No. 15-2364

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DOMINIC OLIVEIRA,

Plaintiff–Appellee,

v.

NEW PRIME, INC.,

Defendant–Appellant.

On Appeal From The United States District Court
For The District Of Massachusetts (No. 1:15-cv-10603-PBS)

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INTRODUCTION

In two separate Contractor Agreements, Plaintiff expressly agreed to arbitrate any dispute arising from his relationship with Prime. Plaintiff does not challenge the validity of the arbitration agreements he signed, and does not dispute that the vast majority of his claims fall within the scope of those agreements. Thus, under no circumstances should this case proceed in court—it must be heard in arbitration. The *only* question at issue in this appeal is whether the parties' dispute is arbitrable *under the Federal Arbitration Act* ("FAA"), in light of the FAA's inapplicability to certain transportation-sector "contracts of employment." 9 U.S.C. § 1 (the "Section 1 Exemption").

But that threshold question, too, must be heard in arbitration. Plaintiff expressly agreed to arbitrate *all* threshold questions of arbitrability. *See* App. 102, 112 ("ANY DISPUTES … INCLUDING THE ARBITRABILITY OF DISPUTES BETWEEN THE PARTIES, SHALL BE FULLY RESOLVED BY ARBITRATION"). Again, Plaintiff does not challenge the validity of this delegation clause, and does not dispute that the delegation clause, on its face, permits no exceptions. Yet the district court ordered the parties to conduct a mini-trial, replete with robust discovery, so the court could decide the Section 1 Exemption question itself. The district court's erroneous decision contravenes the parties' contracts, the FAA, and nearly all federal case law addressing

the Section 1 Exemption issue. This Court should compel the parties to arbitration.

Plaintiff's Answering Brief gives short shrift to the Supreme Court's repeated admonitions that courts must rigorously enforce arbitration agreements and resolve all doubts in favor of arbitration. *See, e.g.*, *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (admonishing court for failure to "give 'due regard … to the federal policy favoring arbitration'" (citation omitted)). And Plaintiff's arguments contradict the weight of federal case law on the Section 1 Exemption issue. As the Eighth Circuit held in *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766 (8th Cir. 2011), "[a]pplication of the FAA's [Section 1] transportation worker exemption is a threshold question of arbitrability" that must be decided by an arbitrator—at least where, as here, the arbitration agreement "specifically incorporate[s] the Rules of the American Arbitration Association (AAA)," which "provide that an arbitrator has the power to determine his or her own jurisdiction over a controversy between the parties." *Id.* at 769. There is simply no reason to believe that applicability of the Section 1 Exemption—unique among all threshold arbitrability issues—is the one arbitrability issue that must be decided by a court.

Further, even if the district court properly reserved the Section 1 Exemption issue to itself, it still erred by ordering discovery into the nature of the parties' working relationship and its development over time.

This inquiry is both irrelevant and improper as a matter of law. Courts uniformly hold that the Section 1 Exemption does not apply to independent contractors, and they determine the existence of an independent-contractor relationship at the motion-to-compel stage from the face of the agreement and evidence of the parties' intent at the time of signing. On the record below, Plaintiff did not and cannot meet his burden to show that the Contractor Agreements were "contracts of employment," as defined by the FAA, rather than independent-contractor agreements. The Contractor Agreements, for example, were between Prime and Plaintiff's *corporate entity*, not Plaintiff directly, and expressly state that they create an independent contractor arrangement between the respective corporations. And the Contractor Agreements indisputably assigned Plaintiff—not Prime—control over his schedule, equipment, and routes, all of which are clear indicators that Plaintiff was an independent contractor for purposes of applying the Section 1 Exemption. *See*, *e.g.*, *Labor Relations Div. of Constr. Indus. of Mass., Inc. v. Teamsters Local 379*, 156 F.3d 13, 19 (1st Cir. 1998) ("fundamental inquiry" in determining whether truck drivers are independent contractors "is whether the employer has the right to control the manner and means by which the product is accomplished" (citation omitted)).

The district court's free-wheeling approach to discovery improperly expands the scope of the inquiry into the Section 1 Exemption's applicability and, on these facts, impermissibly intrudes into the key mer-

its issue that must be decided by an arbitrator—*i.e.*, whether Plaintiff was properly classified as an independent contractor under federal and state wage-and-hour laws.

This Court should vindicate the text and intent of the parties' agreements by reversing with instructions to compel arbitration of all the parties' disputes.

ARGUMENT

I. The Court Should Enforce The Parties' Express Agreement That An Arbitrator, Not The District Court, Must Determine Threshold Questions Of Arbitrability.

The district court erred by refusing to compel arbitration of the parties' dispute—including their dispute over the threshold question of arbitrability under the FAA. This Court should hold Plaintiff to the plain terms of the agreements he signed and order the parties to arbitration.

A. Under The Plain Terms Of The Parties' Undisputedly Valid Arbitration Agreements, The Parties' Dispute Must Be Resolved In Arbitration.

