No. 20-1143

In The
Supreme Court of the United States

DENISE A. BADGEROW,

Petitioner,

v.

GREG WALTERS, ET AL.,

Respondents.

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

BRIEF OF ARBITRATION SCHOLAR IMRE STEPHEN SZALAI AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

IMRE STEPHEN SZALAI
Judge John D. Wessel Distinguished
Professor of Social Justice
Counsel of Record
LOYOLA UNIVERSITY
NEW ORLEANS COLLEGE OF LAW
7214 St. Charles Avenue, Box 901
New Orleans, LA 70118
(504) 861-5589
iszalai@loyno.edu

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Imre Stephen Szalai is the Judge John D. Wessel Distinguished Professor of Social Justice at Loyola University New Orleans College of Law, and Professor Szalai is also a senior fellow at the University of Missouri School of Law's Center for the Study of Dispute Resolution, where he teaches in Missouri's top-ranked program in dispute resolution. He graduated from Yale University, double majoring in Economics and Classical Civilizations, and he received his law degree from Columbia University, where he was named a Harlan Fiske Stone Scholar.

Professor Szalai is a leading scholar in the field of arbitration law, and he actively serves as a commercial arbitrator. He is the author of two books about the development and enactment of the Federal Arbitration Act (FAA): *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* (2013), which sets forth a comprehensive history, based on previously untapped archival materials, regarding the enactment of the FAA and similar state arbitration statutes during the 1920s; and *An Annotated Legislative Record of the Federal Arbitration Act* (2020), which sets forth the full legislative history of the FAA, with detailed

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[1] *Amicus curiae* files this brief in his individual capacity, not as a representative of the institutions with which he is affiliated, and no counsel for a party authored this brief in whole or in part. Also, no person or entity made a monetary contribution for the preparation or submission of this brief, except for Loyola University New Orleans, which has generously provided professorship funds for the printing and filing of this brief. All parties have provided written consent to the filing of this brief.

annotations and explanations. His scholarship has appeared in top journals of dispute resolution, and he maintains a blog focusing on arbitration law developments, www.arbitrationusa.com. He has provided testimony to federal and state legislatures regarding arbitration laws, and Professor Szalai has also appeared in national and international media in connection with his research about arbitration. As an arbitrator and scholar in this field, he is regularly invited to speak domestically and abroad at conferences and symposia about arbitration law developments.

Professor Szalai believes that arbitration is an invaluable part of a well-functioning legal system in a democratic society, and arbitration law should be interpreted and applied to promote the equitable resolution of disputes. He has dedicated his professional career to the study and use of arbitration as an effective, fair means to resolve disputes in appropriate circumstances. Professor Szalai is concerned that Petitioner's arguments threaten to undermine the FAA's framework supporting arbitration, and having written two books about the FAA's enactment, Professor Szalai has particular expertise regarding the FAA's history, which Petitioner attempts to rely on. Professor Szalai respectfully submits this *amicus curiae* brief to assist the Court in considering these arbitration issues.

SUMMARY OF ARGUMENT

Petitioner's arguments regarding the FAA's history and purpose are not accurate. Petitioner argues that the Congress of 1924 prioritized Section 4 of the FAA, over and above the FAA's other provisions, and relying on *Vaden v. Discover Bank*, 556 U.S. 49 (2009), Petitioner also argues that Congress intended for the states to enforce these other provisions, such as the FAA's confirmation and vacatur provisions. However, Congress did not intend for Section 4 to eclipse the FAA's other critical provisions, as exemplified by the FAA's text, unitary structure, and legislative history, and Congress never intended for the FAA to govern state court proceedings. Furthermore, state courts today have held that the FAA's confirmation and vacatur provisions do not even apply in state court.

The Court should adopt *Vaden*'s "look-through" approach for all FAA proceedings. First, a federal court's power over the underlying merits dispute serves as the jurisdictional linchpin for the entire FAA. If the underlying merits dispute to be arbitrated does not fall within the scope of subject matter jurisdiction of the federal courts under Title 28, then the arbitration agreement, which is the entire foundation of arbitration, simply cannot be enforced through the FAA in federal court. If a federal court is powerless to enforce the arbitration agreement, then every aspect of an arbitration proceeding collapses. Without the ability to enforce the arbitration agreement under Section 4, there should be no basis for a federal court to appoint an arbitrator under Section 5, or to enforce an arbitral

subpoena under Section 7, or to confirm, vacate, or correct an award under Sections 9, 10, and 11. Second, while providing testimony during joint hearings on the bills that would become the FAA, the FAA's principal drafter suggested that the "look-through" approach applies beyond Section 4 of the FAA. Third, Petitioner's restrictive view of jurisdiction would dismantle and undermine the FAA's robust legal framework, which was intended to facilitate, not impede, arbitration. Denying federal courts the ability to exercise jurisdiction in facilitating the entire arbitration process, including the confirmation of an arbitral award or vacatur of a procedurally-flawed arbitral award, would undermine the effectiveness and purpose of the FAA. Fourth, Petitioner's flawed arguments focus solely on the FAA's confirmation and vacatur provisions. Petitioner fails to explain how Petitioner's restrictive view of subject matter jurisdiction would apply in connection with other FAA proceedings, such as a Section 5 petition to appoint an arbitrator or a Section 7 petition for judicial enforcement of an arbitral subpoena. Petitioner's restrictive view of subject matter jurisdiction would lead to absurd results when applied to the rest of the FAA. Fifth, when federal statutory claims are at issue in an arbitration, such as the Title VII claims in the current case, the Court has recognized the critical importance of a post-award, non-intrusive judicial review by the federal courts to ensure that federal statutory rights have been enforced through a fair arbitral process.

