No. 17-340

In the Supreme Court of the United States

NEW PRIME, INC.

Petitioner,

v.

DOMINIC OLIVEIRA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

Statutes

Other Authorities

TABLE OF AUTHORITIES—continued

Page(s)

INTEREST OF THE *AMICI 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 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 concern to the nation's business community.

The Society for Human Resource Management ("SHRM") is the world's largest human resources professional society, representing 285,000 members in more than 165 countries. For nearly seven decades, SHRM has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. SHRM has more than 575 affiliated chapters within the United States. Since its founding, one of SHRM's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this brief.

Many of *amici*'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 policy reflected in the Federal Arbitration Act ("FAA"), *amici*'s members have structured millions of contractual relationships—including large numbers of agreements with independent contractors—around the use of arbitration to resolve disputes.

Amici have a strong interest in reversal of the judgment below. The First Circuit's decision announcing that the FAA does not apply to independent contractors in the transportation industry cannot be squared with either the text or historical context of the FAA, and undermines an entire industry's reliance on the national policy favoring arbitration.

INTRODUCTION AND SUMMARY OF ARGUMENT

Independent contractors play an essential role in 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://tinyurl.com/zevgo4s. 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://tinyurl.com/ya5b78as.

Participants in this large, and rapidly expanding, sector of the economy rely upon the enforceability of agreements between businesses and independent contractors. Many of those agreements provide for arbitration of disputes because arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court.

If the decision below is allowed to stand, however, untold thousands of arbitration agreements would be called into question. 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).

That holding is wrong under both the plain text of Section 1 and the context in which Congress enacted it in 1925—especially in light of this 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 it was settled at the time the FAA was enacted in 1925. Indeed, this Court made clear in *Circuit City* that the exemption to arbitration contained in Section 1 was designed to avoid conflicts with existing or soon-to-be-enacted federal statutes that had their own dispute-resolution mechanisms for certain kinds of *employees*, such as "seamen," "railroad employees," and "employees" of "air carriers." 532 U.S. at 120-21. But those other federal statutes do not reach independent contractors, and therefore it would have made no sense for Congress to include independent contractors within Section 1's exemption.

Finally, this Court should also hold that factfinders must take a categorical approach to evaluating the applicability of the Section 1 exemption in a particular case based on the language of the contract between the parties. See *In re Swift Transp. Co.*, 830 F.3d 913, 920 (9th Cir. 2016) (Ikuta, J., dissenting). As petitioner details, permitting searching, fact-bound inquiries into the parties' relationship—an analysis that will often overlap with the merits of the parties' dispute, particularly in misclassification cases like this one—would undermine the very simplicity, informality, and expedition of arbitration to which the parties agreed and that the FAA is designed to protect. This Court has rejected such an approach in other contexts, and should do so here.

ARGUMENT

I. Section 1 Does Not Exclude Independent Contractors From Coverage Under The FAA.

A. Independent Contractor Agreements Are Not "Contracts Of Employment."

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. The phrase "contracts of *employment*" in this Section means what it says: a contract between an employer and an employee—not an agreement with an independent contractor to perform work.

The First Circuit brushed aside the uniform contrary case law as (in its view) insufficiently reasoned. The panel dismissed many of these decisions as "simply assum[ing] * * * that independent-contractor

agreements are not contracts of employment under § 1" (JA173), but that criticism is unfair, because any such assumption necessarily rests on the plain language of the statute. "Because the plain language of" Section 1 is "unambiguous," this Court's inquiry both "begins" and "ends" with the statutory text. *Nat'l Ass'n of Mfrs.* v. *Dep't of Defense*, 138 S. Ct. 617, 631 (2018) (quotation marks omitted).

The panel majority itself acknowledged that *Black's Law Dictionary* treats "contract of employment" as synonymous with "employment contract"—a usage that dates back to 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." JA178 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. JA178-179 & nn.19-20. That expansive reading of the Section 1 exemption conflicts with this Court's instruction to give "the § 1 provision * * * a narrow construction." *Circuit City*, 532 U.S. at 118.

The panel also looked to dictionary definitions of "independent contractor" that referred to the contractor "exercising an independent employment." JA181 n.20. That use of the word "employment" in a vacuum offers little guidance on the meaning of the statutory phrase "contract of employment," however, and does not undermine the established distinction

between employees and independent contractors at the time of the FAA's enactment.

As one of those same dictionaries pointed out, while "[s]trictly and etymologically, [employee] means 'a person employed,'" in practice and "as generally used," the word was "understood to mean some permanent employment or position." BOUVIER'S LAW DICTIONARY 1035 (8th ed. 1914). An "independent contractor," by contrast, contracted to do work by his own methods "and without being subject to the control of his employer, except as to the result of his work." *Id.* at 1533.

Thus, as one scholar has summarized, "'employee' served mainly as a near substitute for 'servant,' and it seems always to have been accepted by the courts that neither term extends to persons of 'independent employment' or 'independent contractors' as such persons came to be known." Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One And How It Ought To Stop Trying*, 22 Berkeley J. of Emp. & Lab. L. 295, 309-10 (2001) (footnote omitted).

