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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, Your Honor.

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 a party 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 and 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 and necessarily imply that the  
15 agreement exerts some negative effect on otherwise  
16 existing jurisdiction.

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

24           MR. ORTIZ: Your Honor, the -- those words  
25 "save for such agreement" were originally intended to

1 refer to the hoary doctrine of ouster, which barred the  
2 Federal courts from subject matter jurisdiction in such  
3 suits. The words "but for" suggest that the agreement  
4 itself somehow impairs jurisdiction.

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

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

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

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

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

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

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

1 time.

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

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

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

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

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

24 MR. ORTIZ: Well, because, Your Honor, it  
25 would be the case that arbitration agreements could be

1 enforceable, but just not enforceable in the way that  
2 might be most helpful.

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

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

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

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

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

1 JUSTICE SCALIA: I don't know. When it says  
2 they are enforceable and makes an exception only for  
3 grounds that enable revocation in law or in equity, I  
4 would -- I would think that the general command was  
5 meant to apply to both law and equity.

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

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

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

23 MR. ORTIZ: Well, Justice Stevens, the point  
24 is that "save for such agreement" --

25 JUSTICE STEVENS: Right.

1 MR. ORTIZA -- instructs a court to jump  
2 over the historical ouster doctrine.

3 JUSTICE STEVENS: Doesn't it just instruct  
4 the court to decide whether, if there were no such  
5 agreement, would there be Federal jurisdiction in the  
6 underlying dispute?

7 MR. ORTIZ: Yes. Yes, Your Honor. So if --

8 JUSTICE STEVENS: In this case there would be.

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

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

18 MR. ORTIZ: Yes, Your Honor.

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

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

1 JUSTICE STEVENS: The text says nothing  
2 about the ouster doctrine.

3 MR. ORTIZ: No. But read in its historical  
4 context, Your Honor --

5 JUSTICE STEVENS: Rather than literally.

6 MR. ORTIZ: Rather -- well, literally at the  
7 time it would have been understood to refer -- to refer  
8 to that, because ouster was the whole problem against  
9 which the FAA itself was first enacted. The FAA --

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

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

23 CHIEF JUSTICE ROBERTS: Of the arbitration  
24 agreement?

25 MR. ORTIZ: Yes, sir. So you are -- what

1 the court is instructed to do under the "save for such  
2 agreement" clause is to ignore the historical problem of  
3 ouster and then to see whether in a suit brought to  
4 specifically enforce the arbitration agreement, there  
5 would be Federal subject matter jurisdiction.

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

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

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

1 the arbitration agreement.

2 MR. ORTIZ: With all respect, Justice  
3 Ginsburg, it's a little bit more complicated than that.  
4 The Federal Arbitration Act uses the word "controversy"  
5 four times, twice in section 2, once in section 4, and  
6 once in section 5.

7 In section 2, the word "controversy" is  
8 embedded in a larger phrase: "Controversy arising out  
9 of such contract or transaction." It is that context for  
10 the word "controversy" that makes clear that in section  
11 2 -- both instances in section 2, it is referring to the  
12 dispute which is sought to be arbitrated.

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

21 JUSTICE ALITO: In *Moses H. Cone*, didn't the  
22 Court say that the controversy was the underlying  
23 dispute?

24 MR. ORTIZ: Your Honor, that -- this Court,  
25 in footnote 32 of *Moses H. Cone*, mentioned language

1 that refers to the underlying dispute. In the context  
2 of both the sentence, the footnote itself, and the  
3 overall case, it is clear that the Court could not have  
4 meant that.

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

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

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

1 CHIEF JUSTICE ROBERTS: But you do think --  
2 you do think we should look through to determine  
3 diversity and the amount in question? In other words,  
4 not in the Federal question context, but if it's  
5 diversity, you say we do look through the arbitration  
6 agreement.

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

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

24 JUSTICE SCALIA: Say that again. I didn't  
25 follow that.

1           MR. ORTIZ: Just that -- the -- the point is  
2 a simple one, but it's sometimes hard to express. If you  
3 -- if this Court says that section 4 operates independently  
4 to authorize look through in section 1331 and section 1332,  
5 the courts -- district courts -- will be in the position  
6 of looking through section 1332 petitions to determine  
7 whether the parties are completely diverse.