Amicus curiae respectfully asks the Court to adopt a unified jurisdictional theory of the FAA whereby federal courts apply *Vaden*'s "look-through" approach in connection with all FAA proceedings, not just the FAA's confirmation and vacatur provisions. Although the FAA should not even govern this case, as explained below, adopting the *Vaden* approach for all FAA proceedings would uniformly and fully support the arbitration of underlying merits disputes, including federal statutory claims, that fall within a federal court's subject matter jurisdiction.

ARGUMENT

I. Petitioner's Arguments About The FAA's History And Purpose Are Not Accurate

Petitioner argues that based on the FAA's purpose and history, the Court should interpret the FAA's confirmation and vacatur provisions narrowly and reject *Vaden*'s "look-through" approach for these provisions. Petitioner's Brief at 23-26. Petitioner suggests that the Congress of 1924 prioritized Section 4 of the FAA over and above the statute's other provisions, and Congress somehow intended for states to lift the burden of enforcing the remainder of the FAA. *Id.* However, Petitioner's arguments regarding the FAA's history and purpose are flawed.[2]

[2] Under normal circumstances, it is challenging to attribute an intent to Congress. *Lawson v. FMR LLC*, 571 U.S. 429, 460 (2014) (Scalia, J., joined by Thomas, J., concurring) ("congressional

A. Congress Did Not Prioritize Section 4 Over The FAA's Other Provisions

Petitioner argues that Congress's predominant concern in passing the FAA was the enforcement of arbitration agreements pursuant to Section 4, over and above the FAA's other provisions, such as the provisions regarding confirmation and vacatur of arbitral awards. This Congressional concern, according to Petitioner, helps explain "why Congress might expand jurisdiction" to compel arbitration pursuant to Section 4, without providing for a similar expansion of jurisdiction for the FAA's other provisions. Petitioner's Brief at 24. However, as the Court recognized in *Vaden v. Discover Bank*, 556 U.S. 49, 66 (2009), the FAA does not expand a federal court's subject matter jurisdiction at all. Furthermore, and more importantly, Petitioner is mistaken in attempting to separate and enlarge the significance of Section 4 at the expense of the rest of the statute.

An order of specific performance through Section 4 was not Congress's one and only concern when enacting the FAA, although a concern about specific enforcement of arbitration agreements was, without a doubt,

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'intent' apart from enacted text is fiction to begin with"). However, trying to ascertain Congressional intent regarding the FAA is even more challenging because business interests working together with the American Bar Association conceived, developed, and drafted the bills that would become the FAA before presenting the bills to Congress. *See generally* Imre S. Szalai, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* (2013).

a motivating factor prompting the FAA's enactment.[3] Instead of focusing narrowly on an order of specific performance, Congress enacted a full-bodied, unitary, comprehensive arbitration statute to facilitate different aspects of the arbitral process, from beginning to end, with the FAA's core objective found in Section 2. Section 2 declares that arbitration agreements are fully binding, 9 U.S.C. § 2 (arbitration agreements are "valid, irrevocable, and enforceable"), and every other provision of the FAA supports and carries out Section 2's directive. In furtherance of Section 2's core directive, not only does the FAA provide for judicial orders compelling arbitration (Section 4), but also the FAA enforces and facilitates a commitment to arbitrate in several other ways in order to produce a final, binding arbitral award, such as:

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[3] Prior to the FAA's enactment, federal courts generally refused to compel parties to honor agreements to arbitrate. *Atlantic Fruit Co. v. Red Cross Line*, 5 F.2d 218, 220 (2d Cir. 1924) ("[A]ny agreement contained in an executory contract, ousting in advance all courts of every whit of jurisdiction to decide contests arising out of that contract, will not be enforced by the courts so ousted."). The enactment of the FAA involved a multi-year lobbying campaign, and the desire for specific performance of arbitration agreements was undoubtedly a driving force for this movement to enact modern arbitration laws during the 1920s. *See generally* Szalai, *Outsourcing Justice*, *supra*. However, the FAA is a comprehensive statute going far beyond the provision of an order of specific performance under Section 4. Furthermore, multiple different factors ultimately contributed to the FAA's enactment, such as the growth of interstate trade and an overburdened federal court system. Szalai, *Outsourcing Justice*, *supra*. Providing for binding, final awards would help promote such trade and alleviate an overburdened judiciary.

- by empowering courts to appoint arbitrators if there is a breakdown in the appointment process (Section 5);
- by empowering arbitrators and courts to issue subpoenas for witness testimony and evidence (Section 7);
- by empowering courts to confirm arbitral awards (Section 9);
- by empowering courts to vacate arbitral awards and to direct a rehearing by the arbitrators on the basis of limited grounds involving serious procedural flaws (Section 10);
- by empowering courts to modify or correct arbitral awards on narrow grounds such as an evident, material miscalculation of numbers (Section 11); and
- by permitting appeals of certain judicial orders regarding arbitration (Section 16).

