No. 07-773

In the Supreme Court of the United States

BETTY E. VADEN,

Petitioner,

v.

DISCOVER BANK; DISCOVER FINANCIAL SERVICES, INC.,

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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I. The Conflict in the Courts of Appeals Warrants Certiorari

As the petition explained, Pet. 11-18, there is a sharp and persistent conflict among the courts of appeals—recently acknowledged by courts on both sides—as to whether, under 28 U.S.C. § 1331, a federal court may take jurisdiction over a petition to compel arbitration, see 9 U.S.C. § 4, that does not on its face raise any federal question. In the decisions below, the Fourth Circuit, agreeing with two other circuits, held that a suit seeking to compel arbitration "arises under" federal law whenever the issue on which arbitration is sought is federal in character. Four other circuits, however, have squarely rejected this look-through approach to § 1331.

The brief in opposition does not—and cannot—deny the existence of this square circuit conflict. Nor does it gainsay the practical importance of the question presented or dispute the obvious vice of the look-through approach—that, as here, years of federal court litigation can be devoted to a multi-layered "jurisdictional" determination in a suit with no federal question for the court to decide. Instead, the opposition strains mightily to *avoid* the questions presented, guiding the Court through a lengthy detour, Br. in Opp. 10-12, surveying decisions involving jurisdiction over § 4 petitions under the *diversity* statute, 28 U.S.C. § 1332. These cases do nothing to dissipate the very real conflict as to federal question jurisdiction and, to the (minimal) extent they bear on the issue resolved below, they undermine, rather than support, the Fourth Circuit rule.

As for the question *actually* presented, respondents' arguments against certiorari are insubstantial.

They first contend that this Court's resolution of the question would somehow benefit from allowing *even more* lower courts to choose one side or the other of the already deep and intractable circuit split. Br. in Opp. 12-13. They then claim even more implausibly that factual weaknesses in their own claim to jurisdiction might present barriers to this Court's reviewing—and correcting—the Fourth Circuit's look-through rule. *Id.* at 13-15. Respondents are entirely wrong on both counts.

1. Respondents' sustained effort to submerge the clear circuit split over federal question jurisdiction in a sea of discussion of diversity-of-citizenship cases should not distract this Court. As the decision below succinctly noted, the question of diversity jurisdiction "*is not present*," Pet. App. 8a n.2 (emphasis added), in this case. The question that divided the Fourth Circuit panel below and has splintered courts of appeals nationwide is whether a suit seeking to enforce a contractual arbitration right "arises under" federal law whenever the issue to be arbitrated is federal in character. Even if respondents were right in their reading of the diversity cases, federal courts' (supposedly) uniform approach to § 1332 would be no reason at all for this Court to ignore their indisputably *divergent* interpretations of § 1331.

But respondents are not right about diversity jurisdiction. Their assertion that courts look through pleadings to find the amount in controversy, Br. in Opp. 10-12, is unsupported by the very cases they cite. Thus, in *America's MoneyLine, Inc.* v. *Coleman*, 360 F.3d 782 (7th Cir. 2004) (see Br. in Opp. 11), the Seventh Circuit explained that "there [was] no basis for concluding that the district court should look to any source other than the petition in order to deter-

mine whether the requisite jurisdictional amount has been met," *id.* at 785, finding "no indication that Section 4 * * * altered in any way the rule that federal courts look only to the well-pleaded complaint * * * in determining their jurisdiction," *id.* at 785-786. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983) (see Br. in Opp. 8-9) is no more availing. There, the party suing to compel arbitration alleged diversity of citizenship and the amount in controversy *on the face of the petition*. See Petition ¶ 1, *Mercury Constr. Corp.* v. *Moses H. Cone Mem'l Hosp.*, No. 80-586 (M.D.N.C. Dec. 24, 1980). Thus, to the extent that case law concerning diversity jurisdiction is at all relevant, it bolsters those cases holding *against* the Fourth Circuit that the well-pleaded complaint rule applies to § 4 petitions as it applies to other civil suits.

