FEDERAL QUESTION JURISDICTION AND THE FEDERAL ARBITRATION ACT

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The Federal Arbitration Act ("FAA") gives signatories to an arbitration agreement the right to have that agreement specifically enforced. The FAA does not, however, confer federal subject matter jurisdiction. Absent federal jurisdiction, a party seeking enforcement under the FAA must sue in state court. State courts, however, are far more likely than federal courts to use state contract law doctrines to avoid enforcing arbitration agreements. This has led parties seeking enforcement to look for other ways into federal court.

Some federal courts have found jurisdiction over enforcement actions when the underlying dispute involves a federal question, such as when an employer is seeking to enforce an arbitration agreement against an employee who has sued for employment discrimination under Title VII. These courts reason that the text and history of the FAA require courts to "look through" the dispute about enforceability to the underlying dispute. Other courts, however, have concluded that such a "look through" is inconsistent with the text and history of the FAA and with the well-pleaded complaint rule.

Imre Szalai published an excellent article entitled The Federal Arbitration Act and the Jurisdiction of the Federal Courts *on this issue in 2007, in which he argued that the courts should adopt the "look through" approach. We agree. Our Article nonetheless makes a unique contribution to the scholarly literature in three ways. First, our Article explains that the difficulty of choosing one approach over the other is exacerbated because the same interpretive tools can be marshaled in favor of each approach, and because the arguments made using each interpretive tool are not mutually exclusive.*

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> *Second, our Article argues that the "look-through" approach is most consistent with the strong policy favoring arbitration that has been espoused by the Supreme Court for the last two decades. Third, because a very large number of federal circuits are evenly divided on this issue, it is important for courts to know that there is a scholarly consensus.*

INTRODUCTION

Two parties enter into a pre-dispute arbitration agreement. A dispute involving a federal question arises. One party seeks to enforce the arbitration agreement; the other party refuses to comply with it. The party refusing to comply with the arbitration agreement sues in state court. The other party claims that an arbitration agreement exists and asks the court to compel the parties to arbitrate the dispute. If the party seeking to enforce the arbitration agreement files a petition in federal court to compel arbitration and neither diversity nor admiralty jurisdiction are present, many courts will dismiss the petition even though federal subject matter jurisdiction may be present (i.e., the underlying dispute involves a federal question).[1] At this juncture, the threshold issue of jurisdiction arises.

Several federal circuit courts have adopted a narrow approach to this scenario.[2] This approach, commonly referred to as the *Westmoreland* approach, holds that, for a district court to have federal question jurisdiction over a suit compelling arbitration, the federal jurisdiction must be evident on the face of the arbitration petition itself.[3] If the court adopts this approach and refuses to "look through" the petition to the underlying dispute to be arbitrated, which involves a federal question, the party wishing to arbitrate will not be able to invoke the Federal Arbitration Act[4] in federal court to enforce the arbitration agreement, so federal jurisdiction generally will exist only if the parties are diverse.

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1. *See* Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319, 360–61 (2007).

2. *See* Westmoreland Capital Corp. v. Findlay, 100 F.3d 263, 268 (2d Cir. 1996); *see* Szalai, *supra* note 1, at 361 n.195.

3. *See* Discover Bank v. Vaden, 396 F.3d 366, 368 (4th Cir. 2005), *cert. granted*, 128 S. Ct. 1651 (Mar. 17, 2008) (No.07-773).

4. 9 U.S.C. §§ 1–14 (2006).

On the other hand, suppose that the party resisting arbitration ignores the arbitration agreement and files a traditional complaint in federal court, rather than state court, to litigate the dispute involving the federal question. By filing the lawsuit, the party will invoke federal question jurisdiction under 28 U.S.C. § 1331. While the underlying dispute to be arbitrated is pending in federal court, the party seeking to enforce the arbitration agreement may respond to the complaint by arguing for enforcement of the arbitration agreement. Under such circumstances it is likely that the court will grant relief under the FAA even if the court follows the narrow *Westmoreland* approach.[5]

To avoid the inconsistent results of the narrow approach, other circuits have held that when a party goes to federal court seeking to compel arbitration, "the presence of a federal question in the underlying dispute is sufficient to support subject matter jurisdiction."[6] These courts reason that the language of section 4 of the FAA directs them to "look through" the motion to compel to the underlying dispute between the parties.[7] This approach requires that the issue raised in the underlying dispute, not the actual motion to compel, presents a federal question.

The FAA generally declares that arbitration agreements are "valid, irrevocable, and enforceable" and provides for federal courts' enforcement of arbitration agreements when one party has been aggrieved by another party's failure to honor the agreement.[8] However, the FAA does not create federal jurisdiction in and of itself.[9] The FAA requires that another basis for subject matter jurisdiction must exist before a party may invoke the FAA in federal court to enforce an agreement to arbitrate the underlying dispute.

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5. *See* Drexel Burnham Lambert, Inc. v. Valenzuela Bock, 696 F. Supp. 957, 959 (S.D.N.Y. 1988) ("[I]f an original action based on [federal question jurisdiction] existed, the court 'would have had ancillary power also to consider an application to compel under § 4 of the Arbitration Act.' "); Szalai, *supra* note 1, at 361 (citing Prudential-Bache Sec., Inc. v. Fitch, 966 F.2d 981, 989 (5th Cir. 1992*)* ("acknowledging jurisdiction would exist if the motion to compel arbitration had been filed in response to an already-commenced action based on the same underlying dispute").

6. *Vaden*, 396 F.3d at 367.

7. 9 U.S.C. § 4.

8. *Id.* §§ 2, 4.

9. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983).

The United States Supreme Court has granted certiorari on the issue of whether, in a section 4 suit to compel arbitration, a district court has subject matter jurisdiction of a case when the only potential basis for jurisdiction is that the underlying dispute between the parties raises a federal question.[10] The federal circuit courts are split on the issue. The Fourth and Eleventh Circuits have adopted the "look through" approach of subject matter jurisdiction and the FAA, holding that if the underlying dispute to be arbitrated raises a federal question, federal courts have jurisdiction to hear a section 4 petition to compel arbitration.[11] In contrast, the Second, Third, and Sixth Circuits have adopted a more restrictive view which refuses to recognize subject matter jurisdiction over an action to compel arbitration when the only basis for jurisdiction is a federal question raised by the underlying dispute to be arbitrated.[12] The remaining First, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits are either involved in an intra-circuit conflict or have not yet reached the issue concerning section 4 petitions.[13]

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10. *See Vaden*, 396 F.3d at 368–69. Oral argument for *Vaden v. Discover Bank* was heard by the Supreme Court on October 6, 2008. *See* Transcript of Oral Argument, Vaden v. Discover Bank, No. 07-773 (U.S. argued Oct. 6, 2008), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-773.pdf.

11. *See Vaden*, 396 F.3d at 368–69; Tamiami Partners, Ltd. v. Miccosukee Tribe, 177 F.3d 1212, 1223 n.11 (11th Cir. 1999); Transcript of Oral Argument, *supra* note 10, at 26–27 (stating "save for" requires courts to look through to the underlying dispute between the parties).

12. *See* Fox v. Faust, 239 F. App'x 715, 716–17 (3d Cir. 2007); 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); Transcript of Oral Argument, *supra* note 10, at 10 (arguing that FAA Section 4's "save for" phrase means "save for the arbitration agreement but for the doctrine of ouster").

13. *See* PCS 2000 LP v. Romulus Telecomms., Inc., 148 F.3d 32, 35 (1st Cir. 1998) ("[A] suit under the FAA either to stay or to compel arbitration must proceed in a state forum unless some independent basis for federal jurisdiction exists."); Prudential-Bache Sec., Inc. v. Fitch, 966 F.2d 981, 989 (5th Cir. 1992) (holding federal jurisdiction did not "vest" over a section 4 petition based on the federal character of the underlying claims of federal securities law violations). *But see* Rio Grande Underwriters, Inc. v. Pitts Farms, Inc., 276 F.3d 683, 685 (5th Cir. 2001) ("A party may obtain relief in federal court under the FAA only when the underlying civil action would otherwise be subject to the court's federal question or diversity jurisdiction."). *See also* Wisconsin v. Ho-Chunk Nation, 463 F.3d 655, 659 (7th Cir. 2006) ("[W]e do not look to the [defendant's] underlying complaint in arbitration, but confine our analysis to the federal claims articulated in [the plaintiff's] complaint before the district court."); Blue Cross of Cal. v. Anesthesia Care Assocs. Med. Group, 187 F.3d 1045, 1050, n.5 (9th Cir. 1999) (recognizing case law holding "the existence of a federal question in the underlying dis-

This Article presents an objective analysis of this conflict currently pending before the Supreme Court. Part I briefly addresses the background of the FAA, specifically section 4. Part II addresses the broad approach permitting federal courts to "look through" the complaint for existence of a federal question as adopted by the Fourth Circuit in *Discover Bank v. Vaden*,[14] and the narrow approach which requires a federal question be present on the face of the underlying complaint as described by the Second Circuit in *Westmoreland Capital Corp. v. Findlay*.[15] Part III analyzes each of the arguments presented for the two conflicting approaches. Part IV explains that the difficulty of choosing one approach over the other is exacerbated because the same interpretive tools can be marshaled in favor of each approach and because the arguments made using each interpretive tool are not mutually exclusive. Part V then weighs the strongest arguments favoring each side of the conflict and determines that the arguments favoring the *Vaden* approach are stronger and that federal courts therefore should "look through" the arbitration dispute to the underlying dispute to ascertain jurisdiction.

