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 *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF RESPONDENT

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July 25, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights, freedoms, and structural safeguards that our nation's charter guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text, history, and values, and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Enacted in 1925, the Federal Arbitration Act ("FAA") generally requires courts to enforce agreements to arbitrate disputes, foreclosing litigation over those disputes. 9 U.S.C. § 2. But the Act has an explicit exception for disputes arising from the employment of transportation workers: "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." *Id.* § 1; *see Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001). In an effort to avoid being haled into court for

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

allegedly failing to pay its workers the minimum wage they were entitled to under federal and state law, Petitioner New Prime, Inc., asks this Court to construe that exception in an artificially narrow manner that is contrary to its plain text. This Court should reject that effort and affirm the decision below.

Respondent Dominic Oliveira is a long-haul truck driver who alleges that Petitioner New Prime, Inc., a national trucking company, violated federal and state law by failing to pay him and other drivers minimum wage. When Oliveira sued in federal court, however, New Prime moved to have the court enforce an arbitration agreement that Oliveira had signed as part of his employment paperwork. Resp. Br. 6-8. Although there is no dispute that Oliveira is a "worker[] engaged in . . . interstate commerce," New Prime argues that the FAA's Section 1 exemption does not apply.

New Prime claims that its agreement with Oliveira is not a "contract of employment" because, it says, Oliveira was an independent contractor under common-law agency principles, rather than a company employee. According to New Prime, when Congress used the term "contracts of employment" in the FAA, it meant "only contracts between an *employer* and an *employee* that stated the terms and conditions of *employment*." Pet'r Br. 8.

The problem with New Prime's argument is that, when Congress enacted the FAA nearly a century ago, those words did not have the same meanings and connotations they do now. Today, "employment" tends to suggest an ongoing legal relationship in which individuals labelled "employees" are paid wages or salaries in exchange for their work, the details of which are subject to the supervision and control of the employer. *See, e.g.*, *Black's Law Dictionary* 564, 566 (8th ed. 2004). But that simply was not the case when the FAA

was enacted in 1925. While the common-law concept of a "master-servant" relationship was well established by that point, and was mutually exclusive with independent-contractor status, the word "employment" had nothing to do with the distinction between servants and independent contractors.

Rather, the words "employment," "employer," and "employ" had much different meanings in 1925, both in common parlance and in legal discourse. Those words signified the general concept of utilizing a person's time or effort, or more specifically, engaging a person in a professional capacity to perform work in exchange for payment. As a result, the term "contract of employment" was routinely used to refer to agreements with independent contractors, no less than agreements with individuals who worked for wages or salaries under master-servant conditions. And that is how Congress and the public would have understood the term when it was used in the FAA. New Prime has produced no evidence to the contrary.

Instead, New Prime tries to exploit a shift in linguistic usage that has taken place since 1925. In the late nineteenth and early twentieth centuries, as the nation moved toward an industrial economy, a new term, "employee," came to be used with increasing frequency, modelled on a similar French word. As a general and abstract term that could be applied across vocations, the term "employee" was well suited for use in the context of large work forces laboring in factories, in offices, or in other impersonal settings such as on railroads; hence, it gradually came to replace the more antiquated term "servant" and more specific terms like "clerk" and "workman." Increasingly, the master-servant relationship was referred to as the employer-employee relationship. And as this shift took place, it

began to influence the way that other words based on the root "employ" were used.

That is why, today, "employment" can be defined as "[t]he relationship between master and servant," *Black's Law Dictionary* 566 (8th ed. 2004), and "employment contract" can be defined as "[a] contract between an employer and employee in which the terms and conditions of employment are stated," *id*. at 344. But in 1925, that simply was not yet the case. The term "contracts of employment" had exactly the broad meaning identified by the decision below: "agreements to perform work." J.A. 177.

New Prime's argument, in short, is a study in anachronism. It begins with a present-day definition of "contracts of employment" and attempts to graft that definition onto the past. This approach is literally backward, and the Court should reject it.

ARGUMENT

I. When Congress Enacted The FAA, "Employment" Was A Broad And General Term That Did Not Connote A Master-Servant Relationship.

A. The FAA's exemption provision was written to ensure that the Act would not affect "contracts of employment" of interstate transportation workers. 9 U.S.C. § 1. Because the Act does not define "employment" or "contracts of employment," those terms must be taken to have their "ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)); *see Perrin*, 444 U.S. at 42 (when construing a term, this Court "look[s] to the ordinary meaning of the term . . . at the time Congress enacted

the statute"); *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (same).