Thus, Congress did not enact the FAA solely as a way to commence an arbitration proceeding through Section 4, and the FAA's comprehensive legal framework is not designed solely to commence an arbitration for the sake of arbitrating. Instead, when the heart of the FAA, Section 2, declares that an agreement to arbitrate is fully binding and must be honored, it is understood that such an agreement embodies a broad commitment to participate in good faith in all steps of the arbitration process until its completion, such as by selecting an arbitrator, abiding by the arbitrator's

procedural rulings, and ultimately, abiding by the arbitrator's final award. The FAA's comprehensive framework facilitates several different aspects of this arbitration process in order to produce a final, binding award resolving the parties' underlying dispute. The ultimate goal of the FAA is producing such a binding award, not merely commencing an arbitral proceeding or producing a non-binding result. Thus, Petitioner's emphasis on Section 4 as somehow eclipsing the FAA's other provisions is misplaced.

During joint hearings on the proposed bills that would become the FAA, Julius Henry Cohen, who was the FAA's principal drafter,[4] was careful to showcase the FAA as an all-inclusive statute covering multiple facets of an arbitration, from beginning to end. *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 Subcomms. of the Comms. on the Judiciary*, 68 Cong. 16-17 (1924) [hereinafter *Joint Hearings*] (explaining the different sections of the FAA); *id*. at 34 (describing the different features of the FAA, including arbitral subpoenas, judicial appointment of arbitrators, and simplified procedures to confirm, vacate, modify, or correct arbitral awards); *id.* at 35-37 (same); *see also* S. Rep. No. 536 (1924) (presenting the FAA as a comprehensive arbitration statute by summarizing each section

[4] *See generally* Szalai, *Outsourcing Justice*, *supra*.

of the FAA). Petitioner is therefore incorrect in attempting to prioritize Section 4 at the expense of the rest of the statute. Instead, one should conceptualize the FAA as an integrated whole, with Section 2 declaring the FAA's core objective and the remainder of the statute carrying out this objective. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019) ("Sections 1, 2, 3 [and 4] are integral parts of a whole." (citation omitted)).

B. Congress Did Not Intend For The States To Enforce The FAA

Relying on the Court's decision in *Vaden*, Petitioner suggests that the Congress of 1924 "expand[ed] jurisdiction" for the federal courts to compel arbitration under Section 4, with Congress somehow intending for the states to bear the burden of enforcing the remainder of the FAA's provisions. Petitioner's Brief at 24. There are several flaws with Petitioner's argument. As explained above and recognized in *Vaden*, the FAA does not expand jurisdiction at all, 556 U.S. at 66, and Congress did not prioritize Section 4 over the remainder of the FAA's provisions. Furthermore, Petitioner is deeply mistaken because the FAA was not designed to govern or apply in state courts.

In *Vaden*, the Court described the FAA as creating a "body of federal substantive law . . . equally binding on state and federal courts." 556 U.S. at 59 (citations omitted). Citing the landmark decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the Court in *Vaden*

explained that "state courts have a prominent role to play as enforcers of agreements to arbitrate" in light of the "substantive supremacy of the FAA." 556 U.S. at 59. Petitioner relies on this narrative recognized in *Vaden* to justify a constricted view of federal court jurisdiction for the FAA's confirmation and vacatur provisions. According to Petitioner, federal courts are supposed to focus on the enforcement of arbitration agreements pursuant to Section 4 from the front end, and Congress intended for state courts to fill in any enforcement gap at the back end after an arbitral award has been issued. Petitioner's Brief at 24-25.

However, this narrative about state courts filling in the gap is wrong. Congress never intended for the FAA to govern in state courts, and the Court's ruling in *Southland* has been described as one of the greatest constitutional errors ever made by the Court. David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 Law & Contemp. Probs. 5, 54 (2004) ("In *Southland*, the Court made an error of constitutional proportions that is in significant respects comparable to the error of *Swift v. Tyson*, which the Court famously corrected [almost one hundred years later]."). The late Professor Ian Macneil wrote a detailed book setting forth numerous arguments why *Southland*'s holding is deeply flawed, such as the FAA's structure as a unitary, comprehensive statute;[5] the statute's

[5] Ian R. Macneil, *American Arbitration Law: Reformation, Nationalization, Internationalization* 105-07 (1992). The *Southland* majority failed to evaluate the FAA within its proper context

explicit language referring to the federal courts;[6] the legislative history;[7] the universal understanding at the time of the FAA's enactment that arbitration laws were procedural;[8] and other factors, which all demonstrate that the FAA was never intended to apply in state courts. *See also DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 59 (2015) (Thomas, J., dissenting) ("I remain of the view that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, does not apply to proceedings in state courts."); *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) ("I continue to believe that Congress never intended the Federal Arbitration Act to apply in state courts, and that this Court has strayed far afield in giving the Act so broad a compass."); *id.* at 285 (Scalia, J., dissenting) ("I will, however, stand ready to join four other Justices in overruling [*Southland*], since *Southland* will not become more correct over time . . . ").[9]

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as an integrated, complete framework supporting the different stages of arbitration. Instead, to support its flawed result that the FAA applies in state court, the *Southland* majority selectively plucked out and focused solely on language from Section 2 of the FAA, which generally provides that an arbitration agreement is binding. 465 U.S. at 10-11. A repeated mistake in *Southland* and in other cases like *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and potentially in this case, is the Court's failure to examine the FAA more comprehensively as a unified whole.

