

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BETTY E. VADEN, :

4 Petitioner :

5 v. : No. 07-773

6 DISCOVER BANK, ET AL. :

7 - - - - - x

8 Washington, D.C.

9 Monday, October 6, 2008

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 1:00 p.m.

14 APPEARANCES:

15 DANIEL R. ORTIZ, ESQ., Charlottesville, Va.; on behalf

16 of the Petitioner.

17 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf

18 of the Respondents.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We will hear
argument next in Vaden v. Discover Bank.

Mr. Ortiz.

ORAL ARGUMENT OF DANIEL R. ORTIZ
ON BEHALF OF THE PETITIONER

MR. ORTIZ: Thank you, Mr. Chief Justice,
and may it please the Court:

This case poses two substantive issues:
First, whether section 4 of the Federal Arbitration Act
impliedly repeals section 1331's "well-pleaded
complaint" requirement? Only if it does can a district
court look through a petition to compel arbitration that
itself contains no Federal question to ground Federal
subject matter jurisdiction on a Federal question
lurking somewhere in the dispute sought to be
arbitrated.

And, second, if section 4 does repeal this
part of section 1331, can a completely pre-empted
State-law counterclaim in a pending State-court lawsuit
furnish look-through jurisdiction?

Your Honors, at bottom this is a dispute
between two radically different conceptions of Federal
question jurisdiction. One view, Respondents', is so

1 broad as to allow parties to compel arbitration in
2 Federal court of nearly any dispute concerning credit
3 card debt; and one, Petitioner's, narrowly confined
4 subject matter jurisdiction to those disputes where the
5 arbitration agreement itself arguably arises under
6 Federal law.

7 But, Your Honors, the ordinary, the original
8 meaning of section 4, the structure of the overall
9 Federal Arbitration Act, and the purposes of the Federal
10 Arbitration Act all militate strongly in favor of the
11 Petitioner's view of subject matter jurisdiction here.
12 First, the language. The words "save for such
13 agreement," Your Honors, as the words "save for"
14 themselves suggest, necessarily imply that the agreement
15 exerts some negative effect on otherwise existing
16 jurisdiction.

17 CHIEF JUSTICE ROBERTS: That simply means
18 that you can't bring an action in Federal court because
19 the agreement says you can't. The agreement says you've
20 got to arbitrate. So if you throw the agreement out
21 save for such agreement, the question is whether or not
22 you could then bring the action in Federal court.

23 MR. ORTIZ: Your Honor, the -- those words
24 "save for such agreement" were originally intended to
25 refer to the hoary doctrine of ouster, which barred the

1 Federal courts from subject matter jurisdiction in such
2 suits. The words "but for" suggest that the agreement
3 itself somehow impairs jurisdiction.

4 JUSTICE GINSBURG: Mr. Ortiz, why isn't
5 section 2 of the Arbitration Act sufficient to take care
6 of the ouster doctrine, whatever may have been left of
7 it?

8 MR. ORTIZ: Your Honor, section 2 says that
9 an arbitration agreement shall be valid, irrevocable,
10 and enforceable. At the time when section 2 was
11 enacted, the Federal courts were still split between law
12 and equity. Section 2 by itself could well have made
13 such arbitration agreements enforceable, but only in
14 law. Section 4, "save for such agreement," makes clear
15 that there is no --

16 JUSTICE GINSBURG: I'm not sure that I
17 follow that, because it seems to me -- where did this
18 doctrine of ouster come from? It came from the court.
19 The courts said, no, we won't enforce arbitration
20 agreements if it would oust us of jurisdiction. Why
21 would a court reading section 2 not say, well, that rule
22 never made any sense in the first place, so we're not
23 going to follow it? It's not any rule that Congress has
24 imposed on the courts.

25 MR. ORTIZ: Your Honor, section 2 by itself

1 would not have made clear that in -- such agreements
2 were enforceable in equity. As Justice Story wrote in
3 *Tobey v. County of Bristol*, bills in equity were thought
4 in the Federal courts to be ill-founded in point of
5 jurisdiction to support a motion to compel arbitration.
6 And so although under section 2 such an agreement might
7 be enforceable in law -- damages might be available,
8 penalty clauses might be enforced in law, a party might
9 also be able to recover the expenses incurred in an
10 arbitration that was revoked before the arbitration came
11 to its conclusion -- that would not be clear that --

12 JUSTICE GINSBURG: That may have been the
13 historic model. This was never a notion that Congress
14 enforced on the courts. They imposed it on themselves.

15 So my question remains why shouldn't the
16 Court then say this agreement has been declared
17 enforceable, the ouster doctrine didn't have much to
18 recommend it in the beginning, but certainly not any
19 more; we can change it?

20 MR. ORTIZ: No, Your Honor. It is true that
21 Congress in the Federal Arbitration Act abrogated the
22 ouster doctrine. The only question is whether section 2
23 would do so by itself or whether section 4 was necessary
24 because of the division between law and equity at the
25 time.

1 JUSTICE SOUTER: I'm just not getting the --
2 I have never understood this argument and I still don't
3 understand it now. What is it in the text of section 2
4 that would seem to leave it inadequate to touch equity
5 as well as law?

6 MR. ORTIZ: Your Honor, section 2 says that
7 arbitration agreements shall be valid, irrevocable and
8 enforceable, but it does not say how they could be
9 enforced.

10 JUSTICE SOUTER: Exactly. And why,
11 therefore, would anyone -- why would anyone be drawing
12 distinctions as to how? It would be enforceable in any
13 way that an agreement might appropriately be enforced in
14 the courts of the United States at the time -- or any
15 courts, for that matter, at the time the act was passed.

16 MR. ORTIZ: Your Honor, if Congress wanted
17 to be very clear that ouster in all of its forms was no
18 longer any kind of issue in enforcing arbitration
19 agreements, it took the extra step in section 4.

20 JUSTICE SOUTER: It -- it made a categorical
21 statement in section 2. Why did it need to be any
22 clearer than that?

23 MR. ORTIZ: Well, because, Your Honor, it
24 would be the case that arbitration agreements could be
25 enforceable, but just not enforceable in the way that

1 might be most helpful.

2 JUSTICE SOUTER: Well, it could be, but why
3 in the world would anyone draw that inference?

4 MR. ORTIZ: Your Honor, because there were
5 separate bars at law and equity at the time -- at the
6 time of ouster. Under law, there was some room in some
7 jurisdictions for there to be enforcement, not across
8 the board. In equity there was an even higher standard
9 at the time against jurisdiction.

10 JUSTICE SCALIA: I have the same problem
11 that Justice Souter does, especially since section 2
12 refers to equity. It says they will be irrevocable and
13 enforceable, save upon such grounds as exist at law or
14 in equity for the revocation of any contract.

15 Obviously this -- this section was meant to
16 apply to equitable actions. You wouldn't dismiss them
17 in law for a -- a ground that only existed in equity?

18 MR. ORTIZ: But that particular section,
19 Justice Scalia, is meant to refer to ordinary State
20 contract doctrines in law and equity, which would make
21 the overall contract unenforceable. The "save for"
22 language is specifically directed at ouster, which is a
23 jurisdictional doctrine rather than one of substantive
24 contract law.

25 JUSTICE SCALIA: I don't know. When it says

1 they are enforceable and makes an exception only for
2 grounds that enable revocation in law or in equity, I
3 would -- I would think that the general command was
4 meant to apply to both law and equity.

5 MR. ORTIZ: Your Honor, the Respondents'
6 view also doesn't take into account the other provisions
7 of the Federal Arbitration Act itself. Under their
8 view, the "save for" language is literally read out of
9 section 4 of the agreement, since the rest of section 4
10 would accomplish exactly what they think the
11 look-through doctrine that they are arguing for without
12 those four critical words.

13 Also, sections 203 and sections 205 show
14 that when Congress wanted to expand subject matter
15 jurisdiction, it knew how to do so clearly and
16 unequivocally. And in fact, when Congress adopted
17 Section 205 in 1970 --

18 JUSTICE STEVENS: I hate to interrupt you
19 here, but would you explain why the words "save for such
20 agreement" cut back on the jurisdiction? I didn't quite
21 understand your point.

22 MR. ORTIZ: Justice Stevens, the point is
23 that "save for such agreement" instructs a court to jump
24 over the historical ouster doctrine.

