No. 24-2103

United States Court of Appeals
for the
Second Circuit

NATHANIEL SILVA and
PHIL ROTHKUGEL, on behalf of
themselves and all others similarly situated,

Plaintiff – Appellants,

v.

SCHMIDT BAKING DISTRIBUTION, LLC,
and SCHMIDT BAKING COMPANY, INC,

Defendant – Appellees,

On Appeal from the United States District Court for the
District of Connecticut, Civil Action No. 3:23-cv-01695

BRIEF AS AMICI CURIAE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, NATIONAL EMPLOYMENT LAW PROJECT, THE LEGAL AID SOCIETY, AND PUBLIC JUSTICE IN SUPPORT OF PLAINTIFF-APPELLANTS AND IN SUPPORT OF REVERSAL

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(A) and 26.1, amici curiae the International Brotherhood of Teamsters, National Employment Law Project, The Legal Aid Society, and Public Justice state that they are non-profit corporations, that they have no parent corporations, and that no publicly held corporations own 10% or more of their stock.

RULE 29(a)(2) STATEMENT

Pursuant to Federal Rules of Appellate Procedure 29(a)(2) and 29(a)(4)(E), amici certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting this brief; and no person—other than amici, their members, or their counsel—contributed money intended to fund preparing or submitting this brief.

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INTEREST OF AMICI CURIAE

The International Brotherhood of Teamsters ("IBT") is one of the largest labor unions in the United States, with nearly 350 affiliated locals located throughout the country and a total membership of approximately 1.3 million working men and women. The IBT's local affiliates have traditionally represented freight drivers, truck drivers, and warehouse workers, but today its membership encompasses a wide variety of industries and occupations in both the public and private sectors. The IBT's affiliates include Teamsters Joint Council No. 10, which represents more than 45,000 Teamsters members in 21 locals throughout Massachusetts, Connecticut, New Hampshire, Rhode Island, Vermont and Maine. Many of these members are employed as delivery drivers.

In addition to protecting and improving the workplace conditions of its vast and diverse membership, the IBT and its local affiliates are dedicated to the common goal of achieving social and economic justice for workers everywhere. Accordingly, the IBT has a strong interest in preserving labor standards for all working people at both the state and federal level. Moreover, because of its deep roots in the freight and trucking industries, the IBT has a particular interest in safeguarding delivery drivers, including its members, against any erosion of their workplace conditions, bargaining power, or legal rights.

For similar reasons, the IBT also has a strong interest in challenging employer misclassification schemes that undermine labor protections for delivery drivers, particularly those requiring workers to incorporate as independent business entities in order for the employer to evade accountability under labor, employment, or other workplace laws. This tactic serves merely as a liability shield rather than a genuine mark of independence. In another legal context, the IBT is challenging Amazon's use of Delivery Service Provider companies to insulate itself from joint employer liability under labor law, thereby preventing meaningful legal challenges to their employment and business practices. In this case, the use of mandatory arbitration clauses further exacerbates this problem by preempting judicial scrutiny and depriving workers of collective legal recourse to address the misclassification of its workforce. The IBT, for the benefit of its members and workers everywhere, is committed to exposing and dismantling such schemes in order to ensure that corporations may not skirt their legal obligations by imposing fraudulent independent contractor classifications on their workforce.

The National Employment Law Project (NELP) is a non-profit organization with over 55 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP has studied and written about the working conditions and employment relationships of truck drivers, publishing two comprehensive reports on the subject, *The Big Rig: Poverty,*

Pollution, and the Misclassification of Truck Drivers at America's Ports, in 2010, and *The Big Rig Overhaul: Restoring Middle-Class Jobs at America's Ports Through Labor Law Enforcement*, in 2014. NELP has litigated and participated as amicus curiae in numerous cases addressing independent contractor misclassification under federal and state labor and employment laws, including on behalf of truck and delivery drivers, and in a number of cases involving the scope of the Federal Arbitration Act. NELP seeks to ensure that all workers receive the full protection of labor and employment laws and that employers are not rewarded for skirting their obligations.

