Case No. 17-15102

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA VAN DUSEN and JOHN DOE 1,
Plaintiffs-Appellees

v.

SWIFT TRANSPORTATION CO., INC.; INTERSTATE EQUIPMENT LEASING, INC.; CHAD KILLIBREW; and JERRY MOYES,
Defendants-Appellants.

Appeal from an Order of the United States District Court for the District of Arizona, Case No. 2:10-cv-00899-JWS

AMICUS CURIAE BRIEF OF PUBLIC JUSTICE, P.C. IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Public Justice, P.C. states that it has no parent corporation and that there is no publicly held corporation that owns 10% or more of its stock.

STATEMENT OF INTEREST OF AMICUS CURIAE

Public Justice is a national public interest law firm that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct.[1] Public Justice has a long history of working to ensure access to justice for workers, consumers, and others harmed by corporate wrongdoing. As part of this work, it has a special project devoted to fighting abuses of mandatory arbitration.

In addition, Public Justice has a long history of fighting to protect workers from discrimination, to safeguard workers' health and safety, and to enforce minimum wage laws and other basic workplace standards.

At the intersection of these two bodies of work—representing workers and fighting abuses of mandatory arbitration—we represent truck drivers in a number of cases, who are challenging their misclassification as independent contractors and whose contracts contain arbitration clauses. *See, e.g., Oliveira v. New Prime, Inc.*, No. 15-2364 (1st Cir.); *Pacific 9 Transp., Inc. v. Labor Comm'r*, No. B270832 (Cal. Ct. App.). As a result of this representation, we have carefully

[1] The parties consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), Public Justice states that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than Public Justice, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

studied the original meaning and history of the transportation worker exemption to the Federal Arbitration Act.

This case is likely to be the first opportunity for the Ninth Circuit to squarely rule on the meaning of that exemption. By providing this Court with additional resources regarding the meaning and historical context of the exemption, Public Justice seeks to protect not only the interests of our clients—who, as truck drivers, will likely be impacted by the Court's interpretation of the exemption—but also the public's interest in the proper development of the law.

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SUMMARY OF THE ARGUMENT

The sole issue in this appeal—whether the Federal Arbitration Act applies to the contracts between Swift and the truck drivers it employs—is fundamentally a question of statutory interpretation. The Act explicitly exempts the "contracts of employment" of transportation workers. 9 U.S.C. § 1; *see Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 106, 119 (2001). Whether the contracts between Swift and its drivers are exempt from the statute, therefore, depends on the meaning of the term "contracts of employment" as used in the Act. *Cf.* Swift Opening Br. 21 ("[T]he pertinent question in this case is whether" the drivers' contracts with the company are "'contracts of employment' within the meaning of section 1 of the" statute.).[2]

It is well-established that where, as here, the terms of a statute are not defined in the law itself, courts should give those terms their ordinary meaning at the time the statute was passed. *See, e.g.*, *United States v. TRW Rifle 7.62X51mm Caliber, One Model 14 Serial 593006*, 447 F.3d 686, 689 (9th Cir. 2006). But the court below did not examine the ordinary meaning of the term "contracts of employment" in 1925, when the Federal Arbitration Act was passed. Indeed, it did not perform any statutory interpretation at all. Instead, the court simply assumed—

[2] Unless otherwise specified, all internal quotation marks and alterations are omitted.

without actually analyzing the issue—that the term "contracts of employment" excludes independent contractors' agreements to perform work.

But as the First Circuit recently explained, that assumption is incorrect. *See Oliveira v. New Prime, Inc.*, 857 F.3d 7, 20 (1st Cir. 2017). To the contrary, there is overwhelming evidence that in 1925, when the Federal Arbitration Act was passed, the ordinary—and, indeed, the only—meaning of the term "contract of employment" was simply an agreement to perform work. *See id.* at 20-22; *infra* pages 8-12. The status of the worker was irrelevant. The term "contract of employment" was applied to *all* workers' agreements, including those of independent contractors.

Thus, the plain meaning of the Federal Arbitration Act's exemption for the "contracts of employment" of transportation workers is that it excludes from the statute any transportation worker's agreement to perform work—regardless of the status of the worker.

