Case 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 OF *AMICUS CURIAE* CINTAS CORPORATION IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Amicus Cintas Corporation ("Cintas") has an interest in this case because the first question presented here is also presented in a case now pending in the United States Court of Appeals for the Ninth Circuit, *Cintas Corp. v. Abel*, No. 07-16318, to which Cintas is a party, arising from proceedings in 70 district courts nationwide.[1] The *Cintas* case was taken under submission by the Ninth Circuit in December 2007 after briefing and oral argument. In April 2008, the Ninth Circuit withdrew the submission and deferred resolution of the case pending the issuance of this Court's decision in *Vaden*. The Court's decision here is likely to determine or substantially affect the outcome of the Ninth Circuit appeal.[2]

The *Cintas* case has its genesis in a federal class action and collective action lawsuit filed under federal question jurisdiction in the Northern District of California, *Veliz v. Cintas Corp.*, No. C-03-1180-SBA. The plaintiffs in *Veliz* seek overtime premiums under Section 16(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), and other relief under federal and state law. Cintas moved under Section 3

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[1] No counsel for a party authored any part of this brief. Neither counsel for a party nor a party made any monetary contribution intended to fund the preparation or submission of the brief. All parties have consented to the filing of the brief. *See* Letter from Carter G. Phillips and Daniel R. Ortiz to the Hon. William K. Suter (July 22, 2008).

[2] Cintas petitioned the Court for a writ of certiorari before judgment so that the Ninth Circuit case could be considered together with *Vaden*. That petition, No. 07-1338, was denied on June 16, 2008.

of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 3, to stay the litigation as to approximately 1,900 opt-in plaintiffs who had signed agreements requiring disputes to be resolved by arbitration held in the county and state where they work, or last worked, for Cintas. The district court granted the motion.

In accordance with the place-of-arbitration term in each of the 1,900 plaintiffs' arbitration agreements, Cintas filed petitions to compel arbitration in the 70 federal judicial districts where these plaintiffs worked or last worked for Cintas.[3] The Judicial Panel on Multidistrict Litigation eventually transferred Cintas' 70 petitions to the *Veliz* court for coordinated or consolidated pretrial proceedings to determine whether, within the meaning of 9 U.S.C. § 4, the plaintiffs were failing, neglecting, or refusing to arbitrate in accordance with the terms of their written arbitration agreements.

In the course of those proceedings, the plaintiffs argued that the federal courts lacked subject-matter jurisdiction over Cintas' petitions, even though the claims that Cintas sought to have arbitrated were the very federal question claims that the respondents (as plaintiffs in *Veliz*) had first brought in litigation in federal court. The district court rejected that argument and ruled for Cintas. *In re*

[3] Cintas did not move under Section 4 of the FAA to compel arbitration as to the 1,900 plaintiffs because the district court had indicated previously that it lacked the power to order arbitration outside the Northern District of California. *See* 9 U.S.C. § 4 ("The hearings and proceedings, under such [arbitration] agreement, shall be within the district in which the petition for an order directing such arbitration is filed.").

Cintas Corp. Overtime Pay Arbitration Litigation, 2007 WL 1089695 (N.D. Cal. Apr. 11, 2007). Then the district court certified, and the Ninth Circuit allowed, an interlocutory appeal under 28 U.S.C. § 1292(b) on the issue of subject-matter jurisdiction. *See In re Cintas Corp. Overtime Pay Arbitration Litigation*, 2007 WL 1302496 (N.D. Cal. May 2, 2007); *Cintas Corp. v. Abel*, No. 07-80046, Order (9th Cir. July 24, 2007).

The case was taken under submission by the Ninth Circuit on December 3, 2007. On March 17, 2008, this Court granted the petition for a writ of certiorari in *Vaden*. The Ninth Circuit then withdrew the submission of *Cintas* and deferred the case pending the issuance of the Court's decision here. *Cintas Corp. v. Abel*, No. 07-16318, Order (9th Cir. Apr. 7, 2008).

