SUPREME COURT OF THE UNITED STATES

No. 99–1379

CIRCUIT CITY STORES, INC., PETITIONER *v.* SAINT CLAIR ADAMS

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

[March 21, 2001]

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

Section 2 of the Federal Arbitration Act (FAA or Act) provides for the enforceability of a written arbitration clause in "any maritime transaction or a contract evidencing a transaction involving commerce," 9 U. S. C. §2, while §1 exempts from the Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Whatever the understanding of Congress's implied admiralty power may have been when the Act was passed in 1925, the commerce power was then thought to be far narrower than we have subsequently come to see it. As a consequence, there are two quite different ways of reading the scope of the Act's provisions. One way would be to say, for example, that the coverage provision extends only to those contracts "involving commerce" that were understood to be covered in 1925; the other would be to read it as exercising Congress's commerce jurisdiction in its modern conception in the same way it was thought to implement the more limited view of the Commerce Clause in 1925. The first possibility would result in a statutory ambit frozen in time, behooving Congress to amend the statute whenever it desired to expand arbitration clause enforcement beyond its scope in 1925; the second would

produce an elastic reach, based on an understanding that Congress used language intended to go as far as Congress could go, whatever that might be over time.

In *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265 (1995), we decided that the elastic understanding of §2 was the more sensible way to give effect to what Congress intended when it legislated to cover contracts "involving commerce," a phrase that we found an apt way of providing that coverage would extend to the outer constitutional limits under the Commerce Clause. The question here is whether a similarly general phrase in the §1 exemption, referring to contracts of "any . . . class of workers engaged in foreign or interstate commerce," should receive a correspondingly evolutionary reading, so as to expand the exemption for employment contracts to keep pace with the enhanced reach of the general enforceability provision. If it is tempting to answer yes, on the principle that what is sauce for the goose is sauce for the gander, it is sobering to realize that the Courts of Appeals have, albeit with some fits and starts as noted by JUSTICE STEVENS, *ante*, at 6–7 (dissenting opinion),[1] overwhelmingly rejected the evolutionary reading of §1 accepted by the Court of Appeals in this case. See *ante*, at 3 (opinion of the Court) (citing cases). A majority of this Court now puts its *imprimatur* on the majority view among the Courts of Appeals.

The number of courts arrayed against reading the §1 exemption in a way that would allow it to grow parallel to

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[1] Compare, *e.g.*, *Asplundh Tree Expert Co.* v. *Bates*, 71 F. 3d 592, 600–601 (CA6 1995) (construing exclusion narrowly), with *Willis* v. *Dean Witter Reynolds*, 948 F. 2d 305, 311–312 (CA6 1991) (concluding, in dicta, that contracts of employment are generally excluded), and *Gatliff Coal Co.* v. *Cox*, 142 F. 2d 876, 882 (CA6 1944) ("[T]he Arbitration Act excluded employment contracts"). See also *Craft* v. *Campbell Soup Co.*, 177 F. 3d 1083, 1086, n. 6 (CA9 1999) (noting intracircuit inconsistency).

the expanding §2 coverage reflects the fact that this minority view faces two hurdles, each textually based and apparent from the face of the Act. First, the language of coverage (a contract evidencing a transaction "involving commerce") is different from the language of the exemption (a contract of a worker "engaged in . . . commerce"). Second, the "engaged in . . . commerce" catchall phrase in the exemption is placed in the text following more specific exemptions for employment contracts of "seamen" and "railroad employees." The placement possibly indicates that workers who are excused from arbitrating by virtue of the catchall exclusion must resemble seamen and railroad workers, perhaps by being employees who actually handle and move goods as they are shipped interstate or internationally.

Neither hurdle turns out to be a bar, however. The first objection is at best inconclusive and weaker than the grounds to reject it; the second is even more certainly inapposite, for reasons the Court itself has stated but misunderstood.

