No. 20-1143

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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

As the petition established, this case presents an important and recurring question of federal arbitration law: whether *Vaden*'s "look-through" approach applies to motions to enforce or vacate arbitration awards under Sections 9 and 10 of the FAA. The circuit conflict is deep, acknowledged, and entrenched—with the last circuit weighing in with a divided vote. The question presented was resolved at each stage below and dispositive of the jurisdictional inquiry; both the district court and Fifth Circuit relied exclusively on *Vaden*'s look-through analysis in establishing jurisdiction. The facts teeing up the issue are uncontested, and the only remaining dispute is a pure question of law: which side's interpretation of the FAA is correct. There is no conceivable obstacle to deciding that question here, and its importance is self-evident: it does parties little good to seek to confirm or vacate an arbitration award in a court lacking jurisdiction, and parties are currently left guessing where to assert their basic rights under the FAA.

Despite respondents' best efforts to kick up dust, the case for review remains exceptionally clear. Respondents do not dispute the obvious circuit conflict. Instead, they say, incredibly, that review is somehow premature because "only half" the circuits have weighed in. Opp. 21. But a direct, admitted 4-2 "circuit split" is more than enough. Contra *id.* at 11. Respondents do not contest that the issue arises constantly in courts nationwide and implicates core stakeholder rights under the FAA. So they instead assert the issue somehow lacks "practical significance" (*id.* at 22), which is absurd. Any party litigating in the wrong tribunal will understand immediately the "practical significance" if the decision is later thrown out on jurisdictional grounds and the parties are required to

relitigate from scratch in state court. The "significance" and "federal interest" here (*id.* at I, 2) are just as obvious and apparent as they were in *Vaden* itself.

Respondents are thus left conjuring up "factual and procedural intricacies" as vehicle problems. Opp. 1-2. Yet if any of these objections had any remote merit, one might wonder why not a single one was embraced by either court below—which instead reluctantly *waded into a circuit conflict* to resolve the jurisdictional question. The reason is simple: respondents' theories range from frivolous to outright false, which is why the courts below refused to credit them. Respondents, for example, cannot invoke a court's "continuing jurisdiction" over a *separate* case involving different parties (*not them*)—as the court below expressly noted in explaining why rulings in that action *did not apply to respondents*. Pet. App. 13a n.2 ("the Court could not enter a judgment in [respondents'] favor because they were not parties" to that action). Respondents cannot rewrite the record to avoid review.

And respondents are profoundly confused in suggesting that a denial is warranted because they might eventually win in state court—a point having nothing to do with jurisdiction. Jurisdiction is the threshold inquiry; it comes first. It makes no difference who might ultimately prevail on the merits, because the entire question here *is which court gets to decide the merits in the first place*. This Court has already rejected attempts to "decid[e] [a] cause of action before resolving Article III jurisdiction." *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 98, 101 (1998).

Respondents' contention fares no better as a reason not to resolve the deep split over this critical federal issue.[1]

This case easily checks off every box for certiorari, and this Court's review is urgently warranted.

A. There Is A Clear And Intractable Conflict

As multiple courts have already recognized, "[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." *Quezada* v. *Bechtel OG & C Constr. Servs., Inc.*, 946 F.3d 837, 841 (5th Cir. 2020).

This is the rare case where a respondent readily admits that a clear circuit conflict exists. In respondents' own words, "[c]ircuit courts have diverged on the issue of whether federal courts may 'look through' a petition to confirm, vacate or modify an arbitral award." Opp. 4, 11 (admitting a "four-to-two circuit split"). Respondents even implicitly acknowledge that judges are now left to simply pick sides. See *id.* at 10 & n.4 ("Judge Ho's dissent merely adopted the minority view of the Third and Seventh Circuits"; the majority "analyzed and rejected" those decisions and instead aligned with "the First, Second, and Fourth Circuits").

