No. 20-1143

In the Supreme Court of the United States

DENISE A. BADGEROW, PETITIONER

v.

GREG WALTERS, ET AL.

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

This case presents an important jurisdictional question under the Federal Arbitration Act (FAA), 9 U.S.C. 1-16.

As this Court has confirmed, the FAA does not itself confer federal-question jurisdiction; federal courts must have an independent jurisdictional basis to entertain matters under the Act. In *Vaden* v. *Discover Bank*, 556 U.S. 49 (2009), this Court held that a federal court, in reviewing a petition to compel arbitration under Section 4 of the Act, may "look through" the petition to decide whether the parties' *underlying dispute* gives rise to federal-question jurisdiction. In so holding, the Court focused on the particular language of Section 4, which is not repeated elsewhere in the Act.

After *Vaden*, the circuits squarely divided over whether the same "look-through" approach also applies to motions to confirm or vacate an arbitration award under Sections 9 and 10. In *Quezada* v. *Bechtel OG & C Constr. Servs., Inc.*, 946 F.3d 837 (5th Cir. 2020), the Fifth Circuit acknowledged the 3-2 "circuit split," and a divided panel held that the "look-through" approach applies under Sections 9 and 10. In the proceedings below, the Fifth Circuit declared itself "bound" by that earlier decision, and applied the "look-through" approach to establish jurisdiction. That jurisdictional holding was outcome-determinative.

The question presented is:

Whether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under Sections 9 and 10 of the FAA where the only basis for jurisdiction is that the underlying dispute involved a federal question.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Denise A. Badgerow.

Respondents are Greg Walters; Thomas Meyer; and Ray Trosclair.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 975 F.3d 469. The order and opinion of the district court (Pet. App. 11a-17a) is unreported but available at 2019 WL 2611127.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2020. The petition for a writ of certiorari was filed on February 12, 2021, and granted on May 17, 2021. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Arbitration Act, 9 U.S.C. 1-16, are reproduced in an appendix to this brief (App., *infra*, 1a-5a).

STATEMENT

A. Background

1. In 1925, Congress enacted the FAA to "ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 219 (1985). The Act's passage was "motivated, first and foremost," by that purpose, and this Court has emphasized that "principal objective when construing the statute." *Id.* at 220; see also *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-626 (1985) (Congress's "'preeminent concern'" was enforcing private arbitration agreements) (quoting *Dean Witter*, 470 U.S. at 221).

To achieve its objective, the FAA "'creates a body of federal substantive law'" that is "applicable in [both] state and federal court." *Southland Corp.* v. *Keating*, 465 U.S. 1, 12 (1984); see also *Vaden* v. *Discover Bank*, 556 U.S. 49, 59 (2009). Yet "[w]hile the Federal Arbitration Act creates federal substantive law," "it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331[] or otherwise." *Southland*, 465 U.S. at 15-16 n.9. This leaves the FAA as "something of an anomaly in the field of federal-court jurisdiction." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983); see also *Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 581-582 (2008) ("As for jurisdiction over controversies touching arbitration, the Act does nothing, * * * bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis.").

"Given the substantive supremacy of the FAA, but the Act's nonjurisdictional cast, state courts have a prominent role to play as enforcers of agreements to arbitrate." *Vaden*, 556 U.S. at 59. Indeed, "enforcement of the Act is left in large part to the state courts." *Moses H. Cone*, 460 U.S. at 25 n.32.

2. Section 2 is the FAA's "centerpiece provision." *Mitsubishi Motors*, 473 U.S. at 625. It declares that a written agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2.

If a party refuses to honor an arbitration agreement, the Act authorizes federal courts (in defined circumstances) to enforce the agreement: "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate" may petition to compel arbitration before "any United States district court which, *save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties*." 9 U.S.C. 4 (emphasis added).

The FAA "also supplies mechanisms for enforcing arbitration awards: a judicial decree confirming an award, an order vacating it, or an order modifying or correcting it." *Hall Street*, 552 U.S. at 582 (citing 9 U.S.C. 9-11); see also App., *infra*, 3a-5a (reproducing Sections 9-11). As relevant here, "there is a difference in statutory language between § 4 and the latter sections [Sections 9-11]. In particular, the latter sections do not include the 'save for [the arbitration] agreement' and 'arising out of the controversy between the parties' language" found in Section 4. *Ortiz-Espinosa* v. *BBVA Sec. of Puerto Rico, Inc.*, 852 F.3d 36, 44 (1st Cir. 2017).

3. The scope of federal jurisdiction under the FAA has generated confusion for courts and litigants.

a. In *Vaden*, the Court granted review to resolve a conflict over the proper jurisdictional analysis for Section 4 petitions to compel arbitration: "whether district courts, petitioned to order arbitration pursuant to § 4 of the FAA, may 'look through' the petition and examine the parties'

underlying dispute to determine whether federal-question jurisdiction exists over the § 4 petition." 556 U.S. at 57. At the time, four circuits had held that federal-question jurisdiction did not exist unless the Section 4 petition itself invoked a federal question, whereas two circuits held the opposite—and exercised jurisdiction if the *underlying* dispute involved a federal question. *Ibid.* (outlining the circuit conflict).