The Legal Aid Society is the oldest and largest provider of legal assistance to low-income families and individuals in the United States. The Society's Civil Practice operates trial offices in all five boroughs of New York City, providing comprehensive legal assistance. The Society's Employment Law Unit represents low-wage workers in employment-related matters, including claims for unpaid wages and unemployment benefits. The Society regularly encounters employers who misclassify low-wage employees as independent contractors to evade minimum wage, overtime, and other labor laws. Requiring employees to incorporate and enter supposed independent contractor agreements is another scheme that the Society challenges to prevent wage theft.

Public Justice is a national public interest advocacy organization that fights against abusive corporate power and predatory practices, the assault on civil rights and liberties, and the destruction of the earth's sustainability. The organization maintains an Access to Justice Project that pursues high-impact litigation and advocacy efforts to remove procedural obstacles that unduly restrict the ability of workers, consumers, and people whose civil rights have been violated to seek redress in the civil court system. Towards that end, Public Justice has a longstanding practice of fighting against the unlawful use of mandatory arbitration clauses that deny workers their day in court. Indeed, Public Justice routinely litigates cases involving section 1 of the Federal Arbitration Act, including successfully arguing on behalf of the workers in *New Prime, Inc. v. Oliveria*, 586 U.S. 105 (2019) in the Supreme Court.

INTRODUCTION

Plaintiff-Appellants Nathaniel Silva and Phil Rothkugel (referred to throughout as "Plaintiffs") are commercial truck drivers who worked full time transporting baked goods for Defendant-Appellees Schmidt Baking. Both were initially hired to do this work directly as W-2 employees, in which capacity they picked up goods that had traveled from out of state from a centralized warehouse in Connecticut, transported and delivered them to grocery stores and other authorized retail outlets across the state, and unloaded the products onto store shelves. JA0027-

0028.[1] Because that work puts them in a class of workers engaged in interstate commerce, their employment contracts would have clearly been exempt under Section 1 of the Federal Arbitration Act (FAA), 9 U.S.C. § 1, and they would be able to proceed with their wage and hour claims in court.

However, several months into Plaintiffs' employment, Schmidt required them to form limited liability corporations (LLCs) and execute "Distributor Agreements" on behalf of those newly-formed corporate entities in order to keep their jobs. JA0271 (Silva Decl. at ¶¶ 7-8); JA0275 (Rothkugel Decl. at ¶5). These entities were, in effect, legal fictions; sham LLCs without any practical impact on the work, designed to obscure the reality that this remained an employer-employee relationship. Neither plaintiff had ever formed an LLC, and only did so now because they had been instructed to do so. JA0271, Silva Decl. at ¶ 9 ("Schmidt also required me to form a corporate entity in order to sign the agreement. Schmidt assisted me in forming the corporation. It was called Silva Baked Goods, Inc. I had never formed a corporation before."). Nor did the newly formed LLCs convert Plaintiffs into true independent contractors, running their own businesses—they continued to work as delivery workers under the direct control of Schmidt.

[1] "JA" refers here to the Joint Appendix. References to the factual record throughout will cite to the JA.

Essentially nothing changed about the nature of their work or their employment relationship with Schmidt Baking—except that they now appeared to be incorporated entities contracting with Schmidt to transport the goods they had once transported as W-2 employees. Both Silva and Rothkugel continued to work full-time for Schmidt, driving trucks full of Defendant's products as they traveled in interstate commerce to retail stores across Connecticut, subject to substantial employer control and oversight. JA0271-2; JA0276.

Plaintiffs then brought this action for wage theft, alleging that Schmidt had illegally misclassified them as independent contractors, had unlawfully deducted fees from their wages, and failed to pay them overtime. JA0027-32 (First Amended Complaint). But the District Court prevented them from pursuing these claims as a class action in court, instead shunting them into private and individual arbitration, on the grounds that the existence of these sham LLCs pushed them outside of the coverage of the FAA Section 1's transportation worker exemption. Under the District Court's order, workers who create a sham LLC at the request of their employer can never fall within the scope of the FAA's exemption, no matter the actual employment relationship between the parties or the nature of the work performed.

