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No. 07-773

In The
Supreme Court of the United States

BETTY E. VADEN,

Petitioner,

v.

DISCOVER BANK, *et al.*,

Respondents.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

**BRIEF OF
THE FINANCIAL SERVICES ROUNDTABLE,
CONSUMER BANKERS ASSOCIATION,
AMERICAN FINANCIAL SERVICES ASSOCIATION,
AMERICAN BANKERS ASSOCIATION, AND
MARYLAND BANKERS ASSOCIATION AS
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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QUESTIONS PRESENTED

1. Whether a district court has federal-question jurisdiction over an action to compel arbitration brought pursuant to Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, when the district court would have jurisdiction under 28 U.S.C. § 1331 over the subject matter of a suit arising out of the parties' underlying controversy if there had not been an arbitration agreement.

2. Whether a controversy between the parties regarding respondents' compliance with state usury laws that is completely preempted by Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d, is sufficient to confer federal-question jurisdiction under Section 1331 over an action to compel arbitration pursuant to Section 4 of the Federal Arbitration Act.

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BRIEF OF THE FINANCIAL SERVICES ROUNDTABLE, CONSUMER BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AND MARYLAND BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

The Financial Services Roundtable, the Consumer Bankers Association, the American Financial Services Association, the American Bankers Association, and the Maryland Bankers Association respectfully submit this brief as *amici curiae* in support of respondents.

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a coalition of prominent national and state financial services organizations whose members include various companies that rely on arbitration to resolve controversies with customers and contractors. Not all financial services institutions rely on arbitration to resolve controversies, but many

[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

of them have chosen to do so because of the efficiencies of arbitration.

The Financial Services Roundtable represents 100 of the largest integrated financial services companies that provide banking, insurance, and investment products and services to American consumers. Roundtable member companies provide fuel for America's economic engine accounting directly for $18.3 trillion in managed assets, $678 billion in revenue, and 2.1 million jobs.

The Consumer Bankers Association (CBA) is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer financial services, including auto finance, home equity lending, card products, education loans, small business services, community development, investments, deposits and delivery. CBA was founded in 1919 and provides leadership, education, research and federal representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. CBA members include most of the nation's largest bank holding companies as well as regional and super community banks that collectively hold two-thirds of the industry's total assets.

Founded in 1916, the American Financial Services Association (AFSA) is the trade association for a wide variety of market-funded providers of financial services to consumers and small businesses. AFSA members are important sources of credit to

the American consumer, providing approximately 20 percent of all consumer credit.

The American Bankers Association (ABA) is the principal national trade association of the financial services industry in the United States. Its members, located in each of the fifty states and the District of Columbia, include financial institutions of all sizes and types, both federally and state-chartered. ABA members hold an overwhelming majority of the domestic assets of the banking industry in the United States.

The Maryland Bankers Association (MBA) was formed in 1896 and is a trade association representing 93 percent of the deposits comprised of nearly all state chartered and national banks with operations in Maryland, as well as most savings and loan associations doing business in Maryland.

SUMMARY OF ARGUMENT

I.

A. Section 4 of the Federal Arbitration Act (FAA), 9 U.S.C. § 4, creates a federal cause of action for a party to compel arbitration under a written arbitration agreement in a civil or admiralty matter. Without additional instruction from Congress, this Section 4 cause of action created by Congress would constitute an action "arising under" federal law and would thus create federal-question jurisdiction in federal court under 28 U.S.C. § 1331, regardless of the nature of the underlying controversy to be arbitrated.

But Congress provided further instruction in Section 4 of the FAA. This Court recognized in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 n.32 (1983), that the text of Section 4 of the FAA reflects Congress's intent to limit the otherwise applicable federal-question jurisdiction over a Section 4 cause of action where a federal district court would not have jurisdiction over the subject matter of the underlying controversy, for example a state contract controversy not raising a federal question and not involving diverse parties. Here, however, there is no dispute that the parties' underlying controversy is completely preempted by federal banking law and therefore the district court had jurisdiction to compel the arbitration of that controversy.

B. This Court should be particularly reluctant to read Section 4 of the FAA as petitioner suggests to limit the existing general grant of jurisdiction over this federal cause of action.