The Court initially noted that the FAA "'bestow[s] no federal jurisdiction but rather requir[es] [for access to a federal forum] an independent jurisdictional basis' over the parties' dispute." 556 U.S. at 59 (alterations in original). But the Court ultimately held that federal jurisdiction may exist under the "'look through' approach": "[a] federal court may 'look through' a § 4 petition to determine whether *it is predicated on an action that 'arises under' federal law*." *Id.* at 62 (emphasis added). Under the Court's holding, if the underlying dispute involves a federal claim, federal courts can exercise jurisdiction under Section 4. *Id.* at 53, 62-63.

In so holding, the Court declared that "[t]he text of § 4 drives our conclusion." 556 U.S. at 62; see also, *e.g.*, *id.* at 63 (analyzing what "Section 4 directs"); *id.* at 68 (examining what "[t]he text of § 4 instructs"). Focusing on Section 4's particular language, the Court reasoned that "[t]he phrase 'save for [the arbitration] agreement' indicates that the district court should assume the absence of the arbitration agreement and determine whether it 'would have jurisdiction under title 28' without it." *Ibid.*

The Court further noted that rejecting the look-through approach—and refusing jurisdiction even when the underlying dispute raised a federal question—would invite "curious practical consequences." 556 U.S. at 65. As the Court explained, "when the parties' underlying dispute arises under federal law, the 'look through' approach

permits a § 4 petitioner to ask a federal court to compel arbitration without first taking the formal step of initiating or removing a federal-question suit—that is, without seeking federal adjudication of the very questions it wants to arbitrate rather than litigate." *Ibid.* Otherwise, the Court observed, the FAA would not "accommodate a § 4 petitioner who *could* file a federal-question suit in (or remove such a suit to) federal court, but who has not done so." *Ibid.*

In sum, the Court determined, "§ 4 of the FAA does not enlarge federal-court jurisdiction; rather, it confines federal courts to the jurisdiction they would have 'save for [the arbitration] agreement.'" 556 U.S. at 66. *Vaden* accordingly held that "[a] federal court may 'look through' a § 4 petition and order arbitration if, 'save for [the arbitration] agreement,' the court would have jurisdiction over 'the [substantive] controversy between the parties.'" *Id.* at 53.

b. While *Vaden* set the standard for Section 4, it did not address the proper jurisdictional analysis for motions to confirm or vacate arbitration awards under Sections 9 and 10. That threshold question is the subject of this case.

B. Facts And Procedural History

1. a. Denise Badgerow (petitioner here) worked as an associate financial advisor for REJ Properties, Inc. Pet. App. 2a. The Louisiana firm was run by three principals (respondents here) who were independent franchise advisors for Ameriprise Financial Services, Inc. *Ibid.* All were members of the Financial Industry Regulatory Authority (FINRA), and petitioner's employment relationship was subject to a FINRA arbitration agreement. *Id.* at 3a.

During her employment, petitioner raised concerns about workplace harassment to Ameritrade, and was eventually terminated after reporting violations of federal securities laws, SEC regulations, and FINRA rules; the

termination came the day after respondents were contacted by an Ameriprise Compliance officer about those alleged violations. C.A. ROA 23, 594-598.

Petitioner initiated a FINRA arbitration proceeding against respondents, and later joined Ameritrade after it "successfully moved to compel arbitration in a separate federal lawsuit." App., *infra*, 3a. In her arbitration complaint, petitioner asserted that respondents violated the Securities Exchange Act of 1934, multiple SEC regulations (*e.g.*, 17 C.F.R. 240.17a-3, 17 C.F.R. 240.17a-4, and 17 C.F.R. 240.15c2-11), and FINRA Rule 2040, and explained she was terminated for reporting those violations to Ameritrade. C.A. ROA 599-605. She asserted whistleblower and other state-law claims under Louisiana law, and added a declaratory-judgment claim against Ameritrade, alleging it was a joint employer and thus "jointly liable for the alleged discriminatory conduct of [respondents] and REJ." Pet. App. 3a; C.A. ROA 608.

The FINRA panel sided with respondents and Ameritrade, issuing an award dismissing petitioner's claims with prejudice. Pet. App. 3a.

b. Petitioner then sought to vacate the arbitration award in Louisiana state court. Pet. App. 3a; C.A. ROA 21-41. She submitted "extensive" briefing (Pet. App. 13a n.3) that respondents obtained the award by fraud (*id.* at 3a), which she uncovered during discovery in related litigation. C.A. ROA 23-24, 31-32. Respondents removed the case to federal court citing federal-question jurisdiction (C.A. ROA 8), and moved to confirm the award under Section 9 of the FAA. Pet. App. 3a-4a. Petitioner moved to remand for lack of subject-matter jurisdiction. *Ibid.*

2. The district court denied the motion to remand and confirmed the arbitration award. Pet. App. 11a-17a.

As relevant here, the court found that "the sole question before the Court is whether it has subject matter jurisdiction over the removed action." Pet. App. 13a.[1] It recognized *Vaden*'s holding that "a federal court may 'look through' a § 4 petition to determine whether it is predicated on an action that arises under federal law," but noted that, in *Vaden*'s "aftermath," "courts have grappled with whether the 'look through' approach applies to § 10 motions to vacate." *Id.* at 14a-15a. The court observed that certain circuits had "declin[ed] to extend *Vaden* to § 10 motions" because "*Vaden*'s reasoning was grounded on specific text in § 4 that § 10 does not contain," whereas other circuits had "extended [*Vaden*] to § 10" despite the "textual differences." *Id.* at 15a. At the time, "[t]he Fifth Circuit ha[d] not yet entered into the fray of this circuit split." *Ibid.*

