No.

IN THE
Supreme Court of the United States

SWIFT TRANSPORTATION CO., INC.,
INTERSTATE EQUIPMENT LEASING, INC.,
CHAD KILLIBREW AND JERRY MOYES,

Petitioners,

v.

VIRGINIA VAN DUSEN, JOHN DOE 1 AND
JOSEPH SHEER, INDIVIDUALLY AND ON
BEHALF OF ALL OTHER SIMILARLY
SITUATED PERSONS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where transportation workers engaged in interstate commerce have contracted to arbitrate questions of arbitrability, in addition to disputes relating to the relationship created by the parties' agreement, must the district court determine whether the contract is an employment contract exempt from Section 1 of the Federal Arbitration Act or must the arbitrator do so?

CORPORATE DISCLOSURE STATEMENT

Petitioner Interstate Equipment Leasing, LLC (fka Interstate Equipment Leasing, Inc.) is 100% owned by Swift Transportation Company, Inc., which is a publicly traded company. Swift Transportation Co. of Arizona, LLC (fka as Swift Transportation Co., Inc.) is wholly owned by Swift Transportation Co., LLC, which is not publicly traded.

Petitioners Chad Killibrew and Jerry Moyes are individuals.

Respondents Virginia Van Dusen and Joseph Sheer are individuals.

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Swift Transportation Co. of Arizona, LLC (fka Swift Transportation Co., Inc.) ("Swift"), Interstate Equipment Leasing, LLC (fka Interstate Equipment Leasing, Inc.) ("IEL"), Chad Killibrew, and Jerry Moyes (collectively, "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court ordered this case to arbitration and stayed the case pending the completion of arbitration by way of its unpublished order on September 30, 2010. (App., *infra* 28a-53a.)

The Ninth Circuit Court of Appeals, in a published opinion reported at 654 F.3d 838 (9th Cir. July 27, 2011), denied the plaintiffs' petition for writ of mandamus, stating: "We agree that Petitioners make a strong argument that the District Court erred, but we nonetheless hold that this case does not warrant the extraordinary remedy of mandamus." (App., *infra* 12a-27a, 13a.) The Court further stated: "Whether or not the district court's interpretation ultimately withstands appeal, we cannot find it 'clearly erroneous' as that term is used in the mandamus analysis." (App., *infra* 27a.)

Thereafter, the district court denied plaintiffs' motion for reconsideration and certified its September 30, 2010 interlocutory order for immediate appeal in an unpublished order on September 6, 2011. (App., *infra* 4a-11a.) The Ninth Circuit Court of Appeals granted the petition for

permission to appeal pursuant to 28 U.S.C. § 1292(b) in an unpublished order dated December 8, 2011. (App., *infra* 3a.) Finally, in an unpublished decision filed November 6, 2013, the Ninth Circuit Court of Appeals reversed and remanded, stating its prior published decision "expressly held that a district court must determine whether an agreement for arbitration is exempt from arbitration under § 1 of the [FAA] as a threshold matter. . . . This ruling is the law of the case." (App., *infra* 1a-2a.)

JURISDICTION

The Ninth Circuit's judgment was entered on November 6, 2013. Petitioners timely invoke the jurisdiction of the United States Supreme Court under 28 U.S.C. § 1254(1). *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) (granting certiorari after Court of Appeals affirmed in part and reversed in part the order of the district court compelling arbitration and remanded to the district court for further proceedings).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the FAA are set forth at App., *infra* 58a-59a.

STATEMENT OF THE CASE

The facts in this case are straightforward and largely undisputed. Virginia Van Dusen and Joseph Sheer are interstate truck drivers, each of whom entered into an Independent Contractor Operating

Agreement ("Contractor Agreement") with Swift. (App., *infra* 29a.) Sheer entered into his Contractor Agreement with Swift in California on August 7, 2006. Van Dusen entered into her Contractor Agreement with Swift in New York on March 3, 2009.

The express terms of the Contractor Agreements demonstrate they are not contracts of employment. Although the language of the two contracts varies slightly, it carries the same import in each. The language of Sheer's Contractor Agreement states: "18. Independent Contractor. CONTRACTOR shall be considered an Independent Contractor and not an employee of COMPANY. . . . The CONTRACTOR shall determine the method, means and manner of performing services under this Agreement." (App., *infra* 54a.)