There is no reason to believe that Congress intended to deviate from this plain meaning. To the contrary, the history and purpose of the Act confirm that Congress intended to exempt all transportation workers, including independent contractors. At the time Congress passed the Federal Arbitration Act, the United States had been roiled by years of labor disputes in the transportation industry that had repeatedly led to strikes, and sometimes even violence, that disrupted interstate

commerce and threatened the country's economic stability. *See infra* pages 12-13. In an effort to alleviate the danger caused by this conflict, Congress passed several statutes regulating how labor disputes within the transportation industry should be resolved. *See infra* page 13.

In contrast to these statutes, in which *Congress* determined how labor conflict should be resolved, the Federal Arbitration Act enables *parties* to devise for themselves their own methods of resolving disputes. If transportation workers were subject to the Federal Arbitration Act, transportation companies could require their workers to resolve their disputes through private, individual arbitration. And Congress would lose its ability to regulate transportation workers' employment disputes. Congress had to exempt transportation workers from the Federal Arbitration Act to preserve its authority to regulate the labor conflict that had threatened the country's economy for years. *See Circuit City*, 532 U.S. at 121 (explaining that Congress exempted transportation workers' contracts of employment from the Federal Arbitration Act because of its "demonstrated concern with transportation workers and their necessary role in the free flow of goods").

Given this purpose, it makes perfect sense for Congress to exempt all transportation workers—regardless of how they might be classified. A labor strike that halts the shipment of goods does not carry less potential to disrupt commerce,

simply because the strikers are labeled independent contractors. Because all transportation workers have the potential to disrupt commerce, all transportation workers needed to be exempt from the Federal Arbitration Act.

Thus, the history and purpose of the transportation worker exemption confirm that it should be interpreted according to its plain meaning: that the employment contracts of transportation workers—*all* transportation workers—are exempted.

That plain meaning is sufficient to resolve this appeal. This Court need not review the lower court's analysis of whether, as a factual matter, Swift's drivers were hired as independent contractors. Instead, it should affirm the decision below on a different—much simpler—ground: that the drivers' contracts are exempt from the Federal Arbitration Act, *regardless* of whether they are independent contractors, because *all* transportation workers' agreements to perform work are exempt.

ARGUMENT

I. All Contracts To Perform Work Are "Contracts of Employment" Within the Meaning of the Federal Arbitration Act.

The "contracts of employment" of transportation workers engaged in interstate commerce are exempt from the Federal Arbitration Act. *See* 9 U.S.C. § 1; *Circuit City*, 532 U.S. at 109. There is no dispute that Swift's workers—interstate truck drivers—are transportation workers engaged in interstate commerce.

Nevertheless, Swift contends that the transportation worker exemption doesn't apply, simply because the company's contracts classified—or, as the district court concluded, misclassified—Swift's workers as independent contractors.

As the First Circuit recently explained, this argument suffers from a "fatal flaw": the "failure to closely examine the statutory text—the critical first step in any statutory-interpretation inquiry." *Oliveira*, 957 F.3d at 19. "Because Congress did not provide a definition for the phrase 'contracts of employment' in" the Federal Arbitration Act, it should be "give[n] its ordinary meaning" at the time the statute was enacted. *Id.* And the ordinary meaning of that phrase in 1925, when the Arbitration Act was passed, was an agreement to perform work—regardless of the status of the worker. *See id.* at 20-22; *infra* pages 8-12.

Dictionaries from the early twentieth century demonstrate that the word "employment" was used simply as a synonym for the word "work." *See, e.g.*, *Oliveira*, 957 F.3d at 20 (citing *Webster's New International Dictionary of the English Language* 488, 718 (W.T. Harris & F. Sturges Allen eds., 1923); *Webster's Collegiate Dictionary* 329 (3rd ed. 1925)). A "contract of employment," therefore, was simply an agreement to perform work. *See id*. It had nothing to do with a worker's status—*all* workers were employed; and all workers labored under contracts of employment. *See id.*; *infra* pages 8-12.

In assuming otherwise, the lower court made a common mistake: It assumed that because, today, the word "*employee*" is often used in wage and hour law as a term of art that excludes independent contractors, the word "*employment*" must have been used the same way in the Federal Arbitration Act—a statute passed in 1925 that had no reason to distinguish between different kinds of workers.

This assumption is wrong. In 1925, as now, there were some bodies of law in which the term "employee" was used as a term of art. *See infra* note 3. And in some, but not all, of these bodies of law, that term of art excluded independent contractors.[3] But these specialized meanings never extended to other forms of the

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[3] Tort law, for example, held that in many instances, employers were not liable for injuries caused to third parties by independent contractors, because independent contractors were not under the control of their employer. *See, e.g.*, *Guy v. Donald*, 203 U.S. 399, 406 (1906). Similarly, workers' compensation statutes often did not apply to independent contractors for the same reason. *See, e.g.*, *Clark's Case*, 124 Me. 47 (1924) (collecting cases).