On balance, the court elected to "err on the side of assuming" that *Vaden*'s "look through approach" applies to Section 10 motions. Pet. App. 15a. Its only explanation was practical: by assuming jurisdiction, petitioner "can raise this issue on appeal but if the [c]ourt remands this matter for lack of subject matter jurisdiction then [respondents] will have no appeal option." *Id.* at 15a n.5. The court then "looked through" to the underlying dispute and found federal-question jurisdiction because petitioner's "joint employer claims" were "grounded on federal employment law." *Id.* at 16a. The court accordingly denied

[1] The court explained that it had separately confirmed the award for Ameriprise, and "analyzed and rejected [petitioner's] allegation of fraud" in the process. App., *infra*, 12a-13a & n.3. Although that separate finding was not binding (because respondents "were not parties" to the Ameriprise action), the court declined to reengage the merits. *Id.* at 13a & n.2.

the motion to remand and confirmed the arbitration award. *Id.* at 16a-17a.[2]

Petitioner filed a notice of appeal. C.A. ROA 1814.

3. While petitioner's appeal was pending, the Fifth Circuit addressed the jurisdictional question, and a 2-1 panel adopted *Vaden*'s "look through" approach for motions to confirm or vacate awards under Sections 9 and 10. *Quezada* v. *Bechtel OG & C Constr. Servs., Inc.*, 946 F.3d 837 (5th Cir. 2020).

a. Like the district court, the panel majority observed that "[a]fter *Vaden*, a circuit split developed regarding whether the [Section 4] look-through approach also applies to applications to confirm an arbitration award under section 9, to vacate under section 10, or to modify under section 11." 946 F.3d at 841. "On one side," the majority noted, were the "Third and Seventh Circuits," which "decline to apply the look-through approach set out in *Vaden*" to motions under Sections 9 and 10. *Id.* at 841-842. "On the other side" were the "First, Second, and Fourth Circuits," which "extend the look-through approach to [such] motions." *Id.* at 842.

After examining both sides of the split, the majority expressly rejected the Third and Seventh Circuits' position and "join[ed] the First, Second, and Fourth Circuits in concluding that motions brought under sections 9, 10, and 11 * * * are subject to [*Vaden*'s] look-through approach." 946 F.3d at 843. According to the majority, "'[t]he [FAA] was enacted as a single, comprehensive statutory scheme,'" and "this principle of uniformity dictates

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[2] Respondents also argued that even petitioner's state-law claims were predicated on "alleged violation[s] of federal law." App., *infra*, 16a n.7. The court found it unnecessary to address that issue "because the award itself included federal claims." *Ibid.*

using the same approach for determining jurisdiction under each section of the statute"—even if each provision uses different language. *Id.* at 842. The majority explained that "provid[ing] a different jurisdictional rule for section 4 would be, in essence, to expand jurisdiction for section 4 motions," contravening "[t]he rule that the FAA is not an independent basis for federal jurisdiction and does not enlarge existing grounds for jurisdiction." *Ibid.*

The majority also believed that *Vaden*'s "practical considerations" "apply with equal force to all other sections" of the Act. 946 F.3d at 843. As the majority reasoned, without the look-through approach, litigants would be forced to take "inefficient and formalistic" steps to protect federal jurisdiction, filing (unnecessary) Section 4 motions simply to obtain jurisdiction at the outset so it would be available on the backend. *Ibid.* (identifying a "perverse incentive for cautious practitioners to file first in federal court and be referred or compelled to arbitration, all for the sole purpose of preserving federal jurisdiction to later review the award").

The majority conceded the textual argument on the other side, recognizing that "'[n]either § 9 nor § 10 has any language comparable to that on which the Supreme Court relied in *Vaden*.'" 946 F.3d at 842. But it ultimately declared the textual argument "[un]persuasive," holding instead that this Court's "guidance in *Vaden* and the background principles animating its jurisdictional analysis" warranted applying "the same look-through approach." *Id.* at 842-843.

b. Judge Ho dissented. 946 F.3d at 845-847.

He initially noted that "[a]rbitration agreements are contracts—and contracts are ordinarily a matter of state law." *Id.* at 845. While "[a]rbitration disputes" may be "brought in federal court[] if Congress so authorizes," he noted that the FAA "confers no federal jurisdiction." *Ibid.*

Thus "[d]isputes arising out of arbitration" generally "belong in state court." *Ibid.*

While Judge Ho agreed that Section 4 "allows federal courts to exercise jurisdiction over certain arbitration disputes under 28 U.S.C. § 1331," "[t]his case, however, involves not a motion to compel arbitration under § 4, but a motion to vacate an arbitration award under § 10." 946 F.3d at 845-846. And none of the post-award "sections contain the 'look through' language found in § 4." *Id.* at 846. Indeed, he noted, "neither the panel majority nor the parties claim any textual support for federal jurisdiction." *Ibid.* And while "they observe that there is a circuit split on the issue," he continued, "[r]ather than count circuits, I would follow the text wherever it leads"—and "[f]idelity to text thus compels me to conclude that the district court lacked jurisdiction." *Ibid.*

