No. 15-2364

In the

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
Case No. 1:15-cv-10603-PBS

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING OR REHEARING EN BANC

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(b)(2), the Chamber of Commerce of the United States of America (the "Chamber") respectfully moves for leave to file a brief as *amicus curiae* in support of defendant-appellant's petition for rehearing or rehearing en banc. The proposed *amicus* brief is submitted to the Court along with this motion. Counsel for both plaintiff-appellee and defendant-appellant have informed counsel for the Chamber that they do not object to the Chamber's filing of an *amicus* brief in support of the petition.

IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

REASONS FOR GRANTING THE MOTION

Many of the Chamber's members and affiliates regularly rely on arbitration agreements in their contractual relationships. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the legislative policy reflected in the Federal Arbitration Act ("FAA"), the Chamber's members have structured millions of contractual relationships—including large numbers of agreements with independent contractors—around the use of arbitration to resolve disputes.

The panel majority's decision in this case—announcing that the FAA does not apply to independent contractors in the transportation industry—conflicts with the decisions of numerous other courts. That unwarranted carveout undermines the reliance by the Chamber's members and affiliates on the national policy favoring arbitration, and creates an untenable disuniformity, with the FAA applying to arbitration agreements

with an independent contractor in California or New York but not to an identically situated contractor in Massachusetts.

The Chamber therefore has a strong interest in the rehearing of this case.

CONCLUSION

The Court should grant the motion for leave to file the accompanying *amicus* brief.

Dated: June 6, 2017

Respectfully submitted.

s/ Andrew J. Pincus

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2017, I electronically filed the foregoing with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users, who will be served by the appellate CM/ECF system.

s/ Andrew J. Pincus
Andrew J. Pincus

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

Many of the Chamber's members and affiliates regularly rely on arbitration agreements in their contractual relationships. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the legislative policy reflected in the Federal Arbitration Act ("FAA"), the

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* affirms that no party or counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

Chamber's members have structured millions of contractual relationships—including large numbers of agreements with independent contractors—around the use of arbitration to resolve disputes.

The panel majority's decision in this case—announcing that the FAA does not apply to independent contractors in the transportation industry—conflicts with the decisions of numerous other courts. That unwarranted carveout undermines the reliance by the Chamber's members and affiliates on the national policy favoring arbitration, and creates an untenable disuniformity, with the FAA applying to arbitration agreements with an independent contractor in California or New York but not to an identically situated contractor in Massachusetts.

The Chamber therefore has a strong interest in the rehearing of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Independent contractors are an essential part of the modern economy. According to one study, between 2010 and 2014, the number of independent contractors "increased by 2.1 million workers," accounting for "28.8 percent of all jobs added." Will Rinehart & Ben Gitis, *Independent Contractors And The Emerging Gig Economy*, American Action Forum (July 29, 2015), https://www.americanactionforum.org/research/independent-contractors-and-the-emerging-gig-economy/. That "number is

expected to keep growing at a steady clip." Brendon Schrader, *Here's Why The Freelancer Economy Is On The Rise*, Fast Company (Aug. 10, 2015), https://www.fastcompany.com/3049532/heres-why-the-freelancer-economy-is-on-the-rise.

This enormous, and rapidly expanding, sector of the economy relies on the enforceability of the agreements between businesses and independent contractors. Many such agreements provide for arbitration of any disputes that may arise, because arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court.

Yet under the panel majority's opinion in this case, untold thousands of independent contractors would have their arbitration agreements severely undermined. Specifically, the panel majority held that Section 1 of the FAA's narrow exclusion of "contracts of *employment*" involving transportation workers also eliminates the FAA's protection of arbitration agreements entered into by independent contractors. 9 U.S.C. § 1 (emphasis added).

With respect, that holding is mistaken. The panel's reversal of the district court's decision not only creates a conflict with ***every*** other district and appellate court to consider the issue but also is wrong on the merits—especially in light of the Supreme Court's admonitions that Section 1 must

be given a "narrow construction" and "precise reading." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118, 119 (2001).

The distinction between employees and independent contractors is well established in the law, and was settled at the time the FAA was enacted in 1925. Indeed, the Supreme Court made clear in *Circuit City* that Section 1 aimed to avoid conflicts with existing or impending federal statutes that separately provided alternative dispute-resolution mechanisms for certain kinds of *employees*, such as "seamen," "railroad employees," and "air carriers and their employees." *Id.* at 120-21. But those other federal statutes do not reach independent contractors, and therefore it would make little sense for Congress to have nonetheless included independent contractors in Section 1's exemption provision.

