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In Defense of Moses

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IN DEFENSE OF *MOSES*

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INTRODUCTION

In 1925, Congress enacted a short statute to make arbitration agreements in maritime transactions and interstate commerce "valid, irrevocable, and enforceable."[1] Yet the Federal Arbitration Act's (FAA)[2] simple objective of facilitating the resolution of disputes outside of the courtroom has proven much easier to declare than to implement in practice. In the century since its enactment, the FAA has become a frequently litigated statute and the subject of 59 opinions of the Supreme Court,[3] the majority of which have reversed lower courts' interpretations of the Act.[4] The Supreme Court's FAA jurisprudence has not only been abundant but also controversial. For instance, the Court's holdings that the Act applies in both federal and state courts[5] and in employment disputes,[6] and that it preempts contradictory state law,[7] are frequently accused of being overly expansive[8] and

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[1] Act of February 12, 1925, c. 213, 43 Stat. 883, § 2.

[2] 9 U.S.C. §§ 1–16. The Act was codified and enacted as title 9 of the United States Code by section 1 of Act July 30, 1947, c. 392, § 1, 61 Stat. 674.

[3] The first FAA opinion rendered by the Supreme Court was Marine Transit Corporation v. Dreyfus, 284 U.S. 263 (1932). In the 2021 Term alone, the Court heard four FAA cases: Badgerow v. Walters, 142 S. Ct. 1310 (2022); Morgan v. Sundance, Inc., 142 S. Ct. 1708 (2022); Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783 (2022); Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906 (2022). Among the lower federal and state courts, over 2,000 FAA-related decisions were rendered between June 1, 2021 and September 1, 2022, alone.

[4] The Supreme Court has overturned fourty-four of the fifty-nine FAA cases that have come before it (including 3 cases in which the Court overturned the lower court in part). The number of Supreme Court decisions concerning the FAA has been said to be "disproportionate . . . considering that the Court only hears 75-80 cases a year (out of 10,000 certiorari petitions filed each year)." Gary Born & Claudio Salas, *The United States Supreme Court and Class Arbitration: A Tragedy of Errors*, 2012 J. DISP. RESOL. 21, 38 (2012).

[5] Southland Corp. v. Keating, 465 U.S. 1, 14–15 (1984).

[6] Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 122–23 (2001).

[7] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341–42 (2011).

prejudicial to weaker individuals such as employees and consumers,[9] prompting initiatives for legislative amendments of the FAA.[10]

In this article I intend neither to sanction nor to dispel these accusations. Instead, on the occasion of its 40th anniversary, I revisit the Supreme Court's seminal decision in *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*. (hereinafter *Moses*).[11] A renewed examination of this decision is timely and necessary

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[8] *See, e.g.*, Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1305–1306 (1985) ("In the last three years, the Court has fulfilled the promise of its earlier decision and dramatically expanded the ambit of the FAA."); Preston Douglas Wigner, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499, 1500 (1995) ("[T]he Court greatly expanded the application of the FAA to contracts containing arbitration agreements."); Margaret L. Moses, *Arbitration Law: Who's in Charge*, 40 SETON HALL L. REV. 147, 147 (2010) ("The Supreme Court's construction of the statute, especially in the last twenty-five years, amounts to a judicially created legislative program, imposed without congressional input, that has vastly expanded the reach and focus of the original statute."); Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 94 (2012) ("[T]he United States Supreme Court has thwarted the equal footing policy established in the FAA and replaced it with a judicial policy favoring arbitration."); IMRE STEPHEN SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA 191 (2013) ("[T]he Supreme Court has erred in applying the Federal Arbitration Act in the employment context and in the consumer context."); Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 FLA. L. REV. 711, 713 (2015) ("[T]he United States Supreme Court has broadened the scope of federal preemption power under the Federal Arbitration Act (FAA) to unprecedented and unexplained bounds." (footnote omitted)).

[9] *See, e.g.*, Jean R. Sternlight, *Panacea or Corporate Tool: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 642 (1996) ("[T]he Court's preference for binding arbitration in the context of consumer and other little guy transactions is supported by neither theoretical arguments nor empirical evidence."); Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 376 (2016) (criticizing the Supreme Court's jurisprudence confirming the validity of class action waivers in standard-form arbitration agreements); Stephanie Greene & Christine Neylon O'Brien, *New Battles and Battlegrounds for Mandatory Arbitration After Epic Systems, New Prime, and Lamps Plus*, 56 AM. BUS. L.J. 815, 822 (2019) (criticizing the Supreme Court's jurisprudence pertaining to employment arbitration); David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 63 (2015) (criticizing consumer arbitration).

[10] The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 came into effect on March 3, 2022, and is the first substantive amendment to the FAA since its passage in 1925. 9 U.S.C. §§ 401–402. Another arbitration-related legislation that recently passed in the House of Representatives is H.R. 963, the Forced Arbitration Injustice Repeal (FAIR) Act of 2022, which prohibits pre-dispute agreements requiring arbitration of employment, consumer, antitrust, or civil rights disputes. H.R. Rep. No. 117-963, at 6 (2022).

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

given growing calls for its reconsideration.[12] In *Moses*, the Supreme Court held that § 2 of the FAA, which mandates that arbitration agreements "shall be valid, irrevocable, and enforceable," manifests "a congressional declaration of a liberal federal policy favoring arbitration agreements."[13] This federal policy, according to the Court, in turn gives rise to what has become known as the "presumption . . . in favor of arbitration" (Presumption).[14] According to the *Moses* Presumption, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ."[15]

Hundreds of lower court decisions have applied the Presumption in FAA cases since *Moses*.[16] At the same time, the Presumption has also been accused of elevating arbitration agreements above other contracts without any basis for doing so in the FAA, and of "divert[ing] courts from the best reading of the text at the first hint of uncertainty, and thereby work[ing] a massive alteration of written contracts in America."[17] In the face of growing calls for the *Moses* Presumption to be reconsidered, it is likely that litigants will attempt, sooner or later, to challenge it before the Supreme Court. This is the first article to defend the Presumption.

