

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

NEW PRIME INC.,)
 Petitioner,)
 v.) No. 17-340
DOMINIC OLIVEIRA,)
 Respondent.)

Pages: 1 through 53
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NEW PRIME INC.,)
Petitioner,)
v.) No. 17-340
DOMINIC OLIVEIRA,)
Respondent.)
- - - - -

Washington, D.C.

Wednesday, October 3, 2018

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

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

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

2 (11:09 a.m.)

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

6 Mr. Boutrous.

7 ORAL ARGUMENT OF THEODORE J. BOUTROUS, JR.

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

16 MR. BOUTROUS: But it --

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

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

25 JUSTICE SOTOMAYOR: No. But it said

1 it shall apply to any other class of workers,
2 not employees. It used a much broader term.

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

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

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

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

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

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

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

23 And I don't think the Court has to
24 determine whether every seaman is -- is an
25 employee or not. The question is whether they

1 had a contract of employment.

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

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

12 MR. BOUTROUS: In -- in that case,
13 yes, Your Honor, that was -- that was the
14 issue. But the overall thrust, if -- on page
15 120 to 121 of Circuit City, the Court in
16 talking about seamen, railroad employees, air
17 carrier -- the air carrier employees who were
18 added to the Railway Labor Act in 1935, I
19 believe, this Court said over and over again
20 these were employment relationships, talking
21 about the relationship between employees and
22 employers. So this Court in Circuit City was
23 clearly contemplating exactly what the statute
24 says, that a contract of employment is a
25 contract of employment. It's not an

1 independent contractor agreement.

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

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

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

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

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

7 And here --

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

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

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

23 JUSTICE GORSUCH: Well, what do we do
24 about the fact that, less haphazardly, your --
25 your colleague on the other side has documented

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

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

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

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

25 It was deeply embedded. This Court's

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

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

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

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

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

25 In the -- the need for a narrow

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

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

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

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

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

25 MR. BOUTROUS: Your Honor, we believe

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

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

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

1 they're outside the Federal Arbitration Act.
2 That can't -- you can't use the Act to enforce
3 any arbitration.

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

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

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

1 -- whether it's a contract of employment or an
2 independent contractor agreement.

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

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

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

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

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

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

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

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

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

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

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

22 And in the Wisconsin Central case from
23 last term, where the question was what does
24 money mean, the Court said the government had
25 made a decent case that money could be

1 interpreted more broadly. But that wasn't the
2 ordinary usage.

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

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

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

25 MR. BOUTROUS: It is a different

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

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

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

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

25 As to the general question, if you

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

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

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

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

21 MR. BOUTROUS: Yes.

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

24 MR. BOUTROUS: I was about to say
25 that, Your Honor.

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

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

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

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

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

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

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

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

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

24 MR. BOUTROUS: But -- yes, Your Honor,
25 that's what he alleges. But the -- the --

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

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

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

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

22 JUSTICE SOTOMAYOR: On this --

23 CHIEF JUSTICE ROBERTS: Counsel, did I
24 understand -- I've been pondering your answer
25 to the question I asked a while ago. Did I

1 understand you'd be perfectly happy to have a
2 court decide the arbitrability issue here?

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

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

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

1 agreement; is it a contract of employment?

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

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

23 MR. BOUTROUS: Your Honor, I -- I -- I
24 can't think of one. But here we have the
25 unique circumstance where the statute focuses

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

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

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

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

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

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

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

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

9 MR. BOUTROUS: Yes.

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

12 MR. BOUTROUS: Yes.

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

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

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

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

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

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Ms. Bennett.

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

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

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

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

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

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

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

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

1 as other workers. That --

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

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

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

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

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

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

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

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

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

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

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

6 MS. BENNETT: Sure.

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

9 MS BENNETT: Sure.

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

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

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

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

3 JUSTICE KAGAN: So -- so --

4 MS. BENNETT: Sorry.

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

7 MS. BENNETT: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 And so we have the text of the

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

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

10 JUSTICE GINSBURG: But what of the --

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

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

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

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

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

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

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

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

18 (Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 corporation would -- would be a company.

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

4 MS. BENNETT: Sure.

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

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

13 If that's not true --

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

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

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

25 So independent contractors who are

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

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

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

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

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

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

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

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

3 JUSTICE KAGAN: But to take one -- an
4 opposite extreme from UPS or FedEx, you know,
5 suppose it's like Joe Smith Truckers, and Joe
6 Smith Truckers is Joe Smith and his brother,
7 and -- and the contract was with Joe Smith
8 workers, and he says "my brother will do the
9 work."

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

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

25 And this is a really rare -- as this

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

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

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

24 What I'm saying is if there's an
25 agreement that's not of a specific person, a

1 worker, to perform work, then they're outside
2 the scope.

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

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

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

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

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

5 If there are --

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

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

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

24 But the second answer is that if a
25 court were to decide the question of -- if the

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

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

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

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

25 And, again, so the -- both the

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

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

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

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

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

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

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

23 Since counsel left off with the
24 language and history of the statute, let me
25 just go back to the statute. It says

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

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

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

1 only, so long as the relationship between them
2 shall continue."

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

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

16 That was --

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

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

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

25 MR. BOUTROUS: But -- but the -- the

1 -- the reason we cite it, Your Honor, is that
2 it was well established what a contract of
3 employment was.

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

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

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

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

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

24 We cite Black's Law Dictionary, which
25 says, "A contract of employment," and this --

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

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

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

13 Thank you very much.

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

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

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