The Contractor Agreements contain arbitration provisions whereby both Sheer and Van Dusen agreed to arbitrate all disputes arising out of their independent contractor relationship with Swift. They also delegate to the arbitrator issues related to the "arbitrability of disputes between the parties." The broad arbitration provision in both Contractor Agreements states, in pertinent part:

> All disputes and claims arising under, arising out of or relating to this Agreement, including an allegation of breach thereof, and *any disputes arising out of or relating to the relationship created by the Agreement,* including any claims or disputes arising under or relating to any state or federal laws, statutes or regulations, and any

> disputes as to the rights and obligations of the parties, *including the arbitrability of disputes between the parties*, shall be fully resolved by arbitration in accordance with Arizona's Arbitration Act and/or the Federal Arbitration Act. Any arbitration between the parties will be governed by the Commercial Rules of the American Arbitration Association . . . .

(App., *infra* 55a-56a at ¶ 24 (emphasis added).)

Swift terminated its Contractor Agreement with Sheer in April 2009. (App., *infra* 33a.) Van Dusen terminated her Contractor Agreement with Swift in February 2010. (App., *infra* 33a-34a.) In December 2009, Sheer brought suit against Swift and IEL in the United States District Court for the Southern District of New York. (App., *infra* 34a.) Sheer later filed a first amended complaint, adding Van Dusen as a plaintiff, and a second amended complaint, adding Jerry Moyes and Chad Killebrew as defendants. (*Id.*) The second amended complaint included claims brought under the Fair Labor Standards Act, New York Labor law, and the California Labor Code. (*Id.*) All but one of those claims hinge on the single contention that Sheer and Van Dusen were employees of Swift and not independent contractors. The district court had jurisdiction over the matter under 29 U.S.C. §216(b), 28 U.S.C. §1331, and 28 U.S.C. §1337.

The district court in New York transferred the action to the U.S. District Court for the District of Arizona. (App., *infra* 35a.) Shortly after the case was transferred, Petitioners moved to compel

arbitration pursuant to the arbitration provisions. (*Id.*) Sheer and Van Dusen opposed the motion, claiming, among other things, that the Contractor Agreements were exempt from arbitration under Section 1 of the FAA ("Section 1"). (App., *infra* 47a.) Section 1 exempts "contracts of employment . . . of workers engaged in foreign or interstate commerce" from the FAA. 9 U.S.C. § 1 (App., *infra* 58a).

On September 30, 2010, the district court issued its order compelling arbitration. (App., *infra* 28a-53a.) The court concluded that a valid agreement to compel arbitration exists and it includes the dispute at issue. The arbitration agreements delegate to the arbitrator disputes relating to the contracts as well as the arbitrability of disputes between the parties. (App., *infra* 37a.)

The district court also addressed plaintiffs' contention that the arbitration agreement in the Contractor Agreement is exempt from the FAA and the Arizona Arbitration Act ("AAA") "'because it is part of a contract of employment of workers engaged in interstate commerce."[1] (App., *infra* 47a.) The district court found that the issue of "whether plaintiffs were defendants' employees, rather than

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[1] Although Section 1 exempts only contracts of employment of transportation workers from the FAA, the AAA "exempts all employer and employee employment agreements from the provisions of [the Act]." *North Valley Emergency Specialists, LLC v. Santana,* 208 Ariz. 301, 306, 93 P. 3d 501, 506 (Ariz. 2004) (citing ARIZ. REV. STAT. § 12-1517). On our facts, the differences between the two statutes are not material.

independent contractors," falls within the scope of the arbitration agreement for two reasons. (App., *infra* 49a-50a.) First, the arbitration agreement "explicitly includes 'any disputes arising out of or relating to the relationship created by the [Contractor Agreement],' as well as 'any disputes as to the rights and obligations of the parties, including the arbitrability of disputes between the parties' under the terms of the arbitration agreement." (App., *infra* 50a.) Second, resolving the employer/independent contractor issue would require an analysis of the Contractor Agreements as a whole, which is a matter for the arbitrator, not the court. (*Id.*) When addressing the threshold issue of arbitrability, "the district court considers only the validity and scope of the arbitration clause itself and not the contract as a whole." (*Id.*) Thus, the district court granted defendants' motion to compel arbitration, leaving for the arbitrator the determination of whether an employer/employee relationship existed. (App., *infra* 53a.)

