No. 99-1379

In the Supreme Court of the United States

CIRCUIT CITY STORES, INC., PETITIONER

v.

SAINT CLAIR ADAMS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Federal Arbitration Act applies to contracts of employment.

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INTEREST OF THE UNITED STATES

This case concerns the proper interpretation of the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, as applied to a pre-dispute employment contract. Although this case involves claims of discrimination under state law, the United States has a significant interest in its outcome. The scope of the exclusion in Section 1 of the FAA for employment contracts may affect the enforcement of arbitration agreements covering claims of employment discrimination under federal civil rights statutes. Similarly, this Court's ruling may affect employment discrimination claims brought by the Secretary of Labor against federal contractors, see 29 U.S.C. 793-794 (1994 & Supp. IV 1998); 38 U.S.C. 4211-4212 (1994 & Supp. IV 1998), and financial aid recipients, 42 U.S.C. 2000d *et seq.*; 29 U.S.C. 2938 (Supp. IV 1998). In addition, this case may affect enforcement of anti-retaliation provisions in federal statutes designed to protect employees who report public health and safety violations, as well as enforcement of various federal labor standards. See, *e.g.*, 30 U.S.C. 815(c); 29 U.S.C. 660(c); 29 U.S.C. 216 (1994 & Supp. IV 1998); 29 U.S.C. 2617 (1994 & Supp. IV 1998). Finally, state anti-

discrimination laws play an integral role in the "scheme of interrelated and complementary state and federal enforcement" under federal anti-discrimination statutes. *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 65 (1980). The United States therefore has an interest in the ability of the States to establish procedures for resolving employment-related claims arising under state law.

STATEMENT

1. The Federal Arbitration Act was enacted into law in 1925. Act of Feb. 12, 1925, ch. 213, 43 Stat. 883. Its basic coverage provision provides that it applies to "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction." 9 U.S.C. 2. The FAA provides that such provisions in covered contracts "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Ibid.* In the exclusion at issue in this case, however, the statute provides that it does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. 1.

2. Respondent Saint Clair Adams applied for a position with petitioner Circuit City Stores, Inc., in October 1995. J.A. 12-17. Prospective applicants for employment with petitioner must sign a "Circuit City Dispute Resolution Agreement." *Ibid.* That form requires that employees submit all claims and disputes to mutually binding arbitration. J.A. 54; see J.A. 12. The terms of the form specify that it includes "all previously unasserted claims, disputes or controversies arising out of or relating to [the] application or candidacy for employment, employment and/or cessation of employment with Circuit City, * * * includ[ing] claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil

Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and law of tort." J.A. 13.

Respondent signed the form and was hired to work for petitioner. J.A. 54. Respondent left employment with Circuit City in November 1996. J.A. 48. On November 26, 1997, respondent filed a state-law civil action in California state court against petitioner and other defendants, alleging discrimination and harassment on the basis of respondent's sexual orientation. J.A. 10, 47-48.

Petitioner filed an action in United States District Court for the Northern District of California seeking to compel arbitration of respondent's claim. J.A. 55. The district court held that the arbitration provision was enforceable under the FAA, and it therefore granted petitioner's request for an order compelling arbitration and staying state court proceedings. J.A. 43-45.

3. The Ninth Circuit reversed. J.A. 53-56. The court of appeals held that, because the arbitration agreement "was a condition precedent to [respondent's] employment," it "was an employment contract." J.A. 56. The court had previously held, in *Craft* v. *Campbell Soup Co.*, 177 F.3d 1083, 1094 (1999), that, because of the Section 1 exclusion, "the FAA does not apply to labor or employment contracts." The court therefore held the FAA inapplicable in this case. J.A. 56.

SUMMARY OF ARGUMENT

In provisions unchanged since its enactment, the Federal Arbitration Act covers arbitration provisions in every contract relating to "a transaction involving commerce." 9 U.S.C. 2. It excludes, however, "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. 1. This case concerns the scope of the Section 1 exclusion and its relationship to the Section 2 coverage provision. In particular, it presents the question whether excluding contracts

of "any other class of workers engaged in foreign or interstate commerce" excludes all employment contracts that would have otherwise been brought within the FAA by the Section 2 coverage provision. That question can be answered in two steps.

First, the terms immediately at issue—"involving commerce" in the Section 2 coverage provision and "engaged in * * * commerce" in the Section 1 exclusion—are coextensive. Standard dictionary definitions available to Congress in 1925 (like those of today) defined each of the crucial terms—"involved" and "engaged"—in terms of the other. Decisions of this Court made clear that the "engaged in * * * commerce" formulation indicated an intent to go as far as Congress thought it could in the exclusion, just as this Court has held Congress went to the far reaches of its Commerce Clause authority when it used the "involving commerce" language of the Section 2 coverage provision.

Indeed, the precise language of the Section 1 exclusion was proposed to Congress by a distinguished witness (then-Secretary of Commerce Herbert Hoover), and a similarly worded provision was proposed by the chairman of the ABA committee that had originally drafted it. Each of them made clear that this or similar language should be added, in Hoover's words, "[i]f objection appears to the inclusion of workers' contracts in the law's scheme." *Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. 14 (1923). Therefore, each of them, as well as the Congress that accepted their proposal, believed that the terms of the Section 1 exclusion were sufficient to remove employment contracts from the ambit of the Section 2 "involving commerce" formulation. Petitioner's contention that "involving commerce" and "engaged in * * * commerce" had different meanings at the time Congress drafted the FAA—a contention on which petitioner rests its argument—has no foundation.