Amici file this brief principally to highlight the prevalence of these kinds of misclassification schemes in low-wage industries, especially for workers in logistics

and last-mile distribution. Independent contractor misclassification is neither new nor rare. It is an employer practice that continues to deprive workers across the economy of minimum wage and overtime, organizing rights, workers' compensation, unemployment insurance, and the many other rights and benefits of employment status. This Court should not now prevent workers like Plaintiffs from bringing their misclassification claims before a judge simply by taking the misclassification at face value and accepting the fiction that these are independent businesses, not workers.

Amici also write to underscore that the decision below wrongly limits Section 1 of the FAA and is profoundly at odds with basic and longstanding principles of labor and employment law. Employers cannot evade their legal obligations to their workers by calling them independent businesses and requiring them to incorporate as a condition of work. By the same token, neither can they force the legal claims of arbitration-exempt workers out of court simply by hiring them through shell LLCs. Plaintiffs were hired to do transportation work—to pick up and transport goods in interstate commerce—work they then performed themselves. Irrespective of the legal form of their employment relationship with Defendants, these are transportation workers exempt from the coverage of the FAA.

ARGUMENT

I. Plaintiffs Are Among the Many Misclassified Workers Required to Incorporate as Independent Businesses, and their Misclassification Claims Should Be Heard in Court.

A. Incorporation Requirements Are an Increasingly Prevalent Form of Independent Contractor Misclassification, Affecting Many Thousands of Low-Wage Workers.

Independent contractor misclassification schemes that require workers to incorporate as LLCs as a condition of signing up to work are increasingly common across the economy. In sectors as different as construction, janitorial, tech sales, and limousine driving, employers are requiring workers to form limited liability corporations, franchise entities, or other shell businesses in order to get or keep their jobs.[2] The putative employer will then contract with the workers in their capacity as "owners" or "partners" of the shell company in order to avoid liability under labor and employment laws.[3] Labeling workers as independent contractors allows employers to shirk the legal obligations of being an employer, shift the costs of doing

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[2] *Minnesota Advisory Task Force on Employee Misclassification, Report to the 2011-2012 Biennium*, 89th Minn. Leg., at 8 (2011), available at https://www.leg.state.mn.us/docs/2011/mandated/110509.pdf (observing that thousands of construction workers have recently formed LLCs in order to avoid compliance with Minnesota law) (last visited 2/14/2025).

[3] *See* Catherine Ruckelshaus and Sarah Leberstein, *Summary of Independent Contractor Reforms New State and Federal Activity* (NELP Nov. 2011), *available at* https://www.nelp.org/app/uploads/2015/03/2011Independent ContractorReformUpdate.pdf (last visited 06/10/2024) (describing LLC as "new" form of misclassification in 2011 to which state legislatures were beginning to respond).

business onto their workers, minimize the risk of union organizing, and avoid paying payroll taxes and making unemployment insurance contributions.[4] Requiring workers to incorporate as independent businesses and to contract work on behalf of those businesses formalizes this practice.

In recent years, low-wage workers who have brought similar claims to those at issue here include: Philadelphia janitors required to purchase a janitorial "franchise" and incorporate it as an LLC, while continuing to perform all of the cleaning work individually and without ever hiring employees;[5] a New York limousine driver who was required to incorporate his own business in order to work as a chauffeur for the senior executives of a company, but who a federal court found was nonetheless an employee under the Fair Labor Standards Act;[6] drywall installation workers in Minnesota misclassified by their construction industry employer and instructed to form individual LLCs;[7] and sales representatives for a telecommunications company.[8]

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[4] *See* Laura Padin, Setting the Record Straight on Independent Contracting, Testimony Before U.S. House of Representatives (Apr. 17, 2023) ("corporations that misclassify their workers can save 20 to 40 percent of payroll costs").
[5] *Myers v. Jani-King of Philadelphia, Inc.*, 2015 WL 1055700 (E.D. Pa. Mar. 11, 2015).
[6] *Gustafson v. Bell Atlantic Corp.*, 171 F. Supp. 2d 311 (S.D.N.Y. 2001).
[7] *State of Minnesota v. Mehr*, Case No. 19A00991 (Minn. 4th Jud. Dist. 2020) (Criminal Compl.).
[8] *Ferraro v. Telia Carrier U.S., Inc.*, 2022 WL 4627881 (D. Mass. 2022).

