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Arbitration Agreements in Labor and Employment Contracts: Well within the Reach of the FAA - Circuit City Stores, Inc. v. Adams

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NOTES

Arbitration Agreements in Labor and Employment Contracts: Well Within the Reach of the FAA

Circuit City Stores, Inc. v. Adams[1]

I. INTRODUCTION

Despite a series of decisions where the Supreme Court has upheld the use of arbitration in the employment context, the Court has never clearly stated that arbitration agreements contained in employment contracts fall under the Federal Arbitration Act (FAA). This omission has led to a split in the Circuits as to the scope of the FAA coverage and exemption provisions. The controversy centers on whether the FAA covers all employment contracts except those of employees who transport people or goods in interstate commerce or whether the FAA exempts all employment contracts.

II. FACTS AND HOLDING

Saint Clair Adams (Adams) was hired as a sales counselor by the Circuit City[2] store in Santa Rosa, California, in October, 1995. On October 23, 1995, Adams completed a six-page application to work at Circuit City Stores (Circuit City).[3] Within the application Adams signed a document entitled "Circuit City Dispute Resolution Agreement" (DRA).[4] The DRA requires that employees submit all claims and disputes to mutually binding arbitration.[5] "An employee cannot work at

1. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).
2. Circuit City is a national retailer of consumer electronics. *Id.*
3. *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1071 (9th Cir. 1999).
4. *Id.*
5. The DRA specifies that job applicants agree to settle:

> all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, exclusively by final and binding arbitration before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments to the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and law of tort.

Id. at n. 1.

Circuit City without signing the DRA."[6] Adams was employed by Circuit City until he resigned in November of 1996, complaining of constructive discharge.[7]

Adams filed an employment discrimination lawsuit under the California Fair Employment and Housing Act (FEHA) and other general state law tort claims against Circuit City in state court.[8] In response, Circuit City filed suit in the United States District Court for the Northern District of California, seeking to enjoin the state-court action and to compel mutually binding arbitration of Adams' claims pursuant to the FAA.[9] The district court concluded that Adams was required by the arbitration agreement and the FAA to submit his claims against Circuit City to binding arbitration.[10] Adams appealed the district court's order staying the state court action and compelling arbitration.[11]

While Adams' appeal was pending, the Court of Appeals for the Ninth Circuit, in an unrelated case, *Craft v. Campbell Soup Co.*, ruled on the key issue of whether the FAA applies to labor or employment contracts and held that the FAA does not apply to labor or employment contracts.[12] The court in *Circuit City*, following the rule announced in *Craft*, held the arbitration agreement between Adams and Circuit City was not subject to the FAA because it was contained in a "contract of employment."[13] The court noted that section four of the FAA provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other basis for federal jurisdiction.[14] Thus, the court reversed the district court's order compelling arbitration and remanded the case to the district court for dismissal because of a lack of federal jurisdiction under section four of the FAA to compel arbitration.[15]

Circuit City petitioned the Supreme Court for a writ of certiorari, noting that the Ninth Circuit's conclusion that all employment contracts are excluded from the FAA was contrary to the majority of circuits who have interpreted the FAA. The majority of circuits held the FAA applied to all employment contracts, except for contracts

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6. If "an employee signs the DRA and then withdraws consent within three days, the employee 'will no longer be eligible for employment at Circuit City.'" *Id.*

7. *Circuit City Stores, Inc. v. Adams*, 2000 WL 1132951*48a (N.D. Cal. April 3, 1998).

8. Adams alleged he experienced discrimination and harassment by his employer based on his sexual orientation. *Id.*

9. *Circuit City*, 532 U.S. at 109. Section four of the FAA provides, "[a] party aggrieved by the alleged failure . . . of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4 (1994).

10. *Circuit City*, 532 U.S. at 109.

11. *Circuit City*, 194 F.3d at 1071.

12. *Craft*, 177 F.3d 1083 (9th Cir. 1999).

13. *Circuit City*, 194 F.3d at 1071-72.

14. *Id.* at 1071.

15. *Id.* at 1071-72.

of employees who actually transport people or goods in interstate commerce.[16] The Supreme Court granted Circuit City's petition for writ of certiorari.[17]

Reversing the Court of Appeals for the Ninth Circuit, the Supreme Court held that an arbitration agreement contained within a contract of employment is within the reach of the FAA. The Court stated the text of section one does not allow the exclusion provision to defeat the language of section two as to all employment contracts, but only exempts the contracts of employment of transportation workers from the FAA.[18] To hold otherwise, the Court explained, would be to give "an expansive construction of the FAA exclusion provision that goes beyond the meaning of the words Congress used."[19]

III. LEGAL BACKGROUND

A. The Federal Arbitration Act

"The Federal Arbitration Act was originally enacted in 1925 and then reenacted and codified in 1947 as Title 9 of the United States Code."[20] Its purpose "was to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts."[21] To that end, section two of the FAA provides that arbitration agreements "in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in

16. *Circuit City*, 532 U.S. at 109. *See e.g. McWilliams v. Logicon, Inc.*, 143 F.3d 573, 575-76 (10th Cir. 1998) ("The workers engaged in interstate commerce exclusion does not encompass all employment contracts, just those of employees actually engaged in channels of interstate commerce."); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997) ("The circuit courts have uniformly reasoned that the strong federal policy in favor of arbitration requires a narrow reading of this section one exemption."); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997); *Cole v. Burns Intern. Sec. Services*, 105 F.3d 1465, 1470-71 (D.C. Cir. 1997) ("[S]ection 1 of the FAA does not exclude all contracts of employment that affect commerce" but "exempts only the employment contracts of workers actually engaged in the movement of goods in interstate commerce."); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 747-48 (5th Cir. 1996) (Section one exempts only contracts of employment of workers engaged in the movement of goods in commerce.); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995) (Section one "should be narrowly construed to apply to employment contracts of seamen, railroad workers, and any other class of workers actually engaged in the movement of goods in interstate commerce."); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) (Section one applies "only to those actually in the transportation industry."); *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971) (Section one is limited to employees "involved in, or closely related to, the actual movement of goods in interstate commerce."); *Tenney Engineering, Inc. v. United Elec. Radio & Mach. Workers of America, (U.E.) Local 437*, 207 F.2d 450, 452 (3d Cir. 1953) (Section one applies only to workers "who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it.").