As an initial matter, Plaintiff appears to misapprehend the consequences of this appeal. Plaintiff's arguments seem to assume that, if the FAA Section 1 Exemption applies, the arbitration provisions in the Contractor Agreements are unenforceable and this litigation will proceed in court. But the applicability of the Section 1 Exemption—the *only* question at issue in this appeal—has no bearing whatsoever on the

validity or enforceability of the parties' arbitration agreements. If the FAA does not apply to the parties' agreements, that simply means the district court cannot invoke the FAA as the mechanism to compel arbitration. But the court should still compel arbitration on other grounds, such as state law, or use other tools at its disposal to enforce the parties' explicit agreement to arbitrate—such as dismissing or staying the case. *See Citrus Mkt'g Bd. of Israel v. J. Lauritzen A/S*, 943 F.2d 220, 225 (2d Cir. 1991) (recognizing the "power inherent in every court to control the disposition of the cases on its docket," even where there was no basis to compel arbitration under the FAA (citations omitted)). The arbitration provisions in the Contractor Agreements are no different from many other contractual provisions that courts routinely enforce without the aid of the FAA—such as a waiver-of-claims or a choice-of-venue clause. Here, the Contractor Agreements reflect the clear agreement of the parties *not* to resolve their disputes in federal court.

Indeed, the Contractor Agreements expressly provide that arbitration shall be enforced "in accordance with Missouri's Arbitration Act and/or the Federal Arbitration Act." App. 102, 112 (capitalization altered). Thus, even if the district court correctly declined to compel arbitration under the FAA, Prime should still have the chance to urge enforcement of the arbitration agreements on other grounds (including state law)—either before the district court on remand, before an arbitrator directly, or in an independent state-law action. *See Harden v.*

Roadway Package Sys., Inc., 249 F.3d 1137, 1142 n.3 (9th Cir. 2001) (reversing order to compel arbitration under FAA but noting possibility of different result if the defendant "were to pursue arbitration based on California law"); *Diaz v. Mich. Logistics, Inc.*, 2016 WL 866330, at *4 (E.D.N.Y. Mar. 1, 2016) ("even assuming that Plaintiffs fall within the § 1 exemption (and the FAA does not apply), Plaintiffs' claims are subject to mandatory arbitration under New York arbitration law").

Plaintiff readily admits that "[t]he FAA is not the only possible source of authority under which courts may compel arbitration." Oliveira Br. 13 n.4. And the validity of the arbitration provisions and their application to Plaintiff's disputes are not in question. Thus, whatever the scope of the Section 1 Exemption, Prime should not be forced to proceed with discovery and further litigation that could substantially affect the merits of the underlying dispute. One way or another, this case must be arbitrated.[1]

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[1] To the extent Plaintiff intends to argue that Prime has waived its right to compel arbitration on grounds other than the FAA, such an argument would fail, as courts "do not lightly find waiver of the right to arbitrate" through parties' litigation conduct. *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 724 (9th Cir. 2000). Plaintiff can demonstrate no prejudice as a result of Prime's decision to seek to compel arbitration under the FAA first, before turning to other grounds for compelling arbitration. *See Sevinor v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 807 F.2d 16, 19 (1st Cir. 1986) (prejudice is required to "prevail on [any] claim of waiver"); *see also Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 758 (9th Cir. 1988) (party seeking to

[Footnote continued on next page]

B. Under The Parties' Arbitration Agreements, The Threshold Question Of FAA Arbitrability Is For An Arbitrator To Decide.

In any event, the place for the parties to be arguing over the arbitrability of their dispute under the FAA is before an arbitrator. Plaintiff does not dispute that delegation clauses—in which parties "agree to allow the arbitrator to decide both whether a particular dispute is arbitrable as well as the merits of the dispute," *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989)—are fully enforceable. Nor could he, as courts uniformly agree that parties may submit such threshold issues to arbitration. *See*, *e.g.*, *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68-70 (2010); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986); *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 10 (1st Cir. 2009). Thus, the key question in this case—"'who has the primary power to decide arbitrability'"—"turns upon what the parties agreed about *that* matter." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

Plaintiff also does not contest that the delegation provisions he signed are valid and that, on their face, they apply to *all* threshold questions of arbitrability. App. 102, 112 ("ANY DISPUTES … IN-

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prove waiver must show "prejudice to the party opposing arbitration").

CLUDING THE ARBITRABILITY OF DISPUTES BETWEEN THE PARTIES, SHALL BE FULLY RESOLVED BY ARBITRATION"). Nothing more is needed to compel arbitration. *See Shaw's Supermarkets, Inc. v. United Food & Commercial Workers Union*, 321 F.3d 251, 254-55 (1st Cir. 2003) ("the parties have crossed the arbitrability threshold by signing valid agreements to arbitrate the subject matter of the dispute").

