ACCIDENTAL ARBITRATION

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ABSTRACT

The Supreme Court's muscular interpretation of the Federal Arbitration Act (FAA) has encouraged businesses to insert arbitration clauses in untold millions of contracts. However, this Article explores a subtler way in which arbitration's kingdom is growing. Increasingly, defendants are trying to enforce ultra-broad arbitration agreements that nobody at the time of contracting could have foreseen would be relevant to the lawsuit. Some companies demand arbitration of claims that have nothing to do with the contract that includes the arbitration provision. Others attempt to exploit arbitration agreements in transactions between the plaintiff and a far-flung third party. And still others invoke arbitration provisions in contracts that both do not relate to the plaintiff's allegations and that they did not sign. In these scenarios, the potential for private dispute resolution is less a product of the litigants' shared expectations and more a result of happenstance. The Article calls this phenomenon "accidental arbitration."

The Article demonstrates that the law governing accidental arbitration is chaotic. Judges disagree about whether to allow companies to freeride on expansive arbitration clauses in contracts that are, at most, only tenuously connected to the underlying merits. Some feel obligated by the FAA to take these provisions at face value, but others refuse. Similarly, although outsiders generally must prove that they fall within some exception to the privity requirement to mandate arbitration, businesses are trying to eliminate this step by deeming enormous classes of entities to be "parties" to the arbitration clause. Finally, drafters often use delegation clauses to empower arbitrators to decide if a case must be arbitrated, and there is vast confusion about whether arbitrators should be able to determine whether an arbitration agreement is overbroad or binds non-signatories. These splits in authority are so deep that courts—including federal appellate panels— have been reaching different conclusions when presented with the same contract.

The Article then offers three arguments that would help untie these doctrinal knots. First, it expands on a thesis that I have sketched elsewhere and that some courts have tentatively endorsed: that the plain language of the FAA only validates agreements to arbitrate claims that "aris[e] out of"

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the contract that features the arbitration clause. The Article shows that the current Supreme Court, which prizes textualism, would adopt this "contractual nexus" theory, removing the FAA from the equation and giving states greater freedom to regulate accidental arbitration. Second, the Article urges courts not to allow drafters to name huge classes of allies as "parties" to the arbitration clause. This tactic, which I call "artificial privity," is a brazen effort to erase the longstanding distinction between contractual parties (who have agreed to terms and thus can enforce them directly) and non-signatories (who have not assented and have no such rights). Third, the Article explains why courts, not arbitrators, should enjoy the power to decide whether to compel accidental arbitration. Courts possess jurisdiction over whether the FAA applies and if someone has consented to arbitrate. Accordingly, recognizing the contractual nexus theory and the fallacy of artificial privity would prevent corporations from assigning these important gateway issues to arbitrators.

TABLE OF CONTENTS

INTRODUCTION

Consider three recent lawsuits. First, on April 23, 2022, Kamille and Leonard Smith and their kids went shopping at their local Walmart in Roanoke, Virginia.[1] The Smiths, who are African American, had paid and were leaving when a Walmart employee stopped them, accused them of stealing, and berated them in front of a crowd that included their neighbors and their children's classmates.[2] Eventually, the police arrived and cleared the Smiths of wrongdoing.[3] But because the Smiths felt that they had been racially profiled, they filed a complaint against Walmart for defamation, false imprisonment, and violation of their civil rights.[4]

Second, Eve Wexler's phone began to ring off the hook with calls from AT&T Corporation (AT&T Corp.).[5] The messages, which were automated, dealt with the same random subject: a U-Verse television package purchased by a stranger named Paul McPherson.[6] Wexler would hang up

1. *See* Complaint at 3, 7, Smith v. Walmart Inc., No. 22-cv-00568 (W.D. Va. Nov. 18, 2024).
2. *See id.* at 2, 7–8.
3. *See id.* at 10–11.
4. *See id.* at 4–7.
5. *See* Class Action Complaint at 4–6, Wexler v. AT&T Corp., No. 15-CV-0686 (E.D.N.Y. Feb. 27, 2020).
6. *See id.*

only to hear her phone buzz again the next day.[7] Because this made it difficult for her to perform daily tasks, she sued AT&T Corp. under the Telephone Consumer Protection Act (TCPA), which prohibits unsolicited robocalls.[8]

Third, Raheem Rice was outside a party at a house in Las Vegas that a stranger had rented through Airbnb.[9] Suddenly, a gunman shot into the crowd, killing Rice.[10] The administrator of Rice's estate sued Airbnb for wrongful death, asserting that it should have known that the property had become a cesspool of criminal behavior.[11]

Each firm responded to these complaints by moving to compel arbitration.[12] At first blush, this seems entirely unremarkable. For decades, forced arbitration has been corporate America's bulwark against consumer and employment grievances.[13] A century ago, Congress passed the Federal Arbitration Act (FAA) to eradicate the common law's tradition of refusing to specifically enforce pre-dispute arbitration agreements.[14] The statute was supposed to be a procedural rule for federal courts,[15] but shapeshifted in the 1980s, when the Court decreed that it applies in state court,[16] preempts state laws that are hostile to arbitration[17] and governs statutory claims.[18] Since then, countless businesses have inserted arbitration clauses into their

7. *See id.* at 6.

8. *See id.* at 1–2, 6.

9. *See* Plaintiffs' Complaint for Personal Injuries and Demand for Jury Trial at 3, Rice v. Zheng Trust, No. A-19-801549-C (Nev. Dist. Ct. Sept. 9, 2019) [hereinafter Rice Complaint]; Airbnb, Inc. v. Rice, 518 P.3d 88, 89 (Nev. 2022).

10. *See Airbnb, Inc.*, 518 P.3d at 89.

11. *See id.*; Rice Complaint, *supra* note 9, at 4–6.

12. *See* Memorandum in Support of Defendants' Motion to Compel Arbitration and Stay Proceedings, Smith v. Walmart, Inc., No. 22-cv-00568 (W.D. Va. Aug. 14, 2023) [hereinafter Walmart Motion to Compel]; Defendant AT&T Corp.'s Memorandum in Support of Its Motion to Compel Arbitration, Wexler v. AT&T Corp., 211 F. Supp. 3d 500 (E.D.N.Y. Sept. 30, 2016) (No. 15-CV-0686) [hereinafter AT&T Corp. Motion to Compel]; Defendant Airbnb, Inc.'s Motion to Compel Arbitration and Stay Litigation, *Airbnb, Inc.*, 518 P.3d 88 (No. A-19-801549-C).

13. Influential early articles about forced arbitration include Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1996); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997); and Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 638 (1996).

14. *See* Act of Feb. 12, 1925, ch. 213, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1–16); H.R. REP. No. 68-96, at 1–2 (1924).

15. *See, e.g.*, *Arbitration of Interstate Commercial Disputes: Joint Hearings Before the Subcomms. of the Comms. on the Judiciary on S. 1005 and H.R. 646*, 68th Cong. 37 (1924) [hereinafter *Joint Hearings*] (declaring that the statute "relate[s] solely to procedure of the [f]ederal courts").

16. *See* Southland Corp. v. Keating, 465 U.S. 1, 12 (1984).

17. *See id.* at 16.

18. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (compelling arbitration of Sherman Act claims).

contracts, making the phrase "alternative dispute resolution" an oxymoron.[19]

Nevertheless, even if arbitration has become routine, Walmart, AT&T Corp., and Airbnb's efforts to invoke it were not. For example, Walmart did not argue that the Smiths had agreed to arbitrate when they bought their goods on April 23, 2022, or during an earlier trip to the store, or in any way in their capacity as consumers.[20] Instead, Walmart relied on the total coincidence that Kamille Smith happened to drive for its Spark program: a gig delivery service like Amazon Prime or Instacart.[21] In turn, to start working, she had needed to accept Spark's terms, which forced her to agree to arbitrate "all disputes" she would ever have against Walmart.[22]

FIGURE 1: EXCERPT FROM WALMART'S SPARK ARBITRATION CLAUSE[23]

> i. *Claims Covered By Arbitration Provision*: Unless expressly limited below, the FAA and this Arbitration Provision shall exclusively govern the interpretation and enforcement of this Arbitration Provision, and shall apply to any and all disputes between the Parties

AT&T Corp.'s motion went even further. AT&T Corp. observed that, six years before Wexler sued, she had ordered an iPhone and signed up for wireless service from its sister company, AT&T Mobility, LLC (Mobility).[24] As a result, Wexler had clicked a box on a computer screen accepting Mobility's terms, which required her to arbitrate "all . . . claims between us" and defined "us" as Mobility's "subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns."[25] AT&T

19. *See, e.g.*, ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION: ACCESS TO THE COURTS IS NOW BARRED FOR MORE THAN 60 MILLION AMERICAN WORKERS 5 (2017) (reporting that roughly 60.1 million American employees are bound by forced arbitration clauses); David Horton, *Forced Arbitration in the Fortune 500*, 109 MINN. L. REV. (forthcoming 2025) (manuscript at 32), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4734628 [https://perma.cc/V99X-JART] (determining that about 80% of Fortune 500 companies employ forced arbitration).

20. *See* Walmart Motion to Compel, *supra* note 12, at 2; Smith v. Walmart, Inc., No. 22-cv-00568, 2023 WL 5215376, at *4 n.3 (W.D. Va. Aug. 14, 2023) (discussing the narrowness of Walmart's legal theory).

21. *See* Walmart Motion to Compel, *supra* note 12, at 2; *Smith*, 2023 WL 5215376, at *4; *see also* SPARK DRIVER, https://drive4spark.walmart.com/ [https://perma.cc/MTC5-JY4G].

22. *See* Walmart Motion to Compel, *supra* note 12, at 2–3.

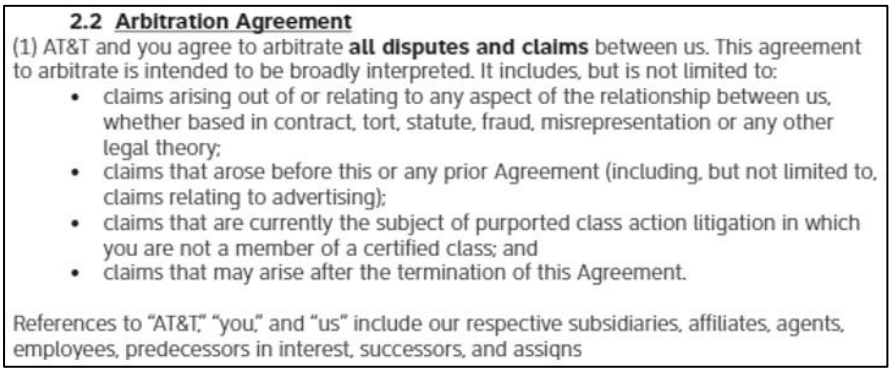
23. Declaration of Adam Dodge in Support of Motion to Compel Arbitration Exhibit A at 7, Shelton v. Delivery Drivers, Inc., No. 22-cv-02135 (C.D. Cal. Jan. 31, 2023); *see also* Defendants Walmart Inc. and Delivery Drivers, Inc.'s Motion to Compel Arbitration at 7, Shelton v. Delivery Drivers, Inc., No. 22-cv-02135 (C.D. Cal. Jan. 31, 2023) [hereinafter Walmart and Delivery Drivers Motion to Compel].

24. *See* AT&T Corp. Motion to Compel, *supra* note 12, at 1–2.

25. Declaration of David Bates Exhibit 2 at 11, Wexler v. AT&T Corp., No. 15-CV-0686 (E.D.N.Y. Feb. 27, 2020) [hereinafter Bates Declaration Ex. 2].

Corp. thus argued that Wexler needed to arbitrate any assertion she made against every member of Mobility's corporate family.[26]

FIGURE 2: EXCERPT FROM MOBILITY'S ARBITRATION CLAUSE[27]



2.2 Arbitration Agreement

(1) AT&T and you agree to arbitrate **all disputes and claims** between us. This agreement to arbitrate is intended to be broadly interpreted. It includes, but is not limited to:

- claims arising out of or relating to any aspect of the relationship between us, whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory;
- claims that arose before this or any prior Agreement (including, but not limited to, claims relating to advertising);
- claims that are currently the subject of purported class action litigation in which you are not a member of a certified class; and
- claims that may arise after the termination of this Agreement.

References to "AT&T," "you," and "us" include our respective subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns

Finally, Airbnb sought the most counterintuitive form of relief. It proved that, during life, Rice had opened an Airbnb account, which required him to arbitrate all controversies stemming from "use of the Airbnb platform."[28] In addition, Airbnb's contract included a delegation clause, which stated that "[i]f there is a dispute about whether this [a]rbitration [a]greement can be enforced or applies to our [d]ispute, you and Airbnb agree that the arbitrator will decide that issue."[29] Thus, although Rice's personal representative objected that Rice "did not book the Airbnb rental where the shooting occurred" and "[n]ever utilized Airbnb's services at all," Airbnb contended that Rice had promised to submit the very question about whether the arbitration should proceed to the arbitrator.[30]

26. *See* AT&T Corp. Motion to Compel, *supra* note 12, at 8.
27. *See* Bates Declaration Ex. 2, *supra* note 25, at 11.
28. Airbnb, Inc. v. Rice, 518 P.3d 88, 89 (Nev. 2022).
29. *Id.*
30. *Id.* at 90.

FIGURE 3: EXCERPT FROM AIRBNB'S ARBITRATION AND DELEGATION CLAUSES[31]

25.4 Agreement to Arbitrate. You and Airbnb mutually agree that any dispute, claim or controversy arising out of or relating to these Terms or the applicability, breach, termination, validity, enforcement or interpretation thereof, or any use of the Airbnb Platform, Host Services, or any Content (collectively, "Disputes") will be settled by binding arbitration on an individual basis (the "Arbitration Agreement"). If there is a dispute about whether this Arbitration Agreement can be enforced or applies to a Dispute, you and Airbnb agree that an arbitrator will decide that issue.

* * *

These stories illustrate a mind-bending development in the "arbitration war."[32] Traditionally, corporations only tried to invoke arbitration provisions in agreements that led to the dispute and that they or a close ally had signed.[33] Yet as the examples above demonstrate, defendants are now asking courts to enforce arbitration clauses that appear in contracts that have little to no relation to the plaintiff's allegations or even to the defendants themselves. In these cases, the potential for private dispute resolution seems to emerge from nowhere, brought about by the staggering breadth of the arbitration agreement and some twist of fate. This Article explores this issue, which it calls "accidental arbitration."

The Article starts by identifying this trend's roots. During the 2010s, the Court issued a rash of opinions that effectively interpreted the FAA to bar class actions.[34] This means that small claims, which are only viable on an aggregate basis, will not survive their transplant into the arbitral forum.[35] In turn, because plaintiffs' lawyers "regard arbitration as the place where 'lawsuits go to die,'" they deliberately target corporations that do not seem to be covered by a relevant arbitration agreement.[36] But arbitration clauses are often lurking in unexpected places, and many of them are what I have

31. *Terms of Service*, AIRBNB, https://www.airbnb.com/help/article/2908#22 [https://perma.cc/4H4R-SMSP].

32. *The Arbitration War*, N.Y. TIMES (Nov. 26, 2010), https://www.nytimes.com/2010/11/27/opinion/27sat1.html [https://perma.cc/RC4V-2MG6].

33. *See, e.g.*, Mey v. DIRECTV, LLC, 971 F.3d 284, 302 (4th Cir. 2020) (Harris, J., dissenting) ("Arbitration clauses generally are limited in subject-matter scope to claims 'arising out of or relating to' the contract containing the arbitration agreement.").

34. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (holding that the FAA prohibits courts from deeming class arbitration waivers to be unconscionable).

35. *See, e.g.*, Note, *The Market Participant Doctrine and Forced Arbitration*, 137 HARV. L. REV. 1359, 1362 (2024) ("[A]n arbitration agreement may deprive a plaintiff of a remedy altogether, since '[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.'" (quoting Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004))).

36. Hawkins v. Region's, 944 F. Supp. 2d 528, 532 (N.D. Miss. 2013).

previously called "infinite arbitration clauses": those that govern any dispute and a range of non-signatories.[37] Thus, businesses have the incentives and the ammunition to demand arbitration under a contract that is, at best, tenuously linked to the asserted misconduct.[38]

The Article then divides accidental arbitration into four varieties and explains that each has caused massive doctrinal confusion. First, accidental arbitration can occur if there is no relationship between the wrongdoing and the contract with the arbitration provision (the container contract).[39] Judges split over these fact patterns. Some opine that the FAA requires them to enforce the arbitration clause as written.[40] For example, a federal court in Virginia noted that Walmart's arbitration agreement was "not limited to disputes arising under or relating to the contract," and sent Kamille Smith's complaint into the private forum.[41] Yet other judges limit boundless arbitration clauses to their setting,[42] deem them to be unconscionable,[43] or hold that the plaintiff did not agree to arbitrate "literally every possible dispute he or she might have" with a company.[44]

A second species of accidental arbitration involves non-signatory defendants.[45] The ancient doctrine of privity states that only parties to a

37. David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633, 639–40 (2020); *see also infra* text accompanying notes 78–80 (discussing this article in more depth).

38. After this Article had been accepted for publication, an accidental arbitration case made headlines. A woman suffered a fatal allergic reaction at a restaurant on Disney property. *See* Tierney Sneed, *Disney's Not Alone in Saying Your Clicks Means You Can't Sue*, CNN (Aug. 16, 2024, 11:47 AM), https://www.cnn.com/2024/08/16/politics/arbitration-signing-away-rights-disney-plus-wrongful-death-lawsuit/index.html [https://perma.cc/KJ57-FBD4]. Her husband then sued Disney for wrongful death. *See id.* Disney responded by trying to invoke an arbitration clause that was buried in the terms of service of its Disney+ streaming service. *See id.* However, publicity about the case sparked backlash, and Disney abandoned its motion to compel. *See* Claire Fahy, *Disney Backs Down from Effort to Use Disney+ Agreement to Block Lawsuit*, N.Y. TIMES (Aug. 20, 2024), https://www.nytimes.com/2024/08/20/nyregion/disney-arbitration-allergy-death-lawsuit.html [https://perma.cc/7NXH-PDY4].

39. *See infra* Section II.B.1.

40. *See, e.g.*, Mey v. DIRECTV, LLC, 971 F.3d 284, 288 (4th Cir. 2020).

41. Smith v. Walmart, Inc., No. 22-cv-00568, 2023 WL 5215376, at *4 (W.D. Va. Aug. 14, 2023).

42. *See, e.g.*, Johnson v. Walmart Inc., 57 F.4th 677, 679, 683 (9th Cir. 2023) (holding that the arbitration clause in Walmart.com's terms of use, which governs "any aspect of the relationship between you and Walmart," does not extend to in-store purchases).

43. *See, e.g.*, McFarlane v. Altice USA, Inc., 524 F. Supp. 3d 264, 277 (S.D.N.Y. 2021) (holding that "[t]o enforce the [a]rbitration [p]rovision 'according to its literal terms' would cross [the unconscionability] line" and cause "outrageous results").

