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## A Muddy Mess: The Supreme Court's Jurisprudence on Jurisdiction for Arbitration Matters

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# A Muddy Mess: The Supreme Court's Jurisprudence on Jurisdiction for Arbitration Matters

KRISTEN M. BLANKLEY\*

*The Supreme Court's 2022 Badgerow v. Waters decision attempts to create a bright-line rule regarding access to federal courts to hear arbitration matters. On its face, the Badgerow majority opinion reads like a straightforward exercise in textualism. Badgerow interpreted the judicial test for jurisdiction under the Federal Arbitration Act ("FAA") provision regarding vacatur differently than it interpreted the jurisdictional test for a motion to compel under a different part of the statute. However, Badgerow leaves courts, which were already struggling to decipher the Supreme Court's 2009 decision of Vaden v. Discover Bank, with a significant number of outstanding questions. Although these two cases can theoretically be read together, the two holdings leave open a host of practical difficulties that could lead to years of litigation on arbitration matters—matters that should otherwise be resolved simply and efficiently. This Article outlines the two decisions, how they are read together, and how they leave open inconsistencies. This Article then*

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*discusses the likely practical fallout from Badgerow, a proverbial “muddy mess.” The “muddy mess” has already begun to occur, based on early lower courts working with these two inconsistent precedents. This Article suggests legislative changes to create a consistent and predictable rule for motions dealing with arbitration practice.*

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## INTRODUCTION

During the life of an arbitration case, some parties never need judicial intervention.<sup>1</sup> Those parties proceed to arbitration voluntarily and comply with the resulting arbitration award.<sup>2</sup> However, when parties do not comply with their arbitration obligations, the Federal Arbitration Act (“FAA”) allows parties to petition the court for assistance at very specific junctures.<sup>3</sup> Under the FAA, a court can determine a limited number of highly significant arbitration issues, such as enforcing arbitration agreements,<sup>4</sup> ensuring a case has an arbitrator,<sup>5</sup> providing for subpoenas,<sup>6</sup> and confirming or vacating arbitration awards.<sup>7</sup> This Article refers to these points in a case as “litigation contact points.”

Over the last fifty years, federal courts have adopted a relatively uniform and predictable set of rules regarding access to arbitration under party contracts. In contrast, state arbitration laws have less predictability, with states exhibiting various levels of acceptance

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<sup>1</sup> See Kristen M. Blankley, *A Uniform Theory of Federal Jurisdiction Under the Federal Arbitration Act*, 23 GEO. MASON L. REV. 525, 559 (2016).

<sup>2</sup> See *id.*

<sup>3</sup> 9 U.S.C. § 4 (2022).

<sup>4</sup> *Id.* (allowing courts to compel arbitration under arbitration agreements).

<sup>5</sup> § 5 (providing a mechanism to appoint an arbitrator in the event the arbitrator selection method stipulated in the agreement fails).

<sup>6</sup> § 7 (providing a mechanism to compel attendance at arbitration hearings).

<sup>7</sup> §§ 9–11 (allowing courts to confirm, vacate, and modify arbitration awards).

and hostility towards arbitration issues.<sup>8</sup> In other words, the difference between federal court and state court determination of arbitration issues may be outcome determinative, particularly on issues of enforcing arbitration agreements (“front-end” issues) and vacatur and confirmation of arbitration awards (“back-end” issues).<sup>9</sup>

The issues surrounding predictability are compounded by a newer problem—questions about federal court jurisdiction to hear these key arbitration issues.<sup>10</sup> The FAA does not include a grant of jurisdiction, and parties must find an independent ground to be in federal court. Further, the Supreme Court’s jurisprudence on preemption makes only portions of the FAA applicable to state courts.<sup>11</sup> Thus, although state and federal courts have jurisdiction over these matters,<sup>12</sup> federal arbitration law may not apply equally

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<sup>8</sup> See, e.g., *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 342–43 (2011) (noting various state attitudes towards enforcement of arbitration agreements); see also Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Respondents at 5–6, *Badgerow v. Walters*, 142 S. Ct. 1310 (2022) (No. 20-1143) (discussing the “great variety of devices and formulas” to address arbitration issues).

<sup>9</sup> See, e.g., Lyra Haas, Note, *The Endless Battleground: California’s Continued Opposition to the Supreme Court’s Federal Arbitration Act Jurisprudence*, 94 B.U. L. REV. 1419, 1426 (2014) (“The debates between the California Supreme Court (CSC) and the Supreme Court started as soon as the Supreme Court shifted towards the broader interpretation of the FAA.”). In addition, Montana law and courts have been known to take a tough look at arbitration, and one of Montana’s most stringent laws on arbitration was stuck down by the Supreme Court in *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996).

<sup>10</sup> Under 9 U.S.C. § 6, the litigation mechanism to make a request dealing with arbitration should be presented in the form of a motion, not a lawsuit. 9 U.S.C. § 6 (2022).

<sup>11</sup> The Supreme Court held that Section 2 of the FAA, regarding enforcement of arbitration agreements, is substantive law with preemptive power over the states. See generally *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (“In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”).

<sup>12</sup> Most jurisdictions have a version of the Uniform Arbitration Act. See *Arbitration Act*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=a0ad71d6-085f-4648-857a-e9e893ae2736> (last visited Mar. 14, 2023). Approximately twenty jurisdictions work from the 1956 version of the Uniform Arbitration Act (UAA), which mirrors most of the Federal

in state courts, particularly on issues involving the review of arbitration awards.<sup>13</sup>

For litigants, the difference between federal and state court might mean the difference between arbitrating or litigating an issue on the front-end and confirming or vacating an arbitration award on the back-end. The federal courts, led by the Supreme Court, are more likely to be pro-arbitration,<sup>14</sup> while state courts may be less favorable—or downright inhospitable—to arbitration.<sup>15</sup>

In 2009, the Supreme Court began to weigh in on the question of federal court jurisdiction when it decided *Vaden v. Discover Bank*.<sup>16</sup> The *Vaden* facts demonstrate the epitome of uncertainty and inefficiency.<sup>17</sup> A simple debt collection case in state court spawned collateral litigation in federal court to compel arbitration, and that collateral litigation proceeded all the way to the Supreme Court.<sup>18</sup> Following years of litigation, the Court found no jurisdiction over the collateral litigation,<sup>19</sup> sending the case back to state court under “nearly identical” state arbitration law.<sup>20</sup>

The scholarship on this crucial topic is sparse. I addressed the limited nature of this ruling in my paper *A Uniform Theory of Federal Jurisdiction Under the Federal Arbitration Act*.<sup>21</sup> *Vaden* only

Arbitration Act. Twenty-two jurisdictions work from the Revised Uniform Arbitration Act (RUAA). *See id.* With respect to the availability of court assistance at litigation contact points is the same in both versions of the UAA. *See id.*

<sup>13</sup> *See, e.g.,* Stephen Wills Murphy, *Judicial Review of Arbitration Awards Under State Law*, 96 VA. L. REV. 887, 893–94 (2010) (providing examples of states with judicial review different than that available under the FAA); Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN. ST. L. REV. 1103, 1156 (2009) (noting that the Supreme Court’s rulings on judicial review may not apply to the states through preemption principles).

<sup>14</sup> *See, e.g.,* *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (announcing that disputes should be resolved “in favor of arbitration”).

<sup>15</sup> *See, e.g.,* Note, *State Courts and the Federalization of Arbitration Law*, 134 HARV. L. REV. 1184, 1201–02 (2021) (discussing efforts by states to undermine the federal trend towards arbitration through state law).

<sup>16</sup> *See Vaden v. Discover Bank*, 556 U.S. 49, 52–53 (2009).

<sup>17</sup> *See id.* at 54–55.

<sup>18</sup> *See id.* (describing the procedural history of the case).

<sup>19</sup> *See id.* at 70 (holding that the FAA “does not empower a federal court to order arbitration” in the case between *Vaden* and *Discover Bank*).

<sup>20</sup> *See id.* at 71 (discussing the role of state courts in these matters).

<sup>21</sup> *See Blankley, supra* note 1, at 526.

addressed the question of jurisdiction for “front-end” federal question cases.<sup>22</sup> *Vaden* did not begin to address two other categories of cases: (1) cases involving diversity jurisdiction or (2) cases involving “back-end” motions.<sup>23</sup> In the *Uniform Theory* paper, I developed a test that could be used for all jurisdictional questions, through either a common law extension of *Vaden* or a statutory change to the FAA.<sup>24</sup>

As time passed, federal district courts addressed these jurisdictional questions inconsistently.<sup>25</sup> The lower courts’ diverging tests set the stage for another Supreme Court decision on this topic.<sup>26</sup> Rather than extend *Vaden*, the Supreme Court limited its holding in the 2022 decision of *Badgerow v. Walters*.<sup>27</sup> *Badgerow* involved another routine matter that spiraled into competing motions to vacate and confirm in state and federal court, respectively.<sup>28</sup> The Court addressed whether federal question jurisdiction existed on a motion to vacate.<sup>29</sup> The Court, however, announced a different test for “back-end” motions.

The two cases yielded significantly different holdings and relied on different tools of statutory interpretation.<sup>30</sup> While liberal leaning justices authored both majority opinions (Justice Ginsburg writing for the majority in *Vaden* and Justice Kagan writing for the majority in *Badgerow*), the approaches, policies, and outcomes are different.<sup>31</sup> These two cases leave significant questions about arbitration jurisdiction unresolved.<sup>32</sup> While these two cases can be reconciled through the lens of textualism, their ability to stand side-by-side will

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<sup>22</sup> See *id.* at 539 (discussing *Vaden*’s holding).

<sup>23</sup> See *id.* at 541 (delineating four types of cases based on whether the arbitration issue is a “front-end” or “back-end” issue and whether jurisdiction is premised on diversity or federal questions).

<sup>24</sup> See *id.* at 562–65 (discussing how a uniform jurisdictional test could be implemented).

<sup>25</sup> See *Badgerow v. Walters*, 142 S. Ct. 1310, 1315 (2022).

<sup>26</sup> See *id.*

<sup>27</sup> See *id.* at 1314 (2022).

<sup>28</sup> See *id.*

<sup>29</sup> See *id.* at 1314–15 (describing procedural history).

<sup>30</sup> Compare *Vaden v. Discover Bank*, 556 U.S. 49, 52–53 (2009), with *Badgerow*, 142 S. Ct. at 1314.

<sup>31</sup> See *Vaden*, 556 U.S. at 52; see also *Badgerow*, 142 S. Ct. at 1314.

<sup>32</sup> See *infra* Part III.

likely prove difficult in practice. The *Badgerow* majority's claimed simplicity will likely create far more questions than answers.<sup>33</sup>

This Article seeks to anticipate *Badgerow*'s implications and unanswered questions. Rather than making this area clearer, *Badgerow* muddies already complicated waters for federal courts. *Badgerow* requires that federal courts use different tests to determine jurisdiction based on the litigation contact point, and not based on the nature of the arbitrated<sup>34</sup> controversy. The Court's decision effectively eradicates federal question jurisdiction in all arbitration petitions other than those pursuant to motions to compel under *Vaden*. Certainly, this reading violates several rules of statutory interpretation, notably the practice of reading statutes to avoid absurd results.

The many implications of *Badgerow* and *Vaden* boil down to a simple observation—both cases are wrongly decided. *Vaden* is wrongly decided because of the limited nature of its “look through,” while *Badgerow* is wrongly decided by limiting *Vaden* and further complicating the landscape.<sup>35</sup> These two cases focus on facts relevant to the litigation as framed by the parties, which I call *litigation* facts, as opposed to facts relevant to the controversy to be arbitrated, which I call *arbitration* facts. Because the FAA seeks to administer arbitration, using *arbitration* facts to determine federal court jurisdiction would provide better results. The purpose of arbitration, according to the Supreme Court, is to “allow for efficient, streamlined procedures” providing “lower costs, greater efficiency and speed.”<sup>36</sup> The reality, however, is that the court adjacent processes are becoming more and more cumbersome.

This Article proceeds as follows: Part I considers the statutory basis for federal court jurisdiction, the *Vaden* decision, and the varying responses to *Vaden* by the district courts between 2009 and 2021.<sup>37</sup> Part II analyzes the *Badgerow* decision, highlighting the differences in interpretation between *Vaden* and *Badgerow*.<sup>38</sup> Part III examines the problems and complications arising from these two decisions, focusing on *Badgerow*'s endorsement of patchwork tests

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<sup>33</sup> See *Badgerow*, 142 S. Ct. at 1320.

<sup>34</sup> *Id.* at 1321–22.

<sup>35</sup> See *infra* Sections III.A–B.

<sup>36</sup> See *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 344, 348 (2011).

<sup>37</sup> See *infra* Part I.

<sup>38</sup> See *infra* Part II.



based on the litigation contact point.<sup>39</sup> Part IV suggests a legislative change that would resolve this problem.<sup>40</sup> That legislative change would involve using *arbitration* facts and considering the controversy subject to arbitration. If Congress makes the proposed changes, litigants and courts would benefit from a consistent approach to the jurisdictional question. In addition, the workloads of both the federal and state courts would likely remain relatively constant with some cases being newly available for federal court jurisdiction and others becoming ineligible for federal court jurisdiction.

### I. FROM *VADEN* TO *BADGEROW*

The FAA is an anomaly in federal law. According to the Supreme Court, the FAA is substantive law—as opposed to procedural rules—with preemptive power over conflicting state law.<sup>41</sup> The FAA, however, does not provide an independent source of federal court jurisdiction to hear arbitration matters.<sup>42</sup> These inconsistent propositions create difficulties for federal courts.<sup>43</sup> Without jurisdiction under the FAA, parties must establish an independent ground for jurisdiction, such as diversity jurisdiction, federal question jurisdiction, or admiralty jurisdiction.<sup>44</sup> This Article concentrates on the jurisdictional questions under both diversity and federal question jurisdiction.<sup>45</sup>

Understanding *Badgerow*'s importance requires an understanding of the legal landscape leading to the decision. This Part considers the text of the FAA, the *Vaden* decision, and the state of federal law when the Court decided *Badgerow*.

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<sup>39</sup> See *infra* Part III.

<sup>40</sup> See *infra* Part IV.

<sup>41</sup> See *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).

<sup>42</sup> See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581–82 (2008) (describing the FAA as an “anomaly”).

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* at 581–82 (noting that the FAA applies to “cases falling within a court’s jurisdiction”).

<sup>45</sup> Federal courts’ admiralty jurisdiction as it relates to arbitration is outside of the scope of this paper.

### A. *How the FAA Addresses Jurisdiction*

The only explicit jurisdictional language in the FAA is found in Section 4, one of the “front-end” provisions.<sup>46</sup> Section 4 allows parties to move for an order to compel arbitration<sup>47</sup> and is usually invoked in a dispute regarding whether arbitration is appropriate at all.<sup>48</sup> Section 4 supports three categories of motions to compel: (1) cases already in federal court;<sup>49</sup> (2) cases in state court; and (3) cases in which motions to compel are requested in anticipation of disputes regarding the enforceability of an arbitration agreement.<sup>50</sup> Cases in this third category are known as “freestanding” motions because they are not made as part of a larger litigated case.<sup>51</sup> Section 4 provides jurisdiction in federal court if the court would have jurisdiction “save for such [arbitration] agreement.”<sup>52</sup> The contours of the “save for” language remain ambiguous; however, the Court’s *Vaden* decision provides guidance in certain procedural postures.<sup>53</sup>

By contrast, the “back-end” provisions do not contain jurisdictional language, although most contain venue language.<sup>54</sup> Section 9 directs courts to confirm arbitration awards in one of two courts: (1) courts specified by arbitration agreements; or (2) courts where the

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<sup>46</sup> Congress specifies the jurisdiction of the federal courts’ admiralty jurisdiction. 9 U.S.C. § 8 (2022). Section 8 provides: “If the basis of jurisdiction [is] . . . in admiralty . . . the party claiming to be aggrieved may begin his proceeding . . . according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.” *Id.*

<sup>47</sup> § 4 (“[T]he court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.”).

<sup>48</sup> Parties who agree to arbitrate and voluntarily submit their claims to an arbitration forum or independent arbitrator do not need any court order to proceed.

<sup>49</sup> For cases already in federal court, the party seeking arbitration should file a motion under both Sections 3 and 4. Section 3 allows the court to stay the pending federal court litigation, while Section 4 allows the court to order the parties to arbitrate their claims. §§ 3–4. Section 3 does not need any jurisdictional language because that statute presumes that the litigation in federal court has proper jurisdiction. § 3.

<sup>50</sup> § 4.

<sup>51</sup> See Blankley, *supra* note 1, at 542 (defining “freestanding” cases).

<sup>52</sup> 9 U.S.C. § 4 (2022) (referencing jurisdiction in both civil cases and admiralty cases).

<sup>53</sup> See *Vaden v. Discover Bank*, 556 U.S. 49, 62–63 (2009).

<sup>54</sup> See *infra* text accompanying notes 55–58.

award was made.<sup>55</sup> Sections 10 and 11 provide federal district courts with the power to vacate<sup>56</sup> or modify<sup>57</sup> awards in the district in which they are made. Despite the limited language of the FAA, the Supreme Court interpreted the language of these three provisions broadly to *also include* any court in which venue is proper under general venue rules under the theory that Congress intended broad access.<sup>58</sup>

Arbitration’s “middle motions” (i.e., motions to appoint arbitrators and motions for subpoenas) contain no jurisdictional language.<sup>59</sup> Section 5 allows courts to appoint arbitrators to fill vacancies when contractual methods of appointment fail.<sup>60</sup> Section 7 provides federal courts with authority to enforce an arbitrator subpoena,<sup>61</sup> and it includes venue language—the “district court in which such arbitrators, or a majority of them, are sitting”<sup>62</sup>—but no jurisdictional language.<sup>63</sup> These two sections have led to diverging lower court precedent under both Section 5<sup>64</sup> and Section 7.<sup>65</sup>

The FAA leaves additional key jurisdictional questions unanswered. Those questions include: (1) what information can the courts use to determine if jurisdiction exists at various litigation contact points? (2) should the legal tests for jurisdiction be different at different litigation contact points? (3) for a specific litigation contact point (i.e., a motion to compel or a motion to vacate), should the

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<sup>55</sup> § 9 (specifying the courts where confirmation can occur).

<sup>56</sup> § 10 (specifying the courts where vacatur can occur).

<sup>57</sup> § 11 (specifying the courts where modification can occur).

<sup>58</sup> *See Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198 (2000) (discussing whether the venue provisions of 9 U.S.C. §§ 9–11 provide exclusive or additional grounds for the parties to an arbitration award).

