No.

In the Supreme Court of the United States

DENISE A. BADGEROW, PETITIONER

v.

GREG WALTERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DANIEL L. GEYSER
Counsel of Record
ALEXANDER DUBOSE & JEFFERSON LLP
Walnut Glen Tower
8144 Walnut Hill Lane, Ste. 1000
Dallas, TX 75231
(214) 396-0441
dgeyser@adjtlaw.com

AMANDA BUTLER SCHLEY
BUSINESS LAW GROUP
700 Camp Street, Ste. 418
New Orleans, LA 70130

NICHOLAS BACARISSE
ALEXANDER DUBOSE & JEFFERSON LLP
515 Congress Ave., Ste. 2350
Austin, TX 78701

QUESTION PRESENTED

This case presents a clear and intractable conflict regarding an important jurisdictional question under the Federal Arbitration Act (FAA), 9 U.S.C. 1-16.

As this Court has repeatedly confirmed, the FAA does not itself confer federal-question jurisdiction; federal courts must have an independent jurisdictional basis to entertain matters under the Act. In *Vaden* v. *Discover Bank*, 556 U.S. 49 (2009), this Court held that a federal court, in reviewing a petition to compel arbitration under Section 4 of the Act, may "look through" the petition to decide whether the parties' *underlying dispute* gives rise to federal-question jurisdiction. In so holding, the Court focused on the particular language of Section 4, which is not repeated elsewhere in the Act.

After *Vaden*, the circuits have squarely divided over whether the same "look-through" approach also applies to motions to confirm or vacate an arbitration award under Sections 9 and 10. In *Quezada* v. *Bechtel OG & C Constr. Servs., Inc.*, 946 F.3d 837 (5th Cir. 2020), the Fifth Circuit acknowledged the 3-2 "circuit split," and a divided panel held that the "look-through" approach applies under Sections 9 and 10. In the proceedings below, the Fifth Circuit declared itself "bound" by that earlier decision, and applied the "look-through" approach to establish jurisdiction. That holding was outcome-determinative, and this case is a perfect vehicle for resolving the widespread disagreement over this important threshold question.

The question presented is:

Whether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under Sections 9 and 10 of the FAA where the only basis for jurisdiction is that the underlying dispute involved a federal question.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Denise A. Badgerow.

Respondents are Greg Walters; Thomas Meyer; and Ray Trosclair.

RELATED PROCEEDINGS

Civil District Court for the Parish of Orleans, Louisiana, Division M, No. 13:

Denise Badgerow v. *Greg Walters, et al.*, No. 19-4752 (May 13, 2019) (notice of removal)

United States District Court (E.D. La.):

Denise A. Badgerow v. *Greg Walters, et al.*, No. 19-10353 (June 27, 2019) (judgment)

Denise A. Badgerow v. *Greg Walters, et al.*, No. 19-10353 (Aug. 20, 2019) (order denying motion to alter or amend judgment)

United States Court of Appeals (5th Cir.):

Denise A. Badgerow v. *Greg Walters, et al.*, No. 19-30766 (Sept. 15, 2020)[*]

[*] Although not directly related to these proceedings, this case broadly relates to the proceedings in *Denise A. Badgerow* v. *REJ Properties, Inc., d/b/a Walters, Meyer, Trosclair and Associates; and Ameriprise Financial Services, Inc.*, No. 17-9492 (E.D. La.), and *Denise A. Badgerow* v. *REJ Properties, Inc.*, Nos. 19-30584 & 19-30687 (5th Cir.) (Sept. 11, 2020) (judgment).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Introduction 2
Statement 3
Reasons for granting the petition 14
- A. There is a clear and intractable conflict over a significant jurisdictional question under the FAA 14
- B. The question presented is exceptionally important and warrants review in this case 29

Conclusion 32
Appendix A — Court of appeals opinion (Sept. 15, 2020) 1a
Appendix B — District court order and opinion (June 26, 2019) 11a
Appendix C — Statutory provisions 18a

TABLE OF AUTHORITIES

Cases:

Collins v. *Blue Cross Blue Shield of Mich.*, 103 F.3d 35 (6th Cir. 1996) 20
Collister v. *KXAN-TV*, No. 19-350, 2019 WL 11506114 (W.D. Tex. Nov. 26, 2019) 28
Dean Witter Reynolds Inc. v. *Byrd*, 470 U.S. 213 (1985) 3, 4
Doscher v. *Sea Port Group Sec., LLC*, 832 F.3d 372 (2d Cir. 2016) .... *passim*
Federated Mut. Ins. Co. v. *Federated Nat'l Holding Co., Inc.*, No. 18-714, 2018 WL 3104110 (D. Minn. June 22, 2018) 27, 28

Page

Cases—continued:

Federated Mut. Ins. Co. v. *FedNat Holding Co.*,
928 F.3d 718 (8th Cir. 2019)..28
Goldman v. *Citigroup Global Mkts. Inc.*,
834 F.3d 242 (3d Cir. 2016) ....*passim*
Hall Street Assocs., L.L.C. v. *Mattel, Inc.*,
552 U.S. 576 (2008)...4, 5
Harman v. *Wilson-Davis & Co.*, No. 16-229,
2017 WL 74707 (D. Utah Jan. 6, 2017) 28
Janus Distributs. LLC v. *Roberts*, No. 16-2130,
2017 WL 1788374 (D. Colo. May 5, 2017).......................28
Kasap v. *Folger Nolan Fleming & Douglas, Inc.*,
166 F.3d 1243 (D.C. Cir. 1999)..................................19, 30
Kokkonen v. *Guardian Life Ins. Co.*,
511 U.S. 375 (1994).. 16, 22, 23, 25
Landau v. *Eisenberg*, 922 F.3d 495 (2d Cir. 2019)...........24
Luong v. *Circuit City Stores, Inc.*,
368 F.3d 1109 (9th Cir. 2004)....................................20, 28
Magruder v. *Fidelity Brokerage Servs. LLC*,
818 F.3d 285 (7th Cir. 2016)...................................*passim*
McCormick v. *Am. Online, Inc.*, 909 F.3d 677
(4th Cir. 2018) 25, 26, 27
Minor v. *Prudential Sec., Inc.*, 94 F.3d 1103
(7th Cir. 1996) 19, 22
Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)..4
Moses H. Cone Mem'l Hosp. v. *Mercury Constr. Corp.*,
460 U.S. 1 (1983)..4
Ortiz-Espinosa v. *BBVA Sec. of Puerto Rico, Inc.*,
852 F.3d 36 (1st Cir. 2017) 5, 24, 25
Quezada v. *Bechtel OG & C Constr. Servs., Inc.*,
946 F.3d 837 (5th Cir. 2020)...................................*passim*
Russ v. *United Servs. Auto. Ass'n*, No. 18-4222,
2019 WL 3083015 (D. Ariz. July 15, 2019) 27, 28
Southland Corp. v. *Keating*, 465 U.S. 1 (1984)...................4

Page

Cases—continued:

V.I. Hous. Auth. v. *Coastal Gen. Constr. Servs. Corp.*,
27 F.3d 911 (3d Cir. 1994) 18
Vaden v. *Discover Bank*, 556 U.S. 49 (2009)............*passim*

Statutes, regulations, and rule:

Federal Arbitration Act (FAA), 9 U.S.C. 1-16..........*passim*
9 U.S.C. 2 (§ 2)..4
9 U.S.C. 4 (§ 4)...*passim*
9 U.S.C. 9 (§ 9)...*passim*
9 U.S.C. 10 (§ 10).......................................*passim*
9 U.S.C. 11 (§ 11).......................................*passim*
28 U.S.C. 1254(1)...2
28 U.S.C. 1331...*passim*
28 U.S.C. 1332...17
17 C.F.R. 240.15c2-11 8
17 C.F.R. 240.17a-3...8
17 C.F.R. 240.17a-4...8
FINRA Rule 2040...8

Miscellaneous:

1 *Alternative Dispute Resolution Practice Guide*
§ 14:1 (Dec. 2020 update) 7, 15
American Arbitration Association <www.adr.org> 30
Kaitlyn A. Crowe, *The Problem of Federal Question Jurisdiction Over FAA Petitions After a Domestic Arbitration*, Mintz Insights Center (Mar. 13, 2019)
<tinyurl.com/mintz-faa>...3
FINRA, *Dispute Resolution Statistics*
<tinyurl.com/finra-stats> 30
O'Connor's Federal Rules, Civil Trials, Ch. 7-E § 4.1.1(1)
(2021 ed.)...3
Beverly A. Pohl, et al., *A Circuit Split on a Question of Federal Jurisdiction*, Federal Bar Association's
SideBar, Winter 2019 <tinyurl.com/FBA-FAA>......2, 3

In the Supreme Court of the United States

No.