To identify this ordinary meaning, the Court consults "[d]ictionaries from the era of [the statute]'s enactment." *Sandifer*, 571 U.S. at 227; *see, e.g.*, *id.* at 227-28 (relying on contemporaneous editions of *Webster's New International Dictionary* and the *Oxford English Dictionary*); *Wis. Cent. Ltd.*, 138 S. Ct. at 2070 (same, plus *Black's Law Dictionary*); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 228 (1994) (relying on contemporaneous dictionaries and noting that the period of a statute's enactment is "the most relevant time for determining a statutory term's meaning").

Significantly, therefore, when a word's meaning has changed over time, this Court interprets that word according to how it was defined when Congress passed the relevant legislation, not according to its modern definition. *See Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 609-12 (1987) (where the question was whether a plaintiff had "alleged *racial* discrimination within the meaning of § 1981," relying on contemporaneous dictionaries to show that "[t]he understanding of 'race' in the 19th century . . . was different" than it is "today").

B. At the time of the FAA's enactment, the term "contract of employment" was not defined in popular, historical, or legal dictionaries. Nor was "employment contract." This suggests that neither formulation was a recognized term of art. Dictionaries of the era did, however, define the word "employment." And those definitions consistently gave the word a broad meaning—one that encompassed paying another person for his or her work, whether or not the common-law criteria for a master-servant relationship were satisfied.

For instance, the first edition of *Webster's New International Dictionary*, which was the version of *Webster's* current between 1909 and 1934, defines "employment" simply as:

- Act of employing, or state of being employed.
- That which engages or occupies; that which consumes time or attention; occupation; office or post of business; service; as, agricultural *employments;* public *employment*.

Webster's New International Dictionary 718 (1st ed. 1930). Nothing in these definitions even invokes the concept of a master-servant legal relationship, typically defined by the employer's "power to direct the time, manner, and place of the services." *Black's Law Dictionary* 997 (8th ed. 2004). Much less does *Webster's* limit the word "employment" to that context, or signal any special focus on it. At its most specific, the *Webster's* definition of "employment" simply means "occupation," "office or post of business," and "service." *Id*. Illustrating this broad meaning, *Webster's* provides the following words as synonyms: "Work, business, vocation, calling, office, service, commission, trade, profession." *Id*.

The contemporaneous edition of the *Oxford English Dictionary* (its first edition) tells the same story.[2] It lists the following definitions of "employment":

- The action or process of employing; the state of being employed.

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[2] The first edition of the *Oxford English Dictionary* was published in ten separate volumes issued between 1884 and 1928, as *A New English Dictionary on Historical Principles*. In 1933, these ten volumes were comprehensively reissued as a new set, under the dictionary's present title. *See History of the OED*, https://public.oed.com/history/.

- The service (of a person).
- That on which (one) is employed; business; occupation; a special errand or commission.
- A person's regular occupation or business; a trade or profession.

3 *A New English Dictionary on Historical Principles* 130 (1st ed. 1897).[3] Again, even where these definitions relate specifically to business or vocation, they do not suggest any particular focus on the master-servant relationship, or on the other traits of what we would today call an employer-employee relationship. Instead, definitions such as "a special errand or commission" and a "person's regulation occupation or business" plainly encompass agreements between independent contractors and those making use of their services.

Legal dictionaries from the era are no different. The 1910 edition of *Black's Law Dictionary* indicates that "employment" includes "an engagement or rendering services for another," *Black's Law Dictionary* 422 (2d ed. 1910), but narrows the definition no further. To the contrary, it cautions against limiting the word even to that broad meaning: "This word does not necessarily import an engagement or rendering services for another. A person may as well be 'employed' about his own business as in the transaction of the same for a principal." *Id.* The same text was included in the next edition, accompanied by a new definition: "The act of hiring, implying a request and a contract for compensation." *Black's Law Dictionary* 658 (3d ed.

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[3] The dictionary provides three other definitions marked as "obsolete": "The use or purpose to which a thing is devoted," "An official position in the public service; a 'place,'" and "Implement." 3 *A New English Dictionary on Historical Principles* 130 (1st ed. 1897).

1933) (citation omitted). Nothing here even hints that "employment" requires a master-servant relationship or excludes independent contractors.

The 1914 edition of *Bouvier's Law Dictionary* contains no entry for "employment" but defines "employed" as "[t]he act of doing a thing, and the being under contract or orders to do it." 1 *Bouvier's Law Dictionary* 1035 (1914 ed.). Its 1926 edition, under a different editor and publisher, includes an entry for "employment" broadly stating that "'employment, profession or trade' means some business, employment, profession or trade in which one is engaged." *Id.* at 354 (1926 ed.); *see id.* (also noting that "employment" can encompass time spent on an employer's premises although not actually engaged in work).

