No. 99-1379

In The

Supreme Court of the United States

◆

CIRCUIT CITY STORES, INC.,
Petitioner,

v.

SAINT CLAIR ADAMS,
Respondent.

◆

On Writ Of Certiorari to the
United States Court Of Appeals
for the Ninth Circuit

◆

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

◆

LAWRENCE Z. LORBER*
LAWRENCE R. SANDAK
STEPHANIE L. MARN
PROSKAUER ROSE LLP
1233 Twentieth Street, N.W.
Suite 800
Washington, D.C. 20036-2396
(202) 416-6800

Of Counsel:

STEPHEN A. BOKAT
ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5337

**Counsel of Record*

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This *amicus curiae* brief is submitted in support of the Petitioner Circuit City Stores, Inc. By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief.[1]

STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents an underlying membership of nearly three million businesses and organizations, with 140,000 direct members, in every size, sector and geographic region of the country. The Chamber serves as the principal voice of the business community. An important function of the Chamber is to represent the interests of its members by filing *amicus* briefs in this Court on issues of national concern to American business. The Chamber has a particular interest in this case since it addresses an issue of great concern to its members - the enforceability of pre-

[1] Pursuant to Supreme Court Rule 37.6, the Chamber of Commerce of the United States of America states that this brief was prepared in its entirety by the Chamber and its counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than the Chamber, its members or their counsel.

dispute arbitration clauses, which are used by many Chamber members.

SUMMARY OF ARGUMENT

The ancient adage that "justice delayed is justice denied" is at the core of our legal tradition, finding its roots in the Magna Carta, which provided that "justice be to none denied or delayed." *Strachan v. Colon*, 941 F.2d 128 (2d Cir. 1991)(citing 1 W.S. Holdsworth, *A History of English Law*, 57-58 (3d ed. 1922)). Perhaps in no area of civil law does this legal principle carry more substance than in the application of laws governing the workplace. During the past 40 years, the workplace has witnessed an explosive burst of lawmaking, regulation and adjudication at the federal, state and local levels by which the diverse elements of our workforce have been provided with protections and rights. These developments did not occur in one overarching legislative act, a "big bang" of employment legislation, but rather in separate, successive acts, by which individual status rights were recognized and protected.

Thus, beginning with the Equal Pay Act of 1963, the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, the Employee Retirement Income Security Act; through the Employee Polygraph Protection Act, the Worker Adjustment and Retraining Notification Act, the Americans with Disabilities Act, the Civil Rights Act of 1991 and the Family Medical Leave Act, several additional statutes, as well as the detailed regulatory schemes accompanying these laws and the case law built thereon, the American workplace has become perhaps the most regulated area of common human activity.

Since this regulatory structure was developed in a piecemeal fashion, these laws have different procedural requirements, governmental agency involvements,

enforcement schemes and remedies. And this federal structure is often mirrored by state and local regulatory and enforcement schemes, with their own procedural requirements and independent remedies, which apply in tandem with the federal requirements. The courts have extended workplace protections through recognition of various common law actions, sounding in both tort and contract. For both the employers who must comprehend and follow this complex mosaic of laws and the employees who look to them for protection, the complexity of the workplace regulatory scheme is particularly challenging.

The purpose of underscoring the complexity of the law of the workplace is not to question the various rights and protections thereby established. Rather, it is to provide an understanding of a basic principle. This extraordinarily complex structure has been built to ensure a very simple premise: that each individual employee be treated fairly and equitably in the workplace and that each employer understand what is expected to achieve this result. Yet, the very complexity builds in delays and confusion. And when the ultimate forum for resolution of employment disputes is the courts, already burdened by growing caseloads of criminal and civil matters, expeditious resolution is often impossible. The result is that the intended benefits of these laws are often dissipated by interminable legal jousting and the necessity to find a place in an impossibly crowded court system. Employees who are attempting to secure their rights or redress grievances, and the employers who desire to understand their obligations and conduct their businesses accordingly, are forced into an endless legal contest which often freezes the employment relationship into a perpetual state of conflict and confusion. Perhaps the current morass of employment adjudication was best described by Charles Dickens when he

wrote about another litigation one hundred and fifty years ago:

> Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; *innumerable* old people have died out of it. Scores of persons have deliriously found themselves made parties to Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit.