DENISE A. BADGEROW, PETITIONER

v.

GREG WALTERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Denise A. Badgerow respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 975 F.3d 469. The order and opinion of the district court (App., *infra*, 11a-17a) is unreported but available at 2019 WL 2611127.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2020. On March 19, 2020, the Court extended the time within which to file a petition for a writ of certiorari due on or after the order's date to 150 days from "the date of the lower court judgment * * * or order deny-

ing a timely petition for rehearing"; that order had the effect of extending the deadline to file this petition to February 12, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Arbitration Act, 9 U.S.C. 1-16, are reproduced in the appendix to this petition (App., *infra*, 18a-22a).

INTRODUCTION

This case presents a square and indisputable conflict over a significant jurisdictional question: whether *Vaden*'s "look-through" approach applies to motions to enforce or vacate arbitration awards under Sections 9 and 10 of the FAA. In the proceedings below, the Fifth Circuit declared itself "bound" by a divided panel decision adopting the "look-through" approach. In that decision, a 2-1 majority expressly rejected the position of the Seventh and Third Circuits and adopted the contrary position of the First, Second, and Fourth Circuits; the dissent (Judge Ho) would have reached the opposite conclusion. The same jurisdictional issue was resolved at each stage of this case and was dispositive below; there are no conceivable obstacles to resolving it in this Court.

This case easily satisfies the traditional criteria for granting review. The conflict is obvious, acknowledged, and entrenched. It has already been recognized by multiple courts and commentators.[1] Two circuits have explicitly

---

[1] *E.g.*, Beverly A. Pohl, et al., *A Circuit Split on a Question of Federal Jurisdiction*, Federal Bar Association's SideBar, Winter 2019, at 5-6 ("[g]iven the existing circuit split, lawyers involved in arbitrations might reasonably advance either side of this argument in circuits that have not yet weighed in"; "eventually the Supreme Court may have

held that *Vaden*'s "look-through" approach does not apply under Sections 9 and 10, whereas four circuits have held the opposite—the last one by a divided vote. Further percolation is pointless: the arguments have been exhaustively developed on each side, and there is no realistic prospect that either faction will back down. The remaining circuits are simply left to pick sides—while parties are left wondering where to assert their rights under the FAA.

The question presented raises legal and practical issues of surpassing importance, and its correct disposition is essential to the FAA's proper operation. It does parties little good to seek to confirm or vacate an arbitration award only to learn on appeal that the district court lacked jurisdiction. This Court granted review in *Vaden* to resolve the identical question for petitions to compel under Section 4, and it is equally essential to have clarity for motions to enforce or vacate under Sections 9 and 10. Because this case presents an optimal vehicle for resolving this important question of federal law, the petition should be granted.

STATEMENT

1. a. In 1925, Congress enacted the FAA to "ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 219 (1985). The Act's passage was "motivated, first and

---

to resolve this important question of federal question jurisdiction") <tinyurl.com/FBA-FAA>; Kaitlyn A. Crowe, *The Problem of Federal Question Jurisdiction Over FAA Petitions After a Domestic Arbitration*, Mintz Insights Center (Mar. 13, 2019) ("[t]he federal circuit courts are split"; "it remains to be seen which approach will eventually be approved by the Justices") <tinyurl.com/mintz-faa>; O'Connor's Federal Rules, Civil Trials, Ch. 7-E § 4.1.1(1) note (2021 ed.) ("Courts disagree on whether a court can 'look through' the complaint and examine the parties' underlying dispute to determine whether it involves federal-question jurisdiction.").

foremost," by that purpose, and this Court has emphasized that "principal objective when construing the statute." *Id.* at 220; see also *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-626 (1985) (Congress's "'preeminent concern'" was enforcing private arbitration agreements) (quoting *Dean Witter*, 470 U.S. at 221).

To achieve its objective, the FAA "'creates a body of federal substantive law'" that is "applicable in [both] state and federal court." *Southland Corp.* v. *Keating*, 465 U.S. 1, 12 (1984); see also *Vaden* v. *Discover Bank*, 556 U.S. 49, 59 (2009). Yet "[w]hile the Federal Arbitration Act creates federal substantive law," "it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331[] or otherwise." *Southland*, 465 U.S. at 15-16 n.9. This leaves the FAA as "something of an anomaly in the field of federal-court jurisdiction." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983); see also *Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 581-582 (2008) ("As for jurisdiction over controversies touching arbitration, the Act does nothing, * * * bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis.").

"Given the substantive supremacy of the FAA, but the Act's nonjurisdictional cast, state courts have a prominent role to play as enforcers of agreements to arbitrate." *Vaden*, 556 U.S. at 59. Indeed, "enforcement of the Act is left in large part to the state courts." *Moses H. Cone*, 460 U.S. at 25 n.32.

b. Section 2 is the FAA's "centerpiece provision." *Mitsubishi Motors*, 473 U.S. at 625. It declares that a written agreement to arbitrate "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.

If a party refuses to honor an arbitration agreement, the Act authorizes federal courts (in defined circumstances) to enforce the agreement: "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate" may petition to compel arbitration before "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*." 9 U.S.C. 4 (emphasis added).

The FAA "also supplies mechanisms for enforcing arbitration awards: a judicial decree confirming an award, an order vacating it, or an order modifying or correcting it." *Hall Street*, 552 U.S. at 582 (citing 9 U.S.C. 9-11); see also App., *infra*, 19a-22a (reproducing Sections 9-11). As relevant here, "there is a difference in statutory language between § 4 and the latter sections [Sections 9-11]. In particular, the latter sections do not include the 'save for [the arbitration] agreement' and 'arising out of the controversy between the parties' language" found in Section 4. *Ortiz-Espinosa* v. *BBVA Sec. of Puerto Rico, Inc.*, 852 F.3d 36, 44 (1st Cir. 2017).

2. The scope of federal jurisdiction under the FAA has generated substantial confusion for courts and litigants nationwide.

a. In *Vaden*, the Court granted review to resolve a conflict over the proper jurisdictional analysis for Section 4 petitions to compel arbitration: "whether district courts, petitioned to order arbitration pursuant to § 4 of the FAA, may 'look through' the petition and examine the parties' underlying dispute to determine whether federal-question jurisdiction exists over the § 4 petition." 556 U.S. at 57. At the time, four circuits had held that federal-question jurisdiction did not exist unless the Section 4 petition itself invoked a federal question, whereas two circuits held

the opposite—and exercised jurisdiction if the *underlying* dispute involved a federal question. *Ibid.* (outlining the circuit conflict).