44. Wexler v. AT&T Corp., 211 F. Supp. 3d 500, 504 (E.D.N.Y. 2016).

45. This Article does not address non-signatory plaintiffs, who raise different issues. When a non-signatory defendant tries to enforce an arbitration clause in a contract that the plaintiff signed, there is no doubt that the plaintiff agreed to arbitrate *something* with *someone*. *See* Horton, *supra* note 37, at 673–74. But in contrast, non-signatory plaintiffs argue that they have never agreed to arbitrate *anything* with *any relevant party*. *See id.* at 671–73; Danielle D'Onfro, *Contract-Wrapped Property*, 137 HARV. L. REV. 1058, 1096–103 (2024) (explaining that some attempts by defendants to compel arbitration against non-signatory plaintiffs are illicit efforts to create equitable servitudes on chattels).

contract can enforce it.[46] But the FAA recognizes exceptions to this rule,[47] including the principle that third-party beneficiaries can demand arbitration if the signatories "clearly" so intended.[48] Companies are trying to exploit this carve out by extending their arbitration clauses to enormous categories of potential co-defendants.[49] In addition, businesses are experimenting with a novel method of permitting their allies to mandate arbitration. Because third-party beneficiary caselaw is unpredictable, drafters are attempting to bypass it by deeming non-signatories to be "parties" to the arbitration agreement.[50] Three federal appellate courts and a Supreme Court Justice have given their blessing to this tactic, which I will refer to as "artificial privity."[51]

This tees up the third variety of accidental arbitration: "hybrids." Some cases boast both claims that are detached from the container contract and involve non-signatory defendants. For instance, in Eve Wexler's lawsuit, the only bridge between AT&T Corp.'s botched robocalls and Mobility's customer terms was the "happenstance" that "Wexler's phone [wa]s on Mobility's network" and the arbitration agreement tried to establish artificial privity by defining "Mobility" to include its "affiliates."[52] The Fourth, Ninth, and Eleventh Circuits recently grappled with hybrids, and these three appeals generated dueling results and eight separate opinions.[53]

Fourth, due to proliferation of delegation provisions, sometimes the question in an accidental arbitration case is not *whether* to order arbitration of the merits of the dispute, but *who decides* whether to order arbitration of the merits of the dispute. However, it is unclear whether arbitrators should ever be able to determine whether an arbitration agreement governs claims that are unrelated to the container contract. The Nevada Supreme Court felt obliged by the FAA to hold that Raheem Rice's estate needed to arbitrate

46. *See* Jesse W. Lilienthal, *Privity of Contract*, 1 HARV. L. REV. 226, 226 (1887).

47. *See* Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631 (2009).

48. Paparazzi, LLC v. Sorenson, No. 22-CV-00028, 2023 WL 2760593, at *5 (D. Utah Apr. 3, 2023) (quoting Bridas S.A.P.I.C. v. Gov't of Turkm., 345 F.3d 347, 362 (5th Cir. 2003)).

49. *See infra* text accompanying notes 141, 177–79.

50. *See, e.g.*, Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358, 1381 (1992) (calling the third-party beneficiary rule "difficult or impossible to apply in a meaningful and consistent way" and "essentially an empty test that asks a non-question").

51. *See* Meeks v. Experian Info. Servs., Inc., Nos. 21-17023, 22-15028, 2022 WL 17958634, at *2 (9th Cir. Dec. 27, 2022); Outokumpu Stainless USA, LLC v. Coverteam SAS, No. 17-10944, 2022 WL 2643936, at *3 (11th Cir. July 8, 2022); GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC, 590 U.S. 432, 447 n.* (2020) (Sotomayor, J., concurring).

52. Wexler v. AT&T Corp., 211 F. Supp. 3d 500, 503, 504 (E.D.N.Y. 2016).

53. *See* Mey v. DIRECTV, LLC, 971 F.3d 284 (4th Cir. 2020) (enforcing an arbitration clause in a hybrid situation); *id.* at 295 (Harris, J., dissenting); Revitch v. DIRECTV, LLC, 977 F.3d 713 (9th Cir. 2020) (refusing to enforce the same contract that was at issue in *Mey*); *id.* at 721 (O'Scannlain, J., concurring); *id.* at 724 (Bennett, J., dissenting); Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204 (11th Cir. 2021) (declining to enforce an arbitration clause in another hybrid case); *id.* at 1215 (Pryor, J., concurring); *id.* (Newsom, J., concurring); *see also infra* Section II.B.3.

whether it needed to arbitrate its wrongful death claims—although the justices called this outcome "odd[]" and conceded that "the dispute here did not arise out of a contract between the parties."[54] Conversely in two other tort cases against Airbnb with similar facts, a federal district judge in Maryland and an Illinois appellate court ignored the delegation clause, reasoning that the plaintiffs "had nothing to do with booking the property on Airbnb [and their] injuries did not arise from [their] use of the Airbnb platform."[55]

Likewise, there is a massive split in authority about delegation clauses and non-signatories. Can arbitrators decide whether an outsider has standing to enforce an arbitration provision? This common fact pattern presents a "logical conundrum."[56] Some courts conceptualize it as a question about the *scope* of the arbitration clause: a quotidian matter of contract *interpretation* that arbitrators are equipped to handle.[57] But others see it as a question of contract *formation*. After all, "[i]f the nonsignatories are not parties to the contract, then the [p]laintiff has no agreement with them."[58] And since "an arbitrator derives his or her powers from the parties' agreement,"[59] allowing an arbitrator to determine *whether* an individual has consented to arbitrate against a particular defendant would give the arbitrator an authority they have not yet earned.[60]

Finally, the Article outlines three proposals that would resolve this confusion. The first is the "contractual nexus" theory. In an earlier paper, I noted that section 2, the FAA's centerpiece, applies solely to agreements to arbitrate causes of action that "aris[e] out of" the container contract.[61] Thus, my argument continued, state law—which fills the FAA's gaps with rules that give courts more leeway to regulate arbitration—governs when a claim does not pertain to the underlying transaction.[62] Since then, a few judges have either gestured towards the contractual nexus theory or tentatively

54. Airbnb, Inc. v. Rice, 518 P.3d 88, 91 (Nev. 2022).

55. Peterson v. Devita, 237 N.E.3d 1010, 1013 (Ill. App. Ct. 2023); *accord* Matthew-Ajayi v. Airbnb, Inc., No. 23-3035, 2024 WL 1769186, at *2 (D. Md. Apr. 24, 2024).

56. O'Connor v. Ford Motor Co., No. 19-cv-5045, 2023 WL 130522, at *5 (N.D. Ill. Jan. 9, 2023).

57. *See, e.g.*, Becker v. Delek US Energy, Inc., 39 F.4th 351, 356 (6th Cir. 2022).

58. Swiger v. Rosette, 989 F.3d 501, 507 (6th Cir. 2021) (quoting De Angelis v. Icon Ent. Grp. Inc., 364 F. Supp. 3d 787, 796 (S.D. Ohio 2019)).

59. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682 (2010).

60. *See, e.g.*, Rogers v. Tug Hill Operating, LLC, 76 F.4th 279, 288 (4th Cir. 2023).

61. Horton, *supra* note 37, at 678; *see also id.* at 678–82.

62. *See id.* at 681–82.

adopted it[63] while others have ignored it[64] or expressed reservations.[65] Accordingly, this Article seeks to conclusively establish that the current Supreme Court, which is staunchly textualist, would embrace the contractual nexus theory.[66] This means that judges can use state law principles that the FAA would normally preempt to deny some motions to compel accidental arbitration.[67]

Second, the Article urges courts to reject corporate efforts to create artificial privity. The fact that a drafter names scores of potential co-defendants as "parties" to the arbitration provision does not make it so. Instead, contract law distinguishes between (1) "parties" or "signatories" and (2) "third parties" or "non-signatories."[68] The test is straightforward: Did a person or entity *manifest assent* to the transaction?[69] And the outcome can be dispositive: Because contracts draw their normative force from consent, parties/signatories can directly enforce an arbitration agreement, but third parties/non-signatories must jump through the additional hoop of meeting an exception to the privity requirement such as third-party beneficiary doctrine.[70] When firms name other entities as "non-signatory part[ies],"[71] they are illicitly trying to confer privity upon litigants who never agreed to be bound.[72]

Third, the Article explains why even when a contract has a delegation clause, courts, not arbitrators, should determine whether to compel accidental arbitration. For starters, the contractual nexus theory recognizes that the crucial question when an allegation does not seem to relate to the

63. *See, e.g.*, Johnson v. Walmart Inc., 57 F.4th 677, 681 (9th Cir. 2023); Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1213 (11th Cir. 2021); Revitch v. DIRECTV, LLC, 977 F.3d 713, 722 (9th Cir. 2020) (O'Scannlain, J., concurring); McFarlane v. Altice USA, Inc., 524 F. Supp. 3d 264, 278–79 (S.D.N.Y. 2021); Mey v. DIRECTV, LLC, No. 17-CV-179, 2021 WL 973454, at *11 (N.D.W. Va. Feb. 12, 2021). As this Article was deep in the editing stage, the Second Circuit gave the contractual nexus theory the most full-throated endorsement to date. *See* Davitashvili v. Grubhub Inc., 131 F.4th 109, 119 (2d Cir. 2025) ("The FAA's scope is limited to 'agreements to arbitrate controversies that "arise out of" the parties' contractual relationship'—that is, controversies that were 'cause[d]' by the relationship." (quoting Viking River Cruises, Inc. v. Moriana, 596 U.S. 639, 652 n.4 (2022))).

64. *See, e.g.*, Mey v. DIRECTV, LLC, 971 F.3d 284, 293 (4th Cir. 2020); Smith v. Walmart, Inc., No. 22-cv-00568, 2023 WL 5215376, at *4–5 (W.D. Va. Aug. 14, 2023).

65. *See, e.g.*, Hetrick Cos. v. IINK Corp., 710 F. Supp. 3d 467, 491–92 (E.D. Va. 2024).

66. *See infra* Section III.A.

67. *See infra* Section III.A.

68. *See, e.g.*, Baldwin v. Cavett, 502 F. App'x 350, 353 (5th Cir. 2012) (calling this an "important distinction").

69. *See id.*

70. *See, e.g.*, Lesieur v. Fryar, 325 S.W.3d 242, 251 (Tex. App. 2010) ("Generally, to enforce a contract, the person or entity seeking to enforce it must be either a party to the contract or a third-party beneficiary to it.").

71. Outokumpu Stainless USA, LLC v. Coverteam SAS, No. 17-10944, 2022 WL 2643936, at *2 (11th Cir. July 8, 2022).

72. *See infra* Section III.B.

container contract is whether the FAA governs.[73] In turn, because the Justices have strongly implied that arbitrators cannot decide if the statute applies, this is a topic "that a court should decide for itself."[74] Likewise, to establish artificial privity, a non-signatory party needs to show that it agreed to the drafter's arbitration provision, and "the existence of an agreement" is a topic that "court[s] necessarily ha[ve] to decide."[75] Accordingly, judges should determine who is a party/signatory and who is not. Finally, and similarly, courts must resolve attempts by non-signatories to latch onto someone else's arbitration clause under third-party beneficiary principles.[76] A plaintiff who contests a non-signatory's standing to compel arbitration argues that they did not agree to arbitrate *anything*—including whether the lawsuit must be arbitrated—with the contractual outsider.[77] Once again, because arbitration flows from consent, it would be circular to allow the arbitrator to determine whether the plaintiff agreed to arbitrate.

Finally, I should clarify how this Article builds upon my prior work. As noted, this paper is a sequel to a piece I published in 2020 called *Infinite Arbitration Clauses*.[78] By an "infinite arbitration clause," I essentially meant one that is extremely broad.[79] *Infinite Arbitration Clauses* concluded with a brief section urging courts to implement the contractual nexus theory and to hold that section 2 of the FAA does not govern efforts to compel arbitration of claims that are unrelated to the container contract.[80] This Article adds four main contributions. First, it updates my previous analysis to include a flood of decisions that appeared after *Infinite Arbitration Clauses* came out.[81] Second, it identifies and critiques the use of artificial privity.[82] Third, it analyzes the original public meaning of section 2 to reveal that conservative, textualist Justices would be persuaded by the contractual nexus theory.[83] Fourth, it offers new insights about the role of delegation clauses in accidental arbitration cases.[84]

The Article contains three Parts. Part I describes how the Court enlarged the FAA's impact, fueling the perception that a successful request for arbitration is the practical equivalent to prevailing on a dispositive motion.

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73. *See infra* Section III.C.
74. New Prime Inc. v. Oliveira, 586 U.S. 105, 111 (2019).
75. Garcia v. Stoneledge Furniture LLC, 321 Cal. Rptr. 3d 181, 189 (Ct. App. 2024).
76. *See infra* Section III.C.
77. *See infra* text accompanying note 392.
78. *See* Horton, *supra* note 37.
79. *See id.* at 639–40 (using this phrase as a shorthand for arbitration agreements that apply to all claims between the parties, govern non-signatories, and survive termination of the container agreement).
80. *See id.* at 678–83.
81. *See infra* Part II.
82. *See infra* Section II.B.2, Section III.B.
83. *See infra* Section III.A.
84. *See infra* Section III.C.

Part II explains how these high stakes have sown the seeds of accidental arbitration and generated doctrinal chaos. Part III offers solutions to these problems by fleshing out the contractual nexus theory, exposing artificial privity as a sham, and imploring judges to ignore delegation clauses in accidental arbitration cases.

I. FORCED ARBITRATION

This Part provides background by sketching the FAA's history. It explains how the statute rose from relative obscurity to become a juggernaut.

Congress passed the FAA in 1925.[85] At common law, two arbitration-specific principles, the ouster and revocability doctrines, made it difficult to obtain specific performance of a pre-dispute arbitration clause.[86] The FAA abolished these rules through its centerpiece, section 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[87]

By barring courts from applying unique anti-arbitration measures, lawmakers put arbitration clauses "upon the same footing as other contracts."[88]

The FAA contains three other provisions that are relevant for my purposes. For starters, section 1 declares that section 2's enforcement mandate does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[89] As I will discuss later, this exclusion has been a fount of interpretive disputes.[90] Also, sections 3 and 4 of the FAA instruct courts to act as gatekeepers to the arbitral forum by hearing disputes about "the making of the agreement for arbitration"[91] and compelling arbitration if they are "satisfied that the issue involved . . . is referable to arbitration."[92]

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85. *See* Federal Arbitration Act, 9 U.S.C. §§ 1–16.

86. *See* Kill v. Hollister (1746) 95 Eng. Rep. 532, 532 (KB); Vynior's Case (1609) 77 Eng. Rep. 597, 599 (KB).

87. 9 U.S.C. § 2.

88. H.R. REP. NO. 68-96, at 1 (1924).

89. 9 U.S.C. § 1.

90. *See infra* text accompanying notes 118–19, 303–04.

91. 9 U.S.C § 4.

92. *Id.* § 3.

Unfortunately, the FAA provides little guidance about other important issues. Indeed, because the law is "a relic from a far more innocent age of drafting,"[93] its text is relatively threadbare. Thus, for the first five decades of the FAA's existence, judges and commentators often filled its gaps by consulting its legislative history.[94] With varying degrees of clarity, these sources suggested that Congress intended the statute to apply only in federal court[95] and govern breach of contract allegations.[96] Thus, until the late twentieth century, the FAA was widely seen as little more than "a tool for resolving commercial disputes between businesspeople."[97]

Matters changed dramatically during the tort reform movement of the 1980s. As concern mounted about the litigation "explosion,"[98] the Court declared in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* that section 2 of the FAA embodies a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[99] *Moses Cone* created a powerful presumption that causes of action fall within the ambit of an arbitration clause.[100] To be sure, when courts decide whether someone assented to the container contract, they apply "ordinary state-law principles that govern the formation of

93. Alan Scott Rau, *Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions*, 14 AM. REV. INT'L ARB. 1, 32 (2003).

94. *See, e.g.*, Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 201–02 (1956) (consulting the FAA's legislative record to reject the argument that section 3 applies more broadly than sections 1 and 2); Note, *Enforceability Under the United States Arbitration Act: Collective Bargaining Agreements and Contracts Not "Involving Commerce,"* 63 YALE L.J. 729, 732 (1954) ("The legislative history of the Arbitration Act indicates that Congress intended to exclude all employment contracts from its operation.").

95. *See Joint Hearings*, *supra* note 15, at 37 (declaring that the FAA "is no infringement upon the right of each [s]tate"); Roger H. Broach, Note, *Arbitration—Under the Federal Arbitration Act in a Diversity Suit an Allegation of Fraudulent Inducement to a Contract Involving Interstate Commerce Will Not Prevent Enforcement of a Broad Arbitration Clause in the Contract*, 46 TEX. L. REV. 260, 262 (1967) ("[T]he legislative history of the Act strongly indicated that it rested upon the power of Congress to prescribe federal court procedures.").

96. *See* Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926) (describing arbitration as "peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact"); Wilko v. Swan, 346 U.S. 427, 435 (1953) (exempting securities claims from the FAA because "[d]etermination of the quality of a commodity or the amount of money due under a contract is not the type of issue here involved"), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

97. Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1428–29 (2008).

98. *See, e.g.*, Maurice Rosenberg, *Let's Everybody Litigate?*, 50 TEX. L. REV. 1349, 1350–59 (1972) (asserting that Americans are "litigating more frequently" and "defining as legal problems more and more forms of the distresses, anxieties, and wounds they once regarded as the slings and arrows of outrageous fortune").

99. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

100. *See, e.g.*, Big Y Foods, Inc. v. Conn. Props. Tri-Town Plaza, LLC, 985 F. Supp. 232, 235 (D. Conn. 1998) (relying on *Moses Cone* for the proposition that "[i]n accordance with the strong federal policy favoring arbitration, [a] broad arbitration agreement creates a presumption of arbitrability" (citing WorldCrisa Corp. v. Armstrong, 129 F.3d 71, 74 (2d Cir. 1997) (citing *Moses Cone*, 460 U.S. at 24–25))).

contracts."[101] However, if a party *did* agree, then federal law kicks in, and the judge must resolve "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration."[102] Similarly, the Justices held that section 2 of the statute applies in state court[103] and preempts any state law that treats an arbitration agreement as unfair just because it is an arbitration agreement.[104] Finally, the Court declared that arbitration was an adequate substitute for litigation and upheld agreements to arbitrate violations of federal securities,[105] antitrust,[106] racketeering,[107] and anti-discrimination laws.[108]

Plaintiffs' lawyers, public interest groups, and scholars tried to stem this tide. Some protested that "consumers and employees don't typically read or understand [arbitration] clauses"[109] and that forced arbitration is not "the product of 'consent,' 'agreement' or 'bargaining.'"[110] But courts were not convinced. Because contract law defines assent objectively, a person's lack of awareness that they were surrendering their procedural rights was irrelevant; rather, the dispositive fact was that they had "take[n] action[]—such as signing their names on a document or saying certain words—that would lead a reasonable person to believe that they have assented to the terms of the contract."[111]

In addition, anti-arbitration advocates tried to wave the banner of states' rights. To appeal to conservative Justices, they contended that the FAA was drowning out the voices of state legislators and judges.[112] For example, when the FAA applied, it eclipsed laws in more than twenty states that voided pre-dispute arbitration clauses in employment, tort, or insurance contracts.[113] But although federalism arguments convinced a few members of the Court—Justice Thomas dissents from any opinion that involves the

101. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995).
102. *Moses Cone*, 460 U.S. at 24–25.
103. *See* Southland Corp. v. Keating, 465 U.S. 1, 14–16 (1984).
104. Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987).
105. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989).
106. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).
107. *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 242 (1987).
108. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991).
109. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1649 (2005).
110. Schwartz, *supra* note 13, at 58.
111. Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 113–14 (1996); *see also* Lockhart v. Gen. Motors Corp, No. CV-01-2052, 2001 WL 1262922, at *3 (C.D. Cal. Sept. 14, 2001) (explaining that it does not matter "if plaintiff did not read or understand the agreement").
112. *See, e.g.*, Transcript of Oral Argument at *32, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) (No. 93-1001) (noting that twenty state attorneys general had urged the Court to reconsider its views that the FAA applied in state court and preempted state law).
113. *See* Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 438 n.280 (1998).