A

Is Congress further from a plenary exercise of the commerce power when it deals with contracts of workers "engaged in . . . commerce" than with contracts detailing transactions "involving commerce?" The answer is an easy yes, insofar as the former are only the class of labor contracts, while the latter are not so limited. But that is not the point. The question is whether Congress used language indicating that it meant to cover as many contracts as the Commerce Clause allows it to reach within each class of contracts addressed. In *Allied-Bruce* we examined the 1925 context and held that "involving commerce" showed just such a plenary intention, even though at the time we decided that case we had long understood "affecting commerce" to be the quintessential expression of

an intended plenary exercise of commerce power. *Allied-Bruce, supra*, at 273–274; see also *Wickard* v. *Filburn*, 317 U. S. 111 (1942).

Again looking to the context of the time, I reach the same conclusion about the phrase "engaged in commerce" as a description of employment contracts exempted from the Act. When the Act was passed (and the commerce power was closely confined) our case law indicated that the only employment relationships subject to the commerce power were those in which workers were actually engaged in interstate commerce. Compare *The Employers' Liability Cases,* 207 U. S. 463, 496, 498 (1908) (suggesting that regulation of the employment relations of railroad employees "actually engaged in an operation of interstate commerce" is permissible under the Commerce Clause but that regulation of a railroad company's clerical force is not), with *Hammer* v. *Dagenhart*, 247 U. S. 251, 271–276 (1918) (invalidating statute that had the "necessary effect" of "regulat[ing] the hours of labor of children in factories and mines within the States"). Thus, by using "engaged in" for the exclusion, Congress showed an intent to exclude to the limit of its power to cover employment contracts in the first place, and it did so just as clearly as its use of "involving commerce" showed its intent to legislate to the hilt over commercial contracts at a more general level. That conclusion is in fact borne out by the statement of the then-Secretary of Commerce, Herbert Hoover, who suggested to Congress that the §1 exclusion language should be adopted "[i]f objection appears to the inclusion of workers' contracts in the law's scheme." Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 14 (1923) (hereinafter Hearing on S. 4213 et al.).

The Court cites *FTC* v. *Bunte Brothers, Inc.*, 312 U. S.

349 (1941), *United States* v. *American Building Maintenance Industries,* 422 U. S. 271 (1975), and *Gulf Oil Corp.* v. *Copp Paving Co.,* 419 U. S. 186 (1974), for the proposition that "engaged in" has acquired a more restricted meaning as a term of art, immune to tampering now. *Ante*, at 9–10. But none of the cited cases dealt with the question here, whether exemption language is to be read as petrified when coverage language is read to grow. Nor do the cases support the Court's unwillingness to look beyond the four corners of the statute to determine whether the words in question necessarily "'have a uniform meaning whenever used by Congress,'" *ante*, at 10 (quoting *American Building Maintenance, supra*, at 277). Compare *ante*, at 12 ("[W]e need not assess the legislative history of the exclusion provision") with, *e.g.*, *American Building Maintenance, supra*, at 279–283 (examining legislative history and agency enforcement of the Clayton Act before resolving meaning of "engaged in commerce").

The Court has no good reason, therefore, to reject a reading of "engaged in" as an expression of intent to legislate to the full extent of the commerce power over employment contracts. The statute is accordingly entitled to a coherent reading as a whole, see, *e.g.*, *King* v. *St. Vincent's Hospital*, 502 U. S. 215, 221 (1991), by treating the exemption for employment contracts as keeping pace with the expanded understanding of the commerce power generally.

B

The second hurdle is cleared more easily still, and the Court has shown how. Like some Courts of Appeals before it, the majority today finds great significance in the fact that the generally phrased exemption for the employment contracts of workers "engaged in commerce" does not stand alone, but occurs at the end of a sequence of more specific exemptions: for "contracts of employment of sea-

men, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Like those other courts, this Court sees the sequence as an occasion to apply the interpretive maxim of *ejusdem generis*, that is, when specific terms are followed by a general one, the latter is meant to cover only examples of the same sort as the preceding specifics. Here, the same sort is thought to be contracts of transportation workers, or employees of transporters, the very carriers of commerce. And that, of course, excludes respondent Adams from benefit of the exemption, for he is employed by a retail seller.