[6] Macneil, *supra*, at 106-07.

[7] *Id.* at 111-19.

[8] *Id.* at 109-11.

[9] There is an unresolved, problematic tension in the Supreme Court's characterizations of the FAA. While the Court in

The Congress of 1924 never intended for states to play a significant role in enforcing the FAA's confirmation and vacatur provisions. Moreover, looking to present times, some states today have refused to treat the FAA's post-award, judicial review provisions as applicable in state court. *See*, *e.g.*, *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 597 (Cal. 2008) ("[T]he provisions for judicial review of arbitration awards in

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Southland erroneously held that the FAA is federal substantive law, the Court at other times correctly treats the FAA as merely procedural law. For example, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), the Court characterized the FAA as fundamentally procedural in nature: through an agreement to arbitrate, "a party does not forgo the substantive rights afforded by [a] statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *See also E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002) (enforcement of an arbitration agreement "only determines the choice of forum" for resolving disputes about one's substantive rights). This dissonance in the Court's FAA jurisprudence is troubling and should be corrected. Because of the erroneous *Southland* decision, the FAA continues to spawn a broad, unconstitutional displacement of state sovereignty. *See*, *e.g.*, *Preston v. Ferrer*, 552 U.S. 346, 359 (2008) ("the FAA supersedes state laws lodging primary jurisdiction in another forum," including a special administrative tribunal carefully designed by a state to enforce state-created rights). If the Court continues to uphold *Southland* and treat the FAA as a federal substantive right, the Court should take the next step and cure the inexplicable "anomaly" regarding the FAA by recognizing that federal question subject matter jurisdiction exists in connection with all FAA proceedings. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983) ("The [FAA] is something of an anomaly in the field of federal-court jurisdiction" since it embodies federal substantive law and yet does not give rise to federal question jurisdiction.). The Court has never been able to explain this strange "anomaly."

sections 10 and 11 of the FAA are directed to 'the United States court in and for the district where the award was made.'" (citation omitted)); *Swissmex-Rapid S.A. de C.V. v. SP Sys., LLC*, 212 Cal. App. 4th 539, 547 (Cal. Ct. App. 2012) ("[S]ection 9 [of the FAA dealing with confirmation of awards] has no application to state court proceedings."); *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 99-100 (Tex. 2011) (Section 10 of the FAA is addressed only to federal court); *Com. ex rel. Kane v. Philip Morris USA, Inc.*, 114 A.3d 37, 56 (Pa. Commw. Ct. 2015) (same). Petitioner's policy and history arguments that jurisdiction is expanded just for Section 4 orders at the front end, so that states can enforce the FAA's purportedly less significant provisions at the back end, are simply wrong.

II. *Vaden*'s Look-Through Approach Should Apply To All Aspects Of The FAA, Including The FAA's Confirmation And Vacatur Provisions

A. Section 4 Holds The Jurisdictional Key For The Entire FAA

If the underlying merits dispute to be arbitrated does not fall within the scope of subject matter jurisdiction of the federal courts under Title 28, then the arbitration agreement, which is the entire foundation of arbitration, simply cannot be enforced through the FAA in federal court. If a federal court is powerless to enforce the arbitration agreement, the foundation for all arbitration, then every aspect of an arbitration proceeding collapses. Without the ability to enforce the

arbitration agreement under Section 4, there should be no basis for a federal court to appoint an arbitrator under Section 5, or to enforce an arbitral subpoena under Section 7, or to confirm, vacate, or correct an award under Sections 9, 10, and 11. A federal court's power over the underlying merits dispute serves as the jurisdictional linchpin for the entire FAA.

The FAA is an integrated, comprehensive statute. *Cf. New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019) ("Sections 1, 2, 3 [and 4] are integral parts of a whole." (citation omitted)). It is incorrect to view a confirmation of an arbitral award pursuant to Section 9, or an appointment of an arbitrator under Section 5, or the enforcement of arbitral subpoenas under Section 7, as separate, distinct proceedings. There is only one proceeding or case or controversy when analyzing the FAA: the underlying merits dispute to be resolved through arbitration. Parties do not engage in arbitration for the sake of merely arbitrating; they arbitrate to resolve the underlying dispute. The jurisdictional analysis adopted in *Vaden* should be viewed as applicable to the entire FAA. Such a unified jurisdictional theory of the FAA does not expand or contract a federal court's subject matter jurisdiction. Instead, a federal court can facilitate arbitration through the FAA only if the underlying merits dispute falls within the traditional subject matter jurisdiction of the federal courts.

B. In His Brief To The Judiciary Committees In Connection With Joint Hearings, The FAA's Principal Drafter Applied A Look-Through Approach Beyond Section 4 Of The FAA

During the joint hearings on the proposed bills that would become the FAA, Julius Henry Cohen, the FAA's principal drafter, submitted a written brief describing the comprehensive nature of the FAA. *Joint Hearings* at 33-41. Cohen cited the number of each section of the statute and summarized each section. *Id.* at 34. As part of this summary of the statute, Cohen also discussed how jurisdiction should be analyzed in connection with the FAA:

> 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. (Although, if the basis of jurisdiction is diversity of citizenship, the usual limitation of $3,000 is removed.)[10]

Joint Hearings at 34 (emphasis added).

