No. 20-1143

IN THE

# Supreme Court of the United States

DENISE A. BADGEROW,

*Petitioner*,

*v.*

GREG WALTERS, *et al.*,

*Respondents.*

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

## BRIEF FOR SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENT


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## INTEREST OF AMICUS CURIAE[1]

The Securities Industry and Financial Markets Association (SIFMA) advocates for the interests of its members in the securities industry, including hundreds of securities firms, banks, and asset managers. Its mission is to support strong and stable financial markets and to promote economic growth, while educating others about—and, in turn, increasing confidence in—the financial markets.

SIFMA's members and their affiliates provide lending, financial advising, brokerage, and other financial services to thousands of individuals and businesses across the country. Some of SIFMA's members use standardized agreements with customers and employees requiring that disputes be resolved through Financial Industry Regulatory Authority ("FINRA") arbitrations like the one at issue in this case.

SIFMA members are both arbitral claimants and arbitral respondents, but regardless of their role, they have a strong interest in clear rules about when federal courts have subject matter jurisdiction to hear arbitration-related petitions under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, and a strong interest in making sure the FAA's clear federal policy favoring arbitration is honored, including for FINRA arbitration of federal securities law claims.

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. A list of SIFMA's members is available at https://my.sifma.org/Directory/Member-Directory. Counsel for the parties have consented to the filing of this brief.

## SUMMARY OF ARGUMENT

When parties arbitrate a federal securities law dispute before a FINRA panel, a federal court has jurisdiction over subsequent enforcement proceedings. This Court should dispel any confusion over the application of the FAA in federal securities law arbitrations and confirm that the "look-through" approach applies to post-arbitration enforcement petitions. In so doing, this Court would not only clarify alleged uncertainties about federal jurisdiction that Petitioner seeks to exploit, but also better ensure uniform application of federal law in securities law arbitrations—thereby mitigating the risk of inconsistent post-arbitration standards in the state courts.

The look-through approach flows directly from this Court's decision in *Vaden* v. *Discover Bank*, 556 U.S. 49 (2009), which requires that federal jurisdiction to entertain petitions to compel arbitration be assessed based on the parties' "underlying substantive controversy." *Id.* at 62. The jurisdictional inquiry under *Vaden* thus focuses on the nature and claims of the dispute being arbitrated. In *Vaden*'s wake, numerous courts have confirmed there is no legal or intellectual basis to depart from this principle in post-arbitration enforcement petitions like the one at issue here. And while a few courts have tried to limit *Vaden*'s application, none does so persuasively.

The look-through approach is also right as a matter of policy. Federal question jurisdiction *cannot* turn on a blinkered review of the enforcement petition alone: That would turn normal pleading standards on their head and ensure a steady stream of artfully pleaded petitions from unsuccessful arbitration claimants who prefer to relitigate federal claims in state court. The

look-through approach adopts the sensible understanding that an arbitration and related federal court petitions, including a subsequent enforcement proceeding, are jurisdictionally related, not artificially distinct actions. The look-through approach also facilitates streamlined arbitrations, promotes judicial efficiency, ensures fairness for all parties, and provides a proper (and properly limited) role for federal courts in proceedings that meaningfully arise under federal law. By contrast, Petitioner's position—which seeks to exploit perceived differences in the deference state courts give to arbitration awards—invites inconsistent state standards, gamesmanship, and forum shopping, and unjustifiably divests federal courts of any role in numerous federal law disputes.

## ARGUMENT

### I. *VADEN* SUPPORTS A LOOK-THROUGH APPROACH FOR MOTIONS TO CONFIRM OR VACATE UNDER FAA SECTION 9 AND 10

#### A. *Vaden* Confirmed That Jurisdiction Over An FAA Petition Is Based On The Parties' Underlying Controversy

This Court's 2009 decision in *Vaden* v. *Discover Bank* dictates the result in this case. *Vaden* involved a motion to compel arbitration under Section 4 of the FAA, 9 U.S.C. § 4. The threshold question was whether the Fourth Circuit acted correctly in looking to the "underlying controversy" the parties sought to arbitrate in order to determine whether there was federal subject matter jurisdiction. 556 U.S. at 53. The response was a resounding yes: This Court unanimously agreed that district courts "should 'look through' a § 4 petition" to determine if the underlying conflict arises

under federal law. *Id.* at 65-66; *see also id.* at 72 (Roberts, C.J., concurring in part and dissenting in part). If the parties' underlying controversy arises under federal law, then federal question jurisdiction lies under 28 U.S.C. § 1331. 556 U.S. at 62.

