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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I. RESPONDENTS DO NOT AND CANNOT ESTABLISH JURISDICTION UNDER SECTION 1331

One scours respondents' brief in vain for an answer to the fundamental question of why this action "aris[es] under" federal law? 28 U.S.C. § 1331. This is no small technical matter. The jurisdiction of federal district courts is "not self-executing," *Merrell Dow Pharm.* v. *Thompson*, 478 U.S. 804, 807 (1986), and respondents (Discover), like any other party asserting jurisdiction, bear the burden of overcoming the "presum[ption] that a cause lies outside [the] limited jurisdiction" Congress has provided, *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). As petitioner explained, Pet. Br. 17, the only legal obligation Discover asked the district court to enforce arose under state contract law. The district court was not asked to—indeed, it was not permitted to—decide the ostensibly "federal" usury question Ms. Vaden had raised as a counterclaim in the state court suit.

The closest Discover comes to identifying the particular federal question on which jurisdiction rests is when it points to three federal provisions lurking in the case, in the apparent hope that the Court will find one of the candidates sufficient: (1) the FDIA, see Resp. Br. 47; (2) the overall FAA, see *ibid.*; and (3) something of a dark horse, Section 4 itself, see *id.* at 20 (pointing out that a federal court deciding a peti-

tion under Section 4 "necessarily determines" whether the requirements of that provision have been established).

Taken together, these might mean Congress *could*, consistent with the Constitution, extend jurisdiction to include an action like this one. But even together they cannot establish that Discover's action falls within the jurisdiction Congress *has actually granted and limited* in Section 1331. See generally *Gully* v. *First Nat'l Bank*, 299 U.S. 109, 117 (1936) (Section 1331 not satisfied merely because "a question of federal law is lurking in the background").

The FDIA cannot supply jurisdiction because an action seeking to enforce a contractual provision providing for arbitration of an FDIA claim does not arise under that statute—any more than a contractual agreement to dismiss a federal employment discrimination suit or to litigate it in a particular state court arises under Title VII, see *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (describing arbitration agreements as "in effect, a specialized kind of forum-selection clause"). The petition here did not ask the district court to decide the FDIA issue and Section 4 actually *prohibits* it from doing so, requiring it to either compel arbitration or dismiss the proceeding. See 9 U.S.C. § 4. Whether to compel arbitration, the actual issue before the court, in no way "really and substantially involve[d] a dispute or controversy respecting the validity, construction, or effect [of the FDIA]." See *Shulthis* v. *McDougal*, 225 U.S. 561, 569 (1912).[1]

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[1] Of course, the courts below "construed" the FDIA in order to find jurisdiction on the look-through theory, but a dispute about jurisdiction is not enough to support even constitu-

Nor did the petition seek to vindicate any rights arising under the FAA. On the contrary, Discover sought to hold Ms. Vaden to obligations allegedly imposed under a contract governed by state law. To be sure, the FAA represents "substantive federal law" insofar as it preempts state laws that single out arbitration for unfavorable treatment. See *Perry* v. *Thomas*, 482 U.S. 483, 489-490, 492 (1987). But a party petitioning to enforce a contractual arbitration agreement is no more vindicating rights arising under the FAA than the plaintiffs in *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149 (1908), who maintained that the railroad's Hepburn Act defense to their contract suit was unconstitutional, see *id.* at 151, could be said to have been vindicating their rights under the Due Process Clause. The exact same could be said, in fact, by litigants whose agreements to arbitrate *state law* disputes fall within the FAA's coverage. See, *e.g.*, *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984) (agreement to arbitrate California Franchise Investment Law dispute was covered, so long as embodied in "a written * * * contract evidencing a transaction involving commerce") (quoting 9 U.S.C. § 2). If enforcing an FAA-covered agreement counts as vindicating a federal right for federal question purposes, then these cases could be removed to federal court on that basis. Cf. 9 U.S.C. § 205. This would, of course, render diversity jurisdiction a "dead letter," to use Discover's words, see Resp. Br. 39, since the Section 1331 route would spare parties the need to satisfy either the complete diversity or amount-in-controversy requirements.

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tional "arising under" jurisdiction over the substantive suit itself. See *Mesa* v. *California*, 489 U.S. 121, 136 (1989).

Although it has the virtue of novelty, respondents' third, more tentative suggestion that the interpretation of Section 4 itself is the federal question has the vice of implausibility. At the outset, this theory has the puzzling effect of making a second-order issue about jurisdiction an affirmative reason for finding federal question jurisdiction in the larger lawsuit itself. That a court must decide the "federal" question of injury-in-fact, venue, or complete diversity in a case, however, does not mean that the case itself "arises under" federal law, any more than a hotly-disputed question as to a defendant's status as a federal officer, 28 U.S.C. § 1442, could vault a state criminal prosecution into a federal court's "arising under" subject matter jurisdiction, see *Mesa* v. *California*, 489 U.S. 121, 136 (1989). And although the meaning of Section 4 could in theory be drawn into question in any Section 4 case, a petitioner's entitlement to relief depends on establishing that contractual rights have been violated.