17. *Circuit City v. Adams*, 529 U.S. 1129 (2000) (The petition for write of certiorari to the United States Supreme Court was granted and limited the question to the issue presented in the petition.).

18. *Circuit City*, 523 U.S. at 118-19.

19. *Id.* at 106.

20. *Cole v. Burns Int'l Sec. Services*, 105 F.3d 1465, 1470 (D.C. Cir. 1997).

21. *Gilmer v. Interstate/Johnson Lane, Corp.*, 500 U.S. 20, 24 (1991).

equity for the revocation of any contract."[22] Section one of the FAA, however, states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[23]

B. Interpreting the Section One Exemption Provision Narrowly

A few courts interpret section one broadly and argue that it exempts all contracts of employment that facilitate or affect commerce (even tangentially) from the coverage provisions of section two of the FAA.[24] A far greater number of courts interpret the section one exemption provision narrowly, and hold that it exempts only the employment contracts of workers actually engaged in the transportation of goods in commerce.[25]

This issue was raised, but not decided, in *Gilmer v. Johnson/Interstate Lane*.[26] In that case, Gilmer had been required, as a condition of his employment, to register as a securities representative with the New York Stock Exchange. The registration application contained an agreement to arbitrate any controversy arising out of Gilmer's employment or termination of employment. When Gilmer was terminated at age sixty-two, he brought suit in federal court alleging age discrimination under the Age Discrimination in Employment Act of 1967, and his employer sought to compel arbitration.[27] The Supreme Court acknowledged, but failed to resolve, the issue of the scope of section one exclusion of contracts of employment, finding that the arbitration agreement at issue was not part of a contract of employment.[28]

1. Avoiding redundancy

The rationale for a narrow reading of section one is twofold. One of the canons of statutory interpretation holds that courts should "avoid a reading of statutory language which renders some words altogether redundant."[29] This canon has implications for interpreting both section one and section two. Secondly, the canon

22. 9 U.S.C. § 2 (1994). Although "courts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions," general contract defenses such as fraud, duress, or unconscionability, grounded in state contract law, may invalidate arbitration agreements. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

23. 9 U.S.C. § 1 (1994).

24. *See Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1067-68 (4th Cir. 1993); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1120 (3d Cir. 1993) (ignoring conflicting precedent in *Tenney*); *United Food and Commercial Workers, Local Union No. 7R v. Safeway Stores, Inc.*, 889 F.2d 940, 943-44 (10th Cir. 1989).

25. *Cole*, 105 F.3d 1465.

26. *Gilmer*, 500 U.S. 20.

27. *Id.* at 23-24.

28. *Id.* at 25 n. 2.

29. *Cole*, 105 F.3d at 1470 (citations omitted).

of *ejusdem generis* limits general terms which follow specific ones to matters similar to those specified.[30]

Applying the redundancy canon to section two coverage provisions, the Supreme Court determined in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* that the contract at issue did evidence a "transaction" in interstate commerce, as required by section two.[31] However, the Court did not go so far as to construe the statute to apply only to contracts between merchants for the interstate shipment of goods.[32] Such a narrowing of the statute, the Court held, would make Congress' amendment of the statute to exclude certain kinds of employment contracts in section one unnecessary.[33]

2. *Ejusdem generis*

The second applicable statutory canon which supports a narrow reading of section one is the rule of *ejusdem generis*. In this statute, the general phrase, "any other class of workers engaged in foreign or interstate commerce," takes its meaning from the specific terms preceding it, "seamen" and "railroad employees."[34] The Sixth Circuit noted that under the rule of *ejusdem generis*, section one excludes only those other classes of workers who are likewise engaged directly in commerce, that is, "only those other classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it."[35]

3. Past precedent

The narrow interpretation of the exemption clause in section one is also supported by the Supreme Court's decision in *Allied-Bruce Terminix Cos. v. Dobson*.[36] *Allied-Bruce* involved the interpretation of section two of the FAA, specifically, whether the language–"a contract evidencing a transaction involving commerce"–extended the Act's reach to the full limits of Congress' commerce

30. *Id.* at 1471 (citations omitted).

31. 388 U.S. 395, 400-01 (1967) (the contract at issue was a consulting agreement between two businesses to arrange a transfer of manufacturing and selling operations from New Jersey to Maryland).

32. *Id.*

33. *Id. See also Rojas v. TK Commun., Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) (applying a broad meaning to the term "commerce" in section one itself would rob the rest of the exclusion clause of all significance); *Cole*, 105 F.3d at 1470 (If the final phrase of the exclusionary clause–"any other class of workers engaged in foreign or interstate commerce"–extended to all workers whose jobs have any effect on commerce, the specific inclusion of seamen and railroad employees in the exemption provision would have been unnecessary.).

34. *Cole*, 105 F.3d at 1471

35. *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 598 (6th Cir. 1995) (quoting *Tenney Engineering, Inc. v. United Elec., Radio & Machine Workers of America, Local 437*, 207 F.2d 450, 452 (3d Cir. 1953)).

36. 513 U.S. 265 (1995).

clause powers.[37] To reach its holding that section two did reach to the limits of the commerce clause, the Court analyzed the phrase "involving commerce" with respect to the phrases "in commerce" and "affecting commerce," which is found in the exclusionary clause of section one.[38]

"Involving commerce" is broader than the common words of art "in commerce" and therefore covers more than "only persons or activities within the flow of interstate commerce."[39] The Court examines the statute's language, background, and structure then concludes that the word "involving" is broad and is the functional equivalent of "affecting."[40] The phrase "affecting commerce" usually signals Congress' intent to exercise its Commerce Clause powers to the full.[41] This analysis strongly suggests that exclusion provision in section one covers only those workers actually involved in the "flow" of commerce, for example, those workers responsible for the transportation and distribution of goods.[42]

The Court did address the contrary argument that when Congress passed the FAA in 1925, it may have thought that the Commerce Clause would not extend as far as it actually has.[43] However, the Court notes that it is "not unusual for this Court in similar circumstances to ask whether the scope of a statute should expand along with the expansion of the Commerce Clause power itself, and to answer the question affirmatively--as, for the reasons set forth above, we do here."[44] The *Allied-Bruce* Court did not rely on the legislative history of the statute, because they felt it is "at best, secondary, and at worst, irrelevant," because the statutory text is not ambiguous and case law is "absolutely clear" on the meaning of the statute.[45] However, other courts argue that the statute is ambiguous so that the scope of the Commerce Clause in 1925 as well as the FAA legislative history offer compelling insight into the statute's meaning.

