No. 13-936

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

BRIEF IN OPPOSITION OF RESPONDENTS VAN DUSEN AND DOE

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May 2014

QUESTION PRESENTED

Whether the Ninth Circuit correctly held that the Federal Arbitration Act does not authorize courts to compel arbitration in cases to which the Act does not apply.

PARTIES

The respondents in this Court, who were plaintiffs-appellants in the court of appeals, are Virginia Van Dusen, John Doe 1 (who was identified in the record of the proceedings below as Jose Motolinia), and Joseph Sheer.

This brief is filed on behalf of respondents Van Dusen and Doe. Respondent Sheer is currently in bankruptcy proceedings, and the bankruptcy trustee has not yet authorized counsel to represent him in this Court.

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INTRODUCTION

The Federal Arbitration Act (FAA) requires courts to compel arbitration only of arbitration agreements within its scope. *See* 9 U.S.C. §§ 2, 4; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400–03 (1967). The Act specifically excludes from its coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"; it states explicitly that "nothing herein"—including sections 2 and 4 of the Act—"shall apply" to such contracts. 9 U.S.C. § 1. Thus, the FAA neither commands nor authorizes a court to compel arbitration of any issue, including an issue of "arbitrability," under an arbitration clause in a transportation worker's employment agreement.

In this case, the court of appeals applied the plain meaning of the statutory language in ruling that before a court may compel arbitration under the FAA, it must find that the FAA applies—that is, it must determine that the agreement at issue is not subject to the exclusion of transportation-worker employment agreements under section 1 of the Act. As the court correctly concluded, even if an arbitration provision contains a "delegation clause" committing questions of arbitrability to decision by an arbitrator, the FAA provides no authority for compelling arbitration of such issues under contracts to which it does not apply. An agreement outside the scope of the FAA cannot bootstrap itself into enforceability by purporting to delegate the question of arbitrability to the arbitrator.

Contrary to petitioners' assertions, nothing in the court of appeals' straightforward application of the FAA conflicts with precedents of this Court. Nor is there any conflict among the circuits meriting review

by this Court: Petitioners' claim of intercircuit conflict is based solely on a brief passage from an opinion of the Eighth Circuit that does not discuss the issue of whether or how the FAA can command arbitration under an agreement to which it does not apply and has not been followed by any other court on that point. In light of the Eighth Circuit's failure to analyze the statutory issue, the clarity with which the statute compels the result reached by the court of appeals in this case, and the absence of any other federal appellate decisions that touch on the issue of how to apply section 1 in cases involving delegation clauses, this Court should deny review in this case.

STATEMENT

Respondents Virginia Van Dusen, John Doe 1, and Joseph Sheer (collectively, "the drivers") are interstate truck drivers who worked for petitioner Swift Transportation Company. Although the drivers allege that their relationship with Swift was properly classed as employment subject to the requirements of state and federal wage-and-hour and labor laws, Swift contends that they were independent contractors, and called their employment agreements "independent contractor" agreements. Swift did not comply with minimum wage, overtime and other requirements of federal and state wage laws.

The drivers filed an action against Swift and related defendants (collectively "Swift") alleging violations of federal and state laws governing their employment relationship with Swift, and sought to proceed through a collective action on their federal Fair Labor Standards Act claims and a class action on their other claims. Swift, invoking arbitration clauses in the employment agreements that bar collective actions,

moved under section 4 of the FAA to compel the drivers to arbitrate their claims on an individual basis.

The drivers resisted the motion, arguing that their agreements with Swift were employment agreements of workers engaged in interstate commerce within the meaning of section 1 of the FAA, which exempts such agreements from the FAA. Without deciding that issue, the district court compelled arbitration, holding that because the arbitration clauses delegated issues of "arbitrability" to the arbitrator, it was up to the arbitrator to decide whether the agreements were employment contracts of transportation workers under section 1 of the FAA. The court thus exercised its power under section 4 of the FAA to compel arbitration of the employment agreement issue, without ever finding that the FAA even applied.