2. Tellingly, when respondents do turn to the question actually presented they do not even attempt to square the decision below with those of the Second, Sixth, and Seventh Circuits. As explained in the petition, Pet. 11-15, each of these courts has held that 28 U.S.C. § 1331 does *not* allow a district court to "look through" pleadings that do not themselves contain a federal question, even when the issue to be arbitrated is federal in character. See *Wisconsin* v. *Ho-Chunk Nation*, 463 F.3d 655, 660 (7th Cir. 2006); *Smith Barney, Inc.* v. *Sarver*, 108 F.3d 92, 94 (6th Cir. 1997); *Westmoreland Capital Corp.* v. *Findlay*, 100 F.3d 263, 268 (2d Cir. 1996). Respondents likewise concede, Br. in Opp. 10, that the First and Eleventh Circuits have taken the directly opposite view, joining the Fourth Circuit in holding that a federal court *should* look through the pleadings and take jurisdiction based on the presence of a federal issue in

the underlying dispute. See *Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians*, 177 F.3d 1212, 1223 n.11 (11th Cir. 1999); *PCS 2000 LP* v. *Romulus Telecomms., Inc.*, 148 F.3d 32, 34-35 (1st Cir. 1998).

Unable to cast any doubt on this clear, sharp, and entrenched disagreement, respondents devote significant energy to quibbling over which side of the split the Fifth Circuit belongs on. For reasons explained in the petition, respondents are wrong to claim (Br. in Opp. 10-11 & n.3, 13) that the Fifth Circuit's decision in *Rio Grande Underwriters, Inc.* v. *Pitts Farms, Inc.*, 276 F.3d 683 (2001), overruled *Prudential-Bache Securities, Inc.* v. *Fitch*, 966 F.2d 981 (1992), in which the court definitively rejected the look-through approach. See Pet. 13 n.4 (describing Fifth Circuit's strict "prior panel" rule). But even if respondents' understanding of Fifth Circuit law were correct, that would merely transform this undisputed conflict from a four-to-three split against the Fourth Circuit into a three-to-four split in its favor. The courts of appeals would still remain closely and irreconcilably divided and this Court's review would be no less essential.[1]

3. Unable to explain away either the existence or the importance of the square conflict, respondents raise a curious claim that review of the Fourth Cir-

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[1] Respondents' observation that internal conflict within the Fifth Circuit could be addressed by *en banc* proceedings, Br. in Opp. 11 n.3, is altogether beside the point. Although there is no genuine uncertainty as to what a district court of that circuit *should* do (*i.e.*, follow the earlier-decided *Prudential-Bache* unless and until that case is overruled by the full court), what *Prudential-Bache* and *Rio Grande do* highlight is the great difficulty these jurisdictional questions continue to present. See Pet. 16-18. It is this persistent and widespread confusion—not any particular intra-circuit conflict—that calls out for this Court's intervention.

cuit's decision in this case would be "premature," Br. in Opp. 12-13, noting, as did the petition, see Pet. 17, 18 n.6, that the Ninth and Eleventh Circuits have pending cases that raise the look-through issue and suggesting that a "consensus," Br. in Opp. 13, might emerge were the Court to stay its hand here.

The claim that these cases provide an "opportunity for consensus," Br. in Opp. 13, is simply counterfactual. Even if both courts were to follow respondents' favored approach, the circuits would still be evenly split, four-to-four. (Adding the erroneously claimed Fifth Circuit defection would make it only three-to-five). Letting a circuit conflict percolate is one thing; allowing it to fester is quite another.

Even respondents' modest claim that this Court would "benefit" from allowing "debate" in the lower courts to continue, Br. in Opp. 13, is a hollow one. The arguments for and against the Fourth Circuit rule have been fully and comprehensively aired in recent opinions taking both sides of the issue. Judge Wilkinson's opinion in *Vaden I* expressly recognized the existence of a circuit split, Pet. App. 62a-63a, and responded directly to the rationales of those courts that have applied the well-pleaded petition rule, *id.* at 65a n.2, 67a-71a. Judge Marcus continued this debate when he took the unusual step of writing a lengthy opinion "specially concurring" in his own opinion for the court in *Community State Bank* v. *Strong*, 485 F.3d 597 (11th Cir.), reh'g en banc granted, 508 F.3d 576 (11th Cir. 2007), in which he considered—and refuted—with scholarly precision each of the arguments advanced by Judge Wilkinson. Finally, the Fourth Circuit reaffirmed its look-through approach in *Vaden II* in the face of a dissenting opinion that advanced many of Judge Marcus's

arguments. See Pet. App. 38a-39a (Goodwin, J., dissenting). Although everything on the look-through issue has already been said, respondents would postpone review until every circuit has said it.[2]