Plaintiffs sought mandamus relief of the district court order from the Ninth Circuit Court of Appeals. To obtain mandamus relief, Sheer and Van Dusen had to show clear error. *See Hernandez v. Tanninen*, 604 F.3d 1095, 1099 (9th Cir. 2010). The Ninth Circuit found that the issue before it was one of first impression in the federal courts of appeals. After outlining the arguments of both parties, the Court of Appeals noted "we believe [plaintiffs] offer the better interpretation" of Section 1. (App., *infra* 21a.)

Despite favoring plaintiffs' interpretation over that of the district court, however, the Court of

Appeals was unconvinced the district court decision was clearly erroneous. As a result, the Ninth Circuit denied mandamus in a published opinion, stating:

> [W]e believe the best reading of the law requires the district court to assess whether a Section 1 exemption applies before ordering arbitration. We acknowledge, however, that the law's repeated admonishments that district courts refrain from addressing the merits of an underlying dispute can be read to favor the District Court's decision. This factor, along with the lack of controlling precedent, render the question relatively close. *Whether or not the district court's interpretation ultimately withstands appeal*, we cannot find it "clearly erroneous" as that term is used in the mandamus analysis.

(App., *infra* 27a (emphasis added).)[2]

Thereafter, the district court denied the plaintiffs' motion for reconsideration of the court's September 30, 2010 order compelling arbitration. (App., *infra* 11a.) The court found its original analysis of the issue was correct, in spite of the Ninth Circuit's indication of its preference. (*Id.*)

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[2] Plaintiffs had also argued in the district court that the class action arbitration waiver in the arbitration provisions is unconscionable. The district court rejected that argument, and the Ninth Circuit did not address it, either in the mandamus proceeding or the appeal. The propriety of the class action arbitration waiver is not at issue in this petition.

Both the district court and the Court of Appeals certified the order compelling arbitration for immediate appeal. (App., *infra* 3a,11a.)

After full briefing on the appeal, and without allowing oral argument, the Ninth Circuit Court of Appeals reversed and remanded in an unpublished memorandum decision. (App., *infra* 2a.) Notwithstanding the inconclusiveness of its previous published opinion (indicating the issue was "close" and questioning "[w]hether or not the district court's interpretation ultimately withstands appeal"), the court stated that its prior opinion "expressly" held the issue of whether an arbitration agreement is exempt under Section 1 is a question for the district court "as a threshold matter." (*Id.*) The Court found that prior ruling was "law of the case" and "law of the circuit." (*Id.*) Thus, the Court remanded for the district court to determine whether the "Contractor Agreements" between the parties are exempt under Section 1 "before it may consider Swift's motion to compel."[3] (*Id.*)

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[3] The Ninth Circuit erred in holding its decision was compelled by applying the law of the case doctrine to its earlier opinion. The prior panel's mandamus decision was based upon the special circumstances of the writ, and not on the merits of the case. *PowerAgent, Inc. v. Electronic Data Systems*, 358 F.3d 1187, 1190-91 (9th Cir. 2004) ("denial of a petition for mandamus usually does not constitute the law of the case, because of the special limitations on granting such a writ"). At best, that portion of the mandamus decision that the court found constituted law of the case was *dicta*, to which the law of the case doctrine does not apply. *See, e.g., Trent v. Valley Elec. Ass'n, Inc.*, 195 F.3d 534, 537 (9th Cir. 1999) (finding doctrine

Petitioners bring this petition for certiorari to address the interpretation and application of Section 1 of the FAA, in the context where parties have delegated issues of arbitrability to the arbitrator.

REASONS FOR GRANTING THE PETITION

I. This Petition Raises an Important Unresolved Issue of Law

A. The Supreme Court Has Not Yet Addressed Section 1's Exemption Where Parties Have Delegated Arbitrability Issues to the Arbitrator

This Court has addressed numerous issues of law regarding arbitration under the FAA in the last several years—although not yet the issue raised by this petition. It is settled that arbitration is a matter of contract, that parties' delegation of specific matters to the arbitrator must be enforced by the district courts, and generally, that the parties can delegate matters of arbitrability to the arbitrator.[4]

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did not apply to the prior panel's statement that the "evidence would seem to compel a judgment in her favor" because the statement was "*dicta* and not a decision on the merits"). The prior panel's acknowledgement that an appeal was likely to follow reinforces a conclusion that the first panel was not deciding the underlying matter.