The drivers sought mandamus relief in the Ninth Circuit. In considering whether the district court had committed an error sufficient to warrant mandamus, the court of appeals first concluded that the district court had erred in compelling arbitration under the FAA without determining that the FAA applied. The court succinctly explained the nature of the district court's error:

> A district court's authority to compel arbitration arises under Section 4 of the FAA. Section 1 of the FAA, titled "exceptions to operations of this title," explicitly carves out a category of cases exempt from the provisions of the Act. See S. Rep. No. 68–536, at 2 (1924) (stating that Section 1 defines the contracts to which "the bill will be applicable."); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 … (2001) (stating that Section 1 of the FAA "exempts contracts from the FAA's

coverage"). 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. *See Harden v. Roadway Package Sys., Inc.*, 249 F.3d 1137, 1140 (9th Cir. 2001) (holding that "[t]he district court lacked the authority to compel arbitration ... because the FAA is inapplicable to [employees] who are engaged in interstate commerce").

Here, Defendants moved to invoke the District Court's authority to order arbitration under Section 4 of the FAA. The District Court, acting pursuant to that section, compelled Petitioners to arbitrate. In essence, Defendants and the District Court 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*. This position puts the cart before the horse: Section 4 has simply no applicability where Section 1 exempts a contract from the FAA, and private contracting parties cannot, through the insertion of a delegation clause, confer authority upon a district court that Congress chose to withhold.

* * *

Our reading of the FAA is consistent with the relevant case law in the field. As previously stated, the law clearly permits parties to delegate "questions of arbitrability" to an arbitrator. *See, e.g.*, *AT&T Techs.[, Inc. v. Commun. Workers of Am.]*, 475 U.S. [643,] 649 [(1986)]. The Supreme Court defines "questions of arbitrability" as questions of "whether the parties have submitted a particular dispute to arbitration." *Howsam [v.*

> *Dean Witter Reynolds, Inc.]*, 537 U.S. [79,] 83 (2002). The question at issue here does not fit within that definition, however: whatever the contracting parties may or may not have agreed upon is a distinct inquiry from whether the FAA confers authority on the district court to compel arbitration. The Court has never indicated that parties may delegate this determination to an arbitrator in the first instance; on the contrary, it has affirmed that, when confronted with an arbitration clause, the district court must first consider whether the agreement at issue is of the kind covered by the FAA. *See Prima Paint* …, 388 U.S. [at] 401 … (resolving "first question" of whether a consulting agreement "evidenc[ed] transactions in 'commerce'"). This is equally true where the arbitration clause at issue delegates an arbitrability question because "[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*." *Rent-A-Center, West, Inc. v. Jackson*, [561] U.S. [63, 70] … (2010) (emphasis added).

Pet. App. 21a–25a.

Nonetheless, the court of appeals denied mandamus because the district court's ruling, although erroneous, involved a matter of first impression as to which there was no directly controlling precedent in the courts of appeals. *Id*. at 26a. For this reason, and also because of the existence of language in case law that, taken out of context, had contributed to leading the district court astray, the court held that the dis-

trict court's error was not clear enough to warrant mandamus relief. *Id*. at 26a–27a.

Following the court of appeals' ruling, the drivers sought reconsideration by the district court based on the Ninth Circuit's conclusion that it was legal error to have referred the case to arbitration without first resolving the section 1 issue. The district court adhered to its previous ruling, but this time certified the ruling for appeal under 28 U.S.C. § 1292(b). The court of appeals accepted the appeal, and in an unpublished, nonprecedential, two-paragraph ruling, held that under the reasoning of its mandamus opinion, which was law of the case (and, according to the panel, also law of the circuit), the district court had erred in holding that it could compel arbitration under the FAA without first determining that the FAA applied. Thus, the court held, "[o]n remand, the district court must determine whether the Contractor Agreements between each appellant and Swift are exempt under § 1 of the FAA before it may consider Swift's motion to compel." Pet. App. 2a.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals' Decision Implements the Clear Terms of the FAA and Is Fully Consistent with This Court's Decisions.

A. The Plain Statutory Text and This Court's Opinions Show That the FAA Cannot Require Arbitration of Any Issue Under an Agreement That Falls Outside Its Scope.

Swift contends that this case turns on the proposition that "[t]he most fundamental of legal principles

under the FAA is that arbitration is a matter of contract," Pet. 11, and that because the contract at issue here purports to delegate questions of arbitrability to the arbitrator, a court must enforce that contract by compelling arbitration even of the threshold question whether the FAA applies to the agreement. What Swift ignores, however, is that all of the decisions of this Court on which it relies for the proposition that arbitration agreements must be enforced according to their terms are premised on the applicability of the FAA. By definition, however, the FAA cannot require arbitration of *anything* under an arbitration agreement that falls wholly outside its scope.