<sup>59</sup> *See infra* text accompanying notes 60–65.

<sup>60</sup> 9 U.S.C. § 5 (2022) (noting that, if necessary, “upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire”).

<sup>61</sup> § 7 (“[U]pon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance [of witnesses] . . . or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.”).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *See infra* notes 223–47.

<sup>65</sup> *See id.*

jurisdictional test be different depending on the type of jurisdiction sought? and (4) should the jurisdictional test be different if the case involves pending litigation, as opposed to “freestanding” motions?

One way to look at these questions is to categorize the cases by litigation contact point and jurisdictional basis. The easiest way to visualize these categories is in a two-by-two grid:

**Table 1:**

<b>Primary Litigation Contact Points–Timing of Motion by Type of Jurisdiction</b>		
	Federal Question Jurisdiction	Diversity Jurisdiction
Front-End Motions	Front-End Motions (stay/confirm) under Federal Question Jurisdiction	Front-End Motions (stay/confirm under Diversity Jurisdiction)
Back-End Motions	Back-End Motions (confirm/modify/vacate) under Federal Question Jurisdiction	Back-End Motions (confirm/modify/vacate) under Diversity Jurisdiction

The table could also include the “middle motions”:

**Table 2:**

<b>Expanded Litigation Contact Points–Timing of Motion by Type of Jurisdictions</b>		
	Federal Question Jurisdiction	Diversity Jurisdiction
Front-End Motions	Front-End Motions (stay/confirm) under Federal Question Jurisdiction	Front-End Motions (stay/confirm) under Diversity Jurisdiction
Middle Motions	Middle Motions (appoint/subpoena) under Federal Question Jurisdiction	Middle Motions (appoint/subpoena) under Diversity Jurisdiction
Back-End Motions	Back-End Motions (confirm/modify/vacate) under Federal Question Jurisdiction	Back-End Motions (confirm/modify/vacate) under Diversity Jurisdiction

Further complicating the matter, courts treat cases differently depending on whether a motion relates to pending litigation (in federal or state court) or is a freestanding motion.<sup>66</sup> This element balloons the table:<sup>67</sup>

<sup>66</sup> See Blankley, *supra* note 1, at 542.

<sup>67</sup> In my *Uniform Theory* article, I visualized the various tests created by the lower courts in many of these categories of cases. *See id.* at 554. My previous depiction intended to categorize the plethora of legal tests developed by the courts. In contrast, this series of tables seeks to show the relevant distinguishing factors that led the courts to create different tests. While the table in the *Uniform Theory* article is simpler, these tables show the increasing complexity of jurisdictional area.

**Table 3:**

<b>Additional Considerations in Litigation Contact Points—Timing of Motion by Type of Jurisdiction by Underlying Case Posture</b>				
	Federal Question Jurisdiction		Diversity Jurisdiction	
	Pending Case	Freestanding	Pending Case	Freestanding
Front-End Motions	Front-End / Federal Question / Pending Case	Front-End / Federal Question / Freestanding	Front-End / Diversity / Pending Case	Front-End / Diversity / Freestanding
Middle Motions	Middle / Federal Question / Pending Case	Middle / Federal Question / Freestanding	Middle / Diversity / Pending Case	Middle / Diversity / Freestanding
Back-End Motions	Back-End / Federal Question / Pending Case	Back-End / Federal Question / Freestanding	Back-End / Diversity / Pending Case	Back-End / Diversity / Freestanding

Against this backdrop, the lower courts created diverging jurisdictional tests for these different categories, and the Supreme Court began to deal with these issues in *Vaden*.<sup>68</sup>

#### B. *The Vaden Decision*

The *Vaden* facts involve a case in the top-left corner of Table 3:<sup>69</sup> a front-end motion (i.e., motion to compel) filed under federal question jurisdiction with pending litigation in state court.<sup>70</sup> Discover Bank sued Betty Vaden in a Maryland court for failing to pay

<sup>68</sup> See *Vaden v. Discover Bank*, 556 U.S. 49, 57 (2009).

<sup>69</sup> See *supra* Table 3, p. 688.

<sup>70</sup> *Vaden*, 556 U.S. at 53.

roughly \$10,000 in credit card debt.<sup>71</sup> Vaden countersued as a class action alleging violations of state banking laws.<sup>72</sup> At this point, Discover Bank petitioned the District of Maryland under Section 4 of the FAA for an order to compel arbitration.<sup>73</sup> Discover Bank acknowledged that its claim could not be brought in federal court, but it claimed the court had jurisdiction over the counterclaim under federal banking law.<sup>74</sup> Despite the seemingly mundane nature of the claim, the parties appealed the case all the way to the Supreme Court.<sup>75</sup>

The Court resolved the question of whether a court should consider only the four corners of the motion to compel or be permitted to “look through” the petition to additional facts.<sup>76</sup> The *Vaden* Court, in an opinion authored by Justice Ginsburg, held that courts should “look through” the petition to the underlying litigation to determine if the federal court has jurisdiction.<sup>77</sup> Applying this test, the Court held that the federal courts did not have jurisdiction because the state court complaint did not assert a federal claim and the counterclaims did not bestow jurisdiction because of the “well-pleaded complaint” rule.<sup>78</sup> The fact that Discover Bank sought to *arbitrate* the banking claims under federal law was immaterial.<sup>79</sup> In a footnote, the Court

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<sup>71</sup> *Id.* at 54 (“Discover sued its cardholder, Vaden, in a Maryland state court to recover arrearages amounting to \$10,610.74, plus interest and counsel fees.”).

<sup>72</sup> *Id.* (describing counterclaim).

<sup>73</sup> *Id.* at 54–55 (describing the procedural history).

<sup>74</sup> *Id.* at 55 (noting that the counterclaim would be governed by federal law because of preemption principles).

<sup>75</sup> *Id.* at 57.

<sup>76</sup> *Id.* at 57 (describing the question presented to the court and the split of opinion by the lower courts).

<sup>77</sup> *Id.* at 65, 70 (holding that the look-through doctrine allows the lower courts to consider the underlying litigation to determine if jurisdiction lies).

<sup>78</sup> *Id.* at 70 (“We read that prescription in light of the well-pleaded complaint rule and the corollary rule that federal jurisdiction cannot be invoked on the basis of a defense or counterclaim.”). Interestingly, the well-pleaded complaint rule is not universally applied in federal court. Under the “Smith exception,” some state law claims that implicate federal issues may be heard in federal court. *See Grable & Sons v. Darue Engineering & Mfg.*, 545 U.S. 308, 312 (2005) (finding jurisdiction in a state law quiet title action).

<sup>79</sup> *Vaden*, 556 U.S. at 54–55 (“Faced with Vaden’s counterclaims, Discover sought federal court aid. It petitioned the United States District Court for the District of Maryland for an order, pursuant to § 4 of the Federal Arbitration Act (FAA or Act), compelling arbitration of Vaden’s counterclaims.”).

also noted that in the absence of a complaint, the court should “look through” to the “full-bodied” controversy to determine jurisdiction.<sup>80</sup>

In reaching its decision, the majority relied on a series of interpretive tools, starting with an analysis of the text of the FAA.<sup>81</sup> The Court interpreted the words “save for”<sup>82</sup> as directing the court to look beyond the petition to the underlying *litigation* case.<sup>83</sup> While both the majority and dissenting opinions agreed that the “look through” doctrine applied, they disagreed on what the court should look through to. The majority looked through to the *litigated* case, in part, to avoid the possibility of forum shopping.<sup>84</sup> In dicta, the Court noted that courts would have to look to the case *to be arbitrated* if the petition were freestanding—i.e., without any pending litigation.<sup>85</sup>

Nevertheless, the majority reminded Discover Bank that it is not without recourse: it could seek to enforce the arbitration agreement under nearly identical Maryland law.<sup>86</sup> But practically, the parties remained exactly as they were after years of litigation—in state court with an open question as to whether arbitration will be compelled.<sup>87</sup>

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<sup>80</sup> *Id.* at 68 n.16 (“Whether or not the controversy between the parties is embodied in an existing suit, the relevant question remains the same: Would a federal court have jurisdiction over an action arising out of that full-bodied controversy?”). Of course, Discover Bank could *only* avail itself of state courts on the collections action. Discover Bank likely had no reason to anticipate the class action counterclaim.

<sup>81</sup> *Id.* at 62.

<sup>82</sup> 9 U.S.C. § 4 (2022) (“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 . . .”).

<sup>83</sup> *Vaden*, 556 U.S. at 63–64 (2009) (discussing the textual basis for the ruling).

<sup>84</sup> *See id.* at 68–69 (expressing concern about looking through to the full controversy out of fear of forum shopping).

<sup>85</sup> *See id.* at 70.

<sup>86</sup> *Id.* at 71 (discussing the ability of the Maryland courts to enforce agreements to arbitrate under state law).

<sup>87</sup> Whether Discover Bank would win a motion to compel under state law was an open question. Discover Bank could have been concerned that the Maryland state court would hold that the bank waived its right to arbitrate by bringing its debt collection action in court in the first place. Even in its motion to compel,



In a separate opinion, Justice Roberts, joined by Justices Stevens, Breyer, and Alito, argued that the look-through should extend to the controversy to be arbitrated—no matter how that controversy is framed by the parties.<sup>88</sup> This opinion relied on the application of the “whole act” rule and the FAA’s broad applicability.<sup>89</sup> Additionally, the opinion urged that looking through to the whole arbitral controversy is an administratively simpler rule than the one adopted.<sup>90</sup>

This *Vaden* opinion answered the question before it, providing a limited look through in front-end motions based on federal question jurisdiction which also involve pending litigation. The opinion further provides guidance in its dicta that courts should consider the whole arbitration case in freestanding front-end motions based on federal question jurisdiction. However, the *Vaden* Court provided no guidance on answering these jurisdictional questions for any other litigation contact point. Building off the previous table, Table 4 depicts the areas answered—and unanswered—by *Vaden*.<sup>91</sup>

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Discovery Bank only sought to compel the banking class action claim and not the debt collection claim. *Id.* at 54–55 (noting that Discover Bank only sought to arbitrate the counterclaims). The law at the time was unsettled on how issues of waiver. In 2022, the Supreme Court decided *Morgan v. Sundance*, holding that the test for waiver consists only of action inconsistent to the right to arbitrate. 142 S. Ct. 1708, 1711 (2022) (holding that arbitration should not have a specific test for waiver). Under the law today, Discover Bank arguably waived its right to arbitrate when it brought its debt collection action in state court.

<sup>88</sup> *Vaden*, 556 U.S. at 72–73 (Roberts, J., concurring in part and dissenting in part) (arguing that the look-through should apply to the controversy to be arbitrated).

<sup>89</sup> *Id.* at 74 (reading Section 4 in light of Section 2).

<sup>90</sup> *See id.* at 76 (noting how the *Vaden* case would have a different result depending on the sequence of the filing of the complaint or the counterclaim).

<sup>91</sup> *See infra* Table 4, p. 692.

**Table 4:**

Supreme Court Guidance by Litigation Contact Point around 2010				
	Federal Question Jurisdiction		Diversity Jurisdiction	
	Pending Case	Freestanding	Pending Case	Freestanding
Front-End Motions	<i>Vaden</i> look through - Holding	<i>Vaden</i> look through - <i>dicta</i>	Unclear	Unclear
Middle Motions	Unclear	Unclear	Unclear	Unclear
Back-End Motions	Unclear	Unclear	Unclear	Unclear

### C. Lower Court Rulings Interpreting *Vaden*

Following *Vaden*, the lower courts predictably applied its rule to other similarly situated cases. However, courts developed inconsistent law for many of the other litigation contact points.<sup>92</sup> In my *Uniform Theory* article, I provided a survey of the various tests the lower courts developed as they confronted these questions through its publication date in 2016.<sup>93</sup> This section recalls my previous survey and updates the cases through the 2022 *Badgerow* decision.<sup>94</sup> For simplicity's sake, this section is organized in the same categories outlined in Table 1.<sup>95</sup>

<sup>92</sup> See *infra* note 109 and accompanying text.

<sup>93</sup> Blankley, *supra* note 1, at 554–56.

<sup>94</sup> See *infra* notes 109–13 and accompanying text.

<sup>95</sup> See *supra* Table 1, p. 686.

## 1. FRONT-END MOTIONS UNDER FEDERAL QUESTION JURISDICTION

The *Vaden* decision instructs courts to “look through” a front-end Section 4 motion to compel to determine whether the court would have jurisdiction “save for” the arbitration agreement.<sup>96</sup> For cases involving litigation, the court “looks through” to the *litigation* facts to support jurisdiction. For “freestanding” cases, *Vaden* suggests in dicta that courts should “look through” to the petition and consider the *arbitration* facts.<sup>97</sup> Lower courts have followed this precedent for cases falling into this box.<sup>98</sup> Federal circuit courts applying this framework to date include the Third,<sup>99</sup> Fourth,<sup>100</sup> Fifth,<sup>101</sup> and Eleventh<sup>102</sup> Circuits.

## 2. FRONT-END MOTIONS UNDER DIVERSITY JURISDICTION

For cases based on diversity jurisdiction, courts uniformly refuse to “look through” the petition to determine if the parties are diverse.<sup>103</sup> Instead, the courts only look to see if the parties *to the petition* are diverse, even if additional parties involved in the arbitration would destroy diversity.<sup>104</sup> The inconsistent treatment can be

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<sup>96</sup> *Vaden v. Discover Bank*, 556 U.S. 49, 70 (2009) (discussing jurisdictional rule).

<sup>97</sup> *Id.* at 68 n.16.

<sup>98</sup> *See, e.g., infra* notes 99–102.

<sup>99</sup> *See, e.g., O’Hanlon v. Uber Techs., Inc.*, 990 F.3d 757, 763 (3d Cir. 2021) (applying *Vaden* “look through” analysis to determine jurisdiction but ultimately denied motion to compel on the basis that the arbitration agreement was not signed).

<sup>100</sup> *See, e.g., Cmty. State Bank v. Knox*, 523 F. App’x 925, 930–31 (4th Cir. 2013) (finding no federal court jurisdiction after looking through to the controversy to be arbitrated in a freestanding motion under Section 4).

<sup>101</sup> *See, e.g., Polyflow, L.L.C. v. Specialty RTP, L.L.C.*, 993 F.3d 295, 302 (5th Cir. 2021) (using a “look through” and compelling motion to compel arbitration under *Vaden* on a claim of a breach of a settlement agreement where the claim underlying the settlement was a federal claim).

<sup>102</sup> *See, e.g., Cmty. State Bank v. Strong*, 651 F.3d 1241, 1254–55, 1259–61 (11th Cir. 2011) (applying the *Vaden* “look through” for the parties involved in the underlying litigation and looking through to the broader arbitration controversy for the parties who were not parties to the underlying litigation).

<sup>103</sup> *See, e.g., Moses H. Cone Mem’l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 4–7 (1983).

<sup>104</sup> *See id.*

traced back to the Supreme Court's 1983 decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*,<sup>105</sup> a case involving a Section 4 petition naming diverse parties, even though nondiverse parties would be involved in the arbitration.<sup>106</sup> The Supreme Court heard the motion without questioning jurisdiction,<sup>107</sup> apparently answering the question *sub silencio*.

Lower courts reconcile the tension by applying the different tests to different litigation contact points.<sup>108</sup> Federal appellate courts do not apply the "look through" doctrine to determine the diversity of citizenship,<sup>109</sup> but have developed different tests to determine the amount in controversy.<sup>110</sup> Some Circuits "look through"<sup>111</sup> the petition while others do not.<sup>112</sup> Some Circuits apply different variations of the "look through" doctrine depending on whether the case relates to pending litigation or is freestanding.<sup>113</sup> These cases show that

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*; see also Blankley, *supra* note 1, at 544 (discussing the role of *Moses H. Cone* in the adding to the complexity of these jurisdictional questions).

<sup>107</sup> *Moses H. Cone*, 460 U.S. at 7 n.4, 29.

<sup>108</sup> See *infra* notes 109–15 and accompanying text.

<sup>109</sup> See *ADT, L.L.C. v. Richmond*, 18 F.4th 149, 150–52 (5th Cir. 2021) (determining diversity on the basis of the parties to the petition on the basis of the word "party" in the FAA); *Hermès of Paris, Inc. v. Swain*, 867 F.3d 321, 324 (2d Cir. 2017) (rejecting "look through" to determine diversity of citizenship); *Home Buyers Warranty Corp. v. Hanna*, 750 F.3d 427, 434–35 (4th Cir. 2014) (failing to apply a "look through" to determine diversity of parties on a Section 4 motion); *Northport Health Servs. of Ark., L.L.C. v. Rutherford*, 605 F.3d 483, 490 (8th Cir. 2010) (rejecting the argument that *Vaden* requires the courts to "look through" determine diversity of citizenship given the *Moses H. Cone* ruling).

<sup>110</sup> See *id.*

<sup>111</sup> See *Dell Webb Cmtys, Inc. v. Carlson*, 817 F.3d 867, 870–71 (4th Cir. 2016) (considering the arbitration demand to determine amount in controversy); *CMH Homes, Inc. v. Goodner*, 729 F.3d 832, 836 (8th Cir. 2013) ("We think it follows from *Vaden* that the district court in this case properly 'looked through' to the underlying controversy between the parties to determine the amount in controversy.").

<sup>112</sup> *Am. Gen. Fin. Servs. of Ala., Inc. v. Witherspoon*, 426 F. App'x 781, 781–83 (11th Cir. 2011) (applying the standard for removal to determine amount in controversy, distinguishing *Vaden* on the grounds that the parties to the Section 4 petition involved a third-party defendant and not the parties to the original state court action).

<sup>113</sup> The Ninth Circuit, for example, has taken different approaches in different cases. *Geographic Expeditions, Inc. v. Est. of Lhotka*, 599 F.3d 1102, 1107 (9th

courts across the country have developed different tests, thus complicating arbitration law as opposed to simplifying it. Although these cases involve front-end motions, the facts used to consider whether the court has jurisdiction (i.e., litigation facts or arbitration facts) turn on whether the court's jurisdiction is based in diversity or federal question.<sup>114</sup> To date, no case has grappled with the underlying fundamental question of which set of facts (i.e., litigation facts or arbitration facts) *should* be considered under the FAA's text or policy.<sup>115</sup>

### 3. BACK-END MOTIONS UNDER FEDERAL QUESTION JURISDICTION

The cases with back-end motions under Sections 9, 10, and 11 under federal question jurisdiction involve the most diametrically opposed set of jurisdictional tests under federal law.<sup>116</sup> Some Circuits simply hold that jurisdiction is unavailable for these cases, reasoning that the petition to confirm, vacate, or modify does not *in and of itself* involve a federal question, even if the underlying arbitration did.<sup>117</sup> In these cases, the courts find that the challenge to the arbitration agreement, as a settlement document, does not raise any question of federal law independent of the FAA.<sup>118</sup> Stated another

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Cir. 2010) (applying a legal certainty standard to determine the amount in controversy but not engaging in a “look through” to determine if the standard was met); *but see* Greystone Nev., L.L.C. v. Anthem Highlands Cmty. Ass'n, 549 F. App'x 621, 624 (9th Cir. 2013) (considering the value of arbitration for individual homeowners by looking through to the amount in controversy in arbitration).