But even the word "employee" did not always exclude independent contractors. Where there was no reason to distinguish between different kinds of workers, the word "employee" was in 1925—and is today—often used to refer to any worker, including independent contractors. *See, e.g.*, *Railway Employees' Dep't, A.F.L. v. Indiana Harbor Belt Railroad Co.*, Decision No. 982, 3 Dec. U.S. R.R. Lab. Bd. 332, 337 (1922) (explaining that in the Transportation Act of 1920, when Congress referred to "railroad employees[,] it undoubtedly contemplate[d] those engaged in the customary work directly contributory to the operation of the railroads"—including independent contractors); 49 C.F.R. § 390.5 (defining the term "employee" for purposes of the Motor Carrier Act to include any "driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle)").

Of particular relevance, statutes passed in the late nineteenth and early twentieth century to regulate labor disputes in the transportation industries repeatedly used the word "employee" to refer to all workers in the regulated

word "employ." Even in contexts where the law narrowly defined "employees" to exclude independent contractors, the terms employ, employer, and employment were all regularly used without regard to a worker's status. *See infra* notes 4-7.

Thus, independent contractors were consistently characterized as "employed."[4] Those who hired independent contractors were called their "employers."[5] And the work of an independent contractor was called

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industry—including independent contractors. *See, e.g.*, Erdman Act, 30 Stat. 424 (1898); Newlands Act, 38 Stat. 103; *infra* page 16.

[4] *See, e.g.*, *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922) ("[T]he Court of Common Pleas held that the party employed was an independent contractor."); *Arthur v. Texas & P. Ry. Co.*, 204 U.S. 505, 516-17 (1907) (referring to "an independent contractor" as "employed . . . to do work upon the freight"); *Woodward Iron Co. v. Limbaugh*, 276 F. 1, 2 (5th Cir. 1921) ("[T]the moving of the coal by tramcars was not included in the work which Waters was employed to do as an independent contractor."); *James Griffith & Sons Co. v. Brooks*, 197 F. 723, 725 (6th Cir. 1912) ("For this purpose the company . . . employed him as an independent contractor."); *The Indrani*, 101 F. 596, 598 (4th Cir. 1900) ("If an independent contractor is employed to do a lawful act, and in the course of the work does some casual act of negligence, the common employer is not answerable." (internal quotation marks omitted)).

[5] *See, e.g.*, *John L. Roper Lumber Co. v. Hewitt*, 287 F. 120, 121 (4th Cir. 1923) (listing circumstances under which "the employer is not answerable to a third person for injuries resulting from the negligence of the contractor"); *Pierson v. Chicago, R.I. & P. Ry. Co.*, 170 F. 271, 274 (8th Cir. 1909) ("An independent contractor is one who renders service in the course of an occupation representing the will of his employer only as to the result of his work and not as to the means by which it is accomplished."); *Toledo Brewing & Malting Co. v. Bosch*, 101 F. 530, 531 (6th Cir. 1900) ("[T]his right was denied upon the ground that the acts complained of as negligent were those of an independent contractor, for which the defendant, as employer, was not responsible.")

"employment."[6] Indeed, many courts *defined* independent contractors as workers "exercising an independent employment."[7]

Unsurprisingly, then, independent contractors' agreements to perform work were called "contracts of employment." *See, e.g.*, *Teamster as Independent Contractor Under Workmen's Compensation Acts*, 42 A.L.R. 607, 617 (1926); *1922 A.L.R.* at 228, 256, 272; Theophilus J. Moll, *A Treatise on the Law of Independent Contractors and Employers' Liability* 48, 58, 334 (1910).

Sources from around the time the Federal Arbitration Act was passed consistently use the term "contract of employment" to refer to the contract under which an independent contractor is employed. The United States Supreme Court, for example, repeatedly referred to contracts with attorneys, who were undoubtedly independent contractors, as "contracts of employment." *See, e.g.*, *Watkins v. Sedberry*, 261 U.S. 571, 575 (1923); *Calhoun v. Massie*, 253 U.S. 170, 179 (1920) (McReynolds, J., dissenting); *Taylor v. Bemiss*, 110 U.S. 42, 44 (1884).[8] And there

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[6] *See, e.g.*, Thomas M. Cooley, *A Treatise on the Law of Torts* 1098 (3rd.ed. 1906); *infra* note 7.