I. BACKGROUND OF THE FEDERAL ARBITRATION ACT

The FAA, enacted in 1925 as the United States Arbitration Act,[16] a portion of which was re-codified in 1947,[17] provides that arbitration agreements are "valid, irrevocable, and en-

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pute is not sufficient to create subject matter jurisdiction over a petition to compel arbitration under [Section] 4" and declining to address the issue not raised by the parties). *But see* Carter v. Health Net of Cal., Inc., 374 F.3d 830, 836 (9th Cir. 2004) (noting a "clear jurisdictional principle" has emerged from cases regarding the presence of federal questions in an underlying dispute such that they are "insufficient to provide an independent basis for federal question jurisdiction to review an arbitration award under the FAA"); Kasap v. Folger Nolan Fleming & Douglas, Inc., 166 F.3d 1243, 1246–47 (D.C. Cir. 1999) (citing *Westmoreland* with approval) (noting Supreme Court's holding that section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute and further noting the weight of authority's rejection of that statement); *In re* Cintas Corp. Overtime Pay Arbitration Litig., No. M:06-cv-01781-SBA, 2007 U.S. Dist. LEXIS 35591, at *5 (N.D. Cal. 2007) (granting respondents' motion to certify for interlocutory appeal).

14. *Vaden*, 396 F.3d at 367, 373.
15. *See Findlay*, 100 F.3d at 267–70.
16. United States Arbitration Act, ch. 213, 43 Stat. 883 (1925).
17. 9 U.S.C. §§ 1–14 (2006).

forceable,"[18] and affords protection by a United States district court for an order directing that the arbitration proceed in the "manner provided for in such agreement."[19] The FAA is currently divided into three chapters: Chapter 1, entitled "General Provisions," covers domestic arbitration; Chapters 2 and 3 cover international arbitration.[20] The prominent statutory provisions governing enforceability of arbitration agreements under Chapter 1 are sections 2, 3, and 4.[21]

Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[22]

Section 2 of the Act specifically allows federal court enforcement of agreements to arbitrate future disputes arising in maritime transactions as well as in disputes arising from interstate or foreign commerce.[23]

The FAA declares arbitration agreements to be enforceable and affords two procedural mechanisms for enforcing an arbitration agreement covered by section 2: (i) "a stay of litigation in any case raising a dispute referable to arbitration," and (ii) "an affirmative order to engage in arbitration."[24]

Section 3 of the Act provides, in pertinent part:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied

18. *Id.* § 2.
19. *Id.* § 4.
20. *See id.* §§ 201–208, 301–307.
21. *See* Szalai, *supra* note 1, at 326.
22. *See* 9 U.S.C. § 2.
23. *See id.*; Southland Corp. v. Keating, 465 U.S. 1, 10–11 (1984).
24. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22 (1983) (citing 9 U.S.C. §§ 3, 4).

> that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.[25]

This section "authorizes a federal court to stay proceedings pending arbitration not only when the arbitration agreement is validated by section 2 of the Arbitration Act but also when the agreement to arbitrate is validated by applicable state law."[26]

Section 4, over which there exists a current split between the circuits, provides, in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under [T]itle 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.[27]

Under section 4, any party to such an agreement may seek to compel any dispute that falls within the scope of the agreement upon showing that the other party has "fail[ed], neglect[ed], or refus[ed]"[28] to participate in arbitration of it.[29]

The Supreme Court has described the FAA as an "anomaly" because it "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction."[30] Therefore, petitions to compel arbitration

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25. 9 U.S.C. § 3.

26. *See* U.S. *ex rel.* Capolino Sons, Inc. v. Elec. & Missile Facilities, Inc., 364 F.2d 705, 709 (2d Cir. 1966).

27. 9 U.S.C. § 4.

28. *Id.*

29. *See* Cmty. State Bank v. Strong, 485 F.3d 597, 606 (11th Cir. 2007) (citing 9 U.S.C. § 4), *vacated, reh'g en banc granted*, 508 F.3d 576 (11th Cir. Sept. 10, 2007).

30. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983). " 'In a given case, a federal district court must have at least one of three types of subject matter jurisdiction: (1) jurisdiction under a specific statutory grant; (2) federal question jurisdiction pursuant to 28 U.S.C. § 1331; or (3) diversity jurisdiction pursuant to 28 U.S.C. § 1332(a).' " *Cmty. State Bank*, 485 F.3d at

brought pursuant to section 4 must allege an independent ground of jurisdiction before the party may appeal to the FAA in federal court.[31] However, this does not mean that an arbitration agreement is unenforceable if a petition fails to allege an independent ground for federal jurisdiction. Rather, a party seeking to enforce an agreement to arbitrate under the FAA can pursue a remedy in state court under the FAA if it cannot independently establish federal jurisdiction.[32]

In other words, the FAA requires state courts to enforce arbitration clauses in spite of state law or policy to the contrary.[33] Thus, if a state statute invalidated arbitration agreements within the scope of the FAA, that statute would violate the Supremacy Clause of the United States Constitution.[34] Although technically it should not matter in which court a party brings a motion to compel arbitration, in application it does matter because state courts often act protectively over contract law and find arbitration agreements unenforceable on grounds of unconscionability.[35] Such courts will deny a motion to compel arbitration.[36]

As a result, an inconsistency has arisen among the circuits that refuse to hold that a federal question present in an underlying dispute is sufficient to establish subject matter jurisdiction over a motion to compel arbitration under section 4 of the FAA. This inconsistency has caused, and will continue to cause, extensive differences in the outcomes of similar and sometimes identical issues. The two approaches described above, and adopted by five of the circuits as described below, detail the analysis and reasoning established by courts in determining whether to permit federal question jurisdiction in the underlying dispute as an adequate basis to support a motion to compel arbitration under section 4 of the FAA.

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604 (quoting Baltin v. Alaron Trading Corp., 128 F.3d 1466, 1469 (11th Cir. 1997)).

31. *See* Commercial Metals Co. v. Balfour, Guthrie, & Co., 577 F.2d 264, 268 (5th Cir. 1978).

32. *See id*. at 269.

33. *See* Southland Corp. v. Keating, 465 U.S. 1, 11–16 (1984).

34. *See* Perry v. Thomas, 482 U.S. 483, 490–91 (1987); *Southland*, 465 U.S. 1, 10 (citing U.S. CONST. art. VI, cl. 2).

35. *See, e.g.*, Armendariz v. Found. Health Psychare Servs., Inc., 6 P.3d 669, 689–90 (Cal. 2000).

36. *See* Scott J. Burnham, *The War Against Arbitration in Montana*, 66 MONT. L. REV. 139, 169–72 (2005).

II. CIRCUIT SPLIT: DOES THE PRESENCE OF A FEDERAL QUESTION IN THE UNDERLYING SUIT CONFER SUBJECT MATTER JURISDICTION ON FEDERAL DISTRICT COURT PURSUANT TO A SECTION 4 MOTION TO COMPEL ARBITRATION?

The federal courts are split on the process by which a federal court may be awarded subject matter jurisdiction over an arbitration petition. To determine whether a federal district court has subject matter jurisdiction pursuant to a section 4 motion to compel arbitration based on the presence of a federal question in the underlying dispute between the parties, some courts "look through" the arbitration petition for the existence of a federal question in the initial dispute. Others find such approach forbidden by the well-pleaded complaint rule.

First, this Part addresses the broad "look through" approach adopted by the Fourth and Eleventh Circuits, and describes the arguments in favor of this approach.[37] Second, Part II details the approach followed by the Second, Third, and Sixth Circuits that, based on the "well-pleaded complaint" rule, prohibit the method of "looking through" the complaint to the underlying dispute between the parties.[38] These courts base this prohibition on the lack of federal question jurisdiction conferred on federal district courts pursuant to the language and interpretation of section 4, and on the non-existence of an exception for section 4 petitions in the well-pleaded complaint rule.

A. District Courts Should "Look Through" the Arbitration Petition When a Federal Question Is Present in the Underlying Dispute

The broad approach adopted formally by the Fourth and Eleventh Circuits, often deemed the "*Vaden* approach," permits a federal court to "look through" the face of a motion to compel arbitration. This enables the court to determine whether a federal question is present in the underlying dispute in order to

37. *See* Discover Bank v. Vaden, 396 F.3d 366, 369 (4th Cir. 2005), *cert. granted*, 128 S. Ct. 1651 (Mar. 17, 2008) (No.07-773).

38. *See* Fox v. Faust, 239 F. App'x 715, 716–17 (3d Cir. 2007); 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).

permit the federal court to compel arbitration under the FAA.[39] In addition to diversity jurisdiction under 9 U.S.C. § 1332 and admiralty jurisdiction, the Fourth Circuit has held that that when a party goes to federal court seeking to compel arbitration, the presence of a federal question in the underlying dispute is sufficient to support subject matter jurisdiction.[40]

In *Vaden,* Discover Financial Services ("Discover") sued Betty Vaden in state court for her unpaid credit card balance.[41] When Mrs. Vaden instituted several class action counterclaims against Discover based on state law, Discover sued in federal district court under section 4 of the FAA to compel Mrs. Vaden to submit her counterclaims to arbitration by arguing the state law claims were completely preempted by the Federal Deposit Insurance Act.[42] The district court ordered arbitration.[43]

The Fourth Circuit initially noted that both parties recognized that the FAA, in and of itself, does not constitute a federal question; such belief that the FAA confers federal question jurisdiction is inconsistent with the language of the statute and has been rejected by the Supreme Court.[44] Nevertheless, the court held that there were three reasons permitting the district court to "look through" the arbitration request to determine whether "the overall controversy between the parties is grounded in federal law."[45] First, the plain language of the statutory text requires courts to consider jurisdiction as it arises out of the whole controversy between the parties.[46] Second, similar to the Declaratory Judgment Act,[47] the real controversy in federal question cases is "whether a federal action prompted the motion to compel arbitration."[48] Third, to hold otherwise would greatly restrict the ability of federal courts to hear cases under section 4 of the FAA.[49]

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39. *See Vaden*, 396 F.3d at 367.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 368.
44. *Id.* (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983)).
45. *Vaden*, 396 F.3d at 369–70 (citing Tamiami Partners, Ltd. v. Miccosukee Tribe, 177 F.3d 1212, 1223 n.11 (11th Cir. 1999)).
46. *Id.* at 369.
47. *See* 28 U.S.C. § 2201 (2000) (providing a procedural mechanism for potential federal civil defendants to obtain judicial resolution of present controversies that otherwise would linger at the discretion of potential plaintiffs).
48. *Vaden*, 396 F.3d at 371.
49. *See id*. at 372.