*Vaden*'s fundamental teaching is that a federal court's determination of jurisdiction must be based on "the whole controversy between the parties—not just a piece broken off from that controversy." 556 U.S. at 67. Indeed, the *Vaden* Court was unanimous that the underlying statement of claim is relevant for jurisdictional purposes, and divided only as to *how far* a court should look beyond the petition itself. *Compare id.* (proper to look through to state court pleadings where counterclaim to be arbitrated arose in determining "the whole controversy as framed by the parties"), *with id.* at 72-73 (Roberts, C.J., concurring in part and dissenting in part) (only necessary to look to claims sought to be arbitrated).

*Vaden*'s embrace of realism—embodied in its clear statement that courts should assess federal jurisdiction by looking to the underlying controversy—was in no way confined to petitions to compel arbitration. To be sure, the *Vaden* Court relied in part on Section 4's venue provision, which states that motions to compel may be brought in a "district court which … would have jurisdiction … of the subject matter of a suit arising out of the controversy between the parties." 9 U.S.C. § 4. But this Court never said that this *venue* language implies a *jurisdictional* analysis that is somehow unique to Section 4. Rather, the venue provision crystallized a broadly applicable analysis that focuses on the "substantive conflict between the parties," 556 U.S. at 62-67 (internal quotation marks omitted), or, as this Court put it in an earlier case, the parties' "'underlying dis-

pute.'" *See id.* at 63 (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 25, n.32 (1983)).

The *Vaden* Court rejected any "[a]rtful dodges" that might "divert us from recognizing the actual dimensions of [the] controversy" for purposes of federal question jurisdiction. *Vaden*, 556 U.S. at 67-68. It would be bizarre if this insistence on a clear-eyed jurisdictional analysis keyed to the nature of the parties' underlying dispute was limited to Section 4, leaving formalism to control subject matter jurisdiction over other FAA petitions that are just as closely linked to the underlying arbitrated controversy.

*Vaden*'s realism is equally applicable to post-arbitration enforcement petitions. Without the look-through approach, parties seeking to preserve federal review over FAA enforcement petitions related to the arbitration may be incentivized to file duplicative federal court actions as a jurisdictional anchor—a nonsensical course in which a party "seek[s] federal adjudication of the very questions it wants to arbitrate rather than litigate." 556 U.S. at 65. As with Section 4 petitions, a rule of law based on the "'totally artificial distinction'" of whether a preemptive anchor suit has been filed would lead to wasteful litigation and perverse results. *Id.*; *see also Pershing, LLC* v. *Kiebach*, 819 F.3d 179, 182-183 (5th Cir. 2016) (noting that ignoring the underlying controversy for jurisdictional purposes would encourage otherwise unnecessary litigation).