The Court's decision may affect not only the Ninth Circuit proceeding in *Cintas*, but thereby the underlying litigation throughout the country in which Cintas seeks federal enforcement of agreements to arbitrate federal question claims. Cintas respectfully requests that this Court consider Cintas' perspective in this case, in order to appreciate the full consequences of the rule that Petitioner invites the Court to adopt.

SUMMARY OF ARGUMENT

By its plain language, Section 4 of the FAA authorizes a federal court to enforce an agreement to arbitrate whenever the dispute to be arbitrated would fall within the court's subject-matter jurisdiction. The phrase "any United States district

court which, save for such agreement, would have jurisdiction" recognizes that the court's jurisdiction over the underlying dispute is merely theoretical in light of the agreement to arbitrate. "[U]nder Title 28" signifies that jurisdiction over the underlying dispute may spring from any of the full range of federal jurisdictional provisions, including 28 U.S.C. § 1331. Finally, "of the subject matter of a suit arising out of the controversy between the parties" specifies that it is jurisdiction over the dispute to be arbitrated that allows a federal court to enforce an agreement to arbitrate.

Because the Section 4 mechanism for enforcement of arbitration agreements is available only as to controversies that are within federal subject-matter jurisdiction, Section 4 does not create any independent jurisdiction. Instead, jurisdiction over a Section 4 petition derives from jurisdiction the court would have over the underlying dispute.

Applying Section 4 according to its terms serves the federal policy favoring enforcement of arbitration agreements. An interpretation contrary to that of the Fourth Circuit will in many cases deny parties recourse to the federal courts for enforcement of agreements to arbitrate federal claims. The effect of such a rule is more pronounced in light of the fact that many states view Section 4 as inapplicable in state court and state arbitration regimes may not provide enforcement mechanisms as broad as their federal counterpart. Subjecting cases such as *Cintas* to a multitude of state procedural regimes would not only reward the forum-shopping tactics of those seeking to avoid arbitration in accordance with the terms of their written agreements, but it would also

likely yield inconsistent results – and results antithetical to the FAA.

ARGUMENT

I. The Plain Language of FAA Section 4 Provides that a Federal Court May Hear a Petition to Compel Arbitration If the Court Would Have Jurisdiction Over the Subject Matter of the Underlying Dispute.

Section 4 creates a federal remedy to enforce written agreements to arbitrate. It also describes the circumstances in which a court may hear a petition invoking that remedy. The statutory language at issue in this case provides that a Section 4 petition to compel arbitration may be filed before:

> 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. The Court's analysis of the first question presented – whether FAA Section 4 authorizes a federal court to hear a petition to compel arbitration whenever the dispute to be arbitrated arises under federal law – must begin with the language of the statute. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

Section 4 allows a district court to hear a petition for arbitration if, "save for" the arbitration agreement, the court "would have jurisdiction under Title 28" over "the subject matter of a suit arising

out of the controversy between the parties." Read naturally, the statute provides that if a district court would have subject-matter jurisdiction over the parties' substantive dispute (absent the arbitration agreement), the court can hear a petition to compel arbitration of that dispute. It allows federal courts to compel arbitration of any dispute that they would otherwise be able to entertain on the merits. *Discover Bank v. Vaden*, 396 F.3d 366, 369-70 (4th Cir. 2005); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 177 F.3d 1212, 1223 n.11 (11th Cir. 1999). A close analysis of each key phrase of this clause confirms that plain language reading.

A. "[A]ny United States district court which, save for such agreement, would have jurisdiction"

Section 4 requires a federal court to consider whether it would have jurisdiction if the case were brought in a different posture (not unlike evaluating jurisdiction over a claim for declaratory judgment). The conditional phrase "would have jurisdiction" demonstrates that the court must consider its jurisdiction over a proceeding other than the one before it. This means that jurisdiction over a Section 4 petition is dependent; it flows from jurisdiction over something else.