1. The Plain Language of Section 4 of the FAA

The Fourth Circuit held that " 'where the statute's language is plain, the sole function of the courts is to enforce it according to its terms.' "[50] The court emphasized that section 4 of the FAA provides, in pertinent part:

> A party . . . may petition any United States district court which, save for such agreement, would have jurisdiction under [T]itle 28, . . . of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.[51]

First, the court noted that the phrase "save for such agreement" must be given its "common and ordinary meaning." "The common understanding of the phrase 'save for' means 'but for' or 'notwithstanding.' "[52] Therefore, when used under these circumstances, the phrase "save for such agreement" awards jurisdiction to the district court even if there never existed any agreement to arbitrate.[53] The court read this phrase as an "instruction to set aside the arbitration agreement and then consider the grounds for federal jurisdiction independently."[54]

Second, the court found significant Congress's decision to reference "Title 28" generally rather than dividing the phrase into its component parts.[55] Because Congress could have specifically referred to either sections 1331 or 1332, and did not do so, its decision to remain silent is entitled to deference and is therefore controlling.[56]

Third, the court interpreted the phrase "controversy between the parties." The court noted that the natural reading of this phrase references the "overall substantive conflict between the parties[,]" not solely the "discrete dispute" of whether a valid arbitration agreement is present.[57] "Litigants do not

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50. *Id.* at 369 (quoting U.S. *ex rel.* Wilson v. Graham County Soil & Water Conservation Dist., 367 F.3d 245, 247 (4th Cir. 2004)).

51. 9 U.S.C. § 4 (2006) (emphasis added).

52. *See* Vaden, 396 F.3d at 369.

53. *See id.*

54. *Id.*

55. *Id.* at 370.

56. *Id.* ("Siphoning off federal question jurisdiction from Title 28 would rewrite the statute.").

57. *Id.*

come to court solely to resolve the collateral issue of whether or not they have an agreement to arbitrate."[58] Instead, the question of an arbitration agreement's existence arises because of an underlying dispute or "controversy" between parties.[59] The court held that this underlying "controversy" is the one that "must arise under federal law."[60]

2. Whether a Federal Action Prompted the Motion to Compel Arbitration

Vaden also recognized that, pursuant to the well-pleaded complaint rule,[61] " '[t]he usual rules for determining federal question jurisdiction provide that a complaint will not avail a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense.' "[62] The Fourth Circuit acknowledged that other circuits have held that if the FAA is construed to provide a federal forum whenever the underlying dispute involves a federal question, the FAA would overturn the well-pleaded complaint rule.[63] The Fourth Circuit, however, rejected this analysis, pointing out that the Supreme Court has applied the well-pleaded complaint rule more liberally in connection with the Declaratory Judgment Act.[64]

Under the Declaratory Judgment Act, "a party which traditionally would be a defendant can bring a preemptive suit in federal court, thus accelerating the claim against it . . . [t]his creates a wrinkle in the traditional well-pleaded complaint rule."[65] The Supreme Court resolved this issue by permitting federal courts to hypothesize what a well-pleaded complaint in a traditional case would look like: (1) " 'if, but for the availabil-

58. *Id.*
59. *Vaden*, 396 F.3d at 370.
60. *Id.*
61. The well-pleaded complaint rule provides that a court's jurisdiction must be determined from the plaintiff's complaint, without regard to superfluous references to federal law in the complaint or to potential defenses. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908).
62. *Vaden*, 396 F.3d at 371 (quoting Prudential-Bache Sec., Inc. v. Fitch, 966 F.2d 981, 988 (5th Cir. 1992)).
63. *Id.* (citing Drexel Burnham Lambert, Inc. v. Valenzuela Bock, 696 F. Supp. 957, 963 (S.D.N.Y. 1988)).
64. *See id.* (citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 16 (1982)).
65. *Id.*

ity of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking' "; and (2) federal courts can take " 'original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant [had] brought a coercive action to enforce its rights, that suit would necessarily present a federal question.' "[66]

The Fourth Circuit held that, similar to these prior decisions where the "real controversy" between the parties concerned a dispute regarding a federal question that prompted a declaratory judgment action, the "real controversy" in cases involving section 4 of the FAA is whether a federal action provoked the motion to compel arbitration.[67] By looking to the dispute underlying an arbitration petition, as is required by the text of section 4, the court is not "changing the rules" of federal question jurisdiction, but is applying the rules in the context of the FAA's procedural posture, as was done by the Supreme Court with the Declaratory Judgment Act.[68]

3. Federal Courts' Ability to Adjudicate Cases Under Section 4

The Fourth Circuit recognized that the *Westmoreland* court admitted that its narrow approach greatly restricts the ability of federal courts to hear cases under section 4 of the FAA; a federal court could never hear a suit to compel arbitration unless the parties are diverse.[69] The Fourth Circuit noted that because there exists a " 'congressional declaration of a liberal federal policy favoring arbitration agreements' " and the FAA embodies a federal policy favoring arbitration, " 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.' "[70] Further, if courts were able to refuse subject matter jurisdiction when the underlying dispute involved a federal question, the real controversy between the parties could not reach federal court even if the plaintiff's

66. *Id.* (quoting *Franchise Tax Bd.*, 463 U.S. at 16, 19).
67. *See id.*
68. *See id.* at 372 (citing *Franchise Tax Bd.*, 463 U.S. at 16).
69. *Id.* (citing Westmoreland Capital Corp.v. Findlay, 100 F.3d 263, 268 (2d Cir. 1996)).
70. *Id.* (quoting Drews Distrib.,Inc. v. Silicon Gaming, Inc., 245 F.3d 347, 350 (4th Cir. 2001)).

complaint presents a federal question.[71] Additionally, even though Congress did not intend to create federal jurisdiction with the FAA, Congress did not mean to unjustifiably restrict federal jurisdiction either.[72] Ultimately, in reliance on prior Supreme Court precedent and its textual interpretation of the statute, *Vaden* permitted district courts to "look through" the arbitration request to determine whether the overall controversy between the parties is grounded in federal law.[73]

As discussed in Part II.C, the United States Supreme Court granted certiorari in *Vaden*.[74] The Supreme Court had not yet issued a decision as of the date this article went to press.

B. The "Well-Pleaded Complaint" Rule Prohibits "Looking Through" the Section 4 Petition to the Underlying Dispute To Be Arbitrated

In contrast to the broad approach adopted by the Fourth and Eleventh Circuits, the Second, Third, and Sixth Circuits refuse to recognize subject matter jurisdiction when the only basis for jurisdiction is a federal question in the underlying dispute.[75] This view, often called the *Westmoreland* approach, requires either diversity or admiralty jurisdiction in order to meet the requirements of subject matter jurisdiction under a section 4 petition.[76]

In *Westmoreland Capital Corp. v. Findlay*, the Second Circuit faced the issue of whether a petition under the FAA to stay arbitration of claims that arose, in part, under the Securities Exchange Act of 1934[77] was properly dismissed for lack of subject matter jurisdiction.[78] Petitioners, Westmoreland and its

71. *Id.*
72. *Id.*
73. *See id.* at 369 (citing Tamiami Partners, Ltd. v. Miccosukee Tribe, 177 F.3d 1212, 1223 (11th Cir. 1999)).
74. Discover Bank v. Vaden, 396 F.3d 366, 368-69 (4th Cir. 2005), *cert. granted*, 128 S. Ct. 1651 (Mar. 17, 2008) (No.07-773).
75. *See* Westmoreland Capital Corp. v. Findlay, 100 F.3d 263, 268 (2d Cir. 1996); Smith Barney, Inc. v. Sarver, 108 F.3d 92, 94 (6th Cir. 1997).
76. *See Westmoreland*, 100 F.3d at 268 ("A petition under FAA § 4 to compel or stay arbitration must be brought in state court unless some other basis for federal jurisdiction exists, such as diversity of citizenship or assertion of a claim in admiralty.").
77. 15 U.S.C. § 78 (2006).
78. *See Westmoreland*, 100 F.3d at 264.

owners, Joseph and Mary Jayson, filed a petition pursuant to section 4 of the FAA seeking an order to preliminarily and permanently enjoin respondents from pursuing a joint arbitration proceeding with the National Association of Securities Dealers, Inc. ("NASD").[79] Respondents, George Findlay and John Joyce, were individuals who allegedly received fraudulent financial planning advice from an employee of Westmoreland, which led them to invest in worthless stock.[80] Rather than filing a simultaneous motion to dismiss Westmoreland's claim for lack of subject matter jurisdiction, respondents filed a simultaneous motion to dismiss the petition under Fed. R. Civ. P. 12(b)(6) on grounds that the FAA did not authorize the court to stay arbitration and that the court lacked jurisdiction to enjoin an arbitration proceeding on statute of limitation grounds under Rule 15 of the NASD Code.[81] The district court dismissed the petition.