International arbitration does not have this same problem. Under the New York Convention, federal courts have jurisdiction to cases “regardless of the amount in controversy.” 9 U.S.C. § 203 (2022).

<sup>114</sup> See *supra* note 109.

<sup>115</sup> See *infra* Section II.C.

<sup>116</sup> See *infra* Section III.C.2.ii.

<sup>117</sup> See *infra* note 118.

<sup>118</sup> Early per curium and otherwise unpublished decisions from the Fourth and Second Circuits adopted this approach. See *Ball v. Stylecraft Homes*, 564 F. App'x 720, 722–23 (4th Cir. 2014) (per curium) (finding no jurisdiction because the motion to vacate presented only state law claims); *Bittner v. RBC Cap. Mkts.*, 331 F. App'x 869, 871 (2d Cir. 2009) (rejecting the “look through” approach but holding that jurisdiction would not lie even if the court could use the “look through” approach). In published opinions, both jurisdictions would later apply

way, these courts refuse to consider any *arbitration* facts and find no litigation facts supporting the petition—including the fact that on the face of the petition, the underlying case involved a federal question. This approach has been adopted by the Third, Seventh, and D.C. Circuits.<sup>119</sup>

Prior to and including the Fifth Circuit’s decision in *Badgerow*, a growing number of jurisdictions used a “look through” approach to determine if the subject matter of the arbitration raised a federal question.<sup>120</sup> The Fifth Circuit explicitly extended *Vaden* to back-end motions based on federal question jurisdiction.<sup>121</sup> The lower court in *Badgerow* found jurisdiction, despite the fact that *Badgerow* was not seeking to vacate one of the claims predicated on federal law.<sup>122</sup> The First, Second, and Fourth Circuits similarly found jurisdiction based on an extension of *Vaden* where the arbitration facts supported jurisdiction.<sup>123</sup>

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*Vaden* to Section 10 motions based on federal court jurisdiction. *See infra* note 121.

<sup>119</sup> *See, e.g.,* *Goldman v. Citigroup Glob. Mkts., Inc.*, 834 F.3d 242, 250 (3d Cir. 2016) (“Though that motion meanders, it does make something apparent: the Goldmans point to no federal law as the reason there should be a vacatur.”); *Magruder v. Fidelity Brokerage Svcs. L.L.C.*, 818 F.3d 285, 288 (7th Cir. 2016) (“Neither § 9 nor § 10 has any language comparable to that on which the Supreme Court relied in *Vaden*. Long before *Vaden* we had reached the same conclusion about the effect of § 4, and we also had held that a federal issue resolved by the arbitrator does *not* supply subject-matter jurisdiction for review or enforcement of the award.”); *Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1247 (D.C. Cir. 1999) (pre-*Vaden* decision distinguishing the language of Sections 4 and 10 of the FAA).

<sup>120</sup> *Badgerow v. Walters*, 975 F.3d 469, 472–73 (5th Cir. 2020).

<sup>121</sup> *Id.* (citing *Quezada v. Bechtel OG & C Constr. Svcs., Inc.*, 946 F.3d 837, 843 (5th Cir. 2020)).

<sup>122</sup> *Id.* at 474 (noting that all of the claims stem from a common set of facts and looking through to the “whole controversy”).

<sup>123</sup> *See Ortiz-Espinoza v. BBVA Sec. of P.R.*, 852 F.3d 36, 44–45 (1st Cir. 2017) (“As we now explain, we agree with the Second Circuit that the look-through approach cannot be limited to § 4 petitions to compel. Initially, we note that the mere difference in statutory text between the sections does not itself compel a holding that the sections are to be interpreted differently.”); *Landau v. Eisenberg*, 922 F.3d 495, 498 (2d Cir. 2019) (finding jurisdiction to confirm an arbitration award in a case under federal trademark law); *Doscher v. Sea Port Grp. Sec., L.L.C.*, 832 F.3d 372, 374 (2d Cir. 2016) (finding jurisdiction because the petitioner claimed the arbitrator manifestly disregarded federal law); *McCormick v. Am. Online, Inc.*, 909 F.3d 677, 679 (4th Cir. 2018) (“Thus, if the underlying

This category—back-end motions under federal question jurisdiction—involves the most extreme differences in outcome based on the jurisdictional test used. As discussed in more detail below,<sup>124</sup> the majority approach effectively eliminates federal court jurisdiction under federal question jurisdiction by refusing to consider arbitration facts.<sup>125</sup> To add an additional wrinkle, some courts have been willing to entertain back-end motions under federal question jurisdiction if the court had previously stayed the same case under Section 3.<sup>126</sup> These cases suggest significant differences based on insignificant procedural postures.

#### 4. BACK-END MOTIONS UNDER DIVERSITY JURISDICTION

The cases involving back-end motions under diversity jurisdiction exhibit a similar pattern as the cases involving front-end motions involving diversity jurisdiction, although fewer of these cases have reached the circuit level.<sup>127</sup> As with diversity cases on motions to compel, courts continue to look solely to the parties to the petition.<sup>128</sup> As with the motions to compel, determining the amount in controversy has proven to be much more difficult.<sup>129</sup>

At this litigation contact point, courts created three tests to determine the amount in controversy.<sup>130</sup> Some courts utilize the

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claim is one that otherwise could be litigated in federal court, the § 10 or § 11 motion can likewise be resolved in federal court.”).

<sup>124</sup> See *infra* Section III.C.

<sup>125</sup> See *Crews v. S & S Serv. Ctr. Inc.*, 848 F. Supp. 2d 595, 600 (E.D. Va. 2012) (acknowledging that this category of cases would never have federal court jurisdiction).

<sup>126</sup> See *id.* (acknowledging an exception for cases beginning in federal court but later stayed for arbitration).

<sup>127</sup> See *infra* Section II.C.

<sup>128</sup> *Magruder v. Fidelity Brokerage Svcs. L.L.C.*, 818 F.3d 285, 288 (7th Cir. 2016) (assuming parties have different citizenship based on the named parties to the petition). In rare instances, the courts will find a lack of diversity based on necessary parties that would destroy diversity under Federal Rule of Civil Procedure 19. See *InterVest Int’l Equities Corp. v. Aberlich*, No. 12-CV-13750, 2013 WL 1316997, at \*2–3 (E.D. Mich. Mar. 29, 2013) (finding a nondiverse party necessary and thus destroying diversity of citizenship).

<sup>129</sup> See *infra* notes 131–35 and accompanying text.

<sup>130</sup> See *infra* notes 131–35 and accompanying text.

“award approach” and look to see if the amount awarded in arbitration was \$75,000 or more.<sup>131</sup> While simple in its application, these courts can never find jurisdiction in cases involving a \$0 award (i.e., a “defense award”) or cases for injunctive, declaratory, or other non-monetary relief.<sup>132</sup> The second approach is the “demand approach,” which serves as a “look through” to see if the amount in controversy in arbitration exceeded \$75,000.<sup>133</sup> The third approach is the “mixed approach.”<sup>134</sup> Courts relying on this test use the award approach if the parties do not seek to reopen the arbitration but use the demand approach if the parties would go back to arbitration following the court’s ruling.<sup>135</sup>

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<sup>131</sup> *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466, 1472 (11th Cir. 1997) (adopting award approach in part because the award approach would use two different amounts in controversy depending on the litigation contact point); *Ford v. Hamilton Invs., Inc.*, 29 F.3d 255, 260 (6th Cir. 1994) (adopting award approach); *Morcor Fin., L.L.C. v. Lucida Constr. Co.*, No. CV 21-00370-KD-B, 2021 WL 5989103, at \*2 (S.D. Ala. Dec. 17, 2021) (finding amount in controversy met because the arbitration award totaled more than \$1 million).

<sup>132</sup> *See Baltin*, 128 F.3d at 1466.

<sup>133</sup> *Pershing, L.L.C. v. Kiebach*, 819 F.3d 179, 182 (5th Cir. 2016) (adopting demand approach); *Magruder*, 818 F.3d at 287 (summarily deciding that the parties did not meet the amount in controversy because the parties took advantage of FINRA rules for cases involving less than \$75,000); *Bailey v. Wells Fargo Bank, N.A.*, 174 F. Supp. 3d 1359, 1362 (N.D. Ga. 2016) (finding the amount in controversy not met because the arbitration award was roughly \$18,000); *Equitas Disability Advoc., L.L.C. v. Daley, Debofsky & Bryant, P.C.*, 177 F. Supp. 3d 197, 204 (D.D.C. 2016) (noting that the D.C. Circuit follows the demand approach); *Benhenni v. Bayesian Efficient Strategy Trading, L.L.C.*, No. CV 15-8511 (ES), 2016 WL 5660461, at \*2 (D.N.J. Sept. 29, 2016) (adopting demand approach in a case in which the amount demanded met the amount in controversy but the award did not).

<sup>134</sup> *See infra* Section III.C.2.ii.

<sup>135</sup> *Hale v. Morgan Stanley Smith Barney, L.L.C.*, 982 F.3d 996, 998 (6th Cir. 2020) (“And in cases where the petitioner seeks to vacate a \$0 arbitration award and reopen his arbitration, the Court held that the amount in controversy includes the amount sought in the underlying arbitration.”); *Grubhub, Inc. v. Sznitko*, No. CV 22-1676PA, 2022 WL 2102107, at \*1 (C.D. Cal. Mar. 15, 2022) (finding no jurisdiction under a mixed approach to confirm a \$0 award); *Coffey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. CV 12-00176PA, 2012 WL 94545, at \*3 (C.D. Cal. Jan. 11, 2012) (applying mixed approach and finding no jurisdiction because the parties were solely seeking to vacate a \$0 award without reopening arbitration).



In sum, this area of the law is an overcomplicated landscape of questions rather than simple answers. The jurisprudence developed in a patchwork manner based on the specific litigation contact point, without considering whether these contact points should be treated differently. Had the courts placed more consideration on simplicity and consistency—two of the FAA’s underlying policies<sup>136</sup>—courts and litigants would not be spending significant time and expense on ancillary matters that have the potential of being outcome determinative. The time was certainly right for the Supreme Court to grant certiorari on another case involving jurisdiction for FAA motions. But rather than simplifying things, the *Badgerow* decision made everything more complicated.

## II. THE *BADGEROW* DECISION

The Supreme Court presumably took the *Badgerow* case to shed light on the question of jurisdiction in back-end arbitration motions.<sup>137</sup> Like the *Vaden* case, *Badgerow* started with a routine dispute. Denise Badgerow “worked as a financial advisor for REJ Properties, a firm run by,” *inter alia*, defendant Greg Walters.<sup>138</sup> Badgerow arbitrated, and lost, a claim of unlawful termination under federal law.<sup>139</sup> Thereafter, Badgerow filed a motion to vacate the award in state court; Walters moved to remove the case to federal court and confirm the arbitration award; and Badgerow moved to remand the case back to state court for lack of jurisdiction.<sup>140</sup> The

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<sup>136</sup> *See, e.g.*, 9 U.S.C. § 6 (2022) (proving that all applications made under the FAA be styled as motions to avoid the procedural complications associated with lawsuits).

<sup>137</sup> *Badgerow v. Walters*, 142 S. Ct. 1310, 1314 (2022).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* (noting that the arbitrator sided with Walters and dismissed Badgerow’s claims). Because of Badgerow’s position as a financial advisor, her claims were subject to arbitration before the Financial Industry Regulatory Authority (FINRA). *Badgerow v. Walters*, 975 F.3d 469, 41 (5th Cir. 2020) (discussing the role of FINRA in the case). Employment claims in the securities industry have long been considered subject to arbitration since the Supreme Court’s decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (holding that Gilmer’s statutory claims were arbitrable against his employer in the securities arena). For this reason, it is unsurprising that her fist litigation contact point was on a “back-end” matter, as opposed to a “front-end” arbitration matter.

<sup>140</sup> *Badgerow*, 142 S. Ct. at 1314–15 (describing procedural history).

lower federal courts found jurisdiction was proper by looking through to the arbitration facts, which involved a claim of unlawful termination under federal law.<sup>141</sup>

A. *The Majority Opinion: A Lesson in Textualism*

The Supreme Court granted certiorari to resolve the question of whether *Vaden's* “look through” doctrine applies to Sections 9, 10, and 11 of the FAA.<sup>142</sup> Justice Kagan issued the majority opinion, joined by seven other Justices.<sup>143</sup> Her approach to the case was straightforward, indeed, a textualist’s dream.

The majority begins with the proposition that federal courts have limited jurisdiction and the FAA does not provide subject-matter jurisdiction.<sup>144</sup> The opinion notes that the FAA provides certain litigation contact points, such as “petitions to compel” and “applications to confirm, vacate, or modify,” but those provisions “do not themselves support federal jurisdiction.”<sup>145</sup> The Court suggests the first place to consider jurisdiction is from the petition itself:

If it shows that the contending parties are citizens of different States (with over \$75,000 in dispute), then § 1332(a) gives the court diversity jurisdiction. Or if it alleges that federal law (beyond Section 9 or 10 itself) entitles the applicant to relief, then § 1331 gives the court federal-question jurisdiction.<sup>146</sup>

The majority then notes that, despite the underlying federal claim resolved in arbitration, the post-arbitration matters between Badgerow and Walters raise “no federal issue” because the parties are not contesting “the legality of Badgerow’s firing but the enforceability of an arbitral award,” a matter involving state law regarding settlements.<sup>147</sup> Peculiarly, the Court notes that an arbitration award

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<sup>141</sup> See *id.* at 1315 (describing lower court rulings).

<sup>142</sup> *Id.* (noting the conflict within the circuits on this question).

<sup>143</sup> Justice Breyer dissented in an opinion not joined by any other justice. See *id.* at 1322 (Breyer, J., dissenting).

<sup>144</sup> *Id.* at 1316 (providing general rules on jurisdiction).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 1316–17.

is “no more than a contractual resolution of the parties’ dispute . . . [a]nd quarrels about legal settlements . . . typically involve only state law, like disagreements about contracts.”<sup>148</sup> Although not stated so clearly or succinctly, the majority appears to be saying that the courts were solely being asked to interpret Sections 9 and 10 of the FAA, and that the underlying dispute—whether it be federal employment law or state contract law—would make little difference to the analysis.<sup>149</sup>

The Court then distinguishes *Vaden* and holds that the “look through” mechanism<sup>150</sup> is not available for petitions other than those to compel arbitration. This holding is based on the textual differences between Section 4 and all other sections of the FAA.<sup>151</sup> Section 4 contains the “save for” text, which is interpreted as requiring a “look though.”<sup>152</sup> Sections 9 and 10 do not use similar language.<sup>153</sup>

The majority invokes the textualist canon that when “‘Congress includes particular language in one section of a statute but omits it in another section of the same Act,’ we generally take the choice to be deliberate.”<sup>154</sup> In addition, the Court notes that it could not insert language into Sections 9 and 10 that Congress did not choose to insert.<sup>155</sup> The Court further states that the “look through” doctrine is “a highly unusual one,” and it would be inappropriate to expand its use.<sup>156</sup>

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<sup>148</sup> *Id.*

<sup>149</sup> *See id.*

<sup>150</sup> *Id.* at 1317 (describing the Section 4 analysis underlying the “look through” doctrine).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *See id.*

<sup>154</sup> *Id.* at 1318 (quoting *Collins v. Yellen*, 141 S. Ct. 1761, 1782 (2021)). This reasoning was also persuasive to the Third and D.C. Circuits adopting the same rule. *See Goldman v. Citigroup Glob. Mkts., Inc.*, 834 F.3d 242, 250 (3d Cir. 2016) (“Section 10 lacks the critical ‘save for such agreement’ language that was central to the Supreme Court’s *Vaden* opinion.”); *Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1247 (D.C. Cir. 1999) (noting that “the same words are not in § 10”).

<sup>155</sup> *Badgerow*, 142 S. Ct. 1310, 1318 (2022) (“We have no warrant to redline the FAA, importing Section 4’s consequential language into provisions containing nothing like it. Congress could have replicated Section 4’s look-through instruction in Sections 9 and 10.”).

<sup>156</sup> *See id.*

The Court also surmises that Congress intended the federal courts to have broader jurisdiction to hear arbitration matters on the front-end of cases compared to the back-end in order to enforce agreements to arbitrate.<sup>157</sup> The Court articulates: “Congress created an exception to those ordinary jurisdictional principles for Section 4 petitions to compel. But it is one thing to make an exception, quite another to extend that exception everywhere.”<sup>158</sup> The majority rejects the contention that the disparate outcomes in *Vaden* and *Badgerow* would be difficult to administer.<sup>159</sup> The Court also side-steps the question of jurisdiction for other parts of the FAA, notably Section 6.<sup>160</sup>

Overall, the majority opinion is a lesson in textualism. The Court concentrates its discussion on the language of Section 4 and how that language differs from the language of other sections of the FAA.<sup>161</sup> Employing a language canon (i.e., construing different language differently), is another textual tool employed by the Court.<sup>162</sup> The only tool of interpretation used by the Court that is not purely textualist involved determining Congressional intent, but the Court interpretive tool merely supported its decision, rather than acting as a primary basis for its decision.<sup>163</sup>

#### B. *The Dissenting Opinion: An Exploration of Practical Concerns*

In contrast to the textualist approach taken by the majority, Justice Breyer’s dissent is grounded in the pragmatic principles often underlying his decisions, including his arbitration opinions.<sup>164</sup> His

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<sup>157</sup> *Id.* at 1322.

<sup>158</sup> *Id.* at 1321.

<sup>159</sup> *Id.* at 1321 (rejecting the practical argument of administrative simplicity across the sections of the FAA).

<sup>160</sup> *Id.* at 1319–20 (rejecting Walter’s argument that Section 6 provides an FAA-wide “look through”).

<sup>161</sup> *See id.* at 1317 (“To show why that is so, we proceeded methodically through Section 4’s wording.”).

<sup>162</sup> *See id.* at 1317–18.

<sup>163</sup> *Id.* at 1322.