First, petitioner's reading of Section 4's limitation on jurisdiction would undermine one of the core purposes of the FAA, which was to provide that arbitration agreements would be enforceable. That is so because petitioner's jurisdictional rule would exclude from federal court enforceability a significant category of actions to compel arbitration pursuant to Section 4 of the FAA and leave those actions to state court where there may be no Section 4 cause of action at all. Indeed, many state courts (including courts in Maryland, where this action arose) have held that the

federal Section 4 cause of action to compel arbitration is not available in state court. Although many States have created their own causes of action to compel arbitration, such statutes have not been adopted in every State. And, even when a State has created a cause of action, it may not be co-extensive with the scope of Section 4 because, for example, it exempts particular subjects such as credit disputes.

Second, petitioner's broad reading of Section 4's limitation on jurisdiction is contrary to another core purpose of the FAA, which is to promote timely resolution of controversies that are subject to arbitration agreements. Relegated to state court, actions to compel arbitration of controversies involving claims arising under federal law may languish and the right to arbitrate may become meaningless because some States, even when they provide a state cause of action to enforce agreements to arbitrate, do not authorize immediate appeal of a court decision refusing to compel arbitration. In those States, parties may be forced to litigate their underlying controversy on the merits *before* the party seeking arbitration is entitled to obtain appellate review of the trial court's refusal to compel arbitration.

Third, petitioner's restrictive view of federal court jurisdiction would undermine the utility of arbitration agreements to industries that operate in multiple States and that have come to rely on uniform agreements for their customers and contractors, and uniform enforcement by the courts.

Unfortunately, there is evidence that, even after enactment of the FAA, state courts overall are less willing to enforce arbitration agreements than federal courts.

C. Petitioner mischaracterizes a piece of the drafting history of Section 4 of the FAA which, when correctly understood, provides further support for respondents' interpretation. Specifically, when Congress provided in Section 4 for federal court jurisdiction over actions to compel arbitration in cases where a federal district court would have jurisdiction "of the subject matter of a suit arising out of the controversy between the parties," Congress fully intended that the federal court examine the subject matter of the parties' underlying controversy to determine whether the controversy would give rise to either federal-question jurisdiction or diversity jurisdiction.

In considering the FAA, the House of Representatives passed a provision, ultimately not adopted by the Senate, that addressed diversity jurisdiction and would have reduced the amount-in-controversy requirement for diversity cases underlying an action to compel arbitration pursuant to Section 4. The House there used the term "controversy" to refer to the underlying controversy and would have required that the federal court rely on the value of that controversy. Such an examination of the underlying controversy is precisely how all courts have determined whether a Section 4 action to compel arbitration in federal court based on diversity

jurisdiction meets the statutory requirement that "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs." 28 U.S.C. § 1332(a).

Petitioner offers no other means to measure the amount-in-controversy, and no reason to support the distinction she would create between the method for determining whether federal court jurisdiction exists over a Section 4 action based on federal-question jurisdiction (she would have the court look only to the action to compel arbitration) as opposed to whether it exists based on the diversity of parties (which she apparently acknowledges requires the court to look to the underlying controversy to determine the amount in controversy).

II.

Under the plain language of Section 4, the district court had jurisdiction over respondents' Section 4 cause of action to compel arbitration because a federal court would have jurisdiction over an action between the parties on the subject matter of a suit arising out of the underlying merits controversy regarding whether respondents engaged in unlawful usury.

A. The claim of unlawful usury in the underlying controversy arises under federal law because it is completely preempted by Section 27 of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. § 1831d.

Section 27 was modeled on Sections 85 and 86 of the National Bank Act, 12 U.S.C. §§ 85, 86 "to prevent discrimination against State-chartered insured depository institutions, including insured savings banks." 12 U.S.C. § 1831d(a). In *Beneficial National Bank v. Anderson*, 539 U.S. 1, 8-9, 11 (2003), this Court held that because Sections 85 and 86 of the National Bank Act "provide the exclusive cause of action for [usury] claims" against national banks, those provisions "completely preempt" state law claims, which are therefore treated as federal claims that "arise under" federal law. The same is true for Section 27 of the FDIA, which governs state banks, and thus petitioner's allegations of usury against a state bank likewise arise under federal law.

B. Citing *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002), petitioner contends, nonetheless, that because she raised her Section 27 claim (in the guise of a state claim) only as a counterclaim in a pending state court proceeding, respondents cannot remove the pending state action to federal court and, thus, there is no "arising under" jurisdiction.

But the FAA does not require that a state civil action be removable to federal court in order for the federal court to have jurisdiction over a Section 4 action to compel arbitration. All that Section 4 requires for federal court jurisdiction is that an action to compel arbitration in district court be one where the district court would have jurisdiction over the subject matter of a lawsuit that would arise out of the

underlying controversy that the party seeks to arbitrate (*e.g.*, because the subject matter of the controversy arises under federal law or the underlying controversy meets the requirements for diversity jurisdiction).