The *Cyclopedic Law Dictionary*, published in 1912, similarly defines "employment" as "[a] business or vocation," and "[t]he service of another." *The Cyclopedic Law Dictionary* 314 (1st ed. 1912). Its next edition, published in 1922, expands upon this definition only by adding "calling; office; service; commission[;] trade; profession" and "the act of employing, in another sense, the state of being employed." *Id*. at 350 (2d ed. 1922). That entry is unchanged in the 1940 edition. *Id*. at 381 (3d ed. 1940).

In sum, the dictionaries in circulation when Congress enacted the FAA did not limit the word "employment" to conditions involving a common-law master-servant relationship. *Cf*. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 419, 422 (2012) (identifying the current editions of *Webster's*, the *Oxford English Dictionary*, *Black's Law Dictionary*, *Bouvier's Law Dictionary*, and *The Cyclopedic Dictionary of Law* as among "the most useful and authoritative" dictionaries for establishing the meanings of words in the first half of the twentieth

century). Nor did these dictionaries suggest that the master-servant relationship had any particular significance to the word's meaning at all. That concept is entirely absent.

Notably, therefore, this is *not* a situation in which dictionaries from the period contain multiple definitions of the word, one supporting New Prime's position and one supporting Respondent Oliveira's position. *Cf. MCI Telecomms. Corp.*, 512 U.S. at 227 ("Most cases of verbal ambiguity in statutes involve . . . a selection between accepted alternative meanings shown as such by many dictionaries."). Were that the case, New Prime might argue that its preferred definition—even if the less common of the two—was the one that Congress intended in the FAA's exemption provision. *See Sandifer*, 571 U.S. at 231-32 (relying on "the broader statutory context" to choose between "two common meanings" that a term was given in dictionaries from when the legislation was adopted). But here there is no competition between rival definitions. The one offered by New Prime is nowhere to be found.

This Court has rejected the arguments of parties who "cite dictionary definitions contained in, or derived from, a single source." *MCI Telecomms. Corp.*, 512 U.S. at 225. All the more forcefully, therefore, it should reject the arguments of a party who cannot cite *any* contemporaneous dictionary for its claimed definition of a statutory term. *Cf. Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 418 (1992) ("The existence of alternative dictionary definitions of the word . . . indicates that the statute is open to interpretation."). New Prime cannot show that any dictionary from when the FAA was enacted contained the anachronistic definition of "employment" that it advocates. To be sure, "a statute may make a departure from the natural and popular acceptation of language,"

Sandifer, 571 U.S. at 228 (quotation marks omitted), but "text or context" must provide strong evidence of such a departure before this Court will give a word "anything other than [its] ordinary meaning," *id.* And the clearer it is that the relevant dictionaries defined a term a certain way, the higher the burden on any party who advocates reading that term differently.

C. To appreciate why "employment" did not have the meaning in 1925 that New Prime claims, it helps to understand where the root word "employ" came from and how its meaning, and those of its derivatives, had developed up to that point.

The word "employment," first used in the fifteenth century, was created by adding a suffix to the verb "employ." *See* "Employment," *Oxford English Dictionary* (3d. ed. 2014). That verb had been borrowed in the Middle Ages from the French and Anglo-Norman word "imploier," which meant "to use or apply (for a purpose), to put to work," "to engage (someone) in an occupation," and "to occupy (time) with an activity." "Employ," *Oxford English Dictionary* (3d ed. 2014). And this word, in turn, had its origin in the classical Latin word "implicāre," meaning "to enfold" and "to involve." *Id.* (noting the connection between this word and the verb "to implicate").

Consistent with these roots, in English the verb "employ" originally meant simply to utilize something for a purpose. This traditional, general meaning was reflected in the first three definitions of "employ" listed by *Webster's* in the early twentieth century:

- To . . . involve.
- To make use of, as an instrument, means, or material; to apply; use; as, to *employ* the pen in writing, bricks in building, words and phrases in speaking.

- To occupy; busy; devote; concern; as, to *employ* time in study; to *employ* one's energies to advantage.

Webster's New International Dictionary 718 (1st ed. 1930). The first three definitions in the *Oxford English Dictionary* were similar:

- To apply (a thing) to some definite purpose; to use as a means or instrument[.]
- To apply, devote (effort, thought, etc.) to an object.
- To make use of (time, opportunities). . . . In mod[ern] use also . . . 'to fill with business[.]'

3 *A New English Dictionary* 129-30 (1st ed. 1897); *see id.* (noting that "[t]he senses of this word . . . are derived from the late L[atin] sense of *implicare* 'to bend or direct upon something'").

To "employ" later came to signify, more specifically, the concept of occupying *a person's* time or effort. And that sense of the word was well suited to describe the act of engaging another person to perform tasks in exchange for payment. Thus, the *Oxford English Dictionary*'s first edition reported that "employ" also meant:

- To find work or occupation for (a person, his bodily or mental powers)[.]
- To use the services of (a person) in a professional capacity, or in the transaction of some special business; to have or maintain (persons) in one's service.