Not only are the supposed benefits of further percolation illusory, but the costs of allowing the Fourth Circuit rule to stand are large and serious. As the petition explained, Pet. 22-23, the Fourth Circuit rule promises to produce costly and inefficient litigation on the threshold question of subject matter jurisdiction, requiring federal courts to examine in detail issues that closely track the merits of the underlying dispute (and that the FAA reserves to the arbitrator) in suits where the "merits" question sounds in state, not federal, law. See *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375, 381 (1994). If the Fourth Circuit decision were to stand, this case's convoluted path to the jurisdictional threshold—it required the attention of five federal judges and produced five separate opinions over four years of litigation—would hardly be unique. To the contrary, the large volume of arbitration cases filed each year, see Pet. 32-35, ensures that the costly inquiries the look-through rule necessitates

[2] Denying review now would also waste a unique opportunity to address the scope of any look-through jurisdiction. While resolving the propriety of look-through jurisdiction is itself sufficient reason to grant review, this case would also allow the Court—if it were to agree with respondents' position on the first question presented—to address the question of *how far* a federal court may permissibly look through. See Pet. 34-35. That question would be crucial to cabining the look-through approach's intrusion on the state courts and respondents have not identified any case pending in the lower courts that would provide a similar opportunity to address it.

will take place on a grand scale in the lower federal courts.[3]

4. Respondents' arguments that this case is a "poor vehicle" and their professed concern that "fact-intensive determinations" might "prevent resolution of the jurisdictional question if certiorari were granted," Br. in Opp. 3, are red herrings.

Leaving aside the oddity of respondents' arguing against certiorari by raising doubts about the correctness of lower court rulings in their favor, this Court can resolve the look-through jurisdiction questions without re-deciding any other jurisdictional determination. As recent cases make clear, federal courts are not obliged to decide *every* jurisdictional issue a case raises, see *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1191 (2007); *Ruhrgas A.G.* v. *Marathon Oil Co.*, 526 U.S. 574, 584-585 (1999), and *this Court's* jurisdiction is not confined to cases that satisfy 28 U.S.C. § 1331's well-pleaded complaint rule. See *United States* v. *Corrick*, 298 U.S. 435, 440 (1936); *cf. Asarco Inc.* v. *Kadish*, 490 U.S. 605, 623-624 (1989). None of the narrow determinations respondents highlight, see Br. in Opp.

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[3] The pending Ninth Circuit case on which respondents rely, Br. in Opp. 13, illustrates the perils of continued percolation. See *In re Cintas Corp. Overtime Pay Arbitration Litig.*, No. M:06-cv-01781-SBA, 2007 WL 1302496, at *2 (N.D. Cal. May 2, 2007), interlocutory appeal granted, No. 07-80046 (9th Cir. July 24, 2007). That case, a multidistrict litigation proceeding, involves multiple stand-alone § 4 petitions in which jurisdiction purportedly stems from federal issues in the underlying dispute. An incorrect decision by the Ninth Circuit in this appeal alone would impose further wasteful costs in 70 different cases.

14, is prerequisite to this Court's deciding the extent, if any, § 1331 allows look-through jurisdiction.[4]

Indeed, respondents' theory would preclude review of *nearly any* jurisdictional decision involving a § 4 petition. Fact-bound threshold questions as to whether an arbitration agreement exists or whether a party has refused to arbitrate are present whenever a petition to compel is filed. Far from presenting "serious obstacles," Br. in Opp. 13-15, these issues in fact raise no barrier to this Court's deciding the threshold legal issues presented here.

II. The Second Decision Below is Irreconcilable with This Court's Decision in *Holmes Group*

As the petition explained, the second decision below fails even on the Fourth Circuit's own logic. Pet. 26-32. A look-through approach requires federal courts to determine whether they would have subject matter jurisdiction over the underlying dispute. But here the only federal issues were injected by petitioner's *counter*claim, and this Court's decision in *Holmes Group, Inc.* v. *Vornado Air Circulation Systems*, 535 U.S. 826 (2002), makes clear that federal counterclaims cannot supply "arising under" jurisdiction. Respondents' attempts to reconcile the decision below with *Holmes Group* are wholly unpersuasive

[4] Respondents obliquely suggest that their claims of diversity jurisdiction, never ruled on in the courts below, should bar this Court from reviewing this case. Br. in Opp. 3 n.1, 12 n.4. But this Court has not hesitated to resolve jurisdictional issues ruled on below while remanding additional jurisdictional questions not decided on appeal. See, *e.g.*, *Carden* v. *Arkoma Assocs.*, 494 U.S. 185, 197 (1990).

and *Vaden II* opens federal courts to disputes still further from the bounds envisioned by § 1331.