Labor enforcement agencies at the state and federal level have prosecuted employers for using misclassification schemes like these.[9] The United States Department of Labor has repeatedly pursued wage and hour claims against employers it alleges are misclassifying their workers by requiring them to set up LLCs.[10] And as one state Deputy Labor Commissioner explained over ten years ago, "we will see individuals who are clearly employees called independent contractors. Now, we're seeing them called members of LLCs. The beat goes on."[11]

B. In Last Mile Trucking in Particular, Employers Are Using Incorporation to Evade Obligations and Keep Workers Claims Out of Court.

These misclassification schemes have become especially endemic in the trucking industry. Many companies with significant last-mile distribution businesses have, like Schmidt, shifted their employment practices away from direct W-2

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[9] *See*, *e.g.*, *Perez v. Paul Johnson Drywall*, 14-cv-1062 (D. Ariz. 2014) (U.S. DOL complaint alleging wage theft and independent contractor misclassification of construction workers by Arizona-based construction company).

[10] *See*, *e.g.*, Wage and Hour Division, *WHD News Release: Investigation in Utah and Arizona Secures Wages and Benefits for More Than 1,000 Workers Who Were Wrongly Classified*, United States Department of Labor (April 23, 2015), https://www.dol.gov/newsroom/releases/whd/whd20150518 (describing case in which construction workers initially building houses in Utah and Arizona as employees were then required to become "member/owners" of limited liability companies to continue doing the same work on the same job sites for the same companies).

[11] Anna Deknatel and Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. Pa. J.L. & Soc. Change 53, 81 (2015) (quoting Utah Deputy Labor Commissioner Alan Hennebold).

employment towards ostensible independent contracting, without meaningfully changing the nature of the work.

FedEx, for example, adopted the same business model as Schmidt: treating its delivery drivers as "contractors," requiring them to incorporate and then purchase the rights to distribute FedEx's packages within a certain region, and crafting lengthy independent contractor agreements that purported to allow the drivers to operate their own businesses. *Anfinson v. FedEx Ground*, 244 P.3d 32, 35-36 (Wash. Ct. App. 2010) (describing FedEx's practice of contracting with drivers only through their personal corporate entities, and disregarding the existence of those entities in analysis of the drivers' individual employment status). Multiple federal courts held that these drivers were nonetheless employees. *See Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1047 (9th Cir. 2014) (holding that FedEx delivery drivers were employees under Oregon's wage laws); *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 988 (9th Cir. 2014) (holding that FedEx delivery drivers were employees for purposes of California's wage laws); *Craig v. FedEx Ground Package Sys., Inc.*, 335 P.3d 66, 92 (Kan. 2014) (holding that FedEx delivery drivers were employees for purposes of Kansas' wage laws).

Among baked foods conglomerates in particular, requiring workers to form sham LLCs to do business has become something of a business copycat tactic. Snyder's-Lance, like Schmidt, a baked goods conglomerate with a large distribution

arm (most famous for its pretzels), is a good example. Before its merger with Snyder's, Lance truck drivers had been employed under a standard W-2 employment model. After the merger, the newly formed Snyder's-Lance switched to Snyder's purported independent contractor model—requiring all of its drivers to form LLCs and sign standardized "Distributor Agreements," and deeming them to be independent contractors. *See Mode v. S-L Distribution Co., LLC*, 2021 WL 3921344, *2 (W.D.N.C. Sept. 1, 2021). Flowers Foods, another baked foods company with a large distribution arm—also the defendant employer in *Bissonnette*—uses identical employment arrangements. *See*, *e.g.*, *Bissonnette v. Lepage Bakeries*, 469 F. Supp. 3d 191, 196-200 (D. Conn. 2020); *Brock v. Flowers Foods, Inc.*, 121 F.4th 753 (10th Cir. 2024) (finding delivery drivers to be exempt transportation workers, and noting that the terms of the distributor agreement governing their employment "evince Flowers's continuing control"); *Canales v. Lepage Bakeries, LLC*, 596 F. Supp. 3d 261, 268-9 (D. Mass. Mar. 30, 2022) *aff'd on appeal*, 67 F.4th 38 (1st Cir. 2022). *Martins v. Flower Foods, Inc.*, 463 F. Supp. 3d 1290, 1296 (M.D. Fla. 2020), *vacated and remanded on other grounds*, 852 Fed. Appx. 519 (11th Cir. 2021).

