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IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X
CIRCUIT CITY STORES, INC., :
Petitioner :
v. : No. 99-1379
SAINT CLAIR ADAMS :
- - - - -X

Washington, D.C.
Monday, November 6, 2000

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:02 a.m.

APPEARANCES:
DAVID E. NAGLE, ESQ., Richmond, Virginia; on behalf of
the Petitioner.
MICHAEL RUBIN, ESQ., San Francisco, California; on behalf
of the Respondent.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 99-1379, Circuit City Stores v. Saint Clair
5 Adams.

6 Mr. Nagle.

7 ORAL ARGUMENT OF DAVID E. NAGLE

8 ON BEHALF OF THE PETITIONER

9 MR. NAGLE: Mr. Chief Justice, and may it please
10 the Court:

11 The Federal Arbitration Act is a declaration of
12 Federal policy favoring arbitration, arbitration
13 agreements, and its coverage extends to the very limits of
14 Congress' Commerce Clause power. There's an exception to
15 the act, the scope of which is in dispute today. The
16 respondent asserts that all contracts of employment are
17 excluded from the coverage of the act. That simply cannot
18 be correct.

19 The act does not say that it excludes all
20 contracts of employment. Section 1 excludes only certain
21 kinds of employment contracts, the contracts of employment
22 of seamen, railroad employees, any other class of workers
23 engaged in foreign or interstate commerce.

24 Beginning nearly 50 years ago, 11 courts of
25 appeals have read that text in a uniform, consistent

1 manner, finding it to create a narrow exclusion applicable
2 only to those workers who are actually engaged in the
3 movement of people or goods across State lines, and we
4 contend that that's the only interpretation consistent
5 with the text of the statute.

6 QUESTION: Is the word class important to your
7 argument?

8 MR. NAGLE: Your Honor --

9 QUESTION: Or would your argument be just the
10 same without --

11 MR. NAGLE: I do not believe that it
12 significantly alters it. I think the class is a term
13 which is used in the Railway Labor Act, for instance,
14 which was under consideration and passed the following
15 year to refer to categories of craft or class of
16 employees.

17 QUESTION: Well, it would seem to me to help
18 your argument somewhat, because we -- the statute asks us
19 to think in terms of classes of workers, rather than
20 individual workers engaged --

21 MR. NAGLE: Oh, certainly, Your Honor. It
22 identifies a group or a category of employees in the same
23 manner that seamen and railroad employees are grouped.
24 Seamen, of course, was a recognized term. As the opinion
25 of the Court -- as Justice O'Connor's opinion for the

1 Court in McDermott International recognized, seamen was a
2 term having specific meaning. Railroad employees was a
3 term defined under the Transportation Act of 1920 and also
4 in the Railway Labor Act, so --

5 QUESTION: Mr. Nagle, I guess at the time that
6 this act was adopted in -- what, 1925?

7 MR. NAGLE: Yes, Your Honor.

8 QUESTION: We had not taken as broad a view of
9 the Commerce Clause power as is true today, is that
10 correct?

11 MR. NAGLE: I would acknowledge that, Your
12 Honor.

13 QUESTION: And so Congress probably didn't have
14 in mind that its jurisdiction was as broad as we would
15 have subsequently indicated, and apparently it intended at
16 least that the act not include or cover contracts of
17 employment over which their authority to regulate was very
18 clear, right?

19 MR. NAGLE: That is correct, Your Honor. They
20 were specifying seamen and railroad employees.

21 QUESTION: And the indications were that at
22 least then Secretary of Commerce Hoover thought employees
23 shouldn't be covered at all, and he presented language to
24 the Congress which approved it, and yet you want us to say
25 that Congress did intend to include for arbitration

1 contracts of employment over which the jurisdiction was
2 most questionable, and yet exclude it for those where the
3 jurisdiction of Congress was clearest at the time, which
4 seems a little odd to me.

5 MR. NAGLE: Well, there are several points in
6 response, Your Honor. First, the letter from Secretary
7 Hoover was a letter submitted to the committee in 1923,
8 written on the day that it was entered, and there was no
9 further explanation.

10 I would also submit that we need to look to the
11 language of the coverage provision, section 2 of the act,
12 and contrast that with the language contained in section 1
13 of the act.

14 I acknowledge that Commerce Clause authority
15 over seamen and railroad employees would have been clear,
16 but I would also point -- bring to the Court's attention,
17 of course, the fact that there were statutory mechanisms
18 in place, and also the single item that we know most
19 clearly is that the seamen as a group, through their
20 representative, Mr. Bruce, have specifically asked that
21 they be carved out. While it may be somewhat difficult to
22 determine exactly what Congress' motive was, they were
23 responding to a request from a constituency group to be
24 carved out.

25 QUESTION: Well, the other most troublesome

1 point for me, anyway, is this Court's decision in Allied-
2 Bruce, which dealt with section 2, and said that we're
3 going to interpret it now as reaching the full scope of
4 Congress' Commerce Clause power. Why would we not do the
5 same for this section 1?

6 MR. NAGLE: Well, in Allied-Bruce, which is one
7 of the cases upon which we would principally rely, that
8 was an interpretation of section 2, the coverage, and
9 certainly was making it clear that the Court recognized
10 that Congress was acting to the full with respect to its
11 Commerce Clause power.

12 Section 1 is an exclusion. It is to be narrowly
13 construed. I would submit that there is a general policy
14 that whenever we have a statute which clearly enunciates a
15 public policy of broad scope that any exclusion to that
16 should be narrowly construed.

17 QUESTION: Why is that? I mean, it seems to me
18 an exception is just as important as the rule. Why should
19 we unrealistically construe it just because it's an
20 exception?

21 MR. NAGLE: I certainly would not suggest
22 that --

23 QUESTION: Would you tell that to the members of
24 Congress? When you vote for this exception, bear in mind
25 that we're not going to take it to have its most

1 reasonable meaning. We're going to construe it narrowly.
2 Why? Why would we do that?

3 MR. NAGLE: I apologize, Your Honor. I was not
4 suggesting that we take an unreasonable meaning. In fact,
5 I'm suggesting that we take the most reasonable
6 construction that Congress --

7 QUESTION: Well then, fine, so your case really
8 turns, it seems to me, on the point that the language used
9 by the Congress that enacted this statute in section 1 was
10 at that time narrower than the language used in section 2.