On appeal, the Second Circuit noted that it had jurisdiction pursuant to 9 U.S.C. § 4 and 29 U.S.C. § 1331 because the claims alleged in the underlying suit arose, at least in part, under the Securities Exchange Act of 1934.[82] The court affirmed dismissal of the petition, reasoning that federal question jurisdiction was lacking and petitioners advanced no other basis for the exercise of subject matter jurisdiction.[83] The court held that the petitioner's argument to the contrary failed for two reasons: first, it was based on a misinterpretation of section 4 of the FAA; second, it would require the court "to overturn the well-established rule that federal question jurisdiction must be determined based on the face of a 'well-pleaded complaint.' "[84]

1. The Language and Interpretation of Section 4 Do Not Confer Federal Question Jurisdiction on District Courts

The Second Circuit held that neither the text of the FAA nor its interpretations grant federal question jurisdiction to

79. *Id.* at 265.
80. *See id.* at 264.
81. *Id.* at 265.
82. *Id.* at 267.
83. *Id.* at 266.
84. *Id.* at 267 (citations omitted).

district courts.[85] Initially, the Second Circuit noted that although the text of section 4 appears to confer jurisdiction on federal courts to issue motions to compel arbitration where the court would have jurisdiction over the underlying claims, many courts have concluded that this is not sufficient to compel federal question jurisdiction even though such jurisdiction would be present had the claim originally been brought in federal court.[86]

Westmoreland relied on Judge Leval's opinion in *Drexel Burnham Lambert, Inc. v. Valenzuela Bock*, which held that even though underlying claims are based on federal law, the text of section 4 does not confer federal question jurisdiction " 'where the claim of federal jurisdiction is not based on the petition itself, but . . . on the federal character of the underlying dispute [in arbitration].' "[87] Rather, the language of section 4 should "be read as a response to the antiquated common law principle that an agreement to arbitrate would oust the federal courts of jurisdiction."[88] The Second Circuit relied on this commentary to section 4, which provides that a court otherwise vested of jurisdiction of the lawsuit would not be divested by the arbitration agreement and may thus proceed to order arbitration, contrary to prior precedent.[89]

Second, *Westmoreland* noted that sections 7, 9, 10, and 11 of FAA, which refer to "United States court," suggest bestowal of jurisdiction, but have not been interpreted to confer jurisdiction on the federal courts.[90] The court reasoned that if the language of section 4 "were interpreted to give federal courts jurisdiction to compel arbitration whenever the underlying claim involves a federal question," an odd distinction would be created: "a petition to *compel* arbitration could be brought in federal court, but a petition under . . . [sections] 9 or 10 to *confirm*

85. *Id.*

86. *See id*. (citing Prudential-Bache Sec., Inc. v. Fitch, 966 F.2d 981, 986–88 (5th Cir. 1992); Kaplan v. Dean Witter Reynolds, Inc., 896 F. Supp. 1219, 1219–20 (S.D. Fla. 1995); Giangrande v. Shearson Lehman/E.F. Hutton, 803 F. Supp. 464, 469–73 (D. Mass. 1992); In re Prudential Sec., Inc., 795 F. Supp. 657, 660–62 (S.D.N.Y. 1992); Klein v. Drexel Burnham Lambert, Inc., 737 F. Supp. 319, 322-24 (E.D. Pa. 1990); Drexel Burnham Lambert, Inc. v. Valenzuela Bock, 696 F. Supp. 957 (S.D.N.Y. 1988)).

87. *See Westmoreland,* 100 F.3d at 267 (quoting *Valenzuela Bock*, 696 F. Supp. at 965).

88. *Id.* at 268 (quoting *Valenzuela Bock*, 696 F. Supp. at 961–62).

89. *Id.* at 268 n.6 (citing *Valenzuela Bock*, 696 F. Supp. at 96–62).

90. *Id.* (citing *Valenzuela Bock*, 696 F. Supp. at 960–61).

or *vacate* the arbitration award in the same dispute could not."[91] This unusual result would create an unintended presumption—that a federal court's interest "in determining whether the arbitration award was entered in manifest disregard of the federal law" would appear "far greater than the federal interest in seeing that the claims could be arbitrated."[92] Thus, unless some other basis for federal jurisdiction exists, a petition to compel arbitration must be brought in state court.[93]

2. The Well-Pleaded Complaint Rule Does Not Provide an Exception for Section 4 Petitions

The Second Circuit stated that it was highly unlikely that Congress intended to repeal the well-pleaded complaint rule when it adopted the predecessor statute to the current FAA in 1925 because the well-pleaded complaint rule had already been in existence for thirty-seven years when this statute was adopted.[94] In the past, when Congress has wanted to allow an exception to the well-pleaded complaint rule, it has done so expressly.[95] For example, in 1970, Congress intended to and expressly gave the United States district courts authority to hear specified arbitration cases under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[96] Therefore, because Congress has not explicitly created an exception to the well-pleaded complaint rule for arbitration petitions under section 4 of the FAA, section 4 does not overturn the ancient rule.[97]

In reliance on prior precedent and the absence of an exception to the well-established rule, the Second Circuit held that the requirements of federal question jurisdiction were not satisfied.[98] The court ruled that the rights of the parties under the Exchange Act (the putative federal question), would only

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91. *Id.* (emphasis added).

92. *Id.* (quoting *Valenzuela Bock*, 696 F. Supp. at 963).

93. *Id.*

94. *Id.* (citing "Act of February 12, 1925," 43 Stat. 883, ch. 213, § 1 et seq; Metcalf v. Watertown, 128 U.S. 586, 588–89 (1888)).

95. *Id.* (citing 28 U.S.C. § 1442(a) (1994) ("allowing removal to federal court of civil or criminal actions filed in state court against officers of the United States"); 12 U.S.C. § 632 (1994) ("providing for original and removal jurisdiction over certain cases raising issues with respect to foreign or international banking")).

96. *Id.* at 269 (citing 9 U.S.C. §§ 203, 205 (1994)).

97. *See id.*

98. *See id.*

enter the dispute, if at all, as a defense, and therefore was not part of plaintiff's well-pleaded complaint.[99] In so ruling, the court upheld the narrow approach to the issue of federal question jurisdiction such that even when an underlying claim involves a federal question, this in and of itself is not sufficient to confer subject matter jurisdiction on a federal court.[100]

C. The Impending Supreme Court Decision in Vaden

As discussed in Part II.A, the United States Supreme Court granted certiorari in *Vaden* on March 17, 2008,[101] and held oral argument in October of the same year.[102] The Court had not yet issued its decision when this article went to press.

At oral argument, counsel for the debtors argued that looking through the arbitration issue to the underlying dispute would be "so broad as to allow parties to compel arbitration in Federal court of nearly any dispute concerning credit card debt."[103] His textual argument was that the "save for" language in the FAA section 4 means "save for [the arbitration] agreement but for the [jurisdictional] doctrine of ouster."[104] Several of the Justices, however, were skeptical:

> JUSTICE STEVENS: The text says nothing about the ouster doctrine.
> MR. ORTIZ: No. But read in its historical context, Your Honor—
> JUSTICE STEVENS: Rather than literally.
> MR. ORTIZ: Well, literally at the time it would have been understood to refer—to refer to that. . . .
> CHIEF JUSTICE ROBERTS: This is a tough—it's a tough sell.[105]

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99. *See id.* (citing Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 127–28 (1974) (per curiam) (" 'The federal questions must be disclosed upon the face of the complaint, unaided by the answer.' ")). The court also held that the counterclaim to compel arbitration under section 4 did not provide an alternative basis for federal question jurisdiction for the same reasons that the petition failed to provide for this jurisdiction. *Id.*

100. *See id.*

101. Discover Bank v. Vaden, 396 F.3d 366, 368–69 (4th Cir. 2005), *cert. granted*, 128 S. Ct. 1651 (Mar. 17, 2008) (No.07-773).

102. Transcript of Oral Argument, *supra* note 10.

103. *Id.* at 3–4.

104. *Id.* at 10.

105. *Id.* at 10–11.

Counsel for the bank argued that this was an "easy" case that could be resolved by interpreting the statute textually.[106] Again, however, several Justices were skeptical. First, if "save for" means that courts should "look through" the arbitral controversy to the underlying dispute, it may be difficult to identify the underlying dispute.[107] In the *Vaden* case itself, for example, the underlying dispute might be defined either as the state claim for the debtor's failure to pay the balance, or the federal counterclaim for the bank's alleged assessment of excessive fees. Second, if the "save for" language in section 4 requires a "look-through" in federal question cases, then presumably it would require a similar look-through in diversity cases, but ascertaining the "proper" parties for the purpose of determining whether diversity jurisdiction exists will be difficult if suit in the underlying case has not yet been brought: "JUSTICE SCALIA: It's very strange to decide federal jurisdiction on the basis of—of imagined—imagined complaints."[108]

Consistent with the analysis in Part III of this Article, it seems unlikely, from oral argument, that the Court will agree with counsel for the debtors that the "save for" language in section 4 refers to the ouster doctrine. The Court seemed more favorably inclined with the look-through approach but was uncomfortable with the prospect of federal courts having to conjure jurisdictional facts out of thin air. The Court may look for a compromise—adopting the look-through approach but finding some way to cabin it.

III. ANALYSIS OF THE CIRCUIT SPLIT

In the years prior to the enactment of the FAA in 1925, many courts would not specifically enforce arbitration agreements on the theory that agreements to arbitrate ousted these courts of jurisdiction.[109] This practice, which preceded enactment of the FAA, has caused great dissimilarity between the circuits when faced with the issue of whether a federal question present in the underlying dispute confers subject matter jurisdiction on a district court faced with a section 4 motion to com-

106. *Id*. at 26.
107. *Id*. at 37–39, 51–52.
108. *Id*. at 33; *see also id*. at 34.
109. *See* Discover Bank v. Vaden, 396 F.3d 366, 369 n.2 (4th Cir. 2005), *cert. granted*, 128 S. Ct. 1651 (Mar. 17, 2008) (No.07-773).

pel arbitration. Additionally, the Supreme Court's adoption of the well-pleaded complaint rule, though adopted prior to the statute, has contributed to the inconsistency between the circuits because the courts must face the question of whether the rule permits or prohibits looking through the section 4 petition to compel arbitration to the underlying dispute between the parties to determine the presence of a federal question.