<sup>164</sup> Kristen M. Blankley, *Standing on Its Own Shoulders: The Supreme Court’s Statutory Interpretation of the Federal Arbitration Act*, 55 AKRON L. REV. 101, 109 (2022) (discussing Justice Breyer’s judicial philosophy grounded in purposivism and use of tools of statutory interpretation). Justice Breyer’s decision in this

approach in *Badgerow* utilizes a large number of interpretive tools to support his reading of the jurisdictional limits (or allowances) under the FAA.<sup>165</sup>

Justice Breyer's first argument in favor of a universal "look through" approach sounds in the whole act rule—the interpretive tool suggesting that an entire statute should be read as a cohesive whole.<sup>166</sup> He observes that six separate sections of the FAA (Sections 4, 5, 7, 9, 10, and 11) specifically invoke the assistance of the United States district courts,<sup>167</sup> and he surmises that the Court's ruling affects all of these sections.<sup>168</sup> In other words, the majority appears to limit *Vaden* to cases falling under Section 4, and *Badgerow* applies to the remainder of the FAA.<sup>169</sup> The dissent glimpses that the FAA *should* give the federal courts jurisdiction over all FAA petitions but is restrained by prior rulings holding that the FAA does not provide such independent ground for jurisdiction.<sup>170</sup>

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case is consistent with his overall judicial philosophy. STEPHEN G. BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 73–74 (2010) ("I argue that the Court should interpret written words, whether in the Constitution or in a statute, using tools that help make the law effective in practice. . . . I suggest that by understanding that its actions can have real-world consequences . . . , the Court can help make the law work more effectively.").

<sup>165</sup> See *infra* notes 166–89 and accompanying text.

<sup>166</sup> *Badgerow*, 142 S. Ct. at 1322–23 (outlining various aspects of the FAA containing language giving the federal courts the ability to hear arbitration motions); see generally Blankley, *supra* note 164, at 138–39 (discussing the whole act rule).

<sup>167</sup> *Badgerow*, 142 S. Ct. at 1322–23 (discussing the six sections of the FAA with language regarding the federal courts).

<sup>168</sup> *Id.* at 1323 ("This case directly concerns jurisdiction under Sections 9 and 10, but the Court's reasoning applies to all the sections just mentioned.").

<sup>169</sup> *Id.*

<sup>170</sup> The dissent notes:

At first blush, one might wonder why there is any question about whether a federal court has jurisdiction to consider requests that it act pursuant to these sections. The sections' language seems explicitly to give federal courts the power to take such actions. Why does that language itself not also grant jurisdiction to act? The answer, as the Court notes, is that we have held that the FAA's authorization of a petition does not itself create jurisdiction. Rather, the federal court must have what we have called an independent jurisdictional basis to resolve the matter.

Next, the dissent recalls—but deceptively oversimplifies—the Court’s *Vaden* holding. Justice Breyer focuses on the language that *Vaden* requires lower courts to “look [ ] through a § 4 petition to the parties’ underlying substantive controversy.”<sup>171</sup> While technically correct, the dissent leaves one to believe that *Vaden* requires looking through to the underlying *arbitration* facts—which is only the case when the litigation contact point involves a freestanding petition.<sup>172</sup> The *Vaden* case itself only allowed a limited “look through” to the *litigation* facts, thus finding no jurisdiction in Discover Bank’s federal counterclaim.<sup>173</sup> Thus, Justice Breyer depicts *Vaden* in a broader light than the case supports. Although this distinction makes little difference to Justice Breyer’s point, the frame recalls the broader “look through” for which he advocated in the part concurring/part dissenting opinion he joined.<sup>174</sup>

Justice Breyer’s dissent in *Badgerow* then criticizes the majority for overlooking the use of practical consequences of multiple jurisdictional tests, especially considering the Court’s reliance on practicalities in *Vaden*.<sup>175</sup> *Vaden* considered a number of practical considerations, including the oddities involved in limiting a jurisdictional analysis of Section 4 to the petition.<sup>176</sup> Justice Breyer notes that the *Badgerow* decision leads to “curious consequences and artificial distinctions” between Section 4 and the other litigation contact points.<sup>177</sup>

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*Id.* (Breyer, J., dissenting) (internal quotation marks and citations omitted and emphasis added).

<sup>171</sup> *Id.* (citing *Vaden v. Discover Bank*, 556 U.S. 49, 62 (2009) (internal quotation marks omitted)).

<sup>172</sup> *See supra* note 87–90 and accompanying text.

<sup>173</sup> *See supra* notes 69–91 and accompanying text describing the holding of the *Vaden* case.

<sup>174</sup> *Vaden v. Discover Bank*, 556 U.S. 49, 72 (2009) (listing Justice Breyer among the signatories of Justice Roberts’ part concurrence/part dissent arguing for a broader “look through” than the majority opinion).

<sup>175</sup> *Badgerow*, 142 S. Ct. at 1323 (Breyer, J., dissenting) (“The second reason [relied upon in *Vaden*], which the majority today neglects, was practical.”).

<sup>176</sup> *Id.* (Breyer, J., dissenting) (“To find jurisdiction only where the petition to enforce an arbitration agreement itself established federal jurisdiction, we explained, would result in ‘curious practical consequences,’ including unduly limiting the scope of section 4 and hinging jurisdiction upon distinctions that were ‘totally artificial.’” (citing *Vaden* 556 U.S. at 65)).

<sup>177</sup> *Id.* at 1323–24 (Breyer, J., dissenting).

He specifically advocates for a broader “look through” for each litigation contact point under the FAA.<sup>178</sup> This approach would lead to simplicity and uniformity in administration. Justice Breyer questions how courts determine jurisdiction in cases under Sections 5 (involving appointment of arbitrators) and 7 (involving subpoenas) without any type of “look through.”<sup>179</sup> He questions the continuing jurisdiction of a court to hear back-end motions, even if the court had jurisdiction under Section 4 and posited that a court might lose jurisdiction on the back-end even if it had jurisdiction on the front-end<sup>180</sup>—a result contrary to current practice by many federal courts.<sup>181</sup> A uniform “look through” would also meet the Supreme Court’s policy goal of enforcing arbitration agreements and simplifying the process.<sup>182</sup>

In response to the textualist arguments set forth by the majority, Justice Breyer urged for a “whole act” reading of the FAA, rather than parsing each section of the FAA on its own. He noted that “[v]arious aspects of the FAA’s text and structure suggest that Section 4’s jurisdictional rule should apply throughout.”<sup>183</sup> He further urged that the FAA be read “as a single whole, with each section providing one enforcement tool, and one section—Section 4—providing both an enforcement tool and a jurisdictional rule applicable to the entire toolbox.”<sup>184</sup> Justice Breyer further used legislative

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<sup>178</sup> *Id.* at 1324 (Breyer, J., dissenting) (“I would use the look-through approach to determine jurisdiction under each of the FAA’s related provisions—Sections 4, 5, 7, 9, 10, and 11.”).

<sup>179</sup> *Id.* at 1324 (Breyer, J., dissenting) (considering whether jurisdiction would exist given the lack of “save for” language); *see also* discussion *infra* Part III concerning the difficulties involving questions for appointing arbitrators and issuing subpoenas.

<sup>180</sup> *Badgerow*, 142 S. Ct. at 1325 (Breyer, J., dissenting) (discussing complications arising from interpreting jurisdiction for Sections 9, 10, and 11 differently than under Section 4). Justice Breyer also sees difficulties in states enforcing arbitration matters. *Id.* at 1326 (Breyer, J., dissenting) (“But we cannot be sure that state courts have the same powers under the FAA that federal courts have.”).

<sup>181</sup> *Id.* at 1326 (Breyer, J., dissenting) (citing *Me. Cmty. Health Options v. Albertsons Cos.*, 993 F.3d 720, 725 (Watford, J., concurring)); *see also* *McCormick v. Am. Online, Inc.*, 909 F.3d 677, 684 (4th Cir. 2018).

<sup>182</sup> *Badgerow*, 142 S. Ct. at 1327 (Breyer, J., dissenting) (discussing policy considerations underlying the FAA).

<sup>183</sup> *Id.* (Breyer, J., dissenting).

<sup>184</sup> *Id.* (Breyer, J., dissenting).

history to support this argument.<sup>185</sup> He cited portions of the legislative history supporting the overarching policy of simplicity.<sup>186</sup> In addition, he cited the testimony of the FAA's primary drafter, Julius Cohen, stating: "Federal courts are given jurisdiction to enforce [arbitration] agreements whenever . . . they would normally have jurisdiction of a controversy between the parties."<sup>187</sup> Ultimately, all of these arguments tie together in an argument Justice Breyer characterized as an interpretation involving "common sense."<sup>188</sup> As discussed more below, these ideas would have led to a better outcome not only for courts and litigants but also as a matter of statutory interpretation.<sup>189</sup>

### C. *Synthesizing Vaden and Badgerow*

The Court's jurisprudence in this area created a patchwork of rulings and dicta that speak directly to only two of the twelve boxes in Tables 3 and 4.<sup>190</sup> *Vaden* specifically provides a look through to litigation facts in front-end federal question cases with pending litigation, and it provides dicta suggesting that front-end federal question cases on a freestanding petition can use a "look through" to the arbitration facts.<sup>191</sup> In Table 5, these two boxes are shaded the lightest to signify the availability of a look through.<sup>192</sup> *Vaden* does not address what test should be employed in front-end cases based on diversity jurisdiction, and those boxes are shaded slightly darker in the upper right corner of Table 5.<sup>193</sup>

Now *Badgerow* holds that back-end federal question cases involving freestanding motions have no "look through."<sup>194</sup> In dicta, the Court also suggests that no look through would be available in other federal question cases for either "middle motions" or back-end

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<sup>185</sup> *Id.* at 1328 (Breyer, J., dissenting).

<sup>186</sup> *Id.* (Breyer, J., dissenting) (citing various Congressional reports).

<sup>187</sup> *Id.* (Breyer, J., dissenting) (citing *Arbitration of Interstate Commercial Disputes: J. Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 34 (1924) (statement of Julius H. Cohen)).

<sup>188</sup> *Id.* at 1328–29 (Breyer, J., dissenting).

<sup>189</sup> *See infra* Part III.

<sup>190</sup> *See supra* Table 3, p. 688; *see supra* Table 4, p. 692.

<sup>191</sup> *Vaden v. Discover Bank*, 556 U.S. 49, 62 (2009)

<sup>192</sup> *See infra* Table 5, p. 708.

<sup>193</sup> *Vaden*, 556 U.S. at 62.

<sup>194</sup> *Badgerow v. Waters*, 142 S. Ct. 1310, 1314 (2022).



motions with pending litigation.<sup>195</sup> For reasons discussed in more detail below,<sup>196</sup> the Court's ruling appears to hold that federal question jurisdiction will never lie in "back-end" or "middle motions."<sup>197</sup> These boxes are shaded the darkest because a court will likely never have jurisdiction to hear these motions. In dicta, *Badgerow* suggests no look through would be available for "middle motions" or "back-end" motions in diversity cases; however, the Court suggests that diversity and amount in controversy could be determined by the petition itself.<sup>198</sup> These four boxes are shaded in, in the lower right corner of Table 5.<sup>199</sup>

While *Badgerow* suggests that lower courts will have no problems applying different tests in different situations,<sup>200</sup> this analysis shows that courts will need to develop at least twelve different tests for twelve different litigation contact points (without accounting for admiralty jurisdiction). This Article argues that both cases are wrongly decided, but for different reasons. The next Part discusses how these two decisions complicate both the theoretical and practical legal landscape.<sup>201</sup>

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<sup>195</sup> *Id.* at 1320.

<sup>196</sup> *See infra* Section III.E–F.

<sup>197</sup> *See infra* Table 5, p. 708.

<sup>198</sup> *See Badgerow*, 142 S. Ct. at 1316.

<sup>199</sup> *See infra* Table 5, p. 708.

<sup>200</sup> *See Badgerow*, 142 S. Ct. at 1320–21.

<sup>201</sup> *See infra* Part III.

**Table 5:**

<b>Supreme Court Guidance by Litigation Contact Point</b>				
	Federal Question Jurisdiction		Diversity Jurisdiction	
	Pending Case	Freestanding	Pending Case	Freestanding
Front-End Motions	<i>Vaden</i> look through – Holding	<i>Vaden</i> look through – <i>dicta</i>	Unclear	Unclear
Middle Motions	<i>Badgerow</i> – no look through – <i>dicta</i>	<i>Badgerow</i> – no look through – <i>dicta</i>	<i>Badgerow</i> – no look through – <i>dicta</i>	<i>Badgerow</i> – no look through – <i>dicta</i>
Back-End Motions	<i>Badgerow</i> – no look through – <i>dicta</i>	<i>Badgerow</i> – no look through – Holding	<i>Badgerow</i> – no look through – <i>dicta</i>	<i>Badgerow</i> – no look through – <i>dicta</i>

### III. A MUDDY MESS

Despite the *Badgerow* Court's insistence that its decision will create clarity for lower courts,<sup>202</sup> this Article forecasts nothing short of a jurisdictional muddy mess. As depicted in Table 5 above,<sup>203</sup> the FAA contemplates at least three categories of litigation contact points (front, middle, or end) and courts created different jurisdictional tests depending on the type of subject matter jurisdiction (federal question or diversity) and litigation posture (prior litigation or freestanding motion).<sup>204</sup> *Vaden* and *Badgerow* provide direct answers for only two of the twelve boxes.<sup>205</sup>

<sup>202</sup> See *Badgerow*, 142 S. Ct. at 1321.

<sup>203</sup> See *supra* Table 5, p. 708.

<sup>204</sup> See *Badgerow*, 142 S. Ct. at 1321.

<sup>205</sup> See *supra* Table 5, p. 708.

This Part considers six “muddy” areas left in the wake of *Badgerow*: (1) consequences from inconsistencies among legal tests; (2) the question of what is or is not “looking through”; (3) lingering questions regarding determining an amount in controversy; (4) whether *Badgerow* is the death knell for back-end motions based on federal question jurisdiction; (5) jurisdictional requirements for appointing arbitrators; and (6) jurisdictional requirements for enforcing arbitrator subpoenas.

#### A. *Lack of Consistency Between Tests*

In Table 5 above, I outlined twelve distinct litigation contact points, but even that table involves some oversimplifications. For instance, the “middle motions” row combined both motions to appoint arbitrators and motions to enforce arbitration subpoenas.<sup>206</sup> As noted below, courts do not use uniform jurisdictional tests for those two motions.<sup>207</sup> Moreover, cases under admiralty jurisdiction are omitted entirely.<sup>208</sup> Even within the twelve boxes in the table, circuit splits exist.<sup>209</sup>

The *Badgerow* majority dismisses any concern about consistency and simplicity, noting that this concern rings in policy, “not in text.”<sup>210</sup> The Court finds that this policy argument is “oversol[d],” contending that lower courts can tell “in an instant” which jurisdictional test to use.<sup>211</sup> Perhaps the majority oversells its idea, not the other way around.

The majority ignores two significant reasons for ruling in favor of consistency—one sounding in statutory interpretation and the other in policy.<sup>212</sup> Regarding statutory interpretation, the textual policy for a universal “look though” could easily be supported by the

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<sup>206</sup> *Id.*

<sup>207</sup> *See infra* Sections III.D–E.

<sup>208</sup> *See* 9 U.S.C. § 2 (2022) (“A written provision in any maritime transaction . . . to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable.”).

<sup>209</sup> Jackie S. Celender, *Look at Me, Not Through Me: Supreme Court Limits Federal Jurisdiction for Post-Arbitration Award Petitions*, K&L GATES (Apr. 15, 2022), <https://www.klgates.com/Look-At-Me-Not-Through-Me-Supreme-Court-Limits-Federal-Jurisdiction-for-Post-Arbitration-Award-Petitions-4-15-2022>

<sup>210</sup> *See* *Badgerow v. Waters*, 142 S. Ct. 1314, 1320 (2022).

<sup>211</sup> *Id.* at 1321.

<sup>212</sup> *See id.* at 1322, 1329 (Breyer, J., dissenting).

whole act rule, i.e., reading the jurisdictional language from Section 4 into Sections 5, 7, 9, 10, and 11.<sup>213</sup> The Supreme Court's use of the whole act rule in arbitration cases, however, has been inconsistent at best and outcome-determinative at worst.<sup>214</sup>

Consider the early arbitration preemption cases. In 1984, the Supreme Court decided *Southland v. Keating*, holding that the FAA is substantive law that preempts state law restricting parties' ability to contract to arbitrate.<sup>215</sup> Given the jurisdictional language in FAA Section 4 and references to federal courts in Section 9 and other places, the Supreme Court rejected reading the statute as a whole to reach the conclusion that part of the FAA is substantive law rather than procedural law.<sup>216</sup> Other FAA preemption cases similarly reject reading the FAA as a cohesive whole for the purpose of preempting state laws hostile to arbitration.<sup>217</sup>

On the other hand, the Supreme Court relies on the whole act rule, or variations thereof, in other arbitration cases, notably arbitrability cases.<sup>218</sup> In arbitrability and later preemption cases, the Court has noted that Sections 2, 3, and 4 must all work together to enforce arbitration agreements, both through substantive law and procedural mechanisms.<sup>219</sup> One of the clearest uses of the whole act rule in the arbitration docket involves questions of venue, a concept closely related to jurisdiction.<sup>220</sup> In *Cortez Byrd Chips, Inc. v. Bill Harbert*

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<sup>213</sup> See *id.* at 1328 (Breyer, J., dissenting).

<sup>214</sup> See, e.g., *Southland v. Keating*, 465 U.S. 1, 16 (1984); *Rent-A-Center W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010).

<sup>215</sup> *Southland*, 465 U.S. at 16 ("In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.").

<sup>216</sup> *Id.* at 29 (O'Connor, J., dissenting) (arguing that the FAA should be read as a cohesive statute and that the structure of the Act points to the opposite conclusion reached in *Southland*).

<sup>217</sup> See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (affirming the holding of *Southland* against a challenge to its continued validity).

<sup>218</sup> See, e.g., *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198 (2000).

<sup>219</sup> See *Rent-A-Center W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010) (discussing how FAA Sections 2, 3, and 4 all work together); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (same); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (same).

<sup>220</sup> See, e.g., *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198 (2000).