### B. *Vaden's* Application To Confirmation And Vacatur Actions Has Been Recognized By A Substantial Body Of Caselaw

Recognizing *Vaden's* clear teachings, Courts of Appeals around the country have embraced the "look-through" approach for FAA enforcement petitions—as Respondents explain. BIO 15.[2] *See Quezada* v. *Bechtel OG & C Constr. Servs., Inc.*, 946 F.3d 837, 843 (5th Cir. 2020); *Landau* v. *Eisenberg*, 922 F.3d 495, 498 (2d Cir. 2019); *McCormick* v. *America Online, Inc.*, 909 F.3d 677, 682 (4th Cir. 2018); *Ortiz-Espinosa* v. *BBVA Sec. of P.R., Inc.*, 852 F.3d 36, 47 (1st Cir. 2017); *Doscher Sea Port Grp. Sec., LLC*, 832 F.3d 372, 382 (2d Cir. 2016). Those recent cases stand atop a substantial body of caselaw. *See Giusti* v. *Morgan Stanley Smith Barney, LLC*, 581 F. App'x 34, 35 (2d Cir. 2014) (summary order) ("Federal courts may 'look through' a petition to vacate an arbitration award to assess whether, 'save for the arbitration agreement,' the court would have jurisdiction over 'the substantive controversy between the parties.'" (quoting *Vaden*, 556 U.S. at 53)); *Kiely* v. *Canty*, 102 F. Supp. 3d 359, 365 (D. Mass. 2015); Mem. & Order at 2, *First Fed. Fin. Corp.* v. *Carrion-Concepcion*, No. 14 Civ. 01019 (D.P.R. Aug. 6, 2014), ECF No. 43; Order at 2-3, *Ortiz-Espinosa* v. *BBVA Securities of P.R., Inc.*, No. 12 Civ. 01608 (D.P.R. Oct. 30, 2012), ECF No. 8; *Southwest Fla. Area Local, Am. Postal Workers Union* v. *U.S. Postal Serv.*, No. 2:14-cv-

[2] As discussed herein, "enforcement petitions" under the FAA are post-arbitration petitions to confirm, vacate, or modify an arbitral panel's award. *See* 9 U.S.C. §§ 9-11. These provisions encompass two sides of the same coin: An arbitral award *must* be confirmed under the FAA unless the standard for vacating or modifying the award is met. *See* 9 U.S.C. § 9.

75-FtM-29DNF, 2014 WL 4788057, at *4 (M.D. Fla. Sept. 19, 2014); *see also, e.g.*, *Azteck Commc'ns* v. *UPI Commc'ns, Inc.*, No. Civ. A. H-09-0690, 2009 WL 1660288, at *4 (S.D. Tex. June 15, 2009) (no jurisdiction over petition to vacate where "[t]he parties are not diverse and the parties' claims in the underlying arbitration all arise under state law").[3]

The small number of post-*Vaden* decisions that have reached the opposite conclusion are unpersuasive. *Magruder* v. *Fidelity Brokerage Services LLC*, 818 F.3d 285 (7th Cir. 2016), for example, was a *pro se* case in which subject matter jurisdiction was not even contested until the Seventh Circuit raised the issue *sua sponte*, *see id.* at 286-287. Its entire discussion of federal question jurisdiction is essentially dicta because it was "not clear" that the federal stock certificate regulation relied on by the plaintiff "establishe[d] a federal right" at stake in the underlying arbitration. *See id.* at 287. The decision is also internally inconsistent, as it acknowledged looking through to the arbitral proceeding in order to determine the amount in controversy for

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[3] Other courts have applied *Vaden*'s reasoning in determining the amount-in-controversy for diversity jurisdiction, looking through to the amount sought in the arbitral pleadings and providing justifications equally applicable to federal question jurisdiction. *See, e.g.*, *Pershing*, 819 F.3d at 182-183 (look-through approach "recognizes the true scope of the controversy between the parties" and "avoids the application of two conflicting jurisdictional tests for the same controversy"); *see also, e.g.*, *National Cas. Co.* v. *Resolute Reinsurance Co.*, No. 15cv9440, 2016 WL 1178779, at *2 (S.D.N.Y. Mar. 24, 2016); *Ameriprise Bank, FSB* v. *PNC Bank, Nat'l Ass'n*, Civ. A. No. 12-1113, 2012 WL 5906400, at *8 (W.D. Pa. Nov. 26, 2012); *Smith* v. *Tele-Town Hall, LLC*, 798 F. Supp. 2d 748, 756 (E.D. Va. 2011); *Switzer* v. *Credit Acceptance Corp.*, Civ. A. No. 5:09cv00075, 2010 WL 424573, at *2 (W.D. Va. Jan. 27, 2010).

diversity jurisdiction purposes, *id.*, even as it rejected doing the same thing for federal question purposes, *id.* at 288. *Magruder* also relied on a flawed analogy with respect to settlements, *see infra* pp. 14-15,[4] and promotes bad policy that is flatly inconsistent with *Vaden*, *see infra* Part II.[5]