A. Whether the Text and Legislative History of Section 4 Ousts Federal Courts of Subject Matter Jurisdiction

As noted above, 9 U.S.C. § 4 reads in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, *save for such agreement*, would have jurisdiction under *[T]itle 28*, in a civil action or in admiralty of the subject matter of a suit *arising out of the controversy between the parties*, for an order directing that such arbitration proceed in the manner provided for in such agreement.[110]

The Fourth Circuit has acknowledged the well-known principle that "where 'the statute's language is plain, the sole function of the courts is to enforce it according to its terms.' "[111]

1. "[S]ave for such agreement"

As noted above, *Vaden* held that "[t]he common understanding of the phrase, 'save for' means 'but for' or 'notwithstanding.' "[112] When interpreted this way, the phrase, "save for such agreement," could be read as an instruction to set aside the arbitration agreement and to consider the grounds for federal jurisdiction independently.[113] It has been argued that this phrase was included by Congress to respond "to an 'antiquated and arcane principal of the common law' where a claim for specific performance of an arbitration agreement would oust the

110. 9 U.S.C. § 4 (2006) (emphasis added).

111. United States *ex rel.* Wilson v. Graham County Soil & Water Conservation Dist., 367 F.3d 245, 247 (4th Cir. 2004) (quoting United States v. Ron Pair Enter., Inc., 489 U.S. 235, 241 (1989)).

112. *Vaden*, 396 F.3d at 369.

113. *Id.*

court of jurisdiction."[114] However, this argument has been found unpersuasive.[115] As the *Vaden* court noted, the authors of a respected federal arbitration treatise have explained that this theory is historically inaccurate—the "save for" language is found only in the FAA and not in any state arbitration reform acts upon which the FAA is based, and those states suffered from the same common law "ouster problem."[116] Had the "save for" language been meant to solve the ouster problem, similar language would have been found in the 1920 New York Act, the 1923 New Jersey Act, and the old UAA, all drafted by the same reformers who drafted the FAA.[117]

The Eleventh Circuit, in *Tamiami Partners, Ltd. v. Miccosukee Tribe* ("*Tamiami III*"), established the test for determining federal question jurisdiction over a section 4 petition.[118] In a footnote, the court stated:

> The Federal Arbitration Act empowers a district court to issue an order compelling arbitration if the court, "save for [the arbitration] agreement, would have jurisdiction under title 28, in a civil action . . . of the subject matter of a suit arising out of the controversy between the parties.[119]

Applying this test, the Eleventh Circuit has subsequently held "that [section] 4 directs a district court to take subject matter jurisdiction over a [section] 4 petition if it would have subject matter jurisdiction over the dispute-to-be-arbitrated."[120]

Courts supporting the argument that the phrase "save for" was a response to the antiquated ouster principal of common law have read this language differently. For example, the Sec-

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114. *See id.* at 369–70 n. 2.

115. *See, e.g.*, *id.* at 370 n.2 (citing 1 MACNEIL, SPEIDEL & STIPANOWICH, FEDERAL ARBITRATION LAW § 9.2.3 (1995)).

116. *Id.*

117. *Id.*

118. *See* Cmty. State Bank v. Strong, 485 F.3d 597, 605 (11th Cir. 2007), *vacated*, *reh'g en banc granted* 508 F.3d 576 (11th Cir. 2007) (citing Tamiami Partners, Ltd. v. Miccosukee Tribe, 177 F.3d 1212 (11th Cir. 1999)). In *Tamiami III*, the developer managing a bingo hall sued an Indian tribe in federal district court seeking a declaration that their contract be arbitrable, confirmation of an arbitration award, and compelled arbitration of other aspects of the licensing dispute. *See Cmty. State Bank*, 485 F.3d at 605. As the parties' agreement incorporated the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–21, "[t]he panel concluded that 'federal law [was] equally implicated when these claims [were] presented in the arbitration context.' " *See id.* (quoting *Tiamiami III*, 177 F.3d at 1222–23).

119. *Tiamiami III*, 177 F.3d at 1223 n.11.

120. *Vaden*, 485 F.3d at 606.

ond, Third, and Fifth Circuits, the Southern District of New York, and the Eastern District of Pennsylvania have read this "savings clause" as providing that a court "otherwise vested of jurisdiction of the suit would not be divested [of jurisdiction] by the arbitration agreement and may proceed to order arbitration, contrary to prior precedent."[121] Also, courts have held that the legislative history of the FAA makes it clear that the Act's "purpose was 'to ensure judicial enforcement of privately made agreements to arbitrate' by 'overrul[ing] the judiciary's longstanding refusal to enforce agreements to arbitrate.' "[122]

Like section 4 of the FAA, the primary substantive provision in section 2 "provides that written arbitration agreements shall be enforceable 'save upon such grounds as exist . . . for the revocation of any contract.' "[123] The Supreme Court reads "this 'savings clause' as reflecting the Act's overall purpose 'to make arbitration agreements as enforceable as other contracts, but not more so.' "[124] Judge Marcus, concurring in *Community State Bank* (an Eleventh Circuit panel decision that has since been vacated for rehearing en banc), stated that the "savings clause" of section 4 of the FAA should be read just like that of section 2 in accordance with the Act's overall purpose of overturning the judiciary's hostility to enforcing agreements to arbitrate.[125]

2. "Title 28"

Congress generally refers to "Title 28" in the text of section 4 of the FAA. However, the original version of the FAA made a general reference to the "judicial code" rather than to "Title 28," which is also present in the current version of the FAA.[126]

121. Westmoreland Capital Corp. v. Findlay, 100 F.3d 263, 268 n.6 (2d Cir. 1996) (citations omitted); Drexel Burnham Lambert, Inc. v. Valenzuela Bock, 696 F. Supp. 957, 963 (S.D.N.Y. 1988). *See also* Prudential-Bache Sec., Inc. v. Fitch, 966 F.2d 981, 988 (5th Cir. 1992) (citations omitted); Klein v. Drexel Burnham Lambert, Inc., 737 F. Supp. 319, 323 n.12 (E.D. Pa. 1990) (citations omitted); Szalai, *supra* note 1, at 332 ("A Fifth Circuit opinion agreed with *Valenzuela Bock*'s assessment of the 'save for' clause as responding to the ouster doctrine.") (quoting *Valenzuela Bock*, 696 F. Supp. at 962–63).

122. *Ctmy. State Bank*, 485 F.3d at 631 (Marcus, J., concurring) (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219–20 (1985)).

123. *Id.* (quoting 9 U.S.C § 2 (2006)).

124. *Id.* (quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967)).

125. *See id.* at 632.

126. *See* Szalai, *supra* note 1, at 356.

At the time the FAA was enacted, Congress had drafted other legislation which referred exclusively to the grant of jurisdiction found in section 24 of the judicial code.[127] Congress could have similarly limited the language of section 4 of the FAA to refer solely to a certain type of jurisdiction by parsing Title 28 into its component parts.[128] Therefore, because Congress has exercised its power to include specific grants of jurisdiction within other statutes, but chose to make a general reference to Title 28 in the FAA, deference should be given to the words present in the Act. In other words, Congress's "silence is controlling."[129]

Further, a proposed, yet rejected provision of the FAA referred exclusively to diversity jurisdiction.[130] Julius H. Cohen, a prominent attorney who participated in drafting the FAA, indicated in a brief submitted to Congress that " '[t]he Federal Courts are given jurisdiction to enforce such agreements whenever under the Judicial Code they would normally have jurisdiction of a controversy between the parties.' "[131] The legislative history of the 1954 amendments to section 4 explicitly provide 28 U.S.C. § 1331 as the only expressly cited example of a statute covered by the broad reference to Title 28 in section 4.[132] If Congress intentionally sought to preclude federal question jurisdiction as a basis for jurisdiction under a section 4 petition, it is ironic that this statute is the only statute expressly noted in the legislative history as an example of Title 28, section 4's broad coverage.[133] Therefore, Congress's general reference to "Title 28" insinuates that a party may petition a district

127. *Id.* at 350 (noting All Writs Act, Pub. L. No. 475, § 51, 36 Stat. 1087, 1101 (1911), wherein Congress drafted language referring only to diversity jurisdiction).

128. *See id.* at 351; Discover Bank v. Vaden, 396 F.3d 366, 370 (4th Cir. 2005), *cert. granted*, 128 S. Ct. 1651 (March 17, 2008) (citing 42 U.S.C. §9613(h) (2000); 22 U.S.C. §6082(c)(1) (2000)).

129. *Vaden*, 396 F.3d at 370 (quoting *In re* Griffith, 206 F.3d 1389, 1394 (11th Cir. 2000)).

130. *See* Szalai, *supra* note 1, at 339 n.111, 342 n.120 (citing *Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomm. of the Comm. on the Judiciary*, 68th Cong. 34 (1924) [hereinafter 1924 Hearings] (brief of Julius H. Cohen).

131. *Id.* at 356 (citing 1924 Hearings, *supra* note 130, at 24 (brief of Julius H. Cohen)).

132. *See id.* at 357.