At a minimum, rehearing is warranted to provide for a full consideration of this issue. As Judge Barbadoro noted in dissent, the first time that the plaintiff raised the issue of Section 1's coverage in the district court was via a "less-than-robust argument" in a "supplemental surreply." Op. 42. And the district court did not accept that argument, instead pointing to the "extensive contrary case law." *Id.* Plaintiff first made a full-throated argument on this issue in its response brief on appeal—forcing defendant to state its position in a necessarily truncated

fashion in its reply. *See* Pet. 7. Rehearing will allow for the focused presentation that this issue warrants and that the panel did not receive.

In short, the critical and frequently recurring issue of whether the FAA excludes independent contractors in the transportation industry from its coverage warrants full consideration and rehearing by the panel or *en banc* Court.

ARGUMENT

A. The panel majority's interpretation of Section 1 conflicts with the statute's plain meaning and structure.

Section 1 of the FAA provides that the statute's federal protections for arbitration agreements do not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Prior to the panel majority's opinion in this case, courts uniformly understood the phrase "contracts of employment" in this Section to mean what it says: a contract between an employer and an employee—not an agreement with an independent contractor to perform work.

As the petition details, the panel majority's contrary conclusion conflicts with the views of two appellate courts—the Ninth Circuit in *In re Swift Transportation Co.*, 830 F.3d 913 (9th Cir. 2016) and the California Court of Appeal in *Performance Team Freight Systems, Inc. v. Aleman*, 241

Cal. App. 4th 1233 (2015)—and over a dozen federal district court cases around the country. Pet. 7-10.

The panel brushed aside this uniform contrary case law as, in its view, insufficiently reasoned. But the logical basis on which many of these decisions "simply assume . . . that independent-contractor agreements are not contracts of employment under § 1" (Op. 23) is that the statutory text is plain and its meaning unambiguous. The panel majority itself acknowledged that *Black's Law Dictionary* treats "contract of employment" as synonymous with "employment contract"—the first usage of which was from 1927—and defines that term as one would expect: as a "contract between an ***employer*** and ***employee*** in which the terms and conditions of employment are stated." Op. 28 n.19 (quoting Black's Law Dictionary (10th ed. 2014) (emphasis added)).

But the panel majority instead relied on dictionary definitions of the broader verb "employ" and various instances where the phrase "contract of employment" was used outside the context of the FAA (or any other federal statute) to conclude that Congress must have meant to exempt independent contractors under Section 1. But that inflation of the provision's language beyond its plain meaning conflicts with the Supreme Court's instruction to give "the § 1 provision . . . a narrow construction." *Circuit City*, 532 U.S. at 118. The panel majority also failed to recognize

that its interpretation fails to align Section 1 with other federal laws that provided the context in which the exemption was enacted—laws that ***do*** recognize the long-established distinction between employees and independent contractors.

In *Circuit City*, the Supreme Court explained at length that the residual category of "workers engaged in . . . commerce" must be "controlled and defined by reference to the enumerated categories of workers which are recited just before it"—namely, "seamen" and "railroad employees." *Id.* at 115. And the Court explained that "seamen" and "railroad employees" were excluded from the FAA because "[b]y the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers"; "grievance procedures existed for railroad employees under federal law"; "and the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent." *Id.* at 121 (citing, respectively, the Shipping Commissioners Act of 1872, 17 Stat. 262; Transportation Act of 1920, 41 Stat. 456; and Railway Labor Act of 1926, 44 Stat. 577).

As the Court summarized, "[i]t is reasonable to assume that Congress excluded 'seamen' and 'railroad employees' from the FAA for the simple reason that it did not wish to unsettle established or developing

statutory dispute resolution schemes covering specific workers." *Circuit City*, 532 U.S. at 121. And the Court explained that the residual category of other transportation workers was included because Congress contemplated extending similar legislation to other categories of employees: "Indeed, such legislation was soon to follow, with the amendment of the Railway Labor Act in 1936 to include air carriers and their employees." *Id.*

Yet these other federal statutes were, and are, limited in scope to employees, as that term is traditionally understood. For example, the Railway Labor Act defines "employee" with reference to ordinary common-law concepts of direction and control: "[t]he term 'employee' as used herein includes every person in the service of a carrier (subject to *its continuing authority to supervise and direct the manner of rendition of his service*) who performs any work defined as that of an *employee* or subordinate official." Railway Labor Act of 1926, § 1, Pub. L. No. 69-257, 44 Stat. 577 (emphasis added).

Other contemporaneous legislation governing railroad workers and seamen points in the same direction; those laws adopt the common-law approach to who counts as an "employee"—and therefore necessarily appreciate the distinction between an employee and an independent contractor. The Federal Employers' Liability Act was enacted in 1908, and

applies only to "employee[s]" who are injured "while . . . employed by" a "common carrier by railroad." 45 U.S.C. § 51. As the Supreme Court put it, "[f]rom the beginning the standard" for application of FELA "has been proof of a master-servant relationship between the plaintiff and the defendant railroad." *Kelley v. S. Pac. Co.*, 419 U.S. 318, 323 (1974). The Court reiterated its pronouncement from a decade *prior* to the enactment of the FAA that "the words 'employee' and 'employed' in the statute were used in their natural sense, and were 'intended to describe the conventional relation of employer and employee.'" *Id.* (quoting *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 94 (1915)).

