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 LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Imre S. Szalai is an Associate Professor of Law at California Western School of Law.[1] He focuses his scholarship on the Federal Arbitration Act ("FAA") and its legal framework supporting arbitration. His article, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319 (2007), focuses on the FAA jurisdictional issue raised in this case.

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Amici believe Petitioner's arguments conflict with the text of the FAA and with the historical record regarding the enactment of the FAA and state

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[1] *Amici* file this brief in their individual capacities, and not as representatives of the institutions with which they are affiliated. No counsel for either party authored the brief in whole or in part. No person or entity, other than California Western School of Law, which paid for the printing of this brief through Professor Szalai's research funds, made a monetary contribution to the preparation or submission of the brief. All parties have consented to the filing of this brief, and their consents have been filed with the Court.

arbitration statutes during the 1920s. Additionally, *amici* are concerned that the constricted view of the FAA urged by Petitioner threatens to dismantle the entire legal framework of the FAA, not just the important enforcement provision set forth in 9 U.S.C. § 4. This brief examines the historical background regarding the FAA and demonstrates why *amici*, as well as other FAA scholars, have found Petitioner's construction of the FAA to be seriously flawed.

SUMMARY OF ARGUMENT

When Congress enacted the FAA, Congress forcefully declared that arbitration agreements are "valid, irrevocable, and enforceable," 9 U.S.C. § 2, and Congress erected a legal framework to support arbitration. This legal framework provides that a federal court has jurisdiction to enforce an arbitration agreement if the court, "save for such agreement, would have jurisdiction under Title 28 . . . of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4 [hereinafter "save for" clause].

Two conflicting jurisdictional views of § 4 have emerged. The view urged by Petitioner threatens to dismantle the FAA's legal framework, which was intended to facilitate, not impede, arbitration. Under this constricted view, articulated by the Southern District of New York in *Drexel Burnham Lambert, Inc. v. Valenzuela Bock*, 696 F. Supp. 957 (S.D.N.Y. 1988),

and then by the Second Circuit in *Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263 (2d Cir. 1996), the term "controversy" in § 4 refers to the dispute regarding the breach of the arbitration agreement. *Discover Bank v. Vaden*, 396 F.3d 366, 370 (4th Cir. 2005) ("Those urging adoption of the [flawed] *Westmoreland* doctrine would interpret the phrase 'controversy between the parties' to encompass only the discrete dispute about whether there is a valid arbitration agreement."). Under this constricted approach, a federal court does not have subject matter jurisdiction over a § 4 petition to compel arbitration merely because the underlying claim to be arbitrated is subject to federal question jurisdiction. *Westmoreland*, 100 F.3d at 268.[2]

Under the broader interpretation, followed by the Fourth Circuit in this case, the term "controversy," as used not only in § 4 but also in other provisions of the FAA, refers to the underlying dispute to be arbitrated. *Discover Bank*, 396 F.3d at 370. Accordingly, a federal court has jurisdiction to enforce an arbitration agreement if the court has jurisdiction pursuant to Title 28 of the subject matter of a suit arising out of the underlying dispute to be arbitrated.[3]

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[2] This Brief refers to the constricted jurisdictional view as the "*Westmoreland* approach."

[3] This Brief refers to the broader jurisdictional view as the "*Discover Bank* approach."

The historical context of the enactment of the FAA and the plain language of the FAA both demonstrate that the *Discover Bank* approach is correct, and the *Westmoreland* approach is seriously flawed.

First, the *Westmoreland* approach treats the "save for" clause in the FAA as responding to the ouster problem, but the historical background regarding the FAA's enactment demonstrates this construction is incorrect. The FAA was patterned after state arbitration statutes that had been recently enacted in New York in 1920 and New Jersey in 1923, and all three statutes were drafted by the same reformers. The ouster problem existed in both federal courts and state courts prior to the enactment of the New York and New Jersey statutes. If the "save for" clause were a response to the ouster problem, as the *Westmoreland* approach suggests, these state arbitration statutes would contain a similar "save for" clause because the ouster problem existed in both state and federal courts. However, a similar "save for" clause does not exist in the state arbitration statutes drafted by the same reformers who drafted the FAA. Furthermore, there is evidence that the "save for" clause was purposefully included in § 4 to deal with a federal jurisdiction issue, not the ouster problem existing in both state and federal courts.

