No. 07-773

IN THE

Supreme Court of the United States

BETTY E. VADEN,

Petitioner,

v.

DISCOVER BANK; DISCOVER FINANCIAL SERVICES, INC.,

Respondents.

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

BRIEF FOR RESPONDENTS

ALAN S. KAPLINSKY
MARTIN C. BRYCE, JR.
BALLARD, SPAHR, ANDREWS & INGERSOLL, LLP
1735 Market St., 51st Fl.
Philadelphia, PA 19103
(215) 665-8500

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
MATTHEW B. ARCHER-BECK
LOWELL J. SCHILLER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington D.C. 20005
(202) 736-8000

Counsel for Respondents

* Counsel of Record
[Additional Counsel On Inside Cover]

August 1, 2008

JOSEPH W. HOVERMILL
MATTHEW T. WAGMAN
JOHN C. CELESTE
MILES & STOCKBRIDGE, P.C.
10 Light Street.
Baltimore, MD 21202
(410) 385-3442

QUESTIONS PRESENTED

(1) Whether the court of appeals correctly ruled that the district court had jurisdiction to compel arbitration under Section 4 of the Federal Arbitration Act where the parties' underlying dispute is completely preempted by federal banking law.

(2) Whether the court of appeals correctly ruled that the district court's exercise of jurisdiction to compel arbitration under Section 4 of the Federal Arbitration Act is consistent with this Court's decision in *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002).

RULE 29.6 DISCLOSURE

DFS Services LLC (f/k/a Discover Financial Services LLC f/k/a Discover Financial Services, Inc.) and Discover Bank are wholly owned subsidiaries of the ultimate (publicly held) parent company, Discover Financial Services (f/k/a NOVUS Credit Services Inc.).

No publicly held company owns more than 10% of the stock of Discover Financial Services.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

STATUTES Page

RULES

LEGISLATIVE HISTORY

TABLE OF AUTHORITIES – continued

SCHOLARLY AUTHORITIES Page

OTHER AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The fundamental issue presented by this case is whether Section 4 of the Federal Arbitration Act ("FAA") means what it says when it plainly provides that a district court may compel arbitration when, "save for" the agreement to arbitrate, it "would have jurisdiction under Title 28, in a civil action . . . of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4.

On that issue, Petitioner Betty Vaden ("Petitioner") nowhere disputes the determination – supported by the Federal Deposit Insurance Corporation ("FDIC") below – that the controversy between the parties over the legality of interest payments and other fees by Discover Bank was "completely preempted" and thus is solely "based on federal law." *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 8 (2003). As such, the court of appeals properly affirmed the district court's determination that it "would have jurisdiction under title 28 . . . of the subject matter of a suit arising out of the controversy between the parties," and it thus had jurisdiction to "direc[t] that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4.

That straightforward conclusion follows the analysis of Section 4 in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, where this Court noted that although the FAA provides no "independent" grant of jurisdiction, it does, through Section 4, "provid[e] for an order compelling arbitration only *when the federal district court would have jurisdiction over a suit on the underlying dispute*." 460 U.S. 1, 25 n.32 (1984) (emphasis added). Under *Moses H. Cone*, a district court is obligated to address a petition to compel arbitration

under Section 4 where, as here, the parties' agreement is subject to the FAA and where the court "would have subject matter jurisdiction" over "a suit arising out of the controversy between the parties." 9 U.S.C. § 4.

Petitioner studiously avoids the plain language of Section 4 and this Court's statements in *Moses H. Cone*. Instead, petitioner argues that the issue presented is whether "Congress clearly and unambiguously intended in Section 4 to repeal many of Section 1331's jurisdictional limitations." Pet. Br. 21. But petitioner's argument is precisely backwards. Although Section 2 of the FAA creates a federal substantive right, this Court has explained that the FAA is anomalous in that it creates no "independent" grant of jurisdiction. That conclusion was based upon an analysis of Sections 3 and 4, each of which reflects that Congress sought to limit federal court jurisdiction to the circumstances set forth in those provisions. The appropriate issue thus is whether Section 4 authorizes a district court to exercise its authority to compel arbitration under the FAA.

When petitioner finally addresses the language of Section 4, she advances an implausible interpretation that would render Section 4 irrelevant in all, or virtually all, real-world circumstances where a party seeks to compel arbitration when there is not already a pending federal lawsuit. Under petitioner's view, a district court is not permitted to "look through" the petition to compel arbitration to the underlying controversy that one of the parties seeks to arbitrate. Pet. Br. 11-12. That, however, is precisely what the language of Section 4 requires – a determination whether the court "would have jurisdiction under title 28, in a civil action or in admiralty of the subject

matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4.

Petitioner's position effectively would render Section 4 irrelevant not only in cases involving disputes that arise out of federal law, but also in cases where the underlying disputes would support diversity jurisdiction because the amount in controversy requirement requires courts to "look through" the Section 4 petition to the underlying dispute to assess the amount in controversy. *E.g.*, *Doctor's Assocs., Inc.* v. *Hamilton*, 150 F.3d 157, 160-61 (2d Cir. 1998). As petitioner acknowledges, Section 4 applies where a party neglects or refuses to arbitrate a dispute including cases where no complaint has been filed at all. Pet. Br. 4. Under her interpretation, however, Section 4 would be relegated to a curiosity, available as an independent basis to compel arbitration only when the agreement to arbitrate involved matters such as land disputes within "the Gila River Indian Community." *Id.* at 29. Petitioner's request that this Court should misread and trivialize Section 4 should be denied.

STATUTORY BACKGROUND

Congress passed the Federal Arbitration Act ("FAA") in 1925. The "preeminent concern of Congress" was "to ensure judicial enforcement of privately made agreements to arbitrate" by "overul[ing] the judiciary's longstanding refusal" to do so. *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-21 (1985); see also *Allied-Bruce Terminix Cos., Inc.* v. *Dobson*, 513 U.S. 265, 270 (1995) ("[T]he basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate."). Indeed, Congress enacted the FAA in "response to hostility of American courts to the enforcement of

arbitration agreements, a judicial disposition inherited from then-longstanding English practice." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 111 (2001); see *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.14 (1985). This judicial hostility took several forms, including refusing to give effect to arbitration agreements, declining to enforce them through specific performance, and denying stays of judicial proceedings in favor of arbitration. See *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 120-21 (1924).

Section 2 of the FAA directly addresses this judicial hostility, providing that a written agreement to arbitrate "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 equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has explained, "[t]he effect of [Section 2] is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone*, 460 U.S. at 24; see also *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984) (same).[1]

Although Section 2 creates a body of substantive federal law, this Court has concluded that "it does not create any *independent* federal-question jurisdiction."

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[1] Before the FAA will apply, a court must determine whether the agreement to arbitrate is contained in a "maritime transaction" or a contract "evidencing a transaction involving commerce." 9 U.S.C. § 2. Likewise, before arbitration may be compelled, the court must decide whether the parties' underlying dispute is subject to arbitration under their agreement. *Mitsubishi Motors Corp.*, 473 U.S. at 626.

Southland, 465, U.S. at 15 n.9 (emphasis added). That is, Congress did not intend to confer jurisdiction in every case solely because the parties' agreement to arbitrate fell within the scope of Section 2 of the FAA.[2] This "anomaly" in the area of federal subject matter jurisdiction, *Moses H. Cone*, 460 U.S. at 25 n.32, is "implicit" in the language of FAA Sections 3 and 4, which set forth jurisdictional bases for a court to stay litigation and enforce arbitration under the FAA, *Southland*, 465 U.S. at 15 n.9.

Specifically, Section 3 allows a court to enter a stay of litigation only where there already is a "suit or proceeding" before the court, 9 U.S.C. § 3, and therefore presupposes an independent source of jurisdiction because a "court cannot stay a suit pending before it unless there is such a suit in existence." *Moses H. Cone*, 460 U.S. at 25 n.32. Likewise, Section 4 provides that a party may petition the court for an order compelling arbitration when it is "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration." 9 U.S.C. § 4. That authority is contingent on a further determination that, "save for" the agreement to arbitrate, the court "would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out the controversy between the parties." *Id.*;

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[2] In contrast, the Act to Implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1970, provides that a proceeding under its coverage "shall be deemed to arise under the laws and treaties of the United States." 9 U.S.C. § 203. Chapter 2 of the FAA thus provides an independent grant of jurisdiction to compel arbitration and to confirm or set aside arbitration awards for international disputes.

Moses H. Cone, 460 U.S. at 25 n.32; *Southland*, 465 U.S. at 15 n.9.

Historically, Section 4 petitions for arbitration have been brought in two different types of cases. If there is pending litigation before the district court, a petition for relief under Section 4 is known as an "embedded" proceeding, *i.e.*, the case before the district court involves "both a request for arbitration and other claims for relief." *Green Tree Fin. Corp.* v. *Randolph*, 531 U.S. 79, 87 (2000). Section 4 also contemplates "independent" proceedings where the request to compel "arbitration is the sole issue before the court." *Id.*; see also *The Anaconda* v. *American Sugar Ref. Co.*, 322 U.S. 42, 45 (1944) ("From [Section 4] it is clear that the parties may proceed in an admiralty case without the customary libel and seizure"). Indeed, "[n]ormally, [Section 4] motions are brought in independent proceedings." *Hartford Fin. Sys.* v. *Florida Software Servs.*, 712 F.2d 724, 728 (1st Cir. 1983) (Breyer, J.) (citing cases).

FACTUAL AND PROCEDURAL BACKGROUND

In 1990, Respondent Discover Bank, a federally insured bank, issued a Discover credit card to Petitioner Betty Vaden. Pet. App. 4a. In June 1999, petitioner's credit account attained Platinum status, *id.*, and, in July 1999, she was sent an amendment to her Cardmember Agreement that included a broad arbitration clause allowing either party to elect binding arbitration as the means to settle "'any past, present or future claim or dispute . . . arising from or relating to'" her account, her past accounts, or the enforceability of the arbitration clause, the Cardmember Agreement, or any prior agreement. *Id.* at 49a-50a; see also *id.* at 4a-5a, 77a.