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

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

18           JUSTICE STEVENS: Is that point argued in  
19 Moses -- Moses Cone? Was that point argued in that  
20 case?

21           MR. ORTIZ: I do -- I do not know, Your  
22 Honor.

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

1           MR. ORTIZ: No, Your Honor. The question --  
2 1332 does not authorize look through for purposes of  
3 determining completeness of diversity, so if section 4  
4 independently authorizes --

5           JUSTICE SCALIA: I thought you said it did  
6 have a look through -- an automatic look through, itself.

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

11          JUSTICE SCALIA: I see. I see. You are --  
12 you are -- you are limiting it to the amount. Got you.

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

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

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

1 JUSTICE STEVENS: Right.

2 MR. ORTIZ: -- then in 1332 cases, this  
3 Court would be looking through not only for  
4 amount-in-controversy purposes --

5 JUSTICE STEVENS: But also complete  
6 diversity.

7 MR. ORTIZ: -- but also for complete  
8 diversity.

9 JUSTICE STEVENS: What's wrong with that?

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

15 JUSTICE STEVENS: Maybe it would. So what?

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

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

25 MR. ORTIZ: Well, Your Honor, that's not

1 actually the way any Federal -- lower Federal court  
2 now.

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

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

15 JUSTICE BREYER: Why?

16 MR. ORTIZ: -- the parties.

17 JUSTICE BREYER: Why?

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

24 JUSTICE KENNEDY: All right. So you define  
25 "look through" as -- under our hypothetical here as

1 looking through to all people who might potentially be  
2 parties under this arbitration agreement.

3 MR. ORTIZ: Well, that would be the  
4 implication of taking the kind of look through theory  
5 that Respondents are arguing for in this case and  
6 applying it evenhandedly.

7 JUSTICE KENNEDY: I will think about that.  
8 I'm -- I'm -- I wasn't -- it wasn't clear to me that  
9 that was so.

10 MR. ORTIZ: But, Your Honors, there are also  
11 several jurisdictional gaps in the Act that are created  
12 under Respondents' view. The critical --

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

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

24 JUSTICE KENNEDY: But that's not quite so,  
25 because the -- the action could proceed with just A and

1 C, and it's -- it -- it could come to a complete judgment  
2 as to them. In the look through for the -- the claims  
3 that are involved, the action couldn't possibly proceed  
4 without taking account of the pre-emption claim -- the  
5 Federal -- the Federal claim.

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

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

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

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

1           MR. ORTIZ: This Court could; and,  
2 interestingly, that wasn't the situation in Moses H.  
3 Cone itself. There, there was a preexisting lawsuit,  
4 and this Court did not look through. The Court found  
5 that there was no problem with the architect being  
6 absent from the petition to compel arbitration itself.

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

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

22           In all those cases -- situations, Your  
23 Honor, the Federal courts would be in the position of  
24 being able to compel arbitration under section 4 but not  
25 being able to compel the attendance of witnesses at the

1 arbitration or to subsequently confirm, vacate, or  
2 modify an award coming from an arbitration that they,  
3 themselves, compelled.

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

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

18           Here this case has been pending in Federal  
19 court just at the jurisdictional stage for many years  
20 now. In the Strong case which is now en banc before the  
21 Fifth Circuit -- I'm sorry, the Eleventh Circuit --  
22 Justice -- Judge -- excuse me, Judge Marcus wrote a  
23 32-page opinion.

24           CHIEF JUSTICE ROBERTS: Yes, and what really  
25 leapt off the page at me in that opinion -- he gets to the

1 end, I think he basically presents your position and  
2 then he says: Thus, on my reading the relevant portion  
3 of section 4 could be rewritten this way.

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

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

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

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

25 But certainly the language as originally

1 understood would have -- that "save for" language would  
2 have been all about ouster, which it is clear from the  
3 time was thought by Congress to be the major obstacle to  
4 arbitration.

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

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

10 JUSTICE ALITO: What's the explanation for  
11 that?

12 MR. ORTIZ: The explanation, Your Honor, is  
13 that in New York law and equity had been merged.

14 JUSTICE ALITO: I know. And you say in New  
15 Jersey, it was, you know, a very complicated argument  
16 about the status of it. What about the Uniform  
17 Arbitration Act?

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

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

3                   CHIEF JUSTICE ROBERTS: Thank you, counsel.

4                   MR. ORTIZ: Thank you.

5                   CHIEF JUSTICE ROBERTS: Mr. Phillips.

6                   ORAL ARGUMENT OF CARTER G. PHILLIPS

7                   ON BEHALF OF THE RESPONDENTS

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

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

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

1 out of the controversy between the parties."