11 MR. NAGLE: Absolutely, Your Honor.

12 QUESTION: Now, what support do you have for
13 that?

14 MR. NAGLE: I would point the Court first to --
15 for contemporaneous construction of the language I would
16 point the Court to Illinois Central Railroad v. Behrens, a
17 1914 case, where the Congress clearly recognized -- the
18 Court clearly recognized that the Congress had very broad
19 authority under the FELA statute over instate commerce,
20 recognized that even trains, for instance, moving in
21 intrastate commerce were nevertheless in the channels of
22 commerce, and so when the FELA in 1914 limited its
23 coverage to an employee who was injured while employed in
24 commerce, this Court found that that was a narrower
25 construction --

1 QUESTION: Employed in is not the same as
2 engaged in, but I'd like to go back, first, to the
3 involving term.

4 MR. NAGLE: Yes.

5 QUESTION: You're using words and say that --
6 saying that in the second section, involved is a very
7 broad term, and in the first section engaged is a narrow
8 term.

9 MR. NAGLE: Yes, Your Honor.

10 QUESTION: But some of the briefs in this case
11 tell us that involved in is not affecting commerce, that
12 indeed this is the only piece of Federal legislation that
13 uses the words, involved in. Is that so?

14 MR. NAGLE: To my knowledge it is, and that's
15 what the Court indicated in the Allied-Bruce decision.

16 QUESTION: So -- but you're asking us to say
17 that Congress meant in 1925 something different in using
18 these two words.

19 MR. NAGLE: In involving commerce says, as this
20 Court found in Allied-Bruce, that it's the functional
21 equivalent of affecting commerce, which is --

22 QUESTION: Well, let's be precise about the
23 words. Are we talk about, involved in commerce, or
24 involving commerce?

25 MR. NAGLE: Involving commerce, in section 2,

1 the coverage.

2 QUESTION: That's quite different than involved
3 in commerce. You can say someone is involved in commerce.
4 I think that's quite different from saying that somehow
5 this -- it's a contract involving commerce.

6 MR. NAGLE: I -- I'm sorry, Your Honor, I'm not
7 using the phrase, involved in --

8 QUESTION: I think it's important to your case
9 that involving commerce is a broader concept than involved
10 in commerce.

11 MR. NAGLE: Yes, Your Honor. I'm not aware that
12 involved --

13 QUESTION: Involving commerce means pertaining
14 to commerce.

15 MR. NAGLE: Yes, Your Honor.

16 QUESTION: Involved in commerce means pretty
17 much the same as engaged in commerce, it seems to me, and
18 so if involving commerce is the same as involved in
19 commerce, and involved in commerce is the same as engaged
20 in commerce, you lose.

21 MR. NAGLE: Your Honor, I --

22 QUESTION: To put it shortly.

23 MR. NAGLE: I am not referring to the phrase,
24 involved in commerce.

25 QUESTION: Because it doesn't appear. The

1 phrase is involving commerce.

2 MR. NAGLE: Yes, Your Honor.

3 QUESTION: That's the broad coverage of
4 section --

5 MR. NAGLE: Section 2, yes.

6 QUESTION: Of section 2.

7 MR. NAGLE: Yes. Section 1's exclusion is for
8 contracts of employment of seamen, railroad employees, and
9 other workers engaged in commerce.

10 QUESTION: And they could have said in that
11 section, don't you think -- do you think it would have
12 been any different if they had said, seamen involved in
13 commerce, as opposed to engaged in commerce?

14 MR. NAGLE: As Your Honor has recognized, they
15 did not use involved in. That perhaps would have
16 supported Mr. Adams' argument that they were trying to
17 show parallel construction. I would submit, Your Honor,
18 that the fact that the Congress could have ended with the
19 phrase, contracts of employment, then we would not be here
20 today if that was their intent, or could have used
21 parallel language, which would have supported respondent's
22 suggestion that they had the same meaning.

23 QUESTION: But isn't the Congress' notion of the
24 limits of its power, doesn't that explain why they didn't
25 say contract of employment, period?

1 MR. NAGLE: I would not, Your Honor, because if
2 section 2 is the coverage provision and Congress was
3 making reference to its Commerce Clause power in coverage,
4 there would certainly be no reason for them to make
5 reference to or be concerned by the limits of their
6 Commerce Clause power in drafting an exclusion from the
7 statute. If they had --

8 QUESTION: Well, can you give us a better
9 explanation? I mean, this goes back to Justice O'Connor's
10 question about the oddity of an exclusion which excluded
11 those contracts which were most obviously at the time of
12 drafting within the congressional power, without touching
13 those as to which the power was doubtful, or perhaps
14 absent, and as I understood your answer, your answer was a
15 suggestion that perhaps politics was simply the answer. I
16 mean, the one particular political group had asked for it.

17 Can you think of any other reason to draw what
18 to me also seems like an odd distinction in the
19 congressional mind?

20 MR. NAGLE: I would point to Judge Posner's
21 opinion in the Pryner case out of the Seventh Circuit, in
22 which he concluded that the Seventh Circuit concluded in
23 his opinion that this section 1 exclusion should be
24 narrow. He pointed again to the advocacy of the seamen's
25 union, and the recognition that they were a heavily

1 regulated industry that already had a statute in place
2 that provided for an administrative process for resolution
3 of disputes.

4 QUESTION: Then why didn't they just stop with
5 seamen?

6 MR. NAGLE: His -- Judge Posner's suggestion is
7 that the railroad industry, the Railway Labor Act was in
8 the works at the time.

9 QUESTION: Okay.

10 MR. NAGLE: It was also a similarly heavily
11 regulated --

12 QUESTION: All right.

13 MR. NAGLE: -- heavily unionized industry, and
14 Judge Posner's opinion goes on that Congress may have
15 anticipated, quite correctly, that motor carriers would
16 also become a heavily regulated industry, and in the --

17 QUESTION: What conclusion do you draw from
18 that?

19 I'm wondering, under your view, are employees of
20 travel agents covered within the exclusion, or are they
21 covered?

22 MR. NAGLE: Travel agents, I would -- under our
23 interpretation I do not believe that they would be covered
24 because they're not engaged --

25 QUESTION: How about ticket agents for

1 railroads?