C. Ninth Circuit Reliance on Legislative History for Correct Interpretation of Section One

The Ninth Circuit is adamant that to understand whether Congress intended for the FAA to apply to employment contracts, there must first be a review of Congress' commerce power in 1925, before the Supreme Court dramatically expanded the meaning of interstate commerce in the 1930s.[46] So before it applied either of the

37. *Id.* at 273.
38. *Id.*
39. *Id.* (quoting *U.S. v. American Building Maint. Indus.*, 422 U.S. 271, 276 (1975)).
40. *Id.* at 274.
41. *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 273. *See Russell v. United States*, 471 U.S. 858, 859 (1985).
42. *Cole*, 105 F.3d at 1472.
43. *Allied-Bruce*, 513 U.S. at 275.
44. *Id.*
45. *Cole*, 105 F.3d at 1472.
46. *Craft*, 177 F.3d at 1086.

previous two canons of statutory interpretation mentioned, the Ninth Circuit in *Craft v. Campbell Soup Co.*, looked first at the words that Congress used.[47]

The court turned to the ordinary meaning of the phrase "contract evidencing a transaction involving commerce," and stated that an individual employment contract would not seem to fall within the ordinary concept of a contract "evidencing a transaction," even if it involves interstate commerce.[48] The court referred to the meaning of "transaction" when Congress passed the FAA in 1925, and noted that it commonly meant "a business deal; an act involving buying and selling."[49] An employment contract, the court said, is not commonly referred to as either a "business deal" or as "an act involving buying and selling."[50] Instead, the connotation of the phrase "transaction involving commerce," as Congress would have meant it in 1925, was of a commercial deal or a merchant's sale.[51] Congress' Commerce Clause power at the time of the FAA enactment was limited to employees who actually transported people or goods in interstate commerce.[52] Congress simply did not have the power to legislate employment contracts of accountants or secretaries even if they worked for railroads or steamship companies.[53] Under these circumstances, the Ninth Circuit concluded that section two of the FAA appeared not to encompass employment contracts at all.[54] Furthermore, section one exempted those very same employees from the scope of the FAA.[55]

However, that the language of section one of the FAA might also suggest that Congress intended for section two to apply to some collective bargaining agreements and employment contracts, makes the Ninth Circuit view the statute as a whole as ambiguous.[56] The ambiguity allows the court to take into account the legislative history of the FAA, which demonstrates that the Act's purpose was solely to bind

47. *Id.* at 1084-85.
48. *Id.* at 1085.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. Matthew Finkin, *Employment Contracts Under the FAA-Reconsidered*, 48 Lab. L.J. 329, 333 (1997) (It was "irrelevant whether or not the statute dealt with employees 'in' interstate commerce, 'engaged in' interstate commerce or who were 'involved in' interstate commerce, for however the statute was phrased, these employees were wholly outside the power of Congress to regulate at the time and Congress could not have intended to include them.").
54. *Id.*
55. *Id.* at 1087. *See Arce v. Cotton Club of Greenville, Inc.*, 883 F. Supp. 117, 123 (N.D. Miss. 1995) ("Interstate commerce at the time the FAA was enacted was generally understood to be limited to maritime and railroad transactions. Thus, when Congress excluded employment contracts of maritime and railroad workers, it resulted in voiding the power to enforce arbitration clauses of most employment contracts. With the addition of the catch-all phrase 'or any other class of worker engaged in foreign or interstate commerce,' *all employment contracts would have been excluded from the arbitration enforcement power of the FAA.*") (emphasis added). *See also* Finkin, *supra* n. 53, at 334 ("When the Act was passed in 1925, Congress excluded all contracts of employment over which it then had jurisdiction.").
56. *Id.*

merchants who were involved in commercial dealings.[57] Finally, the *Craft* court is critical of the inconsistent effect many courts' redefinition of the phrase "involving commerce," to cover all productive activities, has on the exemption provision.[58]

Courts had developed two interpretations of the FAA provisions: Congress did not intend for the FAA to apply to any employment contracts or Congress intended for the FAA to apply to all employment contracts, except for the contracts of employees who actually transport people or goods in interstate commerce.[59] However, the Supreme Court had not yet definitively ruled on whether the FAA applied to labor and employment contracts.[60]

IV. INSTANT DECISION

In *Circuit City*, the Supreme Court had to decide whether the FAA applied to labor and employment contracts thereby requiring them to overturn the Ninth Circuit Court of Appeals and give effect to the arbitration agreement between Circuit City and Adams by compelling arbitration.[61]

A. The Majority

1. Section two extends coverage to employment contracts

The Court began its interpretation of the FAA[62] by focusing upon the words "transaction" and "involving commerce" within the FAA coverage provision. Specifically, section two provides that a "written provision in any maritime transaction or a *contract evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[63]

The Supreme Court dismissed Adams' argument that the word "transaction" in section two extends coverage to commercial contracts only, thereby excluding employment contracts from FAA coverage.[64] If this analysis proved correct, the Court reasoned that the separate exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate

57. *Craft*, 177 F.3d at 1089.

58. *Id.* at 1088. The Ninth Circuit argues that under current law, the right answer is that the FAA should keep its 1925 definition. Otherwise, courts wrongly expand the coverage "involving commerce" to keep the FAA in play.

59. *Id.* at 1085.

60. *Id.* at 1090.

61. *Circuit City*, 532 U.S. at 109 (Justice Anthony M. Kennedy delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas joined.).

62. 9 U.S.C. §§ 1-16 (1994).

63. 9 U.S.C. § 2 (emphasis added).

