No. 17-_____

IN THE
# Supreme Court of the United States

LOWER COLORADO RIVER AUTHORITY,

*Petitioner*,

v.

PAPALOTE CREEK II, L.L.C.,

*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


Robert K. Wise
LILLARD WISE SZYGENDA PLLC
13760 Noel Road
Suite 1150
Dallas, Texas 75240
(214) 739-2000

Evan A. Young
*Counsel of Record*
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard
Suite 1500
Austin, Texas 78701
(512) 322-2506
evan.young@bakerbotts.com

*Counsel for Petitioner Lower Colorado River Authority*



WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

## QUESTION PRESENTED

By contract, parties can agree to the arbitration of virtually any dispute. The Federal Arbitration Act (the FAA) makes such arbitration agreements "valid, irrevocable, and enforceable." 9 U.S.C. § 2. It then tells parties that they may turn to "any United States district court which, save for such agreement, would have jurisdiction under Title 28" to compel arbitration. *Id.* § 4. Here, verifying the requirement of "jurisdiction under Title 28" was easy because the existence of diversity jurisdiction was undisputed. But the court of appeals concluded that § 4 also requires federal district courts to probe the underlying dispute between the parties to ensure that all other measures of justiciability, not just "jurisdiction under Title 28," would have been satisfied if the parties had never agreed to arbitration. The underlying dispute here, the court concluded, would not have been "ripe" if brought as an original matter and, therefore, the district court lacked subject-matter jurisdiction to compel arbitration of that dispute.

The question presented is whether a federal court's subject-matter jurisdiction to entertain a motion to compel arbitration under § 4 of the FAA can be established by complete diversity without "looking through" the petition to assess whether the underlying dispute would have presented separate "justiciability" concerns (like ripeness) if it had been brought directly in a federal-court lawsuit.

## PARTIES TO THE PROCEEDINGS BELOW

Petitioner Lower Colorado River Authority was the plaintiff in the district court and the appellee in the court of appeals.

Respondent Papalote Creek II, L.L.C., was the defendant in the district court and the appellant in the court of appeals.

## CORPORATE DISCLOSURE STATEMENT

As a governmental entity, this Court's Rule 29.6 does not require a Corporate Disclosure Statement, but for the Court's convenience, petitioner states as follows:

Petitioner Lower Colorado River Authority is a Texas conservation and reclamation district and a political subdivision of the State of Texas. Accordingly, it has no parent corporation and no publicly-owned company owns ten percent or more of it.

Respondent Papalote Creek II, LLC, is a Delaware limited liability company. No publicly-held company is a member or parent of a member of it and, therefore, no publicly-owned company owns ten percent or more of it.[1]

[1] Elevate Holdco Funding, LLC, is the sole member of Papalote Creek II, L.L.C.; Elevate Wind HoldCo, LLC, is the sole member of Elevate Holdco Funding, LLC; PD Alternative Investments US, Inc. is one of the two members of Elevate Wind HoldCo, LLC, and no publicly held corporation owns ten percent or more of the stock of PD Alternative Investments US, Inc.; EC&R InvesCo Mgmt, LLC is one of the two members of Elevate Wind HoldCo, LLC; E.ON Climate & Renewables North America, LLC, is the sole member of EC&R InvesCo Mgmt, LLC; and E.ON US Corporation, is the sole member of E.ON Climate & Renewables North America, LLC, and no publicly held corporation owns ten percent or more of the stock of E.ON US Corporation.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISION



STATUTES



SECONDARY SOURCES

IN THE

# Supreme Court of the United States

---

LOWER COLORADO RIVER AUTHORITY,

*Petitioner*,

v.

PAPALOTE CREEK II, L.L.C.,

*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

---

Petitioner Lower Colorado River Authority (LCRA) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-20a) is reported at 858 F.3d 916. The court of appeals' order denying LCRA's petition for rehearing *en banc* (App., *infra*, 35a-36a), the district court's order compelling arbitration (*id.* at 21a-34a), and the district court's order

denying the motion to stay arbitration pending appeal (*id.* at 41a-47a), are unreported.

## STATEMENT OF JURISDICTION

The court of appeals' judgment was filed on May 31, 2017. See App., *infra*, 37a-38a. The court of appeals thereafter denied LCRA's petition for rehearing *en banc* on July 25, 2017. *Id.* at 35a-36a. On October 16, 2017, Justice Alito extended the time for filing a petition for a writ of certiorari until November 22, 2017. This Court has jurisdiction under 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.

## PRELIMINARY STATEMENT

Many Supreme Court cases are complex; this one is simple. It asks the straightforward question of whether federal courts sitting in diversity must compel arbitration when the parties' dispute is one that they have agreed to arbitrate under a valid, written arbitration agreement. The answer should be a clear "yes," but the Fifth Circuit imposed both a new limitation on the enforcement of arbitration agreements and a new burden on federal district courts. It held that a federal court can compel arbitration only if the court—despite having subject-matter jurisdiction under Article III and Title 28 to adjudicate a justiciable petition to compel arbitration—also conducts a full inquiry into the justiciability of a *hypothetical* claim that has not been filed. That is, beyond verifying that the underlying dispute is one over which the court "would have jurisdiction under title 28" (which is what § 4 of the FAA requires), the Fifth Circuit demanded that district courts verify that the hypothetical lawsuit would also sat-

isfy every non-Title 28 justiciability constraint that binds the federal courts.

The Fifth Circuit did not suggest that this new limitation was an Article III requirement; after all, the parties' diversity of citizenship here is undisputed and there is a live, ripe controversy about whether their dispute is arbitrable under the contract's arbitration provision. Rather, to justify its burdensome new requirement, the court blamed this Court, concluding that *Vaden* v. *Discover Bank*, 556 U.S. 49 (2009), had construed the FAA to mandate such a result. But neither *Vaden* nor the FAA even remotely requires converting a ruling on a pettiton to compel arbitration into a deep dive into the parties' underlying dispute to answer questions that Congress never asked.

Reversing the judgment below should be a straightforward matter, perhaps even by summary reversal, given the Fifth Circuit's incorrect application of *Vaden*. Agreements—such collective-bargaining agreements and commercial contracts—often require arbitration of disputes that could not be litigated in federal court. Arbitration agreements are wholly a creature of private contracts, and thus are not governed by Article III's "case" or "controversy" requirement. Accordingly, parties can, and often do, agree to arbitrate disputes that could not be brought in federal court.

For example, federal courts cannot decide cases that are "unripe" or that require an "advisory opinion"—but nothing stops parties from contracting to submit such disputes to private arbitration. The courts' role under the FAA is not to resolve or even address the parties' underlying dispute—it is to hold parties to their promise about *how* to resolve that dispute. Thus, a court can verify the existence of a valid arbitration provision, can de-

cide whether the parties' disputes falls within that agreement's scope, can compel a recalcitrant party to arbitrate as promised, and can enforce the results of the arbitration.