Second, Congress amended § 4 of the FAA in 1954 to include a broad reference to Title 28. The legislative history regarding the 1954 amendments explicitly cites the federal question jurisdiction statute, 28 U.S.C. § 1331, to illustrate a jurisdictional

basis for a petition to compel arbitration pursuant to § 4 of the FAA. Reading this legislative history together with the plain text of § 4, the FAA simply instructs federal courts to set aside the arbitration agreement and consider whether the court would have subject matter jurisdiction pursuant to Title 28, including both federal question and diversity jurisdiction, over the dispute to be arbitrated.

Third, Petitioner's overly restrictive view threatens to undermine the FAA by curtailing the opportunities for federal court enforcement of arbitration agreements. A federal forum for enforcing arbitration agreements is significant because of concerns regarding the enforcement of arbitration agreements in state courts.

Fourth, the jurisdictional issue presented in this case, although involving § 4, impacts the other provisions of the FAA, and the flawed *Westmoreland* approach urged by Petitioner threatens to undermine the entire legal framework of the FAA.

ARGUMENT

I. The Historical Background Of The Enactment Of The FAA And Other Arbitration Statutes Thoroughly Discredits *Westmoreland*'s Interpretation Of § 4 As A Response To The Ouster Problem

Section 4 provides that a federal court has jurisdiction to enforce an arbitration agreement if the

court, "save for such agreement, would have jurisdiction under Title 28 . . . of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4.[4] According to the *Westmoreland* approach advocated by Petitioner, the phrase "save for such agreement" was included to respond to the ouster problem. Brief of Petitioner at 26. However, as explained in more detail below, the historical background surrounding the enactment of the FAA and other arbitration statutes during the 1920s refutes the constricted *Westmoreland* view of § 4.

Immediately following the enactment of the FAA in 1925, one of the earliest commentaries regarding the FAA used the *Discover Bank* approach when discussing the jurisdiction of federal courts to compel arbitration. In January 1926, the editorial board of the Harvard Business Review, with assistance from a business law scholar, published an article examining the recently enacted FAA. *Legal Developments Significant in Business – The United States Arbitration Law*, 4 HARV. BUS. REV. 236 (1926). The article explained that the FAA "does not extend in any way the jurisdiction of the Federal Courts," and the article then summarized when a federal court has jurisdiction to

[4] Section 4, as originally enacted, referenced the judicial code instead of Title 28 and provided that an aggrieved party may petition "any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties." Act of Feb. 12, 1925, ch. 213, § 4, 43 Stat. 883.

enforce an arbitration agreement: (1) "The agreement to arbitrate must be made in writing prior to the ***dispute***, unless both parties agree to arbitration subsequent to the ***dispute***," and (2) "The ***dispute*** must be one that comes under the jurisdiction of the Federal Courts." *Id.* at 237 (emphases added). This early, firsthand commentary treated the underlying dispute to be arbitrated as the appropriate basis for jurisdiction to compel arbitration under the FAA.

This early commentary regarding the FAA is consistent with the plain meaning of § 4. The plain meaning of the phrase "save for" is "but for." 14 OXFORD ENGLISH DICTIONARY 528 (2d ed. 1989) (defining "save for" as "exception being made for, but for"). As used in the context of the FAA, the language "save for such agreement" in § 4 simply directs the court to set aside the arbitration agreement and examine whether it has subject matter jurisdiction of the underlying dispute to be arbitrated as if the agreement had never existed. *Discover Bank*, 396 F.3d at 370.

Over sixty years after the enactment of the FAA, the district court in the *Valenzuela Bock* case, and then the Second Circuit in *Westmoreland*, grossly misinterpreted the language "save for such agreement" in § 4. According to the *Westmoreland* approach advocated by Petitioner, § 4's "save for" language is a "response to the antiquated common law principle that an agreement to arbitrate would oust the federal courts of jurisdiction," *Westmoreland*, 100 F.3d at 268; Brief of Petitioner at 26; *see also Valenzuela Bock*, 696

F. Supp. at 962-63. Prior to the enactment of modern arbitration statutes like the FAA during the 1920s, courts generally refused to enforce arbitration agreements because such agreements "ousted" courts of jurisdiction. *Valenzuela Bock*, 696 F. Supp. at 962 (citations omitted) (the "ouster problem"). Under the *Westmoreland* approach advocated by Petitioner, the "save for such agreement" language "instruct[s] the court to 'set aside' not the arbitration agreement itself or the suit before it to specifically enforce that agreement, but merely the previous judicial hostility to arbitration agreements." *Community State Bank v. Strong*, 485 F.3d 597, 631 (11th Cir. 2007) (Marcus, J., specially concurring, joined by Jordan, J.).[5] According to Petitioner, the simple word "agreement" in § 4's phrase "save for such agreement" is somehow code language for the ancient ouster doctrine adopted from the English courts. Brief of Petitioner at 26.[6]

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[5] The Eleventh Circuit in *Community State Bank* subsequently granted a rehearing en banc, 508 F.3d 576 (11th Cir. 2007), and is now holding the case in abeyance pending a decision of the Court in this case.