Before identifying the "something else" over which the court must have jurisdiction in order to hear a petition to compel arbitration, the statute establishes a key characteristic of the dispute under consideration: there is no agreement to arbitrate. The words it uses to accomplish this purpose are "save for such agreement." Thus, "save for" the

parties' agreement to arbitrate, there would be a controversy over which the court would have jurisdiction.

With this language, the statute asks the court to "set aside the arbitration agreement and then consider the grounds for federal jurisdiction independently." *Vaden*, 396 F.3d at 369. The text emphasizes the connection between the "save for" and "would have" phrases by using commas to set them apart from the rest of the sentence: ". . . which, save for such agreement, would have jurisdiction under Title 28, in a civil suit . . . ." The two phrases work in tandem to ask the court to "look through" the petition to see whether there would be an independent basis for federal jurisdiction in the underlying controversy between the parties.

Any reading that eliminates the connection between these two phrases does violence to the statutory text. Section 4 asks the court to inquire "would there be jurisdiction if . . . ," and then fills in the blank. Petitioner argues that Congress meant to fill in the blank with "the ouster doctrine were nullified." As a matter of textual interpretation, this cannot be right. First, the ouster doctrine already *was* nullified in Section 2 of FAA, 9 U.S.C. § 2, a fact that renders unnecessary a theoretical inquiry into jurisdiction absent the ouster doctrine. Second, the words of the statute – "save for such agreement" – cannot be contorted into an expression of the demise of the ouster doctrine. Their plain meaning is "but for the arbitration agreement," not "if the arbitration agreement were enforceable." Thus, Section 4 does not ask the court to consider its jurisdiction as if there were no ouster doctrine, it asks the court to

consider its jurisdiction as if there were no arbitration agreement.

B. "[U]nder Title 28"

The statute next establishes the sources of jurisdiction that a court may consider in its jurisdictional inquiry. The phrase "under Title 28" conveys the full range of federal jurisdictional provisions, including 28 U.S.C. § 1331, the section conferring federal question jurisdiction. Originally, Section 4 referred to "the judicial code" rather than Title 28. Act of Feb. 12, 1925, ch. 213, § 4, 43 Stat. 883. The Judicial Code included all types of federal jurisdiction, including federal question jurisdiction. Act of Mar. 3, 1911, Pub. L. No. 61-475, § 24, 36 Stat. 1087, 1091 ("The district courts shall have original jurisdiction . . . where the amount in controversy exceeds . . . the sum or value of three thousand dollars and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority, or (b) is between citizens of different States."). As part of the post-World War II recodification of federal statutes into the various Titles of the United States Code, when Congress amended Section 4 to read "under Title 28," it specifically cited 28 U.S.C. § 1331 as an example of the provisions encompassed by the phrase "Title 28." *See* S. Rep. No. 83-2498, at 8 (1954), as reprinted in 1954 U.S.C.C.A.N. 3991, 3998 ("'Title 28, in a civil action' was substituted for 'the judicial code at law, in equity.' . . . That title sets out the general jurisdiction of district courts in civil and admiralty matters. See section 1331 et seq., thereof.").

In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 n.32 (1983), this Court specifically approved of "*Commercial Metals Co. v. Balfour, Guthrie, & Co.*, 577 F.2d 264, 268-269 (CA5 1978) and cases cited" therein. One of those "cases cited" is *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 408 (2d Cir. 1959), where the court held that "jurisdiction under . . . Section 4 may doubtless in some instances be federal question jurisdiction, based upon rights alleged to arise out of some federal statute other than the Arbitration Act." *Robert Lawrence Co.*, 271 F.2d at 408. That is exactly the situation in *Cintas* – jurisdiction under Section 4 is federal question jurisdiction, based upon rights alleged to arise out of a federal statute (the FLSA) other than the FAA.