*Magruder* (like Petitioner, Br. 15-18) also sought to distinguish *Vaden*'s jurisdictional analysis because "[n]either § 9 nor § 10 has any language comparable to [the Section 4 language] on which the Supreme Court relied in *Vaden*." 818 F.3d at 288; *see also Minor* v. *Prudential Sec., Inc.*, 94 F.3d 1103, 1106 (7th Cir. 1996) (similar); *Kasap* v. *Folger*, 166 F.3d 1243, 1247 (D.C. Cir. 1996) (similar). But that argument is inconsistent with *Vaden* and based on a misreading of the FAA. As explained above (at 4-5), the Section 4 language that *Vaden* relied on is about *venue*, not jurisdiction. The venue for a petition to compel is not necessarily obvious, so Section 4 provides an answer: Before arbitration begins, the appropriate federal court to decide petitions to compel is "any United States district court which, save for such agreement, would have jurisdiction under Title 28." 9 U.S.C. § 4. Once arbitration is complete, the appropriate venue is much clearer: the district "wherein the award was made." 9 U.S.C. §§ 10-

[4] As explained below, the analogy between FAA enforcement petitions and litigation over the breach of a settlement agreement (*i.e.*, a wholly-separate contract dispute) is inapposite. FAA enforcement petitions are not jurisdictionally independent actions; accordingly, the superior analogy is to appeals.

[5] For these and the reasons that follow, the Third Circuit's refusal to adopt a "look-through" approach is equally unpersuasive, as that court simply "adopt[ed] the reasoning of the Seventh Circuit [in *Magruder*.]" *Goldman* v. *Citigroup Global Mkts., Inc.*, 834 F.3d 242, 254-255 (3d Cir. 2016).

11; *see also* 9 U.S.C. § 9 (similar). There is no need to "look through" to the arbitral statement of claim to determine the appropriate *venue* in which to file the petition to vacate or confirm and therefore no need for a similar venue provision in Sections 9, 10, or 11. *Magruder*'s reasoning thus gains no force from the maxim that "an express statutory requirement here, contrasted with statutory silence there, shows an intent to confine the requirement to the specified instance," because "there is more here, showing why the negative pregnant argument should not be elevated to the level of interpretive trump card." *Field* v. *Mans*, 516 U.S. 59, 67-69 (1995).[6]

*Vaden* used Section 4's venue provision not as a basis for jurisdiction in itself, but as a springboard for a broader jurisdictional analysis. Because Section 4, in locating the venue for a petition prior to the commencement of arbitration, answers *what* an FAA court is asserting jurisdiction over in the first place—namely, the underlying "controversy between the parties"—it is strong evidence that the parties' underlying controversy is the focus of any jurisdictional inquiry. 556 U.S. at 63, 67. Applying a consistent jurisdictional analysis that focuses on the parties' actual controversy is thus consistent with *Vaden*'s key insight. By contrast, it would be absurd to read the FAA's instructions about *which* federal court should hear a particular type of

[6] *Crews* v. *S & S Serv. Ctr. Inc.*, 848 F. Supp. 2d 595 (E.D. Va.), *aff'd*, 474 F. App'x 370 (4th Cir. 2012), rested on the same misapprehension that Section 4's venue provision indicates "*when* federal courts may entertain petitions to compel arbitration," *id.* at 599 (emphasis added), rather than *which* federal courts may do so. And *Crews* forthrightly acknowledged that its rule creates the exact "totally artificial distinction" that *Vaden* found to be unacceptable. *Id.* at 600 (quoting *Vaden*, 556 U.S. at 65).

FAA petition as evidence that Congress intended to close the federal courts to some arbitral parties whose underlying controversy arises under federal law, but not to others.[7]

In sum, this Court should maintain fidelity to its reasoning in *Vaden*. Consistent with the weight of the case law—and with the simple proposition that federal courts have jurisdiction over controversies that arise under federal law—this Court should hold that the look-through approach is the proper jurisdictional analysis for FAA petitions like the one here.

## II. THE LOOK-THROUGH APPROACH IS THE ONLY SENSIBLE POLICY

The look-through approach is also sound policy, and consistent with the reality that where an arbitral controversy arises under federal law, subsequent enforcement proceedings do too. By contrast, the formalistic approach advocated by Petitioner would promote artificial distinctions and encourage needless gamesmanship.