2 MR. NAGLE: Railroad employees, to the extent
3 that they fall within the definition of employee, for
4 instance, under the Railway Labor Act, I would submit that
5 because railroad employees is a -- or employees is a term
6 under that statute, which includes various employees --

7 QUESTION: So you draw a distinction between
8 ticket agents who sell them as employees of the railroad
9 and those who sell them as employees of the travel agent?

10 MR. NAGLE: I draw a distinction --

11 QUESTION: You think that's what Congress had in
12 mind?

13 MR. NAGLE: I draw the distinction because
14 Congress specifically referred to railroad employees.
15 When we get into travel agents -- and I apologize if you
16 were saying employees of railroads who are travel agents,
17 but I think --

18 QUESTION: -- railroad employees engaged in
19 foreign or interstate commerce.

20 MR. NAGLE: Yes, Your Honor.

21 QUESTION: But I take it what you're suggesting,
22 you have to give some content to other class of workers
23 engaged in commerce. Don't you suggest that that's
24 engaged in transportation or something?

25 MR. NAGLE: Yes, Your Honor. Certainly, in

1 trying to read the statute --

2 QUESTION: You see, if we accept your view we
3 have to have a jurisprudence of what transportation is.
4 If we accept the respondent's view, we have to have a
5 jurisprudence on what an employment contract is. Both
6 require interpretation, but the latter is a statutory
7 term.

8 MR. NAGLE: Yes, Your Honor.

9 QUESTION: The former is not.

10 MR. NAGLE: I would acknowledge that in order to
11 determine the meaning of the final phrase there, any other
12 class of workers engaged in foreign or interstate
13 commerce, that we need to -- that we need primarily to
14 recognize the doctrine of ejusdem generis, and the fact
15 that it does follow after the references to seamen and
16 railroad employees.

17 They are specific groups in a list. They
18 certainly have something in common, that being that they
19 are transportation workers, and I would also submit that
20 it's inappropriate to read a statute to eliminate the
21 reference to seamen and railroad employees. If reading it
22 as respondent contends, it's essentially an exclusion for
23 all contracts of employment of all workers engaged in
24 foreign or interstate commerce, and that's, as Judge
25 Edwards said in the Cole v. Burns Security case --

1 QUESTION: Well, I suppose their answer is,
2 Congress has already regulated seamen, they're about to
3 regulate railroad employees, so they want to make very
4 sure that those are excluded, and then they go on to the
5 limits of their Commerce power, which were vague at the
6 time, and give everyone else the same protection that
7 seamen and railroad workers have.

8 MR. NAGLE: I simply don't think that that
9 conforms with the statute. If we are just reading the
10 exclusion, Congress has -- section 2, the coverage is very
11 broad, using the language to demonstrate the breadth of
12 coverage. The exclusion is very narrow, and if one
13 chooses to look to the legislative history that Mr. Adams
14 and his amici point to, there's very, very limited
15 legislative history. There's essentially one hearing
16 before a Senate committee in 1923 with three Senators
17 present.

18 QUESTION: Well, skipping the legislative
19 history, Mr. Nagle, why is it so narrow? It says, engaged
20 in commerce, and even in 1925 that extended beyond
21 transportation workers. You want the cutoff to be
22 transportation workers, I take it.

23 MR. NAGLE: Your Honor, I'm not aware of cases
24 that in 1925 would have said, engaged in commerce would go
25 beyond transportation workers. I think that involving

1 commerce would -- the section 2 language goes to the
2 breadth of it, but in commerce, this Court, as I
3 mentioned, Illinois Central Railroad case, the Gulf Oil
4 Corporation case, the Bunte Brothers case, in each of
5 those the Court said that in commerce is not the
6 equivalent of affecting commerce.

7 In the Bunte Brothers case the Court said, words
8 derive vitality from the aim and nature of the specific
9 legislation.

10 QUESTION: So communications workers, those were
11 not included as engaged in commerce?

12 MR. NAGLE: They would not have been included as
13 engaged in commerce.

14 QUESTION: You say as of 1925, the only workers
15 engaged in commerce were those who were engaged in the
16 moving of goods, is that --

17 MR. NAGLE: In the movement of people and goods
18 across State lines, Your Honor.

19 QUESTION: Well, if that's the case, then I
20 think what we're faced with on your own interpretation is
21 an exclusion which is as complete in relation to the
22 coverage of employees as the inclusion at the beginning of
23 the provision is in relation to commerce in general, and
24 so it seems to me that your argument supports the
25 interpretive theory that Congress was, in fact, in each

1 instance, in the coverage and in the exclusion,
2 legislating to the limits, and if the limits change as to
3 the one, we ought to recognize a change in the limits as
4 to the other.

5 MR. NAGLE: I would disagree, Your Honor, in --
6 with respect to the example that Justice Ginsburg just
7 gave, with respect to telephone, telegraph workers. In
8 1877 this Court in the Pensacola Telegraph case had found
9 that telephone telegraph workers affected commerce, were
10 involved in commerce, but they were not engaged in
11 commerce in that they were not actually moving goods --
12 certainly we would acknowledge that telephone operators
13 were not moving goods across State lines.

14 QUESTION: When you are talking about all
15 workers, a lot of water has flowed over the dam or under
16 the bridge since 1925.

17 MR. NAGLE: Yes, Your Honor.

18 QUESTION: I just would like to focus, you to
19 focus for a minute on the consequences. One of the things
20 that's strongest for you is that in all the other circuits
21 but the Ninth, for a long time have limited to
22 transportation workers this exemption.

23 MR. NAGLE: Certainly, Your Honor.

24 QUESTION: So what bad would happen if we bought
25 the Ninth Circuit? That is, in thinking about it, I

1 thought that the purpose of this act is to stop State
2 court hostility to arbitration. Isn't that the basic
3 idea?

4 MR. NAGLE: Yes, Your Honor.

5 QUESTION: All right. So if we read workers out
6 of it you still have the NLRB there today, and doesn't the
7 NLRB have the power today to protect any worker, just --
8 you wouldn't need this -- to protect them because the NLRB
9 operating under section 301, or just its general power,
10 could protect all these workers adequately, and therefore
11 there's no reason not to read them out and to invent
12 distinctions between transportation and other kinds of
13 worker. Now, what's your response to that?

