CONTRACT LAW — FEDERAL ARBITRATION ACT — NINTH CIRCUIT REFUSES TO ENFORCE INFINITE ARBITRATION AGREEMENT. — *Revitch v. DIRECTV, LLC*, 977 F.3d 713 (9th Cir. 2020).

The Federal Arbitration Act[1] (FAA) requires courts to enforce agreements by private parties to resolve their disputes in arbitration rather than litigation. Despite abundant evidence that Congress intended the FAA to apply only in federal court[2] and only to commercial dealings,[3] the Supreme Court has reinterpreted the law since the 1980s,[4] imposing it on state courts[5] and finding in it a command to enforce even one-sided arbitration contracts imposed on consumers and workers by corporate actors eager to keep claims individual, secret, and rare.[6] Emboldened by these victories, corporations have begun drafting agreements with "infinite" terms that purport to bind individuals in perpetuity to arbitrate any and all claims they might bring against a vast group of counterparties.[7] Recently, in *Revitch v. DIRECTV, LLC*,[8] the Ninth Circuit declined to enforce such an agreement against a consumer plaintiff. While the *Revitch* court reached a just result, its reasoning arguably contravened state law and Supreme Court precedent, making the decision unlikely to support broad-based judicial rejection of these contracts. However, a separate concurrence in the case was more doctrinally sound and may therefore light the way for future courts to hold infinite arbitration agreements unenforceable.

In early 2018, Jeremy Revitch filed a class action lawsuit against DIRECTV, LLC (DirecTV) in federal court in California.[9] Revitch alleged that DirecTV had bombarded his cellphone with prerecorded ads even though he had never shared his number or consented to the calls.[10] Annoyed by the intrusions, he sought damages for himself and other

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[1] 9 U.S.C. §§ 1–16.

[2] *See* Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 101–13 (2006).

[3] *See id.* at 108; Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 125–29 (2001) (Stevens, J., dissenting).

[4] *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) ("[O]ver the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.").

[5] Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).

[6] *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018).

[7] *See generally* David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633 (2020) (coining the phrase "infinite arbitration clauses" and documenting their proliferation).

[8] 977 F.3d 713 (9th Cir. 2020).

[9] *See* Revitch v. DirecTV, LLC, No. 18-cv-01127, 2018 WL 4030550, at *1 (N.D. Cal. Aug. 23, 2018).

[10] *See Revitch*, 977 F.3d at 715.

victims under the Telephone Consumer Protection Act.[11] As the litigation unfolded, DirecTV "somehow uncovered" that Revitch had electronically signed a customer agreement with AT&T Mobility, LLC (AT&T) almost seven years earlier while checking out at an AT&T store.[12] That agreement contained a broadly worded arbitration clause that purported to cover "all disputes and claims between" Revitch and AT&T and defined "AT&T" to include its "subsidiaries, . . . successors," and, crucially, "affiliates."[13] Although AT&T and DirecTV were separate companies when Revitch signed the contract, they became "distant corporate cousins" when AT&T's parent company acquired DirecTV four years later.[14] Citing this transaction, DirecTV claimed to be an "affiliate" of AT&T and moved to compel arbitration pursuant to the contract.[15]

A magistrate judge presiding on behalf of the district court denied DirecTV's motion.[16] The court emphasized that, although the FAA requires arbitration agreements to be enforced according to their terms, arbitration is, at its core, "strictly a matter of consent."[17] Thus, when considering whether to compel arbitration, a court must determine "(1) whether a valid agreement to arbitrate exists" (the "formation" prong) and, if so, "(2) whether the agreement encompasses the dispute at issue" (the "scope" prong).[18] Applying California state contract law, the court held that no agreement existed between Revitch and DirecTV because Revitch could not have intended to agree to arbitrate with "an entity that became affiliated with AT&T . . . long after he entered into the original contract by virtue of an entirely fortuitous event."[19] Indeed, the court explained, "[n]o reasonable consumer" would have done so.[20]

The Ninth Circuit affirmed.[21] Writing for a divided panel, Judge O'Scannlain[22] began by restating the two-part test applied below.[23] Starting with the formation prong, the court acknowledged that the "ordinary definition" of "affiliate" would include DirecTV.[24] Because

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[11] 47 U.S.C. § 227; *see Revitch*, 977 F.3d at 715.

[12] *Revitch*, 977 F.3d at 715; *see Revitch*, 2018 WL 4030550, at *2.