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[7] *See Pershing*, 819 F.3d at 182-183; *Bangor & Aroostook R.R. Co.* v. *Maine Cent. R.R. Co.*, 359 F. Supp. 261, 263 (D.D.C. 1973) (rejecting jurisdictional approach that "would render the Arbitration Act—enacted as a single coordinated piece of legislation …—little more than an odd patchwork of individual statutes, bereft of any coherent plan"); *cf. Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484-485 (1989) ("[F]or similar claims, based on similar facts, which are supposed to arise within a single federal regulatory scheme" to be subject to different forums would "make[] little sense" and lead to "litigants manipulating their allegations").

### A. Formalism Is Not A Valid Approach

Federal question jurisdiction hinges "on the contents of a well-pleaded complaint." *Vaden*, 556 U.S. at 56. The "well-pleaded complaint rule" is satisfied when "[a] plaintiff's statement of his own cause of action … shows that it is based upon [federal law]." *Id.* at 60 (quoting *Louisville & Nashville R.R. Co.* v. *Mottley*, 211 U.S. 149, 152 (1908)); *see also*, *e.g.*, *Mims* v. *Arrow Fin. Servs., LLC*, 565 U.S. 368, 377-380 (2012). The look-through approach fits comfortably within the rule: When the arbitration claimant's "statement of his own cause of action"—*i.e.*, his arbitral pleading—"is based on federal law," the petition bringing the controversy to federal court falls within the rule, and federal question jurisdiction lies.

Petitioner appears to argue that "*even if the underlying dispute involve[s] a federal claim*, and *even if the underlying case was initially filed in federal court*," a post-arbitration petition must be adjudicated in state court unless it itself references federal law. Pet. Br. 23 (emphases original). In other words, pure formalism governs: Even though a party may have arbitrated federal claims, a petition to enforce those claims may be artfully pleaded to divest the presiding court of its jurisdiction.

That is wrong. As an initial matter, Petitioner's rule is inconsistent with fundamental pleading norms. On a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), courts can consider evidence from outside the pleadings *entirely*. *See Makarova* v. *United States*, 201 F.3d 110, 113 (2d Cir. 2000); *Aversa* v. *United States*, 99 F.3d 1200, 1209-1210 (1st Cir. 1996). And even in the more limited Rule 12(b)(6) context, the underlying federal claims would be

part of any petition that appends, relies on, or references the arbitral pleading. *See, e.g.*, *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (on Rule 12(b)(6) motion, "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine … in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."). Such integral documents "merge" into the petition. *See Beddall* v. *State St. Bank & Tr. Co.*, 137 F.3d 12, 17 (1st Cir. 1998).

Moreover, Petitioner's desired separation between post-arbitration petitions and the underlying arbitrated dispute would only encourage forum-shopping and impermissible artful pleading. An arbitration claimant who has litigated federal law claims and lost, and who believes his post-arbitration prospects are better in state court, could evade federal jurisdiction simply by filing a petition to vacate while studiously avoiding mention of the federal law claims in the petition (*i.e.*, exactly what Petitioner attempted to do here). Fundamental pleading precepts prevent plaintiffs from masking "the underlying nature" of the controversy in order to avoid a federal forum. *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 397 n.2 (1981) ("[C]ourts will not permit … artful pleading to close off defendant's right to a federal forum" and accordingly "will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." (citation and quotation omitted)). Yet a rigid separation between the contents of an FAA petition and the underlying documents disclosing the nature of the parties' controversy would allow just that, elevating form over substance and impeding federal jurisdiction over disputes involving federal claims.

### B. Where Parties Arbitrate Federal Issues, The Action Before The Court Arises Under Federal Law

An arbitrated claim, like a litigated claim, is premised on a right of action under applicable law. The parties' dispute "arises under" the provision of law that provides the right. *E.g.*, *Mims*, 565 U.S. at 378-379 ("[W]hen federal law creates a private right of action and furnishes the substantive rules of decision, the claim arises under federal law, and district courts possess federal-question jurisdiction under [28 U.S.C.] § 1331."); *see also Vaden*, 556 U.S. at 65. An arbitration that involves a single, federal law claim, for example, incontrovertibly arises under federal law. This remains true for a subsequent post-arbitration petition for at least two reasons.