Second, no principle of statutory construction provides a basis to depart from Congress's intent, as expressed in the plain words of Section 1 of the FAA, to exclude employment contracts from the statute's reach. Petitioner invokes the canon of *ejusdem generis* to limit the meaning of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" to transportation workers, on the ground that the two specific categories ("seamen" and "railroad employees") are categories of transportation workers. Though *ejusdem generis* is useful where a statute is ambiguous, however, the statutory text and congressional purpose here are clear. Moreover, there is no reason why Congress would have wanted to limit the FAA exclusion to transportation workers, since the same reasons that justify the exclusion of transportation workers (including legislative doubts that genuine consent can simply be assumed when the employee signs a form arbitration agreement offered on a take-it-or-leave-it basis) would apply equally to other workers. Applying *ejusdem generis* as formulated by petitioner would oust the States from their traditional authority over employment relations—a result that this Court should not read into the statute without a more express indication of Congress's intent. It would also perversely attribute to the 1925 Congress that enacted the FAA an intent to subject to the FAA non-transportation workers (over whom Congress had little constitutional authority in 1925), leaving the States with authority over only transportation workers (over whom the 1925 Congress would have had the clearest constitutional authority).

ARGUMENT

I. BECAUSE "ENGAGED IN * * * COMMERCE" IN THE SECTION 1 EXCLUSION AND "INVOLVING COMMERCE" IN THE SECTION 2 COVERAGE PROVISION WERE UNDERSTOOD IN 1925 AS CO-EXTENSIVE, THE ORDINARY MEANING OF THE SECTION 1 PHRASE EXCLUDES FROM THE FAA ALL EMPLOYMENT CONTRACTS THAT COULD COME WITHIN THE FAA UNDER SECTION 2

Sections 1 and 2 of the FAA have remained unchanged since they were enacted in 1925. See 43 Stat. 883. Section 2 is the basic coverage provision of the Act. It sets forth the Act's core principle that arbitration provisions in covered contracts "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. Section 2 also specifies what the Act covers: "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract [or] transaction." *Ibid.* For purposes of this case, the key language of Section 2 is that requiring a transaction "involving commerce."

Section 1 of the FAA expressly excludes certain contracts from the ambit of the FAA, providing that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. 1. In *Craft* v. *Campbell Soup Co.*, *supra*, the court of appeals held that the Section 1 exclusion, by the use of the terms "contracts of employment of * * * any other class of workers engaged in foreign or interstate commerce," excluded all contracts of employment from the FAA. See *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991) (reserving that question). The court concluded that all employment

contracts that could come within the ambit of the FAA by virtue of the "involving commerce" coverage language of Section 2 are excluded as contracts of "workers engaged in * * * commerce" under Section 1. *Craft*, 177 F.3d at 1094. That conclusion is correct.

A. In 1925 When The FAA Was Enacted, The Terms "Involving Commerce" And "Engaged In Commerce" Were Coextensive

Petitioner rests its argument on the premise that "the § 1 exclusion of employment contracts for workers 'engaged in commerce' must exclude a class of contracts well short of the overall sweep of the statute as defined by the broader language of § 2." Pet. Br. 16. As a matter of the plain meaning of the words used by Congress when it drafted the FAA in 1925, that is incorrect. The plain meanings of "involving commerce" in Section 2 and "engaged in * * * commerce" in Section 1, as given in general and legal dictionary definitions of the day, were coextensive. Therefore, by excluding "contracts of employment of * * * workers engaged in * * * commerce" in Section 1, Congress excluded any employment contract "involving commerce" within the meaning of Section 2.

Absent indications to the contrary, Congress is ordinarily presumed to have used the ordinary and common meanings of the terms it employs in statutes. Those ordinary meanings, however, are necessarily the meanings of the terms "at the time Congress enacted the statute." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). Dictionaries from the period when Congress enacted the FAA establish that the terms "involved in" and "engaged in" had the same meaning.

The authoritative dictionary of American English at the time Congress enacted the FAA was *Webster's New International Dictionary of the English Language* (1917). Among the definitions provided in that dictionary for "involve" is "[t]o *engage* thoroughly; to occupy, employ, or absorb." *Id.*

at 1138 (emphasis added). The dictionary thus gave "engage" as one meaning of "involve." Similarly, among the definitions given in that dictionary for "engage" are "[t]o become involved or entangled" and "[t]o embark in a business; to take a part; to employ or *involve* one's self; to devote attention and effort; to enlist; as, to *engage* in controversy." *Id.* at 725 (first emphasis added; second in original). The dictionary thus gave "involve" as one meaning of "engage." See *Smallwood* v. *Jeter*, 244 P. 149, 153 (Idaho 1926). Each of the terms "involve" and "engage" was defined in terms of the other.[1]

Editions of Black's and Bouvier's legal dictionaries from 1910 and 1914 do not define "involve" and define only specialized meanings of "engage" not relevant here.[2] But in 1933, a few years after the enactment of the FAA, a new edition of *Black's Law Dictionary* added a definition of "engage" as "[t]o employ or *involve* one's self; to take part in; to embark on." *Black's Law Dictionary* 661 (3d ed. 1933) (emphasis added). That confirms the identity of meaning, both in common and legal usage, between the terms "engaged in" and "involved in" at the time the FAA was enacted.

In short, at the time Congress enacted the FAA, the common meanings of the term "involving commerce" in the Section 2 coverage provision and "engaged in * * * commerce" in the Section 1 exclusion were coextensive. To be sure, the

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[1] Modern dictionaries similarly define the two terms in part in terms of each other. See *Webster's Third New Int'l Dictionary* 751 (1976) (defining "engage" as "to employ or involve oneself"), 1191 (defining "involve" as "to draw in as a participant: engage, employ").

[2] Both dictionaries define "engagement" to mean "[i]n French law" "[a] contract" or "[t]he obligation arising from a *quasi* contract" and also to refer in our own law to non-binding promises by married women. *Black's Law Dictionary* 425 (2d ed. 1910); 1 *Bouvier's Law Dictionary* 1040 (3d rev. 1914). Bouvier's also defines "engaged" to mean "[w]ithin the meaning of a bylaw of a fraternal order, one is engaged in the sale of liquor who is a partner in the saloon business, though he performs no labor in or about the saloon and takes no active part in the business." *Ibid.*

terms were not identical; while abstract entities (such as transactions) could "involve" commerce, only people or business organizations could "engage in" commerce. But although the usage of the two terms varied in this way, their common and ordinary meaning was identical.[3] Accordingly, by excluding "contracts of employment of * * * workers engaged in * * * commerce" from the FAA, Congress excluded all contracts of employment "involving commerce" under Section 1 of the FAA.