Nor does the proposition that federal courts have a "virtually unflagging obligation * * * to exercise the jurisdiction given them," Resp. Br. 21 (quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976)), avail respondents. That obligation attaches only after the party asserting jurisdiction has carried its burden. Until that time, federal courts have an "unflagging obligation" rooted in respect for Congress's control over jurisdiction and respect for state courts to *not* accept it. See Fed. R. Civ. P. 12(h)(3); 28 U.S.C. § 1447(c). This language is no basis for broadly expanding jurisdiction, let alone for exercising it in actions like this one, where lack of statutory jurisdiction is plain. *Romero* v. *Int'l*

Terminal Operating Co., 358 U.S. 354, 379 (1959) (noting "the deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes"); *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"). "[T]he fair presumption[, in fact,] is * * * that a cause is without [the federal court's] jurisdiction, until the contrary appears." *Turner* v. *Bank of N. America*, 4 U.S. (4 Dall.) 8, 10 (1799).

II. "LOOKING THROUGH" FLOUTS BEDROCK PRINCIPLES OF FEDERAL COURT SUBJECT MATTER JURISDICTION

In her opening brief, petitioner identified two sets of very serious problems inherent in look-through jurisdiction. First, it necessarily requires courts to *hypothesize* what case a Section 4 respondent *would* have brought and decide difficult and important questions of federal law just to make a jurisdictional determination. Such intensive jurisdictional digressions violate core principles of judicial restraint, as well as the principle that jurisdictional rules should be readily administrable "rule[s] of thumb." *Holmes Group* v. *Vornado Air Circulation Sys.*, 535 U.S. 826, 832 (2002). They are also fatally at odds with the FAA's aims of speeding arbitrable disputes out of court and having arbitrators decide questions in the first instance. Indeed, the stripped-down procedural rights that Congress afforded Section 4 respondents are ill-suited to litigating these larger questions and

leave little doubt that Congress did not intend such litigation.

Second, looking through takes no account of what federal jurisdiction typically treats as central: the rightful interest of States. Respondents' theory would allow a federal court to assert jurisdiction based on a hypothetical lawsuit even when the parties were litigating an actual lawsuit in state court over which the federal court could not assert jurisdiction. Describing this parade of undesirables requires no lawyerly creativity. The two appellate decisions ever to attempt to apply look-through, the decision below and the Eleventh Circuit's later-vacated opinion in *Community State Bank* v. *Strong*, 485 F.3d 597, vacated, reh'g en banc granted, 508 F.3d 576 (11th Cir. 2007), are riddled with such problems. See Pet. Br. 42-44; cf. *Morrison* v. *Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) ("[T]his wolf comes as wolf.").

By way of response, Discover offers the startling assertion that the "examination of the parties' underlying dispute" required in look-through "is little different than the analysis [required to] * * * assess whether" the dispute "falls within the scope of the FAA and the parties' arbitration agreement." Resp. Br. 39. But the federal courts in this case spent years sorting through difficult legal issues, such as whether the FDIA completely preempted petitioner's state-law counterclaims and whether Discover Bank was the real party in interest, one of which required briefing from a federal agency and both of which *would literally never have arisen* if Discover had sought the same order directing arbitration from the Maryland court where it (at least DFS) had filed suit. Fur-

thermore, Discover's brief does not so much as mention, let alone respond to, *Strong*, in which Judge Marcus spent 31 pages of slip opinion attempting to faithfully apply the look-through rule—and then wrote another 48-page opinion concurring in his own judgment to explain why the rule was untenable.

III. RESPONDENTS FAIL TO CLOSE THE MANY BIZARRE JURISDICTIONAL GAPS LOOK-THROUGH CREATES

As petitioner argued and lower courts have recognized, look-through jurisdiction creates several serious jurisdictional gaps within the FAA. Pet. Br. 40-41; *e.g.*, *Drexel Burnham Lambert, Inc.* v. *Valenzuela Bock*, 696 F. Supp. 957, 963 (S.D.N.Y. 1988). Since Section 4 contains the "save for" clause that respondents believe repeals section 1331's well-pleaded complaint rule and Sections 7, 9, 10, and 11 do not, under the respondents' own reasoning these later sections should not authorize look-through. Thus, although a federal court could look through to obtain jurisdiction to compel arbitration, it could not later look through to confirm, vacate, or modify the award *in the same case*. Only a state court could do so.

Respondents attempt to overcome this "bizarre," *ibid.*, result through legal hand-waving. They claim—without any explanation in a two-sentence footnote—that unspecified "textual differences" and "this Court's [specific] analysis of Section 4," Resp. Br. 35-36 n.20, somehow leap over the problem. This will not do. The text of these later provisions just as clearly does not contain "save for" language as the text of Section 4 does. If that language is, as respon-

dents contend, what creates look-through in Section 4, it cannot do so in the later provision. And their amici offer no better explanation. Only two, the two law professors, even address the problem and they ask this Court to adopt a grand "unified theory of jurisdiction" grounded in the "emanat[ions]" of Sections 3 and 4 to resolve it. Law Professors Amicus Br. 29. Their "unified theory," however, rides roughshod over the text. It simply takes "a jurisdictional principle[, the two professors believe,] emanates" from two provisions—only one of which actually contains the critical "save for" language—and applies it without any warrant to other provisions lacking that same language. In their hands, the FAA's text becomes a pretty plaything. Although courts may sometimes find rights in the penumbras of and emanations from express constitutional provisions, see *Griswold* v. *Connecticut*, 381 U.S. 479, 483-484 (1965), jurisdictional inquiries are far more circumspect. A mere jurisdictional emanation surely cannot repeal, let alone by implication, the core restriction on statutory federal question jurisdiction.