The existence of a claim in a pending state court lawsuit is simply evidence of the nature of the underlying controversy between the parties. It cannot control the federal court's jurisdiction to hear a Section 4 cause of action to compel arbitration. Indeed, as respondents note (and petitioner agrees), no litigation need be pending in order for a Section 4 action to be initiated.

ARGUMENT

THE FEDERAL DISTRICT COURT HAD JURISDICTION OVER RESPONDENTS' ACTION TO COMPEL ARBITRATION PURSUANT TO SECTION 4 OF THE FAA BECAUSE THE FEDERAL COURT WOULD HAVE HAD JURISDICTION OVER THE UNDERLYING CONTROVERSY OF WHETHER RESPONDENTS CHARGED USURIOUS RATES OF INTEREST

Petitioner contends that a federal district court has no jurisdiction to determine whether she and respondents must engage in the arbitration to which they previously agreed in their written agreement. Petitioner is wrong because Congress intended federal courts to have jurisdiction over a cause of action to compel arbitration pursuant to Section 4 of

the Federal Arbitration Act (FAA), 9 U.S.C. § 4, whenever the district court would have jurisdiction over suit between the parties on the subject matter of the underlying controversy.

Congress intended that the federal court would determine whether it has jurisdiction over an action to compel arbitration by looking through to the subject matter of the controversy that the action seeks to arbitrate. The federal court must look through to determine whether the federal court would have jurisdiction over that underlying controversy, *e.g.* because the controversy arises under federal law (which would give rise to federal-question jurisdiction) or the controversy involves diverse parties and the statutorily required amount (which would give rise to diversity jurisdiction).

That determination in this case establishes that there is federal court jurisdiction because the controversy that petitioner has refused to arbitrate involves a claim that respondents charged usurious interest on her credit card. That claim arises under federal law, and thus would give rise to federal-question jurisdiction in federal court because the claim is "completely preempted" by Section 27 of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. § 1831d.

I. A Federal Court Has Jurisdiction Over An Action Brought To Compel Arbitration Pursuant To Section 4 Of The FAA Whenever It Would Have Jurisdiction Over The Underlying Controversy Which The Party Seeks To Arbitrate

Respondents have shown that Section 4 of the FAA is properly read to establish federal-question jurisdiction over a Section 4 cause of action to compel arbitration whenever the district court would have jurisdiction over the underlying controversy which the party seeks to arbitrate. Resp. Br. 13-39. The only actions to compel arbitration pursuant to Section 4 of the FAA that cannot be heard in federal court are those where the underlying controversy also could not be heard in federal court, *e.g.*, cases where there would be neither diversity jurisdiction nor federal-question jurisdiction over the subject matter of the underlying controversy because it is a dispute of state law between non-diverse parties.

Amici concur with this reading, and contend that, in addition to being compelled by the text, structure and court precedent (as respondents show), this reading is also compelled to achieve the core purpose of the FAA to ensure prompt enforcement of arbitration agreements and the drafting history of the FAA, which petitioner misreads.

A. The Limitation Of Section 4 On Federal Court Jurisdiction Over Certain Actions To Compel Arbitration Should Not Be Expanded Beyond Its Plain Meaning

Parties to a written agreement to arbitrate a controversy arising out of a transaction involving commerce have a substantive federal right under Section 2 of the FAA to their arbitration agreement being "valid, irrevocable, and enforceable" save for defenses applicable to any other contract. 9 U.S.C. § 2. Section 2 of the FAA "creat[es] a substantive rule" of federal law. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

The federal cause of action to compel the arbitration to which a party has a right under Section 2 is set forth in Section 4 of the FAA. Because it is a cause of action created by Congress, federal courts would normally possess federal-question jurisdiction to hear such an action pursuant to 28 U.S.C. § 1331, regardless of the nature of the underlying controversy to be arbitrated. *See American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916) (action "arises under" federal law when cause of action is created by federal law).[2]

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[2] Moreover, contrary to petitioner's contention (Pet. Br. 17), the issue resolved in a Section 4 proceeding regarding the validity and scope of the arbitration agreement involves questions of federal law, and is not solely a question of state contract law. Section 2 establishes "as a matter of federal law" that in determining "the construction of the contract language

(Continued on following page)

