arbitration Act was enacted.

A. Issue (1): Who Should Determine Issues of “Antecedent Determination” Such as the Applicability of the Section 1 Exemption of the FAA

In 1803, Chief Justice John Marshall declared, “It is emphatically the province and duty of the judicial department to say what the law is.”¹²⁵ Because a different interpretation of the FAA threatened to severely diminish the due process rights of the parties¹²⁶ and ultimately dispose of

119. *See id.* at 540–41.

120. *Id.* at 541.

121. *Id.*

122. *Id.* at 543.

123. *Id.* (quoting *United States v. Sisson*, 399 U.S. 267, 298 (1970)).

124. *See id.* at 542–44.

125. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

126. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 407 (1967) (Black, J., dissenting) (“I am by no means sure that thus forcing a person to forgo his

some controversies altogether,¹²⁷ the Court in *New Prime* appropriately reserved the power to determine the scope of the Act's application for the judiciary. From a policy perspective, arbitrators are ill-equipped and inappropriately incentivized to determine the applicability of the section 1 exemption. Furthermore, under the language of the Act, arbitrators have no right to subjugate the federal courts' jurisdiction. Instead, Congress granted that power to the judiciary.

Although the Court declined to discuss its policy reasoning when deciding the procedural question, its holding is supported by a logical policy argument that the judiciary should resolve questions concerning the applicability of the Act. While today's arbitrators are often highly skilled and knowledgeable adjudicators, they serve as no real substitute for the federal courts in their ability to determine the applicability of federal statutes.

Three concerns arise from the prospect of allowing arbitrators to determine the applicability of the section 1 exemption. First, under the rules of the American Arbitration Association, arbitrators are not required to have ever practiced law.¹²⁸ Second, as noted by Justice Black in his *Prima Paint Corporation v. Flood & Conklin Manufacturing Co.* dissent, arbitrators "even if qualified to apply the law, [are] not bound to do so."¹²⁹ Third, arbitrators are wholly incentivized to resolve matters in a manner that keeps them within the arbitrator's jurisdiction.¹³⁰

When the judiciary decides the applicability of the Act, however, these three concerns become moot. The judiciary is comprised solely of attorneys well versed in law, duty-bound to apply it, and lacking any incentive to usurp judicial authority. Further, as noted by Justice Black, "a reasonable

opportunity to try his legal issues in the courts where, unlike the situation in arbitration, he may have a jury trial and right to appeal, is not a denial of due process of law.").

127. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) ("Hence, who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration.").

128. *Qualification Criteria for Admittance to the AAA National Roster of Arbitrators*, AM. ARBITRATION ASS'N, http://www.adr.org/sites/default/files/document_repository/Qualification_Criteria_for_Admittance_to_the_AAA_National_Roster_of_Arbitrators.pdf (last visited Oct. 14, 2019) (noting that applicants for membership must meet or exceed the requirement of a "[m]inimum of 10 years of senior-level business or professional experience or legal practice").

129. *Prima Paint Corp.*, 388 U.S. at 407 (Black, J., dissenting).

130. See *id.* at 416 (Black, J., dissenting) ("The only advantage of submitting the issue . . . to arbitration is for the arbitrators. Their compensation corresponds to the volume of arbitration they perform.").

and fair reading of [the] Act’s language and history” demonstrates Congress’s intent not to “trespass upon the courts’ prerogative to decide the legal question of whether any legal contract exists upon which to base arbitration.”¹³¹ Therefore, from a policy standpoint, arbitration “is not a proper remedy for . . . questions with which the arbitrators have no particular experience and which are better left to the determination of skilled judges with a background of legal experience and established systems of law.”¹³²