Charles Dickens, *Bleak House* 4 (Bantam Classic ed., Bantam Books 1983 (1853).

It cannot have been intended by the authors of our unique employment statutes that the parties would become like Jarndyce and Jarndyce. Yet without a fair, expeditious and economical dispute resolution process, that is precisely what will happen to our employment law process. Therefore, alternative dispute resolution processes, including arbitration, which satisfy due process and fairness requirements and ensure that statutory rights and remedies are enforced, should be preserved. The Ninth Circuit's interpretation of the

Federal Arbitration Act, ("FAA") which stands alone among the federal courts that have reviewed this issue, is unnecessarily cramped and restricted, and at odds with the language of that statute, the policies underlying the encouragement of alternative dispute resolution mechanisms, including contractual arbitration, and the basic public policy which encourages fair and rapid resolution of employment disputes.

ARGUMENT

I. SECTION 1 OF THE FEDERAL ARBITRATION ACT DOES NOT EXCLUDE ALL CONTRACTS OF EMPLOYMENT FROM ITS COVERAGE

With the exception of the Ninth Circuit,[2] every United States Court of Appeals that has addressed the scope of the FAA's "workers engaged in . . . interstate commerce" exclusion has concluded that a narrow construction of 9 U.S.C. § 1 to include only employees actually engaged in the channels of interstate commerce comports with the plain meaning of the statute and federal policy favoring arbitration. *See Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3d Cir.), *cert. denied*, 522 U.S. 915 (1997); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 356-58 (7th Cir.), *cert. denied*, 522 U.S. 912 (1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998); *Paladino v. Avnet Computer Technologies*, 134 F.3d 1054, 1060-61 (11th Cir. 1998); *Cole v. Burns Int'l Sec.* Servs., 105 F.3d 1465, 1472 (D.C. Cir. 1997).

The plain meaning of the § 1 exclusion, which states 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," is that three categories of employment contracts are excluded from the Act's coverage: (1) seamen; (2) railroad employees; and (3) "any other class of workers engaged in foreign or

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[2] *Craft v. Campbell Soup Company*, 177 F.3d 1083 (9th Cir. 1999).

interstate commerce." Well-settled precepts of statutory construction support the conclusion that the § 1 exclusion is properly interpreted as narrow. Under the rule of *ejusdem generis*, the phrase, "any other workers engaged in foreign or interstate commerce," takes its meaning from the specific terms preceding it, "seamen" and "railroad employees." Therefore, it includes only those other classes of workers who are likewise engaged directly in commerce; that is, only those other classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it. *Cole*, 105 F.3d at 1471.

A narrow construction of § 1's exclusion also comports with the cardinal principle of statutory construction that instructs that a court has a "duty to give effect, if possible, to every clause and word of a statute." *Bennett v. Spear*, 520 U.S. 154, 173 (1997). If the phrase "any other class of workers engaged in foreign or interstate commerce" is interpreted to extend to all workers whose jobs merely have any effect on commerce, then the specific inclusion of "seamen and railroad workers" is rendered altogether redundant and unnecessary. Had Congress intended to exclude all employment contracts from coverage under the Act, it could simply have said "nothing herein shall apply to contracts of employment."

As a matter of statutory construction, the phrase "involving commerce" used in § 2 of the FAA, has a different and broader meaning than the phrase "in commerce" in § 1. In *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273-74 (1995), this Court stated:

> The initial interpretive question focuses upon the words "involving commerce." These words are broader than the often-found words of art "in commerce." They therefore cover more than "'only persons or activities within the flow of interstate commerce.'" . . . After examining the statute's language, background, and structure, we conclude that the word "involving" is broad and is indeed the functional equivalent of "affecting."