25 JUSTICE STEVENS: Doesn't it just instruct

1 the court to decide whether, if there were no such
2 agreements, would there be Federal jurisdiction in the
3 underlying dispute?

4 MR. ORTIZ: Yes. Yes, Your Honor.

5 JUSTICE STEVENS: So in this case there
6 would be.

7 MR. ORTIZ: No, Your Honor, because the
8 underlying dispute between the parties in this case is
9 a -- concerns the arbitration agreement, not the
10 underlying bank debt.

11 JUSTICE STEVENS: No, it's not the
12 underlying bank debt, but it is an underlying dispute
13 over which this Federal -- if you had brought your class
14 action as an original case, there would have been
15 Federal jurisdiction.

16 MR. ORTIZ: Yes, Your Honor.

17 JUSTICE STEVENS: So then why doesn't the
18 language read on this case?

19 MR. ORTIZ: Well, Your Honor, the language
20 in -- the language -- the particular language of section
21 4 is meant to say, save for such agreement but for the
22 doctrine of ouster, setting aside the ouster doctrine
23 whether there would be --

24 JUSTICE STEVENS: The text says nothing
25 about the ouster doctrine.

1 MR. ORTIZ: No. But read in its historical
2 context, Your Honor --

3 JUSTICE STEVENS: Rather than literally.

4 MR. ORTIZ: Well, literally at the time it
5 would have been understood to refer -- to refer to that,
6 because ouster was the whole problem against which FAA
7 itself was first enacted. FAA --

8 CHIEF JUSTICE ROBERTS: This is a tough --
9 it's a tough sell. When you say "save for such
10 agreement," which I agree with Justice Stevens seems to
11 me you've put the agreement aside and then you say right
12 away then you look at the agreement to see if there is
13 Federal jurisdiction and only the agreement, not through
14 that. So you're throwing it out and then you bring it
15 right back in. It seems --

16 MR. ORTIZ: Not quite, Your Honor. What --
17 the rest of that sentence in section 4 instructs the
18 court to look at a suit concerning the subject matter in
19 controversy, which would be a suit seeking specific
20 performance of the arbitration.

21 CHIEF JUSTICE ROBERTS: Of the arbitration
22 agreement?

23 MR. ORTIZ: Yes, sir. So you are -- what
24 the court is instructed to do under the "save for such
25 agreement" clause is to ignore the historical problem of

1 ouster and then to see whether in a suit brought to
2 specifically enforce the arbitration agreement, there
3 would be Federal subject matter jurisdiction.

4 CHIEF JUSTICE ROBERTS: Right. And I guess
5 it's -- I mean, you say if it said save for the historic
6 doctrine of ouster, then it would be easy to say, and
7 then you look at the arbitration agreement. But it says
8 "save for such agreement" and then you look at the
9 agreement.

10 MR. ORTIZ: Well, you're not quite looking
11 at the agreement. And this makes clear, I believe, that
12 ouster was the problem being referred to in those four
13 words in section 4. It says a suit arising out of a
14 controversy. It's instructing the Federal courts to
15 determine Federal subject matter jurisdiction for a
16 section 4 proceeding, which was completely novel at the
17 time.

18 JUSTICE GINSBURG: You just -- you just used
19 the words "arising out of the controversy." "The
20 controversy" is used in several sections of the
21 Arbitration Act, and "the controversy" in other contexts
22 means the underlying dispute between the parties. "The
23 controversy" is not over the enforcement of the
24 arbitration agreement.

25 MR. ORTIZ: With all respect, Justice

1 Ginsburg, it's a little bit more complicated than that.
2 The Federal Arbitration Act uses the word "controversy"
3 four times, twice in section 2, once in section 4 and
4 once in section 5.

5 In section 2, the word "controversy" is
6 embedded in a larger phrase: "Controversy arising out
7 of such contractor transaction." It is that context for
8 the word "controversy" that makes clear that in section
9 2, both instances in section 2, it is referring to the
10 dispute which is sought to be arbitrated.

11 In section 5, by contrast, the simple word
12 which appears the middle of 4A of the Petitioner's
13 brief, either -- section 5, which deals with the
14 appointment of arbitrators or umpires, it says "either
15 party to the controversy", it's clear in the section 5
16 context that the word "controversy" by itself refers to
17 the controversy over arbitration, not to the underlying
18 dispute.

19 JUSTICE ALITO: In Moses H. Cone, didn't the
20 court say that the controversy was the underlying
21 dispute?

22 MR. ORTIZ: Your Honor, that -- this Court,
23 in that footnote 32 of Moses H. Cone, mentioned language
24 that refers to the underlying dispute. In the context
25 of both the sentence, the footnote itself, and the

1 overall case, it is clear that the Court could not have
2 meant that.

3 That phrase is followed immediately by a
4 semicolon and then the word "hence." And after the word
5 "hence" in that same sentence in the same footnote, this
6 Court says, "Hence an independent basis for jurisdiction
7 needs to exist," which in context makes it clear that
8 it's not referring to look through.

9 Also that sentence cites a Fifth Circuit
10 case, Commercial Metals Company, and the other -- points
11 to the other cases in it. They basically show that an
12 independent -- stand for the proposition that an
13 independent basis of jurisdiction exists, not that there
14 is look through. And, in fact, one of them dealing with
15 Federal-question jurisdiction says that the Federal
16 issue has to appear on the face of the complaint.

17 The rest of footnote 32, Your Honor, is all
18 directed towards -- towards the jurisdictional inertness
19 of the FAA overall. And the case of Moses H. Cone,
20 itself, if look through had been rigorously adopted
21 there, it would have defeated subject-matter
22 jurisdiction because there would not have been complete
23 diversity among the parties.

24 CHIEF JUSTICE ROBERTS: But you do think --
25 you do think we should look through to determine

1 diversity and the amount in question? In other words,
2 not in the Federal-question context, but if it's
3 diversity, you say we do look through the arbitration
4 agreement.

5 MR. ORTIZ: Your Honor, that seems a
6 somewhat different sense of look through; but, to the
7 extent that ordinary, background 1331 or 1332 principles
8 authorize such look through, that is appropriate in
9 arbitration cases as much as it is appropriate outside
10 of arbitration cases.

11 It is Petitioner's contention that section 4
12 has no independent look-through force. To the extent
13 that look through is appropriate, it is because it is
14 appropriate under section 1332, itself. If under
15 Respondents' view section 4 operates independently to
16 authorize look through, then it would presumably
17 override 1332's normal principle that you do not look
18 through in determining complete diversity. And it would
19 have the overall effect of paradoxically reducing the
20 number of petitions to compel on the diversity side that
21 could be brought in Federal court.

22 JUSTICE SCALIA: Say that again. I didn't
23 follow that.

24 MR. ORTIZ: The -- the point is a simple
25 one, but it's sometimes hard to express. If you -- if

1 this Court says that section 4 operates independently to
2 authorize look through in section 1331 and section 1332,
3 the courts, district courts, will be in the position of
4 looking through section 1332 petitions to determine
5 whether the parties are completely diverse.

6 It will not be basing the complete diversity
7 determination on the parties before it in the
8 arbitration -- in the petition to compel, itself, but it
9 will be looking through to the underlying dispute.

10 Now, in Moses H. Cone, if the Court had done
11 that, it would have picked up the architect who was
12 dropped from the actual -- between the actual underlying
13 lawsuit and the petition to compel arbitration, and
14 completeness of diversity would have been defeated
15 there.

16 JUSTICE STEVENS: Is that point argued in
17 Moses -- Moses Cone? Was that point argued in that
18 case?

19 MR. ORTIZ: I do -- I do not know, Your
20 Honor.

21 JUSTICE SCALIA: Why -- why wouldn't 1332
22 require complete diversity and require the court to
23 assure itself of that anyway?

24 MR. ORTIZ: No, Your Honor. The question --
25 1332 does not authorize look through for purposes of

1 determining completeness of diversity, so if section 4
2 independently authorizes --

3 JUSTICE SCALIA: I thought you said it did
4 have a look through, an automatic look through, itself.

5 MR. ORTIZ: Not under the completeness of
6 diversity, Your Honor. To the extent it has anything
7 equivalent to look through, it's on the amount-in-
8 controversy side of Section 1332.