IV. THE DECLARATORY JUDGMENT ACT DOES NOT SUPPORT, LET ALONE SUPPLY, FEDERAL QUESTION JURISDICTION HERE

Respondents, like the court below, invest much effort in asserting the "close[ness]" of the "analog[y]" between the jurisdiction they ask the Court to sustain here and a case where a litigant asks a federal court for a "negative declaration" that its actions do not violate another party's federal rights. Resp. Br. 11.

Just as the defendant's federal claim supplies jurisdiction in such cases, so too it should here, respondents argue.

This analogy fails for a fundamental reason: even on respondents' reading, the reason a federal court has Section 1331 subject matter jurisdiction in a declaratory judgment action is because it is being asked to decide a federal question. Whether or not the Declaratory Judgment Act alters the application of the well-pleaded complaint rule, it does not relieve the party invoking the federal court's jurisdiction of its obligation to show that the dispute it asks the court to decide is determined by federal law. Respondents acknowledge this difference *en passant*, implying that it is a minor imperfection in an otherwise compelling analogy. See Resp. Br. 20 ("To be sure, the district court does not * * * resolve the underlying dispute."). But this is a fatal flaw and makes clear that declaratory judgment cases offer Discover no help in carrying its Section 1331 burden.

Discover also mischaracterizes declaratory judgment jurisdiction law. In *Textron Lycoming Reciprocating Engine Div.* v. *UAW*, 523 U.S. 653 (1998), this Court pointedly refused to "indulg[e]" the precise "assumption[]" on which respondents' analogy rests: that "federal-question jurisdiction can be established on the basis of an anticipated federal claim, even when the declaratory-judgment plaintiff has a non-federal defense," *id.* at 659-660. In a footnote, respondents half-heartedly answer that this is not a problem here because "Discover * * * does have a federal substantive claim to relief" and "petitioner's completely preempted underlying claim can only arise under federal law." Resp. Br. 20 n.10. But that

is simply wrong. The language Discover points to in support of its first proposition says only and uncontroversially that the FAA represents a body of federal substantive law. *Ibid.* (citing *Moses H. Cone*, 460 U.S. at 25 n.32 and *Southland*, 465 U.S. at 12). Needless to say, the FAA may create substantive law but it creates no "substantive claim to relief" in the sense a declaratory judgment requires. And Discover's second proposition, that *petitioner's* state-law counterclaim might for some purposes be deemed federal, is unresponsive to *Textron*, which talks of the declaratory-judgment *plaintiff's* need to have a federal claim.

V. NEW JERSEY'S SITUATION WHEN IT ENACTED ARBITRATION REFORM SUPPORTS PETITIONER'S VIEW OF SECTION 4

Respondents and certain amici argue that New Jersey's failure to merge law and equity until 1947 somehow means that Section 4's "save for" language could not have been intended to address ouster. Resp. Br. 33; Cintas Amicus Br. 13; Law Professors Amicus Br. 19-20. This argument, however, reflects a shallow view of history.

New Jersey was a leading commercial state and its courts favored arbitration long before 1923. See S. Whitney Landon, *Commercial Arbitration in New Jersey*, 1 N.J. L. Rev. Univ. of Newark 65, 75-78 (1935) (citing cases). Indeed, despite an ostensible ban on executory arbitration agreements, New Jersey courts approved arbitration of future land damage disputes, *e.g.*, *Hoagland* v. *Veghte*, 30 N.J.L. 516 (Ct.

Err. & App. 1862), and enforced agreements to arbitrate future disputes under the fiction that arbitration was a contractual "condition precedent" to litigation, James B. Boskey, *A History of Commercial Arbitration in New Jersey*, 8 Rutgers-Cam. L.J. 1, 20 (1976)).

In arbitration matters, moreover, New Jersey had blended legal and equitable authority well before the 1947 "merger." It long had special statutory procedures for arbitration, including enforcing an award as a rule of court, and its courts had concluded long before that "[t]he court * * * has jurisdiction of the case by statute, and * * * [t]he statute contemplates no difference in the power or jurisdiction of the court, or in the mode of proceeding, whether the submission be made a rule of a court of law or equity." *Stoll* v. *Price*, 21 N.J.L. 32 (1847); see Act of Dec. 2, 1794 § 1, Laws of the State of New Jersey 142 (Paterson ed.) (quoted in James B. Boskey, *A History of Commercial Arbitration in New Jersey*, 8 Rutgers-Cam. L.J. 1, 9 (1976)); *Imlay* v. *Wikoff*, 4 N.J.L. 132 (N.J. 1818) (noting that arbitrators may exercise both legal and equitable powers). And despite the continuing formal distinction between law and equity, the New Jersey Supreme Court summarily rejected a constitutional challenge to the 1923 Arbitration Act as "encroach[ing] upon the jurisdiction of the Court of Chancery over specific performance of contracts of arbitration" as "plainly unsound" under case law *existing before* passage of the Act. *Sommer* v. *Mackay*, 160 A. 495, 496 (N.J. 1932) (per curiam) (citing *Davila* v. *United Fruit Co.*, 103 A. 519 (N.J. 1918)).