64. *Circuit City*, 532 U.S. at 113.

commerce" would be redundant and pointless.[65] Moreover, such an interpretation is inconsistent with the Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.*, where the Court held that section two required the arbitration of a dispute that did not rise out of a commercial deal,[66] and the Court's expansive reading of those words adopted in *Allied-Bruce Terminix Cos. v. Dobson*.[67] The Court in *Allied-Bruce* found that the FAA was enacted to implement Congress' intent to "exercise its commerce power to the full."[68]

2. Section one must be read narrowly

The exemption clause under section one of the FAA, which provides the Act shall not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"[69] must be evaluated in light of the expansive meaning given to section two.[70] Adams, adopting the Ninth Circuit's reasoning, seized upon the expansive construction of section two coverage provision adopted by the Court in *Allied-Bruce*, and argued that section one interpretation should be just as broad, thus exempting all employment contracts.[71] The Court pointed out the inconsistency of the Ninth Circuit's interpretation of the section one exemption as excluding all contracts of employment from the reach of the FAA, with the majority of the Courts of Appeals, which have concluded that the exclusion provision is limited to transportation workers.[72]

To counter Adams' interpretation of the clause, the Court applied the theory of *ejusdem generis*, a means of statutory interpretation that provides when construing a statute, the meaning of general terms that follow specific ones should be limited to matters similar to those specified.[73] Thus, the Court reads the residual clause in section one as giving effect to the terms "seamen" and "railroad employees" because otherwise there would be no need for Congress to use those phrases if those classes

65. *Id.* at 114.

66. 500 U.S. 20 (The claim in this case was an age discrimination claim based on an agreement in a securities registration application.).

67. *See Allied-Bruce*, 513 U.S. at 277, 279-80.

68. *Circuit City*, 532 U.S. at 112 (quoting *Allied-Bruce*, 513 U.S. at 277). *See Prima Paint*, 388 U.S. at 405 ("[I]t is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of control over interstate commerce and over admiralty."); *Southland Corp. v. Keating*, 465 U.S. 1 (1994) (The FAA is applicable in state courts and pre-emptive of state laws hostile to arbitration.).

69. 9 U.S.C. § 1.

70. *Circuit City*, 532 U.S. at 113.

71. *Id.* Adams is arguing that the two provisions are coterminous. In other words, the "involving commerce" provision puts within the FAA reach all contracts within the Congress' commerce power, and the "engaged in . . . commerce" language in section one in turn exempts from the FAA all employment contracts falling within that authority.

72. *See Cole*, 105 F3d at 1471.

73. *Circuit City*, 532 U.S. at 114-15. *See* Norman J. Singer, *Statutes and Statutory Construction* § 47.17 (Clark Boardman Callaghan 1992); *Norfolk & Western. R. Co. v. Train Dispatchers*, 499 U.S. 117, 129 (1991).

of workers were subsumed within the meaning of the "engaged in . . . commerce" residual clause.[74]

To bolster support for its position that the FAA does not exclude all contracts of employment, the Supreme Court relies on Congress' use of different modifiers to the word "commerce" within the statute.[75] The Court evaluates the various modifiers as they relate to the phrase "affecting commerce" which indicates "Congress' intent to regulate to the outer limits of its authority under the Commerce Clause."[76] The Supreme Court in *Allied-Bruce* addressed the meaning of "involving," looking at the usual meaning of the word as well as the pro-arbitration purposes of the FAA, and held that the word "involving" like "affecting" signals an intent to exercise Congress' commerce power to the full.[77] However, the general words "in commerce" and the specific phrase "engaged in commerce" are understood by the Court to have a more limited reach.[78]

Adams asked the Court to follow a mode of statutory interpretation that would involve taking into account the scope of the Commerce Clause at the time the FAA was enacted.[79] Without making a thorough analysis of the Commerce Clause, the Court dismisses this argument because it would contradict earlier cases, cause instability in statutory interpretation, and would be unwieldy for all parties.[80] In addition, such a means of interpretation ignores the reason why the formulation of words became a term of art in the first place, namely that the plain meaning of the words "engaged in commerce" is narrower than the more open-ended "affecting commerce" and "involving commerce."[81] This is not to say, however, that the Court thinks it may decide to construe the "engaged in commerce" language in the FAA without reference to the statutory context in which it is found and in a manner consistent with the FAA purpose.[82] However, these considerations still point to a narrow construction of section one, exempting only the employment contracts of transportation workers from the FAA.[83]

The Supreme Court based its decision on the text of section one and stated that it did not need to look at the legislative history of the exclusion provision; however, the Court does note that its decision does not attribute an irrational intent to

74. *Circuit City*, 532 U.S. at 115.
75. *Id.*
76. *Id.*
77. *Id.* (quoting *Allied-Bruce*, 513 U.S. at 277).
78. *Id.* In *Allied-Bruce*, the Court noted that the words "in commerce" are "often-found words of art," that have not been read as expressing congressional intent to regulate to the outer limits of authority under the Commerce Clause. *Allied-Bruce*, 513 U.S. at 273. *See also U.S. v. Am. Bldg. Maint. Ind.*, 422 U.S. 271, 279-80 (1975) (the phrase "engaged in commerce" is "a term of art, indicating a limited assertion of federal jurisdiction"); *Jones v. U.S.*, 529 U.S. 848, 855 (2000) (phrase "used in commerce" "is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce").
79. *Circuit City*, 532 U.S. at 116.
80. *Id.* at 117-18.
81. *Id.* at 117-18.
82. *Id.*
83. *Id.* at 118-19.