14 MR. NAGLE: Well, certainly the National Labor
15 Relations Act and the Labor Management Relations Act come
16 into play in the collective bargaining context.

17 QUESTION: Who wouldn't they have power to
18 protect? Who wouldn't they have power -- if the States
19 become unreasonable in respect to arbitration, i.e., they
20 stop enforcing arbitration agreements with workers,
21 couldn't the NLRB come right in there and say, don't be
22 unreasonable, we want the right rules here, and we'll both
23 get the arbitration and protect the workers?

24 Is there anyone on -- in other words, on the
25 Ninth Circuit interpretation, that's somehow going to be

1 left out in the cold when they want an arbitration
2 agreement?

3 MR. NAGLE: Your Honor, certainly the Ninth
4 Circuit started its analysis in the Craft case, which was
5 a collective bargaining agreement case --

6 QUESTION: I mean, I'm interested in a practical
7 fact. This statute is to stop the hostility of the States
8 to arbitration. I wouldn't want workers who wanted
9 arbitration to be left out in the cold, any more than
10 anybody else, and then I thought, well, if we accept the
11 Ninth Circuit they're not going to be left out in the
12 cold, because they have the NLRB in there to protect them
13 and, moreover, it will help them somewhat in terms of the
14 purposes because they won't get these agreements shoved in
15 their face and they will be able perhaps to have more
16 freedom to choose.

17 But I'm not -- I'm not expressing a view on
18 that. Whatever the right thing is, we have people there
19 on the board to protect them. That's -- so in other
20 words, if I deny your interpretation, am I causing any
21 harm? Leaving the words out of it, I want to know the
22 consequences.

23 MR. NAGLE: The consequences, Your Honor, is
24 that arbitration and the Federal policy favoring
25 arbitration, which is designed to reduce litigation, will

1 lead to a period of tremendous turmoil while the courts
2 are trying to grapple with the application and enforcement
3 of arbitration agreements.

4 The extent to which they're enforceable under
5 various laws, choice of law provisions, when arbitration
6 agreements contain a governing law provision, the question
7 that I think is very significant, although it's only
8 mentioned in Mr. Adams' brief in footnote 19, the question
9 of arbitrability of Federal employment statutes, if the
10 FAA is taken out of the mix, where this Court relied in
11 part on the liberal Federal policy favoring arbitration in
12 Gilmer and used that to -- as a consideration with respect
13 to enforcement of arbitration agreements, if the FAA is
14 taken out of the mix, I think note 19 in Adams' brief
15 suggests that there's an effort to avoid arbitration of
16 even the Federal claims, and --

17 QUESTION: Well, even if the FAA doesn't apply
18 to employment contracts, State arbitration rules can --
19 they can be used, can they not?

20 MR. NAGLE: There are State arbitration rules
21 which vary dramatically from State to State, Your Honor,
22 certainly. That I think does not solve the issue,
23 because, as this Court has recognized on a number of
24 occasions, one of the great advantages of the broad
25 application of the FAA is providing that substantive law

1 of arbitrability.

2 If we are to revert back to the State
3 substantive law of arbitrability, we will have the
4 determinations made on various statutes, we'll have the
5 issues that arise when a contract arbitration agreement is
6 entered into in one State, performed in a third, a claim
7 is brought in a third, we'll have removal to Federal court
8 and a question of which State substantive statute on
9 arbitrability --

10 QUESTION: Why would you have removal to the
11 Federal court unless you had diversity if it's State law
12 that controls?

13 MR. NAGLE: In -- there may be cases where there
14 is diversity, just a --

15 QUESTION: Well, if these are employment
16 relations, wouldn't most of them be diversity -- most of
17 them be nondiverse, that is, a worker and employer in the
18 same State?

19 MR. NAGLE: I would disagree, Your Honor. I
20 think there are many large national corporations that --
21 such as Circuit City which is primarily -- principal place
22 of business is in Virginia, and so to the extent that
23 large companies have employees in many States there may
24 very well be diversity, and then when the matter is
25 removed on diversity grounds there will be the question as

1 to which State substantive law of arbitrability would
2 apply.

3 QUESTION: Wouldn't it be the place where the
4 work is performed?

5 MR. NAGLE: Well, it may be, Your Honor. On
6 some occasions this Court has had arbitration agreements
7 such as in Allied-Bruce, where it was essentially one
8 sentence in a termite prevention contract. A number of
9 employers since Gilmer, and in reliance on Gilmer, have
10 developed very sophisticated arbitration programs which
11 include, among other things, governing law provisions, and
12 so you may have a corporation which is based in one State,
13 has a detailed arbitration rules and procedures, as
14 Circuit City does --

15 QUESTION: Nevertheless, it would be State law
16 that would control, some State law.

17 MR. NAGLE: It will be some State law. One of
18 the issues that the courts will need to determine is when
19 we have a governing law provision such as in the Circuit
20 City agreement, specifying that the Virginia Uniform
21 Arbitration Act would apply, and then the question will
22 arise whether, for instance, California would honor that
23 reference to that State statute.

24 I think it's simply an issue that the courts
25 will have to grapple with for a number of years until

1 someone returns here on that issue.

2 QUESTION: Mr. Nagle, at the time this -- the
3 exclusion was passed, can you tell me whether it was
4 customary to require each party to bear a portion of the
5 cost of the arbitration, so was it -- would it have been
6 customary at that time to require employees to pay part of
7 the up-front arbitration costs?

8 MR. NAGLE: Your Honor, I didn't hear the
9 beginning. Are you saying in 1925 --

10 QUESTION: Yes.

11 MR. NAGLE: -- would it have been customary?

12 QUESTION: Yes.

13 MR. NAGLE: It was an administrative machinery
14 that was put in place. I cannot represent to the Court
15 that it would have been customary on that. I do not know,
16 Your Honor.

17 QUESTION: Could you tell me just for the
18 record, what are the best cases that you have to establish
19 the proposition that at the time this legislation was
20 enacted it was already well-established that engaged in
21 commerce was not the limit of the Congress' power over
22 interstate commerce? What are your best cases?

23 MR. NAGLE: Illinois Central Railroad v.
24 Behrens, the Shanks v. Delaware, the railroad case. Those
25 are pre-FAA cases. Certainly subsequent interpretation,

1 if you look at Bunte Brothers case, which was involving --
2 I'm sorry. In commerce was not equivalent to affecting
3 commerce. It was sometime later, but it referred to the
4 Clayton Act, which had been passed in 1908.

