No. 23-2083

In the

United States Court of Appeals

For the Fourth Circuit

PABLO ESPIN; NICHOLAS PADAO; JEREMY BELL; KEITH TAYLOR,
Plaintiffs-Appellees,

v.

CITIBANK, N.A.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of North Carolina at Raleigh
Case No. 5:22-cv-00383-BO-RN

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN FINANCIAL SERVICES ASSOCIATION, AND AMERICAN BANKERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLANT

Jennifer B. Dickey
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062

Kathryn M. Barber
MCGUIREWOODS LLP
800 East Canal Street
Richmond, VA 23219
T: (804) 775-4716
kbarber@mcguirewoods.com

Philip Bohi
AMERICAN FINANCIAL SERVICES ASSOCIATION
1750 H Street NW, Suite 650

Jonathan Y. Ellis
MCGUIREWOODS LLP
888 16th Street NW, Suite 500
Washington, DC 20006

Counsel for Amici Curiae The Chamber of Commerce of the United States of America, American Financial Services Association, and American Bankers Association

(Counsel continued on inside cover)

Washington, DC 20006

T: (202) 828-2887
jellis@mcguirewoods.com

Thomas Pinder
Andrew Doersam
AMERICAN BANKERS ASSOCIATION
1333 New Hampshire Avenue NW
Washington, DC 20036

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-2083 Caption: Pablo Espin, et al. v. Citibank, N.A.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Chamber of Commerce of the United States of America; American Financial Services Association;
(name of party/amicus)

American Bankers Association

who is amici curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Kathryn M. Barber Date: February 1, 2024

Counsel for: Amici Curiae

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive branch, and the courts.

The American Financial Services Association was founded in 1916 and is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

The American Bankers Association is the principal national trade association of the financial services industry. It is the voice for the nation's $23.7 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2.1 million people.

[1] No party's counsel authored this brief in whole or in part, and no entity or person, aside from amici curiae, their members, or their counsel, contributed any money to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

Amici regularly file amicus curiae briefs in cases, like this one, that raise issues of importance to the nation's business community. Many of their members regularly rely on consumer and employment arbitration agreements because resolving disputes through arbitration is fast, fair, inexpensive, and less adversarial than litigation in court. The district court's decision jeopardizes arbitration and its many benefits for businesses and consumers alike by applying an insufficiently rigorous standard for discerning whether Congress intended to displace the Federal Arbitration Act's protections. *Amici* thus have a strong interest in this case and in reversal of the judgment below.

INTRODUCTION

Longstanding federal policy favors arbitration. For good reason. Arbitration gives consumers—including servicemembers in our nation's military—access to a fair, inexpensive, and efficient forum to resolve disputes they would be unlikely to resolve in court, at least not without significant delay and expense. Recognizing arbitration's many advantages, the Federal Arbitration Act (FAA) requires courts to strictly enforce contractual agreements to arbitrate. That mandate controls, including when a plaintiff raises federal statutory claims, unless Congress clearly and manifestly provides otherwise. As decades of Supreme Court precedent reflect, such a "clear and manifest" command arises only when the statute expressly references and precludes arbitration.

Instead of this demanding standard, the district court applied a lax approach that would undo Congress's effort to ensure enforcement of arbitration agreements. The district court read the Servicemembers Civil Relief Act (SCRA) to override the FAA simply because the SCRA states that servicemembers may, in "civil actions," pursue collective actions regardless of "previous agreement[s] to the contrary." 50 U.S.C. § 4042(a). But that language says nothing about arbitration. It nowhere approaches the "clear and manifest" expression of congressional intent required for another federal statute to displace the FAA's protections.

If, as the district court incorrectly held, the SCRA's text were enough to override the FAA, the FAA's enforceability mandate would become meaningless. Litigants could manufacture supposed conflicts between the FAA and all manner of federal statutes, contrary to the rule that congressional enactments should be harmonized whenever possible and undermining congressional intent to promote arbitration. This Court should reject that result and adhere to the correct and controlling standard.

This Court should also reject any back-up effort by plaintiffs to escape their contractual agreements to arbitrate based on the Military Lending Act (MLA). Plaintiffs assert that the MLA's anti-arbitration provisions are triggered every time a consumer uses her credit card on the theory that such credit card use qualifies as a

new "extension of credit" under the MLA. This position defies reason as well as the statutory and regulatory text.