Congress.[84] The Court also deflects the criticism of various *amici* who argue that by requiring arbitration agreements in most employment contracts to be covered by the FAA, the statute effectively preempts state employment laws to the contrary.[85] The Court argues that this criticism is misplaced because in the present case the FAA is being applied in a federal, rather than in a state court.[86] The Court finished its analysis by citing the benefits to be had by the enforcement of arbitration agreements and warning that Adams' interpretation of section one would cause considerable complexity and uncertainty which would, in turn, call into doubt the efficacy of alternative dispute resolution procedures and the FAA pro-arbitration purposes.[87]

B. The Dissent

1. The majority is ignoring important legislative history

The dissent[88] argues that the reliance the majority places on recent Court of Appeals decisions makes it appropriate to delve into the legislative history of the statute.[89] Looking at the history of the FAA, the dissent argues that it is clear that neither the drafting of the original bill by the ABA, nor the records of Congressional deliberations during the years leading up to the enactment of the Act in 1925, contain any evidence that the proponents of the legislation intended it to apply to agreements affecting employment.[90]

In fact, the original bill was opposed by representatives of organized labor, including the president of the International Seamen's Union of America, because they were concerned that the legislation might authorize federal judicial enforcement of arbitration clauses in employment contracts and collective-bargaining agreements.[91] In response to their objections, the chairman of the ABA committee that drafted the legislation advised the Senate Judiciary Subcommittee that although "it is not intended that this shall be an act referring to labor disputes at all," the Subcommittee could amend the bill to include the language: "but nothing herein

84. *Id.* at 121. The Court noted that there is no paradox in the Congressional decision to exempt the workers over whom the commerce power was most apparent (seamen and railroad employees) because Congress already had authority to govern those employment relationships by the enactment of statutes specific to them, including dispute resolution schemes covering specific workers.

85. *Id.* at 121-22.

86. *Id.* The Court says the criticism is relevant to the Court's decision in *Southland Corp.*, 465 U.S. at 15-16 (holding that Congress intended the FAA to apply in state courts, and to preempt state anti-arbitration laws to the contrary).

87. *Id.* at 123.

88. *Id.* at 124 (Stevens, J., dissenting) (Stevens was joined by Justices Ginsburg and Breyer, and by Justice Souter as to Parts II and III).

89. *Id.*

90. *Id.* at 125. The Court notes that the original bill was drafted upon consideratаion of "the further extension of the principle of commercial arbitration." *Report of the Forty-third Annual Meeting of the ABA*, 45 A.B.A. Rep. 75 (1920). Furthermore, members of Congress understood the bill as giving an "opportunity to enforce an agreement in commercial contracts and admiralty contracts." 65 Cong. Rec. 1931 (1924).

91. *Circuit City*, 532 U.S. at 126-27.

contained shall apply to contracts of employment of seamen or any class of workers engaged in foreign or interstate commerce."[92] This is the amendment that assuaged organized labor's opposition to the proposed law and, as the dissent accuses, fulfills the original fears of organized labor by essentially rewriting the text of section one.[93] The dissent believes the Court "play[ed] ostrich to the substantial history behind the amendment" and argues that the clarifying amendment adopted to eliminate opposition to the bill was not pointless.[94]

The idea endorsed by this Court, that only employees engaged in interstate transportation are excluded by section one, was not expressed until 1954 by the Third Circuit.[95] The fact that the Fourth Circuit rejected the idea shortly after, and a conflict among the Circuits persisted throughout the 1950s suggests that attaching as much weight to recent Court of Appeals opinions as the Court does in this case while ignoring the history surrounding the statute, may be inappropriate.[96] The majority is warned that it is misuing its authority when it refuses to look beyond the text of the statute and take into account the opinions expressed by the enacting Congress, in effect ignoring the interests of unrepresented employees in favor of its policy preferences for arbitration.[97]

2. The hurdles to an evolutionary reading of section one

Justice Souter's dissent[98] focuses on the question of whether the phrase in the section one exemption, referring to contracts of "any . . . class of workers engaged in foreign or interstate commerce," should receive an evolutionary reading, so as to expand the exemption for employment contracts to keep pace with the enhanced reach of the general enforceability provision.[99] Courts of Appeals have largely rejected the evolutionary reading of section one accepted by the Ninth Circuit in this case.[100] There are two hurdles that seemingly prevent the section one exemption from growing alongside the expanding section two coverage provision.[101] First, the language of the coverage is different from the language of the exemption.[102] Second, the "engaged in . . . commerce" catchall phrase in the exemption follows the more specific exemptions for employment contracts of "seamen" and "railroad

92. *Id.* at 127.
93. *Id.* at 129.
94. *Id.* at 128.
95. *Id.* at 130.
96. *Id. See Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957) (implying that the Court believes the FAA does not apply to collective-bargaining agreements because section one exempts labor contracts).
97. *Circuit City*, 532 U.S. at 132.
98. *Id.* at 133 (Souter, Stevens, Ginsburg, & Breyer, J.J., dissenting).
99. *Id.* at 134.
100. *Id.*
101. *Id.* at 135.
102. *Id.*

employees."[103] The dissent argues that neither of these hurdles is a bar.[104] With regard to the first hurdle, the dissent asserts there is no good reason 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.[105]

As for the second hurdle, although the majority sees the sequence of the words as requiring an application of *ejusdem generis*, the dissent argues that there are good reasons not to apply the maxim.[106] The dissent concludes its argument by asserting that there is nothing that prevents the coverage and exclusion clauses from being construed together in a consistent and coherent manner.[107]

V. COMMENT

A. The Supreme Court and Statutory Canons

The Supreme Court in *Circuit City* clearly followed the majority position by interpreting the FAA section two coverage broadly and bringing all employees into the reach of the FAA.[108] Likewise, its narrow reading of the section one exemption clause, exempting only transportation workers from the FAA coverage, is also consistent with the majority of Courts of Appeals to have decided this issue.[109] And to the extent that the Supreme Court itself had addressed related issues, such as the the scope of section two, the instant decision is consistent with past decisions.

The Court began its analysis with the coverage provision in section two of the FAA. The Court noted that it read the coverage provision broadly in accordance with the precedent set in *Prima Paint* and *Allied-Bruce* and then immediately turned its focus to the section one exemption clause.[110] The majority does not address in any depth what the dissent considers the preliminary issue: whether employment contracts fall under the FAA in the first place. The majority's logic follows *Cole* when they decide that section two must have a broad scope; to read it narrowly--as applying to only a few types of contracts--would make section one unnecessary and redundant. In other words, if the FAA only applied to commercial contracts as the dissent argues, and not employment contracts, there would be no need to then

103. *Id.*

104. *Id.*

105. *Id.* at 137. The Court reviewed its decision in *Allied-Bruce* where the Court held that the phrase "involving commerce" had the same expansive reach as "affecting commerce" and reached the same conclusion about "engaged in commerce." The latter phrase, within the context of the time, allows for an interpretation that employment contracts are exempted from the FAA. *Id.* at 135-36.