[6] An earlier draft of the FAA from 1921 helps demonstrate that the term "agreement" was not intended to mean "the ancient ouster doctrine." The enforcement provision contained in this earlier draft stated that "a party aggrieved by the failure, neglect or refusal of another to perform under a contract providing for arbitration or a submission to arbitration may petition the District Court of the United States which, save for such contract or submission, would have jurisdiction . . . of the controversy between the parties. . . ." *Report of the Committee on Commerce, Trade and Commercial Law*, 46 A.B.A. REP. 309, 360

(Continued on following page)

Several FAA scholars have condemned *Westmoreland*'s textual and historical interpretation of § 4 as "utterly unfounded," "tortured," "historically inaccurate," "bizarre," and as creating significant "adverse effects" that would undermine the entire FAA.[7] The historical background of the enactment of the FAA and other contemporaneously enacted state arbitration statutes confirms that the "save for" language does not respond to the ouster problem, as the *Westmoreland* approach contends, and instead deals with an issue of federal jurisdiction. 1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL ARBITRATION LAW § 9.2.3.3 (1999). The "save for" clause is found only in the FAA and not in the New York or New Jersey state arbitration statutes upon which the FAA was based. However, the ouster problem existed in both federal and state courts. If the *Westmoreland* approach were correct in interpreting the "save for" clause as a response to the ouster problem, a similar "save for" clause would have existed in the contemporaneously enacted state

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(1921). The phrase "save for such contract or submission" in this earlier draft suggests that the term "agreement" in the FAA has a plain meaning referring to the agreement to arbitrate, not the ancient ouster doctrine adopted from the English courts as suggested by Petitioner.

[7] *See* 1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL ARBITRATION LAW § 9.2.3.3 (1999); Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319 (2007); Richard A. Bales & Jamie Ireland, *Federal Question Jurisdiction and the Federal Arbitration Act*, COLO. L. REV. (forthcoming 2008), *available at* http://ssrn.com/abstract=1112304.

arbitration statutes drafted by the same reformers who drafted the FAA. Finally, Congressional testimony confirms this historical analysis and demonstrates that the "save for" clause was purposefully added to the FAA to deal with an issue of federal jurisdiction, not the ouster problem that existed in both state and federal courts.

A. The FAA Contains A "Save For" Clause Not Included In The New York And New Jersey Arbitration Statutes, Despite All Three Statutes Being Drafted By The Same Reformers

An arbitration reform movement led by members of the New York Chamber of Commerce, the American Bar Association, the New York Bar Association, and others helped reverse the long-standing judicial reluctance to enforce arbitration agreements by proposing legislation in the 1920s before state legislatures and Congress to provide for the enforcement of such agreements. *See generally* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 25-47 (1992). The first modern arbitration statute providing for the enforcement of arbitration agreements was enacted in New York in 1920, and New Jersey enacted a similar statute in 1923. *Id.* at 34-35, 42. In 1925, Congress enacted the FAA, which was patterned after these two state statutes. 1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL

ARBITRATION LAW § 9.2.3.3 (1999).[8] All three of these modern arbitration statutes were drafted by the same reformers.[9]

The only significant difference between the enforcement provision of § 4 of the FAA and its counterpart in the New York and New Jersey statutes is

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[8] *See also 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 Hearings on S. 1005 and H.R. 646 Before the Subcomm. of the Comm. on the Judiciary*, 68th Cong. 40 (1924) [hereinafter 1924 Hearings] (FAA patterned after the "successful New York and New Jersey statutes").

[9] 1924 Hearings at 10 (New York attorney Julius Henry Cohen "has had charge of the actual drafting of the [FAA]"); *id.* at 19 (describing Cohen as the person upon whom the "burden fell of drafting the [FAA]"). Cohen helped draft the New York, New Jersey, and federal arbitration statutes. *A Bill Relating to Sales and Contracts to Sell in Interstate and Foreign Commerce and a Bill 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: Hearing on S. 4213 and 4214 Before the Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong. 8 (1923) ("Mr. Cohen . . . prepared and submitted to the New York Legislature a draft of the act which is now the New York law."); Gilbert H. Montague, *They Builded Better Than They Knew*, 46 MICH. L. REV. 1140, 1140-41 (1948) ("Mr. Cohen was one of the original group that drafted and procured the adoption of legislation for commercial arbitration by the Legislatures of New York and New Jersey and by Congress."); *see also* 1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL ARBITRATION LAW § 9.2.3.3 (1999) (recognizing that the same reformers drafted the FAA and the New York and New Jersey arbitration statutes).

the "save for" clause that exists in the federal statute, but not the state statutes. The New York arbitration statute originally stated in relevant part:

> Remedy in case of default.
>
> A party aggrieved by the failure, neglect or refusal of another to perform under a contract or submission providing for arbitration, described in section two hereof, may petition the supreme court, or a judge thereof, for an order directing that such arbitration proceed in the manner provided for in such contract or submission.