Petitioner posits that Congress intended there to be federal question jurisdiction over a Section 4 petition only when the petition independently arises under federal law, such as when a federal statute requires arbitration. (Pet. Br. at 29-30). But congressionally mandated arbitration sits apart from Section 4, because Section 4 only compels arbitration "under a written agreement for arbitration." The FAA's avowed intent is to ensure that "*private* agreements to arbitrate" are enforced. *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 476 (1989) (emphasis added). If Congress, by statutory command, requires arbitration, it is questionable whether such a matter could even fall within the purview of Section 4 absent a written agreement incorporating the relevant statute. And even if Section 4 were applicable to statutory arbitration, there is no reason why the existence of this isolated

jurisdictional path should block "look through" jurisdiction. The statutory arbitration provisions featured by Petitioner were all enacted well after the 1925 enactment of the FAA. *See, e.g.,* Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1239 (Sept. 16, 1980). Congress did not include the broad provision in Section 4 just in case, someday many years later, it might provide for arbitration by statute.

C. "[O]f the subject matter of a suit arising out of the controversy between the parties"

As explained above, Section 4 requires a federal court to consider its jurisdiction, under the full range of federal jurisdictional provisions, as if there were no arbitration agreement. The phrase "subject matter of a suit arising out of the controversy between the parties" identifies the "something else" over which a court must have jurisdiction in order to hear a petition to compel arbitration. This makes perfect sense, because such a suit is exactly what would be presented to the court if there were no agreement to arbitrate.

In this context, "controversy" can only mean the parties' substantive dispute. This Court has already embraced that plain meaning of the statute, explaining 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 . . .*" *Moses H. Cone*, 460 U.S. at 25 n.32 (emphasis added). Petitioner ignores that portion of the *Moses H. Cone* decision.

The FAA consistently uses the word "controversy" to refer to the parties' dispute over their substantive rights and obligations. Section 2 addresses the enforceability of a written agreement "to settle by arbitration a controversy arising out of" a contract. 9 U.S.C. § 2. "Controversy" has the same meaning in Section 1 ("matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction"), Section 5 ("upon the application of either party to the controversy the court shall designate and appoint an arbitrator"), Section 10 ("[w]here the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy"), and Section 11 ("[w]here the award is imperfect in matter of form not affecting the merits of the controversy"). 9 U.S.C. §§ 1, 5, 10, 11. It would be strange indeed for Congress to use "controversy" to mean the parties' substantive dispute everywhere except Section 4. *See, e.g., Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (recognizing "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning") (internal quotation marks omitted).

The structure of Section 4 validates this straightforward reading. The section begins by stating that it only applies where there is some "failure, neglect, or refusal" to arbitrate. It makes no sense to require a court to analyze whether it would have jurisdiction over the subject matter of the parties' controversy (or to set aside the arbitration agreement), if the controversy *itself* were the refusal to arbitrate. There would be no need for any of the

provisions discussed above; the statute could simply state that a petition may be filed in a court "which would have jurisdiction in a civil action over the alleged failure, neglect, or refusal to arbitrate." Congress knew how to refer to the subject matter of the petition itself; it did not need to use "subject matter . . . controversy" language to do that.

As recently as in her petition for a writ of certiorari, Petitioner argued that the "controversy between the parties" was the dispute over the refusal to arbitrate. (Pet. at 25). Abandoning that argument for an even less plausible one, she now insists that it is "a traditional suit seeking specific performance of a contract." (Pet. Br. at 36). Petitioner maintains that the jurisdictional language in Section 4 can be interpreted by reference to the New York statute, which does not include it. She argues that because New York merged law and equity in 1848, it developed a swift process to enforce some types of arbitral awards by 1920 (Pet. Br. at 35 n.5), and so "the New York drafters merely extended their existing swift process to the new task of compelling arbitration" (*id*. at 34-35). The federal system had no such expedited process prior to the FAA, and Petitioner surmises that the jurisdictional language in Section 4 was meant to inform federal courts (who had no previous experience with such suits) that the FAA should be treated as a specific performance action for purposes of jurisdiction. (*Id*. at 36). Perhaps not surprisingly, Petitioner's theory finds no support in precedent or scholarship.