Indeed, even Swift's formulation of the "fundamental principle" acknowledges that the principle applies only *under the FAA*. That is, the FAA only requires that arbitration agreements be enforced according to their terms if those agreements are subject to the FAA. As this Court has repeatedly explained, both the FAA's substantive requirement that arbitration agreements be enforced and its procedural provisions, sections 3 and 4—which provide, respectively, for stays of litigation pending arbitration and for orders compelling arbitration—apply only to those arbitration agreements that are *subject to the FAA*. *See*, *e.g.*, *Rent-A-Center*, 561 U.S. at 67–68; *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 629–30 (2009); *Vaden v. Discover Bank*, 556 U.S. 49, 58 (2009); *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989); *Prima Paint*, 388 U.S. at 400–03; *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201 (1956).

Like any other order compelling arbitration, an order compelling arbitration of an issue of arbitrabil-

ity (under an arbitration agreement providing for the arbitration of such issues) is an exercise of a court's authority under the FAA—specifically, its authority to enforce the terms of arbitration agreements under section 2 of the Act, and its authority to compel arbitration under section 4 of the Act. *See Rent-A-Center*, 561 U.S. at 69. As this Court explained in *Rent-A-Center*, "[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*. That is, if, but only if, the agreement to arbitrate arbitrability is enforceable under section 2 of the Act, the court must compel arbitration under section 4. *See id*. at 2778.

These core principles dictate that if an arbitration agreement—including one to arbitrate questions of arbitrability—falls outside the realm of agreements enforceable under the FAA, the FAA does not authorize, and certainly cannot require, a court to compel arbitration of the arbitrability issue. This Court's recognition in *Rent-A-Center* that the FAA "operates on" an agreement to arbitrate arbitrability "just as it does on any other" arbitration agreement necessarily means that when the FAA excludes an arbitration agreement from its coverage, the exclusion operates on an agreement to arbitrate arbitrability as fully as it does to an agreement to arbitrate any other issue. Thus, as the court of appeals explained, section 4, which is the sole authorization in the FAA for an order compelling arbitration, "has simply no applicability where Section 1 exempts a contract from the FAA, and private contracting parties cannot, through the insertion of a delegation clause, confer authority upon

a district court that Congress chose to withhold." Pet. App. 22a. Therefore, even on the dubious assumption that the question whether the contract falls within the section 1 exemption from the FAA is a question of "arbitrability" (*but see* Pet. App. 24a), a court cannot compel arbitration of that question under the FAA unless the court determines that the FAA applies.

There is no dispute that employment contracts of transportation workers fall completely outside the FAA. As this Court put it in *Circuit City*, "[s]ection 1 of the Federal Arbitration Act … *excludes from the Act's coverage* 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.'" 532 U.S. at 109 (emphasis added). "Section 1 *exempts from the FAA* … contracts of employment of transportation workers." *Id*. at 119 (emphasis added).

This Court's recognition that transportation workers' employment agreements fall completely outside the FAA reflects unambiguous statutory language providing explicitly that the entirety of the Act is inapplicable to such contracts: "*nothing herein contained* shall apply to contracts of employment of … workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added). Thus, the exemption applies not only to section 2's substantive requirement that arbitration agreements be enforced to the same extent as other contracts, but also to section 4's requirement that courts compel arbitration of disputes subject to arbitration agreements. *See*, *e.g.*, *Brown v. Nabors Offshore Corp.,* 339 F.3d 391, 394 (5th Cir. 2003) (affirming denial of motion to compel arbitration under a seaman's employment contract because the contract was "excluded from the application of the

FAA" by section 1); *Harden*, 249 F.3d at 1141 (holding that district court "lacked the authority to compel arbitration in this case because the FAA is inapplicable" to contracts of transportation workers).