Judge Ho also repudiated the majority's view that it would be "absurd" for Congress to "confer federal jurisdiction over motions to compel under § 4, but not over motions to confirm, vacate, and modify under §§ 9-11." 946 F.3d at 846. As he explained, "Section 4 commences the arbitration process"; "Sections 9-11, by contrast, operate only after the issuance of the arbitration award." *Ibid.* The "dichotomy" thus "'parallels the distinction * * * between an original federal claim and a dispute about its contractual resolution,'" and it is "consistent with how we treat settlements"—"[t]he enforcement of settlements is ordinarily a matter for state courts, not federal courts," "even when a settlement happens to resolve federal questions." *Ibid.*

Finally, Judge Ho downplayed the majority's concerns about "creat[ing] perverse incentives." 946 F.3d at 846. He noted that the majority failed to cite any authority that even "permits" the "stratagem" of filing a motion to compel under Section 4 solely to preserve jurisdiction under

Sections 9-11; on the contrary, he identified circuit authority for *dismissing* "a case following a motion to compel"—which would eliminate the "perverse incentive[]" entirely. *Id.* at 846-847. And while the majority believed that Judge Ho's approach "violate[s]" *Vaden*'s rule that the FAA does not "expan[d]" jurisdiction, he countered that "*Vaden* instructs us to faithfully follow the text of the FAA, including the unique language of § 4." *Id.* at 847.

4. After *Quezada* came down, the Fifth Circuit affirmed in this case. Pet. App. 1a-10a.

The court initially noted that "the finding of federal subject-matter jurisdiction" was the sole contested issue. Pet. App. 2a, 4a ("the only issue for our review is whether the district court properly found that it had *jurisdiction* to rule on the merits of the removed petition to vacate and properly denied remand").

The court then held it was "bound" by *Quezada* to apply *Vaden*'s "look-through analysis." Pet. App. 5a-6a, 9a-10a. "Under this analysis," the court explained, "'a federal court should determine its jurisdiction by "looking through" [an FAA] petition to the parties' underlying substantive controversy.'" *Id.* at 6a (quoting *Vaden*, 556 U.S. at 62).

Doing so here, the court concluded that "the district court had subject-matter jurisdiction." Pet. App. 2a. First, the court found the district court was "plainly" correct in concluding that the underlying dispute involved a "federal-law claim": petitioner sought a "declaratory judgment" rendering Ameriprise jointly liable for REJ's "violation of federal civil rights law," including for "claims of Title VII liability against REJ"; "[a]djudicating that claim requires applying Title VII * * * and thus arises under federal law." *Id.* at 7a n.3. Second, the court concluded that petitioner could not avoid the federal questions in the underlying dispute by limiting her motion to vacate to her

claims against respondents (while dropping any attempt to vacate Ameriprise's dismissal). *Id.* at 7a-9a. Applying *Vaden*'s look-through approach, the panel found that the "'whole controversy'" involved the Ameriprise claims; they "arose from the same common nucleus of operative fact"; and the "federal-law claim against Ameriprise" would vest supplemental jurisdiction over any related "state-law claims." *Id.* at 8a-9a.[3]

The court "thus h[e]ld that, applying the look-through analysis, the district court correctly found that the federal claim against Ameriprise in the FINRA arbitration proceeding" vested "federal subject-matter jurisdiction over the removed petition to vacate the FINRA arbitration dismissal award." Pet. App. 9a.

SUMMARY OF ARGUMENT

This case presents a significant jurisdictional question with a remarkably straightforward answer. According to the court of appeals, *Vaden*'s "look-through" approach applies to motions to enforce or vacate arbitration awards under Sections 9 and 10 of the FAA. That holding is openly and unabashedly based on taking a unique clause in Section 4 and judicially rewriting it into two sections where it does not exist—all premised on the court's sense of the FAA's best policy. The decision below violates fundamental rules of statutory construction and runs afoul of

[3] The court also rejected petitioner's argument that she sought vacatur under Louisiana arbitration law, not the FAA. Aside from failing to see any difference in the "jurisdictional analysis," the court found petitioner's argument was foreclosed under her contract: "the arbitration agreement * * * that covers this dispute explicitly states that it is 'covered and enforceable under the terms of the [FAA].'" Pet. App. 5a. Petitioner has not renewed that argument before this Court.

bedrock jurisdictional norms. The judgment should be reversed.

A. The FAA's text and context unambiguously establish that *Vaden*'s "look-through" approach does not apply to motions under Sections 9 and 10.

First and foremost, there is no textual basis whatsoever for reading a "look-through" approach into those sections. Neither section even hints that such an analysis is appropriate. The only basis for a "look-through" analysis is rooted in a unique "save-for" clause that appears in Section 4 but conspicuously does *not* appear in Sections 9-10. When Congress includes language in one section but omits it from another in the same Act, the choice is presumptively deliberate. There is no judicial license for a court to insert Section 4's language in other sections where it does not exist.

The contrary decision also presents a surplusage problem: If Section 4's unique language is *not* necessary to premise jurisdiction on an underlying federal claim, then Section 4's clause apparently does no work at all. Respondents' position therefore fails for two equally powerful reasons: (i) it tries to read into Sections 9 and 10 language that Congress reserved exclusively for Section 4; or (ii) it assumes jurisdiction exists *even without Section 4's unique language*, which is another way of saying that language does nothing at all—it is "insignificant" and "superfluous." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001). Neither reading presents a tenable construction of the statute.

B. A plain-text reading of Sections 9 and 10 align the FAA with longstanding jurisdictional norms.

An arbitration award is contractual in nature; it represents an out-of-court settlement of the parties' claims. Yet it is virtually always the case that when a federal claim is settled and dismissed, any subsequent disagreements

over the settlement raise *state-law* issues—even if the settlement itself resolved federal questions, and even if the suit was initially filed in federal court.

