

No. _____

In The
Supreme Court of the United States

ANGELA D. CLACK

Petitioner,

v.

**UNITED SERVICES AUTOMOBILE
ASSOCIATION (USAA)**

Respondent,

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

Angela D. Clack
1222 Knights Cross Drive
San Antonio, Texas 78258
jat3c@att.net
(210) 347-5122

Pro Se Petitioner

QUESTION PRESENTED

In its brief opinion, the Fifth Circuit acknowledged that the court “has no jurisdiction to decide future claims before the Equal Employment Opportunity Commission” and further stated “and Plaintiff has agreed to arbitrate her claims” The appeals court seems to rely on the mere existence of a valid agreement to arbitrate as the rationale for affirming the lower court’s order granting USAA’s motion to compel arbitration and dismissing with prejudice Clack’s Title VII claims including those claims arising from the same nucleus of operative facts, but still pending administrative exhaustion with the EEOC.

The appeals court turned a blind eye, as the lower court did, to Clack’s raised disputed issues of material fact, her unambiguous assertion of no failure, neglect or refusal to arbitrate and her repeated requests to proceed summarily to a trial pursuant to 9 U.S.C. § 4. In affirming the lower court’s exercise of jurisdiction, the Fifth Circuit completely ignored, as the lower court did, the statutory requirement of a trial under 9 U.S.C. § 4 as a prerequisite to the district court’s exercise of jurisdiction to compel. And the Fifth Circuit declined to address whether USAA even had standing to bring its motion to compel given USAA’s failure to show it had suffered any harm and failure to show that Clack’s activity amounted to a failure, neglect or refusal to arbitrate her Title VII claims that were still pending administrative exhaustion.

This case thus raises important jurisdictional issues critical in maintaining the nation's confidence in the disposition of matters before federal courts where the parties have a valid arbitration agreement. Thus, the specific question presented is:

Whether a federal court can exercise jurisdiction to compel arbitration based solely on the existence of an arbitration agreement, without a finding of a failure, neglect or refusal to arbitrate and without conducting the statutory trial under 9 U.S.C. § 4, when the party opposing the motion to compel arbitration has made a request for trial and has made an unequivocal denial of any failure, neglect or refusal to arbitrate.

PARTIES TO PROCEEDING

Petitioner Angela D. Clack was the plaintiff in the district court and the appellant in the court of appeals.

Respondent United Services Automobile Association., was the defendant in the district court and the appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

None of the petitioners is a nongovernmental corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company.

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FAILURE, NEGLECT, OR REFUSAL TO PERFORM HAS BEEN PLACED IN ISSUE. THE CONFLICTING JUDGMENT AND THE INCORRECT APPLICATION OF 9 U.S.C. § 4 OF THE FAA STAND TO UNDERMINE THE PUBLIC'S CONFIDENCE IN ENTERING INTO ARBITRATION AGREEMENTS.

- A. This Court Should Grant Certiorari because this circuit's decision cannot be reconciled with this Court's precedent regarding a federal court's jurisdiction to compel arbitration.
- B. This Court Should Grant Certiorari to prevent further misuse of the Federal Arbitration Act to gain a federal court's assistance on motions to compel arbitration where there is no dispute regarding the making of an arbitration agreement or any failure, neglect or refusal to perform under the agreement.
- C. This Court Should Grant Certiorari to correct the Fifth Circuit's departure from the "due process" proceeding mandated in 9 U.S.C. § 4.

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OPINIONS BELOW

The opinion of the Court of Appeals is unpublished and is found at Appendix, App. 1. The order of the United States District Court for the Western District of Texas compelling arbitration and dismissing with prejudice at Appendix, App. 3.

STATEMENT OF JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Fifth Circuit entered on March 26, 2018. See App. 1. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves two provisions of the Federal Arbitration Act (the FAA). First, § 2 provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2.

Second, § 4 provides:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, 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, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the

issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof. *9 U.S.C. § 4.*

STATEMENT OF THE CASE

Due to EEOC administrative processing of Clack's Title VII claims, she received the right to sue on some of her claims while other claims, which arose from the same nucleus of operative facts, remained pending administrative exhaustion with the EEOC. With the understanding that she had a valid arbitration agreement, Clack filed a petition within the district court, requesting a stay pending administrative exhaustion of her additional Title VII claims, for the sole purpose of shielding her Title VII claims, that were still pending with the EEOC, from preclusion by the doctrine of a res judicata. She did so in accordance with *42 U.S.C. § 2000e* and the Fifth Circuit's mandate to Title VII plaintiff's in *Davis v. Dallas Area Rapid Transit*, *383 F.3d 309* (5th Cir. 2004)

It is important to note that the contract between the parties allows for either party to file within a court of competent jurisdiction to protect and preserve rights.