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[12] *See*, *e.g.*, Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1215 (11th Cir. 2021) (Newsom, J., concurring) ("We should rethink [the *Moses H. Cone* canon]."); Harper v. Amazon.com Servs., Inc., 12 F.4th 287, 297 (3d Cir. 2021) (Matey, J., concurring) (noting in reference to Newsom J.'s concurring opinion in *Calderon* that "[s]ome have already called for an examination of the presumption amplifying the modest command that an agreement to resolve a controversy through arbitration 'shall be valid, irrevocable, and enforceable' into a wide-ranging displacement of private agreements and state law," and concluding that "the challenges presented by the judicially magnified presumptions of § 2 deserve a fresh look" (footnote omitted) (quoting 9 U.S.C. § 2)).

[13] *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. Some commentators have labeled this holding of the Court "an embarrassing mistake." Sarath Sanga, *A New Strategy for Regulating Arbitration*, 113 NW. U. L. REV. 1121, 1134 (2019).

[14] Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 79 n.4 (2010) (Stevens, J., dissenting) (referring to "the presumption we usually apply in favor of arbitration").

[15] *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25.

[16] As of July 24, 2022, the *Moses* Presumption has been cited in 965 court decisions reported on WestLaw.

[17] *Calderon*, 5 F.4th at 1220–21 (Newsom, J., concurring). *See also* Sternlight, *supra* note 9, at 704. ("The Court should reject the view that ambiguities in arbitration agreements should always be interpreted as broadly as possible to favor arbitration. The practice of interpreting ambiguities to favor arbitration, which the Court first enunciated in *Moses H. Cone* in 1983, is nothing less than a means of spreading binding arbitration by Supreme Court fiat." (footnote omitted)).

The article responds to three critiques.[18] The first critique is that the *Moses* Presumption has no foundation in the text of the

[18] Two additional critiques of the *Moses* Presumption are worth noting, although a detailed discussion of them is beyond the scope of the present article. The first critique is that the Presumption originated in the Supreme Court's jurisprudence concerning labor arbitration, and in particular its interpretation of the 1947 Federal Labor Management Relations Act (LMRA), 29 U.S.C. § 173(d), Pub. L. No. 80–101, § 203(d), 61 Stat. 136, 154 (1947). The Supreme Court has held that the LMRA suggests that labor disputes should be arbitrated "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582–83 (1960). According to the Supreme Court, any "[d]oubts should be resolved in favor of [arbitration]," because arbitration furthers the "common goal of uninterrupted production under the [collective bargaining] agreement." *Id.* Critics have contrasted this federal policy promoting arbitration of collective bargaining disputes with the FAA, which they argue "is motivated not by the public purpose of promoting labor peace, but primarily by the private purpose of making arbitration agreements just like other contracts." Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531, 549 (2014). There are at least three reasons why this line of criticism overstates the importance of any labor arbitration roots that the Presumption might have. The first reason is that the Supreme Court and federal circuit courts have long applied similar principles in labor and commercial arbitrations, making the labor roots of the Presumption less significant. *See, e.g.*, Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 296, 319 n.6 (2010) (referring to principles that are "well settled in both commercial and labor cases" and noting that "precedents applying the FAA . . . employ the same rules of arbitrability that govern labor cases."); MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds, 974 F.3d 386, 407 n.6 (3d Cir. 2020) ("Although the FAA applies to commercial arbitration agreements by its own terms, it is well-accepted that labor arbitration disputes arising under federal law should be resolved in accordance with the FAA, even though labor arbitration agreements may not be technically governed by the statute."). The second reason is that this critique "misconstrue[s] [*Warrior & Gulf*] as establishing a presumption that labor disputes are arbitrable whenever they are not expressly excluded from an arbitration clause." *Granite Rock Co.*, 561 U.S. at 319 n.8. As the Supreme Court has made clear, *Warrior & Gulf* in fact emphasized that, even in the labor context, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit . . . ." *Id.* (quoting *Warrior & Gulf*, 363 U.S. at 582). This further minimizes any distinction drawn between labor and FAA arbitration. The third reason is that an arbitration agreement is, at its core, "a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974). Therefore, the principle that the parties' choice of forum should "control absent a strong showing that it should be set aside" is applicable broadly and justifies the enforcement of all validly concluded arbitration agreements, whether in the context of labor or commercial disputes. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).

A second critique of the *Moses* Presumption is that it "may well run directly into the textual guarantee of trial rights" because "the trial by jury is a fundamental guaranty of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver." Harper v. Amazon.com Servs., Inc., 12 F.4th 287, 305 n.3 (3d Cir. 2021) (Matey, J., concurring) (quoting Hodges v. Easton, 106 U.S. 408, 412 (1882)). In this regard, it is worth noting that § 4 of the FAA guarantees a party's right to a jury trial on the factual question of whether an

FAA.[19] I argue that the text of the FAA does not negate the Presumption, nor the "liberal federal policy favoring arbitration agreements" on which it is founded. The explicit language of the FAA limits judicial discretion to refuse enforcement of arbitration agreements and mandates courts to treat arbitration agreements falling within the Act's purview as "valid, irrevocable, and enforceable."[20] This broad and mandatory language indicates that the FAA *favors* arbitration agreements in the sense of favoring their *enforcement* as opposed to their *non-enforcement*. This preference is not, however, unlimited. The FAA permits courts to refuse to enforce an arbitration agreement on the same grounds that would allow "for the *revocation* of any contract."[21] When the FAA is read as a whole and interpreted in the context in which it was passed in 1925, the most plausible interpretation of this narrow "revocation" exception is that it refers only to grounds concerning the existence or formation of arbitration agreements, rather than their validity or scope.[22] In establishing the *Moses* Presumption as a tool for implementing the federal policy favoring the enforcement of arbitration agreements embodied in the FAA, the Supreme Court set out an even narrower rule of interpretation than the explicit language of the FAA appears to permit. This rule assists courts in determining the intentions of the parties only where the *scope* of an arbitration agreement—rather than its existence/formation or validity—is ambiguous by presuming that parties who conclude valid arbitration agreements intend to arbitrate their disputes.[23] In other words, where it is ambiguous "*whether* a particular merits-related dispute is arbitrable because