B. This Court's Cases Establish That Congress Used Both "Involving Commerce" And "Engaged In * * * Commerce" To Reach To The Full Extent Of Its Commerce Clause Power, As Then Understood

1. This Court held in *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265 (1995), that Congress intended the FAA to cover all contracts within the scope of its Commerce Clause power when it provided for coverage of contracts "involving commerce" in the FAA's Section 2 coverage provision. The Court explained:

> The pre-New Deal Congress that passed the Act in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out to be the case. But, it is not unusual for this Court in similar circumstances to ask whether the scope of a statute should expand along with the expansion of the Commerce Clause power itself, and to answer the question affirmatively—as * * * we do here.

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[3] Petitioner's brief, apparently unwittingly, testifies to the modern equivalence of the two terms in its descriptions of the workers covered under his view of the statute. See Pet. Br. 8 ("workers who are actually *engaged* in the movement of goods"), 22 (workers "*engaged* in actual transportation"), 22 (workers "*engaged* in the actual interstate transportation of goods"), 22 ("workers actually *involved* in the interstate transportation of goods"), 23 (workers with "direct *involvement* in the interstate transportation of goods"), 25 n.12 (workers "directly *engaged* in transport of goods") (emphases added in each quotation).

Id. at 275. As we show below, the same is true of the "engaged in * * * commerce" language used in Section 1 of the FAA. That language indicated an intent by Congress to legislate to the full scope of its Commerce Clause power over employment. It would be anomalous to adopt an expanding interpretation of the "involving commerce" language in Section 2 of the Act without interpreting the "engaged in * * * commerce" language in Section 1 to have the same flexibility. Indeed, to do so would defeat—not effectuate—the intent of Congress that whatever contracts of employment were swept within the FAA by Section 2's coverage provision should be excluded by the Section 1 exclusion. See R.A. Epstein, *Fidelity Without Translation*, 1 Green Bag 2d 21, 27-29 (1997).

2. In 1925, Congress's power to regulate employment relationships had been held by this Court to be severely restricted. Congress described the relatively small number of workers over whom it could exercise its Commerce Clause power as "engaged in commerce." Constitutional disputes concerning the scope of Congress's Commerce Clause power over employment had to do with whether Congress could regulate all employees who "engaged in commerce," and neither Congress nor this Court suggested that Congress could regulate beyond that class. The history of the Federal Employers' Liability Acts provides an illustration.

a. In 1906, Congress first enacted what has become known as the first Federal Employers' Liability Act (FELA). Act of June 11, 1906, ch. 3073, 34 Stat. 232. That Act provided that "every common carrier *engaged in trade or commerce* * * * between the several States * * * shall be liable to any of its employees" for damages resulting from specified negligent acts. *Ibid.* (emphasis added). Relying on the "any of its employees" language, this Court held that, even if the *employer* was generally "engaged in * * * commerce," the Act was unconstitutional because Congress had the power to provide a remedy only for *employees* who

were actually engaged in interstate commerce at the time of the injury. As the Court explained, "[t]he act then being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, *without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury*, of necessity includes subjects wholly outside of the power of Congress to regulate commerce." *Howard* v. *Illinois Cent. R.R.*, 207 U.S. 463, 498 (1908) (emphasis added). The Court explained that among the forbidden "subjects" regulated by the statute would be a railroad doing interstate and local business "having shops for repairs, and it may be for construction work, as well as a large accounting and clerical force." *Id.* at 498-499. At the time of *Howard*, Congress's Commerce Clause power thus did not even extend so far as providing legal rules generally governing employees working for common carriers who were "engaged in trade or commerce."

Congress took heed of the decision in *Howard* and enacted a revised FELA the same year. The revised statute, now limited by its terms to railroads, provided that "[e]very common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury *while he is employed by such carrier in such commerce*." 45 U.S.C. 51, Act of Apr. 22, 1908, ch. 149, 35 Stat. 65 (emphasis added). The Court upheld the constitutionality of the revised FELA because, "unlike the one condemned in [*Howard*], [it] deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employees *while engaged in such commerce*." *Mondou* v. *New York, New Haven & Hartford R.R.*, 223 U.S. 1, 51-52 (1912) (emphasis added). Under *Howard* and *Mondou*, Congress's Commerce Clause power extended only to employees who were personally engaged in interstate commerce, and even then only to those employees *while* they were engaged in interstate commerce.

In cases beginning the following year, the Court retreated slightly from these principles, so that employees while engaged in work that was inextricably tied to covered employment were also covered. For example, in three cases decided on May 26, 1913, the Court held that the FELA constitutionally provided coverage for an iron worker injured while repairing a bridge for an interstate railroad, *Pedersen* v. *Delaware, Lackawanna & W. R.R.*, 229 U.S. 146 (1913); a clerk keeping track of railroad cars in a rail yard of an interstate railroad, *St. Louis, San Francisco & Tex. Ry.* v. *Seale*, 229 U.S. 156 (1913); and a worker in a rail yard guiding a locomotive through some switches so that it could be connected to an interstate train, *Norfolk & W. Ry.* v. *Earnest*, 229 U.S. 114 (1913). Those cases did not alter the principle that Congress's authority to regulate employment was limited to employees who were engaged in interstate commerce *while* they were engaged in such commerce. But they did slightly expand the meaning of "engaging in commerce," the linguistic formulation Congress used to express its intent to exercise all of its Commerce Clause power.

b. The following year, in *Illinois Central Railroad* v. *Behrens*, 233 U.S. 473, 477 (1914), the Court had reached the point where it "entertain[ed] no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce." But the Court held in *Behrens* that the revised FELA nonetheless did not cover a railroad worker injured in a collision as part of a crew that "was moving several cars loaded with freight which was wholly intrastate," even though the same crew frequently moved interstate cars over the same tracks. *Id.* at 476. *Behrens* thus held that, although Congress had constitutional power to regulate the worker in that case, the revised FELA did not do so.