The argument can be discarded without delving too far into the historical background. First, and most importantly, it does not square with the actual

language of the statute. The phrase "a suit arising out of the controversy between the parties" is certainly a strange way to say "a common-law specific performance action." And if that were the case, there would be no reason to say "save for such agreement" because jurisdiction would be founded directly on the agreement. Second, Petitioner presents nothing beyond speculation to link New York's previous "swift process" to its new arbitration act in the 1920s. Nor is there any support in the legislative history for the theory that Congress intended Section 4 to be merely an extension of existing specific performance law. Third, Petitioner does not contend that New Jersey – the other state whose arbitration statute formed the basis for the FAA – had New York-style, expedited "special proceedings." Indeed, New Jersey did not merge law and equity until 1947. Alan V. Lowenstein, *The Legacy of Arthur T. Vanderbilt to the New Jersey Bar*, 51 Rutgers L. Rev. 1319, 1331 (1999). Yet New Jersey's arbitration act did not have any provision similar to the jurisdictional provisions in Section 4. Act of Mar. 21, 1923, ch. 134, 1923 N.J. Laws 291.

For all of these reasons, Petitioner's interpretation of Section 4 runs afoul of the statutory text. The statute must be given its plain meaning. *BP Am. Prod. Co. v. Burton*, 127 S. Ct. 638, 643 (2006) ("Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.").

II. A Petition to Compel Arbitration Under FAA Section 4 Arises Under Federal Law If the Underlying Dispute Arises Under Federal Law.

This Court has long recognized that the FAA "does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331." *Moses H. Cone*, 460 U.S. at 25 n.32; *see Vaden*, 396 F.3d at 368. In other words, a Section 4 petition to compel arbitration does not arise under federal law by virtue of being brought pursuant to the FAA. But recognition that the FAA does not create independent jurisdiction is not inconsistent with – indeed, it affirmatively reflects – an understanding that federal jurisdiction over a Section 4 petition derives from federal jurisdiction that would exist as to the underlying dispute. Indeed, in the very footnote where this Court stated that the FAA is not an independent source of jurisdiction, it likewise recognized that a Section 4 petition could be filed when a district court "would have jurisdiction over a suit on the underlying dispute." *Moses H. Cone*, 460 U.S. at 25 n.32.

In establishing Section 4 as a remedy for enforcement of arbitration agreements, Congress was acutely aware of the limits of federal jurisdiction. It did not seek to expand those limits by authorizing federal courts to interfere with disputes that are outside the federal courts' power to decide. Instead, Congress carefully circumscribed the Section 4 remedy, making it available only when the dispute to be arbitrated would fall within the established jurisdiction of the federal courts. *See* 9 U.S.C. § 4; *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265,

291 (1995) (Thomas, J., dissenting) ("[F]ederal courts have jurisdiction to enforce arbitration agreements only when they would have had jurisdiction over the underlying dispute."); Legal Developments Significant in Business: The United States Arbitration Law, 4 Harv. Bus. Rev. 236, 237 (1926) ("The new act . . . does not extend in any way the jurisdiction of the Federal Courts, but rather makes arbitration agreements valid and enforceable within their present jurisdiction."). It is precisely this limitation on the availability of the remedy that led the Court to conclude that Section 4 creates no independent jurisdiction. *See Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984); *Moses H. Cone*, 460 U.S. at 25 n.32. In short, federal courts have no independent federal jurisdiction over Section 4 petitions because their jurisdiction over such petitions derives from, and is limited by, their jurisdiction over the underlying disputes.