In July 2003, because petitioner failed to pay her credit card balance of over $10,000, Discover Bank, through its servicing affiliate, Discover Financial Services, Inc. ("DFS"), sued petitioner for nonpayment in Maryland state court. Pet. App. 5a. In response, petitioner filed class-action counterclaims against DFS based on contract law and various state anti-usury statutes. *Id.* As relevant here, petitioner sought to represent a class action, claiming that she and others were assessed finance charges, late fees, and interest in violation of Maryland law. Joint Appendix ("JA") 29-30.

Discover Bank then sought to vindicate its federal right to compel arbitration in federal court. Invoking Section 4 of the FAA, Discover Bank and DFS (collectively "Discover") filed a petition to compel arbitration in the United States District Court for the District of Maryland. JA 28-42. Discover alleged that "resolution of [petitioner's] claims that Discover Bank charged illegal finance charges, interest and late fees involve questions of federal law under 28 U.S.C. § 1331." JA 30 ¶ 8. Discover further alleged that Counts I through III of petitioner's state-law counterclaims were completely preempted by Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d(a). *Id.*

Petitioner sought to avoid arbitration. She argued that the arbitration amendment only applied to Platinum cardholders and that she had not been a Platinum cardholder at the time the amendment was issued. Pet. App. 51a-52a. Petitioner also disputed Discover Bank's standing to compel arbitration because she had filed her counterclaims against DFS, not Discover Bank. *Id.* at 60a-61a.

The district court held that the parties had entered into a valid and enforceable arbitration agreement,

Pet. App. 83a-86a, and therefore granted Discover Bank's motion to compel arbitration, *id.* at 88a, 89a. On appeal, the Fourth Circuit rejected petitioner's argument that the district court lacked subject matter jurisdiction over Discover Bank's petition to compel arbitration. *Id.* at 61a-63a. It looked to this Court's opinion in *Moses H. Cone*, which states that "Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute." 460 U.S. at 25 n.32. See Pet. App. 62a. Following *Moses H. Cone*, the court of appeals held that a district court may address a Section 4 petition to compel arbitration if, "but for the arbitration agreement," there would be "subject matter jurisdiction" over "a properly invoked federal question in the underlying dispute." *Id.* at 72a.

The court of appeals remanded the case to allow the district court to address matters relevant to the district court's subject matter jurisdiction. Pet. App. 73a. On remand, the district court ruled that it had subject matter jurisdiction to compel arbitration of the parties' dispute. *Id.* at 48a. Specifically, the district court noted that petitioner "concedes that the FDIA completely preempts" state claims including petitioner's challenges to her interest rate if made "against a federally insured bank such as Discover Bank." *Id.* at 46a. The district court determined that "Discover Bank, not DFS, is the true lender and that [petitioner's] counterclaims are directed against the alleged unlawful terms of the loan, not DFS' servicing of the loan." *Id.* at 48a. The district court concluded that "[t]he complete preemption doctrine, therefore, applies." *Id.* The district court also held that the parties had entered into a valid arbitration agreement. *Id.* at 53a.

On appeal, the Fourth Circuit held that the district court had jurisdiction to compel arbitration. It explained that under Section 4, "a district court may issue an order compelling arbitration if the court would otherwise 'have jurisdiction under Title 28, in a civil action . . . *of the subject matter of a suit arising out of the controversy* between the parties.'" Pet. App. 7a (omission in original) (quoting 9 U.S.C. § 4). The court further noted that "Section 4 does not require a party actually to file suit regarding the underlying controversy; the FAA requires only that a party be aggrieved by another party's failure to arbitrate a controversy, 'the subject matter of which would fall within the jurisdiction of [the court], were an actual suit to arise out of the controversy.'" *Id.* (quoting *Reynolds & Reynolds Co.* v. *Image Software, Inc.*, 254 F. Supp. 2d 761, 765 (S.D. Ohio 2003)). Because "a § 4 petition to compel arbitration is properly in federal court if the underlying dispute presents a federal question," *id.* at 7a-8a, the Fourth Circuit held that it "must therefore look through the arbitration claim" and examine the dispute between the parties. *Id.* at 8a.

The court below addressed whether the parties' dispute (memorialized in petitioner's counterclaims) underlying the petition to compel arbitration was completely preempted by the FDIA. Pet. App. 11a. In assessing the question of "complete preemption" under the FDIA, the Fourth Circuit looked to *Beneficial National Bank*, 539 U.S. at 11 (2003), in which this Court addressed the issue of complete preemption "within the context of the National Bank

Act" ("NBA"). Pet. App. 20a.[3] The Fourth Circuit concluded that *Beneficial*'s analysis of complete preemption under Sections 85 and 86 of the NBA was equally applicable here because the NBA "is to national banks as section 27 of the FDIA is to state-chartered banks." *Id.*[4] Relying upon this Court's decision in *Beneficial*, the decisions of sister courts of appeals, the language of Section 27 of the FDIA, and the FDIC's *amicus* brief, the Fourth Circuit concluded that the FDIA completely preempted petitioner's state-law usury claims. *Id.* at 24a-25a.

SUMMARY OF ARGUMENT

The meaning of Section 4 of the FAA is plain and unambiguous. It grants federal courts jurisdiction to compel arbitration, but only if, after putting to one side the arbitration agreement, the court concludes that it "would have jurisdiction" over "a suit arising out of the controversy between the parties." 9 U.S.C.

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[3] The *Beneficial* Court held that "[b]ecause §§ 85 and 86 provide the exclusive cause of action" for usury claims, "there is . . . no such thing as a state-law claim of usury against a national bank." 539 U.S. at 11. As the court below explained, "even though the plaintiff's complaint [in *Beneficial*] did not mention federal law, [the] cause of action arose under federal law and defendant National Bank's removal to federal court based on complete preemption under the NBA was proper." Pet. App. 21a.

[4] The court of appeals also requested an amicus brief from the Federal Deposit Insurance Corporation ("FDIC") on the question whether Section 1831d "'completely preempts' state law usury claims." Pet. App. 24a. The FDIC opined that Discover Bank is the real party in interest and, as such, petitioner's counterclaims were completely preempted by federal law. *Id.* at 23a. The Fourth Circuit affirmed that conclusion, *id.*, and petitioner does not challenge this determination.

§ 4; *Moses H. Cone*, 460 U.S. at 25 n.32. In this case, it is undisputed that the underlying controversy over the legality of interest payments and other fees by Discover Bank was "completely preempted" and thus solely "based on federal law." Cf. *Beneficial Nat'l Bank*, 539 U.S. at 8. The district court thus properly exercised jurisdiction to compel arbitration in this case.

That conclusion follows from the language, structure and purpose of the FAA, each of which confirms that Congress adopted Section 4 to advance the federal policy in favor of private arbitration without expanding federal court jurisdiction to encompass each and every dispute involving an arbitration agreement within the scope of the FAA. The jurisdictional inquiry reflected in the text of Section 4 fits neatly within the structure of the FAA, and advances Congress's goals under the Act, through a process closely analogous to the inquiry under the Declaratory Judgment Act. See 28 U.S.C. § 2201; *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 19 (1983).

In contrast, petitioner offers a tortured and implausible interpretation of Section 4 based largely upon a misreading of the legislative history leading to Congress's enactment of the FAA. Petitioner's argument cannot be reconciled with the language of the statute, and, if permitted, would severely undermine the utility of Section 4 as an independent means to enforce agreements to arbitrate, even though "[n]ormally, such motions are brought in independent proceedings." *Hartford Fin. Sys.*, 712 F.2d at 728 (Breyer, J.). Indeed, under petitioner's approach, a district court could not "look through" the petition and thus could not invoke diversity jurisdiction, even though this Court stated explicitly

that courts may do so. *Moses H. Cone*, 460 U.S. at 25 n.32. Such a reading would subvert the overarching purpose of the FAA: to ensure that agreements to arbitrate are enforced in accordance with their terms.

Second, the peculiar procedural posture of this case – that the parties' federal dispute first was revealed in a counterclaim filed in Maryland state court – should make no difference under Section 4 of the FAA. As petitioner acknowledges, Section 4 is designed to address the situation where a party neglects or refuses to arbitrate a dispute, including cases where no complaint has been filed at all. Pet. Br. 4. That petitioners' refusal to arbitrate was reflected in counterclaims filed in state court does not deprive the district court of jurisdiction to address Discover Bank's petition. As such, the judgment below in no way conflicts with this Court's ruling in *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002).

Finally, this Court need not and should not address the new issue of "standing," which petitioner seeks to inject into this case now even though she did not raise that issue in the petition for certiorari. See Sup. Ct. R. 14.1(a). That question raises no jurisdictional issue, but merely presents the factbound issue whether the district court properly concluded that petitioner (i) has refused to arbitrate in a case where petitioner has denied the existence of an agreement to arbitrate, and (ii) has opposed arbitration for years in legal proceedings before the district court and court of appeals. Petitioner's argument is procedurally improper and substantively meritless.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION TO COMPEL ARBITRATION UNDER SECTION 4 OF THE FAA.

This case turns on the correct interpretation of the language of Section 4 of the FAA. "It is axiomatic that '[t]he starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 685 (1985) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)); accord *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999). In assessing the statutory text, this Court "consider[s] not only the bare meaning of the word[s] but also [their] placement and purpose in the statutory scheme," *Bailey* v. *United States*, 516 U.S. 137, 145 (1995), as well as "the provisions of the whole law" including "its object and policy," *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 35 (1990). Application of these principles confirms that the district court properly exercised jurisdiction to compel arbitration in this case.

A. The Language, Structure, And Purpose Of The FAA Support Jurisdiction To Compel Arbitration In This Case.

1. The plain language of Section 4 confirms that the district court had jurisdiction to compel arbitration of the parties' dispute.