But Congress provided further instruction in Section 4 of the FAA and created a limitation on that jurisdiction for certain actions to compel arbitration. *See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). The text of Section 4 of the FAA reflects Congress's intent to limit the otherwise applicable federal-question jurisdiction of 28 U.S.C. § 1331 over a Section 4 cause of action, but only where a federal district court would not have jurisdiction over the subject matter of the underlying controversy sought to be arbitrated. Petitioner's

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itself," "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24-25 (1983). Thus, this Court has interpreted arbitration agreements subject to Section 2 without any reference to state law. *See Preston v. Ferrer*, 128 S. Ct. 978, 988-989 (2008) ("following the guide that [*Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)] provides" to determine meaning of arbitration agreement without reference to state law); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 626 (1985) (interpreting arbitration agreement without reference to state law); *Southland,* 465 U.S. at 15 & n.7 (same); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967) (same). In addition, state statutes or common law doctrines that are not generally applicable to all contracts are preempted as applied to arbitration agreements. *See Southland*, 465 U.S. at 16. As such, a Section 4 cause of action to compel arbitration of a Section 2 agreement would also normally qualify as an action "arising under" federal law for purposes of 28 U.S.C. § 1331 because the action would involve resolution of a substantial federal question of law. *See City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997) (action "arises under" federal law when the "right to relief under state law requires resolution of a substantial question of federal law").

attempt to expand Section 4's limitation on a federal court's Section 1331 jurisdiction should be rejected because the plain language of Section 4 cannot be reconciled with petitioner's reading that jurisdiction be limited to cases where the parties' agreement to arbitrate is created by federal law.

In particular, Section 4 provides that a party may bring an action to enforce an agreement to arbitrate in "any United States district court which, *save for such agreement*, *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 (emphases added). This Court has explained that this language instructed that not every action under Section 4 of the FAA "create[s] 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. Instead, there must be an "independent basis for federal jurisdiction" apart from the Section 4 cause of action itself. 460 U.S. at 25 n.32; *see also* 465 U.S. at 15 n.9. Federal courts thus have jurisdiction over the Section 4 cause of action "only when the federal district court would have jurisdiction over a suit on the underlying dispute." 460 U.S. at 25 n.32.

Petitioner purports to rely upon the canon that implied repeals should be narrowly construed, Pet. Br. 20, but that argument is exactly backwards. As this Court has explained, the limiting language of Section 4 is the basis for this Court's conclusion that the FAA is "an anomaly in the field of federal-court

jurisdiction" because it creates a federal cause of action that a federal court does not automatically have federal-question jurisdiction to hear. *Moses H. Cone*, 460 U.S. at 25 n.32. Section 1331, tracing its roots back to the Judiciary Act of 1875, presumptively provides a federal forum for any cause of action arising under federal law. *See, e.g., Powell v. McCormack*, 395 U.S. 486, 515 (1969) ("[I]t has generally been recognized that the intent of the drafters [of Section 1331] was to provide a broad jurisdictional grant to the federal courts."). That jurisdictional grant should not be deemed limited absent an express statement or the clearest implication by Congress in the text of the statute. *See, e.g., Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland*, 535 U.S. 635, 643-644 (2002); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491-494 (1991); *cf. Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

As a result, to the extent that the language in Section 4 is read to limit jurisdiction that otherwise would be available under Section 1331, the canon of construction against implied repeals requires that this limitation of jurisdiction be construed narrowly. *See, e.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) ("Repeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary"); *cf. Lane v. Peña,* 518 U.S. 187, 192 (1996)

(even express repeal of sovereign immunity "will be strictly construed, in terms of its scope, in favor of the sovereign").

Under this approach, Section 4 cannot be read to deprive federal courts of jurisdiction over actions to compel arbitration in cases such as this where the subject matter of a suit arising out of the underlying controversy would give rise to federal court jurisdiction. To read Section 4 to deny federal courts jurisdiction over a case in which the underlying controversy actually involves a dispute that itself arises under federal law, and which would have been heard by the federal courts in the absence of an arbitration agreement, would be irrational.

B. The Core Purposes Of The FAA Would Be Undermined By Petitioner's Reading Of Section 4 To Eliminate Federal Court Jurisdiction Because State Courts Do Not Always Provide A Remedy

Petitioner's reading of Section 4 of the FAA, if accepted, would undermine the FAA's key purpose of enforcing arbitration agreements. Petitioner claims (Pet. 44) that the same enforcement remedies are available in state courts, but that is not always so. Some States do not recognize a Section 4 cause of action in state court and do not provide an alternative state cause of action to compel arbitration that is commensurate with the Section 4 cause of action. Also, some States render an action to compel

arbitration meaningless because they do not allow immediate appeal but rather force a trial on the merits of the controversy before allowing appellate review of a court's determination that arbitration is not required.