Accordingly, if the contracts at issue here are employment agreements involving transportation workers, the district court cannot be required by the FAA to order arbitration of any issue under them because the FAA does not apply to them at all. Swift's assertion that the district court was required by the arbitration agreements' delegation clause to order arbitration of the question whether the contracts are employment agreements exempt from the Act "puts the cart before the horse," as the court of appeals put it, because if the contracts are not subject to the FAA, the Act cannot require enforcement of any of their terms, including their purported requirement that issues of arbitrability be arbitrated. Pet. App. 22a.

Contrary to Swift's assertion, the Ninth Circuit's application of this fundamental principle does not in any way imply that "parties would never be able to delegate issues of arbitrability to the arbitrator." Pet. 14. As this Court's decisions, including *Rent-A-Center*, illustrate, a host of arbitrability issues may be delegated, including some challenges to the validity and scope of arbitration clauses. What cannot be delegated, however, is the determination whether the statute that Swift claims requires the court to compel arbitration applies to the agreement in question.[1]

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[1] Swift's lengthy exegesis on the "two different types of challenges to the validity of agreements to arbitrate under the FAA," Pet. 15, as discussed by this Court in *Rent-A-Center*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), and *Prima*

(*Footnote continued*)

B. The Decisions of This Court That Dictate the Result Below Are Not Obsolete.

Implicitly suggesting that a court's obligation to compel arbitration under section 4 of the FAA may apply to arbitration agreements that fall outside the substantive enforceability mandate of section 2, Swift criticizes the Ninth Circuit for citing this Court's holding in *Bernhardt v. Polygraphic Co. of America*, 350 U.S. at 202, that the FAA's procedural provisions are inapplicable to agreements that are not enforceable under section 2. Swift suggests that *Bernhardt*'s holding on this point is obsolete because *Bernhardt* was "decided more than 50 years ago." Pet. 14, n.6.

This Court's more recent decisions, however, have repeatedly emphasized the applicable point of *Bernhardt*: FAA sections 3 and 4, which require courts to stay litigation and compel arbitration in disputes that are subject to arbitration agreements, are merely procedural provisions that implement section 2's mandate that arbitration agreements be enforced, and hence are subject to the same limits as section 2. The Court reaffirmed *Bernhardt* on this point in *Prima Paint*, 388 U.S. at 401, and recognized that it could determine whether to compel arbitration only after "[h]aving determined that the contract in question is within the coverage of the Arbitration Act." *Id*. at 402.

The Court's subsequent decisions have repeatedly observed that the authority conferred by the FAA's procedural sections is limited to agreements that are

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Paint, is wholly beside the point. The issue here is not the "validity of [an] agreement[] to arbitrate under the FAA," but rather the antecedent question whether the FAA applies at all.

enforceable under section 2. In *Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University*, for example, the Court stated:

> Section 2 of the Act … declares that a written agreement to arbitrate in any contract involving interstate commerce or a maritime transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, and § 4 allows a party to *such an arbitration agreement* to "petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement."

489 U.S. at 474 (emphasis added).

Similarly, in *Arthur Andersen LLP v. Carlisle*, the Court again stated that the Act's procedural provisions "allow[] litigants … to invoke agreements made enforceable by § 2." 556 U.S. at 630. In *Vaden v. Discover Bank*, the Court likewise emphasized that section 4 of the Act exists to allow implementation of section 2's enforceability mandate. 556 U.S. at 58. And in Swift's favorite authority, *Rent-A-Center*, the Court explicitly stated that section 4 of the FAA is merely a "procedure[] by which federal courts implement § 2's substantive rule." 561 U.S. at 68. It follows that if section 2 is inapplicable because section 1 excludes a contract from its enforceability mandate, section 4 cannot require a court to compel arbitration.

Indeed, if section 4 extended to contracts beyond those covered by section 2, it would render the limits on section 2's requirement that arbitration agreements be enforced illusory. Compelling arbitration is what it means to enforce an arbitration agreement.

Thus, applying section 4 to agreements that are *not* enforceable under section 2 would effectively *expand* section 2's substantive enforceability requirement. That result would be doubly contrary to the terms of section 1, which exclude certain contracts both from section 2's requirement of enforcement and from all the rest of the provisions of the FAA, including section 4.