133. *See id.*

court to compel arbitration if the district court would have subject matter jurisdiction of the underlying suit "by virtue of any provision in Title 28."[134]

The Fourth Circuit has noted that if Congress had intended for federal courts to hear section 4 petitions only when diverse parties are involved, it would not have made a sweeping reference to "jurisdiction under Title 28."[135] To the contrary, other courts have noted that assuming Congress intended subject matter jurisdiction to be determined on the basis of the section 4 petition itself, diversity is not the only applicable basis of federal jurisdiction under Title 28.[136] For example, when the arbitration clause sought to be enforced is part of a maritime contract, admiralty jurisdiction will apply to both the arbitration petition and the underlying suit;[137] "where the party resisting arbitration brings a federal cause of action, a district court will have *supplemental* jurisdiction under 28 U.S.C. § 1367 over the defendant's counterclaim to compel arbitration of the dispute";[138] and "when the agreement to arbitrate itself arises under federal law, a § 4 action to enforce this federal right may state a federal question."[139]

Additionally, the party who disregards the arbitration agreement and sues regarding the parties' federal dispute can bring the case in federal court if the party chooses, or, if the party chooses not to, the defendant can remove the suit to federal court and either participate in litigation there or file a counter claim under section 4 compelling arbitration.[140] Either way, the federal court will have supplemental jurisdiction over

134. Vaden, 396 F.3d at 370.

135. Cmty. State Bank v. Strong, 485 F.3d 597, 626 (11th Cir. 2007) *vacated, reh'g en banc granted*, 508 F.3d 576 (11th Cir. 2007) (Marcus J., concurring) (citing *Vaden*, 396 F.3d at 370).

136. *See id.* at 626–27 ("[W]here the party resisting arbitration brings a federal cause of action, a district court will have *supplemental* jurisdiction under 28 U.S.C. § 1367 over the defendant's counterclaim to compel arbitration of the dispute.") (emphasis in original) (citing Slomkowski v. Craig-Hallum, Inc., 644 F. Supp. 132 (D. Minn. 1986)).

137. *Id.* at 626 (citing Drexel Burnham Lambert, Inc. v. Valenzuela Bock, 696 F. Supp. 957, 964–65 (S.D.N.Y. 1988); *In re* Continental U.K., Ltd. v. Anagel Confidence Compania Naviera, S.A., 658 F. Supp. 809, 812 (S.D.N.Y. 1987) ("Jurisdiction in admiralty is unquestionably present, as the dispute involves a 'maritime transaction' ".).

138. *Cmty. State Bank*, 485 F.3d at 626–27 (citing *Slomkowski*, 644 F. Supp. 132).

139. *Id.* at 627 (citing Valenzuela Bock, 696 F. Supp. at 965).

140. *See id.* at 627 n.11.

the section 4 counterclaim pursuant to the plaintiff's federal claim. Therefore, as the above examples indicate, the concern that the real controversy between the parties cannot reach federal court, even when the state action plaintiff's complaint presents a federal question, is unfounded.

3. "[C]ontroversy between the parties"

The circuits favoring the broad look through approach have concluded that the phrase "controversy between the parties" references the overall substantive conflict between the parties.[141] Litigants do not go to court to resolve solely whether a valid arbitration agreement exists between them. Rather, parties seek to resolve their "real-life" conflicts and move on. Therefore, as the question regarding the validity of the arbitration agreement likely arises only when a dispute exists between the parties, the Fourth and Eleventh Circuits have held that the "controversy between the parties" is the underlying dispute which must arise under federal law.[142] Further, as noted above, courts should interpret this language as it is intended to be used by Congress so as to promote its common understanding, except under circumstances where Congress has already dictated or narrowed the interpretation of the term.[143]

To the contrary, those urging adoption of the narrow *Westmoreland* doctrine argue that the *Vaden* approach is inconsistent with the well-pleaded complaint rule. The *Westmoreland* court interprets "controversy between the parties" to include only the dispute clear from the text of the motion to compel arbitration.[144] Under these circumstances, the appropriate question is whether there exists a valid agreement to arbitrate between the parties. In addition to the Second, Third, and Sixth Circuits, the Fifth Circuit has also interpreted this

141. *See* Discovery Bank v. Vaden, 396 F.3d 366, 367 (4th Cir. 2005), *cert. granted*, 128 S. Ct. 1651 (Mar. 17, 2008) (No.07-773); Tamiami Partners, Ltd. v. Miccosukee Tribe, 177 F.3d 1212, 1223 (11th Cir. 1999); *see also* Transcript of Oral Argument, *supra* note 10, at 31–32 (stating that the language of the section references the "subject matter of the controversy between the parties"; not specifically an existing lawsuit).

142. *See Vaden,* 396 F.3d at 367; *Tamiami Partners, Ltd.*, 177 F.3d at 1223.

143. *See Vaden,* 396 F.3d at 367; *Tamiami Partners, Ltd.*, 177 F.3d at 1223.

144. *See* Westmoreland Capital Corp. v. Findlay, 100 F.3d 263, 267 (2d Cir. 1996).

language as a reference to the controversy pending before the district court.[145]

In *Commercial Metals Co. v. Balfour, Guthrie, & Co.,* the Fifth Circuit relied on the Supreme Court's decision in *Gully v. First National Bank* which declared the general principle that

> [a] suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends . . . .[146]

The Fifth Circuit assumed that the relevant "dispute or controversy" to be analyzed was the petition to compel arbitration, not the underlying dispute. Therefore, if the alleged right to compel arbitration derived from an agreement of the parties, not from federal law, a suit does not arise under federal law per *Gully*.[147]

Often a section 4 motion to compel arbitration will be brought in an embedded suit, where the controversy before the court may consist of both the section 4 petition and also of the dispute to be arbitrated. However, in other cases, a freestanding section 4 petition will be brought so that the only "controversy" before the district court is whether the arbitration agreement is valid. Judge Marcus, concurring in the Eleventh Circuit's opinion in *Community State Bank,* argued that "because resolution of a controversy over arbitrability is generally a matter of contract interpretation," a stand-alone section 4 petition usually will not state a federal question.[148] In other words, to read "controversy between the parties" as consisting

145. *See* Prudential-Bache Sec., Inc. v. Fitch, 966 F.2d 981, 986–88 (5th Cir. 1992).

146. 577 F.2d 264, 267 (5th Cir. 1978) (quoting Gully v. First Nat'l Bank, 299 U.S. 109, 114 (1936)).

147. *See id.* at 268. Although the dispute to be arbitrated in *Commercial Metals* was not federal in nature but rather a breach of contract suit, Judge Marcus believed it suggested that the appropriate dispute to which the Eleventh Circuit should apply the well-pleaded complaint rule is the dispute to be resolved by the district court, not the dispute to be resolved by the arbitrator. Cmty. State Bank v. Strong, 485 F.3d 597, 625 (11th Cir. 2007) (Marcus, J., concurring), *reh'g en banc granted, vacated*, 508 F.3d 576 (11th Cir. 2007).

148. *Cmty. State Bank*, 485 F.3d at 633 (Marcus, J., concurring).

of the underlying dispute to be arbitrated, as the Second,[149] Third,[150] and Sixth Circuits;[151] the Eastern District of Pennsylvania;[152] and the Southern District of New York[153] have held, would have the effect of overturning the well-pleaded complaint rule.

B. Application and Restriction of the "Well-Pleaded Complaint" Rule to Section 4 Petitions

"The usual rules for determining federal question jurisdiction provide that a 'complaint will not avail a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense.' "[154] As indicated above, inconsistency has arisen between the circuit courts regarding the strictness of the well-pleaded complaint rule pursuant to section 4 of the FAA.

1. "Looking Through" the Petition to the Underlying Dispute

The Fourth Circuit has argued that the well-pleaded complaint rule is not as rigid as the opposing courts suggest.[155] This court analogized section 4 to the application of the Declaratory Judgment Act in *Franchise Tax Board v. Construction Laborers Vacation Trust*.[156] As noted above, the Supreme Court has indicated that the Declaratory Judgment Act creates a "wrinkle" in the traditional well-pleaded complaint rule so that a declaratory judgment party, traditionally a defendant, "can bring a preemptive suit in federal court . . . accelerating the claim against it."[157] Under this scenario, "[a] would-be

149. *Westmoreland*, 100 F.3d at 268.
150. *See* Fox v. Faust, 239 F. App'x 715, 717 (3d Cir. 2007).
151. *See* Smith Barney, Inc. v. Sarver, 108 F.3d 92, 94 (6th Cir. 1997).
152. *See* Klein v. Drexel Burnham Lambert, Inc., 737 F. Supp. 319, 324 (E.D. Pa. 1990) (citations omitted).
153. *See* Drexel Burnham Lambert, Inc. v. Valenzuela Bock, 696 F. Supp. 957, 963 (S.D.N.Y. 1988) (citations omitted).
154. *See* Prudential-Bache Sec., Inc. v. Fitch, 966 F.2d 981, 988 (5th Cir. 1992) (quoting Gully v. First Nat'l Bank, 299 U.S. 109, 113 (1936)).
155. *See* Discover Bank v. Vaden, 396 F.3d 366, 371 (4th Cir. 2005), *cert. granted*, 128 S. Ct. 1651 (Mar. 17, 2008) (No.07-773).
156. *See id*. at 371–72 (citing Franchise Tax Bd. V. Constr. Laborers Vacation Trust, 463 U.S. 1 (1983)).
157. *See id.* at 371.

plaintiff . . . is transformed into a declaratory-judgment *defendant* [and is not capable] of invoking a federal question on the face of a well-pleaded complaint."[158]