1. Some States do not provide any practical means to compel arbitration in state court

Petitioner's expansive reading of Section 4's limit on a federal court's jurisdiction to compel arbitration would undermine the FAA's core purpose to provide that arbitration agreements are judicially enforceable. *See 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."). Petitioner's reading would exclude from federal court enforceability certain actions to compel arbitration despite the fact that the underlying controversy would give rise to federal court jurisdiction. Those parties would be left to state courts which do not necessarily provide a cause of action commensurate with Section 4 to enforce the arbitration agreement.

Although this Court has not addressed the question directly, many state courts (including courts in Maryland, where this action arose) have held that the federal Section 4 cause of action is not available in state court. *See*, *e.g.*, *St. Fleur v. WPI Cable Systems/Mutron*, 879 N.E.2d 27, 32 (Mass. 2008);

Nitro Distributing, Inc. v. Dunn, 194 S.W.3d 339, 351 (Mo. 2006), *cert. denied,* 127 S. Ct. 726 (2006); *Wells v. Chevy Chase Bank, F.S.B.,* 768 A.2d 620 (Md. 2001), *cert. denied,* 541 U.S. 983 (2004); *United Nuclear Corp. v. General Atomic Co.*, 597 P.2d 290, 308 (N.M. 1979), *cert. denied,* 444 U.S. 911 (1979). Thus, in those States (and possibly others that have yet to address the issue), a party to an arbitration agreement that is deemed by Section 2 of the FAA to be "valid, irrevocable, and enforceable" nonetheless has no means to bring its federal Section 4 cause of action to compel arbitration in state court.

If such a party looks to state law to enforce the arbitration agreement, it will find that not every State has created a state cause of action to compel arbitration. Alabama, for example, does not have any state law providing for the enforcement of an agreement to arbitrate. *See Allied-Bruce Terminix*, 513 U.S. at 295-296 (Thomas, J., dissenting). Moreover, the States that have created such a cause of action have not always created one that is co-extensive with the scope of Section 4. For example, Maryland, from where the instant case arises, appears to have limited the scope of its state arbitration law to those agreements that provide "for arbitration under the law of the State." Md. Cts. & Jud. Proc. Code Ann. § 3-202. Thus, in the absence of federal court jurisdiction over a Section 4 action, this language may draw into question petitioner's assertion (Pet. Br. 44) that respondents would be able to obtain an order compelling arbitration in Maryland

state court under the state arbitration law. *See Regina Constr. Corp. v. Envirmech Contracting Corp.*, 565 A.2d 693, 696 n.1 (Md. Ct. Spec. App. 1989) (statutory language "raises the question of whether, to be enforceable in a Maryland court, the agreement must in some way make reference to Maryland law").

Other States exempt particular subjects from the scope of their state arbitration laws, including credit disputes. For example, Montana's arbitration law expressly excludes from its scope "any contract by an individual for the acquisition of real or personal property, services, or money or credit when the total consideration to be paid or furnished by the individual is $5,000 or less." Mont. Code Ann. § 27-5-114(2)(b). Other common exemptions in state arbitration laws include disputes regarding insurance, *see, e.g.*, Neb. Rev. Stat. § 25-2602.01(f)(4); S.D. Stat. Ann. § 21-25A-3, or employment, *see*, *e.g.*, Ark. Code Ann. § 16-108-201(b)(2); Iowa Code Ann. § 679A.1(2)(b), or disputes with professionals such as doctors and attorneys, *see*, *e.g.*, S.C. Code Ann. § 15-48-10(b)(3).

2. Some state courts have no mechanism for appellate review of a court's refusal to compel arbitration prior to a trial on the merits of the controversy which the party seeks to arbitrate

Elimination of federal court jurisdiction over actions to compel arbitration of certain controversies

also is contrary to another core purpose of the FAA, which is to promote timely resolution of controversies that are subject to arbitration agreements. *See Preston v. Ferrer*, 128 S. Ct. 978, 986 (2008) ("A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.' ").

Relegated to state court, actions to compel arbitration may languish and become meaningless because some States that provide a cause of action to enforce agreements to arbitrate do not authorize immediate appeal of a trial court's refusal to compel arbitration. *See, e.g.*, *Muao v. Grosvenor Properties Ltd.*, 122 Cal. Rptr. 2d 131 (Cal. Ct. App. 2002); *Weston Sec. Corp. v. Aykanian*, 703 N.E.2d 1185 (Mass. App. Ct. 1998), *rev. denied*, 710 N.E.2d 604 (Mass. 1999); *Bush v. Paragon Property, Inc.*, 997 P.2d 882 (Or. Ct. App. 2000); *Batton v. Green*, 801 S.W.2d 923 (Tex. App. 1990).

