No. 21-309

In the Supreme Court of the United States

SOUTHWEST AIRLINES CO.,
Petitioner,

v.

LATRICE SAXON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

NAVAN WARD
President
JEFFREY R. WHITE
Senior Associate General Counsel
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(202) 944-2839
jeffrey.white@justice.org

GERSON H. SMOGER
Counsel of Record
SMOGER & ASSOCIATES
13250 Branch View Lane
Dallas, TX 75234
(972) 243-5297
gerson@texasinjurylaw.com

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES. iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE UNDERLYING HISTORY AND THE DRAFTING OF THE FEDERAL ARBITRATION ACT MAKES IT CLEAR THAT CONGRESS MEANT TO EXCLUDE ALL EMPLOYMENT CONTRACTS OF WORKERS FROM THE ACT 3

A. Background of the FAA 3

B. 1922: ABA Drafts a Federal Arbitration Bill Which Is Introduced in Congress 5

C. The International Seamen's Union of America and the American Federation of Labor Voice Serious Concerns About the Proposed Bill 6

D. 1923: Hearings Take Place Regarding the Benefits of the FAA With the ABA Offering to Revise the Bill to Include an Exemption for Workers 7

E. Herbert Hoover Sends the Committee a Letter Regarding the Bill Which Specifically Adds Railroad Employees to the Exemption 10

F. 1925: The ABA Revises the Bill with Hoover's Proposed Language and the Bill is Passed into Law 12

II. BY IGNORING THE ENTIRE DRAFTING AND LEGISLATIVE PROCESS SURROUNDING THE FAA, THE DECISION BY THE CIRCUIT CITY COURT IS BASED UPON FACTUALLY INCORRECT ASSUMPTIONS AND INCORRECT ANALYSIS 14

III. EVEN IF CIRCUIT CITY WERE CORRECTLY DECIDED, RESPONDENT, WHO IS CLEARLY A TRANSPORTATION WORKER, IS STILL EXEMPT FROM THE FAA 19

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

Balt. & Ohio Sw. R.R. Co. v. Burtch,
263 U.S. 540 (1924). 23

Brown v. Nabors Offshore Corp.,
339 F.3d 391 (5th Cir. 2003). 20

Buckley v. Nabors Drilling USA Inc.,
190 F. Supp. 2d 958 (S.D. Tex. 2002). 20

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001). *passim*

Gulf Oil Corp. v. Copp Paving Co.,
419 U.S. 186 (1974). 23

McDermott Int'l., Inc. v. Wilander,
498 U.S. 337 (1991). 19, 20

New Prime v. Oliveira,
139 S. Ct. 532 (2019). 2, 18, 21

Ratzlaf v. United States,
510 U.S. 135 (1994). 15

The Daniel Ball,
77 U.S. 557 (1870). 23

Tran v. Texan Lincoln Mercury, Inc.,
2007 WL 2471616 (S.D. Tex., Aug. 29, 2007) . . 20

United Bhd. of Maint. of Way Emps. & Ry. Shop Laborers v. St. Louis Sw. Ry. Co., Decision No. 120, 2 R.L.B. 96 (1921) 21

United States v. American Bldg. Maint. Industries,
422 U.S. 271 (1975) 23

Veliz v. Cintas Corp.,
No. C 03-1180 SBA, 2004 WL 2452851
(N.D. Cal. Apr. 5, 2004) 20

Wis. Cent. Ltd. v. United States,
138 S. Ct. 2067 (2018) 18

STATUTES

9 U.S.C. §§ 1 *et seq*. . . . . *passim*

9 U.S.C. § 1 24

15 U.S.C. § 13 23

15 U.S.C. § 18 23

45 U.S.C.A. § 151 20

1920 N.Y. Laws 803-07 4

OTHER AUTHORITIES

27 Proc. Ann. Convention Int'l Seamen's Union
of America 100 (1924) 7

43 A.B.A. Rep. 75 (1920) 5

45 A.B.A. Rep. 293 (1922) 5

46 A.B.A. Rep. 287 (1923) 12

67 Cong. Rec. 732 (1922) 6

Jose Aparicio, *The Arbitration Hack: The Push to Expand the FAA's Exemption to Modern-day Transportation Workers in the Gig Economy*, 54 U.S.F. L. REV. 397 (2020) 20

Jay Newton Baker, *The American Federation of Labor*, 22 YALE L.J. 73 (1912) 6

Julius Cohen, COMMERCIAL ARBITRATION AND THE LAW (1918) 4

Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265 (1926). 4, 6, 18

Committee on Commerce, Trade & Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A.J. 153 (1925) 5, 6

Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282 (1996) 7, 11

John J. George, MOTOR CARRIER REGULATION IN THE UNITED STATES (1929) 18

Hearing on S. 4213 and S. 4214 Before the S. Subcomm. of the Judiciary, 67th Cong. 7 (1923). . . . . *passim*

Herbert Hoover, THE MEMOIRS OF HERBERT HOOVER: THE CABINET AND THE PRESIDENCY 1920-1933 (1952). 12

Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., (1924) . . 4, 10, 24

Robert D. Leiter, THE TEAMSTERS UNION: A STUDY OF ITS ECONOMIC IMPACT (1957) 22

Christopher R. Leslie, *The Arbitration Bootstrap,* 94 TEX. L. REV. 265 (2015) 4, 8

Ian R. Macneil, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION (1992) 4, 12

Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Law Never Enacted by Congress*, 34 FLA. ST. U.L. REV. 99, 106 (2006) 8

Organization and Membership of American Trade Unions, 23(2) MONTHLY LAB. REV. 8 (Aug. 1926) 11, 21

Proceedings of the Forty-Fifth Annual Convention of the American Federation of Labor (1925) . . . 13

"Seamen Condemn Arbitration Bill," N.Y. TIMES, Jan. 14, 1923 7

S. REP. No. 68-536 (1924). 4

Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259 (1991) 14

Strike Paralyzes Railway Express, N.Y. TIMES, Oct. 14, 1919 22

Wesley A. Sturges, COMMERCIAL ARBITRATION AND AWARDS § 15 (1930) 4

Imre Szalai, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA (2013). 5, 7, 12, 13

Ray L. Wilber and Arthur M. Hyde, THE HOOVER POLICIES (1937) 12

INTEREST OF *AMICUS CURIAE*[1]

The American Association for Justice ("AAJ") was established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 75-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

AAJ is concerned that the overly broad construction of the Federal Arbitration Act advanced by Petitioner in this case undermines the right of American workers to pursue their statutory and common-law rights in a judicial forum.

SUMMARY OF ARGUMENT

The bill which became the Federal Arbitration Act ("FAA"), 9 U.S.C. 1 *et seq*., was written by a committee of the American Bar Association ("ABA") to make arbitration agreements between merchants enforceable when entered into during the course of international and interstate commerce. However, the International Seamen's Union of America and the American

---

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel has made a monetary contribution to its preparation or submission. Petitioner and Respondent have consented to the filing of this brief.

Federation of Labor ("AFL") immediately objected that the ABA's proposal would result in the FAA being applied to workers. In response, advocates for the bill, including the ABA drafting committee and Commerce Secretary Herbert Hoover, advanced language to alleviate these concerns which exempted employment contracts of workers from the Act's application.

Nevertheless, this Court in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), came to the conclusion that all workers, except seamen, railroad employees, and transportation workers, were intended to be covered by the Act. The *Circuit City* Court came to its conclusion by eschewing any attempt to review the legislative history. Instead, the court incorrectly applied the canon of *ejusdem generis*, while referencing extraneous maritime and railroad statutes that were never part of the legislative record nor even considered by the ABA drafters. Had the *Circuit City* Court attended to Justice Gorsuch's maxim that the FAA "should be interpreted as taking [its] ordinary meaning . . . [which is the] meaning at the time Congress enacted the statute," *New Prime v. Oliveira*, 139 S. Ct. 532, 539 (2019), the *Circuit City* Court could not have come to the conclusion that it did.

On the other hand, even *if* the holding by the *Circuit City* Court is accepted and the Section 1 exemption is deemed to focus on categories exclusively within the transportation sector, the exemption would still apply to Respondent. Just as merchant arbitration contracts, indisputably part of the FAA, cover goods in the stream of commerce from their initiation to final

delivery, all transportation workers involved in this stream would still be covered by the FAA exemption.

There is nothing in the legislative history, nor any logical understanding of the exemption, that would support Petitioner's cramped definition that the exemption was intended to be limited to workers who physically crossed state lines during the course of their work.

ARGUMENT

I. THE UNDERLYING HISTORY AND THE DRAFTING OF THE FEDERAL ARBITRATION ACT MAKES IT CLEAR THAT CONGRESS MEANT TO EXCLUDE ALL EMPLOYMENT CONTRACTS OF WORKERS FROM THE ACT.