Consequently, the exclusion in § 1 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*," should be given a narrow interpretation, not one that excludes from the FAA's coverage *all* contracts of employment.

The Ninth Circuit's analysis in *Craft*, relied upon in the decision below, is fundamentally flawed because it relies on the "theoretical musings" of legal commentators who similarly equate the words "involving commerce" with the words of art "in commerce." Thus, the Ninth Circuit supports its decision, not pursuant to settled case law, but with the flawed analysis by Matthew W. Finkin:

> The [FAA] exempts contracts of employment, all contracts of employment, over which Congress had constitutional authority. * * * As the commerce power has been expanded by the United States Supreme Court, the exemption has expanded along with it, leaving the status of employees' contracts in practical effect just as

> they were when the Act passed. The contrary (though prevailing) view produces an anomaly.

Craft,177 F.3d at 1089 n.8. The conclusion that the scope of the exemption has expanded along with the expansion of the commerce power is based upon the presumption that "involving commerce" means the same thing as "in commerce," which it does not.

The Ninth Circuit also relies on Richard A. Epstein whose analysis is similarly flawed:

> But once the FAA is (mistakenly) expanded, what fate befalls its exclusion? . . . Under current law, the right answer is that the FAA keeps to its 1925 contours. . . . By venturing into the waters of partial translation, both sides to the present dispute get the arguments confused. First, they wrongly expand the coverage, "involving commerce" to keep the FAA in play; then they give the 1925 exemption its 1925 plain meaning.

Craft at 1088 (citing Richard A. Epstein, *Fidelity Without Translation*, 1 Green Bag 2d 21, 27-29 (1997)). Yet if "involving commerce" has a broader meaning than the words of art, "in commerce," as this Court has said, then there is no inconsistency or anomalous result in interpreting § 2 of the FAA to apply to the reach of the commerce power, and interpreting the § 1 exclusion narrowly, to apply only to workers actually engaged in the flow of interstate commerce.

The Ninth Circuit's decision in *Craft*, on which the lower court in the present case relied, further reflects the view that the FAA should be interpreted in terms of Congress' understanding of the limits of the commerce power in 1925. This Court rejected this argument in *Allied-Bruce Terminix*, where it explained that it would expand the scope of § 2 of the FAA, along with the expansion of the commerce power, even though when the FAA was enacted, the commerce power was much narrower:

> The pre-New Deal Congress that passed the Act in 1925 might well have thought the Commerce Clause did not stretch as far as it 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, for the reasons set forth above, we do here.

Id. at 275. Not only is it appropriate for courts to interpret statutes in this manner, it is essential if courts are to maintain consistency and prevent chaos in the law.

As for *Craft's* reliance on the legislative history of the FAA, the statute is not ambiguous, such that there is no need or justification to turn to scant legislative history. *See Cole*, 105 F.3d at 1472 ("in a case such as this, where the statutory text does not admit of serious ambiguity, . . . legislative history is, at best, secondary and at worst irrelevant."). Moreover, the legislative history does not evidence that Congress intended to exclude from the Act's coverage all contracts of employment. Since its enactment in 1925 the FAA has been reenacted, and in the intervening years, when the scope of the commerce power expanded, Congress has not seen fit to amend the FAA to expressly exclude from its scope all employment contracts.

Finally, although this Court has never reached the issue of § 1's scope, *see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25, n. 2 (1991), and did not analyze the arbitration agreement at issue in *Gilmer* as an employment contract, the result, i.e. enforcement of an agreement to arbitrate all employment-related claims that was entered into as a condition of employment, suggests that the FAA does not exclude all contracts of employment. Certainly, "it would be anomalous to compel arbitration of Gilmer's employment claims simply because the arbitration agreement was not formally part of a 'contract for employment.'" *Cole*, 105 F.3d at 1472.