5 In fact, another point to note on that case is
6 that they noted where it was reenacted in 1950, and that
7 Congress did not change the language, despite the fact
8 that this Court had made clear there was a difference
9 between in commerce and affecting commerce. The
10 reenactment without change seemed to suggest that Congress
11 had acquiesced in that.

12 I would point out that the Federal Arbitration
13 Act was reenacted in 1949 without change, after the law
14 had become quite clear over that respect.

15 QUESTION: Have you -- just, I want to be sure
16 you give us your best answer to Justice O'Connor's initial
17 question as to the reason why there's this rather narrow
18 exception from a broad provision.

19 MR. NAGLE: I would say that while Congress'
20 motives are not always clear, and the very limited
21 legislative history doesn't provide any guidance on that,
22 what we know is that Mr. Furiceff of the Seamen's Union
23 specifically asked that his union be carved out. We know
24 that seamen and railroad employees were groups that
25 already had by statute an administrative mechanism for

1 resolution of disputes.

2 Pryner and Asplundh Tree both point out that
3 they were heavily regulated, and that there -- I would
4 conclude, if I could, that there is nothing in the
5 legislative history to suggest that Congress was
6 contemplating the scope of its authority when it crafted
7 the words in section 1.

8 If I may reserve the remainder of my time.

9 QUESTION: Very well, Mr. Nagle.

10 Mr. Rubin, we'll hear from you.

11 ORAL ARGUMENT OF MICHAEL RUBIN

12 ON BEHALF OF THE RESPONDENT

13 MR. RUBIN: Mr. Chief Justice, and may it please
14 the Court:

15 We agree with petitioner in response to the
16 question from Justice Scalia that the focus of the Court's
17 inquiry today has to be on what Congress meant in 1925,
18 whether it intended the section 1 exclusion to go -- to
19 remain symmetrical with the section 2 coverage.

20 QUESTION: In 19 --

21 QUESTION: Mr. Rubin, if your position is
22 correct, why didn't, in section 1, Congress simply stop
23 with, shall apply to contracts of employment, period?

24 MR. RUBIN: Congress could have done it that
25 way, but it used the language that was presented to it by

1 Secretary Hoover, who stated -- whose letter was both in
2 the 1923 committee hearing and was also reprinted in the
3 1924 committee hearing.

4 Secretary Hoover --

5 QUESTION: When was the bill actually passed?
6 When was the law passed?

7 MR. RUBIN: It was enacted into law in February
8 1925.

9 QUESTION: '25.

10 MR. RUBIN: Secretary Hoover, just 2 weeks after
11 the seamen's union expressed concerns not only about its
12 application to seamen, but according to Mr. Furiceff to
13 seamen, railroad men and sundry other workers in
14 interstate and foreign commerce, wrote a letter to the
15 chair of the Senate Judiciary Committee in which he said,
16 if there appear to be objections to the inclusion of
17 workers' contracts, then he proposes that the following
18 language be used.

19 The language that he proposed is the identical
20 language that Congress used in the section 1 exclusion.
21 While --

22 QUESTION: That's very good sleuthing, but I
23 mean, this is a letter. This is not even a committee
24 report. It is a letter sent 2 years before this statute
25 is enacted, and you want us to assume that that is the

1 only reason, not only that Congress didn't end the
2 sentence in section 1 with employment contracts, but it
3 is -- but also it explains why Congress didn't at least,
4 if it was not going to end the sentence there, at least
5 use the same language in section 1 that it did in section
6 2.

7 MR. RUBIN: There is --

8 QUESTION: I mean, that is a very difficult
9 thing to explain.

10 MR. RUBIN: There is a linguistic explanation
11 for what they did. While Congress could have limited that
12 way had it been presented in a different way, Congress' --
13 Secretary Hoover asked Congress to expedite passage of the
14 bill to satisfy the commercial interests who were urging
15 it.

16 QUESTION: I gather he failed, since he sent the
17 letter in 1923 and the bill was passed in 1925.

18 (Laughter.)

19 MR. RUBIN: He did -- he was successful in
20 getting the language that he proposed included in the bill
21 immediately after he proposed it, but why is the
22 additional language in there, what purpose does it serve,
23 because that, I think, is the response to the Chief
24 Justice's question.

25 Well, we start with the first two phrases, the

1 first two classes, seamen, and railroad employees. Now,
2 in 1925, given how limited Congress' Commerce Clause power
3 was, there weren't that many categories of workers who
4 were actually covered by Congress. In fact, the only
5 private sector employees that were covered by any Federal
6 statute under the Commerce Clause power in 1925 were
7 seamen and railroad employees, so not only was --

8 QUESTION: They were covered by the Commerce
9 Clause power, or by any Federal statutes?

10 MR. RUBIN: I'm sorry. They were covered by
11 Federal statutes.

12 QUESTION: By Federal statutes.

13 MR. RUBIN: Excuse me if I misspoke.

14 QUESTION: No, I --

15 MR. RUBIN: Then -- then, because the objection
16 from labor, which Secretary Hoover at least urged Congress
17 to overcome, however quickly or not it might have
18 happened, referred more broadly to all classes of
19 employees, because the underlying concern was the
20 disparity in bargaining power, as this Court acknowledged
21 in *Prima Paint* in its footnote 9, when it referred to the
22 section 1 exclusion, because the disparity in bargaining
23 power applies between all workers and bosses as perceived
24 by labor at the time, and as reflected by Congress in 1932
25 in the *Norris La Guardia Act*. Congress went beyond that.

1 QUESTION: This would include an employment
2 contract between a CEO and a corporation, I assume, right?
3 You're --

4 MR. RUBIN: There is --

5 QUESTION: I mean, you're painting this as --

6 MR. RUBIN: Our position is yes.

7 QUESTION: Your position is simply covering the
8 hard-hat-lunch-bucket worker, but I assume it would cover
9 a contract between a CEO and his corporation.

10 MR. RUBIN: Just like FELA at the time, we
11 believe, would have covered an on-the-job injury by a high
12 executive of a railroad company, it is our construction
13 that worker and employee means anyone employed by a
14 company. There is an amicus brief that argues otherwise.