Petitioner errs in citing *Behrens* for the proposition that the "engaging in commerce" language in the revised FELA "did not extend to the full range of Congress' Commerce Clause authority." Pet. Br. 18. The Court's decision in *Behrens* did not turn on whether the employee or employer were "engaging in commerce." It turned on the temporal qualification in the revised FELA—the "while" clause. As the Court explained, "[g]iving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, * * * it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce." 233 U.S. at 478. See also *ibid.* ("[T]he true [statutory] test is the nature of the work being done *at the time of the injury*.") (emphasis added). Thus, it was the use of the term "while"—not any doubt about the scope of the "engaging in commerce" language—that limited the reach of the revised FELA to less than Congress's full constitutional power. Had Congress not included the "while" provision in the revised FELA, the employee would have been covered by the statutory "engaging in commerce" provision.[4]

In Section 1 of the FAA, Congress did not include any "while" clause or temporal qualification. Accordingly, under *Behrens* and the other cases cited above, the "engaged in * * * commerce" language in Section 1 extended to the full reach of Congress's power over employment.[5]

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[4] The Court resolved any tension between its decision in *Behrens* and its decision in *Howard* by explaining that the defect in the first FELA was not that it included some employees who were not transporting items in commerce at the time of the accident, but that Congress had "attempted to regulate the liability of every carrier in interstate commerce * * * for any injury to any employee, even though his employment had no connection whatever with interstate commerce." 233 U.S. at 477.

[5] Petitioner makes a similar error in relying on *Shanks* v. *Delaware, Lackawanna & Western Railroad*, 239 U.S. 556, 558 (1916). In that case, the Court stated the test for coverage under the revised FELA as: "[W]as

c. In short, at the time Congress enacted the FAA, its Commerce Clause authority over employees extended no farther than to those "engaged in commerce."[6] Congress therefore used those terms in the FAA's Section 1 exclusion to express its intent to cover all of the employees it constitutionally could. No decision of this Court suggested that Congress's authority over employees extended beyond the "engaging in commerce" formulation.

The scope of the "engaging in commerce" language did expand gradually over time, as shown by *Pedersen*, *Seale*, and *Earnest*. See also, *e.g.*, *Southern Pac. Co.* v. *Industrial Accident Comm'n*, 251 U.S. 259, 262 (1920) (FELA applies to lineman repairing electrical line used by interstate and intrastate trains). Congress was surely aware of the decisions

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the employee at the time of the injury, engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" Petitioner asserts (Br. 18) that the Court thereby construed FELA's "engaging in commerce" language "to identify only a specific subcategory of workers falling within Congress' Commerce Clause authority." But the reason the test under the revised FELA applied only to transportation was not that the term "engaging in commerce" was so limited. It was, instead, the result of the fact that the revised FELA, by its terms, applied only to "every common carrier by railroad." That in no way suggests or supports an inference that the "engaging in commerce" language in the revised FELA—or the similar language in Section 1 of the FAA—was limited to transportation workers.

[6] Petitioner is correct (Br. 29) that Congress's Commerce Clause authority in 1925 was "not limited to 'employees who actually transported people or goods in interstate commerce.'" It could surely regulate common carriers in non-transportation businesses, such as telegraph and telephone companies. See *Howard*, 207 U.S. at 497. More importantly, Congress could regulate "the purchase, sale and exchange of commodities" in interstate commerce, as petitioner states (Br. 29), and business transactions "incident[] to" such activities. See *Stafford* v. *Wallace*, 258 U.S. 495, 516 (1922). Congress's Commerce Clause authority over employees and their relationship to employers, however, was narrower. *Hammer* v. *Dagenhart*, 247 U.S. 251, 272 (1918) ("The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof.").

expanding the scope of "engaging in commerce" when it enacted the FAA. Accordingly, by using the "engaged in * * * commerce" formulation in the Section 1 exclusion, Congress ensured that the exclusion expanded along with any expansions in Congress's Commerce Clause authority. There are no workers who Congress believed would be covered by the Section 2 coverage provision because their employment contracts "involv[ed] commerce," but whose work fell outside the "engaged in commerce" exclusion of Section 1.

d. Petitioner argues (Br. 15) that in cases decided after this Court's recognition of an expanded congressional Commerce Clause authority in the 1930's, the Court construed the term "engaged in commerce" to be narrower than the full scope of Congress's commerce power. Some of the cases cited construed statutes enacted after the 1930's, by which time the term "in commerce" had become a term of art. In *Russell* v. *United States*, 471 U.S. 858 (1985), for example, the Court noted, in construing the federal arson statute enacted in 1970, that "Congress is aware of the distinction between legislation limited to activities 'in commerce' and an assertion of its full Commerce Clause power." *Id.* at 859 n.4 (internal quotation marks omitted). By 1970, Congress was thus aware that "in commerce" denoted something less than Congress's full Commerce Clause authority. Nothing in *Russell* suggests that Congress in 1925 was aware of that meaning.

Similarly, in *McLeod* v. *Threlkeld*, 319 U.S. 491 (1943), the Court construed the Fair Labor Standards Act provision covering employees satisfying two distinct standards—"engaged in commerce or in the production of goods for commerce." The Court held that "engaged in commerce" in that statute did not extend as far as the Commerce Clause. The Court relied on Congress's "deliberate and purposeful" express decision in 1938 to reject proposed "affecting commerce" language in favor of what by then were known to be

the two more specific categories. See *id.* at 493. Indeed, the Fair Labor Standards Act had been passed in the aftermath of this Court's landmark decision in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which first upheld an "affecting commerce" statute and made clear that "affecting commerce" provided a generally permissible basis for the exercise of the broadest reaches of Congress's Commerce Clause authority. See also *United States* v. *Darby*, 312 U.S. 100, 119-123 (1941); cf. *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 544-551 (1935) (denying general "affecting commerce" authority). By that time, as the Court noted in *McLeod*, "[t]he distinction in the coverage arising from this choice of language was well known to Congress." 319 U.S. at 493 n.2 (citing, *inter alia*, *Jones & Laughlin*). *McLeod* does not suggest that a 1925 Congress would have been aware of the distinction.