[4] Most recently, the Court has issued a number of opinions addressing the enforceability of class arbitration waivers in consumer contracts. *See American Express Co. v. Italian Colors*

But what about where the FAA itself exempts certain issues from its purview? In particular, what about the transportation worker exception in Section 1 of the FAA, which states: "nothing herein contained shall apply to contracts of employment of . . . any other class of workers engaged in foreign or interstate commerce?" Can the parties delegate to the arbitrator the determination of whether the contract at issue is such an exempt "contract of employment" to which the FAA does not apply? Is that issue one of basic arbitrability, as the Eighth Circuit found in *Green v. Supershuttle International, Inc.*, 653 F.3d 766 (8th Cir. 2011)? Or is that issue reserved for the district courts who alone must decide whether the agreement is of the kind covered

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Restaurant, __ U.S. __, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013); *AT&T Mobility LLC v. Concepcion*, __ U.S. __, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011); *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010). In all of these recent cases, the Court's analysis is grounded on "the overarching principle that arbitration is a matter of contract." *See American Express*, 133 S. Ct. at 2309 (holding that a contractual waiver of class arbitration must be enforced under the FAA, even where the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery); *see also AT&T Mobility*, 131 S. Ct. at 1748 (holding the FAA preempts a state judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts); *Stolt-Nielsen*, 559 U.S. ___, 130 S. Ct. at 1773 (holding parties may agree to limit with whom a party will arbitrate its disputes). Although Plaintiffs' lawsuit is brought as a purported class action, and the arbitration provisions specifically contain class arbitration waivers, neither the validity of the class allegations nor the validity of the waivers is at issue in this petition.

by the FAA, as found by the Ninth Circuit here? Is the issue one that cannot be delegated?

Further complicating the issue is the fact that the answer to that initial question is also enmeshed with the ultimate merits determination of the lawsuit. In other words, in determining whether the contract here is an independent contractor contract or an employment contract, the district court impermissibly would be required to entangle itself in the merits of the case.

An analysis of the legal principles of arbitration under the FAA frames the issue and also demonstrates the errors in the Ninth Circuit's cursory analysis.

B. Fundamentally, Arbitration Is a Matter of Contract

The most fundamental of legal principles under the FAA is that arbitration is a matter of contract. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772, 2777, 177 L. Ed. 2d 403 (2010). "The FAA thereby places arbitration agreements on an equal footing with other contracts, . . . and requires courts to enforce them according to their terms . . ." *Id.* at 2776. Parties are "free to structure their arbitration agreements as they see fit" and courts must "give effect to the contractual rights and expectations of the parties." *Volt Info. Sciences v. Bd. of Trustees*, 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989). This principle is consistent with the "liberal federal policy favoring arbitration agreements" that this Court has long recognized and

enforced. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 591, 154 L. Ed. 2d 491 (2002) (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). It also "recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648-49, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986).

Here, there is no dispute the parties entered into a broad arbitration agreement, as part of the Contractor Agreements, which, under the FAA, must be enforced by the district court according to its terms.

C. Parties Can Delegate Threshold Questions Related to Arbitrability to the Arbitrator

The one exception to the liberal federal policy favoring arbitration agreements is the "question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability* . . . .'" *Howsam*, 537 U.S. at 83, 123 S. Ct. at 591 (quoting *AT & T Technologies,* 475 U.S. at 649, 106 S. Ct. at 1418 (italics added by *Howsam*). The question of arbitrability is for the court to determine "'[u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam*, 537 U.S. at 83, 123 S. Ct. at 591 (quoting *AT & T Technologies*, 475 U.S. at 649, 106 S. Ct. at 1418).

In 2010, the Court expanded on the principle that parties can "clearly and unmistakably" provide that the question of arbitrability is to be decided by the arbitrator, rather than the court. In *Rent-A-Center*, *supra*, the Court noted that "[w]e have recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability . . . .'" *Rent-A-Center*, 130 S. Ct. at 2777 (citing *Howsam*, 537 U.S. at 83-85, 123 S. Ct. at 592). That is the purpose of a delegation clause: "The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Rent-A-Center*, 130 S. Ct. at 2777.[5] Thus, "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Id.* at 2777-78.