The Supreme Court has directed federal courts to consider "what a well-pleaded complaint in a traditional case would look like," noting that absent " 'the availability of the declaratory judgment procedure, the federal claim would arise *only as a defense* to a state created action' " and jurisdiction would be lacking in federal court.[159] However, federal courts have taken original jurisdiction over declaratory judgment suits when a declaratory judgment defendant brings a coercive action to enforce its rights when that suit presents a federal question.[160] The Fourth Circuit has noted that because the real controversy between the parties is the "prospect of a federal question suit which prompted the declaratory judgment action, so the real controversy in cases [under section 4 of the FAA] is whether a federal action prompted the motion to compel arbitration."[161] Therefore, to look through the arbitration petition to the underlying dispute, courts should apply the rules in the context of the FAA's procedural posture, as the Supreme Court has previously done with the Declaratory Judgment Act.[162]

Courts applying the *Westmoreland* doctrine reason that if the FAA provides a federal forum whenever the underlying dispute to be arbitrated involves a federal question, the Act overturns the longstanding rule that federal question jurisdiction must be determined from the face of a well-pleaded complaint.[163] The Second, Third, and Sixth Circuits have found this interpretation unacceptable, as the legislative history of the Act lacks any indication that Congress intended to alter the rules established to determine federal jurisdiction over a complaint.[164]

Judge Marcus, specially concurring in the Eleventh Circuit's opinion in *Community State Bank v. Strong*, emphasized a concern against permitting district courts to look through the

158. *See id.* (citation omitted).
159. *See id.* (quoting Franchise Tax Bd., 463 U.S. at 16) (emphasis added).
160. *See Franchise Tax Bd.*, 463 U.S. at 19 (citations omitted).
161. *See Vaden*, 396 F.3d at 371.
162. *See id.* at 372.
163. *See* Drexel Burnham Lambert, Inc. v. Valenzuela Bock, 696 F. Supp. 957, 963 (S.D.N.Y. 1988).
164. *See* Westmoreland Capital Corp. v. Findlay, 100 F.3d 263, 269 (2d Cir. 1996); Prudential-Bache Sec., Inc. v. Fitch, 966 F.2d 981, 988 (5th Cir. 1992).

motion to compel arbitration to determine whether federal question jurisdiction is present.[165] Initially, Judge Marcus noted that, pursuant to the Supreme Court's decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, an arbitration provision is severable from the remainder of the contract in which it is contained and is independently enforceable even if the remainder of the contract is found to be void.[166]

Pursuant to the well-pleaded complaint rule, federal courts must find a federal question, if at all, within the plaintiff's complaint and not from any additional allegations pled that are unnecessary to the plaintiff's cause of action.[167] Pleadings that merely "anticipate the respondent's federal defense (or offer a federal reply to an anticipated state-law defense) are insufficient to bring the petitioner's own cause of action within federal jurisdiction."[168] Therefore, "[a] straightforward application of that rule . . . yields the conclusion that the federal nature of the underlying dispute to be arbitrated is irrelevant in determining whether a § 4 cause of action filed in district court itself arises under federal law."[169]

"[T]he mere fact that [a] petitioner[] bring[s] an action under the FAA is by itself insufficient to confer federal jurisdiction over the petition."[170] A section 4 petition requires the allegation of only a narrow set of facts, all sounding in contract, which include: "(1) the existence of a dispute between the parties; (2) a written agreement that includes an arbitration provision which purports to cover the dispute; (3) the relationship of the transaction . . . to interstate or foreign commerce; and (4) the failure, neglect or refusal of the defendant to arbitrate the

165. *See* Cmty. State Bank v. Strong, 485 F.3d 597, 616 (11th Cir. 2007) (Marcus, J., concurring) (citing 9 U.S.C. § 4), *vacated, reh'g en banc granted*, 508 F.3d 576 (11th Cir. Sept. 10, 2007).

166. *Id.* at 622 (Marcus, J., concurring) (citing *Prima Paint*, 388 U.S. 395, 402–03 (1967)).

167. *Id.* at 616 (Marcus, J., concurring) (quoting Okla. Tax Comm'n v. Graham, 489 U.S. 838, 840–41 (1989)).

168. *Id.* at 621 (Marcus, J., concurring) (citing Rivet v. Regions Bank of La., 522 U.S. 470, 475 (1998) (stating that "[a] defense is not part of a plaintiff's properly pleaded statement of his or her claim")).

169. *See id.* at 616–17 (Marcus, J., concurring) (citing Okla. Tax Comm'n, 489 U.S. at 840–41) (" '[W]hether a case is one arising under [federal law] . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim . . . unaided by anything alleged in anticipation o[r] avoidance of defenses . . . .' ") (alteration in original)).

170. *Id.* at 617 (Marcus, J., concurring) (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983)).

dispute."[171] "[I]n seeking to compel arbitration . . . the basis of the plaintiff's complaint is the contractual agreement of the parties to arbitrate."[172] Therefore, the district court must adjudicate only the arbitration agreement between the parties; it may not consider the underlying dispute between the parties after ruling that the dispute falls within the scope of the arbitration agreement.[173]

Additionally, because a section 4 petitioner merely asks the court to specifically enforce a contract, it is not necessary for the petitioner to plead the reasoning behind the motion to compel arbitration—i.e., the subject matter of the underlying dispute.[174] " 'The fact that the face of the petition alludes to . . . [a party's federal] claim does not vitiate th[e] result [that the section 4 FAA petition does not state a federal question]' "—in other words—" 'the petition . . . is not a well-pleaded complaint.' "[175] The nature of the dispute is only relevant to the extent that the court must be satisfied that the dispute comes within the breadth of the parties' arbitration clause.[176] Further, even if the well-pleaded complaint rule permitted courts to consider defenses that state a federal question, the defenses available to a petition to compel arbitration pursuant to section 4 of the FAA are limited by the parties' agreement.[177] Additionally, as Judge Marcus concluded in *Community State Bank*, a simple contract enforcement action, embedded within a motion to compel arbitration, does not state a federal question.[178] Thus, by this argument, a rule permitting district courts to look through the well-pleaded complaint to determine whether

171. *Id.* at 618–19 (Marcus, J., concurring) (citing LARRY E. EDMONDSON, DOMKE ON COMMERCIAL ARBITRATION § 22:2 (3d ed. 2003)).

172. Commercial Metals Co. v. Balfour, Guthrie, & Co., Ltd., 577 F.2d 264, 266 (5th Cir. 1978).

173. *See Cmty. State Bank*, 485 F.3d at 618 (Marcus, J., concurring) (citations omitted).

174. *See id.* at 620 (Marcus, J., concurring).

175. *See id.* (Marcus, J., concurring) (quoting Westmoreland Capital Corp. v. Findlay, 100 F.3d 263, 269 (2d Cir. 1996) (second and third alternations in original)).

176. *Id.* (Marcus, J., concurring). " '[T]he mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction,' nor does it automatically render the cause of action 'the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system.' " *Id.* (quoting *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 813-14 & n.11 (1986)).

177. *See id.* at 622 (Marcus, J., concurring).

178. *See id.* at 635.

the underlying dispute presents a federal question is at odds with longstanding Supreme Court precedent.

Further, when Congress has intended to create an exception to the well-pleaded complaint rule, it has done so explicitly.[179] Therefore, even if section 4's text is susceptible to more than one reasonable interpretation, federal courts should not look through the claim embodied in the arbitration petition to the principal dispute presented to the arbitrator for resolution.

2. Federal Courts' Ability to Hear Cases Under Section 4

The Fourth Circuit, in *Discover Bank v. Vaden*, voiced its concern about the consequences of applying the well-pleaded complaint rule in its strictest form to section 4 petitions to compel arbitration.[180] *Vaden* acknowledged that to eliminate the ability of federal courts to hear a section 4 petition where federal jurisdiction exists over the actual dispute, but is not present on the face of the petition, would greatly restrict the ability of federal courts to hear this type of cases.[181] Further, even the Second Circuit in *Westmoreland* noted that its narrow view forecloses the possibility that federal question jurisdiction could ever form the basis for subject matter jurisdiction of a section 4 petition.[182] If the narrow holding were controlling, federal courts could never hear a suit to compel arbitration unless the parties happened to be diverse.[183] Because the FAA embodies a federal policy favoring arbitration, " 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.' "[184]

As stated above, the Fourth Circuit has noted that this strict application is "inconsistent with the 'congressional declaration of a liberal federal policy favoring arbitration agreements.' "[185] In *Vaden*, the court acknowledged that state courts

179. *See* Westmoreland Capital Corp. v. Findlay, 100 F.3d 263, 268 (2d Cir. 1996) (citations omitted).

180. Discover Bank v. Vaden, 396 F.3d 366, 372 (4th Cir. 2005), *cert. granted*, 128 S. Ct. 1651 (Mar. 17, 2008) (No.07-773).

181. *See id*. at 372.

182. *See Westmoreland*, 100 F.3d at 268.

183. *See id*; Transcript of Oral Argument, *supra* note 10, at 50–51.

184. *Vaden*, 396 F.3d at 372 (quoting Drews Distrib., Inc. v. Silicon Gaming, Inc., 245 F.3d 347, 350 (4th Cir. 2001)).

185. *See id.* (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

are capable of applying federal law, including section 4 petitions.[186] However, under such circumstances, when the real controversy between the parties cannot reach federal court because a federal question is not present on the face of the motion to compel arbitration, the liberal federal policy in favor of arbitration is disregarded.[187] This also occurs when a federal question is present in the underlying dispute between the parties.[188] In passing the FAA, Congress did not intend to excessively restrict federal question jurisdiction.