Act of Apr. 19, 1920, ch. 275, § 3, 1920 N.Y. Laws 803, 804.[10] Under the New York statute, an aggrieved party may petition the "supreme court, or a judge thereof," whereas the FAA, as originally enacted, provided that the aggrieved party may petition "any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties." Act of Feb. 12, 1925, ch. 213, § 4, 43 Stat. 883. The "save for" clause appearing in the

[10] Similarly, the New Jersey arbitration statute originally stated that a "party aggrieved by the failure, neglect or refusal of another to perform under an agreement in writing for arbitration may petition any justice of the Supreme Court or judge of a Circuit Court, holding court for the county where either party resides, for an order directing that such arbitration proceed in the manner provided for in such agreement." Act of Mar. 21, 1923, ch. 134, § 3, 1923 N.J. Laws 291.

FAA is noticeably absent from the New York and New Jersey arbitration statutes drafted by the same reformers.

B. The Ouster Problem Existed In Both Federal And State Courts

Prior to the enactment of the FAA and similar state arbitration statutes during the 1920s, both federal courts and state courts generally refused to enforce arbitration agreements because of the ouster problem. 1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL ARBITRATION LAW § 9.2.3.3 (1999) ("[T]he ouster problem was just as great under state law as it was under federal."); 1924 Hearings at 35 (describing the legal landscape prior to the enactment of the FAA in 1925 and explaining that "[t]his liberty [to disregard an arbitration agreement because courts refused to enforce them] still exists throughout the United States, except within the States of New York and New Jersey, which have laws making such agreements valid and enforceable [as of 1920 and 1923, respectively.]").

A Senate Report regarding the proposed bill that would become the FAA confirms that the ouster problem existed in both state and federal courts. The report explains:

> [I]t is very old law that the performance of a written agreement to arbitrate would not be enforced in equity. . . . Until recently in England, and up to the present time in nearly, if

> not quite all, the States of the Union, such has been the law in regard to arbitration agreements. . . .

S. REP. NO. 68-536 (1924). The Senate Report further explains that these "ancient rules of English law," which treated arbitration agreements as unenforceable because they ousted courts of jurisdiction, have been followed both "by our State ***and*** Federal Courts." *Id.* (emphasis added).

C. The "Save For" Clause In The FAA Cannot Be Explained By The Ouster Problem, Which Existed In Both Federal And State Courts

The *Westmoreland* approach advocated by Petitioner claims that § 4's "save for" clause responds to the ouster problem, and it is undeniable that the ouster problem existed in both federal and state courts, as discussed above.[11] However, the "save for" clause is found only in the FAA and not in the New York or New Jersey state arbitration statutes upon which the FAA was based.[12] If the *Westmoreland* approach were correct in its interpretation of the "save for" clause as responding to the ouster problem, a similar "save for" clause would have been included in the contemporaneously enacted state arbitration statutes drafted by the same reformers who drafted

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[11] *See supra* Section I.B.

[12] *See supra* Section I.A.

the FAA. 1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL ARBITRATION LAW § 9.2.3.3 (1999). The "save for" clause in the FAA is not an arbitration-related provision dealing with the ouster doctrine. Instead, the "save for" clause is one of the FAA's federal provisions dealing with jurisdiction. *Id.*[13]

The need for the more descriptive "save for" clause in the FAA likely arises from the difference between the general jurisdiction of state courts and the limited jurisdiction of federal courts. Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319, 338-39 (2007). If the "save for" clause had been deleted from § 4 of the FAA, § 4 would have been just like its counterparts in the New York and New Jersey statutes and would have provided that any party aggrieved by the failure of another to arbitrate pursuant to an arbitration agreement may petition any United States district court for an order directing the parties to arbitrate. *Id.* Without the "save for" clause, § 4 of the FAA would have dramatically expanded a federal court's jurisdiction to entertain any petition to enforce an arbitration agreement covered by the FAA. *Id.* Instead, § 4 was carefully drafted to ensure that jurisdiction over a petition to compel arbitration was