On the delegation issue, the Ninth Circuit criticized Petitioners and the district court, claiming they "have adopted the position that contracting parties may invoke the authority of the FAA to decide the question of *whether the parties can invoke the authority of the FAA*." (App., *infra* 22a, *In re Van Dusen*, 654 F.3d 838, 844 (9th Cir. 2011).) But by

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[5] Arizona courts take the same approach to arbitrability: "who decides arbitrability is like any other contract interpretation question: it depends on what the parties agreed to." *Wages v. Smith Barney Harris Upham & Co.*, 188 Ariz. 525, 529-30, 937 P.2d 715, 719-20 (Ariz. App. 1997) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985 (1995)).

definition, all matters related to arbitrability would invoke the authority of the FAA to decide the question of whether the parties can invoke the authority of the FAA. If the Ninth Circuit's criticism were valid, then parties would never be able to delegate issues of arbitrability to the arbitrator.[6]

The parties' arbitration agreement here contains just such a delegation clause, which reflects the parties' agreement to arbitrate threshold issues concerning the arbitration agreement. It broadly reads: "any disputes as to the rights and obligations of the parties, *including the arbitrability of disputes between the parties*, shall be fully resolved by arbitration in accordance with Arizona's Arbitration Act and/or the Federal Arbitration Act." (App., *infra* 57a (italics added).) *See Rent-A-Center*, 130 S. Ct. at 2775 (finding an arbitration agreement providing the arbitrator "shall have exclusive authority to resolve

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[6] Because recent Supreme Court authority has found arbitrability questions can be delegated under the FAA, the Ninth Circuit's reliance on *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 76 S. Ct. 273, 100 L. Ed. 199 (1956) for instruction is misplaced. (*See* App., *infra* 22a-23a.) *Bernhardt*, decided more than 50 years ago, did not involve a delegation clause or a Section 1 exemption. The issue in *Bernhardt*, a diversity case, was whether the stay provision in 9 U.S.C. § 3 stands alone, so that it could be applied where the contract at issue indisputably did not involve interstate commerce and otherwise was enforced under state law. *Bernhardt*, 350 U.S. at 202, 76 S. Ct. at 275. *Bernhardt* is inapposite. In contrast to the facts and issue raised here, the contract in *Bernhardt* did not contain a delegation clause and the Court did not address or decide *who* should decide questions of arbitrability under the FAA.

any dispute relating to the . . . applicability [or] enforceability . . . of this Agreement" delegated to the arbitrator the issue of whether the arbitration agreement was unconscionable). Plaintiffs have not disputed that the parties clearly and unmistakably intended to delegate questions of arbitrability to the arbitrator; instead, Plaintiffs argue the parties are prohibited from delegating these questions to the arbitrator.

D. Applying This Court's Established Principles of Arbitration, the Section 1 Exemption Question Has Been Delegated to the Arbitrator in the Arbitration Agreement

The Court has recognized two different types of challenges to the validity of agreements to arbitrate under the FAA:

> "One type challenges specifically the validity of the agreement to arbitrate," and "[t]he other challenges the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.*, the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid."[7]

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[7] The dissent in *Rent-A-Center* aptly described the second type of challenge as a challenge to "the validity of the arbitration agreement tangentially—via a claim that the entire contract (of which the arbitration is but a part) is invalid for some reason." *Rent-A-Center*, 130 S. Ct. at 2783-84 (Stevens, J., dissenting).

Rent-A-Center, 130 S. Ct. at 2778 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006)). The Court has held that "only the first type of challenge is relevant to a court's determination whether the arbitration agreement at issue is enforceable." *Rent-A-Center*, 130 S. Ct. at 2778. Because § 2 of the FAA states that a written arbitration provision is "valid, irrevocable, and enforceable" "*without mention* of the validity of the contract in which it is contained, . . . a party's challenge to . . . the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." *Id.* The arbitration provision is severable from the remainder of the contract as a matter of substantive federal arbitration law. *Id.*

The consequence of these principles of federal arbitration law is that where a party only challenges the validity of the agreement to arbitrate, then the district court must address that challenge before ordering the dispute to arbitration. *Id.* However, where the challenge is to the whole contract (of which the agreement to arbitrate was a part), then the court will not intervene but instead will order the matter to the arbitrator for decision. *Id.* at 2778-79.