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[10] At the time of the FAA's enactment, federal courts had jurisdiction over cases if the amount in controversy exceeded $3,000. Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091. Section 8 of the proposed, draft bill would have removed the amount in controversy requirement for the FAA when the basis for jurisdiction was diversity jurisdiction. Note that this jurisdictional modification was not limited to any one provision of the FAA, such as provisions regarding confirmation or vacatur of an arbitral award or the judicial appointment of an arbitrator. It appears that Cohen, in his original draft of the statute, is setting forth a jurisdictional analysis that applies to the entirety of the FAA.

Immediately after setting forth this jurisdictional "look-through" approach to "enforce" an arbitration agreement, Cohen then discussed and conceptualized the judicial power to appoint arbitrators under Section 5 as part of this broader "enforcement" of an arbitration agreement. *Id.* It appears that Cohen was applying the "look-through" jurisdictional analysis to Section 5's judicial appointment of an arbitrator. *Id.* In other words, a federal court has power to "enforce" an arbitration agreement by appointing an arbitrator under Section 5 if the federal court has subject matter jurisdiction of the underlying merits controversy between the parties. But note that Section 5 of the FAA does not contain the jurisdictional language found in Section 4. Cohen's brief submitted as part of the record during the joint hearings suggests that the "look-through" approach applies more broadly and is not limited solely to Section 4.

Similarly, under this jurisdictional view, if a federal court has subject matter jurisdiction of the underlying merits dispute between the parties, a federal court would have power to "enforce" an arbitration agreement by enforcing an arbitral subpoena pursuant to Section 7, or by confirming an arbitral award pursuant to Section 9, or by vacating a deeply flawed arbitral award and directing a rehearing pursuant to Section 10. A proper, final, binding arbitral award is the end goal of arbitration and part and parcel of the full "enforcement" of an arbitration agreement. Arbitration would be of little use if the arbitral process did not

finally resolve the underlying merits dispute through a final award.

C. Petitioner's Restrictive View Of Jurisdiction Would Undermine The FAA's Broad Framework Supporting Arbitration

Consider the following three hypothetical disputes, where each dispute is covered by a valid, predispute agreement to arbitrate:

- Dispute A – "Diversity Dispute": A contractual dispute between a citizen of California and a citizen of New York, where the amount in controversy is $100,000.
- Dispute B – "Federal Question Dispute": An employee, a citizen of Illinois, claims that an employer, also a citizen of Illinois, has violated Title VII by engaging in unlawful discrimination.
- Dispute C – "Dispute Lacking Federal Subject Matter Jurisdiction": A contractual dispute between two citizens of Illinois, where the amount in controversy is $50,000.

The first two disputes, Disputes A and B, indisputably fall within the subject matter jurisdiction of the federal courts. Under the jurisdictional theory proposed by *amicus curiae*, a federal court would have subject matter jurisdiction to apply any provision of the FAA in connection with an arbitration involving any of these

first two hypothetical disputes, including a court order compelling arbitration pursuant to Section 4, a court order appointing an arbitrator pursuant to Section 5, a court order enforcing an arbitral subpoena under Section 7, and a court order confirming, vacating, modifying, or correcting an arbitral award pursuant to Sections 9, 10, and 11 of the FAA. All of these FAA proceedings would be aimed at a final resolution of these two underlying disputes, Disputes A and B, both of which are within the subject matter jurisdiction of the federal courts.

Such a jurisdictional analysis, whereby a "look-through" approach is used in connection with any FAA proceeding, is straightforward and simple for courts to administer, and this jurisdictional approach is also most supportive of the broad framework facilitating arbitration established by the Court's FAA cases from the last several decades, as well as the FAA's "liberal federal policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citation omitted). However, with respect to the third dispute, Dispute C, a federal court would not have jurisdiction to facilitate arbitration pursuant to any provision of the FAA since Dispute C does not fall within the subject matter jurisdiction of the federal courts.

Petitioner's restrictive view of jurisdiction would in effect dismantle and undermine the FAA's robust legal framework, which was intended to facilitate, not impede, arbitration. Under *Vaden*, a federal court could order the parties to arbitrate with respect to Disputes A and B. However, under Petitioner's flawed,

restrictive view of jurisdiction, a federal court would generally be powerless to confirm, vacate, modify, or correct an arbitral award in connection with Dispute B, the Federal Question Dispute. The parties in Dispute B lack diversity of citizenship to satisfy jurisdiction under 28 U.S.C. § 1332, and Petitioner's restrictive view of jurisdiction apparently prohibits federal courts to "look through" and examine the underlying federal question claim in connection with an arbitral award issued regarding Dispute B.

A federal court's inability to confirm, vacate, modify, or correct an arbitral award from the back end is inconsistent with a federal court's ability at the front end to enforce the same arbitration agreement. In other words, it is irrational that parties can be forced to arbitrate, but at the same time, they cannot be forced to honor the arbitral award arising from that same agreement. If awards are not binding, arbitration becomes useless. Parties enter into agreements to arbitrate with the goal of obtaining a proper, final, binding arbitral award resolving an underlying dispute should a dispute arise in the future. Denying federal courts the ability to exercise jurisdiction in facilitating the entire arbitration process, including the confirmation of an arbitral award or vacatur of a procedurally-flawed arbitral award, would frustrate or undermine the effectiveness and purpose of the FAA.