II. SECTION 1 OF THE FAA SHOULD BE INTERPRETED NARROWLY BECAUSE FEDERAL POLICY FAVORS ARBITRATION

A. Courts Have Long Recognized The Federal Policy Favoring Arbitration

A narrow construction of the exclusionary clause is consistent with the underlying purpose of the Act, which is to favor arbitration. In substance, the FAA mandates that arbitration agreements contained in contracts involving commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, and provides for orders compelling arbitration when one party fails to comply with a valid arbitration agreement. 9 U.S.C. § 4. The history of the FAA's interpretation in this Court reflects a clear disposition to interpret its application broadly. *See Gilmer*, 500 U.S. at 24 (finding that the Act was enacted "to reverse

the longstanding judicial hostility to arbitration agreements that had existed at English common law and to place arbitration upon the same footing as other contracts" and that the "presumption of arbitrability" elevates arbitration agreements to a preferred position over other contracts); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) ("The preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute"); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) ("In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements"); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) ("[W]e not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.").

B. Arbitration Should Be Favored Because The Federal Civil Rights Statutes Contemplate Alternative Dispute Resolution

Recognition that justice delayed is justice denied is reflected in the Civil Rights Act of 1991, which expressly provides in § 118 that: "[w]here appropriate, and to the extent

authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." This principle is also reflected in the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 et seq., which authorized a formal program of alternative dispute resolution at the federal trial court level out of Congress' recognition that arbitration should be encouraged because of the advantage it enjoys over litigation in more promptly resolving disputes. In § 2 of the Act, "Findings and Declaration of Policy," Congress found in pertinent part:

> (1) alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements;
>
> (2) certain forms of alternative dispute resolution, including mediation, early neutral evaluation, minitrials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently;
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> * * *

Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651.

The policy issues surrounding arbitration have generated extensive commentary. This Court has framed the inquiry in terms of whether the prospective litigant is able to

exercise his substantive rights under the applicable civil rights statute in the arbitration. *See Gilmer*, 500 U.S. at 28 ("So long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)). Over the last few years, this Court has repeatedly found that statutory rights of action are vindicated in the arbitral forum, and hence have held arbitration agreements enforceable to claims under the Sherman Act, 15 U.S.C. §§ 1-7; § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); the civil provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq.; § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2); and the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 et seq. *See Gilmer*, 500 U.S. at 26 (citing *Mitsubishi*, 473 U.S. at 614; *Shearson/American Express, Inc. v. McMahon*, 428 U.S. 220 (1987); *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989)); *see also Perry v. Thomas*, 482 U.S. 483 (1987). Following this Court's example, lower courts have held arbitration agreements enforceable in cases arising under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2612. *See O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997).

It is against the background of a "federal policy favoring arbitration," *Gilmer*, 500 U.S. at 26, that the applicability of a mandatory pre-dispute agreement to arbitrate an employment dispute between an employer and an employee must be measured. Having engaged in a detailed analysis of the applicability of pre-dispute arbitration provisions in statutory discrimination matters, the First

Circuit has held: "While people may and do reasonably disagree about whether pre-dispute arbitration agreements are a wise way of resolving discrimination claims, there is no 'inherent conflict' between the goals of Title VII and the goals of the FAA." *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 170 F.3d 1, 11 (1st Cir. 1999)(citing *Gilmer*, 500 U.S. at 26, quoting *McMahon*, 482 U.S. at 227 (1987)). In *Cole*, 105 F.3d at 1486 n.19, Chief Judge Edwards of the D.C. Circuit emphasized the *Gilmer* Court's admonition that in evaluating the enforceability of compulsory arbitration, it is necessary to ask whether compulsory arbitration of Title VII claims would be inconsistent with the statutory framework and purposes of Title VII. Once the procedural fairness and due process of the arbitration are established, there should be no impediment to the utilization of the well-established alternative to court adjudication. *See Cole*, 105 F.3d at 1485.