The FAA's jurisdictional scheme mirrors this settled practice. Section 4 permits courts to "look through" to the underlying federal dispute at a case's outset, but relegates non-diverse parties to state court to resolve any post-arbitration issues—just as parties are ushered to state court to resolve disputes over a settled federal claim. Unless the new dispute over the arbitration award itself qualifies for federal jurisdiction, it does not belong in federal court. That unexceptional outcome does not put the FAA on different footing than any other area of federal law; it simply aligns the FAA's jurisdictional structure with the same rules that apply everywhere else.

C. The FAA's purpose and history are also consistent with the FAA's limited jurisdictional scope.

First, Congress's dominant concern in passing the FAA was ensuring that arbitration agreements are enforced according to their terms. If Congress felt the need to expand federal jurisdiction for any task, that was it—and there was no comparable showing of any similar enforcement problems on the backend. It thus is perfectly sensible to presume that Congress meant what it said when it inserted the "save-for" clause in Section 4 (to increase access to federal court when compelling arbitration), but omitted the same clause after the parties' arbitration is over.

Second, this jurisdictional framework also reflects the significant role that States have always played in enforcing arbitration agreements. State courts have long proved competent in faithfully respecting and enforcing parties' arbitral rights, and there is no reason to rewrite the FAA's plain text to judicially recalibrate this historic practice.

Third, before *Vaden*, lower courts overwhelmingly rejected the "look-through" concept in confirming or vacating arbitration awards. That consistent practice did not generate any obvious or serious problems for parties seeking to employ arbitration as a sensible means of dispute resolution. And if Congress determines that federal jurisdiction is necessary on the backend, it can address that policy issue via the political process. The answer is not to ask courts to redline the statute to expand jurisdiction that textually does not exist.

ARGUMENT

FEDERAL COURTS LACK SUBJECT-MATTER JURISDICTION TO CONFIRM OR VACATE AN ARBITRATION AWARD WHERE THE ONLY BASIS FOR JURISDICTION IS THAT THE UNDERLYING DISPUTE INVOLVED A FEDERAL QUESTION

A. The FAA's Text And Context Establish That *Vaden*'s "Look-Through" Approach Does Not Apply To Motions Under Sections 9 And 10

1. a. The textual case against applying *Vaden*'s "look-through" approach to Sections 9 and 10 is simple and compelling: nothing in either section remotely suggests that jurisdiction turns on the nature of the underlying dispute.

Sections 9 and 10 describe the substantive and procedural requirements for confirming or vacating an arbitration award. See App., *infra*, 3a-5a. Nothing in those sections endorses a "look-through" approach. There is no hint that such an analysis is allowed or appropriate. Neither section even references "the subject matter of the underlying dispute" (*Goldman*, 834 F.3d at 254), much less anything about "jurisdiction under title 28" (compare 9 U.S.C. 4). Indeed, neither section has *any* jurisdictional language at all.

The so-called "look-through" approach is not standard jurisdictional fare. Federal jurisdiction usually turns on the face of a "'well-pleaded complaint,'" not by peering into an underlying controversy. *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 392 (1987). There is no textual directive in Sections 9 and 10 displacing this "longstanding * * * rule" (*Vaden*, 556 U.S. at 60), let alone any other jurisdictional language to potentially fill the gap. There is, in short, no statutory authority anywhere in either section's plain text authorizing jurisdiction because the underlying case involved a federal claim.

b. *Vaden* reached the opposite conclusion for Section 4, but that only proves *petitioner's* point. Unlike Sections 9 and 10, Section 4 has unique language that instructs courts, explicitly, to look through the petition to the underlying dispute. *Vaden*, 556 U.S. at 62-63 (describing Section 4's "save for" clause). Even a quick glance at the opinion confirms that Section 4's unique language drove *Vaden's* analysis, but any speculation is unnecessary: in the Court's words, "[t]he text of § 4 drives our conclusion." 556 U.S. at 62. Section 4's "save-for" clause was the core focus of the analysis (*e.g.*, 556 U.S. at 70), and the undeniable textual source for the "look-through" approach.

That shuts the door on respondents' position. Sections 9 and 10 "lack[] the critical 'save for such agreement' language that was central to the Supreme Court's *Vaden* opinion." *Goldman*, 834 F.3d at 253. Neither section "contain[s] the 'look through language found in § 4" (*Quezada*, 946 F.3d at 846 (Ho, J., dissenting)), or even has any "comparable" language (*Magruder*, 818 F.3d at 288). The key clause is conspicuously missing.