The MLA and the Department of Defense (DOD)'s regulations implementing it do not require creditors to constantly monitor and reassess whether a consumer is an active servicemember. Instead, they allow creditors to make that assessment once, at the most natural time, when a customer opens a credit-card account. If every credit-card swipe were a fresh "extension of credit" for purposes of the MLA, creditors would be caught in an endless and risky loop of checking and re-checking customer status. And if an existing credit-card customer's status changed to active duty, that change would instantly trigger new contract terms and credit offerings, threatening credit-card companies with criminal and civil liability if they slip up for any one transaction. This Court should reject plaintiffs' effort to impose such an unworkable, burdensome, and immensely disruptive regime.

ARGUMENT

I. This Court should maintain the Supreme Court's demanding standard for discerning whether a federal statute displaces the FAA.

The decision below is inconsistent with the FAA's requirement to rigorously enforce agreements to arbitrate, absent an explicit contrary command by Congress. This Court should enforce the demanding standard for displacing the FAA that the Supreme Court has repeatedly articulated. Any other course would undermine the

FAA's protections and deny businesses and consumers alike the many benefits of arbitration.

A. Arbitration benefits consumers.

Plaintiffs premise their action on the unfounded view that arbitration somehow prevents servicemembers from enforcing their rights under the SCRA. It does not. If anything, individual arbitration expands access to justice, provides for faster and cheaper resolution of claims in a fair and flexible forum, where claims are often resolved in plaintiffs' favor. It thus allows consumers and workers, including servicemembers, to vindicate their rights fairly, inexpensively, and efficiently.

1. Arbitration expands access to justice.

Arbitration allows consumers to pursue claims they could not viably litigate through more expensive and time-consuming litigation in court. Many consumer claims, including those under the SCRA, are too small in terms of dollars involved and center on facts too individualized to support class action treatment. When a class action cannot be brought, individual litigation in court is often not a realistic path. A plaintiff would have tremendous difficulty navigating formal and complex court procedures without counsel. And securing counsel is often prohibitively expensive (on a pay-as-you-go basis) or impossible (on a contingency basis). Indeed, studies indicate that a claim must involve at least $60,000, and even as much as $200,000, to attract a contingent-fee lawyer. Elizabeth Hill, *Due Process at Low*

Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association, 18 OHIO ST. J. ON DISP. RESOL. 777, 783 (2003).

Arbitration provides an alternative, low-cost option that consumers can navigate themselves, even when they cannot secure counsel. This streamlined and simpler route gives access to a neutral decisionmaker at low or no cost. Arbitration thus allows consumers, including servicemembers, to seek redress that, as a practical matter, they could not seek in court. It therefore expands the number of claims that those consumers can pursue.

2. Arbitration is more efficient and less expensive.

Not only can consumers pursue more claims through arbitration than through the court system alone, but they can do so more quickly, more simply, and for far less money.

The hallmarks of private dispute resolution are "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019). Not only is arbitration typically "cheaper and faster than litigation," but it generally has "simpler procedural and evidentiary rules" and "is often more flexible in regard to scheduling of times and places of hearings and discovery devices." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)). For example, unlike most court proceedings (and especially those involving

unrepresented parties), consumer arbitration hearings routinely proceed by telephone or videoconference.

This streamlined process promotes faster resolutions. As one empirical study determined, between 2014 and 2021, prevailing arbitration claimants spent an average of 321 days in arbitration, compared to an average of 439 days spent in litigation by prevailing plaintiffs. Nam D. Pham & Mary Donovan, *Fairer, Faster, Better III: An Empirical Assessment of Consumer & Employment Arbitration*, U.S. Chamber of Commerce Institute for Legal Reform 5, 15 (Mar. 2022), available at https://instituteforlegalreform.com/wp-content/uploads/2022/03/FINAL-ndp-Consumer-and-Employment-Arbitration-Paper-2022.pdf. Another study found that awarded arbitrations take, on average, less than 11 months to decide, versus an average of 26.6 months to reach a verdict in state-court jury-trial cases. Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CAL. L. REV. 1, 51 (2019).

3. Arbitration claimants do just as well, if not better, than litigants in court.

Arbitration results also favor consumers. In both arbitration and litigation, most disputes settle. Pham, *supra*, at 10. But for those that are resolved by an award or decision, consumers win in arbitration 41.7 percent of the time, compared to only 29.3 percent of the time in court. *Id.* at 11. Not only do they win more, but they win bigger: the average consumer receives $79,945 in arbitration but averages just

$71,354 in litigation. *Id.* at 13-14. This divide only increases as the awards grow: the top 10% of arbitration awards were $161,325 and higher, while the top 10% of litigation awards were just $61,500 and higher. *Id.* at 13.