When a party files a petition to compel arbitration, the only relevant jurisdictional question that involves the underlying dispute is whether there would be "subject matter" "jurisdiction *under title 28*" over that hypothetical lawsuit. 9 U.S.C. § 4 (emphasis added). Subject-matter jurisdiction under Title 28 includes, most prominently, federal-question, diversity, and admiralty jurisdiction, see 28 U.S.C. §§ 1331-1333. When, as here, the basis for jurisdiction is diversity of citizenship, satisfying Title 28 is easy on the face of the petition to compel arbitration. Because it is more complicated when a party relies on federal-question jurisdiction, as in *Vaden*, this Court cautiously "approve[d] the 'look through' approach *to this extent*: A federal court may 'look through' a § 4 petition to determine whether it is predicated on an action *that 'arises under' federal law* * * *." 556 U.S. at 62 (emphasis added).

*Vaden*'s limited authorization of a "look through" approach was a way to *expand* federal courts' ability to compel arbitration. The FAA's text invites parties to petition "any United States district court which, save for such agreement, would have jurisdiction under title 28 * * *." 9 U.S.C. § 4. Unless federal courts can "look through" the petition to compel arbitration to see if a federal question would be presented in the underlying dispute, the courts could never compel arbitration of disputes that arose under federal law that were not already in litigation. *Vaden*, 556 U.S. at 65. Such a concern is missing in a diversity case.

The text of § 4 thus justifies *Vaden*'s "look through"

approach and also justifies its limitation of that approach to federal-question cases. Moreover, *Vaden* does not even remotely suggest that the FAA ever requires a federal court to "look through" the petition to determine anything *other than* whether the court "would have jurisdiction under title 28." In deciding whether federal-question, diversity, or admiralty jurisdiction would exist, courts do not "look through" the petition to compel arbitration to answer the irrelevant question of the hypothetical justiciability of the underlying dispute, which the federal court is *not* being asked to adjudicate. As the Second and Eighth Circuits have held, *Vaden* does not even require a "look through" approach to determine diversity of citizenship, which necessarily means that *Vaden* and the FAA do not require a "look through" to ascertain a *non*-Title 28 issue that, unlike statutory subject-matter jurisdiction, the FAA does not even mention.

The Fifth Circuit's holding misconstrues both § 4 of the FAA and *Vaden*. It squarely conflicts with the Second and Eighth Circuits regarding the scope of the "look through" approach, and implicitly rejects the holdings of court after court, both before and after *Vaden*, that routinely have held that questions of justiciability are ones for the arbitrator to decide. Moreover, by creating both a new test that must be met before arbitration can be compelled and a substantive limit that leaves many arbitration agreements beyond the federal courts' authority to enforce, the Fifth Circuit's holding severely limits federal courts' ability to effect the FAA's goal of promoting arbitration.

Finally, the judgment below encourages gamesmanship aimed at evading arbitration. LCRA never *wanted* to be in federal court—it filed its petition to compel arbitration in state court. Respondent Papalote Creek II,

L.L.C. (Papalote)—the party contending that no federal jurisdiction exists—removed it. The Fifth Circuit's needless expansion of extra-statutory bars to compelling arbitration wrongly gives a new and improper tool to parties seeking to avoid arbitration.

## STATEMENT

The Fifth Circuit's opinion accurately states the relevant facts about the parties' contractual relationship and underlying dispute. LCRA challenges only that court's application of the law to those facts.

1. LCRA, a Texas conservation and reclamation district, and Papalote, the owner of a South Texas wind farm, entered into a power-purchase agreement (the contract) in December 2009. Under the contract, LCRA agreed to buy all the wind farm's energy for eighteen years. App., *infra*, 2a. The contract has a liability limitation and requires arbitration of performance-related disputes, including those that could not have been brought in federal court because they are not "ripe." *Id.* at 2a-4a, 23a-25a.[2]

In the spring of 2015, a dispute arose about the liability limitation's meaning. LCRA contended that it capped

---

[2] Because the contract's arbitration provision requires "any dispute" arising with respect to the parties' performance to be arbitrated, it requires arbitration of performance-related disputes regardless of whether they would be considered "unripe" for Article III purposes, which the Fifth Circuit did not dispute and which case law broadly recognizes. See, *e.g.*, *W. Mass. Elec. Co.* v. *Int'l Bhd. of Elec. Workers, Local 455*, No. 11-30106-DPW, 2012 WL 4482343, at *6-7 (D. Mass. Sept. 27, 2012) (an arbitration provision requiring arbitration of "any difference, dispute or grievance" did not require a ripe dispute); *Oil, Chem. & Atomic Workers Int'l Union* v. *Phillips 66 Co.*, 776 F. Supp. 1189, 1193-1194 (S.D. Tex. 1991) (same); see also cases cited in note 6, *infra*.

LCRA's liability under the contract at $60 million. *Id.* at 4a-5a. As the parties were unable to resolve the dispute amicably, LCRA demanded arbitration to resolve it. *Id.* at 5a.

2. After Papalote refused to arbitrate, LCRA filed a petition to compel arbitration in a Texas state court on June 30, 2015. *Ibid.* Papalote removed the action to the United States District Court for the Western District of Texas based on diversity jurisdiction under 28 U.S.C. § 1332. *Ibid.* It then argued that the dispute was not arbitrable because it was neither performance-related nor ripe (as LCRA had not yet stopped buying energy under the contract). *Ibid.*

The district court, in February 2016, found that the dispute was performance-related and that Papalote had failed to properly brief the ripeness issue, and ordered arbitration. *Id.* at 5a-6a; 30a-33a. Papalote appealed the order and moved the district court to stay arbitration pending its appeal. The district court denied the stay motion. *Id.* at 41a-47a

3. While Papalote's appeal was pending, the parties proceeded to arbitration. *Id.* at 7a. In June 2016, the arbitrator issued an award favorable to LCRA, declaring that LCRA's liability under the contract was limited to $60 million. *Ibid.* Shortly thereafter, LCRA stopped buying energy from Papalote. *Ibid.*

4. The Fifth Circuit vacated the district court's order compelling arbitration. Its judgment turned not on arbitrability but on its conclusion that the district court lacked subject-matter jurisdiction over the petition because the parties' dispute about the meaning of the contract's liability limitation was not ripe. *Id.* at 19a. According to the court, *Vaden* required the district court to "look through" LCRA's petition to ascertain the contours

of the parties' underlying dispute; hypothesize a lawsuit involving that underlying dispute; and assess the ripeness (and other justiciability aspects) of that hypothetical lawsuit. *Id.* at 10a-13a. Put another way, it proceeded under the following syllogism:

- under *Vaden*, federal courts have statutory subject-matter jurisdiction over petitions to compel arbitration only if *both* the court would have subject-matter jurisdiction under Title 28 over the underlying dispute if brought as a federal-court lawsuit *and* such a suit would be justiciable (*e.g.*, it is ripe), *id.* at 10a-11a;
- when the district court compelled arbitration, the dispute between LCRA and Papalote would not have been "ripe" had LCRA sought its resolution in a declaratory-judgment lawsuit, *id.* at 14a-15a; and
- the hypothetical *lawsuit's* unripeness meant that the district court lacked subject-matter jurisdiction under the FAA to compel *arbitration*, *id.* at 18a-19a.