2 It seems to me reasonably clear to interpret  
3 that language as saying you look to the underlying  
4 dispute between the parties.

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

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

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

1 over the subject matter of this dispute? And the  
2 dispute in this case, which Professor Ortiz was very  
3 explicit about -- he said specifically that if he had  
4 brought this as an affirmative lawsuit, it would have  
5 arisen under Federal law.

6 It seems to me that's as clear a concession  
7 that the nature of this dispute is a question of Federal  
8 law and, therefore --

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

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

1           MR. PHILLIPS: I think that the -- I think what  
2 the judge has to do is to take -- is to give the plaintiff  
3 in the section 4 complaint the benefit of his allegations.  
4 And we have made an allegation here that the subject matter  
5 of this dispute arises under Federal law, and we did that  
6 not just based on our own assessment of the situation in the  
7 abstract, but we did that on the basis that she had  
8 filed a very specific claim against us asserting that we  
9 had violated essentially section 20.

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

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

24           JUSTICE GINSBURG: But in practical  
25 effect, what happens now? You -- you have asserted that

1 you can enforce because of the counterclaim that asserts  
2 -- that arises under Federal law. But you say it's  
3 not the same as removal because the underlying claim,  
4 your suit on the debt owed, remains in Federal -- State  
5 court, but what happens to that claim once you have this  
6 arbitration?

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

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

23 JUSTICE STEVENS: Mr. Phillips --

24 MR. PHILLIPS: I'm sorry?

25 JUSTICE STEVENS: Clear up one thing for me.

1 Is it correct, as Justice Ginsburg suggested, that the  
2 counterclaim was purely defensive? Didn't it ask for  
3 additional relief? The counterclaim, wasn't it a class  
4 action?

5 MR. PHILLIPS: Oh, right. No -- yes --  
6 no -- exactly. That's absolutely true.

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

9 MR. PHILLIPS: Right. Although --

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

13 MR. PHILLIPS: But I couldn't -- I couldn't  
14 remove it --

15 JUSTICE GINSBURG: Chose not to --

16 MR. PHILLIPS: I think that was the point  
17 she was trying to make.

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

22 MR. PHILLIPS: Right. I -- I understand  
23 that, Justice Ginsburg, but the -- the -- but the point  
24 I am trying to make here is that the language of section  
25 4 just talks about the subject matter of the controversy

1 between the parties. It doesn't specifically talk about  
2 an existing lawsuit, and frankly it doesn't envision the  
3 existence of a specific lawsuit.

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

10 MR. PHILLIPS: Well, in that --

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

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

20 JUSTICE SCALIA: What is the dispute? You  
21 say the dispute is not defined by what -- what has been  
22 brought in a complaint.

23 MR. PHILLIPS: It's defined by our complaint  
24 in section 4.

25 JUSTICE SCALIA: But you -- from your

1 argument, I would gather that a court would be able to  
2 imagine a counterclaim. Once it finds out, you know,  
3 what -- what -- what the principal complaint is about,  
4 the court could imagine that there would be a  
5 counterclaim for interest or for something else.

6 MR. PHILLIPS: Well, I'm not sure -- I'm not  
7 even sure --

8 JUSTICE SCALIA: It's very strange to decide  
9 Federal jurisdiction on the basis of -- of imagined --  
10 imagined complaints.

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

17 JUSTICE SCALIA: So the problem with his --  
18 I mean with his interpretation, you don't have to  
19 imagine anything.

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

25 JUSTICE SCALIA: Well --

1 MR. PHILLIPS: It has to do with equity and  
2 law when it uses "equity" and "law" in other contexts.  
3 And --

4 JUSTICE SCALIA: You don't have to imagine  
5 complaints. You -- you don't have to invent litigation.

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

14 JUSTICE SCALIA: It's close to inconceivable  
15 to me that Congress wanted -- wanted us to -- to  
16 construct litigation that is not yet in existence.

17 MR. PHILLIPS: But I think all of this  
18 really is talking -- I mean this is not significantly  
19 different --

20 JUSTICE STEVENS: -- answer that the  
21 litigation does exist.

22 MR. PHILLIPS: Right.

23 JUSTICE SCALIA: No, but your position is it  
24 doesn't have to exist. Had that litigation not been  
25 brought, had the motion to arbitrate been brought before

1 a lawsuit was filed, the court would still have to  
2 consider what is the dispute between the parties and  
3 what kind of complaints could that dispute have  
4 generated.