Without being served, USAA filed a motion to compel arbitration and dismiss arguing that the parties had a valid arbitration agreement. Within its motion, USAA argued that Clack had breached the agreement in that the underlying Title VII claims, which USAA was aware were still pending before the EEOC, were subject to arbitration.

In her response Clack unambiguously denied any failure, neglect or refusal to arbitrate citing the specific provisions within the parties' contract on which she relied in filing her petition along with the specific Fifth Circuit precedent which she believed applied to the fact situation of her case which mandated that she act to preserve her rights for a subsequent arbitration.

USAA replied indicating that Clack could seek "her stay" in arbitration.

Subsequent filings by Clack requested a trial pursuant to 9 U.S.C. § 4 of the FAA on the raised disputed issues based on no failure, neglect or refusal to arbitrate.

Multiple other filings by Clack introduced evidence, affidavits, declarations and additional requests for trial, and evidentiary hearings on the raised disputed issues.

Prior to the Court's judgement and order, Clack raised justiciability issues of *ripeness* related to her claims still pending with the EEOC and USAA's *standing* to file a motion to compel given the parties contractual agreement and USAA's failure to demonstrate any harm related to Clack's district court filing.

Despite the statutory requirement under *9 U.S.C. § 4* of the FAA that the party seeking to compel be aggrieved, and the requirement to proceed summarily to a trial on the raised disputed issue of no failure, neglect or refusal to arbitrate to establish jurisdiction to compel, the district court, without a trial and with knowledge that the entire actual controversy between the parties was not yet ripe for adjudication, and without establishing that USAA had suffered any harm, and without examination of the contractual agreement between the parties, nevertheless compelled arbitration and dismissed with prejudice.

In its opinion, the Fifth Circuit acknowledged the Court's lack of jurisdiction over Clack's claims still pending before the EEOC, but nevertheless affirmed the district court's order acting without jurisdiction in compelling arbitration and dismissing with prejudice.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT REVIEW OF THE COURT OF APPEALS' DECISION BECAUSE THE DECISION IS INCONSISTENT WITH SUPREME COURT PRECEDENT AND THE FIFTH CIRCUIT'S OWN PRECEDENT REGARDING JURISDICTION TO RULE ON MOTIONS TO COMPEL ARBITRATION. THE RULING ALSO CREATES UNCERTAINTY REGARDING THE MANNER IN WHICH FEDERAL COURTS WILL ENFORCE ARBITRATION AGREEMENTS WHEN THE MAKING OF THE AGREEMENT, OR THE FAILURE, NEGLECT, OR REFUSAL TO PERFORM HAS BEEN PLACED IN ISSUE. THE CONFLICTING JUDGMENT AND THE MISAPPLICATION OF 9 U.S.C. § 4 OF THE FAA STAND TO UNDERMINE THE PUBLIC'S CONFIDENCE IN ENTERING INTO ARBITRATION AGREEMENTS.

- A. This Court Should Grant Certiorari because this circuit's decision cannot be reconciled with this Court's precedent regarding a federal court's jurisdiction to compel arbitration.**

There is no dispute in this case that Clack, and USAA had entered into a valid, enforceable arbitration agreement. There is also no dispute that Clack's Title VII claims are subject to arbitration. Remarkably, there is also no

dispute that, at the time that USAA filed its motion to compel arbitration and at the time that the district court granted USAA's motion to compel arbitration, Clack still had Title VII claims, which arose from the same nucleus of operative facts, pending before the EEOC so that the entire actual controversy between the parties, as they had framed it, was not ripe for adjudication and USAA, with direct knowledge of Clack's claims still pending before the EEOC, did not have the proper standing for a claim of aggrievement under 9 U.S.C. § 4, having suffered no harm, and thus USAA lacked standing to seek the court's assistance in compelling arbitration.

As this Court declared in *Vaden v. Discover Bank*, 556 U.S. 49 (2009) a party seeking to compel arbitration may gain a federal court's assistance only if, save for the agreement, the entire, actual 'controversy between the parties,' as they have framed it, could be litigated in federal court. Indeed, the Fifth Circuit in *Lower Colorado River Auth. v. Papalote Creek II*, L.L.C., 858 F.3d 916, 922 (5th Cir. 2017) held that "ripeness is a constitutional prerequisite to the exercise of jurisdiction."

Courts have a special obligation to satisfy themselves of the lower court's jurisdiction. See *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000) (alteration in original) quoting *Steel Co. v. Citizens for a Better Env't*,

523 U.S. 83, 95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). "The "core component" of the requirement that a litigant have standing to invoke the authority of a federal court "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560 (1992).

The Fifth Circuit's decision in this case conflicts with relevant and significant precedent of this Court regarding jurisdiction. It is the duty of the lower courts to be unwavering and consistent in the application of precedent rooted in *U.S. Const. art. III* case and controversy language tied to the federal courts' exercise of jurisdiction.

