IN THE SUPREME COURT OF THE UNITED STATES

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CIRCUIT CITY STORES, INC., :

Petitioner :

v. : No. 99-1379

SAINT CLAIR ADAMS :

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Washington, D.C.

Monday, November 6, 2000

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

APPEARANCES:

DAVID E. NAGLE, ESQ., Richmond, Virginia; on behalf of the Petitioner.

MICHAEL RUBIN, ESQ., San Francisco, California; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:02 a.m.)

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

Mr. Nagle.

ORAL ARGUMENT OF DAVID E. NAGLE

ON BEHALF OF THE PETITIONER

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

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

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

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

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

QUESTION: Is the word class important to your argument?

MR. NAGLE: Your Honor --

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

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

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

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

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

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

MR. NAGLE: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

QUESTION: Well, the other most troublesome

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

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

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

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

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

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

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

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

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

MR. NAGLE: Absolutely, Your Honor.

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

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

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

MR. NAGLE: Yes.

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

MR. NAGLE: Yes, Your Honor.

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

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

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

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

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

MR. NAGLE: Involving commerce, in section 2,

the coverage.

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

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

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

MR. NAGLE: Yes, Your Honor. I"m not aware that involved --

QUESTION: Involving commerce means pertaining to commerce.

MR. NAGLE: Yes, Your Honor.

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

MR. NAGLE: Your Honor, I --

QUESTION: To put it shortly.

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

QUESTION: Because it doesn't appear. The

phrase is involving commerce.

MR. NAGLE: Yes, Your Honor.

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

MR. NAGLE: Section 2, yes.

QUESTION: Of section 2.

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Okay.

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

QUESTION: All right.

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

QUESTION: What conclusion do you draw from that?

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

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

QUESTION: How about ticket agents for

railroads?

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

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

MR. NAGLE: I draw a distinction --

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

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

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

MR. NAGLE: Yes, Your Honor.

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

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

trying to read the statute --

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

MR. NAGLE: Yes, Your Honor.

QUESTION: The former is not.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. NAGLE: Yes, Your Honor.

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

MR. NAGLE: Certainly, Your Honor.

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

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

MR. NAGLE: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

of arbitrability.

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

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

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

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

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

to which State substantive law of arbitrability would apply.

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

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

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

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

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

someone returns here on that issue.

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

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

QUESTION: Yes.

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

QUESTION: Yes.

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

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

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

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

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

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

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

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

resolution of disputes.

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

If I may reserve the remainder of my time.

QUESTION: Very well, Mr. Nagle.

Mr. Rubin, we'll hear from you.

ORAL ARGUMENT OF MICHAEL RUBIN

ON BEHALF OF THE RESPONDENT

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

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

QUESTION: In 19 --

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

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

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

Secretary Hoover --

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

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

QUESTION: '25.

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

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

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

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

MR. RUBIN: There is --

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

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

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

(Laughter.)

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

Well, we start with the first two phrases, the

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

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

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

QUESTION: By Federal statutes.

MR. RUBIN: Excuse me if I misspoke.

QUESTION: No, I --

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

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

MR. RUBIN: There is --

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

MR. RUBIN: Our position is yes.

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

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

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

MR. RUBIN: That is possible.

QUESTION: We don't have to decide that.

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

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

affecting commerce notion --

MR. RUBIN: There was not.

QUESTION: -- floating out there?

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

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

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

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

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

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

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

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

whenever --

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

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

QUESTION: That may well be, but --

MR. RUBIN: A --

QUESTION: -- that's terrible drafting.

MR. RUBIN: The --

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

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

evidencing a transaction involving commerce.

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

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

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

MR. RUBIN: Then that has --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. RUBIN: Yes. Yes.

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

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

QUESTION: Or, LMRA, yes.

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

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

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

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

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

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

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

MR. RUBIN: Well, there are --

QUESTION: All right.

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

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

The question I have is the same I addressed to

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

MR. RUBIN: Yes.

QUESTION: It's an old statute.

MR. RUBIN: Yes.

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

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

MR. RUBIN: No.

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

MR. RUBIN: There --

QUESTION: Is there a problem?

MR. RUBIN: There are several levels of

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

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

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

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

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

MR. RUBIN: In those --

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

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

QUESTION: Yes.

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

QUESTION: Right.

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

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

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

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

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

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

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

MR. RUBIN: To --

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

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

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

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

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

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

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

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

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

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

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

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

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

If there are no further questions --

QUESTION: Thank you, Mr. Rubin.

MR. RUBIN: Thank you.

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

REBUTTAL ARGUMENT OF DAVID E. NAGLE

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

declined to do so.

If there are no further questions --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nagle. The case is submitted.

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