15 QUESTION: Yes, because you'd say that it covers
16 workers, and workers might have had a definition at the
17 time that did not include the CEO.

18 MR. RUBIN: That is possible.

19 QUESTION: We don't have to decide that.

20 MR. RUBIN: You certainly do not have to decide
21 that.

22 QUESTION: Mr. Rubin, what was well-established
23 as of 1925 about the meaning of Congress' power? Was it
24 well-established that engaged in commerce was narrower
25 than Congress' full power? Was there already the

1 affecting commerce notion --

2 MR. RUBIN: There was not.

3 QUESTION: -- floating out there?

4 MR. RUBIN: There was not. We have cited
5 numerous statutes, as well as cases of the time. There is
6 not a single statute in effect in 1925 or a case
7 describing the commerce power as it pertained to employees
8 that used a broader term than engaged in.

9 QUESTION: What about the case cited by opposing
10 counsel, Behrens.

11 MR. RUBIN: Behrens and Shanks. The Behrens and
12 Shanks case arose under the amended FELA, the 1908 version
13 of FELA. That act referred initially to engaged in, but
14 then on two separate occasions had what we characterize as
15 a temporal limitation. It said, while engaged in.

16 It specifically limited the scope to less than
17 the full commerce power, as would have been expressed by
18 the term, engaged in, and in Shanks and in Behrens, and in
19 several other cases, this Court expressly noted that
20 whether workers were covered by the amended FELA or not,
21 turned upon whether the injury they suffered occurred
22 while they were engaged in.

23 It didn't focus on the type of work they
24 generally performed. It -- for instance, in Behrens, I
25 believe, the worker was working on an interstate --

1 intrastate traffic. His job often included interstate
2 traffic. He would be engaged in commerce, but because at
3 the time he was hit by the locomotive he was engaged in
4 solely intrastate work, the Court said that, given the
5 temporal limitation of FELA, it doesn't apply.

6 So those cases support our position. Shanks in
7 particular supports our position because Shanks goes to --
8 the FELA law was very complicated. There were many, many
9 cases coming before this Court trying to decide who is and
10 who is not covered by the various limitations. Shanks
11 goes through and summarizes the Supreme Court
12 jurisprudence of the time under FELA and makes very clear
13 that engaged in is as broad as it gets, because it
14 includes not just those narrowly working on the trains as
15 they were going down the tracks, but everyone whose job is
16 sufficiently related as to be practically a part of the
17 interstate commerce.

18 So at the time, in 1925, engaged in was a term
19 of art. It was a term of art that reached to the full
20 scope of Congress' commerce power. That is to complete
21 the answer as to -- actually, it doesn't quite complete
22 the answer, because there are still some words that we
23 have to address. That explains, we believe, why there was
24 the reference to in -- engaged in foreign or interstate
25 commerce, because that was the common use of art

1 whenever --

2 QUESTION: But it wasn't -- but then they would
3 have used it in section 2. I mean, you have a very
4 difficult phenomenon to explain, that is the fact that
5 Congress obviously and intentionally used different
6 language in section 1 and section 2. That is just
7 terrible drafting, just terrible drafting if Congress was
8 trying to do what you say they were trying to do.

9 MR. RUBIN: The two sections were drafted at
10 different times by different people. A --

11 QUESTION: That may well be, but --

12 MR. RUBIN: A --

13 QUESTION: -- that's terrible drafting.

14 MR. RUBIN: The --

15 QUESTION: I mean, Congress is supposed to come
16 up with a coherent bill, and we usually assume it was all
17 drafted at the same time and somebody sat down and used
18 the same words to mean the same things throughout the
19 statute, and we usually assume that when they use
20 different words they mean different things.

21 MR. RUBIN: There is a reason why the locutions
22 in section 2 are different from those in section 1, and
23 that is because the language in section 2, the coverage
24 provision refers to -- and it's an odd locution, one that
25 we've certainly not seen in other statutes -- contract

1 evidencing a transaction involving commerce.

2 The word engaged, had engaged come first, would
3 not have fit in that phrase, because there can't be a
4 contract evidencing a transaction engaged in commerce,
5 because a transaction cannot engage in commerce.

6 By the same token, in the section 1 exclusion it
7 would have made no sense to use the word, involving,
8 because workers aren't involving commerce. Now, perhaps
9 they're involved in --

10 QUESTION: They're engaged in businesses
11 involving commerce. Workers in businesses involving
12 commerce.

13 MR. RUBIN: Then that has --

14 QUESTION: I mean, it's so easy to do.

15 MR. RUBIN: It both adds more words, it does not
16 respond to the concerns of those --

17 QUESTION: If you're worried about adding words,
18 they could have ended it after workers and it would have
19 achieved the same result.

20 MR. RUBIN: It does not address the concerns of
21 those who were objecting, because it used the exact
22 language that they proposed.

23 There's one more phrase that I haven't
24 addressed, and that's the any other. I know Justice
25 Kennedy asked about the class, but the complete phrase is,

1 any other class of workers and, as this Court has stated
2 on several occasions, when Congress uses terms such as --
3 in fact, when it uses the language, any other, it means
4 exactly that, any other. That's as broad as it gets.

5 That is language without limitation, and instead
6 of saying, any other class of workers in transportation,
7 which is essentially what petitioner's argument would have
8 the Court read section 1 to mean, commerce was a defined
9 term of art. Section 1 itself defined commerce as,
10 interstate or foreign commerce, as broad as it gets. It
11 didn't say, commerce means transportation.

12 Petitioner would not only have the Court adopt
13 the illogical explanation that Congress excluded from this
14 bill those workers over whom its commerce power was the
15 clearest and federalize the law of arbitration only those
16 as to whom I believe Justice O'Connor said was most
17 questionable --

18 QUESTION: Mr. Rubin, there's also the phrase,
19 contract of employment. You were candid in telling us
20 that you consider workers to include any employee, even
21 managerial employees. What about collective bargaining
22 contracts? Are they -- where do they stand as -- do they
23 fall within the section 1 exclusion?