Section 1 of the FAA states that the Act does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Ignoring the clear legislative history, Petitioner argues that this exemption applies only narrowly to a small group of workers in the transportation sector who happen to cross state lines during the course of their work. Pet'r Brief 14-21. Petitioner's cramped construction belies the history behind the enactment of the FAA, Congressional intent, and basic principles of contract construction as applied by this Court and elsewhere.

A. Background of the FAA

By the beginning of the twentieth century, arbitration between businesses had become common in

the United States. Problematically though, arbitration encountered a substantial legal obstacle due to the relative lack of judicial enforceability of agreements. This was because, under English common law, courts considered agreements between businesses to arbitrate future disputes to be revocable at any time.[2]

As arbitration clauses became a more prominent part of merchant-to-merchant contracts, business interests pushed for statutory remedies to combat this revocability. In 1920, the first such statute was enacted in New York.[3] After this proved successful, there was a push for a federal law that would be applicable in all federal courts.[4] This effort was led by the two men most responsible for the New York law: Julius Cohen, a lawyer who served as general counsel for the New York State Chamber of Commerce and who had written a book in 1918 on the subject, COMMERCIAL ARBITRATION AND THE LAW; and Charles Bernheimer, a cotton goods merchant who chaired the Chamber's arbitration committee. Immediately after the New

---

[2] *See* Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 34 (1924) ("1924 Hearings") (Statement of Julius Henry Cohen); Ian R. Macneil, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 20 (1992); Wesley A. Sturges, COMMERCIAL ARBITRATION AND AWARDS § 15, at 45 (1930).

[3] 1920 N.Y. Laws 803-07.; S. REP. No. 68-536, at 3 (1924) *See also* Christopher R. Leslie, *The Arbitration Bootstrap,* 94 TEX. L. REV. 265, 302 (2015).

[4] Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 275-76 (1926).

York law passed, Bernheimer[5]and Cohen began working on the passage of an equivalent federal bill.

B. 1922: ABA Drafts a Federal Arbitration Bill Which Is Introduced in Congress.

The Congressional bill that would become the FAA was drafted by Julius Cohen and reviewed by the American Bar Association's Committee on Commerce, Trade and Commercial Law.[6] The drafting process began at the ABA's annual meeting in 1920.[7] In 1922, the Committee reported to the ABA general body that it had finished drafting its proposed federal arbitration statute.[8]

After adoption by the ABA, on December 20, 1922, Senator Sterling in the Senate and Congressman Mills in the House introduced the federal arbitration bill in

---

[5] *See* Hearing on S. 4213 and S. 4214 Before the S. Subcomm. of the Judiciary, 67th Cong. 7-8 (1923) ("1923 Hearings"), where Bernheimer asserted that "[t]he statement I make is backed up by 73 commercial organizations in this country who have, by formal vote, approved of the bill before you gentlemen." *See also* Committee on Commerce, Trade & Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A.J. 153 at 153 (1925). The 1923 Hearings were held during the 67th Congress, while the FAA was passed by the 68th Congress. However, the 1923 Hearings were before a sub-committee whose membership was the same in the 68th Congress.

[6] 1923 Hearings at 2 (statement of Charles L. Bernheimer).

[7] 43 A.B.A. REP. 75 (1920); *see also* Imre Szalai, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA 104 (2013).

[8] 45 A.B.A. REP. 293-95 (1922).

the form reported at the 1922 meeting of the American Bar Association.[9]

Julius Cohen broadly summarized the purpose of the ABA's proposed bill:

> A written provision for arbitration contained in any contract which involves maritime transactions (matters which would be embraced within admiralty jurisdiction), or interstate commerce as generally defined, is made "valid, enforceable and irrevocable," except upon the grounds for which any contract may be revoked.[10]

Notably, this original bill did not include an exemption for "contracts of employment."

C. The International Seamen's Union of America and the American Federation of Labor Voice Serious Concerns About the Proposed Bill.

The bill's treatment of labor disputes sparked strong opposition from the International Seamen's Union of America and the American Federation of Labor.[11] Seamen's Union president Andrew Furuseth saw the bill as a mechanism for the "reintroduction of

---

[9] *See* 67 Cong. Rec. 732, 797 (1922) (noting the introduction of H.R. 13522 and S. 4214).

[10] Cohen & Dayton, *supra,* at 267; *see also* Committee on Commerce, *supra* at 153.