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

15 CHIEF JUSTICE ROBERTS: But what if --  
16 I'm sorry.

17 JUSTICE GINSBURG: There would be nothing  
18 inappropriate about a State court entertaining that  
19 excessive interest claim, but applying Federal law to  
20 it. I mean, the -- 1831(d) says that Federal law governs  
21 the interest --

22 MR. PHILLIPS: Right.

23 JUSTICE GINSBURG: Not State usury law. So  
24 you could have this case going on in State court.

25 MR. PHILLIPS: Right.

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

3 MR. PHILLIPS: Right. Although, you know,  
4 that's to the -- obviously, that sets aside the  
5 arbitration agreement completely.

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

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

17 JUSTICE SOUTER: I know section 4 doesn't,  
18 but section 2 does.

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

21 JUSTICE SOUTER: You can -- based on the  
22 Federal act, you can, in a State court, claim your right to  
23 enforce the arbitration agreement.

24 MR. PHILLIPS: Right, but the -- but the  
25 flip side of that is --

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

3 MR. PHILLIPS: Because we have serious  
4 doubts as to whether or not in fact we will have our  
5 Federal rights protected as zealously as we would in a  
6 Federal court.

7 JUSTICE SOUTER: Well, what reason --

8 JUSTICE KENNEDY: Speaking of gymnastics,  
9 can I ask you if you had foreseen this problem, could  
10 you have brought a declaratory judgment action to  
11 establish that your Federal claim --

12 MR. PHILLIPS: Yes.

13 JUSTICE KENNEDY: -- controls this dispute  
14 and could you have then said that you wanted this  
15 arbitrated?

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

18 JUSTICE KENNEDY: Why didn't you do that?  
19 Why are we here?

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

22 JUSTICE KENNEDY: I mean, could you still do  
23 that after this case?

24 MR. PHILLIPS: Assuming there's no statute  
25 of limitations issue, and I don't know that there would

1 be, but that would available. But it still seems to me  
2 that the bottom-line question is: Are you entitled to  
3 bring an action under section 4?

4 JUSTICE BREYER: So your theory -- I mean  
5 basically I think you concede that the other side has a  
6 point in sometimes it will be difficult to say what the  
7 dispute is precisely and, therefore, difficult to know  
8 if precisely this dispute does or does not -- one that  
9 you can get into Federal court on. For example, it  
10 hasn't even arisen. You know, there is no lawsuit. And  
11 I guess what would happen, what the judge should say is  
12 they should say to you you'd like to have this in  
13 Federal court, wouldn't you, this dispute? What's it  
14 about?

15 MR. PHILLIPS: Right.

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

20 MR. PHILLIPS: Right.

21 JUSTICE BREYER: So that -- you know,  
22 something could happen here. It could happen that they  
23 could decide they want to sue in a big class action and  
24 get huge amounts of money under usury laws of the State  
25 which don't exist, so they have to proceed under an FDIC

1 reg, and then it could be Federal. And the judge might  
2 say to you: "What? You're just imagining." And that  
3 would be up to the judge.

4 MR. PHILLIPS: Right, and the judge would  
5 have the discretion to decide --

6 JUSTICE BREYER: "You're imagining." It's  
7 a kind of a defense.

8 MR. PHILLIPS: Right.

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

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

16 JUSTICE BREYER: A real suit. And --

17 MR. PHILLIPS: But they are here.

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

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

1 JUSTICE BREYER: So you say this one is not  
2 so hard to figure out.

3 MR. PHILLIPS: Right.

4 JUSTICE BREYER: There might be some that  
5 are.

6 MR. PHILLIPS: Right, and there's no  
7 question about that, and it's --

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

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

23 JUSTICE BREYER: Well, in his case -- in the  
24 Chief Justice's case, wouldn't you say they don't get  
25 into court, probably don't because they are bringing

1 this under a State law?

2 MR. PHILLIPS: You see, I get to file the  
3 original complaint.

4 CHIEF JUSTICE ROBERTS: No. But you just  
5 say, is the dispute one that could have been brought in  
6 Federal court? And this dispute --

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

9 CHIEF JUSTICE ROBERTS: It's a violation of  
10 the Sherman Act.

11 MR. PHILLIPS: Right.

12 CHIEF JUSTICE ROBERTS: Of course, it could  
13 be brought in Federal court.

14 MR. PHILLIPS: Well -- and in the right  
15 case, the Federal -- you know, if I had to go that far,  
16 I might well make that argument, Mr. Chief Justice, but  
17 in this case I don't have to go that far. And I think  
18 all the Court needs to resolve is in a situation where  
19 the parties have a very concrete dispute between them,  
20 one that arises exclusively under Federal law, and a  
21 party seeks to have that claim arbitrated under section  
22 4 pursuant to --