Id. at 130. *Webster's* captured this meaning in similar terms:

- To make use of the services of; to have or keep at work; to give employment to; to intrust with

> some duty or behest; as, to *employ* a hundred workmen; to *employ* an envoy; often, in the passive, to have employment; to be at work; as, he has been *employed* for some time.

Webster's New International Dictionary 718 (1st ed. 1930).

Significantly, even these newer and more refined definitions were not limited to contexts in which a master-servant legal relationship existed. Instead, they squarely embraced the hiring of a person who qualified as an independent contractor: someone engaged to perform a particular task, compensated for the successful completion of that task, and free to direct the details of the task's completion. Each definition, for instance, would fit the hiring of an attorney just as well as a factory worker or domestic servant.

The 1910 and 1933 editions of *Black's Law Dictionary* likewise defined "employ" in broad terms. This definition reflects both the word's traditional, generic meaning—utilizing a person's efforts for a purpose—and the more precise concept of paying someone for his or her labor:

- To engage in one's service; to use as an agent or substitute in transacting business; to commission and intrust with the management of one's affairs; and, when used in respect to a servant or hired laborer, the term is equivalent to hiring, which implies a request and a contract for compensation, and has but this one meaning when used in the ordinary affairs and business of life.

Black's Law Dictionary 421 (2d ed. 1910); *id.* at 657 (3d ed. 1933). While this definition makes a specific reference to the hiring of servants, it is not limited to that context. Rather, it describes the use of the word "in

respect to a servant *or* hired laborer" (emphasis added), the latter of which could include independent contractors, whose hiring involves "a request and a contract for compensation." *Id.*

In short, as of the early twentieth century the verb "employ" retained its broad original meanings, which centered around using something or someone for a purpose. The word also had developed a more specific sub-definition that reflected a particular type of economic transaction—paying someone for their work. But as yet, the word had no inherent connection with the presence of a master-servant relationship.[4]

That would change later in the twentieth century, driven by the increasing use of the newer term "employee" and its ripple effects on the meanings of other *employ*-related words. *See* Part II, *infra*. But when the FAA was enacted, the meaning of "employ" had not yet been transformed by this change. Nor had the meaning of the word "employment," which retained the broad definition previously discussed. And as shown, "that definition d[id] not exclude, either

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[4] The reference to "the conventional relation of employer and employee" in *Robinson v. Baltimore & O.R. Co.*, 237 U.S. 84, 94 (1915), does not indicate otherwise. In that case—which did not involve distinguishing independent contractors from servants or employees—this Court rejected the unconventional notion that a porter who worked for the Pullman Company was somehow also employed by the railroad carrier on which Pullman's train cars operated. The Court held that the porter was instead "a servant of another master," the Pullman Company, which "selected its [own] servants, defined their duties, fixed and paid their wages, directed and supervised the performance of their tasks, and placed and removed them at its pleasure." *Id.* at 93. In other words, the Court held that the porter was not "employed" by the railroad carrier because he had *no* legal or contractual relationship with that carrier, even though some of his services benefitted the carrier as an "incidental matter." *Id.*

explicitly or implicitly," independent contractor arrangements. *Sandifer*, 571 U.S. at 228.

D. The broad meaning of "employment" in the early twentieth century, which encompassed paid work with or without a master-servant relationship, was not found only in dictionary definitions. It was also reflected in actual usage, which matched those definitions perfectly.

Court decisions and legal treatises issued in the years leading up to the FAA's enactment regularly used the word "employment" to cover the hiring of independent contractors. Indeed, the word "employment" was often found in the very definition of an "independent contractor." *See, e.g.*, *Simonton v. Morton*, 119 A. 732, 733 (Pa. 1923) ("Where a contract is let for work to be done by another in which the contractee reserves no control over the means of its accomplishment, but merely as to the result, *the employment* is an independent one establishing the relation of a contractee and contractor and not that of master and servant." (emphasis added)); *Murray v. Dwight*, 55 N.E. 901, 902 (N.Y. 1900) ("The relation of master and servant is often confused with some other relation. . . . There are many kinds of *employment* . . . where one person may render service to another without becoming his servant in the legal sense." (emphasis added)).