[11] The AFL had a vast membership "divided into 115 national and international unions." Jay Newton Baker, *The American Federation of Labor*, 22 YALE L.J. 73, 74 (1912).

forced involuntary labor." He felt that the bill "would bring about compulsory labor for seamen, railroad workers and all engaged in interstate commerce, and would jeopardize the existence of labor and other organizations formed by workingmen …."[12]

Both unions were staunch opponents of giving arbitrators authority over individual employment contracts. For instance, at the International Seamen's Union convention in 1924, the convention forcefully resolved to continue cooperation with the AFL "in preventing the enactment of any measure designed to fasten any species of compulsory arbitration upon any group of workers in America."[13]

D. 1923: Hearings Take Place Regarding the Benefits of the FAA With the ABA Offering to Revise the Bill to Include an Exemption for Workers.

A subcommittee of the Senate Judiciary Committee held hearings on the bill in January 1923. The hearings make clear that the focus of the Act was merchant-to-merchant arbitrations. Every example given by Bernheimer regarding the need for enforceability of arbitration agreements was of a case

[12] "Seamen Condemn Arbitration Bill," N.Y. TIMES, Jan. 14, 1923, at 21; Szalai, *supra*, at 132; Matthew W. Finkin, "*Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282, 284 (1996).

[13] 27 Proc. Ann. Convention Int'l Seamen's Union of America 100 (1924).

between merchants,[14] while other witnesses also described the bill solely with reference to disputes between businessmen.[15] In fact, Cohen, Bernheimer, and their colleagues took pains to tell Congress the limited scope of the proposed legislation.

When asked about the objections posed to the bill by the heads of the Seamen's Union and the AFL, W.H.H. Piatt, testifying at the 1923 Hearings in his capacity as chairman of the ABA Committee of Commerce Trade and Commercial Law, which was the committee that wrote the bill and presented it to Congress, pointedly testified:

> He has objected to it, and criticized it on the ground that the bill in its present form would affect, in fact compel, arbitration of the matters of agreement **between stevedores and their employers**.[16] Now, it was not the intention of the bill to have any such effect as that. It was not the intention of this bill to make an industrial arbitration in any sense; and so I suggest … they should add to the bill the

[14] Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Law Never Enacted by Congress*, 34 FLA. ST. U.L. REV. 99, 106 (2006).

[15] *See* Moses, *id.*; Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. Rev. 265, 306-07 (2015).

[16] Southwest in their brief at 13, in attempting to justify their attempt not to include freight loaders as falling within the parameters of the exemption, insist that "seamen" did not include "stevedores." This is quite bizarre, because stevedores, as shown here, were specifically referenced as an example of "seamen" who required the exemption.

> following language, "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce." **It is not intended that this shall be an act referring to labor disputes, at all.** It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.

1923 Hearings at 9 (bold emphasis supplied).

This response from Piatt was followed by questioning from Senator Walsh of Montana. Senator Walsh wanted to know whether the legislation would apply to contracts that were not really voluntary:

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

Id. Piatt responded that this was not the purpose of the bill and that the ABA had written the bill only to enforce arbitrations between businesses:

> I would not favor any kind of legislation that would permit the forcing of man [sic] to sign that kind of a contract.... I think that ought to be protested against, because it is the primary end

> of this contract that it is a contract between merchants one with another, buying and selling goods.

Id. at 10.

Thus, the testimony before the committee, including from the chair of the ABA committee that drafted the bill, makes it clear the FAA was only meant to apply to contracts between merchants. Mr. Piatt and the other ABA proponents had no objection to excluding workingmen, because they did not believe their bill was intended to cover employment contracts at all. Piatt therefore suggested adding language that: "nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce." This exclusion tracked Julius Cohen's description of the bill as dealing with admiralty and interstate commerce. 1924 Hearings, Statement of Julius Cohen at 15.

E. Herbert Hoover Sends the Committee a Letter Regarding the Bill Which Specifically Adds Railroad Employees to the Exemption.

Secretary of Commerce Herbert Hoover had long heavily advocated for the passing of the FAA, pointing to the New York Arbitration Act's ability to relieve congestion within the New York court system. But Hoover was also lobbied by railroad worker unions to have railroad employees expressly excluded from the mandates of the bill. These unions felt that they could not rely solely on the efforts of the AFL, because up through 1926 the "Big Four" railroad labor organizations (Brotherhood of Locomotive Engineers,

Order of Railway Conductors of America, Brotherhood of Locomotive Firemen and Engineers, and Brotherhood of Railroad Trainmen) were in competition with the AFL.[17]

Therefore, Hoover wrote the Committee, noting that he recognized the objection to the "inclusion of workers' contracts in the law's scheme." 1923 Hearings at 14 (letter of Secretary of Commerce Herbert Hoover). Hoover recommended that language be added to the proposed bill, stating, "but nothing herein contained shall apply to contracts of employment of seamen, *railroad employees*, or any other class of workers engaged in interstate or foreign commerce." *Id.* (emphasis supplied).

