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INTRODUCTION

Fueling the already fiercely debated issue of arbitration agreements in the employment context, the United States Supreme Court reaffirmed an "emphatic federal policy"[1] favoring arbitration with its March 2001 decision in *Circuit City Stores, Inc. v. Adams*.[2] The subject of much debate, this issue has divided the courts and scholars alike. Over the past few decades, the Supreme Court has clearly favored arbitration outside the employment context.[3] Yet, until *Circuit City*, the law was unclear as to whether businesses could require their employees to resolve legal disputes through arbitration and forego the opportunity to seek redress in court.

Using a textual analysis to narrowly interpret the statutory language at issue, the *Circuit City* Court ruled on this unresolved, and frequently litigated, issue.[4] The Court held that only a narrow category of employees, interstate transportation workers, are exempt from the Federal Arbitration Act ("FAA").[5] As such, all other employment contracts containing agreements to arbitrate are enforceable and fall within the scope of the FAA.[6] This decision raises concern among critics who argue that arbitration agreements are inherently unfair and inappropriate for resolving employment disputes.

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1. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985).

2. 532 U.S. 105, 119 (2001).

3. *See, e.g.*, Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 82 (2000) (holding that an arbitration agreement's silence with respect to arbitration fees and costs does not render it unenforceable); Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 541 (1995) (holding that the Carriage of Goods by Sea Act, 46 U.S.C. § 1303(8), does not invalidate foreign arbitration clauses in bills of lading); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991) (holding that claims under the Age Discrimination in Employment Act can be the subject of compulsory arbitration clauses in securities registration applications); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989) (holding that claims under the Securities Act of 1933, 15 U.S.C. § 77l(2), are arbitrable via pre-dispute arbitration agreements and overruling Wilko v. Swan, 346 U.S. 427 (1953)); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 234 (1987) (holding that claims under the Securities Exchange Act of 1934, 15 U.S.C. § 78(b), are arbitrable via pre-dispute arbitration agreements); *Mitsubishi*, 473 U.S. at 636 (holding that international antitrust claims are arbitrable via pre-dispute arbitration agreements); Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) (holding that state law purporting to invalidate arbitration agreements in franchise contracts violated the Supremacy Clause).

4. *Circuit City*, 532 U.S. at 111.

5. *Id.* at 119.

6. *Id.*

This comment begins by outlining the facts and procedural history of *Circuit City*, including the arguments raised by the respondent employee and the Court's short-order treatment of those challenges. Part II discusses the history of the Federal Arbitration Act, key Supreme Court decisions that shaped the current pro-arbitration climate, and arguments for and against arbitration of employment disputes. Part III contains an analysis of the *Circuit City* holding, specifically addressing the Court's justification for its decision and the methods of interpretation the Court employed. Part IV considers the practical effects of the *Circuit City* ruling and provides an in-depth look at some of the criticisms flowing from it.

I. FACTS AND PROCEDURAL HISTORY

In October 1995, Saint Clair Adams applied for a job at Circuit City, Inc. ("Circuit City"), a nationwide electronics retail chain.[7] The employment application Adams signed contained an arbitration provision which bound Adams to "settle any and all previously unasserted claims, disputes or controversies arising out of or relating to [his] application or candidacy for employment, employment and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration* before a neutral Arbitrator."[8]

Circuit City's Santa Rosa, California store hired Adams as a sales counselor.[9] Two years later, Adams sued Circuit City in state court for employment discrimination "stemming from harassment based on his sexual orientation."[10] The company responded with a suit in federal district court to compel arbitration.[11] The district court concluded that Adams was obligated to submit his claims against Circuit City to binding arbitration pursuant to the arbitration agreement.[12] Adams then appealed to the United States Court of Appeals for the Ninth Circuit, which found in his favor.[13] The Ninth Circuit ruled that all employment contracts were beyond the reach of the FAA, and, since "the arbitration agreement in this case was an employment contract," the FAA was inapplicable.[14] This decision, while not surprising considering the Ninth Circuit's distaste for

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7. *Id.* at 109.
8. *Id* at 109-10.
9. *Id.* at 110.
10. *The Supreme Court, 2000 Term—Leading Cases*, 115 HARV. L. REV. 507, 509 (2001) [hereinafter *Leading Cases*].
11. *Circuit City*, 532 U.S. at 110.
12. *Id.*
13. Circuit City Stores, Inc. v. Adams, 194 F.3d 1070, 1071 (9th Cir. 1999).
14. *Circuit City*, 194 F.3d at 1071.