106. *Id.* at 138. The dissent agrees with Adams' argument that it does not make sense to say that Congress made sure to prevent the FAA from applying to the class of employment contracts it actually had the authority to legislate in 1925 (contracts of workers employed by carriers and handlers of commerce). *Id.* It would have made more sense either to cover all employment contracts or to exclude them all. *Id.*

107. *Id.* at 140.

108. *Cole*, 105 F.3d at 1470.

109. *Id.*

110. *Circuit City*, 532 U.S. at 112.

exempt those employment contracts in section one because they were never covered by the statute in the first place.

When the majority assumes that nothing in the statute can be treated as surplusage, they impute a type of legislative omniscience to Congress.[111] It has been argued, however, that the legislature is far from omnipotent and waits for the courts to determine the precise effect of a bill.[112] This is not to say that each word of the statute does not count, but that as a result of a statute's imprecision, a statute that is the product of compromise--as is the case here--"may contain redundant language as a by-product of the strains of the negotiating process."[113] Because the majority ignored the legislative context of the FAA, it failed to take into account that the section one amendment may have been a suggestion to appease the fears of organized labor that the FAA would somehow authorize federal enforcement of arbitration clauses in employment contracts and collective-bargaining agreements.[114] It is not pointless, the dissent points out, to adopt an amendment in order to get a bill passed, even if that results in redundant language.[115] So, by ignoring this legislative context, the Court is "forced" to interpret section two broadly to avoid making section one "redundant" or "surplusage." Addressing the legislative context, even if it is promptly dismissed, could have prevented the Court from appearing to ignore arguments simply because they were contrary to their own. The Court's stronger argument for giving a broad effect to section two is its analysis of the precedent set in *Gilmer* and *Allied-Bruce.*[116]

Next the Court had to determine whether the plain meaning of section one of the FAA was apparent and if there was an argument to be made that arbitration agreements in employment contracts were not covered by the FAA. Even where the statutory language is not entirely clear, courts have tools at their disposal for clarifying the meaning of a statute without reviewing its legislative history. These interpretative tools are the canons of construction, which are rules of thumb that aid courts in determining the meaning of legislation. One benefit of applying canons of construction to a statute, rather than considering its legislative history, is that the canons enable courts to focus on the text actually approved by Congress instead of extrinsic material.[117]

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111. Richard A. Posner, *Statutory Interpretation--In the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 812 (1983) (arguing that legislatures do not reach the precise effect of a bill because they can wait for the courts to do so).

112. *Id.*

113. *Id.* While statutory language "is in an important sense more compact than the language of judicial opinions and law-review articles . . . it does not follow that statutes are more carefully drafted, or even that greater care assures greater economy of language." *Id.*

114. *Circuit City*, 532 U.S. at 126-27.

115. *Circuit City*, 532 U.S. at 126-27.

116. *Gilmer* held that section two required the arbitration of an age discrimination claim based on an agreement in a securities registration application, a dispute that did not arise from a "commercial deal or merchant's sale." *Gilmer*, 500 U.S. 20. *Allied-Bruce* presented an expansive reading of the words in section two. *Allied-Bruce*, 513 U.S. 265.

117.. *CBS Inc. v. Primetime 24 Joint Venture*, 245 F.3d 1217, 1225 (11th Cir. 2001).

In *Circuit City*, the Court applied the canon of *ejusdem generis* to the section one exemption provision. After ascertaining the meaning of the provision through the use of the canon and determining that it was not ambiguous, the Court stated that there was no need to consider the legislative history of the provision.[118] This is consistent with the plain meaning approach to interpretation that "given [a] straightforward statutory command, there is no reason to resort to legislative history."[119] Even where there are contrary indications in the statute's legislative history, the Supreme Court does "not resort to legislative history to cloud a statutory text that is clear."[120] As the Eleventh Circuit argued, "the 'plain' in 'plain meaning' means that we look to the actual language used in a statute, not to the circumstances that gave rise to that language."[121] Any ambiguity in the statutory language must "result from the common usage of that language, not from the parties' dueling characterizations of what Congress 'really meant.'"[122]

As such, the Court's failure to acknowledge that the *ejusdem generis* canon of statutory interpretation may be set aside when there is a good reason to do so, a position advocated by the dissent, is not harmful to the decision's credibility under a strict textualist paradigm. As with all rules of statutory construction, *ejusdem generis* does not apply when the context shows a contrary intention."[123] However, the majority found the exemption provision to have a clear meaning that was not contrary to the FAA context.[124] Specifically, the Court addressed the dissent's argument that it made no sense for the statute's drafters to exempt the workers over whom the commerce power was most apparent at the time of enactment--seamen, railroad employees, and other workers engaged in interstate commerce.[125] The Court, actually referring to the only piece of legislative history that explicitly mentions the exclusionary clause, explained that "it is reasonable to assume that Congress excluded 'seamen' and 'railroad employees' from the FAA for the simple reason that it did not wish to disturb existing statutory dispute resolution schemes covering those specific workers."[126]

With regards to the dissent's accusation that the majority "plays ostrich" to the history behind the section one amendment, the Court does make note of Adams' argument that the phrase "engaged in commerce" should be assessed in light of the Commerce Clause's scope in 1925.[127] The Court even cites several cases to the effect that in the time surrounding the FAA passage, the commerce power was very narrow.[128] The Court denounced such a "variable standard" as causing instability,

118. *Circuit City*, 532 U.S. at 119.
119. *U.S. v. Gonzales*, 520 U.S. 1, 6 (1997).
120. *Ratzlaf v. U.S.*, 510 U.S. 135, 147 (1994).
121. *CBS*, 245 F.3d at 1224.
122. *CBS*, 245 F.3d at 1225.
123. *New Castle County v. Natl. Union Fire Ins. Co.*, 243 F.3d 744, 752 (3d Cir. 2001).
124. *Circuit City*, 532 U.S. at 120.
125. *Id.* at 120-21.
126. *Circuit City*, 532 U.S. at 121. Congress had already regulated seamen and the railroad industry and had already established an arbitration process for resolution of their disputes.
127. *Id.* at 115-16.
128. *Id.* at 116.