The New Jersey legislature had thus to worry little about overcoming unfavorable case law or that

courts would be reluctant to exercise their equitable jurisdiction to enforce an arbitration agreement. As in New York, the existing state of affairs was in many ways favorable to arbitration. But unlike New York,

> [t]his supportive attitude extended to the enforcement of executory arbitration agreements, with a full panoply of enforcement remedies. Thus, the reforms imposed by the 1923 Arbitration Act did not reflect a dissatisfaction with the attitude of New Jersey court[s, as respondents and their amici assume]; rather the legislation represented a codification of prior case law, complemented by a dissatisfaction with arbitration law throughout the United States.

Boskey, 8 Rutgers-Cam. L.J. at 22. New Jersey did not need "save for" language because it had little negative case law to overcome and, in the arbitration area, less division of law and equity to attend to.

VI. CASE LAW APPLYING SECTION 1332 DOES NOT SUPPORT RESPONDENTS' ARGUMENT FOR AN EXCEPTION TO SECTION 1331

Unable to point to a federal issue meeting Section 1331's requirements, Discover shifts attention to a different statutory provision, identifying what it claims will be the "practical consequence[]" of construing Section 4 as jurisdiction-conserving here. Resp. Br. 26. If the Court were to uphold ordinary Section 1331 requirements in cases like this one, Discover insists, courts would have no choice but to

abandon their accepted method for ascertaining the amount in controversy in arbitration petitions brought under Section 1332, which looks through to the amount sought in arbitration, rather than, say, attempting to monetize the marginal value of directing arbitration. Lest it jeopardize this settled regime for applying Section 1332, respondents warn, the Court should affirm the decision below.

But there is an obvious problem with respondents' house-of-cards argument. What they present as a practical impossibility—an approach that rejects "looking through" in federal question cases *and* still applies the Section 1332 amount-in-controversy requirement in the fashion they urge—is in fact the dominant, settled approach in the federal courts of appeals. See Pet. Br. 26 nn.12 & 13 (citing cases). But practicalities aside, respondents are wrong—and those courts correct—as a matter of logic, as well. Once again, the respondents look to the wrong statute. If, as they erroneously assume, Section 4 were a statute conferring jurisdiction on the district courts, there might be some need to explain seeming differences in its application in diversity and federal question cases. But once Section 4 is recognized for what it is—a provision granting a remedy and clearing away ouster objections in actions where federal court subject matter jurisdiction must be independently established—the contention that courts are applying two separate jurisdictional statutes differently is no more noteworthy than "dog bites man."

Thus, the decisions respondents seek to hang around petitioner's neck are not examples of construing Section 4 to authorize look-through, but rather instances of applying established Section 1332 prin-

ciples to arbitration disputes. That courts make diversity jurisdiction's amount-in-controversy determination by looking through to the dispute sought to be arbitrated does not distinguish arbitration from non-arbitration. See *St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 288-290 (1938) (holding that amount in controversy rests on value of underlying dispute). In both lawsuits and arbitrations, courts routinely look through to the underlying dispute to determine the stakes. Petitioner's position on Section 4 is thus consistent and logical. Section 4 simply does not affect either Section 1331's or Section 1332's usual application.

Indeed, it is respondents who must "do an about-face when it comes to diversity jurisdiction." Resps. Br. 25-26 (internal quotation omitted). If Section 4 itself mandated a general look-through approach, it would *restrict*, not expand, the number of petitions that could be brought under diversity. That is because Section 1332 generally does not "look through" in applying the statutory complete-diversity requirement. Except in a narrow class of cases, see Fed. R. Civ. P. 19(b), the fact that a plaintiff sues only some potential defendants and not others who would spoil the required complete diversity does not affect a district court's Section 1332 jurisdiction. *Horn* v. *Lockhart*, 84 U.S. (17 Wall) 570, 579 (1873). Indeed, that rule repeatedly has been applied in the FAA context. See *Moses H. Cone*, 440 U.S. at 932 & n.4 (finding complete diversity in Section 4 petition despite no complete diversity in dispute sought to be arbitrated); see also *America's MoneyLine, Inc.* v. *Coleman*, 360 F.3d 782, 785 (7th Cir. 2004) (holding that complete diversity is based on "the parties to the petition to

compel arbitration, *not* the underlying controversy") (emphasis added); *Doctor's Assocs.* v. *Distajo*, 66 F.3d 438, 445 (2d Cir. 1995) (same). If Section 4 operated to repeal Section 1332's anti-look-through regime with respect to complete diversity, as respondents argue it operates to repeal Section 1331's well-pleaded complaint rule, fewer petitions to compel could be brought in federal court.