II. The Conflict Claimed by Swift Does Not Warrant Review.

In the face of the compelling logic supporting the decision below, Swift's assertion that this Court should grant review in this case comes to rest on its claim that the decision below conflicts with a brief passage in a single opinion of the Eighth Circuit that does not even address the fundamental question whether the FAA can require arbitration of a case to which it does not apply. That decision, which Swift acknowledges is the only other federal appellate decision that even touches on the issue presented here, does not demonstrate a need for review by this Court.

Specifically, in *Green v. Supershuttle International, Inc.*, 653 F.3d 766 (8th Cir. 2011), an airport shuttle driver contended, among other things, that a district court should not have compelled him to arbitrate because of the FAA's exemption of employment contracts of transportation workers. The Eighth Circuit rejected the argument on the ground that "[a]pplication of the FAA's transportation worker exemption is a threshold question of arbitrability," and "[p]arties can agree to have arbitrators decide threshold questions of arbitrability." *Id.* at 769. Construing the parties' agreement to allow the arbitrator to determine arbitrability issues, the court concluded that

the employee "agreed to have the arbitrator decide whether the FAA's transportation worker exemption applied." *Id*.

The Eighth Circuit's opinion in *Green* nowhere addresses the statutory question whether section 4 of the FAA does (or can) require a court to compel arbitration under an agreement to which the Act does not apply. Without considering that issue, *Green* merely labeled the question before the court in that case as one of "arbitrability" and examined the contractual question whether the particular agreement in question contained an agreement to arbitrate arbitrability.

Because *Green* does not discuss the statutory issues decided in this case, it presents no square conflict with the decision below. Even if *Green* were interpreted as implicitly rejecting the reasoning of the court in this case, however, the superficiality of its analysis—indeed, the complete absence of analysis—calls into question whether the Eighth Circuit (let alone any court outside the Eighth Circuit) would follow it in any case in which the logic of the Ninth Circuit's holdings were called to its attention. Swift itself concedes that *Green* displays a "lack of meaningful analysis" of the issue. Pet. 21.

Indeed, no court at any level has followed *Green* in holding that a court may be required by section 4 of the FAA to compel arbitration of a question of arbitrability without first resolving a dispute over whether the FAA applies to the contract at issue. As Swift acknowledges, that issue has not yet arisen in any other federal appellate decision. Thus, even if Swift's characterization of *Green* as conflicting with the decision below were accepted, the conflict would remain an exceedingly shallow one, involving an issue that

has so far been decided only in two circuits, with only one having subjected it to any real analysis.

The decision below, moreover, is in accord with decades of case law involving arbitration agreements *without* clauses delegating arbitrability determinations to the arbitrator. In such cases, courts at all levels have routinely addressed the issue whether a contract is subject to the FAA before compelling arbitration.[2] Because, as this Court explained in *Rent-A-Center*, the FAA operates in the same way with respect to an agreement to arbitrate arbitrability as it does with respect to an agreement to arbitrate any other issue, 561 U.S. at 69, those cases lend great weight to the view of the court below that a court must determine that the FAA applies before it can conclude that the FAA requires it to compel arbitration. Against this weight of authority, a single opinion that does not address the dispositive statutory question fails to present a substantial conflict meriting this Court's attention.

Given the extremely attenuated conflict claimed by Swift, this Court should not devote its resources to

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[2] The cases are legion, so we cite only a few examples: *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272–74 (1995); *Prima Paint*, 388 U.S. at 401–02; *Bernhardt*, 350 U.S. at 200–01; *Bell v. Atlantic Trucking Co.*, 405 F. Appx. 370 (11th Cir. 2010); *Am. Home Assur. Co. v. Vecco Concrete Constr. Co.*, 629 F.2d 961, 963 (4th Cir. 1980); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am., (U.E.) Local 437*, 207 F.2d 450, 453 (3d Cir. 1953); *Owner-Operator Indep. Drivers Ass'n v. C.R. England, Inc.*, 325 F. Supp. 2d 1252, 1258 (D. Utah 2004); *Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co.*, 288 F. Supp. 2d 1033, 1035 (D. Ariz. 2003).

reviewing whether courts in cases involving delegation clauses must compel arbitration without first determining whether the FAA applies. Instead, the Court should wait to see whether that issue arises in additional cases and, if so, whether the courts of appeals coalesce around a common approach or develop a true disagreement. Unless and until those developments occur, it is premature to suggest a need for review by this Court. Particularly in light of Swift's own acknowledgment of how little "meaningful analysis" the lower courts have as yet devoted to the issue, Pet. 21, the issue is one that should be allowed to percolate in the lower courts.