Thus, in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.,* 388 U.S. 395, 87 S. Ct. 1801, 18

The dissent also agreed that "a challenge of the first type goes to the court; a challenge of the second type goes to the arbitrator." *Id.*

L. Ed. 2d 1270 (1967), where the plaintiff claimed fraud in the inducement of the entire contract, the Court held that the issue was for the arbitrator to decide, and not the court. *Id.* at 403-04, 87 S. Ct. at 1806. In *Rent-A-Center*, the majority of the Court extended this rule to apply where the plaintiff claimed the arbitration agreement as a whole was unconscionable, but not the delegation provision that Rent-A-Center was asking the Court to enforce. *Rent-A-Center*, 130 S. Ct. at 2778-79. In these circumstances, the Court held "we must treat [the delegation provision] as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Id.* at 2779; *see also Buckeye*, 546 U.S. at 446, 126 S. Ct. 1204 (whether the general contract defense renders the entire contract void or voidable has no relevance).

The situation here is similar to that in *Prima Paint* and *Buckeye,* where the law established the "notion that a party may be bound by an arbitration clause in a contract that is nevertheless invalid." *See Rent-A-Center*, 130 S. Ct. at 2787 (Stevens, J., dissenting). In those cases, the underlying contract itself was being attacked as invalid because fraudulently induced (*Prima Paint*) or illegal (*Buckeye*). The Court in *Buckeye* recognized that the rule "permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void." *Buckeye*, 546 U.S. at 448. The Court found that the opposing view would "permit[ ] a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable." *Id.* at 448-49. In *Buckeye*, the Court

found the law preferred the first scenario—giving effect to the arbitration agreement, and sending the question of the validity of the contract to the arbitrator. *Id.* at 449.

This law "reflects a judgment that the ' "national policy favoring arbitration,' " [citation omitted] outweighs the interest in preserving a judicial forum for questions of arbitrability . . . *when questions of arbitrability are bound up in an underlying dispute*." *Rent-A-Center*, 130 S. Ct. at 2787-88 (Stevens, J., dissenting). As the dissent in *Rent-A-Center* concluded:

> When the two are so bound up, there is actually no gateway matter at all: The question 'Who decides' is the entire ball game. Were a court to decide the fraudulent inducement question in *Prima Paint*, in order to decide the antecedent question of the validity of the included arbitration agreement, then it would also, necessarily, decide the merits of the underlying dispute. Same, too, for the question of illegality in *Buckeye* . . . .

Id. at 2788.[8]

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[8] The Ninth Circuit erred by giving no weight to the policy of the law that merits issues are for the arbitrator to decide. (*See* App., *infra* 27a ("We acknowledge, however, that the law's repeated admonishments that district courts refrain from addressing the merits of an underlying dispute can be read to favor the District Court's decision.").)

That law, as to which the majority and dissent in *Rent-A-Center* are in agreement, applies equally here. Plaintiffs have no dispute with the arbitration provision in the Contractor Agreements. The question at issue in this petition—who decides whether the Contractor Agreements that are the foundation for the plaintiffs' claims instead are employment contracts—goes to the *whole* contract, in which the arbitration agreement is nested. Thus, according to the terms the parties have agreed upon, the legal character of that contract (independent contractor agreement v. employment agreement) is a determination the arbitrator must make. It may be that the arbitrator ultimately finds that the contract is of a type that cannot be arbitrated under the FAA. The law, however, dictates that the arbitrator make that call rather than the court.

The facts of this case illustrate the propriety of this law. Assume the opposite of the law were applied, and the district court decides whether the Contractor Agreements are instead employment agreements. Because the Contractor Agreements on their face expressly state they are independent contractor agreements, and not employment agreements, the district court would have to look beyond merely the language of the contract to determine whether the relationship between the parties instead was an employment relationship. This is not a simple inquiry. The test that must be applied to determine the parties' in-fact relationship is a multi-factor, highly individualized, fact-based test.

Where, like here, the gateway arbitrability issue is also entangled with the merits issue, then by deciding arbitrability the court necessarily makes decisions that affect the merits. The result is that the court will have taken both the arbitrability issue and at least some of the merits issues away from the arbitrator, in violation of the FAA's strong policy favoring arbitration. *See AT&T Mobility, supra*, 131 S. Ct. at 1749 ("our cases place it beyond dispute that the FAA was designed to promote arbitration").