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arbitration agreement exists/was legally formed. 9 U.S.C. § 4 (allowing "the party alleged to be in default . . . except in cases of admiralty" to "demand a jury trial" where an issue concerning the "making of the agreement" is raised). As discussed in detail below, the *Moses* Presumption does not apply to this determination. Moreover, the Supreme Court has held that the right to a trial by jury does not justify a presumption *against* a waiver of this right by way of an arbitration agreement. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017). While the Supreme Court in *Kindred* did not refer to the *Moses* Presumption, it did confirm that the right to a jury trial may be waived.

[19] Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1219–20 (11th Cir. 2021) (Newsom, J., concurring).

[20] 9 U.S.C. § 2.

[21] *Id.* (emphasis added).

[22] *See id.*

[23] "Ambiguous" means "capable of two or more constructions, both of which are reasonable." Powerine Oil. Co., Inc. v. Superior Court, 37 Cal. 4th 377, 390 (2005) (quoting Waller v. Truck Ins. Exch., Inc., 11 Cal. 4th 1, 18 (1995)).

it is within the scope of a valid arbitration agreement," the *Moses* Presumption requires courts to err on the side of arbitrability, that is, that the parties intended to arbitrate the dispute.[24]

The second critique is that the Presumption contradicts Congress's intention in enacting the FAA, as reflected in the legislative history of the Act.[25] I argue that the purposes for which Congress enacted the FAA, to the extent that they are discernable from its legislative history, support the *Moses* Presumption. Critics correctly note that Congress purported to place arbitration agreements "upon the same footing as other contracts" by enacting the FAA,[26] which seemingly conflicts with "favoring" arbitration agreements. However, when Congress's motivation for placing arbitration agreements "upon the same footing as other contracts" is considered, its preference for enforcing valid arbitration agreements becomes clear.[27] By enacting the FAA, Congress sought to end courts' historic hostility toward arbitration agreements and persistent refusal to enforce them.[28] Indeed, without *favoring* such enforcement by making it statutorily mandated, Congress could not have achieved its goal of equalizing arbitration agreements with other contracts. Moreover, the fact that the FAA was enacted in order to reverse long-standing judicial hostility to arbitration agreements makes it a remedial statute that should be interpreted broadly in order to implement the federal policy

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[24] First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944–45 (1995); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) ("[A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability.").

[25] 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, 123 (2006) ("[N]othing in the legislative history suggests a strong federal policy favoring arbitration.").

[26] Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974) (quoting H.R. REP. NO. 68-96, at 1 (1924)); *see also* S. REP. NO. 68-536, at 2 (1924).

[27] H.R. REP. NO. 68-96, at 1 (1924).

[28] S. Rep. No. 68-536, at 2 (1924) (noting the courts' "jealousy of their rights as courts, coupled with the fear that if arbitration agreements were to prevail and be enforced, the courts would be ousted of much of their jurisdiction."). See also Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 270 (1995) ("[T]he basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate."); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018) ("Congress adopted the Arbitration Act in 1925 in response to a perception that courts were unduly hostile to arbitration. No doubt there was much to that perception. Before 1925, English and American common law courts routinely refused to enforce agreements to arbitrate disputes.").

underlying it. This federal policy favors the enforcement of valid arbitration agreements even where their scope is ambiguous.

The third critique is that the *Moses* Presumption has been unduly expanded by lower courts, for instance by relying on it to trump other established contract interpretation rules such as *contra proferentem*. I examine FAA jurisprudence since *Moses* and argue that lower courts have largely applied the Presumption narrowly and as intended by the Supreme Court. Indeed, most lower courts have relied on the Presumption to ascertain the intentions of parties who validly conclude a broad arbitration agreement where there is no strong evidence that their particular dispute falls outside the scope of the agreement. When applied in this manner, the *Moses* Presumption serves the FAA's undisputed goal: the enforcement of valid arbitration agreements. There is also good reason for the *Moses* Presumption to trump the *contra proferentem* rule, in particular. Since the Presumption only applies to questions of scope, rather than formation/existence or validity, it makes more sense to presume that parties intended to arbitrate all disputes arising from their contract than to interpret an arbitration agreement narrowly if the drafter is seeking arbitration and broadly if the drafter is resisting arbitration. Moreover, even where a dispute is presumed to fall within the scope of an arbitration agreement pursuant to the *Moses* Presumption, this does not affect the merits of the parties' underlying dispute but only the forum in which that dispute will be resolved.[29] In that forum, be it a court or arbitration, the *contra proferentem* rule remains available if ambiguities exist with respect to the underlying contract's substantive terms. The nature of the *contra proferentem* rule itself further supports its preemption by the *Moses* Presumption in regard to ambiguities in the scope of arbitration agreements. *Contra proferentem* is an interpretive rule of last resort that is not designed to ascertain the parties' intentions at all, and its ultimate goal of protecting vulnerable parties can be (and has

[29] Hojnowski v. Vans Skate Park, 901 A.2d 381, 392 (N.J. 2006) (noting, in the context of reconciling the infancy doctrine with the public policy favoring arbitration that "[a]s opposed to a pre-injury release of liability, a pre-injury agreement to arbitrate does not require a minor to forego any substantive rights. Rather, such an agreement specifies only the forum in which those rights are vindicated").