[7] *See, e.g.*, *Prest-O-Lite Co. v. Skeel*, 182 Ind. 593 (1914); *Alexander v. R. A. Sherman's Sons Co.*, 86 Conn. 292, 297 (1912); *Harmon v. Ferguson Contracting Co.*, 159 N.C. 22 (1912); *Karl v. Juniata Cty.*, 206 Pa. 633 (1903); *see also General Discussion of the Nature of the Relationship of Employer and Independent Contractor*, 19 A.L.R. 226, 227-232, 243 (1922) [hereinafter *1922 A.L.R.*] (citing numerous cases).

[8] The Supreme Court held, in 1891, that attorneys that are not "in regular and continual service" to their employer—i.e. attorneys hired to litigate a single lawsuit

are numerous lower court cases that also refer to independent contractors' agreements to perform work as "contracts of employment." *See, e.g.*, *Tankersley v. Webster*, 116 Okla. 208 (1925) ("[T]he contract of employment . . . conclusively shows that Casey was an independent contractor."); *Lindsay v. McCaslin*, 123 Me. 197 (1923) ("When the contract of employment has been reduced to writing, the question whether the person employed was an independent contractor or merely a servant is determined by the court as a matter of law."); *Waldron v. Garland Pocahontas Coal Co.*, 89 W. Va. 426 (1921) ("Whether a person performing work for another is an independent contractor depends upon a consideration of the contract of employment, the nature of the business, [and] the circumstances under which the contract was made and the work was done.").[9]

Of particular relevance, the 1926 edition of the American Law Reports demonstrates that the term "contract of employment" was used to describe the

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or conduct a particular transaction—are independent contractors. *Louisville, E. & St. LR Co. v. Wilson*, 138 US 501, 505 (1891).

[9] *See also, e.g.*, *U.S. Fid. & Guar. Co. of Baltimore, Md., v. Lowry*, 231 S.W. 818, 822 (Tex. Civ. App. 1921) (explaining that whether a person is an independent contractor or employee depends upon whether the "contract of employment" gives the employer the right "to control the manner and continuance of the particular service and the final result"); *Luckie v. Diamond Coal Co.*, 41 Cal. App. 468, 477 (1919) (explaining that a person working under a "written contract of employment" could be either "an independent contractor or [a] servant," depending on how the work was actually performed); *Hamill v. Territilli*, 195 Ill. App. 174, 176 (Ill. App. Ct. 1915) ("Appellant strongly contends that under the contract of employment Territilli and Scully were independent contractors for whose negligence it was not responsible, while appellee urges the contrary.").

agreements under which teamsters—that is, truck drivers—worked, even if the drivers were independent contractors. Citing several cases from between 1916 and 1925, the Reports state: "When the *contract of employment* is such that the teamster is bound to discharge the work himself, the employment is usually one of service, whereas, if, under the contract, the teamster is not obligated to discharge the work personally . . . , the *employment* is generally an independent one." *Teamster as Independent Contractor Under Workmen's Compensation Acts*, 42 A.L.R. 607, 617 (1926) (emphasis added).

And, in a 1919 case much like this one, the California Court of Appeal used the term "contract of employment" to refer to an agreement between a truck driver and the coal company for which he worked, where the very question at issue in the case was whether the driver was an independent contractor or an employee of the company. *Luckie*, 41 Cal. App. at 471. The court's analysis in that case is instructive. The driver had leased his truck from the company and agreed to drive for the company for ten hours a day until his lease was paid off. *Id.* at 472. The contract stated that the driver was responsible for gas, oil, repairs, and insurance. *Id.* And it provided that all "responsibility" and liability "for the operation of the truck" was the driver's, not the company's. *Id.*

Nevertheless, the court repeatedly characterized the contract as a "contract of employment." *Luckie*, 41 Cal. App. at 475, 477-79, 481-82. And, the court held,

whether the driver was an employee of the coal company or an independent contractor could not be determined "solely from the written contract of employment," because a worker's status depends on the "true relation" between the worker and his employer, not the terms of the contract. *Id.* at 477, 479.

As this case makes clear, while a worker's *status* depended on the relationship between the worker and the employer, the worker's *contract* was always a "contract of employment." *See Luckie*, 41 Cal. App. at 477, 479; *see also infra* pages 8-11 (citing cases demonstrating that regardless of a worker's status, the worker's contract was a contract of employment).