arbitration,[15] was noteworthy because it "conflict[ed] with every other Court of Appeals to have addressed the question."[16]

The United States Supreme Court granted certiorari in order to conclusively resolve the question of whether the FAA was applicable in the employment context.[17] Rejecting the Ninth Circuit's interpretation of the FAA, as well as Adams' arguments about the inappropriateness of arbitration for resolving employment disputes,[18] the Supreme Court held that the FAA does apply to employment contracts, and, furthermore, that it would not tolerate the notion "that the advantages of the arbitration process somehow disappear when transferred to the employment context."[19]

II. BACKGROUND

A. *History of the Federal Arbitration Act and Key Supreme Court Decisions*

Despite initial skepticism, the United States Supreme Court has "rigorously upheld the enforceability of arbitration clauses" over the past decade.[20] Congress enacted the Federal Arbitration Act[21] ("FAA" or the "Act") in 1925, and in it the United States Supreme Court found "an 'emphatic federal policy in favor of arbitral dispute resolution,'"[22] giving arbitration agreements practical enforceability.[23]

The FAA makes agreements to arbitrate enforceable for both existing controversies and future disputes.[24] The primary substantive provi-

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15. This case provided the Ninth Circuit with an opportunity to reiterate its anti-arbitration stance, expressing again its preference for broadly interpreting § 1 to exclude all employment contracts from the scope of the FAA. *See* Craft v. Campbell Soup Co., 177 F.3d 1083, 1094 (9th Cir. 1999) (holding, in a decision issued while the *Circuit City* appeal was pending, that the FAA is inapplicable to labor or employment contracts).

16. *Circuit City*, 532 U.S. at 111 (citing cases from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Tenth, and District of Columbia Circuit).

17. *Id.* at 110-11.

18. Adams argued that the FAA does not apply because, according to language in § 2 of the FAA, the Act is limited to commercial contracts involving interstate commerce. He contended that an employment contract, such as his, was not a contract within the scope of the FAA. *Id.* at 113.

19. *Id.* at 119, 123.

20. David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 54, 73-74. Original skepticism can be traced back to English common law courts' opposition to anything that threatened to deprive them of jurisdiction. American courts initially adopted this attitude. Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 270 (1995).

21. Pub. L. No. 68-401, Chap. 213, 43 Stat. 883 (reenacted July 30, 1947, chap. 392, 61 Stat. 670, codified as amended at 9 U.S.C. §§ 1-16 (2000)).

22. Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 696 (citing *Mitsubishi*, 473 U.S. at 631).

23. *See* Jeremiah A. Byrne, Note, *"Another Day" Has Come and Gone:* Circuit City Stores, Inc. v. Adams, *Application of the Federal Arbitration Act to Employment Disputes*, 40 BRANDEIS L.J. 163, 170-71 (2001).

24. *See* 9 U.S.C. § 2 (2000).

sion that authorizes this enforcement is found in § 2 of the FAA, which states:

> A written provision in any maritime transaction or 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 exist at law or in equity for the revocation of any contract.[25]

The Supreme Court has interpreted this section broadly to uphold enforcement of arbitration for federal statutory claims,[26] and also to preempt state laws attempting to invalidate or restrict arbitration.[27] According to the Court, § 2 evidences a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state's substantive or procedural policies to the contrary."[28]

In recent years, the Supreme Court has issued a series of landmark decisions favoring enforceability of arbitration agreements.[29] These decisions, culminating last year with *Circuit City*, have effectively turned the tide on the "longstanding judicial hostility to arbitration agreements" that Congress sought to overcome with the FAA.[30] So powerful has its endorsement been, that the Court has been criticized by some observers as being too extreme in its enthusiasm for arbitration.[31] Yet, while the Court's pro-arbitration stance does provoke some concern, particularly regarding the implications of arbitration in the employment context, it is safe to say that in recent years, the Court has been unwavering in its preference for "resolving difficult questions in favor of arbitration."[32]

In 1984, the Court issued one of its earliest pro-arbitration decisions.[33] In *Southland Corp. v. Keating*,[34] the Court established the FAA's

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25. *Id.*

26. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 89 (2000) ("[W]e have recognized that federal statutory claims can be appropriately resolved through arbitration, and we have enforced agreements to arbitrate that involve such claims.").

27. *Allied-Bruce Terminix*, 513 U.S. at 272 ("[S]tate courts cannot apply state statutes that invalidate arbitration agreements.").

28. Schwartz, *supra* note 20, at 86.

29. *See, e.g.*, *Green Tree*, 531 U.S. at 82; Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 541 (1995); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 234 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636 (1985); Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).