23 JUSTICE GINSBURG: That claim doesn't --

24 JUSTICE STEVENS: Let me get one fact.

25 MR. PHILLIPS: I'm sorry.

1 JUSTICE STEVENS: Is the State court suit  
2 still pending?

3 MR. PHILLIPS: Yes, the State court suit is  
4 still pending.

5 JUSTICE STEVENS: So there are two separate  
6 underlying actions.

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

10 JUSTICE GINSBURG: But there could be  
11 nothing left for the State court to do after you have  
12 the arbitration. I mean, you are not going to arbitrate  
13 about interest due on a nonexistent debt. I mean, you  
14 have to have the two things together.

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

19 JUSTICE GINSBURG: I just can't envision a  
20 case where what you haven't effected is taking a case, a  
21 debt -- simple debt, no diversity, a State court case.

22 MR. PHILLIPS: Right.

23 JUSTICE GINSBURG: And you remove the State  
24 court from the picture and gotten it over into Federal  
25 court to order the arbitration and any follow-up to the

1 arbitration. It just seems to me you have effected --  
2 accomplished what you could not have accomplished by the  
3 -- by removal, which you admit that you can't remove on  
4 the basis of a counterclaim.

5 MR. PHILLIPS: But see, Justice Ginsburg, I  
6 think that's not right. I think that actually what  
7 happens is you eliminate what I perceive to be the  
8 Federal question in this through the arbitral process.

9 You still have the underlying collection  
10 action. If the Court says, no, there is no violation of  
11 the usury laws, you have not overcharged, you have not  
12 made any mistake, the question we still have is a claim  
13 on the debt and her obligation to pay it.

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

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

1           The second part of the statute which is  
2 the -- you know, the one that has obviously created the  
3 greatest amount of controversy here, is, you know,  
4 "would have jurisdiction over the subject matter."  
5 Again, it seems to me that this is the easiest case the  
6 Court is going to face in this area, because here is one  
7 where there is no question --

8           JUSTICE SCALIA: That's what worries me.  
9 That's what worries me.

10           (Laughter.)

11           JUSTICE SCALIA: If we accept your theory,  
12 this is the easiest case. What about the hard cases that  
13 are further down the line?

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

20           But the -- but again, it seems to me that  
21 district courts have the authority to resolve this,  
22 because if they don't believe that there really is a  
23 Federal claim that would justify exercise of section 4,  
24 they can say that. If they do, then they will --  
25 then they will send it.

1 I mean, look -- the other thing about this  
2 is -- you know, the other side makes a big fuss about  
3 federalism, but we are not asking to take the issues  
4 away from the Federal court -- from the State courts to  
5 the Federal courts. What we are asking for is what  
6 everybody has agreed to here, which is to have these  
7 disputes resolved by arbitration.

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

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

15 JUSTICE SOUTER: Then bring that up here on  
16 appeal from the State court.

17 MR. PHILLIPS: Well, I wish it were that  
18 easy to get this Court to grant review of everything  
19 that I bring up here in the first place, but --

20 CHIEF JUSTICE ROBERTS: You don't have any  
21 trouble.

22 (Laughter.)

23 MR. PHILLIPS: I appreciate that, Your Honor.

24 JUSTICE STEVENS: Mr. Phillips, it's not  
25 really a question of getting constants from Federal

1 judges; the arbitrators can decide this question.

2 MR. PHILLIPS: Right.

3 JUSTICE STEVENS: The arbitrator might  
4 decide there is no pre-emption.

5 MR. PHILLIPS: Right. But the -- and that's  
6 fine and we have to live with that. And obviously,  
7 since we can't change the standards of review on the  
8 back end under sections 9, 10, and 11, we are going to be  
9 pretty much stuck with that -- with that determination.  
10 But the truth is the bigger risk is that the trial  
11 judge, the State court will not send it to arbitration.

12 JUSTICE STEVENS: May I ask this -- I haven't  
13 reread the Moses Cone case, but is your adversary  
14 correct in saying that there would have been no  
15 jurisdiction in that case if we followed your view?