going against prior case law, and declining to take into account the Commerce Clause's originally narrow scope.[129]

It is not clear how the rationale promoted by the *Craft* court and the dissent--that statutory words such as "involved in commerce" should be subject to variable interpretations depending on the date of adoption--would promote stability and a better understanding of the statute at issue. It is not clear how the dissent would promote stability because, to quote the majority, "legislative history is problematic even when the attempt is to draw inferences from the intent of the duly appointed committees of the Congress."[130] When a statute is passed by Congress, it is the text of the statute that has been voted on and approved for inclusion in our country's laws and "not statements put in some committee report or made on the floor--and certainly not someone's understanding of the circumstances which gave rise to the legislation."[131] The indeterminacy that the majority warns could result from the dissent's desire to open up common jurisdictional phrases to variable interpretations may be avoided or minimized by focusing on the text of a statute instead of its legislative history, which is what lends credence to the majority's decision.[132] The Eleventh Circuit quoted Judge Harold Leventhal as saying, "the use of legislative history is akin to 'entering a crowded cocktail party and looking over the heads of the guests for one's friends.'"[133] The majority makes it clear that it does not need to find its support among the dissent's "friends," namely sub-committee reports and interest groups statements.

The split in the circuits boils down to which mode of statutory interpretation prevails; namely, does the legislative history figure in to a court's interpretation only after it makes a determination that the statute is ambiguous on its face, or is history considered such an integral part of finding meaning that a court should not be bound by the statute's text, even when the text seems clear.[134] In the prevailing number of cases, courts look to the text of the statute to determine the plain meaning of the words.[135] Only if the text is ambiguous will most courts turn to legislative history

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129. *Id.* at 117.

130. *Circuit City*, 532 U.S. at 120. The respondent relies upon testimony before a Senate subcommittee hearing suggesting that the exception may have been added in response to the objections of an interest group.

131. *CBS*, 245 F.3d at 1227.

132. *CBS*, 245 F.3d at 1228.

133. *Id.* (quoting *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993)).

134. The first view is represented in the majority's opinion. *See Circuit City* 532 U.S. at 119-21; *Gonzales*, 520 U.S. at 6; *Ratzlaf*, 510 U.S. at 147; *CBS*, 245 F.3d at 1224-25; *New Castle County*, 243 F.3d 752. The second view is followed by the dissent. *See Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 10 (1975) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"); *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (Judge Learned Hand surmised that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning.").

135. *See Circuit City*, 532 U.S. at 119-21; *Gonzales*, 520 U.S. at 6; *Ratzlaf*, 510 U.S. at 147; *CBS*, 245 F.3d at 1224-25; *Train*, 426 U.S. at 10; *New Castle County*, 243 F.3d 752; *Cabell*, 148 F.2d 739.

to fill in the pieces of the puzzle.[136] The Supreme Court reached the right result because it used the words of the statute itself to determine whether the statute's meaning was ambiguous, and upon deciding that the text was clear, rejected bringing in legislative history to cloud the statute's plain meaning.

As mentioned above, the Court provided only a cursory discussion of the legislative history of the FAA, but did explain why the statute's history did not play a large role in their decision; whereas, the dissent focused on the FAA legislative history. The way the opinions of both the majority and dissent are written could lead one to believe that courts may pick the canons of interpretation that would result in an interpretation that was consistent with certain policy preferences. The usual criticism of canons, is that for "every canon one might bring to bear on a point there is an equal and opposite canon so that the outcome of the interpretive process depends on the choice between paired opposites--a choice that the canons themselves do not illuminate."[137] The majority even admits "canons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different direction."[138] So, although the Court's decision is supported by the canons it used, its decision that the statute had a "plain meaning" was reached without having to take into account the evidence brought up by the dissent that the drafters of the FAA never meant for the Act's provisions to apply to employment contracts.

The critics of a strict textualist approach point out that even "[e]veryday language is a part of the human organism and is no less complicated than it."[139] And although it is possible that statutes may be written in plain language capable of unanimous interpretation, Judge Hand once observed, "The duty of ascertaining [a statute's] meaning is difficult enough at best, and one certain way of missing it is by reading it literally, for words are such temperamental beings that the surest way to lose their essence is to take them at their face."[140] Contrary interpretations of a statute are almost always going to exist; the danger is that those interpretations may have support due to the existence of contrary canons. To the extent this decision can be called "result-based," and an attempt to further the Court's policy favoring arbitration, the decision's validity would seem to diminish, although the majority's decision was supported by the modes of interpretation it used.[141]

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136. *See Circuit City*, 532 U.S. at 119-21; *Gonzales*, 520 U.S. at 6; *Ratzlaf*, 510 U.S. at 147; *CBS*, 245 F.3d at 1224-25; *Train*, 426 U.S. at 10; *New Castle County*, 243 F.3d 752; *Cabell*, 148 F.2d 739.

137. Posner, *supra* n. 111, at 806.

138. *Circuit City*, 532 U.S. at 115.

139. Matthew Schultz, Student Author, *Equitable Repudiation: Toward a Doctrine of Fallible Perfection in Statutory Interpretation*, 29 Fla. St. U. L. Rev. 303, 311 (2001) (quoting Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* § 4.002 (Harcourt, Brace & Co., Inc. 1921)).

140. *Id.* at 311.

141. S. Kathleen Isbell, Student Author, *Compulsory Arbitration of Employment Agreements: Beneficent Shield or Sword of Oppression? Armendariz v. Found. Health Psychcare Servs., Inc.*, 22 Whittier L. Rev. 1107, 1140 n. 303 (2001) (The opinion in *Circuit City*, with "Justices Kennedy, O'Connor, Scalia, Thomas, and Chief Justice Rehnquist, two of which argued so contrarily in the *Southland* dissent, and all of whom are usually suspicious of expansive federal power--facing off against Justices Steven, Souter, Ginsburg, and Breyer, all of whom are generally sympathetic to 'liberal' as well as federal interests--stands as a stark reminder of the result-based orientation of the current majority.").