This language differed from Piatt's proposed exemption in two ways. First, Hoover's suggestion for the first time included railroad employees. Second, Hoover happened to use the phrase "workers engaged in interstate ... commerce," rather than "workers in interstate ... commerce,"[18] although as to this second change, no one at the time saw any difference between the two formulations. Hoover himself explained that his proposal was designed to take "workers' contracts"

---

[17] *Organization and Membership of American Trade Unions*, 23(2) MONTHLY LAB. REV. 8, 12 (Aug. 1926).

[18] Although this choice of language did not matter to anyone at the time (*see* Finkin, *supra*, at 297), the decision to use the phrase "engaged ... in commerce" came to matter when the Act was interpreted afterwards. *See* discussion of *Circuit City, infra.*

out of the law's scheme altogether, and it satisfied the unions who had sought that very end.[19]

F. 1925: The ABA Revises the Bill with Hoover's Proposed Language and the Bill is Passed into Law.

Later in 1923 the ABA Committee made Hoover's change to the draft bill,[20] inserting in Section 1 the exemption language: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[21] The ABA general body approved the draft of the bill containing the exemption language at its annual meeting in 1923.

When the bill was reintroduced in the next session of Congress, Congress took up the ABA's revised draft with Secretary Hoover's language used for the exemption clause. This inclusion was lauded by the Seamen's Union, the AFL and the railroad unions

---

[19] *See* Finkin, *supra*, at 297; Ray L. Wilber and Arthur M. Hyde, THE HOOVER POLICIES 114 (1937); Herbert Hoover, THE MEMOIRS OF HERBERT HOOVER: THE CABINET AND THE PRESIDENCY 1920-1933, at 68-69 (1952).

[20] Macneil, *supra,* at 91.

[21] *Id.*; 46 A.B.A. REP. 287 (1923); In its report, the Committee stated that this change was made "[i]n order to eliminate th[e] opposition" of the International Seamen's Union. 46 A.B.A. REP. 287 (1923). Indeed, after the exemption was inserted in 1923, one of the leading proponents of the bill, Charles Bernheimer, stated that "we are not ... convinced that it would not be in the interests of labor to have them included." Even so, he conceded that "all industrial questions have been eliminated" in order to appease labor's concerns. Szalai, *supra*, at 153.

which felt that the exemption language completely dealt with their objections. As stated at the Proceedings of the Forty-Fifth Annual Convention of the American Federation of Labor 52 (1925):

> Protests from the American Federation of Labor and the International Seamen's Union brought an amendment which provided that "nothing herein contained shall apply to contracts of employment of seamen, railroad employe[e]s or any other class of workers engaged in foreign or interstate commerce." This exempted labor from the provisions of the law, although its sponsors denied there was any intention to include labor disputes.[22]

On February 12, 1925, President Coolidge signed the bill into law after it passed through Congress without opposition. The only objection ever raised to the Act was that it should not cover workers. Julius Henry Cohen, the FAA's principal drafter, described the added amendment as having the effect of "leav[ing] out labor disputes," but he did not view the amendment as materially altering the bill in any way.[23]

In any case, because employment-related litigation comprised only a fraction of cases during the 1920's, legislators viewing the Act as a form of docket relief would have been unlikely to argue against a broad

---

[22] *See also Circuit City Stores*, 532 U.S. at 127 (Stevens, J., dissenting).

[23] Szalai, *supra,* at 134-35.

construction of the employment exception.[24] In the end, in 1925 neither the drafters, the Secretary of Commerce, organized labor, nor members of Congress believed that the FAA applied to employment contracts.

II. BY IGNORING THE ENTIRE DRAFTING AND LEGISLATIVE PROCESS SURROUNDING THE FAA, THE DECISION BY THE *CIRCUIT CITY* COURT IS BASED UPON FACTUALLY INCORRECT ASSUMPTIONS AND INCORRECT ANALYSIS.

Generally speaking, the historical and legislative context of an act's passage should be important to a proper understanding of an act. Here, as detailed in Section I above, the exemption language at issue was designed to obtain organized labor's approval for the legislation. Organized labor felt that if the FAA applied to workers, the disparity in bargaining power would permit employers to coerce potential employees to enter into unfair employment agreements subject only to an arbitrator's purview.

To cure this, the drafters, whose primary desire was the enforceability of arbitration agreements between merchants, assured both organized labor and Congress that the bill would not cover contracts between employers and employees.