Citing *Vaden*, Petitioner suggests that states are supposed to play a "significant role" in enforcing the FAA's post-award provisions. Petitioner's Brief at 25. However, as recognized above, some states view the

FAA's post-award, judicial review provisions as inapplicable in state court. *See*, *e.g.*, *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 597 (Cal. 2008). If the underlying merits claim falls within the subject matter jurisdiction of the federal courts, federal courts should have the power under the FAA to confirm or vacate an award resolving such a claim.

D. Petitioner Fails To Explain How Subject Matter Jurisdiction Would Work With The Remainder Of The FAA's Provisions

Under the rationale advanced by Petitioner, when a federal court analyzes the FAA's "back end" provisions regarding confirmation and vacatur of arbitral awards, a federal court is apparently forbidden from "looking through" to the underlying merits dispute to be arbitrated. Petitioner's flawed arguments focus on the FAA's confirmation and vacatur provisions. However, Petitioner fails to explain how Petitioner's restrictive view of subject matter jurisdiction would apply in connection with several other FAA proceedings, such as a Section 5 petition to appoint an arbitrator or a Section 7 petition for judicial enforcement of an arbitral subpoena.[11]

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[11] Petitioner, attempting to compare arbitral awards to negotiated settlements, argues that because settlements only raise state law issues, all arbitral awards are likewise limited and raise only state law issues. Petitioner's analogy, comparing arbitral awards with negotiated, final settlements, does not work with the FAA's pre-award provisions, such as Section 5's appointment

For example, in connection with Dispute B mentioned above, the Federal Question Dispute, suppose that a party is seeking to appoint an arbitrator pursuant to Section 5 or enforce an arbitral subpoena pursuant to Section 7. The federal question nature of this underlying civil rights dispute apparently would not satisfy Petitioner's restrictive view of jurisdiction in connection with an FAA proceeding to appoint an arbitrator or enforce an arbitral subpoena. How then will a federal court examine subject matter jurisdiction using the Petitioner's restrictive view in such FAA proceedings? Presumably, under the Petitioner's flawed, restrictive view of jurisdiction, a federal court would be limited to examining whether the two parties to the FAA proceeding are citizens of different states, and whether the amount in controversy exceeds $75,000. However, what is the amount in controversy when parties cannot agree on a particular arbitrator? For

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power and Section 7's subpoena power. Issuing a subpoena or appointing an arbitrator cannot be compared to a settlement agreement. Furthermore, Petitioner's analogy is flawed. Arbitral awards are entirely different from negotiated settlements in many respects. For example, arbitral awards are based on the arbitrator's determinations or findings of liability after considering arguments and evidence, whereas parties rarely admit wrongdoing in connection with negotiated settlements. Also, negotiated settlements can be invalidated using general contract defenses, but Congress decided to provide special protections for arbitral awards. Unlike settlements, arbitral awards can be confirmed through summary procedures, 9 U.S.C. § 9, and arbitral awards can be vacated only under limited circumstances. 9 U.S.C. § 10. Moreover, when federal statutory claims are involved, the findings of liability in an arbitral award raise special concerns addressed in the next subsection of this brief.

example, what if an arbitral organization provides the parties with a strike list of ten proposed arbitrators, and the parties cannot agree which three of these ten arbitrators will hear the dispute? Or what is the amount in controversy when a party seeks to enforce an arbitral subpoena for certain documents, emails, or testimony from a third-party witness? Possibly, the fees of one or more of the ten arbitrators on the strike list can be used to assess the amount in controversy for a Section 5 proceeding to appoint an arbitrator, or perhaps the value of the documents, emails, or testimony sought can be used to assess the amount in controversy for a Section 7 proceeding to enforce an arbitral subpoena against a third party. But it does not make sense to analyze whether a federal court has subject matter jurisdiction over such narrow disputes regarding which of the ten arbitrators to appoint or which particular emails can be subpoenaed. What is the federal interest in hearing such isolated, narrow disputes? Instead, such disputes are ancillary to the larger case or controversy, the underlying civil rights dispute between the parties in Dispute B, which should be the focus of the jurisdictional analysis for the entire FAA.

Also consider a Section 7 proceeding to enforce an arbitral subpoena against a third party in connection with Dispute C above, the Dispute Lacking Federal Subject Matter Jurisdiction, where the two parties to the arbitration proceeding are from Illinois and where only one of these parties is seeking to enforce an arbitral subpoena against a third party. Under Petitioner's rationale in this case, presumably a federal court can

enforce the arbitral subpoena if the third party is a citizen from some state other than Illinois, and if the value of the evidence sought from the third party somehow exceeds $75,000. But notice that the federal court would be powerless to compel arbitration of the underlying contractual dispute since the underlying dispute does not satisfy the federal court's subject matter jurisdiction due to the lack of diversity between the two parties involved in the underlying merits dispute. Petitioner's flawed, restrictive jurisdictional view may lead to this absurd result whereby a court may have jurisdiction to enforce an arbitral subpoena in connection with a particular underlying dispute, such as Dispute C, but the federal court at the same time is powerless to compel arbitration or "enforce" the arbitration agreement in connection with the underlying dispute. *Maine Cmty. Health Options v. Albertsons Companies, Inc.*, 993 F.3d 720, 726 (9th Cir. 2021) (Watford, J., concurring) ("Why would Congress have wanted federal courts to intervene to enforce a subpoena issued in an arbitration proceeding involving a controversy that itself is not important enough, from a federalism standpoint, to warrant federal-court oversight?").