30. *Gilmer*, 500 U.S. at 24.

31. The Court's favorable treatment of arbitration has been characterized as "creat[ing] a monster" and exalting arbitration agreements to "a privileged place in the contractual hierarchy, trumping both federal and state statutory rights and, in some circuits, even curtailing the powers of federal agencies to enforce civil rights." Schwartz, *supra* note 20, at 36; *Leading Cases*, *supra* note 10, at 508.

32. Schwartz, *supra* note 20, at 82.

33. *Southland Corp.*, 465 U.S. at 16.

preemptive effect on state law, holding that § 2 of the Act strips states of the authority to "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[35] For the first time, the Court held that the FAA applies not only in federal courts, but in state courts as well.[36] As a result, the FAA now preempts all state laws that are hostile to arbitration or that attempt to impose conditions on the enforceability of these agreements.[37]

Relying on *Southland,* the Court in *Allied-Bruce Terminix Cos., Inc. v. Dobson*[38] broadly interpreted the FAA's language as proof of intent by Congress to exercise its commerce power to the fullest, thereby invalidating any state law contrary to the enforcement of arbitration.[39] The Court reaffirmed its pro-arbitration stance by applying the FAA to "an intrastate contract to provide termite extermination services to an Alabama homeowner, thereby preempting an Alabama statute making predispute arbitration agreements unenforceable."[40] This decision made it clear that few contracts would escape the expansive reach of the FAA.[41]

In *Gilmer v. Interstate/Johnson Lane Corp.*,[42] the Court issued a powerful endorsement of arbitration.[43] The Court rejected a number of arguments about arbitration's intrinsic unfairness, calling these complaints "far out of step with [the Court's] current strong endorsement of the federal statutes favoring this method of resolving disputes."[44] Rejecting the suggestion that arbitration was inferior to a judicial remedy, the Court stated that, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[45]

These influential Supreme Court pro-arbitration decisions sanctioned the use of arbitration and made it clear that the Court would not

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34. 465 U.S. 1.
35. *Id.* at 10.
36. *Id.* at 16.
37. *Id.*
38. 513 U.S. 265 (1995).
39. *Allied-Bruce Terminix*, 513 U.S. at 277. The Court noted that there was no reason to overrule its decision in *Southland* because "[n]othing significant has changed in the 10 years subsequent to *Southland*; no later cases have eroded *Southland's* authority; and no unforeseen practical problems have arisen. Moreover, in the interim, private parties have likely written contracts relying on *Southland* . . . and we find it inappropriate to reconsider what is by now well-established law." *Id.* at 272.
40. Schwartz, *supra* note 20, at 88 (referring to *Allied-Bruce Terminix Cos. v. Dobson*, 628 So. 2d 354, 355 (Ala. 1993)).
41. *Id.* at 274.
42. 500 U.S. 20 (1991).
43. *Gilmer*, 500 U.S. at 30
44. *Id.* (citing *Rodriguez de Quijas*, 490 U.S. at 481).
45. *Id.* at 26 (citing *Mitsubishi*, 473 U.S. at 628).

entertain generalized attacks on the adequacy or applicability of arbitration.[46]

B. Benefits of Arbitration in the Workplace

These key Supreme Court decisions have sparked intense debate among the courts and commentators alike. Like *Southland, Allied-Bruce*, and *Gilmer* before it, *Circuit City* has been divisive, specifically concerning the merits of arbitration in the workplace.

Arbitration is frequently praised for offering advantages to both sides of any claim.[47] Even in the employment arena, where parties tend to be on unequal footing, the Supreme Court has rejected the notion that the advantages of arbitration somehow cease to exist.[48] Generally recognized as being less expensive and faster than the judicial system, arbitration is also praised for its private nature and its ability to "maintain goodwill between the parties."[49]

Corporate defendants too find arbitration particularly attractive for several reasons.[50] First, since corporations are particularly vulnerable to unfavorable publicity, they probably benefit most from the private nature of arbitration.[51] Second, the nature of corporations' disputes against minor players—such as employees, customers, and smaller businesses—generally involve small sums of money and tend to be patterned and repetitive.[52] Such disputes are especially well suited to the "informality of arbitration," which limits discovery and thus requires less preparation time "for hearing and presenting evidence."[53] This allows corporate defendants to avoid the generally higher costs associated with litigation.[54] Attorneys' fees on the plaintiff's side are typically lower for the same reasons.[55] In arbitration, where a prevailing plaintiff may be entitled to

46. Schwartz, *supra* note 20, at 104.

47. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 122-23 (2001); *see also* Byrne, *supra* note 23, at 164 (explaining the benefits provided by the enactment of the FAA, namely less expense to both parties involved and a speedier resolution to the issue at hand).