9 JUSTICE SCALIA: I see. I see. You are --
10 you are -- you are limiting it to the amount.

11 MR. ORTIZ: Yes. So, under Respondents'
12 view, there would be -- section 4 would authorize a look
13 through one part of section 1332 and not with respect to
14 another part of section 1332 under --

15 JUSTICE STEVENS: I am not -- I mean just --
16 I have to be sure I follow. Why couldn't it require the
17 same look through in a diversity case as it does in a
18 Federal-question case?

19 MR. ORTIZ: Because, Your Honor, if this
20 Court authorizes look through in Federal-question cases
21 through the arbitration agreement, itself, to the
22 underlying dispute, then if that look -- and that look
23 through comes -- authorization comes from Section 4 --

24 JUSTICE STEVENS: Right.

25 MR. ORTIZ: -- then in 1332 cases, this

1 Court would be looking through not only for
2 amount-in-controversy purposes --

3 JUSTICE STEVENS: Complete diversity.

4 MR. ORTIZ: -- but also for complete
5 diversity.

6 JUSTICE STEVENS: What's wrong with that?

7 MR. ORTIZ: Well, that would have the
8 effect, Your Honor, of not allowing the petitioner to
9 define the contours of the lawsuit and would actually
10 reduce the number of section 1332 petitions that could
11 be brought in Federal court.

12 JUSTICE STEVENS: Maybe it would. So what?

13 MR. ORTIZ: Well, Your Honor, if that is --
14 that is an implication that is -- is lurking in
15 Respondents' position, and it is also -- in a case like
16 this it is a little bit worrying as to why ordinary
17 section 1332 principles should not apply.

18 JUSTICE BREYER: There is a dispute between
19 people. You look at their underlying dispute, the
20 underlying one, and you say: Is there diversity?
21 What's the problem?

22 MR. ORTIZ: Well, Your Honor, that's not
23 actually the way you use Federal -- lower Federal court
24 now.

25 JUSTICE BREYER: Why -- why wouldn't you do

1 just what I said, just what we started with? You take
2 out the arbitration agreement, and then you look to see
3 what this dispute is about. And if it's about something
4 that happens to involve all people from one side in one
5 State and from another State on the other side, there is
6 jurisdiction. Why is that a problem? I don't
7 understand.

8 MR. ORTIZ: Your Honor, it -- it removes the
9 Petitioner's ability or the plaintiff's ability or the
10 -- similar to the plaintiff's ability in an ordinary
11 lawsuit to define --

12 JUSTICE BREYER: Why?

13 MR. ORTIZ: -- the parties.

14 JUSTICE BREYER: Why?

15 MR. ORTIZ: Well, because, Your Honor,
16 someone could not bring a section 4 petition in Federal
17 court against maybe one party seeking to force that
18 party into arbitration if there are other parties
19 involved in the underlying dispute where there is no
20 diversity.

21 JUSTICE KENNEDY: All right. So you define
22 "look through" as -- under our hypothetical here as
23 looking through to all people who might potentially be
24 parties under this arbitration agreement.

25 MR. ORTIZ: Well, that would be the

1 implication of taking the kind of look-through theory
2 that Respondents are arguing for in this case and
3 applying it evenhandedly.

4 JUSTICE KENNEDY: I will think about that.
5 I'm -- I'm -- I wasn't -- it wasn't clear to me that
6 that was so.

7 MR. ORTIZ: But, Your Honor, there are also
8 several jurisdictional gaps in the act that are created
9 under Respondents' view. The critical --

10 CHIEF JUSTICE ROBERTS: Can I hold up just a
11 second to make sure I understand it. You are saying
12 that, let's say, Person A has an arbitration agreement
13 that implicates Persons B and C. C is diverse, but B is
14 not. They could decide to compel arbitration with
15 respect to B and leave C out of it. But if you follow
16 the look-through doctrine, you would say, well, the
17 dispute is between A and B and C; and so you would be
18 depriving A of their right to frame their own complaint
19 in a way that doesn't create Federal jurisdiction.

20 MR. ORTIZ: Exactly, Your Honor, and that --

21 JUSTICE KENNEDY: But that's not quite so,
22 because the -- the action could proceed with just A and
23 C, and then it -- it could come to a complete judgment
24 as to them. In the look through for the -- the claims
25 that are involved, the action couldn't possibly proceed

1 without taking account of the pre-emption claim that the
2 Federal -- the Federal claim.

3 You couldn't -- you could decide the case
4 completely in No. 1, the diversity case, but not in No.
5 2. So there -- so there is a difference. It's true,
6 you don't decide it completely as to all parties.

7 MR. ORTIZ: When the -- no, Your Honor.
8 But there -- there could under your situation be large
9 parts of the underlying dispute that are not covered
10 under -- and still left to be decided. It is, you know,
11 not the case that necessarily everything would be
12 subject to arbitration.

13 CHIEF JUSTICE ROBERTS: Of course, I suppose
14 how that works depends on what the rules are about how
15 you frame the dispute once you do look through.

16 I mean, if there is a pending State suit
17 between A and B, even though C may -- you could have
18 sued C as well, I mean the judge can say, well, I am
19 only going to look through to what the -- the actual
20 litigation is; and if I look at that, that's not a
21 Federal case. And -- and -- and so your position
22 follows.

23 MR. ORTIZ: This Court could; and,
24 interestingly, that wasn't the situation in Moses H.
25 Cone, itself. There, there was a preexisting lawsuit,

1 and this Court did not look through. The court found
2 that there was no problem with the architect being
3 absent from the petition to compel arbitration, itself.

4 Well, Your Honors, there is also, as I
5 mentioned, strange jurisdictional gaps that are created
6 under Respondents' view of this case. Section 4 is the
7 only section of the arbitration -- in the Federal
8 Arbitration Act that has the critical "save for such"
9 language, which under Respondents' view authorizes
10 look-through jurisdiction, in particular, Sections 7, 9,
11 10, and 11, which allow a court, a Federal court, to
12 compel the attendance of witnesses at an arbitration.
13 That is Section 7; and then 9, 10, and 11, which
14 respectively allow a Federal court to confirm, vacate,
15 or modify an arbitration once it has happened.

16 None of those sections contain language
17 which under Respondents' view or the Fourth Circuit's
18 view are necessary for there to be look through.

19 In all those cases -- situations, Your
20 Honor, the Federal courts would be in the position of
21 being able to compel arbitration under section 4 but not
22 being able to compel the attendance of witnesses at the
23 arbitration or to subsequently confirm, vacate, or
24 modify an award coming from an arbitration that they,
25 themselves, compelled.

1 Coming from an arbitration that they
2 themselves compelled. The closest Respondent comes to
3 sort of explaining this or trying to jump or leap over
4 this gap, are two amici, two law professors, who argue
5 that this Court should find jurisdiction, subject matter
6 jurisdiction under sections 7, 9, 10 and 11 as an
7 emanation from sections 3 and 4, only one of which
8 actually has the necessary "save for" language.

9 Also, Your Honors, this look-through
10 approach to Federal subject matter jurisdiction violates
11 the core purposes of the Federal Arbitration Act. The
12 Federal Arbitration Act was meant to get things to
13 arbitration quickly and to have arbitrators, not judges,
14 decide them. These -- sometimes often complex
15 jurisdictional inquiries undermine both those aims.

16 Here this case has been pending in Federal
17 court just at the jurisdictional stage for many years
18 now. In the Strong case which is now en banc before the
19 Fifth Circuit -- I'm sorry, the Eleventh Circuit --
20 Justice -- Judge -- excuse me, Judge Marcus wrote a
21 32-page opinion.

22 CHIEF JUSTICE ROBERTS: Yes, and what really
23 leapt off the page at me in that opinion, he gets to the
24 end, I think he basically presents your position and
25 then he says: Thus, on my reading the relevant portion

1 of section 4 could be rewritten this way.