This explains why Section 4 does not include language akin to that appearing in Section 203 of the FAA, 9 U.S.C. § 203. *See* Pet. Br. at 37-38 (citing Section 203 as evidence that Congress "knows how to [expand jurisdiction] clearly and unequivocally"). The language in Section 203 was necessary to secure a federal forum, in light of the high likelihood that the dispute would be based on foreign law or have aliens on both sides, otherwise rendering a federal forum unavailable. Because domestic parties to an arbitration agreement had at least two different paths to federal court (diversity or federal question) that Section 4 expressly acknowledged, Congress had no need to "expand" the jurisdictional scope of the FAA in Section 4.

Of course, Congress' deference to existing jurisdictional boundaries in no way suggests that it intended to limit the federal courts' ability to compel arbitration of disputes that would be within their power to decide. As explained in Part I, the plain statutory language evinces an intent to make the Section 4 remedy available whenever, but for the arbitration agreement, the underlying dispute could be sued upon in federal court. Congress provided that federal jurisdiction over a petition to compel arbitration would be coextensive with a federal court's jurisdiction over the underlying dispute. *See Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising Out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Joint Hearing on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 24 (1924) (statement of Julius Cohen) ("[T]he Federal Courts are given jurisdiction to enforce such agreements whenever under the Judicial Code they would normally have jurisdiction of a controversy between the parties."). *See also Allied-Bruce*, 513 U.S. at 291 (Thomas, J., dissenting) ("[T]he FAA treats arbitration simply as one means of resolving disputes that lie within the jurisdiction of the federal courts."). When a Section 4 petition is brought to compel arbitration of a dispute that arises under federal law, therefore, the petition likewise arises under federal law. *See* Ian R. Macneil, *American Arbitration Law* 219 n.4 (1992) ("[T]he jurisdictional provision of section 4 simply replicated jurisdiction the courts would have had in the absence of an arbitration agreement.").

Thus, Section 4 conceives of a petition to compel arbitration as an adjunct, jurisdictionally, to a dispute over which the federal courts would have jurisdiction. Section 4 petitions are routinely viewed in that manner when brought as so-called "embedded" petitions – *i.e.*, motions to compel filed after the other party has initiated litigation in federal court. Neither the text nor the history of Section 4 provides any basis for viewing an "independent" Section 4 petition differently. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 87-89 (2000) (rejecting distinction between "independent" and "embedded" for purposes of assessing appellate jurisdiction under the FAA). To the contrary, the statute makes federal jurisdiction over a petition dependent on whether there would be federal jurisdiction over the underlying dispute – not on whether the party resisting arbitration has actually presented the dispute to a federal court.

Petitioner argues that this Court's decisions in *Mesa v. California*, 489 U.S. 121 (1989), and *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994), conflict with the *Vaden* court's recognition that jurisdiction over a Section 4 petition derives from jurisdiction over the underlying dispute. *Mesa*, however, had nothing to do with derivative, or "look-through," jurisdiction, and *Kokkonen* is readily distinguishable. In *Kokkonen*, the Court held that a federal court does not have jurisdiction over a motion to enforce a settlement agreement by virtue of its jurisdiction over the settled lawsuit. *Kokkonen*, 511 U.S. at 381-82. But the Court's decision was grounded on the absence of a federal statute making jurisdiction over the dispute regarding the

settlement agreement depend on jurisdiction over the dispute that was settled. *See id.* at 381. In contrast to the situation in *Kokkonen*, Section 4 creates a federal remedy that is available as to disputes that would fall within the federal courts' jurisdiction.

An understanding of the derivative nature of federal question jurisdiction over Section 4 petitions also resolves any objection that such jurisdiction contravenes the well-pleaded complaint rule. The federal nature of a dispute to be arbitrated can be pleaded as easily as the citizenship of the parties or the amount in controversy. Where a well-pleaded Section 4 petition seeks to compel arbitration of a dispute involving a federal question, the basis of federal jurisdiction will be apparent from the petition itself.