It is respondents' theory of Section 4, in fact, that entails a suspiciously inconsistent approach, requiring look-through to apply fundamentally differently in two dimensions of the *same* statute, Section 1332. Petitioner's reading of Section 4—the one followed by the majority of the federal courts of appeals—encounters no comparable difficulty. Because the provision creates a remedy (and the relevant language only lifts the "ouster" obstacle), it should not and does not affect ordinary Section 1332—or Section 1331—principles at all.

VII. RESPONDENTS' REMAINING ARGUMENTS AGAINST PETITIONER'S CONSTRUCTION OF SECTION 4 ARE UNPERSUASIVE

Respondents reserve the longest section of their brief, II(B), not for laying out any affirmative arguments of their own, but for a scattershot attack on petitioner's reading of Section 4. None of these many negative arguments, however, convinces.

First, what respondents themselves identify as their strongest argument, Resp. Br. 27 ("The clearest indication that petitioner's interpretation is wrong * * *."), rests on a category mistake. They state the

obvious, that "Section 4 explicitly directs courts to compel arbitration *only* when the *right* to arbitrate is not in issue," but then conclude that "[g]iven this direct command, it would be passing strange for Congress to include the 'save for' clause in Section 4 based on a need to assure district courts that the existence of an agreement to arbitrate does not 'oust' them of jurisdiction * * *." *Id.* at 27-28 (second emphasis added). That is true, of course, only if subject matter jurisdiction is coextensive with the substantive right to arbitration—a position even broader than the one respondents would have this Court adopt and one this Court has repeatedly rejected when holding that the FAA itself grants no jurisdiction. *E.g.*, *Moses H. Cone*, 460 U.S. at 25 n.32.

Second, respondents argue that petitioner's construction of Section 4 "would require additional words to be added to the statutory text" because "'save for such agreement' [really means] save for [prior judicial unwillingness to enforce any] such agreement." Resp. Br. 28 (second alteration in original). But this is silliness. The same could be said of nearly any statute or contract. The phrase "because of such law or contract," for example, really means "because of [how a court would enforce] such law or contract." The former is simply clear shorthand for the latter. It should be remembered, moreover, that respondents' forced construction of Section 4 makes the critical term "save for such agreement" surplusage. Given respondents' reading of the other relevant statutory terms, these few words could be dropped from Section 4 without changing respondents' view of its meaning. See Pet. Br. 33.

Third, respondents claim petitioner's interpretation of the "save for" clause makes Section 2 "superfluous." Resp. Br. 28. This is untrue. See pp. 10-12, *supra*; Pet. Br. 22-26. Because of differences between the state and federal courts, Congress, unlike the New York and New Jersey Legislatures, could not rely simply on the words of Section 2 to overturn the ouster doctrine. In the federal courts, such language would have only partially overcome it. *Ibid.* And, in any event, Section 2 addresses more than ouster.

Fourth, respondents argue that the lack of "save for" language in Section 3 means that this language cannot address ouster in Section 4. Resp. Br. 29. This is incorrect. Unlike Section 4, Section 3 specifically directs the federal court to "stay the trial of the action until * * * arbitration has been had." 9 U.S.C. § 3. In other words, under Section 3, the district court *retains* jurisdiction throughout the arbitration and after it. There is simply no danger of ouster. That Section 3 addresses the ouster problem in a way Section 4 cannot underscores—not undercuts—the necessity of "save for" language in the latter section.

Fifth, respondents argue that Section 4's "save for" language cannot have been meant to address the ouster doctrine because, they believe, the "ouster" doctrine did not actually divest the courts of jurisdiction but rather reflected the court's refusal to specifically enforce arbitration agreements "because the *effect* of specific enforcement would be to divest courts of jurisdiction." Resp. Br. 30. But this is a verbal quibble. Whether "ouster" marked an ontological jurisdictional void or simply a lack of jurisdiction due to the "*effect*" of arbitration, the courts lacked jurisdiction.

Sixth, respondents argue that Section 4's "controversy between the parties" cannot refer to a traditional suit seeking specific performance of a contract (as opposed to the dispute sought to be arbitrated) because "[i]f the controversy in question were * * * the controversy about whether to enforce the contract to arbitrate, then Section 4 would make no sense because without the contract to arbitrate itself, there could be nothing to enforce." Resp. Br. 32. This argument defies understanding until one realizes that it represents nothing more than a metaphysically enhanced version of respondents' view of the phrase "save for such agreement." If "save for" means simply, as respondents claim, "put to one side," Resp. Br. 32; see also *id.* at 14, 15, 17, and one treats that injunction seriously as a metaphysical matter, then of course the agreement is out of the picture and perhaps, in some sense, "there could [be said to] be nothing to enforce." But respondents' "put to one side" view of the "save for" language rests on, as petitioner explained in discussing the Fourth Circuit's similar view, a very strained reading of the language that conflicts with their own argument that the words "save for" mean "but for" or "notwithstanding." See Pet. Br. 31-34. And metaphysical hype cannot improve a faulty argument. If the agreement exists at all, as commonsense and a straight-forward reading of "save for" as "but for" or "notwithstanding" would hold, there is—*pace* respondents—something to enforce.