Section 4 provides, in relevant part, as follows:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, [i] save for such agreement, [ii] would have jurisdiction

> under title 28, in a civil action or in admiralty [iii] of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4. By its plain terms, Section 4 requires the district court to make an assessment, (i) putting to one side the agreement to arbitrate, (ii) whether it would have had jurisdiction under Title 28, (iii) over a suit between the parties arising out of their underlying dispute.

First, the district court's jurisdictional assessment is made "save for" the arbitration agreement. "Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *BP Am. Prod. Co.* v. *Burton*, 127 S. Ct. 638, 643 (2006); see also *Leocal* v. *Ashcroft,* 543 U.S. 1, 9 (2004) ("When interpreting a statute, we must give words their 'ordinary or natural' meaning."); *Barber* v. *Gonzales*, 347 U.S. 637, 641 (1954) ("[S]tatutory language should be interpreted whenever possible according to common usage."). The ordinary or common meaning of "save for" is "but for" or "except for." See *Webster's New International Dictionary of the English Language* 1885 (1923) (defining "save" as "Except, excepting, not including, leaving out"; synonym: "EXCEPT"); *Funk & Wagnall's New Standard Dictionary of the English Language* 2180 (1924) (defining "save" as "Not taking account of; unless; excepting"; synonym: "BUT"); 14 *Oxford English Dictionary* 528 (2d ed. 1989) (defining "save" as "Except, with the exception of, but" and "save for" as "exception being made for, but for"); Pet. App. 64a ("The common understanding of the phrase 'save for' means 'but for' or 'notwithstanding.'"). As such, Section 4 obligates the district court to put to

one side the parties' agreement to arbitrate when it considers the remaining requirements of Section 4.

Second, the district court must assess whether it "would have jurisdiction under title 28." The use of the subjunctive phrase "would have" reflects that the court must assess not the suit before it, but a potential suit. See *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 555, (1973) ("The use of the subjunctive indicates that Congress was concerned with the potential effects."). Further, the reference to "title 28" reflects that the assessment of jurisdiction is not cabined solely to a single basis, such as diversity jurisdiction, but encompasses more broadly all bases for jurisdiction reflected in Title 28. Pet. App. 65a.[5]

Third, and most significantly, Section 4 provides that the object of the court's jurisdictional assessment is "the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4. As this Court has explained, this language requires the district court to assess whether it "would have jurisdiction over a suit on the underlying dispute." *Moses H. Cone*, 460 U.S. at 25 n.32; accord *Southland*, 465 U.S. at 15 n.9 (citing *Krauss Bros. Lumber Co.* v. *Louis Bossert & Sons, Inc.* 62 F.2d 1004, 1006 (2d Cir. 1933) (L. Hand, J.)).[6]

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[5] Under the original version of Section 4, jurisdiction to compel arbitration was based on whether the district court "would have jurisdiction" over a suit arising "under the judicial code at law, in equity, or in admiralty." Act of Feb. 12, 1925, ch. 213, § 4, 43 Stat. 883, 883. That language confirms that Congress intended a variety of bases upon which the district court could ground its jurisdiction under Section 4.

[6] The *Krauss Brothers* decision issued by Judge Learned Hand and relied on in *Southland* is particularly instructive. There,

That straightforward reading of "controversy between the parties" is confirmed elsewhere in the FAA. For example, in Section 2, Congress twice uses the same word "controversy" to refer to the dispute "arising out of [the parties'] contract or transaction," and not the dispute about arbitrability. 9 U.S.C. § 2.[7] That fact is critical because "'identical words used in different parts of the same act are intended to have the same meaning.'" *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990) (quoting *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986)); see also *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction*

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the Second Circuit held that it had "no doubt that the District Court had jurisdiction over" an independent suit "specifically to enforce" arbitration under Section 4. 62 F.2d at 1005-06. The Court explained that the language of Section 4 was "entirely clear" and, applying that language, there was jurisdiction to compel arbitration because the parties' underlying dispute "involved an interstate shipment" and the parties "were citizens of different states." *Id.* at 1006.

[7] *See also* Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 Harv. Negot. L. Rev. 319, 344-45 (2007) ("Sections 2 and 4 should be construed together, and the term 'controversy' in both sections should be read consistently to mean the underlying dispute to be arbitrated."). This meaning is also consistent with the use of "controversy" in other sections of the FAA, which plainly reference the underlying dispute. 9 U.S.C. § 1 ("maritime transactions" include "agreements relating to . . . matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction"); *id.* § 5 ("upon the application of either party to the controversy the court shall designate and appoint an arbitrator"); *id.* § 10 (the court may vacate the award "where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy"); *id.* § 11 (the court "may make an order modifying or correcting the award . . . [w]here the award is imperfect in matter of form not affecting the merits of the controversy").

Laborers Pension Trust, 508 U.S. 602, 634 (1993) (noting that the "usual presumption of statutory interpretation [is] that the same term carries the same meaning whenever it appears in the same Act").

Indeed, when read in proper context, the phrase "controversy between the parties" in Section 4 cannot refer to whether the agreement to arbitrate should be specifically performed, as petitioner proposes. Section 4 requires an assessment of jurisdiction "save for" the parties' agreement to arbitrate. 9 U.S.C. § 4. In the absence of an arbitration agreement, however, there could be no "controversy between the parties" over arbitrability.

Rather, under Section 4, a district court has jurisdiction to compel arbitration if, putting to one side the agreement to arbitrate, it would have subject matter jurisdiction to address on the merits a suit arising out of the underlying controversy between the parties. Because this meaning of Section 4 is evident from its plain language, the Court "need go no further." *Sullivan*, 496 U.S. at 482.

2. The same conclusion likewise follows from the structure of the FAA.

In both *Moses H. Cone* and *Southland*, this Court explained that, although the FAA creates "federal substantive law" of arbitrability, "it does not create any *independent* federal-question jurisdiction under 28 U.S.C. § 1331 . . . or otherwise." *Moses H. Cone*, 460 U.S. at 25 n.32; *Southland*, 465 U.S. at 15 n.9 (emphasis added). This Court found that conclusion "implicit" in the jurisdictional language reflected in Sections 3 and 4 of the FAA. *Southland*, 465 U.S. at 15 n.9.

Under Section 3 of the FAA, a stay may be granted only "by a 'court in which such suit is pending.'" *Id.*

(quoting 9 U.S.C. § 3). Similarly, under Section 4, the court's jurisdiction to compel arbitration is dependent on whether the district court "'would have jurisdiction under title 28 . . . of the subject matter of a suit arising out of the controversy between the parties.'" *id.* (quoting 9 U.S.C. § 4). As such, in *Moses H. Cone*, the Court concluded that Section 4 thus expressly defines the circumstances under which the district court has jurisdiction to compel arbitration. 460 U.S. at 25 n.32.

Petitioner ignores *Moses H. Cone* and instead relies upon passing statements in this Court's decision in *Hall Street Associates* v. *Mattel* for the proposition that the FAA "'does nothing'" with respect to jurisdiction. Pet. Br. 6, 12. But the *Mattel* Court broke no new ground in this area; rather, it merely restated the abiding understanding reflected in *Moses H. Cone* and *Southland* that the FAA does not create "independent" jurisdiction. See *Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 128 S. Ct. 1396, 1402 (2008) (citing *Moses H. Cone*, 460 U.S. at 25 n.32).[8] That is, the FAA does not provide independent federal-question jurisdiction; rather, Section 4 provides for an order compelling arbitration "only when the federal district court would have jurisdiction over a suit on the underlying dispute." *Moses H. Cone*, 460 U.S. at 25 n.32.

That inquiry under Section 4 is similar to a district court's assessment of federal-question jurisdiction in a declaratory judgment action. For example, in

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[8] In *Mattel*, the parties' agreement to arbitrate was "entered into in the course of district-court litigation," 128 S. Ct. at 1407, and thus there was no need to compel arbitration or assess whether the court had jurisdiction to compel arbitration.

Franchise Tax Board v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), this Court recognized that "[f]ederal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question." *Id.* at 19; see also *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 248 (1952); 10B Charles Alan Wright, et al., *Federal Practice and Procedure* § 2767, at 655-58 (3d ed. 1998) ("[I]f the federal issue would inhere in the claim on the face of the complaint that would have been presented in a traditional damage or coercive action, then federal jurisdiction exists over the declaratory-judgment action."). Likewise, the federal courts of appeals apply the same standard for "arising under" jurisdiction in a declaratory judgment action, assessing "*whether federal question jurisdiction would exist* over the presumed suit by the declaratory judgment defendant." *GNB Battery Techs., Inc.* v. *Gould, Inc.*, 65 F.3d 615, 619 (7th Cir. 1995) (emphasis added).[9]

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[9] *See*, *e.g.*, *Household Bank* v. *JFS Group*, 320 F.3d 1249, 1259 (11th Cir. 2003) ("[A] federal district court has subject-matter jurisdiction over a declaratory judgment action if, as here, a plaintiff's well-pleaded complaint alleges facts demonstrating the defendant *could file* a coercive action arising under federal law." (emphasis added)); *Cardtoons, L.C.* v. *Major League Baseball Players Ass'n*, 95 F.3d 959, 964 (10th Cir. 1996) ("[F]ederal question jurisdiction exists in a declaratory judgment action if the potential suit by the declaratory judgment defendant would arise under federal law."); *TTEA* v. *Ysleta del Sur Pueblo*, 181 F.3d 676, 681 (5th Cir. 1999) ("To establish an independent basis for jurisdiction . . . the plaintiff need not show that it would state a claim absent the declaratory judgment statute. Rather, it may show that there would be jurisdiction over a claim against it.").