An analysis of the text of the Act itself and the Supreme Court’s precedential treatment of its sequencing reveals a similar conclusion. While after the Court’s decision in *Rent-A-Center* parties may contractually designate an arbitrator to determine questions of arbitrability, “a court’s authority under the Arbitration Act to compel arbitration . . . isn’t unconditional”¹³³ and is bound by the limits set by Congress in sections 1 and 2. The Court has, at least since 1956, stressed the significance of the Act’s sequencing and recognized that each of the Act’s sections are “integral parts of a whole.”¹³⁴ Further, the Court has found that sections 1 and 2 “define the field in which Congress was legislating,” and that sections 3 and 4 only apply to contracts within that field.¹³⁵ The Court has also recognized that “the enforceability of arbitration provisions” (i.e., sections 3 and 4) “depends on whether those provisions are ‘part of . . . a contract ‘evidencing a transaction involving commerce’” under section 2.¹³⁶ Following this line of reasoning, and understanding that section 1 helps define the types of contracts contemplated by section 2,¹³⁷ there is only one conclusion—courts may not stay proceedings properly before them and compel arbitration under section 4 prior to determining their own jurisdiction under sections 1 and 2.

Consistent with both policy and text, the Court in *New Prime* took a momentous step towards restoring the due process rights of those individuals who are parties to a contract that one party claims should fall

131. *Id.* at 407–08 (Black, J., dissenting).

132. *Id.* at 415–16 n.15 (Black, J., dissenting) (quoting Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926)).

133. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537 (2019).

134. *Id.* at 538 (quoting *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201–02 (1956)).

135. *Id.* (quoting *Bernhardt*, 350 U.S. at 201).

136. *Id.* (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10–11 (1984)).

137. *See id.* at 537 (“§ 1 helps define § 2’s terms.”).

within the FAA's coverage. The *New Prime* Court rightly held that it is for the judiciary to analyze and adjudicate federal statutes.

B. Issue (2): Whether the Section 1 Exemption Applies to Independent Contractors

Section 1 of the FAA sets forth the premise that “nothing” within the Act shall apply to “contracts of employment of . . . any . . . class of workers engaged in foreign or interstate commerce.”¹³⁸ Despite this seemingly broad and straight-forward language, the statute has, for decades, been misapplied in a nefariously underinclusive manner.¹³⁹ Historically, corporations have been able to skirt the Act's section 1 exemption to mandatory arbitration by simply classifying those who carry out their day-to-day revenue-generating activities as “independent contractors” as opposed to “employees,” regardless of whether there exists any substantial difference in the everyday functions of such individuals.

This dichotomous, form-over-function approach has plagued many potentially meritorious actions brought by plaintiffs against the company with which they have contracted to perform services by sending them to arbitral forums that often lack procedural and evidentiary safeguards. Despite the broad language of the Act, which seems to cover all “workers,” courts have refused to include contracts that purport to establish an independent contractor agreement within the language of section 1's exemption. Courts have primarily offered two justifications as to why the section 1 exemption does not cover independent contractor agreements: (1) the liberal federal policy favoring arbitral dispute resolution and (2) the Supreme Court's instruction to narrowly construe the section 1 exemption.¹⁴⁰

138. 9 U.S.C. § 1 (2018).

139. *See, e.g.*, *Lenz v. Yellow Transp., Inc.*, 431 F.3d 348 (8th Cir. 2005) (enforcing an arbitration agreement for a customer service representative for an interstate trucking company); *Palcko v. Airborne Express, Inc.*, 372 F.3d 588 (3d Cir. 2004) (enforcing an arbitration agreement under state law despite determining that the employee in question was engaged in interstate commerce).

140. *See, e.g.*, *Villalpando v. Transguard Ins. Co. of Am.*, 17 F. Supp. 3d 969, 982 (N.D. Cal. 2014) (“[C]onsidering that the § 1 exclusion is to be both interpreted narrowly and understood to favor arbitration the Court declines to find at this time that Plaintiff is exempt from the FAA.”) (citations omitted); *Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co.*, 288 F. Supp. 2d 1033, 1035–36 (D. Ariz. 2003) (“Given the strong and liberal federal policy favoring arbitral dispute resolution, the Court cannot conclude on this record that § 1 bars the enforcement of the arbitration provision at issue.”); *Morning Star Assocs., Inc. v. Unishippers Glob. Logistics, LLC*, No. CV 115-033, 2015 WL 2408477, at *4–5 (S.D. Ga.