been) achieved by other means, such as the unconscionability doctrine.[30]

The gist of the article is this: the Presumption set out by the Supreme Court in *Moses* does not place arbitration agreements "on a pedestal."[31] It is simply intended to serve as an interpretative tool for ascertaining the intentions of the parties and for implementing the federal policy, clearly reflected in the text and legislative history of the FAA, that valid arbitration agreements are to be enforced. This is also the way in which lower courts have generally understood the Presumption over the past four decades—as "a policy of promoting enforcement of arbitration agreements 'to accord with the original intention of the parties.' "[32] Critics may fairly object to the application of the *Moses* Presumption in employment or consumer cases involving non-negotiated adhesion contracts, but the baby should not be thrown out with the bathwater. The *Moses* Presumption applies to *all* arbitrations falling within the purview of the FAA, many of which involve disputes arising out of run-of-the-mill commercial contracts that do not give rise to the same issues as adhesive employment or consumer contracts. Even in the latter contexts, the *Moses* Presumption does not operate to force arbitration agreements on unwilling parties or to uphold invalid arbitration agreements. Reconsidering *Moses* and eliminating the Presumption or the federal policy on which it is founded would be

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[30] The Supreme Court recently held that "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules." Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1713 (2022). *Morgan* concerned the waiver of the right to arbitrate and whether a party asserting such waiver must show that the waiving party not only acted inconsistently with the right to arbitrate but also that its acts caused prejudice. While the Court's holding in *Morgan* argubaly extends beyond waiver to any "ordinary procedural rule," *id*., it presumes that such a rule is applied consistently and uniformally outside the arbitration context. *Id.* ("Outside the arbitration context, a federal court assessing waiver does not generally ask about prejudice."). In contrast, the *contra proferentem* rule—a discretionary rule of last resort—has not been applied consistently by courts in other contexts. Moreover, the Court in *Morgan* did not address the *Moses* presumption, which applies to questions of scope, rather than validity, of arbitration agreements.

[31] Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1219 (11th Cir. 2021) (Newsom, J., concurring); Frankel, *supra* note 18, at 532.

[32] Margaret L. Moses, *Arbitration Law: Who's in Charge?*, 40 SETON HALL L. REV. 147, 175 (2010) (quoting Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959)). Moses argues that such a policy is "substantially different" from the Supreme Court's claim in *Moses* that "the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 175–76 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983)). However, as this article attempts to show, these are one of the same.

contrary to the text of the FAA and Congressional intent, as well as detrimental to arbitration as an effective alternative to litigation in the courts.

In Part I of the article, I briefly introduce the Supreme Court's opinion in *Moses*, the federal policy favoring arbitration agreements, and the Presumption that operationalizes it. In Part II, I discuss the arguments that the *Moses* Presumption, and the federal policy on which it is founded, have no basis in the text or the legislative history of the FAA. I rebut these claims by demonstrating that both the text and the legislative history of the FAA support a federal policy favoring the enforcement of valid arbitration agreements, which in turn justifies the narrowly tailored Presumption that the Supreme Court established in *Moses*. In Part III, I turn to arguments calling for the elimination of the Presumption on the ground that it has been unduly expanded and misapplied by lower courts over the past forty years, turning arbitration agreements into "super contract[s]."[33] I examine federal and state court decisions interpreting the Presumption and show that these interpretations have been largely in line with the Supreme Court's narrow formulation in *Moses*. I also discuss the critique that the Presumption has displaced the *contra proferentem* rule of contract interpretation. I show that most lower courts have only applied the Presumption instead of *contra proferentem* in cases of ambiguities regarding the *scope* of valid arbitration agreements, as directed by the Supreme Court. I argue that such a limited application of the Presumption is justified given the unique nature of such scope ambiguities as well as the nature of the *contra proferentem* rule itself. In Part IV, I conclude that the *Moses* Presumption is appropriate and necessary in order to accomplish the goals of the FAA, and that calls to eliminate it are misplaced and should be rejected.

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[33] Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 581 (2007) (quoting David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1088 (2002)); *see also* Frankel, *supra* note 18, at 533 n.3.

I. MOSES AND THE FEDERAL PRESUMPTION FAVORING ARBITRATION

Moses involved a dispute between Moses H. Cone Memorial Hospital (Hospital), located in North Carolina, and Mercury Construction Corp. (Mercury), a contractor based in Alabama and hired by the Hospital to construct additions to its building.[34] The parties' contract contained a dispute resolution clause referring "[a]ll claims" to binding arbitration.[35] A dispute arose over Mercury's claims for additional costs.[36] The Hospital applied to a state court in North Carolina seeking a declaration that Mercury could not refer the dispute to arbitration "due to waiver, laches, estoppel, and failure to make a timely demand for arbitration," and that the Hospital was not liable to Mercury.[37] Mercury petitioned the federal district court for the Middle District of North Carolina for an order to compel arbitration of the dispute pursuant to the FAA.[38] The Hospital objected, and the district court stayed Mercury's federal suit pending resolution of the state-court suit brought by the Hospital, finding that "the two suits involved the identical issue of the arbitrability of Mercury's claims."[39] Mercury appealed to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit reversed the district court's stay order and remanded the case with instructions for entry of an order compelling arbitration.[40] The Hospital appealed, and the Supreme Court granted certiorari.

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[34] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 4 (1983).

[35] *Id.* at 5. Some disputes were to be referred in the first instance to an independent architect. *Id.* at 4–5. The dispute at issue in this case was not resolved by the Architect. *Id.* at 6–7.

[36] *Id.* at 6.