B. This Court Should Grant Certiorari to prevent further misuse of the Federal Arbitration Act to gain a federal court's assistance on motions to compel arbitration where there is no dispute regarding the making of an arbitration agreement or any failure, neglect or refusal to perform under the agreement.

USAA, in its motion to compel, did not properly allege a failure, neglect or refusal to arbitrate because they could not. They filed their motion to compel knowing full well that Clack's claims were still pending administrative exhaustion and that they (USAA) were in the midst of the

EEOC's investigation of those claims. USAA filed its motion to compel to complain of Clack's presence within the district court which USAA knew was necessary to preserve Clack's pending Title VII claims from a res judicata bar and which was allowed under the provisions of the contract between the parties. The district court never determined that Clack failed, neglected or refused to arbitrate because the court could not. Instead, the district court merely acknowledged the existence of an arbitration agreement and improperly granted USAA's motion to compel.

In this case, the Fifth Circuit didn't address Clack's argument regarding whether the district court erred in compelling arbitration, without a trial, after Clack placed the failure, neglect or refusal to arbitrate in issue.

Further, the appeals court ignored their own precedent which was the basis for Clack's district court filing. "The doctrine of res judicata, or claim preclusion, forecloses relitigation of claims that were or could have been raised in a prior action." *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 312-13 (5th Cir. 2004) In *Davis*, the Fifth Circuit put Title VII claimants on notice that they must take steps to avoid preclusion of their claims by the doctrine of res judicata. Clack, believing that she was subject to the court's mandate, took the steps outlined by the Fifth Circuit in crafting a

well-plead petition with the proper notification statements and a request for a stay pending administrative exhaustion. In the appeals court's affirming the district court's grant of the motion to compel, the Fifth Circuit did not acknowledge their own precedent and Clack's efforts to prevent preclusion of her claims. It is worth noting that on multiple occasions, the appeals court has moved to bar by the doctrine of res judicata the Title VII claims of claimants with fact situations like Clacks citing *Davis* as the instruction these unfortunate claimants should have followed. See: *Murry v. General Services Administration*, (5th Cir. Jan. 2, 2014), *Thomas v. City of Houston*, (5th Cir. July 22, 2015), *Carrington v. Maye*, (5th Cir. Jan. 5, 2018). The appeals court's reliance upon *Davis* to bar Title VII claims by the doctrine of a res judicata while at the same time ignoring *Davis* when Clack properly complies with its mandates to preserve her claims is fundamentally unfair and represents a contradiction of the appeals court's own precedent and is a misuse of judicial authority that begs this Court's attention and correction.

This case provides the Court an ideal opportunity to correct the appeals court activity that is not aligned with its own precedent and will allow this Court to stop the misuse of the FAA and ensure adherence to the statutory requirements of the FAA, specifically 9 U.S.C. § 4.

C. This Court Should Grant Certiorari to correct the Fifth Circuit's departure from the “due process” proceeding mandated in 9 U.S.C. § 4.

Concerning issues related to the making of or failure, neglect or refusal to perform under an arbitration agreement, 9 U.S.C. § 4 of the FAA reads in pertinent part, “the court *shall* make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure.” Arbitration agreements are entered into by lay people who rely upon the federal courts to properly interpret the arbitration contracts and resolve disputes according to the instructions outlined in the Federal Arbitration Act. When the courts, as in this case, depart from the strict, unambiguous and plain meaning of “shall” within the proceedings outlined in § 4 of the FAA upon which parties to arbitration agreements rely, the public trust in the judicial process is damaged. As a matter of public interest, this Court must exercise its supervisory authority to correct such abuses of discretion which amount to more than a simple misinterpretation of § 4. These departures a statutory requirement represent a denial of a party’s due process right to notice and the opportunity to be heard.

This Court has expressed that “the essential requirements of due process . . . are notice and

an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985) Due process requires that interested parties be given notice of the hearing and an opportunity to be heard prior to the court rendering a decision. *Dusenberry v. United States* 534 U.S. 161, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002). If the public is to have confidence in arbitration agreements, this Court must ensure that federal courts abide by the FAA's provisions.

Those of us who enter into arbitration agreements do so because arbitration has been represented as an equivalent judicial forum for dispute resolution. We enter into these agreements with the expectation that the federal courts will, as the FAA provisions mandate, resolve "making" and "performing" disputes according to the procedure outlined in § 4. Without this Court's assurance that federal court oversight will be rendered as intended, arbitration is nothing more than a means for a sophisticated drafter of the arbitration agreement, in this case a Fortune 500 company, to exploit the other party without consequence.

CONCLUSION

For the foregoing reasons, Clack respectfully requests that the Court grant the petition.

Respectfully submitted,



Angela D. Clack
1222 Knights Cross Drive
San Antonio, Texas 78258
jat3c@att.net
(210) 347-5122

Pro Se petitioner

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