In sum, consumers (including servicemembers) that pursue arbitration spend less time and money to resolve their claims than they would in court, while prevailing more often and receiving larger awards.

B. The district court's lax standard for overriding the FAA would undermine Congress's effort to promote arbitration.

Congress recognized individual arbitration's many mutual benefits when it enacted the FAA in 1925. Before that time, courts "routinely refused to enforce agreements to arbitrate disputes." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 505 (2018). Congress crafted the FAA to overcome this unwarranted judicial hostility and ensure that arbitration's "promise of quicker, more informal, and often cheaper resolutions" would be available to all. *Id.* The district court's misreading of the SCRA and overly lax standard for discerning whether a federal statute displaces the FAA's protections would undo this promise and invite the exact sort of judicial hostility to arbitration that the FAA was designed to overcome.

1. Only a clear and manifest express command by Congress displaces the FAA's protections.

Consistent with Congress's aim to establish "a liberal federal policy favoring arbitration agreements," the FAA directs courts to "treat arbitration agreements as

valid, irrevocable, and enforceable." *Id.* (citations omitted); *see* 9 U.S.C. § 2 ("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 . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."). The FAA thereby requires courts to "rigorously enforce arbitration agreements according to their terms, including . . . the rules under which that arbitration will be conducted." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (cleaned up). Courts must do so "even when the claims at issue are federal statutory claims." *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012); *see id.* at 101 ("We have repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court.").

Only an express "contrary congressional command" may override the FAA's enforcement mandate. *Id.* at 98 (citation omitted). That command must be "clear and manifest." *Epic Sys.*, 584 U.S. at 510. And it must be explicit: when a statute "is silent on whether claims . . . can proceed in an arbitral forum, the FAA requires the arbitration agreement to be enforced according to its terms." *CompuCredit*, 565 U.S. at 104. Indeed, "the absence of any specific statutory discussion of arbitration or class actions" provides "an important and telling clue that Congress has not displaced the [FAA]." *Epic Sys.*, 584 U.S. at 517. On the rare occasions that

Congress has "restricted the use of arbitration," it has done so by explicitly prohibiting arbitration—stating, for example, that "[n]o predispute arbitration agreement shall be valid or enforceable." *CompuCredit*, 565 U.S. at 103-04; *see* 7 U.S.C. § 26(n)(2). Without such an express restriction, the FAA and the other federal statute at issue coexist and must be harmonized.

Even when a statute references class actions, that reference alone—especially when unaccompanied by any discussion of arbitration—does not preclude individual arbitration. *See CompuCredit*, 565 U.S. at 103-04; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) ("[T]he fact that [a statute] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred."). This result holds true both when a statute simply creates a civil cause of action and when it contains a "nonwaiver provision" prohibiting waiver of rights to pursue that action. *CompuCredit*, 565 U.S. at 101.

This high standard for overriding the FAA stems from the rule that, "[w]hen confronted with two Acts of Congress allegedly touching on the same topic," courts should strive to harmonize the statutes, rather than find them in conflict. *Epic Sys.*, 584 U.S. at 510. Thus, a party suggesting "that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow." *Id.* (citations omitted). And in evaluating any supposed conflict, courts "come armed with the

strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes" to override it. *Id.* (citations omitted).

Approaching statutory interpretation in this way reflects "[r]espect for Congress as drafter"—courts should not "easily find[] irreconcilable conflicts in [Congress's] work." *Id.* at 511. Rather, they should find a conflict only when Congress has clearly expressed its intent to create one. *See CompuCredit*, 565 U.S. at 103-04 (compiling statutes where Congress spoke with the requisite "clarity" to override the FAA). This approach also "grow[s] from an appreciation that it's the job of Congress by legislation"—not the judiciary's—both to write the laws and to repeal them. *Epic Sys.*, 584 U.S. at 511.