Petitioner rejects the analogy between Section 4 and the Declaratory Judgment Act, contending that unlike a declaratory judgment action, "neither the Section 4 petition nor the response to it asks the court to resolve any federal question and the court cannot reach the merits of the underlying dispute in which any federal question is embedded." Pet. Br. 20. But, in deciding a petition under Section 4, a court necessarily determines whether a party has been "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration." 9 U.S.C. § 4. And there can be no question that in compelling arbitration under the FAA, a party seeks to vindicate its rights under a "federal substantive law establishing and regulating the duty to honor an agreement to arbitrate." *Moses H. Cone*, 460 U.S. at 25 n.32; *Southland*, 465 U.S. at 12 ("We thus read the underlying issue of arbitrability to be a question of substantive federal law").[10] To be sure, the district court does not also resolve the underlying dispute for which arbitration is sought, but that is necessarily the case under Section 4 where the relief sought is enforcement of a federal right to compel arbitration (rather than

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[10] Petitioner's reliance on *Textron Lycoming Reciprocating Engine Division* v. *UAW*, 523 U.S. 653 (1998), is likewise misplaced. Pet. Br. 19. The *Textron* Court simply noted that "[n]o decision of this Court has squarely confronted and explicitly upheld federal-question jurisdiction on the basis of the anticipated claim against which the declaratory-judgment plaintiff presents a nonfederal defense." 523 U.S. at 659-60. Here, Discover, like the declaratory judgment plaintiff, does have a federal substantive claim to relief (*see Moses H. Cone*, 460 U.S. at 25 n.32; *Southland*, 465 U.S. at 12); moreover, petitioner's completely preempted underlying claim can only arise under federal law.

litigation) of the parties' dispute. See *Dean Witter Reynolds*, 470 U.S. at 219-20 (FAA's "overriding goal" is to send properly arbitrable disputes to arbitration).

Contrary to petitioner's suggestion, Pet. Br. 20, applying Section 4 in accordance with its terms does not effect a broad-based repeal of federal court jurisdiction under 28 U.S.C. § 1331. Instead, Section 4 provides a *dependent* grant of jurisdiction that authorizes a district court to compel arbitration when it determines that it would have jurisdiction over the parties' underlying dispute. Cf. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 267 (1926) ("The Federal courts are given jurisdiction to enforce such agreements whenever under the Judicial Code they would have had jurisdiction of an action or proceeding arising out of the controversy between the parties."). As such, the controlling presumption applicable to this dispute is that "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); see *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not"); *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976) (noting the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them").

3. As this Court has noted, "we must not overlook [the FAA's] principle objective when construing the statute." *Dean Witter Reynolds*, 470 U.S. at 220. As such, Section 4 should be interpreted, consistent with its language, to further the FAA's "overriding goal" of

"ensur[ing] judicial enforcement of privately made agreements to arbitrate." *Id.* at 219.

In enacting the FAA, Congress sought to provide an effective means to "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone*, 465 U.S. at 22. At the same time, Congress did not seek to expand the jurisdiction of the district courts to encompass every arbitration agreement within the purview of the FAA. See *Southland*, 465 U.S. at 15 n.9; *Moses H. Cone*, 460 U.S. at 25 n.32. Thus, although the FAA creates "federal substantive law," it does not create federal jurisdiction to enforce every arbitration agreement within its scope. 460 U.S. at 25 n.32.

Through Section 4, Congress provided a federal court vehicle for the effective enforcement of agreements to arbitrate, even if there were no pending litigation in the district court. So long as a party is "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate" and the district "would have jurisdiction" over "a suit arising out of the controversy between the parties," the district court has the power and duty to compel arbitration. 9 U.S.C. § 4. In this way, Section 4 is an essential mechanism for advancing the FAA's goal of making arbitration agreements enforceable.

If the ability of the federal courts to enforce arbitration agreements were limited to situations in which a party had already filed a suit in the district court, the FAA's purpose of "mandat[ing] the enforcement of arbitration agreements," *Southland*, 465 U.S. at 10, would be significantly undermined. As petitioner acknowledges, Section 4 provides a mechanism for enforcing agreements to arbitrate

when there is "no such suit . . . pending in district court." Pet. Br. 4.

In light of the FAA's purpose, Section 4 is properly construed in a way that preserves its role as an effective means of providing a party aggrieved by "the alleged failure . . . of another to arbitrate," 9 U.S.C. § 4, to "enforce [the] private agreemen[t] into which [the] parties had entered," *Dean Witter Reynolds*, 470 U.S. at 221. Although state courts often are called on to enforce the FAA's obligations, the FAA is "to be vindicated by the federal courts where otherwise appropriate." *Moses H. Cone*, 460 U.S. at 25 n.32. Indeed, federal court jurisdiction is all the more critical where, as here, the parallel state court system has held that it is not bound by Section 4 of the FAA. *E.g.*, *Walther* v. *Sovereign Bank*, 872 A.2d 735, 742 (Md. 2005) ("state courts are not bound by . . . §§ 3 and 4 of the FAA"). As such, Discover Bank could exercise its rights under FAA Section 4 only in federal court.

An interpretation of Section 4 that prevents the district court from "looking through" the petition to the parties' underlying dispute, would both violate the language of Section 4 and subvert Congress's goals under the FAA. Petitioner acknowledges that Congress intended Section 4 to apply even when there is no prior suit "pending in district court." Pet. Br. 4. If, as petitioner contends, a district court could not ground jurisdiction on the parties' underlying dispute, the only cases in which it would be authorized to order independent relief would be cases where the obligation to arbitrate were based on some federal law separate and apart from the FAA. *Id.* at 29-30 (citing ERISA, "disputes between concessioners in national parks," and contracts affecting land "within the Gila River Indian Community" and the

"Salt River Pima-Maricopa Indian Reservation").[11] The Congress that enacted the FAA, however, plainly was not concerned with these obscure circumstances since the statutes cited by petitioner did not even exist when the FAA was enacted. Cf. *Allied-Bruce Terminix*, 513 U.S. at 280 (addressing interests of Congress when it enacted the FAA).

Nor does petitioner advance any basis why district courts may "look through" to the underlying controversy in assessing the amount in controversy in diversity cases, but may not do so in federal question cases. By its own logic, petitioner's view would exclude any diversity case from being brought in an independent action to compel arbitration under Section 4 because the amount in controversy requirement can only be met by reference to the parties' underlying dispute. Indeed, Congress enacted Section 4 because courts that had "enforce[ed]" agreements to arbitrate denied parties' the benefits of those agreements by "awarding nominal damages for breach of contract." Pet. Br. 22 (citing cases). As a result, the only way to establish diversity jurisdiction would be to look beyond the arbitrability question before the court and to the underlying dispute to be arbitrated.

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[11] Each of the statutes identified by petitioner was enacted well *after* the FAA. 29 U.S.C. § 1401 (1980); 16 U.S.C. § 5954 (1998); 25 U.S.C. § 415(f) (2002); 25 U.S.C. § 416a(c) (1983). Indeed, the ERISA statute and other statutes provide their own means for a party to seek arbitration of a dispute thereby making an appeal to Section 4 unnecessary. *See* 29 U.S.C. § 1401(a)(1) ("Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 . . . shall be resolved through arbitration."); *accord* 16 U.S.C. § 5954(b)(2); 25 U.S.C. §§ 415(f) & 416a(c).

There can be no doubt that Congress intended for diversity jurisdiction to serve as an independent basis for jurisdiction under Section 4. See *Moses H. Cone*, 460 U.S. at 25 n.32 ("[H]ence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue").[12] Even the courts of appeals that ostensibly refuse to "look through" to the substantive disputes underlying Section 4 arbitrability actions, see*, e.g.*, *Westmoreland Capital Corp.* v. *Findlay,* 100 F.3d 263, 267-68 (2d Cir. 1996), require courts to review the underlying dispute to determine whether the amount in controversy meets the jurisdictional minimum. See *Doctor's Assocs.*, 150 F.3d at 160-61.[13]

Neither these courts of appeals (*e.g.*, *Westmoreland*) nor petitioner offers any explanation for this disparity in treatment between diversity and federal-question jurisdiction, and the language of Section 4 supports none. See Szalai, *supra* at 362 (explaining that courts rejecting the look-through approach "do

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[12] The same is true of admiralty jurisdiction. In *The Anaconda*, this Court explained that Section 4 provides "for framing an issue and trying it as to whether the parties are bound to arbitrate" and makes "clear that the parties may proceed in an admiralty case without the customary libel and seizure." 322 U.S. at 45; *see Henderson* v. *United States*, 517 U.S. 654, 659 (1996) (explaining that a "libel" is a complaint at admiralty).

[13] Every court of appeals to have addressed the issue agrees that the amount in controversy must be assessed by looking to the underlying dispute to be arbitrated. *See, e.g.*, *Richard C. Young & Co.* v. *Leventhal*, 389 F.3d 1, 3 (1st Cir. 2004); *America's MoneyLine, Inc.* v. *Coleman*, 360 F.3d 782, 785-86 (7th Cir. 2004); *Smith Barney, Inc.* v. *Sarver*, 108 F.3d 92, 95 n.3 (6th Cir. 1997); *Jumara* v. *State Farm Ins. Co.*, 55 F.3d 873, 877 (3d Cir. 1995).

an about-face" when it comes to diversity jurisdiction). Thus, if petitioner would forbid a court from looking through to the underlying dispute for purposes of establishing jurisdiction under 28 U.S.C. § 1331, then that logic would require the same result as to 28 U.S.C. § 1332. Such a result, however, would undermine the FAA's central goal of "ensur[ing] judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds*, 470 U.S. at 219.

As this Court has explained, in construing the FAA, it is necessary to be aware of the "practical consequences" of competing interpretations. *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U.S. 193, 203-04 (2000). The "practical consequences" of the interpretation advanced by petitioner would be to render Section 4 meaningless in any independent action brought to compel arbitration.

B. Petitioner's Alternative Interpretation Of Section 4 Is Contrary To The Language, Structure, And Purpose Of The FAA.

Petitioner argues that Section 4 permits federal courts to review independent petitions to compel arbitration only where the dispute over arbitrability itself raises a federal question. Pet. Br. 29. Because this reading conflicts with the unambiguous language of Section 4, petitioner is forced to twist that language beyond recognition through a novel re-interpretation of the FAA's legislative history.