48. *See Circuit City*, 532 U.S. at 123; *see also Gilmer*, 500 U.S. at 32-33 (upholding the enforceability of arbitration agreements, despite "unequal bargaining power between employers and employees," so long as there is no indication that the employee was "coerced or defrauded into agreeing" to arbitration).

49. Byrne, *supra* note 23, at 182.

50. *See* Schwartz, *supra* note 20, at 60.

51. *See* Byrne, *supra* note 23, at 183 ("Arbitration proceedings are mostly conducted in private, and no opinion is released to the public.").

52. *See* Schwartz, *supra* note 20, at 60.

53. *Id.*

54. *See id.*

55. *See id.*

recover attorneys' fees, the corporate defendant benefits by limiting expenses in the event an unfavorable judgment is rendered.[56]

Additionally, while statistics indicate that employees are more likely to recover damages in arbitration than in a judicial forum,[57] "there is a general perception that arbitrators give smaller awards than juries."[58] Because arbitrators typically come from the business community, corporate defendants may feel they have a better chance of gaining sympathy, "if not downright bias," from arbitrators.[59] The Supreme Court, however, stated in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[60] that it refused "to indulge the presumption that the parties and arbitral body conducting a proceeding [would] be unable or unwilling to retain competent, conscientious, and impartial arbitrators."[61] Yet, critics point out that it is no secret "individual arbitrators have an economic stake in being selected again, and their judgment may well be shaded by a desire to build a 'track record' of decisions that corporate repeat-users will view approvingly."[62]

C. Criticisms of Arbitration in the Workplace

Despite a strong pro-arbitration climate, not everyone endorses this dispute resolution mechanism.[63] In particular, concern is mounting over the increased usage of arbitration agreements in the employment context.[64] Critics insist that employees "are particularly deserving of protection from compelled arbitration" and that, in the employment context, the potential for an unjust result is heightened.[65] These criticisms stem from the notion that, for a variety of reasons, arbitration is an unfair and inappropriate process for resolving disputes between employers and employees.[66]

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56. *Id.*

57. *See* Byrne, *supra* note 23, at 182 (citing Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 7 n.4 (1st Cir. 1999)).

58. Schwartz, *supra* note 20, at 60. Schwartz discusses findings that suggest that virtually all employment defense firms counsel employers to adopt arbitration policies as a means of reducing exposure and controlling risk. He cites a survey of sixty-two arbitration awards in securities industry employment cases which confirmed the "'intuitive' assumption that arbitrating employment disputes 'before a panel of arbitrators . . . would generally provide a more favorable forum for employers.'" *Id.* at 63 nn.89-92.

59. *Id.* (noting, for example, that arbitrators for security industry disputes are drawn from the securities industry itself).

60. 473 U.S. 614 (1985).

61. *Mitsubishi*, 473 U.S. at 634.

62. Schwartz, *supra* note 20, at 60-61.

63. *See* Drahozal, *supra* note 22, at 705.

64. *See* Schwartz, *supra* note 20, at 38.

65. *Id.*

66. *See* Drahozal, *supra* note 22, at 705.

Critics frequently contend that because the vast majority of arbitration clauses are in adhesion contracts, employees do not really *consent* to arbitration.[67] Adhesion contracts are typically standard form agreements between parties with unequal bargaining power.[68] One party typically drafts the agreement and presents it to the other "party on a take-it-or-leave-it basis."[69] Critics argue that when an employee agrees to arbitration, she is either unaware of what she is agreeing to,[70] or she has no choice but to agree to the mandatory arbitration language because it is a condition of employment.[71]

Other attacks on the fairness of arbitration revolve around arbitration's practical operation. Opponents argue that the procedures are biased in favor of employers.[72] The take-it-or-leave-it nature of arbitration, critics argue, puts employees in a vulnerable position.[73] Steep costs to plaintiffs, the potential for biased arbitrators, limited discovery, "lack of an appeal," and "the unavailability of class relief" are common arguments asserted by those who oppose arbitration.[74]

Pointing to behavioral evidence, opponents argue that the benefits of arbitration do not run both ways—that arbitration clearly favors employers.[75] As proof, empirical data shows that when workplace disputes arise, employers usually seek to compel arbitration, while employees prefer to litigate.[76]

It has also been suggested that the *Circuit City* ruling effectively diminishes the "regulatory impact of statutory and common law doctrines."[77] Pointing out that corporate defendants have been most eager to embrace mandatory arbitration, critics object to the deregulatory impact

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67. *See id.*

68. *See* Schwartz, *supra* note 20, at 55.