Nonetheless, the *New Prime* Court grabbed the wheel and veered back onto the road Congress intended. *New Prime* used a textualist analysis to close the form over function loophole in the simplest way possible—not by distinguishing between an “employee” and “independent contractor,” but by instead concluding that both fall within the scope of the exemption. Although it ultimately refused to offer an analysis of as much, *New Prime* is consistent with both the legislative history behind the Act and the Court’s precedential treatment of the language of the section 1 exemption.

The legislative history of the Act, though sparse, is demonstrative of Congress’s intent behind its enactment. Congress adopted the FAA to compel federal courts to enforce arbitration agreements, during a time of undue hostility toward arbitration, by placing agreements to arbitrate disputes “upon the same footing as other contracts, where [they] belong[.]”¹⁴¹ Originally proposed by trade associations dealing in groceries and other perishables and from commercial and mercantile groups,¹⁴² the Act was designed to guarantee certain procedural advantages at a time when there was “much agitation against the costliness and delays of litigation.”¹⁴³ While the benefits of expediting dispute resolution for produced, shipped, bought, or sold commodities were obvious, the potentially overbroad scope of the Act created significant concerns.

As the Court noted, Congress plainly “demonstrated concern with transportation workers and their necessary role in the free flow of goods.”¹⁴⁴ The main opposition to the Act came from members of organized labor organizations who noted “the potential disparity in bargaining power between individual employees and large employers.”¹⁴⁵ These organizations were concerned with the potential the Act had to “require courts to enforce unfair employment contracts,”¹⁴⁶ especially “insurance, employment, construction, and shipping contracts . . . routinely . . . being offered on a take-it-or-leave-it basis to captive customers or employees.”¹⁴⁷

May 20, 2015); *Owner-Operator Indep. Drivers Ass’n v. United Van Lines, LLC*, No. 4:06CV219 JCH, 2006 WL 5003366, at *2 (E.D. Mo. Nov. 15, 2006).

141. H.R. REP. NO. 68-96, at 1 (1924).

142. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 410 n.2 (1967) (Black, J., dissenting) (citing 50 A.B.A. REP. 357 (1925)).

143. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 360 (2011) (Breyer, J., dissenting) (citing H.R. REP. NO. 68-96, at 2 (1924)).

144. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 (2001).

145. *Id.* at 132 (Stevens, J., dissenting).

146. *Id.* (Stevens, J., dissenting).

147. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) (Black, J., dissenting).

Labor disputes, however, were never designed to be within the scope of the Act. In fact, the chairman of the ABA committee that drafted the legislation stated at a Senate Judiciary Subcommittee hearing that “[i]t is not intended that this shall be an act referring to labor disputes, at all.”¹⁴⁸ The chairman further noted that should the Subcommittee fear any danger of labor disputes coming within the purview of the Act, they should add the language of “but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce” to clarify the point.¹⁴⁹ As such, when Congress drafted the final version of the Act, it had essentially adopted that exact language.¹⁵⁰ The logical connection between the chairman’s words and Congress’s actions point only to the conclusion that Congress did not mean to include within the scope of the Act any labor disputes between parties engaged in the production, shipment, purchase, or sale of commodities, regardless of their relationship.

Moreover, the decision in *New Prime*, while being a radical departure from the status quo of lower courts, is nonetheless consistent with the Court’s precedential treatment of the section 1 exemption. The Court has held that “the exclusion provision is limited to transportation *workers*, defined, for instance, as those *workers* ‘actually engaged in the movement of goods in interstate commerce.’”¹⁵¹ Further, the Court has held that “[i]t would be rational for Congress to ensure that *workers* in general would be covered by the provisions of the FAA, while reserving for itself more specific legislation for those engaged in transportation.”¹⁵² Knowing the importance of careful word choice, had the Court intended that the section 1 exemption apply only to employees, it would have used that term in describing the scope.¹⁵³

By reasoning that the text of the FAA, as it was understood at the time of drafting, indicates that independent contractor-principal relationships should be included in the plain meaning of the term “contracts of employment,” the *New Prime* Court rightly decided the merits issue and

148. *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9 (1923) (statement of W.H.H. Platt, Chairman of the Committee of Commerce, Trade and Commercial Law of the American Bar Association).