And while there are numerous cases using the term "contract of employment" to refer to the employment agreements of independent contractors, a Westlaw search reveals not a single case from this time period holding that the contract under which an independent contractor works is *not* "a contract of employment."

The use of the term "contract of employment" to refer solely to those agreements with workers whom a particular statute or common law doctrine might define as "employees" is a distinctly modern usage. The first instance of this more narrow usage appears to be in a 1954 New Mexico case—nearly thirty years after the passage of the Federal Arbitration Act. *See Nelson v. Eidal Trailer Co.*, 58 N.M. 314, 316 (1954). And even today, this usage is infrequent—far outstripped

by the traditional meaning: an agreement to perform work, regardless of the status of the worker.[10]

Statutory terms are to be interpreted according to their ordinary meaning at the time the statute was passed. *See Perrin v. United States*, 444 U.S. 37, 42 (1979). The ordinary—indeed, the only—meaning of the term "contract of employment" at the time the Federal Arbitration Act was passed was an agreement to perform work.

II. The Purpose and Historical Context of the Federal Arbitration Act's Exemption for Transportation Workers Confirm that the Exemption Applies to Independent Contractors.

There is no reason to believe that Congress silently incorporated into the Federal Arbitration Act a unique meaning of the term "contracts of employment" that, unlike the universally-accepted definition, excluded independent contractors. To the contrary, the purpose and historical context of the exemption confirm that Congress intended to exempt all transportation workers—including independent contractors. The Federal Arbitration Act is not about minimum wage or workers'

[10] A Westlaw search for cases that state that an independent contractor's contract is not a contract of employment turns up a couple dozen cases. A search for cases that use the term "contract of employment" in a manner that encompasses the agreements of independent contractors leads to hundreds of results. *See, e.g.*, *Guill v. Acad. Life Ins. Co.*, 935 F.2d 1286 (4th Cir. 1991) ("Academy's employment contracts provide that its agents are independent contractors."); *Phelps v. 3PD, Inc.*, 261 F.R.D. 548, 554-55 (D. Or. 2009); *Smith v. Interactive Fin. Mktg. Grp., L.L.C.*, 79 Va. Cir. 158 (2009); *Larmon v. CCR Enterprises*, 285 Ga. App. 594, 595 (2007).

compensation or any other specialized body of law that might have reason to distinguish between different kinds of workers. The Act is about dispute resolution. And in legislating about dispute resolution, it makes perfect sense that Congress would treat all transportation workers alike.

Beginning in the late nineteenth century, disputes between transportation workers and their employers had repeatedly crippled interstate commerce and endangered the public. During the Pullman Strike of 1894, for example, tens of thousands of workers struck, violence broke out in several cities, and the railroad system was paralyzed. *See* A.P. Winston, *The Significance of the Pullman Strike*, 9 J. Polit. Econ. 540 (1901); Almont Lindsey, *The Pullman Strike* 335-36 (1942). In 1921, a nationwide strike by sailors and longshoremen shut down both East and West coast ports for weeks. David Montgomery, *The Fall of the House of Labor: The Workplace, the State, and American Labor Activism 1865-1925* 403 (1987). And in 1922, a railroad strike threatened to shut down major industries—coal mines couldn't transport their coal; fruit was rotting because there was no way to get it to market—as 400,000 railroad shopmen refused to work. Margaret Gadsby, *Strike of the Railroad Shopmen*, 15 Monthly Lab. Rev. 6 (Dec. 1922).

These were not the only incidents of labor unrest. The early twentieth century saw over a hundred strikes, just in the railroad industry alone. Paul Stephen Dempsey, *Transportation: A Legal History*, 30 Transp. L.J. 235, 273 (2003).

Amidst this ongoing strife, Congress repeatedly passed legislation attempting to regulate the transportation industries and erect dispute resolution mechanisms that it hoped would obviate the need to resort to strikes. *See, e.g.*, Shipping Commissioners Act of 1872, 17 Stat. 262; Erdman Act, 30 Stat. 424 (1898); Newlands Act, 38 Stat. 103 (1913); Transportation Act of 1920, 41 Stat. 456. These statutes demonstrate Congress's concern with the economic threat posed by continued labor unrest in the transportation industry.