69. *Id.*

70. *See id.*

71. *See* Drahozal, *supra* note 22, at 706.

72. *See id.* at 705 (noting "typical characteristics of an arbitration proceeding . . . uniformly disadvantage individuals").

73. *See* Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1234-35 (2002).

74. Drahozal, *supra* note 22, at 705. Critics of arbitration point to the behavior of the parties involved in employment disputes and suggest that, unlike employers, individuals who are compelled to sign arbitration agreements typically prefer to take their claims to court once a dispute arises. *Id.* at 748. *But see* Byrne, *supra* note 23, at 168 (explaining that, ironically, it is many of these exact features of arbitration that are advocated as benefits by proponents).

75. *See* Schwartz, *supra* note 20, at 62.

76. *See id.* at 62. The author's survey of forty published federal cases involving arbitration of employment disputes over a two-year period revealed that the employer moved to compel arbitration in forty out of forty cases. *See id.* n.88.

77. Schwartz, *supra* note 20, at 55.

of these agreements in the employment context.[78] Applying arbitration to important federal regulatory statutes, such as those that establish discrimination claims, makes arbitration attractive to the corporate defendant looking to limit costs and negative public exposure, and has the dangerous effect of "self-deregulation."[79]

Despite vocal concern from critics of arbitration, however, human resource departments utilize arbitration agreements with increasing frequency.[80] This widespread use, along with strong backing from the Supreme Court, has "established the [FAA] as a major piece of legislation affecting the careers of many Americans."[81]

III. *CIRCUIT CITY STORES, INC. V. ADAMS*[82]

In *Circuit City Stores, Inc. v. Adams*, the Supreme Court decided whether the FAA applied to agreements to arbitrate employment disputes, or whether an exclusionary provision in the Act required deference to judicial resolution of these matters.[83] The Court determined that the critical issue was to what extent § 1 of the FAA intended to cover the arbitrability of employment disputes.[84] Section 1 provides, in pertinent part, 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."[85] The language of this provision leaves room for interpretation as to whether it exempts *all* employment contracts from the Act's coverage, or *only* employment contracts of interstate transportation workers.[86] With the exception of the Court of Appeals for the Ninth Circuit, however, every Circuit to address the issue had limited the § 1 exclusion to transportation workers.[87] The Supreme Court approached this issue in *Gilmer v. Interstate/Johnson Lane Corp.*,[88] but stopped short of resolving it since the dispute in *Gilmer* stemmed from a securities registration application held not to be an employment contract.[89] Leaving the issue unresolved in *Gilmer*, the Court in *Circuit City* interpreted § 1 and ruled on its applicability to employment matters.[90]

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78. *Id.* at 62.
79. *Id.*
80. *See* Byrne, *supra* note 23, at 167.
81. *Id.* at 164.
82. 532 U.S. 105 (2001).
83. *See Leading Cases*, *supra* note 10, at 508.
84. *See Circuit City*, 532 U.S. at 109.
85. 9 U.S.C. § 1 (2000).
86. *See Circuit City*, 532 U.S. at 109.
87. *See id.*
88. 500 U.S. 20 (1991).
89. *Gilmer*, 500 U.S. at 25 n.2.
90. *Circuit City*, 532 U.S. at 113 ("Concluding that the application [in *Gilmer*] was not a 'contract of employment' at all, we found it unnecessary to reach the meaning of § 1.").

In its holding, the Court limited the § 1 exemption to transportation workers.[91] In arriving at this decision, the Court rejected the Ninth Circuit's position that "all employment contracts are excluded from the FAA"[92] and embraced a narrow reading of the statutory language.[93] The Court justified its interpretation utilizing both a textual analysis of the language of § 1, as well as an examination of congressional intent.[94] Interpreting the phrase "any other class of workers engaged in commerce," the Court applied "the maxim *ejusdem generis*," which means "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[95] This logic supports the Court's reasoning that the general clause "any other class of workers" should be defined by reference to the specific categories of "seamen" and "railroad employees" mentioned before it.[96]