But respondents curiously resist review on the ground that "[o]nly six of the twelve circuits" have decided the issue. Opp. 11. A split of that magnitude is not "limited"

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[1] Respondents' one-sided view of the merits is wrong in any event—it ignores the reasons issue preclusion would not apply, how respondents' fraudulent conduct does indeed undermine the arbitration judgment, and the legitimate reasons (not "forum-shopping") that petitioner sought vacatur in state court—including, with obvious relevance here, *the lack of subject-matter jurisdiction in federal court under the FAA*.

(Opp. 21)—it is a compelling case for the Court's attention. And that is especially true in the arbitration context, where this Court often grants review even where there is only a shallow split or no split at all. *E.g.*, *American Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228 (2013); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011); *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).

Respondents still complain that there has not been "sufficient opportunity" for the issue to develop (Opp. 21), but they never explain how further percolation would sharpen the issues or produce any practical or theoretical benefit. A quick pass through the circuit-level decisions confirms that these are not drive-by holdings; each circuit studied the issue in an extensive analysis, considered counter-arguments, and resolved the question in a reasoned disposition. Pet. 14-29. The circuits simply disagree, fundamentally, over the Act's proper construction. They have divided nearly down the center. As Judge Ho noted, a single vote prevented this 4-2 split from becoming a 3-3 tie. *Quezada*, 946 F.3d at 846. And the Fifth Circuit's latest entry confirms that judges will now continue to survey the conflicting approaches and reach opposite conclusions. Nothing suggests this mature split is the product of inadequate consideration.

Respondents finally suggest that the circuit conflict may somehow "resolve[] itself." Opp. 11. This is wishful thinking. It would take at least two circuits to flip positions, and there is no indication that any circuit (much less more than one) will revisit the issue and discard its current approach. Judge Ho's dissent shows that the so-called "trend" (Opp. 11) will not inevitably continue and the "majority" position has clear flaws. And, of course, respondents overlook that the "minority" circuits will pre-

dictably lack meaningful opportunities to revisit the question: since those circuits *rejected* federal jurisdiction, parties in those regions are on notice to file FAA motions to confirm or vacate in *state* court, not federal court—lest they walk headlong into circuit precedent mandating dismissal. There accordingly is every reason to think the persistent conflicts and confusion will only worsen until this Court intervenes.[2]

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

1. The question presented is of obvious legal and practical importance. It is essential for stakeholders to know which courts have power to adjudicate key motions under the FAA. This Court granted review in *Vaden* to decide the same question under Section 4, and the need for clarity is just as obvious under Sections 9 and 10. The issue arises all the time (which respondents do not dispute), and the consequences of getting it wrong are clear: parties will have no idea whether to litigate these issues in state or federal court—and they will face the constant prospect of a complete do-over if they choose a court that ultimately lacks jurisdiction.

Respondents have no real answer for any of this. They say that the issue has no "practical" importance (Opp. 22), which is puzzling. The entire point is that *parties do not know where to file*—and entire proceedings will be ditched where courts ultimately conclude there is no federal jurisdiction. It thus makes no difference whether state and federal courts would likely resolve the *underlying* motions the same way. Contra *ibid.* Federal courts cannot *assume* jurisdiction because they think a remand

[2] Respondents oddly attack the "minority" position as "overly textual." Opp. 18. One would usually consider a decision adopting a "textual reading of the Act" to be a feature, not a bug.

might produce the same result. *Steel Co.*, 523 U.S. at 101. There is an unflagging obligation to establish jurisdiction without regard to the merits—and the existing confusion will continue to waste judicial and party time and resources until this Court establishes a clear answer.

2. Respondents' scattershot vehicle attacks fall woefully short. This case is an ideal vehicle for deciding this important question. There are no factual disputes bearing on the question presented. The jurisdictional question was squarely raised and resolved at each stage below, and each court adopted *Vaden*'s look-through analysis as the exclusive basis for exercising jurisdiction. Pet. App. 4a-6a, 9a-10a, 15a. There is not a single factual or procedural impediment that would stand in the way of the Court's ability to decide that question—and respondents do not seriously contend otherwise.