FAA in state court[114]—they never carried the day.[115] The Court voided state anti-arbitration law after state anti-arbitration law, declaring that jurisdictions cannot "singl[e] out arbitration provisions for suspect status."[116]

Finally, litigants gained little traction by citing the FAA's legislative record.[117] Rather than engaging with the hearings or reports on the FAA, the Court relied on the statute's "pro-arbitration" purposes and selectively parsed its text for support.[118] For example, in 2001's *Circuit City Stores, Inc. v. Adams*, the Justices ignored evidence that Congress had understood section 1 of the FAA to flatly exempt employment contracts[119] and cited "the advantages of the arbitration process" to hold that the statute only excludes "transportation workers."[120] Thus, the Court transformed the FAA from a minor star in the civil justice galaxy into a claim-sucking black hole.

Then, in the 2010s, the Court upped the wattage of the FAA again in two ways. First, in a series of politically polarized, five-four decisions, the Justices effectively held that by merely agreeing to arbitrate, plaintiffs waive their right to file class actions.[121] A chorus of critics has argued that

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114. *See, e.g.*, Viking River Cruises, Inc. v. Moriana, 596 U.S. 639, 665 (2022) (Thomas, J., dissenting).

115. *See Allied-Bruce Terminix*, 513 U.S. at 269 (holding that the FAA preempts an Alabama statute that makes pre-dispute arbitration clauses unenforceable); *id.* at 282 (O'Connor, J., concurring) (same); Perry v. Thomas, 482 U.S. 483, 491 (1987) (same for a California law that exempts wage disputes from arbitration).

116. Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996); *see also supra* text accompanying note 115.

117. *See, e.g.*, Brief for Respondent at *4, *7–8, Cir. City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (No. 99-1379) (relying heavily on the FAA's legislative record to argue that Congress did not intend the statute to apply to employment contracts); Transcript of Oral Argument, *supra* note 112, at *26, *32, *42–44, *49 (repeatedly referring to the FAA's legislative history in an attempt to show that it was not supposed to preempt state law).

118. *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 14–16 (1984) (holding that section 2 of the FAA applies in state court although sections 3 and 4 only apply to federal courts).

119. Recall that section 1 states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. In 1925, few employment contracts were subject to Congress's then-feeble Commerce Clause power. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 272 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941). Accordingly, section 2, which governs arbitration clauses in contracts in interstate commerce, could only apply to workers in the transportation industry, who shuttled between states on the job. Thus, by excluding "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, Congress meant to exempt the only employment contracts to which section 2 could possibly apply. *See Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing Before a Subcomm. of the Comm. on the Judiciary on S. 4213 and S. 4214*, 67th Cong. 9, 14 (1923).

120. Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 121, 123 (2001).

121. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (holding that the FAA preempts a California Supreme Court opinion that allowed courts to find some class arbitration waivers to be unconscionable); Lamps Plus, Inc. v. Varela, 587 U.S. 176, 186 (2019) (prohibiting judges from using a contract's "silence or ambiguity" about whether class arbitration is permissible to find that parties agreed to such procedures).

by forcing consumers and employees to arbitrate their own low-value claims—which few, if any, will do—the Court gave businesses license to print their own "'get out of jail free' card[s]."[122]

Second, the Court expanded the jurisdiction of arbitrators over gateway issues related to the arbitration. As mentioned, sections 3 and 4 of the FAA entrust courts with deciding whether a claim falls within the scope of a valid arbitration clause.[123] However, the Justices determined that these provisions are default rules, and that parties can assign these topics to arbitrators if there is "'clea[r] and unmistakabl[e]' evidence" that they wished to do so.[124] This prompted corporations to experiment with delegation provisions, which send disputes about arbitration *to* arbitration.[125] The idea is that arbitrators, who bill by the hour, have financial incentives to reject plaintiffs' arguments that arbitration is unwarranted.[126]

To summarize, the FAA is a formidable hurdle for anyone who sues a business. Lawyers on both sides regard arbitration demands as akin to

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122. Thomas O. Main, *Arbitration, What Is It Good For?*, 18 NEV. L.J. 457, 475 n.54 (2018) (citing Maureen A. Weston, *The Death of Class Arbitration After* Concepcion*?*, 60 U. KAN. L. REV. 767, 770 (2012)). Although it is outside the scope of this Article, I should note that some plaintiffs' lawyers have turned the tables on defendants by filing "mass arbitrations": scores of individual claims designed to bully firms into settling rather than having to pay hefty administrative fees. *See* J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1289 (2022); David Horton, *The Arbitration Rules: Procedural Rulemaking by Arbitration Providers*, 105 MINN. L. REV. 619, 674 (2020).

123. *See supra* text accompanying notes 91–92.

124. Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 69 n.1 (2010) (quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995)).

125. *See, e.g.*, Coinbase, Inc. v. Suski, 602 U.S. 143, 146 (2024) (featuring a clause stating that "disputes arising out of or related to the interpretation or application of the [a]rbitration [a]greement . . . . *shall be decided by an arbitrator and not by a court or judge*" (quoting Joint Appendix - Volume I of II at *218, *Coinbase, Inc.*, 602 U.S. 143 (No. 23-3))).

126. *See* David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 410–11 (2018). Some background can help explain why delegation clauses are so potent. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 402 (1967), the Court recognized the separability doctrine, a legal fiction that divides every agreement with an arbitration clause into two contracts: the container contract and the agreement to arbitrate. To slightly oversimplify, this rule means that a plaintiff who only contests the validity of the container contract (for instance, by arguing that it was fraudulently induced) has not attacked the freestanding arbitration clause, which applies and sends the issue to the arbitrator. *See id.* at 402–03. The only way to have a court preside is to attack the arbitration provision specifically. *See id.* at 403–04. In *Rent-A-Ctr.*, 561 U.S. at 68–69, the Court took separability to the next level by casting delegation clauses as miniature, self-contained arbitration agreements. As Justice Scalia's majority opinion put it, a "delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Id.* at 68. Under the separability doctrine, then, contracts with delegation and arbitration clauses are three contracts: (1) the agreement to arbitrate whether to arbitrate, (2) within the agreement to arbitrate the merits, and (3) within the container contract. *See* Horton, *supra*, at 375. In turn, this means that plaintiffs must arbitrate any attack on the contract—including an argument that the arbitral regime is stacked against them—unless they can explain why they should not be forced to arbitrate the discrete question of whether they need to arbitrate the merits. *See Rent-A-Ctr.*, 561 U.S. at 72–76.

motions to dismiss or for summary judgment.[127] And as I discuss next, this view has spawned a growing number of attempts to compel arbitration based on contracts that have little to do with the dispute or the defendant (or both).

II. ACCIDENTAL ARBITRATION

This Part describes the rise of accidental arbitration: the burgeoning practice of corporations invoking boundless arbitration agreements in unpredictable ways. This Part begins by exploring the roots of this movement. It then offers a taxonomy of types of accidental arbitration and reveals that each has divided courts.

A. Origins

As noted, for about fifteen years, the perception has been that being made to arbitrate is the "death knell for consumer and workers' rights cases."[128] As a result, plaintiffs' attorneys have gone to great lengths to sue companies that do not seem to be able to force arbitration. In turn, firms have expanded the coverage of their arbitration clauses and pursued any plausible theory that arbitration is warranted. This section explains how this dynamic breeds accidental arbitration.

The Court's FAA opinions during the 2010s sent the plaintiffs' bar scrambling. Because many consumer and employment agreements have arbitration clauses, it no longer seemed desirable to represent anyone who had formed a contract with the defendant.[129] The legal system therefore experienced a spate of class actions against food makers for mislabeling their products,[130] vehicle manufacturers for breaching implied warranties,[131]

127. The best evidence of the fact that attorneys view motions to compel in the same vein as dispositive motions is the fact that they fight tooth-and-nail over them. *See, e.g.*, Cheatham v. Va. Coll., LLC, No. 19-cv-04481, 2020 WL 5535684, at *1 (N.D. Ga. Sept. 15, 2020) (complaining that "[t]his is another arbitration dispute in which the parties are litigating whether or not they should be litigating" (quoting Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1329 (11th Cir. 2005))).

128. Matthew Fritz-Mauer, *Naked Class Waivers*, 102 OR. L. REV. 109, 127 (2023); *see also supra* text accompanying note 122.

129. *See, e.g.*, CellInfo, LLC v. Am. Tower Corp., 506 F. Supp. 3d 61, 64 (D. Mass. 2020) (describing why arbitration "chills lawyers' enthusiasm to take cases").

130. *See, e.g.*, David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 1029 (2017) (explaining that "around 2010, attorneys began to file a large number of putative class actions challenging the labeling of mass-market foods and beverages"); Pardini v. Unilever U.S., Inc., No. 13-cv-01675, 2015 WL 1744340, at *1 (N.D. Cal. Apr. 15, 2015) (involving a class action challenging the nutrition information on "I Can't Believe It's Not Butter! Spray").

131. *See, e.g.*, Ngo v. BMW of N. Am., LLC, 23 F.4th 942, 947 (9th Cir. 2022) (citing several similar lawsuits); Ruderman v. Rolls Royce Motor Cars, LLC, 511 F. Supp. 3d 1055, 1059 (C.D. Cal. 2021) (remarking that "[t]his type of case is not new"), *appeal dismissed per stipulation sub nom.* Ruderman v. Rolls Royce Motor Cars NA, LLC, No. 21-55068, 2021 WL 3142040 (9th Cir. June 1, 2021).

debt collectors for abusive practices,[132] firms for underpaying temp workers provided by staffing companies,[133] and various enterprises for placing illegal robocalls.[134] The common denominator in these lawsuits is that these entities do not contract directly with the claimant.

Defendants responded by turning to the queen on the chessboard: their total dominion over fine print. For one, they tried to plug gaps in the coverage of their arbitration clauses. Traditionally, drafters used "broad" provisions, which mandate arbitration for allegations "arising out of or relating to" the container agreement.[135] Judges generally find that broad arbitration agreements extend to claims that are a step removed from the parties' transaction, such as torts and antitrust violations.[136] But even broad provisions require "some direct relationship between the dispute and the performance of duties specified by the contract,"[137] which means that they do not cover claims "that are unrelated to the agreement, out of the context of the agreement, or outrageous and unforeseeable."[138] So corporate counsel innovated. They began writing arbitration clauses that are "not limited to disputes arising from or related to the transaction."[139] These "infinite" provisions govern wrongdoing of any kind, like "a punch in the nose during a dispute over a medical billing."[140]

Likewise, companies extended their arbitration clauses to their potential allies. When a plaintiff sues multiple defendants, each of them has an interest in sending the dispute to the arbitral forum, where they need not

132. *See, e.g.*, Estrada v. Moore L. Grp., APC, No. 22-cv-01594, 2022 WL 2666924, at *1 (C.D. Cal. July 11, 2022); Page v. N.A.R. Inc., No. 18-cv-2200, 2019 WL 1370146, at *1 (D.N.J. Mar. 26, 2019); Brown v. Firstsource Advantage, LLC, No. 17-5760, 2019 WL 568935, at *1 (E.D. Pa. Feb. 12, 2019).

133. *See, e.g.*, Bock v. Salt Creek Midstream LLC, No. 19-1163, 2020 WL 3989646, at *1 (D.N.M. July 15, 2020) (mentioning "a wave of garden-variety, wage-and-hour disputes between workers in the oil and gas industry and the business entities they allege to be their employers"), *findings and recommendations adopted*, No. 19-1163, 2020 WL 5640669 (D.N.M. Sept. 22, 2020).

134. For example, in 2007, plaintiffs filed fourteen TCPA class actions. Stuart L. Pardau, *Good Intentions and the Road to Regulatory Hell: How the TCPA Went from Consumer Protection Statute to Litigation Nightmare*, 2018 U. ILL. J.L. TECH. & POL'Y, 313, 322. By 2014, this number had exploded to more than 2,000. Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 8084 (2015) (O'Rielly, Comm'r, dissenting in part and approving in part), *set aside in part by* ACA Int'l v. FCC, 885 F.3d 687 (D.C. Cir. 2018).

135. Frazer v. Rhoads, No. A167455, 2024 WL 356834, at *6 (Cal. Ct. App. Jan. 31, 2024).

136. *See, e.g.*, Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 721 (9th Cir. 1999) (observing that, to be arbitrable under a broad clause, the "factual allegations need only 'touch matters' covered by the contract containing the arbitration clause" (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614, 624 n.13 (1985))); Spain v. Johnson, 711 F. Supp. 3d 1260, 1264 (D. Colo. 2024) (compelling arbitration of personal injury allegations); *In re* Remicade (Direct Purchaser) Antitrust Litig., 938 F.3d 515, 523 (3d Cir. 2019) (same for antitrust complaint).

137. Hearn v. Comcast Cable Commc'ns, LLC, 992 F.3d 1209, 1213 (11th Cir. 2021) (quoting Doe v. Princess Cruise Lines, Ltd., 657 F.3d 1204, 1218 (11th Cir. 2011)).

138. Clay v. N.M. Title Loans, Inc., 288 P.3d 888, 896 (N.M. Ct. App. 2012).

139. *In re* Jiffy Lube Int'l, Inc., Text Spam Litig., 847 F. Supp. 2d 1253, 1262 (S.D. Cal. 2012).

140. Med. Staff of Drs. Med. Ctr. v. Kamil, 33 Cal. Rptr. 3d 853, 857 (Ct. App. 2005).

monitor parallel proceedings and may be less likely to be found vicariously liable or ordered to pay indemnity.[141] And although the doctrine of privity only allows the parties to a contract to assert rights under it,[142] the FAA absorbs "'traditional principles' of state law [that] allow a contract to be enforced by . . . nonparties,"[143] including the rule that third-party beneficiaries can invoke an arbitration clause if the parties "clear[ly]" so intended.[144] Therefore, some corporations practically declare that anyone on their side of the "v." in the case caption is a third-party beneficiary of their arbitration agreement.[145]

In sum, modern consumer and employment litigation often features plaintiffs who do not seem to be in a contractual relationship with the defendant. But at the same time, these people assert claims that, at least on paper, fall within the orbit of a capacious arbitration provision. As I discuss next, this scenario has been wreaking havoc in the courts.

B. Cases

This section reveals that accidental arbitration can occur where (1) there is no link between a cause of action and the container contract, (2) the defendant is not a party/signatory, (3) a lawsuit involves both unrelated allegations and an outsider defendant, or (4) there is a battle over whether any of these issues can be delegated to the arbitrator. It shows that each of these topics has proven deeply vexing.

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141. *See, e.g.*, Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1211 (11th Cir. 2021) (noting that drafters might wish to mandate arbitration of claims against third parties to avoid being embroiled in the litigation and to avoid "downstream liability").

142. *See* C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 79 (Bos., Little, Brown & Co. 2d ed. 1880) ("[The principle] that a person for whose benefit a promise was made, if not related to the promisee, could not sue upon the promise. . . . is so plain upon its face that it is difficult to make it plainer by argument.").

143. Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631 (2009) (quoting 21 WILLISTON ON CONTRACTS § 57:19 (4th ed. 2001)). Other theories by which non-signatories commonly try to enforce arbitration clauses include equitable estoppel and agency. *See, e.g.*, Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531, 569–87 (2014).

144. First Bank v. Brumitt, 519 S.W.3d 95, 103 (Tex. 2017) ("['T]he presumption' that the parties contracted solely 'for themselves,' [can only be overcome via] 'a clear expression of the intent to create a third-party beneficiary . . . .'" (quoting Corpus Christi Bank & Tr. v. Smith, 525 S.W.2d 501, 503–04 (Tex. 1975))).

145. *See, e.g.*, Batty v. Experian Info. Sols., Inc., No. 20-CV-1716, 2020 WL 10817762, at *2 (N.D. Tex. Oct. 7, 2020) (covering "[c]laims made by or against anyone connected with us or you or claiming through us or you, or by someone making a claim through us or you, such as a coapplicant, authorized user, employee, agent, representative or any affiliated/parent/subsidiary company").

1. Unrelated Claims

In rising numbers, corporations are trying to compel arbitration of claims that are unrelated to the parties' agreement. Judges do not see eye-to-eye about how to analyze these requests.

Initially, courts refused to enforce boundless arbitration agreements. The most influential such decision, *Smith v. Steinkamp*, came from the Seventh Circuit in 2003.[146] Sheila Smith took out two payday loans from Instant Cash, Inc.[147] The first required arbitration for "all claims asserted by you . . . against us," but the second did not mention arbitration.[148] When Smith alleged that the second loan was illegal, Instant Cash tried to enforce the arbitration clause in the first loan.[149] In an opinion written by Judge Posner, the court held that reading the infinite language literally would lead to ludicrous results:

> [I]f Instant Cash murdered Smith in order to discourage defaults and her survivors brought a wrongful death suit against Instant Cash . . . , Instant Cash could insist that the wrongful death claim be submitted to arbitration. For that matter, if an employee of Instant Cash picked Smith's pocket when she came in to pay back the loan, and Smith sued the employee for conversion, he would be entitled to arbitration of her claim. It would make no difference that the conversion had occurred in Smith's home 20 years after her last transaction with Instant Cash.[150]

In addition, Judge Posner suggested that Instant Cash's arbitration dragnet "might be thought unconscionable."[151] Shortly afterwards, a federal judge in California, the South Carolina Supreme Court, and appellate courts in Kentucky and Oklahoma followed *Smith* and either (1) interpreted infinite clauses only to cover foreseeable allegations[152] or (2) found that ordering arbitration of claims with "little connection to the underlying

146. *See* Smith v. Steinkamp, 318 F.3d 775, 777 (7th Cir. 2003).
147. *See id.* at 775.
148. *Id.* at 776; *see id.* at 777.
149. *See id.* at 777.
150. *Id.* at 777.
151. *Id.* at 778.
152. *See* Aiken v. World Fin. Corp., 644 S.E.2d 705, 709 (S.C. 2007) ("Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this [c]ourt will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings."); Rust v. Carriage Servs. of OK, Inc., 173 P.3d 805, 809 (Okla. Civ. App. 2007) (holding that an infinite arbitration clause "does not apply to disputes arising from the relationship of the parties commenced by [an] earlier agreement").

agreement" would be grossly unfair.[153] Accordingly, judges agreed that "even the broadest arbitration clauses obviously cannot cover every type of dispute that might arise."[154]

But this consensus dissolved during the arbitration revolution of the 2010s. As mentioned, the Court handed defendants a long winning streak in FAA cases.[155] Although none of these opinions grappled with infinite clauses, they reinforced that judges "must enforce arbitration contracts according to their terms"[156] and cannot apply contract rules in a fashion that deems arbitration to be inferior to litigation.[157]

Since this tectonic shift, some courts have implied or held that there is nothing wrong with a clause "that requires arbitration of all disputes between the parties."[158] These judges accuse cases like *Smith* of inverting the *Moses Cone* directive by "asking whether the arbitration agreement could be interpreted *not* to cover this dispute."[159] For instance, in *Haasbroek v. Princess Cruise Lines, Ltd.*, Michelle Haasbroek started a job in a spa on a cruise ship and agreed to arbitrate "[a]ny and all disputes, claims, or controversies whatsoever."[160] While the vessel was at sea, Haasbroek was raped and impregnated by a colleague.[161] Later, she sued her employer for failing to ensure her safety.[162] She argued that the arbitration clause did not apply because the attack occurred while "she was off-duty and in a residential area of the ship 'far' from the area where she was assigned to carry out her contractual duties."[163] Yet a Florida district court found that this disconnect between the wrongdoing and Haasbroek's employment

153. Valued Servs. of Ky., LLC v. Watkins, 309 S.W.3d 256, 265 (Ky. Ct. App. 2009); *In re* Jiffy Lube Int'l, Inc., Text Spam Litig., 847 F. Supp. 2d 1253, 1263 (S.D. Cal. 2012) ("[A] tort action arising from a completely separate incident could not be forced into arbitration—such a clause would clearly be unconscionable.").