Justice Souter's dissent, in which Justices Stevens, Ginsburg, and Breyer joined, found fault with the rule of statutory interpretation adopted by the majority, insisting instead that the better maxim was "*ex abundanti cautela*," meaning "abundance of caution."[97] The dissent contended that by applying *ejusdem generis*, the majority ignored the idea that "a whole may differ from the sum of its parts."[98] The dissent argued that § 1 should be read to exclude *all* employment contracts from the reach of the FAA, and that the words "any other class of workers" should be read as a catchall phrase encompassing workers of all kinds.[99]

While the decision in *Circuit City* focused primarily on interpretive issues surrounding the meaning of § 1, the Court also undertook an analysis of the basic coverage authorized under § 2, the primary substantive provision of the FAA.[100] Rejecting the argument that the term "transaction" in § 2 is limited to commercial contracts, the Court reasoned that if § 2 did not apply to employment contracts, there would be no reason to specify certain types of employment in the § 1 exclusion provision.[101] The Court went on to explain that the words "involving commerce" evidenced Congress' intent to "exercise its full commerce power in the coverage provision of the FAA."[102] In short, the Court rea-

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91. *See id.* at 109.
92. *Id.* at 110-11.
93. *See id.* at 118.
94. *See id.* at 114.
95. *Id.* at 114-15.
96. *Id.*
97. *Id.* at 140 (Souter, J., dissenting).
98. *Leading Cases*, *supra* note 10, at 513.
99. *Circuit City*, 532 U.S. at 138-39 (Souter, J., dissenting).
100. *See id.* at 113-16.
101. *Id.* at 113.
102. Byrne, *supra* note 23, at 173.

soned that a narrow reading of § 1, together with a broad reading of § 2, places employment contracts squarely within the scope of the FAA.[103]

IV. ANALYSIS

The Court's statutory interpretation of § 1 in *Circuit City* resolved the question left unanswered in *Gilmer*.[104] The ruling made it clear that, with the narrow exception of interstate transportation workers, the FAA could be invoked to completely enforce arbitration agreements in the employment context.[105] *Circuit City* has been described as "the case that would define the future of arbitration in the American workplace."[106] An article in the *Wall Street Journal*, following this decision, described *Circuit City* as the Court's "biggest pro-business decision," signaling "a very good year for big corporations."[107] With the backing of the Supreme Court, arbitration has become the "cornerstone of dispute resolution programs."[108] To be sure, *Circuit City* has secured a place for arbitration in the employment arena, and the effects, not surprisingly, have prompted concern among those who oppose its use in this context.

A. *The practical effects of* Circuit City

The Court's endorsement of the broad enforcement powers of the FAA has paved the way for increased usage of arbitration agreements in employment contracts.[109] These agreements "have become increasingly commonplace in a number of fields of commerce."[110] From the financial industry to the health care and insurance industries, binding arbitration often is a condition of service or employment.[111]

Before the enactment of the FAA, arbitration was "the sole province of trade association members" or "limited to contracts between large corporations."[112] Shipping and railroad workers, the class of employees enumerated in § 1 of the FAA, constituted a relatively small number of employees who operated under established arbitration procedures.[113] Today, however, experts estimate that binding arbitration agreements

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103. *See id.* at 174-75.

104. *See Circuit City*, 532 U.S. at 113; *see also Gilmer*, 500 U.S. at 25.

105. *See* Byrne, *supra* note 23, at 167.

106. *Id.*

107. Robert S. Greenberger, *Businesses See Gains in High-Court Term*, WALL ST. J., June 29, 2001, at B4.

108. Byrne, *supra* note 23, at 166.

109. *See* Schwartz, *supra* note 20, at 53.

110. *Id.*

111. *Id.* at 53-54.

112. Drahozal, *supra* note 22, at 704.

113. *See Circuit City*, 532 U.S. at 121. The Shipping Commissioners Act of 1872, the Transportation Act of 1920, and the Railway Labor Act of 1926 established procedures for resolving employment disputes between seamen and railroad employees and their employers. *Id.*

cover as many as five million nonunion workers nationwide.[114] And, in the wake of *Circuit City*, commentators predict that "use [of these agreements] will only increase as corporate drafters of form contracts catch on to its advantages."[115]

Numerous employment organizations have issued statements regarding arbitration agreements in the employment context. The Equal Employment Opportunity Commission ("EEOC"), for example, issued an official policy statement against pre-dispute arbitration agreements for employment discrimination disputes.[116] Staunchly opposed to mandatory arbitration in the employment context, the EEOC's position stems from concern over agreements that require employees, as a condition of employment, to "give up their right to pursue employment discrimination claims in court."[117] The EEOC maintains that "the courts play an essential role in enforcing the civil rights laws," and that if employees are forced to resolve their claims in an arbitral forum, "there is no public accountability for decisions that are made or for employers who violate the law."[118]