In the last several years, many workers who have experienced wage theft and other employment law violations have challenged these practices, alleging that these Distributor Agreements were sham legal forms designed to obscure what was fundamentally an employment relationship. And reviewing courts have, to a

significant extent, seen through these schemes. Some of these workers have successfully defeated summary judgement, *see*, *e.g.*, *Mode v. S-L Distribution Co., LLC*, 18-cv-150, 2021 WL 3921344 *14-16 (W.D.N.C. Sept. 1, 2021), while others have achieved certification of their class claims, *see*, *e.g.*, *Carr v. Flowers Foods, Inc.*, 15-cv-6391, 2019 WL 2027299 (E.D. Pa. May 8, 2019), and still others have reached valuable settlements, *see*, *e.g.*, *Maranzano v. S-L Distribution Co., LLC*, 19-cv-1997 (M.D. Pa. Nov. 4, 2022); *Rivera v. Martin's Famous Pastry Shoppe, Inc.*, 20-cv-483, 2021 U.S. Dist. LEXIS 28829 (M.D. Pa. Feb. 16, 2021).

In sum, many thousands of individual commercial truck drivers and other transportation workers are hired through employment structures made to look, at least on paper, like arms-length business-to-business arrangements. But like other low-wage workers in misclassification-prone industries, they tend to work full-time for a single employer, under their control and supervision. Stripped of employee protections by these fictions, misclassified workers are often victims of wage theft and other violations of their workplace rights.

In recent years, many workers have challenged these practices and the misclassification schemes that enable them, bringing classwide claims that cannot be pursued in individual arbitration. In these cases, workers have repeatedly tried to pose a basic question to our legal system: is this form of employment illegally depriving them of their workplace rights? But the District Court's decision, by taking

at face value the same fictitious corporate structure workers are arguing is illegal, would deny them an answer to that question. Left to arbitrate their claims, workers would have to proceed individually and would be unable to obtain injunctive relief that might force a change of employer practice. Any arbitral decision would be private and non-precedential, and would offer no guidance to employers, workers, or courts as to the legitimacy of these practices.[12] In our view, that outcome would represent a failure of the justice system.

II. The District Court's Decision Is at Odds with Recent Caselaw Under Section 1 of the FAA and with Basic Principles of Employment Law.

A. The Court Should Focus on the Actual Work Typically Performed, Not the Legal Form of the Employment Relationship.

The District Court erred in concluding that Plaintiffs' contracts were not exempt under the FAA simply because they were required to use newly-incorporated businesses to enter into an employment contract. In *New Prime v. Oliveira*, 586 U.S. 105 (2019), the Supreme Court held that independent contractors may nonetheless be "transportation workers" with "contracts of employment" covered by the Section 1 exemption of the FAA. In assessing whether Mr. Oliveira, a long-haul trucker operating as an independent contractor but doing transportation work for New Prime, was covered under Section 1, the Court maintained that the pertinent question was

[12] *See* Daniel Ocampo, *FAQ on Mandatory Arbitration in Employment*, NELP Fact Sheet (Oct. 2024); Hugh Baran & Elisabeth Campbell, *Forced Arbitration Helped Employers Who Committed Wage Theft Pocket $9.2 Billion in 2019 From Workers in Low-Paid Jobs*, NELP Data Brief (June 2021).

whether his contract was an agreement to perform work, not the legal form of the relationship. *Id*. at 121 (holding that because "contract of employment" was not a term of art at the time of the Act's adoption in 1925, it should be read broadly to embrace independent contractor relationships…) Although Mr. Oliveira's contract with New Prime was not an employment contract between an employer and employee as those terms are used today, it functioned as "an agreement to perform work," bringing it within the sweep of the Section 1 exemption. *Id*.

In fact, Oliveira had contracted to work for New Prime through an incorporated entity—called "Hallmark Trucking LLC"—that New Prime required him to set up. *See Oliveira v. New Prime, Inc.*, 141 F. Supp. 3d 125, 128 (D. Mass. 2015). But the existence of an LLC mediating the relationship between the transportation worker and the company employing him to perform work did not change the Supreme Court's conclusion that his was a "contract of employment" under Section 1's exemption. In short, the Supreme Court has already held that an agreement between two corporations can be a covered "contract of employment," as long as it is an agreement for the "performance of *work* by *workers*." *New Prime*, 586 U.S. at 116 (emphasis in original).