In those States, parties may be forced to litigate their underlying controversy on the merits *before* the party seeking to compel arbitration is entitled to obtain appellate review of the trial court's order denying its motion to compel arbitration, unlike the system authorized in the FAA. *See* 9 U.S.C. § 16 (order refusing to compel arbitration is immediately appealable).

3. State courts have evidenced a hostility to enforcement of arbitration agreements in a manner that burdens interstate industries

Arbitration agreements are of critical importance to interstate industries that rely on uniform agreements for their customers and contractors, and uniform enforcement by the courts. For example, many financial services companies have opted to enter into arbitration agreements and arbitrate controversies because it is an efficient means of resolving controversies.[3] Research has shown that arbitration is beneficial for consumers, particularly consumers with smaller claims. In a study financially supported by *amicus* American Bankers Association, it was determined that in lending-related cases that were initiated by consumers, a majority of the arbitrations were resolved in favor of consumers, and a larger majority of consumers surveyed were satisfied or very satisfied with the arbitration

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[3] Not every financial services institution seeks to enter into arbitration agreements with their customers. *See* Linda J. Demaine & Deborah R. Hensler, "*Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 Law & Contemp. Probs. 55, 64 (2004) (25% of credit card agreements sampled did not contain arbitration clauses). Thus, customers who do not wish to arbitrate disputes have identifiable market options for obtaining financial services without arbitration agreements. *See* Consumer Action News, *2007 Credit Card Survey*, at 5 (Spring 2007), *available at* http://www.consumer-action.org/downloads/english/CA_News_ CC_07.pdf.

process. *See* Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases*, at 9-10, 12-13 (2004) *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf.

These benefits of arbitration agreements to companies and consumers alike are, of course, lost completely when the agreements cannot be enforced. And that is more likely when parties are left to state courts rather than federal courts, because there is evidence that state courts are overall less willing to enforce arbitration agreements through actions to compel than are federal courts. One scholar has reported that "it does seem that state courts are more likely to refuse to enforce arbitration agreements than are federal courts" and that "[a]lthough no empirical studies have been done * * * , the decided cases do seem to support such a general differentiation." Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts*, 147 U. Pa. L. Rev. 91, 94 (1998).

After a comprehensive survey of decisions by Florida courts, another commentator has concluded that "certain decisions from the Florida Supreme Court do seem to be at odds with their federal counterparts and, thus, at odds with the federal policy of favoring arbitration." Douglas J. Giuliano, *Parochialism in Arbitration?: How Some Arbitration Decisions By Florida Courts Are At Variance With Federal Arbitration Precedent*, 81 Fla. Bar J. 8, 10

(2007). A survey of California courts has reached the same conclusion. *See* Stephen A. Broome, *An Unconscionable Application Of The Unconscionability Doctrine: How The California Courts Are Circumventing The Federal Arbitration Act*, 3 Hastings Bus. L.J. 39 (2006).

A recent empirical study about confirmation of arbitration awards (as opposed to enforcement of arbitration agreements through motions to compel arbitration) likewise found that state courts were more likely to overturn such awards than federal courts. *See* Michael H. LeRoy, *Do Courts Create Moral Hazard? When Judges Nullify Employer Liability in Arbitrations: An Empirical Analysis*, at 49 (Spring 2008), *available at* http://ssrn.com/abstract=1116305. These findings indicate that state courts, more than federal courts, are unwilling to respect the decisions of arbitrators, which may also be one of the reasons such courts refuse to compel arbitration in the first instance.

C. The Drafting History Of The FAA Confirms That Congress Intended Federal Courts To Look Through To The Underlying Controversy To Determine Jurisdiction

Respondents show (Resp. Br. 16) that the text of the FAA reflects that, when Congress used the term "controversy" in Section 4, it intended the federal court to look to the substantive controversy that the party seeks to arbitrate to determine jurisdiction over

an action to compel arbitration based on whether that controversy would give rise to federal court jurisdiction if there were no arbitration agreement.