*Construction Co.*, the Supreme Court used the whole act rule to apply the venue language in Section 9 dealing with motions to confirm arbitration awards to Sections 10 and 11 dealing with motions to vacate and modify.<sup>221</sup> The unanimous Court held that “the three venue sections of the FAA are best analyzed together, owing to their contemporaneous enactment and the similarity of their pertinent language.”<sup>222</sup> The *Badgerow* majority conspicuously omits any reference to *Cortez Byrd*, but Justice Breyer’s dissent cites it twice.<sup>223</sup> Despite being the most on point authority, neither the majority nor the dissent cites *Cortez Byrd* for its use of the whole act rule in reading the procedural language of the FAA consistently across sections.<sup>224</sup>

The majority also dismisses the policy argument that a uniform “look through” might expand access to arbitration.<sup>225</sup> The Court has long adopted a “national policy favoring arbitration,”<sup>226</sup> and the *Cortez Byrd* decision promoted increased access to federal courts.<sup>227</sup> These policies could easily support a universal “look through” to arbitration facts (not litigation facts) to ensure broader access to federal courts across all arbitration motions.

The *Badgerow* majority also rejected the policy reasons for consistently reading jurisdictional language across the FAA.<sup>228</sup> In contrast, the dissent equates test uniformity with efficiency.<sup>229</sup> Justice Breyer foresees the *Badgerow* decision as “breeding litigation from

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<sup>221</sup> *Id.* at 198.

<sup>222</sup> *Id.*

<sup>223</sup> See *Badgerow v. Walters*, 142 S. Ct. 1324, 1327 (2022) (Breyer, J., dissenting).

<sup>224</sup> Justice Breyer only cites *Cortez Byrd* for the concept of avoiding absurd results in statutory interpretation and to support the policy of efficiency. *Id.*

<sup>225</sup> *Id.* at 1321.

<sup>226</sup> *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022) (discussing the contours of the “national policy” in favor of arbitration (citation omitted)).

<sup>227</sup> See *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 200 (2000) (discussing the “liberalizing” view of venue).

<sup>228</sup> *Badgerow*, 142 S. Ct. at 1316 (“A federal court may entertain an action brought under the FAA *only if* the action has an ‘independent jurisdictional basis.’” (emphasis added) (citation omitted)).

<sup>229</sup> *Id.* at 1327 (Breyer, J., dissenting) (discussing efficiency and its relationship to uniformity in arbitration).

a statute that seeks to avoid it.”<sup>230</sup> Between *Vaden* and *Badgerow*, the lower courts devised a myriad of jurisdictional tests, and *Badgerow*’s majority opinion does little to alleviate further confusion.<sup>231</sup> The remaining points in this Part detail the muddled jurisdictional landscape for issues without clear Supreme Court guidance – notably amount in controversy issues on both front-end and back-end motions, the fate of federal question jurisdiction on back-end motions, jurisdictional determinations on Section 5 motions to appoint an arbitrator, and jurisdictional determinations on Section 7 motions to enforce subpoenas. The plethora of unanswered questions creates additional inefficiency never intended by the FAA.<sup>232</sup>

### B. *What Is (And Is Not) “Looking Through”?*

In *Vaden*, the Supreme Court did not define what “looking through” meant.<sup>233</sup> But, given the tension between *Vaden* and *Badgerow*, this definition is more important than ever.<sup>234</sup> Perhaps the biggest lingering question is the following: Is a court engaging in a “look through” when the face of the petition provides all the facts necessary to support jurisdiction? Perhaps the Court would

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<sup>230</sup> *Id.* (Breyer, J., dissenting) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995)).

<sup>231</sup> *See, e.g., Garner v. BankPlus*, 484 B.R. 134, 140 (Bankr. S.D. Tex. 2012) (declining to apply the “look through” test to bankruptcy jurisdiction and instead relying on the claims made on the face of the complaint to determine federal question jurisdiction).

<sup>232</sup> *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019) (“In individual arbitration [envisioned by the FAA], ‘parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, *greater efficiency and speed*, and the ability to choose expert adjudicators to resolve specialized disputes.”) (emphasis added) (citation omitted)).

<sup>233</sup> *Vaden v. Discover Bank*, 556 U.S. 49, 62 (2009). Rather than defining “look through” in their opinion, the Court merely holds, “A federal court may ‘look through’ a § 4 petition to determine whether it is predicated on an action that ‘arises under’ federal law.” *Id.*

<sup>234</sup> *Compare id.* (holding that “[a] federal court may ‘look through’ a § 4 petition to determine whether it is predicated on an action that ‘arises under’ federal law”), with *Badgerow*, 142 S. Ct. at 1314 (holding that “[FAA’s sections 9 and 10] lack Section 4’s distinctive language directing a look-through, on which *Vaden* rested. Without that statutory instruction, a court may look only to the application actually submitted to it in assessing its jurisdiction.”).

have been better suited to create a “look at” test, rather than a “look through” test.

Although the *Badgerow* majority states that a “court may look only to the application actually submitted,”<sup>235</sup> the Court found that the facts stated in the petition regarding the federal case at hand were insufficient to grant jurisdiction.<sup>236</sup> How, exactly, a petitioner demonstrates jurisdiction appears to be evolving.

Consider scenario 1. Company A, from State A, and Company B, from State B, arbitrate a breach of contract action. The parties voluntarily submit to the jurisdiction of the arbitrator under their contract, and neither party files a motion to compel. The arbitrator awards Company A \$1.2 million in damages. Company B files a motion to vacate the award based on alleged arbitrator misconduct. The motion to vacate alleges diversity of citizenship and an amount-in-controversy of \$1.2 million. Can the court simply take the pleaded facts to establish jurisdiction, or do either of these facts require a “look through” irrespective of being discussed in the motion? Under *Vaden* and *Badgerow*, this case is easy, and jurisdiction can be supported based on the statements in the application (i.e., motion to vacate).

Contrast those facts with scenario 2. Company A and Company B, both located in State A, arbitrate a copyright dispute. The parties voluntarily submit to the jurisdiction of the arbitrator. Company A files a demand in arbitration alleging copyright violations under federal law, and Company B files an answering statement denying all liability. The arbitrator issues an award for injunctive relief only, requiring Company B to stop using Company A’s copyrighted materials. Company B files a motion to vacate based on the same arbitrator’s misconduct. On the face of the Section 10 motion, Company B states that the underlying arbitration case involved federal copyright law, but the grounds for vacatur involved the arbitrator’s conduct. This case, a back-end case based on federal question jurisdiction, has left courts baffled in determining what facts are sufficient to set forth in the application.

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<sup>235</sup> *Badgerow*, 142 S. Ct. at 1314.

<sup>236</sup> *Id.* at 1318.

*Badgerow* involved procedural facts similar to scenario 2—a freestanding motion to vacate based on federal question jurisdiction.<sup>237</sup> The face of the *Badgerow* petition included information about the arbitration case based on federal employment law.<sup>238</sup> The *Vaden* petition also included language about the federal banking laws to be arbitrated.<sup>239</sup> The *Vaden* Court, however, explicitly disregarded these facts.<sup>240</sup> In *Vaden*, Discover Bank contended that the legal nature of the claim involved Vaden’s allegations of “illegal finance charges, interest and late fees” under “federal law under 28 U.S.C. § 1331.”<sup>241</sup> However, because those facts were in a state court counterclaim, the Court found the application insufficient to establish jurisdiction.<sup>242</sup> In *Badgerow*, Walters’ motion to vacate explicitly referenced the federal laws at dispute in the arbitration.<sup>243</sup> If the Court were looking for facts to support federal question jurisdiction, it could have found them on the face of the petition itself; however, the Court rejected that argument outright.<sup>244</sup> In other words, the necessity of a “look through” was never to cure a “pleading” style deficiency but a substantive argument regarding which facts can support jurisdiction.<sup>245</sup> In this way, a “look at” test might have

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<sup>237</sup> *Id.* at 1314–15.

<sup>238</sup> See generally *Badgerow v. Walters*, No. 19-10353, 2019 WL 2611127, at \*1–3 (E.D. La. June 26, 2019) (discussing procedural history).

<sup>239</sup> Verified Complaint in the Nature of a Petition to Compel Arbitration and Enjoin Defendant’s Prosecution of her State Court Counterclaim at 3 ¶ 8, *Discover Bank v. Vaden*, No. 03CV03224, 2003 WL 23922538 (D. Md. Nov. 12, 2003).

<sup>240</sup> When discussing the case’s procedural history, the Court mentions the federal banking laws in dispute but ultimately grants federal question jurisdiction through the “look through” approach, rather than solely looking at the face of the complaint. *Vaden v. Discover Bank*, 556 U.S. 49, 55, 62 (2009).

<sup>241</sup> Verified Complaint, *supra* note 239, at 3 ¶ 8.

<sup>242</sup> *Vaden*, 556 U.S. at 62 (“[I]n keeping with the well-pleaded complaint rule as amplified in *Holmes Group*, however, a federal court may not entertain a § 4 petition based on the contents, actual or hypothetical, of a counterclaim.”).

<sup>243</sup> *Badgerow v. Walters*, 142 S. Ct. 1310, 1315 (2022) (noting that the district court looked to the subject of the arbitration to determine jurisdiction).

<sup>244</sup> *Id.* at 1317–18 (“It had to proceed downward to *Badgerow*’s employment action, where a federal law claim satisfying § 1331 indeed exist . . . [but] the look-through method for assessing jurisdiction should not apply”).

<sup>245</sup> *Id.* at 1315 (“Courts have divided over whether the look-through approach used in *Vaden* can establish jurisdiction in a case like this one — when the application before the court seeks not to compel arbitration under Section 4 but to confirm, vacate, or modify an arbitral award under other sections of the FAA.”).



been clearer, since looking “through” does not seem to matter when the face of the petition alleges a federal question.

The “look through” language, in and of itself, appears to be a misnomer; it suggests that the court should be able to determine jurisdiction based on the motion itself.<sup>246</sup> However, in both *Vaden* and *Badgerow*, the Court refused to consider the facts stated in the motion and considered other facts entirely.<sup>247</sup> Reading these cases together, the Court appears to suggest that when a “look through” is unavailable, jurisdiction may also be unavailable. This results in an absurd reading of the FAA, which provides for certain relief in federal courts, but the lack of a “look through” in conjunction with the unavailability of relying on the pleadings renders jurisdiction unavailable in many cases.

In traditional civil litigation, pleading facts would be sufficient to meet the burden of establishing jurisdiction.<sup>248</sup> Yet, under the FAA, the parties do not submit pleadings—they submit motions, as specified by the text.<sup>249</sup> Because the motions are to be “heard in the manner provided by law for the making and hearing of motions,” one might expect that the courts could consider affidavits submitted to establish facts in the absence of formal pleadings.<sup>250</sup> The Supreme Court, without expressly saying so, appears to reject the ability to

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<sup>246</sup> *Badgerow*’s definition of “look through” suggests that jurisdiction could be determined on the motion’s face if the court solely chose to look there. *See id.* at 1314. (“If the underlying dispute falls within the court’s jurisdiction—for example, by presenting a federal question—then the court may rule on the petition to compel. That is so regardless [of] whether the petition alone could establish the court’s jurisdiction.”).

<sup>247</sup> Both complaints included references to federal law that theoretically could grant federal question jurisdiction. *Vaden*, 556 U.S. at 55 (referencing the Federal Deposit Insurance Act); *Badgerow v. Walters*, 2019 WL 2611127, \*1 (E.D. La. June 26, 2019) (“Louisiana whistleblower call was premised on violations of federal law”).

<sup>248</sup> *See, e.g., Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (“The presence or absence of federal-question jurisdiction is governed by the ‘well-pleaded complaint rule,’ which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.”).

<sup>249</sup> 9 U.S.C. § 6 (2022) (specifying motion practice for all requests under the FAA).

<sup>250</sup> *Id.*

establish jurisdiction using supporting facts from the papers, whether or not “look through” is available.<sup>251</sup>

If the courts cannot use the facts in the motions and the attached affidavits, then what can the courts use to establish jurisdiction? *Vaden* appears to instruct the courts to look not at a Section 4 petition, but to either a state court complaint or the controversy to be arbitrated if no parallel lawsuit is pending.<sup>252</sup> In cases involving motions to confirm and vacate, the FAA specifically instructs the parties to “also file” the “agreement,” the “award,” and affidavits needed for the court to make its ruling.<sup>253</sup> The *Badgerow* ruling, however, instructs the lower courts that they cannot use this information to determine jurisdiction because considering even the award could constitute an impermissible “look through.”<sup>254</sup>

In cases where look-through is permissible, none of these problems would exist. However, these two cases raise serious questions about whether and how the parties can satisfy the burden of establishing jurisdiction in cases where no “look through” is available. A doctrine describing what the courts can “look at” would be simpler and more in line with the actual holding of *Badgerow*.

### C. *Lingering Diversity Jurisdiction Questions*

Both *Vaden* and *Badgerow* involve federal question jurisdiction.<sup>255</sup> Lingering questions exist regarding how both cases apply to diversity cases. This section considers three issues: (1) diversity of citizenship determinations; (2) amount in controversy issues for “front-end” motions; and (3) amount in controversy issues for “back-end” motions.

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<sup>251</sup> For example, the *Vaden* court analyzes the statutory construction of § 4 of the FAA in establishing federal jurisdiction instead of relying on the federal question raised *Vaden*’s initial counterclaim. *See Vaden*, 556 U.S. at 57–58 (2009).

<sup>252</sup> *Id.* at 62 (noting that courts should consider whether they would have jurisdiction if the parties had no arbitration agreement). The *Vaden* Court rejected the argument that the Section 4 petition is akin to a request for specific performance under contract law. *Id.* at 63 (rejecting argument under contract law).

<sup>253</sup> 9 U.S.C. § 13(a)–(c) (2022) (setting forth the papers needed to file the motions).

<sup>254</sup> *Badgerow v. Walters*, 142 S. Ct. 1310, 1324 (2022).

<sup>255</sup> *See id.* at 1319; *Vaden*, 556 U.S. at 51.

### 1. DIVERSITY OF CITIZENSHIP

As explained above,<sup>256</sup> the courts universally accept that the parties to the petition should be considered the parties for the purpose of diversity of citizenship even if pending state court litigation or the proposed arbitration involves nondiverse citizens, such as individual employees or agents of a diverse business.<sup>257</sup> The Supreme Court did not dispute (or analyze) jurisdiction in the 1983 case of *Moses H. Cone*, which involved fewer—and diverse—parties to the arbitration petition than the pending litigation.<sup>258</sup> Lower courts continue to rely on the “precedent” set by *Moses H. Cone* to determine diversity, both in “front-end” and “back-end” cases.<sup>259</sup>

The Court’s ruling *sub silencio* and the resulting lower court opinions are unsupported by the FAA.<sup>260</sup> Section 4 allows a “party” to compel arbitration.<sup>261</sup> Although not specified, “party” appears to be a party to the arbitration agreement based on the language that a motion to compel must be “served upon the party in default” of the obligation to arbitrate,<sup>262</sup> not parties to a lawsuit. An early Second Circuit case used this definition of “party” to determine if any state

<sup>256</sup> See *supra* Sections I.B–C.

<sup>257</sup> This rule applies provided that all indispensable parties are joined to the action, and the courts will conduct a Federal Rule of Civil Procedure 19 analysis to ensure all necessary parties are joined to the case. See, e.g., *Hermès of Paris, Inc. v. Swain*, 867 F.3d 321, 324 (2d Cir. 2017) (looking only at the petition and any parties necessary under Rule 19); see also *Doctor’s Assocs., Inc. v. Distajo*, 66 F.3d 438, 445–46 (2d Cir. 1995) (rejecting argument that employees and agents are indispensable parties to the action under Rule 19).

<sup>258</sup> See *supra* notes 106–07 and accompanying text.

<sup>259</sup> See *Distajo*, 66 F.3d at 445 (agreeing that looking at the parties named in a motion to compel is sufficient to determine the presence of diversity jurisdiction).

<sup>260</sup> Compare *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 14 (1983) (noting that District Courts’ abstention from exercising jurisdiction is a unique, narrow exception to a court’s duty to adjudicate), with 9 U.S.C. § 4 (2022) (requiring extra written steps by petitioners despite having jurisdiction, thereby making the arbitration process potentially more difficult for those seeking it).

<sup>261</sup> § 4 (“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 . . .”).

<sup>262</sup> *Id.*

court defendants should be joined to a petition.<sup>263</sup> This logic, however, has not been adopted by other courts.<sup>264</sup> Instead, most courts simply look at the citizenship of the parties in the caption of the motion.<sup>265</sup>

Limiting the diversity analysis to the caption of the motion is, admittedly, a simple test to administer.<sup>266</sup> The courts, however, could easily (and likely always with the same result) look to the agreement to arbitrate (i.e., the *arbitration* facts, not the *litigation* facts) to determine the diversity of citizenship.<sup>267</sup> This rule would also be consistent with the fundamental principle that only those who have agreed to arbitrate should be compelled to arbitrate.<sup>268</sup> The corollary—those who did not agree to arbitrate should not be mandated to arbitrate—also follows from this reading of the word “party” in Section 4.<sup>269</sup> In the first year after the Court decided *Badgerow*, courts appear to be applying the same test to determine diversity.<sup>270</sup> Questions may still arise on the arbitrability side, i.e.,

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<sup>263</sup> *Distajo*, 66 F.3d at 446 (“Accordingly, we hold that the district court was correct in looking only to the citizenship of the parties in the action before it . . . who signed the arbitration agreement . . . to determine whether there was complete diversity.” (emphasis added)).

<sup>264</sup> A pair of Connecticut cases discuss the *Distajo* precedent approvingly, but ultimately fall back on the test of simply looking at the parties to the petition. *See Doctor’s Assocs., Inc. v. Tripathi*, No. 3:16-CV-562(JCH), 2016 WL 7634464, at \*5 (D.Conn. Dec. 2, 2016) (“Accordingly, the Court declines to “look through” the Petition, but instead, to ascertain whether diversity of citizenship exists, looks to the citizenship of the actual parties to the Petition, as well as any indispensable parties . . . .”); *Doctor’s Assocs., Inc. v. Pahwa*, No. 3:16CV004465(JCH), 2016 WL 7635748, at \*4 (D. Conn. Nov. 3, 2016) (same).

<sup>265</sup> *See Tripathi*, 2016 WL 7634464, at \*4 (“diversity of citizenship is determined by reference to the parties *named* in the proceeding . . . .” (emphasis added)).

<sup>266</sup> *See id.* (noting that diversity is determined merely by looking at the parties named in the proceedings).

<sup>267</sup> *Id.*

<sup>268</sup> *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (“[W]here the party has agreed to arbitrate, he or she, in effect, has relinquished much of” the right to litigate).

<sup>269</sup> *Id.* (“That is because a party who has not agreed to arbitrate will normally have a right to a court’s decision about the merits of its dispute (say, as here, its obligation under a contract).”)