E. Petitioner's Restrictive Jurisdictional View Is In Tension With The Court's FAA Precedents

This case involves an arbitral award where the underlying dispute includes federal statutory claims, and in the Court's landmark *Mitsubishi* ruling and in

several other cases, the Court gave its blessing to the arbitrability of federal statutory claims.[12] Although *Mitsubishi* involved a "front-end" petition to compel arbitration of a federal antitrust claim, an overlooked part of the Court's decision in *Mitsubishi* addressed the critical importance of "back-end," post-award judicial review. The Court in *Mitsubishi* discussed concerns whether federal statutory claims, such as the federal antitrust laws, are suitable or appropriate for resolution through arbitration. Such statutory laws are often designed to protect the public interest, and some have argued that courts should play an exclusive role or perhaps some continuing role in the enforcement of such statutory claims. 473 U.S. at 629, 632-35. There is a concern whether private arbitrators, who are not publicly accountable, can correctly implement and enforce critical public policies embodied in federal statutes. *Id.* at 629; *see also id.* at 632 (acknowledging fox-and-henhouse concern that "decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community"). The Court in *Mitsubishi* addressed such concerns as follows:

> And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function. *Having permitted the*

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[12] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-27 (1985) (federal antitrust claims); *see*, *e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (federal civil rights claims).

> *arbitration to go forward [in connection with a petition to compel arbitration], the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed*.

Id. at 637-38 (emphasis added).

As part of the Court's justification for permitting the arbitrability of federal statutory rights, the *Mitsubishi* Court recognized that federal courts would be able to engage in a "non-intrusive" review of the arbitral award to ensure the arbitral tribunal "took cognizance of the antitrust claims and actually decided them." *Id.* at 638. To assist with this federal court review of the arbitral award, the Court also noted that a reasoned opinion by the arbitral tribunal should be available as well as a stenographic record of the arbitration proceeding. *Id.* at 638 n.20.

Although *Mitsubishi* is arguably distinguishable from the current case because of the international nature of the antitrust dispute in *Mitsubishi*, the concerns raised in *Mitsubishi* are relevant here. When federal statutory rights are at issue in an arbitration, a post-award, non-intrusive judicial review by the federal courts helps ensure that critical statutory rights have been vindicated through a fair arbitral process. The Court in *Mitsubishi* justified its decision to permit the arbitrability of federal statutory rights on the grounds that such a federal court review would remain fully available after an arbitral award has been issued.

Applying Vaden's "look-through" approach to the FAA's post-award provisions is most consistent with facilitating such a judicial review recognized in *Mitsubishi*. *See also Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 232 (1987) (citing *Mitsubishi*, 473 U.S. at 636-37 & n.19) (approving of arbitrability of a federal statutory claim because, as recognized in *Mitsubishi*, judicial scrutiny of arbitral awards helps "ensure that arbitrators comply with the requirements of the statute"). Furthermore, as recognized above, state courts may not be able to serve in this critical role of judicial review of arbitral awards under the FAA because some states view the FAA's post-award review provisions as inapplicable in state court. *See*, *e.g.*, *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 597 (Cal. 2008).[13]

III. Under An Original Understanding Of The FAA, The FAA Would Not Apply In This Case, But Under *Stare Decisis* And Consistent With The FAA's Governing Framework, The Court Should Adopt *Vaden*'s "Look-Through" Approach For All FAA Proceedings

If the Court applied a comprehensive textual analysis and the original understanding of the FAA in this case, the FAA would not govern this dispute at all. The FAA was never intended to cover federal statutory

[13] Preserving federal court review of arbitral awards through adoption of the *Vaden* approach is especially critical if the underlying claims fall within the exclusive jurisdiction of the federal courts.

claims or employment disputes, such as the Title VII claims at issue in this case. This section of the brief helps show how the Court's decisions in prior FAA cases, like *Mitsubishi* and *Circuit City*, gave rise to the question presented in this case. Furthermore, based on the FAA's governing framework and *stare decisis*, the Court should adopt *Vaden*'s "look-through" approach for all FAA proceedings.

A. The FAA Was Never Designed To Cover Statutory Claims

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Court misread Section 2 of the FAA, the FAA's core provision, and as a result, the Court radically transformed and expanded the meaning of the statute. The text of the FAA is limited to written provisions in a contract to arbitrate disputes arising out of that contract. 9 U.S.C. § 2 (written provisions in a contract "to settle by arbitration a controversy thereafter arising out of such contract" are fully binding). The FAA was originally designed to cover contractual disputes between merchants of relatively co-equal bargaining power in connection with the interstate shipment of goods.[14] However, in *Mitsubishi*, the Court selectively quotes from Section 2 as follows:

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[14] *See*, *e.g.*, *Joint Hearings* at 7 (FAA is designed for disputes such as one arising from an interstate shipment of a carload of potatoes between a Wyoming seller and New Jersey dealer).

> We do not agree, for we find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims. The Act's centerpiece provision makes a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce . . . 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.