2 Well, I mean that to me is a confession of
3 error if you have to rewrite the statute to get to your
4 position.

5 MR. ORTIZ: Well, Your Honor, he didn't say
6 it had to be rewritten. He said if you wanted to make
7 it even clearer what was originally intended under
8 section 4 that is how you would do it. That's a far cry
9 from saying that you need to do violence to the statute.
10 Here --

11 CHIEF JUSTICE ROBERTS: Well, his rewriting
12 doesn't look very much like section 4 to me.

13 MR. ORTIZ: Your Honor, if his rewriting,
14 given the disappearance of the ouster doctrine -- he's
15 trying to make it clear to present context what was
16 originally understood at the time the Congress
17 originally enacted the FAA. There is no memory,
18 historical memory or otherwise, of the ouster doctrine,
19 no realization how it actually played out; and against
20 that absence of knowledge, Judge Marcus is trying to
21 educate his readers and the lower courts as to how
22 things need to be done.

23 But certainly the language as originally
24 understood would have -- that save-for language would
25 have been all about, which it is clear from the time was

1 thought by Congress to be the major obstacle to
2 arbitration.

3 JUSTICE ALITO: What about the fact that
4 that was not included in the New Jersey statute, nor was
5 it included in -- was it included in the Uniform
6 Arbitration Act?

7 MR. ORTIZ: No, Your Honor. Now --

8 JUSTICE ALITO: What's the explanation for
9 that?

10 MR. ORTIZ: The explanation, Your Honor, is
11 that in New York law and equity have been merged.

12 JUSTICE ALITO: I know. And you're saying
13 New Jersey; it was, you know, a very complicated
14 argument about the status of it. What about the Uniform
15 Arbitration Act?

16 MR. ORTIZ: By the later times it appeared
17 that it was closer, coming -- the law and equity across
18 many jurisdictions was coming closer, but at the time in
19 the Federal court system at least, if only because of
20 Justice Story's hostility towards jurisdiction, finding
21 jurisdiction in the Tobey case to build equity seeking
22 specific performance kinds of things, that language is
23 necessarily clear.

24 Your Honors, if there are no further
25 questions I would like to reserve my time for rebuttal.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 MR. ORTIZ: Thank you.

3 CHIEF JUSTICE ROBERTS: Mr. Phillips.

4 ORAL ARGUMENT OF CARTER G. PHILLIPS

5 ON BEHALF OF THE RESPONDENTS

6 MR. PHILLIPS: Thank you, Mr. Chief Justice,
7 and may it please the Court:

8 It seems to me that if the argument that
9 just ended doesn't prove anything, it suggests that
10 perhaps the Court ought to follow the simple expedient
11 of read the statute as it's written, apply it as written
12 and come to what strikes me, at least, as a reasonably
13 easy resolution of this particular case.

14 The statute says that a party aggrieved by
15 the alleged failure to arbitrate -- and we have that
16 precisely in this case because the other side has filed
17 a lawsuit against our indemnitee arising out of an
18 underlying dispute -- may petition any United States
19 district court which, save for such an agreement -- it's
20 pretty clear that everybody agrees that in this context
21 you just simply put the agreement aside -- and then you
22 say would have jurisdiction under Title 28 in a civil
23 action of the subject matter of the suit arising out of
24 the controversy between the parties.

25 It seems to me reasonably clear to interpret

1 that language as saying you look to the underlying
2 dispute between the parties.

3 JUSTICE GINSBURG: But that's the question
4 that I have, Mr. Phillips. What is the underlying
5 dispute between the parties?

6 It seems to me that your look-through
7 argument is look-through only halfway. That is, if you
8 look -- if you consider the controversy, the suit that
9 was brought in the State court, the controversy is here
10 we have a customer who hasn't paid the amount charged.
11 So we have a suit on a debt. Why isn't that the
12 controversy? You have to make the counterclaim the
13 controversy, which comes up only defensively. It wasn't
14 brought as a lawsuit.

15 MR. PHILLIPS: Justice Ginsburg, the
16 language of section 4 actually talks about the subject
17 matter of a suit arising out of, not the existence of a
18 suit; and section 4 doesn't require that a lawsuit have
19 been filed. So it's not appropriate simply to say to
20 yourself look at what litigation actually exists,
21 because in as many cases as not there is not going to be
22 any litigation ongoing. So the court has to make the
23 hypothetical: would the court have had jurisdiction
24 over the subject matter of this dispute? And the
25 dispute in this case, which Professor Ortiz was very

1 explicit about -- he said specifically that if he had
2 brought this as an affirmative lawsuit it would have
3 arisen under Federal law.

4 It seems to me that's as clear a concession
5 that the nature of this dispute is a question of Federal
6 law. And therefore --

7 CHIEF JUSTICE ROBERTS: Who gets to frame --
8 who gets to frame the complaint? Normally if you're a
9 party and you have a dispute that may implicate Federal
10 law, you have control over the complaint. You don't
11 have to have a -- you don't have to well plead it in a
12 way that implicates a Federal question. You can go out
13 of your way to do it in a way that does not implicate a
14 Federal question; and therefore it would not be, you
15 could not bring it in Federal court.

16 Just as in the diversity example, you can
17 specifically avoid suing people who would create
18 diversity. But in your position the judge has to in his
19 mind write a complaint and see whether there is
20 jurisdiction or not; and how does the judge decide
21 whether to sue diverse parties or not to sue diverse
22 parties?

23 MR. PHILLIPS: I think what the judge has to
24 do is to take -- is to give the plaintiff in the section
25 4 complaint the benefit of his allegations. And we have

1 made an allegation here that the subject matter of this
2 dispute arises under Federal law, and we did that not
3 just based on our own assessment of the situation in the
4 abstract, but we did that on the basis that she had
5 filed a very specific claim against us asserting that we
6 had violated essentially section 20.

7 JUSTICE GINSBURG: But -- but she chose to
8 assert it only defensively; and it's not a complaint --
9 the counterclaim if it had been brought as an
10 independent action, everybody agrees qualifies for
11 Federal jurisdiction. But the litigant who has this
12 claim is asserting it only as a defense to a claim that
13 you admit does not qualify for Federal jurisdiction.

14 MR. PHILLIPS: But Justice Ginsburg, I think
15 the difference is that we are not seeking to remove her
16 original lawsuit. That's not -- if that were the case,
17 then I think the argument you're making is a legitimate
18 one. All we are seeking to do is to assert our
19 independent section 4 rights and that's not at all
20 dependent on the --

21 JUSTICE GINSBURG: But in the practical
22 effect, what happens? Now you have asserted that you
23 can enforce because of the counterclaim that asserts --
24 that arises under Federal law. But you say it's is not
25 the same as removal because the underlying claim, your

1 suit on the debt owed, remains in Federal -- State
2 court; but what happens to that claim once you have this
3 arbitration?

4 MR. PHILLIPS: Well, there are a couple
5 possibilities. I mean, first of all, the arbitration
6 agreement is quite explicit in saying that if, if you --
7 if this starts off as litigation and then a subsequent
8 claim is made by either of the parties, the parties have
9 the right to enforce the arbitration as to that
10 particular claim. So that's specifically what we did in
11 this particular case.

12 So in theory, at least the collection action
13 would remain in State court as a State cause of action,
14 although it would certainly be available to the
15 Petitioner in this case to say, well, no, if you're
16 going to arbitrate that portion of the case then I'm
17 content to arbitrate the rest of the case as well. So
18 they could do it that way or we could arbitrate the
19 Federal law.

20 JUSTICE STEVENS: Mr. Phillips --

21 MR. PHILLIPS: I'm sorry?

22 JUSTICE STEVENS: Clear up one thing for me.
23 Is it correct, as Justice Ginsburg suggested, that the
24 counterclaim was purely defensive? Didn't it ask for
25 additional relief? The counterclaim, wasn't it a class

1 action?

2 MR. PHILLIPS: Oh, right. Yeah -- no --
3 exactly. That's absolutely true.

4 JUSTICE STEVENS: So it was not merely an
5 defense to the action, the State court action.

6 MR. PHILLIPS: Right.

7 JUSTICE GINSBURG: I meant -- I didn't mean
8 to say you couldn't get affirmative relief on a
9 counterclaim. Of course you could. But this --

10 MR. PHILLIPS: But I couldn't -- I couldn't
11 remove it --

12 JUSTICE GINSBURG: Chose not to --

13 MR. PHILLIPS: I think that was the point
14 she was trying to make.

15 JUSTICE GINSBURG: -- chose not to litigate
16 the case, chose to -- well, I'm being sued, so I'm going
17 to bring up this claim. It wasn't as an original
18 matter.