[13] *Revitch*, 2018 WL 4030550, at *3 (emphasis omitted).

[14] Plaintiff-Appellee's Answering Brief at 6, *Revitch*, 977 F.3d 713 (9th Cir. 2020) (No. 18-16823).

[15] *Revitch*, 977 F.3d at 715.

[16] *Revitch*, 2018 WL 4030550, at *1.

[17] *Id.* at *6 (quoting Granite Rock Co. v. Int'l Brotherhood of Teamsters, 561 U.S. 287, 299 (2010) (internal quotation marks omitted)).

[18] *Id.* at *5 (quoting Chiron Corp. v. Ortho Diagnostic Sys. Inc., 207 F.3d 1126, 1130 (9th Cir. 2000)).

[19] *Id.* at *11.

[20] *Id.* at *15.

[21] *Revitch*, 977 F.3d at 721.

[22] Judge O'Scannlain was joined by Judge McKeown.

[23] *See Revitch*, 977 F.3d at 716.

[24] *Id.* at 717.

California law requires contracts to be interpreted to effectuate the parties' mutual intent, which is generally "determine[d] . . . 'from the written terms . . . alone,'" DirecTV argued that this finding was sufficient to deem it a party to Revitch's contract.[25] But the inquiry did not end there, as the panel understood California law to permit courts to consider extratextual factors like the parties' expectations when a contract's written terms would produce "absurd results."[26] Here, the court reasoned, the textual interpretation advanced by DirecTV would do just that by binding Revitch to arbitrate "any dispute with any corporate entity that happens to be acquired by AT&T" — even disputes entirely unrelated to the initial transaction and with companies acquired long after he signed the original contract.[27] Thus freed from a text-only analysis, the court found that Revitch could not have expected to be forced to arbitrate this dispute with DirecTV and concluded on that basis that no agreement had been formed.[28] The court therefore did not reach the scope prong.[29]

DirecTV had argued that the Supreme Court's intervening decision in *Lamps Plus, Inc. v. Varela*[30] required the panel to find the absurd results canon preempted by the FAA and to instead resolve any ambiguities in the term "affiliates" in favor of arbitration.[31] The court disagreed, explaining that the *Lamps Plus* Court — which held that the FAA preempts California's rule that contractual ambiguities are to be construed against the drafter when the rule is cited to impose class arbitration procedures[32] — so held because that rule required courts to reach "default" outcomes unsupported by genuine consent.[33] In contrast, the court explained, the absurd results canon is fully compatible with the FAA because it helps courts "discern the mutual intent of the parties" and does so in a manner that does not inherently disfavor arbitration agreements.[34] Finally, the court acknowledged that its holding created a circuit split, as the Fourth Circuit had recently allowed DirecTV to enforce a customer's agreement with AT&T on nearly identical facts.[35]

Judge O'Scannlain also concurred separately to clarify that he would affirm on the scope prong as well.[36] The FAA's plain text, he explained,

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[25] *Id.* (quoting Kashmiri v. Regents of Univ. of Cal., 67 Cal. Rptr. 3d 635, 652 (Ct. App. 2007)).
[26] *Id.* (quoting *Kashmiri*, 67 Cal. Rptr. 3d at 652).
[27] *Id.*
[28] *Id.* at 718.
[29] *See id.* at 719.
[30] 139 S. Ct. 1407 (2019).
[31] *Revitch*, 977 F.3d at 718.
[32] *Lamps Plus*, 139 S. Ct. at 1417–19.
[33] *Revitch*, 977 F.3d at 718.
[34] *Id.* at 719; *see id.* at 718.
[35] *Id.* at 719–20 (citing Mey v. DIRECTV, LLC, 971 F.3d 284 (4th Cir. 2020)).
[36] *Id.* at 721 (O'Scannlain, J., concurring).

requires courts to compel arbitration only over disputes "arising out of" the contract containing the arbitration clause or the transaction governed by that contract.[37] Noting the scarcity of cases addressing the FAA's "arising out of" language, the concurrence analyzed similar language in other statutes and noted the absence of any Supreme Court precedent for compelling a party to arbitrate claims "wholly unrelated" to its contract, reasoning that the FAA must be read not to reach such claims.[38] Because he found Revitch's suit against DirecTV "wholly unrelated" to — and thus not arising out of — his agreement with AT&T, Judge O'Scannlain concluded that the FAA afforded the court no power to send it to arbitration.[39]