1. In violation of the settled maxim that the interpretation of a statutory provision "begin[s] with the text of the statute," *Limtiaco* v. *Camacho*, 127 S. Ct. 1413, 1418 (2007), petitioner studiously avoids the language of Section 4 and instead begins her analysis with a long discourse on the legislative

history leading up to the enactment of the FAA. Pet. Br. 21-27. That analysis should be rejected because it (i) cannot be reconciled with the plain language of Section 4 of the FAA, including both the "save for" and "a suit arising" clauses; (ii) undermines the language of Section 3; and (iii) fails on its own terms.

First, petitioner's interpretation of the phrase "save for such agreement" is implausible. According to petitioner, Congress included that language in Section 4 to instruct a reviewing court that it was "no longer handcuffed by 'ouster'" and that it "possessed equitable jurisdiction to compel arbitration." Pet. Br. 26. Thus, according to petitioner, the phrase "'save for such agreement' instructs the court to ignore this outmoded rule in examining its jurisdiction."[14] That argument is plainly wrong.

The clearest indication that petitioner's interpretation is wrong is that Section 4 is the provision setting forth a district court's authority to compel arbitration where the parties have agreed to arbitrate. Section 4 explicitly directs courts to compel arbitration *only* when the right to arbitrate is not in issue. Given this direct command, it would be passing strange for Congress to include the "save for" clause in Section 4 based on a need to assure district courts that the existence of an agreement to arbitrate

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[14] The "ouster" problem referred to by petitioner is the unwillingness of pre-FAA courts specifically to enforce agreements to arbitrate due to their belief that parties could not, by contract, oust the courts of their jurisdiction. *See, e.g.*, *Perkins* v. *U.S. Elec. Light Co.*, 16 F. 513, 515 (2d Cir. 1881). This Court has recognized that the FAA "was designed to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Volt Info. Scis.* v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989).

does not "oust" them of jurisdiction to compel arbitration of those agreements.

Moreover, petitioner's interpretation violates the fundamental canon that a statute should be read to convey its plain meaning, not a meaning that would require additional words to be added to the statutory text. See, *e.g.*, *Haynes* v. *United States*, 390 U.S. 85, 92 (1968) ("[I]f this was indeed Congress' purpose, it is difficult to see why it did not . . . insert the few additional words necessary to make clear its wishes."); *Kordel* v. *United States*, 335 U.S. 345, 350 (1948) ("[W]e see no reason for reading the additional words into the text."). Under petitioner's interpretation, when Congress said "save for such agreement" it really meant to say "save for [prior judicial unwillingness to enforce any] such agreement." See Pet. Br. 26 ("The phrase 'save for *such agreement*' instructs the court to ignore this outmoded *rule*" (emphases added)). The text of the statute simply does not support that reading. See *Addison* v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 617 (1944) ("To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another.").

Petitioner's interpretation of the "save for" clause is likewise flawed because it would render "superfluous" and "insignificant" other parts of the FAA. *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'" (quoting *Montclair Twp.* v. *Ramsdell,* 107 U.S. 147, 152 (1883))). Section 2 of the FAA makes agreements within the scope of the FAA "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any

contract." 9 U.S.C. § 2. As such, Section 2, the FAA's "centerpiece provision," *Mitsubishi Motors Corp.*, 473 U.S. at 625, directly addresses judicial hostility based upon "ouster."

Petitioner's reading of the "save for" clause also is implausible because, if petitioner were correct, Congress would have required similar treatment of the "ouster" in other provisions such as Section 3 of the FAA. Section 3 provides that when a court enforces a valid arbitration agreement, it must "stay the trial of the action until such arbitration has been had," thereby allowing its jurisdiction to be "ousted." 9 U.S.C. § 3. Congress, however, saw no need to inform district courts that they had jurisdiction to stay their proceedings when the parties had entered into an agreement to arbitrate. See, *e.g.*, *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-21 (1991) (explaining that when language is included in one provision but not in its neighbor, it reflects a "deliberate" choice by Congress).

Finally, petitioner's reading of the "save for" clause fails on its own terms because her "effort to connect the 'save for' language to the ancient problem of 'ouster of jurisdiction' is imaginative, but utterly unfounded and historically inaccurate." 1 Ian R. Macneil et al., *Federal Arbitration Law* § 9.2.3, at 9:18 (1996) (footnote omitted). First, the FAA was modeled after state statutes that contained no such language, even though both were addressing the same judicial hostility to arbitration. See *infra* at 33.

Moreover, petitioner misstates Congress's understanding of the "ouster" doctrine when she argues that the "save for" clause was necessary to assure a court asked to enforce an arbitration agreement that it "'would not be divested by the arbitration agreement,'" and therefore "'may proceed

to order arbitration, contrary to prior precedent.'" Pet. Br. 26 (quoting *Drexel Burnham Lambert, Inc.* v. *Valenzuela Bock*, 696 F. Supp. 957, 962-63 (S.D.N.Y. 1988)). According to petitioner, Congress sought to assure courts that arbitration agreements did not divest them of their jurisdiction. This understanding of the "ouster" problem is unfounded.

Congress recognized that many courts accepted arbitration agreements as valid.[15] Congress was concerned, however, that courts nonetheless found arbitration agreements to be revocable at any time and unenforceable at equity, thereby barring the remedy of specific performance. See S. Rep. No. 68-536, at 2 (1924) ("But it is very old law that the performance of a written agreement to arbitrate would not be enforced in equity . . . . [T]he agreement was subject to revocation by either of the parties at any time before the award.").

Congress never expressed a concern that courts were refusing to review arbitration agreements because they thought they lacked jurisdiction to do so. Rather, it understood that the "ouster" problem involved the unwillingness of courts to enforce specifically arbitration agreements because the *effect* of specific enforcement would be to divest courts of their jurisdiction. See, *e.g.*, *Dean Witter Reynolds*, 470 U.S. at 220 n.6 ("[B]ecause of the jealousy of the

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[15] The Senate Report is explicit on this point: "It is not contended that agreements to arbitrate have no validity whatever. A party may be liable in an action for damages for the breach of an executory agreement to arbitrate; or . . . the appropriate action may be brought at law or in equity to enforce the award. *Both maritime contracts or transactions and contracts involving interstate commerce are at least valid to this extent.*" S. Rep. No. 68-536, at 2 (1924) (emphasis added).

English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were *thereby* ousted from their jurisdiction." (quoting H.R. Rep. No. 68-96 1-2 (emphasis added)); *U.S. Asphalt Ref. Co.* v. *Trinidad Lake Petroleum Co.*, 222 F. 1006, 1011-12 (S.D.N.Y. 1915) (holding that the court will not enforce an arbitration agreement that is "*intended* to oust the courts and all courts of their jurisdiction" (emphasis added)).

This correct understanding of the "ouster" problem also confirms that the "save for" language in Section 4 is not superfluous, Pet. Br 33, but was included by Congress to address the jurisdictional issue created by FAA Section 2, which makes arbitration agreements "valid, irrevocable, and enforceable." 9 U.S.C. § 2. As a result of Section 2, courts are without jurisdiction to decide the parties' *underlying dispute* if the parties agreed to arbitrate. See, *e.g.*, *Preston* v. *Ferrer*, 128 S. Ct. 978, 981 (2008). As such, the phrase "save for such agreement" requires the district court to assess its jurisdiction over a potential suit on the parties' *underlying dispute* without regard to the effect that the arbitration agreement would have on the court's jurisdictional analysis under the FAA.

Second, and equally misguided, is petitioner's interpretation of the jurisdictional language of Section 4. Petitioner suggests that the language "would have jurisdiction" of "a suit arising out of the controversy between the parties" in Section 4 means a "traditional suit seeking specific performance of a contract." Pet. Br. 36. Of course, the only "contract" for which anything resembling "specific performance" is sought under Section 4 is the parties' agreement to arbitrate.

Petitioner's interpretation of this language would render Section 4 nonsensical. Cf. *Sheridan* v. *United States*, 487 U.S. 392, 402 n.7 (1988) ("[C]ourts should strive to avoid attributing absurd designs to Congress, particularly when the language of the statute and its legislative history provide little support for the proffered, counterintuitive reading."). As explained above, the "save for" clause in Section 4 instructs courts to put to one side the arbitration agreement when making the jurisdictional determination mandated by Section 4. If the controversy in question were, as petitioner argues, the controversy about whether to enforce the contract to arbitrate, then Section 4 would make no sense because without the contract to arbitrate itself, there could be nothing to enforce.[16]

Further, petitioner's interpretation is inconsistent with the original language of Section 4, which provided that courts were to determine whether they "would have" jurisdiction over such suits "under the judicial code at law, in equity, or in admiralty." Act of Feb. 12, 1925, ch. 213, § 4, 43 Stat. 883, 883. Petitioner acknowledges that Congress's adoption of the current language was not meant to change the substantive meaning of Section 4, Pet. Br. 31, but the original language confirms that Congress contemplated that a court examining its jurisdiction over such a suit would look to its jurisdiction "at law, in

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[16] As noted, this Court already has stated that "Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the *underlying dispute*." *See Moses H. Cone*, 460 U.S. at 25 n.32 (emphasis added)); *id.* at 20-21 (contrasting litigation over "arbitrability" with litigation over the "merits of the underlying disputes").

equity or in admiralty." Act of Feb. 12, 1925, at 883. Under petitioner's interpretation of Section 4, however, a court never would have had jurisdiction at law, since a "traditional suit seeking specific performance of a contract" was established as a suit at equity. See, *e.g.*, *Union Pac. Ry.* v. *Chicago, Rock Island & Pac. Ry.*, 163 U.S. 564, 600 (1896) ("The jurisdiction of courts of equity to decree the specific performance of agreements is of a very ancient date, and rests on the ground of the inadequacy and incompleteness of the remedy at law."); *United States Mut. Accident Ass'n* v. *Barry*, 131 U.S. 100, 122 (1889) ("[T]he remedy of the plaintiff was solely in equity, for a specific performance of the contract.").[17]

Petitioner argues that Congress added this language to the New York and New Jersey state codes upon which the FAA was modeled because the federal system, unlike the state systems, had not yet merged its procedures for law and equity. Pet. Br. at 24 & n.3. That is wrong. New Jersey maintained separate courts for law and equity until 1947, and it still requires that parties seeking primarily equitable relief bring actions in the Chancery Division of the Superior Court, which is distinct from the court's Law Division. See N.J. R. of Ct. 4:3-1; *Lyn-Anna Props.,*

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[17] Indeed, as petitioner acknowledges, Pet. Br. 36, Section 4 creates a *statutory* right to compel arbitration that "supplant[s]" the old suits at equity. *Id.* Under Section 4, courts are instructed to use a particular set of procedures set forth in the statute. Among those procedures is the right to a jury trial, a right that was required in suits at law but unavailable in suits at equity. *See*, *e.g.*, *Furrer* v. *Ferris*, 145 U.S. 132, 134 (1892) ("[I]t is evident that the petitioner preferred to not exercise his right to a common-law action and a trial by a jury, but rather to come into a court of equity and have his rights there determined according to the rules and practice of such courts.").