Other cases cited by petitioner rely on the particular legal context of the statutory provision at issue. See *FTC* v. *Bunte Bros.*, 312 U.S. 349, 353, 351-352 (1941) (refusing to construe "in commerce" broadly, in reliance on 25-year history of narrow construction by Federal Trade Commission as "practical construction of the [statute] by those entrusted with its administration"). In *United States* v. *American Building Maintenance Industries*, 422 U.S. 271 (1975), for example, the Court refused to construe the term "engaged in commerce" in Section 7 of the Clayton Act, 15 U.S.C. 18, to cover the whole scope of Congress's Commerce Clause power, based on the need to construe that provision harmoniously with the varying scope of related federal antitrust provisions. 422 U.S. at 276-279.[7] The same consideration

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[7] Petitioner cites *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974), as reaching the same narrow construction of "engaged in commerce." *Gulf Oil* involved three different "engaged in commerce" provisions in the antitrust laws. One of them was enacted in 1936, and the Court construed it narrowly based on the fact that the legislative record showed that Congress had deleted an "'effects on commerce' provision,

suggests the need to construe "engaged in * * * commerce" in the Section 1 exclusion harmoniously with "involving commerce" in the Section 2 coverage provision. Having construed "involving commerce" in the Section 2 coverage provision to expand with Congress's Commerce Clause authority, the Court should apply the same principle to "engaged in * * * commerce" in the Section 1 exclusion.

The Court also relied in *American Building Maintenance* on the fact that Section 7 of the Clayton Act was amended and reenacted in 1950. 422 U.S. at 279-280. Referring to amendments to Section 7 during reenactment and committee reports showing that Congress was "fully aware * * * that both the original and the newly amended versions of § 7 were limited to corporations 'engaged in commerce,'" the Court concluded that "the decision to re-enact § 7 with the same 'in commerce' limitation can be rationally explained only in terms of a legislative intent, at least in 1950, not to apply the rather drastic prohibitions of § 7 of the Clayton Act to the full range of corporations potentially subject to the commerce power." 422 U.S. at 281.

Contrary to petitioner's contention (Br. 30), nothing in the process of codifying—but *not* amending—the FAA in 1947, Act of July 30, 1947, ch. 392, § 2, 61 Stat. 670, shows any awareness of limitations in the "engaged in * * * commerce" language in Section 1 of the FAA.[8] At the time of

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leaving only the 'in commerce' language." *Id.* at 200. The Court also noted that a broad interpretation would extend the statute "beyond its clear language to reach a multitude of local activities that hitherto have been left to state and local regulation." *Id.* at 201. Neither of those rationales would provide a basis to narrow the scope of the 1925 FAA. The Court did not resolve the proper construction of the other two provisions at issue in *Gulf Oil*, see *id.* at 201-202, although it addressed one of them later that Term in *American Building Maintenance*.

[8] See H.R. Rep. No. 255, 80th Cong., 1st Sess. 1 (1947) ("This bill takes each section of title 9 * * * and without any material change enacts each section into positive law. No attempt is made in this bill to make amendments in existing law."). Of course, because this Court did not construe

the codification, *Gatliff Coal Co.* v. *Cox*, 142 F.2d 876, 882 (6th Cir. 1944), the only reported appellate decision on the subject, had held that the FAA did not apply to employment contracts. It was not until six years later that the first appellate decision held to the contrary. See *Tenney Eng'g, Inc.* v. *United Elec. Workers*, 207 F.2d 450 (3d Cir. 1953). Moreover, while the Court in *American Building Maintenance* was concerned about a "drastic" expansion of the statute there, construing the Section 1 exclusion language to be as broad as the Section 2 coverage provision would not work any expansion of the FAA. To the contrary, in this case it is petitioner's construction of "engaged in * * * commerce" in Section 1 that would "drastically" expand the FAA to cover a controversial area—employment contracts—that Congress had no reason to believe was included in the statute it enacted in 1925.

Finally, the Court has regularly noted in cases construing the "engaged in" language that "[t]ranslation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business." *Bunte Bros.*, 312 U.S. at 353. See also *American Bldg. Maint.*, 422 U.S. at 277 ("The phrase 'in commerce' does not, of course, necessarily have a uniform meaning whenever used by Congress."); *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 197 (1974) ("The answer [to the meaning of 'engaged in commerce'] depends on the statutory language, read in light of its purposes and legislative history."). In the context of the FAA, the construction of "engaged in * * * commerce" in Section 1 should not depend on this Court's construction of other provisions in other statutes enacted in different contexts and

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the "involving commerce" language as extending to the full scope of Congress's Commerce Clause authority until almost 50 years later in *Allied-Bruce*, Congress could not have been aware of the potential problem that could be created by broadly construing "involving commerce" in the FAA's Section 2 coverage provision and then narrowly construing "engaged in * * * commerce" in the Section 1 exclusion.

with different histories and purposes. Rather, the "engaged in * * * commerce" language of Section 1 of the FAA should be construed in the same way that this Court has flexibly construed the cognate "involving commerce" language in Section 2, so that Congress's original intent not to include employment contracts in the FAA is preserved.