154. RN Sol., Inc. v. Cath. Healthcare W., 81 Cal. Rptr. 3d 892, 902 (Ct. App. 2008).

155. *See supra* Part I.

156. Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63, 67 (2019) (citing Rent-A-Ctr., Inc. v. Jackson, 561 U.S. 63, 67 (2010)).

157. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341–42 (2011) (opining that the FAA would preempt "a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery" or "that fail to abide by the Federal Rules of Evidence").

158. Hearn v. Comcast Cable Commc'ns, LLC, 992 F.3d 1209, 1213 (11th Cir. 2021) (quoting Bd. of Trs. v. Citigroup Glob. Mkts. Inc., 622 F.3d 1335, 1343 (11th Cir. 2010)); *see also* Smith v. Walmart, Inc., No. 22-cv-00568, 2023 WL 5215376, at *4, *4 n.3 (W.D. Va. Aug. 14, 2023) (ordering arbitration of claims that do not relate to the container contract based on the arbitration provision's infinite scope).

159. Mey v. DIRECTV, LLC, 971 F.3d 284, 292 (4th Cir. 2020).

160. Haasbroek v. Princess Cruise Lines, Ltd., 286 F. Supp. 3d 1352, 1355 (S.D. Fla. 2017).

161. *See id.*

162. *See id.*

163. *Id.* at 1358.

contract was "irrelevant" because the arbitration provision was not restricted to "claims arising from, or relating to, employment."[164]

However, most judges still refuse to order arbitration of causes of action that are untethered to the container contract. Three aspects of these opinions stand out. First, in a break from *Smith*, they no longer frame the issue as contract *interpretation*. Instead, they conceptualize the inquiry as contract *formation*—to which *Moses Cone*'s presumption in favor of arbitration does not apply.[165] Recall Eve Wexler's TCPA complaint against AT&T Corp. from the Introduction.[166] A federal district court in New York refused to honor Mobility's infinite clause:

> Notwithstanding the literal meaning of the clause's language, no reasonable person would think that checking a box accepting the "terms and conditions" necessary to obtain cell phone service would obligate them to arbitrate literally every possible dispute he or she might have with the service provider . . . . Rather, a reasonable person would be expressing, at most, an intent to agree to arbitrate disputes connected in some way to the service agreement with Mobility.[167]

Second, these decisions often find that infinite clauses are also unconscionable. For instance, in *McFarlane v. Altice USA, Inc.*, hackers stole the birthdays and social security numbers of 52,846 employees of telecommunications giant Altice USA.[168] Nine victims initiated a class action against Altice for failing to protect their data, prompting the company to seek arbitration of seven of these individuals' claims.[169] However, instead of invoking an arbitration clause in the plaintiffs' employment contracts, Altice cited the fluke that these individuals were Altice *cable subscribers*.[170] In turn, when they had signed up, they had accepted Altice's service terms, which mandate arbitration for "[a]ny and all disputes arising between [y]ou and Altice."[171] With little analysis, a New York federal judge held that enforcing the infinite clause in this scenario would be manifestly unfair.[172]

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164. *Id.* at 1360 n.8.

165. *See* Johnson v. Walmart Inc., 57 F.4th 677, 681 (9th Cir. 2023); McFarlane v. Altice USA, Inc., 524 F. Supp. 3d 264, 276–77 (S.D.N.Y. 2021); Wexler v. AT&T Corp., 211 F. Supp. 3d 500, 503–04 (E.D.N.Y. 2016); Peterson v. Devita, 237 N.E.3d 1010, 1015 (Ill. App. Ct. 2023).

166. *See supra* text accompanying notes 5–8.

167. *Wexler*, 211 F. Supp. 3d at 504; *accord McFarlane*, 524 F. Supp. 3d at 277.

168. *See McFarlane*, 524 F. Supp. 3d at 269.

169. *See id.* at 269–70.

170. *See id.* at 273.

171. *Id.*

172. *See id.* at 277–78. Similarly, other courts have deemed infinite clauses to be unconscionable when defendants try to enforce them against allegations that are "wholly divorced from the underlying . . . contract." Thomas v. Cricket Wireless, LLC, 506 F. Supp. 3d 891, 904 (N.D. Cal. 2020).

Third, if the FAA applies (a question I consider in Section III.A), then both strands of this majority view are vulnerable to preemption.[173] The flaw with the contract formation approach is that the plaintiff has agreed to the container contract, and once someone acts like they accept a deal, "a court will almost automatically find assent to all [of its] terms."[174] By finding that an individual only *partially* consented, these judges seem to be rewriting rather than applying conventional contract law.[175] Likewise, as noted, the FAA prohibits judges from treating arbitration as tainted.[176] Yet when courts find that it would be grossly inequitable to deem a plaintiff to have agreed to arbitrate all claims against a business, their logic only makes sense if there is something inappropriate about having to pursue relief in the private forum. Thus, even judges who are sympathetic to consumers and employees have worried that "deeming an arbitration clause [to be] unconscionable because it is too broad . . . applies a general contract defense 'in a fashion that disfavors arbitration.'"[177]

2. Non-Signatories

Another fertile source of accidental arbitration is motions to compel filed by non-signatories. Some of these litigants assert that they are third-party beneficiaries whereas others make the novel argument that they are party non-signatories.[178]

To be clear, most judges have found infinite clauses to be unconscionable only when a defendant tries to apply them to an unrelated claim. *See, e.g.*, Shalomayev v. Altice USA, Inc., No. 21-CV-5540, 2022 WL 2359406, at *8 (E.D.N.Y. June 30, 2022) (upholding Altice's cable contract when the plaintiff's claims "have a nexus" to that contract); Sapan v. DIRECTV, LLC, No. 22-cv-01600, 2023 WL 5505914, at *7 (C.D. Cal. June 9, 2023); Garcia v. Nabfly, Inc., No. 23 Civ. 1162, 2024 WL 1795395, at *9 (S.D.N.Y. Apr. 24, 2024). *But see* Cook v. Univ. of S. Cal., 321 Cal. Rptr. 3d 336, 347 (Ct. App. May 24, 2024) (deeming an infinite clause to be facially unconscionable).

173. I argue that the FAA does not govern these fact patterns. *See infra* Section III.A. To be fair, some courts in the majority camp have half-heartedly questioned whether the FAA applies. *See* Wexler v. AT&T Corp., 211 F. Supp. 3d 500, 505 (E.D.N.Y. 2016) (noting briefly that "the FAA explicitly limits itself to agreements 'to settle by arbitration a controversy thereafter *arising out of such contract or transaction*" (quoting 9 U.S.C. § 2)); *McFarlane*, 524 F. Supp. 3d at 278 (same).

174. Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 CASE W. RSRV. L. REV. 57, 72 (2012).

175. *See* Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775, 778 (2000) (noting that under traditional contract principles, "[a] light is either on or off; the parties have agreed to a contract or they haven't").

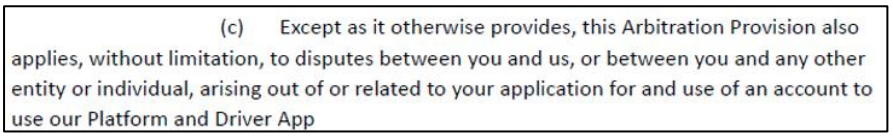
176. *See supra* text accompanying notes 99–101.

177. *Wexler*, 211 F. Supp. 3d at 505 (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011)). *But see McFarlane*, 524 F. Supp. 3d at 278 (reasoning that finding infinite provisions to be unconscionable does not discriminate against arbitration because the same rationale would "would apply equally to an 'infinite forum selection clause' or an 'infinite liability limitation clause'").

178. Outokumpu Stainless USA, LLC v. Coverteam SAS, No. 17-10944, 2022 WL 2643936, at *2 (11th Cir. July 8, 2022).

Arbitration demands by outsiders can seem to materialize out of the clear blue. For one, non-signatory defendants capitalize on the fact that drafters often extend arbitration rights to mammoth, open-ended categories of possible co-defendants.[179] Consider a class action brought by Uber drivers against Microsoft for providing facial recognition services that Uber had used without their consent.[180] Microsoft demanded arbitration even though it admitted that it had neither formed a contract with the plaintiffs nor even had any "direct interactions with [them]."[181] Instead, Microsoft contended that it was a third-party beneficiary of Uber's contract, which covered allegations against "any other entity . . . arising out of or related to . . . [Uber's] Platform and Driver App."[182] A federal judge in Illinois agreed, noting that Uber's clause "describe[s] a class to which [Microsoft] belongs."[183] Yet Microsoft's power to piggyback on Uber's contract was so difficult to discern that *Microsoft itself* did not notice it until the litigation had been pending for two years.[184]

FIGURE 4: EXCERPT FROM UBER'S ARBITRATION CLAUSE[185]


(c) Except as it otherwise provides, this Arbitration Provision also applies, without limitation, to disputes between you and us, or between you and any other entity or individual, arising out of or related to your application for and use of an account to use our Platform and Driver App

Unfortunately for non-signatory defendants, not every court is as permissive. For instance, in its oft-cited decision in *White v. Sunoco, Inc.*, the Third Circuit offered a different take on third parties and arbitration.[186] Donald White sued Sunoco, Inc., a chain of gas stations, for falsely promising to charge less for fuel purchased with a Citibank-issued Sunoco Rewards card.[187] Citibank's contract stated that "you or we may" elect

179. *See supra* text accompanying note 141.

180. *See* Notice of Removal at 4–7, Peña v. Microsoft Corp., No. 21-cv-03229 (N.D. Ill. Jun. 16, 2021).

181. Memorandum of Law in Support of Microsoft Corporation's Motion to Compel Arbitration and Stay Claims at 1, Kashkeesh v. Microsoft Corp., 679 F. Supp. 3d 731 (N.D. Ill. June 26, 2023) (No. 21-cv-03229) [hereinafter Microsoft Motion to Compel].

182. *Id.* at 4.

183. *Kashkeesh*, 679 F. Supp. 3d at 735.

184. *See id.* at 737. Because of this lag, the Uber drivers argued that Microsoft had waived its right to arbitrate. *See id.* at 736–37. The court disagreed, reasoning that waiver requires the intentional relinquishment of a known right, and Microsoft simply did not realize that it enjoyed the ability to compel arbitration under Uber's contract. *See id.* at 738–39.

185. *See* Microsoft Motion to Compel, *supra* note 181, at 4.

186. *See* White v. Sunoco, Inc., 870 F.3d 257 (3d Cir. 2017).

187. *See id.* at 260.

arbitration.[188] It defined "we" as "Citibank" but included a paragraph that seemed to expand the class of entities entitled to demand arbitration:

> Whose Claims are subject to arbitration? . . . [N]ot only ours and yours, but also claims made by or against anyone connected with us or you or claiming through us or you, such as a co-applicant or authorized user of your account, an employee, agent, representative, affiliated company, predecessor or successor, heir, assignee, or trustee in bankruptcy . . . .[189]

Sunoco argued that it fell within the scope of this clause because it helped market the card and was thus "connected with" Citibank.[190] The appellate panel disagreed. For one, the court opined that the language merely outlined *which claims* are subject to arbitration and did not speak to the question of *who* can induce the process.[191] And in any event, the judges explained that Sunoco's partnership with Citibank was not sufficiently close to make it "connected," since the other relationships listed—like "agent" and "affiliate[]"—contemplated shared rights, duties, and liabilities.[192] Thus, the court "avoid[ed] . . . giving . . . unintended breadth" to the contract.[193]

To avoid outcomes like *White*, drafters have started exploring a new strategy. Rather than trying to confer enforcement rights upon their allies as non-signatories, they are naming these individuals and entities as *parties* to the arbitration agreement. For example, they require arbitration for claims against "us," which they define to mean their "employees, parents, subsidiaries, affiliates, beneficiaries, agents[,] and assigns."[194] The goal is to create a shortcut that allows these defendants to compel arbitration without having to prove that they are third-party beneficiaries. As noted above, I call this gambit "artificial privity."[195]

The few courts that have addressed artificial privity have given it their blessing. For example, in *Meeks v. Experian Information Services, Inc.*, the

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188. *Id.* at 261.

189. *Id.*

190. *Id. passim*; *see id.* at 266–68.

191. *See id.* at 267 ("Sunoco's argument fails because it confuses the nature of the claims covered by the arbitration clause with the question of who can compel arbitration.").

192. *See id.* at 268.

193. *Id.* (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961)); *see also* GMS Mine Repair & Maint., Inc. v. Baize, No. 1-cv-00184, 2022 WL 866268, at *7 (S.D.W. Va. Mar. 22) (reasoning that allowing third parties to invoke arbitration clauses would cause "nonsensical" results), *appeal dismissed*, No. 22-1356, 2022 WL 4546874 (4th Cir. May 26, 2022).

194. George v. Rushmore Serv. Ctr., LLC, No. 18-cv-13698, 2020 WL 2319293, at *2 (D.N.J. May 11, 2020), *vacated*, 114 F.4th 226 (3d Cir. 2024); *see also* Carrillo v. ROICOM USA, LLC, 486 F. Supp. 3d 1052, 1062 (W.D. Tex. 2020); Silva v. Butori Corp., No. CV-19-04904, 2020 WL 2308528, at *1 (D. Ariz. May 8, 2020) ("I understand that all references in this Agreement to the Company will be a reference also to all parent, subsidiary, and affiliated entities . . . ." (emphasis omitted)).

195. *See supra* text accompanying notes 47–50.

plaintiffs signed up for credit monitoring with ConsumerInfo.com, which does business as Experian Consumer Services (ECS).[196] The company's terms of service stated that "ECS and you agree to arbitrate all disputes and claims between us" and that "references to 'ECS' . . . and 'us' shall include our respective parent entities, subsidiaries, [and] affiliates."[197] Later, the plaintiffs alleged that Experian, which is ECS' "sister company,"[198] had wrongly flagged some of their old payday loans as "seriously past due."[199] Experian tried to invoke the arbitration provision in the ECS contract, and a federal judge in California denied the motion, reasoning that Experian was not a party and did not even contend that it was a third-party beneficiary.[200] The Ninth Circuit reversed.[201] Judges Bennett and Dorsey held that Experian was a "party" because it was an ECS "affiliate" and thus fell within the definitions of "ECS" and "us."[202] But dissenting Judge Thomas protested that no matter what the contract *said*, Experian was simply *not* a party and accordingly could "only compel arbitration if it demonstrate[d] that the third-party beneficiary doctrine applie[d]."[203]

Artificial privity likewise surfaced in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, the Supreme Court's latest opinion about the FAA and third parties.[204] Outokumpu Stainless USA, LLC's predecessor hired F.L. Industries, Inc. to make equipment at a steel plant.[205] F.L. Industries then farmed out some of the work to GE Energy.[206] Eventually, Outokumpu sued GE Energy for furnishing defective motors and GE Energy sought arbitration under the contract between

196. *See* Meeks v. Experian Info. Servs., Inc., Nos. 21-17023, 22-15028, 2022 WL 17958634, at *1 (9th Cir. Dec. 27, 2022); Consolidated Brief for Plaintiffs-Appellees at 1, *Meeks*, 2022 WL 17958634 (Nos. 21-17023, 22-15028) [hereinafter Meeks Plaintiffs' Brief]; Defendant-Appellant's Consolidated Opening Brief at 5, *Meeks*, 2022 WL 17958634 (Nos. 21-17023, 22-15028).

197. Defendant-Appellant's Consolidated Opening Brief, *supra* note 196, at 8 (emphasis omitted).

198. *Meeks*, 2022 WL 17958634, at *1.

199. Meeks Plaintiffs' Brief, *supra* note 196, at 1.

200. *See* Meeks v. Experian Info. Sols., Inc., No. 21-cv-03266, 2021 WL 3878734 (N.D. Cal. Aug. 31) (denying defendant's motion to compel arbitration), *aff'd on reh'g*, 2021 WL 5149066 (N.D. Cal. Nov. 5, 2021) (denying motion to compel upon reconsideration), *rev'd sub nom. Meeks*, 2022 WL 17958634.

201. *Meeks*, 2022 WL 17958634, at *1.

202. *See id.* at *2 ("The text of the arbitration provision binds plaintiffs to arbitrate with ECS and defines ECS to include 'affiliates,' and Experian is an affiliate and was so when the plaintiffs entered into the agreement.").

203. *Id.* at *3 (Thomas, J., dissenting).

204. GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC, 590 U.S. 432 (2020).

205. *See id.* at 435.

206. *See id.* The contract was originally between ThyssenKrupp Stainless USA, LLC and F.L. Industries, but ThyssenKrupp then sold the plant to Outokumpu. *Id.* In addition, GE Energy was known as Converteam SAS at the time of the transaction. *Id.* These issues had no bearing on the resolution of the dispute.

Outokumpu and F.L. Industries.[207] In a narrow ruling, the Justices held that the New York Convention, which operates in tandem with the FAA to regulate international arbitration, does not prohibit non-signatories from enforcing arbitration provisions.[208] However, Justice Sotomayor's concurrence questioned whether GE Energy needed to use third-party doctrines.[209] As Justice Sotomayor noted, the contracts specified that F.L. Industries included "[s]ubcontractors," and referenced "a list of potential subcontractors, one of which was GE Energy."[210] Therefore, Justice Sotomayor suggested that Outokumpu had "expressly agreed to arbitrate disputes . . . with subcontractors like GE Energy."[211] On remand, the Eleventh Circuit followed Justice Sotomayor's analysis, finding that third-party rules were irrelevant because GE Energy, although "not a signatory," was still "a defined party covered by the arbitration clause."[212]

3. Hybrids

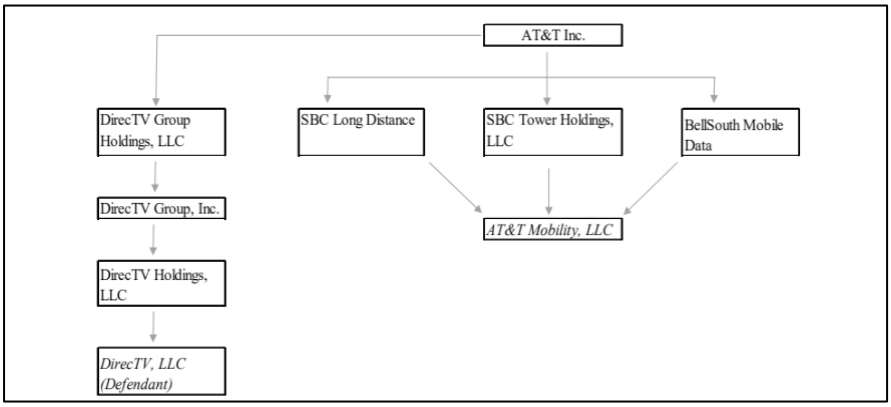
Other accidental arbitration scenarios are hybrids: They feature both causes of action that do not pertain to the container contract and non-signatory defendants. Hybrids have generated a glaring circuit split.