Respondents' submission instead is a weak attempt at distraction. They argue that federal jurisdiction might exist for some other reason. Opp. 23-32. But alternative grounds for affirmance are just that—alternative grounds. They were not resolved in the courts below, and there is no need for this Court to resolve them here. Respondents are free to press other grounds on remand, but this Court "routinely grants certiorari to resolve important questions that controlled the lower court's decision notwithstanding a respondent's assertion that, on remand, it may prevail for a different reason." Reply Br., *Kisor* v. *Wilkie*, No. 18-15, at 2 (filed Nov. 19, 2018).

In any event, respondents ignore the obvious reason that neither court accepted any of respondents' alternative theories below (and instead chose to wade into a circuit conflict): their arguments are meritless.

First, respondents insist that petitioner's "state[-]court pleadings *on their face* raise multiple substantial questions of federal law." Opp. 23-28 (noting, at length,

how respondents "posited" these argument "at the district court and appellate levels"). Not so. Petitioner argued that respondents' *fraud* undermined the arbitration award. Opp. 7. "Fraud" is not a federal question. The fact that the *underlying* subject of the fraud involves a federal issue is irrelevant—which is likely why neither court even bothered to address respondents' contention.

Second, respondents falsely assert that the district court already had "continuing" jurisdiction over this action. Opp. 28-33. This is frivolous. Respondents premise this argument on the so-called "REJ Suit." Opp. 13. That was a different case, with a different docket number, involving different parties. It has no direct operative effect here, which is why the same district court (entertaining both cases) held, explicitly, that the court's REJ ruling was not binding in this separate case: "the Court could not enter a judgment in [respondents'] favor because they were not parties to [that] Action." Pet. App. 13a n.2. Respondents may not like that fact, but they cannot rewrite the record or pretend the two actions are somehow the same.[3]

3. Respondents pick up the same mischaracterization in trying to distinguish this case from other circuit-level authority: "*Unlike here*, none of the cases in the current circuit split on the look-through question emanated from a motion to compel arbitration under FAA § 4 followed by an action to confirm, vacate or modify the ensuring arbitration award." Opp. 30 n.12 (emphasis added). That may correctly describe the posture of those other decisions, but respondents badly mischaracterize the posture of this

[3] Respondents state this "significant ruling" was "conspicuously absent" from petitioner's submission. Opp. 8-9. False again. Petitioner expressly noted this separate ruling *and explained why it was not binding in this case*. See Pet. 9 n.2 (citing Pet. App. 12a-13a & nn.2-3).

case. While *the REJ Action against Ameriprise* involved a motion to compel arbitration, there was no motion to compel here: petitioner voluntarily initiated arbitration against these respondents; there was no lawsuit before the arbitration, no case to stay pending that arbitration, and thus no "continuing" action providing any possible hook for motions to vacate or confirm. Pet. App. 3a. Respondents are simply again pretending that the Ameriprise suit and this suit are interchangeable, even though respondents "were not parties" to that standalone action. Pet. App. 12a; Opp. App. 11a.[4]

For similar reasons, respondents are off-base in accusing petitioner of "forum shopping." Opp. 14, 32. There is nothing wrong with filing a vacatur action in state court when there is *no pending action* involving the same parties and claims in federal court. Petitioner had to bring her FAA challenge *somewhere*. And given the circuit split

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[4] In making its (baseless) "continuing jurisdiction" argument, respondents also misstate this Court's decisions. According to respondents, this Court has held that "'where the court has authority under the [FAA] * * * to make an order for arbitration, the court also has authority to confirm the award or to set it aside.'" Opp. 29 (quoting *Marine Transit Corp.* v. *Dreyfus*, 284 U.S. 263, 275-276 (1932)). Respondents overlook that *Marine Transit* turned on the unique language of 9 U.S.C. 8, which authorizes rights specific to the *maritime* context. 284 U.S. at 274. Unlike Sections 9 and 10, Section 8 "explicitly" provides carryover authority to review an award post-arbitration: "where a cause of action 'is otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary,'" the court may "'direct the parties to proceed with the arbitration *and shall retain jurisdiction to enter its decree upon the award*.'" 284 U.S. at 274 (quoting 9 U.S.C. 8) (emphasis added). If anything, the fact that Congress included that language in Section 8 alone confirms the same rule does *not* apply under Sections 9-11. Contra Opp. 28-29 (placing similar weight on *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U.S. 193 (2000), a case addressing *venue*, not jurisdiction, see 529 U.S. at 195, 202).