Indeed, far from being a modern legal invention, "the distinction between employees and independent contractors has deep roots in our legal tradition." *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 721-22 (1996). As petitioner's brief explains in detail (at 18-21), distinctions in the law between master-servant relationships and other work relationships date back to the 1300s and were recognized by Blackstone. See Ordinance of Labourers, 23 Edw. III (1349); 1 William Blackstone, *Commentaries on the Laws of England*, *422-32.

Moreover, the development of the law on vicarious liability led to the specific conception of an independent contractor as distinct from an employee under the familiar master-servant standard. That test for distinguishing between the two "was first developed in the mid-nineteenth century by English courts and was soon adopted by American courts." John Bruntz, *The Employee/Independent Contractor Dichotomy: A Rose Is Not Always A Rose*, 8 Hofstra Lab. L. J. 338, 339 (1991) (citing *Boswell* v. *Laird*, 8 Cal. 469 (1857)). Numerous decisions from circuit courts prior to the enactment of the FAA acknowledged this distinction. See Pet. Br. 20-21. And the distinction was taken as settled law in the First Restatements of Law, issued less than a decade after the FAA's enactment. See Restatement (First) of Agency § 2, cmt. a (1933); Restatement (First) of Torts § 409 cmt. a (1934).

In sum, the statutory text and the relevant legal context make clear that "contracts of employment" means contracts with an employee, and does not include agreements with an independent contractor.

B. Section 1 Was Enacted Against The Backdrop Of Other Federal Statutes That Apply Only To Employees And Do Not Encompass Independent Contractors.

Limiting Section 1's exclusion to contracts with employees is also compelled by the context in which Section 1 was enacted.

This Court in *Circuit City* 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." 532 U.S. at 115. And the Court determined 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 this 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. The residual category of other transportation workers was included for a similar reason. *Cf. Epic Sys. Corp.* v. *Lewis*, No. 16-285, --- S. Ct. ----, Slip Op. 12 (May 21, 2018) ("[W]here, as here, a more general term follows more specific terms in a list, the general term is usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words.") (quotation marks omitted). That is, 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." *Circuit City*, 532 U.S. at 121.

Significantly, 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" by incorporating 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 (emphases added).

Other federal laws governing railroad workers and seamen point in the same direction. They also adopt the common-law approach to who counts as an "employee"—and therefore necessarily incorporate 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 this Court has held, "[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). In reaching that holding, 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)).

The Jones Act, which was enacted in 1920, extended the same principles previously 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 also is consistent with this Court's broader 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"). Incorporating these traditional principles therefore also encompasses "the common understanding * * * of the difference between an employee and an independent contractor." *Darden*, 503 U.S. at 327.

Thus, the statement by the panel below that independent contractors and employees performing transportation work "play the same necessary role in the free flow of goods" misses the point. JA181-82. Congress was not legislating based on individual *function*, but rather based on the coverage of the excluded categories of contracts under other extant federal statutes. Because those statutes do not apply to independent contractors, the Section 1 exclusion similarly does not encompass those agreements.

Finally, there is nothing "strange" (JA181) about Congress' decision in the FAA to exempt from its coverage only those transportation workers 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 approach, 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, structure, and context of the FAA confirm that Section 1's exemption for "contracts of employment" of transportation workers applies only to employees, not independent contractors.

II. Excluding Independent Contractors From The FAA Harms Businesses, Independent Contractors, And Consumers.

The First Circuit's interpretation of Section 1 to exempt independent contractors from the FAA is not

only wrong, but also carries significant real-world adverse consequences. That interpretation forecloses the entire transportation sector from obtaining the benefits of arbitration as secured by the FAA.

This Court recognized in *Circuit City* that "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."); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995) (recognizing that one of the "advantages" of arbitration is that it is "cheaper and faster than litigation") (quotation marks omitted).

In addition, the empirical evidence confirming that employees tend to fare better in arbitration apply with equal force to independent contractors. Studies have shown that those employees who arbitrate their claims are more likely to prevail than those who go to court. See, *e.g.*, Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998). For example, one study of employment arbitration in the securities industry found that employees who arbitrated were 12% more likely to win their disputes than were employees who litigated in the Southern District of New York. See Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003-Jan. 2004). And the arbitral awards that the employees obtained were typically the same as, or larger than, the court awards. See *ibid.* A 2004 report compiled a number of employment arbitration

studies and concluded that employees were 19% more likely to win in arbitration than in court. See Nat'l Workrights Inst., *Employment Arbitration: What Does the Data Show?* (2004), available at goo.gl/nAqVXe. As one scholar recently agreed, "there is no evidence that plaintiffs fare significantly better in litigation [than in arbitration]"; rather, arbitration is "favorable to employees as compared with court litigation." Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 16 (2017) (quotation marks omitted; alterations in original).