---

[24] *See* Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259, 295 (1991).

However, rather than following the clear intention of the ABA drafters, then Secretary of Commerce Hoover, and Congress, the *Circuit City* Court held that the exemption language excluded from coverage only seamen, railroad employees, and other workers in the transportation sector. 532 U.S. at 114-15 & 119. In doing so, three quarters of a century after the Act was passed, the Court eschewed all historical review by stating that it had no need to "assess the legislative history of the exclusion provision" because the Court "[does] not resort to legislative history to cloud a statutory text that is clear." 532 U.S. at 119, citing *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) As Justice Stevens noted in his dissent: "When [the Court's] refusal to look beyond the raw statutory text enables it to disregard countervailing considerations that were expressed by Members of the enacting Congress and that remain valid today, the Court misuses its authority." *Id.* at 132 (Stevens, J., dissenting).

In undertaking this "textual" analysis, the *Circuit City* Court applied the canon of construction *ejusdem generis*. Theoretically, *ejusdem generis* requires that where there are specific terms followed by a general term, the general term is construed to include only objects similar to the specific terms.

Therefore, the Court held that with respect to the exclusionary language of § 1 of the FAA, "any other class of workers engaged in foreign or interstate commerce" "should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it." The Court's conclusion

was that because "seamen" and "railroad employees" both work in transportation, "other workers" must mean "transportation workers." 532 U.S. at 109-11.

However, the Court applied *ejusdem generis* incorrectly. The common characteristic that the "other workers" in this clause shared with seamen and railroad employees in 1925 was that they were all workers employed in "commerce," not that they were specifically transportation workers. Consider the phrase: "On an African safari, one needs to fear lions, leopards, and other predators." The operative concept here is what is to be "feared," not, as the court employed *ejusdem generis,* what is similar between lions and leopards. While both are cats, the use of the words "other predators," should not be interpreted to include only other cats, like servals, but animals to be feared, which would include non-feline hyenas, wild dogs, and crocodiles.

Nowhere in the legislative history is it suggested that "other workers" should be limited to transportation workers rather than, as the text clearly states, "any other class of workers engaged in foreign and interstate commerce." Not once are the words "transportation worker" ever used, most likely because the union lobbying for this provision, the AFL which was the nation's largest umbrella union, represented employees well beyond the transportation sector.

Indeed, the original exemption proposed by the ABA included only seamen and workers in commerce. It was Secretary Hoover's subsequent addition of "railroad employees" that turned the phrase into a string. It is intellectually inappropriate to then use

that language to explain the meaning of the word "workers" when "workers" was already a part of the proposed statute before the words "railroad employees" were added.

A second reason, given by the *Circuit City* Court, is that it "assumed" that Congress excluded only seamen, railroad employees, and transportation workers, because the former two categories had federally legislated arbitration provisions. 532 U.S. at 120-21. The Court reasoned that Congress must have excluded them because there was no need to make arbitration enforceable for them.[25] *Id*. Yet, this cannot explain the passion with which the unions lobbied against being included within the confines of the Act. Furthermore, there is no mention in any hearing that Congress even took note of these arbitration laws at the time, and they were clearly of little importance to the ABA drafting committee.

Finally, it is historically incorrect to say that seamen and railroad employers were "rounded out" by interstate busmen and truckers as the Court did. *Circuit City*, 532 U.S. at 121. The transportation of goods and passengers by motor carrier was far from an insignificant part of commerce in the 1920's. In 1926,

[25] For its assumption, the Court cited the Transportation Act of 1920 and the Railway Labor Act of 1926 as examples of federal railroad employee dispute resolution regulations, *Circuit City,* 532 U.S. at 121, though even here it is a stretch to see how an Act signed into law in May 1926 implicated the FAA, which became law more than a year before. Certainly, the future passage of a law is anything but "inevitable."

25,000 trucks and over 3,000 buses engaged in motor commerce.[26]

Rather than the tortured logic, untethered to history, exhibited in the *Circuit City* decision, Justice Gorsuch later made clear that the FAA "should be interpreted as taking [its] ordinary meaning ... [which is the] meaning at the time Congress enacted the statute." *New Prime v. Oliveira*, 139 S. Ct. 532, 539 (2019) (alterations in original), quoting *Wis. Cent. Ltd. v. United States,* 138 S. Ct. 2067, 2074 (2018). This in fact is consistent with what Julius Cohen, the primary drafter of the FAA, wrote: "[The FAA] must be read in the light of the situation which it was devised to correct and of the history of arbitration and of similar statutes in the recent past."[27] The *Circuit City* Court failed to do this.