Moreover, the small handful of district court opinions Swift cites involving the courts' application of section 1 to arbitration agreements with delegation clauses suggest that the issue is not, or not yet, one that frequently arises. They also indicate that courts addressing it in those few cases where it does arise are likely to recognize the logic of the Ninth Circuit's approach. Swift identifies only two district court decisions that arguably address the issue, one in the Ninth Circuit and one in the Tenth Circuit. Both follow the reasoning of the court of appeals in this case and hold that whether the FAA applies is a question a court must decide before compelling arbitration under the FAA. *See* Pet. 22, n.10 (citing *Cilluffo v. Cent. Refrigerated Servs., Inc.*, 2013 WL 3508069 (C.D. Cal. Jan. 30, 2013), and *Christie v. Loomis Armored US, Inc.*, 2011 WL 6152979 (D. Colo. Dec. 9, 2011)).[3] In

[3] It is unclear from the opinion in *Christie* whether the case even involved a delegation clause. A third case cited by Swift did not involve the FAA's transportation-worker exclusion and relied on the Ninth Circuit's mandamus ruling only as support for the

(*Footnote continued*)

the unlikely event that one of those cases, or some additional case that may arise in the future, eventually results in an appellate decision that indicates the existence of a substantial disagreement among the courts of appeals over an issue of broad significance, there will be ample time for this Court to address the issue then.

In addition, the question whether a court must enforce an arbitration agreement with a delegation clause before determining whether the agreement is subject to the FAA is unlikely to make a difference in a large number of cases. In many instances, *state* arbitration laws will require arbitration even if the FAA is inapplicable. That happens not to have been true in this particular case because Arizona's arbitration statute contains an exclusion for arbitration clauses in employment contracts. *See* Pet. 5, n.1. Because, however, the Uniform Arbitration Act and the Revised Uniform Arbitration Act, which together have been adopted by most states, do not exclude employment agreements, resolution of the question whether an agreement falls within the FAA section 1 exemption will often not determine whether a case is subject to arbitration.[4]

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unexceptionable proposition that courts must comply with the text of the FAA (including its limitations) in exercising their powers under the Act. *See In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 838 F. Supp. 2d 967, 983 (C.D. Cal. 2012).

[4] *See*, *e.g.*, *Cilluffo v. Cent. Refrigerated Servs., Inc.*, 2012 WL 8523507 (C.D. Cal. Sept. 24, 2012) (holding agreement exempt under FAA section 1 but compelling arbitration under Utah Arbitration Act).

Beyond the absence of a conflict that requires resolution by this Court, additional reasons related to the unique procedural posture of this case further obviate any claimed need for review by this Court. First, as Swift itself points out, the panel in the mandamus proceeding addressed the question of the district court's authority under section 1 as part of a ruling on whether the district court had committed a clear error. Although the panel in the subsequent appeal treated the mandamus opinion as establishing Ninth Circuit precedent on the merits, the opinion in the appeal itself is unpublished and nonprecedential. Thus, the Ninth Circuit has yet to issue a *precedential* ruling on whether its earlier mandamus ruling in fact stands as binding precedent on whether a court must rule on the applicability of the FAA before it compels arbitration under the FAA. That circumstance renders Swift's assertion of a circuit conflict still more theoretical and premature.

Second, the lower courts in this case have not yet determined whether the FAA applies and whether arbitration must be compelled. It remains possible that Swift might prevail on that issue, which would render it unnecessary to address its argument here. If, as the drivers believe is more likely, the district court ultimately denies Swift's motion to compel arbitration because the agreements fall outside the Act's scope, Swift will again have an opportunity to appeal, and if its appeal is unsuccessful, it will again be able to seek review by this Court of its assertion that the FAA requires courts to compel arbitration of cases without resolving the antecedent question whether the Act applies. Although the issue is unlikely to merit review any more at that point than it does now, if a real conflict were unexpectedly to develop, the Court could

address it then. Meanwhile, the Court should follow its usual practice of not addressing cases from the courts of appeals that are in an interlocutory posture. *See Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., opinion respecting denial of certiorari).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 2014