*First*, a post-arbitration petition is jurisdictionally related to the arbitral proceeding; it is not an independent action. Courts have confirmed that such a petition is not a separate pleading. *See, e.g.*, *IFC Interconsult, AG* v. *Safeguard Int'l Partners, LLC*, 438 F.3d 298, 308 (3d Cir. 2006) (petition "for confirmation of [an] arbitration award [under Section 9 is] a motion, not a pleading"). The FAA itself also makes clear that a petition is not to be construed as commencing a freestanding action. *See* 9 U.S.C. § 6 ("[A]ny application" under the FAA should be heard "in the manner provided by law for the making and hearing of motions"); *see also ISC Holding AG* v. *Nobel Biocare Fin. AG*, 688 F.3d 98, 112 (2d Cir. 2012) (party against whom petition to compel was brought "unquestionably *could not have filed an answer* in this case").

A post-arbitration petition is, as courts often recognize, akin to an appeal—a continuation of a preexist-

ing controversy. *See, e.g.*, *Bull HN Info. Sys.* v. *Hutson*, 229 F.3d 321, 329 (1st Cir. 2000); *see also National Cas. Co.* v. *Resolute Reinsurance Co.*, No. 15cv9440, 2016 WL 1178779, at *2 (S.D.N.Y. Mar. 24, 2016) ("[A]rbitration confirmation proceedings are quasi-appellate in nature" and jurisdiction over these "appeals" should be coextensive with that which "would have … been present if the case had been litigated rather than arbitrated" (citations and internal quotation marks omitted)). In an appeal, the underlying controversy between the parties provides subject matter jurisdiction as a matter of course, *regardless of the issues on appeal*. 28 U.S.C. § 1291 ("The courts of appeals … shall have jurisdiction of appeals from *all* final decisions of the district courts[.]") (emphasis added). Where parties litigate federal and state law claims but appeal only state law issues, federal jurisdiction continues. As in an appeal, the parties in a post-arbitration petition remain engaged in a single, continuous controversy for jurisdictional purposes. *See Smith* v. *Tele-Town Hall, LLC*, 798 F. Supp. 2d 748, 756 (E.D. Va. 2011) ("When a party moves to confirm, vacate, or modify an arbitration award, the controversy in issue is not simply the arbitration award but also the underlying substantive claims. Ignoring the underlying claims and focusing instead solely on the arbitration award divorces the judicial process from the arbitration process in a manner inconsistent with the FAA.").

While the appeal analogy fits, the analogy employed by Petitioner (at Br. 21-23) and the Seventh Circuit's *Magruder* decision—settlement disputes—does not. Where, for example, parties have a federal law dispute and settle it, a subsequent action for breach of the settlement does *not* generally arise under federal law. *See* 818 F.3d at 288 (citing *Kokkonen* v. *Guardian*

*Life Ins. Co.*, 511 U.S. 375 (1994)). Such a dispute over the performance of a settlement agreement is a classic breach of contract case. It is an independent action arising under state law—a wholly separate controversy—that does not require any review whatsoever of any decision on the underlying, settled federal claims.

*Second*, and by contrast, where the parties' underlying controversy was based on federal claims, the adjudication of a post-arbitration petition will as a practical matter almost necessarily implicate the resolution of federal law questions. Many post-arbitration enforcement petitions raise substantive federal law questions because petitioners seek to vacate for substantive legal error, claiming that the arbitrator acted in "manifest disregard of the law." *See, e.g.*, *Comedy Club, Inc.* v. *Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009); *Wonderland Greyhound Park, Inc.* v. *Autotote Sys., Inc.*, 274 F.3d 34, 35 (1st Cir. 2001); *see also* 9 U.S.C. § 10(a)(4).[8] As the First Circuit has explained, manifest disregard arguments assert that "arbitrators knew the law and explicitly disregarded it." *Advest, Inc.* v.