In this context particularly, the *Circuit City* Court's view that all workers except seamen, railroad employees, and transportation workers were intended to be covered by the Act makes little sense. According to *Circuit City*, Congress meant to *exclude* those workers most likely to be involved in the admiralty and interstate commerce matters underlying the contracts at the heart of the FAA but meant to *include* all employment contracts of workers unlikely to relate to admiralty or interstate commerce. This is illogical. Clearly, the purpose of the exclusion, apparent from

---

[26] *See* John J. George, MOTOR CARRIER REGULATION IN THE UNITED STATES 215 (1929).

[27] Cohen & Dayton, *supra*, at 266.

the legislative history, is that the FAA was not intended to apply to employment contracts at all.

III. EVEN IF *CIRCUIT CITY* WERE CORRECTLY DECIDED, RESPONDENT, WHO IS CLEARLY A TRANSPORTATION WORKER, IS STILL EXEMPT FROM THE FAA.

According to the *Circuit City* Court, it must be concluded that Congress intended to limit the application of the exemption to categories of work – seamen, railroad, and, at minimum, other transportation workers – not concerning itself with the specifics of the work performed within each field. *See* 532 U.S. at 114. Because, according to the *Circuit City* Court, the plain language of the exemption centers on the type of work being performed rather than the status of the person performing it, all workers in the transportation sector, including ramp workers at transportation hubs, i.e., airports, are "workers" subject to the exemption.

If the *Circuit City* Court's *ejusdem generis* analysis is correct, transportation workers must be defined as broadly as seamen and railroad employees are defined. These designations have been consistently defined very broadly. "Seamen" and "railroad employees" as set out in the Section 1 exemption, certainly did not and do not necessarily include only workers who cross state lines, as Petitioners argue. Instead, "seamen" is a term of art, meaning "a person employed on board a vessel in furtherance of the vessel's purpose." *McDermott Int'l., Inc. v. Wilander*, 498 U.S. 337, 346 (1991). And "railroad employee" "includes every person in the

service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service)." Railway Labor Act of 1926, 45 U.S.C.A. § 151.[28]

This is consistent with long-standing federal interpretation of these terms. For instance, courts interpreting Section 1 have typically looked to judicial interpretations of "seamen" from the Jones Act, which treats the term broadly.[29] As this Court has explained, the broad definition of "seaman" as a person "employed on board a vessel in furtherance of [the vessel's] purpose," was the definition of seaman under maritime law when Congress passed the Jones Act in 1920 (five years before enacting the FAA). *Wilander*, 498 U.S. at 346.

The understanding of the term "railroad employees" at the time the FAA was passed was equally broad. Although the FAA does not define the term "railroad employees," other statutes do. For example, in 1898 Congress defined railroad employees in the Erdman Act as "all persons actually engaged in any capacity in

---

[28] *See* Jose Aparicio, *The Arbitration Hack: The Push to Expand the FAA's Exemption to Modern-day Transportation Workers in the Gig Economy*, 54 U.S.F. L. REV. 397, 421-22 (2020) (footnotes omitted).

[29] *E.g.*, *Tran v. Texan Lincoln Mercury, Inc.*, 2007 WL 2471616 (S.D. Tex., Aug. 29, 2007); *Veliz v. Cintas Corp.*, No. C 03-1180 SBA, 2004 WL 2452851, at *4 (N.D. Cal. Apr. 5, 2004); *Brown v. Nabors Offshore Corp.*, 339 F.3d 391, 393 (5th Cir. 2003); *Buckley v. Nabors Drilling USA Inc.*, 190 F. Supp. 2d 958, 964 n.2 (S.D. Tex. 2002).

train operation or train service of any description,"[30] which certainly included baggage and freight handlers. *See also United Bhd. of Maint. of Way Emps. & Ry. Shop Laborers v. St. Louis Sw. Ry. Co.*, Decision No. 120, 2 R.L.B. 96, 101–02 (1921) (citing numerous decisions holding that baggage and freight handlers were railroad employees).

As to other transportation workers, the *Circuit City* Court's logical construct thus requires they be treated equally broadly, which is further supported by the number of "workers" then in the transportation non-seamen, non-railroad sector. In 1925, the largest AFL-affiliated transportation-based membership union, the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America ("Teamsters"), had 100,000 members.[31] The Teamsters have always included within its membership warehouse workers.