Operating according to these principles, the Supreme Court "has rejected *every*" single one of litigants' "many . . . efforts to conjure conflicts between the [FAA] and other federal statutes." *Id.* at 516 (emphasis in original). The Court "had no qualms," for example, about "enforcing a class waiver in an arbitration agreement even though the Age Discrimination in Employment Act expressly permitted collective legal actions." *Id.* at 517 (citations omitted). In the same vein, the Supreme Court found no conflict between the Credit Repair Organizations Act (CROA) and the FAA, even though the former "expressly provided a 'right to sue,'

repeatedly used the words 'action' and 'court' and 'class action,' and even declared '[a]ny waiver' of the rights it provided to be 'void.'" *Id.* (citations omitted).

Decades of Supreme Court precedent set an incredibly high bar for litigants who, like plaintiffs here, assert that a federal enactment overrides the FAA's mandate to enforce arbitration agreements. It is critical that courts rigorously apply this bar to give effect to congressional intent, respect the separation of powers, and preserve the federal policy favoring arbitration and extend its many benefits to claimants under a wide array of federal statutes, including the SCRA.

2. Reading the SCRA to override the FAA's mandate would undermine the FAA and the arbitral system.

The district court applied too lenient a standard when it wrongly held that the SCRA overrides the FAA.

This should have been an easy case. Congress amended the SCRA in 2019 to provide that "[a]ny person aggrieved by a violation . . . may in a civil action . . . be a representative party on behalf of members of a class or be a member of a class, in accordance with the Federal Rules of Civil Procedure, notwithstanding any previous agreement to the contrary." 50 U.S.C. § 4042(a). This provision says nothing about arbitration. Instead, it speaks only of "civil actions"—thereby addressing only a servicemember who can pursue such an action in the first instance—and allows servicemembers to participate in or represent a class if doing so would be consistent with the Federal Rules of Civil Procedure (which only govern in civil actions in

federal court). It applies only to a servicemember who has not already validly waived a right to pursue a civil action by executing a binding arbitration agreement.

Although the SCRA references "previous agreements," and allows for class proceedings despite them, it does not reference *arbitration* agreements. *See CompuCredit*, 565 U.S. at 103. The SCRA provides for the nonwaiver of class actions in civil actions, but so did the CROA, which recognized a right to bring class actions in civil actions and barred waiver of such rights. *See id.* at 99-100. As the Supreme Court held in *CompuCredit*, however, a nonwaiver provision that does not reference arbitration is insufficient to override the FAA. *Id.* at 101. Without explicit discussion of arbitration, it would "take[] a considerable stretch to regard [such a provision] as a 'congressional command' that the FAA shall not apply." *Id.* at 101-02; *see id.* at 102 n.3 (noting dictum in *Gilmer* observing that ADEA's nonwaiver provision "did not explicitly preclude arbitration or other nonjudicial resolution of claims"). In the SCRA, as in the CROA, "had Congress meant to prohibit" the arbitration provisions pervasive across all kinds of consumer contracts, "it would have done so in a manner less obtuse" than simply providing that servicemembers may pursue collective actions in any civil action they are otherwise able to bring. *Id.* at 103. *CompuCredit* squarely controls here.

Yet the district court did not even mention *CompuCredit*. In fact, the court even said that "it need not consult the FAA" *at all*—thus discarding the presumption

that the FAA controls and can and should be harmonized with later statutes whenever possible. JA303. The district court also acknowledged that "the SCRA is silent as to arbitration specifically," yet reasoned that merely by providing servicemembers the right to bring class actions in any civil action and barring waiver of that right, the SCRA somehow contains a clear and manifest command overcoming the FAA. JA304-305.

That reasoning cannot be squared with the Supreme Court's demanding standard, which requires explicit discussion of arbitration reflecting Congress's plain intent to preclude the same.[2] By taking a contrary view, the decision below weakens beyond recognition the Supreme Court's longstanding rule that any congressional command overriding the FAA must be "clear and manifest." The district court and plaintiffs would have this Court adopt instead a regime under which general references to "civil actions," collective action, and "previous agreements" may suffice to overcome the FAA's mandate.