The Fifth Circuit thus rejected LCRA's argument that its petition to compel arbitration, in fact, presented a ripe dispute because it involved a "live" controversy about whether the parties' dispute about the meaning of the contract's liability limitation was a performance-related one as required by its arbitration provision. *Id.* at 9a-10a.[3] Given its ripeness holding, the court did not con-

[3] The Fifth Circuit also held that (1) the dispute was not ripe for purposes of federal jurisdiction when the district court ordered arbitration because, before then, LCRA had never directly threatened to stop buying energy under the contract, *id.* at 13a-16a, and (2)

sider Papalote's argument that the district court's judgment should be reversed because the dispute was beyond the arbitration provision's scope. *Id.* at 19a n.6. The Fifth Circuit remanded the case to the district court for further proceedings consistent with its opinion. *Id.* at 20a.

## REASONS FOR GRANTING THE PETITION

LCRA neither invoked federal jurisdiction nor sought to litigate in federal court. Rather, Papalote removed the petition to compel arbitration to federal court, and, under § 4 of the FAA, the district court had the authority and obligation to compel arbitration, which it did. The arbitrator had the contractual authority to resolve the justiciability issue (*i.e.*, ripeness) that Papalote raised in the district court, which she did adversely to Papalote. LCRA, therefore, should be able to put this dispute behind it.

The Fifth Circuit's ruling threatens much more than LCRA's desire for finality. It threatens the entire framework for the enforceability of arbitration provisions by federal courts. The judgment below presents a pure question of law unburdened by any factual disputes—the Fifth Circuit's interpretations of *Vaden* and § 4 of the FAA are either right or wrong. Nor is this a one-off situation—federal courts routinely deal with petitions to compel arbitration, and the Fifth Circuit imposed a new obligation on courts ruling on such petitions irrespective of their jurisdictional basis (*i.e.*, federal-question, diversity, or admiralty jurisdiction).

---

LCRA's decision to stop buying energy under the contract after the arbitration award did not cure the lack of ripeness when the order compelling arbitration was issued, *id.* at 16a-19a. While LCRA disagrees with these holdings, this petition does not challenge them.

In short, the judgment below created an entire class of arbitration agreements that are unenforceable in federal court—those involving disputes that would not be justiciable *if* they were brought as federal lawsuits. It imposed added burdens on *all* arbitration agreements, which must be subjected to additional scrutiny before any petition to compel arbitration can be decided.

## I. This Court Should Authoritatively Determine The Jurisdictional Requirements For Access To Federal Court To Compel Arbitration

The FAA represents Congress's "'national policy favoring arbitration' of claims that parties contract to settle in that matter." *Preston* v. *Ferrer*, 552 U.S. 346, 353 (2008) (quoting *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984)). A mistaken ruling about subject-matter jurisdiction is a serious question regardless of its context, but a mistaken ruling that shuts the doors to federal courts in contravention of the strong "national policy favoring arbitration" is especially significant.

The judgment below represents an error of law on an issue of grave importance. The Fifth Circuit's misstatement of the law flows from a mistaken understanding of the scope of arbitration as reflected in the FAA, conflicts with this Court's decision in *Vaden*, and creates a circuit conflict. Accordingly, the question presented merits this Court's review.

### A. The judgment below departs from the FAA's text and conflates private arbitration with federal-court adjudication

The Fifth Circuit made the enforceability of an arbitration agreement turn on the underlying dispute's theoretical justiciability. See App., *infra*, 13a-15a. This conflation imposes extra-statutory barriers to federal courts'

ability to rule on petitions to compel arbitration. The judgment below thus undermines arbitration's very purpose, which is to avoid the judicial system in resolving the underlying dispute, with courts limited to ruling on petitions to compel arbitration by asking only whether there is a valid arbitration agreement and whether the dispute falls with the agreement's scope.

Below, LCRA first explains why the Fifth Circuit's holding violates the FAA's fundamental principles and text. It then explains why the Fifth Circuit's stated rationale for its new rule—this Court's opinion in *Vaden*—cannot support the judgment below and conflicts with decisions of the Second and Eighth Circuits.

*1. Federal justiciability doctrines are irrelevant to the substantive disputes that can be resolved by arbitration*

"The FAA reflects the fundamental principle that arbitration is a matter of *contract*." *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010) (emphasis added). Section 2 of the FAA makes those contracts "valid, irrevocable, and enforceable," 9 U.S.C. § 2, as case after case in this Court has emphasized.[4] Section 4 of the FAA, in turn, invites a party to an arbitration agreement to seek a federal court's aid if the other party to the agreement refuses to arbitrate in contravention of the agreement. *Id.* § 4. Those who ask a federal (or indeed a state) court to compel arbitration are not asking the court to reach the dispute's merits—they are only asking the court to resolve the immediate, but collateral, conflict about

[4] See *infra* Part I.A.2.a (discussing the relevance of this Court's reiteration that the central purpose of the FAA is rigorous enforcement of arbitration agreements).

whether the contract in fact requires the dispute's arbitration. *What will be arbitrated* is generally irrelevant to that inquiry.

Likewise, justiciability doctrines—like ripeness—certainly determine whether a federal court can resolve a dispute. But they apply to a private arbitration *only* if the parties' agreement so provides. "Arbitration is not a 'judicial proceeding'" at all. *McDonald* v. *City of West Branch*, 466 U.S. 284, 288 (1984). As the Eleventh Circuit explained: "'Article III of the Constitution limits the jurisdiction of *federal courts* to "cases" and "controversies."' Private arbitration panels are obviously not federal courts." *Klay* v. *United Healthgroup, Inc.*, 376 F.3d 1092, 1106 (11th Cir. 2004) (quoting *Coral Springs St. Sys., Inc.* v. *City of Sunrise*, 371 F.3d 1320, 1327 (11th Cir. 2004)) (emphasis added).

Nothing prevents parties from resorting to arbitration to resolve disputes that they could not directly resolve in a federal court. As the Second Circuit explained,

> [a] dispute may be arbitrable within the specific meaning of the arbitration clause, and not give rise to a justiciable cause of action—especially in light of the federal policy to construe liberally arbitration clauses, and the broad reach of the agreement clause * * * requiring arbitration "should any dispute arise between Owners and the Charterers."

