No. 07-773

In the Supreme Court of the United States

BETTY E. VADEN,

Petitioner,

v.

DISCOVER BANK; DISCOVER FINANCIAL SERVICES, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether a suit seeking to enforce a state-law arbitration obligation brought under Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, "aris[es] under" federal law, see 28 U.S.C. § 1331, when the petition to compel itself raises no federal question but the dispute sought to be arbitrated—a dispute that the federal court is not asked to and cannot reach—involves federal law.

2. If so, whether a "completely preempted" state-law *counter*claim in an underlying state-court dispute can supply subject matter jurisdiction.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The majority and dissenting opinions of the Fourth Circuit (Pet. App. 1a-39a) are reported at 489 F.3d 594. The initial opinion of the Fourth Circuit (Pet. App. 57a-74a) is reported at 396 F.3d 366. The opinion (Pet. App. 40a-54a) and order (Pet. App. 55a-56a) of the district court are reported at 409 F. Supp. 2d 632. The earlier opinion (Pet. App. 75a-88a) and order (Pet. App. 89a-90a) of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2007. The court of appeals denied a timely petition for rehearing and rehearing en banc on July 20, 2007 (Pet. App. 91a-92a). On September 24, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 7, 2007 and the petition was filed on that date. This Court granted the petition on March 17, 2008. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331 provides that the "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Section 4 of the Federal Arbitration Act, 9 U.S.C. § 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 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.

Chapters 1 and 2 of Title 9 of the United States Code are set out in full as appendices to this brief.

STATEMENT

This case asks whether Section 1331 permits a district court to look through a petition to compel arbitration, see 9 U.S.C. § 4, that itself raises no federal question to ground jurisdiction on the underlying dispute to be arbitrated and, if so, whether a "completely preempted" state-law counterclaim in that dispute can supply it. The Fourth Circuit answered yes to both questions.

A. Statutory Framework

Congress enacted the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (FAA or Act), in 1925 "'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate,' and place such agreements 'upon

the same footing as other contracts.'" *Volt Info. Scis.* v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (citations omitted). At the time, most American courts "refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 220 n.6 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924)). This "ouster" doctrine manifested itself in three different, but overlapping, ways: some courts held such agreements invalid on public policy grounds, *e.g.*, *Wood* v. *Humphrey*, 114 Mass. 185, 186 (1873) ("[A]greements to arbitrate which entirely oust the courts of jurisdiction will not be supported at law or equity."); others held that they could be revoked any time before an arbitration award, *e.g.*, *N.P. Sloan Co.* v. *Standard Chem. & Oil Co.*, 256 F. 451, 454-455 (5th Cir. 1918); and still others held them unenforceable in equity by specific performance, but allowed damages at law for breach, *e.g.*, *Rison* v. *Moon*, 22 S.E. 165, 167 (Va. 1895).

Section 2, the Act's "centerpiece provision," *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985), makes written arbitration agreements "in any maritime transaction or a contract evidencing a transaction involving commerce * * * valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2. Its "saving clause" was meant "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp.* v. *Flood & Conklin Mfg.*, 388 U.S. 395, 404 n.12 (1967).

The FAA provides two different enforcement mechanisms. When a federal district court already has jurisdiction over a suit containing issues referable to arbitration, Section 3 directs it, on application of a party "not in default in proceeding with * * * arbitration," 9 U.S.C. § 3, to stay determination of those issues. When no such suit is pending in district court, Section 4 allows

> [a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration [to] 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.

9 U.S.C. § 4. District courts must treat Section 4 petitions as motions, 9 U.S.C. § 6, and hold "an expeditious and summary hearing, with only restricted inquiry into factual issues," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983), particularly whether the dispute is within a binding arbitration agreement and whether the respondent is in breach of it, see 9 U.S.C. § 4.

When neither issue is genuinely in dispute, the court orders arbitration; if either is, the court proceeds "summarily to trial," with (non-admiralty) respondents entitled to a jury. 9 U.S.C. § 4. If, after trial, the court determines that the respondent has breached an obligation to arbitrate, it orders arbitra-

tion. *Ibid.* If it does not, it dismisses the petition. *Ibid.* In any event, Section 4 does not allow the court to decide any issue in the underlying dispute or to retain jurisdiction pending completion of any arbitration. *Ibid.*; cf. 9 U.S.C. §§ 3, 8.

Other provisions of the FAA address matters that arise once parties have proceeded to arbitration. Section 7, for instance, grants federal courts the power to compel persons to testify at arbitration proceedings, while Sections 9, 10, and 11, provide, respectively, means for affirming, vacating, and modifying arbitration awards by petitioning the court in the district where the arbitration occurred. See 9 U.S.C. §§ 7, 9-11.

Congress amended Title 9 in 1970, see An Act to Implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1970, Pub. L. No. 91-368, 84 Stat. 692, to add Chapter 2, 9 U.S.C. §§ 201 *et seq.*, implementing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). Rather than alter the FAA's original provisions (Title 9's Chapter 1), Congress added provisions specifically applicable to commercial arbitration agreements involving foreign citizens (and certain other transactions touching on foreign commerce), including two specifically addressing federal subject matter jurisdiction. One "deem[s]" all actions and proceedings relating to such agreements "to arise under the laws and treaties of the United States," 9 U.S.C. § 203; the other authorizes removal to federal district court whenever "the subject matter of an action or proceeding pending in a State court relates to an arbitration

agreement or award falling under the Convention," 9 U.S.C. § 205. Chapter 2 was intended to "leave unchanged the largely settled interpretation of the Federal Arbitration Act." H.R. Rep. No. 1181, 91st Cong., 2d Sess. 3 (1970) (letter from Acting Assistant Secretary of State H.G. Torbert, Jr.).

This Court has held that the FAA has broad substantive but no jurisdictional sweep. In *Southland Corp.* v. *Keating*, 465 U.S. 1 (1983), for example, this Court held that the FAA "preempts a state law that withdraws the power to enforce arbitration agreements," *id.* at 16 n.10, and governs in both state and federal court, *id.* at 15-16. On the other hand, this Court has repeatedly recognized that the FAA is "something of an anomaly in the field of federal-court jurisdiction." *Hall St. Assocs.* v. *Mattel*, 128 S. Ct. 1396, 1402 (2008) (quoting *Moses H. Cone*, 460 U.S. at 25 n.32). Although the Act "creates federal substantive law requiring the parties to honor arbitration agreements," *Southland*, 465 U.S. at 15 n.9, it "bestow[s] no federal jurisdiction," *Hall St. Assocs.*, 128 S. Ct. at 1402 (citing *Moses H. Cone*, 460 U.S. at 25 n.32). "As for jurisdiction," this Court has noted, "the Act does nothing." *Ibid.*

B. Proceedings Below

In June 2003, respondent Discover Financial Services, Inc. (DFS) sued petitioner Betty Vaden in Maryland state court for failing to pay a balance allegedly owed on her credit card. Pet. App. 59a. Ms. Vaden filed class action counterclaims, alleging that DFS had breached the contract and that its "assess-

ment of finance charges, late fees, and interest rates * * * [were] in violation of Maryland law." *Id.* at 41a.

DFS and Discover Bank (together Discover) then filed a Section 4 petition in Maryland federal district court. They sought to compel arbitration of these counterclaims, citing language in a cardmember agreement to the effect that "in the event of any past, present, or future claim or dispute * * * relating to [your a]ccount * * *, you or we may elect * * * binding arbitration." *Id.* at 49a-50a. The petition did not allege that Discover had demanded arbitration or otherwise notified Ms. Vaden of its "election" or that relief was unavailable in the state court where the claims were pending. J.A. 28-43. Discover alleged federal subject matter jurisdiction under 28 U.S.C. § 1331, asserting that certain of the counterclaims were "completely preempted," J.A. 30, and that the court had supplemental jurisdiction under 28 U.S.C. § 1367 to compel arbitration of the remaining claims, *Ibid.* Discover further asked the court to enjoin Ms. Vaden from further litigating her counterclaims in state court. J.A. 41.

In response, Ms. Vaden denied she was party to an arbitration agreement. She relied on Discover's records showing that it had sent notices purporting to amend cardholder agreements to include the arbitration clause only to those holding "Platinum" accounts as of July 1999 and that her account had not been "upgraded" until later. Pet. App. 60a. The district court found that an arbitration agreement existed, directed her to arbitrate all her claims, and stayed the state court proceedings. *Id.* at 86a-87a.

The Fourth Circuit vacated and remanded. Raising the question of subject matter jurisdiction for the

first time, Pet. App. 61a, it acknowledged that a number of courts of appeals had held that Section 1331 does not confer jurisdiction unless the obligation to arbitrate itself arises under federal law, Pet. App. 62a (citing *Westmoreland Capital Corp.* v. *Findlay*, 100 F.3d 263 (2d Cir. 1996)), but announced that it would instead follow the Eleventh Circuit's decision in *Tamiami Partners, Ltd.* v. *Miccosukee Tribe*, 177 F.3d 1212 (11th Cir. 1999), holding "that a federal court possesses subject matter jurisdiction over a case when the controversy underlying the arbitration agreement presents a federal question," Pet. App. 63a.