Further, Plaintiff ignores the fact that the Contractor Agreements incorporate the AAA's rules, App. 102, 112, which expressly "provide that an arbitrator has the power to determine his or her own jurisdiction over a controversy between the parties." *Green*, 653 F.3d at 769; *see also Fantastic Sams Franchise Corp. v. FSRO Ass'n*, 683 F.3d 18, 25 (1st Cir. 2012) ("Under the [AAA rules], arbitrators typically decide questions which concern the scope of their own jurisdiction."). Adopting these rules is "about as 'clear and unmistakable' as language can get" that the parties agreed to arbitrate arbitrability. *Awuah*, 554 F.3d at 11 (citation omitted); *see also Petrofac, Inc. v. DynMcDermott Petroleum Ops. Co.*, 687 F.3d 671, 674 (5th Cir. 2012); *Cullinane v. Uber Techs., Inc.*, 2016 WL 3746471, at *9 (D. Mass. July 8, 2016) ("Once a court decides that the arbitration clause is broad enough to encompass the issues in dispute and that the parties agreed to have the contract governed by the AAA Rules, it must compel arbitration.").

In short, there is no dispute that the parties intended threshold questions of arbitration—including questions about the arbitrator's jurisdiction—to be resolved in arbitration, in addition to the merits of their disputes.

The only question for the Court, then, is whether the parties' threshold dispute regarding the scope of the Section 1 Exemption somehow falls outside the parties' clear, voluntary, mutual agreement to have all jurisdictional issues resolved in arbitration. This Court's precedents and the better-reasoned authority from other circuits answer this question definitively: It does not.

Plaintiff argues that the particular question of arbitrability under Section 1 of the FAA differs from other arbitrability questions because, if the FAA does not apply, then the district court lacks authority to compel arbitration under the FAA in the first place. Oliveira Br. 12-15. But that is true any time the validity of the arbitration agreement, or the enforceability of the arbitration agreement by a particular party, is in dispute; a ruling that the agreement is invalid or cannot be enforced by the party filing the motion to compel would mean that the FAA does not apply. Yet courts routinely compel arbitration of such threshold jurisdictional issues. *See*, *e.g.*, *Howsam*, 537 U.S. at 84 (ordering arbitration of the threshold question "whether the arbitration contract bound parties who did not sign the agreement"). The entire point of a delegation clause is to empower parties to agree to arbitrate threshold issues

that would otherwise be decided by the court. *See Dialysis Access Ctr., LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 375-76 (1st Cir. 2011) ("it is the court's duty … to determine whether the parties intended to arbitrate grievances concerning a particular matter" "*except* where the parties clearly and unmistakably provide otherwise" (citations omitted; emphasis added)); *see also Rent-A-Center*, 561 U.S. at 70 (a delegation clause "is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce"). Here, the parties' contracts unmistakably empower a third party—the arbitrator—to resolve such threshold questions.[2]

The only *textual* limit on the district court's authority to compel arbitration under the FAA is that the court must first be "satisfied that the making of the agreement for arbitration or the failure to comply

[2] In any event, "defense[s]" to arbitration are *always* within the arbitrator's province. *Howsam*, 537 U.S. at 83-84. Even without a delegation clause, the scope of a court's inquiry at the motion-to-compel stage is extremely limited, and includes only "whether the parties have a valid arbitration agreement at all" "and whether a concededly valid arbitration clause encompasses a particular type of controversy." *Fantastic Sams*, 683 F.3d at 25. All *other* questions of arbitrability must be resolved by the arbitrator, even where the parties did not (as here) sign a delegation clause. *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2856 (2010). Plaintiff's protest that the Section 1 Exemption excuses him from his otherwise valid obligation to arbitrate this dispute is nothing more than a "defense" to arbitration, which—under any theory—must be resolved in arbitration.

therewith is not in issue." 9 U.S.C. § 4. If neither of those questions is unsettled, then the court "*shall* make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.* (emphasis added). Here, there is no dispute regarding the "making" of the delegation clause, and no dispute that Plaintiff failed to comply with it. Thus, the district court was required to direct the parties to arbitration.

Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956), is not to the contrary. There, the Court granted certiorari to resolve a question regarding the weight that state arbitration laws must be given in a federal diversity case under *Erie R.R. Co. v. Tompkins*, 58 S. Ct. 817 (1938)—*not* questions of how the FAA should be interpreted, much less the scope of the Section 1 Exemption. *Bernhardt*, 350 U.S. at 200. The Court discussed the FAA in limited fashion only, explaining that because the underlying contract was neither a "maritime transaction" nor a contract "involving commerce," the FAA provided no basis to avoid the *Erie* issue. *Id.* at 201 (quoting 9 U.S.C. § 2). There was no discussion, however, of whether the FAA requires questions of its applicability to be resolved *in court*. And even assuming that a court would resolve such questions in a typical case, *Bernhardt* is silent about whether parties can agree to *alter* that default rule through a delegation clause. *Bernhardt*, therefore, says nothing about the key question here:

Whether courts must enforce agreements in which the parties expressly delegate threshold questions of arbitrability to the arbitrator.