They also demonstrate that Congress recognized that the threat was posed by *all* transportation workers, regardless of how they might be labeled—for these dispute resolution statutes applied to all workers in the industries they regulated, including independent contractors. The Shipping Commissioners Act, for example, authorized government-appointed shipping commissioners to resolve disputes between a "master, consignee, agent, or owner" of a ship "and *any* of his crew." Shipping Commissioners Act of 1872, § 25, 17 Stat. 262 (emphasis added). Similarly, the Erdman and Newlands Acts established dispute resolution mechanisms for the railroad industry that applied to "all persons actually engaged in *any* capacity in train operation or train service of any description"—including independent contractors. Erdman Act, 30 Stat. 424 (1898) (emphasis added) (explicitly stating that the Act applies to railroad workers even if "the cars" in which they worked were "held and operated by the carrier under lease or other

contract"—that is, even if they were independent contractors); Newlands Act, 38 Stat. 103 (same).

And when Congress returned the railroads to private operation after they had been nationalized during World War I and set rules for the newly re-privatized industry, it again established a dispute resolution system that applied to all railroad workers. *See* Transportation Act of 1920, 41 Stat. 456. The Transportation Act of 1920 created a federal Railroad Labor Board to govern labor disputes in the industry, in the hope of preventing the return of the labor unrest that had previously gripped the railroad industry. *See id.*; *Railway Employees' Dep't, A.F.L. v. Indiana Harbor Belt Railroad Co.*, Decision No. 982, 3 Dec. U.S. R.R. Lab. Bd. 332, 337 (1922) (emphasizing that the goal of the Transportation Act "was to prevent interruption to traffic, growing out of" labor disputes in the railroad industry—disputes that "had for years . . . harassed the public, blocked commerce, stagnated business, destroyed property values, and visited great inconvenience and suffering upon millions of people").

The Board made clear that railroads could not circumvent the Transportation Act simply by hiring independent contractors. *Indiana Harbor*, Dec. U.S. R.R. Lab. Bd. at 337-39. "It is absurd," the Board explained, "to say that" railroads and their workers "would not be permitted to interrupt commerce by labor controversies unless the operation of the roads was turned over to contractors in

which event the so called contractors and the railway workers might engage in industrial warfare ad libitum." *Id.* at 337. A strike by independent contractors, the Board observed, "would as effectually result in an interruption to traffic as if the men were the direct employees of the carrier." *Id.* at 338. Therefore, the Board held, even though the statute referred to railroad "employees," it "undoubtedly" applied to *all* railroad workers—including independent contractors. *Id.* at 337 ("When Congress in this act speaks of railroad employees it undoubtedly contemplates those engaged in the customary work directly contributory to the operation of the railroads.").

The Board explicitly distinguished statutes which involved "the railroad company's liability for injuries incurred by the contractor's employees." *Indiana Harbor*, 3 Dec. U.S. R.R. Lab. Bd. at 338. Those cases regulate "the *private* relations between the employer and the employee," and therefore, the Board concluded, they might have good reason to exclude independent contractors. *See id.*(emphasis added). But, the Board explained, the "paramount purpose" of the Transportation Act was "to [e]nsure to the *public* . . . efficient and uninterrupted railway transportation by protecting the people from the loss and suffering incident to the interruption to traffic growing out of controversies between the carriers and the employees who do their work." *Id.* at 339 (emphasis added). And, for that purpose, the Board concluded, it was "immaterial" whether a railroad worker was

an independent contractor. *Id.* If workers had the power to disrupt transportation, they were subject to the Act. *See id.* at 337-39.

It was against this backdrop that Congress passed the Federal Arbitration Act —a statute that requires courts to enforce private contracts between parties about how they will resolve their disputes. *See* 9 U.S.C. § 2. If the statute did not exempt all transportation workers, including independent contractors, it would have conflicted with the Transportation Act of 1920—which required all railroad labor disputes to be resolved by the statutory mechanism provided in the Act—and the Shipping Commissioners Act—which authorized all seamen to bring their disputes to government-appointed shipping commissioners. As the Supreme Court explained in *Circuit City*, it is "reasonable to assume that Congress excluded" transportation workers from the Federal Arbitration Act "for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes" governing them. *Circuit City*, 532 U.S. at 121.