(at the very heart of this case) over federal jurisdiction, state court was clearly the prudent place to lodge her action: why would anyone risk filing suit to vacate or confirm in federal court when there is a serious chance the suit will be dismissed for lack of jurisdiction?

Indeed, had a single vote flipped in *Quezada*, the outcome would have been 2-1 the other way—eliminating federal jurisdiction over petitioner's filing. Respondents simply overlook the confusion and uncertainty that litigants now face in deciding where to assert their rights under the FAA.

4. Respondents argue that review should be denied because a remand would only "force[]" respondents to "move the district court in the REJ Suit to enjoin the state proceedings" under 28 U.S.C. 2283. Opp. 14. This is bewildering. Hypothetical threats about non-existent future filings have no bearing on whether federal courts properly exercised jurisdiction in this actual case. But respondents again misstate reality: the "REJ Suit" is a different suit with different parties. Pet. App. 13a n.2. Respondents did not participate in that case, and (as non-participants) they have no right to file *anything* in that action. The threat to file a frivolous motion is not an obvious basis for resisting review.

5. Respondents assert that any future decision here would be "moot." Opp. 32. How a dispositive ruling against jurisdiction is somehow "moot" is anyone's guess. Such a holding would vacate the federal court's judgment and remand to state court to decide the merits. That is anything but "moot."

Nor is it an "advisory opinion on jurisdiction" simply because respondents are convinced that state courts would reach the same "ultimate disposition." Opp. 32. That reflects a bizarre understanding of "advisory." Putting aside that respondents' self-interested predictions of

success are overstated, there is nothing "advisory" about enforcing the limits on federal jurisdiction or vacating a ruling exceeding that jurisdiction.

If respondents instead mean that a jurisdictional ruling is "advisory" because the separate decision in the Ameriprise suit would still stand (Opp. 12-13), they are deeply confused. Respondents were not participants to that action; they cannot pretend the court's holding there is somehow transported into the docket here. If respondents wish to argue issue preclusion in this action, they are free to do so. But someone still has to decide *where that defense will be adjudicated*, which is precisely the jurisdictional question presented here. If this Court grants review, its decision will dictate the scope of federal jurisdiction and where this case belongs. Far from advisory, that is as concrete as it gets.

6. In a last-ditch effort, respondents argue that this case is an "exceedingly poor candidate" because they disagree with petitioner's substantive basis for vacating the arbitration award. Br. 23 & n.10. But the question is not who will ultimately win the underlying case, but *which court gets to decide that*. Respondents' downstream merits arguments ("both substantive and procedural," Opp. 23) have absolutely nothing to do with the antecedent jurisdictional inquiry; they pose no obstacle to deciding the jurisdictional question; and this Court need not (and, indeed, *cannot*) address the merits before deciding whether there is subject-matter jurisdiction. *Steel Co.*, 523 U.S. at 101.[5]

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[5] Respondents stress the district court's statement that petitioner's arguments were "legally frivolous" and "utterly absurd." Opp. 9-10. Suffice it to say that petitioner disagrees. The same district court was separately reversed by the Fifth Circuit in related litigation (see Nos. 19-30584 and 19-30687), and petitioner believes a court (with actual

CONCLUSION

The petition should be granted.

Respectfully submitted.

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jurisdiction) would reject the district court's views as well. But if respondents' position is as strong as they think, respondents should have no trouble convincing the state court. Their view of the merits provides no basis for expanding federal jurisdiction under the FAA.