Petitioner's contrary assessment (Pet. Br. 37) is based on a misreading of the drafting history. In 1924, the version of the bill passed by the House of Representatives that ultimately became the FAA contained an additional provision that would have specifically addressed diversity jurisdiction over Section 4 actions. The provision would have reduced the amount-in-controversy requirement for establishing diversity jurisdiction for the Section 4 cause of action. That provision used the term "controversy" for purposes of measuring the value of the action, and in doing so referred back to the underlying merits controversy that "is to be determined by arbitration." 65 Cong. Rec. 11,081 (1924).[4] The Senate, without explanation, adopted a version of the bill without this provision, 66 Cong. Rec. 2759-2760 (1925), and the House accepted the Senate version.

[4] The provision stated that "if the basis of jurisdiction be diversity of citizenship," which at that time required the showing an amount in controversy in excess of $3,000, "the district court or courts which would have jurisdiction if the matter in controversy exceeded, exclusive of interest and costs, the sum or value of $3,000, shall have jurisdiction to proceed hereunder notwithstanding the amount in controversy is unascertained or is to be determined by arbitration." 65 Cong. Rec. at 11,081.

The House provision, although ultimately not contained in the final law enacted, confirms that Congress intended that the term "controversy" when used in the FAA is meant to refer back to the underlying controversy on the merits that "is to be determined by arbitration." The proposal would have made no sense if it were supposed to refer to the parties' extant dispute whether to arbitrate.

Indeed, as respondents show (Resp. Br. 24-26), examination of the underlying controversy is precisely how courts determine whether a Section 4 action in federal court based on diversity jurisdiction meets the statutory requirement that "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs." 28 U.S.C. § 1332(a). Petitioner offers no other means to measure the amount-in-controversy and there is none, particularly because Congress instructed that the costs of litigating the action cannot be considered in determining the amount-in-controversy.

There is no reason to distinguish between federal question and diversity cases in terms of looking at the underlying controversy to determine whether a federal court has jurisdiction over a Section 4 action.

II. PETITIONER'S CLAIM AGAINST RESPONDENTS IS COMPLETELY PREEMPTED BY SECTION 27 OF THE FDIA WHICH PRESENTS A CONTROVERSY ARISING UNDER FEDERAL LAW OVER WHICH FEDERAL COURTS WOULD HAVE FEDERAL-QUESTION JURISDICTION

The district court had jurisdiction over respondents' Section 4 cause of action to compel arbitration because a federal court would have jurisdiction over the subject matter of a suit arising under the underlying controversy regarding whether respondents charged petitioner unlawful charges, fees, and rates of interest on her credit card account in violation of state usury laws. Petitioner does not dispute in her opening brief in this Court that the Fourth Circuit was correct that petitioner's usury claim, although framed by petitioner in terms of state law, actually arises under federal law because it is "completely preempted" by Section 27 of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. § 1831d. The fact that petitioner raised this federal claim in state court as a counterclaim does not alter the analysis of federal court jurisdiction under Section 4 of the FAA.

A. Section 27 Of The FDIA Completely Preempts Usury Claims Against State Banks

Section 27 of the FDIA was deliberately modeled on Sections 85 and 86 of the National Bank Act, 12 U.S.C. §§ 85, 86. Sections 85 and 86 of the National Bank Act "provide the exclusive cause of action for

[usury] claims" against national banks." *Beneficial National Bank*, 539 U.S. at 11. "[T]here is, in short, no such thing as a state-law claim of usury against a national bank" because it is preempted by Section 85 and 86. *Ibid*. This Court emphasized that even where a complaint makes no mention of federal law, if the complaint "unquestionably and unambiguously claims that petitioners violated usury laws," that "cause of action against national banks only arises under federal law." *Ibid*.

Whereas Sections 85 and 86 apply to national banks, Section 27 of the FDIA applies to state banks. Section 27 begins by stating Congress's express purpose "to prevent discrimination against State-chartered insured depository institutions, including insured savings banks." 12 U.S.C. § 1831d(a). The discrimination against state banks referenced by Congress was due to this Court's interpretation of Section 85 in *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), which placed national banks at a competitive advantage over state banks regarding interstate lending because state banks were still governed by the varying restrictive usury laws of each of the 50 States, whereas interest imposed by national banks was governed only by the State in which they were located. *See Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 826 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993).

Congress enacted Section 27(a) two years later, in 1980, and modeled it on Section 85 in order to restore parity between national banks (chartered

by the federal government) and state banks with regard to the interest rates they could charge.[5] At the same time, Congress enacted Section 27(b), which is modeled on and tracks Section 86 of the National Bank Act, 12 U.S.C. § 86. Section 86 provides a federal cause of action for violations of Section 85 of the National Bank Act. As explained in *Beneficial National Bank*, starting in the Nineteenth Century, this Court has adopted a "consistent construction of [Section 86 of] the National Bank Act as providing an *exclusive* federal cause of action for usury against national banks." 539 U.S. at 10 (emphasis added). Thus, state law causes of action were preempted and the state law "cause of action [alleged in a complaint] necessarily arises under federal law." *Id*. at 9. Similarly, Congress provided borrowers a federal cause of action against state banks in Section 27(b) if they are charged interest in excess of that authorized by Section 27(a).