Reading the FAA to require rigorous enforcement of delegation clauses is consistent with the Eighth Circuit's decision in *Green*. The agreement in that case, like the Contractor Agreements here, "specifically incorporated" the AAA rules, which meant that the parties "agreed to allow the arbitrator to determine threshold questions of arbitrability." *Green*, 653 F.3d at 769. Because of that broad agreement, the court held that the parties had "therefore agreed to have the arbitrator decide whether the FAA's transportation worker exemption applied." *Id.* The same result is appropriate here.

C. Any Doubts About Arbitrability Under The Parties' Agreement Should Be Resolved In Favor Of Arbitration.

There should be no doubt about the enforceability of the parties' arbitration provisions. Yet if any doubt exists, the important policy rationales undergirding the Supreme Court's many precedents regarding the FAA strongly support resolving those doubts on the side of arbitration.

The FAA must be interpreted against the background principle that a bargained-for arbitration agreement is enforceable so long as the agreement is "susceptible of an interpretation that covers the asserted dispute." *AT&T Techs.*, 475 U.S. at 650. This exacting standard is nec-

essary because, as the Supreme Court reaffirmed last year in a decision by Justice Breyer, courts *must* pay "due regard" to the liberal "federal policy favoring arbitration." *DirectTV*, 136 S. Ct. at 471 (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees*, 489 U.S. 468, 476 (1989)); *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011). Indeed, the "overarching purpose" of the FAA is "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," *Concepcion*, 131 S. Ct. at 1748-49, in order to "revers[e] centuries of judicial hostility to arbitration agreements," *Shearson/Am. Ex., Inc. v. McMahon*, 482 U.S. 220, 225 (1987) (citation omitted). As a result, the Supreme Court has repeatedly ruled that "courts must 'rigorously enforce' arbitration agreements according to their terms." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)); *see also*, *e.g.*, *CompuCredit Corp. v. Greenwood*, 133 S. Ct. 665, 669 (2012); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983).

This means that the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter*, 470 U.S. at

218. By declining to enforce a concededly valid agreement to arbitrate, the district court's ruling is in clear tension with these principles.

Further, Plaintiff ignores the Supreme Court's commands that "as a matter of federal law, *any doubts* concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25 (emphasis added); *see also AT&T Techs.*, 475 U.S. at 650; *Volt*, 489 U.S. at 476. Indeed, Plaintiff's principal authority for the proposition that Section 1 Exemption issues should be resolved in court, *In re Van Dusen*, denied mandamus relief because it could not say that the district court committed "clear error" in light of the strong federal policies favoring arbitration, which made the case "close." 654 F.3d 838, 846 (9th Cir. 2011). But those same policies make clear that "close" calls must be resolved in favor of arbitration. As better explained by the Eighth Circuit in *Green*, federal policy militates in favor of enforcing the parties' agreement in this case.

Finally, in the circumstances of this case, Plaintiff's rule would require the district court to resolve key merits issues, which would severely undercut the value of Prime's arbitration right. Courts may not "rule on the potential merits of the underlying claims" when determining whether to compel arbitration. *AT&T Techs.*, 475 U.S. at 649-50; *see also Italian Colors*, 133 S. Ct. at 2313 (rejecting interpretation of FAA that would "sacrifice[] the principal advantage of arbitration" (citation omitted)). The district court's planned foray into the contours of

Plaintiff's working relationship with Prime would indisputably intrude into *the* key issue in this wage-and-hour classification case. As a result, any eventual arbitration would likely be rendered moot—or at minimum, the issues left for the arbitrator to decide would be trivial. Prime Br. 25-26.

Plaintiff also ignores that the district court's approach would mean that misclassification cases in the transportation industry could *never* go to arbitration, no matter how explicit an agreement to the contrary. Prime Br. 27-28.[3] Plaintiff urges this Court to ignore these significant consequences, invoking the truism that "a policy concern cannot trump a statute's clear command." Oliveira Br. 22. But there is no "clear [statutory] command" supporting Plaintiff's position here; to the contrary, the Supreme Court has made clear that the need to avoid entanglement with the merits of an underlying claim is *embedded in the FAA*, and, consequently, a faithful interpretation of the statute requires resolving close disputes to avoid these troubling outcomes. *See AT&T Techs.*, 475 U.S. at 649-50; *Berenson v. Nat'l Fin. Servs. LLC*, 485 F.3d 35, 43 (1st Cir. 2007) (recognizing rule that district court's role does not

[3] Indeed, even Plaintiff's *amicus curiae* recognizes that if courts are required to delve into the merits of classification disputes like these, the result will be "a slower and more cumbersome process rather than a cheaper and more efficient" one as arbitration was intended to provide. Mot. for Leave to File *Amicus Curiae* Br. 6.

permit "reach[ing] the potential merits of the claim" (quoting *MedCam, Inc. v. MCNC*, 414 F.3d 972, 975 (8th Cir. 2005)).[4]

In short, every established federal principle for construing arbitration agreements requires enforcing the parties' agreement to arbitrate.