The court grounded this look-through approach in three phrases in Section 4. Pet. App. 64a. First, the court read the phrase "save for such agreement" as "an instruction to set aside the arbitration agreement and then consider the grounds for federal jurisdiction independently," *ibid.*, disagreeing with *Westmoreland* and other decisions that read this language as overriding the traditional "ouster" bar against enforcing arbitration agreements, *id.* at 65a n.2. The court then highlighted Section 4's reference to "Title 28." *Id.* at 65a-66a. That mention, it reasoned, indicated that all parts of Title 28 must give rise to jurisdiction and without "looking through," it believed, Section 1331 could not. *Ibid.* Third, the court believed the phrase "controversy between the parties" could refer only to either "the overall substantive conflict between the parties" or "the discrete dispute about whether there is a valid arbitration agreement." *Id.* at 66a. It chose the former option because, it believed, litigants "do not come to court solely to resolve the collateral issue of whether or not they have an

agreement to arbitrate," but rather "incur[] the expense and burdens of litigation * * * to resolve their real-life conflicts and move on." *Ibid.*

The court then addressed the objection that looking through the petition violates Section 1331's "well-pleaded complaint" limitation. Pet. App. 67a-70a; see *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152 (1908). Drawing an analogy to declaratory judgment actions, it dismissed this concern: "Just as the real controversy * * * [in a declaratory judgment action i]s the prospect of a [coercive] federal question suit * * *, so the real controversy * * * [here] is whether a federal action prompted the motion to compel arbitration." Pet. App. 69a.

The Fourth Circuit then remanded the case to see whether looking through could establish jurisdiction in this case. Pet. App. 72a-73a. In particular, it directed the district court to decide whether Ms. Vaden's counterclaims were "completely preempted" by federal law. *Id.* at 73a n.3. Under this doctrine, a state-law claim can ground federal question jurisdiction on removal under 28 U.S.C. § 1441(b) if federal law not only preempts the state law but also "provides the exclusive cause of action for the claim asserted." *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 8 (2003). When that happens, "any complaint that comes within the scope of the federal cause of action," even if it is pleaded solely in state-law terms, "necessarily 'arises under' federal law." *Id.* at 7 (quoting *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 24 (1983)). That this determination depended, in part, on whether Discover Bank, rather than DFS, the named defendant in the state court action, was "a party of interest," Pet. App. 73

n.3, compounded its complexity. The Fourth Circuit also instructed the lower court to reexamine whether Discover's financial records, viewed in the light most favorable to Ms. Vaden, raised a genuine factual dispute as to the existence of an arbitration agreement. *Id.* at 73 n.4.

On remand, the district court resolved each of these issues in Discover's favor, ruling that Discover Bank was "the real party in interest," Pet. App. 46a, that the "complete preemption doctrine * * * applie[d]," *id.* at 48a, and that no reasonable fact-finder could conclude that Ms. Vaden had not received (or accepted) the arbitration amendment, *id.* at 48a-53a. The court again ordered arbitration of all her counterclaims (both those completely preempted and those not) and enjoined her from pursuing them in state court. *Id.* at 55a.

A divided Fourth Circuit panel affirmed in all respects. Pet. App. 4a. Noting that the question was one of first impression, *id.* at 20a, the court held that federal law completely preempted Ms. Vaden's state-law counterclaims, *id.* at 25a, that Discover Bank was the "real party in interest," *id.* at 18a, and that, on a look-through theory, federal question jurisdiction was thus established. The majority rejected Ms. Vaden's contention, taken up by the dissent, that under this Court's decision in *Holmes Group* v. *Vornado Air Circulation Systems,* 535 U.S. 826, 830 (2002), a federal *counterclaim* could not furnish "arising under" jurisdiction. Pet. App. 10a n.4.

Judge Goodwin dissented, maintaining that Discover had failed to establish an independent basis for federal jurisdiction. Pet. App. 28a. Appealing to "basic" principles of federal question jurisdiction, Pet.

App. 30a, and to *Holmes Group* in particular, he concluded that a completely preempted state-law counterclaim was insufficient to establish federal question jurisdiction even under the look-through theory, *id.* at 33a-38a. The dissent also argued that looking through was itself wrong. *Id.* at 38a-39a. Agreeing with Judge Marcus's special concurrence in *Community State Bank* v. *Strong,* 485 F.3d 597 (11th Cir.), vacated, reh'g en banc granted, 508 F.3d 576 (11th Cir. Sept. 10, 2007) (No. 06-11582), which had urged reconsideration of the Eleventh Circuit's look-through rule and responded directly to the Fourth Circuit's *Vaden I* decision, Judge Goodwin concluded that "finding federal question jurisdiction where the court is asked only to enforce a private contract considerably and * * * unjustifiably[] expands federal court jurisdiction," Pet. App. 39a.

SUMMARY OF ARGUMENT

The Fourth Circuit grounded look-through jurisdiction on a fundamentally mistaken view of how Section 4 and the FAA operate: that "[l]itigants do not come to court solely to resolve the collateral issue of whether or not they have an agreement to arbitrate" but "to resolve their real-life conflicts." Pet. App. 66a. This view, of course, gets the FAA exactly backwards. It does *not* allow courts "to resolve [any] real-life conflicts." By its terms, Section 4 allows a court to decide *only* "the collateral issue" and order arbitration only if it finds one party in breach. Only when there is no agreement—and the FAA thus does not apply—can a court itself resolve the primary "real-life conflicts" between the parties.

This fundamental misunderstanding led the court to find "arising under" jurisdiction, 28 U.S.C. § 1331, when the dispute for which arbitration is sought, but not the petition to compel itself, includes a question of federal law. In so doing, the Fourth Circuit committed several fundamental errors:

First, the court's analysis focused on the wrong statute. In finding jurisdiction based on certain language in Section 4, the Fourth Circuit made little attempt to square its rule with the text of S*ection 1331* or decades of case law interpreting that provision. Under those precedents, an action seeking to enforce an ordinary arbitration provision does not "aris[e] under" federal law, even if the FAA might displace an otherwise available state-law defense. Although this Court has repeatedly held that "[a]s for jurisdiction * * * the Act does nothing," *Hall St. Assocs.* v. *Mattel*, 128 S. Ct. 1396, 1402 (2008), the Fourth Circuit effectively held that Section 4 both impliedly repeals Section 1331's well-pleaded complaint rule and adopts the well-pleaded counterclaim rule this Court rejected in *Holmes Group* v. *Vornado Air Circulation Systems*, 535 U.S. 826 (2002). A jurisdictionally inert statute, however, can do no such thing.

Second, even if it did not contravene the principle that federal subject matter jurisdiction must be established independently of the FAA, the Fourth Circuit's construction of Section 4 would be untenable in its own right. In reading the provision as jurisdiction-conferring, the court of appeals took insufficient account of the history, text, structure, and purposes of Section 4, the text and structure of the surrounding provisions, and of the need to interpret the FAA as a coherent whole. In addition, the Fourth Circuit

did not attend to important historical differences between the federal and state systems that led Congress to include language in Section 4 that early adopting States had not included in their analogous statutes in order to ensure that federal courts would repudiate the "ouster doctrine," which had long barred specific performance of arbitration agreements. In fact, in cases like this one, a look-through approach frustrates, rather than advances, the FAA's central purposes—getting arbitrable disputes into arbitration as quickly as possible and having arbitrators, rather than courts, decide them.

Third, to find jurisdiction here the Fourth Circuit had to adopt a maximal version of look-through, one that aggravates its incompatibility with basic principles of federal jurisdiction. Having held (in *Vaden I*) that Section 4 allows a federal court to ignore its lack of jurisdiction over the "collateral dispute" it is asked to decide, the court's second decision held that Section 4 entitles a federal court to ignore its lack of jurisdiction over the action actually pending between the parties so long as the petitioner could point to *some* suit the controversy might raise that would *somewhere* contain a federal question. Here, it looked through the petition very far indeed, resting jurisdiction on completely preempted state-law *counter*-claims.

Fourth, the court ordered arbitration when Discover had no standing to petition for it. The alleged arbitration agreement allowed either party to *elect* arbitration; it did not require it. Thus, in filing her state-law counterclaims after Discover had brought suit against her in state court, Ms. Vaden could not have breached any arbitration obligation. Under the

agreement, such an obligation could attach only after Discover had asked Ms. Vaden to arbitrate, which it has never done. Ms. Vaden's decision to defend against Discover's Section 4 petition cannot itself constitute an injury to Discover's legal rights, when Discover has never formally asserted an election to arbitrate. Accordingly, Discover has suffered no "injury in fact" on which to assert constitutional standing.

The approach the Fourth Circuit established is extraordinary in every respect. It affirmatively directs federal courts to disregard state interests in deciding their jurisdiction and does so for no reason at all: the relief sought from the federal court here was fully and equally available in the state court where Discover brought suit. Indeed, this friction-inducing approach is not merely gratuitous, but counterproductive. A state court can make good on the core promise of the FAA—to get parties bound by an arbitration agreement into arbitration as quickly as possible. A federal court, obliged to determine its subject matter jurisdiction before reaching the merits of an arbitrability dispute, must, under the look-through rule, resolve myriad legal questions (some fact-intensive, others abstract and broadly significant) that are unrelated to the arbitrability dispute before it and that are, to the extent actually raised by the parties' substantive disagreement, committed by the FAA to arbitral resolution. This completely distorts the regime Congress intended.

ARGUMENT

I. TO CONFER JURISDICTION, SECTION 1331 REQUIRES MORE THAN THE MERE PRESENCE OF A FEDERAL ISSUE THAT IS BEYOND THE DISTRICT COURT'S AUTHORITY TO DECIDE SOMEWHERE IN THE UNDERLYING DISPUTE

Although the court of appeals recognized the need for subject matter jurisdiction, see Pet. App. 61a, neither of its decisions made any serious effort to square its exercise of jurisdiction with this Court's precedents construing 28 U.S.C. § 1331. Those cases make clear that Discover's Section 4 petition does not fall within that jurisdictional grant.