19 MR. PHILLIPS: Right. I -- I understand
20 that, Justice Ginsburg, but the -- the -- but the point
21 I am trying to make here is that the language of section
22 4 just talks about the subject matter of the controversy
23 between the parties. It doesn't specifically talk about
24 an existing lawsuit, and frankly it doesn't envision the
25 existence of a specific lawsuit.

1 JUSTICE GINSBURG: The controversy between
2 the parties is the credit card company says, customer,
3 you're in default \$10,000; and the customer said, if
4 that's so, then I have certain offsets because they
5 charged me too much interest. How do you --

6 MR. PHILLIPS: Well, in that --

7 JUSTICE GINSBURG: -- how do you -- it's all
8 part of the same controversy, isn't it?

9 MR. PHILLIPS: But -- no -- well, I mean you
10 could -- you can certainly view it as part of the same
11 controversy, but the -- but the bottom line is, the
12 question is: Would a Federal court have jurisdiction
13 over the dispute that arises under Federal law between
14 the Petitioner and the Respondents? And the answer is
15 clearly yes.

16 JUSTICE SCALIA: What is the dispute? You
17 say the dispute is not defined by what -- what has been
18 brought in a complaint.

19 MR. PHILLIPS: It's defined by our complaint
20 in section 4.

21 JUSTICE SCALIA: But you -- from your
22 argument, I would gather that a court would be able to
23 imagine a counterclaim. Once it finds out, you know,
24 what -- what -- what the principal complaint is about,
25 the court could imagine that there would be a

1 counterclaim for interest or for something else.

2 MR. PHILLIPS: Well, I'm not sure -- I'm not
3 even sure --

4 JUSTICE SCALIA: It's very strange to decide
5 Federal jurisdiction on the basis of -- of imagined --
6 imagined complaints.

7 MR. PHILLIPS: Well, I -- I mean the problem
8 with that -- I mean the difficulty arises, Justice
9 Scalia, because the language of the statute does say
10 that the court has to determine whether it would have
11 jurisdiction over the subject matter of the controversy.
12 And then that --

13 JUSTICE SCALIA: So the problem with his --
14 I mean with his interpretation, you don't have to
15 imagine anything.

16 MR. PHILLIPS: Well, with his
17 interpretation, you have to imagine everything. In
18 point of fact, you have to imagine that this had
19 something to do with ouster when it doesn't use the word
20 "ouster."

21 JUSTICE SCALIA: Well --

22 MR. PHILLIPS: It has to do with equity and
23 law when it uses "equity" and "law" in other contexts.
24 And --

25 JUSTICE SCALIA: You don't have to imagine

1 complaints. You -- you don't have to invent litigation.

2 MR. PHILLIPS: Well, no. That's true, but
3 what it -- but -- but the flip side of that is that this
4 is a section, a fundamental provision, of the Federal
5 Arbitration Act that apparently was designed to provide
6 a basis of Federal jurisdiction for the Gila Indian
7 Tribe claims. It seems inconceivable to me that
8 Congress had that narrow an interpretation of section 4
9 in mind when it passed this particular law.

10 JUSTICE SCALIA: It's close to inconceivable
11 to me that Congress wanted us to -- to construct
12 litigation that is not yet in existence.

13 MR. PHILLIPS: But I think all of this
14 really is talking -- I mean this is not significantly
15 different --

16 JUSTICE STEVENS: -- answer that the
17 litigation does exist.

18 MR. PHILLIPS: Right.

19 JUSTICE SCALIA: No, but your position is it
20 doesn't have to exist. Had that litigation not been
21 brought, had the motion to arbitrate been brought before
22 a lawsuit was filed, that the court would still have to
23 consider what is the dispute between the parties and
24 what kind of complaints could that dispute have
25 generated.

1 MR. PHILLIPS: And it may well be, Justice
2 Scalia, that in that context the answer is that the
3 court will say that the claim is unripe; that we don't
4 know for sure whether or not this is going to congeal
5 into a real dispute between the parties. And if that's
6 the case, obviously, then the court does not have to go
7 forward. But you don't have to worry about that in the
8 context of this particular litigation because that
9 dispute has congealed. The parties are at loggerheads
10 over the particular issue in this case. And -- I'm
11 sorry.

12 JUSTICE GINSBURG: There would be nothing
13 inappropriate about a State court entertaining that
14 excessive interest claim, but applying Federal law to
15 it. I mean the -- 1831(d) says that Federal law governs
16 the interest --

17 MR. PHILLIPS: Right.

18 JUSTICE GINSBURG: Not state usury law. So
19 you could have this case going on in State court.

20 MR. PHILLIPS: Right.

21 JUSTICE GINSBURG: And the State court would
22 be perfectly competent to apply the Federal law.

23 MR. PHILLIPS: Right. Although, you know,
24 that's to the -- obviously, that sets aside the
25 arbitration agreement completely.

1 JUSTICE SOUTER: Well, why does it set
2 aside? This is the thing I guess I don't understand
3 about the case, and that is what is really driving your
4 side, given the difficulties that I share with the
5 Justices on my right and left here. And the -- the
6 tacit assumption seems to be that you in fact are going
7 to get shortchanged on your arbitration right if you
8 have to bring your arbitration claim in a State court.
9 And I don't see that.

10 MR. PHILLIPS: Well, first of all, section 4
11 doesn't apply in --

12 JUSTICE SOUTER: I know section 4 doesn't,
13 but section 2 does.

14 MR. PHILLIPS: To be sure, section 2 does,
15 but whether or not --

16 JUSTICE SOUTER: You can -- based on the
17 Federal act, you can in State court claim your right to
18 enforce the arbitration agreement.

19 MR. PHILLIPS: Right, but the flip side of
20 that is --

21 JUSTICE SOUTER: Why don't you do it in the
22 State court instead of going through these gymnastics?

23 MR. PHILLIPS: Because we have serious
24 doubts as to whether or not in fact we will have our
25 Federal rights protected as zealously as we would in a

1 Federal court.

2 JUSTICE KENNEDY: Speaking of gymnastics,
3 can I ask you if you had foreseen this problem, could
4 you have brought a declaratory judgment action to
5 establish that your Federal claim --

6 MR. PHILLIPS: Yes.

7 JUSTICE KENNEDY: -- controls this dispute
8 and could you have then said that you wanted this
9 arbitrated?

10 MR. PHILLIPS: Yes, Justice Kennedy. I
11 believe we could have done both of those.

12 JUSTICE KENNEDY: Why didn't you do that?
13 Why are we here?

14 MR. PHILLIPS: Well, because we brought the
15 action under section 4, which I think --

16 JUSTICE KENNEDY: I mean, could you still do
17 that after this case?

18 MR. PHILLIPS: Assuming there's no statute
19 of limitations issue, and I don't know that there would
20 be, but that would be available. But it still seems to me
21 that the bottom-line question is: Are you entitled to
22 bring an action under section 4?

23 JUSTICE BREYER: So your theory -- I mean
24 basically I think you concede that the other side has a
25 point in sometimes it will be difficult to say what the

1 dispute is precisely and, therefore, difficult to know
2 if precisely this dispute does or does not -- one that
3 you can get into Federal court on. For example, it
4 hasn't even arisen. You know, there is no lawsuit. And
5 I guess what would happen, what the judge should say is
6 they should say to you you'd like to have this in
7 Federal court, wouldn't you, this dispute? What's it
8 about?

9 MR. PHILLIPS: Right.

10 JUSTICE BREYER: And once he says what's it
11 about, both sides will say, well, basically it started
12 off -- it's just about collecting some money from
13 in-state parties. So that's not Federal.

14 MR. PHILLIPS: Right.

15 JUSTICE BREYER: So that, you know,
16 something could happen here. It could happen that they
17 could decide they want to sue in a big class action and
18 get huge amounts of money under usury laws of the State
19 which don't exist, so they have to proceed under an FDIC
20 reg, and then it could be Federal. And the judge might
21 say to you: "What? You're just imagining." And that
22 would be up to the judge.

23 MR. PHILLIPS: Right, and the judge would
24 have the discretion to decide --

25 JUSTICE BREYER: It's a kind of a defense.

1 MR. PHILLIPS: Right.

2 JUSTICE BREYER: But you'd say then it might
3 be the case that it wouldn't be so hard to decide.

4 MR. PHILLIPS: Right. There could be a
5 letter that says, look, what you're doing here violates
6 Federal law, and if you don't stop it, we are going to
7 take action against you. And then we have to sit there
8 and wait.