[8] This Court has cast doubt on, but not formally abrogated, its "manifest disregard of the law" jurisprudence. *See Stolt-Nielson S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 n.3 (2010) ("We do not decide whether 'manifest disregard' survives our decision in *Hall Street Associates, LLC* v. *Mattel, Inc.*, 552 U.S. 576, 585 (2008), as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10."). In the absence of a definitive ruling on that point, petitioners seeking vacatur often continue to make such arguments. *E.g. Weiss* v. *Sallie Mae, Inc.*, 939 F.3d 105, 109 (2d Cir. 2019) (noting this Court's precedent renders "unclear" whether the "'manifest disregard' paradigm constitutes an independent framework for judicial review," but that the Second Circuit continues to apply that framework "for vacating arbitration awards" (citation and quotation omitted)).

*McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990). Thus, a post-arbitration petition raising a claim of "manifest disregard" literally *requires* the district court to (re)consider the federal claims brought in an arbitration. *See, e.g.*, *Bangor Gas Co.* v. *H.Q. Energy Servs. (U.S.), Inc.*, 846 F. Supp. 2d 298, 304 (D. Me.) (considering whether an arbitral panel acted in manifest disregard of FERC rules when issuing its final award), *aff'd*, 695 F.3d 181 (1st Cir. 2012).[9]

Enforcement petitions may raise federal law issues in other ways, too. For example, the FAA permits a district court to grant a petition to vacate an award when there is "misbehavior by which the rights of any party have been prejudiced." 9 U.S.C. § 10(a)(3). A district court considering such a petition to vacate must necessarily consider what "rights" a party has—including any rights created by federal law.[10] That is particularly salient in FINRA arbitrations like this one: FINRA is a creature of federal statute, *see infra* p. 20, and the parties' *procedural* rights (as well as the substantive rights that they litigated) may ultimately flow from federal law. *Cf. Kashner Davidson Sec. Corp.* v.

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[9] *See also, e.g.*, *Priority One Servs., Inc.* v. *W & T Travel Servs., LLC*, 825 F. Supp. 2d 43, 51 (D.D.C. 2011) (considering whether arbitral panel exceeded powers in refusing to apply federal law); *In re Petrie* v. *Clark Moving & Storage, Inc.*, No. 09-cv-06495, 2010 WL 1965801, at *5 (W.D.N.Y. May 17, 2010) (considering whether arbitral panel misapplied the Carmack Amendment).

[10] The FAA also permits district courts to vacate awards when arbitrators "refus[e] to hear evidence pertinent and material to the controversy." 9 U.S.C. § 10(a)(3). Considering whether evidence was "pertinent and material" to an underlying "controversy"—which, here, is a controversy involving federal claims—unavoidably requires a district court to consider questions of federal law.

*Mscisz*, 531 F.3d 68, 75, 79 (1st Cir. 2008) (considering whether arbitral panel ignored NASD rules when issuing final award); *Dennis* v. *Wachovia Sec., LLC*, 429 F. Supp. 2d 281 (D. Mass. 2006) (similar).[11] Indeed, the suggestion that FAA enforcement proceedings do not *allow* for the consideration of federal law issues where such issues formed the arbitral dispute is flatly inconsistent with this Court's understanding of FAA enforcement. *See Shearson/Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 232 (1987) (post-arbitration judicial review can "ensure that arbitrators comply with the requirements" of federal securities law); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985) (upholding arbitration agreement in part because "the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed").[12]

### C. Where Parties Arbitrate Federal Issues, Federal Jurisdiction Over Post-Arbitration Enforcement Is Consistent With The FAA's Policy Goals And With Federal Interests

The look-through approach applied by the Fifth Circuit in this case advances the FAA's basic policy

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[11] While the violation of FINRA's rules may be relevant to determining whether an arbitral award should be confirmed or vacated pursuant to one of the enumerated bases under the FAA, the violation of FINRA's rules, standing alone, is not a basis for vacating an arbitral award.

[12] These arguments apply equally to petitions to confirm because such petitions are the mirror image of petitions to vacate or modify—confirmation "must" be granted unless the criteria for vacating or modifying are met, 9 U.S.C. § 9.

goals and provides clear rules and appropriate boundaries for federal courts in FAA enforcement proceedings.