B. Effect of the Court's Decision

The result of the Court's decision in this case may have effects on several fronts. Employers use arbitration agreements because they want finality in their disputes with employees.[142] Before the instant decision, Circuits were split on whether to give such agreements effect under the FAA thus granting them the finality that employers desired. However, with this decision, employers will be secure in their knowledge that an agreement to arbitrate will be enforceable if it is contained in an employment contract. The decision should cause employers to reconsider their employment policy strategies and may "create a situation where employers can take a much more positive approach to controlling the process and limiting the cost of employment disputes."[143] However, employers must realize that contracts containing arbitration agreements may be declared invalid if they are unconscionable or are a product of fraud or duress.[144]

The arbitration agreement in Adam's employment contract was recently held to be invalid by the Court of Appeals for the Ninth Circuit, who was hearing the case on remand from the Supreme Court.[145] The court held that the DRA was procedurally unconscionable because it was a "contract of adhesion: a standard-form contract, drafted by the party with superior bargaining power, which relegates to the other party the option of either adhering to its terms without modification or rejecting the contract entirely."[146] The court noted that the DRA forces employees to arbitrate claims against the employer but does not require Circuit City to arbitrate its claims against employees.[147] Not only does the DRA force Adams to arbitrate his statutory claims, it does so without giving him the benefit of many statutory remedies.[148]

Although the Ninth Circuit's recent ruling in the *Circuit City* remand serves as a reminder to employers that arbitration agreements must be procedurally and

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142. Julie L. Waters, Student Author, *Does the Battle Over Mandatory Arbitration Jeopardize the EEOC's War in Fighting Workplace Discrimination?*, 44 St. Louis U. L.J. 1155, 1188 (2000).

143. Paul Peter Nicolai, *Rethinking Employment Law Strategies*, 56 Dis. Res. J. 67, 68 (2001).

144. *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687. *See supra* text accompanying n. 22.

145. *Circuit City Stores*, 279 F.3d at 893. "Under California law a contract is unenforceable if it is both procedurally and substantively unconscionable." *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000).

146. *Id.* (quoting *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 145-46 (Cal. App. 1997)).

147. *Id.* at 893-894.

148. *Id.* at 894. For example, under the DRA, the remedies are limited to injunctive relief, up to one year of back pay and up to two years of front pay, compensatory damages, and punitive damages in an amount up to the greater of the amount of back pay and front pay awarded or $5,000. By contrast, a plaintiff in a civil suit for sexual harassment under the FEHA is eligible for all forms of relief that are generally available to civil litigants--including appropriate punitive damages and damages for emotional distress. *See Commodore Home Sys., Inc. v. Superior Court of San Bernardino County*, 649 P.2d 912, 914 (Cal. 1982). The DRA also requires employees to split the arbitrator's fees with Circuit City, which the court says by itself "would render an arbitration agreement unenforceable." Finally, the DRA imposes a strict one year statute of limitations on arbitrating claims that would deprive Adams of the benefit of the continuing violation doctrine available in FEHA suits. *See e.g. Richards v. CH2M Hill, Inc.*, 29 P.3d 175, 176 (Cal. 2001).

substantively fair, the Supreme Court's decision that such arbitration agreements fall under the FAA may be the green light some employers have been waiting for. In fact, even before the ruling in *Circuit City*, many employers put arbitration agreements in employment contracts to settle disputes with their employees. The reason being that the majority of courts have been acting as if arbitration agreements contained in employment contracts were enforceable under the FAA provisions for many years now.[149] This decision just makes it official and the practice of arbitrating employee disputes now carries the imprimatur of the Supreme Court.

C. The Legislative Response to Circuit City

There has already been a legislative response to *Circuit City*. A bill has been introduced in Congress that would overrule this decision and related decisions. The Preservation of Civil Rights Protection Act of 2001 (H.B. 2282) by Representative Dennis Kucinich (D-Ohio) would amend the FAA by striking the language "of seamen" and all that follows through "commerce."[150] The section one exemption provision would then read "nothing herein contained shall apply to contracts of employment."[151] The bill specifically states that "any clause of any agreement" that requires arbitration of a constitutional claim is unenforceable, but voluntary arbitration and enforcement of collective bargaining agreements would be exempt.[152] In the Senate, Russ Feingold (D-Wisconsin) is also considering introducing a similar bill.[153] In California, where this case originated, state Senator Sheila Kuehl (D-Los Angeles) introduced a similar measure to prohibit arbitration of employment matters.[154] Senate Bill 410 would require that mandatory pre-employment arbitration clauses be presumed "unconscionable."[155]

Although this decision was supposed to resolve the question of whether arbitration agreements contained in employment contracts are within the FAA reach, it appears that this is not the last we have heard of the issue if the legislative response is any indication of the decision's popularity. Currently, the split in the Circuits has been resolved in favor of enforcing arbitration agreements, which is consistent with recent Supreme Court decisions upholding the use of arbitration in the employment context. However, until the statutory language that caused the confusion is amended, employees would be well advised to take binding agreements to arbitrate employment disputes as being just that--binding.

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149. *Cole*, 105 F.3d at 1470.

150. Lindbergh Porter, Jr., Jennie Lau, & Eugene D. Mazo, *Alternative Dispute Resolution: Boosts from the Supreme Courts, But Risks for Over-Reaching Employers*, 663 Practicing Law Instit. Lit. 351, 362 (2001).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

VI. CONCLUSION

The Supreme Court's decision in the present case resolves a split in the Circuits and is the product of a broad interpretation of the FAA coverage provision and a narrow interpretation of its exemption provision. The Court, finding that the FAA meaning was clear on its face, declined to consider the statute's legislative history, and thus reached a result consistent with its policy preference for arbitration: the FAA provisions do apply to arbitration agreements found within employment contracts. Although its decision was supported by the canons of interpretation it used, the majority, to avoid an appearance of a "results-based" decision, may have been better served to address the legislative history of the FAA. Given the apparent conflict between the enacting Congress' intent as outlined by the dissent and the courts' interpretation, the controversy over whether employees can be subjected to mandatory arbitration will likely continue until Congress decides to act.

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