9 JUSTICE BREYER: A real suit. And --

10 MR. PHILLIPS: But they are here. They are
11 here.

12 JUSTICE BREYER: And in a real suit, there
13 is a class action brought not just on behalf of the one
14 you're trying to sue but on behalf of everybody, where
15 they have to proceed under a Federal reg, and they are
16 going to get a huge amount of money, and you say that's
17 what we want arbitrated.

18 MR. PHILLIPS: And that's precisely what
19 we've asked for here, Justice Breyer.

20 JUSTICE BREYER: So this one is not so hard
21 to figure out.

22 MR. PHILLIPS: Right.

23 JUSTICE BREYER: There might be some that
24 are.

25 MR. PHILLIPS: Right, and there's no

1 question about that, and it's --

2 CHIEF JUSTICE ROBERTS: What's hard to
3 figure out, you have, let's say, a franchisee, and you
4 have a dispute with the franchisor. And the franchisee
5 says it's an antitrust violation, and I'm going to sue
6 you under the California antitrust law, and he does.
7 And the Federal court says, we've looked through and
8 says, well, you could have sued under the Federal
9 antitrust law. And you -- yes, I could have; I
10 deliberately didn't. And then they say, well, this is
11 something that could have been brought in Federal court.
12 And that really deprives a plaintiff of his right to
13 frame his complaint as he sees fit.

14 MR. PHILLIPS: And I understand that,
15 Mr. Chief Justice. And in the right case, you know, I'm
16 not sure how I would come out in that particular --

17 JUSTICE BREYER: Well, in his case, in the
18 Chief Justice's case, wouldn't you say they don't get
19 into court, probably don't because they are bringing
20 this under a State law?

21 MR. PHILLIPS: You see, I would comply with
22 the original complaint.

23 CHIEF JUSTICE ROBERTS: No. But you just
24 say, is the dispute one that could have been brought in
25 Federal court?

1 MR. PHILLIPS: Right. Well, that's exactly
2 what the Eleventh Circuit held.

3 CHIEF JUSTICE ROBERTS: It's a violation of
4 the Sherman Act.

5 MR. PHILLIPS: Right.

6 CHIEF JUSTICE ROBERTS: Of course, it could
7 be brought in Federal court.

8 MR. PHILLIPS: Well -- and in the right
9 case, the Federal -- you know, if I had to go that far,
10 I might well make that argument, Mr. Chief Justice, but
11 in this case I don't have to go that far. And I think
12 all the Court needs to resolve is in a situation where
13 the parties have a very concrete dispute between them,
14 one that arises exclusively under Federal law, and a
15 party seeks to have that claim arbitrated under section
16 4 pursuant to --

17 JUSTICE GINSBURG: That claim doesn't --

18 JUSTICE STEVENS: Let me get one fact.

19 MR. PHILLIPS: I'm sorry.

20 JUSTICE STEVENS: Is the State court suit
21 still pending?

22 MR. PHILLIPS: Yes, the State court suit is
23 pending.

24 JUSTICE STEVENS: So there are two separate
25 underlying actions.

1 MR. PHILLIPS: The State court has stayed
2 its hand pending the outcome of the Federal litigation.
3 So we'll see what happens. But, obviously, as I say --

4 JUSTICE GINSBURG: But there could be
5 nothing left for the State court to do after you have
6 the arbitration. I mean, not that you arbitrate about
7 interest due on a nonexistent debt. I mean, you have to
8 have the two things together.

9 MR. PHILLIPS: Well, I mean, in some ways,
10 as I say, it seems to me that's Petitioner's right or
11 potentially -- or ours. I suppose either side could ask
12 to have that arbitrated, but the truth is if you took --

13 JUSTICE GINSBURG: I just can't envision a
14 case where what you haven't effected is taking a case, a
15 debt, simple debt, no diversity a State court case.

16 MR. PHILLIPS: Right.

17 JUSTICE GINSBURG: And you remove the State
18 court from the picture and gotten it over into Federal
19 court to order the arbitration and any follow-up to the
20 arbitration. It just seems to me you have effected --
21 accomplished what you could not have accomplished by the
22 -- by removal, which you admit that you can't remove on
23 the basis of a counterclaim.

24 MR. PHILLIPS: But see, Justice Ginsburg, I
25 think that's not right. I think that actually what

1 happens is you eliminate what I perceive to be the
2 Federal question in this through the arbitral process.

3 You still have the underlying collection
4 action. If the Court says, no, there is no violation of
5 the usury laws, you have not overcharged, you have not
6 made any mistakes, the question we still have is a claim
7 on the debt and her obligation to pay it.

8 Now, whether she wants to adjudicate that in
9 State court or resolve it as part of the arbitral
10 process, that's really up to her as far as how that
11 goes. But the arbitration agreement could not be
12 plainer in saying that you can divide up the claims for
13 purposes of seeking arbitration, and that seems to fit
14 perfectly well with an effort to say that there is a
15 specific claim here that arises exclusively under
16 Federal law, and that, therefore, we can enforce our
17 arbitration rights pursuant to that section 4 right.

18 And that's, frankly, all we are trying to
19 accomplish here, Justice Ginsburg.

20 The second part of the statute which is
21 the -- you know, the one that has obviously created the
22 greatest amount of controversy here, is, you know,
23 "would have jurisdiction over the subject matter."
24 Again, it seems to me that this is the easiest case the
25 Court is going to face in this area, because here is one

1 where there is no question --

2 JUSTICE SCALIA: That's what worries me.

3 That's what worries me.

4 (Laughter.)

5 JUSTICE SCALIA: If we accept your theory,
6 this is the easiest case, what about the hard cases that
7 are further down the line?

8 MR. PHILLIPS: Well, I think what's going to
9 happen -- I candidly don't think they are going to come
10 up that much, in part because these issues have been
11 around a long time. You know, it's not like there have
12 been dozens of these kinds of issues arising over time.
13 I don't think it's likely to be that big a problem.

14 But again, it seems to me that district
15 courts have the authority to resolve this, because if
16 they don't believe that there really is a Federal claim
17 that would justify exercise of section 4, they can say
18 that. If they do, then they will -- then they will send
19 it.

20 I mean, look -- the other thing about this
21 is, you know, the other side makes a big fuss about
22 federalism, but we are not asking to take the issues
23 away from the Federal court -- from the State courts to
24 the Federal courts. What we are asking for is what
25 everybody has agreed to here, which is to have these

1 disputes resolved by arbitration.

2 JUSTICE GINSBURG: But you could have asked
3 for that in the State court as well, and --

4 MR. PHILLIPS: There is no question about
5 that, Justice Ginsburg. The problem is that there is
6 some lack of confidence in the State courts that we will
7 get the same treatment under section 4 that we would get
8 in Federal court. And Congress created that right.

9 JUSTICE SOUTER: Then bring that up here on
10 appeal from the State court.

11 MR. PHILLIPS: Well, I wish it were that
12 easy to get this Court to grant review of everything
13 that I bring up here in the first place.

14 JUSTICE STEVENS: You don't have any
15 trouble.

16 (Laughter.)

17 MR. PHILLIPS: I appreciate that.

18 JUSTICE STEVENS: It's not really -- of
19 getting constants from Federal judges; the arbitrators
20 can decide this question.

21 MR. PHILLIPS: Right.

22 JUSTICE STEVENS: The arbitrator might
23 decide there is no preemption.

24 MR. PHILLIPS: Right. But the -- and that's
25 fine and we have to live with that. And obviously,

1 since we can't change the standards of review on the
2 back end under sections 9, 10 and 11, we are going to be
3 pretty much stuck with that -- with that determination.
4 But the truth is the bigger risk is that the trial
5 judge, the State court will not send it to arbitration.

6 JUSTICE STEVENS: May I ask this, I haven't
7 reread the Moses Cone case, but is your adversary
8 correct in saying that there would have been no
9 jurisdiction in that case if we followed your view?

10 MR. PHILLIPS: No.

11 JUSTICE STEVENS: Because the arbitrator was
12 not of diverse citizenship from the other parties?

13 MR. PHILLIPS: I mean, It wasn't litigated.
14 It's not clear on the face of the opinion. So if there
15 is something he knows that I don't know, maybe. But
16 I -- I -- certainly nothing in there that reflects
17 that -- that view of the world.