A few years later, in *Southwest Airlines v. Saxon*, the Supreme Court made clear that the focus of the Section 1 analysis is on "the actual work that the members of the class, as a whole, typically carry out." 596 U.S. 450, 456 (2022). *See also*

Fraga v. Premium Retail Servs., 61 F.4th 228, 235 (1st Cir. 2023) (observing that "Saxon's repeated and emphasized command to focus on what the workers themselves actually do strongly suggests that workers who do transportation work are transportation workers."). Then the following year, in *Bissonnette v. Lepage Bakeries*, the Court reaffirmed this focus. 601 U.S. 246 (2024). In that case, the plaintiff workers bringing wage and hour claims were commercial truck drivers doing last-mile delivery work for a bakery but operating through LLCs. Although the *Bissonnette* Court did not directly address the status of the workers as purported independent contractors whose contracts of employment were formally structured as business-to-business arrangements between corporate entities, *see id*. at 249, the Court focused its analysis on the actual "performance of work." *Id.* at 253.

These cases instruct courts to look past labels and formalities to whether the contract is an agreement to perform work and what type of work is performed under the contract. In this case, Plaintiffs continued to perform transportation work after Schmidt formally ended their W-2 employment, transporting and delivering goods in interstate commerce on behalf of their respective newly-formed LLCs. And they did so under an agreement with Schmidt to perform that work. While the legal form of their employment relationship looked different, their actual work remained unchanged, as did their status as covered transportation workers under Section 1.

B. The Amazon Cases in Other Circuits Are Distinguishable and Do Not Support the District Court's Decision.

The District Court also erred in relying heavily on cases from other federal courts of appeals holding that businesses entities cannot be transportation workers under Section 1 of the FAA. Two of the appellate cases cited, in the Fourth and Ninth Circuits, were decided in regard to Amazon delivery subcontractors on facts quite different from those present here.[13] In neither of those cases was the plaintiff an individual worker operating under a shell corporation to perform transportation work. Those cases do not concern delivery drivers at all; the plaintiffs there were corporate middlemen tasked with supervising a large number of truck drivers. Properly understood, they do not support the court's decision below.

In *Amos v. Amazon Logistics Inc.*, 74 F.4th 591, 597 (4th Cir. 2023), the plaintiffs compelled to arbitrate their claims were Amazon delivery subcontractors known as "Delivery Service Partners," which are the entities responsible for the vast majority of Amazon's last-mile distribution. But these Delivery Service Partners were not individual truck drivers operating through the corporate veneer of an LLC. They were actual corporate entities who hired and maintained payroll for tens and sometimes hundreds of delivery drivers. As the Fourth Circuit panel wrote in *Amos*, the plaintiff's LLC—through which she contracted with Amazon, and under which

[13] The other appellate case is the Sixth Circuit case *Tillman Transportation, LLC v. MI Business Incorp.*, 95 F.4th 1057 (6th Cir. 2024).

she was bound by an arbitration clause—"was not some legal fiction existing only to shield Amazon from unwanted liabilities… It was not a 'nominal party' or 'mere window dressing' that could be swept aside." Rather, it "was a major North Carolina employer in and of itself, with several hundred delivery drivers on its payroll." *Id.*, 74 F.4th at 597.

Similarly, the plaintiffs in *Fli-Lo Falcon, LLC v. Amazon*, 97 F.4th 1190 (9th Cir. 2024) were Amazon Delivery Service Partners each with many employees hired to deliver packages to Amazon customers. Although the majority declined to join the Fourth Circuit in addressing the issue of fictitious incorporation, Judge Thomas did so in her concurring opinion. *See id*. at 1201-02 (Thomas, J., concurring). She noted that the plaintiffs in the case were "not sham corporations, but bona fide business entities, and their relationship with Amazon [was] not an employment relationship, but a commercial one." *Id*., at 1202. But she made sure to register her concern as to how the decision might play out under a different set of facts: it might "allow companies to contract around the FAA's exemption by forcing their transportation workers to create sham corporations, then contracting with those corporations rather than employing the workers directly." *Id*.