There is no basis for "artificially import[ing]" Section 4's language into Sections 9 and 10. *Minor* v. *Prudential Sec., Inc.*, 94 F.3d 1103, 1107-1108 (7th Cir. 1996). When Congress uses different language in neighboring sections

of the same act, it presumably does so for a reason. See, *e.g.*, *Salinas* v. *United States R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021) ("'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"). Congress did not insert a unique clause solely in Section 4 because it wanted courts to judicially redline that clause into other provisions. The disparate treatment is deliberate, and nothing in the FAA grants the judiciary a license to override Congress's judgment. *E.g.*, *Kasap* v. *Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1247 (D.C. Cir. 1999) (refusing to "transport the unique jurisdictional language of § 4 into [§§ 9-10]"); see also *Empire Healthchoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677, 696 (2006) ("We have no warrant to expand Congress' jurisdictional grant 'by judicial decree.'").[4]

[4] Nor does *Vaden*'s logic violate the Court's (correct) observation that the FAA does not independently create federal jurisdiction. Contra, *e.g.*, *Quezada*, 946 F.3d at 842 (deeply confusing this point). This Court's statement responds to the general presumption that a suit *arises under the law that creates the cause of action*. In that usual scenario, a petition filed under the FAA would give rise to a federal question (since the FAA is a federal act)—meaning that *any* party seeking to invoke *any* of the FAA's remedies (even in a state-law contract action between non-diverse parties) would be able to bring the dispute to federal court. This Court has repeatedly rejected *that* proposition—*i.e.*, the limited argument that any action invoking the FAA automatically raises a federal question. But this Court has never once suggested that *Section 4's isolated jurisdictional grant* cannot itself support federal jurisdiction where its terms are met. Courts can enforce Section 4 to mean what it says without stepping on the toes of this Court's (very different) principle that invoking the FAA generally is not enough.

c. Respondents' contrary view also fails for an additional reason: If the "look-through" approach is authorized *without* Section 4's "save-for" clause, then that clause becomes entirely superfluous. See, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001). Respondents cannot explain how courts might employ Section 4's "look through" approach under Sections 9 and 10 without any comparable textual directive—unless Section 4's textual directive is meaningless. And yet if courts are authorized to assert jurisdiction based on the underlying dispute with or without Section 4's unique command, the "save-for" clause does nothing. Contra *Vaden*, 556 U.S. at 62.

Accordingly, under respondents' view, courts must either judicially rewrite Sections 9 and 10 to include language Congress withheld from those provisions, or presume that Congress included an entire clause as a central feature of Section 4 for no reason at all. Either assumption violates one of this Court's cardinal principles of statutory construction.

2. The plain-text reading of Sections 9 and 10 is further bolstered by other provisions of the Act.

First, unlike Sections 9 and 10, Section 8 "explicitly" provides jurisdiction to enforce arbitration awards in the maritime context: "where a cause of action 'is otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary,'" the court may "'direct the parties to proceed with the arbitration *and shall retain jurisdiction to enter its decree upon the award*.'" *Marine Transit Corp.* v. *Dreyfus*, 284 U.S. 263, 274 (1932) (quoting 9 U.S.C. 8) (emphasis added). Section 8 shows that Congress knew exactly how to vest jurisdiction to enforce an award on the back-end if jurisdiction exists to compel arbitration on the front-end. See *id.* at 276 ("the District Court entered its decree upon the award against th[e] cor-

poration under the authority expressly conferred by section 8"). Yet Congress limited that jurisdictional grant to Section 8 alone, and omitted any similar authority for non-maritime post-arbitration review. If anything, that confirms the same rule does *not* apply under Sections 9-11. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Moreover, it is certainly true that Congress treated admiralty cases differently for reasons specific to the admiralty context. See, *e.g.*, *The Anaconda* v. *American Sugar Refining Co.*, 322 U.S. 42, 45 (1944); *Marine Transit*, 284 U.S. at 272-273, 275. But that does not diminish the key point: Section 8 shows that Congress knew how to expand jurisdiction, explicitly, to enforcing awards, and yet chose not to repeat that command for non-maritime cases—despite Sections 9 and 10's placement *immediately adjacent* to Section 8. Again, there is no basis for courts to countermand that congressional determination.[5]

Second, Chapters 2 and 3 of the FAA—addressing matters of international arbitration under the Convention—also show that Congress understood how to broadly vest courts with jurisdiction over arbitration matters. See,

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[5] According to the Fourth Circuit and respondents, *Maritime Transit* held, categorically, that "'where the court has authority under the [FAA] * * * to make an order for arbitration, the court also has authority to confirm the award or to set it aside.'" *McCormick* v. *America Online, Inc.*, 909 F.3d 677, 683 (4th Cir. 2018) (quoting *Marine Transit*, 284 U.S. at 275-276); Br. in Opp. 29 (same). Both apparently overlook that *Marine Transit* turned on the unique language of Section 8, which specifically instructs courts to retain jurisdiction. Contrary to the Fourth Circuit's view, this consequently does *not* establish that "the court that has jurisdiction to compel arbitration under § 4 also has jurisdiction * * * to confirm, vacate, modify, and enforce the resulting arbitration award." *McCormick*, 909 F.3d at 683. Indeed, this cuts exactly the opposite way—and shows precisely the textual authority that Sections 9-11 are missing.

e.g., 9 U.S.C. 203 ("An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States * * * shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy."); 9 U.S.C. 302 (Section 203 "of this title shall apply to this chapter as if specifically set forth herein"). Yet Congress again chose not to replicate that broad jurisdictional grant for domestic arbitration.

Respondents' position is inconsistent with these provisions. Even if Congress had reason not to extend the same sweeping jurisdictional grant under the Convention, it was assuredly aware of the need to craft *some* jurisdictional rule where it indeed wished federal courts to exercise jurisdiction.

Congress textually provided tailored jurisdiction to compel under Section 4, enforce maritime awards under Section 8, and decide virtually all aspects of international arbitration under Chapters 2 and 3. Yet it tellingly elected not to confer any additional judicial authority under Sections 9 and 10. Congress's reticulated scheme is entitled to respect, and there is no basis for the judiciary to pretend that Congress included Section 4's unique "look-through" clause in other provisions where it textually does not exist.