18 JUSTICE STEVENS: But -- if, in fact, were a
19 nondiverse party in the Moses Cohen, there should have
20 been no jurisdiction?

21 MR. PHILLIPS: Well, now, the nondiverse
22 party issue, it depends on how you read section 4. You
23 know, section 4 talks about the parties. And the
24 parties there I don't think means parties to the
25 underlying controversy. I think there parties refers

1 specifically to the dispute in front of the court.

2 So I don't think the pass-through problem
3 for 1332 applies in that particular context for complete
4 diversity.

5 I don't think Congress envisioned you would
6 look beyond the immediate dispute under section 4 to see
7 whether there are additional parties, except to the
8 extent, obviously, that you would have necessary and
9 indispensable party litigation that might bring them in.

10 I think the assumption is you take the
11 complaint as it's written, and then you look to see
12 whether or not there is amount of controversy. For that
13 you have to go beyond because the dispute with respect
14 to arbitration is not going to get you anywhere near
15 that number. And you have to look beyond for Federal
16 questions to see whether or not there is a Federal issue
17 there to be enforced.

18 JUSTICE BREYER: Is this right? I'm asking
19 if it may sound favorable to you, then I'll get a good
20 response in rebuttal.

21 MR. PHILLIPS: I'm not going to give a good
22 response?

23 JUSTICE BREYER: If you read it the other
24 way -- if you read it the other way, the way the
25 Petitioners want to read it, then is this so or not?

1 That then you look to see if there is Federal
2 jurisdiction of the arbitration agreement; is that
3 right?

4 MR. PHILLIPS: Under their interpretation?

5 JUSTICE BREYER: Yes, under their
6 interpretation.

7 MR. PHILLIPS: Yes.

8 JUSTICE BREYER: So, what you could have is
9 you could have two parties sign an arbitration agreement
10 that lasts for a year that governs all disputes between
11 them, and one is from Vermont; the other from
12 California.

13 MR. PHILLIPS: Right.

14 JUSTICE BREYER: So there is jurisdiction.
15 And all the disputes happen to involve just pure matters
16 of -- that never could come into Federal court. I mean
17 there are such matters you could argue about.

18 MR. PHILLIPS: Sure. Right.

19 JUSTICE BREYER: But nevertheless, we have a
20 Federal court issuing this injunction, under their
21 theory.

22 MR. PHILLIPS: Right. Assuming the amount
23 of --

24 JUSTICE BREYER: Assuming they are right.

25 MR. PHILLIPS: Assuming the amount of

1 controversy -- I mean, it could have an amount --

2 JUSTICE BREYER: Oh, I see. The arbitration
3 agreement has to meet the amount in controversy.

4 MR. PHILLIPS: Right. It has to have an
5 independent basis for Federal jurisdiction.

6 JUSTICE BREYER: All right. So then
7 probably no arbitration agreement in itself meets the
8 amount.

9 MR. PHILLIPS: Well, that's exactly our
10 point. That's why you have to look through.

11 JUSTICE BREYER: So if you didn't look
12 through, then this would apply to nothing?

13 MR. PHILLIPS: Pretty much that's our view
14 of the case.

15 JUSTICE BREYER: If the arbitration --

16 MR. PHILLIPS: Yes. I'm sure my opponent
17 will say something different than that.

18 JUSTICE BREYER: The arbitration agreement
19 has to -- they talk about the arbitration agreement,
20 then you could have really important Federal questions
21 in substantive issues --

22 MR. PHILLIPS: Yes.

23 JUSTICE BREYER: -- that couldn't come in
24 because the arbitration agreement doesn't? Or you could
25 have State questions that would suddenly come in because

1 the arbitration agreement does. The arbitration -- but
2 now you're saying, well, that second case is never going
3 to arise.

4 MR. PHILLIPS: Probably not.

5 JUSTICE BREYER: Probably not, because no
6 arbitration agreement has -- so then it becomes a
7 nullity of the statute?

8 MR. PHILLIPS: Right.

9 JUSTICE BREYER: Except to overcome the
10 ouster. Okay. We've got your side of it.

11 (Laughter.)

12 JUSTICE SCALIA: Well, it makes a nullity of
13 it, except that it gets into the Federal court the
14 decision on the arbitration agreement, which was the
15 object of this stuff, whatever -- whatever the
16 underlying claim is, whether it's a Federal claim or
17 not.

18 As I understood the purpose of the
19 Arbitration Act, it was to make sure that arbitration
20 was -- was honored not just in Federal cases but in
21 State cases as well. And it's entirely compatible with
22 that, that sometimes a Federal court will -- will direct
23 arbitration in a case this involves an underlying
24 controversy that's purely non-Federal.

25 MR. PHILLIPS: Oh absolutely. I mean, you

1 know, in a situation -- it depends on how you interpret
2 it. If you interpret it the way that the Petitioner
3 does in saying that you can't have any look through --
4 now he softens that and says, well, no, you can have
5 look through for diversity.

6 But if you accept the idea that section 4
7 only makes you look at the dispute at the arbitration
8 level, then the reality is you're going to have no cases
9 that are going to be covered, because you're never going
10 to satisfy the amount in controversy.

11 And then the issue is why do you get to look
12 through for diversity purposes and never get to look
13 through for Federal question purposes? And it -- it
14 seems to me the much easier way to reconcile the
15 language of the statute is to say, of course, you look
16 through to see, particularly if you have an unquestioned
17 Federal question dispute that's being litigated between
18 the parties; we know that; there is not an issue before
19 us. In fact, he has conceded as much even here in court
20 today.

21 And so, it seems to me that's the solution
22 to this case. Now admittedly, there will be other cases
23 where you may have right in these questions, and there
24 will be other cases where the parties will have to fight
25 at the Federal district court level as to precisely

1 what's at issue and what the plaintiff really means to
2 be fighting over. And it may be in some instances you
3 won't get an order that directs arbitration. But that's
4 not this case.

5 JUSTICE GINSBURG: Why isn't it proper to
6 look to see -- the party who wants arbitration has a
7 dispute; the dispute is we are owed money by the debtor.
8 Why shouldn't the court say, well, we'll see what your
9 case is about; if your case would qualify for Federal
10 jurisdiction, fine. But we are not going to look to see
11 what the defendants cases is or might be. We'll just
12 look at your case and that's how we will define the
13 controversy.

14 MR. PHILLIPS: Well, there are two problems
15 with that. First of all, the statute talks about the
16 subject matter of the controversy. It doesn't talk
17 about the specific controversy.

18 And second of all, the statute clearly
19 envisions that there are going to be situations where
20 there is no complaint, there is no underlying State
21 court cause of action, and it still envisions in that
22 situation that a district court is going to have to
23 determine whether or not it would have jurisdiction.

24 JUSTICE GINSBURG: But then you'll have not
25 only a hypothetical claim, because nothing has been

1 brought, but an hypothetical answer by way of
2 counterclaim to that claim.

3 MR. PHILLIPS: But it seems to me that's
4 precisely what the language "would have jurisdiction
5 over the subject matter of the controversy" asks this
6 Court to make a determination of.

7 JUSTICE GINSBURG: So you would come into
8 the court and say there is no suit going on anywhere,
9 but if we were to bring this suit in State court, the
10 defendant could have brought this Federal counterclaim?
11 That's a lot of hypothesis.

12 MR. PHILLIPS: But it seems to me, Justice
13 Ginsburg, the better way to think about this is what if
14 we were getting letters from the Petitioner saying you
15 are engaged in usurious conduct, you're outrageous, you
16 got to stop what you're doing, we are going to bring a
17 class action against you, you had better change your
18 behavior tomorrow, and they don't sue us, and they don't
19 sue us, and they don't sue us?

20 And then the question is are we entitled to
21 go to court to get that resolved and are we entitled to
22 have the resolution to that issue as a matter of
23 arbitration?

24 JUSTICE STEVENS: Mr. Phillips, the answer
25 to a better hypothetical is what if there had been no

1 original collection action but they had brought such an
2 action.