Judge Thomas' hypothetical is exactly the situation presented in this case. Plaintiffs were required to form sham corporations in order to keep their jobs, and asked to execute Distributor Agreements that function in practice as straightforward

contracts of employment. Plaintiffs then brought this action to challenge these practices as legal fictions designed by Schmidt to avoid its obligations under wage and hour law. This Court's order now points to those exact corporate forms as grounds to decline Plaintiffs a judicial forum to resolve those claims. It is a rule of decision that stands in contrast to the decisions in *Amos* and *New Prime*, and that threatens to open up a yawning loophole in the coverage of the FAA's Section 1 exemption.

C. The Court's Ruling would put the FAA Squarely at Odds with Longstanding Principles of Labor and Employment Law.

Finally, decades of case law under numerous federal and state labor and employment statutes make it crystal clear that incorporation does not shield employers from their obligations to their workers. *See*, *e.g.*, *Frankel v. Bally, Inc.*, 987 F.2d 86, 90–91 (2d Cir. 1993) ("[T]he corporate form under which a plaintiff does business is not dispositive in a determination of whether an individual is an employee or an independent contractor within the meaning of the ADEA."); *In re FedEx Ground Package System, Inc.*, 712 F. Supp. 2d 776, 793 (N.D. Ind. 2010) ("if FedEx retains the right to control unincorporated drivers, it retains the right to control incorporated drivers"); *Parilla v. Allcom Constr. & Install. Svcs.*, LLC, 2009 WL 2868432 (M.D. Fl. 2009) (plaintiff who incorporated was an employee; incorporation was a "façade"); *DaSilva v. Border Transfer of MA, Inc.*, 296 F. Supp. 3d 389, 402 (D. Mass. 2017) ("incorporation cannot be a shield to prevent liability

under the [Massachusetts] Wage Act"); *Anfinson v. FedEx Ground*, 244 P.3d 32 (Wash. Ct. App. 2010) (disregarding delivery drivers' personal corporate entities in analysis of the drivers' individual employment status); *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1103 (9th Cir. 2014) *cert. denied*, 135 S. Ct. 877 (2014) ("While 'purporting to relinquish' some control to the drivers by making the drivers form their own businesses and hire helpers, [defendant] 'retained absolute overall control' over the key parts of the business.").

There is no federal statute that allows employers to decide for themselves—through their choice of contract term or by label—whether their workers are protected by statute. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729–30 (1947) ("Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the [Fair Labor Standards] Act."); *Padovano v. FedEx Ground Package Sys., Inc.*, 2016 WL 7056574, at *4 (W.D.N.Y. Dec. 5, 2016) (explaining that "[i]f any business could avoid [wage and hour law] by simply classifying their workers as independent contractors and compensating them through corporations rather than paying them directly, [wage and hour law] would be rendered useless").[14]

[14] *See also Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 290 (7th Cir. 2016) ("[S]tatus as an employee for purposes of the FLSA depends on the totality of circumstances rather than on any technical label[.]"); *N.L.R.B. v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968) (explaining that employee status under the

The FAA is no different. Whatever corporate forms mediate the relationship between Schmidt and its drivers, their contracts of employment were "agreement[s] to perform work." *New Prime*, 586 U.S. at 121.

CONCLUSION

For the foregoing reasons, we urge this Court to reverse the decision below.

Dated: Feb. 21, 2024

Respectfully submitted,

/s/Catherine Ruckelshaus

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NLRA is not determined by reference to a "shorthand formula or magic phrase," but by assessing "all the incidents of the relationship" and the "total factual context"); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) (holding the same under ERISA).

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 29(a)(5) because it contains 4,820 words, excluding the items exempted under Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a proportionally spaced typeface in 14-point Times New Roman.

Dated: February 21, 2025
New York, New York

/s/ Catherine Ruckelshaus
Catherine Ruckelshaus
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CERTIFICATE OF SERVICE

I, Catherine Ruckelshaus, certify that on February 21, 2025, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 21, 2025
New York, New York

/s/ Catherine Ruckelshaus
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