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[5] Section 27(a) provides that a "State-chartered insured depository institution[ ]" (which the provision also describes as a "state bank") may "take, receive, reserve, and charge on any loan or discount made, or upon any note, . . . interest . . . at the rate allowed by the laws of the State, territory, or district where the bank is located." 12 U.S.C. § 1831d(a). State banks alternatively are authorized to choose to charge "a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank" in the district where the state bank is located, if that rate is greater. *Ibid*. The statute further provides that state banks have the right to charge such interest on any loan "notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section." *Ibid*.

Because Congress used Section 86 as a model for Section 27(b), it follows that Congress intended that the same complete preemption to apply for claims, such as petitioner's, that fall within the scope of Section 27. *See Beneficial National Bank*, 539 U.S. at 7-8 (citing *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 65-66 (1987)); *see also Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978). That likewise is the position taken by the Federal Deposit Insurance Corporation, which submitted an *amicus* brief in the Fourth Circuit explaining that petitioner's state law claims were completely preempted and thus arose solely under federal law. Pet. App. 23a-24a (describing brief).

The legislative history of Section 27 confirms that Congress made a conscious choice to incorporate the National Bank Act language into Section 27. *See, e.g.*, 126 Cong. Rec. 6,907 (1980) (statement of Sen. Bumpers); 125 Cong. Rec. 30,655 (1979) (statement of Sen. Pryor). It provides no basis for concluding that Congress intended state banks to have less access to federal courts than national banks. To the contrary, as noted above, the entire thrust of Section 27 was to create parity between the two categories of banks.

B. The Procedural Posture Of The Claim In State Court Is Irrelevant To Whether A District Court Would Have Jurisdiction Over The Subject Matter Of A Suit Arising Out Of The Underlying Controversy If There Were No Arbitration Agreement

Petitioner does not dispute that if she initiated a civil action that included her usury claim against respondents (whether denominated a Section 27 claim or a state law cause of action for usury), a federal district court would have jurisdiction over the action because one of her claims would "arise under" federal law. *Cf. Beneficial National Bank*, 539 U.S. at 10. Moreover, she does not appear to dispute that if she initially had filed such an action in state court, respondents could have removed the action to federal court under 28 U.S.C. § 1441, again because one of her claims would be "arising under" federal law. *See Beneficial National Bank*, 539 U.S. at 9 & n.5. Indeed, if petitioner had threatened to bring such an action, respondents could have brought a declaratory judgment action in federal court against petitioner seeking a declaration that petitioner's potential usury cause of action was meritless because they were in compliance with Section 27. *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 19 n.19 (1983); Resp. Br. 20 n.10.

Petitioner nonetheless contends (Pet. Br. 46-52) that the fact that she raised her Section 27 claim (in the guise of a state claim) only as a counterclaim in a

pending state court proceeding means that there is no federal court jurisdiction over the Section 4 action to compel arbitration because, she claims, respondents cannot remove the pending state action to federal court pursuant to *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002).

But the FAA does not require that a state court action be *removable* to federal court in order for the federal court to have jurisdiction over a Section 4 action to compel arbitration. As noted above, Section 4 requires only that the district court would have jurisdiction over the subject matter of a suit brought by one of the parties on their underlying controversy on which the party wants the court to compel arbitration.[6]

The existence of a claim in pending state court litigation is nothing more than evidence of the underlying controversy. The fact that the underlying controversy manifests itself as a state court counterclaim does not control the federal court's jurisdiction to hear a Section 4 cause of action to compel arbitration. As respondents show (Resp. Br. 6, 42-43), and petitioner agrees (Pet. Br. 4), no litigation

[6] Indeed, to the extent that the posture of potential litigation could be relevant to federal court jurisdiction to hear a Section 4 action to compel arbitration, petitioner ignores that the district court would possess jurisdiction over a declaratory judgment that respondents can still file against her. *See Franchise Tax Bd.*, 463 U.S. at 19 n.19.

need be pending or anticipated in order for a Section 4 action to be initiated.

CONCLUSION

For the reasons set forth above, and in respondents' brief on the merits, the Court should affirm the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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