For more than a century, this Court has interpreted the "arising under" language of Section 1331 considerably more narrowly than the parallel language in Article III, compare, *e.g.*, *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152-154 (1908) with *Osborn* v. *Bank of the U.S.,* 22 U.S. (9 Wheat.) 738, 823 (1824), in order to respect Congress's role in deciding whether to confer jurisdiction. *Merrell Dow Pharm.* v. *Thompson*, 478 U.S. 804, 807-812 (1986) (lower federal courts' jurisdiction "is not self-executing"); see generally *Healy* v. *Ratta*, 292 U.S. 263, 270 (1934) (federal courts must "scrupulously confine their own jurisdiction to the precise limits which the statute has defined"). For purposes of Section 1331, an action "arises under" federal law only if it "really and substantially involves a dispute or controversy respecting the validity, construction, or effect of [federal] law, upon the determination of which

the result depends." *Shulthis* v. *McDougal*, 225 U.S. 561, 569 (1912); see also *Gully* v. *First Nat'l Bank*, 299 U.S. 109, 112 (1936) ("[A] case arises 'under [federal law]'" if the plaintiff's claim "will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another."). A court must determine this, moreover, by looking only to "what necessarily appears in the *plaintiff's* statement of his own claim." *Oklahoma Tax Comm'n* v. *Graham*, 489 U.S. 838, 840-841 (1989) (emphasis added) (quoting *Taylor* v. *Anderson*, 234 U.S. 74, 75-76 (1914)); *Mottley*, 211 U.S. at 152-154. These rules not only promote "clarity and ease of administration" by providing "a 'quick rule of thumb' for resolving jurisdictional conflicts," *Holmes Group*, 535 U.S. at 832, but also express "[d]ue regard for the rightful independence of state governments," *ibid.*, and "the demands of reason and coherence, and the dictates of sound judicial policy," *Romero* v. *Int'l Terminal Operating Co.,* 358 U.S. 354, 379 (1959).

These precedents, which the Fourth Circuit almost completely neglected to consider, make clear that respondents' Section 4 action does not "arise under" federal law for Section 1331 purposes. This Section 4 petition does not "really and substantially involve[] a dispute or controversy respecting the validity, construction, or effect of [federal] law." Regardless of whether the issues a Section 4 petitioner hopes to arbitrate are state or federal, a Section 4 proceeding determines only if there is an arbitration agreement covered by the FAA and if the respondent party has "fail[ed], neglect[ed], or refus[ed]" to fulfill it. 9 U.S.C. § 4. Indeed, the statute *prohibits* the federal

court from going further. Once "satisfied that an agreement for arbitration has been made and has not been honored," *Prima Paint Corp.* v. *Flood & Conklin Mfg.*, 388 U.S. 395, 400 (1967), the court must order arbitration, 9 U.S.C. § 4. If the petition fails on either point, "the proceeding shall be dismissed." *Ibid.* In either event, the proceeding ends. Section 4 does not allow the court to decide a dispute it deems non-arbitrable; nor does it allow for ongoing jurisdiction over a dispute that the court sends to arbitration. A Section 4 proceeding decides only *who* can hear a particular dispute—arbitrators or courts—not any of the issues in the dispute itself. And it is the parties' agreement—ordinarily, though not inevitably, a state-law contract—that determines this "who" question. See *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter * * * courts generally * * * apply ordinary state-law principles that govern the formation of contracts.").[1]

To be sure, Section 4 arbitrability disputes sometimes require courts to interpret the FAA or implement its policies. But that does not give rise to Section 1331 jurisdiction. As the Fourth Circuit itself recognized, "[n]o one contends that [the FAA] in and

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[1] As explained below, see pp. 28-29, *infra*, a Section 4 petition will itself "arise under" federal law where federal law creates the arbitration obligation. Moreover, courts whose federal question jurisdiction is independently established may, and often do, direct arbitration of federal questions, as do courts whose jurisdiction is established by diversity of citizenship. See *Community State Bank* v. *Strong*, 485 F.3d 597, 626-627 (11th Cir.) (Marcus, J., specially concurring), reh'g en banc granted, 508 F.3d 576 (11th Cir. Sept. 10, 2007) (No. 06-11582).

of itself constitutes a federal question." Pet. App. 62a. Finding such jurisdiction, even when, as here, a case presents a substantial question about the meaning of the FAA itself, would contravene the principle that the statute "does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 * * * or otherwise." *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 n.9 (1984).

Nor does the presence of a federal question *in the dispute to be arbitrated* change anything. Because a Section 4 court cannot decide such a question, it stands inert and, so far as the Section 4 court is concerned, there is no federal question jurisdiction even though "a question of "federal law is lurking in the background." *Gully*, 299 U.S. at 117; accord *Morris* v. *City of Hobart*, 39 F.3d 1105, 1111 (10th Cir. 1994) (no federal question jurisdiction over a suit for violation of an agreement to settle Title VII claims). Indeed, this Court has twice rejected approaches to jurisdiction like the Fourth Circuit's. In *Mesa* v. *California*, 489 U.S. 121 (1989), this Court refused to adopt a broad, "plain language" interpretation of the federal officer removal statute, 28 U.S.C. § 1442(a), ruling instead that in light of the reasons Congress had conferred such jurisdiction, it should only apply to cases that presented a federal-law defense. And *Kokkonen* v. *Guardian Life Insurance Co.*, 511 U.S. 375 (1994), rejected a claim that federal jurisdiction extends to any action arising from an agreement to settle a federal lawsuit. This Court emphasized that, as here, "[t]he facts to be determined with regard to such alleged breaches of contract are quite separate from the facts to be determined in the principal suit." *Id*. at 381.

To the extent the Fourth Circuit addressed Section 1331 at all, it relied on a false analogy between Section 4 proceedings and actions under the Declaratory Judgment Act, 28 U.S.C. § 2201. Noting a statement in *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), that "[f]ederal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question," Pet. App. 69a (quoting 463 U.S. at 19) (alteration in original), it asserted that looking through a Section 4 petition does "not 'chang[e] the rules' of federal question jurisdiction [but merely] appl[ies] the rules in the context of the FAA's procedural posture, just as the Supreme Court did with the Declaratory Judgment Act in *Franchise Tax Board,"* Pet. App. 70a.

This is wrong for two reasons. First, although this Court has held that a federal claim in the coercive suit is a necessary element for "arising under" jurisdiction, it has never held that it is a sufficient one. In all the cases it has decided, the declaratory-judgment plaintiff himself has had a federal claim. *Textron Lycoming Reciprocating Engine Div.* v. *UAW*, 523 U.S. 653, 660 & n.4 (1998). That is not the case here. Second, and more important, the declaratory judgment analogy misses the central point. Even if the declaratory-judgment plaintiff did not himself have to assert a federal claim (but see *Textron*, 523 U.S. at 659-660) and the Declaratory Judgment Act thus would alter the ordinary application of the well-pleaded complaint doctrine, it would do so only because the dispute the federal court is asked to decide

is one otherwise within the court's "arising under" jurisdiction and one that it ordinarily would decide. No less than a suit seeking damages or injunctive relief, "the Declaratory Judgment Act plaintiff's right to relief still 'necessarily depends on resolution of a substantial question of federal law.'" *Community State Bank* v. *Strong,* 485 F.3d 597, 633 (11th Cir.) (Marcus, J., concurring), vacated, reh'g en banc granted, 508 F.3d 576 (11th Cir. Sept. 10, 2007) (No. 06-11582) (quoting *Franchise Tax Bd.,* 463 U.S. at 28). Here, in contrast, neither the Section 4 petition nor the response to it asks the federal court to resolve any federal question and the court cannot reach the merits of the underlying dispute in which any federal question is embedded.

In short, unless Section 4 impliedly repeals much of Section 1331 and pushes statutory "arising under" jurisdiction near the maximum Article III allows, there can be no federal question jurisdiction here. Any such argument would, moreover, face a very high hurdle. This Court has long disfavored repeals by implication and will not find one "unless the intention of the legislature to repeal [is] clear and manifest." *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007) (internal quotation marks omitted) (quoting *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981)).

"[T]he deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes," *Romero*, 358 U.S. at 379, compounds this difficulty. As this Court has long held, "[d]ue regard for the rightful independence of state governments * * * requires that [federal courts] scrupulously confine their

own jurisdiction to the precise limits which the statute has defined." *Id.* at 380 (quoting *Healy*, 292 U.S. at 270). To succeed, then, respondents must show that Congress clearly and unambiguously intended in Section 4 to repeal many of Section 1331's jurisdictional limitations, all of which protect the autonomy of state courts. Any doubt or ambiguity counsels strongly against this Court expanding Section 1331's reach by "looking through."

II. THE FAA'S HISTORY, TEXT, STRUCTURE, AND PURPOSES ALL SHOW THAT CONGRESS INTENDED SECTION 4 TO OVERCOME THE OUSTER DOCTRINE, NOT TO REPEAL THE LIMITATIONS OF SECTION 1331

A. The FAA's History Reveals that Section 4 Was Meant to Provide a Means for Quick Specific Performance of Arbitration Agreements

The FAA addressed American courts' longstanding rejection of arbitration agreements—a stance based upon the English common law, which "refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction." H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924). Through the FAA, Congress intended to rescind this rule and put arbitration agreements "upon the same footing as other contracts." *Volt Info. Scis.* v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (quoting

Scherk v. *Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

To fulfill this goal, the FAA had to overcome three discrete obstacles to enforcement of arbitration clauses. First, a number of courts found agreements to arbitrate void because they attempted to oust the courts of jurisdiction. See, *e.g.*, *United States Asphalt Ref. Co.* v. *Trinidad Lake Petroleum Co.*, 222 F. 1006, 1012 (S.D.N.Y. 1915); *Wood* v. *Humphrey*, 114 Mass. 185 (1873). Other courts allowed a party who had already agreed to arbitrate to revoke its consent at any time before the arbitrator's award. See, *e.g.*, *N.P. Sloan Co.* v. *Standard Chem. & Oil Co.*, 256 F. 451, 454-455 (5th Cir. 1918). Finally, some courts permitted enforcement of arbitration agreements at law—awarding nominal damages for breach of contract—but not in equity and so denied specific performance as a remedy. See, *e.g.*, *Perkins* v. *United States Elec. Light Co.*, 16 F. 513, 515 (2d Cir. 1881); *Tobey* v. *County of Bristol*, 23 F. Cas. 1313, 1321-1322 (C.C.D. Mass. 1845) (Story, J.); *Rison* v. *Moon*, 22 S.E. 165, 167 (Va. 1895).