[37] *Id.* at 7.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 8. The Fourth Circuit framed the issue on appeal as:

> [T]he right of the plaintiff to an order of arbitration by the district court of its dispute with the Hospital pursuant to the Federal Arbitration Act, and whether that right, if it exists, may be frustrated by the "reactive" filing of a state declaratory action by the Hospital asserting the non-arbitrability of the dispute before Mercury had any real opportunity to seek arbitration.

In re Mercury Const. Corp., 656 F.2d 933, 938 (4th Cir. 1981) (en banc). The Fourth Circuit held that the district court had an obligation to maintain federal jurisdiction over Mercury's action and to compel arbitration notwithstanding the pending state court action. Not doing so, the court found, would "defeat Mercury's plain federal right to arbitration and . . . deny it a right to a federal forum for the redress of a federal right." *Id.* at 946.

The central question before the Supreme Court was whether the district court's stay of Mercury's FAA action because of the Hospital's parallel state-court action was proper.[41] One of the relevant factors in making this determination was whether federal or state law "provides the rule of decision on the merits."[42] In this case, the main issue presented in Mercury's federal action was the "arbitrability" of the dispute—i.e., whether it should be referred to arbitration—thereby bringing the FAA into play.[43] Justice Brennan, delivering the opinion of the majority, made several important findings regarding the FAA in this regard.

First, the Court found that the FAA governs arbitrability questions in both state and federal courts[44] and therefore that it would make no difference to the Hospital whether the arbitrability of the dispute were decided by the state or by the federal court.[45] In reaching this conclusion, the Court noted "Congress's clear intent [in enacting the FAA was] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible. . . . [The Act calls] for an expeditious and summary hearing, with only restricted inquiry into factual issues."[46] Staying the federal court action in this case in order to allow the state court to determine the applicability of the FAA would have resulted, the Court found, in an inevitable delay that would have "frustrated the statutory policy of rapid and unobstructed enforcement of arbitration

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[41] *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 13. The Court was to determine this question by applying the "exceptional-circumstances test" it had established in Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), a case involving federal water rights. Under this test, "[o]nly the clearest of justifications will warrant dismissal" of a federal action because of parallel state-court litigation. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 16 (emphasis omitted) (quoting *Colorado River Water Conservation Dist.*, 424 U.S. at 819).

[42] *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 23.

[43] *Id.* at 24. Arbitrability is a "term of art covering 'disputes about whether the parties are bound by a given arbitration clause,' as well as 'disagreements about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.' " Ostreicher v. TransUnion, LLC, No. 19-CV-8174, 2020 WL 3414633, at *5 (S.D.N.Y. June 22, 2020) (quoting Pincaro v. Glassdoor, Inc., No. 16 Civ. 6870, 2017 WL 4046317, at *5 (S.D.N.Y. Sept. 12, 2017)).

[44] *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. *Moses* has therefore been referred to as the first in the "federalism trilogy" of FAA decisions, which also includes Southland Corp. v. Keating, 465 U.S. 1 (1984) and Dean Witter Reynolds v. Byrd, 470 U.S. 213 (1985). *See* Thomas E. Carbonneau, *"Arbitracide": The Story of Anti-Arbitration Sentiment In the U.S. Congress*, 18 AM. REV. INT'L ARB. 233, 240 n.34 (2007).

[45] *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 20.

[46] *Id.* at 22.

agreements."[47] The Court further held that the FAA creates a body of substantive federal law concerning "arbitrability" issues, which favors arbitration and preempts contradictory state law or policy.[48] The Court pointed in this regard to § 2 of the FAA, which requires that a written arbitration agreement "in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[49] The Court held that this section reflects "a congressional declaration of a liberal federal policy favoring arbitration agreements."[50]

As a corollary to this federal policy, the Court established the following presumption:

> [A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.[51]

Ultimately, neither the validity nor the scope of the arbitration agreement was at issue in *Moses*.[52] On the specific question before it, the Supreme Court affirmed the decision of the Fourth Circuit to reverse the district court's stay order and to compel arbitration.[53] Justice Rehnquist, swith whom Chief Justice Burger and Justice O'Connor joined, dissented.[54] The dissenting Justices did not, however, take issue with the Court's pronouncements about the FAA or the Presumption that it established.[55] Rather, the dissent disagreed with two procedural aspects of the Court's decision. The first aspect was that the district court's order was appealable to begin with.[56] Concluding

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[47] *Id.* at 23.

[48] *Id.* at 24.

[49] 9 U.S.C. § 2.

[50] *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24.

[51] *Id.* at 24–25.

[52] The Hospital did not appeal the Fourth Circuit's holding that the parties' dispute should be referred to arbitration. Its only objection was that the court of appeals had decided this issue even though it had not been decided by the district court. *Id.* at 29 ("[T]he Hospital does not contest the substantive correctness of the Court of Appeals's holding on arbitrability. . . . [I]t points out that the only issue formally appealed to the Court of Appeals was the propriety of the District Court's stay order.").

[53] *Id.*

[54] *Id.* at 30 (Rehnquist, Burger, & O'Connor, JJ., dissenting).

[55] *Id.*

[56] *Id.* at 34.

that the order was interlocutory and therefore not appealable to the Fourth Circuit, the dissent found it unnecessary "to decide whether the District Court's [stay] order was proper in this case."[57] The second procedural aspect of the Court's decision that the dissent was "disturbed" by was its endorsement of the Fourth Circuit's "order compelling arbitration, even though that issue was not considered by the District Court."[58]

It does not appear, therefore, that the Supreme Court sought to devise some revolutionary rule of interpretation that departed from the text of the FAA or its stated objectives. Nonetheless, critics have argued that the *Moses* Presumption departs from the text and legislative history of the FAA. I discuss this critique in the next Part. In Part III I turn to the argument that the Presumption has been unduly expanded by lower courts since *Moses* was rendered.