The Court initially noted that the FAA "'bestow[s] no federal jurisdiction but rather requir[es] [for access to a federal forum] an independent jurisdictional basis' over the parties' dispute." 556 U.S. at 59 (alterations in original). But the Court ultimately held that federal jurisdiction may exist under the "'look through' approach": "[a] federal court may 'look through' a § 4 petition to determine whether *it is predicated on an action that 'arises under' federal law*." *Id.* at 62 (emphasis added). Under the Court's holding, if the underlying dispute involves a federal claim, federal courts can exercise jurisdiction under Section 4. *Id.* at 53, 62-63.

In so holding, the Court declared that "[t]he text of § 4 drives our conclusion." 556 U.S. at 62; see also, *e.g.*, *id.* at 63 (analyzing what "Section 4 directs"); *id.* at 68 (examining what "[t]he text of § 4 instructs"). Focusing on Section 4's particular language, the Court reasoned that "[t]he phrase 'save for [the arbitration] agreement' indicates that the district court should assume the absence of the arbitration agreement and determine whether it 'would have jurisdiction under title 28' without it." *Ibid.*

The Court further noted that rejecting the look-through approach—and refusing jurisdiction even when the underlying dispute raised a federal question—would invite "curious practical consequences." 556 U.S. at 65. As the Court explained, "when 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." *Ibid.* Otherwise, the

Court observed, the FAA would not "accommodate a § 4 petitioner who *could* file a federal-question suit in (or remove such a suit to) federal court, but who has not done so." *Ibid.*

In sum, the Court determined, "§ 4 of the FAA does not enlarge federal-court jurisdiction; rather, it confines federal courts to the jurisdiction they would have 'save for [the arbitration] agreement.'" 556 U.S. at 66. *Vaden* accordingly held that "[a] federal court may 'look through' a § 4 petition and order arbitration if, 'save for [the arbitration] agreement,' the court would have jurisdiction over 'the [substantive] controversy between the parties.'" *Id.* at 53.

b. While *Vaden* set the standard for Section 4, it did not address the proper jurisdictional analysis for motions to confirm or vacate arbitration awards under Sections 9 and 10. "There remains a significant circuit split" on that question, and "the Supreme Court has not stepped in to clarify this area." 1 *Alternative Dispute Resolution Practice Guide* § 14:1 (Dec. 2020 update) (*ADR Practice Guide*).

3. a. Denise Badgerow (petitioner here) worked as an associate financial advisor for REJ Properties, Inc. App., *infra*, 2a. The Louisiana firm was run by three principals (respondents here) who were independent franchise advisors for Ameriprise Financial Services, Inc. *Ibid.* All were members of the Financial Industry Regulatory Authority (FINRA), and petitioner's employment relationship was subject to a FINRA arbitration agreement. *Id.* at 3a.

During her employment, petitioner raised concerns about workplace harassment to Ameritrade, and was eventually terminated after reporting violations of federal securities laws, SEC regulations, and FINRA rules; the

termination came the day after respondents were contacted by an Ameriprise Compliance officer about those alleged violations. C.A. ROA 23, 594-598.

Petitioner initiated a FINRA arbitration proceeding against respondents, and later joined Ameritrade after it "successfully moved to compel arbitration in a separate federal lawsuit." App., *infra*, 3a. In her arbitration complaint, petitioner asserted that respondents violated the Securities Exchange Act of 1934, multiple SEC regulations (*e.g.*, 17 C.F.R. 240.17a-3, 17 C.F.R. 240.17a-4, and 17 C.F.R. 240.15c2-11), and FINRA Rule 2040, and explained she was terminated for reporting those violations to Ameritrade. C.A. ROA 599-605. She asserted whistleblower and other state-law claims under Louisiana law, and added a declaratory-judgment claim against Ameritrade, alleging it was a joint employer and thus "jointly liable for the alleged discriminatory conduct of [respondents] and REJ." App., *infra*, 3a; C.A. ROA 608.

The FINRA panel sided with respondents and Ameritrade, issuing an award dismissing petitioner's claims with prejudice. App., *infra*, 3a.

b. Petitioner then sought to vacate the arbitration award in Louisiana state court. App., *infra*, 3a; C.A. ROA 21-41. She submitted "extensive" briefing (App., *infra*, 13a n.3) that respondents obtained the award by fraud (*id.* at 3a), which she uncovered during discovery in related litigation. C.A. ROA 23-24, 31-32. Respondents removed the case to federal court citing federal-question jurisdiction (C.A. ROA 8), and moved to confirm the award under Section 9 of the FAA. App., *infra*, 3a-4a. Petitioner moved to remand for lack of subject-matter jurisdiction. *Ibid.*

4. The district court denied the motion to remand and confirmed the arbitration award. App., *infra*, 11a-17a.

As relevant here, the court found that "the sole question before the Court is whether it has subject matter jurisdiction over the removed action." App., *infra*, 13a.[2] It recognized *Vaden*'s holding that "a federal court may 'look through' a § 4 petition to determine whether it is predicated on an action that arises under federal law," but noted that, in *Vaden*'s "aftermath," "courts have grappled with whether the 'look through' approach applies to § 10 motions to vacate." *Id.* at 14a-15a. The court observed that certain circuits had "declin[ed] to extend *Vaden* to § 10 motions" because "*Vaden*'s reasoning was grounded on specific text in § 4 that § 10 does not contain," whereas other circuits had "extended [*Vaden*] to § 10" despite the "textual differences." *Id.* at 15a. At the time, "[t]he Fifth Circuit ha[d] not yet entered into the fray of this circuit split." *Ibid.*

On balance, the court elected to "err on the side of assuming" that *Vaden*'s "look through approach" applies to Section 10 motions. App., *infra*, 15a. Its only explanation was practical: by assuming jurisdiction, petitioner "can raise this issue on appeal but if the [c]ourt remands this matter for lack of subject matter jurisdiction then [respondents] will have no appeal option." *Id.* at 15a n.5. The court then "looked through" to the underlying dispute and found federal-question jurisdiction because petitioner's "joint employer claims" were "grounded on federal employment law." *Id.* at 16a. The court accordingly denied

[2] The court explained that it had separately confirmed the award for Ameriprise, and "analyzed and rejected [petitioner's] allegation of fraud" in the process. App., *infra*, 12a-13a & n.3. Although that separate finding was not binding (because respondents "were not parties" to the Ameriprise action), the court declined to reengage the merits here. *Id.* at 13a & n.2.

the motion to remand and confirmed the arbitration award. *Id.* at 16a-17a.[3]

Petitioner filed a notice of appeal. C.A. ROA 1814.

5. While petitioner's appeal was pending, the Fifth Circuit addressed the jurisdictional question, and a 2-1 panel adopted *Vaden*'s "look through" approach for motions to confirm or vacate awards under Sections 9 and 10. *Quezada* v. *Bechtel OG & C Constr. Servs., Inc.*, 946 F.3d 837 (5th Cir. 2020).

a. Like the district court, the panel majority observed that "[a]fter *Vaden*, a circuit split developed regarding whether the [Section 4] look-through approach also applies to applications to confirm an arbitration award under section 9, to vacate under section 10, or to modify under section 11." 946 F.3d at 841. "On one side," the majority noted, were the "Third and Seventh Circuits," which "decline to apply the look-through approach set out in *Vaden*" to motions under Sections 9 and 10. *Id.* at 841-842. "On the other side" were the "First, Second, and Fourth Circuits," which "extend the look-through approach to [such] motions." *Id.* at 842.