After years of labor unrest, Congress was clearly "concern[ed] with transportation workers and their necessary role in the free flow of goods." *Circuit City*, 532 U.S. at 121. Congress "deem[ed] it of the highest public interest to prevent the interruption of interstate commerce by labor disputes and strikes." *Pennsylvania R. Co. v. U.S. R.R. Labor Bd.*, 261 U.S. 72, 79 (1923). Therefore, it was perfectly "rational" for Congress to decide that employers in the transportation

industry should not be permitted to decide for themselves how labor disputes should be resolved, but instead these disputes should remain open to regulation by Congress or public adjudication in court. *Circuit City*, 532 U.S. at 121.

Given that purpose, it would make no sense for Congress to distinguish between independent contractors and other workers. Railroad conductors or sailors or truck drivers are just as "necessary" to "the free flow of goods"—and just as able to interrupt that "free flow of goods" by striking—if they are independent contractors as they are if they meet some specialized definition of "employee" used for some other purpose.

Congress meant what it said: "Contracts of employment" of transportation workers—*all* transportation workers—are exempt from the Federal Arbitration Act.

III. The Policy Concerns Swift Cites Support the Conclusion that the Transportation Worker Exemption Applies to Independent Contractors.

Applying the transportation worker exemption to all transportation workers' agreements to perform work not only adheres to the plain text of the statute and effectuates the purpose of the exemption, it avoids the policy concerns Swift spends much of its brief lamenting. A court deciding whether a worker's contract is exempt from the Federal Arbitration Act need only determine whether the

contract is an agreement to perform work. It need not determine whether that agreement properly characterizes the worker's employment status.

This plain-text interpretation of the Act eliminates Swift's concern that courts deciding the threshold question of whether the Federal Arbitration Act applies will become entangled in the merits of the parties' claims—which, as here, often hinge on whether a worker has been properly classified.[11] *Cf.* Swift Opening

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[11] In any case, Swift's concern is overstated. All else being equal, an interpretation of the statute that allows courts to determine whether to compel arbitration without having to decide any issues relevant to the merits of the parties' underlying dispute is certainly preferable. But Swift's assertion that courts deciding motions to compel arbitration may *never* rule on an issue that might implicate the merits of a dispute is false. To the contrary, the Supreme Court has expressly rejected this argument. *See Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B.*, 501 U.S. 190, 209 (1991). In *Litton*, both the merits of the parties' dispute and the determination of whether the parties were required to arbitrate that dispute depended on whether the right asserted in the case "ar[o]se under" an expired collective bargaining agreement. *See id.* at 208-210 & n.4. The dissent argued that the Court should compel arbitration to avoid determining the merits of the dispute. *Id.* at 208. But the majority disagreed. The Court explained: "[W]e must determine whether the parties agreed to arbitrate this dispute, and we cannot avoid that duty because it requires us to interpret a provision of a bargaining agreement," even though that interpretation was dispositive of the merits of the case. *Id.* at 209; *see also Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 592 (7th Cir. 2001) (resolving dispute about whether party had authority to sign contract, which resolved both the motion to compel arbitration and the merits of the dispute).

The Court in *Litton* relied on *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986), the very case Swift contends supports its argument. *See Litton*, 501 U.S. at 208-09. Swift misunderstands *AT&T Technologies.* The quotation that Swift relies on—that courts may not "rule on the potential merits of the underlying claims"—was an admonition to courts that where a dispute is indisputably subject to arbitration, courts may not refuse to compel arbitration solely because they believe that the underlying claims are meritless. *See AT&T*

Br. 32-33. It also avoids the problem of workers whose employment status may change over time. *Cf. id.* at 24-25. And it ensures that courts considering workers with the same contract will reach the same result. *Cf. id.* at 25-26. No extensive discovery needed. *Cf. id.* at 25.

Of course, policy concerns cannot override the plain text of the statute. But here, text, history, and policy all point in the same direction: All transportation workers are exempt.

IV. Holding that the Transportation Worker Exemption Does Not Apply to Independent Contractors Would Create a Circuit Split.

In a well-reasoned, scholarly opinion, the First Circuit—the only appellate court to have decided the issue so far—recently agreed with this analysis. Relying largely on the same evidence that is cited in this brief, the court concluded that when the Federal Arbitration Act was passed, the "ordinary meaning" of the phrase "contracts of employment" was agreements to perform work—regardless of the status of the worker. *Oliveira*, 857 F.3d at 20. And, the court observed, because independent contractors "play the same necessary role in the free flow of goods" as other transportation workers, it would make no sense for Congress to have drawn a distinction between independent contractors and other workers. *See id.* at 22.