Sections 2 and 4 of the FAA work in tandem to override this ouster doctrine. Section 2 makes arbitration agreements "valid, irrevocable, and enforceable." But this declaration alone would not necessarily suffice to render arbitration agreements specifically enforceable in equity. They still could have been enforceable only in law for nominal damages. Section 4 thus fulfilled Congress's purpose by providing a "simple method for securing the performance of

an agreement to arbitrate." S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924).[2]

But Section 4 does more than merely make arbitration clauses specifically enforceable; it creates a unique, streamlined mechanism designed to avoid the "cumbersome" nature of the "old actions in the courts." *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong., 1st Sess. 35 (1924) (statement of Mr. Julius Henry Cohen) ("*Joint Hearings*"). Inspired by decades of similarly streamlined practice in New York, see pp. 34-35, *infra*, the FAA's Section 4 procedure "is very simple, following the lines of ordinary motion procedure, reducing technicality, delay, and expense to a minimum and at the same time safeguarding the rights of the parties." H.R. Rep. No. 96 at 2; *Joint Hearings* 39 (Section 4 actions "procee[d] with a minimum of legal intervention and the parties are

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[2] This general two-tiered approach was followed in contemporaneous state arbitration acts. Like Section 2 of the FAA, Section 2 of the 1920 New York Arbitration Act stated the general policy of the act by providing that arbitration clauses "shall be valid, enforceable and irrevocable." Act of Apr. 19, 1920, ch. 275, 1920 N.Y. Laws 803. Specifically referencing the arbitration agreements "described in section 2," Section 3 of the New York Act provided a specialized remedial mechanism for aggrieved parties to secure specific performance. The same structural pattern appears in both the 1923 New Jersey Act, Act of Mar. 21, 1923, ch. 134, 1923 N.J. Laws 291, and the Uniform State Arbitration Act proposed by the American Bar Association, see Committee on Commerce, Trade and Commercial Law, *Report of the Forty-Fifth Annual Meeting of the American Bar Association* 318 app. C (1922).

assured of the same speedy and expert hearing which they originally desired").

Because this special petitioning process was previously unknown to federal law, Congress had to establish new jurisdictional rules that federal judges would understand how to apply. Unlike New York state courts, federal courts remained divided between law and equity.[3] Jurisdiction in a court of law did not provide jurisdiction in a court of equity. *Buzard* v. *Houston*, 119 U.S. 347, 351-353 (1886). So merely declaring arbitration agreements enforceable meant courts might still perceive themselves as ousted of equitable jurisdiction.

Congress solved this dilemma by describing jurisdiction over the unique proceedings created in Section 4 by analogy to familiar forms of action. See *Joint Hearings* 34 (allowing Section 4 suits "wherever under the Judicial Code [courts] would normally have jurisdiction of a controversy between the parties"). Prior to the FAA, a party seeking to compel arbitration would ordinarily have sued for specific performance of a contract. Although the particular lawsuit would have fallen to the doctrine of ouster, courts were well accustomed to examining their own jurisdiction over specific performance suits. *McCormick* v. *Oklahoma City*, 236 U.S. 657 (1915) (finding diversity

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[3] In New York, law and equity had merged over sixty years prior to the adoption of its state arbitration statute. See Act of Apr. 12, 1848, ch. 379, § 62, 1848 N.Y. Laws 510. Thus, when the New York arbitration statute provided jurisdiction for its courts to enforce an arbitration agreement, it had no reason to clarify that equity courts as well as those in law had jurisdiction—the statute's grant necessarily reached both.

jurisdiction over suit for specific performance, but insufficient allegations to support federal question jurisdiction); *Marsh* v. *Nichols, Shepard & Co.*, 140 U.S. 344 (1891) (concluding that suit for specific performance of contract involving patent did not present a federal question); see also *Great Lakes & St. Lawrence Transp. Co.* v. *Scranton Coal Co.*, 239 F. 603, 605 (7th Cir. 1917); *Joseph Dry Goods Co.* v. *Hecht*, 120 F. 760, 765-766 (5th Cir. 1903). In creating this new proceeding, Congress therefore used the phrase "would have jurisdiction * * * of a suit" to refer to jurisdiction over a hypothetical suit for specific performance. See pp. 35-36, *infra*. And it was firmly established that jurisdiction over a suit for specific performance was to be determined by the allegations on the face of the initial filing. James Love Hopkins, *The New Federal Equity Rules* 165-167 (5th ed. 1925) (quoting federal equity rule 25 as requiring "a short and plain statement of the grounds upon which the court's jurisdiction depends").

But it would not have been enough for Congress to simply say that one might petition any court that could have compelled specific performance between the parties. The phrase "would have jurisdiction" was itself ambiguous—"would have" under what rules? A federal court might conclude in a particular case that state-law ouster principles applied. See, *e.g.*, *Gatliff Coal Co.* v. *Cox*, 142 F.2d 876, 881 (6th Cir. 1944) (holding arbitration agreement not governed by the FAA invalid under Kentucky law as "an attempt to oust the legally constituted courts of their jurisdiction"). And if a court analyzed its jurisdiction under then-existing federal common law, it may well have found that ouster applied. See, *e.g.*, *Trott* v. *City*

Ins. Co., 24 F. Cas. 215, 217 (C.C.D. Me. 1860) (No. 14,189) (explaining that courts would not enforce "an [arbitration] agreement by a bill in equity, for a specific performance * * * as illfounded in point of jurisdiction"). So deeply entrenched was the ouster doctrine, in fact, that in some forms it persisted despite the FAA. See *Rae* v. *Luzerne County*, 58 F.2d 829, 830 (M.D. Pa. 1932) (finding ouster precluded arbitration defense in contract action).

Congress therefore carefully clarified in Section 4 that federal courts were no longer handcuffed by "ouster" and that they thus possessed equitable jurisdiction to compel arbitration. The phrase "save for such agreement" instructs the court to ignore this outmoded rule in examining its jurisdiction. See *Drexel Burnham Lambert, Inc.* v. *Valenzuela Bock*, 696 F. Supp. 957, 962-963 (S.D.N.Y. 1988) ("The likely intended meaning of the 'save for' clause is that the court which is otherwise vested of jurisdiction of the suit would not be divested by the arbitration agreement and may proceed to order arbitration, contrary to prior precedent."); see also *Westmoreland Capital Corp.* v. *Findlay,* 100 F.3d 263, 267-268 & n.6 (2d Cir. 1996) (adopting the interpretation of the *Valenzuela Bock* court); *Prudential-Bache Sec., Inc.* v. *Fitch,* 966 F.2d 981, 988 (5th Cir. 1992) (same).

Congress thus designed Section 4 to overturn the longstanding but widely criticized common-law rule and create a unique remedy analogous to, but not the same as, specific enforcement. The Fourth Circuit thought this nuanced, contextual understanding of history was "historically inaccurate." Pet. App. 65a n.2 (citing 1 Ian R. MacNeil et al., *Federal Arbitration Law* § 9.2.3.3 (1995)). Its view, however, rests not on

detailed historical argument, but only on negative implication from the absence of similar language in earlier state arbitration laws. The Fourth Circuit summarily stated that because the state arbitration statutes, which were also addressed to ouster, did not include the "save for" language, that language could not have been necessary to address ouster under the FAA. *Ibid*. But the States did not need such language; Congress did. The federal statute simply confronted additional discrete issues, including a division between law and equity, the potential applicability of state law, and the necessity of instructing federal courts of limited jurisdiction on a new process. Properly understood, history explains why Congress would have believed Section 4's special "save for" language was necessary to completely overcome ouster in the federal courts.

To properly interpret the FAA, one must both consider the background that Congress was legislating against and attend to the differences inherent in the federal system. Considering the division between law and equity in federal courts and the common-law background of arbitration agreements, Congress's reason for specifically referencing the abrogation of ouster in relation to specific performance in federal courts becomes apparent. When read in proper context, "save for such agreement" is neither a mystery nor a superfluity, but a necessary part of a coherent scheme.

B. The Fourth Circuit's Look-Through Approach Wrenches Phrases from Section 4 Out of Their Context, Ignores Title 9's Structure, and Creates Many Troubling Jurisdictional Gaps

In construing Section 4 as jurisdiction-conferring, the Fourth Circuit relied exclusively on what it took to be the "ordinary meaning" of three of Section 4's terms: "save for the agreement," "Title 28," and "controversy." Pet. App. 64a-66a. It made no attempt to square its conclusion with the surrounding text of that provision, with related provisions of the Act, with this Court's precedents, with background principles of federal jurisdiction, or with the Act's purposes. As those all make clear, Section 4 was intended to "provide[] a simple method for securing the performance of an arbitration agreement." S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1924). It is not a clandestine conduit for expanding federal court jurisdiction. Indeed, on closer scrutiny, the Fourth Circuit's "plain meaning" interpretations fail on even their own terms.

To begin, the Fourth Circuit's conclusion that the statute's reference to "Title 28" supports transforming Section 4 from a procedural provision providing an expedited form of specific performance into a font of subject matter jurisdiction not only "read[s] too much into a benign reference," *Strong*, 485 F.3d at 626, but reflects a fundamentally mistaken premise. The Fourth Circuit reasoned that since Congress referenced Title 28 generally rather than referencing only specific parts, it must have intended that *all* of

its sections would furnish subject matter jurisdiction for Section 4 petitions, Pet. App. 65a-66a ("[W]here Congress knows how to say something but chooses not to, its silence is controlling." (citation omitted)), and that only a look-through rule would preserve federal question jurisdiction.