II. The Narrow Exemption in Section 1 Of The FAA Is Inapplicable To Plaintiff's Disputes With Prime.

Even if this Court agrees with the district court that questions about applicability of the Section 1 Exemption are for courts to decide, it should still reverse the district court because, in this case, the Section 1 Exemption does not apply.

As an initial matter, this Court has never extended the Section 1 Exemption to truck drivers, as opposed to rail workers and seamen (the core workers of concern when Congress enacted the exemption). But even if truck drivers are included within the exemption as a general matter, they are plainly not included where (as here) the parties entered into an independent contractor relationship rather than a "contract of employment," as required by the FAA. The record in this case

[4] Oliveira's reliance on *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991), is misplaced. The parties in *Litton* had not agreed to a delegation clause. Moreover, the Court's inquiry in *Litton* was not, as Oliveira contends, "dispositive of the merits of the case." Oliveira Br. 21-22. To the contrary, the Court emphasized that it "d[id] not decide" the ultimate liability question and deliberately left important issues (including a key defense) for arbitration. *Litton*, 501 U.S. at 210 n.4.

indisputably shows that the parties did not enter into a "contract of employment," and Oliveira failed to meet his burden to show otherwise.

A. The Section 1 Exemption Does Not Apply To Disputes Arising Out Of Independent Contractor Agreements.

Plaintiff argues that the Section 1 Exemption applies to all work-for-hire contracts regardless of whether the parties intended to enter an employment relationship. That is wrong—not even the district court accepted this argument. Consistent with every court to address the issue, the district court correctly determined that an independent contractor agreement is not a "contract[] of employment" subject to the Section 1 Exemption. App. 190-91 (citing cases). Plaintiff's attack on this rule—which is based on precedents and interpretations marshalled piecemeal from contexts far afield of the FAA—cannot withstand scrutiny. *See Morning Star Assocs., Inc. v. Unishippers Global Logistics, LLC*, 2015 WL 2408477, at *5 (S.D. Ga. May 20, 2015) ("[w]ithout guidance from any controlling precedent," courts should decline to "apply principles from entirely different areas of the law to expand the § 1 exemption that Congress intended to be narrowly applied").

The starting point for any interpretation of the Section 1 Exemption is the Supreme Court's recognition that the FAA "compel[s]" giving it "a narrow construction." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001). The FAA's text and structure "undermines any attempt to give the provision a sweeping, open-ended construction"—a

conclusion that is only underscored by "the fact that the provision is contained in a statute that 'seeks broadly to overcome judicial hostility to arbitration agreements.'" *Id.* (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272-73 (1995)). Consistent with that direction, courts may not "abandon [a] precise reading" of Section 1. *Id.* at 119.

Indeed, the Supreme Court interpreted the Section 1 Exemption narrowly in its only other case examining the exemption. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court concluded that an arbitration provision was not part of a "contract of employment," even though the agreement mandated that the employee arbitrate employment-related disputes with his employer, because the employer was not a party to the contract. *Id.* at 25 n.2. Taken together, *Circuit City* and *Gilmer* leave no doubt that the Section 1 Exemption must not be interpreted any more broadly than is absolutely necessary. *See also Veliz v. Cintas Corp.*, 2004 WL 2452851, at *3 (N.D. Cal. Apr. 5, 2004) (recognizing that "[c]ourts examining the FAA § 1 exemption both before and after *Circuit City* consistently have held" that it must "be narrowly construed"). Plaintiff omits any mention of these foundational principles.

Unsurprisingly in light of Supreme Court precedent, the courts that have addressed Plaintiff's theory—that an independent contractor agreement can be shoehorned into Section 1's "contract of employment"

framework based on the subsequent conduct of the parties—have dismissed that broad construction out of hand.

The Northern District of California, for instance, found it unnecessary to look beyond the pleadings to resolve the "contract of employment" prerequisite: "The FAA provision in question concerns employment contracts, and Plaintiff has pled that he is an independent contractor." *Villalpando v. Transguard Ins. Co. of Am.*, 17 F. Supp. 3d 969, 982 (N.D. Cal. 2014). Similarly, the District of Arizona rejected an argument that the Section 1 Exemption applies to independent contractors where the plaintiff failed to "cite[] the Court to any controlling case law establishing that the § 1 exemption is applicable under the circumstances of this action, and the Court [was] aware of none." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co.*, 288 F. Supp. 2d 1033, 1035 (D. Ariz. 2003). Especially "[g]iven the strong and liberal federal policy favoring arbitral dispute resolution," the court refused to sweep up independent contractor agreements into the narrow Section 1 Exemption. *Id.* Nearly every other court to address the question has done the same.[5]

[5] *See, e.g.*, *Diaz*, 2016 WL 866330, at *4; *Morning Star*, 2015 WL 2408477, at *5; *Performance Team Freight Sys., Inc. v. Aleman*, 241 Cal. App. 4th 1233, 1242 (2015); *Doe v. Swift Transp. Co.*, 2015 WL 274092, at *3 (D. Ariz. Jan. 22, 2015); *Carney v. JNJ Exp., Inc.*, 10 F. Supp. 3d 848, 852 (W.D. Tenn. 2014); *Port Drivers Fed. 18, Inc. v. All*