After examining both sides of the split, the majority expressly rejected the Third and Seventh Circuits' position and "join[ed] the First, Second, and Fourth Circuits in concluding that motions brought under sections 9, 10, and 11 * * * are subject to [*Vaden*'s] look-through approach." 946 F.3d at 843. As the majority reasoned, "'[t]he [FAA] was enacted as a single, comprehensive statutory scheme,'" and "this principle of uniformity dictates using the same approach for determining jurisdiction under

[3] Respondents also argued that even petitioner's state-law claims were predicated on "alleged violation[s] of federal law." App., *infra*, 16a n.7. The court found it unnecessary to address that issue "because the award itself included federal claims." *Ibid.*

each section of the statute." *Id.* at 842. The majority explained that "provid[ing] a different jurisdictional rule for section 4 would be, in essence, to expand jurisdiction for section 4 motions," contravening "[t]he rule that the FAA is not an independent basis for federal jurisdiction and does not enlarge existing grounds for jurisdiction." *Ibid.*

The majority also found that *Vaden*'s "practical considerations" "apply with equal force to all other sections" of the Act. 946 F.3d at 843. As the majority reasoned, without the look-through approach, litigants would be forced to take "inefficient and formalistic" steps to protect federal jurisdiction, filing (unnecessary) Section 4 motions simply to obtain jurisdiction at the outset so it would be available on the backend. *Ibid.* (identifying a "perverse incentive for cautious practitioners to file first in federal court and be referred or compelled to arbitration, all for the sole purpose of preserving federal jurisdiction to later review the award").

The majority acknowledged the textual argument on the other side, including that "'[n]either § 9 nor § 10 has any language comparable to that on which the Supreme Court relied in *Vaden*.'" 946 F.3d at 842. But it ultimately declared the textual argument "[un]persuasive," holding instead that this Court's "guidance in *Vaden* and the background principles animating its jurisdictional analysis" warranted applying "the same look-through approach." *Id.* at 842-843.

b. Judge Ho dissented. 946 F.3d at 845-847.

He initially noted that "[a]rbitration agreements are contracts—and contracts are ordinarily a matter of state law." *Id.* at 845. While "[a]rbitration disputes" may be "brought in federal court[] if Congress so authorizes," he noted that the FAA "confers no federal jurisdiction." *Ibid.* Thus "[d]isputes arising out of arbitration" generally "belong in state court." *Ibid.*

While Judge Ho agreed that Section 4 "allows federal courts to exercise jurisdiction over certain arbitration disputes under 28 U.S.C. § 1331," "[t]his case, however, involves not a motion to compel arbitration under § 4, but a motion to vacate an arbitration award under § 10." 946 F.3d at 845-846. And none of the post-award "sections contain the 'look through' language found in § 4." *Id.* at 846. Indeed, he noted, "neither the panel majority nor the parties claim any textual support for federal jurisdiction." *Ibid.* And while "they observe that there is a circuit split on the issue," he continued, "[r]ather than count circuits, I would follow the text wherever it leads"—and "[f]idelity to text thus compels me to conclude that the district court lacked jurisdiction." *Ibid.*

Judge Ho also repudiated the majority's view that it would be "absurd" for Congress to "confer federal jurisdiction over motions to compel under § 4, but not over motions to confirm, vacate, and modify under §§ 9-11." 946 F.3d at 846. As he explained, "Section 4 commences the arbitration process"; "Sections 9-11, by contrast, operate only after the issuance of the arbitration award." *Ibid.* The "dichotomy" thus "'parallels the distinction * * * between an original federal claim and a dispute about its contractual resolution,'" and it is "consistent with how we treat settlements"—"[t]he enforcement of settlements is ordinarily a matter for state courts, not federal courts," "even when a settlement happens to resolve federal questions." *Ibid.*

Finally, Judge Ho downplayed the majority's concerns about "creat[ing] perverse incentives." 946 F.3d at 846. He noted that the majority failed to cite any authority that even "permits" the "stratagem" of filing a motion to compel under Section 4 solely to preserve jurisdiction under Sections 9-11; on the contrary, he identified circuit au-

thority for *dismissing* "a case following a motion to compel"—which would eliminate the "perverse incentive[]" entirely. *Id.* at 846-847. And while the majority believed that Judge Ho's approach "violate[s]" *Vaden*'s rule that the FAA does not "expan[d]" jurisdiction, he countered that "*Vaden* instructs us to faithfully follow the text of the FAA, including the unique language of § 4." *Id.* at 847.

6. After *Quezada* came down, the Fifth Circuit affirmed in this case. App., *infra*, 1a-10a.

The court initially noted that "the finding of federal subject-matter jurisdiction" was the sole contested issue. App., *infra*, 2a, 4a ("the only issue for our review is whether the district court properly found that it had *jurisdiction* to rule on the merits of the removed petition to vacate and properly denied remand").

The court then held it was "bound" by *Quezada* to apply *Vaden*'s "look-through analysis." App., *infra*, 5a-6a, 9a-10a. "Under this analysis," the court explained, "'a federal court should determine its jurisdiction by "looking through" [an FAA] petition to the parties' underlying substantive controversy.'" *Id.* at 6a (quoting *Vaden*, 556 U.S. at 62).

Doing so here, the court concluded that "the district court had subject-matter jurisdiction." App., *infra*, 2a. First, the court found the district court was "plainly" correct in concluding that the underlying dispute involved a "federal-law claim": petitioner sought a "declaratory judgment" rendering Ameriprise jointly liable for REJ's "violation of federal civil rights law," including for "claims of Title VII liability against REJ"; "[a]djudicating that claim requires applying Title VII * * * and thus arises under federal law." *Id.* at 7a n.3. Second, the court concluded that petitioner could not avoid the federal questions in the underlying dispute by limiting her motion to vacate to her claims against respondents (while dropping any attempt

to vacate Ameriprise's dismissal). *Id.* at 7a-9a. Applying *Vaden*'s look-through approach, the panel found that the "'whole controversy'" involved the Ameriprise claims; they "arose from the same common nucleus of operative fact"; and the "federal-law claim against Ameriprise" would vest supplemental jurisdiction over any related "state-law claims." *Id.* at 8a-9a.[4]

The court "thus h[e]ld that, applying the look-through analysis, the district court correctly found that the federal claim against Ameriprise in the FINRA arbitration proceeding" vested "federal subject-matter jurisdiction over the removed petition to vacate the FINRA arbitration dismissal award." App., *infra*, 9a.[5]

REASONS FOR GRANTING THE PETITION

A. There Is A Clear And Intractable Conflict Over A Significant Jurisdictional Question Under The FAA

The Fifth Circuit's decision further cements a preexisting conflict over a core jurisdictional question under the FAA: whether *Vaden*'s "look-through" approach applies to motions to enforce or vacate arbitration awards under Sections 9 and 10. Four circuits (including a divided panel of the Fifth Circuit) hold that the look-through approach

---

[4] The court also rejected petitioner's argument that she sought vacatur under Louisiana arbitration law, not the FAA. Aside from failing to see any difference in the "jurisdictional analysis," the court found petitioner's argument was foreclosed under her contract: "the arbitration agreement * * * that covers this dispute explicitly states that it is 'covered and enforceable under the terms of the [FAA].'" App., *infra*, 5a. Petitioner is not renewing that argument before this Court.

[5] Petitioner is challenging the court's threshold, dispositive decision to apply *Vaden*'s "look-through" approach to motions to vacate or confirm under Sections 9 and 10; petitioner, again, is not renewing any other arguments before this Court.

applies, whereas two circuits squarely hold the opposite. *E.g.*, *Quezada*, 946 F.3d at 842-843 (outlining the "circuit split"). The conflict has been openly acknowledged by courts and commentators nationwide, and there is no chance it will disappear on its own. *E.g.*, *ADR Practice Guide*, *supra* ("There remains a significant circuit split" and "the Supreme Court has not stepped in to clarify this area.").