Seventh, respondents argue that "controversy" could not refer to a suit for specific performance to enforce an arbitration provision because all such suits would have arisen only in equity or in admi-

ralty, whereas the original version of Section 4 referred to "controversies" over which the district courts would have jurisdiction "under the judicial code at law, in equity, or in admiralty." Resp. Br. 32-33 (quoting Act of Feb. 12, 1925 ch. 213, § 4, 43 Stat. 883). Thus, they claim, petitioner's view makes the two words "at law" irrelevant. Respondents place, however, more weight on this phrase than it can reasonably bear. The term "under the judicial code at law, in equity, or in admiralty" was meant—much as the phrase "Title 28" was later—as a catch-all to refer simply to jurisdiction grounded somewhere in the judicial code. Pet. Br. 30-31 & n.4. Nothing suggests that Congress intended every individual part of this all-encompassing standard formulation to have a Section 4 referent. That would, as petitioner showed with respect to the Fourth Circuit's similar argument about "Title 28," lead to absurd results. *Id.* at 28-31 & n.4. That Section 4 provides, as respondents recognize, Resp. Br. 34, a hybrid action including jury trials, which were unavailable at equity, makes the original reference to "at law" completely understandable.

Eighth, respondents claim that petitioner's reading of Section 4 cannot be reconciled with the structure of the FAA. Resp. Br. 34. It is respondents, however, who fail here. They, not petitioners, fail to explain how a jurisdictionally inert act, see *Hall St. Assocs.* v. *Mattel, Inc.*, 128 S. Ct. 1396, 1402 (2008); *Moses H. Cone*, 460 U.S. at 25 n.32; *Southland*, 465 U.S. at 15 n.9, can create jurisdiction, let alone partially repeal Section 1331. Somehow they conclude that since "the Court's *general* conclusion that the FAA creates no 'independent' federal jurisdiction was

based upon the Court's *specific* analysis of the jurisdictional language of Section 4," Resp. Br. 35, they can jump over this difficulty. The fact that this Court's "*general*" conclusion against jurisdiction rests on "*specific*" analysis of Section 4, however, compounds their problem. If the conclusion that nothing in the FAA creates subject matter jurisdiction rests on a close reading of, among other things, Section 4, then Section 4 itself certainly cannot create any.

Ninth, respondents similarly fail to explain how Congress's clear express grant of look-through jurisdiction in Chapter 2 of Title 9 can be reconciled with their argument by strained implication as to Chapter 1. As Section 205 shows, when Congress wanted to refer to the dispute sought to be arbitrated, it did not use Section 4's term "controversy between the parties," as respondents claim, but direct, straightforward language, see Pet. Br. 39, and, when it wanted to repeal the well-pleaded complaint rule to allow look-through, it knew how to do so clearly and unequivocally, see *ibid.*; 9 U.S.C. § 205 ("The procedure for removal of causes otherwise provided by law shall apply, *except that the ground for removal * * * need not appear on the face of the complaint but may be shown in the petition for removal*.") (emphasis added), as this Court requires, see Pet. Br. 20-21. Respondents cannot ground a repeal of Section 1331 on such uncertain and speculative foundations when other provisions concerning arbitration in the same title show that Congress knew exactly how to accomplish this result, if it wanted.

Finally, respondents claim that not "looking through" in federal question cases somehow violates the purposes of the FAA. Petitioner agrees that one

goal of the FAA "is to provide a mechanism through which the parties can ensure the enforceability of agreements to arbitrate," Resp. Br. 36, so long as those agreements fall within the coverage of the Act. The FAA does not, however, as respondents seem to assume, allow enforcement of every arbitration agreement in federal court. Some agreements to arbitrate fall outside the FAA's coverage and some, like this one, may fall within the FAA's substantive coverage but (because federal subject matter jurisdiction is missing) be enforceable under the FAA only in state court. Respondents also make much of the fact that state arbitration law may not track the FAA exactly. Resp. Br. 38. That fact is true but irrelevant. Although it is an open question whether Section 4's particular *procedural* provisions apply in state court, *e.g.*, *Southland*, 465 U.S. at 16 n.10; *Moses H. Cone*, 460 U.S. at 26 n.35, it is clear that the FAA's *substantive* provisions fully apply there, *Southland*, 465 U.S. at 14-16, and, in particular, that a state court must enforce the FAA through an ordinary action seeking specific performance, 465 U.S. at 24 (O'Connor, J., dissenting) ("the Court reads [the FAA] to require state courts to enforce [its substantive rights] using procedures that mimic those specified for federal courts by FAA §§ 3 and 4").

VIII. *HOLMES GROUP* BARS GROUNDING LOOK-THROUGH JURISDICTION ON A STATE-LAW COUNTERCLAIM

Even if this Court accepts look-through jurisdiction as a general matter, no "arising under" jurisdiction exists here, as *Holmes Group* shows. Discover

fails to grapple, however, with the implications of this Court's reasoning in that case. Instead it serves up feeble literalism, observing that "*Holmes Group* does not purport to say anything about a district court's jurisdiction to compel arbitration under Section 4 of the FAA," Resp. Br. 41, and that the holding below "poses no threat to * * * removal jurisdiction for the simple reason that it does not involve an issue of removal jurisdiction at all," *id.* at 46. This misses the point rather grievously. To begin, *Holmes Group* did "not involve an issue of removal jurisdiction" either. It concerned the interpretation of 28 U.S.C. § 1295(a)(1), which establishes the Federal Circuit's appellate jurisdiction and which in turn references 28 U.S.C. § 1338. See 535 U.S. at 829. In deciding the statutory jurisdictional question, however, the Court relied on principles that apply across those various statutory provisions—and on the basic norm that those statutes should operate as a coherent whole. See *Romero* v. *Int'l Terminal Operating Co.,* 358 U.S. 354, 379 (1959) (emphasizing the need for "reason and coherence" across the various statutes constituting "the mosaic of federal judiciary legislation.").