<sup>270</sup> *See Sullivan v. Feldman*, No. H-20-2236, 2022 WL 17822451, at \*8–9 (S.D. Tex. Dec. 20, 2022) (holding that *Badgerow* does not change the inquiry for diversity of citizenship); *LA Apparel, Inc. v. Straight A Co., LP*, No. 3:21-285,

whether nonparties are bound by the agreement, but that question is outside the scope of this Article.

Determining the parties to the arbitration agreement should require a look-through to the arbitration agreement.<sup>271</sup> Unlike motions to confirm, vacate, or modify,<sup>272</sup> the statute does not specifically require the attachment of the agreement to the Section 4 motion.<sup>273</sup> However, it is difficult to imagine how a court would determine that the “making of the agreement” occurred absent evidence of the contract.<sup>274</sup> A “look-through” might be appropriate in that instance to determine the correct diversity of citizenship of the parties.<sup>275</sup>

For “back-end” cases, the word “parties” can also be found in Sections 9<sup>276</sup> and 12.<sup>277</sup> In these instances, “parties” clearly means parties to the arbitration, as opposed to parties to the petition.<sup>278</sup> Questions could arise about whether nondiverse parties to the arbitration could destroy diversity jurisdiction on a back-end motion.

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2022 WL 17417173, at \*4 (M.D. Pa. Dec. 5, 2022) (applying traditional diversity rules in arbitration context).

<sup>271</sup> *Doctor’s Assocs., Inc. v. Distajo*, 66 F.3d 438, 452–53 (2d Cir. 1995).

<sup>272</sup> 9 U.S.C. § 13 (2022) (specifying papers to be filed with a “back-end” motion).

<sup>273</sup> *See id.*

<sup>274</sup> § 4; *see also* § 2 (enforcing only written agreements to arbitrate).

<sup>275</sup> In *Uniform Theory*, I advocated for a look-through on diversity of citizenship issues as a way to simplify the analysis and apply a “look through” to all aspects of the jurisdictional inquiry. Blankley, *supra* note 1, at 545. This paper presents a refined “look through” analysis to focus on the parties to the arbitration agreement. A variation on looking through to the arbitration agreement is to look through to the demand in arbitration. Because arbitration is consensual, parties may agree to arbitrate by consent even if they are not parties to the agreement. Determining the names of the parties to an arbitration would be easy to administer, however, this test is not grounded in the text of the FAA. The FAA only involves court involvement to enforce agreements in writing, *see* § 2, and Section 4 is limited to circumstances in which parties to an arbitration agreement are in default.

<sup>276</sup> § 9 (discussing the right to confirm an award by “any party to the arbitration”).

<sup>277</sup> § 12 (“Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party.”).

<sup>278</sup> § 9 (specifying “any party to the *arbitration* . . .”).

The *Badgerow* case suggests, without deciding, that diversity of citizenship should be decided on the basis of the parties to the petition (presumably in both “front-end” and “back-end” cases).<sup>279</sup> Justice Kagan noted in the majority that the “obvious place” to start considering diversity is “the face of the application” if that document “shows that the contending parties are citizens of different [s]tates.”<sup>280</sup> This statement is necessarily dicta because *Badgerow* involves a federal question, not diversity jurisdiction.<sup>281</sup> Although the court did a highly textual analysis in *Badgerow*, this statement regarding jurisdiction from the “face of the application” has no real grounding in the FAA, and, therefore, arguments could be made that a “look through” to the agreement or the award is more appropriate.

Although this area of law seems settled, the grounding of these holdings relies less on arbitration law and more on the law of civil procedure.<sup>282</sup> Creative advocates could open this area to additional confusion.

## 2. AMOUNT IN CONTROVERSY

The amount in controversy question is even more unsettled.<sup>283</sup> *Vaden*’s directive to “look-through” and *Badgerow*’s directive in the opposite direction make the amount in controversy question particularly difficult.<sup>284</sup> This section considers “front-end” and “back-end” amount in controversy questions separately.

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<sup>279</sup> See *Badgerow v. Walters*, 142 S. Ct. 1310, 1316 (2022).

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* (noting that the parties are from the same state).

<sup>282</sup> See *id.* at 1316, 1319 (discussing thematic elements of civil procedure such as diversity jurisdiction, federal question jurisdiction, and venue).

<sup>283</sup> See *id.* at 1320 (noting how there are difficult questions regarding amount in controversy); see also 14AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3702.5 (4th ed.2022) (“In measuring the amount in controversy in the determination of petitions to enforce arbitration subpoenas, the decisions are split on whether the jurisdictional amount should be calculated with reference to the underlying arbitration action or the subpoena enforcement proceeding pending in federal court, with more courts favoring the latter.”)

<sup>284</sup> *Badgerow*, 142 S. Ct. at 1320; see also *Vaden v. Discover Bank*, 556 U.S. 49, 53–54 (2009).

i. “Front-end” Motions

Because the Supreme Court decided two cases dealing with federal question jurisdiction, significant questions still exist to determine what meets the amount in controversy. Following *Vaden*, some lower courts understandably applied the “look through” doctrine to determine the amount in controversy.<sup>285</sup> *Badgerow*’s limitation of *Vaden* may cause courts additional confusion on this question.

Reading the decisions together, *Badgerow* should limit *Vaden*’s reach to those cases involving motions to compel under Section 4.<sup>286</sup> Because motions to compel under diversity jurisdiction are determined under Section 4, *Vaden*’s “look through” approach logically survives *Badgerow*.<sup>287</sup> The “save for” language central to *Badgerow*’s distinction from *Vaden* applies equally to all motions to compel, including amount-in-controversy questions.<sup>288</sup> Most importantly, the *Badgerow* decision distinguishes, rather than overrules, *Vaden*, so both decisions are good law and decide different questions.<sup>289</sup>

The matter is more complicated, however, because the lower courts do not universally apply *Vaden*’s “look through” to amount in controversy questions, and those courts adopting a “look through” do not do so consistently across jurisdictions.<sup>290</sup> Drawing from dicta in *Vaden*, courts adopted different “look through” tests depending on whether the motion to compel was freestanding or associated with state court litigation.<sup>291</sup> *Vaden* suggests that freestanding motions to compel should have a broad “look through” to the entirety

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<sup>285</sup> See *supra* notes 111–15 and accompanying text.

<sup>286</sup> *Badgerow*, 142 S. Ct. at 1317 (discussing the role of Section 4 in the analysis).

<sup>287</sup> See *id.* (noting that in *Vaden*, the Court proceeded “methodically through Section 4’s wording.”).

<sup>288</sup> *Id.* at 1315 (noting that the Court was deciding how *Vaden* affects “other sections of the FAA”).

<sup>289</sup> See, e.g., *Barrow v. Onshore Quality Control Specialists, LLC*, No. 1:22-CV-00670-LY, 2022 WL 16849125, at \*4 (W.D. Tex. Nov. 10, 2022) (“looking through” to the amount of controversy on a motion to compel by applying the *Vaden* “look through” and distinguishing *Badgerow*).

<sup>290</sup> See *supra* notes 111–15 and accompanying text.

<sup>291</sup> See *Vaden v. Discover Bank*, 556 U.S. 49, 57–58 (2009) (showcasing how various district courts utilize the “look through” test).

of the dispute to be arbitrated,<sup>292</sup> while cases involving state court litigation should simply “look through” to the matter as framed in the state court complaint.<sup>293</sup> *Vaden* left all of these questions unanswered, and *Badgerow* did nothing to address these complications.

While the courts will likely read *Badgerow* as applying to “back-end” motions while *Vaden* applies to “front-end” motions, some lower courts could apply *Vaden* to the more limited category of “front-end” federal question cases. Lower courts viewing *Badgerow* as a critique on *Vaden* may be hesitant to apply the “look through” to all matters under Section 4. The Supreme Court’s statement in *Badgerow* that “uniformity in and of itself provides no real advantage in this sphere” may green light courts to create their own tests in amount-in-controversy questions.<sup>294</sup> Worse, this language may signal that the Court is uninterested in granting certiorari to additional cases in this sphere.

#### ii. “Back-end” Motions

As noted above,<sup>295</sup> prior to *Badgerow*, lower courts created three different tests for addressing whether the amount in controversy is met on a “back-end” motion: (1) the “award approach,” in which arbitration awards over the amount in controversy support jurisdiction; (2) the “demand approach,” in which arbitrations with claims over the amount in controversy would meet the jurisdictional threshold; and (3) the “mixed approach” that applies the “award approach” unless a party seeks to reopen the arbitration, at which point the court would use the “demand approach.”<sup>296</sup> *Badgerow*’s rejection of a “look through” will almost undoubtedly preclude the “demand” and “mixed approaches” as well as cast some doubt on the “award approach.”<sup>297</sup>

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<sup>292</sup> See *Vaden*, 556 U.S. 49, 50 (2009).

<sup>293</sup> *Id.* at 61, 67, 68.

<sup>294</sup> *Badgerow v. Walters*, 142 S. Ct. 1310, 1321 (2022).

<sup>295</sup> See *supra* Section I.C.3–4 (discussing “back-end” amount-in-controversy questions).

<sup>296</sup> *Id.*

<sup>297</sup> See *Badgerow*, 142 S. Ct. at 1314, 1316, 1324. The *Badgerow* decision does not disrupt federal court jurisdiction in international arbitration matters under the New York Convention because the courts have original jurisdiction “regardless of the amount in controversy.” 9 U.S.C. § 203.



Both the “demand approach” and the “mixed approach” require a “look through” to *arbitration* facts.<sup>298</sup> Both approaches ask for the amount at issue in the arbitration, and whether that amount exceeds the amount in controversy.<sup>299</sup> Determining the amount claimed would necessarily require a “look through” to the arbitration itself, even if the number is listed on the face of the petition because, as noted above,<sup>300</sup> the facts alleged in the petition are insufficient to establish jurisdiction.<sup>301</sup> The FAA requires litigants, however, to attach the award to petitions to confirm, vacate, or modify,<sup>302</sup> so presumably the courts would be permitted (or even required) to consider the contents of the award.<sup>303</sup>

Because *Badgerow* appears to prohibit all “look through” in “back-end” cases, the “award approach” may be the only means by which to determine if jurisdiction exists for amount in controversy cases. The “award approach” would eliminate jurisdiction in “defense” or “\$0” awards. This interpretation leads to an absurd result that Congress likely did not intend.<sup>304</sup> The Congressional record has no discussion of jurisdiction.<sup>305</sup> The FAA simply allows parties to seek to have their award confirmed, vacated, or modified.<sup>306</sup> Removing the cases that would have jurisdiction under the demand and mixed approaches creates the absurdity that cases that *could have* been compelled to arbitrate are no longer eligible for federal court assistance on the back-end.

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<sup>298</sup> Kyle S. Beckrich, Note, *Am I Welcome Here? Getting Into Federal Court to Confirm or Vacate an Arbitration Award*, 68 BAYLOR L. REV. 846, 852, 855 (2016).

<sup>299</sup> *Id.* at 852–56 (2016) (describing the mechanics of the demand approach and the “remand” approach).

<sup>300</sup> *See Badgerow*, 142 S. Ct. at 1324.

<sup>301</sup> *Id.* at 1324–25.

<sup>302</sup> 9 U.S.C. § 13 (2022) (listing papers to be attached to arbitration petitions).

<sup>303</sup> *See Am. Zurich Ins. Co. v. Caton Park Nursing Home*, No. 21-CV-4698, 2022 WL 1136579, at \*1 (N.D. Ill. Apr. 18, 2022) (applying award approach to determine the amount in controversy on a back-end motion).

<sup>304</sup> *See Beckrich, supra* note 298, at 858–59.

<sup>305</sup> H.R. Rep. No. 255, 80th Cong., 1st Sess. (1947).

<sup>306</sup> § 9.

D. *Badgerow as the Death Knell for Back-End Motions Under Federal Question Jurisdiction*

The *Badgerow* decision appears to strike the death knell for federal court intervention on the back-end for all cases involving federal questions.<sup>307</sup> As this section demonstrates, lower courts are already dismissing cases for lack of jurisdiction under *Badgerow*.<sup>308</sup> This conclusion, however, operates differently in cases involving prior arbitration litigation than in freestanding claims under Section 10.<sup>309</sup> This ruling also appears to affect confirmation motions under Section 9.<sup>310</sup> Each is discussed in turn.

As a short aside, *Badgerow* does not appear to disrupt prior holdings that courts have jurisdiction over back-end motions in labor cases.<sup>311</sup> Because a party's "refusal to comply with a labor-arbitration award is itself a contract violation over which the [Labor Relations Management Act] grants jurisdiction," the courts have independent federal question jurisdiction.<sup>312</sup> This Article, however, concerns matters under the FAA, not the Labor Relations Management Act.

1. CASES INVOLVING PRIOR ARBITRATION LITIGATION

Prior to *Badgerow*, many courts assumed they retained jurisdiction over cases involving a motion to compel.<sup>313</sup> The very

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<sup>307</sup> See *Badgerow v. Walters*, 142 S. Ct. 1310, 1314, 1316, 1325.

<sup>308</sup> *Dunbar v. Airbnb*, No. 21-00451, 2022 WL 17067455, at \*2 (D. Haw. Nov. 17, 2022).

<sup>309</sup> See *Mitchell v. Frattini*, No. 22-cv-2352, 2022 WL 17157027, at \*2 (S.D.N.Y. Nov. 22, 2022).

<sup>310</sup> See *Raymond James & Assocs., Inc. v. Martin*, No. CV ELH-21-3096, 2022 WL 1104576, at \*10 (D. Md. Apr. 13, 2022).

<sup>311</sup> See *Badgerow*, 142 S. Ct. at 1316.

<sup>312</sup> *Riverbay Corp. v. Service Employees Int'l Union, Local 32BJ*, No. 22-cv-10994 (LJL), 2023 WL213623, \*3 (S.D.N.Y. Feb. 21, 2023) (holding that *Badgerow* does not overrule the court's jurisdiction under a collective bargaining agreement); *Greenhouse Holdings, LLC v. Int'l Union of Painters & Allied Trades Dist. Council 91*, 43 F.4th 628, 631 (6th Cir. 2022); see also *San Jose Healthcare Sys., LP v. Stationary Eng'r Loc. 39 Pension Tr. Fund*, No. 21-CV-09974-SVK 2022 WL 2161504, at \*3 (N.D. Cal. June 15, 2022) (finding jurisdiction on a post-arbitration motion under the NLRA).

<sup>313</sup> See, e.g., *Dodson Int'l Parts, Inc. v. Williams Int'l Co., LLC*, 12 F.4th 1212, 1227 (10th Cir. 2021) (rejecting the idea that jurisdiction must be reestablished for a case in which jurisdiction was proper on a Section 4 motion). Some court

fact that Section 3 calls for a *stay* of litigation, rather than a *dismissal* of the case suggests that the courts will have additional work to do.<sup>314</sup> Although the back-end provisions do not mention jurisdiction, the stay provision implies that the courts would still need to be involved in the other matters, such as subpoenaing witnesses, appointing arbitrators, or dealing with awards.<sup>315</sup> Indeed, the *Cortez Byrd* decision noted that “the Court with the power to stay the action under § 3 [of the FAA] has the further power to confirm any ensuing arbitration award.”<sup>316</sup>

At least two Circuits relied on this analysis prior to *Badgerow*.<sup>317</sup> The Sixth Circuit reasoned that the Act allows courts to “facilitate an arbitration” as necessary and that the stay promotes efficiency in streamlining the process for judicial intervention.<sup>318</sup> The stay provision also ensures that the same judge will remain with the case at all litigation contact points, rather than risking assignment of different judges at different points in the litigation case.<sup>319</sup> Similarly, the First Circuit held that the “very existence of Sections 9, 10, and 11 demonstrate the importance of post-award federal court review.<sup>320</sup> Those provisions show that Congress contemplated that the federal courts would have a central role and broad authority” over the entirety of the case.<sup>321</sup> The back-end sections, while not bestowing a grant of jurisdiction “contemplate that award enforcement will occur in federal courts as a matter of course.”<sup>322</sup>

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independently reexamined their jurisdiction on a motion to vacate even when the court had previously ordered the parties to arbitrate. *See* *Kawasaki Heavy Indus., Ltd. v. Bombardier Recreational Prods., Inc.*, No. 10-cv-641-SMY-DGW, 2016 WL 10459788, at \*1–2 (S.D. Ill. 2016) (examining jurisdiction despite the previous order to compel but finding jurisdiction based on the prior jurisdiction).

<sup>314</sup> 9 U.S.C. § 3 (2022) (providing for a stay of litigation).

<sup>315</sup> § 12.

<sup>316</sup> *Cortez Byrd Chips, Inc. v. Bill Halbert Const. Co.*, 529 U.S. 193, 202 (2000).

<sup>317</sup> *Arabian Motors Grp. W.L.L. v. Ford Motor Co.*, 19 F.4th 938, 941 (6th Cir. 2021); *Ortiz-Espinoza v. BBVA Sec. of P.R., Inc.*, 852 F.3d 36, 43 (1st Cir. 2017).

<sup>318</sup> *Arabian Motors Grp.*, 19 F.4th at 941 (referencing appointment of arbitrators, subpoenaing witnesses, and back-end motions).

<sup>319</sup> *Id.* at 941–42.

<sup>320</sup> *Ortiz-Espinoza*, 852 F.3d at 43.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

However, *Badgerow* can be read to mean that the district courts lose their jurisdiction to hear motions to confirm and vacate, even if those very courts had jurisdiction under Section 4 in the first instance.<sup>323</sup> Justice Breyer noted this possibility: “Where the parties’ underlying dispute involves a federal question (but the parties are not diverse), the majority holds that a party can ask a federal court to order arbitration . . . but it cannot ask that same court” to rule on post-arbitration motions.<sup>324</sup> He asked: “But why prohibit a federal court from considering the results of the very arbitration it has ordered and is likely familiar with?”<sup>325</sup> The parties, then, would have to seek a remedy in a state court to determine whether arbitration of a federal question met the standards for vacatur.<sup>326</sup> Without saying so explicitly, Justice Breyer suggests that the federal courts may never have jurisdiction to hear a post-arbitration motion under federal question jurisdiction.<sup>327</sup> He implies that this reading creates an absurd result.<sup>328</sup>

Courts are already creating inconsistent case law on this issue.<sup>329</sup> A federal court in Hawaii noted that “even though the court previously had jurisdiction to *compel* the parties to arbitrate . . . the court does not have jurisdiction” over the parties’ motion to vacate.<sup>330</sup> Conversely, a court in North Carolina distinguished *Badgerow* on a case with prior jurisdiction, stating: “It would be a strange interpretation of the FAA that a federal court, which has subject matter jurisdiction over claims that it subsequently refers to arbitration, is deprived of its jurisdiction to confirm or vacate the arbitration award.”<sup>331</sup>

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<sup>323</sup> *Badgerow v. Walters*, 142 S. Ct. 1310, 1325 (2022) (Breyer, J., dissenting).