III. FEDERAL POLICY FAVORING ARBITRATION IS WELL FOUNDED BECAUSE ARBITRATION ALLOWS CLAIMS TO BE RESOLVED FAIRLY, QUICKLY AND INEXPENSIVELY

The decision of the Ninth Circuit, interpreting the FAA to exclude from its scope virtually all claims concerning the employment relationship, is inconsistent with the "liberal federal policy favoring arbitration agreements." *Gilmer*, 500 U.S. at 25; *Moses H. Cone*, 460 U.S. at 24. The very purpose underlying the FAA's enactment in 1925 was "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by

American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer*, 500 U.S. at 24.

This Court has made clear that arbitration agreements, enforceable under the FAA, may encompass statutory claims concerning the employment relationship, including those alleging employment discrimination. *Id.* at 26. "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628.

With the increasing use of arbitral fora to resolve statutory employment claims has come evidence that the "trade-off" made by employees who entered into arbitration agreements has been largely to their benefit. Discrimination claims brought in arbitration are resolved more quickly and inexpensively than those brought in court; such claims are more fully aired in arbitration as they are rarely dismissed prior to arbitration hearings, and such hearings are unconstrained by strict adherence to the rules of evidence; and, in fact, employees prevail more frequently before arbitration panels than before juries. And for employers, the recourse to alternative dispute resolution processes culminates in expeditious and economical resolution of workplace issues so that the business of the workplace may continue.

The comprehensive federal legislation of the last few decades governing all aspects of the employment relationship has resulted in an explosion of employment-related litigation, which has clogged the federal courts. *See, e.g.*, Report of the

Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts, 1997 Ann. Surv. Am. L. 9, 88-89 (some judges surveyed believe that small cases brought by individual claimants, including employment discrimination cases, "clog the federal courts and divert the attention of judges away from larger, more significant civil cases" and that the resultant caseloads "will require an increased number of judges, destroying the collegiality and cohesiveness of the federal bench")(*cited in* Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. Ill. L. Rev. 583, 593 n.64).

Data derived from the annual reports of the Administrative Office of the United States Courts shows that federal court filings of employment cases jumped from approximately 3.9 percent of all such filings in 1991 to 8.6 percent of all filings in 1998. Similarly, civil rights[3] filings escalated from 9.2 percent in 1991 to 15.4 percent in 1998. And, because of the general increase in litigation during the past decade, the raw numbers are even more revealing. In 1991, 8,102 federal employment cases were filed. By 1998,

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[3] "Civil rights" filings include complaints alleging employment discrimination, as well as housing, accommodation, welfare and voting discrimination. 13 Daily Lab. Rep. A-1 (BNA) (Jan. 20, 2000).

that number jumped nearly threefold to 24,111. Civil Rights filings multiplied from 19,100 in 1991 to 43,187 in 1998.[4]

[4] Statistics gathered from Admin. Office of the United States Courts, 1975-98.

As a result, employment discrimination cases filed in court can take years before reaching juries. The truism that "justice delayed is justice denied" is demonstrated daily in the federal courts. According to one survey, the average length of a discrimination action, from filing to award, in the Southern District of New York was 27.5 months, as compared to comparable arbitrations filed before the New York Stock Exchange and the National Association of Securities Dealers, Inc. which took 15.6 months and 17.8 months respectively. *See Mandatory Arbitration Agreements in Securities Industry Employment Contracts: Hearings before the Comm. on Banking, Housing, and Urban Affairs*, July 3, 1998, at iv (written statement of Stuart J. Kaswell, General Counsel, Securities Industry Ass'n).[5] When the time associated with exhausting administrative remedies in advance of court action and litigating post-judgment appeals is factored in, the average duration of litigation more than doubles the average duration of arbitration.

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[5] Available at: www.sia.com/ government_relations/html/stuart_testimony.html.