Likewise, in contemporary legal discourse, the party hiring an independent contractor was routinely labeled an "employer," and contractors were routinely described as being "employed." *See, e.g.*, *Flori v. Dolph*, 192 S.W. 949, 950-51 (Mo. 1917) (an "'independent contractor' is one, who . . . contracts to do a piece of work . . . without being subject to the control of *his employer* except as to the result of his work" (citing treatise)); *Prest-O-Lite Co. v. Skeel*, 106 N.E. 365, 367 (Ind. 1914) ("When *the person employing* may prescribe

what shall be done, but not how it is to be done, or who is to do it, the person *so employed* is a contractor, and not a servant."); *Embler v. Gloucester Lumber Co.*, 83 S.E. 740, 742 (N.C. 1914) ("An 'independent contractor' is said to be one who . . . contracts to do a piece of work . . . without being subject to *his employer*, except as to the result of the work[.]" (citing, *inter alia*, *Bouvier's Law Dictionary*)); *N. Bend Lumber Co. v. Chicago, M. & P.S. Ry. Co.*, 135 P. 1017, 1021 (Wash. 1913) ("A reservation by *the employer* of the right . . . to supervise the work for the purpose merely of determining whether it is being done in conformity to the contract does not affect the independence of the relation.") (emphasis added in all quotations).[5]

As one leading authority explained in 1922: "In cases involving independent contractors, the courts use various pairs of correlative expressions, such as 'employer' and 'person employed,' 'employer' and 'independent contractor;' [and] 'employer' and 'contractor[.]'" *General Discussion of the Nature of the Relationship of Employer and Independent Contractor*, § 4, 19 A.L.R. 226 (1922) (footnotes omitted); *see id.* § 6 ("the existence or absence of a right on *the employer's* part, to exercise control over the details of the work" determines "whether *the person employed* is or is not an independent contractor" (emphasis added)); *id.* § 9 (citing "the general principle which declares *an employer* to be exempt from liability for injuries caused by the torts of an independent contractor" (emphasis added)).

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[5] To similar effect, see also *Alexander v. R. A. Sherman's Sons Co.*, 85 A. 514, 515 (Conn. 1912) (quoting treatise); *Messmer v. Bell & Coggeshall Co.*, 117 S.W. 346, 348 (Ky. 1909) (citing treatise); *Keys v. Second Baptist Church*, 59 A. 446, 447 (Me. 1904); *City of Richmond v. Sitterding*, 43 S.E. 562, 563 (Va. 1903).

Unable to contest the evidence above, which reinforces the dictionary definitions set forth earlier, New Prime is reduced to arguing that the term "contracts of employment" should not be "deconstructed" and interpreted according to "atomized definitions of its constituent parts." Pet'r Br. 23. But this is a specious objection: the meaning of "employment" did not magically change when the word was incorporated into the term "contract of employment."

To the contrary, that term was used exactly as the meanings of its individual parts would suggest. It simply meant the hiring of someone to perform work. As such, the term "contracts of employment" was used to refer to agreements with independent contractors. *See, e.g.*, *Dobson's Case*, 128 A. 401, 402 (Me. 1925) ("whether the relation be that of master and servant or not is determined by ascertaining from the *contract of employment* whether the employer retains the power of directing and controlling the work, or has given it to the contractor"); *Chicago, R.I. & P. Ry. Co. v. Bennett*, 128 P. 705, 707 (Okla. 1912) ("the test is not whether the defendant did in fact control and direct plaintiff in his work, but is whether it had the right under *the contract of employment* . . . to so control and direct him in the work"); *Allen v. Bear Creek Coal Co.*, 115 P. 673, 679 (Mont. 1911) ("The relation of the parties under *a contract of employment* is determined by an answer to the question, Does the employé in doing the work submit himself to the direction of the employer, both as to the details of it and the means by which it is accomplished? If he does, he is a servant, and not an independent contractor. If, on the other hand, the employé has contracted to do a piece of work . . . in pursuance of a plan previously given him by the employer, without being subject to the orders of the

latter as to detail, he is an independent contractor.") (emphasis added in all quotations).

In short, contemporaneous dictionary definitions and actual usage were aligned. "Contracts of employment" meant "agreements to perform work." Resp. Br. 2. There is no basis for this Court to adopt New Prime's anachronistic limiting definition.

II. The Word "Employee" Gradually Influenced—And Limited—The Meaning Of The Term "Employment," But Only Well After The FAA Was Enacted.

A. As shown above, the terms "employment" and "contracts of employment" did not mean what New Prime says they meant in 1925. And New Prime does not cite a single contemporaneous source that supports its reading of those terms. Instead, New Prime attempts a sleight of hand by directing attention toward the word "employee." It argues that "at the time the FAA was enacted, it was well established that independent contractors were *not* employees." It further argues that "contracts of employment," as used in the FAA, means only "agreements that purport to establish an employer-employee relationship." Pet'r Br. 16-17. Thus, the syllogism concludes, contracts of employment do not include agreements with independent contractors.