16 MR. PHILLIPS: No.

17 JUSTICE STEVENS: Because the arbitrator was  
18 not of diverse citizenship from the other parties?

19 MR. PHILLIPS: I mean, it wasn't litigated.  
20 It's not clear on the face of the opinion. So if there  
21 is something he knows that I don't know, maybe. But  
22 I -- I -- certainly nothing in there that reflects  
23 that -- that view of the world.

24 JUSTICE STEVENS: But on your view, if, in  
25 fact, there were a nondiverse party in the Moses Cohen,

1 there should have been no jurisdiction?

2 MR. PHILLIPS: Well, you know, the  
3 nondiverse party issue, it depends on how you read  
4 section 4. You know, section 4 talks about the parties.  
5 And "the parties" there I don't think means parties to the  
6 underlying controversy. I think there "parties" refers  
7 specifically to the dispute in front of the court.

8 So I don't think the pass through problem  
9 for 1332 applies in that particular context for complete  
10 diversity.

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

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

24 JUSTICE BREYER: Is this right? I'm asking  
25 if it may sound favorable to you, then I'll get a good

1 response in the rebuttal.

2 MR. PHILLIPS: I'm not going to give a good  
3 response?

4 JUSTICE BREYER: If you read it the other  
5 way -- if you read it the other way, the way the  
6 Petitioners want to read it, then is this so or not?  
7 That then you look to see if there is Federal  
8 jurisdiction of the arbitration agreement; is that  
9 right?

10 MR. PHILLIPS: Under their interpretation?

11 JUSTICE BREYER: Yes, under their  
12 interpretation.

13 MR. PHILLIPS: Yes.

14 JUSTICE BREYER: So, what you could have is  
15 you could have two parties sign an arbitration agreement  
16 that lasts for a year that governs all disputes between  
17 them, and one is from Vermont, the other from  
18 California.

19 MR. PHILLIPS: Right.

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

24 MR. PHILLIPS: Sure. Right.

25 JUSTICE BREYER: But nevertheless, we have a

1 Federal court issuing this injunction, under their  
2 theory.

3 MR. PHILLIPS: Right. Assuming the amount  
4 of --

5 JUSTICE BREYER: Assuming they are right.

6 MR. PHILLIPS: Assuming the amount of  
7 controversy is -- I mean, it could have an amount --

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

10 MR. PHILLIPS: Right. It has to have an  
11 independent basis for Federal jurisdiction.

12 JUSTICE BREYER: All right. So then  
13 probably no arbitration agreement in itself meets the  
14 amount.

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

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

19 MR. PHILLIPS: Pretty much that's our view  
20 of the case. Yes.

21 JUSTICE BREYER: If the arbitration --

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

24 JUSTICE BREYER: The arbitration agreement  
25 has to -- if they are talking about the arbitration

1 agreement, then you could have really important Federal  
2 questions in substantive issue --

3 MR. PHILLIPS: Yes.

4 JUSTICE BREYER: -- that couldn't come in  
5 because the arbitration agreement doesn't? Or you could  
6 have State questions that would suddenly come in because  
7 the arbitration agreement does. The arbitration -- but  
8 now you're saying, well, that second case is never going  
9 to arise.

10 MR. PHILLIPS: Probably not.

11 JUSTICE BREYER: Probably not, because no  
12 arbitration agreement has -- so then it becomes a  
13 nullity, this statute?

14 MR. PHILLIPS: Right.

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

17 (Laughter.)

18 JUSTICE SCALIA: Well, it makes a nullity of  
19 it, except that it gets into the Federal court the  
20 decision on the arbitration agreement, which was the  
21 object of this stuff, whatever -- whatever the  
22 underlying claim is, whether it's a Federal claim or  
23 not.

24 As I understood the purpose of the  
25 Arbitration Act, it was to make sure that arbitration

1 was -- was honored not just in Federal cases but in  
2 State cases as well. And it's entirely compatible with  
3 that, that sometimes a Federal court will -- will direct  
4 arbitration in a case that involves an underlying  
5 controversy that's purely non-Federal.

6 MR. PHILLIPS: Oh, absolutely. If -- I  
7 mean, you know, in a situation -- it depends on how you  
8 interpret it. If you interpret it the way that the  
9 Petitioner does in saying that you can't have any look  
10 through -- now he softens that and says, well, no, you  
11 can have look through for diversity.

12 But if you accept the idea that section 4  
13 only makes you look at the dispute at the arbitration  
14 level, then the reality is you're going to have no cases  
15 that are going to be covered, because you're never going  
16 to satisfy the amount in controversy.

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

1 today.