Delays in court proceedings not only take a financial and emotional toll on the litigants, but compromise the ability of out-of-work employees to pay their legal bills. *See* Martin J. Oppenheimer & Cameron Johnstone, *A Management Perspective: Mandatory Arbitration Agreements are an Effective Alternative to Employment Litigation*, 52 Disp. Resol. J. 19, 22 (1997); s*ee also* Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. Cooley L. Rev. 1, 7-8 (1998). Many blue collar and non-managerial claimants are unable to secure counsel, who are often reluctant to enter into contingent fee arrangements with employees whose potential recovery does not justify the substantial time and expense called for in discovery-intensive discrimination cases.[6] By bringing disputes to a prompt and

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[6] According to one estimate, arbitration as opposed to litigation of employment claims results in a fifty percent cost savings to the parties. *See* Garry G. Mathiason, *Evaluating and Using Employer-Initiated Arbitration Policies and Agreements: Preparing the Workplace for the Twenty-First Century*, Q227 ALI-ABA 23, 41 (1994). The same

final disposition, both sides avoid the substantial disruption to lives and businesses inherent in the long duration of court proceedings.

Furthermore, of the many employees who go to court, few see their cases ever come to trial. Employment claims are often disposed of on motions to dismiss or summary judgment, as well as other procedural barriers that stand between employees and juries. According to the U.S. Justice Department's Bureau of Justice Statistics, employment discrimination complaints filed in federal court that reached disposition by trial declined from 9 percent to 5 percent

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study concluded that the average duration of an arbitration claim is 8.6 months, compared to three to eight years for litigation claims. *See id*. (*citing* Elizabeth Rolph, et al., Inst. For Civil Justice, *Escaping the Courthouse: Private Alternative Dispute Resolution in Los Angeles*, 18-19 (1994)).

between 1990 and 1998. 13 Daily Lab. Rep. A-1 (BNA) (Jan. 20, 2000). On the other hand, parties to an arbitration can be relatively certain that their dispute will be considered on the merits after a full hearing. *See Cole*, 105 F.3d at 1488 ("Arbitration also offers employees a guarantee that there will be a hearing on the merits of their claims; no such guarantee exists in litigation where relatively few employees survive the procedural hurdles necessary to take a case to trial in the federal courts.")

Data comparing the success rate of employees in arbitration versus their counterparts who file discrimination claims in court also demonstrates the benefits of the arbitral forum for employees. According to one study examining the results of AAA arbitrations in employment cases between 1993 and 1995, employees prevailed in 63 percent of those cases. *See* Lisa Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Employee Rts. & Employment Pol'y J. 189, 213 (1997). This is a far greater rate of success than employees realize in court. *See* Lewis Maltby, *Employment Arbitration: Is it Really Second Class Justice?*, Disp. Resol. Mag., Vol. 6, No. 1, Fall 1999, at 23.

Though average awards to employees are higher when made by juries than by arbitrators, this fact must be placed in the context of the reality that between 1990 and 1998 the percentage of employment discrimination actions which actually culminated in a plaintiff's verdict dropped from a low 2 percent to a scant 1.6 percent. *See* 13 Daily Lab. Rep. A-1 (BNA) (Jan. 20, 2000). A more illuminating comparison is this: during a similar period, the entire class of employees who took their disputes to court collectively received 10.4 percent of their total demands, while employees who took their disputes to arbitration received 18 percent of their total demands.[7] *See* Maltby, *supra* at 24. According to Lewis Maltby, who compiled this data:[8] "[F]ar more employees win

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[7] The expedited process and greater confidentiality of arbitration lead to an additional remedial benefit. Employees are more likely to be in a position to remain with or return to the employer upon resolution of their dispute. "Because arbitration is closer in time to the discriminatory conduct, the likelihood is greater that the employee will accept reinstatement rather than damages. In contrast, many courts are reluctant to order reinstatement following protracted litigation, by which time animus between employer and employee has intensified and the trust required for a solid employment relationship is irretrievably lost." John W.R. Murray, *The Uncertain Legacy of Gilmer: Mandatory Arbitration of Federal Employment Discrimination Claims*, 26 Fordham Urb. L.J. 281, 298 (1999)(*citing* Susan A. FitzGibbon, *Reflections on Gilmer and Cole*, 1 Employee Rts. & Employment Pol'y J. 221, 245-55 (1997)).