3. A "Petitioner" Does Not Violate the Well-Pleaded Complaint Rule

A "petitioner" is an "initiating part[y]" in an arbitration proceeding that he or she seeks to initiate, and is therefore a plaintiff in an independent action seeking to remove a case to federal court and compel arbitration under section 4 of the FAA.[189] In *Community State Bank*, the Eleventh Circuit looked to the petitioners' own statement of the disputes they wished to arbitrate; petitioners were not restricted to seeking compelled arbitration on issues already brought against them in court.[190] The petitioners sought to arbitrate two disputes: (1) the defendant's state-court claims, and (2) the petitioners' own affirmative claim involving a federal question for which they planned to seek declaratory relief from the arbitrator.[191] Under such circumstances, the Eleventh Circuit held that "[i]f *either* of [the] two disputes-to-be-arbitrated state[d] a federal question, the district court ha[d] subject matter jurisdiction over the petition to compel."[192] Therefore, it would be erroneous if the district court only examined state law and refused to find federal question jurisdiction sufficient to invoke a motion to compel arbitration in federal court; to do so would deny the petitioner process in federal court to which it was entitled.[193]

186. *See id.*
187. *See id.*
188. *See id.*
189. Cmty. State Bank v. Strong, 485 F.3d 597, 606 (11th Cir. 2007).
190. *Id.*.
191. *Id.* at 607.
192. *Id.*
193. *See id.* at 606–07.

4. Unpleaded Federal Claims in the Underlying Dispute

Similar to the FAA, the Declaratory Judgment Act does not create an independent basis for federal subject matter jurisdiction.[194] In *Household Bank v. JFS Group,* the Eleventh Circuit established the test to determine whether a claim under the Declaratory Judgment Act also arises under federal law.[195] The court held that federal question jurisdiction exists in a declaratory judgment action if the plaintiff has alleged facts in a well-pleaded complaint that demonstrate that the defendant *could* file a coercive action arising under federal law.[196]

When the Eleventh Circuit was subsequently faced with a jurisdictional issue regarding a motion to compel arbitration pursuant to section 4, the court relied on its opinion in *Household Bank*.[197] The court held that the appropriate question to be asked in this scenario is whether petitioners allege facts in a well-pleaded complaint that demonstrate that the plaintiff in the underlying action *could* file a coercive action against petitioners arising under federal law.[198] Because the same allegations could have served as the basis for a claim alleging a violation of a federal as well as a state statute, petitioners alleged facts demonstrating that the plaintiff could have filed a coercive action against petitioners arising under federal law.[199] Therefore, even though the plaintiff chose not to include federal claims within his complaint, this did not mean he *could* not

194. *See* Szalai, *supra* note 1, at 366 n.211 (citing Nashoba Commc'ns Ltd. P'ship No. 7 v. Town of Danvers, 893 F.2d 435, 437 (1st Cir. 1990); First Fed. Sav. and Loan Ass'n of Lake Worth v. Brown, 707 F.2d 1217, 1220 (11th Cir. 1983); Stanley v. CIA, 639 F.2d 1146, 1158 (5th Cir. 1981) ("Declaratory Judgment Act does not of itself create jurisdiction."), *rev'd in part, vacated in part sub nom.* United States v. Stanley, 483 U.S. 669 (1987); King v. Sloane, 545 F.2d 7, 8 (6th Cir. 1976)).

195. *See* 320 F.3d 1249, 1251 (11th Cir. 2003).

196. *Id.*

197. *See* Cmty. State Bank v. Strong, 485 F.3d 597, 608 (11th Cir. 2007) (citing 9 U.S.C. § 4), *vacated, reh'g en banc granted*, 508 F.3d 576 (11th Cir. Sept. 10, 2007) (citing *Household Bank*, 320 F.3d at 1251).

198. *See id.*

199. *See id.*; *see also* Szalai, *supra* note 1, at 368 (citing CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2767 (2d ed. 1986 & Supp. 2005) ("[I]f the federal issue would inhere in the claim on the face of the complaint that would have been presented in a traditional damage or coercive action, then federal jurisdiction exists over the declaratory-judgment action.")).

have done so.[200] Further, "the fact that a plaintiff 'chose to initiate an action in state court without [federal] claims' is not a 'substantial reason' under Federal Rule of Civil Procedure 15 for denying leave to amend the complaint to add federal claims once the defendant has succeeded in removing the state-law case to federal court."[201]

In support of the reasoning used by the Eleventh Circuit, one scholar has argued that to examine the underlying controversy between the parties is not contrary to the well-pleaded complaint rule: just as the well-pleaded complaint rule has been flexibly applied with declaratory judgment actions, the similarity between the Declaratory Judgment Act and the FAA enables district courts to examine the underlying controversy to be arbitrated under a section 4 petition to determine whether jurisdiction exists over a petition to compel arbitration.[202]

However, the analogy between the Declaratory Judgment Act and the FAA has also been criticized. A Declaratory Judgment Act plaintiff who could face a federal claim brought against him or her asks the federal district court to resolve the merits of that federal claim *in advance*. To the contrary, a petition to compel arbitration pursuant to section 4 of the FAA asks a court to consider a controversy *already arisen*. Therefore, the timing, but not the meaning, of federal question jurisdiction is altered. "[T]he Declaratory Judgment Act plaintiff's right to relief still 'necessarily depends on resolution of a substantial question of federal law.' "[203] A section 4 petitioner who does or could face a federal claim brought against him or her does not ask a federal district court to adjudicate that federal claim; rather the petitioner asks the court to compel arbitration of the dispute.[204] Therefore, unlike a Declaratory Judgment Act petitioner, a section 4 petitioner does not ask the federal district court to adjudicate the underlying federal claim. The Declaratory Judgment Act is not analogous to the FAA because

200. *Cmty. State Bank*, 485 F.3d at 611.

201. *Id.* (citing Halliburton & Assocs., Inc. v. Henderson, Few & Co., 774 F.2d 441, 443 (11th Cir. 1985)).

202. *See* Szalai, *supra* note 1, at 368 (citing Columbia Gas Transmission Corp. v. Drain, 237 F.3d 366, 370 (4th Cir. 2001)).

203. *Cmty. State Bank*, 485 F.3d at 633 (Marcus, J., concurring) (quoting Franchise Tax Bd. v. Const. Laborers Vacation Trust, 463 U.S. 1, 28 (1983)).

204. *See* Prudential-Bache Sec., Inc. v. Fitch, 966 F.2d 981, 988 (5th Cir. 1992).

decisions broadly permitting jurisdiction under the former are not applicable to the latter.

IV. RESOLVING THE ISSUE

The arguments favoring both the *Vaden* and the *Westmoreland* approaches have been thoroughly discussed in Part III, and this section will not repeat them. What remains is to tie them together and to recommend which direction, on balance, courts should go. This is not an easy task for two reasons. First, the same interpretive tools can be marshaled in favor of each approach. For example, both the *Vaden* and the *Westmoreland* approaches are supportable by facially reasonable textualist interpretations of the statute and considerations of legislative intent. Second, arguments made using each interpretive tool are not mutually exclusive. An example is the textualist argument favoring each approach. One might reasonably conclude, that "save for" means "but for" and therefore commands courts to "look through" the arbitration agreement. This does not preclude, however, a conclusion that the "savings clause" of section 4 should be read just like that of section 2, which allows both a stay of litigation in any case raising a dispute referable to arbitration or an order to engage in arbitration, and therefore arbitration contracts should be no more enforceable in federal courts than other contracts.

For these reasons, unlike most outstanding legal issues, it is impossible to designate one approach as "right" and the other as "wrong." Rather, it is quite possible that both approaches are "right." Moreover, it is impossible to argue for the "rightness" of one approach and then to point how that necessarily forecloses arguments in favor of the other approach. Thus, although it remains undecided for courts today, it will be determined by the Supreme Court, which has heard the oral argument to decide not which approach is right or wrong, but to choose among two plausible approaches. One approach ultimately will be "wrong" only because the Court will have said so.

The strongest arguments in favor of the *Westmoreland* approach were marshaled by Judge Marcus's concurrence in *Community State Bank*.[205] There, he argued that the "savings

205. *See Cmty. State Bank*, 485 F.3d at 632 (Marcus, J., concurring).

clause" of the FAA section 4 should be read just like that of section 2, and that, therefore, section 4 should be interpreted as making arbitration agreements as enforceable as other contracts but not more so. Because federal courts do not, absent diversity, ordinarily have subject matter jurisdiction over other contracts, federal courts likewise should not have subject matter jurisdiction, absent diversity, over arbitration agreements. Judge Marcus also argued forcefully that the well-pleaded complaint rule prohibits looking through the complaint to the underlying dispute, and that the FAA was not intended to be an exception to the rule. Both of these arguments may well be "right."

However the arguments favoring the *Vaden* approach are stronger. First, "save for" means (and meant) "but for." Section 4 therefore permits a federal court to assert jurisdiction whenever that court would have had jurisdiction over the underlying dispute but for the arbitration agreement. Second, the term "controversy between the parties" relates to the underlying dispute between the parties, not to the dispute about the enforceability of the arbitration agreement. Third, if the "save for" clause was intended to solve the ouster problem, the clause would have been included in other statutes and enacted around the same time as the FAA. Finally, the *Vaden* approach is most consistent with the liberal policy favoring arbitration that the Supreme Court has espoused since the mid-1980s.

Imre Szalai, writing on this topic in 2007, concluded that courts should adopt the *Vaden* approach and look through the arbitration dispute to the underlying dispute. We independently arrive at the same conclusion.

CONCLUSION

Even though the two different approaches addressed and explained above have resulted in dissimilar and potentially detrimental outcomes to the litigating parties, the issue of whether section 4 enables a federal district court to look through the motion to compel arbitration to the underlying dispute between the parties will finally be determined because the issue is presently before the Supreme Court. Reasonable minds can disagree over the proper interpretation of section 4, and the difficulty of choosing one approach over the other is exacerbated because the same interpretive tools can be mar-

shaled in favor of each approach and because the arguments made using each interpretive tool are not mutually exclusive. After weighing the strongest arguments favoring each approach, this Article concludes that the Supreme Court should adopt the *Vaden* approach and look through the arbitration dispute to the underlying dispute.