3. Respondents' contrary position (adopted by a bare majority of circuits) is staggering. They effectively concede that the FAA's language cuts directly against them. See, *e.g.*, *Doscher*, 832 F.3d at 381. But they insist that the statutory "purpose[]" and certain "practical consequences" override the Act's text. *Id.* at 381-388.

As this Court just explained last Term, "[t]he difficulties with this argument are by now familiar." *BP P.L.C.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1542 (2021). "'[E]ven the most formidable' policy arguments

cannot 'overcome' a clear statutory directive." *Ibid.* (quoting *Kloeckner* v. *Solis*, 568 U.S. 41, 56 n.4 (2012)). "Once more, this Court's task is to discern and apply the law's plain meaning as faithfully as we can, not 'to assess the consequences of each approach and adopt the one that produces the least mischief.'" *Ibid.* (quoting *Lewis* v. *Chicago*, 560 U.S. 205, 217 (2010)).

The text here is plain and unambiguous. Section 4's unique language is the only conceivable basis for adopting a look-through approach; that language is indisputably not found in Sections 9 and 10. To be sure, respondents are mistaken about their views of the FAA's "purpose" and "consequences." But their fundamental misstep is looking to policy in the first place—especially when confronted with language as unmistakable as this.

B. Longstanding Jurisdictional Rules And Procedural Norms Further Promote The FAA's Plain-Text Reading

Congress's jurisdictional regime—permitting the "look-through" approach for pre-arbitration motions in live federal disputes but not for post-arbitration activity—is directly aligned with longstanding jurisdictional and procedural norms. Indeed, the FAA exactly parallels how it works when parties settle and dismiss a federal suit and then seek to litigate issues concerning the settlement. The look-through approach, by contrast, would contravene this settled law.

1. Both arbitration awards and ordinary settlements are effectively contracts. *Magruder*, 818 F.3d at 288. Yet "if parties settle litigation that arose under federal law, any contest about that settlement needs an independent jurisdictional basis"—parties cannot automatically "return to federal court," even though the suit originally involved federal claims. *Ibid.* (citing *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375 (1994)).

The FAA simply adopts the same rule for arbitration. While a controversy at the outset involves disputed federal claims, the same controversy post-arbitration involves their *contractual resolution*. *E.g.*, *Goldman*, 834 F.3d at 255; *Magruder*, 818 F.3d at 288; see also *Quezada*, 946 F.3d at 846 (Ho, J., dissenting). Just as settling litigants cannot automatically "return to federal court," the fact that an arbitration resolves a "federal question" does not confer jurisdiction to enforce or vacate an arbitration award. *Ibid.* Instead, the FAA tracks the traditional "distinction * * * between an original federal claim" (where jurisdiction exists) and "a dispute about its contractual resolution" (where it does not). *Magruder*, 818 F.3d at 288.

The FAA thus parallels the ordinary treatment of federal claims before and after settlement: federal jurisdiction exists when a suit is filed but not to enforce its contractual resolution: "enforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction." *Kokkonen*, 511 U.S. at 381-382. The look-through approach, by contrast, would stand at odds with these principles.

2. According to certain courts, however, "[a]pplying the look-through approach to post-award decisions avoids" a "'bizarre' distinction": "'a petition to compel arbitration could be brought in federal court, but a petition under FAA §§ 9 or 10 to confirm or vacate the arbitration award in the same dispute could not.'" *Ortiz-Espinosa* v. *BBVA Sec. of Puerto Rico, Inc.*, 852 F.3d 36, 46-47 (1st Cir. 2017).

But there is nothing at all "bizarre" about that. As *Kokkonen* confirms, courts often have jurisdiction at the outset but not for post-dismissal disputes. Indeed, that is standard practice in federal courts. Arbitration awards are a form of private settlement. Parties usually cannot

invoke federal jurisdiction to police issues regarding a settlement *even if the underlying dispute involved a federal claim*, and *even if the underlying case was initially filed in federal court*.

This is an exact parallel to that common situation. Reading Sections 9 and 10 to mean what they say merely "harmonizes" the FAA with these settled jurisdictional tenets. *Magruder*, 818 F.3d at 288. Presuming that jurisdiction always exists if it once ever existed—even when a settlement dispute has nothing to do with federal law on its face—violates bedrock jurisdictional doctrine.[6]

C. The FAA's Purpose And History Are Consistent With Reading Sections 9 And 10 To Mean What They Say

1. The plain-text reading of Sections 9 and 10 is also consistent with the FAA's purpose. Congress's predominant concern in passing the Act was *enforcing* agreements to arbitrate. This Court has reiterated that primary objective time and again. *E.g.*, *Volt Info. Scis., Inc.* v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 477, 478 (1989) (the FAA's "passage 'was motivated,

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[6] Nor is it problematic that some courts might compel arbitration and stay a case—thus retaining supplemental jurisdiction over post-arbitration motions—while other courts might compel and dismiss. This again mirrors the treatment of settled claims: if a federal court "retain[s] jurisdiction over the settlement contract," the court can later enforce it; but if the same court refuses to "embody" the same settlement in the same dismissal order (a decision purely "in the court's discretion"), the court would lack jurisdiction. *Kokkonen*, 511 U.S. at 381-382; see also *Quezada*, 946 F.3d at 846-847 (Ho, J., dissenting) (rejecting the Fifth Circuit majority's embrace of the contrary logic). As *Vaden* itself confirms, the "actual litigation * * * define[s] the parties' controversy," even if "events could have unfolded differently"; "a party's ability to gain adjudication of a federal question in federal court often depends on how that question happens to have been presented." 556 U.S. at 68-69 & n.17.