Numerous businesses enter into agreements with independent contractors. See Rinehart & Gitis, *supra*; Schrader, *supra*. Businesses in the transportation industry are no exception. This Court recognized over sixty years ago that transportation "[c]arriers * * * have increasingly turned to owner-operator truckers to satisfy their need for equipment as their service demands." *Am. Trucking Ass'ns, Inc.* v. *United States*, 344 U.S. 298, 303 (1953); see also *Transamerican Freight Lines, Inc.* v. *Brada Miller Freight Sys.*, 423 U.S. 28, 35 (1975) (recognizing the role of independent contractors in avoiding "waste of resources" from fluctuating "[d]emand for a motor carrier's services"). More recently, the Census Bureau reported that over half a million trucks nationwide are primarily operated by owner operators. See U.S. Census Bureau, *2002 Economic Census: Vehicle Inventory and Use Survey* 15, 39 (Dec. 2004), https://tinyurl.com/yb4yy3ed.

But if the decision below is permitted to stand, businesses in the transportation industry could be deprived of the simplicity, informality, and expedi-

tion of arbitration for resolving disputes with independent contractors. 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, "private parties have likely written contracts relying on [this Court's FAA precedent] as authority." *Allied-Bruce*, 513 U.S. at 272. The decision below, however, deprives businesses of the ability to rely upon 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).

In short, businesses should be able to rely on the protections of the FAA in their independent contractor agreements.

III. The Applicability Of The Section 1 Exemption Should Be Determined Based On The Terms Of The Parties' Agreement.

If, for the reasons explained above, Section 1's exemption for "contracts of employment" is properly construed to cover only employee agreements, guidance is needed as to how a factfinder should determine whether the exemption applies in any given case.

The answer, as Judge Ikuta has persuasively explained, is to take a "categorical approach that focuses solely on the words of the contract." *In re Swift Transp. Co.*, 830 F.3d at 920 (Ikuta, J., dissenting). Contrary to the district court here, which ordered

"factual discovery" into the relationship between petitioner and respondent beyond the undisputed four corners of their contract (JA 151), Judge Ikuta's proposed approach accords with both the text and purposes of the FAA.

To begin with, Section 1 by its plain terms excludes certain types of "*contracts*" from the FAA's reach; the exemption is not tied to the nature of a particular working relationship. 9 U.S.C. § 1 (emphasis added). This Court recognized over fifty years ago that Section 1 "expressly exclude[s] from the reach of the Act" certain "*categories* of contracts." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 n.9 (1967) (emphasis added).

Moreover, the contrary approach endorsed by the district court here would in many cases make the threshold question of the applicability of the FAA turn on the merits of their underlying dispute. In a misclassification case like this one, for example, the dispute over whether the plaintiff is in actuality an independent contractor or an employee is precisely the underlying dispute that the parties agreed to submit to an arbitrator for resolution. Yet as this Court has held in other contexts, when a motion to compel arbitration has been filed, "a federal court may consider *only* issues relating to the making and performance of the agreement to arbitrate." *Prima Paint*, 388 U.S. at 404 (emphasis added). *Cf. Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 449 (2006) (explaining that challenges to "the validity of the [parties'] contract as a whole" must be resolved by the arbitrator). As the Court has explained, "[i]n so concluding, we honor not only the plain meaning of the statute, but also the unmistakably clear congressional purpose that the arbitration procedure,

when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint*, 388 U.S. at 404.[2]

A factual inquiry into the parties' relationship whenever a party in the transportation industry moves to compel arbitration would impose significant cost and delay in resolving the threshold question of arbitrability. That result is "in contravention of Congress' intent 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.'" *Preston* v. *Ferrer*, 552 U.S. 346, 357 (2008) (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)).

The Court has made clear that Section 1 should not interpreted in a manner that introduces "considerable complexity and uncertainty * * *, in the process undermining the FAA's proarbitration purposes and 'breeding litigation from a statute that seeks to avoid it.'" *Circuit City*, 532 U.S. at 123 (quoting *Allied-Bruce*, 513 U.S. at 275); cf. *American Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228, 239 (2013) (rejecting the imposition of a "preliminary lit-

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[2] See also, *e.g.*, *Blinco* v. *Green Tree Servicing, LLC*, 366 F.3d 1249, 1252 (11th Cir. 2004) ("the party moving to enforce an arbitration provision [has] a right not to litigate the dispute in a court and bear the associated burden"); *CIGNA HealthCare of St. Louis, Inc.* v. *Kaiser*, 294 F.3d 849, 855 (7th Cir. 2002) (explaining that permitting "discovery on the merits" before "the issue of [the] arbitrability [of the dispute] is resolved puts the cart before the horse" because, "[i]f a dispute is arbitrable, responsibility for the conduct of discovery lies with the arbitrators"); *Local 771, I.A.T.S.E.* v. *RKO General, Inc., WOR Div.*, 546 F.2d 1107, 1113 (2d Cir. 1977) ("[T]he bargained-for purpose of arbitration * * * is the avoidance of litigation and its concomitant costs and delays.").

igating hurdle" onto requests to compel arbitration that "would undoubtedly destroy the prospect of speedy resolution that arbitration * * * was meant to secure"; "[t]he FAA does not sanction such a judicially created superstructure").

For these reasons, Section 1's applicability should turn solely on the terms of the relevant agreement.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 2018