More baffling still is respondents' ostensible "refutation" of the idea that "jurisdiction under Section 4 * * * depend[s] upon the pendency of a[] lawsuit." Resp. Br. 41. Petitioner's brief made no such claim. Indeed, her point was almost the exact opposite: that when an issue actually arises in a suit pending in state court and the case is not removable, Congress could not have intended for federal courts to entertain a Section 4 action. Whatever can be said for deciding jurisdiction based on a hypothetical case, it is much more extreme to rely on a hypothetical in pref-

erence to reality. It is at least doubtful, moreover, that Congress meant for Section 4 to apply to pending state cases at all. That Section 4 includes no language, akin to that in Section 3, empowering the federal court to stay state court proceedings, is no small matter. Although the courts below granted Discover's requested stay quite readily, the framers of the FAA legislated against a very different set of background understandings, one which generally accepted concurrent proceedings, see, *e.g.*, *Kline* v. *Burke Constr. Co.*, 260 U.S. 226 (1922), but in which anti-suit injunctions of the kind issued here were almost wholly impermissible, see *ibid.* (interpreting Section 265 of the Judicial Code). Reading Section 4 as authorizing federal courts to direct arbitration of claims pending in state courts requires believing either that Congress in enacting Section 4 intended to provide an essentially toothless (yet friction-inducing) remedy in 1925, since the courts would not stay the pending state court proceedings when they issued a Section 4 order, or that Congress intended in this one section to overturn much well-settled law to provide such stays—without ever saying so. In removable cases, of course, a party could remove and stay litigation under Section 3. But if a state case were non-removable, a Section 4 order to compel would require an anti-suit injunction to be effective and the federal courts were loathe to provide one.

If anything, the exception to settled jurisdictional rules created by the Fourth Circuit here is in fact much *less* defensible than the one this Court refused to create in *Holmes Group*. First, *Holmes Group*, which concerned federal appellate jurisdiction, did not involve state courts. The friction created by par-

allel proceedings like the ones permitted here is even greater than in the *Holmes Group* setting, where the case was pending in only one court system. Second, the interest in expert, uniform interpretation of federal law was at its zenith in *Holmes Group*. It concerned a congressional determination that appeals should be channeled to a specialized, expert court. See generally *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308 (2005) (explaining the purposes of Section 1331 jurisdiction). Here, allowing a federal court to direct arbitration of FDIA claims cannot promote uniform or expert interpretation of *that* statute. Arbitrators will decide these claims. Third, and obviously, an approach that requires the court to guestimate the contours of a hypothetical case furnishes much less of a clearly administrable rule of thumb than even the "well-pleaded-complaint or -counterclaim rule" that *Holmes Group* refused to embrace. 535 U.S. at 832.

In the face of all this, Discover identifies a single consideration that it believes makes the case for federal jurisdiction stronger here than in *Holmes Group*: because "Discover is the plaintiff in the state-court proceeding," respondents observe, "there is no danger of depriving Discover (the master of the state court complaint) of its chosen forum." Resp. Br. 46. But this is silly. More than a half century before *Holmes Group* this Court made clear in *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100 (1941), that there is less justification for allowing a state court plaintiff to remove its case to federal court than for allowing a state court defendant to do the same.

This Court has long rejected such complex and uncertain approaches to jurisdiction. In *Swift Co.* v.

Wickham, 382 U.S. 111, (1965), for example, this Court jettisoned the *Kesler* rule, see *Kesler* v. *Dep't of Pub. Safety*, 369 U.S. 153 (1962), for interpreting the former three-judge court statute, 28 U.S.C. § 2281 (repealed 1976). After noting that "in order to ascertain the correct forum, the merits must first be adjudicated," the Court explained:

> procedural rule[s] governing the distribution of judicial responsibility * * * must be clearly formulated. The purpose of the three-judge scheme was in major part to expedite important litigation: it should not be interpreted in such a way that litigation, like the present one, is delayed while the proper composition of the tribunal is litigated. [The *Kesler*] formulation, whatever its abstract justification, cannot stand as an every-day test for allocating litigation between district courts of one and three judges.

Wickham, 382 U.S. at 124.

IX. THE DISTRICT COURT'S ARTICLE III JURISDICTION WAS ALSO SERIOUSLY QUESTIONABLE

Although the Court may—and should—enforce the limits laid down in Section 1331 without deciding whether Discover's action would also fail on Article III grounds, see *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1191 (2007), petitioner also noted, Pet. Br. 52-56, a substantial question as to the district court's Article III jurisdiction.