[13] *See also* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 86 (1992) (explaining that the FAA must be understood both "as a modern arbitration statute" and "as a peculiarly federal act," and the "save for" clause is one of the FAA's federal provisions).

coextensive with federal court jurisdiction over the underlying dispute to be arbitrated. *Id.*

The American Bar Association was involved in drafting the FAA, and at the same time, the American Bar Association was also involved in drafting a Uniform State Act on Arbitration. *See Report of the Committee on Commerce, Trade and Commercial Law*, 47 A.B.A. REP. 288, 289 (1922). The enforcement provisions of both the draft of the FAA and the draft of the Uniform State Act on Arbitration are essentially the same, except the draft of the FAA contains the "save for" clause while the draft of the Uniform State Act does not. *Id.* at 315, 319. Both of these drafts were created at roughly the same time by the same committee of the American Bar Association. *Id.* at 289. The inclusion of the "save for" clause in the draft of the FAA, but not in the contemporaneous draft of the Uniform State Act, helps confirm that the "save for" clause deals with a federal issue, not the ouster problem faced by both state and federal courts.

Properly construed within its historical context, § 4 of the FAA provides that a federal court has jurisdiction to enforce an arbitration agreement whenever the court, putting aside the arbitration agreement, would have jurisdiction over the underlying controversy between the parties, to the fullest extent permitted by Title 28. *Cf.* 1924 Hearings at 34 ("The 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.").

D. Congressional Testimony Demonstrates The "Save For" Clause In The FAA Is A Federal Provision, Not A Response To The Ouster Problem

The FAA's legislative history contains testimony from Julius Henry Cohen, a prominent New York City attorney who helped draft the FAA and the New York and New Jersey arbitration statutes.[14] His testimony confirms the historical analysis of the "save for" clause as a federal provision instead of a response to the ouster problem.

Cohen explained to Congress that he patterned the FAA on "the successful New York and New Jersey statutes with ***only*** such changes as seem necessary for the Federal statute." 1924 Hearings at 40 (emphasis added). This testimony confirms that the "save for" clause, which is the only significant difference between the enforcement provision of the federal statute and the New York and New Jersey counterparts, deals with an issue of federal jurisdiction, not the ouster problem faced by both state and federal courts. 1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL ARBITRATION LAW § 9.2.3.3 (1999) ("The 'save for' clause was not one of the FAA's arbitration provisions, . . . but one of its federal provisions, dealing with a problem of federal jurisdiction."); Richard A. Bales & Jamie Ireland, *Federal Question Jurisdiction and the Federal Arbitration Act*, COLO. L. REV.

[14] *See supra* note 9.

(forthcoming 2008) ("if the 'save for' clause were intended to solve the ouster problem, the clause would have been included in other statutes enacted around the same time as the FAA"), *available at* http://ssrn.com/abstract=1112304. As explained above, the inclusion of the more descriptive "save for" clause in the FAA arises from the difference between the general jurisdiction of state courts, like New York and New Jersey courts, and the limited jurisdiction of federal courts.

E. The "Save For" Clause In The FAA Cannot Be Explained By The Division Between Law And Equity

Petitioner claims the simple phrase "save for such agreement" is an instruction for federal courts to set aside the ancient ouster doctrine adopted from England. Brief of Petitioner at 26. In an attempt to bolster this historically and textually flawed argument, Petitioner now claims that the "save for" clause in the FAA represented a Congressional attempt to eliminate confusion in federal courts arising from the division between law and equity. *Id.* at 24. Petitioner, focusing solely on New York, explains that "[u]nlike New York state courts, federal courts remained divided between law and equity" at the time of the FAA's enactment. *Id.* Petitioner then speculates that as a direct result of this division between law and equity in the federal system, federal courts facing a petition to compel arbitration following the enactment of the FAA somehow may become confused and

"might still perceive themselves as ousted of equitable jurisdiction." *Id.* According to Petitioner's strained argument, the "save for" clause therefore had to be added to the federal statute, but not the New York statute, to serve as an extra reminder to federal courts that they had to set aside the ancient ouster doctrine, and this aide memoire would somehow erase confusion arising from the division between law and equity in federal courts. *Id.* at 24-26.