That approach defies Supreme Court precedent and congressional intent. It would encourage litigants to conjure up imagined conflicts between the FAA and all manner of federal statutes that Congress never intended to upend the FAA's mandate—statutes that mirror the CROA and others the Supreme Court has already

[2] Nor can the district court's decision be justified by this Court's ruling in *Lyons v. PNC Bank, Nat'l Ass'n*, 26 F.4th 180 (4th Cir. 2022). The statute at issue in *Lyons* included many explicit references to arbitration.

decided lack the required congressional command. As the Supreme Court recognized in *CompuCredit*, "[i]t is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action, including the relief available, in the context of a court suit," including by "repeated use of the terms 'action,' 'class action,' and 'court.'" 565 U.S. at 100. But the district court's approach would make any such statutory terms potentially sufficient to override the FAA. The enforceability of huge swathes of arbitration agreements would be thrown into serious doubt, contrary to Congress's goal in enacting the FAA. Indeed, the FAA's requirement to rigorously enforce arbitration agreements would become effectively meaningless in cases involving federal statutory claims, if litigants could override that requirement merely by pointing to statutory references to "civil actions" and "previous agreements."

As a result, the millions of consumers, including servicemembers, that find themselves in arbitrable disputes would be deprived of the many mutual benefits that arbitration offers, again contrary to congressional intent. To be sure, the MLA reflects Congress's judgment—clearly and manifestly expressed—that servicemembers should not be required to arbitrate certain disputes. But the MLA's restrictions do not apply to the SCRA and are not relevant to whether the SCRA contains the necessary clear and manifest command overriding the FAA's

enforcement mandate. If anything, Congress's decision *not* to address arbitration of SCRA claims means there is no basis to find any prohibition by implication here.

Moreover, adopting the district court's incorrect reasoning would have implications that stretch far beyond the SCRA and its servicemember-specific provisions. Reading the SCRA to displace the FAA would broadly undermine the FAA's requirements for all arbitration agreements covering all consumers and workers. Disputes that would have been easily and cheaply arbitrated will instead clog up the court system, driving up costs and creating inefficiencies and delayed resolutions for consumers and businesses alike. This scenario is the precise opposite of what Congress intended in enacting the FAA.

This Court should correct course and give effect to congressional intent by adhering to the clear-statement rule that Supreme Court precedent requires. Under that standard, the SCRA falls far short of overriding the FAA, and the servicemembers' arbitration agreements must therefore be enforced.

II. Plaintiffs' misreading of the MLA would make the credit-card market unworkable.

Plaintiffs' incorrect interpretation of the MLA's treatment of "extensions of consumer credit" also threatens to deny parties the mutual benefits of the arbitral

process, while disrupting settled industry expectations and imposing an unworkable and unfair system on creditors.

On top of their SCRA arguments, plaintiffs attempted to avoid enforcement of their arbitration agreements in the district court by asserting that the MLA prohibits that enforcement. Plaintiffs point to the MLA's provisions (1) making it unlawful to "extend consumer credit . . . with respect to which" "the creditor requires the borrower to submit to arbitration" and (2) providing that "no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against any covered member . . . or any person who was a covered member . . . when the agreement was made." 10 U.S.C. § 987(e)(3), (f)(4). The MLA does not itself define "consumer credit" or what it means to "extend consumer credit"—instead, Congress directed DOD to do so. *Id.* § 987(h), (i)(6) ("The term 'consumer credit' has the meaning provided for such term in regulations prescribed under this section.").

By regulation, however, "consumer credit" did not include credit cards until October 3, 2017—and plaintiffs all opened their credit-card accounts before that date. No matter, say plaintiffs. By their telling, every swipe of their credit card constitutes a new "extension of consumer credit" for purposes of the MLA. So,

according to plaintiffs, every post-October 2017 use of their cards triggered the MLA's prohibition on arbitration and barred enforcement of their agreements anew.

This view conflicts with the ordinary meaning and industry understanding of what it means to extend credit. The typical use of that term would focus on the bank's approval of a credit line in the first instance, not on each subsequent transaction that uses that credit line.

DOD's regulations are consistent with that understanding. DOD intended—and correctly read the MLA to reflect Congress's intent—that creditors would only assess whether a customer was covered by the MLA's provisions one time, when the customer opened her credit-card account. *See Limitations on Terms of Consumer Credit Extended to Service Members and Dependents*, 79 Fed. Reg. 58,602, 58,616 (Sept. 29, 2014). DOD rejected any regime under which the MLA's restrictions and obligations would suddenly "spring to life" months or years after a customer opened a credit-card account. *Id.* Such a regime, as DOD explained, would be inconsistent with the MLA's text, including its provision making any credit card contract prohibited under the MLA "void from the inception of such contract." 10 U.S.C. § 987(f)(3). That provision "would operate unjustly" if a consumer was not covered by the MLA when she entered into her contract, but later became an active

servicemember, and then tried to void what was an "entirely lawful" contract when she entered it. 79 Fed. Reg. at 58,616.