At the time respondents petitioned the federal court, Discover had not suffered any injury, see *Lujan* v. *Defenders of Wildlife,* 504 U.S. 555 (1992), because Ms. Vaden's conduct—litigating, instead of arbitrating, her counterclaims—was, on *Discover's own theory*, entirely lawful, see Resp. Br. 51 (quoting J.A. 35); *PaineWebber, Inc.* v. *Faragalli*, 61 F.3d 1063, 1067 (3d Cir. 1995) ("[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") (citations omitted); see also *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (holding that Article III standing is determined "at the outset of the litigation"). Respondents do not identify any injury Discover had suffered when it sued. Rather, Discover points to what happened *after* filing, *e.g.*, Resp. Br. 52, apparently hoping that this Court does not notice or attach legal significance to the difference.

Petitioner also continues to question respondents' second premise: that Ms. Vaden's defense of this litigation can be treated as an injury-causing refusal. See Resp. Br. 49-52. Courts hold otherwise. *Spann* v. *Colonial Vill.*, 899 F.2d 24, 27 (D.C. Cir. 1990); see also *Bishop* v. *Wood*, 426 U.S. 341, 348 (1976) (noting that "communication * * * made in the course of a judicial proceeding * * * surely cannot provide retroactive support" for plaintiff's claim of injury). But Discover's position is legally inadequate in any event, unless Discover is also right in assuming that lack of Article III standing is a defect that may be "cured" by later developments in a case.

Respondents cite no authority for that proposition, and the closest they come, see Resp. Br. 52, a "cf." citation to *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61 (1996), which held that complete diversity at the time of judgment was sufficient to cure an erroneous application of the removal statute, is not nearly close enough. As this Court's subsequent decision in *Grupo Dataflux* v. *Atlas Global Group*, 541 U.S. 567 (2005), made clear, the practice at issue in *Lewis*, dismissal of a party whose presence defeated complete diversity, "had long been an exception," *id.* at 572, to the rule that the time of filing controls. And *Dataflux* further explained that the "considerations * * * of finality, efficiency, and economy" *Lewis* cited could support overlooking a *statutory* defect, but never a jurisdictional one. *Id.* at 574.

Nor does the unexceptionable principle that "'[j]urisdiction * * * is not defeated * * * by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover,'" Resp. Br. 49 (quoting *Bell* v. *Hood*, 327 U.S. 678, 682 (1946)), help Discover here. The question is not whether Discover "could actually recover" in the Section 4 action because, for example, the agreement asserted was not binding on Ms. Vaden or does not cover the interest rate dispute, but rather whether, *on Discover's own version of the disputed facts*, it had suffered any injury when it came before an Article III court.

X. THE SUPPOSED RELUCTANCE OF SOME STATE COURTS TO ENFORCE ARBITRATION CANNOT JUSTIFY THIS COURT'S REPEAL OF SECTION 1331'S REQUIREMENTS

Another drumbeat theme of Discover and its amici is that an expansive, jurisdiction-conferring construction of Section 4 is necessary because state courts are reluctant to enforce arbitration obligations. See, *e.g.*, Chamber of Commerce Amicus Br. 6-24. Respondents, however, never advance *any* basis for asserting that the Maryland court in which they filed suit would not have stayed litigation and ordered arbitration had they asked. As respondents acknowledge, the Maryland court could not as a matter of law have decided this case differently; state and federal courts are bound to enforce arbitration agreements on the same terms as other contracts. Section 2 applies the same to each. *Southland*, 465 U.S. at 10-16.

Their only complaint about Maryland is that "federal court jurisdiction is all the more critical where, as here, the parallel state court system has held that it is not bound by Section 4 of the FAA." Resp. Br. 23. But this is little more than word-play. To complain that Section 4's procedures cannot be enforced in state court is no different from complaining that rights under Rule 26 can only be vindicated in federal court, especially when state courts cannot single out covered arbitration agreements for adverse procedural treatment. See *Preston* v. *Ferrer*, 128 S. Ct. 978 (2008). That federal statutory claims are subject to different, nondiscriminatory procedural rules in state court is thin support for claiming hostility. Indeed,

the case respondents cite for the proposition that a federal forum is especially critical, *Walther* v. *Sovereign Bank*, 872 A.2d 735 (Md. 2005), undercuts that very proposition. It suggests that Maryland litigants need not run the gauntlet to enforce an arbitration agreement. As the court explained: "The Maryland Uniform Arbitration Act * * * was purposefully meant to mirror the language of the FAA. [It is t]he State analogue . . . to the Federal Arbitration Act [and] the same policy favoring enforcement of arbitration agreements is present in both our own and the federal acts." *Id.* at 742 (internal quotations omitted).

But even if respondents and amici could show that state courts were refusing to follow federal law, judicial expansion of jurisdiction limited by Congress would not be the proper remedy. Rather, this Court's direct review of final decisions of state courts is the appropriate means of ensuring that they comply with their Article VI duty to give effect to federal law. William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 Cal. L. Rev. 263, 302 (1990). And, of course, this Court need not grant review in every case to effectively supervise recalcitrant courts. But even if direct review were insufficient, only Congress, not this Court, can repeal the well-pleaded complaint rule, even with respect to only a single category of cases.

CONCLUSION

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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