[8] The data was compiled from a search of the

in arbitration than in court, and, overall, employees who take their disputes to arbitration collect more than those who go to court." *Id.*

Inter-University Consortium for Political and Social Research Database (July 11, 1997).

Given these facts, the contention that mandatory arbitration agreements are contrary to public policy because they disfavor employees, rings hollow. Critics of arbitration often point to the limited provisions for discovery in arbitration, compared to those set forth in the Federal Rules of Civil Procedure. In *Gilmer*, however, this Court emphasized that agreements to arbitrate are desirable *precisely because* they trade the intricate procedures of the federal courts for the "simplicity, informality and expedition of arbitration."[9] *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi*, 473 U.S. at 628).

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[9] *Gilmer* was decided before the American Bar Association ("ABA") Task Force on Alternative Dispute Resolution in Employment issued its Due Process Protocols for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship ("Protocols"). (AAA website, available at www.adr.org.). The Protocol, which has been endorsed by many of the foremost providers of alternate dispute resolution ("ADR") services, calls for enhanced discovery in arbitration. Many such providers have implemented or expanded their discovery procedures in response to the Protocols.

To the charge that arbitration is more susceptible to bias and partiality than the court system, this Court responded in *Gilmer* that judicial review under the FAA would allow the courts to set aside any award in which there "was evident partiality or corruption in the arbitrators." *Gilmer*, 500 U.S. at 30-31 (quoting 9 U.S.C. § 10(b)). Moreover, recent efforts by arbitration providers to improve the diversity and expertise of the available pool of arbitrators have proven successful. *See, e.g.*, ABA Protocols, *supra* n.6 (calling for a racially diverse and knowledgeable pool of arbitrators); Nat. Rules for Resol. of Employment Disp. (AAA, effective June 1, 1996) (providing that only arbitrators with experience in employment law be appointed); JAMS/Endispute Rules and Procs. for Mediation/Arb. of Employment Disp. (1995) (same). A related criticism often leveled at arbitration is the relative lack of thorough judicial review of arbitration decisions. Since this Court's decision in *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), the standard of review for an arbitrator's award has been "manifest disregard of the law." While this is indeed a high standard, most employment disputes are fact-based and not likely to raise the kind of legal issues that would require thorough judicial review. *See Cole*, 105 F.3d at 1487. Nonetheless, "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue." *Id.* at 1487 (quoting *Gilmer*, 500 U.S. at 32 n.4.)

Critics of arbitration sometimes point to the so-called "repeat-player" problem. They argue that, because the employer is always a party to an arbitration proceeding, it has an advantage over the one-time employee claimant in somehow manipulating the arbitration process. That the

repeat-player theory was initially developed in the context of a perceived problem in traditional litigation, not arbitration, is often overlooked. *See* Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y Rev. 95 (1974). Moreover, as arbitration providers have enhanced the procedural and due process rights of the parties, and have bolstered the ranks of arbitrators with increasingly competent and knowledgeable decision-makers, many of the perceived inequities have abated. Furthermore, as experienced employee advocates have themselves taken on some of the characteristics of repeat players, the playing field has been leveled substantially. Having repeatedly "decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators," *Gilmer*, 500 U.S. at 30; *Mitsubishi*, 473 U.S. at 634, there is certainly no basis for this Court to alter its course now.