24 MR. RUBIN: Yes, and in fact the majority of the
25 circuits agree with the proposition that collective

1 bargaining agreements are excluded. Various amici have
2 totalled up, I think 5 to 3, but yes, collective
3 bargaining agreements --

4 QUESTION: How was that consistent with -- we're
5 told that the Ninth Circuit is the only one that holds
6 that all employment contracts are out under section 1,
7 but --

8 MR. RUBIN: I believe the more accurate
9 statement would be that those circuits that focused solely
10 on individual employment contracts drew that distinction,
11 because in fact, going back to 20, 25 years, the majority
12 of the circuits have said the collective bargaining
13 agreements are excluded.

14 The practical effect is minimal, because the
15 Labor Management Relations Act, Section 301, as this Court
16 clearly held in *Lincoln Mills v. Textile Workers*, does
17 ensure the Federal common law of arbitrability for
18 collective bargaining agreements.

19 QUESTION: What was the reasoning in the
20 circuits for saying that collective bargaining contracts
21 are excluded? Is it that they were not contracts of
22 employment?

23 MR. RUBIN: No, no, no. It's precisely the
24 opposite, because they were contracts of employment of any
25 other class of workers.

1 QUESTION: And some of the examples involve
2 collective bargaining agreements outside of the
3 transportation industry.

4 MR. RUBIN: Yes. Yes.

5 QUESTION: But why wouldn't those courts have
6 said that the National Labor Relations Act is just a
7 superseding statute?

8 MR. RUBIN: The National -- the -- section 301
9 of the LMRA is a different statute.

10 QUESTION: Or, LMRA, yes.

11 MR. RUBIN: Is a -- well, this Court in Lincoln
12 Mills was faced with a choice as to whether, in deciding
13 to hold collective bargaining agreement arbitration
14 provisions enforceable, it should do so under the FAA, as
15 the lower court had held, by the way, in the Fifth Circuit
16 in Lincoln Mills, or whether to hold it enforceable under
17 section 301, which was enacted in 1947.

18 The Court chose section 301. The Court made no
19 reference whatsoever in its opinion to the FAA, and that's
20 where Justice Frankfurter in his dissent first laid out
21 the argument that we're following up on in our briefs to
22 say that the FAA is inapplicable for this --

23 QUESTION: Why doesn't the 301 reasoning explain
24 what the circuits have done and say, well, these are just
25 controlled by another statute?

1 MR. RUBIN: The circuits who have drawn that
2 distinction have not relied on 301. Sometimes the cases
3 arise in the question of which statute of limitations
4 applies, whether you borrow the Federal Arbitration Act
5 statute of limitations or not, but that hasn't been the
6 distinguishing characteristic and, of course, this case
7 not being a collective bargaining agreement, certainly
8 LMRA section 301 does not apply to this case.

9 QUESTION: Is it true that all the other
10 circuits but the Ninth have restricted this to
11 transportation workers?

12 MR. RUBIN: No. Some have, as we pointed out,
13 restricted it to employees of common carriers.

14 QUESTION: Well, all right, but I mean,
15 restricted it, then it can't be that there are a lot of
16 circuits that have held that collective bargaining
17 agreements are excluded as a contract of other workers.

18 MR. RUBIN: Well, there are --

19 QUESTION: All right.

20 MR. RUBIN: I think the First, Fourth, Fifth,
21 Sixth, and Tenth have -- and the Ninth.

22 QUESTION: I don't see the consistency there,
23 but I need -- that isn't your problem at the moment, nor
24 mine.

25 The question I have is the same I addressed to

1 your brother over -- as I understand it -- this is 75
2 years ago.

3 MR. RUBIN: Yes.

4 QUESTION: It's an old statute.

5 MR. RUBIN: Yes.

6 QUESTION: And it's possible the language is
7 open and, given that possibility, I'd like to know what
8 the consequence is. As far as I understand it, when I'm
9 focusing on workers -- and I believe there still is
10 hostility to arbitration in the States, and I also think
11 that there are a lot of unfair arbitration agreements, but
12 there are even more that are fair and many of them help
13 the average worker, maybe not your client.

14 All right. Given that background, who's going
15 to be left out in the cold? Are there a class of workers
16 such that if we accept the Ninth Circuit they will
17 suddenly not be able to get arbitration agreements that
18 might help them because of State hostility or complex
19 State rules, et cetera?

20 MR. RUBIN: No.

21 QUESTION: Can the NLRA, NLRB take jurisdiction
22 over such a class?

23 MR. RUBIN: There --

24 QUESTION: Is there a problem?

25 MR. RUBIN: There are several levels of

1 responses, but I think to address what I understand your
2 concern to be, workers and employers can always enter into
3 voluntary arbitration agreements. They can always decide
4 between themselves after a dispute arises, for example,
5 that they choose to pursue an arbitration mechanism rather
6 than to go into court.

7 If they agree to arbitrate, there is no problem.
8 It's not like the old common law hostility to arbitration.
9 There's no question that it would be enforceable.

10 QUESTION: Your response is, then, look, they
11 can still agree, just not in the employment contract.

12 MR. RUBIN: They -- in a few -- the ultimate
13 issue here is whether States can determine whether the
14 employment relationships in those States, whether an
15 arbitration agreement is enforceable or not.

16 QUESTION: Well, you're going to be --

17 MR. RUBIN: In those --

18 QUESTION: You're going to be arbitrating under
19 the kind of agreements you describe simply between the --
20 either under State law or under Federal law, aren't you?
21 I mean, there's no other way to do it.

22 MR. RUBIN: If someone is to go to court --

23 QUESTION: Yes.

24 MR. RUBIN: -- to enforce an arbitration
25 agreement that one side is objecting to --

1 QUESTION: Right.

2 MR. RUBIN: Yes. It's either the State law or
3 the Federal law that will apply in this case determines
4 whether --

5 QUESTION: Mr. Rubin, your argument assumes that
6 giving a broader modern meaning to section 2 and giving a
7 broader modern meaning to section 1 are one and the same
8 things.

9 I really don't think that that's what's going on
10 here. I mean, what you're really asking us to do is to
11 change the language of section 1 in light of the fact that
12 we now know that Congress could have gone further than it
13 chose to go in that language. I don't know any other case
14 where we've done that.

15 You're not asking us to simply give that
16 language its modern, more expansive meaning. You're
17 asking us to say, you know, in light of the fact that we
18 now know that it's not just employees engaged in
19 interstate commerce who can be covered. Had Congress
20 known that then, they would have written a different
21 provision and so, Supreme Court, why don't you rewrite it
22 for Congress, because they surely would have put it this
23 way if they had known then what we know now. Do you know
24 any case where we've done that?