III. Fidelity to the Plain Meaning of FAA Section 4 Furthers the Important Federal Policy Favoring Arbitration Agreements.

By directing federal courts to enforce arbitration agreements whenever the dispute to be arbitrated falls within the federal courts' jurisdiction, Section 4 gives full effect to the "liberal federal policy favoring arbitration agreements." *Moses H. Cone*, 460 U.S. at 24. That policy would be frustrated by an interpretation of Section 4 that often denies federal courts the ability to compel arbitration of federal question claims despite the existence of a valid agreement to arbitrate.

The situation in *Cintas* illustrates the correctness of the rule adopted by the Fourth Circuit in *Vaden*

(and by other courts in the cases in accord with it) and shows how a contrary rule would reward the forum-shopping tactics of parties who wish to avoid arbitration in accordance with a contractual place-of-arbitration term.

Each of the respondents to Cintas' petitions to compel arbitration first sued Cintas on FLSA claims in federal district court, invoking federal question jurisdiction. If they had sued Cintas in the district courts for the counties where they last worked for Cintas, Cintas could have responded by moving to compel arbitration in those cases. There would be no question as to the district courts' jurisdiction to consider Cintas' "embedded" motions. But the respondents chose for tactical reasons to seek a nationwide class proceeding against Cintas in the district court for the Northern District of California. That district court decided that it lacked the power to order arbitration outside the Northern District of California. Cintas was thus forced to file "independent" Section 4 petitions.

Under the Petitioner's view of Section 4, Cintas' petitions could not be adjudicated in the district courts that have the power to enforce the parties' arbitration agreements as written, because the *Cintas* respondents chose to sue in a district court that decided it lacks that power. The *Cintas* respondents would thereby succeed in their effort to avoid federal enforcement of the agreed-upon place-of-arbitration term. The *Vaden* rule avoids this arbitrary and unjust result by recognizing that federal jurisdiction over a Section 4 petition derives from federal jurisdiction over the underlying dispute – and does not depend on another party's choice of

forum, especially a choice acted on in violation of the agreement to arbitrate.

Similarly, the *Vaden* rule preserves federal courts' ability to enforce agreements to arbitrate federal claims when the party resisting arbitration chooses not to file a lawsuit at all. Consider, for example, a situation in which one party to a software license agreement with an arbitration clause believes that the other party is using its copyrighted software in violation of the Copyright Act, 17 U.S.C. §§ 101-1332. Such a situation arose in *1mage Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044 (10th Cir. 2006). If the party alleging infringement wanted to avail itself of arbitration, but the other party refused to arbitrate in accordance with the arbitration clause, the Petitioner's interpretation of Section 4 here would place the first party in an untenable position. Although federal question jurisdiction would exist over the underlying controversy, *1mage*, 459 F.3d at 1048-51, the aggrieved party would not be able to initiate a federal action to compel arbitration. Nor would the infringer be likely to seek a judicial audience, since it would prefer to continue its infringement with impunity. Thus, notwithstanding the clear intent of Section 4, the party claiming infringement would have no recourse to the federal courts to enforce an agreement to arbitrate federal claims. But if, as in *1mage*, the party accused of infringement invoked the arbitration clause, the federal courts could enforce the agreement. *See id.* at 1055-59. There is no rational basis for these differing results.

Cintas' current situation and the *1mage* scenario highlight the wisdom of the Fourth Circuit's decision in *Vaden*. Under *Vaden*, the doors of federal courts are not opened or shut depending on whether, or where, the party resisting arbitration chooses to sue the party wishing to arbitrate. Congress surely did not intend for federal jurisdiction over Section 4 petitions to be so manipulated by parties seeking to evade their arbitration agreements. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (considering whether a federal court may resolve a claim of fraud in the inducement of a contract containing an arbitration clause and holding that "it is inconceivable that Congress intended the rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court").