The EEOC claimed a recent victory in its battle against mandatory arbitration in the employment context. In January 2002, the Supreme Court ruled in *EEOC v. Waffle House, Inc.*[119] that the EEOC was not barred from pursuing legal relief on behalf of an employee who had agreed to arbitrate employment disputes with his employer.[120] The Court held that "the EEOC does not stand in the employee's shoes,"[121] and that federal statutory authority permits the EEOC to "pursue victim-specific relief regardless of the forum that the employer and employee have chosen to resolve their disputes."[122]

The EEOC is not the only organization with a very public stance on the issue of workplace arbitration. The National Employment Law Association ("NELA") has also responded by pressuring arbitration providers

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114. Robert S. Greenberger, *Justices Back Arbitration Use In Work Arena*, WALL ST. J., Mar. 22, 2001, at A3 (citing data from the American Arbitration Association, the largest provider of dispute resolution services).

115. Schwartz, *supra* note 20, at 54.

116. *See* EEOC Notice No. 915.002 (July 10, 1997), *available at* http://www.eeoc.gov/docs/mandarb.html [hereinafter EEOC Notice]; *see also* Press Release, EEOC, *EEOC Releases Policy Statement on Mandatory Binding Arbitration* (July 10, 1997), *available at* http:/www.eeoc.gov/press/7-10-97.html (describing the policy statement and the basic purpose of the EEOC). The EEOC is the federal agency responsible for interpreting and defending the public's interest in fair employment practices.

117. EEOC Notice, *supra* note 116.

118. Press Release, *supra* note 116.

119. 122 S. Ct. 754 (2002).

120. *Waffle House*, 122 S. Ct. at 765.

121. *Id.* at 766.

122. *Id.* at 765.

into refusing to take part in compulsory pre-dispute arbitration.[123] Hoping to discourage employers from utilizing these agreements, NELA threatened "to not appoint arbitrators (when its own members had the ability to choose arbitrators) from those services that were willing to be written into such employment contracts."[124]

Even pro-arbitration groups, like the National Academy of Arbitrators ("NAA"),[125] have responded to the growing popularity of arbitration agreements in the workplace. These groups recognize that "the vitality of arbitration is contingent upon a continued confidence in the inherent fairness of the institution."[126] A task force assembled by NAA issued a protocol setting forth recommendations to ensure fair arbitration proceedings.[127] Members of NELA, the American Bar Association, the American Arbitration Association, and the American Civil Liberties Union signed this protocol.[128] Furthermore, the Commission on the Future of Worker-Management Relations (the "Dunlop Commission") has also endorsed arbitration, while at the same time cautioning against issues of potential unfairness.[129] In fact, the Dunlop Commission developed its own recommendations designed to alleviate concerns about the fairness of the arbitration process.[130]

While these assorted recommendations, protocols, and guidelines earnestly strive to ensure basic fairness for arbitration in the workplace, they are merely advisory.[131] Courts do not require employers "to abide by these market-spawned rules of the fairer road," and their practical effect on the arbitration process "remains to be seen."[132] The Federal Arbitration Act itself, however, includes an enumerated list of grounds for

123. Edward A. Dauer, *Judicial Policing of Consumer Arbitration*, 1 PEPP. DISP. RESOL. L.J. 91, 102 (2000); *see* http://www.nela.org/about/about_mission.htm (describing NELA as an organization of more than 3,400 plaintiffs' attorneys who "represent individual employees in cases involving employment discrimination, wrongful termination, employee benefits, and other employment related matters") (last visited Jan. 5, 2002).

124. Dauer, *supra* note 123, at 102.

125. A non-profit professional organization of arbitrators founded in 1947 with approximately 625 members. *See* http://www.naarb.org/whatis.html (last visited Jan. 5, 2002).

126. Byrne, *supra* note 23, at 185.

127. *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship* (May 9, 1995), *at* http://www.naarb.org/protocol.html.

128. *Id.*

129. Byrne, *supra* note 23, at 185. The Dunlop Commission is appointed by the U.S. Secretary of Labor and has championed arbitration as "an efficient way to resolve employment disputes." *Id.*

130. *Id.*

131. Dauer, *supra* note 123, at 102.

132. *Id.*

which a fundamentally unfair arbitration award can be overturned.[133] These grounds include:

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceed their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[134]

These "built-in invalidation mechanisms"[135] in the FAA address many of the very same concerns that arbitration and employment groups are seeking to resolve with their aspirational protocols and standards.