first and foremost, by a congressional desire to enforce'" arbitration agreements); *Dean Witter*, 470 U.S. at 221 (the "preeminent concern of Congress in passing the Act was to enforce private [arbitration] agreements"). This was the focus of the Act's centerpiece provision (Section 2), and it addressed the key problem at the time: the historic reluctance of courts to compel arbitration. *E.g.*, *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 111 (2001) (noting contemporary "hostility of American courts to the enforcement of arbitration agreements"); *Allied-Bruce Terminix Cos., Inc.* v. *Dobson*, 513 U.S. 265, 270 (1995) ("[t]he basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate"). There was no comparable showing in the legislative history of any equivalent problem of courts refusing to enforce or review post-arbitration awards. See, *e.g.*, *Minor*, 94 F.3d at 1107 ("The central federal interest was enforcement of agreements to arbitrate, not review of arbitration decisions.").

This alone provides ample basis for explaining why Congress might expand jurisdiction to achieve the FAA's core objective (read: compelling arbitration) but still rely more heavily on state courts for post-arbitration activity. "[O]nce the arbitration agreement is enforced, there exists no compelling need for the federal courts to be involved, unless a federal question is actually at issue or diversity established." *Minor*, 94 F.3d at 1107; accord *Goldman*, 834 F.3d at 254.

And that is especially true given basic jurisdictional norms: as noted above, federal courts typically lose jurisdiction to enforce a settlement after a federal case is dismissed (*Kokkonen*, 511 U.S. at 382)—and an arbitration award is simply a settlement facilitated by a third party. See, *e.g.*, *Magruder*, 818 F.3d at 288. Whatever interest federal courts have in compelling arbitration when there

is still a live controversy, that interest diminishes considerably after the federal claim is contractually resolved via arbitration. See *Goldman*, 834 F.3d at 254-255.

2. A limited grant of jurisdiction also reflects the significant role that state courts have always played in enforcing arbitration rights. This Court has consistently noted that role. *E.g.*, *Vaden*, 556 U.S. at 59 (flagging the "prominent role" that state courts "play as enforcers of agreements to arbitrate"). And courts have explained that state courts often apply the same (or similar) standards as those found in the FAA. Cf., *e.g.*, *Hall St.*, 552 U.S. at 590 ("[t]he FAA is not the only way into court for parties wanting review of arbitration awards; they may contemplate enforcement under state statutory or common law").

There is no reason to brush aside the FAA's plain text to reallocate the traditional division of responsibility in this area. State courts have faithfully administered arbitration rights for decades (see, *e.g.*, *Vaden*, 556 U.S. at 71), and there is no obvious benefit to shifting those cases to federal court—which is likely why Congress has not revised the FAA to expand federal jurisdiction.

3. In pre-*Vaden* decisions, the federal courts of appeals overwhelmingly understood the FAA not to authorize "look-through" jurisdiction. See, *e.g.*, *Magruder*, 818 F.3d at 288 (cataloging decisions); *Kasap* v. *Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1247 (D.C. Cir. 1999) ("assuming *arguendo* that appellant's reading of § 4 is correct, we do not see how he can transport the unique jurisdictional language of § 4 into § 10"; "§ 10 does not create federal question jurisdiction, even when the underlying arbitration involves federal law"); *Collins* v. *Blue Cross Blue Shield of Mich.*, 103 F.3d 35, 37-38 & n.4 (6th Cir. 1996) ("neither the FAA nor the underlying arbitrated claim provide an independent basis of federal jurisdiction in an action to confirm or vacate an arbitration

award"; distinguishing authority under Section 4); see also *Luong* v. *Circuit City Stores, Inc.*, 368 F.3d 1109, 1111 (9th Cir. 2004) ("§ 10 [does not] create federal question jurisdiction even when the underlying arbitration involves a federal question").

Respondents have not made any showing of any genuine problems or issues under this traditional practice. The sky did not fall, and corporate and private parties have continued looking to arbitration as a viable means of resolving their disputes. And, of course, this simply aligns federal jurisdiction to mirror the exact scenario that commonly exists today—where non-diverse parties enter commercial arbitration agreements with no apparent federal nexus. Not even respondents believe that this large swath of ordinary cases belong in federal court; it is unclear why this particular dispute—raising the same kind of mine-run issues that one often sees after any kind of arbitration—is essential for a federal tribunal.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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APPENDIX

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1. Section 4 of the Federal Arbitration Act, 9 U.S.C. 4, provides:

> **Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination**
>
> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is

within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

2. Section 8 of the Federal Arbitration Act, 9 U.S.C. 8, provides:

> **Proceedings begun by libel in admiralty and seizure of vessel or property**
>
> If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

3. Section 9 of the Federal Arbitration Act, 9 U.S.C. 9, provides:

> **Award of arbitrators; confirmation; jurisdiction; procedure**
>
> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

4. Section 10 of the Federal Arbitration Act, 9 U.S.C. 10, provides:

Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved

by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

5. Section 11 of the Federal Arbitration Act, 9 U.S.C. 11, provides:

Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.