Lobbying by the AFL between 1923 and 1925 would have been done on behalf of all members of its affiliated unions and certainly on behalf of all members of the Teamsters Union. Teamsters' President Daniel Tobin was a member of the AFL's executive counsel and was even Samuel Gompers' campaign manager when Gompers successfully won re-election as the AFL's

---

[30] *See, e.g.*, *New Prime*, 139 S. Ct. at 543 (discussing the Railroad Labor Board's broad construction of the term "employee" in the Transportation Act of 1920 and concluding that the Erdman Act "evince[s] an equally broad understanding of 'railroad employees'").

[31] *Organization and Membership of American Trade Unions*, *supra*, at 13.

president in 1921,[32] and the refusal of Teamsters to cross picket lines was often critical to the success of labor actions.[33]

It strains credulity to think that Gompers and the AFL, in lobbying on behalf of the Teamsters among others, would have accepted cutting out a large portion of the Teamsters' membership from the benefits of the exemption, much less lauding the result. One would have to believe that Gompers celebrated as a victory the fact that well over half of the Teamsters union (local drivers who did not cross state lines during the course of their work, warehouse workers, and transportation helpers) remained bound up by the FAA's required arbitration regime.

Petitioner's faulty reasoning rests on two entirely erroneous assumptions about what can be characterized as "interstate commerce." First, Petitioner offers an implausible conception of the word "interstate," requiring that every applicable transportation worker must physically travel across a border in order to be subject to the exemption. Pet'r Br. 11. This logic would then result in any driver transiting from Providence to Boston or Washington D.C. to Virginia being exempted from the FAA but drivers taking only the 520-mile leg from Lubbock to Houston on a cross-country shipment not being entitled to the exemption. Moreover, Petitioner never states how such carefully designed employment contracts

---

[32] Robert D. Leiter, THE TEAMSTERS UNION: A STUDY OF ITS ECONOMIC IMPACT 38 (1957).

[33] *See, e.g.*, *Strike Paralyzes Railway Express*, N.Y. TIMES, Oct. 14, 1919, at 1.

would work. Would drivers have to be restricted to in-state routes? Would New York City drivers never be able to go over the river to New Jersey?

Petitioner's second strained argument relates to their attempt to cabin the words "engaged in commerce" to the actual physical movement of goods. Contrary to Petitioner's argument, the term "engaged in commerce" necessarily embraces the entire stream of commerce, including intrastate activities. Long before the FAA became law, this Court had already held that purely intrastate trips were in the flow of commerce when they were a component part of an interstate movement. *The Daniel Ball*, 77 U.S. 557, 565 (1870) ("whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.") Loading and unloading have both been found to be in the flow of commerce, because both are necessary for goods to cross state lines. *Balt. & Ohio Sw. R.R. Co. v. Burtch*, 263 U.S. 540, 542, 544 (1924).

As to statutory authority, in *United States v. American Bldg. Maint. Industries*, 422 U.S. 271 (1975), this Court reiterated the long-established understanding that the Clayton Act's use of the words "engaged in commerce," 15 U.S.C. § 13 and § 18, refers broadly to "the flow of interstate commerce -- the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." 422 U.S. at 276, *quoting Gulf Oil Corp. v. Copp Paving Co.,* 419 U.S. 186, 195 (1974).

Finally, it must be remembered that the FAA itself was meant to govern arbitration agreements between merchants covering all matters related to seafaring vehicles and within the flow of commerce from a product's manufacture to final delivery. As stated by Julius Cohen: "There can be no question that the transportation of goods sold or contracted to be sold as described in the first section of the bill is interstate or foreign commerce." 1923 Hearings at 17.[34]

Therefore, even accepting the *Circuit City* definition of those entitled to the exemption, i.e., workers in the transportation sector, all such workers in the flow of commerce, including Petitioner, are exempted from the FAA.

---

[34] *See also* 1924 Hearings at 7 (Statement of Charles L. Stengle, Testimony of Bernheimer). Certainly, the exemption must be at least as broad as the FAA text itself, which covers:

> [C]harter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels collisions, or any other matters [which] would be embraced with admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

9 U.S.C § 1.

CONCLUSION

This Court should affirm the judgment of the U.S. Court of Appeals for the Seventh Circuit.

Respectfully submitted,

NAVAN WARD
President
JEFFREY R. WHITE
Senior Associate General Counsel
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(202) 944-2839
jeffrey.white@justice.org

GERSON H. SMOGER
Counsel of Record
SMOGER & ASSOCIATES
13250 Branch View Lane
Dallas, TX 75234
(972) 243-5297
gerson@texasinjurylaw.com

Counsel for Amicus Curiae

March 3, 2022