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Plaintiff asserts (at 37 n.19) that "lower courts are split" on the question whether a "contract of employment" includes independent contractor agreements, but this purported split is illusory. The *only* case he cites on his side of the "split" did not hold that the Section 1 Exemption includes independent contractors, but only that a contract's "boiler plate language" stating that it was creating an independent contractor relationship was insufficient to resolve the question of Section 1's scope. *Owner-Operator Indep. Drivers Ass'n v. C.R. England, Inc.*, 325 F. Supp. 2d 1252, 1258 (D. Utah 2004). And even this limited holding has been criticized. *See*, *e.g.*, *Port Drivers Fed. 18, Inc. v. All Saints*, 757 F. Supp. 2d 463, 472 (D.N.J. 2011) (declining to follow *C.R. England* because it "provides no substantive analysis or guidance concerning its decision").

Without any meaningful support for a contrary ruling, the district court rightly joined the judicial chorus in concluding that the phrase "contract of employment" does not include independent contractor agreements.

Plaintiff's counter-argument thus relies, by necessity, on authority from different—and irrelevant—contexts. Plaintiff casts his net wide to find examples from other areas of law where courts describe employment relationships, but ultimately comes back emptyhanded.

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Saints, 757 F. Supp. 2d 463 (D.N.J. 2011); *Roadway Package Sys., Inc. v. Kayser*, 1999 WL 817724, at *4 n.4 (Oct. 13, 1999).

Plaintiff's appeals to dictionary definitions (at 23-24), for example, are wholly inapt: One can "employ" a hammer or a scientific methodology, to be sure, but neither sense of the word helps pin down its meaning in a federal statute that must be interpreted with "precis[ion]," *Circuit City*, 532 U.S. at 118. Indeed, Plaintiff concedes that some bodies of law used "employee" as a term of art excluding independent contractors. Oliveira Br. 24-25; *see also*, *e.g.*, *Black's Law Dictionary* 1822 (10th ed. 2014) (defining "employee" as "[s]omeone who works in the service of another person" under a contract "under which the employer has the right to control the details of work performance"). And when Plaintiff discusses the phrase "contract of employment" specifically, he can point to nothing on point; the cases he cites concern the unrelated contexts of agreements in bankruptcy, land reclamation cases, or state tort-law decisions. *See Watkins v. Sedberry*, 261 U.S. 571, 576 (1923); *Calhoun v. Massie*, 253 U.S. 170 (1920); *see also* Oliveira Br. 26-27. Unsurprisingly, despite decades of litigation over the FAA, courts interpreting the Section 1 Exemption have never referenced the type of cases on which Plaintiff builds his theory. *See, e.g.*, *Morning Star*, 2015 WL 2408477, at *5 ("the Court is hesitant to apply principles from entirely different areas of the law to expand the § 1 exemption").

Plaintiff's attempt to bolster his position with history fails as well. Plaintiff contends that Congress was "concern[ed] with the economic threat posed by continued labor unrest in the transportation industry"

writ large, and therefore excluded transportation workers from the FAA to "ensure that transportation workers' disputes were not subject to the whim of private dispute resolution, but instead could be regulated by Congress for the good of the public." Oliveira Br. 33, 36. Thus, Plaintiff argues, certain dispute-resolution statutes for railroad workers were sometimes interpreted broadly to include independent contractors; therefore, he claims, Congress must have intended to exclude independent contractors and employees alike from the FAA when it drafted Section 1. Oliveira Br. 33-36.

This rationale, however, has no support in the FAA's text or legislative history. Further, Plaintiff fails to identify any comparable dispute-resolution statutes governing seamen or other transportation workers, as would be expected if Plaintiff's theory were correct. And he points to no other dispute-resolution statutes covering independent contractors, as would be necessary to shore up his claim that Congress meant to exclude employees *and* independent contractors.[6]

Without any indication that independent contractors in the trucking, airline, bus, or other transportation industries are covered by other

[6] Plaintiff cites (without explanation) the Motor Carrier Act of 1935 ("MCA"), Oliveira Br. 35, but that statute dealt with rate setting, public safety standards, record keeping, and the like. *See* James C. Nelson, *The Motor Carrier Act of 1935*, 44 J. Pol. Econ. 464, 465-67 (1936). It did *not* deal with dispute-resolution—much less any dispute-resolution regime encompassing independent contractors.

federal dispute-resolution statutes, Plaintiff's theory could lead to the absurd result of leaving many independent contractors without *any* federal dispute-resolution regime at all. It is implausible to assume that Congress would have intended that result; Plaintiff's selective historical study is no reason to abandon unanimous precedents holding that independent contractors are not included in the Section 1 Exemption.