But this reasoning is erroneous. There are obvious situations when a petition to compel would itself arise under federal law. Determining jurisdiction based on the controversy the court is asked to resolve (rather than on the one the arbitrator would) does not "[s]ipho[n] off federal question jurisdiction from Title 28." Pet. App. 66a. For example, whenever federal law so preempts a field that arbitration agreements themselves arise under it, as is the case with the Employee Retirement Income Security Act, 29 U.S.C. § 1401 (establishing a federally required, de facto arbitration agreement between employers and plan sponsors of a multiemployer plan concerning determinations made under the ERISA provisions at 29 U.S.C. §§ 1381-1399); see *Strong*, 485 F.3d at 627 (Marcus, J., specially concurring), there would be federal question jurisdiction. This would also be true whenever federal law requires arbitration, *e.g.*, 16 U.S.C. § 5954(b)(2) (requiring disputes between concessioners in national parks and the Secretary of the Interior over the value of existing possessory interests to "be resolved through binding arbitration"), or whenever Congress has specifically stated that certain arbitration disputes "arise under" federal law, *e.g.*, 25 U.S.C. § 415(f) (declaring that actions pursuant to arbitration agreements contained in "any contract, including a lease, affecting land within the Gila River Indian Community" are civil actions "arising

under the Constitution, laws or treaties of the United States within the meaning of section 1331 of Title 28"); 25 U.S.C. § 416a(c) (same with respect to the Salt River Pima-Maricopa Indian Reservation). Actions to compel arbitration of "federal questions" will, moreover, arise in cases where jurisdiction is established on some other ground or where Section 1331 is independently satisfied.

Indeed, the Fourth Circuit's extravagant reading ignores the obvious, historically accurate—but "benign"—explanation for this statutory language. The supposedly significant term, "Title 28," dates back not to 1925, but rather to 1954, when it was placed in the statute as part of a housekeeping measure. S. Rep. No. 2498, 83d Cong., 2d Sess. 2, 9 (1954) (noting that "[t]he judicial code (of 1911) was repealed in 1948 when title 28 of the United States Code * * * was enacted into law," and that amendment was part of a broad program to correct obsolete "references in all such statutes and code titles"). The claim that Congress chose this language carefully with courts' power to compel arbitration of federal questions in mind ignores the historical reality that at that time there was serious doubt as to the arbitrability of federal statutory claims. See *Wilko* v. *Swan*, 346 U.S. 427, 438 (1953); see also *Mitsubishi Motors* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 646 (1985) (Stevens, J., dissenting). The original statutory reference to the "judicial code" seems equally innocuous as a shorthand way of capturing the two heads of jurisdiction under which arbitrability disputes had long found their way to federal court: diversity of citizenship and admiralty. Indeed, at that time, diversity and federal question jurisdiction were part of a single

section of the Judicial Code. Cf. 9 U.S.C. § 1 (defining "maritime transactions" and "commerce").

The whole notion that the reference to "Title 28" expresses a carefully considered legislative policy judgment strains credulity. "Title 28" covers much more than subject matter jurisdiction—only chapter 85 concerns that and even that chapter includes myriad provisions which Congress could hardly have intended to provide jurisdiction for Section 4 petitions. *E.g.*, 28 U.S.C. § 1365 (refusals to testify or to produce documents under Senate subpoenas); 28 U.S.C. § 1344 (granting district courts original jurisdiction in certain electoral disputes); 28 U.S.C. § 1357 (granting district courts original jurisdiction in civil actions "to enforce the right of citizens * * * to vote in any State").[4]

The Fourth Circuit's construction of the phrase "save for such agreement" fares no better. Noting the need to "give effect to every provision and word in a statute and avoid any interpretation that [would] render statutory terms meaningless or superfluous," the court of appeals identified the "common and ordinary meaning" of these four words as "but for" or "notwithstanding." Pet. App. 64a (citations and in-

[4] The Fourth Circuit also failed to exclude the possibility that Congress referenced Title 28 generally not in order to include everything within it but to exclude everything outside it. Not only are many of the jurisdictional grants outside of Title 28 designed for specific situations not amenable to arbitration at all, but statutory grants of jurisdiction outside of Title 28 often eliminated the amount-in-controversy requirement that applied to Section 1331 until 1980. *E.g.*, 42 U.S.C. § 1971(d) (voting rights); 42 U.S.C. § 973h(c) (poll taxes); 42 U.S.C. § 973j(f) (voting rights).

ternal quotation marks omitted). But it then took an inexplicable turn:

> [I]n this context, "save for such agreement" must mean that the district court would have jurisdiction of the case *even if the agreement had never existed*. We thus read this phrase as an instruction to set aside the arbitration agreement and then consider the grounds for federal jurisdiction independently. Indeed, we can think of no other reason why Congress would have chosen to include the "save for" language.

Pet. App. 64a-65a (footnote omitted) (emphasis added). Mistakenly relying on a single line from a treatise, see p. 26, *supra*, it thought the phrase could not have "been meant to solve the ouster problem," Pet. App. 65a n.2.

Apart from misunderstanding history, a history that explains why Congress would have relied on such language to "solve the ouster problem," see pp. 21-27, *supra*, the Fourth Circuit's reasoning fails on its own terms. "But for" and "notwithstanding"—the meanings it rightly gives to "save for"—are quite different from "even if," the term it employs to accomplish "look through." Both "but for such agreement" and "notwithstanding such agreement" imply that the agreement would block otherwise existing subject matter jurisdiction: an understanding consistent with ouster. "Even if the agreement had never existed," by contrast, implies that the agreement has *no* negative effect on jurisdiction at all. It can only add to, not subtract from, subject matter jurisdiction. Only by

turning its own plain-meaning argument upside-down could the Fourth Circuit squeeze expanded subject matter jurisdiction out of a jurisdictionally inert statute.

In doing so, the Fourth Circuit also violated its own cardinal rule of statutory interpretation: avoiding readings that "render statutory terms meaningless or superfluous." Pet. App. 64a. By twisting "save for such agreement" to mean "even if the agreement had never existed," the Fourth Circuit effectively evacuated this statutory term of any meaning. Under its reading, the term "save for such agreement" instructs a court to look through to see whether the court would have jurisdiction of a perhaps hypothetical suit resting on the underlying controversy—a controversy that the Court must leave to an arbitrator to decide. As bracketing the "save for" language shows, however, Section 4 would do exactly this *without* the key "save for" provision: A party * * * may petition any United States district court which [, save for such agreement,] would have jurisdiction * * * in a civil section or in admiralty of the subject matter of a suit arising out of the controversy between the parties." Section 4's use of the conditional "would" by itself accomplishes "look through"—given the Fourth Circuit's strained interpretation of the remaining terms—without the "save for" clause. This Court should reject the Fourth Circuit's unnatural reading of Section 4's key term because it reduces that term to "linguistic superfluity." *Scheidler* v. *National Org. for Women*, 547 U.S. 9, 21 (2006). Petitioner's reading, by contrast, does not. By according to the two words "save for" the "common understanding" that the Fourth Circuit itself concedes they have,

it gives the "save for" clause its intended ouster-denying effect.

The Fourth Circuit similarly misconstrued "controversy between the parties," the third leg on which its look-through interpretation stood. It found that this term must refer to either (1) "the discrete dispute about whether there is a valid arbitration agreement" or (2) "the underlying [dispute]," that is "the whole controversy between the parties," which lies "beyond the arbitration petition." Pet. App. 66a-67a. Between those two choices, it sided with the latter. The choice itself is false, however, and misunderstands why Congress used the phrase.

When New York enacted its arbitration law, it did so against a well-developed background of "special proceedings." These were judicial proceedings that differed greatly from ordinary lawsuits. An "action" under New York law was "an ordinary prosecution, in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence." See N.Y. Code Civ. Pro. § 3333 (1920). A "special proceeding," by contrast, was "[e]very other prosecution by a party." *Id.* § 3334. New York thus distinguished between two different forms of arbitration practice. In so-called "common law arbitration," the court's role was confined to "actions"—basically full-blooded lawsuits. But the court could decide upon motion questions regarding "statutory arbitrations" under title 7 of the New York Code. *In re Di Carlo*, 13 N.Y.S. 83 (Sup. Ct. 1891) (concluding court had no jurisdiction over motion to set aside award from common-law arbitration). That is, statutory arbitrations provided expedited process in the

form of a "special proceeding." 1 J. Newton Fiero, *Practice in Special Proceedings in the Courts of Record of the State of New York* 86-87 (3d ed. 1912); *Gioia* v. *Gioia*, 12 N.Y.S.2d 729 (Sup. Ct. 1939) ("An action upon the award was the method of enforcement under the common law. The statutes do not prohibit that form of procedure * * * but render it obsolete by making the award a rule of court enforcible like a decision by the entry of judgment thereon."). Thus, in 1920, the New York drafters merely extended their existing swift process for enforcing arbitration awards to the new task of compelling arbitration in accord with predispute agreements.

This dual-track system was unknown to federal practice at the time of the FAA's enactment.[5] Before the Act took effect, a person seeking to compel arbitration would have had to file a suit in federal court for specific performance of the arbitration agreement, which would have failed on ouster grounds. *Tobey*, 23 F. Cas. at 1322 (finding that practicalities "must forever constitute, a complete bar to any attempt on the part of a court of equity to compel the specific performance of any agreement to refer to arbitration"). To provide expedited process for disputes about arbitration, then, Congress could

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[5] Indeed, the "special proceedings" distinction in New York arose from the Field Code of 1848, which merged law and equity and abandoned common law forms of action. Act of Apr. 12, 1848, ch. 379, §§ 1, 62, 1848 N.Y. Laws 497, 510. The federal system did not undertake any such systemization until the adoption of the Federal Rules of Civil Procedure in 1938—rules that were a "present-day interpretation and execution of what are at bottom the Field principles." Charles E. Clark, *Code Pleading and Practice Today*, in *David Dudley Field: Centenary Essays* 64 (1949).

not simply reference an existing fast-track practice, as New York could, but had to create one from scratch.