Petitioner's argument that the "save for" clause was included in the FAA to deal with the old division between law and equity is unfounded for several reasons. *First*, Petitioner's argument focuses exclusively on New York and ignores the fact that the FAA was patterned after both "the New York ***and*** New Jersey statutes." 1924 Hearings at 40 (emphasis added). Petitioner claims that "[u]nlike New York state courts, federal courts remained divided between law and equity" at the time of the FAA's enactment, and because the merger of law and equity did not occur in the federal system until 1938, the "save for" clause therefore had to be added to the federal statute, but not the New York statute. Brief of Petitioner at 24-26. However, Petitioner's argument ignores the 1923 New Jersey arbitration statute and the important fact that the merger between law and equity did not occur in New Jersey until 1947, more than twenty years after the adoption of the New Jersey arbitration

statute.[15] Under Petitioner's strained theory that the "save for" clause was necessary to eliminate confusion arising from the division between law and equity, the New Jersey courts would have been confused for more than two decades regarding whether they could enforce arbitration agreements, and like the federal courts, New Jersey courts would have needed an extra instruction to set aside the ouster doctrine. If the "save for" clause were truly meant to deal with the division between law and equity, as Petitioner now claims, New Jersey's contemporaneous arbitration statute, which was drafted by the same reformers as the federal statute,[16] would have contained the same "save for" clause as the federal statute. However, a "save for" clause exists only in the federal statute, and not in the 1923 New Jersey statute.[17] Therefore, the "save for" clause in the FAA was not intended to deal with the division between law and equity as Petitioner now claims.

Second, Petitioner's argument attributing the "save for" clause to the division between law and equity ignores the FAA's legislative history and the express testimony of Julius Henry Cohen. As already

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[15] *See* Alan V. Lowenstein, *The Legacy of Arthur T. Vanderbilt to the New Jersey Bar*, 51 RUTGERS L. REV. 1319, 1331-32 (1999) (explaining that the merger of law and equity did not occur in New Jersey until the adoption of the New Jersey Constitution of 1947).

[16] *See supra* note 9.

[17] *See supra* note 10.

explained above, Cohen testified that he directly patterned the FAA after "the successful New York and New Jersey statutes with ***only*** such changes as seem necessary for the Federal statute." 1924 Hearings at 40 (emphasis added). Therefore, the "save for" clause was intentionally included in § 4 to deal with an issue that existed in federal courts, but not in New York or New Jersey. *See also* 1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL ARBITRATION LAW § 9.2.3.3 (1999) ("The 'save for' clause was not one of the FAA's arbitration provisions, . . . but one of its federal provisions, dealing with a problem of federal jurisdiction."). This Congressional testimony refutes Petitioner's explanation of the "save for" clause and confirms that the "save for" clause did not deal with the division between law and equity, which also existed in New Jersey at the time these modern arbitration statutes were adopted.

Third, Petitioner's argument attributing the "save for" clause to the division between law and equity ignores that in 1954, Congress actually deleted obsolete phrases in the FAA dealing with the old division between law and equity. S. REP. NO. 83-2498, at 8-9 (1954), *as reprinted in* 1954 U.S.C.C.A.N. 3991, 3998-99. If the "save for" clause were designed to deal with the division between law and equity, as Petitioner claims, Congress would have deleted the language "save for such agreement" as surplus when it amended the FAA in 1954.

In sum, the historical background regarding the FAA's enactment discredits as "utterly unfounded," "tortured," and "bizarre" the *Westmoreland*

interpretation of § 4 as a response to the ouster problem. 1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL ARBITRATION LAW § 9.2.3.3 (1999). Properly considered within its historical context, § 4's "save for" clause is not a response to the ouster problem or the division between law and equity, as Petitioner claims. Instead, the "save for" clause is one of the FAA's federal provisions. The plain language of § 4 simply instructs federal courts to set aside the arbitration agreement and consider whether the court would have subject matter jurisdiction pursuant to Title 28 over the dispute to be arbitrated.

II. The Legislative History Of Amendments To The FAA Demonstrates The *Discover Bank* Approach Is Correct

The current version of § 4 of the FAA contains a sweeping reference to Title 28 as a basis for jurisdiction to enforce an arbitration agreement. Section 4 provides that a federal court has jurisdiction to enforce an arbitration agreement if the court, "save for such agreement, would have [subject matter] jurisdiction under Title 28 . . . [over] a suit arising out of the controversy between the parties." 9 U.S.C. § 4. Title 28, of course, includes the federal question jurisdiction statute, 28 U.S.C. § 1331, as well as the diversity jurisdiction statute, 28 U.S.C. § 1332. Title 28 did not exist when Congress enacted the FAA in 1925, and instead of referencing Title 28, the original version of § 4 provided for enforcement of an arbitration agreement in federal court if the federal court

has "jurisdiction under the judicial code . . . of the subject matter of a suit arising out of the controversy between the parties." Act of Feb. 12, 1925, ch. 213, § 4, 43 Stat. 883. The Judicial Code set forth the original jurisdiction of the federal courts, and when the FAA was enacted in 1925, the Judicial Code included federal question jurisdiction as well as diversity jurisdiction. Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319, 347-53 (2007).