Like many interpretive canons, however, *ejusdem generis* is a fallback, and if there are good reasons not to apply it, it is put aside. *E.g.*, *Norfolk & Western R. Co.* v. *Train Dispatchers*, 499 U. S. 117, 129 (1991).[2] There are good reasons here. As Adams argued, it is imputing something very odd to the working of the congressional brain to say that Congress took care to bar application of the Act to the class of employment contracts it most obviously had authority to legislate about in 1925, contracts of workers employed by carriers and handlers of commerce, while covering only employees "engaged" in less obvious ways, over whose coverage litigation might be anticipated with uncertain results. It would seem to have made more sense either to cover all coverable employment contracts or to exclude them all. In fact, exclusion might well have been in order based on concern that arbitration could prove

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[2] What is more, the Court has repeatedly explained that the canon is triggered only by uncertain statutory text, *e.g.*, *Garcia* v. *United States*, 469 U. S. 70, 74–75 (1984); *Gooch* v. *United States*, 297 U. S. 124, 128 (1936), and that it can be overcome by, *inter alia*, contrary legislative history, *e.g.*, *Watt* v. *Western Nuclear, Inc.*, 462 U. S. 36, 44, n. 5 (1983). The Court today turns this practice upside down, using *ejusdem generis* to establish that the text is so clear that legislative history is irrelevant. *Ante,* at 12.

expensive or unfavorable to employees, many of whom lack the bargaining power to resist an arbitration clause if their prospective employers insist on one.[3] And excluding all employment contracts from the Act's enforcement of mandatory arbitration clauses is consistent with Secretary Hoover's suggestion that the exemption language would respond to any "objection . . . to the inclusion of workers' contracts."

The Court tries to deflect the anomaly of excluding only carrier contracts by suggesting that Congress used the reference to seamen and rail workers to indicate the class of employees whose employment relations it had already legislated about and would be most likely to legislate about in the future. *Ante*, at 13–14. This explanation, however, does nothing to eliminate the anomaly. On the contrary, the explanation tells us why Congress might have referred specifically to the sea and rail workers; but, if so, it also indicates that Congress almost certainly intended the catchall phrase to be just as broad as its terms, without any interpretive squeeze in the name of *ejusdem generis*.

The very fact, as the Court points out, that Congress already had spoken on the subjects of sailors and rail workers and had tailored the legislation to the particular circumstances of the sea and rail carriers may well have been reason for mentioning them specifically. But making

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[3] Senator Walsh expressed this concern during a subcommittee hearing on the FAA:

"'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, "There 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.'" Hearing on S. 4213 et al., at 9.

the specific references was in that case an act of special care to make sure that the FAA not be construed to modify the existing legislation so exactly aimed; that was no reason at all to limit the general FAA exclusion from applying to employment contracts that had not been targeted with special legislation. Congress did not need to worry especially about the FAA's effect on legislation that did not exist and was not contemplated. As to workers uncovered by any specific legislation, Congress could write on a clean slate, and what it wrote was a general exclusion for employment contracts within Congress's power to regulate. The Court has understood this point before, holding that the existence of a special reason for emphasizing specific examples of a statutory class can negate any inference that an otherwise unqualified general phrase was meant to apply only to matters *ejusdem generis*.[4] On the Court's own reading of the history, then, the explanation for the catchall is not *ejusdem generis*; instead, the explanation for the specifics is *ex abundanti cautela*, abundance of caution, see *Fort Stewart Schools* v. *FLRA*, 495 U. S. 641, 646 (1990).

Nothing stands in the way of construing the coverage and exclusion clauses together, consistently and coherently. I respectfully dissent.

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[4] In *Watt* v. *Western Nuclear, Inc., supra*, at 44, n. 5, the Court concluded that the *ejusdem generis* canon did not apply to the words "coal and other minerals" where "[t]here were special reasons for expressly addressing coal that negate any inference that the phrase 'and other minerals' was meant to reserve only substances *ejusdem generis*," namely that Congress wanted "to make clear that coal was reserved even though existing law treated it differently from other minerals."