<sup>324</sup> *Id.* (Breyer, J., dissenting).

<sup>325</sup> *Id.* (Breyer, J., dissenting).

<sup>326</sup> *See id.* (Breyer, J., dissenting).

<sup>327</sup> *Id.* (Breyer, J., dissenting).

<sup>328</sup> *See id.* at 1325, 1329 (Breyer, J., dissenting) (“[A]bsurd results are to be avoided”).

<sup>329</sup> *Dunbar v. Airbnb*, No. 21-00451, 2022 WL 17067455, at \*1 (D. Haw. Nov. 17, 2022); *SmartSky Networks, LLC v. Wireless Systems Solutions, LLC*, 2022 WL 4933117, at \*4 (M.D.N.C., 2022).

<sup>330</sup> *Dunbar*, 2022 WL 17067455, at \*1 (emphasis in original); *see also* Forrester v. Spizzirri, No. CV-21-01688-PHX-GMS, 2022 WL 2191931, at \*1 (D. Ariz. June 17, 2022) (questioning whether the court would have jurisdiction on a future motion to confirm or vacate).

<sup>331</sup> *SmartSky Networks*, 2022 WL 4933117, at \*4.

## 2. FREESTANDING MOTIONS

The *Badgerow* decision appears to hold that the claims at issue in arbitration, i.e., the *arbitration* facts, are immaterial to the question of whether a federal court has jurisdiction.<sup>332</sup> If an arguable case for jurisdiction existed in those cases in which the court previously exercised a stay, the freestanding cases stand on much shakier footing.<sup>333</sup> The Eighth Circuit described the *Badgerow* ruling as “dramatically limiting federal jurisdiction to confirm or vacate arbitration awards.”<sup>334</sup> That court noted that many circuits employed a “look through” to the subject matter of the arbitration to establish federal question jurisdiction.<sup>335</sup> After *Badgerow*, however, the courts can no longer rely on the *arbitration* facts, and the Eight Circuit found “federal question jurisdiction foreclosed.”<sup>336</sup>

Shortly after the Court decided *Badgerow*, the Southern District of New York summarized the essential holding when it stated that “it is immaterial whether any *claims* in the arbitration were, in whole or in part” based on federal law.<sup>337</sup> Many other courts are following suit.<sup>338</sup> If the underlying claims are immaterial and federal arbitration law provides no basis for jurisdiction, then no federal court can ever have federal question jurisdiction over nondiverse parties. Thus, Section 10 petitions based on federal question jurisdiction appear to have no basis for jurisdiction.<sup>339</sup>

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<sup>332</sup> *Badgerow*, 142 S. Ct. at 1311.

<sup>333</sup> See *Mitchell v. Frattini*, No. 22-cv-2352, 2022 WL 17157027, at \*2 (S.D.N.Y. Nov. 22, 2022).

<sup>334</sup> *Hursh v. DST Sys., Inc.*, 54 F.4th 561, 563 (8th Cir. 2022).

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at 565. The Eighth Circuit remanded the case to determine if any of the 177 consolidated cases would have diversity jurisdiction.

<sup>337</sup> *Trs. of N.Y. St. Nurses Ass’n Pension Plan v. White Oak Global Advisors, LLC*, No. 21-CV-8330, 2022 WL 2209349, at \*3 (S.D.N.Y. June 20, 2022).

<sup>338</sup> *Sanai v. Cobrae*, No. 2:22-cv-0528-KJM-CKD, 2022 WL 17542106, at \*4 (E.D. Cal. Dec. 8, 2022) (rejecting claim that an award needed to be reviewed for due process concerns); *Mitchell*, 2022 WL 17157027, at \*2 (finding no federal question jurisdiction in freestanding motion to vacate FINRA arbitration award); *Sager v. Davison Design & Dev., Inc.*, No. 2:21cv1366, 2022 WL 2929950, at \*4 (W.D. Pa. July 20, 2022) (refusing to apply “look through” to the subject of the arbitration to determine federal question jurisdiction); *Trs. of N.Y.*, 2022 WL 2209349, at \*3 (refusing to look through the motion to vacate to consider whether the petitioner’s ERISA claims satisfied jurisdiction).

<sup>339</sup> See, e.g., *Mitchell*, 2022 WL 17157027, at \*2.

### 3. MOTIONS TO CONFIRM

Independent jurisdiction must also be satisfied for a court to confirm an arbitration award, i.e., transform the award into a judgment of the court.<sup>340</sup> Section 9 of the FAA provides for venue for confirmation in a number of courts, including a court specified by the parties or the jurisdiction within which the award was made,<sup>341</sup> but the provision does not grant jurisdiction. The *Cortez Byrd* case interprets the venue provision broadly,<sup>342</sup> yet the *Badgerow* case interprets jurisdiction narrowly. These cases are difficult, if not impossible, to reconcile.

Case law interpreting Section 9 on its own is virtually nonexistent because the statute requires that a court must confirm an award unless it is vacated under Section 10 or modified under Section 11.<sup>343</sup> In any event, Section 9 plays an important role in enforcing arbitration awards even when the losing party does not challenge confirmation.<sup>344</sup> As a small number of courts are now deciding, the *Badgerow* decision will apply equally to Section 9 as it does to Section 10, meaning that federal courts will not have jurisdiction to hear confirmation motions for cases involving underlying federal questions.<sup>345</sup>

### 4. ANY JURISDICTION FOR BACK-END FEDERAL QUESTION CASES?

For arbitration cases involving claims under federal law, the *Badgerow* majority equates arbitration awards to contracts and, therefore, easily concludes that contract law (i.e., *state* contract law)

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<sup>340</sup> See, e.g., *Raymond James & Assocs., Inc. v. Martin*, No. CV ELH-21-3096, 2022 WL 1104576, at \*6 (D. Md. Apr. 13, 2022) (applying *Badgerow* to motions to confirm).

<sup>341</sup> 9 U.S.C. § 9 (2022).

<sup>342</sup> *Cortez Byrd Chips, Inc. v. Bill Halbert Const. Co.*, 529 U.S. 193, 198 (2000) (reading provisions together for liberal venue).

<sup>343</sup> *Id.* at 197 (requiring confirmation unless the requirements for vacatur or modification are met).

<sup>344</sup> *Id.* (noting that “the three venue sections of the FAA are best analyzed together”).

<sup>345</sup> See, e.g., *Reineri v. Int’l Bus. Machs. Corp.*, No. 21-CV-8654, 2022 WL 2316622, at \*3 (S.D.N.Y. June 28, 2022) (applying *Badgerow* to a freestanding motion to confirm).

would provide the proper relief.<sup>346</sup> This conclusion, however, is flawed for several reasons.

First, arbitration awards are not contracts.<sup>347</sup> They are more akin to judgments than contracts, and the purpose of a Section 9 confirmation hearing is to make the awards enforceable as if they were court-rendered awards.<sup>348</sup> Contracts are agreed upon exchanges by the contracting parties.<sup>349</sup> Although parties contract for the use of an arbitrator, the parties do not agree on the contents of the award (otherwise, they would have settled).<sup>350</sup>

Second, most contract law defenses, such as duress, unconscionability, capacity, etc., have no application to an arbitration award that was rendered by neutral arbitrators after a hearing on the merits.<sup>351</sup> Instead, the purpose of FAA Section 10 (and its state law equivalents) are to provide grounds for vacatur because contract law does not govern how a third party dictates the resolution of a dispute between others.<sup>352</sup> The end result of *Badgerow* is *not* that state contract law would apply, but that state arbitration law would apply. And if *arbitration* law, not *contract* law applies, why not use the federal arbitration law for federal claims resolved in arbitration?

These sections show that federal courts may never have jurisdiction to hear post-arbitration motions based on federal question jurisdiction. The Tenth Circuit quickly picked up on this language from

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<sup>346</sup> *Badgerow v. Walters*, 142 S. Ct. 1310, 1316–17 (2022) (noting that an arbitration award is “no more than a contractual resolution of the parties’ dispute . . . [a]nd quarrels about legal settlements . . . typically involve only state law, like disagreements about other contracts.”).

<sup>347</sup> Blankley, *supra* note 1, at 537 (“[A]rbitration is a creature of contract,” but not itself a contract).

<sup>348</sup> 9 U.S.C. § 9 (2022) (discussing confirmation of an award as bestowing “a judgement of the court” on the arbitration award).

<sup>349</sup> See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008).

<sup>350</sup> *Id.* at 586 (stating that, while parties may “tailor some . . . features of arbitration by contract, including the way arbitrators are chosen,” they cannot review arbitration awards unless one of the exceptions in the statute is triggered).

<sup>351</sup> See § 10. Illegality may be one of the only potentially viable contract law defenses available to challenge an arbitration award.

<sup>352</sup> *Hall St.*, 552 U.S. at 582.

*Badgerow*, describing the back-end motion as “no more than a contractual resolution to the parties’ dispute.”<sup>353</sup> Yet the court failed to show how state contract law applied.<sup>354</sup>

This analysis begs the question—how can this be? How can a federal statute providing for review of arbitration awards be limited to only diversity and admiralty cases? This conclusion is simply unsupported by the text, and one might expect such a drastic limitation to be in the text or legislative history of the FAA.<sup>355</sup> Because no such limitation exists, reading the FAA to wholly exclude jurisdiction for back-end federal question cases is an absurd result that should be avoided.

#### E. *Complications for Appointing Arbitrators*

As Justice Breyer noted in his dissent, the *Badgerow* decision calls into question how the lower courts address issues involving the appointment of arbitrators under Section 5.<sup>356</sup> Section 5 permits a court to appoint an arbitrator or arbitrators if the parties’ agreement does not have a selection method or if a chosen selection method fails.<sup>357</sup> This provision has no specific jurisdictional language.<sup>358</sup>

Few courts explicitly ruled on the question of the proper determination of jurisdiction under this Section. Some courts simply appoint an arbitrator without a serious jurisdictional inquiry.<sup>359</sup> Often,

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<sup>353</sup> *Matios v. City of Loveland*, No. 22-1047, 2022 WL 2734270, at \*2 (10th Cir. July 14, 2022).

<sup>354</sup> *Id.* (stating “[t]hese contractual disputes are issues of state law, not federal law,” without explaining how state contract law applied).

<sup>355</sup> 9 U.S.C. § 2 (2022).

<sup>356</sup> *Badgerow v. Walters*, 142 S. Ct. 1310, 1324 (2022) (Breyer, J., dissenting).

<sup>357</sup> § 5.

<sup>358</sup> *Id.*

<sup>359</sup> *See, e.g., Campbell v. Keagle Inc.*, 27 F.4th 584, 586 (7th Cir. 2022) (appointing an arbitrator under Section 5 when the arbitration selection provision is voided due to unconscionability); *Garcia v. Church of Scientology Flag Serv. Org., Inc.*, No. 18-13452, 2021 WL 5074465, at \*3 (11th Cir. Nov. 2, 2021) (discussing the appointment of an arbitrator under Section 5 without a discussion of jurisdiction); *Beltran v. AuPairCare, Inc.*, 907 F.3d 1240, 1263 (10th Cir. 2018) (noting in passing that the court could appoint an arbitrator under Section 5 after the court struck the arbitrator-selection clause); *Robinson v. EOR-ARK, LLC*, 841 F.3d 781, 784 (8th Cir. 2016) (noting the ability to appoint an arbitrator under Section 5 given the unavailability of the National Arbitration Forum); *Odyssey Reinsurance Co. v. Certain Underwriters at Lloyd’s London Syndicate* 53, 615 F.



a Section 5 motion is presented at the same time as a Section 4 motion to compel, so the jurisdictional question is simultaneously settled for multiple arbitration requests.<sup>360</sup> In other cases, a Section 5 motion arises after a court has already moved to compel, and the court retains jurisdiction even if the district court dismissed the case (rather than staying the case under the statute) after compelling it to arbitration.<sup>361</sup>

In a rare case involving a discussion of the requisite jurisdiction for a Section 5 motion, the District of Columbia district court briefly addressed the relationship between *Vaden*'s "look through" doctrine and the power to appoint an arbitrator.<sup>362</sup> The court found *Vaden* inapplicable because the motion under consideration was to appoint an arbitrator under Section 5, not a motion to compel under Section 4.<sup>363</sup> In addition, the dispute between the parties did not involve a federal question because the plaintiffs were suing the arbitration forum based on its administration of a case between the plaintiffs and a broker-dealer.<sup>364</sup>

Although courts have yet to consider the jurisdictional tests for motions under Section 5, the *Badgerow* case may now cause lower courts to question their jurisdiction.<sup>365</sup> Petitioners combining a request for the appointment of an arbitrator with a motion to compel

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App'x 22, 23–24 (2d Cir. 2015) (deciding issue without discussing jurisdiction); *Khan v. Dell Inc.*, 669 F.3d 350, 356–57 (3d Cir. 2012) (deciding issue regarding "lapse" without ever determining subject matter jurisdiction).

<sup>360</sup> See, e.g., *Moss v. First Premier Bank*, 835 F.3d 260, 264 (2d Cir. 2016) (noting jurisdiction was proper for other arbitration sections and not discussing jurisdiction specific to Section 5); *In re Checking Acct. Overdraft Litig.* MDL No. 2036, 485 F. App'x 403, 405–06 (11th Cir. 2012) (discussing the ability to appoint an arbitrator in a case where the court already had jurisdiction as multi-district litigation); *Green Valley Trading Co. v. Olam Ams., Inc.*, No. 19-11524-FDS, 2020 WL 65092, at \*1 (D. Mass. Jan. 7, 2020) ("This is an action to compel arbitration and appoint an arbitrator. Jurisdiction is based on diversity of citizenship").

<sup>361</sup> See *Adam Techs. Int'l S.A. de C.V. v. Sutherland Glob. Servs., Inc.*, 729 F.3d 443, 450 (5th Cir. 2013) (finding jurisdiction proper based on the prior diversity jurisdiction).

<sup>362</sup> *Habliston v. FINRA Disp. Resol., Inc.*, 251 F. Supp. 3d 240, 248 (D.D.C. 2017).

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* (finding immaterial the fact that the original dispute between the heir of an investor and a broker dealer involved a federal question).

<sup>365</sup> *Badgerow v. Walters*, 142 S. Ct. 1310, 1324 (2022) (Breyer, J., dissenting).

should be able to claim jurisdiction under both motions in accordance with the tests developed under *Vaden*. To the extent that cases beginning in federal court are stayed (or even dismissed) pending arbitration, courts may find jurisdiction based on the earlier jurisdiction—although Justice Breyer now calls into question the availability of continuing jurisdiction over an arbitration case.<sup>366</sup>

The jurisdictional test for freestanding motions to appoint an arbitrator is unclear, at best. Now that *Badgerow* limits the “look through” doctrine to Section 4 motions, jurisdiction for Section 5 motions must be determined on the face of the motion—not the underlying facts in the arbitration.<sup>367</sup> Whether the underlying facts may be *asserted* in the petition and thus within the four corners of the document remains an outstanding question and one that is discussed below.<sup>368</sup>

#### F. *Complications for Issuing Subpoenas*

Similar to Section 5, *Badgerow* calls into question the future of jurisdiction for FAA Section 7, which allows federal courts to issue subpoenas in arbitration matters.<sup>369</sup> Section 7 permits arbitrators to subpoena witnesses for testimony and to bring documentary discovery with them.<sup>370</sup> If the witness ignores the subpoena, the United States District Court can compel attendance in accordance with the subpoena or find the witness in contempt.<sup>371</sup> Despite the precise language regarding the availability of subpoenas and the possibility of federal court involvement, this section does not include specific jurisdictional language.<sup>372</sup>

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<sup>366</sup> *Id.* at 1326 (Breyer, J., dissenting).

<sup>367</sup> *Id.* at 1324 (Breyer, J., dissenting).

<sup>368</sup> *See infra* Section IV.B.

<sup>369</sup> *Badgerow*, 142 S. Ct. at 1324 (Breyer, J., dissenting).

<sup>370</sup> 9 U.S.C. § 7 (2022) (outlining arbitrator subpoena power).

<sup>371</sup> *Id.* (discussing role of the federal courts in subpoena matters).

<sup>372</sup> As with every other section of the FAA, courts require independent jurisdiction outside of the Section 7 petition. *See, e.g.,* Alliance Healthcare Servs., Inc. v. Argonaut Priv. Equity, LLC, 804 F. Supp. 2d 808, 812 (N.D. Ill. 2011) (noting that the court enforces a subpoena under similar standards to Rule of Civil Procedure 45); Schaieb v. Botsford Hosp., No. 2:12-mc-51165, 2012 WL 6966623, at \*2 (E.D. Mich. Nov. 13, 2012) (noting that the courts “overwhelmingly” require independent jurisdiction for petitions under Section 7). Although outside the

Again, few courts explicitly ruled on the question of proper determination of jurisdiction under Section 7.<sup>373</sup> These cases also fall into predictable categories. Some courts rule on the merits of the question without a serious analysis of jurisdiction.<sup>374</sup> Some courts rely on a simultaneously or previously conducted jurisdictional inquiry on a motion to compel to support jurisdiction.<sup>375</sup> In the rare freestanding case resulting in an opinion, a trend appears to be emerging that the “look through” doctrine is not available.<sup>376</sup>

Consider the approach taken by the Ninth and Second Circuits, both involving diversity jurisdiction on freestanding motions to enforce arbitration subpoenas.<sup>377</sup> In *Maine Community Health Options v. Albertsons Companies, Inc.*,<sup>378</sup> the Ninth Circuit ruled on the issue without regarding any underlying arbitration information. In that case, Maine Community Health Options (“Health Options”) sought

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scope of this paper, the court must also have personal jurisdiction of the subpoenaed party. *See Broumand v. Joseph*, 522 F. Supp. 3d 8, 14 (S.D.N.Y. 2021) (noting the general requirement of personal jurisdiction over the subpoenaed party).

<sup>373</sup> *See infra* notes 374 and 376.

<sup>374</sup> *See, e.g., CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703, 706 (9th Cir. 2017) (ruling on the question of whether documents may be subpoenaed outside of hearing); *Shirvanian v. Byers*, No. 16-21261, 2016 WL 11754322, at \*3–5 (S.D. Fla. Sept. 22, 2016) (discussing the proper federal court to serve the subpoena).