What New Prime fails to acknowledge is that, when the FAA was written, "employee" was a term of relatively recent vintage, which had unique connotations not shared by the terms "employment," "employer," and "employ." As its use proliferated in the late nineteenth and early twentieth centuries, the term "employee" came to function as a replacement for the term "servant." And thus, what used to be called a master-

servant relationship increasingly was called an employer-employee relationship.

As these changes took effect, this use of the word "employee" gradually influenced the meanings of other words that incorporate the root "employ," such as "employment." That is why, today, the term "contracts of employment" tends to evoke "'[a] contract between an employer and employee,'" stating the terms of a specific type of ongoing legal relationship. Pet'r Br. 17 (quoting *Black's Law Dictionary* 393 (10th ed. 2014)). But when the FAA was passed in 1925, these changes had not yet occurred. The word "employment" did not yet have its modern association with an employer-employee relationship. New Prime's argument is built on exploiting this linguistic slippage. This Court has rebuffed such efforts in the past, *see Saint Francis Coll.*, 481 U.S. at 609-12, and it should do so again here.

B. Although the word "employee" shares common etymological roots with "employ," "employer," and "employment," its development in the English language was quite distinct. While those latter words date back to the 1400s and 1500s, the first recorded use of the word "employee" did not occur until the 1800s. *See* "Employee," *Oxford English Dictionary* (3d ed. 2014). Like "employer" and "employment," the word was formed by adding a suffix to the root word "employ." But unlike those other terms, "employee" was modelled on the nineteenth-century use of a similar word in French: the noun "*employé*." *Id.*; *see* 3 *A New English Dictionary* 130 (1st ed. 1897) ("a[fter] F[rench] *employé*"); *Bouvier's Law Dictionary* 353 (1926 ed.) ("From the French.").

By 1910, the word's relative novelty in English was still apparent. The entry for "employee" in that year's edition of *Black's Law Dictionary* begins as follows:

> This word is from the French, but has become somewhat naturalized in our language. Strictly and etymologically, it means "a person employed," but, in practice in the French language, it ordinarily is used to signify a person in some official employment, and as generally used with us, though perhaps not confined to any official employment, it is understood to mean some permanent employment or position. The word is more extensive than "clerk" or "officer."

Black's Law Dictionary 421-22 (2d ed. 1910) (quotation marks omitted).

The 1914 edition of *Bouvier's Law Dictionary* offers a similar definition (under an entry titled "Employé or Employee"), adding: "It may be any one who renders service to another." 1 *Bouvier's Law Dictionary* 1035 (1914 ed.). The word is further described as "[a] term of rather broad signification for one who is employed . . . . It is not usually applied to higher officers of corporations or to domestic servants, but to clerks, workmen, and laborers, collectively." *Id.*

The *Oxford English Dictionary* provided no substantial definition for "employee" in 1897, merely cross-referencing "employé" and adding, in the alternative: "Something that is employed." It defined "employé" as:

> One who is employed. (In Fr[ench] use chiefly applied to clerks; in Eng[lish] use *gen.* to the persons employed for wages or salary by a house of business, or by government.)

3 *A New English Dictionary* 130 (1st ed. 1897); *see id.* (quoting 1879 example: "In Italy, all railroad employés are subjected to rigorous examination.").

Webster's included a combined entry for "Employee, Employé," defining the term as "[o]ne employed by another; a clerk or workman in the service of an employer, usually disting. from *official* or *officer*, or one employed in a position of some authority." *Webster's New International Dictionary* 718 (1st ed. 1930).

Thus, "employee" was a comparatively recent addition to the English lexicon in the early twentieth century, a word that "developed along its own etymological path." *FCC v. AT&T Inc.*, 562 U.S. 397, 403 (2011). As these dictionary entries suggest, it may have been useful because it was a term "of rather broad signification," 1 *Bouvier's Law Dictionary* 1035 (1914 ed.), that conveyed the idea of "some permanent employment or position," *Black's Law Dictionary* 422 (2d ed. 1910), without reference to a specific profession or type of work. As such, "employee" was a generic term that could be applied equally to manual laborers and clerical staff, unlike narrower words like "clerk" and "workman." Moreover, it lacked some of the traditional connotations of the word "servant," including its association with work taking place in small establishments or the home.[6] In contrast, the more abstract term "employee" was well suited to describe the industrial-era phenomenon of large work forces laboring in factories,

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[6] *See* 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. Emp. & Lab. L. 295, 308-09 (2001) ("[C]ourts tended to find important limitations in words such as 'laborer' and 'workman,' which connoted manual laborer and excluded the fast-growing class of clerical and office workers. . . . Although 'servant' was (and is) sometimes used in a very broad sense . . . it also carried the historical baggage of a class system and connoted a feudal relationship of domination and dependence that was offensive to the American culture. Thus, some courts confined the meaning of 'servant' to household servants.").