IV. EXCLUDING EMPLOYMENT DISPUTES FROM MANDATORY ARBITRATION WOULD LEAD TO BIFURCATION OF PROCEEDINGS WITH THE POTENTIAL FOR CONFLICTING RESULTS OF SIMILAR DISPUTES

The policies favoring consistency of decision-making and integrity of the judicial process would also be served by reversal of the decision below. If this Court were to accept the position of the Ninth Circuit and hold that the FAA does not apply to contracts of employment and that any agreement to arbitrate between an employer and an employee constitutes such a contract, then all parties to employment disputes would suffer. Discrimination claims are frequently brought in connection with other employment claims, such as breach of contract, tort or wage and hour claims, all presumably subject to valid arbitration agreements under state law. Currently, all may be joined with statutory claims in arbitration, leading to judicial economy within a single forum. As all such claims may arise from the same facts, the consideration of these claims together preserves resources. If, however, this Court were to hold that the FAA does not apply to mandatory arbitration agreements between employers and employees, the resultant forum bifurcation would be wasteful to both parties. In particular, the party with the least resources -- typically the employee -- would be at a disadvantage. Furthermore, there would be a risk of conflicting decisions arising from the same facts, causing injury to the integrity of both the courts and the arbitration system.

Not only could there be inconsistent findings of fact regarding the same employee, but there is a similar risk that issues common to several employees of the same large employer, situated in different states, would be subject to inconsistent procedures under state laws. In those states in which mandatory agreements to arbitrate statutory claims are enforceable, the employee will be compelled into the arbitral forum, while in other states, the parties may be forced into court. Arbitration agreements within the scope of the FAA are enforceable even if they conflict with state law policies

that preclude arbitration. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *see also Great Western Mortgage Corp. v. Peacock*, 110 F.3d, 222, 230 (3d Cir. 1997). In jurisdictions other than the Ninth Circuit, agreements to arbitrate employment discrimination claims are enforceable even if state law requires the opposite. Provided there is a valid arbitration agreement, federal courts have jurisdiction to compel arbitration in those cases pursuant to the FAA. For example, in *Peacock*, the employee argued that New Jersey public policy, as expressed in the New Jersey Law Against Discrimination, was inconsistent with the mandatory arbitration of her sexual harassment claim. The court enforced the arbitration agreement in part because the "FAA preempts state laws which 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'" *Peacock*, 110 F.3d at 230, (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

However, if this Court upholds the Ninth Circuit's position, then the FAA would not apply to employment disputes, and there would be no federal jurisdiction to compel arbitration of such matters. Therefore, the arbitrability of claims would depend solely on whether employment discrimination claims fall within the scope of that particular state's arbitration laws. With regard to a national employer such as Circuit City, inconsistent treatment of similarly situated employees is inevitable, leading to an intolerable burden on employers with a nation-wide workforce, and to manifest unfairness in the treatment of employees.

It should not be forgotten in an examination of the FAA and statutory civil rights claims that there is a long history of regulation of the workplace at the state level. The state's concern for the well-being and fair treatment of its citizens has led to a welter of laws and regulations aimed at the speedy and balanced resolution of disputes between employers and employees. Most states have recognized that enforcement of these laws and regulations, as well as the obligations imposed on them in employment law by federal statute and administrative regulation, requires the encouragement of alternatives to the full process of trial. Arbitration and other forms of alternative dispute resolution are not only necessary to relieve an overloaded state court system, but also to provide for a fair, inexpensive and speedy resolution of employer/employee disputes.

CONCLUSION

For the foregoing reasons, the U.S. Chamber of Commerce respectfully requests that this Court reverse the Ninth Circuit in *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999) (*per curiam*), and hold that the FAA does apply to contracts of employment, with the narrow exception of employees involved in or closely related to the actual movement of goods in interstate commerce. Prior decisions of this Court, the language and purpose of the legislation at issue, and the federal and state policies favoring arbitration and judicial economy, argue for such an outcome.

Respectfully submitted,

Lawrence Z. Lorber
Counsel of Record
Lawrence R. Sandak
Stephanie L. Marn
PROSKAUER ROSE LLP
1233 Twentieth Street, N.W.
Suite 800
Washington, D.C. 20036-2396
(202) 416-6800

Attorneys for Amicus Curiae
The Chamber of Commerce of
the United States of America

Of Counsel:

STEPHEN A. BOKAT
ROBIN S. CONRAD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, D.C. 20062
(202) 463-5337

Dated August 7, 2000