1. Respondents' contention that *Holmes Group* is irrelevant because it involved appellate jurisdiction over a patent claim and not a § 4 petition, Br. in Opp. 16, is little more than makeweight. Although *Holmes Group* involved 28 U.S.C. § 1338(a), the Court explained that "linguistic consistency" requires 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 was not limited to patent appeals.[5] In cases like this one, where the asserted basis for jurisdiction is a federal issue, *Holmes Group*'s construction of § 1331 is directly applicable.

2. Similarly, respondents fail to explain why the "complete preemption" doctrine should make any jurisdictional difference. As the petition explained, under complete preemption a state law claim is treated, for jurisdictional purposes, *as if* it were federal in character. Pet. 29 n.10; see *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386, 393 (1987). But *Holmes Group* made clear that (actual) federal-law counterclaims cannot supply "arising under" jurisdiction, and neither respondents nor the majority below, see Pet. App. 9a-10a, have advanced any explanation why state law claims "federalized" through complete preemption should receive uniquely favorable treatment.

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[5] The lower federal courts have had no difficulty making the straightforward connection that eludes respondents' grasp. See, *e.g.*, *Topeka Hous. Auth.* v. *Johnson*, 404 F.3d 1245, 1247 (10th Cir. 2005); *Salton, Inc.* v. *Phillips Domestic Appliances & Personal Care B.V.*, 391 F.3d 871, 875 (7th Cir. 2004).

3. Equally unpersuasive is respondents' attempt to mitigate the conflict with *Holmes Group* on the ground that, under the decision below, Discover would remain "master of the complaint." Br. in Opp. 16. The federal system's respect for a plaintiff's *initial* choice of forum has never been a license to move litigation piecemeal back and forth between court systems. See *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 106 n.2 (1941) ("[I]t is believed to be just and proper to require the plaintiff to abide his selection of a forum.") (quoting H.R. Rep. No. 1078, 49th Cong., 1st Sess. 1 (1887)); *Syngenta Crop Protection, Inc.* v. *Henson*, 537 U.S. 28, 32 (2002). And the control recognized in *Holmes Group* hardly justifies permitting respondents to veto their *own* initial forum choice, especially where the state court is equally able to afford the arbitration remedy they seek.

Of course, preserving "plaintiff's choice of forum," 535 U.S. at 832, was only one consideration at work in *Holmes Group*. Just as important were "the clarity and ease of administration of the well-pleaded-complaint doctrine," *ibid.*, and a "due regard for the rightful independence of state governments," *ibid.* (quoting *Shamrock Oil*, 313 U.S. at 109), both of which militate decisively *against* jurisdiction in situations like this one. See Pet. 29-31. That a plaintiff may seek to compel arbitration in the absence of "*any* lawsuit," Br. in Opp. 16, does not, as respondents presume, establish that the pendency of a suit—brought by that party—is irrelevant. See, *e.g.*, *Or. Egg Producers* v. *Andrew*, 458 F.2d 382, 383 (9th Cir. 1972) ("A plaintiff who commences his action in a state court cannot effectuate removal to a federal court even if he could have originated the action in a fed-

eral court and even if a counterclaim is thereafter filed that states a claim cognizable in a federal court."). Indeed, in cases under the Declaratory Judgment Act—a context the *Fourth Circuit* maintained was closely analogous, Pet. App. 68a-70a—federal courts typically *refuse* to entertain actions once a state suit is pending, especially one instituted by the would-be federal plaintiff. See 10B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2758, at 523 (3rd ed. 1998); *Am. Auto. Ins. Co.* v. *Freundt*, 103 F.2d 613, 617 (7th Cir. 1939) (Declaratory Judgment Act does not allow plaintiffs to "accomplish in a particular case what could not be accomplished under the removal act"). And declaratory judgment actions implicate a basic jurisdictional policy consideration–that federal courts are the primary expositors of federal law—that § 4 petitions do not.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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