*Greenwich Marine, Inc.* v. *S.S. Alexandra*, 339 F.2d 901, 908 (2d Cir. 1965) (citation omitted).[5] Private arbitration

[5] As discussed in greater detail in Part II, *infra*, courts routinely leave any justiciability questions to the arbitrator, without regarding them as a basis to impede federal enforceability of arbitration

panels are even less bound by Article III limitations than state courts,[6] and such panels can readily decide disputes that would not be justiciable if brought as a federal-court lawsuit: "There would be nothing improper or illegal (and certainly not unconstitutional) about an arbitration panel resolving a dispute that would have to be dismissed from federal court because it did not constitute a case or controversy." *Klay*, 376 F.3d at 1106.

The Fifth Circuit's holding—requiring a federal court to "look through" the petition to compel arbitration to decide if the underlying dispute is justiciable—conflicts with the foregoing principles. Even though the underlying dispute's ripeness (or its satisfaction of other federal

---

agreements. See also, *e.g.*, *W. Mass. Elec.*, 2012 WL 4482343, at *6-7 (compelling arbitration even though the parties' arbitration agreement allowed the arbitrator "to issue what might in other contexts be considered an advisory opinion"); *Oil, Chem. & Atomic Workers Int'l Union*, 776 F. Supp. at 1193-1194; *Colonial Penn Ins. Co.* v. *Omaha Indem. Co.*, No. 87-1844, 1987 U.S. Dist. LEXIS 11546, at *8 (E.D. Pa. Dec. 15, 1987).

[6] State courts are bound only by the justiciability limits of their state's constitution. Accordingly, they need not apply federal standing, ripeness, mootness, and political-question doctrines and, if authorized by their state law, can even issue advisory opinions. See, *e.g.*, Richard H. Fallon, Jr., *et al.*, Hart and Wechsler's The Federal Courts and The Federal System 58 (7th ed. 2015) (discussing how state constitutions properly can allow advisory opinions). Unsurprisingly, like the federal-courts decisions noted in this petition, state courts enforce arbitration agreements without regard to whether the underlying dispute would be ripe if litigated in court. See, *e.g.*, *Bunker Hill Park Ltd.* v. *U.S. Bank Nat'l Ass'n*, 180 Cal. Rptr. 3d 714, 722-726 (Cal. Ct. App. 2014); *Montowese Indus. Park, LLC* v. *Thomas E. Golden Realty Co.*, No. CV106013733S, 2011 WL 6945546, at *7-9 (Conn. Super. Ct. Nov. 16, 2011); *Bd. of Educ., Merrick Union Free Sch. Dist.* v. *Merrick Faculty Ass'n, Inc.*, 410 N.Y.S.2d 876, 878-879 (N.Y. App. Div. 1978).

justiciability doctrines) has never been a prerequisite to arbitration, the Fifth Circuit held that district courts cannot compel arbitration of a jurisprudentially unripe dispute *even if* the parties' arbitration agreement requires its arbitration. App., *infra*, 8a-13a. Only the clearest, strongest statutory text should justify that result, given (1) the strong policy of the FAA to encourage arbitration and to open the federal courts to enforcement of arbitration agreements, (2) the longstanding recognition that arbitration agreements, as pure creatures of contract, can and often do require arbitration of disputes that federal courts cannot decide, and (3) the Fifth Circuit's recognition that only the FAA (and not Article III) is implicated, because the dispute about arbitrability is "almost certainly" ripe, App., *infra*, 9a. As described below, however, the FAA's text provides no basis for requiring a "look through" into justiciability.

*2. The Fifth Circuit's decision makes an entire class of arbitration agreements unenforceable in federal courts, contrary to the FAA*

Sections 2 and 4 of the FAA give no indication that Congress expected, much less intended, to erect the barrier to arbitration that the Fifth Circuit purported to discover. In fact, both sections provide the opposite. Congress intends rigorous enforcement of arbitration agreements—the antithesis of hidden obstacles. And it expressly delineated the jurisdictional requisites for federal-court enforcement, leaving no room for newly discovered judicial bars.

a. In construing § 2 of the FAA, this Court has recognized that "[t]he preeminent concern of Congress in passing the [FAA] was to *enforce private agreements* into which parties had entered, and that concern requires that we *rigorously enforce* agreements to arbitrate

* * * ." *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985) (emphasis added). The Court has "said on numerous occasions that the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are *enforced according to their terms*.'" *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (quoting *Volt Info. Sciences, Inc.* v. *Bd. of Trustees*, 489 U.S. 468, 479 (1989)) (emphasis added). It has recognized "that parties are 'generally free to structure their arbitration agreements as they see fit.'" *Id.* at 683 (quoting *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)) (internal punctuation omitted). This Court also repeatedly has declined to recognize any limitations on the enforceability of arbitration agreements that are not contained in §§ 2 or 4 of the FAA.[7] Nothing in §§ 2 or 4 requires the parties' underlying dispute to be "ripe" or otherwise justiciable to be enforceable.

Although this Court repeatedly has held that § 2 requires all types of written arbitration agreements to be "rigorously enforce[d]," *Dean Witter*, 470 U.S. at 221, the Fifth Circuit reads the statute quite differently. It not

---

[7] *E.g.*, *Mastrobuono*, 514 U.S. at 58 ("[I]f contracting parties agree to *include* claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration."); *Southland Corp.* v. *Keating*, 465 U.S. 1, 10-11 (1984) ("We discern only two limitations on the enforceability of arbitration provisions governed by the [FAA]: they must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.' We see nothing in the [FAA] indicating that the broad principle of enforceability is subject to any additional limitations under state law.").

only denies rigorous enforcement of such agreements, but also denies federal enforcement of such agreements *altogether* if the parties' underlying dispute would not be "justiciable" had the plaintiff sought relief by means of a lawsuit instead of a petition to compel arbitration.

b. FAA Despite the Fifth Circuit's contrary implication, see App., *infra*, 11a-15a, § 4 of the FAA is equally and even more expressly inhospitable to the exclusion from federal enforcement of arbitration agreements that do not satisfy "ripeness" or other justiciability requirements. Section 4 provides, in relevant part:

> 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 * * * *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.

9 U.S.C. § 4 (emphasis added).

Section 4 does not require the underlying dispute to be "ripe" (or to satisfy any other justiciability doctrine). Rather, it spells out precisely what jurisdictional showing is needed, and *only* requires that the federal court from which the "aggrieved" party has sought relief "have jurisdiction under title 28 * * * of the subject matter of a suit arising out of the controversy between the parties * * * ." *Ibid.*

The reference to "subject matter"—*i.e.*, subject-matter jurisdiction—is a basic one. But even if it were not, § 4 makes clear that it is subject-matter "jurisdiction

under title 28," most typically federal-question, diversity, or admiralty jurisdiction, 28 U.S.C. §§ 1331-1333. This is not a significant restriction because all federal courts must have subject-matter jurisdiction before they can proceed *in any case*. *E.g.*, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 174-176 (1803).