Techs., 475 U.S. at 649-50. It had nothing to do with cases where, to determine whether a dispute is subject to arbitration in the first place, a court must decide an issue that also implicates the merits. *See id.*; *see also Paper, Allied-Indus. Chem. & Energy Workers Int'l Union, Local 4-12 v. Exxon Mobil Corp.*, 657 F.3d 272, 276 (5th Cir. 2011) (rejecting an interpretation of *AT&T* similar to Swift's).

Therefore, the court held, basic principles of statutory interpretation dictate the conclusion that the Federal Arbitration Act exempts *all* transportation workers' agreements to perform work—including those of independent contractors. *See id.* at 20-22.

The trucking company defendant in the First Circuit case made the same arguments Swift makes here. And the First Circuit easily rejected them. First, the company argued that because several district courts have assumed that the transportation worker exemption does not apply to independent contractors, the First Circuit should follow suit. *See Oliveira*, 857 F.3d at 18; *cf.* Swift Opening Br. 28-32 (making similar argument).[12] But as the First Circuit explained, statutory interpretation "is not simply a numbers game." *Oliveira*, 857 F.3d at 19. None of the district courts that have assumed that the exemption doesn't apply to independent contractors actually examined the text of the statute. *See id.* Upon proper examination, the First Circuit held, it is clear that the transportation worker exemption applies to all transportation workers, including independent contractors. *See id.* at 20-22.

[12] As the Appellees point out, Swift mischaracterizes the district court opinions on this issue. Contrary to Swift's assertion, even those district courts that have (wrongly) assumed that the exemption does not apply to independent contractors make clear that workers who are labeled independent contractors may nevertheless be exempt if they can demonstrate that they were misclassified. *See* Answering Br. 46-47.

Next, the company argued—as Swift does here—that the federal policy in favor of arbitration requires that the transportation worker exemption be narrowly construed. *See Oliveira*, 857 F.3d at 22-23. But, the First Circuit explained, this general principle means only that courts should hew closely to the text of the transportation worker exemption, rather than adopting a more expansive interpretation than what the text allows. *See id.* at 22-24. It does not mean that courts may ignore that text altogether. *Id.* at 23 (holding that this principle "cannot override the plain meaning of the statutory language"). In other words, the federal policy favoring arbitration ensures that courts *enforce* the plain meaning of the transportation worker exemption. It may not be used as "an escape hatch to avoid [that] plain meaning." *Id.* at 23; *see also E.E.O.C. v. Waffle House*, 534 U.S. 279, 290, 295 (2002) (rejecting argument that federal policy in favor of arbitration can trump plain meaning of statute).

As the First Circuit's opinion makes clear, there is overwhelming evidence that the term "contracts of employment" as used in the Federal Arbitration Act encompasses *all* contracts to do work—including those of independent contractors. This Court should join the First Circuit in so holding.[13]

[13] If this Court holds that, contrary to its plain text, the transportation worker exemption does not apply to independent contractors, the Court should make clear that companies cannot avoid the exemption simply by misclassifying their workers. In recent years, courts and administrative agencies have repeatedly found that trucking companies are illegally misclassifying their drivers as independent

CONCLUSION

Because the Federal Arbitration Act does not apply to the contracts between Swift and its drivers, regardless of whether the drivers are independent contractors, this Court should affirm the district court's decision.

Dated: July 31, 2017

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contractors. *See, e.g.*, *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 984 (9th Cir. 2014); *Martins v. 3PD Inc.*, No. CIV.A. 11-11313-DPW, 2014 WL 1271761, at *1 (D. Mass. Mar. 27, 2014); *Green Fleet Sys., LLC & Int'l Bhd. of Teamsters, Port Div.*, 2015 L.R.R.M. (BNA) ¶ 180798 (N.L.R.B. Div. of Judges Apr. 9, 2015). An interpretation of the Federal Arbitration Act that turns on how a company labels its workers would further incentivize companies to misclassify their drivers and allow them to benefit from their illegal conduct. This Court and the Supreme Court have repeatedly held that the legal status of a worker does not turn on how that worker is labeled, but rather on the actual circumstances of her employment. *See, e.g.*, *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992); *Alexander v. FedEx Ground Package System, Inc.*, 765 F.3d 981, 989 (9th Cir. 2014). If this Court holds that the transportation worker exemption does not apply to independent contractors, it should also hold that workers, labeled in their contracts as independent contractors, should be given a chance to demonstrate that they are misclassified.

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