Ltd. v. *Harborview Dev. Corp.*, 678 A.2d 683, 689-91 (N.J. 1996) (discussing history).[18]

Nor was this jurisdictional language necessary to explain the procedures of Section 4 by means of an "analogy" to federal equity suits. Pet. Br. 24-25, 27. The procedures of Section 4 are not complicated, and are expressly set forth in the text of the remainder of Section 4. 9 U.S.C. § 4. Indeed, petitioner herself cites the legislative history to explain that the new procedures were meant to be "'very simple, following the lines of ordinary motion procedure.'" Pet. Br. 23 (quoting H.R. Rep. No. 68-96, at 2). Petitioner's reading of the jurisdictional language of Section 4 would have had the perverse effect of *confusing* the courts, since it would have forced them to draw an "analogy" to their equitable jurisdiction even though Section 4 sets out the specific procedures to be followed – including provisions for jury trials, which are unavailable at equity.[19]

2. Petitioner's reading of Section 4 also cannot be reconciled with the structure of the FAA. Petitioner argues that this Court's statement that the FAA

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[18] Further, when the New York legislature enacted its arbitration law in 1920, it had just as much need as Congress did to assure courts that they could compel arbitration. Even though New York established unified procedures in 1848, New York courts continued to enforce the rule that the equitable remedy of specific performance was unavailable to parties aggrieved by another's failure to arbitrate. *See*, *e.g.*, *Smith* v. *Rector of St. Philip's Church*, 14 N.E. 825, 829 (N.Y. 1888); *Van Beuren* v. *Wotherspoon*, 42 N.Y.S. 404, 410 (N.Y. App. Div. 1896).

[19] When the FAA was adopted, a party in federal court was obligated to choose between an action at law and an action at equity. *E.g. Buzard* v. *Houston*, 119 U.S. 347, 351-53 (1886).

"does not create any independent federal-question jurisdiction," *Moses H. Cone*, 460 U.S. at 25 n.32; *Southland*, 465 U.S. at 15 n.9, prohibits federal courts from compelling arbitration under Section 4 even when the parties' underlying controversy would support federal court jurisdiction. Pet. Br. 18. But that conclusion misreads this Court's analysis of the structure of the FAA.

Specifically, this Court derived its conclusion that the FAA created no "independent" federal jurisdiction based upon an analysis of Sections 3 and 4 of the FAA. In *Moses H. Cone*, this Court looked to the limitation in Section 4 that a district court only has jurisdiction to compel arbitration when it "would have jurisdiction over a suit on the underlying dispute" and the limitation of Section 3 that a federal court "cannot stay a suit pending before it unless there is such a suit in existence." 460 U.S. at 25 n.32. Likewise, in *Southland*, this Court explained that its conclusion that the FAA creates no "independent federal-question jurisdiction under § 1331 . . . or otherwise" was "implicit in the provisions in § 3 for a stay by a 'court in which such suit is pending' and in § 4 that enforcement may be ordered by 'any United States district court which, save for such agreement, would have jurisdiction under title 28." 465 U.S. at 15 n.9. Thus, the Court's *general* conclusion that the FAA creates no "independent" federal jurisdiction was based upon the Court's *specific* analysis of the jurisdictional language of Section 4.[20]

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[20] Petitioner exacerbates her error when she argues that 9 U.S.C. §§ 7, 9, 10, and 11 all require an "independent" basis for federal jurisdiction that does not involve a court "looking-through" to the underlying dispute. Pet. Br. 40-41. That argument ignores (i) the textual differences between Section 4

Nor does petitioner's position find any support in Chapter 2 of the FAA, which provides for the enforcement of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"). In Sections 203 and 205, the jurisdictional provisions of Chapter 2, Congress authorized the federal courts to exercise independent federal-question jurisdiction over all arbitration disputes covered under the Convention. See 9 U.S.C. §§ 203, 205. That broad grant of independent jurisdiction reflected in the Convention is tempered by the fact that the Convention itself applies to a much narrower swath of arbitration disputes – only those involving cross-border controversies. See *id.* § 202. In contrast, the FAA applies generally to all commercial arbitration disputes, to the fullest extent of Congress's commerce power. See *id.* § 2; *Allied-Bruce Terminix*, 513 U.S. at 277. Congress's decision to expand the jurisdictional reach of the Convention does not limit the express jurisdictional reach of Section 4 of the FAA.

3. Finally, petitioner's reading of the FAA is contrary to the purpose of the FAA. Specifically, petitioner ignores that the overarching goal of the statute is to provide a mechanism through which parties can ensure the enforceability of agreements to arbitrate in accordance with their terms. See *Allied-Bruce Terminix* , 513 U.S. at 270; *Volt Info. Scis.*, 489 U.S. at 476 ("[T]he federal policy is simply to ensure the enforceability, according to their terms, of private

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and these other sections, and (ii) that the "independent" jurisdiction requirement reflected *Moses H. Cone* derives directly from this Court's analysis of text of Section 4.

agreements to arbitrate.").[21] In the name of avoiding the complexity that may arise when courts are required to assess subject matter jurisdiction, petitioner adopts an interpretation that would render Section 4 virtually meaningless as a mechanism for seeking independent enforcement of agreements to arbitrate in federal court.

By its terms, Section 4 offers relief where a party is aggrieved by the "failure, neglect, or refusal of another to arbitrate." 9 U.S.C. § 4. Congress thus recognized that parties would require orders to compel arbitration even if a lawsuit were not already pending in district court – for instance, where an opponent merely refuses to arbitrate a claim subject to arbitration without filing suit. Petitioner acknowledges this as well. Pet. Br. 4.

Petitioner's interpretation of Section 4, however, precludes jurisdiction based upon a "look-through" approach and authorizes jurisdiction only where the underlying agreement to arbitrate is a creation of federal law. *Id.* at 29. That interpretation would eliminate federal-question jurisdiction as a basis for an independent suit to compel arbitration. Further, that interpretation also would eliminate diversity as an independent basis for jurisdiction, since a court must be able to establish that the amount in controversy is greater than the jurisdictional minimum, see 28 U.S.C. § 1332, and that inquiry

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[21] Petitioner notes the FAA "'make[s] arbitration agreements as enforceable as other contracts, *but not more so*.'" Pet. Br. 42 (citing *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)). This observation reflects an analysis of of "saving clause" of FAA Section 2, and is irrelevant here as petitioner does not contend her arbitration agreement may be revoked.

requires an analysis of the parties' underlying dispute. See *supra* 24-25.[22]

Because it eliminates federal-question and diversity jurisdiction as potential independent bases for jurisdiction, petitioner's interpretation would trivialize Section 4. Pet. Br. 29-30. Here, the denial of a federal forum would leave Discover Bank with no means to vindicate its federal right to compel arbitration under Section 4 because courts in many states – including Maryland – have held that Section 4 is not binding on them. See, *e.g.*, *Walther* v. *Sovereign Bank*, 872 A.2d 735, 742 (Md. 2005); *St. Fleur* v. *WPI Cable Sys./Mutron*, 879 N.E.2d 27, 32 (Mass. 2008); *Discover Bank* v. *Superior Court*, 113 P.3d 1100, 1112 (Cal. 2005).[23]

Lastly, petitioner is mistaken in suggesting that her interpretation furthers the goals of the FAA because it reduces the complexity and thus the delay sometimes associated with a district court's determination whether the parties' underlying dispute would support federal jurisdiction. Pet. Br.

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[22] Nor can petitioner avoid this fundamental problem with her approach by arguing that a Section 4 petitioner can plead the underlying amount in controversy in its petition to compel arbitration. If it could, then a Section 4 petitioner likewise would be able to plead the underlying federal question in its motion to compel arbitration. JA 30.

[23] Further, the scope of state-law arbitration statutes is not coextensive with the protections afforded by the FAA, and certainly was not in 1925. *Compare* Md. Code Ann., Ct. & Jud. Proc. § 3-206 (Maryland Act presumptively does not apply "to an arbitration agreement between employers and employees"), *with Circuit City Stores*, 532 U.S. at 109 (save for transportation workers, the FAA applies to arbitration agreements in employment contracts within the FAA's coverage).

41-45. That examination of the parties' underlying dispute, however, is little different than the analysis already conducted by a district court, which, under Section 4 must assess whether the underlying dispute falls within the scope of the FAA and the parties' arbitration agreement.

In any event, petitioner's *solution* to this complexity, is to render Section 4 dead letter. Without question, that would be more efficient, but only at the expense of the FAA's primary goal to promote arbitration. As this Court has explained, the "preeminent concern of Congress" was "to ensure judicial enforcement of privately made agreements to arbitrate" even if enforcement would not, in individual cases, "promote the expeditious resolution of claims." *Dean Witter Reynolds*, 470 U.S. at 219; *Volt Info. Scis.*, 489 U.S. at 478 ("While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage 'was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.'" (citing *Dean Witter Reynolds*, 470 U.S. at 220)); *Moses H. Cone*, 460 U.S. at 20 (the FAA "requires piecemeal resolution when necessary to give effect to an arbitration agreement").