Section 4 of the FAA simply makes clear that, despite its extremely broad commitment to the enforcement of arbitration agreements as written, it "does not enlarge federal-court jurisdiction," but "confines federal courts" to the already-broad jurisdictional provisions of Title 28. *Vaden*, 556 U.S. at 66. Thus, if a district court has federal-question, diversity, or admiralty jurisdiction over the petition to compel arbitration, § 4 is satisfied without further inquiry.[8] Under basic *expressio unius* principles, § 4's provision of the jurisdictional requirements to compel arbitration should exclude the implication of other unexpressed requirements—if Congress wanted more than a test for "jurisdiction under title 28," it would have said so.

Likewise, § 4 must be read alongside § 2. Given § 2's expansive and aggressive embrace of enforceability, it would be unlikely in the extreme for Congress to smuggle in through § 4 an additional limitation on federal courts' ability to vindicate the purposes of § 2—and even

---

[8] In addressing § 4 in *Dean Witter*, this Court explained that, "[b]y its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. Thus, insofar as the language of the Act guides our disposition of this case, we would conclude that agreements to arbitrate must be enforced, absent a ground for revocation of the contractual agreement." 470 U.S. at 218 (citation omitted).

less likely that such a limitation would remain shrouded for decades until discovered by the Fifth Circuit in 2017.

Here, the district court had diversity jurisdiction over LCRA's petition, and that should have ended the matter. But the Fifth Circuit believed that this Court's decision in *Vaden* effectively rewrote the FAA. Its reading of *Vaden* is erroneous on its face and directly conflicts with the Second and Eighth Circuits' contrary reading and the practice of every other court.

### B. The Fifth Circuit misapplied *Vaden*, dividing the circuits

As described above, the FAA's text and purposes do not support the Fifth Circuit's new rule. The only authority it could muster was this Court's decision in *Vaden*. But its reliance on *Vaden* is so erroneous as to justify summary reversal, and also creates a circuit split, which justifies plenary review.

#### *1. Vaden does not authorize an unbounded jurisdictional "look through"*

The Fifth Circuit placed all responsibility for its new rule on this Court's decision in *Vaden*:

> Under the Supreme Court's decision in *Vaden* * * *, we must "look through" the petition to compel arbitration in order to determine whether the underlying dispute presents a sufficiently ripe controversy to establish federal jurisdiction.

App., *infra*, 10a. The court admitted that it was pushing *Vaden* in a new direction:

> Although *Vaden* concerned whether there was federal question jurisdiction, we see no reason that the holding is limited to only that specific jurisdictional issue. * * * Ac-

> cordingly, *Vaden*'s holding necessarily implies that any of the reasons that a federal court may lack subject matter jurisdiction over the underlying dispute—*e.g.*, ripeness—would similarly prevent a district court from having jurisdiction to compel arbitration.

App., *infra*, 11a. Accordingly, the Fifth Circuit made *two* great leaps, neither of which *Vaden* actually supports:

- leaping from the authorization to "look through" a petition to compel arbitration based on federal-question jurisdiction (as in *Vaden*) to the requirement to "look through" such a petition (like LCRA's) based on diversity-jurisdiction, and
- leaping from requiring subject-matter "jurisdiction under title 28," as *Vaden* and § 4 of the FAA require, to "looking through" a petition to compel arbitration to search out any non-Title 28 justiciability limitation, which neither *Vaden* nor § 4 requires.

*Vaden* supports neither of these leaps.

a. First, there *are* several "reason[s why] the holding" in *Vaden* was "limited to" federal-question jurisdiction, cf. App., *infra*, 11a. The chief one is that this Court *said* as much: "[W]e approve the 'look through' approach *to this extent*: A federal court may 'look through' a § 4 petition to determine whether it is predicated on an action that 'arises under' federal law * * * ." 556 U.S. at 62 (emphasis added). As the Eighth Circuit put it when considering a petition to compel arbitration based on diversity jurisdiction: "*Vaden* does not directly control these cases because the Supreme Court *carefully defined* the issues and *limited its holding* to § 4 petitions based

upon federal question jurisdiction * * * ." *Northport Health Servs. of Ark., LLC* v. *Rutherford*, 605 F.3d 483, 488 (8th Cir. 2010) (discussed more fully in Part I.B.2 below).

Logic supports this limitation. Federal-question jurisdiction involves significantly different considerations than diversity jurisdiction for § 4 purposes. In approving a limited "look through" approach, *Vaden* was faithful to the statutory text. Section 4, after all, requires "subject matter" "jurisdiction under title 28." 9 U.S.C. § 4. Because this jurisdictional inquiry is tethered to the underlying dispute, there is often no way to determine if *federal-question* jurisdiction exists without some "look through" into that dispute (which might involve an actually filed case, as in *Vaden*, or might involve only a hypothetical case). By approving a limited "look through" approach in federal-question cases, this Court, consistent with the FFA's purpose, *expanded* federal courts' ability to enforce arbitration agreements under the statute:

> [W]hen the parties' underlying dispute arises under federal law, the "look through" approach permits a § 4 petitioner to ask a federal court to compel arbitration without first taking the formal step of initiating or removing a federal-question suit—that is, without seeking federal adjudication of the very questions it wants to arbitrate rather than litigate.

556 U.S. at 65.

The Fifth Circuit (App., *infra*, 11a) misread *Vaden*'s statement that "we read § 4 to convey that 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." 556 U.S. at 66. "[T]he entire, actual 'controversy'" was significant in *Vaden* because it involved establishing *federal-question* jurisdiction, where it is essential that the federal question arises *on the face of the complaint*.

In *Vaden*, Discover Bank (with the blessing of the Fourth Circuit) tried to establish federal-question jurisdiction through a *counterclaim* in a case in which the plaintiff's claims arose solely under *state* law. *Id.* at 54-55. This Court's judgment and opinion in *Vaden* turned on the well-pleaded complaint rule, which was not (as the Fourth Circuit had mistakenly believed) superseded in this context: "Under the well-pleaded complaint rule, a completely preempted counterclaim remains a counterclaim and thus does not provide a key capable of opening a federal court's door." *Id.* at 66.[9]

What the Fifth Circuit misunderstood was that this Court's focus in *Vaden* has no diversity-jurisdiction analogue. Its analysis turned on whether a *federal-law* counterclaim could justify *federal-question* subject-matter jurisdiction, something that is never relevant to diversity (which turns on citizenship, not the law under which a claim is brought). The Court made that context even clearer later in the opinion when, after quoting the jurisdictional requirement in § 4 of the FAA, it said: "We read that prescription in light of *the well-pleaded complaint rule* and the corollary rule that federal jurisdiction cannot be invoked on the basis of a defense or counterclaim." *Id.* at 70 (emphasis added). Nothing in *Vaden* suggested

---

[9] See also *id.* at 60-61 (describing the well-pleaded complaint rule and the holding in *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U.S. 826 (2002), which held that federal-question jurisdiction cannot be predicated on counterclaims).

any concern beyond deciding whether federal-question jurisdiction could legitimately serve as a predicate for a § 4 petition.