Congress had, moreover, a particular worry that New York did not. Since respect for state sovereignty limits the subject matter jurisdiction of the federal courts, Congress had to create special jurisdictional safeguards. Wanting to preserve strict jurisdictional neutrality—that is, neither expand nor contract the federal courts' ordinary subject matter jurisdiction—Congress instructed courts to analyze subject matter jurisdiction for the new special Section 4 proceedings the way they would have previously examined the more protracted equitable actions the new proceedings supplanted. In other words, Congress told courts to apply existing rules for determining subject matter jurisdiction over suits seeking specific contract performance to these new Section 4 proceedings. Thus, "a suit arising out of the controversy between the parties," 9 U.S.C. § 4, refers neither to the petition to compel arbitration itself nor to a suit on the more amorphous "underlying dispute"—the only two possibilities the Fourth Circuit saw—but to a traditional suit seeking specific performance of a contract, which the courts had much experience analyzing. See pp. 24-25, *supra*. Understood against the procedural background of the time, then, the term "a suit arising out of the controversy between the parties," 9 U.S.C. § 4, has no mystery and fully maintains the FAA's strict jurisdictional neutrality.

The Fourth Circuit, however, ignored Congress's concern with this strict neutrality principle—a concern so important that Congress rejected the single provision it did in the proposed bill exactly because it

would have expanded jurisdiction. A proposed Section 8 would have abolished the amount-in-controversy requirement for Section 4 petitions grounded on diversity jurisdiction. It stated:

> That if the basis of jurisdiction be diversity of citizenship * * *, the district court or courts which would have jurisdiction if the matter in controversy exceeded, exclusive of interest and costs, the sum or value of $3,000, shall have jurisdiction to proceed hereunder notwithstanding the amount in controversy is unascertained or is to be determined by arbitration."

Joint Hearings 3. The Senate Judicial Subcommittee, however, had this provision deleted from the bill "so as to preserve the jurisdiction of the federal courts." Committee on Commerce, Trade and Commercial Law, American Bar Association, *Report of the Forty-Seventh Annual American Bar Association Meeting* 284 (1924). And the American Bar Association, one of the bill's chief champions, noted Congress's great respect for jurisdictional neutrality. There was, the ABA explained, "considerable reluctance on the part of Congress to increase the jurisdiction of the federal courts." *Ibid*. In the face of such strong congressional concern that the FAA not alter background jurisdictional rules and understandings, the Fourth Circuit's strained reading of several of Section's 4's terms cannot justify a surreptitious and broad expansion of subject matter jurisdiction.

Chapter 2 of Title 9, which provides a mechanism for enforcing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, shows

clearly how hard the Fourth Circuit strained in reading Section 4. Two of its provisions, Sections 203 and 205, 9 U.S.C. §§ 203, 205, straightforwardly accomplish exactly what the Fourth Circuit believed Section 4 did by indirect and labored implication. As these two provisions demonstrate, when Congress wants to expand jurisdiction, it knows how to do so clearly and unequivocally. Section 202 sets the stage. It states that any "arbitration agreement or arbitral award arising out of a legal relationship * * * considered as commercial * * * falls under the Convention, excepting certain agreements among only United States citizens." 9 U.S.C. § 202. Section 203 then grants federal question jurisdiction to any action or proceeding concerning such agreements. It states that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States" and then goes on to make clear that the "district courts * * * shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." 9 U.S.C. § 203. In Section 203, Congress made it unmistakably clear both that it was expanding federal question jurisdiction and how far it was doing so. If it had intended Section 4 to repeal longstanding limits on Section 1331's grant, it could have made that equally clear. Using similar language would have unmistakably accomplished look-through jurisdiction. But, of course, Congress did not use any language even remotely like this.

Section 205 is to the same effect. It shows not only that if Congress had wanted to expand federal subject matter jurisdiction by repealing longstanding jurisdictional principles it knew how to do so clearly

and unequivocally, but also that it knew how to repeal the exact bar at issue here: the well-pleaded complaint rule. Section 205 provides for the removal of certain actions from state to federal court. Two of its features are notable. First, it shows that when Congress wanted to reference the underlying dispute subject to arbitration, it knew how to clearly do so. The first sentence of Section 205 provides that "[w]here the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may * * * remove such action or proceeding." 9 U.S.C. § 205. If Congress had intended to authorize looking through to the underlying dispute subject to arbitration, it could easily have done in Section 4 as it did here.

Second and more important, the next sentence in Section 205 clearly and unequivocally repeals the well-pleaded complaint rule in removal actions. It states that "[t]he procedure for removal of causes otherwise provided by law shall apply, *except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal*." 9 U.S.C. § 205 (emphasis added). If Congress had wanted to permit look-through jurisdiction, it knew exactly how to do so without ambiguity.

As Section 205 shows, the terms "controversy between the parties" and "save for such agreement" cannot bear the burden the Fourth Circuit's reading requires. Since "[d]ue regard for the rightful independence of state governments" requires federal courts to "scrupulously confine their own jurisdiction," *Healy*, 292 U.S. at 270, this Court should not

interpret Section 4 to expand jurisdiction at the expense of state courts without clear authorization—especially when Congress has shown that it knew how to expand jurisdiction if it wanted. See *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 108 (1941) (identifying congressional policy calling for strict construction of removal jurisdiction).

Look-through jurisdiction also leads to several serious jurisdictional gaps within the FAA itself. First, it creates an incomprehensible disconnect between Section 4 and Sections 7, 9, 10, and 11, thereby eviscerating the conception of the FAA as a "coherent regulatory scheme." *Watson* v. *United States*, 128 S. Ct. 579, 584 (2007). These sections specify how district courts should enforce arbitrators' subpoenas, 9 U.S.C. § 7, and confirm, *id.* § 9, vacate, *id.* § 10, or modify, *id.* § 11, their awards. They themselves confer no federal question jurisdiction. See *Moses H. Cone*, 460 U.S. at 25 n.32. As the courts of appeals have recognized, they "require an independent basis of subject matter jurisdiction." *Stolt-Nielsen SA* v. *Celanese AG*, 430 F.3d 567, 572 (2d Cir. 2005) (Section 7).

None of these sections, however, contains a "save for" clause, mentions Title 28, or refers to "a suit arising out of the controversy between the parties," the three key ingredients of look-through jurisdiction. Under the Fourth Circuit's own view, then, these provisions cannot authorize look-through jurisdiction. *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2765 (2006) ("[A] negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute."). Interpreting Section 4's "save for" clause as permit-

ting look-through jurisdiction thus creates a gap in federal court jurisdiction over arbitration agreements. Under the Fourth Circuit's approach, a federal court could obtain jurisdiction to compel arbitration by looking through the petition itself—but then no federal court would be able to enforce the arbitrators' subpoenas or confirm, vacate, or modify their awards, since Sections 7 and 9-11 would not permit such "looking through." As at least one lower federal court has noted, "[i]t would be bizarre if a petition to compel arbitration could be brought in federal court while a petition to confirm or vacate the arbitration award in the same underlying dispute could not." *Valenzuela Bock*, 696 F. Supp. at 963. These latter petitions could be brought only in state court.

C. Look-Through Jurisdiction Contravenes the FAA's Clear Purposes and Thwarts Congress's Will

Not only did the Fourth Circuit disregard the relevant history and flout the statutory text and structure, it also contravened the FAA's core purposes and ignored basic principles governing the allocation of responsibility between state and federal courts, thereby raising difficult constitutional questions.

This Court has emphasized Congress's intention (1) "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," *Moses H. Cone*, 460 U.S. at 22; (2) to respect (in cases where arbitration has been agreed to) the arbitrator's authority to resolve the substantive dispute, *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S.

444, 451-452 (2003); and (3) to "make arbitration agreements as enforceable as other contracts, *but not more so*," *Prima Paint,* 388 U.S. at 404 n.12 (emphasis added). The Fourth Circuit's rule fails to accomplish any of these goals.

First, as this case vividly demonstrates, the look-through approach thwarts "Congress's clear intent" that arbitrable disputes move "out of court * * * as quickly and easily as possible." *Moses H. Cone*, 460 U.S. at 22. Far from a "summary and speedy" process, *id.* at 29, this case has meandered up and down through the federal courts for almost five years, generating hundreds of pages of record and multiple opinions devoted to unraveling recondite and sometimes fact-intensive matters of law—solely to establish whether the district court has "jurisdiction" to decide whether or not the parties should go to arbitration.

And this is no anomaly. The other appellate decisions applying the look-through approach required similarly complex and protracted proceedings. *Tamiami Partners, Ltd.* v. *Miccosukee Tribe,* 177 F.3d 1212 (11th Cir. 1999); *Strong*, 485 F.3d 597. In *Tamiami*, the arbitrators only got the case after three sojourns in the court of appeals.[6] *Strong* was a Section 4 pro-

[6] As Judge Marcus observed, see *Strong*, 485 F.3d at 627 nn. 11 & 12, the decision that launched the look-through line of cases, *Tamiami*, did not actually require look-through to establish Section 1331 jurisdiction. In addition to seeking arbitration, petitioners in that case raised other substantive claims that provided federal question jurisdiction. And the arbitration agreement itself arguably arose under federal law, since a federal statute required alternative dispute resolution.

ceeding initiated after the petitioner's unsuccessful attempt to remove the same litigation to federal court, 485 F.3d at 603-604—resulting in a 32-page opinion followed by a 48-page concurrence.