In 1948, Congress repealed the old Judicial Code and replaced it with Title 28. Act of June 25, 1948, ch. 646, 62 Stat. 869. Congress therefore had to correct the obsolete reference to the old Judicial Code in the jurisdictional language of § 4 of the FAA. In 1954, Congress amended § 4 of the FAA and several other statutes "which at present refer to laws that have been repealed or are obsolete and have been superseded by later laws." S. REP. NO. 83-2498, at 8 (1954), *as reprinted in* 1954 U.S.C.C.A.N. 3991.

When Congress amended the jurisdictional language of § 4 of the FAA in 1954, Congress explicitly cited the federal question jurisdiction statute in the legislative history to illustrate its intent regarding the newly amended jurisdictional language of § 4:

> Also in the first sentence [of § 4 of the FAA], "Title 28, in a civil action" was substituted for "the judicial code at law, in equity." The judicial code (of 1911) was repealed in 1948 when Title 28 of the United States Code, entitled "Judiciary and Judicial Procedure,"

> was enacted into law. That title sets out the general jurisdiction of district courts in civil and admiralty matters. ***See section 1331*** et seq., thereof.

Id. (emphasis added). Thus, the legislative history of the amendments to the jurisdictional language of § 4 expressly sets forth the federal question jurisdiction statute, 28 U.S.C. § 1331, as an example of a statute intended to be covered by the broad reference to Title 28 in § 4 of the FAA.

Reading this legislative history together with the plain language of § 4, the FAA simply instructs federal courts to set aside the arbitration agreement and consider whether the court would have subject matter jurisdiction pursuant to Title 28, including both federal question and diversity jurisdiction, over the dispute to be arbitrated.

III. The Constricted *Westmoreland* Approach Threatens To Undermine The FAA And The Enforcement Of Arbitration Agreements

Through the FAA, the federal judiciary plays a substantial role in facilitating arbitration throughout the United States. When Congress enacted the FAA in 1925, Congress erected a legal framework to support arbitration, and the constricted *Westmoreland* approach advocated by Petitioner threatens to minimize the proper role of the federal courts under this legal framework. The jurisdictional issue on appeal is significant because the *Westmoreland* approach

undermines the ability of parties to enforce arbitration agreements in federal court, which is a core purpose of the FAA, and as explained below, there are concerns with respect to enforcing arbitration agreements in state courts. In addition, FAA scholars have recognized that not only is the *Westmoreland* approach historically flawed and contrary to the express language of § 4, but also the *Westmoreland* approach urged by Petitioner threatens to dismantle the entire legal framework of the FAA, not just the enforcement provision of § 4.

A. The *Westmoreland* Approach Undermines The Ability To Enforce Arbitration Agreements In Federal Court

The FAA is considered landmark legislation for reversing a long-standing judicial reluctance to enforce arbitration agreements. Prior to the enactment of the FAA and similar state statutes during the 1920s, courts generally would not specifically enforce arbitration agreements. Arbitration agreements were revocable at any time before the issuance of an arbitrator's award, and as a result, arbitration agreements were considered "in large part ineffectual" prior to the 1920s. S. REP. NO. 68-536, at 2 (1924). Congressional testimony regarding the proposed bills that would become the FAA expressed frustration with the inability to enforce arbitration agreements. The legislative history recognizes that even when an arbitration proceeding had already commenced, a party "can go in and watch the expression on the face

of [the] arbitrator," and if the party had a "hunch" that the arbitrator would issue an adverse ruling, the party could simply withdraw and say "I do not believe in arbitration any more." 1924 Hearings at 14. Parties could "back out at the last moment when they see the case is going against them." *Id.* at 7.

Section 2 of the FAA, which has been described as the FAA's "centerpiece," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985), reversed this long-standing judicial refusal to enforce arbitration agreements and forcefully proclaimed that arbitration agreements are "valid, irrevocable, and enforceable." 9 U.S.C. § 2. A House Report described the FAA in a nutshell as "declar[ing] simply that such agreements for arbitration shall be enforced, and provid[ing] a procedure in the Federal courts for their enforcement." H.R. REP. NO. 68-96 (1924). The jurisdictional issue on appeal threatens to undermine the FAA by curtailing the opportunities for federal court enforcement of arbitration agreements.

The *Westmoreland* approach may be tantalizing to some opponents of arbitration because the *Westmoreland* approach limits the ability to enforce arbitration agreements in federal courts,[18] and the consequences of denying a federal forum for the

[18] Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319, 323 n.15, 324 (2007).

enforcement of arbitration agreements can be significant. It has been observed that "state courts are more likely to refuse to enforce arbitration agreements than are federal courts," and "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).