II. THE TEXT AND LEGISLATIVE HISTORY OF THE FAA

The main textual critique of the *Moses* Presumption is that it is "*not* firmly grounded in the written or common law."[59] Nothing in the language of the FAA, the argument goes, gives "arbitration agreements favored status or treatment."[60] Therefore, to the extent that the Presumption operates as a " 'substantive' interpretive canon" that "directs courts to depart from a contract's most natural interpretation in favor of—and to further—a policy preference for arbitration," its validity is "on extremely thin ice."[61]

This critique focuses on § 2 of the FAA, considered to be the Act's "centerpiece"[62] and "substantive mandate."[63] Titled "[v]alidity, irrevocability, and enforcement of agreements to arbitrate," § 2 requires that:

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[57] *Id*. at 35.

[58] *Id.*

[59] Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1220 (11th Cir. 2021) (Newsom, J., concurring).

[60] *Id*. at 1221.

[61] *Id*. at 1219–20.

[62] Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 593 (2008).

[63] Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 629 (2009). Whether the FAA should properly be considered a "substantive" or "procedural" statute is beyond the scope of the present article. Since "modern commenters take as 'given' . . . that the FAA is substantive law applying in federal and state court," so does this article. Blankley, *supra* note 8, at 727.

> 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, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . . .[64]

According to critics of *Moses*, the last sentence of § 2—known as the "savings clause"—simply "puts arbitration agreements on equal footing with all other contracts"[65] and "unif[ies] the law of arbitration agreements with the rest of the law of contracts."[66] Therefore, the argument goes, the only purpose of § 2, and of the FAA as a whole, is to "enforc[e] arbitration agreements in the same way as other contracts,"[67] i.e., first and foremost according to their plain text. However, in setting out the Presumption and the federal policy on which it is based, the Supreme Court essentially "rewrote" the Act,[68] requiring courts to "ignore the best evidence of a contractual provision's meaning" in favor of enforcing arbitration.[69] The Supreme Court thereby adopted a "purposivist reading of the FAA,"[70] which discounts its text and focuses on its policies, namely "to encourage arbitration and to relieve congestion in the courts" and to avoid "delay[s] in dispute resolution."[71]

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[64] 9 U.S.C. § 2.

[65] Blankley, *supra* note 8, at 720–21.

[66] Frankel, *supra* note 18, at 539.

[67] Blankley, *supra* note 8, at 749.

[68] Stuart M. Boyarsky, *Not What They Bargained For: Directing the Arbitration of Statutory Antidiscrimination Rights*, 18 HARV. NEGOT. L. REV. 221, 227 (2013). *See also* Carbonneau, *supra* note 44, at 235 n.7 (noting in reference to *Moses* that "the Court, for all practical purposes, eliminated the contract defense language at the end of FAA § 2 by creating a nearly irrebuttable presumption that arbitration agreements were enforceable contracts").

[69] Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1221 (11th Cir. 2021) (Newsom, J., concurring).

[70] *Id.* at 1217; David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1223 (2013); Blankley, *supra* note 8, at 752 (arguing that the Supreme Court has moved "away from a strict reading of the FAA to a broader determination of the statute's purposes").

[71] *Calderon*, 5 F.4th at 1217–18 (Newsom, J., concurring) (first quoting Seaboard Coast Line R. Co. v. Nat'l Rail Passenger Corp., 554 F. 2d 657, 660 (5th Cir. 1977); and then quoting Hanes Corp. v. Millard, 531 F. 2d 585, 598 (D.C. Cir. 1976) (alteration in original)).

Yet, according to critics, not only are these policies not supported by the text of the FAA, they are also negated by the Act's legislative history.[72] As the Supreme Court itself has recognized, the FAA was intended to make arbitration agreements "as enforceable as other contracts, but not more so."[73] Therefore, as with the text of the FAA, its legislative history also supports applying an "equal footing" approach to the interpretation and enforcement of arbitration agreements rather than "favoring" such agreements.[74] The FAA's drafters did not "suggest[] that arbitration clauses should be given special favor as a matter of federal law."[75] Rather, "Congress's stated intent [was] to place arbitration agreements on the *same footing* as other contracts."[76]

Given this perceived lack of support for the *Moses* Presumption and the federal policy on which it is founded in the FAA's text and legislative history, critics have concluded that the Presumption was a "judicial invention"[77] created "out of whole cloth."[78] However, as I demonstrate below, the Presumption as set out by the Supreme Court in *Moses*, as well as the federal policy underlying it, are in fact supported by both the text and the legislative history of the FAA. My analysis in this regard should not be read as an endorsement of these "traditional" methods of statutory interpretation.[79] I am simply responding to

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[72] Moses, *supra* note 18, at 123 ("[N]othing in the legislative history suggests a strong federal policy favoring arbitration.").

[73] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989); EEOC v. Waffle House, Inc., 534 U.S. 279, 293–94 (2002).

[74] *Calderon*, 5 F.4th at 1218–19 (Newsom, J., concurring); Frankel, *supra* note 18, at 537 ("The legislative history of the FAA shows that the drafters simply intended for arbitration clauses to be treated like other contracts—no better, no worse.").

[75] Frankel, *supra* note 18, at 546–47.

[76] Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RSRV. L. REV. 91, 94 (2012).

[77] *Calderon*, 5 F.4th at 1215, 1221 (Newsom, J., concurring); *see also* Carbonneau, *supra* note 44, at 237 n.1.

[78] Moses, *supra* note 18, at 123.

[79] *See generally* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 9 (1994) (noting the " 'original intent' and 'plain meaning' rhetoric in American statutory interpretation scholarship and decisions"); William N. Eskridge Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479–80 (1987) (explaining that the "intentionalist" approach "asks how the legislature originally intended the interpretive question to be answered, or would have intended the question to be answered had it thought about the issue when it passed the statute." "Textualism" is "[a] narrower approach [that] emphasizes the statutory text

the common textualist and "pragmatic"[80] critiques of this century-old statute and attempting to rebut them on the same grounds.