3 MR. PHILLIPS: Right. Well, that's --
4 actually, you're right.

5 JUSTICE STEVENS: That's the case you're
6 really saying. You're saying that is like this case.

7 MR. PHILLIPS: That is this case.

8 JUSTICE STEVENS: And Justice Ginsburg is
9 suggesting it's not, because it happens to arise out of
10 a different -- quite different dispute.

11 MR. PHILLIPS: Right. I thought your
12 question absolutely nailed it because you said, would
13 this -- you know, if you brought that suit could you and
14 would you, and the answer is yes, you could, and
15 therefore you know as -- without any question that it's
16 a Federal suit.

17 JUSTICE GINSBURG: Excuse me --

18 JUSTICE STEVENS: As I understand your
19 opponent, they would agree there was no jurisdiction
20 even in that case.

21 MR. PHILLIPS: Right. I think that's no
22 doubt that that's their position.

23 JUSTICE GINSBURG: What do you do with the
24 assertion that sections 9 through 11 are not in sync
25 with your view, because they would not give you -- you

1 could go in and -- to compel arbitration but once the
2 arbitration was award -- an award was made, you would
3 not have access to the Federal courts to enforce the
4 award?

5 MR. PHILLIPS: Well, I mean the interesting
6 thing about 9, 10 and 11 is if anything the language is
7 broader than our language. If we didn't have the "save
8 for" and "would have jurisdiction under," this would
9 clearly be an action that arises under Federal law,
10 because the question, you know, section 4 says have you
11 been aggrieved, do you have a right of action, and do
12 you have a remedy for that action?

13 I mean, without this rigamarole that we've
14 been talking about this whole time, we would have -- we
15 would easily have a 1331 action. So if anything you
16 would argue that 9, 10 and 11 arise under Federal law
17 regardless. Now if you don't want to go that far, then
18 it seems to me you just say you read sections 9, 10 and
19 11 and pairing material with the limitation in Section 4
20 and you wouldn't read it any broader than that.

21 But there is no basis for taking the
22 unlimited languages in 9, 10 and 11 and somehow
23 distorting that to more narrowly limit the rights that
24 we have under Section 4. So I --

25 JUSTICE ALITO: But the Petitioner says you

1 never clearly clarify the particular Federal on which
2 the jurisdiction rests on this case. What -- can you
3 clarify that?

4 MR. PHILLIPS: Yes. This case arises under
5 section 4 through Section 27.

6 JUSTICE ALITO: Section 4 creates the
7 Federal --

8 MR. PHILLIPS: Yes, it does create it,
9 because section 4, without the "would have jurisdiction"
10 language clearly would be arising under jurisdiction, in
11 my judgment, and the only thing -- and then it places an
12 additional requirement on you.

13 You can't just use the contract that gets
14 you into Federal court. You have to then look to see
15 whether you would have had an underlying cause of action
16 or an underlying Federal claim or whether there would
17 have been diversity jurisdiction on the underlying
18 claim.

19 JUSTICE SCALIA: Why -- why can't you have
20 sort of modified look, through like a modified limited
21 hangout or whatever it was? That is to say, you can
22 look through for the purpose of determining whether the
23 arbitration agreement raises a Federal question. But
24 that doesn't mean you have to look through to determine
25 whether the underlying controversy raises a Federal

1 question.

2 MR. PHILLIPS: Because I think -- I think
3 the reference in the statute to controversy clearly
4 envisions the underlying dispute between the parties,
5 because it's not just the arbitration agreement and it's
6 not even just the controversy; it's the subject matter
7 of the controversy, and you compare that to section 2
8 and it's clear that what the Congress has in mind there
9 is the underlying dispute between the parties.

10 JUSTICE KENNEDY: Is the Petitioner's -- I'm
11 sorry I didn't get a chance to ask the Petitioner -- is
12 the Petitioner's argument for a limited look through
13 compromised in any way by the Beneficial Bank case which
14 allows removal if there is a Federal defense?

15 MR. PHILLIPS: Well, I mean, I don't know if
16 it's compromised by it. I think it -- the Beneficial
17 case makes it absolutely clear that we have here a
18 Federal claim and therefore --

19 JUSTICE KENNEDY: That's of course in the
20 context of a defense, as opposed to a counterclaim.

21 MR. PHILLIPS: Right. But again I don't
22 think -- I don't think section 4 is asking the courts to
23 make that determination. I think what section 4 is
24 asking the Court to look at is the subject matter of the
25 controversy, and is it -- is it clear under the

1 circumstances that there is in fact a Federal claim
2 underlying it? And here there is no question on that.
3 I ask you to affirm.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 Mr. Phillips. Mr. Ortiz, you have three minutes
6 remaining.

7 REBUTTAL ARGUMENT OF DANIEL R. ORTIZ
8 ON BEHALF OF THE PETITIONER

9 MR. ORTIZ: Thank you, Your Honor. Just a
10 few quick points.

11 I think this Court should be exactly clear
12 how much Federal question jurisdiction the look-through
13 theory would create. So long as a Federal issue can be
14 imagined anywhere in the lawsuit, there would be Federal
15 question jurisdiction under this theory, and this is
16 almost by definition going to be the case in any dispute
17 concerning credit card debt, either because of the
18 theory of complete pre-emption from the FDIA, or because
19 of the theory used in the Strong case before the
20 Eleventh Circuit that RICO's prohibition on the
21 collection of unlawful debt --

22 JUSTICE KENNEDY: What about a Federal
23 defense?

24 JUSTICE STEVENS: That isn't quite true,
25 because here there is a definition in the Federal claim

1 in your counterclaim.

2 MR. ORTIZ: I'm sorry, Your Honor?

3 JUSTICE STEVENS: There is a definition of
4 the controversy in your counterclaim and in their
5 response.

6 MR. ORTIZ: No -- there -- in general, if
7 you accepted their theory, as long as there is an issue
8 that could be spun as a Federal issue which there will
9 always be in a credit card debt collection case and
10 just -- in most States, that on look-through theory
11 would be --

12 JUSTICE STEVENS: You're suggesting that
13 every credit card debtor would have a class action?

14 MR. ORTIZ: Your Honor, every -- it does not
15 have to be a class action to establish what would serve
16 --

17 JUSTICE BREYER: That's your view, but I
18 mean believe me, I think I can keep that problem under
19 control. That was your original point. I see the
20 point, it's going to spread too far; you'd have to have
21 some rules that cabin it.

22 Assume I got that under control; maybe I
23 don't. This is a case of "well, his brother was worse."
24 What do you want to say about the criticisms of the
25 horrible things that happen if we adopt your position?

1 MR. ORTIZ: Well, Your Honor, Respondent
2 argues that this is an easy case, or at least over time
3 the courts will decide these things to make the
4 jurisdictional inquiry -- inquiries clear. Petitioner
5 does not believe that is true.

6 For example, here the real party in interest
7 dispute consumed much of the court's time. The lower
8 courts have gone both ways on this issue. It's
9 incredibly fact-dependent. There is no easy answer for
10 it.

11 Also, Your Honor, Petitioner does not
12 believe that the Declaratory Judgment Act would have
13 been appropriate in this case. Declaratory judgments
14 are discretionary and in this context of where you have
15 a pending State court lawsuit Petitioner believes that a
16 Federal district court would be very cautious before
17 permitting one.

18 Also Your Honor, if in the context of
19 declaratory judgment action presumably the district
20 court would have to take the State court admission into
21 account, and in particular here it was admitted that the
22 account was with Discover Financial Services not with
23 the bank.

24 Also, Your Honors, this -- Respondents try
25 to portray Petitioner's position as siphoning off all

1 Federal question jurisdiction. That is not true. Under
2 Petitioner's view, a lot of Federal question
3 jurisdiction -- some would remain. It would just be
4 that the arbitration agreement itself would have to
5 sound in Federal law. ERISA arbitration agreements
6 would still be covered. Some labor agreements would
7 still be covered. There would be --

8 CHIEF JUSTICE ROBERTS: I'm sorry, what do
9 you mean would still be covered?

10 MR. ORTIZ: Would still be covered under
11 Petitioner's theory of what section 4 means. So for
12 example, Mr. Chief Justice --

13 CHIEF JUSTICE ROBERTS: Which would still be
14 in Federal court.

15 MR. ORTIZ: Would still be in Federal court.
16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 The case is submitted.

19 (Whereupon, at 2:01 p.m., the case in the
20 above-entitled matter was submitted.)

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