As it now stands, federal jurisdiction under the FAA rises or falls based on where an action is filed—and countless parties are left guessing where to assert their basic rights under the FAA. The stark division over this fundamental question is untenable. The circuit conflict is both undeniable and entrenched, and it should be resolved by this Court.

1. a. The decision below directly conflicts with settled law in the Seventh Circuit. In *Magruder* v. *Fidelity Brokerage Servs. LLC*, 818 F.3d 285 (7th Cir. 2016), the parties sought to confirm competing FINRA arbitration awards in federal court. 818 F.3d at 286. After the district court enforced one of the awards, the losing side appealed, and the Seventh Circuit flagged the same jurisdictional question presented here. Because "[n]either side's briefs * * * explain[ed] how the dispute c[ame] within federal jurisdiction," the panel "directed the parties to file supplemental memoranda addressing that subject." *Id.* at 286-287.

Despite both parties arguing for jurisdiction, the Seventh Circuit, unlike the Fifth Circuit, held that "a federal issue resolved by the arbitrator does *not* supply subject-matter jurisdiction for review or enforcement of the award." 818 F.3d at 288. In short, the panel concluded, "a federal question can suffice to order arbitration under § 4, but not to enforce or set aside the decision under § 9 or § 10." *Ibid.*

In so holding, the Seventh Circuit expressly refused to find jurisdiction under Section 1331. The court first explained that the FAA itself "does not grant federal jurisdiction." 818 F.3d at 287. Nor, critically, was it enough that "the claim presented to the arbitrator arose" under federal law. 818 F.3d at 287; see also *ibid.* (rejecting Magruder's argument that, "[b]ecause his [underlying] claim arose under federal law," "a federal court has subject-matter jurisdiction to confirm or set aside the award"). The Seventh Circuit acknowledged this Court's *Vaden* decision, but explained it could not "logical[ly]" be extended here: *Vaden* established jurisdiction to "compel" arbitration of federal claims under Section 4, but its holding was tied to Section 4's particular language. *Id.* at 287-288. As the court concluded, "[n]either § 9 nor § 10 has any language comparable to that on which the Supreme Court relied in *Vaden*." *Id.* at 288.

The Seventh Circuit also explained how its position "harmonizes the law of arbitration with the law of contracts." 818 F.3d at 288. As the panel noted, both arbitration awards and ordinary settlements are effectively contracts. *Ibid.* Yet "if parties settle litigation that arose under federal law, any contest about that settlement needs an independent jurisdictional basis"—parties cannot automatically "return to federal court," even though the suit originally involved federal claims. *Ibid.* (citing *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375 (1994)). According to the panel, the same rule applies with arbitration: just as settling parties cannot automatically "return to federal court," the fact that arbitration resolves a "federal question" does not grant jurisdiction to enforce or vacate an arbitration award. *Ibid.* The Seventh Circuit's position thus aligns the FAA with the traditional "distinction

* * * between an original federal claim" (where jurisdiction exists) and "a dispute about its contractual resolution" (where it does not). *Ibid.*

Because "[n]either § 1331 nor § 1332 authorize[d] resolution of the parties' dispute about the arbitrator's decision," the panel vacated the district court's judgment and "remanded with instructions to dismiss for lack of subject-matter jurisdiction." 818 F.3d at 289. Under the Fifth Circuit's approach, the Seventh Circuit would have reached the opposite result. Compare App., *infra*, 9a-10a.

b. The Fifth Circuit's decision also squarely conflicts with established law in the Third Circuit. In *Goldman* v. *Citigroup Global Mkts. Inc.*, 834 F.3d 242 (3d Cir. 2016), the plaintiffs filed a motion to vacate an adverse FINRA arbitration award, and the district court dismissed for lack of subject-matter jurisdiction. 834 F.3d at 246. In affirming, the Third Circuit, siding with the Seventh Circuit, adopted a position directly at odds with the Fifth Circuit's approach: "a district court may not look through a § 10 motion to vacate to the underlying subject matter of the arbitration in order to establish federal question jurisdiction." *Id.* at 255.

First, the Third Circuit found that "[t]he FAA does not itself provide a federal cause of action for vacatur of an arbitration award," and thus does not itself "ground subject-matter jurisdiction for the [plaintiffs'] motion to vacate." 834 F.3d at 249-250.

The court then rejected the precise argument the Fifth Circuit accepted here: that "federal courts may 'look through' a motion to vacate to the subject matter of the underlying arbitration." 834 F.3d at 251. As the court explained, the Third Circuit had "long before * * * refused to look through to the claims in the underlying arbitration" when addressing "§ 10 motion[s] to vacate." *Id.* at 252 (citing *V.I. Hous. Auth.* v. *Coastal Gen. Constr. Servs.*

Corp., 27 F.3d 911, 915 (3d Cir. 1994)). And while *Vaden* subsequently adopted a "'look through'" approach for Section 4, the court found the same logic did not apply to Section 10: "[w]hile there may be some superficial appeal to treating a § 10 motion to vacate an arbitration award in the same manner as a § 4 motion to compel arbitration, a close reading of *Vaden* and the relevant provisions of the FAA undercuts" the argument. *Ibid.*

As the Third Circuit explained, "[n]either the textual nor practical considerations noted by the Court in *Vaden* apply in a case relying on § 10 of the FAA." 834 F.3d at 253. The court reasoned that *Vaden*'s "look-through" treatment was rooted in Section 4's "unique language," with "'[t]he text of § 4 driv[ing the Court's] conclusion.'" *Ibid.* (quoting *Vaden*, 556 U.S. at 62). Section 10, by contrast, "lacks the critical 'save for such agreement' language that was central" to *Vaden*; indeed, as the panel noted, Section 10 has "no reference to the subject matter of the underlying dispute." *Ibid.* "Thus," the panel concluded, "while § 4 calls for a court to consider whether it would have jurisdiction over the 'subject matter of a suit arising out of the controversy between the parties,' § 10 makes no such demand." *Id.* at 253-254; see also *id.* at 254 ("join[ing] other courts in holding that § 4 of the FAA should be read differently than § 10 for jurisdictional purposes").[6]

The Third Circuit next bolstered its position by examining the practical and policy effects of the competing approaches, ultimately "adopt[ing] the reasoning of the Seventh Circuit[]." 834 F.3d at 254-255. The court agreed that

---

[6] The court separately noted that, "[l]ike § 10, § 9 has none of the look-through language of § 4 that undergirds the *Vaden* opinion." 834 F.3d at 255 n.10. Section 9 was not directly at issue in *Goldman* because the prevailing party "separately sought confirmation of the FINRA arbitration award" in state court. *Id.* at 248 n.4.