Put another way, none of the problems that required a "look through" in *Vaden* apply to a jurisdictional predicate of *diversity of citizenship*. Unlike the distinction between claims and counterclaims, where the first party to sue can make a world of difference with respect to whether federal-question jurisdiction exists,[10] diversity exists regardless of who is the plaintiff and who is the defendant, regardless of the claims in the lawsuit, and regardless of whether plaintiffs and defendants are flipped. In other words, a determination of whether the parties' citizenship is diverse does not require the "look through" that is needed when a petition to compel arbitration is based on federal-question jurisdiction.[11]

b. The Fifth Circuit's second leap was to take the "look through" from verifying "jurisdiction under title 28" to a much more intrusive "look through"—one in

---

[10] Both the majority and the partial dissent in *Vaden* discuss this circumstance, unique to federal-question jurisdiction, at some length. See 556 U.S. at 67-68 (maj. op.); *id.* at 73, 75-77 (Roberts, C.J., concurring in part and dissenting in part).

[11] Even if there were a "look through" requirement to establish diversity of citizenship, there is no question that it would be satisfied here. Indeed, whether the amount in controversy exceeds $75,000 could be characterized as a very limited "look through," but as discussed below, see *infra* Part I.B.2, courts that determine the amount-in-controversy in that way reject a full "look through" to determine complete diversity, even though both prongs are clear requirements of 28 U.S.C. § 1332. Given that, there is no textual basis in the FAA for requiring a "look through" to examine justiciability doctrines that are *not* "title 28" jurisdictional requirements, see 9 U.S.C. § 4.

which the federal court must scrutinize the underlying dispute to identify whether all federal-court justiciability doctrines are satisfied. Such an exploration often involves far more deep a dive into the record (or imposes the need to *create* a record) than the comparatively black-and-white analysis required to determine whether federal-question, diversity, or admiralty jurisdiction exists under 28 U.S.C §§ 1331, 1332, or 1333.

Under the Fifth Circuit's approach, a court cannot decide a petition to compel arbitration without first exploring the parties' underlying dispute in depth and assessing standing, mootness, ripeness, the political-question doctrine, the bar on advisory opinions, and the limitation against collusive litigation. None of those justiciability features, however, was discussed in *Vaden* and none of them provides or withholds subject-matter "jurisdiction under title 28," 9 U.S.C. § 4. Rather, they are doctrines devised by courts, primarily through Article III's case-or-controversy requirement. In § 4 of the FAA, Congress expressly limited the jurisdictional analysis to whether "subject matter" "jurisdiction under Title 28" exists, but the Fifth Circuit expanded that carefully written limitation through its misapplication of *Vaden*.

The Fifth Circuit's requirement of justiciability analysis departs from *Vaden* in another important way. *Vaden* addressed the situation in which the party that removed the case was also the party that sought to compel arbitration. Under this posture, the lack of federal jurisdiction was no threat to the FAA's purpose of enforcing arbitration agreement as written and pursuant to the parties' intent because "Discover, we note, is not left without recourse. Under the FAA, state courts as well as federal courts are obliged to honor and enforce agreements to arbitrate." 556 U.S. at 71. But here, LCRA never sought

to invoke federal jurisdiction—it was drawn into federal court by Papalote's timely removal of the case.

If petitions to compel arbitration can be easily removed to federal court, and then defeated by challenges to some aspect of justiciability, parties seeking to evade their arbitration agreements will exploit federal courts to thwart the FAA's purpose. In *Vaden*, "[a]t no time was federal-court intervention needed to place the controversy between the parties before an arbitrator." 556 U.S. at 72. The same is not true here—because Papalote removed the petition, such federal-court intervention *was* necessary.

Beyond creating an extra-textual and enormous new burden on the courts and a new tool of mischief for those wishing to evade arbitration, requiring district courts to search the record (or require that a record be created) to test for justiciability is illogical. The concerns that motivate justiciability analysis—ensuring that the federal courts do not stray beyond their constitutional role—play no part in private contractual agreements to resolve disputes *outside of the judicial process* by arbitration. The time, energy, and money spent by courts and parties assessing justiciability will drain vitality from the FAA, as arbitration becomes less and less efficient and more expensive. Unsurprisingly, *Vaden* did not offer even a hint that such a consequence was in the offing when it approved the limited "look through" approach for the sole purpose of ensuring jurisdiction when petitions to compel arbitration are based on a purported federal question.

The judgment below imposes *Vaden*'s "look through" approach on steroids. It is contrary to the FAA's text and purpose and takes *Vaden* far beyond the limits that the Court itself adopted.

*2. The judgment below creates a circuit split and engenders confusion among the lower courts*

a. The Fifth Circuit's decision also creates a direct 2-1 circuit split with the Second and Eighth Circuits about the "look through" approach's applicability in diversity-jurisdiction cases generally.

In *Northport*, the Eighth Circuit expressly declined to apply *Vaden*'s look-through approach to petitions to compel arbitration based on diversity jurisdiction. See 605 F.3d at 488-491. That court explained that it was a "distort[ion of] the Supreme Court's decision in *Vaden*" to assert (as the Fifth Circuit did here) that *Vaden* effectively "adopt[ed] the 'look through' approach for all § 4 jurisdictional issues, diversity jurisdiction as well as federal question jurisdiction." *Id.* at 488-489. *Vaden*, the court stated, had "carefully defined the issues and limited its holding to § 4 petitions based upon federal question jurisdiction," *id.* at 488, a limitation that did not justify further expansion.[12]

*Northport* reversed a district court that had reached the same conclusion about *Vaden*'s consequences as the Fifth Circuit below. "The district court [in *Northport*] granted the motions to vacate [the previously granted motion to compel], concluding that, while *Vaden* addressed only federal question jurisdiction, its 'look through' analysis implicitly overruled prior federal cases compelling arbitration based upon diversity of citizen-

[12] The overwhelming majority of district court cases likewise have limited *Vaden*'s look-through approach to the determination of federal-question jurisdiction. See, *e.g.*, *Pembroke Health Facilities, L.P.* v. *Ford*, No. 5:16-CV-00158-TBR, 2017 WL 2486354, at *2-3 (W.D. Ky. June 8, 2017) (citing cases).

ship." *Id.* at 485-486.[13] For diversity of citizenship, the Eighth Circuit rejected the very theory that the Fifth Circuit has adopted in this case: "The fundamental flaw in the * * * contention that *Vaden* implicitly overruled prior circuit court diversity jurisdiction decisions * * * is that it ignores the underlying facts and the Supreme Court's decision in *Moses H. Cone* [*Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983)]." *Id.* at 489-490.[14]

---

[13] As noted above, see *supra* note 11, the Eighth Circuit made clear that "some type of look through is needed to determine the amount in controversy," *Northport*, 605 F.3d at 489, to be confident that the $75,000 floor has been exceeded. It, however, declined to "look through" the petition to compel arbitration to determine diversity of citizenship. *Id*. at 488-491. The Eighth Circuit confirmed these positions in *CMH Homes, Inc.* v. *Goodner*, 729 F.3d 832, 836 (8th Cir. 2013).