Two recent hybrids involve the same extraordinary facts. Around 2018, Diane Mey and Jeremy Revitch brought separate class actions against DirecTV.[213] Mey, who sued in West Virginia, and Revitch, who filed in California, both contended that the company had violated the TCPA by subjecting them to harassing marketing calls.[214] They observed that DirecTV's conduct was especially galling because it had twice paid multi-million dollar fines to the U.S. government for contacting people on the national Do Not Call Registry.[215] As Revitch put it, DirecTV had made the steely-eyed calculation that disregarding the law "is profitable" and that liability is merely "an acceptable cost of doing business."[216]

207. *See id.* at 435–36.
208. *See id.* at 441–44.
209. *See id.* at 447 n.* (Sotomayor, J., concurring).
210. *Id.* To be clear, the list mentioned GE Energy's predecessor, Converteam. *See id.*
211. *Id.*
212. Outokumpu Stainless USA, LLC v. Coverteam SAS, No. 17-10944, 2022 WL 2643936, at *3 (11th Cir. July 8, 2022).
213. *See* Class Action Complaint at 1, Vance v. DirecTV, LLC, No. 17-cv-00179 (N.D.W. Va. Aug. 24, 2023) [hereinafter Mey Complaint]; Class Action Complaint at 1, Revitch v. DIRECTV, LLC, No. 18-cv-01127 (N.D. Cal. Feb. 17, 2021) [hereinafter Revitch Complaint].
214. *See* Mey Complaint, *supra* note 213, at 7–9; Revitch Complaint, *supra* note 213, at 2–3.
215. *See* Mey Complaint, *supra* note 213, at 7–9; Revitch Complaint, *supra* note 213, at 2–3.
216. Revitch Complaint, *supra* note 213, at 3.

DirecTV moved to compel arbitration of both lawsuits.[217] DirecTV did not try to prove that either Mey or Revitch were or had ever been DirecTV customers, or that there was an arbitration agreement (or any contract) between itself and them.[218] Instead, DirecTV noted that, years ago, Mey and Revitch had signed up for Mobility's wireless service.[219] This meant that they had accepted Mobility's terms of service, which—as Eve Wexler also learned[220]—mandated arbitration for "all disputes and claims between us" and defined "us" to include "our . . . affiliates."[221] Then, in 2015, AT&T, Inc., which owns Mobility through three subsidiaries, acquired DirecTV Direct Holdings, LLC, the parent of DirecTV, LLC (the entity Mey and Revitch had sued).[222] Putting these pieces together, DirecTV asserted that it could invoke Mobility's arbitration provision as an "affiliate"[223]—or, as a federal appellate judge later put it, "a 'corporate cousin[ ] at least seven times removed."[224]

FIGURE 5: THE RELATIONSHIP BETWEEN DIRECTV AND MOBILITY[225]



217. *See* Mey v. DirecTV, LLC, No. 17-CV-179, 2018 WL 7823097, at *1 (N.D.W. Va. Apr. 25, 2018), *vacated*, 971 F.3d 284 (4th Cir. 2020); Revitch v. DirecTV, LLC, No. 18-cv-01127, 2018 WL 4030550, at *1 (N.D. Cal. Aug. 23, 2018).

218. *See Mey*, 2018 WL 7823097, at *5; *Revitch*, 2018 WL 4030550, at *2–5.

219. *See Mey*, 2018 WL 7823097, at *1; *Revitch*, 2018 WL 4030550, at *2.

220. *See supra* text accompanying notes 5–8.

221. *Mey*, 2018 WL 7823097, at *1; *Revitch*, 2018 WL 4030550, at *3.

222. *See* Plaintiff's Opposition to DirecTV's Motion to Compel Arbitration at 10, Revitch v. DIRECTV, LLC, 977 F.3d 713 (9th Cir. 2020) (No. 18-16823) [hereinafter Revitch Opposition Brief].

223. *See Mey*, 2018 WL 7823097, at *1; *Revitch*, 2018 WL 4030550, at *5.

224. Mey v. DIRECTV, LLC, 971 F.3d 284, 299 (4th Cir. 2020) (Harris, J., dissenting) (quoting *Mey*, 2018 WL 7823097, at *5).

225. Revitch Opposition Brief, *supra* note 222, at 10.

The Fourth Circuit allowed DirecTV to compel arbitration of Mey's lawsuit.[226] The judges in the majority, Rushing and Floyd, started by rejecting Mey's claim that "she did not form an agreement to arbitrate with DIRECTV."[227] Judges Rushing and Floyd noted that Mey did not deny that she had assented to arbitrate with *someone*.[228] In turn, this made the pivotal question whether Mey's consent stretched far enough to encompass DirecTV.[229] The majority held that it did because dictionaries define "affiliate" to mean businesses with "common ownership or control" and Mobility and DirecTV had undeniably become branches in the same corporate family tree.[230] Thus, although the majority did not address the issue head-on, it permitted Mobility to create artificial privity by defining itself to include a litigant that never assented to the container contract.[231] Then, as its final step, the majority analyzed the scope of the arbitration provision.[232] Observing that this language covered every possible dispute, the majority cited the *Moses Cone* presumption and declared that it "arguably contemplates arbitration of Mey's claims, and any ambiguity about whether those claims are included 'must be resolved in favor of arbitration.'"[233]

Nevertheless, a mere month and a half later, a fractured Ninth Circuit held that Revitch—whose case was the spitting image of Mey's—did not need to arbitrate.[234] In an unusual move, Judge O'Scannlain wrote two opinions.[235] First, his majority decision, which Judge McKeown joined, broke ranks with the Fourth Circuit and decided that Revitch and DirecTV did not consummate an arbitration agreement.[236] He admitted that DirecTV and Mobility were "affiliate[s]" under that word's plain meaning.[237] But he rejected DirecTV's entreaty to "end the inquiry right [t]here."[238] Instead, he

226. *See Mey*, 971 F.3d at 294–95.
227. *Id.* at 289.
228. *See id.*
229. *See id.*
230. *Id.* at 289–90 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 35 (Philip Babcock Gove ed., 2002) (defining "affiliate")).
231. Bizarrely, the court never mentioned DirecTV's non-signatory status.
232. *See Mey*, 971 F.3d at 293–95.
233. *Id.* at 294 (quoting Lamps Plus, Inc. v. Varela, 587 U.S. 176, 189 (2019)). The Fourth Circuit sent the case back for the district court to consider whether the arbitration agreement was unconscionable. *See id.* at 295. On remand, the judge held that enforcing the provision against Mey would be unfair because consumers "would rationally expect that the agreement required the arbitration of any issues related to that contract." Mey v. DIRECTV, LLC, No. 17-CV-179, 2021 WL 973454, at *6 (N.D.W. Va. Feb. 12, 2021). In a striking act of defiance, the court also declared that "the Fourth Circuit should revisit its prior decision." *Id.* at *11 n.2.
234. *See* Revitch v. DIRECTV, LLC, 977 F.3d 713, 719–21 (9th Cir. 2020).
235. *See id.* at 714–21; *id.* at 721–24 (O'Scannlain, J., concurring).
236. *See id.* at 720–21 (majority opinion).
237. *See id.* at 717.
238. *Id.*

observed that courts should not read contracts literally when that would "lead to absurd results."[239] He concluded that the absurdity canon applied because Revitch could not have expected when he accepted Mobility's terms that he would need to arbitrate "an unrelated dispute with DIRECTV, a satellite television provider that would not become affiliated with AT&T until years later."[240] Thus, he declared that an "agreement to arbitrate between Revitch and DIRECTV does not exist."[241] Second, in a freestanding concurrence, Judge O'Scannlain threw his support behind the contractual nexus theory.[242] He noted that the phrase "arising out of" in section 2 of the FAA had received "[r]emarkably . . . little judicial attention" and that he had "been unable to find any case that explains it."[243] Yet canvassing authorities from other contexts, he determined that "arising out of" requires a causal connection.[244] Because there was no such relationship between Mobility's terms and DirecTV's calls, Judge O'Scannlain would have held that the FAA never entered the picture.[245]

Finally, in *Calderon v. Sixt Rent a Car, LLC*, another hybrid, the Eleventh Circuit became the first circuit to wholeheartedly embrace the contractual nexus theory.[246] The plaintiff, Ancizar Marin, had booked a rental car from Sixt using Orbitz.com.[247] The Sixt contract did not require

239. *Id.* at 717 (quoting Kashmiri v. Regents of Univ. of Cal., 67 Cal. Rptr. 3d 635, 652 (Ct. App. 2007) (emphasis omitted)).

240. *See id.* at 718.

241. *Id.* at 718. In a hard-to-follow footnote, the majority addressed the fact that DirecTV was not a signatory to Mobility's contract. *See id.* at 716 n.2. The majority opined that a third-party beneficiary must show that "'the law [has] establishe[d] a *privity*, and implie[d]' a mutual 'promise and obligation,' between the nonsignatory party and the signatory party." *Id.* (quoting Spinks v. Equity Residential Briarwood Apartments, 90 Cal. Rptr. 3d 453, 470 (Ct. App. 2009)). As such, the majority seemed to conflate the discrete issues of whether (1) Revitch agreed to arbitrate with DirecTV and (2) DirecTV was a third-party beneficiary of Mobility's terms. *See also id.* at 718 (concluding both that there was no arbitration agreement between Revitch and DirecTV and that DirecTV "was not and is not now a party to the wireless services agreement"). I tease out the differences between these theories. *See infra* Part III.B.

242. *See Revitch*, 977 F.3d at 724 (O'Scannlain, J., concurring); *see also infra* Section III.A.

243. *Revitch*, 977 F.3d at 722 (O'Scannlain, J., concurring).

244. *See id.*

245. *See id.* at 724. In an odd development, a Ninth Circuit panel then adopted the contractual nexus theory without citing *Revitch*. *See* Johnson v. Walmart Inc., 57 F.4th 677, 681 (9th Cir. 2023). Kevin Johnson bought a set of tires from Walmart.com. *See id.* at 679. The website mandated that he arbitrate "all disputes arising out of or related to . . . any aspect of the relationship between [him] and Walmart." *Id.* Johnson then went to a Walmart Auto Care Center and paid for a lifetime balancing and rotation agreement that did not mention arbitration. *See id.* at 680. Later, Walmart refused to maintain Johnson's tires, and he sued the company for breaching the service contract. *See id.* Walmart demanded arbitration, asserting that the arbitration clause on its website "applies to any interaction between Walmart and the customer, regardless of whether the dispute arises out of an online purchase." *Id.* The Ninth Circuit devoted just two sentences to rejecting this argument, noting that section 2 of the FAA requires that complaints emanate from the container contract but Johnson's suit "arises out of an entirely separate transaction at a Walmart store." *Id.* at 681.

246. *See* Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1212–14 (11th Cir. 2021).

247. *Id.* at 1207–08.

arbitration, but Orbitz's terms declared that users must arbitrate "[a]ny and all [c]laims" against Orbitz and specified that "[c]laims" meant "disputes relating to 'services or products provided.'"[248] When Marin filed a class action against Sixt for charging customers for non-existent damage to its cars, Sixt sought arbitration under Orbitz's terms.[249] The appellate court held that Marin did not pursue a "[c]laim[]" because that word meant "services or products provided by Orbitz, not services or products by anyone."[250] Sixt protested that the *Moses Cone* presumption obligated the judges to resolve this ambiguity in favor of arbitration.[251] But the panel responded that section 2 of the FAA, the wellspring of the *Moses Cone* canon, does not apply to allegations like Marin's that are "so tangentially related to the underlying contract."[252] Thus, liberated from the statute and its heavy baggage, the appellate judges were free to indulge in "the best, most ordinary, most sensible interpretation of the contract."[253]

4. Delegation

Delegation provisions are ubiquitous. These clauses create migraines for courts in accidental arbitration cases.

A few bright lines have emerged about the division of power between courts and arbitrators. For starters, two types of questions are not delegable to arbitrators. One is whether an arbitration agreement is exempt from the FAA under section 1. In 2019's *New Prime Inc. v. Oliveira*, the Court relied on the statute's "sequencing" to hold that even if a contract contains a delegation clause, courts enjoy the exclusive authority to decide whether section 1's transportation worker exclusion applies.[254] As Justice Gorsuch explained, "to invoke its statutory powers under [sections] 3 and 4 to stay litigation and compel arbitration according to a contract's terms, a court must first know whether the contract itself falls within or beyond the boundaries of [sections] 1 and 2."[255] Moreover, arbitrators cannot decide the

248. *Id.* at 1208, 1210.

249. *See id.* at 1207–08.

250. *Id.* at 1209 (noting that the definition of "[c]laims" also included activities and issues that related only to Orbitz, such as "any dealings with our customer service agents" and "our [p]rivacy [p]olicy").

251. *See id.* at 1212.

252. *Id.* at 1213; *see id.* at 1212–13.

253. *Id.* at 1214. Orbitz's contract also mandated arbitration for "[c]laims you assert against us, our subsidiaries, travel suppliers or any companies offering products or services through us." *Id.* at 1207. The court's conclusion that Marin did not assert a "[c]laim[]" mooted the issue of whether Sixt belonged within this class. *Id.* at 1214, *see id.* 1214 n.7.

254. New Prime Inc. v. Oliveira, 586 U.S. 105, 111 (2019); *see id.* at 111–12.

255. *Id.* at 111. There is tension between *Rent-A-Center, Inc. v. Jackson*, 561 U.S. 63 (2010), the Court's seminal opinion on delegation clauses, and *New Prime*. *Rent-A-Center* strongly implies that

threshold question of whether a person or entity assented to either the container contract or its arbitration clause.[256] Because arbitrators draw their authority "from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution,"[257] permitting them to rule on *whether* a party agreed to arbitrate would jump the proverbial gun.[258] Conversely, delegation clauses can entrust arbitrators with almost any other dispute about the scope or validity of the agreement to arbitrate the merits, such as how far it reaches and whether it is unconscionable or otherwise void or voidable.[259]

Yet the role of delegation clauses in accidental arbitration cases remains murky. Once, courts refused to enforce delegation provisions when a party's argument that a claim should be arbitrated was "wholly groundless."[260] For example, in *Douglas v. Regions Bank*, the plaintiff opened an account with Union Bank in 2002 and agreed to an infinite arbitration provision and a

courts must construe delegation provisions as independent, industrial-strength arbitration agreements. *See Rent-A-Ctr.*, 561 U.S. at 70 (calling delegation clauses "an additional, antecedent agreement" and declaring that "the FAA operates on this additional arbitration agreement just as it does on any other"). In turn, this suggests that even if the *container contract* might fall within section 1's exception for transportation workers, the FAA would still govern the *delegation clause*. Indeed, under *Rent-A-Center*'s "Russian nesting dolls" approach, *id.* at 85 (Stevens, J., dissenting), the delegation provision is a narrow agreement to arbitrate whether to arbitrate and has nothing to do with transportation workers. And because the separability doctrine deems the delegation provision to stand alone, *see supra* text accompanying note 126, the arbitrator would decide whether the section 1 exclusion governs. Yet *New Prime* conceptualized the issue differently, reasoning that the separability doctrine "applies only if the parties' arbitration agreement appears in a contract that falls within the field [sections] 1 and 2 describe." *New Prime*, 586 U.S. at 112. My analysis about the contractual nexus theory and delegation clauses assumes that *New Prime*, which is more recent than *Rent-A-Center*, reflects the Court's current views. *See infra* Section III.C.

256. *See* MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds, 974 F.3d 386, 400 (3d Cir. 2020) ("Lack of assent to the container contract necessarily implicates the status of the arbitration agreement."); Coinbase, Inc. v. Suski, 602 U.S. 143, 150 (2024) ("[T]he question is whether *the parties agreed* to send the given dispute to arbitration—and, per usual, *that* question must be answered by a court." (first emphasis added)).

257. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 682 (2010).

258. In addition, if an arbitrator found that someone had *not* consented to the process, a paradox would ensue: The arbitrator would have destroyed their own jurisdiction to make such a ruling. *See* Kulukundis Shipping Co., S/A v. Amtorg Trading Corp., 126 F.2d 978, 986 (2d Cir. 1942) ("If the issue of the existence of the [agreement] were left to the arbitrators and they found that it was never made, they would, unavoidably (unless they were insane), be obliged to conclude that the arbitration agreement had never been made.").

259. *See, e.g.*, *Rent-A-Ctr.*, 561 U.S. at 70 (allowing arbitrator to decide whether agreement to arbitrate the merits is unconscionable); *In re* StockX Customer Data Sec. Breach Litig., 19 F.4th 873, 883 (6th Cir. 2021) (same for infancy). Admittedly, the ability of parties to delegate other defenses to contract enforcement is less clear. *See* Mayorga v. Ronaldo, 491 F. Supp. 3d 840, 853–54 (D. Nev. 2020) (noting the split in authority on whether arbitrators can decide whether a party had the mental capacity to enter into the container contract).

260. McCarroll v. L.A. Cty. Dist. Council of Carpenters, 315 P.2d 322, 333 (Cal. 1957).

delegation clause.[261] She closed her account around 2003.[262] In 2005, Union merged with Regions Bank.[263] Two years later, the plaintiff was hurt in a car accident, brought a tort claim, and received a settlement.[264] In 2010, the plaintiff's lawyer deposited her funds at Regions and then stole them.[265] The plaintiff sued Regions for negligence, and the institution responded by trying to enforce the arbitration clause in the 2002 Union Bank contract and arguing that the arbitrator must adjudicate any dispute over whether the claim was arbitrable.[266] The Fifth Circuit held that Regions' theory about why arbitration should proceed was "wholly groundless."[267] The appellate panel reasoned that "the events leading to [the plaintiff's] claim—a car accident, a settlement, and embezzlement of the funds through an account that a third party held with the bank—have nothing to do with her checking account opened years earlier for only a brief time."[268]

But then, in 2019, the Court abolished the wholly groundless exception.[269] In *Henry Schein, Inc. v. Archer & White Sales, Inc*., Archer & White sued Henry Schein, seeking an injunction.[270] The parties were bound by a delegation provision[271] and an arbitration agreement that did not apply to "actions seeking injunctive relief."[272] The courts below ignored the delegation clause because no arbitrator could find that Archer & White's request for an injunction was arbitrable under an arbitration agreement that exempted injunctions.[273] A unanimous Court reversed, focusing on the fact that the FAA's text "does not contain a 'wholly groundless' exception."[274] Explaining that "it is not our proper role to redesign the statute," the Justices held that "a court may not decide an arbitrability question that the parties have delegated to an arbitrator."[275]

Henry Schein's impact on every species of accidental arbitration remains unclear. A few courts have allowed arbitrators to entertain a plaintiff's contention that their claims do not flow from the container contract. For

261. *See* Douglas v. Regions Bank, 757 F.3d 460, 461 (5th Cir. 2014), *abrogated by* Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63 (2019).
262. *See* Regions Bank's Motion to Compel Arbitration and to Stay Proceedings at 3, *Douglas*, 757 F.3d 460 (No. 12-cv-00523).
263. *See Douglas*, 757 F.3d at 461.
264. *See id.*
265. *See id.*
266. *See id.*
267. *Id.* at 464.
268. *Id.*
269. *See* Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63, 71 (2019).
270. *See id.* at 66. Archer & White also requested damages. *See id.*
271. *See id.*
272. *Id.* (quoting Archer & White Sales, Inc. v. Henry Schein, Inc., 878 F.3d 488, 491 (5th Cir. 2017)).
273. *See id.* at 67.
274. *Id.* at 65.
275. *Id.* at 69, 70.

instance, in *Oldacre v. ECP-PF CT Operations*, Christopher Oldacre sued his former employer, Planet Fitness, for violating labor laws.[276] But Oldacre was also a Planet Fitness member and therefore had accepted an agreement that included arbitration and delegation provisions.[277] Although Oldacre protested that his workplace allegations had no relationship to his recreational use of the gym, a federal judge in New York classified his argument as "based on the scope of the arbitration clause" and ordered him to arbitrate it.[278] In addition, a sharply divided Nevada Supreme Court has twice enforced delegation clauses in similar circumstances, reasoning that *Henry Schein* prohibits judges from intervening "even if the arguments in favor of arbitration are wholly groundless."[279] Nevertheless, appellate courts in California and Illinois have gone the other way.[280] These judges have distinguished *Henry Schein* on the basis that it did not involve a request to compel arbitration of claims that were untied to the container contract.[281] Accordingly, they take the position that "chance should not engender a contractual relationship" and that "[a] contract—and not fate—dictates arbitrability."[282]

The caselaw about delegation provisions and non-signatories is even messier. Courts break into three camps. One, which includes the Sixth Circuit, perhaps the First Circuit, and a motley assortment of lower courts, holds that delegation clauses entrust arbitrators with deciding whether a

276. *See* Oldacre v. ECP-PF CT Operations, 673 F. Supp. 3d 294, 295 (W.D.N.Y. 2023).