And the Jones Act, which was enacted in 1920, extended the same principles already enacted in FELA to seamen, providing that "[a] seaman injured in the course of *employment* . . . may elect to bring a civil action at law . . . against the *employer*. Laws of the United States regulating recovery for personal injury to, or death of, a railway *employee* apply to an action under this section." 46 U.S.C. § 30104 (formerly codified at 46 U.S.C. § 688) (emphases added); *see also, e.g.*, *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368-72 (1995) (describing the "essential contours of the employment-related connection to a vessel in navigation required for an employee to qualify as a seaman under the Jones Act"); *Bach v. Trident Shipping Co., Inc.*, 708 F. Supp. 772, 773 (E.D. La. 1988) ("It is by now well

established that an employer-employee relationship is essential for recovery under the Jones Act.").

The line drawn in these specific statutory contexts is also consistent with the Supreme Court's general pronouncement that when Congress uses the term "employee" in a statute without "helpfully defin[ing] it," Congress means "to incorporate traditional agency law criteria for identifying master-servant relationships." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 319, 321 (1992) (construing Congress's definition of "employee" in ERISA); *see also Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) (using same mode of analysis to determine whether a statue had been, in the language of the Copyright Act of 1976, "prepared by an employee within the scope of his or her employment"). As the Court explained, incorporating these traditional principles comports with "the common understanding . . . of the difference between an employee and an independent contractor." *Darden*, 503 U.S. at 327.

Finally, there is nothing "strange" (Op. 31) about Congress' decision in the FAA to exempt from its coverage only those employees who were subject to "more specific legislation," such as "established or developing statutory dispute resolution schemes." *Circuit City*, 532 U.S. at 121. A more modern example of the same congressional behavior, for example,

can be seen in the Class Action Fairness Act, which "carves out" from its conferral of jurisdiction "class actions for which jurisdiction exists elsewhere under federal law, such as under the Securities Litigation Uniform Standards Act." *Estate of Pew v. Cardarelli*, 527 F.3d 25, 30 (2d Cir. 2008) (citing 28 U.S.C. § 1332(d)(9)(A)).

In short, the text and structure of the FAA confirm that Section 1's exemption for "contracts of employment" of transportation workers applies only to employees, not independent contractors. At a minimum, the panel's holding creates a conflict with numerous other courts, which independently warrants rehearing.

B. Whether Section 1 applies to independent contractors is an exceptionally important issue.

Rehearing is also critical because interpreting Section 1 to exempt independent contractors from the FAA carries very significant real-world adverse consequences. That interpretation forecloses the entire transportation sector from obtaining the benefits of arbitration as secured by the FAA. As the Court recognized in *Circuit City*, "there are real benefits to the enforcement of arbitration provisions," including "allow[ing] parties to avoid the costs of litigation." 532 U.S. at 122-23; *see also, e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution.").

Yet the numerous businesses who enter into agreements with independent contractors (*see* Rinehart & Gitis*, supra*; Schrader, *supra*)—particularly those businesses in the transportation industry—could be deprived of the simplicity, informality, and expedition of arbitration under the panel's ruling. And the resulting increase in litigation costs would ultimately be borne by consumers in the form of higher prices and by independent contractors who receive lower payments.

Moreover, the Supreme Court has long recognized that "private parties have likely written contracts relying on [its FAA precedent] as authority." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995). And as the sheer volume of conflicting authority demonstrates (*see* Pet. 7-9), numerous businesses have indeed relied on the FAA in including arbitration provisions in their agreements with independent contractors.

But if the panel majority's interpretation of the Section 1 exemption is permitted to stand, businesses in the transportation industry may well be deprived of the uniform national policy favoring arbitration embodied by the FAA. Instead, they will be able to obtain the benefits of arbitration, if at all, only under a patchwork of state laws that lack the FAA's protection against rules that "single[] out arbitration agreements for disfavored treatment." *Kindred Nursing Ctrs. Ltd. P'Ship v. Clark*, 137 S. Ct. 1421, 1425 (2017). And the enforceability of their arbitration

agreements will depend entirely on the forum in which suit is brought: an agreement that is fully enforceable under the FAA in California or New York will not be enforceable in Massachusetts. Rehearing is critical to fix that troubling lack of uniformity in the FAA's application.

CONCLUSION

The petition for panel rehearing or rehearing *en banc* should be granted.

Dated: June 6, 2017

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD-COUNT LIMITATIONS

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief:

(i) complies with the type-volume limitations of Rule 29(b)(4) because it contains 2,589 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

s/ Andrew J. Pincus
Andrew J. Pincus

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