And as Judge Marcus recognized, complex "jurisdictional" disputes and the as-of-right appeals they precipitate naturally result from any look-through approach. *Id.* at 634 (noting "significant number of cases" in which look-through determination will be difficult). Even a state-law cause of action could be deemed to present a federal question, *e.g.*, through "complete preemption" (cases similar to this one); by "implicating significant federal issues," *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.,* 545 U.S. 308, 313 (2005); or by theorizing that the Section 4 respondent *could have* pleaded a federal claim, *Strong*, 485 F.3d at 607-608. Each of these possibilities raises fact-intensive and "litigation-provoking" difficulties the federal courts would be wise to avoid. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting).

Beyond the sheer *amount* of court time the look-through approach necessitates, such proceedings frequently require the courts to delve into substantive issues that the arbitrator should decide. See, *e.g.*, *Buckeye Check Cashing, Inc.* v. *Cardegna,* 546 U.S. 440, 445-446 (2006); *Green Tree Fin. Corp.*, 539 U.S. at 452. Here, for example, determining whether Discover Bank was the "real party in interest" entailed "look[ing] carefully at the facts" of "the unique and complex relationships among the parties through the various stages of the litigation," Pet. App. 13a, including analyzing, *inter alia*, Ms. Vaden's cardmember agreement, agreements between Discover Bank and

DFS, financial statements, annual reports, and press releases, *Id.* at 14a-18a. This investigation led the Fourth Circuit to conclude, as a matter of first impression, that Section 27(a) of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d(a), effects "complete preemption." Pet. App. 18a-25a. Where the parties agree to refer "any past, present or future claim or dispute" to arbitration, J.A. 44-45, however, these kinds of complex inquiries are to be decided by the arbitrator, not the courts. *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002). As Judge Marcus observed, "[a]n interpretation of the FAA that requires the district court to strongly suggest an answer to the merits of the parties' underlying dispute, but merely as a means of determining whether it has subject matter jurisdiction to enforce a contractual agreement to send that dispute to the *arbitrator* for resolution, can only be described as odd." *Strong*, 485 F.3d at 634.

By contrast, if respondents had sought the very same arbitration order from the Maryland court where Ms. Vaden's claims were already pending (in a suit DFS had initiated) *there would have been no need* to decide the "complete preemption" question or any of the related factual and legal issues the federal courts believed the look-through rule obliged them to resolve. To the contrary, the State court's subject matter jurisdiction would have been beyond dispute, *Southland*, 465 U.S. at 10, and its resolution of Discover's breach-of-arbitration-agreement claim would have been confined to precisely the sort of "restricted inquiry into factual issues," *Moses H. Cone*, 460 U.S. at 22, that Congress intended.

The look-through approach requires federal courts to decide unnecessary questions, ones that do not resolve the parties' actual substantive quarrel, and ones that are entirely beyond the scope of the narrow dispute the federal court is instructed to decide—whether a covered arbitration agreement exists and whether it has been breached. In *Strong*, the Eleventh Circuit found federal question jurisdiction by looking through—indeed, entirely *past*—both the arbitration petition *and the respondent's state court complaint*, concluding that the possibility that the plaintiff could amend the complaint, which stated only Georgia RICO claims, to include a federal cause of action, made the arbitrability question "federal" for Section 1331 purposes. 485 F.3d at 608-609.

The Fourth Circuit inverted the basic rules of restraint that guide federal courts, *i.e.*, that they should not "decide abstract, hypothetical or contingent questions * * * [or] any constitutional question in advance of the necessity for its decision * * * [or] decide any constitutional question except with reference to the particular facts to which it is to be applied." *Alabama State Fed'n of Labor* v. *McAdory,* 325 U.S. 450, 461 (1945). It created serious and needless friction between state and federal courts—surely nothing Congress intended in enacting the FAA. Congress did not streamline the Section 4 process and limit the right to jury trial so that federal courts could decide important and complex questions summarily; it did so because it did not intend for Section 4 courts to delve into these issues at all.

III. LOOKING THROUGH TO GROUND JURISDICTION IN A COMPLETELY PREEMPTED STATE-LAW COUNTERCLAIM CONFLICTS WITH THIS COURT'S DECISION IN *HOLMES GROUP* AND VIOLATES THE BEDROCK PRINCIPLES OF FEDERALISM AND JUDICIAL ADMINISTRATION ON WHICH IT RESTS

Even if Section 4 were to allow look-through jurisdiction—and it does not—the Fourth Circuit's finding of jurisdiction in *Vaden II* would still violate Section 1331. A federal court hearing a Section 4 petition, like a court determining jurisdiction in an ordinary suit, cannot ground federal question jurisdiction in a federal counterclaim, let alone a completely preempted state-law counterclaim, in a suit pending in state court. Yet, the Fourth Circuit did so and thus disregarded in another way this Court's longstanding adherence to the well-pleaded complaint rule and the principles of federalism and efficient litigation that the rule embodies.

In this case, the district court did not have to look through the petition to an inchoate, loosely defined dispute. The "overall substantive conflict between the parties," Pet. App. 66a, was already crystallized in the suit DFS had brought against Ms. Vaden in state court. As Judge Goodwin recognized, *id.* at 32a-38a, the district court would *not* have had jurisdiction over that case, both because a plaintiff may not remove its own case to federal court, see *Shamrock Oil,* 313 U.S. at 107-108, and because this Court held in *Holmes Group*, 535 U.S. at 830, that the presence of a federal *counterclaim* cannot bring a case within fed-

eral courts' "arising under" jurisdiction.[7] See *id.* at 832 (refusing to "transform the longstanding well-pleaded-complaint rule into the well-pleaded-complaint-*or*-*counterclaim* rule").

It makes no sense to claim that the well-pleaded complaint rule precludes a federal court from basing Section 1331 jurisdiction on a *federal* counterclaim but permits jurisdiction based on a "completely pre-empted" state-law counterclaim. As this Court has explained, the "complete preemption" doctrine is not an *exception* to the well-pleaded complaint rule relied on in *Holmes Group*, but rather a "corollary" to it. *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 393 (1987) (citations omitted). The doctrine operates by "convert[ing] an ordinary state common-law complaint into one stating a federal claim *for purposes of the well-pleaded complaint rule*." *Ibid.* (emphasis added and citation omitted). And there is no reason why, if an avowedly and undeniably federal *counterclaim* like the one in *Holmes Group* is legally insufficient "for purposes of the well-pleaded complaint rule," a "convert[ed]" one warrants different treatment. If anything, exactly the opposite rule would make sense. There is more to be said, after all, for an ex-

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[7] Although *Holmes Group* involved the Federal Circuit's appellate jurisdiction, which itself turns on whether the district court's jurisdiction rested on 28 U.S.C. § 1338, see 28 U.S.C. § 1295(a)(1), the Court explained that "linguistic consistency" required "the same test to determine whether a case arises under § 1338(a) as under § 1331," 535 U.S. at 830 (citation omitted), and its conclusion that counterclaims cannot supply "arising under" jurisdiction has been applied, correctly, in cases involving district courts' original jurisdiction. See, *e.g.*, *Aetna Health* v. *Kirshner*, 415 F. Supp. 2d 109 (D. Conn. 2006).

ception for counterclaims of the kind at issue in *Holmes Group*, which concerned disputes that Congress had committed to the *exclusive* jurisdiction of a particular court in order to promote uniformity. See *Holmes Group*, 535 U.S. at 833 (recognizing uniformity as reason for assigning certain appeals involving patents to Federal Circuit); *id.* at 838 (Stevens, J., concurring in part and concurring in the judgment) (same); *id.* at 840 (Ginsburg, J., concurring in the judgment) (same). The counterclaims at issue here, by contrast, lie within state-court concurrent jurisdiction and, in any event, since arbitrators, not a court, would ultimately decide their merits, promoting uniformity cannot be a concern.

The Fourth Circuit believed otherwise, however, and distinguished *Holmes Group* on the single ground that it "did not * * * involve complete preemption." Pet. App. 10a n.4. It believed this doctrine operated so powerfully that it completely "overr[ode] such fundamental cornerstones of federal subject matter jurisdiction as the well-pleaded complaint rule and the principle that the plaintiff is master of the complaint." *Ibid.* (quoting 14B Charles Alan Wright et al., *Federal Practice and Procedure* § 3722.1, at 511 (3d ed. 1998)). In particular, it believed that completely preempted "claims are so necessarily federal that they will always permit removal to federal court, *even if they are raised only by way of defense*." *Ibid.* (quoting 14B Wright § 3722.1, at 511) (internal quotation marks omitted) (emphasis added). In other words, the Fourth Circuit thought that raising a completely preempted state-law counterclaim (although not a federal counterclaim) as a defense could by itself furnish federal question jurisdiction.

This is mistaken. Although the Fourth Circuit quotes the treatise, it omits a crucial qualifier and wildly misunderstands the passage's meaning. The treatise makes the unremarkable point that, when a defendant successfully raises the *defense of complete preemption* and so points out that federal law states the only claim that the plaintiff could conceivably bring, the plaintiff's initial state law claim is deemed federal for jurisdictional purposes. It was only in "*this* sense," 14B Wright § 3722.1, at 510 (emphasis added), that complete preemption works an exception to the well-pleaded complaint rule. Thus, the treatise does *not* take the position that a plaintiff's original state-law complaint should be deemed federal for jurisdictional purposes merely because the defendant raises in a responsive pleading some other provision of state law that is itself completely preempted. That would be unprecedented. None of the cases the treatise cites stands for that remarkable position, the Fourth Circuit cited none, and Ms. Vaden has discovered none. Certainly no case decided by this Court has so held. The complete preemption doctrine merely recognizes that for purposes of the well-pleaded complaint rule federal law sometimes so pervasively occupies an area of law that any claim, even those pleaded under state law, must be deemed federal. It does *not* permit a federal court to ground jurisdiction on a federal issue appearing *anywhere* in a lawsuit. But that is effectively the Fourth Circuit's position.