"'[t]he central federal interest was enforcement of agreements to arbitrate, not review of arbitration decisions'"—suggesting a greater need "for Congress to give federal courts the responsibility of ensuring arbitration agreements are upheld in cases where the courts would otherwise have jurisdiction." *Id.* at 254 (quoting *Minor* v. *Prudential Sec., Inc.*, 94 F.3d 1103, 1107 (7th Cir. 1996)). And the court further agreed that "rejecting look-through in cases involving §§ 9 and 10 of the FAA 'harmonizes the law of arbitration with the law of contracts.'" *Id.* at 255 (quoting *Magruder*, 818 F.3d at 288). "In short," the panel concluded, "'[the] conclusion * * * that a federal question can suffice to order arbitration under § 4, but not to enforce or set aside the decision under § 9 or § 10, parallels the distinction * * * between an original federal claim and a dispute about its contractual resolution.'" *Ibid.* (quoting *Magruder*, 818 F.3d at 288) (alterations in original).[7]

The Third Circuit thus refused to "apply [*Vaden*'s] look-through treatment to § 10 motions to vacate arbitration awards." 834 F.3d at 252. This holding is directly contrary to law in the Fifth Circuit. Compare *Quezada*, 946 F.3d at 843 ("motions brought under sections 9, 10, and 11 * * * are subject to the look-through approach endorsed in *Vaden*").[8]

---

[7] In explaining why the plaintiffs had not otherwise established federal jurisdiction, the court also expressed "concern[]" that "sweeping this kind of run-of-the-mill arbitration dispute into federal court would upset the 'prominent role' that state courts 'play as enforcers of agreements to arbitrate' under the FAA." 834 F.3d at 257 (quoting *Vaden*, 556 U.S. at 59).

[8] Other circuits had rejected the "look-through" approach in pre-*Vaden* decisions, drawing the same distinction between Section 4 and Sections 9-11. See, *e.g.*, *Kasap* v. *Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1247 (D.C. Cir. 1999) ("assuming *arguendo* that appellant's reading of § 4 is correct, we do not see how he can

2. Like the Fifth Circuit, however, multiple circuits have expressly rejected the views of the Seventh and Third Circuits.

a. In *Doscher* v. *Sea Port Group Sec., LLC*, 832 F.3d 372 (2d Cir. 2016), the Second Circuit, like the Seventh and Third Circuits, confronted a challenge to a FINRA arbitration award that resolved an underlying federal claim. 832 F.3d at 374. But unlike those circuits, the Second Circuit held that "federal courts may 'look through' § 10 petitions, applying the ordinary principles of federal-question jurisdiction to the underlying dispute." *Id.* at 389. The Second Circuit had previously adopted the opposite position, but the panel read *Vaden* as overruling prior circuit precedent. *Id.* at 373 (concluding that its earlier decision "cannot survive *Vaden*'s later-established precedent"). This was the opposite conclusion reached by the Seventh and Third Circuits. *Goldman*, 834 F.3d at 252-255; *Magruder*, 818 F.3d at 287-288.

The Second Circuit readily admitted its new approach was atextual: "Beginning with the most obvious point, § 10 lacks the textual 'save for' clause contained in § 4," a point "not to be taken lightly, particularly in the face of the Supreme Court's statement that '[t]he text of § 4 drives our conclusion.'" 832 F.3d at 381 (quoting *Vaden*, 556 U.S. at 62); see also *id.* at 379 n.10 ("Sections 9 and 11 of the Act

---

transport the unique jurisdictional language of § 4 into § 10"; "§ 10 does not create federal question jurisdiction, even when the underlying arbitration involves federal law"); *Collins* v. *Blue Cross Blue Shield of Mich.*, 103 F.3d 35, 37-38 & n.4 (6th Cir. 1996) ("neither the FAA nor the underlying arbitrated claim provide an independent basis of federal jurisdiction in an action to confirm or vacate an arbitration award"; distinguishing authority under Section 4); see also *Luong* v. *Circuit City Stores, Inc.*, 368 F.3d 1109, 1111 (9th Cir. 2004) ("§ 10 [does not] create federal question jurisdiction even when the underlying arbitration involves a federal question").

contain substantially identical language to § 10; all three lack the ["save for"] clause in § 4."). In fact, the court recognized, "[p]erhaps in an ordinary case, this absence would end our inquiry." *Id.* at 382. But the court ultimately found it must "keep in mind 'the cardinal rule that a statute is to be read as a whole,'" and it declared that the FAA's "context," its statutory "purpose[]," and certain "practical consequences" overrode the Act's text. *Id.* at 381-388.

First, the Second Circuit asserted that this Court's *Vaden* decision embraced "contradictory" propositions by emphasizing Section 4's text while also reaffirming that "the Act's provisions do not bestow or enlarge subject matter jurisdiction." 832 F.3d at 381, 384; *id.* at 388 (believing that *Vaden*'s "guiding principles" are "in some tension"). As the Second Circuit reasoned, treating "§ 4's text as a jurisdictional hook" does "precisely" what *Vaden* otherwise prohibits: "it treats § 4 as 'enlarg[ing] federal-question jurisdiction.'" *Id.* at 387 n.21. The Second Circuit thus found it "logically [im]possible" to "limit[] the look-through approach solely to § 4 petitions" without also "construing § 4 to expand federal jurisdiction—a conclusion that the Supreme Court has expressly forbidden us to draw." *Id.* at 384.

In "confront[ing] the difficult task of reconciling" this Court's "guiding principles," the Second Circuit concluded that "[t]he only way to avoid this contradictory result is to reject the premise that produced it—*i.e.*, to conclude that the 'ordinary' jurisdictional inquiry under § 1331 looks to the underlying substantive dispute with respect to *all* remedies under the Act, not just § 4." 832 F.3d at 384 (emphasis added). Accordingly, the Second Circuit declared, federal courts "faced with a § 10 petition may 'look through' the petition to the underlying dispute," even though "*Vaden*'s text-driven analysis * * * would, on

the surface, lead us to reject the look-through approach." *Id.* at 388.[9]

Second, the court stated that its approach advanced the Act's "congressional purposes." 832 F.3d at 385-386. According to the court, its construction properly permits federal courts to "enforce" the Act's full remedies. *Id.* at 386. Otherwise, the court suggested, "there is a certain absurdity to an interpretation that permits parties to file motions to compel arbitration in any case where the underlying dispute raises a federal question but precludes them from seeking the same federal court's aid under the Act's other remedial provisions related to the same dispute." *Id.* at 387.[10]

Finally, the Second Circuit maintained that "applying a look-through approach to the entire Act also prevents

---

[9] In reaching this conclusion, the Second Circuit did not address the key distinction between federal disputes pre- and post-arbitration: while a controversy at the outset involves disputed federal claims, the controversy post-arbitration involves the *contractual resolution* of those claims. *E.g.*, *Goldman*, 834 F.3d at 255; *Magruder*, 818 F.3d at 288; see also *Quezada*, 946 F.3d at 846 (Ho, J., dissenting). What the Second Circuit perceived as "contradictory" results simply paralleled the ordinary treatment of federal claims before and after settlement: federal jurisdiction exists when a suit is filed but not to enforce any contractual resolution of those claims. *Kokkonen*, 511 U.S. at 381-382 ("enforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction").

[10] The court accordingly rejected the Seventh Circuit's view that Congress's "'central'" interest was enforcing arbitration agreements: if compelling arbitration "were Congress's only goal," "it would have had no need to pass §§ 10 or 11 at all." 832 F.3d at 387 (expressly repudiating *Minor*, *supra*); but cf. *Vaden*, 556 U.S. at 59, 71 ("[u]nder the FAA, state courts as well as federal courts are obliged to honor and enforce agreements to arbitrate"; "[g]iven the substantive supremacy of the FAA, but the Act's nonjurisdictional cast, state courts have a prominent role to play").

absurd and illogical discrepancies." 832 F.3d at 386. As the court reasoned, if a district court compels arbitration and stays a case, it could later "entertain" jurisdiction to decide "petitions under §§ 7 and 9-11." *Ibid.* Yet "absent a look-through approach, no jurisdiction would exist over * * * freestanding petitions in the same court, involving the same parties, and concerning the same underlying controversy." *Id.* at 386-387. The court stated the result should not turn on such "artificial distinction[s]." *Id.* at 387 (internal quotation marks omitted).[11]

The Second Circuit accordingly held that "the existence of federal-question jurisdiction over an FAA [Section 10] petition turns on whether the district court would possess jurisdiction over the underlying dispute under the standards of § 1331." 832 F.3d at 388. Although *Doscher* was limited to petitions under Section 10, the Second Circuit later determined that "its logic applies equally to § 9": because the court saw "no reason to employ a different approach for § 9 than § 10," "a district court should employ the 'look through' approach described in *Doscher* when determining subject matter jurisdiction over petitions to confirm arbitration awards under § 9." *Landau* v.