<sup>375</sup> *See Managed Care Advisory Grp., LLC v. Cigna Healthcare, Inc.*, 939 F.3d 1145, 1155–56 (11th Cir. 2019) (discussing that the federal court has “ancillary jurisdiction” to enforce subpoenas under Section 7 when the court already had jurisdiction to enforce a settlement reached in arbitration).

<sup>376</sup> *See, e.g., Me. Cmty. Health Options v. Albertsons Cos., Inc.*, 993 F.3d 720, 726 (9th Cir. 2021); *Wash. Nat’l Ins. Co. v. OBEX Group*, 958 F.3d 126, 133 (2d Cir. 2020).

<sup>377</sup> *See, e.g., Me. Cmty. Health Options v. Albertsons Cos., Inc.*, 993 F.3d 720, 726 (9th Cir. 2021); *Wash. Nat’l Ins. Co. v. OBEX Group*, 958 F.3d 126, 133 (2d Cir. 2020).

<sup>378</sup> *Albertsons Cos., Inc.*, 993 F.3d at 726.

the federal courts to enforce a subpoena against third-party Albertsons Company for certain billing information.<sup>379</sup> Although the parties to the Section 7 petition were citizens of different states,<sup>380</sup> Albertsons claimed the amount in controversy was not met.<sup>381</sup> As a nonparty, Albertsons claimed the amount in controversy was roughly \$1,400, or the amount of money needed to comply with the subpoena.<sup>382</sup> The Ninth Circuit, however, did not look to the *arbitration* fact that roughly \$17 million was at issue in the arbitration.<sup>383</sup> Instead, Health Options claimed that the information received from Albertsons could plausibly lead to its recovery of more than \$75,000 because the overall amount of billings in the subject documents could lead to a recovery in arbitration of more than \$1.7 million.<sup>384</sup> Thus, the federal court had diversity jurisdiction over the case.<sup>385</sup>

The majority opinion did not use “look through” language or otherwise conduct an analysis similar to that in *Vaden*.<sup>386</sup> As noted

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<sup>379</sup> *Id.* at 722.

<sup>380</sup> The Ninth Circuit majority decision never mentioned whether the parties to the underlying arbitration were diverse. Because the court considered the petition alone without regard for the underlying arbitration, the diversity of the parties in the arbitration was not relevant to the majority. *See id.* at 724 (Watford, J., concurring).

<sup>381</sup> *Id.* at 722 (noting the issue in controversy).

<sup>382</sup> *Id.* at 723 (noting that Health Options did not seriously dispute the cost of complying with the subpoena).

<sup>383</sup> *Id.* (“Health Options does not allege that the information subpoenaed from Albertsons will lead to the recovery of the entire \$17 million it seeks against Navitus in the arbitration.”).

<sup>384</sup> *Id.* (“But Health Options does plausibly allege that the subpoenaed information will likely affect more than \$75,000 of its claims against Navitus. The jurisdictional amount requirement is but 4 percent of the total relevant billings from Albertsons to Navitus.”); *see also* Schottenstein v. Wells Fargo Bank, N.A., No. CV 20-MC-81924, 2020 WL 7399003, at \*4 (S.D. Fla. Dec. 17, 2020) (rejecting the “look through” approach for both the diversity and amount-in-controversy prongs of the jurisdictional test); Royal Merch. Holdings, LLC v. Traeger Pellet Grills, LLC, No. 2:19-MC-00108-DB-EJF, 2019 WL 2502937, at \*5 (D. Utah June 17, 2019) (“[T]he Court must look to the parties and amount in controversy in this action, without reference to the underlying arbitration, to determine whether subject matter jurisdiction exists.”); Zurich Ins. PLC v. Ethos Energy (USA) LLC, No. 4:15-CV-03580, 2016 WL 4363399, at \*23 (S.D. Tex. Aug. 16, 2016) (rejecting the argument that the \$7 million in damages sought in the underlying arbitration satisfied the amount in controversy requirement).

<sup>385</sup> *Albertsons Cos., Inc.*, 993 F.3d at 724.

<sup>386</sup> *See generally id.*

in the concurrence, the majority opinion simply dealt with the petition as if it were a freestanding lawsuit.<sup>387</sup> While the result is the same, the concurrence would have preferred to use a “look-through” analysis similar to *Vaden* for all of the FAA.<sup>388</sup> Under a modified “look-through” analysis, the amount in controversy would be met by *arbitration* facts, i.e., the \$17 million in damages.<sup>389</sup> Judge Waterford’s concurrence relied on the application of the whole act rule to treat jurisdiction under the FAA similarly across the entire statute.<sup>390</sup>

The Second Circuit conducted a more thorough analysis of diversity jurisdiction for a Section 7 motion in *Washington National Insurance Company v. OBEX Group*.<sup>391</sup> The arbitration involved claims of fraud associated with reinsurance contracts and damages of \$134 million.<sup>392</sup> Arbitrators issued subpoenas sought by Washington National Insurance Company (“WNIC”) against OBEX and other companies.<sup>393</sup> After negotiations between the parties over search terms, the subpoenaed parties produced more than 14,000 pages of documents at a cost of over \$15,000.<sup>394</sup> WNIC later objected to the production based on information learned from other

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<sup>387</sup> *Id.* at 724 (Waterford, J., concurring) (discussing how the majority considered the petition as if it needed independent jurisdiction in its own right, not connected with the overarching aims of the arbitration).

<sup>388</sup> *Id.* at 725 (Waterford, J., concurring) (“Considering the structure of the FAA as a whole, it seems evident to me that Congress envisioned a § 7 petition not as a freestanding lawsuit, but as an adjunct to the ‘underlying substantive controversy’ between the parties in arbitration.”).

<sup>389</sup> *Id.* at 726 (Waterford, J., concurring) (“It is undisputed that the parties are of diverse citizenship and that Maine Community Health Options has alleged in good faith that the underlying controversy involves a potential recovery in excess of \$17 million. I therefore agree . . . that the district court erred by dismissing this § 7 enforcement proceeding.”).

<sup>390</sup> *Id.* at 725–26 (Waterford, J., concurring) (discussing that the federal courts should only have jurisdiction in a § 7 matter if the court would have jurisdiction over other arbitration matters, such as a Section 4 motion to compel).

<sup>391</sup> See generally *Wash. Nat’l Ins. Co. v. Obex Grp.*, 958 F.3d 126 (2d Cir. 2020).

<sup>392</sup> *Id.* at 130 (describing the amount in controversy in the arbitration).

<sup>393</sup> *Id.* (describing procedural history).

<sup>394</sup> *Id.* (“On April 11, 2018, the respondents responded to the subpoenas, producing 14,814 pages of documents. They asserted that the production cost them \$15,700.25 in attorney’s fees and costs.”).

discovery.<sup>395</sup> WNIC petitioned the federal court under Section 7 under diversity jurisdiction because the parties to the subpoena were from different states and the amount in controversy in arbitration.<sup>396</sup>

Regarding diversity of parties, the Second Circuit began by distinguishing this case from *Vaden* based on the different basis of jurisdiction.<sup>397</sup> The Second Circuit held, consistent with its prior precedent, that the diversity requirement should be determined based on the parties named in the petition, not the parties to the arbitration agreement.<sup>398</sup> As for the amount in controversy, the court held the amount at issue *in the arbitration* should be considered the amount in controversy based on the legal rule that in “actions for declaratory or injunctive relief” the value of the litigation “is measured by the value of the object of the litigation.”<sup>399</sup> Ultimately, the court had jurisdiction to hear the Section 7 motion.<sup>400</sup> The Second Circuit approach appears inconsistent because it considers the “present dispute [i.e., the subpoena dispute] for the citizenship of the parties but at the underlying arbitration for the amount in controversy.”<sup>401</sup> Although facially inconsistent in the use of the “look through” doctrine, this approach mirrors the approach taken by some courts to determine jurisdiction in Section 4 motions.<sup>402</sup>

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<sup>395</sup> *Id.* at 130–41 (describing procedural history).

<sup>396</sup> *Id.* at 131–32 (describing federal court jurisdiction and lower court decision).

<sup>397</sup> *Id.* at 134 (noting the differences between cases involving federal question jurisdiction and diversity jurisdiction).

<sup>398</sup> *Id.* (citing *Hermès of Paris, Inc. v. Swain*, 867 F.3d 321, 324 (2d Cir. 2017)). The *Hermès* case involved a Section 4 petition to compel, rather than a Section 7 motion for a subpoena. *Hermès of Paris*, 867 F.3d at 323 (discussing the request for a motion compel); see also *Generation Mobile Preferred, L.L.C. v. Roye Holdings, L.L.C.*, No. 20-MC-51512, 2022 WL 252176, at \*2 (E.D. Mich. Jan. 26, 2022) (following Second Circuit precedent and looking solely to the parties to the petition to determine whether the diversity requirement is met).

<sup>399</sup> *Wash. Nat’l Ins. Co.*, 958 F.3d at 135 (citing *DiTolla v. Doral Dental IPA of N.Y.*, 469 F.3d 271, 276 (2d Cir. 2006)); see also *Generation Mobile*, 2022 WL 252176, at \*3 (looking to the amount in controversy at arbitration, rather than the Section 7 petition to determine if the amount-in-controversy requirement is met).

<sup>400</sup> *Wash. Nat’l Ins. Co.*, 958 F.3d at 135.

<sup>401</sup> *Generation Mobile*, 2022 WL 252176, at \*3.

<sup>402</sup> See, e.g., *Cnty. State Bank v. Knox*, 523 F. App’x 925, 930–31 (4th Cir. 2013) (finding no federal court jurisdiction after looking through to the controversy to be arbitrated in a freestanding motion under Section 4).

These cases all suggest that the jurisdictional basis for enforcing subpoenas in diversity cases requires diversity of parties *to the petition*, which often involves a third party who is not a party to the underlying arbitration.<sup>403</sup> However, in *Badgerow*, Justice Breyer poses questions (without answering them) of whether diversity *should be* determined based on the parties to the petition or the parties to the arbitration.<sup>404</sup> No court has seriously answered this question in line with arbitration law or policy—yet it adds another difficulty made even more complex by *Badgerow*'s dismissiveness of the variety of litigation contact points under the FAA.<sup>405</sup>

Determining the amount in controversy in cases involving diversity jurisdiction involves similarly open questions, however, the lower courts appear to “look through” to the *arbitration* facts more frequently than not.<sup>406</sup> If *Badgerow* is interpreted to cut off the ability to look through the petition, “[h]ow does a federal judge determine whether summoning a witness is itself worth \$75,000?”<sup>407</sup> The Ninth Circuit’s *Health Options* case was an arguably easy decision because the amount in controversy easily met the jurisdictional limit whether the court considered damages supported by the documents sought (\$1.7 million) or the amount in controversy in arbitration (\$17 million).<sup>408</sup>

Whether courts currently allowing a “look through” will distinguish their holdings from *Badgerow* remains to be seen. These open questions may lead to increased inefficiency and potential forum shopping for parties to position themselves to obtain sought after relief. Whether careful drafting of the arbitration facts into the four

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<sup>403</sup> *Id.*

<sup>404</sup> *Badgerow v. Walters*, 142 S. Ct. 1310, 1325 (2022) (“And at a more basic level, who are the relevant parties to a section 7 request when determining, for diversity purposes?”).

<sup>405</sup> *Id.*

<sup>406</sup> *See, e.g.*, In re Application of Ann Cianflone, Esquire, No. Misc. 3:14–MC-63, 2014 WL 6883128, at \*1 (N.D.N.Y. Dec. 4, 2014) (finding no “plausible” indication that the motion to quash meets the \$75,000 jurisdictional threshold); *Chi. Bridge & Iron Co., N.V. v. TRC Acquisition, L.L.C.*, No. CIV.A. 14-1191, 2014 WL 3796395, at \*2 (E.D. La. July 29, 2014) (finding amount in controversy not met because the subpoenaing party was not seeking \$75,000 in damages from the object of the subpoena).

<sup>407</sup> *Badgerow*, 142 S. Ct. at 1325 (Breyer, J., dissenting).

<sup>408</sup> *See supra* notes 380–85.

corners of a Section 7 motion will be an effective workaround will be discussed below.<sup>409</sup>

#### IV. UN-MUDDYING THE LANDSCAPE

In 2016, in my *Uniform Theory* paper, I suggested both legislative and common law changes that would guarantee consistent federal court jurisdiction for arbitration motions based on *arbitration* facts.<sup>410</sup> Following *Badgerow*, however, recommending a common law change for a universal “look through” is no longer viable. At this point, legislative change is the only way for a universal approach to federal court jurisdiction based on *arbitration* facts.

Legislative change can take two forms. One legislative change would be to codify a “look through” to *arbitration* facts. The other legislative change would involve a specific grant of jurisdiction under the FAA. Although both have advantages and disadvantages, the first suggestion better meets the needs of both arbitration parties and the courts.

##### A. Enacting a Universal “Look Through”

Congress could amend the FAA to provide a universal “look through” to or “look at” *arbitration* facts. Any amendment should eliminate the jurisdictional language in Section 4 and add the following language to the FAA: *The federal courts have jurisdiction under this Act when the controversy arbitrated or to be arbitrated would otherwise satisfy the requirements of jurisdiction under Title 28.*<sup>411</sup> An amendment such as this could either be a standalone section, or it could be added to Section 6. Section 6 requires that all submissions under the Act “be made and heard in the manner provided by law for the making and hearing of motions.”<sup>412</sup> If this language were adopted in a new section, adding it as a new Section 5 or a new Section 7 might be a logical place for a jurisdictional statement.

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<sup>409</sup> See *infra* Section IV.B.

<sup>410</sup> Blankley, *supra* note 1, at 562–65.

<sup>411</sup> I slightly modified the similar recommendation I made in *Uniform Theory* to articulate more clearly that pre- and post-arbitration matters could be brought in federal courts. *Id.* at 562–63 (proposing universal “look through”).

<sup>412</sup> 9 U.S.C. § 6 (1947).



A universal “look through” to *arbitration* facts would be a relatively modest change. As noted above, some circuits were already applying *Vaden*’s “look through” analysis to most or all arbitration matters.<sup>413</sup> Codifying the “look through” would also serve a gate-keeping function to provide federal court jurisdiction in nontrivial cases. The “look through” would ensure that cases of a nature that the federal courts normally hear (i.e., federal question, diversity, and admiralty cases) would be the cases the federal courts would decide.

The universal “look through” to *arbitration* facts would apply the same way no matter the procedural posture of the case. The language would need to apply to cases prior to arbitration (i.e., “front-end” cases), during arbitration (i.e., “middle motions”), and after arbitration (i.e., “back-end” cases). In other words, the universal “look through” must be universal.

This approach would greatly simplify the jurisdictional question and reduce months and even years of litigation on jurisdictional issues. A universal “look through” to *arbitration* facts provides efficiency and stability without opening the proverbial floodgates of arbitration cases in the federal courts.

A universal “look through” would likely only modestly increase the workload of the federal courts compared to a post-*Badgerow* legal landscape. This approach would increase the number of cases that would qualify for federal question jurisdiction, but not to an amount higher than the courts were hearing around the time of *Vaden*. On the other hand, the courts would lose jurisdiction over a number of diversity cases in which the controversy arbitrated or to be arbitrated involved nondiverse parties; thus, closing the loophole that creative captioning can determine federal court jurisdiction. Given the modest increase in federal question cases on one side and the decrease of diversity cases on the other side, this approach would not open any floodgates for increased federal court jurisdiction.

#### B. *Provide an Express Grant of Jurisdiction*

Alternatively, Congress could amend the FAA to provide federal court jurisdiction for all arbitration motions. Again, any amendment

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<sup>413</sup> See, e.g., *Landau v. Eisenberg*, 922 F.3d 495, 498 (2d Cir. 2019) (finding jurisdiction to confirm an arbitration award in a case under federal trademark law).

should eliminate the jurisdictional language in Section 4. This approach would amend the FAA as follows: *The district courts of the United States shall have jurisdiction over motions arising under this chapter.*<sup>414</sup> Again, this language could be added to Section 6 or put in a standalone section immediately before or after Section 6.

The express grant of jurisdiction has the value of simplicity. Any arbitration motion falling under the FAA could be decided by a federal judge. Arbitration law could develop more universally with a system dominated heavily by federal court cases.

On the other hand, an express grant of jurisdiction would potentially create many additional cases for federal judges. Perhaps more worrisome is the potential to “eliminate the dual state and federal regulatory system envisioned by Congress when it originally passed the FAA.”<sup>415</sup> All states have arbitration legislation (most mirroring the FAA), and an express grant of jurisdiction might create a disincentive to rely on state law. This approach also opens the door for lower value claims to enter the federal courts. For instance, cases involving arbitration agreements in credit card and mobile phone contracts could all seek federal court assistance in arbitrating garden variety debt collection cases.<sup>416</sup>

Both approaches would require Congressional action, which is, admittedly unlikely. Although Congress amended the FAA in 2022 through the End Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFASASHA), that legislation had significant bipartisan support.<sup>417</sup> Finding the political will to fix a mundane jurisdictional issue will likely prove much more difficult.

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<sup>414</sup> This approach is nearly verbatim of my previous suggestion in *Uniform Theory*. Blankley, *supra* note 1, at 563.

<sup>415</sup> *Id.*

<sup>416</sup> Indeed, the *Vaden* case began as a “garden variety” debt collection case brought by Discover Bank. *See Vaden v. Discover Bank*, 556 U.S. 49, 54 (2009) (“This case originated as a garden-variety, state-law-based contract action.”).

<sup>417</sup> *See, e.g.*, David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, YALE L.J. FORUM (June 23, 2022), <https://www.yalelawjournal.org/forum/the-limits-of-the-ending-forced-arbitration-of-sexual-assault-and-sexual-harassment-act>.

## CONCLUSION

Although the *Badgerow* case appears to be an unassuming textualist decision by a supermajority of the Court, the decision has broad reaching implications for practice. The categorical rejection of the “look through” approach by the Court leaves significant questions about federal court jurisdiction for “middle” and “back-end” motions. In particular, the *Badgerow* opinion potentially eliminates federal court jurisdiction premised on a federal question at these later arising litigation contact points.<sup>418</sup> Certainly, such a reading of the FAA is absurd, but the Court leaves little room for amending this error.

Ultimately, Congress should step in and clarify the jurisdictional reach of the FAA. Codifying a universal “look through” should be easy and uncontroversial. In the meantime, states may begin to hear an increased number of “middle” and “back-end” arbitration motions based on cases involving underlying federal claims. Future research tracking whether a shift occurs in where these motions are filed will show *Badgerow*’s lasting impact.

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<sup>418</sup> See *Badgerow v. Walters*, 142 S. Ct. 1310, 1322 (2022).