The Fourth Circuit's single attempt to square its approach with the policies underlying *Holmes Group* also fails. In *Holmes Group*, this Court identified three "longstanding policies" that a well-pleaded

counterclaim rule would violate: (1) allowing plaintiff to remain "master of the complaint," (2) maintaining "due regard for the rightful independence of state governments" by not "radically expand[ing] the class of removable cases," and (3) preserving "the clarity and ease of administration of the well-pleaded-complaint doctrine, which serves as a quick rule of thumb for resolving jurisdictional conflicts." 535 U.S. at 831-832 (citations and internal quotation marks omitted). The Fourth Circuit addressed only the first of these policies, arguing that "[t]here is no danger that defendant Vaden might frustrate Discover Bank's choice of state forum" because "it is Discover who filed the arbitration complaint in federal court." Pet. App. 10a n.4. That is trivially true, of course, but at most it shows no harm to this first policy construed at its narrowest.[8] Allowing completely preempted state law counterclaims to furnish jurisdiction for Section 4 petitions does, however, violate this policy's natural and equally important corollary: that neither defendants *nor* plaintiffs may opportunistically switch courts. See *Shamrock Oil*, 313 U.S. at 106 n. 2.

The Fourth Circuit's failure to address the other two "longstanding policies" a well-pleaded-counterclaim rule would violate—"due regard for * * *

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[8] The understanding that led the Fourth Circuit to mistakenly conclude that a completely preempted counterclaim may furnish jurisdiction—that a completely preempted state-law *defense* would furnish removal jurisdiction—certainly violates this policy, even construed at its narrowest. It would allow the defendant, not the plaintiff, to determine whether a case containing only state-law claims would be heard in a state or federal forum.

state governments" and "clarity and ease of administration"—is understandable. Its approach does both policies much violence. Discover seeks here to maintain its suit against Ms. Vaden in state court while petitioning a federal court for arbitration of her counterclaims. Already in state court, it is trying to take to federal court a second-order issue concerning the same basic controversy—whether certain of the first-order disputes included in the lawsuit are subject to arbitration—that the state court is perfectly able to decide and must decide, if asked. This piecemeal approach to litigation not only unnecessarily fractures and multiplies the proceedings, but also disrespects the state court's authority to decide issues properly presented to it. It also unnecessarily creates potential friction between state and federal courts. Must the state court, for example, give preclusive effect to issues decided by the federal court in summarily determining whether it has jurisdiction, including here complex issues surrounding the relationships of the various parties?[9] Likewise, should the state court

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[9] In this case, for example, the state and federal courts are proceeding under completely different theories of whom Ms. Vaden held her account with—DFS or Discover Bank. In the pending state court proceeding DFS filed against Ms. Vaden, DFS, not Discover Bank, is the only plaintiff and it submitted interrogatories asking Ms. Vaden to admit that she had an account with DFS (according to Ms. Vaden's answers). C.A. J.A. 488. In the federal Section 4 proceedings, by contrast, DFS and Discover Bank submitted a declaration stating that the account was with Discover Bank. C.A. J.A. 498. To the Fourth Circuit, this change was significant because only Discover Bank, a federally insured bank, could assert the 12 U.S.C. § 1831d(a) defense that completely preempted Ms. Vaden's state-law counterclaims and conferred federal sub-

stay its hand if the federal-court defendant seeks to head off the Section 4 proceedings by asking it for a declaration that the dispute is *not* arbitrable? Permitting parties to move opportunistically from one court system to another cannot help but create difficult problems of this sort.

IV. DISCOVER'S LACK OF STANDING IS AN ALTERNATIVE GROUND FOR REVERSAL

Although this Court may—and should—reverse because the Fourth Circuit misconstrued the statute, there is a further problem. Discover filed its Section 4 petition in federal court when Ms. Vaden was not even arguably in breach of the (alleged) arbitration agreement. It therefore did not establish the "injury in fact" that is an indispensable prerequisite for Article III standing. See, *e.g.*, *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982); see also *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1191 (2007) ("[A] federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits.'") (quoting *Ruhrgas A.G.* v. *Marathon Oil Co.*, 526 U.S. 574, 585 (1999)).

Discover sought arbitration under a contract provision allowing it to "*elect* to resolve [a covered] claim or dispute by binding arbitration." J.A. 44-45 (emphasis added). Indeed, DFS's claims against Ms. Vaden, unlike her counterclaims, remain pending in state court. Because arbitration was not mandatory, litigating her claim could not itself constitute "ne-

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ject matter jurisdiction under *Vaden II*'s well-pleaded counterclaim rule.

glect" of any legal obligation. Thus, although Discover's petition asserted that Ms. Vaden's state law counterclaims were arbitrable, it failed to identify any "legally protected interest," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992), that had been invaded by her raising them to the state court.

Nor did Discover allege that Ms. Vaden had refused a formal (or informal) arbitration demand before filing its Section 4 petition in federal court. See *PaineWebber, Inc.* v. *Faragalli*, 61 F.3d 1063, 1066 (3d Cir. 1995) (party cannot seek enforcement of FAA § 4 until the opposing party "unequivocally refuses to arbitrate, either by failing to comply with an arbitration demand or by otherwise unambiguously manifesting an intention not to arbitrate"); *Reconstruction Fin. Corp.* v. *Harrisons & Crosfield,* 204 F.2d 366, 369 (2d Cir. 1953) ("The 'cause of action' for breach of the obligation to arbitrate did not 'accrue' until defendant recently asked Reconstruction Finance Corporation to arbitrate the 'controversy,' and Reconstruction Finance Corporation then refused to comply."); *Hanes Corp.* v. *Millard,* 531 F.2d 585, 600 n.12 (D.C. Cir. 1976) ("[S]tatute [of limitations] could not begin to run until the [arbitration] agreement was broken, that is to say, until arbitration was sought by one party and refused by the other."); 1 Martin Domke, *Domke on Commercial Arbitration* § 22:2 (3d ed. 2003) (noting that for a court to order arbitration the demand for arbitration must be "timely made"). Discover thus had no actionable injury under the statute whatsoever. See *Faragalli*, 61 F.3d at 1067 ("[I]t is doubtful that a petition to compel arbitration filed before the 'adverse' party has refused arbitration

would present an Article III court with a justiciable case or controversy in the first instance.").

The Fourth Circuit brushed aside this jurisdictional problem, concluding that Ms. Vaden's conduct *in this litigation—i.e.,* resisting Discover's petition, rather than acquiescing in it—established her refusal to arbitrate within the meaning of the statute. Pet. App. 27a n.20. But that conclusion is manifestly unsound.

First, the single precedent it relied on, *Faragalli*, 61 F.3d 1063, concerned a mandatory, not elective, obligation to arbitrate. *Id.* at 1064 ("Any controversy * * * shall be settled by arbitration."). Under a mandatory arbitration regime, suing may perhaps represent a breach of obligation. Under an elective regime, it cannot. What the *Faragalli* court noted in the context of mandatory arbitration agreements applies with added force to elective ones:

> Clearly, unless the respondent has resisted arbitration, the petitioner has not been "aggrieved" by anything. The reason for this rule, though little discussed, is evident: unless and until an adverse party has refused to arbitrate a dispute putatively governed by a contractual arbitration clause, no breach of contract has occurred, no dispute over whether to arbitrate has arisen, and no harm has befallen the petitioner-hence, the petitioner cannot claim to be "aggrieved" under the FAA. * * * Moreover, it is doubtful that a petition to compel arbitration filed before the "adverse" party has refused arbitration would present an Article III court

> with a justiciable case or controversy in the first instance.

Id. at 1067 (citations omitted).

Second, the Fourth Circuit's view contravenes the black letter rule that Article III standing must be established "as of the commencement of suit." *Lujan*, 504 U.S. at 571 n.5 (plurality opinion); see also *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) ("[W]e have an obligation to assure ourselves that [plaintiff] had Article III standing at the outset of the litigation."); *Keene Corp.* v. *United States*, 508 U.S. 200, 207 (1993) ("[T]he jurisdiction of the Court depends upon the state of things at the time of the action brought." (quoting *Mollan* v. *Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824) (Marshall, C.J.))). Third, if "injury" attributable to maintaining litigation were constitutionally sufficient, the "injury in fact" requirement—the "irreducible [constitutional] minimum"—would be no limitation at all. *Spann* v. *Colonial Vill.*, 899 F.2d 24, 27 (D.C. Cir. 1990) (a litigant "cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit").

The Fourth Circuit's view also creates non-constitutional difficulties. If non-acquiescence in an opponent's Section 4 petition could be pronounced "refusal" *nunc pro tunc*, Ms. Vaden, who was never even asked to arbitrate, could never raise that defense in a Section 4 proceeding, and the statutory limitation to parties "aggrieved by the alleged failure, neglect, or refusal * * * to arbitrate under a written agreement for arbitration" would be rendered nugatory. By allowing litigants like Discover a straight-to-court remedy that Congress did not provide, the Fourth Circuit

rule ignores the practical benefits served by the arbitration-demand process and involves federal courts in disputes where judicial intervention is not actually needed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded to be dismissed for lack of jurisdiction.

Respectfully submitted.

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APPENDIX

APPENDIX A

9 U.S.C., Chapter 1

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

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, ir-

revocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

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.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the

same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting

the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with

the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

§ 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

§ 16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292 (b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

APPENDIX B

Title 9, Chapter 2

§ 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

§ 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

§ 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated

in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

§ 204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

§ 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

§ 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

§ 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

§ 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.