In short, the *Vaden* rule gives full effect to Congress' intent that the federal courts have authority to order the arbitration to which parties agreed as a means of resolving federal claims. A contrary rule would "mean[] that, for all practical purposes, a federal court could never hear a suit to compel arbitration unless the parties happen to be diverse." *Vaden*, 396 F.3d at 372-73. Moreover, even the competing approach to the issue, that taken in *Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263 (2d Cir. 1996), requires courts to make an assessment of the amount in controversy, a necessary element of diversity jurisdiction, thus requiring the court to look through to the parties' underlying dispute.

Section 4 reflects the importance Congress attached to *federal* enforcement of agreements to

arbitrate federal claims. Indeed, state-court enforcement is frequently not a viable alternative. This Court has not expressly held that Section 4 applies in state courts, *see, e.g., Moses H. Cone*, 460 U.S. at 26-27, and taking that as if it were a cue, some state courts have refused to apply Section 4. *See, e.g., St. Fleur v. WPI Cable Sys.*, 879 N.E.2d 27, 32-33 (Mass. 2008); *Cronus Investments, Inc. v. Concierge Servs.*, 107 P.3d 217, 224-26 (Cal. 2005).

Not all states have statutes analogous to Section 4; to the contrary, some have statutes making certain arbitration agreements unenforceable. *See, e.g.,* Ala. Code § 8-1-41 ("The following obligations cannot be specifically enforced: . . . An agreement to submit a controversy to arbitration"); N.Y. Gen. Bus. Law § 399-c ("No written contract for the sale or purchase of consumer goods, . . . to which a consumer is a party, shall contain a mandatory arbitration clause."). These states also have courts that are often reluctant to hold such statutes preempted by the FAA. *See, e.g., Keene v. Hayden*, 964 So. 2d 10, 11 (Ala. 2007) (reversing grant of motion to compel arbitration on grounds that movants offered no evidence that real estate contract involved interstate commerce); *Baronoff v. Kean Dev. Co.*, 818 N.Y.S.2d 421, 424-25 (N.Y. Sup. Ct. 2006) (holding that construction contract did not affect interstate commerce and thus was not subject to the FAA). *See also Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (reversing the Montana Supreme Court's decision, on remand from this Court, to persist in applying a Montana statute that disfavored arbitration agreements).

Even if a dispute unquestionably fell within the ambit of the FAA and the parties succeeded in overcoming state law restricting enforcement of arbitration agreements, they might well face a patchwork of differing enforcement mechanisms without the uniformity of Section 4. *See, e.g.,* Ala. Code § 6-6-1, *et seq*. (containing no expedited procedure to compel arbitration); N.H. Rev. Stat. Ann. § 542:1, *et seq*. (same). And even if a state had procedures that might appear to mirror Section 4, other procedures within the state's law may not be as welcoming to arbitration as other federal procedures. *See, e.g.*, Ohio Rev. Code Ann. § 2711.23 (medical claims arbitrations must involve three arbitrators and arbitration expenses must be divided equally between the parties); N.D. Cent. Code, § 32-29.3-04 (creating numerous unwaivable limitations on the conduct of an arbitration).

For reliable and consistent enforcement of arbitration agreements, many parties – especially those doing business nationwide – must turn to the federal courts. Congress did not discriminate, in Section 4's provision for prompt, uniform federal enforcement of arbitration agreements, between some disputes like the FLSA disputes in *Cintas* that meet the requirements of federal question jurisdiction and other disputes that meet the requirements of diversity jurisdiction.

CONCLUSION

For the reasons set forth above, this Court should affirm the Fourth Circuit's holding that a federal court has jurisdiction to hear a Section 4

petition to compel arbitration if it would have jurisdiction over a suit on the underlying dispute.

Respectfully submitted,

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