in offices, or in other impersonal settings such as on railroads. *See, e.g.*, *Bouvier's Law Dictionary* 353 (1926 ed.) ("Usually embraces a laborer, servant, or other person occupied in an inferior position. Not restricted, however, to any particular employment or service. . . . It may be skilled labor or the service of the scientist or professional man as well as servile or unskilled manual labor." (citations omitted)).[7]

As a generic term describing those who worked for wages, "employee" was also a useful term when crafting legislation that regulated modern industry and its labor force. *See, e.g.*, Pub. L. No. 100, § 1, 35 Stat. 65, 65 (1908) (imposing liability on railroad carriers for injuries to their "employee[s]").[8] That phenomenon prompted further development of the word's meaning. *See Black's Law Dictionary* 657 (3d ed. 1933) ("The term is often specially defined by statutes[.]"). And because many of these statutes addressed worker's compensation—where it was important to distinguish independent contractors from workers who had to follow their employers' specific directions—it was natural for

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[7] The dramatic evolution of the American economy during this period helps explain why these qualities of the word "employee" made it such a useful new term. "From the end of Reconstruction until World War I, the United States was transformed from an agrarian, rural nation in which business was conducted primarily by small, locally owned firms, to an urban, industrial economy in which business was dominated by large, nationally based corporations." Deborah A. Ballam, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present*, 31 Am. Bus. L.J. 553, 598 (1994).

[8] *See* Carlson, *supra*, at 308-09 ("When legislatures sought a broader or more general coverage" in worker's compensation laws, not limited by occupation or industry, "they had an assortment of vague and uncertain terms from which to choose . . . . Out of all those terms, 'employee' prevailed, if only by default.").

those statutes to use the word "employee" in a manner that incorporated the legal concept of a "servant." *See* Carlson, *supra*, at 306-07.

Eventually the word "employee" came to subsume the word "servant." *See Black's Law Dictionary* 564 (8th ed. 2004) (defining "employee" as "[a] person who works in the service of another person (the employer) under an express or implied contract of hire, *under which the employer has the right to control the details of work performance*" (emphasis added)). And that is generally how "employee" is used in legal contexts today—a term largely defined by being mutually exclusive with the term "independent contractor."

In the early twentieth century, however, this usage had not solidified, and the meaning of "employee" was still in flux. Some authorities used the word consistent with its modern connotations. *See Kinsman v. Hartford Courant Co.*, 108 A. 562, 563 (Conn. 1919) ("Let us ascertain first whether the deceased was an independent contractor or an employé at the time he was injured."). Others used it to cover both servants *and* independent contractors. *See Williams v. Nat'l Cash Reg. Co.*, 164 S.W. 112, 115 (Ky. 1914) ("If the employé is merely subject to the control or direction of the owner or his agent as to the result to be obtained, he is an independent contractor."); *Allen*, 115 P. at 679 (same); 1 *Bouvier's Law Dictionary* 1035 (1914 ed.) ("It may be any one who renders service to another . . . . The servant of a contractor for carrying mail is an employé of the department of the post-office." (citations omitted)). That practice was already diminishing, however. *See General Discussion of the Nature of the Relationship of Employer and Independent Contractor*, § 4, 19 A.L.R. 226 (1922) ("There is some authority for using the word 'employee' in the sense of 'independent contractor.' But it is now so generally treated as a

synonym of 'servant' that this is the only juristic signification which can with propriety be ascribed to it at the present day." (citation omitted)).

As the twentieth century progressed, the modern definition of "employee" steadily gained preeminence, and this evolution can be observed in changes to the word's dictionary definition. As noted, the 1910 edition of *Black's Law Dictionary* contained only a very general definition of the term ("more extensive than 'clerk' or 'officer' . . . . understood to mean some permanent employment or position"). The 1933 edition added new material fleshing out a more precise set of concepts: "a person working for salary or wages; applied to anyone so working, but usually only to clerks, workmen, laborers, etc., and but rarely to the higher officers of a corporation or government or to domestic servants." *Black's Law Dictionary* 657 (3d ed. 1933). But the word still had not firmly crystalized into its modern equivalence with "servant." Thus, the 1933 entry notes that because the word is often specially defined in statutes, "whether one is an employee or not will depend upon particular facts and circumstances even though the relation of master and servant . . . does or does not exist." *Id.*

By the next edition, however, things had changed. New text was added stating simply: "'Servant' is synonymous with 'employee.'" *Black's Law Dictionary* 618 (rev. 4th ed. 1968). And the text stating that one could be an employee "even though the relation of master and servant . . . does or does not exist" was removed. *See id.* at 617-18 ("Generally, when person for whom services are performed has right to control and direct individual who performs services not only as to result to be accomplished by work but also as to details and means by which result is accomplished, individual

subject to direction is an 'employee.'"). The word's modern definition had firmly taken hold.