2           And so, it seems to me that's the solution  
3 to this case. Now admittedly, there will be other cases  
4 where you may have ripeness questions, and there  
5 will be other cases where the parties will have to fight  
6 at the Federal district court level as to precisely  
7 what's at issue and what the plaintiff really means to  
8 be fighting over. And it may be in some instances you  
9 won't get an order that directs arbitration. But that's  
10 not this case.

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

20           MR. PHILLIPS: Well, there are two problems  
21 with that. First of all, the statute talks about the  
22 subject matter of the controversy. It doesn't talk  
23 about the specific controversy.

24           And second of all, the statute clearly  
25 envisions that there are going to be situations where

1 there is no complaint, there is no underlying State  
2 court cause of action, and it still envisions in that  
3 situation that a district court is going to have to  
4 determine whether or not it would have jurisdiction.

5 JUSTICE GINSBURG: But then you'll have not  
6 only a hypothetical claim, because nothing has been  
7 brought, but an hypothetical answer by way of  
8 counterclaim to that claim.

9 MR. PHILLIPS: Right. But it seems to me  
10 that's precisely what the language "would have  
11 jurisdiction over the subject matter of the controversy"  
12 asks this Court to make a determination of.

13 JUSTICE GINSBURG: So you would come into  
14 the court and say there is no suit going on anywhere,  
15 but if we were to bring this suit in State court, the  
16 defendant could have brought this Federal counterclaim?  
17 That's a lot of hypothesizing.

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

1           And then the question is are we entitled to  
2 go to court to get that resolved and are we entitled to  
3 have the resolution to that issue as a matter of  
4 arbitration?

5           JUSTICE STEVENS: Mr. Phillips, it seems to  
6 me your better hypothetical is what if there had been no  
7 original collection action but they had brought such an  
8 action.

9           MR. PHILLIPS: Right. Well, that's --  
10 actually, you're right.

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

13          MR. PHILLIPS: That is this case.

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

17          MR. PHILLIPS: Right. But I thought your  
18 question absolutely nailed it because you said, would  
19 this -- you know, if you brought that suit, could you  
20 and would you, and the answer is yes, you could, and  
21 therefore you know as -- without any question that it's  
22 a Federal suit.

23          JUSTICE GINSBURG: Excuse me --

24          JUSTICE STEVENS: As I understand your  
25 opponent, they would agree there was no jurisdiction

1 even in that case.

2 MR. PHILLIPS: Right. I think there's no  
3 doubt that that's their position.

4 JUSTICE GINSBURG: What do you do with the  
5 assertion that sections 9 through 11 are not in sync  
6 with your view, because they would not give you -- you  
7 could go in and -- to compel arbitration but once the  
8 arbitration was award -- award was made, you would  
9 not have access to the Federal court to enforce the  
10 award?

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

19 I mean, without this rigamarole that we've  
20 been talking about this whole time, we would have -- we  
21 would easily have a 1331 action. So if anything you  
22 would argue that 9, 10, and 11 arise under Federal law  
23 regardless. Now if you don't want to go that far, then  
24 it seems to me you just say you read sections 9, 10, and  
25 11 in pari materia with the limitation in section 4,

1 and you wouldn't read it any broader than that.

2 But there is no basis for taking the  
3 unlimited languages in 9, 10, and 11 and somehow  
4 distorting that to more narrowly limit the rights that  
5 we have under section 4. So I --

6 JUSTICE ALITO: But the Petitioner says you  
7 never clearly identified the particular Federal question  
8 on which the jurisdiction rests in this case. What --  
9 can you clarify that?

10 MR. PHILLIPS: Yes. This case arises under  
11 section 4 through the section 27.

12 JUSTICE ALITO: Section 4 creates the  
13 Federal --

14 MR. PHILLIPS: Yes, it does create it,  
15 because section 4, without the "would have jurisdiction"  
16 language clearly would be arising under jurisdiction, in  
17 my judgment, and the only thing -- and then it places an  
18 additional requirement on you.

19 You can't just use the contract that gets  
20 you into Federal court. You have to then look to see  
21 whether you would have had an underlying cause of action  
22 -- an underlying Federal claim or whether there would  
23 have been diversity jurisdiction on the underlying  
24 claim.

25 JUSTICE SCALIA: Why -- why can't you have

1 sort of modified look through like a modified limited  
2 hangout or whatever it was? That is to say, you can  
3 look through for the purpose of determining whether the  
4 arbitration agreement raises a Federal question. But  
5 that doesn't mean you have to look through to determine  
6 whether the underlying controversy raises a Federal  
7 question.