149. *Id.*

150. See 9 U.S.C. § 1 (2018).

151. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001) (citing *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1471 (D.C. Cir. 1997)) (emphasis added).

152. *Id.* at 121 (emphasis added).

153. See *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 542 (2019) (“But if the parties’ extended etymological debate persuades us of anything, it is that care is called for.”).

brought arbitration jurisprudence back in accord with the reasons for which the FAA was drafted and precedent surrounding the applicability of section 1.

V. Conclusion and Future Implications

Transportation and logistics play an integral role in the United States economy. In 2017, this sector comprised “8.9 percent of the Nation’s economy as measured by gross domestic product.”¹⁵⁴ Further, as of 2002, independent contractors owned more than 545,000 trucks operated on United States roads.¹⁵⁵

After *New Prime*, transportation employers may now find that many of the half million contracts they entered into with those independent contractors contain invalid arbitration agreements. It is important to note, however, that contracting parties may still participate in arbitral proceedings even though federal courts may not recognize these arbitration agreements as a legal compulsion to do so. Because of this, the true impact of *New Prime* is difficult to ascertain. While the Court’s decision has tremendous potential to impact the transportation industry—and the nation’s economy as a whole—by forcing disputes into court where costs are higher and resolution is often less expeditious, countless factors will need to be evaluated before determining the true impact.

Though it is impossible to predict the future, it is prudent to set forth some of the possible questions and considerations that may arise following the Court’s decision. The actual economic impact will depend on whether transportation workers alleging injury will, in fact, pursue their claims in the courts of law. This question likely turns on factors such as a potential plaintiff’s knowledge of the law and recognition of a legally cognizable injury, a cost-benefit analysis of an alleged injury, and a willingness to endure lengthy legal proceedings.

The scope of the potential impact will depend on whether potential plaintiffs can aggregate claims. Litigating individual claims, while likely costlier than arbitration, will not have the same economic impact on the industry as class action settlements and judgments. However, it may be difficult to aggregate claims and assemble a class of plaintiffs large enough

154. BUREAU OF TRANSP. STATISTICS, FREIGHT FACTS AND FIGURES 2017, at 5-1 (2017) (from chapter 5, “Economic Characteristics of the Freight Transportation Industry”).

155. U.S. CENSUS BUREAU, 2002 ECONOMIC CENSUS: VEHICLE INVENTORY AND USE SURVEY 15, 39 (Dec. 2004), <https://www2.census.gov/library/publications/economic-census/2002/vehicle-inventory-and-use-survey/ec02tv-us.pdf>.

to prove worthwhile because control within the transportation industry is not highly centralized.¹⁵⁶

Further still remains the question of whether transportation employers will pass any potential additional cost on to consumers. In an industry with such fierce competition and low margins that is already plagued by low barriers to entry resulting in an excess of supply,¹⁵⁷ those who demand transportation services may take a “next man up” approach.

Last, but certainly not least, remains the question of whether talented legal drafters will find a way to work around the exemption. While the *New Prime* Court afforded the exemption a generous reach, it surely is not without bounds. Should legal drafters engineer a circumvention, the discussion of economic impact will be wholly moot.

Despite all the unknowns, one thing is certain: the text of the Federal Arbitration Act, its legislative history, and Supreme Court precedent all support the conclusion that *New Prime* was correctly decided. However, only time will tell whether the Court created a free-flowing interstate or a massive pile-up when it put the wheels back on independent contracting transportation workers’ ride to court.

Reed C. Trechter

156. See U.S. DEP’T OF TRANSP. FED. HIGHWAY ADMIN., EVALUATION OF U.S. COMMERCIAL MOTOR CARRIER INDUSTRY CHALLENGES AND OPPORTUNITIES (2003), https://ops.fhwa.dot.gov/freight/publications/eval_mc_industry/index.htm.

157. See *id.*