As such, petitioner's refusal to abide by the plain meaning of the jurisdictional language in Section 4 is directly contradicted by the FAA's goal to ensure the enforcement of private agreements to arbitrate.

II. THE DISTRICT COURT'S ORDER COMPELLING ARBITRATION DOES NOT CONTRAVENE THIS COURT'S DECISION IN *HOLMES GROUP*.

Petitioner also is wrong in arguing that the district court's exercise of jurisdiction under Section 4 of the FAA violates *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002). Specifically, petitioner contends that, under the "well-pleaded complaint rule," "[e]ven if Section 4 were to allow look-through jurisdiction," a federal court "hearing a Section 4 petition . . . cannot ground federal question jurisdiction in . . . a completely preempted state-law counterclaim, in a suit pending in state court." Pet. Br. 46. That argument ignores the language of Section 4.

As noted above, under Section 4, a court may compel arbitration where a party has been aggrieved by the failure, neglect or refusal of another party to arbitrate, and save for the parties' agreement to arbitrate, a district court would have jurisdiction of a suit over the parties' underlying controversy. Here, the district court properly determined that petitioner had refused to arbitrate a dispute covered by the parties' agreement to arbitrate and that it "would have jurisdiction under title 28, in a civil action . . . of the subject matter of a suit arising out the controversy between the parties," 9 U.S.C. § 4; Pet. App. 48a-53a, 80a. Nothing in *Holmes Group* remotely undermines that result.

The issue before the Court in *Holmes Group* was whether the Federal Circuit had appellate jurisdiction over a case in which a patent law claim was only presented in the defendant's counterclaim. 535 U.S. at 827. This Court noted that the Federal

Circuit's jurisdiction was limited to cases that arise under federal patent law, and further explained that for an action to arise under federal patent law, a patent claim must be part of the plaintiff's well-pleaded complaint. *Id.* at 829-30. This Court held that the Federal Circuit lacked jurisdiction over the appeal because the patent-law counterclaim was not part of the plaintiff's well-pleaded complaint. *Id.*[24]

Holmes Group does not purport to say anything about a district court's jurisdiction to compel arbitration under Section 4 of the FAA. By its terms, Section 4 provides a federal right to compel arbitration of a dispute covered by the FAA where the opposing party has refused to arbitrate. As such, the applicability of Section 4 does not turn on the pendency of an existing lawsuit in federal or state court. Petitioner errs in attempting to extend *Holmes Group* to this case by suggesting that there is no jurisdiction to compel arbitration under Section 4 because it is only petitioner's completely preempted state-court *counterclaims* that support federal-question jurisdiction. Pet. Br. 46. Petitioner argues that, under the well-pleaded complaint rule, causes of action advanced in state-court counterclaims cannot provide a basis to compel arbitration under Section 4. *Id.* That argument cannot be reconciled with the language and purpose of Section 4.

1. By its terms, jurisdiction under Section 4 does not depend upon the pendency of any lawsuit.

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[24] The *Holmes Group* Court based its holding on some of the policies undergirding the well-pleaded complaint rule, namely (1) maintaining the complainant's right to choose the forum; (2) not expanding removal jurisdiction; and (3) maintaining the well-pleaded complaint rule as an easy-to-administer "quick rule of thumb." 535 U.S. at 831-32.

Rather, the plain language of Section 4 provides that a district court may compel arbitration whenever there is an alleged "failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" if the court "*would have* jurisdiction" over "*a suit* arising out of the controversy between the parties." 9 U.S.C. § 4 (emphasis added); see also *Moses H. Cone*, 460 U.S. at 25 n.32 (Section 4 permits an order to compel arbitration to issue when "federal district court would have jurisdiction over a suit on the underlying dispute"). Thus, as petitioner admits, Section 4 provides a mechanism to compel arbitration even when no "suit is pending in district court." Pet. Br. 4.

A contrary rule – one that required pending litigation before Section 4 could be employed – would undermine the core purpose of Section 4 because the federal right to compel arbitration could be thwarted by a party who simply refuses to arbitrate a dispute without ever filing a lawsuit in state or federal court. Cf. 9 U.S.C. § 5 (providing mechanism for choosing an arbitrator where a party has failed to "avail himself" of the method set forth in the arbitration agreement). Indeed, this Court and the courts of appeals have long understood that Section 4 petitions may be brought completely independent of any other pending proceeding. These so-called "independent" proceedings, "in which a request to order arbitration is the sole issue before the court," are distinguished from "embedded" proceedings, which involve "both a request for arbitration and other claims for relief." See *Green Tree Fin. Corp.*, 531 U.S. at 87 & n.3 (citing cases); cf. *Moses H. Cone*, 460 U.S. at 22 (Sections 3 and 4 are "parallel devices for enforcing an arbitration agreement").

Thus, in an independent proceeding, the language of Section 4 directs the district court to assess whether it "would have jurisdiction" over a hypothetical suit between the parties. Here, the completely preempted counterclaims advanced in the pending Maryland state court action confirm (i) the existence of a dispute between the parties that is subject to arbitration in accordance with their agreement, and (ii) that this dispute is one over which a district court would have jurisdiction in "a suit arising out of the controversy between the parties." 9 U.S.C. § 4. Under Section 4 it does not matter whether the dispute between the parties is actually embodied in a formal complaint, a counterclaim, or in no suit at all. The fact that the substance of the parties' controversy is reflected in a Maryland counterclaim is simply irrelevant to whether there is jurisdiction under Section 4.

Put another way, Discover Bank's federal right to compel arbitration under Section 4 is not contingent on whether petitioner decided to memorialize her dispute with Discover Bank in a Maryland state court counterclaim. The procedural posture of the pending Maryland state-court action here – in which Discover brought a simple recovery action against Petitioner, who then brought completely preempted counter-claims – does not deprive Discover of its federal right to have those claims arbitrated consistent with the parties' agreement. Under Section 4, as long as there has been a refusal to arbitrate and the district court "would have jurisdiction" over a potential suit that could be brought on the underlying dispute, Section 4 may be invoked to compel arbitration.

Nor does the discussion of removal jurisdiction in *Holmes Group* have any bearing on the issue before the Court. A district court's jurisdiction under

Section 4 is not coextensive with a court's removal jurisdiction over an existing state-court suit. Rather, before a district court may compel arbitration under Section 4, it must assure itself that, "save for" the agreement to arbitrate, it "*would have jurisdiction* under title 28" over "a suit arising out of the controversy between the parties." 9 U.S.C. § 4 (emphasis added). The removal statute, by contrast, limits removal to "any civil action *brought in a State court* of which the district courts of the United States *have original jurisdiction*." 28 U.S.C. § 1441 (emphasis added). Unlike Section 4, the removal statute requires an existing suit in state court, and also requires the district court to assess if it "ha[s] original jurisdiction" of that existing state-court suit, as opposed to determining if it "would have jurisdiction" over a potential suit. If Congress had intended to make the district court's jurisdiction under Section 4 identical to its removal jurisdiction – and thus dependent on a pending state-court suit – it easily could have done so, but wisely chose not to.

Removal jurisdiction was well established when Congress enacted the FAA in 1925, and therefore Congress could have explicitly tied the jurisdictional inquiry in Section 4 to the district court's removal jurisdiction, but it did not. See *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987) ("Congress could have phrased its requirement in language that looked to the past . . . but it did not choose this readily available option."). Instead, it chose to give the district court power to compel arbitration even when no lawsuit was pending if it "would have jurisdiction" over a potential suit arising out of the parties' underlying dispute.

2. The state court complaint brought by Discover is not the suit to which the district court would look

to assess its jurisdiction. Rather, the inquiry a court must make under Section 4 is whether it "would have jurisdiction" over "a suit arising out of the controversy between the parties," 9 U.S.C. § 4. In other words, upon receiving an independent petition to compel arbitration, the district court must determine which claims the plaintiff alleges should be arbitrated and whether the court would have jurisdiction over a suit brought by the defendant raising those claims.

In this case, Discover seeks to arbitrate petitioner's claims challenging the interest, fees and penalties for which petitioner is responsible under the parties' agreement. Petitioner does not dispute that these claims are completely preempted by federal law, and therefore "even if pleaded in terms of state law, [are] in reality based on federal law." *Beneficial Nat'l Bank*, 539 U.S. at 8. These are the claims specifically identified by Discover in its Section 4 petition as those which it seeks to arbitrate, see JA 29-30, and thus a suit raising these claims satisfies the jurisdictional requirement of Section 4.

Moreover, contrary to petitioner's contention, application of the plain language of Section 4 is entirely consistent with the well-pleaded complaint rule. Pursuant to Section 4, the district court must satisfy itself that a suit raising the claims sought to be arbitrated would properly come within that court's jurisdiction. This is similar to the inquiry in a declaratory judgment action, in which a potential coercive action by the declaratory judgment defendant must satisfy the well-pleaded complaint rule. See *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339

U.S. 667, 672 (1950).[25] A similar application of the well-pleaded complaint rule operates in the context of Section 4.

Nor does application of Section 4 do violence to the goals of the well-pleaded complaint rule identified by the Court in *Holmes Group*, 535 U.S. at 831-32. First, as the court below acknowledged, because Discover is the plaintiff in the state-court proceeding, there is no danger of depriving Discover (the master of the state court complaint) of its chosen forum. And this is not, moreover, a case of one party "opportunistically switch[ing] courts," as petitioner suggests. Pet. Br. 50. Instead, Discover is asserting a federal right to compel arbitration under Section 4, which it cannot assert in Maryland state court. Second, this case also poses no threat to the expansion of removal jurisdiction for the simple reason that it does not involve an issue of removal jurisdiction at all.