277. *See id.* at 296.

278. *Id.* at 299. *Oldacre* is slightly confusing because the plaintiff did not even mention the delegation clause in his opposition to the defendant's motion to compel. *See id.* Thus, he waived the relevant issue, and it is unclear whether the judge would have taken his argument more seriously if he had articulated why the lack of connection between his claims and the container contract invalidated the delegation clause.

279. Airbnb, Inc. v. Rice, 518 P.3d 88, 90–91 (Nev. 2022) (holding that the arbitrator needed to decide whether the estate and deceased Airbnb accountholder had to arbitrate claims against Airbnb stemming from being shot at someone else's Airbnb rental); *see also* Uber Techs., Inc. v. Royz, 517 P.3d 905, 911 (Nev. 2022) (holding that the arbitrator needed to decide whether an Uber accountholder had to arbitrate tort claim stemming from Uber ride she did not order).

280. *See* Moritz v. Universal City Studios LLC, 268 Cal. Rptr. 3d 467, 475–76 (Ct. App. 2020) (refusing to enforce either delegation or arbitration clauses in contracts between producer and studio related to production of *Fast & Furious* movies when producer claimed studio breached a distinct oral contract); Peterson v. Devita, 237 N.E.3d 1010, 1019 (Ill. App. Ct. 2023) (refusing to enforce either delegation or arbitration clauses in Airbnb accountholder's contract when he was seriously injured while visiting someone else's Airbnb rental).

281. *See Moritz*, 268 Cal. Rptr. 3d at 475 (reasoning that *Henry Schein* "presupposes a dispute arising out of the contract or transaction, i.e., some minimal connection between the contract and the dispute"); *Peterson*, 237 N.E.3d at 1017.

282. *Peterson*, 237 N.E.3d at 1017; *see also Moritz*, 268 Cal. Rptr. 3d at 475 ("When an arbitration provision is 'read as standing free from any [underlying] agreement,' 'absurd results ensue.'" (quoting Smith v. Steinkamp, 318 F.3d 775, 777 (7th Cir. 2003))).

non-signatory can compel arbitration.[283] These opinions start by observing that because the plaintiff manifested assent to the container contract, they agreed to arbitrate with *somebody*.[284] And with formation established, the remaining issue of whether a third party can invoke the arbitration clause seems like a matter of defining its *scope*, which can be delegated.[285] Also, there is a colorable argument that judges who assess a non-signatory's standing despite a delegation clause—a process that echoes the wholly groundless rule—"engage in the type of analysis that the Supreme Court held impermissible in *Henry Schein*."[286]

Alternatively, the Eighth and Ninth Circuits employ a case-by-case approach. Because forced arbitration clauses are designed to waive class actions, they tend to include individuating phrases, such as "[e]ither *you* or *we* may choose to have any dispute between *you* and *us* decided by arbitration."[287] Arguably, this "narrow, party-specific language" belies the idea that the parties wanted outsiders to have rights.[288] Instead, courts say that it shows that the "[p]laintiffs only agreed to arbitrate arbitrability—or any other dispute—with the [defendants]."[289] But on the flip side, when an arbitration agreement features broader language, it may authorize the arbitrator to adjudicate whether a non-signatory can mandate arbitration.[290]

Finally, the Fourth and Fifth Circuits, assorted federal district courts, and the Supreme Courts of Nevada and Texas do not allow arbitrators to resolve this topic. These judges emphasize two points. First, when a plaintiff resists being forced to arbitrate with a non-signatory, they deny that they agreed to

283. *See* Blanton v. Domino's Pizza Franchising LLC, 962 F.3d 842, 852 (6th Cir. 2020) ("[T]he arbitrator should decide for itself whether [the non-signatory] can enforce the arbitration agreement."); *cf.* Apollo Comput., Inc. v. Berg, 886 F.2d 469, 473 (1st Cir. 1989) (allowing the arbitrator to decide whether an assignee of a party can compel arbitration); Symonds v. Credico (USA) LLC, No. 20-cv-10192, 2020 WL 7075028, at *6 (D. Mass. Dec. 3, 2020) (extending *Apollo Computer* to third-party beneficiary and equitable estoppel claims).

284. *See* Barney v. Grand Caribbean Cruises, Inc., No. 21-CV-61560, 2022 WL 159567, at *5 (S.D. Fla. Jan. 17, 2022).

285. *See* Becker v. Delek US Energy, Inc., 39 F.4th 351, 356 (6th Cir. 2022) ("Whether a nonsignatory can enforce a delegation clause is . . . a question of enforceability, not existence."); Bell v. Royal Seas Cruises, Inc., No. 19-CV-60752, 2020 WL 5742189, at *4 (S.D. Fla. May 13) ("Plaintiff's third-party beneficiary argument implores the [c]ourt to engage in [contract] construction."), *report aff'd and adopted*, No. 19-CIV-60752, 2020 WL 5639947 (S.D. Fla. Sept. 21, 2020).

286. De Angelis v. Icon Ent. Grp. Inc., 364 F. Supp. 3d 787, 796 (S.D. Ohio 2019).

287. Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1127 (9th Cir. 2013) (emphasis added).

288. Burnett v. Nat'l Ass'n of Realtors, 75 F.4th 975, 983 (8th Cir. 2023) (quoting Burnett v. Nat'l Ass'n of Realtors, 615 F. Supp. 3d 948, 958 (W.D. Mo. 2022)). *But see* Eckert/Wordell Architects, Inc. v. FJM Props. of Willmar, LLC, 756 F.3d 1098, 1099–100 (8th Cir. 2014) (reaching the opposite conclusion when the arbitration clause was broader).

289. *Kramer*, 705 F.3d at 1128; *see also* Donovan v. Coinbase Glob., Inc., 649 F. Supp. 3d 946, 955 (N.D. Cal. 2023) (using similar language and concluding that "[a]t the very least, there is ambiguity as to whether . . . [p]laintiffs agreed to arbitrate arbitrability with a nonsignatory").

290. *See* Saucedo v. Experian Info. Sols., Inc., No. 22-cv-01584, 2023 WL 4708015, at *7 n.2 (E.D. Cal. July 24, 2023) (collecting authority).

arbitrate *anything* with the contractual stranger.[291] In turn, this seems like a contract *formation* theory, which is non-delegable.[292] Second, an effective delegation requires clear and unmistakable evidence that *the parties* intended to arbitrate whether they must arbitrate.[293] But as the Delaware district court asked rhetorically, how can this standard ever be met if the plaintiff and the non-signatory defendant "have not signed an[y] agreement with each other[?]"[294] Thus, the law remains wildly unsettled.

* * *

Firms once only sought to enforce arbitration clauses they had the foresight to place in the contract that sparked the dispute. But now motions to compel routinely involve different agreements and non-signatories, forcing courts to grapple with byzantine doctrinal issues. The next Part charts a path out of this maze.

III. REGULATING ACCIDENTAL ARBITRATION

This Part offers three insights that would improve outcomes in cases involving accidental arbitration. First, the current Court would adopt the contractual nexus theory and find that state law, not the FAA, governs

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291. *See* Rogers v. Tug Hill Operating, LLC, 76 F.4th 279, 288 (4th Cir. 2023) ("[The plaintiff] agreed to arbitrate issues—including threshold issues—arising between him and [the other signatory]. But he did not enter into any agreement that allows an arbitrator to decide whether a third party . . . has rights under the arbitration agreement." (emphasis omitted)); RUAG Ammotec GmbH v. Archon Firearms, Inc., 538 P.3d 428, 433 (Nev. 2023) ("Where a nonsignatory is involved in a motion to compel arbitration under a contract, there is a question as to the very existence of an agreement involving the nonsignatory." (emphasis omitted)); *cf.* Contec Corp. v. Remote Sol. Co., 398 F.3d 205, 209 (2d Cir. 2005) ("In order to decide whether arbitration of arbitrability is appropriate, a court must first determine whether the parties have a sufficient relationship to each other and to the rights created under the agreement.").

292. *See* Newman v. Plains All Am. Pipeline, L.P., 23 F.4th 393, 398 (5th Cir. 2022) ("[D]eciding enforceability between the parties and an arbitration agreement's existence are two sides of the same coin."); O'Connor v. Ford Motor Co., No. 19-CV-5045, 2023 WL 130522, at *6 (N.D. Ill. Jan. 9, 2023) ("[T]he issue of whether [d]efendant has any right as a non-signatory to compel arbitration with [p]laintiffs goes to contract formation and must be decided by the [c]ourt."). The Fifth Circuit came within a hair's breadth of reconsidering *Newman* en banc, splitting 8-8 on the petition. *See* Newman v. Plains All Am. Pipeline, L.P., 44 F.4th 251 (5th Cir. 2022) (Jones, J., dissenting) (dissenting from denial of en banc rehearing).

293. *See supra* text accompanying note 124.

294. GNH Grp., Inc. v. Guggenheim Holdings, L.L.C., No. 19-1932, 2020 WL 4287358, at *5 (D. Del. July 27), *report and recommendation adopted*, No. 19-1932, 2020 WL 13679908 (D. Del. Aug. 19, 2020); Schoenfeld v. Mercedes-Benz USA, LLC, 532 F. Supp. 3d 506, 510 (S.D. Ohio 2021) ("Given that [p]laintiff and [the non-signatory] never agreed to arbitrate any claims that might arise between them, neither can it be said that they clearly and unmistakably agreed to delegate the question of arbitrability to an arbitrator."); Jody James Farms, JV v. Altman Grp., Inc., 547 S.W.3d 624, 632 (Tex. 2018) ("A contract that is silent on a matter cannot speak to that matter with unmistakable clarity, so an agreement silent about arbitrating claims against non-signatories does not unmistakably mandate arbitration of arbitrability in such case.").

motions to compel arbitration of claims that are unassociated with the container contract. Exorcising the specter of the FAA would give state lawmakers and lower courts more freedom to regulate this topic. Second, judges should reject drafters' efforts to engineer artificial privity. Courts ignore bedrock principles when they hold that firms "can compel arbitration as a non-signatory party."[295] Third, even if a contract features a delegation clause, courts, not arbitrators, should be responsible for deciding whether the FAA applies and the consequences that flow if the statute does not control, identifying the parties to the contract, and determining whether a non-signatory can demand arbitration.

A. The Contractual Nexus Theory

Since 2020, a handful of judges have adopted the contractual nexus theory.[296] This section seeks to persuade other courts to do so. It establishes that the current Court would find that section 2 of the FAA means what it says: that the statute only governs agreements to arbitrate claims that "aris[e] out of" the container contract.[297] In turn, because state law reigns when the FAA does not,[298] this view would be a victory for federalism principles and change the results in some cases while placing others on firmer footing.

1. The New FAA Textualism

As the Court's membership has evolved, so has the dynamic in its FAA opinions. After the addition of Justices Gorsuch, Kavanaugh, Barrett, and Jackson, textualists "occupy all nine seats."[299] For the first time in decades, plaintiffs have prevailed in a string of high-profile FAA matters.[300] Their

295. Outokumpu Stainless USA, LLC v. Coverteam SAS, No. 17-10944, 2022 WL 2643936, at *2 (11th Cir. July 8, 2022).

296. *See supra* text accompanying notes 172, 245.

297. 9 U.S.C. § 2.

298. *See* Palcko v. Airborne Express, Inc., 372 F.3d 588, 595–96 (3d Cir. 2004).

299. Ryan H. Nelson, *An Employment Discrimination Class Action by Any Other Name*, 91 FORDHAM L. REV. 1425, 1482 n.341 (2023).

300. *See* Coinbase, Inc. v. Suski, 602 U.S. 143, 152 (2024) (holding that a court, not an arbitrator, should decide whether a contract without an arbitration clause superseded an earlier contract between the same parties that had arbitration and delegation clauses); Bissonnette v. LePage Bakeries Park St., LLC, 601 U.S. 246, 256 (2024) (determining that "[a] transportation worker need not work in the transportation industry to fall within the exemption from the FAA provided by [section] 1"); Smith v. Spizzirri, 601 U.S. 472, 475–76 (2024) (interpreting section 3 of the FAA to prohibit federal courts from dismissing a case that is subject to arbitration when a party requests a stay); Morgan v. Sundance, Inc., 596 U.S. 411, 418 (2022) (announcing that "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules"). Admittedly, the Court's conservatives still sometimes bend over backwards to favor businesses. *See, e.g.*, Coinbase, Inc. v. Bielski, 599 U.S. 736, 747 (2023) (finding that federal district courts must stay proceedings during the appeal of a denial of a motion to compel arbitration).

success stems from a shift in strategy. Rather than arguing that arbitration harms everyday people or mining the statute's legislative record, they have catered to their audience by emphasizing the "'ordinary, contemporary, common meaning [of the FAA] at the time Congress enacted' it."[301] Even pro-business Justices have been receptive to this "progressive textualism."[302] For example, in *New Prime Inc. v. Oliveira*, Justice Gorsuch analyzed authorities from 1925 to find that the words "contracts of employment" in section 1 exempted both employees and independent contractors from the FAA.[303] Likewise, in *Southwest Airlines Co. v. Saxon*, Justice Thomas cited early twentieth century dictionaries to extend section 1's exclusion to individuals who merely assist with the interstate transport of goods.[304] Thus, unlike their forebears, who read the FAA with a healthy regard for arbitration's virtues, this Court refuses to "pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal"[305] or "to elevate vague invocations of statutory purpose over the words Congress chose."[306]

Seen through this lens, section 2, the heart of the FAA, does not apply unless there is a link between the claim and the container contract. For one, the statute says as much:

> A written provision in any maritime transaction or a *contract* evidencing a transaction involving commerce to settle by arbitration *a controversy thereafter arising out of such contract* or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[307]

In addition, the 1925-era authorities the Court has previously used to interpret the FAA demonstrate that "arising out of" means "connected with." First, dictionaries from that period define that phrase as "proceeding, issuing or springing from."[308] Second, during this time, judges in diverse

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301. Brief for Respondent at 12, New Prime Inc. v. Oliveira, 586 U.S. 105 (2019) (No. 17-340) (quoting Wis. Cent. Ltd v. United States, 585 U.S. 274, 284 (2018)).

302. Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437, 1457 (2022) (describing a broad movement to "deploy[] traditional textualist methodology to reach politically progressive interpretations").

303. *New Prime*, 586 U.S. at 114.

304. Sw. Airlines Co. v. Saxon, 596 U.S. 450, 455–59 (2022); *see also Smith*, 601 U.S. at 477 (Justice Sotomayor relying on the 1910 version of *Black's Law Dictionary* to interpret the word "stay" in section 3 of the FAA).

305. *New Prime*, 586 U.S. at 120.

306. *Sw. Airlines Co.*, 596 U.S. at 463.

307. 9 U.S.C. § 2 (emphasis added).

308. 1 BOUVIER'S LAW DICTIONARY 237 (Francis Rawle ed., 3d rev., 8th ed. 1914); 1 A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 445, 446 (James A.H. Murray ed., Oxford,

contexts—ranging from bankruptcy to torts to civil procedure—construed one thing to "aris[e] out of" another "when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection" between them.[309] Third, although textualists disavow *legislative* history, they consider *statutory* history,[310] and the FAA bolsters this interpretation. Congress based section 2 on New York's trailblazing 1920 arbitration statute,[311] which states that a provision in a "contract to settle by arbitration a controversy thereafter arising between the parties to the contract[] . . . shall be valid, enforcible [sic] and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."[312] Section 2 is nearly identical. But unlike the New York legislation, which applies to agreements to arbitrate claims "arising between the parties to the contract,"[313] section 2 only governs promises to arbitrate lawsuits "arising out of [the container] contract."[314] Thus, if Congress had parroted the New York statute, it would have allowed parties to agree to arbitrate any future dispute. Instead, it chose to require a link between the claim and the container contract.

Finally, in 2022, the Court suggested that section 2 only applies if there is a "causal relationship" between the "controvers[y]" and the "parties' contract."[315] In *Viking River Cruises, Inc. v. Moriana*, the Justices held that the FAA preempts part of California's Private Attorneys General Act (PAGA), which deputizes employees to enforce the labor code by suing on

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Clarendon Press 1888) ("to spring forth, as a river, from its source" and "originate, or result *from*"); 1 THE CENTURY DICTIONARY AND CYCLOPEDIA 309 (William Dwight Whitney et al. eds., 1901) ("[t]o have a beginning or origin; originate"); LAIRD & LEE'S WEBSTER'S NEW STANDARD DICTIONARY 35 (E.T. Roe ed., Laird & Lee rev. & enlarged ed. 1920) ("spring forth"); 1 THE OXFORD ENGLISH DICTIONARY 446 (James A.H. Murray, Henry Bradley, W.A. Craigie & C.T. Onions eds., 1933) ("[t]o spring, originate, or result *from*"); WEBSTER'S COLLEGIATE DICTIONARY 57 (G. & C. Merriam 3d ed. 1916) ("[t]o come into action, being, or notice; become operative").

309. *In re* Emps.' Liab. Assur. Corp., 102 N.E. 697, 697 (Mass. 1913) (deciding whether the plaintiff suffered an "injury arising out of . . . his employment" within the meaning of the state Workmen's Compensation Act); United States v. Rabinowich, 238 U.S. 78, 88 (1915) (holding that a one-year statute of limitations for crimes "arising under" the Bankruptcy Act only applied to conduct prescribed by the statute itself); Cruikshank v. Fourth Nat. Bank, 16 F. 888, 889 (C.C.S.D.N.Y. 1883) (observing that "any suit in which a law of [C]ongress was of necessity an ingredient in the case, was a case arising under a law of the United States" for the purposes of removal to federal court).

310. *See* Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 265 (2022) (calling statutory history "the cold record of how a statute evolved from one version to the next").

311. *See* S. REP. NO. 68-536 (1924). Admittedly, most statutory history compares one version of a federal statute to another iteration of that same statute, rather than contrasting a federal statute with a prior state law. *See, e.g.*, Krishnakumar, *supra* note 310, at 300–13. However, the Court has previously interpreted the FAA by examining its similarities to and differences from the New York statute. *See* Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 589 n.7 (2008).

312. *In re* Shima & Co., 186 N.Y.S. 154, 155 (1920) (quoting Arbitration Law, ch. 275, § 2, 1920 N.Y. Laws 804).

313. *Id.*

314. 9 U.S.C. § 2.

315. Viking River Cruises, Inc. v. Moriana, 596 U.S. 639, 652 n.4 (2022).

behalf of the state.[316] The California Supreme Court had invoked the contractual nexus theory to find that the FAA did not apply to PAGA claims because they were between employers and the state and thus did not "aris[e] out of [any] contractual relationship."[317] Speaking through Justice Alito, the Court rejected that rationale, explaining that the employment contract between the company and the worker is the "but-for cause" of any PAGA cause of action.[318] But critically, although the Justices overruled the state high court's *application* of the contractual nexus principle, they apparently had no quarrel with the *principle itself*. This cements the conclusion that, if pressed, the Court would hold that section 2 requires a tie between the complaint and the container contract.