[14] With respect to *Moses H. Cone*, the Eight Circuit explained that this Court had

> stated that the independent basis of federal jurisdiction was diversity of citizenship. But it did not discuss that threshold issue, despite noting the presence of a non-diverse party who made the parallel state court action non-removable. * * *
>
> * * * Even if no party challenged diversity jurisdiction, that the Supreme Court did not even discuss the issue is telling because in other cases it has noted that federal courts are obligated to consider lack of subject matter jurisdiction *sua sponte*. Thus, the representatives' contention requires us to assume both that the Court overlooked a serious diversity jurisdiction issue in *Moses H. Cone* and then implicitly overruled *Cone's* jurisdictional underpinnings in *Vaden*. This is contrary to well-established principles. * * *
>
> In addition, * * * we find many clues in the major-

The Second Circuit recently embraced the Eighth Circuit's approach. In *Hermès of Paris, Inc.* v. *Swain*, that court relied on *Northport* in rejecting the notion that *Vaden* requires a full "look through" into diversity of citizenship when a petition to compel relies on diversity jurisdiction. 867 F.3d 321, 323-326 (2d Cir. 2017). It held that *Vaden's* "look through" approach does *not* apply to diversity of citizenship because, among other reasons, "*Vaden* speaks only to the applicability of a look-through approach where courts assert federal question jurisdiction over an FAA petition," and thus does not disturb pre-existing precedent. *Id.* at 326. Although *Hermès* did not cite the Fifth Circuit's opinion in this case, the conflict is the same as with *Northport*.

A 2-1 clear conflict is sufficient to justify plenary review. Given that the split involves two major issues for federal courts—the contours of federal subject-matter jurisdiction and the availability of judicial enforcement of arbitration provisions—the Court should grant certiorari to resolve the circuit conflict and dispel the additional confusion throughout the country, to which LCRA next turns.

b. The express conflict—whether *Vaden* requires a full "look through" approach for all jurisdictional purposes for all § 4 petitions—is with the Second and Eighth Circuits. But the judgment below contravenes settled practice across the nation both as to whether diversity jurisdiction requires a full "look through" *and* whether a "look through" for justiciability analysis is authorized

---

> ity opinion in *Vaden* that it did not intend to overrule *Moses H. Cone sub silentio*. [For example, t]he Court cited *Moses H. Cone* approvingly.

605 F.3d at 490 (citations omitted).

under § 4 of the FAA.

Significantly, before this case, no court of appeals, including the Fifth Circuit, had ever held that a district court must determine whether the parties' underlying dispute is ripe or otherwise justiciable beyond having a jurisdictional basis under federal-question, diversity, or admiralty jurisdiction. The decision below incorrectly, and for the first time, creates a new requirement for the granting of a petition to compel arbitration—the ripeness of the underlying dispute (and other justiciability prerequisites), thereby creating at least confusion, if not outright conflict, between the Fifth Circuit and all the other circuits about what requirements a party seeking to compel arbitration must satisfy.

Indeed, as described in Part II below, courts routinely confront petitions to compel arbitration where the underlying dispute is alleged not to be justiciable because, for example, it is not ripe or the petitioner lacks standing. Until now, federal courts have not hesitated to rule on such petitions without deciding the justiciability questions, thus amplifying the conflict created by the judgment below.

Instead, federal courts, including the Fifth Circuit (until now), uniformly have decided petitions to compel arbitration based on the answers to two questions: (1) whether a valid arbitration agreement exists, and (2) whether the underlying dispute falls within the agreement's scope. *E.g.*, *Grand Wireless, Inc.* v. *Verizon Wireless, Inc.*, 748 F.3d 1, 6 (1st Cir. 2014) ("To compel arbitration, the defendants must demonstrate that a valid agreement to arbitrate exists, that the[y are] entitled to invoke the arbitration clause, that the other party is bound by that clause, and that the claim asserted comes

within the clause's scope.") (quotation omitted).[15]

This Court consistently has reviewed cases, like this one, to ensure that lower courts are effecting, without exception, the FFA's principal purpose—the enforcement of arbitration agreements *as written and pursuant to the parties' intention*. *E.g.*, *Rent-A-Center*, 561 U.S. at 72-73 (enforcing arbitration agreement's delegation provision giving arbitrator authority to decide whether the agreement as a whole was unconscionable); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344-346 (2011) (enforcing arbitration agreement's class-arbitration waiver provision); *Mastrobuono*, 514 U.S. at 58 (enforcing arbitration agreement's requirement that punitive-damages claims be arbitrated). The judgment below, if not reversed, will make an entire class of arbitration *agreements*—those in which the parties have agreed to arbitrate disputes that federal courts cannot resolve due to federal justiciability doctrines—unenforceable in the Fifth Circuit.

## II. THE ISSUE IS IMPORTANT AND RECURRING, AND THE FIFTH CIRCUIT'S RESOLUTION CONFLICTS WITH EVERY OTHER CASE'S RESOLUTION OF THE ISSUE

The question of whether a district court can compel arbitration of an unripe or otherwise non-justiciable dispute is important and recurring. The Fifth Circuit

---

[15] Cases making this point abound. See, *e.g.*, *Scheurer* v. *Fromm Family Foods LLC*, 863 F.3d 748, 752 (7th Cir. 2017); *Boardman* v. *Pac. Seafood Grp.*, 822 F.3d 1011, 1017 (9th Cir. 2016); *Chorley Enters., Inc.* v. *Dickey's Barbecue Rests., Inc.*, 807 F.3d 553, 563 (4th Cir. 2015); *Century Indem. Co.* v. *Certain Underwriters at Lloyd's*, 584 F.3d 513, 523 (3d Cir. 2009); *Faber* v. *Menard, Inc.*, 367 F.3d 1048, 1052 (8th Cir. 2004); *Nat'l Am. Ins. Co.* v. *SCOR Reinsurance Co.*, 362 F.3d 1288, 1290 (10th Cir. 2004).