B. Plaintiff Did Not Satisfy His Burden To Show That The Section 1 Exemption Applies.

The district court also erred in ordering discovery into the entire course of dealings between Oliveira and Prime to determine whether the Section 1 Exemption applies. Consistent with the FAA's presumption in favor of arbitrability, courts have uniformly resolved the Section 1 Exemption issue at the motion-to-compel stage based on a limited inquiry into whether the parties intended, at the time of contracting, to enter into an independent contractor relationship. The evidence before the district court shows that Plaintiff did not, and cannot, meet his burden of showing that a "contract of employment" exists on these facts. No further discovery could alter that conclusion.

It is undisputed that, as "[t]he party resisting arbitration," Plaintiff bears the burden of proving that his claims "are unsuitable for arbitration." *Green Tree Fin. Corp.-Al. v. Randolph*, 531 U.S. 79, 93 (2000); *see also*, *e.g.*, *Gilmer*, 500 U.S. at 35 (holding that plaintiff bears the burden to show that Congress intended to preclude arbitration of par-

ticular claims under the FAA). Courts uniformly recognize that this burden applies with equal force in situations like this, where a plaintiff attempts to persuade the court that the Section 1 Exemption is a defense to arbitration notwithstanding a written agreement to the contrary. *See*, *e.g.*, Prime Br. 8-9; *Morning Star*, 2015 WL 2408477, at *5 ("To fit within the FAA's narrow exception and circumvent the clear Congressional intent that arbitration provisions be enforced, Plaintiffs have the burden to show that the [agreement] is an employment contract and that they are transportation workers"); *Carney v. JNJ Exp., Inc.*, 10 F. Supp. 3d 848, 852 (W.D. Tenn. 2014) ("The burden is on the Carneys to prove that the Leases are contracts of employment."); *Cilluffo v. Cent. Refrigerated Serv.*, 2012 WL 8523507, at *3-4 (C.D. Cal. 2012) (same).

Plaintiff did not meet this burden. To begin, Plaintiff never disputes that, on their face, both Contractor Agreements purport to create an independent contractor relationship. Prime Br. 11-12; *see also EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) ("absent some ambiguity in the agreement ... it is the language of the contract that defines the scope of disputes subject to arbitration"). This unambiguous written intent should have ended the Section 1 inquiry. Unless the party resisting arbitration proves otherwise, courts "apply the characterization of the relationship *described in the agreement* and find that [a plaintiff] characterized as an independent contractor does not have a contract of employment." *Swift Transp. Co.*, 288 F. Supp. 2d at 103

(emphasis added); *see also*, *e.g.*, *Carney*, 10 F. Supp. 3d at 853 (adopting same standard); *Owner-Operator Indep. Drivers Ass'n, Inc. v. United Van Lines, LLC*, 2006 WL 5003366, at *3 (E.D. Mo. Nov. 15, 2006) (same). Indeed, the "majority" of courts to consider agreements that—as here—"characteriz[e] truck drivers as independent contractors" have held that these descriptions are dispositive "unless the party opposing arbitration demonstrates" otherwise. *Aleman*, 241 Cal. App. 4th at 1241-42. In other words, the Contractor Agreements' characterization of the relationship between Oliveira and Prime establishes a presumption that they are not "contracts of employment."

Plaintiff argues (at 39) that considering contractual wording alone would let employers "evade" the Section 1 Exemption by simply "requir[ing] workers to sign contracts stating they are independent contractors." But contractual labels set a starting presumption, which plaintiffs are free to rebut—either before the arbitrator (pursuant to a delegation clause), or a court.

Plaintiff, however, did not introduce sufficient evidence to overcome the presumption established by the Contractor Agreements' plain terms. Courts consistently find that the Section 1 exemption does not apply on the same facts at issue here.

Significantly, Plaintiff signed the Contractor Agreements on behalf of his corporate entity, not in his personal capacity. Oliveira Br. 5 n.3. It strains credulity that one business entity could enter into a per-

sonal employment contract with another. *See B.S. Costello, Inc. v. Meagher*, 867 F.2d 722, 727 (1st Cir. 1989) (characterizing relationship between company and government entity as an independent contractor relationship). This factor is near-conclusive evidence that Hallmark Trucking, LLC was Prime's independent contractor, not its employee. *See D.V.C. Trucking, Inc. v. RMX Global Logistics*, 2005 WL 2044848, at *3 (D. Colo. Aug. 24, 2005) (finding "no basis to apply the [Section 1] exemption" because "party to the [agreement] is D.V.C. Trucking, Inc., not an individual transportation worker"). Just as a contract discussing employment-related dispute resolution is not a "contract of employment" where the employer is not a party, *Gilmer*, 500 U.S. at 25 n.2, a contract establishing a working relationship is also not an *employment* contract where a corporate entity, not an individual, is on the other side of the agreement.[7]

[7] The fact that Prime and Hallmark Trucking, LLC entered into the Contractor Agreements is powerful evidence about the type of relationship the parties created, but it does not excuse Plaintiff from complying with the arbitration provisions, nor provide a basis for remand (Oliveira Br. 5 n.3). Plaintiff personally accepted the benefits of the Contractor Agreements, and the heart of his underlying claims is that *the same agreements* made him an "employee" entitled to different wages than if he had been an independent contractor. Where Plaintiff's claims arise out of the very relationship that the Contractor Agreements established, he is estopped from arguing that he is not bound by those contractual terms he finds inconvenient now. *See Dubail v. Med. W. Bldg. Corp.*, 372 S.W.2d 128, 132 (Mo. 1963) (defendant "by its actions in accepting the benefits under cer-