C. The Record Of The Proceedings Before Congress Establishes That Congress Understood The Terms "Involving Commerce" And "Engaged In * * * Commerce" To Be Coextensive

The FAA was originally drafted by a committee of the American Bar Association. See H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924). See generally I.R. Macneil, *American Arbitration Law* 85-121 (1992) (discussing history of FAA). A bill embodying the ABA's draft was introduced in Congress in December 1922. H.R. 13522, 67th Cong., 4th Sess. (1922). It quickly attracted attention in labor circles, notably that of Andrew Furuseth, President of the International Seamen's Union. See M.W. Finkin, "*Workers' Contracts" Under the United States Arbitration Act: An Essay In Historical Clarification*, 17 Berkeley J. Emp. & Lab. L. 282, 284 (1996). The Union and the American Federation of Labor immediately went on record against the bill's application to employment contracts, on the ground that the genuine consent to arbitrate disputes that was the backbone of commercial arbitration agreements was lacking when employees sign a take-it-or-leave-it employment contract with an arbitration provision. *Ibid.* As a union resolution stated, the bill "makes need, hunger and want, the basis of contracts which * * * a misused equity power will enforce." *Id.* at 284 n.14; cf. *Volt Info. Sciences, Inc.* v. *Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) ("Arbitration under the Act is a matter of consent, not coercion."); *Prima Paint Corp.* v. *Flood & Conklin Mfg.*, 388 U.S. 395, 403 n.9 (1967) ("We note that categories of contracts otherwise within the Arbitration

Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See § 1.").

On January 31, 1923, a Senate subcommittee held hearings on the bill. *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. (1923) (*Senate Hearing*). Furuseth's concerns were echoed by Senator Walsh at the hearing:

> The trouble about the matter is that a great many of these contracts that are entered into are really not voluntar[y] things at all. Take an insurance policy. * * * *It is the same with a good many contracts of employment.* A man says, "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

Senate Hearing 9 (emphasis added). Those considering the legislation were concerned about the questions about consent that would arise upon application of the arbitration act to employment contracts.

Having apparently heard of labor's concerns with the bill, then-Secretary of Commerce Herbert Hoover wrote a letter to the subcommittee supporting the bill. Hoover's letter is the source of the exclusion in the FAA, and it explains its intended scope. The letter states that "[i]f objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'" *Senate Hearing* 14. Secretary Hoover apparently believed that that language—which was adopted verbatim into the FAA—would address any

objection to "the inclusion of workers' contracts in the law's scheme." There was certainly no suggestion that it would exclude only some employment contracts, or that Congress should draft the exclusion narrowly to achieve that end.

Moreover, others shared Hoover's view. The chairman of the ABA committee that had drafted the legislation, W.H.H. Piatt, also testified before the subcommittee. In response to the question whether he had heard of objections by labor to the bill, he stated:

> [Mr. Furuseth] has objected to it, and criticized it on the ground that the bill in its present form would affect, in fact compel, arbitration of the matters of agreement between the stevedores and their employers. Now, it was not the intention of the bill to have any such effect as that. It was not the intention of this bill to make an industrial arbitration in any sense; and so I suggest that in as far as the committee is concerned, if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce." It is not intended that this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.

Senate Hearing 9. Piatt's suggestion did not include the reference to railroad workers in Hoover's letter, and it substituted for the phrase Hoover suggested ("any other class of workers engaged in interstate or foreign commerce") a slightly different formulation ("any class of workers in interstate and foreign commerce"). But Piatt's suggestion nonetheless establishes that Congress was informed that the purpose of the FAA was to address commercial disputes among merchants and that a provision excluding "workers in

* * * commerce" would eliminate "any danger" that the FAA could be applied to "industrial arbitration" or "labor disputes."

No further action was taken on the FAA until the next Congress. Hearings were held in 1924 before a joint Senate-House committee on the FAA, as now amended to include Hoover's Section 1 exclusion. *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong., 1st Sess. (1924). Although the exclusion was not further addressed in any detail, the basic explanation for the purpose and language of the exclusion was again made part of the record. The chairman of the committee submitted Hoover's letter at the hearing, *id.* at 19, and it therefore was published again as part of the hearing record. *Id.* at 21. The record of the Joint Hearing is replete with witnesses stressing the need for legislation to enforce arbitration agreements in commercial transactions, and no witness or statement suggests that employment contracts would be included. Indeed, with the elimination of employment contracts, "[t]here was no opposition to the bill before the committee." H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924).

This history shows that highly respected and legally sophisticated participants in the process of drafting and enacting the FAA were concerned that it would be construed to apply to employment contracts, and that they sought a formulation that would block such coverage. It shows that the "engaged in * * * commerce" formulation that Hoover proposed was presented to and accepted by Congress as an appropriate way to keep employment contracts out of the ambit of the FAA. That is potent evidence that Congress viewed the term "engaged in * * * commerce" in the Section 1 exclusion as sufficiently broad to eliminate whatever employment contracts might fall within the "involving commerce" term in Section 2.

II. THERE IS NO REASON NOT TO CONSTRUE THE TERMS IN THE SECTION 1 EXCLUSION IN ACCORD WITH THEIR ORDINARY MEANING

As the above discussion demonstrates, the plain meaning of the statutory terms is that the FAA's Section 1 exclusion for "any other class of workers engaged in * * * commerce" is coextensive with the Section 2 coverage provision; any employment contracts drawn into the statute by Section 2 are excluded by the plain meaning of that formulation in Section 1. Therefore, unless there is some other reason to construe Section 1 more narrowly than its plain terms indicate, the court of appeals' conclusion that employment contracts are not covered by the FAA is correct. The "liberal federal policy favoring arbitration," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), does not suffice to narrow Section 1, both because the very question in this case is whether Congress wanted to exclude employment contracts from that policy by enacting the Section 1 exclusion and because that policy in any event could not overcome the plain statutory language and history.[9] An

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[9] Petitioner mistakenly relies (Br. 40) on the provision of the Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1081, providing that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged" to resolve federal discrimination cases. See also 42 U.S.C. 12212. The EEOC has long taken the position that postdispute agreements to employ alternative means of dispute resolution, including binding arbitration, should be fostered. The advisability of non-negotiated predispute agreements to arbitrate as a condition of employment, however, is far more controversial. Accordingly, the statutory provision on which petitioner relies carefully "encourage[s]" arbitration only "[w]here appropriate." See *Wright* v. *Universal Mar. Serv. Corp.*, 525 U.S. 70, 82 n.2 (1998); see also H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 1, at 97, 104 (1991) (inadvisability of enforcing predispute agreements); H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 2, at 41 (1991) (predispute agreement in employment contract does not preclude Title VII claim in court). That provi-

examination of petitioner's other arguments demonstrates that there are in fact no sound bases to depart from the plain meaning rule in this case.