C. As the word "employee" increased in prevalence over the twentieth century, and crystalized into its present-day meaning, it gradually influenced the way that other *employ*-related words were used. Terms like "employment" would eventually come to be associated specifically with the concept of an employer-employee relationship, which had incorporated the concept of a master-servant relationship. But that shift in meaning came well after Congress enacted the FAA.

In 1910, for instance, *Black's Law Dictionary* provided two definitions of the word "employer." The first was broad enough to encompass any person who engages another to perform work: "One who employs the services of others." The second definition reflects the more specialized concept of someone who pays employees on an ongoing basis for their labor: "one for whom employees work and who pays their wages or salaries." *Black's Law Dictionary* 422 (2d ed. 1910). In the next edition, those same definitions were repeated—but significantly, they were followed by a new description: "The correlative of 'employee.'" *Id.* at 657 (3d ed. 1933). Indicating the burgeoning influence of the term "employee," the word "employer" was now coming to be defined in reference to the employer-employee relationship, not just by its broad, traditional meaning. But, significantly, at this time the meaning of the word "employee" remained very much in flux. Indeed, that same version of *Black's Law Dictionary* used the term "employee" to define "independent contractor." *Id.* at 951 ("If the employee is merely subject to the control or direction of the employer as to the result to be obtained, he is an independent contractor.").

The definition of "employer" in the next edition of *Black's* went a step further in this direction, by adding yet another line: "'Master' is a synonymous term." *Black's Law Dictionary* 618 (rev. 4th ed. 1968). And in today's definition of "employer," the word's transformation is complete: "A person who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages." *Id.* at 565 (8th ed. 2004).

The influence of the word "employee" and the concept of an employer-employee relationship is why "employment" can today be defined as "[t]he relationship between master and servant," *id.* at 566, and why "employment contract" can be defined as "[a] contract between an employer and employee in which the terms and conditions of employment are stated," *id.* at 344.

Indeed, the transformation in how these words are used was sufficiently notable that the editors of the *Oxford English Dictionary* discussed it just a few years ago, in conjunction with the dictionary's most recent updates:

> Modern uses of *employ*, *employee*, and *employment* reflect changes in the world of work. From its earliest occurrences in English in the 1400s, *employ* has had a variety of broader and more specialized meanings to do with using or applying things for a particular purpose. The specific meaning "To use the services of (a person) to undertake a task, carry out work, etc." is first recorded in English in 1523 . . . . Over time this meaning shows an increasingly marked narrowing to "to hire or retain (a person) to do something in return for wages or payment". Recently, it has become clear that the definition of *employ* and related words is being drawn more narrowly and precisely in the

> language of Human Resources and of employment law, and this has begun to have some impact on more general use as well[.]

Philip Durkin, *Release Notes: The Changes in Empathy, Employ, and Empire* (Mar. 13, 2014), https://public.oed.com/blog/march-2014-update-release-notes/.

In 1925, however, the longstanding meanings of "employment," "employer," and "employ" had not yet been transformed by the modern concept of an employer-employee relationship. Those words still had broad and general definitions that did not signify or require a master-servant relationship. *See* Part I, *supra*. And thus the ordinary meaning of the term "contracts of employment" was exactly the one identified by the decision below: "agreements to perform work." J.A. 177.

D. Importantly, "contracts of employment" is the phrase that Congress chose to utilize in Section 1 of the FAA; Congress did not exempt "contracts of employ*ees*." And Congress made the breadth of its purpose doubly clear by applying Section 1 to "any other class of *workers* engaged in foreign or interstate commerce," 9 U.S.C. § 1 (emphasis added), not to "any other class of *employees*." Congress had just used the word "employees" earlier in the same sentence when referring to "railroad employees." Thus, even if Congress intended that use of "employees" to cover only common-law servants (which is doubtful, *see* Resp. Br. 40-42), Congress selected a different and broader word, "workers," to describe the wider class of individuals to whom Section 1's exemption applies. "That is significant because Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)).

New Prime argues that limiting this exemption to modern-day "employees" would have made more sense. Pet'r Br. 28-29. But "[t]he role of this Court is to apply the statute as it is written," regardless of whether "some other approach might accor[d] with good policy." *Burrage v. United States*, 571 U.S. 204, 218 (2014) (quotation marks omitted). And "[b]ecause the [FAA] gives no 'textual indication' that its exemptions should be construed narrowly, 'there is no reason to give [them] anything other than a fair (rather than a "narrow") interpretation.'" *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (quoting Scalia & Garner, *supra*, at 363).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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