2. Counterarguments

A skeptic might respond by citing two flaws in the contractual nexus theory. First, they could object that it is too late in the day to insist on a connection between the lawsuit and the container contract. As mentioned above, drafters often mandate arbitration for allegations that "arise out of or relate to" the container contract.[319] Arguably, these provisions exceed the ambit of section 2 because "the phrase 'relate to' is broader than the phrase[] 'arising out of.'"[320] However, rather than questioning if the FAA applies, courts treat the "relate to" language as the hallmark of a "broad" arbitration clause that covers "almost all disputes arising between the parties."[321] This might belie the idea that the "aris[ing] out of" language is significant.

Then again, this norm has never been challenged. As Judge O'Scannlain's concurrence in *Revitch* observed, in the century since the FAA took effect, no court has been asked to square the text of broad arbitration clauses with that of the statute.[322] Thus, the issue remains wide open.

316. *See id.* at 646–62 (finding that PAGA violates the FAA to the extent it allows employees who have agreed to arbitrate to pursue relief on behalf of other employees).

317. Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 151 (Cal. 2014), *overruled by* Quach v. Cal. Com. Club, Inc., 551 P.3d 1123 (Cal. 2024).

318. *Viking River Cruises*, 596 U.S. at 652 n.4. Indeed, as I mentioned, *supra* note 63, the Second Circuit recently relied on this language in *Viking River Cruises* to adopt the contractual nexus theory. *See* Davitashvili v. Grubhub Inc., 131 F.4th 109, 119 (2d Cir. 2025).

319. JPMorgan Chase Bank, N.A. v. Javice, No. 22-cv-01621, 2023 WL 4420433, at *3 (D. Del. July 10, 2023); *see also supra* text accompanying note 135.

320. Van Dijen v. Equifax Info. Servs. LLC, No. 23-cv-05908, 2024 WL 2133952, at *4 (W.D. Wash. May 13, 2024) (quoting United States *ex rel.* Welch v. My Left Foot Child.'s Therapy, LLC, 871 F.3d 791, 798 (9th Cir. 2017)).

321. Horton v. Everything Breaks Inc., No. 22-cv-02131, 2023 WL 5167021, at *4 (N.D. Tex. June 5, 2023).

322. *See* Revitch v. DIRECTV, LLC, 977 F.3d 713, 722–23 (9th Cir. 2020) (O'Scannlain, J., concurring).

Moreover, "arising out of" must mean *something*. It would be extraordinary if the same Justices who carefully analyzed how a 1925 reader would have understood other phrases in the FAA—such as "employment,"[323] "engaged,"[324] "commerce,"[325] and "stay"[326]—simply ignored "arising out of."[327]

Second, taking the contractual nexus theory seriously could lead courts to deny motions to compel in other contexts for highly formalistic reasons. If section 2 only governs allegations that flow from the container contract, what happens when there is no such agreement? For instance, employers sometimes require their workers to sign standalone arbitration pledges[328] and two parties that do not have a formal legal relationship might agree that, if a dispute occurs, they will resolve it in arbitration.[329] It would seem arbitrary to hold that the FAA does not apply to these arrangements because there is no overarching "contract" for a "controvers[y]" to "aris[e] out of."[330] Also, some commentators believe that the statute should govern arbitration clauses in corporate bylaws and charters and wills and trusts.[331] But if the

323. New Prime Inc. v. Oliveira, 586 U.S. 105 *passim* (2019).

324. Sw. Airlines Co. v. Saxon, 596 U.S. 450, 456–57 (2022).

325. *Id.* at 457.

326. Smith v. Spizzirri, 601 U.S. 472, 476–77 (2024).

327. Eagle-eyed readers may note that section 2 validates clauses in "*any maritime transaction* or a contract evidencing a *transaction* involving commerce to settle by arbitration a controversy thereafter arising out of such contract *or transaction*." 9 U.S.C. § 2 (emphasis added). With enough ellipsis, one can make the statute govern agreements "to settle by arbitration a controversy thereafter arising out of such . . . *transaction*." *Id.* (emphasis added). And because "[t]he term 'transaction' is broader and more comprehensive than 'contract,' U.S. Hoffman Mach. Corp. v. Ebenstein, 96 P.2d 661, 663 (Kan. 1939), one might wonder whether section 2 "encompasses controversies that may not arise out of the contract but do arise out of the underlying commercial transaction," *Revitch*, 977 F.3d at 721 n.1 (O'Scannlain, J., concurring) (flagging but not resolving this issue). However, the most natural reading is that the second "transaction" refers back to the first and must be a "maritime transaction." *See* Stephen E. Friedman, *The Lost Controversy Limitation of the Federal Arbitration Act*, 46 U. RICH. L. REV. 1005, 1043 (2012) ("The reference to 'such contract or transaction' almost certainly parallels the reference to the written arbitration provision being in either a contract . . . or a maritime transaction."). And in any event, many attempts to invoke accidental arbitration come completely out of left field and thus do not "aris[e] out of" any transaction between the parties. *See, e.g.*, *supra* text accompanying notes 1–11, 168–72, 213–45.

328. *See, e.g.*, Rent-A-Ctr., Inc. v. Jackson, 561 U.S. 63, 65 (2010) (involving such a contract).

329. *See, e.g.*, Coinbase, Inc. v. Suski, 602 U.S. 143, 153 (2024) (Gorsuch, J., concurring) (imagining two parties who sign "a master contract providing that 'all disputes arising out of or related to this or future agreements between the parties . . . shall be decided by an arbitrator"); Stephen J. Ware, *Section 2's "Arising Out of" Requirement*, *in* THE FEDERAL ARBITRATION ACT: SUCCESSES, FAILURES, AND A ROADMAP FOR REFORM 48, 48 (Richard A. Bales & Jill I. Gross eds., Cambridge Univ. Press 2024) (arguing that sophisticated parties should be able to form arbitration agreements that are not connected to any other contract).

330. 9 U.S.C. § 2.

331. *See* Mohsen Manesh & Joseph A. Grundfest, *The Corporate Contract and Shareholder Arbitration*, 98 N.Y.U. L. REV. 1106, 1107 n.1 (2023); David Horton, *The Federal Arbitration Act and Testamentary Instruments*, 90 N.C. L. REV. 1027, 1029 (2012). Courts occasionally apply the FAA to writings that are technically not "contracts." *See, e.g.*, Pinnacle Museum Tower Ass'n. v. Pinnacle Mkt.

Court insists that a claim must "arise out of" a "contract," the FAA may not cover these instruments.

Nevertheless, on closer inspection, these concerns are exaggerated. For one, when parties sign multiple related contracts, including an independent arbitration agreement, courts conceptualize the entire package as "one overall transaction."[332] Indeed, at least one judge has found that section 2 covers an arbitration agreement given to an employee during onboarding because it was a tile in the larger mosaic of the "terms of [their] at-will employment."[333] And even if the FAA does not apply, parties may be able to form contract-less arbitration agreements under state law. Many states do not require arbitration clauses to appear in a "contract"; rather, they enforce provisions in "record[s],"[334] which means any "tangible medium."[335] For these reasons, my thesis's impact on arbitration agreements that are not embedded in a contract will be minimal.[336]

Dev. (US), LLC, 282 P.3d 1217, 1221–22 (Cal. 2012) (ruling that the FAA governs an arbitration clause in an equitable servitude on a condominium).

332. Nestle Waters N. Am., Inc. v. Bollman, 505 F.3d 498, 503 (6th Cir. 2007); Johnson v. Walmart Inc., 57 F.4th 677, 683 (9th Cir. 2023) ("[W]here two contracts 'are merely interrelated contracts in an ongoing series of transactions,' an arbitration provision in one contract could apply to subsequent contracts." (quoting Int'l Ambassador Programs, Inc. v. Archexpo, 68 F.3d 337, 340 (9th Cir. 1995))).

333. Griffith v. Dollar Gen. Corp., No. 22-CV-1319, 2023 WL 6517868, at *1 (W.D. Pa. Oct. 5, 2023).

334. ARK. CODE ANN. § 16-108-206 (2025); COLO. REV. STAT. § 13-22-206 (2025); D.C. CODE § 16-4406 (2025); HAW. REV. STAT. ANN. § 658A-6 (West 2025); MICH. COMP. LAWS § 691.1686 (2025); MINN. STAT. § 572B.06 (2025); NEV. REV. STAT. § 38.219 (2025); N.J. STAT. ANN. § 2A:23B-6 (West 2025); N.M. STAT. ANN. § 44-7A-7 (2024); N.C. GEN. STAT. § 1-569.6 (2024); N.D. CENT. CODE § 32-29.3-06 (2025); OKLA. STAT. ANN. tit. 12, § 1857 (West 2024); OR. REV. STAT. § 36.620 (2024); UTAH CODE ANN. § 78B-11-107 (West 2025); WASH. REV. CODE § 7.04A.060 (2024); W. VA. CODE § 55-10-8 (2025).

335. ARK. CODE ANN. § 16-108-201(6) (2025); COLO. REV. STAT. § 13-22-201(6) (2025); D.C. CODE § 16-4401(9) (2025); HAW. REV. STAT. ANN. § 658A-1 (West 2025); MICH. COMP. LAWS § 691.1681(f) (2025); MINN. STAT. § 572B.01(7) (2025); NEV. REV. STAT. § 38.213 (2025); N.J. STAT. ANN. § 2A:23B-1 (West 2025); N.M. STAT. ANN. § 44-7A-1(7) (2024); N.C. GEN. STAT. § 1-569.1(6) (2024); N.D. CENT. CODE § 32-29.3-01(5) (2025); OKLA. STAT. ANN. tit. 12, § 1852(6) (West 2024); OR. REV. STAT. § 36.600(6) (2024); UTAH CODE ANN. § 78B-11-102(6) (West 2025); WASH. REV. CODE § 7.04A.010(7) (2024); W. VA. CODE § 55-10-3 (2025).

336. There is one more complication with the contractual nexus theory. Drafters routinely use FAA choice-of-law provisions. For instance, recall Walmart's contract with its Spark workers, which I mentioned in the Introduction and excerpted in Figure 1. *See supra* text accompanying note 22. It declares that "[t]he Parties expressly agree that this Arbitration Provision is governed exclusively by the Federal Arbitration Act." Walmart and Delivery Drivers Motion to Compel, *supra* note 23, at 9. If a claim does not "aris[e] out of" the container contract and therefore does not fall under section 2, can an FAA choice-of-law clause opt back in to the FAA? The answer is unclear. *Compare* Hicks Unlimited, Inc. v. UniFirst Corp., 889 S.E.2d 564, 567 (S.C. 2023) (holding that parties cannot select the FAA when a contract does not involve interstate commerce under section 2), *and* Key v. Accolade Healthcare of the Heartland, LLC, 245 N.E.3d 535 (Ill. App. Ct. 2024) (same), *with* Smith v. Sanders Realty Holdings, LLC, No. 20-CV-03617, 2021 WL 2651817, at *3 (N.D. Ga. Apr. 19, 2021) (reaching the opposite conclusion), *and In re* Kellogg Brown & Root, 80 S.W.3d 611, 617 (Tex. App. 2002) (same).

3. Benefits of the Theory

Recognizing that state law governs motions to compel arbitration of assertions that do not "aris[e] out of" the container agreement would pay three dividends. First, this interpretation of section 2 would represent a small step in restoring states' rights in arbitration. As discussed, the FAA has run roughshod over state power to regulate arbitration for forty years.[337] But the contractual nexus theory would allow states to call the shots in a type of dispute that is becoming increasingly common. To be clear, state law would not necessarily invalidate infinite arbitration provisions. In fact, about a dozen jurisdictions have statutes that, like New York's 1920 law, apply even when there is no link between the allegations and the larger agreement.[338] Yet many states still have laws on the books that exempt vulnerable parties from arbitration[339] or require that class actions be available in arbitration when a plaintiff alleges that a corporation deprived many individuals of small amounts of money.[340] Moreover, state policymakers could create rules that deal specifically with motions to compel arbitration of unrelated claims, thus exerting dominion in an area from which they are normally excluded.

Second, this thesis would abrogate existing decisions that have upheld limitless arbitration agreements. The courts that ordered arbitration of Kamille Smith's racial profiling allegations,[341] Michelle Haasbroek's rape-related tort claims,[342] and Diana Mey's TCPA claims[343] relied on the *Moses*

337. *See supra* text accompanying notes 112–16.

338. These laws typically require arbitration for "any controversy thereafter arising between the parties." ARIZ. REV. STAT. ANN. § 12-1501 (2024); CONN. GEN. STAT. § 52-408 (2024); IDAHO CODE § 7-901 (2024); IND. CODE § 34-57-2-1 (2024); MASS. GEN. LAWS ch. 251, § 1 (2024); ME. REV. STAT. ANN. tit. 14, § 5927 (2024); MO. REV. STAT. § 435.465 (2024); 42 PA. CONS. STAT. § 7303 (2024); S.D. CODIFIED LAWS § 21-25A-1 (2024); VA. CODE ANN. § 8.01-581.01 (2024); VT. STAT. ANN. tit. 12, § 5652 (2024).

339. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-3003(B)(1)–(3) (2024) (voiding arbitration clauses in banking, insurance, and employment contracts); CAL. LAB. CODE § 229 (West 2024) (same for wage disputes); TEX. CIV. PRAC. & REM. CODE ANN. § 171.002(c) (West 2022) (requiring agreements to arbitrate personal injury claims or disputes stemming from transactions for $50,000 or less to be signed by the parties and their lawyers).

340. *See, e.g.*, Waithaka v. Amazon.com, Inc., 966 F.3d 10, 33 (1st Cir. 2020) (applying a Massachusetts rule that invalidates waivers of class action rights in a case that is exempt from the FAA); Muro v. Cornerstone Staffing Sols., Inc., 229 Cal. Rptr. 3d 498, 505–06 (Ct. App. 2018) (reaching the same conclusion under California law).

341. *See supra* text accompanying note 41.

342. *See supra* text accompanying notes 160–64. Today, Michelle Haasbroek's lawsuit would be exempt from the FAA under 2022's Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act. 9 U.S.C. §§ 401–02; *see id.* § 402(a); David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J.F. 1, 10–11 (2022).

343. *See supra* text accompanying notes 226–33.

Cone presumption.[344] But because *Moses Cone* emanates from section 2, these cases should not have been eligible for the FAA and, therefore, would no longer be good law.[345]

Finally, reading section 2 as written would eliminate the threat of preemption that hangs over opinions that are hostile to infinite arbitration clauses. As noted, these cases stand on shaky ground: The FAA forbids judicial discrimination against arbitration, but finding that nobody would agree to arbitrate any claim or that such an arrangement is unconscionable assumes that the arbitral forum is deficient.[346] Yet under the contractual nexus theory, the FAA vanishes, and there is no federal impediment to acknowledging the brute truth that, for many plaintiffs, being forced to arbitrate means forfeiting valuable rights.

B. Artificial Privity

As noted, at least one Supreme Court Justice and three federal appellate courts have deferred to language that names non-signatories as "parties" to the contract.[347] This section offers a more nuanced approach to this issue.

Artificial privity rests on an inherent contradiction. An individual or business cannot be *both* a "party" *and* a "non-signatory" to a contract. Indeed, those concepts are separate, watertight compartments. On the one hand, parties are signatories.[348] Although the word "signatory" is

344. *See* Smith v. Walmart, Inc., No. 22-cv-00568, 2023 WL 5215376, at *5 (W.D. Va. Aug. 14, 2023) (using "the presumption in favor of arbitrability" (quoting Levin v. Alms & Assocs., Inc., 634 F.3d 260, 267 (4th Cir. 2011))); Haasbroek v. Princess Cruise Lines, Ltd., 286 F. Supp. 3d 1352, 1359 (S.D. Fla. 2017) (noting that previous cases have emphasized that "the FAA 'requires expansive interpretation of arbitration agreements'" (quoting Doe v. Princess Cruise Lines, Ltd., 657 F.3d 1204, 1217 (11th Cir. 2011))); Mey v. DIRECTV, LLC, 971 F.3d 284, 292 (4th Cir. 2020) ("[W]e must resolve a dispute about the scope of an arbitration agreement in favor of arbitration . . . .").

345. Several states have policies in favor of arbitration, but "haven't gone full-on *Moses H. Cone*." Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1214 (11th Cir. 2021) (discussing Florida law); *see also* Glazer's Distribs. of Ill., Inc. v. NWS-Ill., LLC, 876 N.E.2d 203, 213 (Ill. App. Ct. 2007) (refusing to rely on *Moses Cone* "where we have found that the FAA is inapplicable"); Gove v. Career Sys. Dev. Corp., 689 F.3d 1, 8 (1st Cir. 2012) (construing arbitration clause against drafter under Maine law).

346. *See supra* text accompanying notes 173–77.

347. *See supra* text accompanying note 51. Likewise, even a decision like *Revitch*, which declined to allow DirecTV to enforce Mobility's arbitration clause, offers a roadmap for companies looking to create artificial privity. As mentioned, the Ninth Circuit held that it would be "absurd" to deem the plaintiff to have agreed to arbitrate "any dispute with any corporate entity that happens to be acquired by AT&T, Inc." Revitch v. DIRECTV, LLC, 977 F.3d 713, 717 (9th Cir. 2020); *see also supra* text accompanying notes 229–36. Nevertheless, the court also opined that "[h]ad the wireless services agreement stated that 'AT&T' refers to 'any affiliates, both present and future,' we might arrive at a different conclusion." *Revitch*, 977 F.3d at 718. Sure enough, after the opinion came out, Mobility added that language to its terms. *See* AT&T CONSUMER ARBITRATION AGREEMENT § 1.3.2.1, https://www.att.com/scmsassets/support/other/attconsumerarbitrationagreement.pdf [https://perma.cc/E9SD-HP85] (defining "AT&T" as "includ[ing] our *past, present, and future* parents, subsidiaries, affiliates, and related entities" (emphasis added)).

348. *See* Parkway 1046, LLC v. U.S. Home Corp., 961 F.3d 301, 313 (4th Cir. 2020) ("The plain meaning of 'party,' when interpreting a contract, is a signatory.").

anachronistic, it refers to the crucial fact that an individual or company *manifested assent* to a transaction through some mechanism—writing, clicking, nodding, or drafting terms.[349] On the other hand, those who never telegraph their willingness to be bound are "non-signatories" or "third parties."[350] There is no such thing as Frankensteinian "party non-signatories."[351]

Rather than deeming gigantic classes of potential defendants to be "parties" based on a single line of fine print, courts should ask the same question they pose to anyone claiming to be a signatory: Did you agree? This rule would be easiest to satisfy when the litigant requesting arbitration and the drafter are closely related. For example, AT&T Corp. might be able to demonstrate that it accepted Mobility's terms,[352] and Experian could perhaps do the same with respect to its affiliate ECS.[353] This evidence could consist of communications between executives or counsel at the two companies that verifies their intent "to enter [the] contract[] collectively."[354] It would show that the defendant is a full-blooded "party" or "signatory"—not a nonsensical "party non-signatory."[355] But other corporations would flunk this test. For instance, in sharp contrast to AT&T Corp., DirecTV could not argue with a straight face that it manifested assent to the arbitration provision of its then-rival Mobility long before the companies' parents merged.[356] Likewise, as far as I know, enterprises like Sixt and Orbitz are not even faintly aware of each other's dispute resolution regimes. In many cases, then, the asserted "party non-signatory's" lack of consent would doom their claim of artificial privity.

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349. *See Signatory*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "signatory" as "[a] person or entity that signs a document . . . and thereby becomes a party to an agreement"); Bauer v. Qwest Commc'ns Co., 743 F.3d 221, 227 (7th Cir. 2014) ("[A] party named in a contract may, by [their] acts and conduct, indicate [their] assent to its terms and become bound by its provisions even though [t]he[y] ha[ve] not signed it." (quoting Carlton at the Lake, Inc. v. Barber, 928 N.E.2d 1266, 1270 (Ill. App. Ct. 2010))).