Judge Bennett dissented.[40] In his view, the formation prong was easily satisfied because DirecTV was now an "affiliate" of AT&T and nothing in the contract's text imposed a time limit on the term.[41] And because the agreement covered "all disputes and claims," Revitch's suit necessarily fell within its scope.[42] But even if the term "affiliates" did not so clearly include later-acquired companies like DirecTV, he argued, the court erred in resolving that question at the formation prong.[43] Instead, the court should have found a properly formed agreement between Revitch and AT&T and then analyzed DirecTV's status as a question of that agreement's scope.[44] That being the case, he continued, any ambiguity should have been controlled not by the absurd results canon but by the Supreme Court's command to resolve "doubts concerning the scope of arbitrable issues . . . in favor of arbitration."[45] Finally, Judge Bennett offered two critiques of the panel's application of the absurd results canon. First, he argued that California law allows that rule to be invoked only when contractual language is ambiguous, which was not the case here.[46] Second, he argued that the majority's reasoning "contravene[d] Supreme Court precedent" because it found absurdity in

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[37] *Id.* (quoting 9 U.S.C. § 2).

[38] *Id.* at 722; *see id.* at 722–23.

[39] *Id.* at 724.

[40] *Id.* at 724 (Bennett, J., dissenting).

[41] *Id.* at 725.

[42] *Id.*

[43] *See id.* at 726.

[44] *See id.* at 726–27. The majority rejected this argument as violating the basic contract law principle that a nonsignatory party like DirecTV may only enforce a contract "on a theory that 'the law [has] establishe[d] a privity'" between it and the signatory party — taking the analysis right back to the formation question the dissent sought to avoid. *Id.* at 716 n.2 (majority opinion) (alterations in original) (emphasis omitted) (quoting Spinks v. Equity Residential Briarwood Apartments, 90 Cal. Rptr. 3d 453, 470 (Ct. App. 2009)).

[45] *Id.* at 726 (Bennett, J., dissenting) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983)).

[46] *Id.* at 727.

the prospect of "Revitch being forced to . . . litigate in the 'inferior' arbitral forum," an analysis at odds with the Court's holding that the FAA bans state laws that disfavor arbitration on their face or in application.[47]

In refusing to read Revitch's contract with AT&T as extinguishing his right to sue DirecTV in court, the Ninth Circuit averted an injustice. As scholars have recognized, even the most targeted arbitration agreements are often unfair to consumers.[48] Revitch's contract was particularly problematic because it purported to extend indefinitely into the future and cover all possible disputes with a vast array of counterparties — a result he surely could not have anticipated or desired.[49] Unfortunately, weaknesses in the court's reasoning leave its opinion vulnerable to reversal by the Supreme Court, making it unlikely to serve as a durable bulwark against infinite arbitration agreements. However, Judge O'Scannlain's concurrence stands on firmer ground and may offer future courts a more doctrinally defensible path to the same result.

The outcome of *Revitch* was by no means inevitable, as the Supreme Court has greatly limited judges' power to refuse to compel arbitration at either the formation or scope prong. On formation, the Court has emphasized that though the FAA preserves "generally applicable contract defenses, such as fraud, duress, or unconscionability,"[50] it prohibits states from "singling out" arbitration agreements under laws "applicable *only* to [them]."[51] Regarding scope, the Court has straightforwardly declared that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[52] Moreover, the Court has held that even well-established, facially neutral state law doctrines like unconscionability are preempted when applied so as to "conflict with the FAA or frustrate its purpose" of making arbitration agreements enforceable.[53] To hold for Revitch, then, the panel had to find a way around a "super-

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[47] *Id.* at 728.

[48] *See, e.g.*, Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL'Y REV. 499, 502 (2017) (arguing that forced arbitration drives wealth inequality); David Horton, *Mass Arbitration and Democratic Legitimacy*, 85 U. COLO. L. REV. 459, 464 (2014) (reviewing MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013)) (contending that consumer arbitration degrades democratic ideals of justice).

[49] *See Revitch*, 977 F.3d at 717; Horton, *supra* note 7, at 639–40.

[50] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (quoting Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).

[51] *Dr.'s Assocs.*, 517 U.S. at 687; *see* Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 1421, 1425 (2017).