Based on its view that creditors should not have to "constantly monitor" the military status of every single one of their customers or face unfair surprise years after executing contracts, DOD's regulations allow credit card issuers to make a "one-time determination," using a database search, of whether a consumer is an active-duty servicemember. 32 C.F.R. § 232.5(b)(3). That "one-time determination" may occur when a consumer "applies to establish the account" and is "conclusive." *Id.* § 232.5(b)(1), (3)(ii). DOD designed this "safe harbor" to allow a creditor "to be free from liability under the MLA at the outset of establishing an account for credit—and throughout the lifespan of that particular account—relating to that consumer." *Limitations on Terms of Consumer Credit Extended to Service Members and Dependents*, 80 Fed. Reg. 43,560, 43,578 (July 22, 2015). Under plaintiffs' view, though, the creditor's determination could never be "conclusive" or singular, and this "safe harbor" DOD crafted, consistent with its view of the statutory text and the terms DOD itself defined, would become meaningless.

This system would be unworkable and overly burdensome for credit-card issuers. If a fresh "extension of consumer credit" occurred every time a consumer swiped her credit card, creditors would have to constantly re-check each customer's covered military status before approving each and every credit-card transaction. It

is not even clear that such efforts would be feasible, at least not without slowing down customers' access to their credit cards.

Even assuming creditors could keep up with these checks, the implications of requiring this constant monitoring would be extreme. If a creditor discovered that an existing consumer had suddenly become an active-duty servicemember—when she was not at the time of opening her credit card account—the creditor would instantly become obligated to comply with the MLA's disclosure requirements, restrictions on contract terms, and credit limit. 10 U.S.C. § 987(b), (c)(1), (e). That is, the creditor would have to *rewrite its contract* with the customer to remove any terms forbidden by the MLA—otherwise, that contract would be deemed "void from [its] inception." *Id.* § 987(f)(3). If the creditor failed to correctly determine the customer's covered military status or meet any of the MLA's obligations for any one credit-card transaction, it would face criminal fines or imprisonment as well as civil liability. *Id.* § 987(f).

There are hundreds of millions of open credit-card accounts in the United States and billions of credit-card transactions annually. *See Bureau of Consumer Financial Protection—Consumer Credit Card Market Report* 26, available at https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf; Board of Governors of the Federal Reserve System, *Federal Reserve Payments Study (FRPS)*, https://www.federalreserve.gov/paymentsystems/

fr-payments-study.htm. Plaintiffs' misreading of the MLA would require creditors to continually assess the status of hundreds of millions of credit-card customers—on pain of criminal sanction. Such a burdensome and unworkable requirement would upend the MLA compliance regime and settled expectations around which the entire credit industry has structured its operations and contracts for years. That cannot be what Congress intended in enacting these MLA provisions. It certainly is not what DOD intended in implementing the statute. This Court should reject plaintiffs' unfounded interpretation of the MLA and the extreme and unwarranted results it would cause.

CONCLUSION

This Court should reverse and remand to enforce plaintiffs' binding arbitration agreements.

Dated: February 1, 2024

Respectfully submitted,

/s/ Kathryn M. Barber
Kathryn M. Barber
McGuireWoods LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219
T: (804) 775-4716
F: (804) 698-2251
kbarber@mcguirewoods.com

Jonathan Y. Ellis
McGuireWoods LLP
888 16th Street NW
Suite 500

Washington, DC 20006
T: (202) 828-2887
jellis@mcguirewoods.com

Jennifer B. Dickey
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062

Philip Bohi
AMERICAN FINANCIAL SERVICES ASSOCIATION
1750 H Street NW, Suite 650
Washington, DC 20006

Thomas Pinder
Andrew Doersam
AMERICAN BANKERS ASSOCIATION
1333 New Hampshire Avenue NW
Washington, DC 20036

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,625 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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/s/ Kathryn M. Barber
Kathryn M. Barber

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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American Financial Services Association, and American Bankers Association as the
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Kathryn M. Barber
Name (printed or typed)

(804) 775-1227
Voice Phone

McGuireWoods LLP
Firm Name (if applicable)

(804) 698-2227
Fax Number

Gateway Plaza, 800 East Canal Street

Richmond, VA 23219
Address

kbarber@mcguirewoods.com
E-mail address (print or type)

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