1. Petitioner contends that Section 1 excludes only employment contracts of transportation workers, see note 2, *supra*, and that all other employment contracts are covered by the FAA. There is, however, a logical flaw in petitioner's argument. Even if petitioner were correct that "the § 1 exclusion of employment contracts for workers 'engaged in commerce' must exclude a class of contracts well short of the overall sweep of the statute as defined by the broader language of § 2," Pet. Br. 16, it would not follow that employment contracts of transportation workers would be the class excluded. To the contrary, the accepted modern meaning of "engaged in commerce," even if narrower than the full sweep of the Commerce Clause, is to refer to "persons or activities within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." *Gulf Oil*, 419 U.S. at 195; see also *United States* v. *Robertson*, 514 U.S. 669, 671-672 (1995) (per curiam) (defendant who purchased goods in California for use in Alaska mine, hired workers out of State and brought them to Alaska, and took mine output out of State "engaged in * * * commerce"); *Mitchell* v. *Lublin, McGaughy & Assocs.*, 358 U.S. 207, 213 (1959) (employees "engaged in" commerce where they "worked on plans and specifications" for facilities used for commerce). That obviously extends far beyond those employed in the transportation of goods.

Applying that formulation to this case would require affirmance of the judgment below. Respondent was employed by "a national retailer of brand-name consumer electronics and related products," Pet. Br. 4, that "distribut[es] to the

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sion does not—and could not—carry any weight in determining the scope of the FAA Section 1 exclusion enacted in 1925.

consumer." *Gulf Oil*, 419 U.S. at 195. Respondent is therefore a member of a "class of workers engaged in * * * commerce" under even the modern, post-1938 meaning of that phrase. Accordingly, petitioner's own arguments regarding the meaning of "engaged in * * * commerce," even if correct, would dictate that respondent—who is not a transportation worker—is within the Section 1 exclusion.

2. Petitioner's argument thus reduces simply to the proposition that the maxim of *ejusdem generis* should be applied to limit the formulation "seamen, railroad employees, or any other class of workers" to transportation workers. For the reasons given above, the concluding phrase ("engaged in foreign or interstate commerce") provides no support for the application of *ejusdem generis* here or the limitation of the exclusion to transportation workers. If *ejusdem generis* is to be applied, it must be for other reasons.

a. There is no sound reason for applying the maxim in this case. As this Court has explained, "[t]he rule of *ejusdem generis* * * * is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty" and it does "not require rejection of that sense of the words which best harmonizes with the context and the end in view." *United States* v. *Powell*, 423 U.S. 87, 91 (1975) (quoting *Gooch* v. *United States*, 297 U.S. 124, 128 (1936)). "That a word may be known by the company it keeps is * * * not an invariable rule, for the word may have a character of its own not to be submerged by its association." *Russell Motor Car Co.* v. *United States*, 261 U.S. 514, 519 (1923). Like other similar maxims, *ejusdem generis* "may not be used to create but only to remove doubt." *Ibid.* See also *Powell*, 423 U.S. at 90 ("[W]e would be justified in narrowing the statute only if such a narrow reading was supported by evidence of congressional intent over and above the language of the statute.").

As explained above, there is no ambiguity in the Section 1 language—"seamen, railroad employees, or any other class of workers engaged in * * * commerce"—to which petitioner would apply *ejusdem generis*. Under that language, "[t]he Arbitration Act does not apply to 'contracts of employment of . . . workers engaged in foreign or interstate commerce,'" *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987) (ellipsis in original). The analysis thus need go no farther.

Indeed, this Court has held that it is "inappropriate to apply the rule of *ejusdem generis*" to quite similar "expansive" language. *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 589 (1980). In *Harrison*, the Court was asked to apply *ejusdem generis* to limit the term "any other final action," as it appeared in an extensive list of administrative orders in Section 307(b)(1) of the Clean Air Act, 42 U.S.C. 7607(b)(1). After stating that it "discern[ed] no uncertainty in the meaning" of the language at issue, the Court held that "the phrase 'any other final action' in the absence of legislative history to the contrary, must be construed to mean exactly what it says, namely, *any other* final action." 446 U.S. at 588-589. The same principle applies here. See also *Garcia* v. *United States*, 469 U.S. 70, 73-75 (1984) (declining to apply *ejusdem generis* to construe "any money or other property" to refer only to postal money or property in phrase "any mail matter or * * * any money or other property of the United States").[10]

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[10] Petitioner argues (Br. 22) that construing "any other class of workers" according to its plain terms would "simply excise the words 'seamen' and 'railroad employees' from FAA § 1." Literally, that is not true, for the concluding phrase applies only to "any *other* class of workers." Indeed, the addition of the word "other" is one of the differences between Hoover's formulation (which Congress adopted) and Piatt's formulation (which Congress did not) of the exclusion. In any event, this kind of listing, concluding with a broad term that could render the other terms superfluous, is ordinarily present in statutes, like those at issue in *Garcia* and *Powell*, to which the Court refuses to apply *ejusdem generis*.

b. At the very least, application of *ejusdem generis* requires the articulation of a persuasive reason why Congress would have wanted to achieve the narrowing result that application of the maxim would achieve; ordinarily, the reason is that a broad reading of a statutory phrase would "giv[e] unintended breadth to the Acts of Congress." *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).[11] See also *Hughey* v. *United States*, 495 U.S. 411, 420 (1990) (applying *ejusdem generis* to avoid result that a "catchall phrase imports into the * * * provisions a wholly new substantive dimension not otherwise evident in the statute"); *Third Nat'l Bank* v. *Impac Ltd., Inc.*, 432 U.S. 312, 322-323 (1977) (noting numerous reasons, including *noscitur a sociis*, for adopting narrowing construction of statutory term and noting that "[n]o reason has been advanced" why Congress would have intended the broader reading of the statute).