[11] The Second Circuit, however, did not explain why a similar result is tolerated with settled federal claims: if a federal court "retain[s] jurisdiction over the settlement contract," the court can later enforce it; but if the same court refuses to "embody" the same settlement in the same dismissal order (a decision purely "in the court's discretion"), the court would lack jurisdiction. *Kokkonen*, 511 U.S. at 381-382; see also *Quezada*, 946 F.3d at 846-847 (Ho, J., dissenting) (rejecting the Fifth Circuit majority's embrace of the Second Circuit's logic). As *Vaden* itself confirms, the "actual litigation * * * define[s] the parties' controversy," even if "events could have unfolded differently"; "a party's ability to gain adjudication of a federal question in federal court often depends on how that question happens to have been presented." 556 U.S. at 68-69 & n.17.

Eisenberg, 922 F.3d 495, 497-498 (2d Cir. 2019) (per curiam).

b. The First Circuit reached the same conclusion in *Ortiz-Espinosa* v. *BBVA Sec. of Puerto Rico, Inc.*, 852 F.3d 36 (1st Cir. 2017). The court recognized that, "[f]ollowing *Vaden*, there exists a split among our sister circuits on this question." 852 F.3d at 44. As the court recounted, "[t]he Second Circuit has held that the look-through approach applies at least to § 10 petitions to vacate"; "[b]y contrast, the Seventh and Third Circuits have held the opposite: that *Vaden* is distinguishable (primarily based on the difference in statutory language) and that 'a federal issue resolved by the arbitrator does *not* supply subject-matter jurisdiction for review or enforcement of the award.'" *Ibid.* (contrasting *Doscher*, *supra*, with *Magruder* and *Goldman*, *supra*). But the First Circuit ultimately "agree[d] with the Second Circuit that the look-through approach cannot be limited to § 4 petitions." *Id.* at 44-45.

Initially, the court acknowledged the "difference in statutory language between § 4 and [§§ 9-11]," but declared "the mere difference in statutory text * * * does not itself compel a holding that the sections are to be interpreted differently." 852 F.3d at 44-45.

Instead, the court identified "several important policy reasons supporting applying the look-through approach to the award enforcement provisions." 852 F.3d at 45. First, the court noted "the important role intended for the federal courts in enforcing arbitration agreements post-award," and declared "it would make no sense to effectively exclude federal jurisdiction over those cases." *Ibid.* Because the "look-through test" is "the only approach available that provides broad federal court jurisdiction over proceedings to enforce awards," the court reasoned it must "appl[y] to sections 9, 10, and 11." *Id.* at 46.

Next, the court observed that its position "provides a unitary jurisdictional approach to the FAA, an objective endorsed by various cases." 852 F.3d at 46 (citing pre-*Vaden* decisions from the Second and Ninth Circuits). As the court explained, "[a]pplying the look-through approach to post-award decisions avoids" what it viewed as "a 'bizarre' distinction": "'a petition to compel arbitration could be brought in federal court, but a petition under FAA §§ 9 or 10 to confirm or vacate the arbitration award in the same dispute could not.'" *Id.* at 46-47.[12]

Finally, the First Circuit stated that "a reviewing court in post-arbitration proceedings may be called to answer questions that implicate federal law," such as "whether the arbitrators 'refus[ed] to hear evidence pertinent and material to the controversy.'" 852 F.3d at 47. According to the court, this "further counsels that the look-through approach should apply consistently under the FAA." *Ibid.*

The First Circuit therefore "conclude[d] that the look-through approach applies to sections 9, 10, and 11." 852 F.3d at 47. Because the FINRA claimants' underlying claims involved federal law, the court held that "the district court properly exercised jurisdiction over claimants' petition to vacate." *Ibid.*; contra, *e.g.*, *Magruder*, 818 F.3d at 288.

c. In *McCormick* v. *Am. Online, Inc.*, 909 F.3d 677 (4th Cir. 2018), the Fourth Circuit likewise held that courts "determining subject-matter jurisdiction over § 10 and § 11 motions" should "look to the nature of the underlying

---

[12] Like the Second Circuit, the First Circuit did not grapple with *Kokkonen* or the traditional "'distinction * * * between an original federal claim and a dispute about its contractual resolution.'" *Goldman*, 834 F.3d at 255 (quoting *Magruder*, 818 F.3d at 288); see also *Quezada*, 946 F.3d at 846 (Ho, J., dissenting).

claim in dispute, just as is done with respect to § 4 petitions to compel arbitration." 909 F.3d at 679. The court flagged the "split of authority among the courts of appeals," and outlined each side's conflicting positions. *Id.* at 679, 682 (contrasting the Seventh and Third Circuits' views with the Second and First Circuits'). "After assessing these differing approaches," the Fourth Circuit picked sides by "join[ing] * * * the First and Second Circuits." *Id.* at 682, 684.

The Fourth Circuit initially acknowledged that *Vaden*'s "'look through'" approach was tied to Section 4's "unique 'save for' language," which "is absent from § 10 and § 11." 909 F.3d at 678-679, 681-682. But the court ultimately agreed with those circuits that found "the difference in language is not dispositive." *Id.* at 682. The court reasoned that the FAA should be read "as an integrated whole, rather than a collection of independent mechanisms." *Ibid.* Thus, under the court's view, "if the district court would have jurisdiction over a § 4 petition," it necessarily "has jurisdiction over § 10 and § 11 motions"—"it would be surplusage to include in each section of the FAA language specifying jurisdiction over each motion filed subsequent to a § 4 petition." *Id.* at 682-683. In short, the court explained, "[t]here is no indication that Congress intended to allow a *federal* court to compel arbitration under § 4 on the basis that the underlying claim arose under federal law and then to require the parties to go to *state* court to review the arbitration's procedures or to enforce its awards." *Ibid.*

The Fourth Circuit likewise "c[ould] think of nothing to suggest that the questions raised in a typical § 4 petition are more appropriate for a federal forum than those raised in a typical § 10 or § 11 motion." 909 F.3d at 683. The court accordingly "[dis]agree[d]" with those courts

"suggest[ing] that the federal interest in compelling arbitration under § 4 is greater than the federal interest in confirming, vacating, or modifying awards under §§ 9-11." *Ibid.* (rejecting *Goldman*, *supra*).

Finally, the court reasoned that its "holding has the added virtue of applying a uniform jurisdictional approach to the FAA," whereas a contrary approach would "subject[] the Act's pre-award and post-award remedies to different jurisdictional inquiries, potentially by different courts, during different stages of the same arbitration." 909 F.3d at 684. According to the court, that alternative would create "'curious practical consequences,'" as parties (hypothetically) file "superfluous" Section 4 motions to "secure jurisdiction over later motions filed under § 10 or § 11." *Ibid.* The court thus "conclude[d]" that, as with Section 4, "jurisdiction over motions under §§ 10 and 11 should likewise be governed by the jurisdictional rules applicable to the underlying dispute": "if the underlying claim is one that otherwise could be litigated in federal court, the § 10 or § 11 motion can likewise be resolved in federal court." *Id.* at 679, 683.