*First*, the look-through approach serves the core purpose of the FAA. While the FAA does not itself confer jurisdiction, it represents a clear federal policy in favor of arbitration. *E.g.*, *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984). For whatever reason, parties like Petitioner here seem to think that they will be able to avoid the FAA's deferential enforcement petition review—and the results of the arbitrations they bargained for—in state courts. Indeed, their preference for state courts reveals an implicit assumption that the states will offer varying degrees of deference from which petitioners may then choose. But the notion that *any* court, state or federal, might *dishonor* the results of arbitrations is precisely the concern that motivated the FAA's passage in the first place. *See, e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (FAA's policy goals apply to state as well as federal courts).

Whether or not a particular forum is more favorable to a given petitioner (or more likely to upend the results of an arbitration), the negative effects that flow from that perception—gamesmanship, forum shopping, and associated collateral litigation—are inconsistent with the FAA's policy in favor of expedient, streamlined proceedings. *See Concepcion*, 563 U.S. at 344 ("overarching purpose" of the FAA is to "ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings"); *see also Hutson*, 229 F.3d at 329 (the "purpose of arbitration in large part is to have simplified, expedited proceedings and courts should be reluctant to adopt rules which interfere with the accomplishment of those

purposes"); *cf. Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484-485 (1989) (arbitral rights should not be construed to allow "litigants … manipulating their allegations" to escape one forum for another). A clear jurisdictional rule that discourages forum shopping serves the FAA's basic goal.

*Second*, the look-through approach promotes judicial efficiency. As *Vaden* recognized, the look-through approach ensures that parties will not file duplicative lawsuits to manufacture federal jurisdiction. 556 U.S. at 65; *see also supra* p. 5. And by applying a single, consistent rule for jurisdictional analysis for all FAA petitions—one that in turn draws upon the familiar standards governing whether a federal claim has been pleaded under 28 U.S.C. § 1331—look-through supports uniformity and administrability. *See Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 275 (1995) (interpreting FAA to avoid "unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it"); *Pershing, LLC* v. *Kiebach*, 819 F.3d 179, 182-183 (5th Cir. 2016) (rejecting multiple jurisdictional tests for FAA); *cf. Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562, 1574 (2016) (interpretation of statute that was "in line with our § 1331 caselaw also promotes 'administrative simplicity[, which] is a major virtue in a jurisdictional statute'" (quoting *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010))); *Rodriguez de Quijas*, 490 U.S. at 484-485 (advocating "harmonious" construction of statutes in relation to arbitral rights).

*Third*, the look-through approach provides a proper yet limited role for federal courts under the FAA. On the one hand, many arbitrations involve purely state law claims. In such cases, the look-through approach will generally require that enforcement proceedings be

brought in state court, and state courts will continue to "have a prominent role to play as enforcers of agreements to arbitrate." *Vaden*, 556 U.S. at 59. At the same time, the look-through approach also respects the federal interest in ensuring that disputes centered on federal law can be heard in a federal judicial forum. In cases like this one, the parties have arbitrated federal claims giving rise to federal jurisdiction, including alleged violations of Title VII and the Equal Pay Act, and multiple violations of SEC regulations (over which federal courts exercise *exclusive* jurisdiction, *see Merrill Lynch*, 136 S. Ct. 1562). Petitioner's desired rule would divest federal courts of subject matter jurisdiction over FAA post-arbitration petitions even where, like here, the core of the parties' underlying dispute involved federal laws, and despite the federal nature of the FINRA arbitral forum.[13]

*Fourth*, the look-through approach is fair to all parties. Under that approach, arbitral claimants remain in full control of which claims they choose to arbitrate, and thus whether federal jurisdiction exists. If a claimant is (for some reason) concerned about the venue of post-arbitration enforcement proceedings, he or she can arbitrate only state law claims against a non-diverse defendant. But if a claimant seeks relief under federal law, and brings federal law disputes to arbitration, he or she must be prepared to accept federal jurisdiction in subsequent enforcement proceedings.

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[13] This Court has endorsed enforcing arbitration agreements for claims arising under federal securities laws. *See, e.g.*, *Rodriguez de Quijas*, 490 U.S. at 480; *McMahon*, 482 U.S. at 233.

## CONCLUSION

This Court should apply the "look-through" approach to analyzing federal subject matter jurisdiction for post-arbitration FAA petitions.

Respectfully submitted.

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