In *Powell*, for example, the Court declined an invitation to limit the phrase "[p]istols, revolvers, and other firearms capable of being concealed on the person" in a criminal statute to exclude weapons not inherently concealable, such as a

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[11] For example, in *Gustafson* v. *Alloyd Co.*, 513 U.S. 561 (1995), the Court applied the related doctrine of *noscitur a sociis* in interpreting the term "communication" in the statutory phrase "any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security." 15 U.S.C. 77b(10). The Court explained that "[f]rom the terms 'prospectus, notice, circular, advertisement, [or] letter,' it is apparent that the list refers to documents of wide dissemination." 513 U.S. at 575. Accordingly, the Court applied the narrowing maxim to limit the term "written communication" to "communications held out to the public at large," *id.* at 576, based in part on the conclusion that holding otherwise would "effect[] expansion of the coverage of the entire statute," *id.* at 578. See also *ibid.* ("It is not plausible to infer that Congress created this extensive liability for every casual communication between buyer and seller in the secondary market."). In this case, it is applying the doctrine of *ejusdem generis* that would substantially expand the FAA to include employment contracts; interpreting the statute according to its terms would permit the legislature (federal or state) to make the difficult policy decisions involved in applying the FAA to employment contracts.

sawed-off shotgun. 423 U.S. at 89 n.3. The Court found that the statutory purpose—"to make it more difficult for criminals to obtain concealable weapons," *id.* at 91—suggests the broader, not narrower, reading. In *Norfolk & Western Railway* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991), the Court explained that the canon "does not control * * * when the whole context dictates a different conclusion." On that basis and after an examination of the legal context and purpose of the statute in question, the Court declined to apply *ejusdem generis* and held instead that an exemption "from the antitrust laws and all other law, including State and municipal law" includes "a carrier's legal obligations under a collective-bargaining agreement." *Id.* at 127.[12]

In this case, applying *ejusdem generis* to limit the FAA Section 1 exclusion to employment contracts of transportation workers would achieve no discernible purpose other than to frustrate Congress's evident intent. The reasons advanced for the exclusion when it was drafted and added to the statute—in particular, the doubt about the integrity of an employee's consent to an arbitration clause likely imposed on a take-it-or-leave-it basis in an employment contract—are at least as applicable to other classes of workers as to transportation workers. Cf. *Prima Paint*, 388 U.S. at 403 n.9. Although it has been urged that an exclusion for transportation workers could be justified on the ground that statutes already in existence in 1925 provided for arbitration of at least some disputes of seaman and railroad workers, see *Tenney Eng'g, Inc.*, 207 F.2d at 452, that justification cannot explain the inclusion of other transportation workers, such

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[12] See also *Gooch*, 297 U.S. at 128 (refusing to apply *ejusdem generis* to limit phrase "for ransom or reward or otherwise" in kidnapping statute to pecuniary motivations); *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 88-89 (1934) (refusing to exclude interest on tax refunds from scope of phrase "interest on bonds, notes, or other interest-bearing obligations" in tax statute).

as those working in the bus, truck, or even the nascent air transit industries. See M. Finkin, *supra*, 17 Berkeley J. Emp. & Lab. L. at 291 n.40 (noting that in 1926 there were 25,000 trucks and more than 3000 buses operating in interstate commerce); cf. *Buck* v. *Kuykendall*, 267 U.S. 307 (1925) (claim by operator of interstate bus line to be relieved of state-law requirement).

Indeed, petitioner has a difficult time formulating a rationale for a transportation-worker-only exclusion. Petitioner notes (Br. 27) the theories that Congress simply "'rounded out' the exclusionary clause to cover similar transportation workers" after including seamen and railroad workers and that Congress "anticipated that other transportation workers * * * also would unionize and lobby successfully for protective legislation." Petitioner concludes (*ibid.*), however, that "[j]ust as likely, these additional groups of transportation workers were included simply to avoid any appearance of favoritism for selected 'special interests.'" The "rounding out" and "avoiding favoritism" theories, however, are not explanations for a transportation-worker-only exclusion; they are acknowledgements of the lack of any good reason why Congress would have wanted to write a statute that would be interpreted as petitioner suggests. Although Congress no doubt sometimes acts in that way, there is no reason to presume that it has, when the alternative explanation that Congress intended to exclude all employment contracts is both logically sound and well supported by the statutory language and the legislative record.

c. Finally, petitioner's expansion of the FAA to include most employment contracts would be particularly unwarranted, because it would oust the States from a part of their traditional authority over the employer-employee relationship. See *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984). The States are well-equipped to adopt nuanced approaches, tailored to local settings and inclinations, to perceived abuses —as well as advantages—that might arise from enforcement

of arbitration agreements in the employment setting.[13] If there is any doubt that Congress intended generally to exclude employment contracts from the FAA, it would be inappropriate to apply *ejusdem generis* to expand the reach of the statute that far into what has been state territory. The better course would be to adopt a cautious interpretation of the FAA, leaving the States with their traditional authority over the employment relationship until Congress has more clearly expressed its intent to do otherwise.

Consideration of the relationship between the States and Congress at the time of the enactment of the FAA in 1925 demonstrates just how odd it would have been for Congress to have excluded all (and only) transportation workers from the FAA. Transportation workers were perhaps the only class of workers over whom Congress had reasonably secure Commerce Clause jurisdiction in 1925. To construe the statute as petitioner suggests would be to assume that Congress wanted to exclude from federal jurisdiction (and thus leave to the States) employment contracts of workers over whom it clearly had substantial regulatory authority, while bringing within the scope of federal law (and thus depriving the States of jurisdiction over) employment contracts of workers over whom it likely had no authority. This Court has applied *ejusdem generis* to avoid a perverse result; it has never applied that or other maxims to put in place a scheme as unusual as that suggested by petitioner.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[13] Since this case involves only state-law claims, affirmance would not present any question regarding the authority of the States to control the forum or forums intended by Congress for resolution of federal statutory claims.

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SEPTEMBER 2000

APPENDIX

1. Section 1 of Title 9 of the United States Code provides:

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

2. Section 2 of Title 9 of the United States Code provides:

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid,

irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.