350. *See, e.g.*, Lawley v. Northam, No. 10-1074, 2013 WL 1786484, at *22 (D. Md. Apr. 24, 2013) (deeming litigants to be third parties when they "'never expressly adopted or engaged in conduct manifesting acceptance' of any duties under the [c]ontract'" (quoting Residential Warranty Corp. v. Bancroft Homes Greenspring Valley, Inc., 728 A.2d 783, 794 (Md. Ct. Spec. App. 1999))).

351. *But cf.* Outokumpu Stainless USA, LLC v. Coverteam SAS, No. 17-10944, 2022 WL 2643936, at *2 (11th Cir. July 8, 2022).

352. *See supra* text accompanying notes 24–26.

353. *See supra* text accompanying notes 196–203.

354. Defendant-Appellant's Consolidated Reply Brief at 4, Meeks v. Experian Info. Servs., Inc., Nos. 21-17023, 22-15028 (9th Cir. Dec. 27, 2022).

355. The parties would have formed a "multilateral" contract (one that has more than two signatories). *See* Bryce Johnson, Comment, *Efficiency Concerns in Breach of Multilateral Contracts*, 44 UCLA L. REV. 1513, 1514 (1997).

356. *See* Karl Bode, *AT&T Promised a TV Revolution—Instead, We Got a Giant Mess*, THE VERGE (Mar. 3, 2021, 9:34 AM), https://www.theverge.com/2021/3/3/22310994/att-directv-uverse-spinoff-sale-television-hbo-max-deal [https://perma.cc/TMQ4-9ZAA] (explaining why AT&T acquired DirecTV).

Four issues warrant further discussion. First, I admit that it seems strange for the law to mandate that arm's-length companies assent to each other's contracts. How would they know which of their peers' arbitration clauses to accept and by what means would they do so? But this awkwardness says more about the synthetic nature of artificial privity than anything. Contract law defines "parties" as those who agree to terms.[357] If drafters want their "employees, parents, subsidiaries, affiliates, beneficiaries, agents and assigns" to be parties, then these people and companies must consent to the arbitration clause.[358]

Second, I can imagine a way in which purported "party non-signatories" might contend that they cross the threshold and *become* full-fledged signatories and parties. They would say that even if they did not participate in the creation of the contract, they belatedly accepted the arbitration clause when they attempted to enforce it.[359] However, this contention flies in the face of the tenet that "the moment of contract formation [i]s the crucial juncture at which the parties establish their respective rights and obligations."[360] I am not aware of any authority that a non-signatory can transmute itself into a signatory after a deal takes effect.

Third, it is truly ironic to conclude that *defendants* have not agreed to arbitrate. As mentioned, anti-arbitration voices have been objecting for decades that ordinary people are forced to arbitrate even though they do not meaningfully assent to the fine print.[361] My view of artificial privity represents the other side of this coin. Just as consumers and employees cannot escape arbitration after manifesting intent to be bound by a contract that includes an arbitration provision, defendants cannot enjoy the advantages of the process if they never agreed to it.

Fourth, cracking down on artificial privity would help reduce the incidence of accidental arbitration. Unmasking "party non-signatories" as garden variety non-signatories would prevent them from directly enforcing an arbitration agreement.[362] Instead, to mandate arbitration, they would need

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357. *See supra* text accompanying notes 348–49.

358. George v. Rushmore Serv. Ctr., LLC, No. 18-cv-13698, 2020 WL 2319293, at *2 (D.N.J. May 11, 2020), *vacated*, 114 F.4th 226 (3d Cir. 2024).

359. In *Meeks*, Experian made exactly that argument. *See supra* text accompanying notes 196–203; Defendant-Appellant's Consolidated Reply Brief, *supra* note 354, at 8.

360. Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. 303, 316 (2008). Likewise, *Black's Law Dictionary* defines a "party" as "one who takes part in a transaction," *Party*, BLACK'S LAW DICTIONARY (8th ed. 2004), and courts declare that someone who "did not negotiate, sign, or otherwise personally enter into the . . . agreement" is "not a 'party' to it," Wise v. Mich. Civ. Serv. Comm'n, No. 268675, 2007 WL 2404523, at *3 (Mich. Ct. App. Aug. 23, 2007).

361. *See supra* text accompanying notes 109–10.

362. *See* Baldwin v. Cavett, 502 F. App'x 350, 353 (5th Cir. 2012) (holding that defendants who "neither made an offer to the [plaintiffs], nor accepted an offer from them" are "not parties to the arbitration agreement" and thus satisfy an exception to privity).

to take the extra step of satisfying an exception to the privity requirement such as third-party beneficiary doctrine.[363]

This should be difficult when the drafter and the "party non-signatory" have little in common. For starters, due to the "strong presumption against conferring contractual benefits on noncontracting third parties,"[364] the "party non-signatory" would face an uphill climb. Also, drafters often impose procedures that are specific to their firm and thus suggest that no one else can borrow the arbitration clause. For instance, in *Calderon*, the Eleventh Circuit cited the fact that plaintiffs needed to contact Orbitz's lawyers before filing an arbitration to reject Sixt's attempt to freeride on the arbitration clause, reasoning that Orbitz could not have intended that customers suing third parties "had to route their [claims] through Orbitz's legal department."[365] Similarly, Mobility's clause requires Mobility to pay attorneys' fees to plaintiffs who win in arbitration, which suggests that it cannot be commandeered by outsiders such as DirecTV.[366] For reasons like these, "party non-signatories" will often not be able to show that they are third-party beneficiaries.

In turn, this analysis would serve as a backstop to the contractual nexus theory in hybrid cases.[367] Recall Diane Mey and Jeremy Revitch's filings against DirecTV.[368] Even if a court held that their allegations did not "aris[e] out of" Mobility's contract and thus were subject to state law, West Virginia, where Mey sued, and California, Revitch's forum, validate agreements to arbitrate any conflict between the parties.[369] Therefore, as a preliminary matter, Mobility's terms would be binding. To be sure, the judge could find in the absence of the FAA that neither plaintiff really agreed to arbitrate against DirecTV or that Mobility's infinite provision is unconscionable. However, that conclusion depends on a state's contract law, and some jurisdictions (such as West Virginia)[370] are less plaintiff-

363. *See, e.g.*, Roberson v. Money Tree of Ala., Inc., 954 F. Supp. 1519, 1527–28 (M.D. Ala. 1997) (requiring a defendant in an arbitration case to fit within an exception to the privity mandate because it did not consent to the container contract).

364. Coatney v. Ancestry.com DNA, LLC, 93 F.4th 1014, 1022 (7th Cir. 2024).

365. Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1209–10 (11th Cir. 2021).

366. *See* Mey v. DIRECTV, LLC, No. 17-CV-179, 2021 WL 973454, at *7 (N.D.W. Va. Feb. 12, 2021).

367. I mention hybrids because there do not seem to be any pure "party non-signatory" cases. Instead, when a defendant tries to establish artificial privity, it appears to be a given that the plaintiff's claims *also* do not relate to the container contract, and we have a hybrid.

368. *See supra* text accompanying notes 213–16.

369. *See* W. VA. CODE § 55-10-8(a) (2024); CAL. CIV. PROC. CODE § 1281 (West 2024).

370. *See* Ampler Burgers Ohio LLC v. Bishop, 902 S.E.2d 818, 829 (W. Va. 2024) (rejecting unconscionability challenge to arbitration agreement brought by 18-year-old employee even though it "required complete confidentiality and contained discovery limitations").

friendly than others (like California)[371]. Yet no matter what a court found about the lack of a link between the claims and the container contract, DirecTV would still need *standing to enforce Mobility's terms.* And as I have argued, the company should not be able to do so either as a "party non-signatory" or by showing that it falls within an exception to "the general rule that allows only parties to enforce an arbitration agreement."[372] Accordingly, seeing the sleight-of-hand behind artificial privity would stop companies from compelling arbitration in unexpected ways.

C. Delegation Revisited

As mentioned above, there is widespread disagreement about what to do when a defendant tries to enforce a delegation clause in an accidental arbitration case.[373] This section argues that courts, not arbitrators, should decide each major issue in these disputes: whether allegations are related to the container contract, the legal consequences that flow when allegations are *not* related to the container contract, who is a party/signatory, and if non-parties/non-signatories have rights.

Judges grappling with the intersection of accidental arbitration and delegation focus on *Henry Schein*.[374] As mentioned above, in that case, the Court abolished the wholly groundless doctrine, which courts had previously used to refuse to enforce delegation clauses when no arbitrator could find that a case must be arbitrated.[375] In a unanimous opinion, Justice Kavanaugh suggested that judges must robotically uphold delegation clauses, announcing that "a court may not decide an arbitrability question that the parties have delegated to an arbitrator."[376]

But *Henry Schein* does not support a blanket rule about delegation provisions. As noted, the issue there was contract interpretation: whether an arbitrator should be able to decide whether an arbitration clause that excluded injunctions governed a complaint for injunctive relief.[377] Permitting arbitrators to define the scope of the arbitration agreement has long been the least controversial species of delegation.[378] Arguably, arbitrators are better than generalist judges at the task since they are "the

371. Supposedly, "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 342 (2011).

372. Ronay Fam. Ltd. P'ship v. Tweed, 157 Cal. Rptr. 3d 680, 685 (Ct. App. 2013); *see also supra* text accompanying notes 359–60.

373. *See supra* Section II.B.4.

374. *See* Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63 (2019).

375. *See id.* at 68.

376. *Id.* at 69.

377. *See id.* at 66–67.

378. *See, e.g.*, Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 453 (2003) (plurality opinion) (reasoning that "[a]rbitrators are well situated to answer" questions about "contract interpretation").

parties' officially designated 'reader' of the contract,"[379] who are "familiar[] with the vocabulary and customs of the industry."[380]

Accidental arbitration is fundamentally different. First, as I have argued, when a defendant seeks to enforce a delegation clause and the plaintiff counters that there is no connection between their allegations and the container contract, the threshold issue is not the ambit of the arbitration clause; rather, it is the coverage *of the FAA*.[381] Under the contractual nexus theory, the first step in the analysis is to decide whether a claim "aris[es] out of" the container contract within the meaning of section 2.[382] And this means that the relevant Court decision is not *Henry Schein*. Instead, it is *New Prime Inc. v. Oliveira*, which, as noted, explained that arbitrators cannot rule on "whether the contract itself falls within or beyond the boundaries of . . . [section] 2."[383] Thus, judges must decide as a preliminary matter whether the FAA applies, setting the stage for resolving other issues about the delegation provision.

This is a major fork in the road. If a court finds a sufficient tether between the allegations and the container contract, section 2 governs, and federal law controls whether courts or arbitrators hear remaining questions about the scope or validity of the agreement to arbitrate the merits.[384] Because the FAA is permissive about delegation, arbitrators will likely exercise jurisdiction over many of these issues.[385] But in stark contrast, if there is no link between the complaint and the container contract, state law provides the touchstone.[386] Although jurisdictions vary, many do not give delegation provisions the same exalted status they enjoy under the FAA.[387] In these

379. Boise Cascade Corp. v. United Steelworkers, Local Union No. 7001, 588 F.2d 127, 128 (5th Cir. 1979) (quoting Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny*, 75 MICH. L. REV. 1137, 1140 (1977)).

380. Recent Case, *Arbitration and Award—Arbitrators and Proceedings—By Considering Trade Usage Arbitrator Exceeded Authority to Interpret Contract Which Reviewing Court Finds Unambiguous*, 63 HARV. L. REV. 347, 348 (1949).

381. *See supra* Section III.A.1.

382. 9 U.S.C. § 2.

383. New Prime Inc. v. Oliveira, 586 U.S. 105, 111 (2019). Admittedly, because *New Prime* only held that delegation clauses cannot entrust arbitrators with deciding whether section 1's exemption applies, this passage is *dicta*. *See id.* at 111. But the Court repeatedly emphasized that questions involving the ambit of sections 1 *and 2* are not delegable. *See id.* at 112 (remarking that "a court may use [sections] 3 and 4 to enforce a delegation clause only if the clause appears in a 'written provision in . . . a contract evidencing a transaction involving commerce' consistent with [section] 2" and that "a court should 'determin[e] that the contract in question is within the coverage of the [FAA]'" (first quoting 9 U.S.C. § 2; and then quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402 (1967))).

384. *See supra* Section III.A.1.

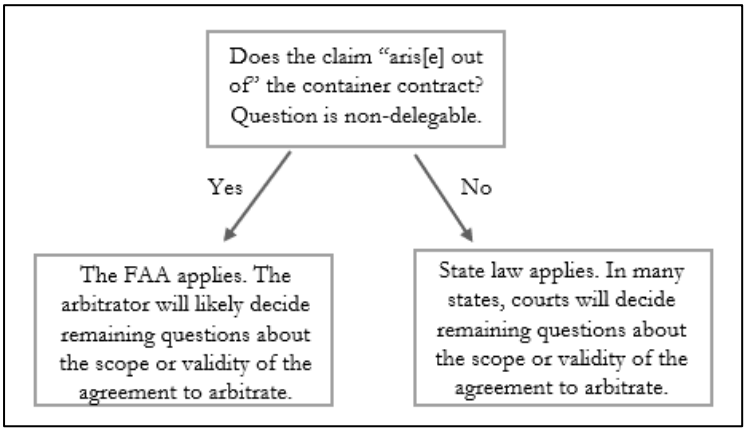
385. *See supra* text accompanying note 254.

386. *See supra* Section III.A.1.

387. *See, e.g.*, Ontiveros v. DHL Express (USA), Inc., 79 Cal. Rptr. 3d 471, 480–82 (Ct. App. 2008) (deeming a delegation clause to be inherently unconscionable), *overruled in part by* Ramirez v.

states, even when a contract has a delegation clause, judges should consider whether plaintiffs meaningfully consent to infinite arbitration clauses or whether such clauses are unconscionable.

FIGURE 7: THE CONTRACTUAL NEXUS THEORY AND DELEGATION CLAUSES



Second, non-signatory issues are also a far cry from *Henry Schein*. For one, as I have argued, defendants trying to take advantage of artificial privity must show that they assented to the drafter's arbitration clause.[388] As the Court held in *Coinbase, Inc. v. Suski*, "whether there is an agreement to arbitrate" is a "question [that] must be answered by a court."[389] Therefore, even under the FAA, judges—not arbitrators—must distinguish between parties/signatories and third parties/non-signatories.

Finally, courts should also decide whether a stranger to the agreement can meet an exception to the privity requirement, such as third-party beneficiary principles. As noted, some courts have reached the opposite conclusion and held that applying third-party beneficiary doctrine is a delegable matter of contract interpretation.[390] They opine that the third-party beneficiary test requires construing the terms of the transaction to see if it

Charter Commc'ns, Inc., 551 P.3d 520 (Cal. 2024)). As noted, one reason delegation clauses are so difficult to invalidate is that the Court casts them as sovereign arbitration provisions that are protected by the separability doctrine. *See supra* note 126. Yet some states do not recognize the separability principle, which denies delegation clauses this shield. *See, e.g.*, Richard C. Reuben, First Options*, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 854 nn.205–07 (2003) (listing jurisdictions).

388. *See supra* text accompanying notes 347–56.

389. Coinbase, Inc. v. Suski, 602 U.S. 143, 150 (2024) (quoting Field Intel. Inc. v. Xylem Dewatering Sols. Inc., 49 F.4th 351, 356 (3d Cir. 2022)).

390. *See supra* text accompanying notes 283–86.

confers arbitration rights on the non-signatory and therefore is a "dispute[] regarding the scope, and not the existence, of a valid agreement."[391] But this position ignores the reality that when a plaintiff challenges a non-signatory defendant's standing to compel arbitration, they are basically objecting: "I did not consent to arbitrate *either* the merits *or* whether I agreed to arbitrate the merits with this person or entity." Once again, the pivotal "question is whether the 'parties' have agreed to *anything at all*"—an inquiry that cannot be delegated.[392]

Moreover, allowing arbitrators to handle non-signatory issues would open the door to motions to compel that are weirder than any accidental arbitration dispute that has surfaced so far. Literally "anyone[,] anywhere in the world" could invoke a delegation clause in a random agreement and demand that the arbitrator evaluate if they are entitled to send the plaintiff's substantive assertions to the arbitral forum.[393] For instance, the next time someone sues DirecTV, the company could invoke the delegation clause in that person's employment contract, or social media accounts, or credit card terms, or rideshare contract, or gym membership—the list stretches on forever—and ask the arbitrator to assess whether it is a third-party beneficiary. Of course, the specter of sanctions might deter frivolous requests.[394] But then again, in the eyes of a ruthless defendant, a small monetary penalty might be a small price to pay to send a case off the rails and force the plaintiff to incur arbitration fees. Assigning non-signatory issues to judges would keep this area of law from spiraling further out of control.

CONCLUSION

Businesses once responded to consumer and employment lawsuits by asking the court to enforce the arbitration clause in the contract that precipitated the claim. But this Article has demonstrated that a growing

391. O'Connor v. BMW of N. Am., LLC, No. 18-cv-03190, 2020 WL 5260416, at *3 (D. Colo. July 23, 2020).

392. Salas v. Toyota Motor Sales, U.S.A., Inc., No. 15-cv-08629, 2024 WL 606166, at *6 n.2 (C.D. Cal. Jan. 10, 2024). In addition, as some courts have recognized, a non-signatory defendant needs to prove that there is "clear and unmistakable evidence" that it and the plaintiff "agreed to arbitrate arbitrability"—an impossible showing when there is no agreement between the litigants at all. Chopin v. Parsley Energy Operations, LLC, No. 21-CV-54, 2021 WL 8442020, at *3 (W.D. Tex. Nov. 22, 2021), *report and recommendation adopted sub nom.* Chopin v. Parsely Energy Operations, LLC, No. 21-CV-054, 2022 WL 1518904 (W.D. Tex. Apr. 10, 2022).

393. Patterson v. Jump Trading LLC, 710 F. Supp. 3d 692, 707 (N.D. Cal. 2024); *see also* Young v. ByteDance Inc., 700 F. Supp. 3d 808, 812 (N.D. Cal. 2023) (explaining that if drafters can delegate non-signatory issues, defendants could "take the lawsuit on an automatic detour into arbitration").

394. *See* Blanton v. Domino's Pizza Franchising LLC, 962 F.3d 842, 851–52 (6th Cir. 2020) (reasoning that *Henry Schein* rejected the "policy concern" that "*anyone* could force [the plaintiff] to arbitrate 'arbitrability' no matter how frivolous the argument").

number of cases break that mold. In these disputes, the source of the defendant's asserted arbitration rights is some random agreement: one that governs a different subject matter or was drafted by another company (or both). From the plaintiff's perspective, the applicability of the arbitration clause is a shock; from the defendant's, it is a happy accident.

Courts are struggling mightily with the complexities of accidental arbitration. Can arbitration clauses cover lawsuits that are unrelated to the container contract? Is some other person or entity a "party" to the arbitration clause because the drafter declares that they are? Should arbitrators be able to decide these issues? The caselaw on point continues to swell but points in opposite directions.

Accordingly, this Article has offered a blueprint for analyzing these questions. First, it has argued that even pro-business Justices would determine that section 2 of the FAA only covers causes of action that "aris[e] out of" the container contract. Second, it has urged courts to abandon their laissez-faire approach to artificial privity and demand proof that non-signatories either manifested assent to the arbitration clause or are third-party beneficiaries. Third, it has explained why the existence of a delegation clause should not always allow arbitrators to decide whether to grant a motion to compel accidental arbitration.