[52] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

[53] *Concepcion*, 563 U.S. at 347 n.6; *see* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1418 (2019). Scholars have described this doctrine as a "disparate impact" standard for arbitration clauses. *See, e.g.*, Richard Frankel, Concepcion *and Mis*-Concepcion*: Why Unconscionability Survives the Supreme Court's Arbitration Jurisprudence*, 2014 J. DISP. RESOL. 225, 241.

statute"[54] overlaid with a doctrinal edifice with "[f]ew gaps . . . left to exploit."[55]

The court made a valiant attempt at threading this jurisprudential needle by avoiding the scope inquiry's pro-arbitration presumption and resolving the case at the nominally more forgiving formation step. Regrettably, this approach misfired in at least two ways. First, the court arguably misapplied California law by invoking the "absurd results" canon despite acknowledging that the language of Revitch's agreement was not ambiguous.[56] Relying on a solitary statement by an intermediate California appellate panel, the court formulated the law as allowing judges to consider extratextual indicia of intent in the presence of *either* textual ambiguity *or* the prospect of absurd results.[57] But, as the dissent noted, the statute cited for that proposition clearly prescribes a two-step inquiry in which courts may consider any potential absurdity only if they *first* find contractual language ambiguous.[58] In treating ambiguity and absurd results as independently sufficient to look beyond a contract's text, the court muddled the law.

Second, the Supreme Court may well view the majority's application of the absurd results canon as incompatible with *AT&T Mobility LLC v. Concepcion*,[59] which interpreted the FAA to preempt generally applicable state law contract rules when they are applied "in a fashion that disfavors arbitration."[60] Anticipating this critique, the majority took pains to ground the "absurdity" of DirecTV's interpretation in the open-endedness of the arbitration obligation, rather than in the "relative merits of arbitration compared to litigation."[61] But this distinction is razor thin, and it is hard to imagine a court reaching the same result without relying on an unarticulated view that arbitral forums are less hospitable to claimants.[62] That view, which the Supreme Court has repeatedly disclaimed,[63] is even more likely to raise hackles here because

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54 Salvatore U. Bonaccorso, Note, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145, 1155 (2015).

55 Note, *State Courts and the Federalization of Arbitration Law*, 134 HARV. L. REV. 1184, 1201 (2020).

56 *See Revitch*, 977 F.3d at 717–18.

57 *Id.* at 717 ("[W]e rely on the 'written terms alone' when the 'contract language is clear and explicit and *does not lead to absurd results*.'" (emphasis added) (quoting Kashmiri v. Regents of Univ. of Cal., 67 Cal. Rptr. 3d 635, 652 (Ct. App. 2007))).

58 *Id.* at 727 (Bennett, J., dissenting) (citing CAL. CIV. CODE § 1637 (West 1872)).

59 563 U.S. 333 (2011).

60 *Id.* at 341.

61 *Revitch*, 977 F.3d at 719 n.3.

62 *See id.* at 728 (Bennett, J., dissenting) ("Why else would it be 'absurd' for a party to have agreed to a very broad, forward-looking arbitration clause?").

63 *See, e.g.*, Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 233 (1987) ("[T]he [previously dominant] mistrust of arbitration . . . is difficult to square with the assessment . . . that has prevailed [more recently].").

the Court has specifically reviewed AT&T's arbitration clause and noted that aggrieved customers are "*better off* under [its procedures] than" as class action plaintiffs.[64] Thus, the *Revitch* court's effort to frame its reasoning as generally applicable is unlikely to save its holding from a skeptical Court that has twice rejected purportedly neutral California contract law doctrines for "subtl[y]" targeting arbitration.[65]

Furthermore, even if the court's decision stands, it risks exacerbating the broader problem of infinite arbitration clauses. Because the Supreme Court has construed the FAA to ban state laws making arbitration agreements harder to form than other contracts,[66] the court had to concede that it "might [have] arrive[d] at a different conclusion" if the agreement had simply contained more explicit language including "future" affiliates of AT&T.[67] While this statement makes no promises and is arguably dicta, it is sure to encourage corporate attorneys to draft agreements with ever more explicitly infinite terms. The revised clauses may ultimately be held unenforceable, but their mere presence will likely deter injured consumers from bringing claims to court in the meantime.[68] Taken together, these weaknesses will limit *Revitch*'s value for future courts seeking to reject unfairly expansive arbitration clauses.