473 U.S. at 625. Notice that the Court's quotation of Section 2 in *Mitsubishi* leaves out critical, limiting language. The Court in *Mitsubishi*, through the use of an ellipsis, avoids quoting the key limitation in the FAA providing that disputes must "aris[e] out of such contract" in order to be covered by the FAA. The right to bring critical statutory claims implicating a strong public interest, such as federal civil rights claims, may not arise out of, and may not be dependent on, the existence of a contract. For example, one's right to be free from discrimination is not based on a contract. The FAA was originally intended to cover commercial, contractual disputes, not statutory claims or other types of claims, like tort claims, that can be asserted without reference to a contract. The full text of the FAA, omitted and ignored by the Court in *Mitsubishi*, does not support the expansive arbitrability of statutory claims.

B. The FAA Was Never Designed To Cover Employment Disputes

When the FAA was enacted in 1925, employment disputes were generally considered to be local issues not involving interstate commerce.[15] However, one class of workers was viewed as engaged in interstate commerce during this time. Transportation workers who crossed state lines, such as railroad employees, were viewed as involved in interstate commerce and were, therefore, subject to Congressional regulation.[16] However, Section 1 of the FAA contains an exemption for such workers:

> [N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

This exemption of the only workers then regulated by the federal government helps demonstrate that the FAA was never intended to apply to employment disputes.

The earliest drafts of the FAA did not contain this worker exemption.[17] There was no need for the exemption because the FAA was drafted and intended for use

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[15] At the time of the FAA's enactment, the Commerce Clause of the United States Constitution was narrowly construed. *See*, *e.g.*, *Hammer v. Dagenhart*, 247 U.S. 251 (1918), overruled by *U.S. v. Darby*, 312 U.S. 100 (1941).

[16] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 136 (2001) (Souter, J., dissenting) (citing *The Employers' Liability Cases*, 207 U.S. 463, 496, 498 (1908)).

[17] Szalai, *Outsourcing Justice*, *supra*, at 132-35, 142-45.

in contractual disputes between merchants involved with interstate shipments. A labor and employment exemption was eventually added to the bill in an abundance of caution.[18] Julius Henry Cohen, the FAA's principal drafter, described the amendment as having the effect of "leav[ing] out labor disputes," and he did not view this amendment as materially altering the bill in any way.[19] Section 1's exemption merely confirms what was generally understood: the FAA was intended for contractual disputes between merchants involved in interstate commerce, not labor or employment disputes. The Court's decisions applying the FAA to employment disputes, like *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), are deeply flawed, and unfortunately, millions of workers have lost access to the robust procedural protections available in court as a result of the Court's error in expanding the FAA to cover employment disputes.[20]

The jurisdictional confusion and problems in this case would not exist if the FAA was interpreted as originally intended. The FAA was designed for a different time in American history, and its original scope was much narrower. The FAA was intended for diversity cases involving contractual disputes arising from interstate shipments (and diversity jurisdiction would be

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[18] *Id.*

[19] *Id.* at 134-35.

[20] Imre S. Szalai, The Emp. Rts. Advoc. Inst., *The Widespread Use of Workplace Arbitration Among America's Top 100 Companies* (Mar. 2018) (80% of America's largest companies have used arbitration agreements for employment disputes).

apparent from the face of an FAA petition in most circumstances), as well as admiralty cases. If the FAA was interpreted as originally intended, the question presented in this case probably would not have arisen. The problems and confusion seen in this case exist in part because of the Court's expansion of the FAA far beyond its text, and the seeds of this confusion can be traced back decades ago to the Court's errors in *Mitsubishi* in expanding the FAA to cover federal statutory claims giving rise to federal question jurisdiction and in *Circuit City*, which erroneously applied the FAA to employment disputes. Unfortunately, the FAA's expansive framework, created by decades of flawed decisions, is no longer rooted in the text and original understanding of the FAA.

Based on the text and original understanding of the FAA, the FAA would not govern this case at all. However, this ship has long sailed,[21] and the FAA is now an "edifice of [the Court's] own creation."[22] This monstrosity of an edifice embodies an expansive, broad framework supporting hundreds of millions of arbitration agreements covering virtually every possible type of dispute in American society.[23] Although *amicus*

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[21] *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) (observing that the "ship has sailed" in response to a different textual argument regarding the FAA).

[22] *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

[23] Imre S. Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. Davis L. Rev. Online 233 (2019) (by conservative estimates, there were more than 826 million consumer arbitration agreements in America in 2018).

curiae desires the Court to correct its erroneous FAA rulings, such as *Mitsubishi*, *Southland*, *Circuit City*, and many more, the Court can and should adopt *Vaden*'s "look-through" approach for all the FAA's provisions in order to support this expansive, judicially-created framework facilitating arbitration. Having already approved of the arbitrability of federal statutory claims pursuant to the FAA, the Court should ensure that limited, post-award judicial review remains available in the federal courts for such disputes. Furthermore, as explained above in the prior section of this brief, there are numerous other arguments why *Vaden* should control all FAA proceedings.

CONCLUSION

The Court should adopt a unified jurisdictional theory of the FAA whereby federal courts apply *Vaden*'s "look-through" approach in connection with all FAA proceedings, not just the FAA's confirmation and vacatur provisions. Such an approach, which is easy for courts to administer, would uniformly and fully support the arbitration of underlying merits disputes, including federal statutory claims, that fall within a federal court's subject matter jurisdiction.

Respectfully submitted,

IMRE STEPHEN SZALAI
Counsel of Record