Commentators have observed that some state courts are applying an overly narrow view of commerce in order to avoid the application of the FAA. Kirsten Brown, *State Court Attempts To Limit The Applicability Of The Federal Arbitration Act In A Post-Lopez World*, 56 U. MIAMI L. REV. 1051 (2002). In addition, § 2 of the FAA allows for generally applicable state-law contract defenses to invalidate an arbitration agreement, and commentators have found that state courts are avoiding the enforcement of arbitration agreements by misapplying state-law contract defenses. 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); Shirley A. Wiegand, *Arbitration Clauses: The Good, The Bad, The Ugly*, 47 OKLA. L. REV. 619, 640 (1994) ("Recent cases reveal continued hostility to the arbitration trend, particularly by some state courts. . . ."); Sandra F. Gavin, *Unconscionability Found: A Look At Pre-Dispute Mandatory Arbitration Agreements 10 Years After Doctor's Associates, Inc. v. Casarotto*, 54 CLEV. ST. L. REV. 249, 270 (2006)

(recognizing a "backlash taking place in state courts today" toward the arbitration process); *cf. Preston v. Ferrer*, 128 S. Ct. 978 (2008) (reversing California Court of Appeal's decision applying state law that delays arbitration until administrative proceedings are completed); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) (reversing Montana Supreme Court's decision to apply Montana law disfavoring arbitration agreements). In light of such concerns regarding enforcing arbitration agreements in state courts, the availability of a federal forum is significant, and when Congress enacted the FAA, Congress specifically declared that a federal court would be available for enforcement of arbitration agreements to the fullest extent of the court's jurisdiction over the dispute to be arbitrated. 1924 Hearings at 34 ("The 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.") (emphasis added).

B. The *Westmoreland* Approach Threatens To Undermine The Entire Legal Framework Of The FAA, Not Just The Important Enforcement Provision Of § 4

This case involves the construction of statutory language found in § 4 of the FAA, which provides for the enforcement of arbitration agreements. However, this case has broader significance because this case could influence the way jurisdiction is considered with respect to the FAA in its entirety.

The FAA is a unitary statute. While § 2 of the FAA declares arbitration agreements to be enforceable, §§ 3 and 4 of the FAA are the core sections providing for judicial action and implementing the main principle found in §2, and the remainder of the FAA's provisions help facilitate arbitration. 1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL ARBITRATION LAW § 9.2.3.3 (1999). Out of the two core sections of the FAA providing for judicial action, §§ 3 and 4, a jurisdictional principle emanates that independent jurisdiction is necessary for a federal court to enforce any other FAA section, such as §§ 7, 8, 9, and 10. *Id.* Under any provision of the FAA, a party must establish that, if there were no arbitration agreement, the court would have subject matter jurisdiction over the underlying dispute to be arbitrated. *Id.* As explained by leading FAA scholars, such a unified theory of jurisdiction is desirable:

> [This unified theory of jurisdiction regarding the FAA] fully complies with the requirement of *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* (U.S. 1983) and *Southland Corp. v. Keating* (U.S. 1984) that the FAA does not create federal jurisdiction. It does so without tortured, ahistorical reading of FAA § 4, with proper respect for genuine history, and without creating the adverse effects of [the flawed *Westmoreland* approach].

1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL ARBITRATION LAW § 9.2.3.3 (1999).

One of the several adverse effects of the *Westmoreland* approach is that its "tortured, ahistorical reading" of § 4 threatens the operation of the entire FAA, not just § 4. *Id.* A simple petition to compel arbitration is often the "trigger for bringing into operation all the rest of the FAA, including general federal arbitration law." *Id.* If a party were denied the opportunity to have a federal court hear a petition to compel arbitration, the party would also be denied all rights to have federal courts decide numerous complex issues under the FAA. *Id.* In sum, the constricted *Westmoreland* approach advocated by Petitioner threatens to undermine the entire FAA and its policy favoring arbitration. *Id. See also* Richard A. Bales & Jamie Ireland, *Federal Question Jurisdiction and the Federal Arbitration Act*, COLO. L. REV. (forthcoming 2008) ("the [*Discover Bank*] approach is most consistent with the liberal policy favoring arbitration"), *available at* http://ssrn.com/abstract=1112304.

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CONCLUSION

Amici respectfully request the Court to affirm the Fourth Circuit's decision below finding that jurisdiction in connection with § 4 of the FAA should be based on the underlying dispute to be arbitrated.

Respectfully submitted,

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