Although Judge O'Scannlain's concurrence did not carry the day, it introduced a promising line of attack that may well withstand Supreme Court scrutiny. Recall that his concurrence argued that the FAA — which commands courts to enforce agreements to arbitrate disputes "arising out of" the contract containing the arbitration clause or the transaction it governs — does not reach disputes "wholly unrelated" to that contract or transaction.[69] Recognizing this "contractual nexus"[70] requirement would severely restrict corporations' ability to treat arbitration clauses signed in specific contexts as permanent, all-purpose waivers of procedural rights. By limiting the range of arbitrable conflicts to those "tied . . . in some meaningful way to the parties' agreement," this reading of the FAA could go a long way to stemming the tide of infinite arbitration agreements.[71]

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[64] *Concepcion*, 563 U.S. at 352.

[65] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1418 (2019) (quoting Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018)); *see Concepcion*, 563 U.S. at 352.

[66] *See* Note, *supra* note 55, at 1189, 1198.

[67] *Revitch*, 977 F.3d at 718.

[68] *See* Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 121 (2017) (demonstrating empirically that consumers perceive terms contained in boilerplate language as "morally and legally legitimate in a way that [they do not perceive] non-contractual policies").

[69] *Revitch*, 977 F.3d at 721, 724 (O'Scannlain, J., concurring); *see* 9 U.S.C. § 2.

[70] *See* Horton, *supra* note 7, at 643, 679–83.

[71] *Id.* at 643. The concurrence cited Professor David Horton extensively for this concept but overlooked a key aspect of his argument. While Horton understands the "contractual nexus" requirement to bear in some sense on contract scope, he argues that it is best analyzed at the *formation*

And the contractual nexus theory could have purchase at the Supreme Court. First, it can coexist with the Court's zealously enforced command to resolve scope ambiguities in favor of arbitration, as it merely recognizes an outer limit to that scope. Moreover, the theory's grounding in statutory language may give it a fighting chance before the Court's textualist majority. In fact, one of the only arguments in recent memory to move the Court to curb the FAA's expansion centered on a similar rediscovery of a limit embodied in the statute's plain text. In that case, *New Prime Inc. v. Oliveira*,[72] the Court held that neither widespread practice nor pro-arbitration policy inclinations could overcome the conclusion that the term "contracts of employment" in the FAA's exception for "contracts of employment of . . . workers engaged in . . . interstate commerce"[73] embraced all "agreements to perform work," not just those of workers considered "employees" under modern employment law.[74] Finally, although the Court has concededly compelled litigants to arbitrate disputes not strictly arising out of their contracts,[75] there is still room to give effect to the FAA's congressionally prescribed boundaries by keeping "wholly unrelated" claims beyond its reach.[76]

For decades, lower courts have struggled to resist the Supreme Court's pro-arbitration FAA jurisprudence.[77] They have almost universally failed, and the Court has instead "doubled down on FAA expansion,"[78] ushering arbitration deep into American life.[79] While *Revitch*'s core holding will likely do little to reverse this trend, Judge O'Scannlain's revival of the FAA's "arising out of" limitation may prove invaluable for courts confronting the corporate bar's latest arbitration excesses.

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prong. *See id.* at 683–87. The distinction matters because the Supreme Court has elsewhere held that courts must enforce clauses in arbitration agreements that delegate the resolution of scope-prong ambiguities to an arbitrator. Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 528 (2019). In locating the contractual nexus analysis at that prong, Judge O'Scannlain's formulation would allow defendants with the foresight to include so-called "delegation clauses" in their agreements to get claimants out of court — at least initially — by arguing that the contractual nexus analysis is a task for the arbitrator.

[72] 139 S. Ct. 532 (2019).

[73] *Id.* at 543–44 (quoting 9 U.S.C. § 1).

[74] *Id.* at 544. Specifically, the Court held that the FAA did not require courts to enforce arbitration agreements imposed on interstate truck drivers, even though those drivers were technically engaged as independent contractors, rather than employees. *See id.* at 536, 543–44.

[75] *See* Horton, *supra* note 7, at 680 (conceding that workplace discrimination claims are treated as arbitrable despite not arising out of the contracts containing the parties' arbitration agreements).

[76] *Revitch*, 977 F.3d at 723 (O'Scannlain, J., concurring) ("I have been unable to locate any case in which the Supreme Court enforced an arbitration clause when the underlying claim was wholly unrelated to the contract in which the clause was contained.").

[77] *See* Bonaccorso, *supra* note 54, at 1156–65.

[78] Note, *supra* note 55, at 1198.

[79] *See, e.g.*, Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [https://perma.cc/ZNX9-NGK4].