Finally, with the correct understanding of the suit to which the district court looks to determine its jurisdiction, the application of the well-pleaded complaint rule is no more difficult to administer than in a declaratory judgment action. Thus, the well-pleaded complaint rule can continue to serve as a "quick rule of thumb" for the district court to assess whether it would have jurisdiction over a suit raising

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[25] *See*, *e.g.*, *Franchise Tax Bd.*, 463 U.S. at 19; *Fina Oil & Chem. Co.* v. *Ewen*, 123 F.3d 1466, 1470 (Fed. Cir. 1997) ("We determine whether there is jurisdiction in a declaratory judgment action by applying the well-pleaded complaint rule. We apply that rule not to the declaratory judgment complaint but to the hypothetical action the declaratory defendant would have brought." (citation omitted)); *Cardtoons*, 95 F.3d 959 at (same). *See also supra* note 9 (citing cases).

the claims to be arbitrated. *Holmes Group*, 535 U.S. at 832.

Here, there can be no question that the district court in this case would have "arising under" jurisdiction over that suit and thus the power to compel arbitration under Section 4. Indeed, petitioner nowhere disputes – and did not present the question here – that there is federal-question jurisdiction over her claims of illegal finance charges, interest, and late fees. On that issue, the court below properly held that "the FDIA completely preempts state-court usury claims against a state-chartered, federally insured bank" and thus that "a federal question exists here." Pet. App. 4a, 28a.[26] That ruling in no way conflicts with *Holmes Group*.

III. PETITIONER'S "STANDING" ARGUMENT IS NOT PROPERLY BEFORE THIS COURT AND IS MERITLESS.

In the last pages of her brief, petitioner presents an "alternative" argument that Discover's motion to compel arbitration must fail because, despite petitioner's consistent refusal to arbitrate throughout the course of this years-long dispute, Discover is not "a party aggrieved" by her "failure, neglect, or refusal" to arbitrate within the meaning of Section 4. Pet. Br. 52-56. That argument should be rejected.

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[26] Petitioner does not challenge here the district court and Fourth Circuit's factual determinations that Discover Bank is the real party in interest. Pet. App. 12a-18a; *see Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980) (noting this Court's "settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred").

First, and foremost, this argument is not fairly included in the questions presented in the petition and is thus not properly before this Court. Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Irvine* v. *California*, 347 U.S. 128, 129 (1954) (Jackson, J.) (plurality opinion) ("We disapprove the practice of smuggling additional questions into a case after we grant certiorari."). Petitioner did not raise this "standing" issue in her petition for certiorari, and, consequently, this Court should decline to address it now.

Indeed, allowing petitioner to raise this new issue now that certiorari has been granted would undermine "the integrity of the process of certiorari." *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992). Petitioner does not contend that there is any conflict among the lower courts on the question of whether, assuming that there is subject matter jurisdiction, the statutory requirements of Section 4 have been satisfied in this case. As such, petitioner made a strategic decision to omit any mention of this "standing" issue in her petition because that would have undermined petitioner's argument that this case presents an appropriate vehicle to resolve the questions that the Court granted certiorari to review. That is, petitioner should not be permitted to contend in her petition that this case squarely presents issues worthy of this Court's review, and then, after certiorari is granted, attempt to smuggle additional issues that have generated no conflicts among the lower courts and that reflect nothing more than routine applications of law to the particular facts in this case. See *City of Okla. City* v. *Tuttle*, 471 U.S. 808, 816 (1985) ("Our decision to grant certiorari represents a commitment of scarce judicial resources

with a view to deciding the merits of one or more of the questions presented in the petition."); *Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("As a general rule, furthermore, we do not decide issues outside the questions presented by the petition for certiorari.").

Nor can petitioner sidestep these procedural hurdles by recasting the trial court's assessment of whether Discover had satisfied the substantive requirements of Section 4 as an issue of Article III standing. To the contrary, petitioner's challenge raises an issue of contract construction and statutory interpretation, which this Court need not and should not address. See *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("[W]hen the plaintiff bases his cause of action upon an act of Congress, jurisdiction cannot be defeated by a plea denying the merits of the claim."); see also *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case."); *Bell* v. *Hood,* 327 U.S. 678, 682 (1946) ("Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.").

Article III imposes minimum requirements on statutory grants of standing, see *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560, 576 (1992), and Congress may, by legislation, confer standing up to the full extent permitted by Article III. See *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979); *Trafficante* v. *Metropolitan Life Ins. Co.,* 409 U.S. 205, 209 (1972). Petitioner does not contend that Congress exceeded the limits of Article III when it authorized district courts to compel

arbitration of disputes upon a showing that a party shows that it was "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement to arbitrate." 9 U.S.C. § 4. Instead, she argues that Discover's motion to compel arbitration should have been denied because "Discover filed its Section 4 petition in federal court when Ms. Vaden was not even arguably in breach of the (alleged) arbitration agreement." Pet. Brief 52. That argument raises no Article III issue but instead raises only the question whether the district court and court of appeals properly applied the statutory requirements of Section 4 to the facts in this case.

Here, the court of appeals properly rejected petitioner's claim that the requirements of Section 4 were not satisfied. As the court of appeals explained, petitioner's failure to abide by her obligation to arbitrate was manifest in her filing a counterclaim in state court and her continuing refusal to arbitrate for years during the pendency of this action. Pet. App. 27a n.20. Specifically, as the court below explained, "[t]o agree with Vaden's arguments that she has not refused a request for arbitration in the meaning of [Section 4] would create an absurd result: reversing a motion to compel arbitration against a party who argues that she never refused to arbitrate in the first place." *Id.*

To be clear, petitioner does not dispute that she has refused to arbitrate in accordance with the parties' arbitration agreement. Indeed, even now she contends that there is no such agreement. As such, the court of appeals properly recognized that a party who maintains litigation over a dispute subject to an arbitration agreement "fail[s], neglect[s], or refus[es]" to arbitrate that dispute. Pet. App. 27a n.20 (citing *PaineWebber, Inc.* v. *Faragalli*, 61 F.3d 1063, 1066

(3d Cir. 1995)), for the proposition that "an action to compel arbitration is proper when the other party refuses to arbitrate by 'unambiguously manifesting an intention not to arbitrate the subject matter of the dispute'"); see also *Downing* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 725 F.2d 192, 195 (2d Cir. 1984) ("Unless Merrill Lynch *commences litigation* or is ordered to arbitrate this dispute . . . and fails to do so, it is not in default of any arbitration agreement . . . ." (emphasis added)).[27]

Petitioner seeks to avoid the consequences of her refusal by establishing that under the parties' agreement, she had a right to file suit. Pet. Br. 52-3. Her right to maintain that suit, however, terminated the moment Discover elected to settle the dispute through arbitration. See JA 35 ("IF EITHER YOU OR WE ELECT ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT . . . ."). Petitioner cannot seriously contend that Discover was not aggrieved by

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[27] Petitioner cites cases to establish a point that is not in contention – that Section 4 requires a party to be aggrieved by the failure, neglect, or refusal of another to arbitrate. Pet. Br. 53-54. The question before the courts below was whether petitioner's conduct in this case satisfies this requirement, and the cases cited by petitioner simply do not address that issue. *See Faragalli*, 61 F.3d at 1067-68 (assuming that a party *does* refuse to arbitrate when she maintains litigation subject to the parties' arbitration agreement). Likewise, the other cases cited by petitioner are inapposite because they did not address whether litigating claims subject to arbitration constitutes a failure, neglect, or refusal. *See Reconstruction Fin. Corp.* v. *Harrisons & Crosfield,* 204 F.2d 366, 369 (2d Cir. 1953); *Hanes Corp.* v. *Millard,* 531 F.2d 585, 600 n.12 (D.C. Cir. 1976), *superseded on other grounds by statute*, 35 U.S.C. § 294, *as stated in National R.R. Passenger Corp.* v. *Consolidated Rail Corp.*, 892 F.2d 1066 (D.C. Cir. 1990).

its status as an unwilling party to litigation over a dispute that it had elected to arbitrate. The statutory question of whether Section 4 creates a pre-filing notification requirement is an issue not properly presented in this case.

Indeed, petitioner's refusal to arbitrate was confirmed in her answer to the petition to compel arbitration. See JA 54 ¶¶ 36, 38 (denying (i) the "existence of an arbitration agreement" and (ii) that Discover is "entitled to any relief whatsoever"). Cf. *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 64 (1996) (holding that a district court's error in failing to remand a case improperly removed due to incomplete diversity at the time of removal does not void the judgment if federal jurisdictional requirements are met at the time judgment is entered). Consequently, every entry of judgment in this case occurred at a time when petitioner had already refused, on the record, to arbitrate.[28]

For years, petitioner has been locked in a live controversy with Discover about whether the underlying dispute between these parties is arbitrable. The notion that Discover Bank is not aggrieved and has suffered no injury within the meaning of Section 4 of the FAA plainly is meritless and reveals just how little confidence petitioner has in the Section 4 issues she actually presented for certiorari.

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[28] Even under Article III, "the injury required for standing need not be actualized" at the commencement of the action, so long as the party is threatened by injury that is "real, immediate, and direct." *Davis* v. *FEC*, 128 S. Ct. 2759, 2769 (2008). Although "the proof required to establish standing increases as the suit proceeds," *id.*, here, petitioner's refusal to arbitrate is undeniable.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

ALAN S. KAPLINSKY
MARTIN C. BRYCE, JR.
BALLARD, SPAHR, ANDREWS & INGERSOLL, LLP
1735 Market St., 51st Fl.
Philadelphia, PA 19103
(215) 665-8500

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
MATTHEW B. ARCHER-BECK
LOWELL J. SCHILLER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington D.C. 20005
(202) 736-8000

JOSEPH W. HOVERMILL
MATTHEW T. WAGMAN
JOHN C. CELESTE
MILES & STOCKBRIDGE, P.C.
10 Light Street.
Baltimore, MD 21202
(410) 385-3442

Counsel for Respondents

August 1, 2008 * Counsel of Record