acknowledged that *every* other lower federal court has answered it by applying *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), which makes justiciability (like other issues) a question for the arbitrator. See App., *infra*, 12a & n.3. The Fifth Circuit, without analysis beyond reiterating its expansive view of *Vaden*, simply disagreed with those cases and declined to apply *Howsam*. *Ibid.*

In *Howsam*, this Court established the paradigm for determining which questions related to a petition to compel arbitration are decided by the court and which are decided by the arbitrator. It held that (1) unless an arbitration agreement provides otherwise, a court determines *only* matters of "substantive arbitrability"—*i.e.*, whether a particular dispute falls within the arbitration agreement's scope as well as the threshold question of whether that provision is enforceable, and (2) the arbitrator determines matters of "procedural arbitrability"—*i.e.*, those matters that "'grow out of the dispute and bear on its final disposition,'" 537 U.S. at 84 (quoting *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 557 (1964)), such as "'allegation[s] of waiver, delay, or a like defense to arbitrability,'" *ibid.* (quoting *Moses H. Cone*, 460 U.S. at 24-25); see *id.* at 85 (listing additional such defenses).

Case after case has squarely placed the "justiciability" issue raised in the judgment below within the category of questions to be resolved by the arbitrator. For example, in *Klay*, the Eleventh Circuit explained:

> Nevertheless, even giving the district court the full benefit of the doubt and assuming that justiciability concerns somehow did affect the arbitrability of the claims, the fact remains that the *justicia-*

> *bility issue was for the arbitrators, and not the court, to resolve.* * * *
> * * *
>
> * * * Generally speaking, courts are empowered to resolve disputes that solely involve whether a particular claim should be resolved in court or arbitration. Arbitrators, are [*sic*] the other hand, are empowered, absent an agreement to the contrary, to resolve disputes over whether a particular claim may be successfully litigated anywhere at all (due to concerns such as statute of limitations, laches, justiciability, etc.), or has any substantive merit whatsoever.

376 F.3d at 1107, 1109 (emphasis added; citations omitted). Multiple other cases make similar points about justiciability issues, whether about ripeness[16] or, as in *Klay*,

---

[16] *E.g.*, *Grant* v. *Brown*, No. 4:14CV01395 ERW, 2014 WL 6389577, at *2 (E.D. Mo. Nov. 14, 2014) (holding that, because "[p]rocedural questions are for an arbitrator to decide, not a judge," the "arbitrator must ultimately decide whether the dispute is ripe for adjudication"); *Transp. Workers Union* v. *Veolia Transp. Servs.*, 24 F. Supp. 3d 223, 229-230 (E.D.N.Y. 2014) (ripeness is "for the arbitrator to decide because it involves an issue of procedural arbitrability"); *Local Union No. 13417* v. *Kan. Gas Serv. Co.*, No. 12-1003-JWL, 2012 WL 1435305, at *7 n.3 (D. Kan. Apr. 25, 2012) ("To the extent the Company is suggesting that the Union's grievance is not ripe, that question is left to the arbitrator.") (citing *Howsam*)); *Milliman, Inc.* v. *Health Medicare Ultra, Inc.*, 641 F. Supp. 2d 113, 119 (D.P.R. 2009) ("We disagree with the Magistrate Judge's finding that the lack of ripeness of the actual dispute that Petitioners brought to arbitration before the AAA precludes this Court from entering an order compelling arbitration. Whether the alleged dispute that led Petitioners to commence arbitration proceedings before the AAA is ripe must ultimately be determined by the arbitrator."); *ACE Am.*

standing and other justiciability doctrines.[17] But *none* of them—before or after *Vaden*—ever concluded that a federal court must consider such issues as part of the § 4 jurisdictional analysis.

The Fifth Circuit's failure to apply *Howsam*'s paradigm to the ripeness issue not only is wrong, but sows confusion about when the paradigm applies and what questions fall within its scope. The sheer volume of cases

---

*Ins. Co.* v. *Huntsman Corp.*, 255 F.R.D. 179, 210 (S.D. Tex. 2008) (holding that a dispute's ripeness is for the arbitrator to decide); *Albritton* v. *W.S. Badcock Corp.*, Nos. 1:02-CV378-D-D & 1:02-CV379-D-D, 2003 WL 21018636, at *4 (N.D. Miss. Apr. 7, 2003) (rejecting argument that a motion to compel arbitration must be denied because the dispute was not ripe because "[t]he Supreme Court [in *Howsam*] * * * has recently held that procedural questions such as ripeness are for an arbitrator, not for the court, to decide"); *Pioneer Navigation Ltd.* v. *Maritime Enters., Inc.*, No. 95-1054, 1995 WL 517137, at *2 (E.D. La. Aug. 30, 1995) ("[T]his court's role is limited to staying the litigation and allowing the arbitrators to resolve all issues under the [contract], including the ripeness of an issue for arbitration."); see *Chi. Typographical Union No. 16* v. *Chi. Sun-Times, Inc.*, 860 F.2d 1420, 1425 (7th Cir. 1988) ("As an abstract matter, there may be some room for doubt whether it is the role of the court to determine if a live 'controversy' or 'disagreement' exists between the parties, in the sense in which those terms are employed in an arbitration clause. As noted above, there is authority that the court should inquire only whether the subject matter of a dispute is within the arbitration clause, leaving the arguably procedural issue of 'ripeness' to the arbitrator.").

[17] *E.g.*, *Envtl. Barrier Co.* v. *Slurry Sys., Inc.*, 540 F.3d 598, 605 (7th Cir. 2008) (holding that standing is "a procedural matter for the determination of the arbitrator"); *CRT Cap. Grp.* v. *SLS Cap., S.A.*, 63 F. Supp. 3d 367, 381 (S.D.N.Y. 2014) (same); *Int'l Union* v. *Federal-Mogul Corp.*, No. 06-CV-15363-DT, 2007 WL 1888802, at *4 (E.D. Mich. June 29, 2007) (agreeing that "affirmative defenses that raise procedural arbitrability questions (such as lack of ripeness or standing) can be decided by the arbitrator").

rejecting the principle adopted by the Fifth Circuit in this case illustrates how often this issue arises.

This petition presents a clean vehicle for the Court to resolve these issues and provide clarity and finality about when federal courts can compel arbitration.

## CONCLUSION

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

Respectfully submitted,

Robert K. Wise
LILLARD WISE SZYGENDA PLLC
13760 Noel Road
Suite 1150
Dallas, Texas 75240
(214) 739-2000

Evan A. Young
*Counsel of Record*
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard
Suite 1500
Austin, Texas 78701
(512) 322-2506
evan.young@bakerbotts.com

*Counsel for Petitioner Lower Colorado River Authority*

November 2017