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Moving beyond this significant hurdle, Plaintiff also does not—and cannot—dispute that the key provisions of the Contractor Agreements explicitly retain for Plaintiff control over details of his work well beyond the level of control that an employee would be given. For example, Plaintiff cannot escape the fact that the Contractor Agreements deemed him "responsible for determining the means of [his] performance," including "equipment routes and scheduling," and that he was "responsible for costs such as fuel, oil, maintenance and repairs"—all indicators of an independent contractor relationship. *Carney*, 10 F. Supp. 3d 848, 853-54; *Van Lines*, 2006 WL 5003366, at *1, *3; *see also* Prime Br. 11-12 (citing App. 93, 95). And Plaintiff had the right to refuse loads Prime offered—another strong indicator. Prime Br. 11; *see Davis v. Larson Moving & Storage Co.*, 2008 WL 4755835, at *6 (Oct. 27, 2008) (concluding plaintiff "has not established that he was functionally an employee" where he "could elect to reject specific shipments").

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tain terms of the contract adopted it as its own and should not be permitted to avoid the obligations imposed by other terms"); *cf. InterGen N.V. v. Grina*, 344 F.3d 134, 145 (1st Cir. 2003) (equitable estoppel "precludes a party from enjoying rights and benefits under a contract while at the same time avoiding its burdens and obligations," including arbitration).

Plaintiff argues that he "should be given a chance" to show that he was not an independent contractor. Oliveira Br. 41. But he had that chance. This Court should neither grant him another merely because he failed to meet his burden the first time, nor allow him to conduct discovery into the full nature of the parties' relationship. Allowing such discovery would ignore the nature of the Section 1 Exemption, which applies only when parties enter into *contracts* of employment. Prime Br. 9. Section 1's focus on the contract itself (and the parties' intent when signing it) is consistent with the FAA's attention to the agreement the parties signed, as opposed to after-the-fact conduct. *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999). And it is consistent with the goal of avoiding impermissible intrusion into the merits of the underlying dispute. *AT&T Techs.*, 475 U.S. at 649-50.

III. The Court Should Order All Of Plaintiff's Disputes To Arbitration.

Finally, Plaintiff insists that because his claims encompass a handful of weeks before signing the Contractor Agreements and a short, undefined period of time after those agreements expired, and because only the Contractor Agreements contain arbitration clauses, the district court correctly denied Prime's motion to compel arbitration on all claims. Oliveira Br. 43-54. The district court, however, did not rule on those arguments; it concluded that Prime's request to compel arbitration on all of Plaintiff's disputes failed "[a]t *this* stage" because it "d[id]

not address the applicability of the § 1 transportation worker exemption." App. 192 (emphasis added). This Court need not resolve an issue that the district court declined to reach. *See Hochendoner v. Genzyme Corp.*, __ F.3d __, 2016 WL 2962148, at *8 (1st Cir. 2016).

In any event, Plaintiff cannot avoid arbitration of his case—or any portion of it—merely because a small subset of his claims allegedly falls outside the time period covered by his arbitration agreement. *See* 9 U.S.C. § 3 ("upon being satisfied that the issue involved in [a] suit or proceeding is referable to arbitration," a district court "*shall … stay the trial* of the action until such arbitration has been had" (emphasis added)); *United Commc'ns Hub, Inc. v. Qwest Commc'ns, Inc.*, 46 F. App'x 412, 415 (9th Cir. 2002) (reversing denial of motion to compel arbitration where only some of the asserted claims were subject to mandatory arbitration, because Section 3 "compels courts to stay litigation of arbitrable issues regardless of whether those issues intertwine with nonarbitrable issues and regardless of whether piecemeal litigation will result" (citation omitted)). Further, the district court has "inherent powers" to stay litigation of any related issues pending arbitration of the bulk of Plaintiff's claims, especially because "issues involved in the case may"—indeed, in this case, would—be "determined" by the arbitration. *Sierra Rutile Ltd. v. Katz*, 937 F.2d 743, 750 (2d Cir. 1991) (citation omitted); *see also Harvey v. Joyce*, 199 F.3d 790, 795-96 (5th Cir. 2000) (reversing order denying stay where nonarbitrable claims were "based

on the same operative facts and [were] inherently inseparable from the [arbitrable] claims").

CONCLUSION

This Court should reverse the district court's decision.

Dated: July 22, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because this brief contains 6,991 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point New Century Schoolbook LT font.

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2016, an electronic copy of the foregoing Reply Brief for Appellant New Prime, Inc. was filed with the Clerk of Court for the United States Court of Appeals for the First Circuit using the Court's CM/ECF system and was served electronically by the Notice of Docket Activity upon registered CM/ECF participants.

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