A. The FAA's Text

Section 2 of the FAA explicitly *mandates* that courts treat arbitration agreements falling within the purview of the Act as "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[81] Section 2 therefore narrows courts' discretion—frequently exercised prior to the enactment of the FAA—to refuse enforcement of arbitration agreements. Simply put, "[u]nless the savings clause applies, arbitration agreements are 'valid, irrevocable, and enforceable.' "[82] Section 2's "savings clause" in turn allows courts to refuse enforcement of arbitration agreements falling within the purview of the FAA in only one circumstance: where grounds that would *revoke* any contract apply.

The FAA does not define the terms "valid," "irrevocable," or "enforceable," and "their ordinary meanings arguably overlap."[83] Nonetheless, these terms should be distinguished. Because the three terms are joined with "and," courts are required to treat arbitration agreement as "valid" *and* "irrevocable" *and* "enforceable," rather than only one of these features.[84] Therefore,

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to the exclusion of other contextual factors (such as legislative history). 'Textualism' can be defended as the best evidence of what the legislature actually meant when it enacted the statute." *Id.* at 1480 n.3.

[80] A "pragmatic statutory interpreter" is concerned with "the expectations of those who worked on the statute, the reasons why they made certain linguistic and structural choices, and their underlying normative presuppositions." ESKRIDGE, JR., *supra* note 79, at 239.

[81] 9 U.S.C. § 2. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985) ("By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.").

[82] Kilgore v. KeyBank, Nat'l Ass'n, 673 F.3d 947, 955 (9th Cir. 2012) (quoting 9 U.S.C. § 2).

[83] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 354 (2011) (Thomas, J., concurring).

[84] 9 U.S.C. § 2. This is in line with the "conjunctive/disjunctive canon" of statutory interpretation, which provides: "*And* joins a conjunctive list, *or* a disjunctive list." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116, 118 (2012).

each term should be interpreted as having a distinct meaning rather than being mere "surplusage."[85]

A "valid" contract is defined as "[a] contract that is fully operative in accordance with the parties' intent."[86] The "validity" of a contract, including an arbitration agreement, concerns "whether it is legally binding, as opposed to whether it was in fact agreed to."[87] An example of a ground for the invalidity of a contract is unconscionability.[88] An "unenforceable" contract is "[a]n otherwise valid contract that, because of some technical defect, cannot be fully enforced."[89] Grounds for non-enforcement of a valid arbitration agreement include, for instance, where the particular dispute falls outside the scope of the agreement[90] or where the agreement is in violation of a statute of limitations.[91] These grounds for "invalidity" or non-enforcement would render the contract "voidable."[92]

In contrast, grounds for "revocation" of a contract may be distinguished from both grounds for "invalidity" and grounds for

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[85] The "surplusage canon" of statutory interpretation provides that "[i]f possible, every word and every provision is to be given effect . . . . None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." *Id*. at 174; *see also, e.g.*, ADT, L.L.C. v. Richmond, 18 F.4th 149, 156 (5th Cir. 2021) ("Wherever possible, we must read statutes to give effect to their every word.").

[86] *Valid Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[87] Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 88 n.1 (2010).

[88] *Id*; *see also, e.g.*, Billy Dixon v. Wells Fargo Bank, N.A., No. 21 Civ. 10, 2021 WL 4805429, at *4 (S.D.N.Y. Oct. 14, 2021) (" 'An unconscionable contract is usually voidable since a party to a contract has the power to validate, ratify or avoid it . . . .' Claims going to whether a contract is voidable do not, however, go to whether the parties ever formed the contract." (citation omitted) (quoting Lawrence v. Miller, 901 N.Y.3d 588, 595 n.3 (2008))).

[89] *Unenforceable Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[90] *Rent-A-Center, W., Inc.*, 561 U.S. at 77–80, 88 n.4 (explaining that a scope question "concerns whether a particular dispute falls within the scope of a concededly binding arbitration agreement").

[91] WILLISTON ON CONTRACTS § 1:21 (4th ed.).

[92] A "voidable contract" is "a contract which, in its inception, is valid and capable of producing the results of a valid contract, but which may be 'avoided,' i.e. rendered void at the option of one (or even, though rarely, of both) of the parties." *Voidable Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 8 cmt. a (Am. L. Inst. 1981) ("Voidable contracts might be defined as one type of unenforceable contract."). Another example of a "voidable" contract is one entered into by a minor. *See, e.g.*, *In re* StockX Customer Data Sec. Breach Litig., 19 F.4th 873, 883–84 (6th Cir. 2021) (holding that "a minor's contract is not synonymous with a nonexistent contract. 'It is elementary that an infant's contract, with certain exceptions . . . , is voidable.' . . . Thus, plaintiffs' infancy defense is a matter of enforceability . . . ." (quoting Payette v. Fleischman, 45 N.W.2d 16, 17 (Mich. 1950)).

non-enforcement. The Supreme Court has indicated that grounds for revocation include where a party never "signed the contract," where a "signor lacked authority to commit [an] alleged principal," and where a "signor lacked the mental capacity to assent."[93] These are grounds relating to the existence or formation of an arbitration agreement that may render it "void."[94] It makes sense that the term "revocation" as used in § 2 of the FAA concerns the existence/formation of arbitration agreements given the judicial approach to arbitration agreements at the time the FAA was enacted.[95] As already noted and as will be discussed further below, prior to 1925 courts frequently refused to specifically enforce arbitration agreements and allowed an aggrieved party to recover only actual (usually nominal) damages where the arbitration agreement was made under a bond.[96] The typical ground for such refusal was the

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[93] Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 n.1 (2006). The Court did not label these grounds as ones for revocation, but it did distinguish them from issues of validity. *Id.*; *see also* Arbogast v. Chi. Cubs Baseball Club, LLC, 194 N.E.3d 534, 547 (Ill. App. Ct. 2021) ("The defense of unconscionability cannot arise unless a contract is found to exist first. Because there is a genuine issue of fact about whether a contract exists at all here, we conclude that we cannot reach the question of whether the arbitration provision is unconscionable.").