Because the plaintiff's "underlying claim" arose out of "alleged violations" of "a federal statute," the Fourth Circuit held that "federal-question jurisdiction" existed to resolve "controversies regarding the arbitration of his claim—particularly his motion filed under §§ 10 and 11 of the FAA." 909 F.3d at 684. Had the Fourth Circuit instead sided with the Seventh and Third Circuits, it would have reached the opposite conclusion. See *ibid.* ("*But see Goldman*, 834 F.3d at 252-55; *Magruder*, 818 F.3d at 287-89.").

3. Numerous district courts outside these jurisdictions have expressly recognized the circuit conflict. *E.g.*, *Russ* v. *United Servs. Auto. Ass'n*, No. 18-4222, 2019 WL 3083015, at *3 (D. Ariz. July 15, 2019); *Federated Mut. Ins. Co.* v. *Federated Nat'l Holding Co., Inc.*, No. 18-714,

2018 WL 3104110, at *2 (D. Minn. June 22, 2018); *Janus Distributs. LLC* v. *Roberts*, No. 16-2130, 2017 WL 1788374, at *3 n.7 (D. Colo. May 5, 2017); *Harman* v. *Wilson-Davis & Co.*, No. 16-229, 2017 WL 74707, at *2 (D. Utah Jan. 6, 2017).[13]

And these lower courts have likewise split over which approach to follow. Compare, *e.g.*, *Russ*, No. 18-4222, 2019 WL 3083015, at *3 ("The Court will follow the guidance of *Luong*—as well as later decisions of courts within this Circuit, the Third Circuit, and the Seventh Circuit—and hold that federal question jurisdiction does not exist in Sections 9 and 10 petitions merely because the underlying matters being arbitrated may have invoked federal questions."), with, *e.g.*, *Federated Mut. Ins. Co.*, No. 18-714, 2018 WL 3104110, at *3 ("The Court has carefully reviewed the FAA and the cases analyzing the issue and concludes that the look-through approach should apply in the context of § 9 petitions.");[14] *Harman*, No. 16-229, 2017 WL 74707, at *2, *3-*4 ("in order to find that federal question jurisdiction is present here, the court must analyze the split between the circuit courts"; siding with the Second Circuit over the Seventh and Third Circuits).

This wide disconnect only underscores the deep confusion this issue has produced, and the obvious need for this Court's urgent intervention.

---

[13] See also, *e.g.*, *Collister* v. *KXAN-TV*, No. 19-350, 2019 WL 11506114, at *4 (W.D. Tex. Nov. 26, 2019) ("the Supreme Court has not yet considered whether this jurisdictional look-through approach applies to petitions to vacate an arbitration award under section 10"; "circuit courts are split on this issue").

[14] On appeal, the Eighth Circuit dodged the issue and reversed based on lack of personal jurisdiction. *Federated Mut. Ins. Co.* v. *FedNat Holding Co.*, 928 F.3d 718, 721-722 (8th Cir. 2019) (noting the "arguments concerning subject-matter jurisdiction raise complicated questions" and instead finding "personal jurisdiction" dispositive).

* * *

The conflict over this core jurisdictional question is deep, obvious, and entrenched. It has been widely acknowledged by courts and expert commentators nationwide. The Fifth Circuit confronted an undeniable 3-2 split, and a divided panel sided with the "majority" approach; the panel below has now declared itself "bound" by that decision (App., *infra*, 10a). The debate has been fully exhausted at the district and circuit level, with each side confronting, and rejecting, the opposing analysis. Additional percolation is pointless: one approach is correct and the other is wrong, and the remaining circuits are left to simply pick sides. There is no realistic prospect that this conflict will somehow resolve itself.

Until this Court intervenes, federal jurisdiction under the FAA will turn on the happenstance of where a dispute arises. This Court's immediate review is warranted.

B. The Question Presented Is Exceptionally Important And Warrants Review In This Case

1. The question presented is of exceptional legal and practical importance. The need for further review is self-evident. This Court granted review in *Vaden* to resolve the identical question on the frontend under Section 4, and the issue is equally pressing and important on the backend under Sections 9 and 10. The circuit conflict has now reached six circuits, with courts firmly disagreeing over the proper rule—and the Fifth Circuit splitting 2-1 after reviewing the competing approaches. Jurisdictional issues require clarity, and the existing uncertainty is intolerable for the FAA's proper operation.

The jurisdictional standard is a dispositive, threshold issue. It is essential for all stakeholders to know which courts have power to adjudicate key motions under the FAA. As it now stands, parties can litigate to finality below only to discover on appeal that the district court

lacked jurisdiction, requiring a complete do-over in another court. *E.g.*, *Magruder*, 818 F.3d at 289; *Kasap*, 166 F.3d at 1248 & n.3. That is the polar opposite of the efficient, expeditious dispute resolution promised by the FAA.

The sheer number of reported decisions confirms the issue's importance, and there is no genuine dispute that the issue arises constantly in courts nationwide. The number of arbitrated cases each year is staggering: FINRA alone closed 4,011 cases in 2019 (FINRA, *Dispute Resolution Statistics* <tinyurl.com/finra-stats>), and the AAA has already resolved 44,852 cases in 2021 (American Arbitration Association <www.adr.org> (reporting cases resolved between Jan. 1 and Feb. 8, 2021) (last visited Feb. 11, 2021)). Motions to enforce or vacate an award are common, and with even a small fraction of those cases implicating federal claims, the need to resolve the question presented is obvious.

There is a reason that expert commentators are tracking this issue, flagging the confusion, and cautioning parties to beware the uncertainty until this Court weighs in. See p. 2 n.1, *supra*. In the meantime, the availability of federal jurisdiction under the FAA will continue to vary nationwide. The Court's review is urgently warranted.

2. This case is an ideal vehicle for deciding this significant question. The dispute turns on a pure question of law: the proper jurisdictional test for ordinary motions under an important federal scheme. It has no factual or procedural impediments. The question presented was squarely resolved at each stage below. App., *infra*, 4a-6a, 9a-10a, 15a. There is no alternative source of federal jurisdiction: the parties are not diverse, the case is not in admiralty, and the vacatur motion does not itself raise a federal question. The Fifth Circuit recognized it was "bound" by cir-

cuit precedent (*id.* at 10a), and the "look-through" analysis is outcome-determinative: the case would have been remanded under settled law in the Seventh and Third Circuits (or the views of Judge Ho), but remand was denied because the Fifth Circuit adopted the contrary approach of the First, Second, and Fourth Circuits. *Quezada*, 946 F.3d at 843; see App., *infra*, 15a n.5 (so conceding). There is no conceivable obstacle to deciding this core jurisdictional question.

* * *

At bottom, a split Fifth Circuit built upon a developed body of law regarding the question presented, exploring every aspect of the debate. The question is cleanly presented. The courts of appeals have set up conflicting jurisdictional rules for basic motions under the FAA, and litigants in other circuits are left guessing which side of the split their circuit will pick—creating confusion and uncertainty over a dispositive threshold issue. The arguments have been fully vetted and further percolation promises nothing but additional conflicts and wasteful litigation. This issue is ripe and cries out for a definitive resolution from this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL L. GEYSER
Counsel of Record
ALEXANDER DUBOSE &
JEFFERSON LLP
Walnut Glen Tower
8144 Walnut Hill Lane, Ste. 1000
Dallas, TX 75231
(214) 396-0441
dgeyser@adjtlaw.com

AMANDA BUTLER SCHLEY
BUSINESS LAW GROUP
700 Camp Street, Ste. 418
New Orleans, LA 70130

NICHOLAS BACARISSE
ALEXANDER DUBOSE &
JEFFERSON LLP
515 Congress Ave., Ste. 2350
Austin, TX 78701

FEBRUARY 2021