8 MR. PHILLIPS: Because I think the line --  
9 I think the reference in the statute to "controversy"  
10 clearly envisions the underlying dispute between the  
11 parties, because it's not just the arbitration agreement  
12 and it's not even just the controversy; it's the subject  
13 matter of the controversy, and you compare that to  
14 section 2 and it's clear that what the Congress has in  
15 mind there is the underlying dispute between the parties.

16 JUSTICE KENNEDY: Is the Petitioner's -- I'm  
17 sorry I didn't get a chance to ask the Petitioner -- is  
18 the Petitioner's argument for a limited look through  
19 compromised in any way by the Beneficial Bank case, which  
20 allows removal if there is a Federal defense?

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

25 JUSTICE KENNEDY: That's of course in the

1 context of a defense, as opposed to a counterclaim.

2 MR. PHILLIPS: Right. But again I don't  
3 think -- I don't think section 4 is asking the courts to  
4 make that determination. I think what section 4 is  
5 asking the Court to look at is the subject matter of the  
6 controversy, and is it -- is it clear under the  
7 circumstances that there is in fact a Federal claim  
8 underlying it? And here there is no question on that.  
9 I ask you to affirm.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 Mr. Phillips.

12 Mr. Ortiz, you have three minutes  
13 remaining.

14 REBUTTAL ARGUMENT OF DANIEL R. ORTIZ  
15 ON BEHALF OF THE PETITIONER

16 MR. ORTIZ: Thank you, Your Honor. Just a  
17 few quick points.

18 I think this Court should be exactly clear  
19 how much Federal question jurisdiction the look through  
20 theory would create. So long as a Federal issue can be  
21 imagined anywhere in the lawsuit, there would be Federal  
22 question jurisdiction under this theory, and this is  
23 almost by definition going to be the case in any dispute  
24 concerning credit card debt, either because of the  
25 theory of complete pre-emption from the FDIA, or because

1 of the theory used in the Strong case before the  
2 Eleventh Circuit that RICO's prohibition on the  
3 collection of unlawful debt --

4 JUSTICE KENNEDY: What about a Federal  
5 defense?

6 JUSTICE STEVENS: That isn't really quite  
7 true, because here there is a definition of a Federal  
8 claim in your counterclaim.

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

10 JUSTICE STEVENS: There is a definition of  
11 a controversy in your counterclaim and in their  
12 response.

13 MR. ORTIZ: No -- there -- in general, if  
14 you accepted their theory, as long as there is an issue  
15 that could be spun as a Federal issue which there will  
16 always be in a credit card debt collection case and  
17 just -- in most States, that on the look through theory  
18 would be --

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

21 MR. ORTIZ: Your Honor, every -- it does not  
22 have to be a class action to establish what would serve  
23 --

24 JUSTICE BREYER: That's your view of it, but  
25 I mean, believe me, I think I can keep that problem under

1 control. That was your original point. I see the  
2 point, it's going to spread too far; you'd have to have  
3 some rules that cabin it.

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

8 MR. ORTIZ: Well, Your Honor, Respondent  
9 argues that this is an easy case, or at least over time  
10 the courts will decide these things to make the  
11 jurisdictional inquiry -- inquiries clear. Petitioner  
12 does not believe that is true.

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

18 Also, Your Honor, Petitioner does not  
19 believe that the Declaratory Judgment Act would have  
20 been appropriate in this case. Declaratory judgments  
21 are discretionary, and in this context of where you have  
22 a pending State court lawsuit, Petitioner believes that a  
23 Federal district court would be very cautious before  
24 permitting one.

25 Also Your Honor, if in the context of

1 declaratory judgment action presumably the district  
2 court would have to take the State court admissions into  
3 account, and in particular here it was admitted that the  
4 account was with Discover Financial Services, not with  
5 the bank.

6 Also, Your Honors, this -- Respondents try  
7 to portray Petitioner's position as siphoning off all  
8 Federal question jurisdiction. That is not true. Under  
9 Petitioner's view, a lot of Federal question  
10 jurisdiction -- some would remain. It would just be  
11 that the arbitration agreement itself would have to  
12 sound in Federal law. ERISA arbitration agreements  
13 would still be covered. Some labor agreements would  
14 still be covered. There would be --

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

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

20 CHIEF JUSTICE ROBERTS: Which would still be  
21 in Federal court.

22 MR. ORTIZ: Would still be in Federal court.  
23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 The case is submitted.

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

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