25 MR. RUBIN: I'm not asking you to rewrite the

1 language, Justice Scalia. I'm asking you to accept that
2 Congress in 1925 saw a symmetry, saw an objection,
3 responded to it by making sure that any worker that might
4 be -- if there were any worker out there whose contract of
5 employment evidenced a transaction involving commerce,
6 they would be taken out of the act completely.

7 QUESTION: You're saying they saw a symmetry
8 which now no longer exists because we've given the first
9 part a much broader meaning, and now this other part,
10 which they once thought was symmetrical, is no longer
11 symmetrical, so now we should read it to mean something
12 more --

13 MR. RUBIN: To --

14 QUESTION: -- than a class of workers engaged in
15 foreign or interstate commerce.

16 MR. RUBIN: To get back to the very first
17 question you asked petitioner's counsel, what did Congress
18 mean by the language used in 1925. Involving, which had
19 never been used before in a commerce relationship and has
20 never been used since, could not have meant anything more
21 than engaged in, because engaged in was as far as it got.

22 So to the extent there has been a rewriting --
23 and I'm not contending there's been a rewriting. I'm
24 contending there's been an application under the modern
25 interpretation of the Commerce Clause. As this Court in

1 Terminex said, you have to look to see what Congress is
2 trying to achieve. What were the purposes? And when the
3 Court read, involved in --

4 QUESTION: Even when it doesn't achieve that by
5 reason of future changes, future changes in the law, or
6 future changes in circumstances. What you're asking us to
7 do is, in light of future changes in the law, make this
8 statute read the way Congress thought it was going to
9 operate when it was enacted, but we don't usually do that.
10 If, in fact, engaged in interstate commerce is something
11 narrower and is no longer symmetrical, tough luck.
12 Congress can amend it. But we don't go around rewriting
13 it in order to preserve symmetry.

14 QUESTION: Maybe your answer is, we've already
15 rewritten section 2.

16 MR. RUBIN: In fact, in Terminex in 1925,
17 that -- that's what happened. The language in 1925
18 maintained that symmetry, maintained that symmetry for
19 purposes that were stated that are in the record. There
20 is no indication of any reason why Congress would have
21 disrupted that symmetry, what purposes could be served,
22 how it could be --

23 QUESTION: But it isn't symmetry. I mean,
24 there's different language used in the two sections.

25 MR. RUBIN: It's symmetry, Your Honor, in the

1 sense that because some felt that the coverage language
2 might encompass workers' contracts of employment,
3 Congress, to the fullest extent it could, pulled those
4 workers out.

5 QUESTION: That's a very odd definition of
6 symmetry.

7 MR. RUBIN: Symmetry may not be the right word.
8 The concept is the word that I'm trying to convey to the
9 Court, and the concept is the concept of ensuring that no
10 contracts of employment that might be covered under
11 Congress' commerce power would be covered. One provision
12 should not be read dynamically, as this Court did in
13 Terminex, while the other is read statically. There's no
14 indication that Congress intended that.

15 Congress didn't use the word, transportation.
16 It had enacted numerous statutes by 1925 that had limited
17 the scope to transportation, or to common carriers, or to
18 common carriers by railroad. It had that language readily
19 available to it had it intended the carve-out, but there
20 is no gap between the section 2 coverage and the section 1
21 exclusion and, therefore, just as in 1925, all workers'
22 contracts of employment were excluded, any other class of
23 workers, the broadest possible language, so, too, we urge
24 the Court to construe the statute that way now.

25 If there are no further questions --

1 QUESTION: Thank you, Mr. Rubin.

2 MR. RUBIN: Thank you.

3 QUESTION: Mr. Nagle, you have 2 minutes
4 remaining.

5 REBUTTAL ARGUMENT OF DAVID E. NAGLE

6 ON BEHALF OF THE PETITIONER

7 MR. NAGLE: Thank you. Very briefly, first,
8 with respect to the particular questions that have arisen
9 regarding our citation of Behrens, I would ask the Court
10 to look at the sections on pages 7 and 8 of our reply
11 brief, where we specifically tried to address that the
12 1925 Congress that had used the words, engaging in
13 interstate commerce, that -- I'm sorry, with respect to
14 Behrens, had indicated that that applied only to employees
15 who were actually engaged in interstate transportation or
16 closely related functions, and not to other employees that
17 Congress had the constitutional authority to regulate.

18 QUESTION: You cite Behrens -- you cite -- never
19 mind. Go ahead.

20 MR. NAGLE: Yes, Your Honor. With respect to
21 the questions on section 301 of the Labor Management
22 Relations Act, that, of course, affects those in the
23 unionized context. I would note, as Justice Scalia had
24 pointed out, that this would lead to the anomalous result
25 that a CEO of a multinational corporation who has an

1 arbitration provision in his or her employment contract,
2 that it would not be enforceable pursuant to the FAA.

3 I would note that in *Prima Paint*, at note 7, the
4 Court made reference -- albeit it in dicta the Court made
5 reference to certain kinds of employment contracts being
6 excluded under section 1, which is consistent with our
7 view that it was not intended to cover the entire range of
8 that which was covered.

9 Ultimately, I would suggest that as the court of
10 appeals have consistently held, the narrow reading of
11 section 1 is the only reason which is based on and
12 consistent with the text, that makes use of the full text
13 and conforms with the principles of statutory
14 construction, so that we don't read words to be
15 meaningless and that we do apply the canon of *ejusdem*
16 *generis*.

17 As this Court noted in *Allied-Bruce*, and
18 particularly in Justice O'Connor's concurring opinion
19 there, there's value in uniformity and stability of the
20 case law which has developed. Since *Gilmer*, untold number
21 of agreements to arbitrate employment claims have been
22 entered into in reliance, and I would suggest that
23 Congress is certainly well aware of this case law
24 development, has had the opportunity to correct it if they
25 thought the Court had gotten it wrong, and they have

1 declined to do so.

2 If there are no further questions --

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nagle.

4 The case is submitted.

5 (Whereupon, at 11:02 a.m. the case in the above-
6 entitled matter was submitted.)

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