B. Historical and Policy Implications

The *Circuit City* majority relied on the significance of the FAA's language to arrive at its decision.[136] Critics have disapproved of the analysis in *Circuit City*, arguing that the Court relied too heavily on a textual analysis and ignored policy considerations and legislative history.[137] With respect to this issue, the Court justified its approach by citing the limited amount of available legislative history.[138] The Court also noted that it would "not resort to legislative history to cloud a statutory text that is clear."[139]

The Court's approach has raised problems, sparking much debate over what legislative history *is* available and the implications this information would have had on the outcome of *Circuit City*. One critic's article suggests "the Court's well-known predilection for textual analysis may take precedence over what are almost certainly its policy preferences."[140]

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133. *See* 9 U.S.C. §§ 10(a)(1)–(4) (2000).
134. *Id.*
135. Byrne, *supra* note 23, at 186.
136. *See Leading Cases*, *supra* note 10, at 514; Byrne, *supra* note 23, at 179.
137. *Leading Cases*, *supra* note 10, at 514-17.
138. *Circuit City*, 532 U.S. at 119.
139. *Id.*
140. *Leading Cases*, *supra* note 10, at 508.

The dissenting opinions in *Circuit City*, authored by Justice Stevens and Justice Souter respectively, argued that the appropriate way to determine congressional intent is to examine the legislative history at the time the FAA was enacted.[141] For example, Justice Stevens argued:

> [N]either the history of the drafting of the original bill by the ABA, nor the records of the deliberations in Congress during the years preceding the ultimate enactment of the Act in 1925, contains any evidence that the proponents of the legislation intended it to apply to agreements affecting employment.[142]

Others argue that "the historical roots of arbitration and of the FAA" fail to support a rule that would enforce arbitration agreements in contracts "marked by disparities in bargaining power, knowledge and interests."[143]

Although a textual analysis controlled the result of the majority opinion in *Circuit City*, limited legislative history *does* support the Court's decision to apply the FAA to employment contracts.[144] Countering arguments to the contrary, commentators note that "[n]othing in legislative history conclusively lends itself to a broad reading of § 1."[145] They argue that "when considered in conjunction with the plain meaning of the statutory language and the FAA's underlying purpose, the limited legislative history indicates Congress' intent to cover employment contracts of all workers except seamen, railroad employees, and those workers engaged in the actual movement of goods in interstate commerce."[146] The Court reasoned that employment disputes for these specific categories of workers were already governed by grievance procedures under federal law.[147] Justifying its reasons for limiting the § 1 exclusion to interstate transportation workers, the Court offered 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 unsettle established or developing statutory dispute resolution schemes covering specific workers."[148] Still, some insist that if the Court had focused more on legislative history, and less on statutory syntax, the Court may have reached a different outcome in *Circuit City*.[149]

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141. *See Circuit City*, 532 U.S. at 125-29 (Stevens, J., dissenting), 133-35 (Souter, J., dissenting).

142. *Id.* at 126 (Stevens, J., dissenting).

143. Schwartz, *supra* note 20, at 39.

144. Byrne, *supra* note 23, at 179.

145. *Id.* at 181.

146. *Id.*

147. *Circuit City*, 532 U.S. at 121.

148. *Id.*

149. *See Leading Cases*, *supra* note 10, at 515.

CONCLUSION

The Supreme Court's decision in *Circuit City Stores, Inc. v. Adams* is consistent with an already strong federal policy favoring arbitration.[150] Holding that the FAA applies to employment contracts, the Supreme Court sanctioned the use of pre-dispute arbitration as a valid mechanism for dealing with employment disputes. Because of the strength of this endorsement, and the advantages arbitration provides to corporate defendants, *Circuit City* concerns critics who insist the FAA was not intended to resolve employment disputes.[151] Critics object to the nature of arbitration agreements, and the fact that, typically, employers include arbitration clauses in adhesion contracts offered to employees on a "take it or leave it" basis. Some argue that "employees, as a class, are particularly deserving of protection from compelled arbitration,"[152] and that, for many reasons, arbitration agreements are overreaching. Yet, despite the many concerns it raises, arbitration has found a big supporter in the Supreme Court, and the *Circuit City* decision has secured a place for arbitration in the employment field.

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150. *See* Byrne, *supra* note 23, at 181.

151. Schwartz, *supra* note 20, at 38.

152. *Id.*

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