II. Different Circuits Addressing This Issue Have Applied Conflicting Analyses to Arrive at Opposite Results

As a matter of first impression before the Ninth Circuit, the analysis of the issue should have been driven by the basic legal principles governing arbitration under the FAA, as discussed above. After setting up the issue and the arguments on both sides, however, the Ninth Circuit did not engage in the required in-depth legal analysis to decide the issue.[9] Based on its bald tautology that "Section I of the FAA 'exempts contracts from the FAA's coverage,' " the Ninth Circuit concluded: "It follows that a district court has no authority to compel arbitration under Section 4 where Section 1 exempts the underlying contract from the FAA's provisions." (App., *infra* 22a.) When the basic principles regulating arbitration under the FAA are also applied to the circumstance, however, which the

[9] Nonetheless, the Ninth Circuit stated that its analysis and holding are now "law of the circuit." (*See* App., *infra* at 2a.)

Ninth Circuit did not consider, the court's holding does not "follow."

The Eighth Circuit in its opinion in *Green*, *supra*, comes to the opposite conclusion as the Ninth Circuit, but also with little analysis. In *Green*, the court found "[a]pplication of the FAA's transportation worker exemption is a threshold question of arbitrability in the dispute between [the parties]." *Green,* 653 F.3d at 769. The court stated the law in one sentence: "Parties can agree to have arbitrators decide threshold questions of arbitrability." *Id.* Because, like here, the arbitration agreement at issue in *Green* incorporated by reference the rules of the American Arbitration Association, which provide that an arbitrator has the power to determine his or her own jurisdiction, the court found "Green therefore agreed to have the arbitrator decide whether the FAA's transportation worker exemption applied." *Id*.

The lack of meaningful analysis in these two conflicting cases affirms what the Ninth Circuit indicated in its initial published opinion—that the issue, one of first impression at that time, is "relatively close." (App., *infra* 27a.) Is the question of whether the FAA's transportation worker exemption applies to a contract a threshold question of arbitrability for the arbitrator, or is it a preliminary jurisdictional question that cannot be delegated? Review should be granted for this Court

to analyze and settle the important question of law raised by this petition.[10]

The analysis of this issue, and the resulting legal conclusion, is of great significance to parties relying on arbitration agreements controlled by the arbitrability rules of the FAA. The seemingly discreet issue of law affects hundreds of thousands of truckers and owner operators around the country.

Who decides this initial question of arbitrability under Section 1, where the arbitration agreement contains a delegation provision? The Ninth Circuit has ruled the district court does. The Eight Circuit has ruled the arbitrator does. The Supreme Court should grant review to decide this issue for all of the federal courts.

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[10] The district courts in the Ninth Circuit and other circuits already are attempting to interpret and apply the decision in *In re Van Dusen*, 654 F.3d 838 (9th Cir. 2011) (App., *infra* 12a-27a). *See Cilluffo v. Central Refrigerated Services, Inc.*, EDCV 12-00886 VAP (OPx), 2013 U.S. Dist. LEXIS 100471, at *16-17 (C.D. Cal. 2013) (in denying request to certify arbitration order for immediate review, court relied on *In re Van Dusen* in determining that the court, rather than the arbitrator, must determine whether the Section 1 exemption applies); *In re Toyota Motor Corp.*, 838 F. Supp.2d 967, 983 (C.D. Cal. 2012) ("Van Dusen has applicability because it reinforces the principle that the Court must comply with the dictates of the statutory text of the FAA"). *See also Christie v. Loomis Armored U.S., Inc.*, 10-cv-02011-WJM-KMT, 2011 U.S. Dist. LEXIS 141994, at *5 (D. Colo. 2011) (citing *Van Dusen* in case involving Section 1 exemption).

CONCLUSION

This Court has addressed many basic rules affecting arbitrability under the FAA. However, an issue remains that has widespread application and is subject to conflicting opinions between the federal circuit courts of appeals. The Ninth Circuit disregarded the basic rules of arbitrability established by Supreme Court precedent by finding a Section 1 exemption determination is for the court, even where the parties have expressly delegated issues of arbitrability to the arbitrator and where resolution of the arbitrability question also will determine the underlying merits of the plaintiffs' claims. Petitioners respectfully request that the Court grant their petition and reverse the Ninth Circuit decision.

Respectfully submitted,

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