[94] Luz Alba v. Superior Ct. of San Bernardino, No. E076054, 2021 WL 4317409, at *2 (Ct. App. Cal. 2021) ("[T]here would be no agreement between the parties if the contract were void for 'fraud in the execution,' but there *would* be a contract between the parties if the contract were merely *voidable* for 'fraud in the inducement.' "). A "void" contract is defined as "[a] contract that is of no legal effect, so that there is really no contract in existence at all." *Void Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* WILLISTON ON CONTRACTS § 57:53 (4th ed.) ("[T]he only grounds for revocation that meet the requirements of the Federal Arbitration Act are mutual agreement or a condition that vitiates the agreement ab initio, including fraud, mistake, and duress." (footnotes omitted)).

[95] This is also in line with the "fixed-meaning canon" of statutory interpretation, which provides that "[w]ords must be given the meaning they had when the text was adopted." SCALIA & GARNER, *supra* note 84, at 78.

[96] *See, e.g.*, Allen v. Watson, 16 Johns. 205, 209 (1819) (N.Y. Sup. Ct. 1819) ("There can be no doubt that the defendant could revoke the powers conferred by the arbitration bond. The consequence was a forfeiture of the penalty" but "the plaintiff could recover no more than the actual damages sustained . . . ."); Or. & W. Mortg. Sav. Bank v. Am. Mortg. Co., 35 F. 22, 23 (C.C.D. Or. 1888); Tobey v. Cnty. of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845); Munson v. Straits of Dover, 99 F. 787, 789 (S.D.N.Y. 1900) ("[N]o case is to be found in which, upon a mere refusal to arbitrate and where no action had been taken by either party under the agreement to refer beyond a mere request and refusal to arbitrate, any damages have ever been recovered, or any other than nominal damages have ever been indicated to be recoverable . . . ."); Wood v. Lafayette, 46 N.Y. 484, 489 (1871) (holding that the arbitrator's power "was revocable by either party, as is the case in every submission to arbitrators . . . ."); Haggart v. Morgan, 5 N.Y. 422, 427 (1851) ("[T]he agreement to arbitrate, only entitled the party to damages, but was no bar to an action.").

doctrine of "revocability," which "allowed parties to repudiate arbitration agreements at any time before the arbitrator's award was made."[97] In other words, the concept of "revocation" allowed a party to bring an action in court in breach of an arbitration agreement, effectively rendering it "void"[98] for being "abandoned,"[99] as opposed to merely invalid[100] or "unenforceable."[101] Moreover, the term "revocation" at the time of the FAA's enactment was defined as "[t]he recall of some power, authority, or thing granted, or a *destroying or making void of some deed that had existence until the act of revocation made it void*."[102]

Returning to the language of § 2, the "savings clause" in this section clearly permits courts to refuse enforcement of arbitration agreements only on grounds for the "revocation," i.e., grounds that relate to the existence/formation, of any contract rather than on grounds for invalidity or non-enforcement of contracts.[103] Justice Thomas's concurrence in *Concepcion* noted:

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[97] Southland Corp. v. Keating, 465 U.S. 1, 32 (1984) (O'Connor J., dissenting).

[98] *In re* Exeter Mfg. Co., 254 A.D. 496, 497 (N.Y. 1st Dep't 1938) ("The Statute of Frauds here involved is not a ground at law or in equity for the 'revocation' of a contract; nor does it make a contract within its purview void, but merely unenforceable.").

[99] Everett v. Brown, 120 Misc. 349, 353 (Sup. Ct. Onondoga Cnty. 1923) ("A violation of the terms of an agreement does not constitute an abandonment of the contract. To constitute a revocation the instrument or declaration relied upon must clearly show such intention.").

[100] For instance, invalid as against public policy. *See, e.g.*, In re Fletcher, 237 N.Y. 440, 445 (1924) ("The primary purpose of the Arbitration Law was to make valid and enforceable provisions for arbitration which had previously been regarded as contrary to public policy . . . .").

[101] *See supra* note 98.

[102] *Revocation*, BLACK'S LAW DICTIONARY (2d ed. 1910) (emphasis added). Indeed, judicial decisions around the time of the FAA's enactment distinguished between the concept of "validity" and "revocability." For instance, applying a 1927 state arbitration law that provided only for the "validity" of arbitration agreements rather than their irrevocability, the Supreme Court of Minnesota explained that "Statutes recognizing the validity of and in aid of common law arbitration, which do not contain specific provisions that agreements to arbitrate future disputes shall be irrevocable, do not make such agreements irrevocable by implication." Park Const. Co. v. Indep. Sch. Dist. No. 32, 296 N.W. 475, 482 (Minn. 1941) (Peterson, J., dissenting).

[103] 9 U.S.C. § 2. This is also why questions concerning validity and enforceability of arbitration agreements may be delegated to the arbitrator where there is clear and unmistakable evidence that the parties intended to do so, while questions concerning the formation or existence of arbitration agreements must be decided by the court. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944–45 (1995). The rationale is that "[a]n agreement that has not been properly formed is not merely an unenforceable contract; it is not a contract at all. And if it is not a contract, it cannot

> [T]he statute does not parallel the words "valid, irrevocable, and enforceable" by referencing the grounds as exist for the "invalidation, revocation, or nonenforcement" of any contract. Nor does the statute use a different word or phrase entirely that might arguably encompass validity, revocability, and enforceability. The use of only "revocation" and the conspicuous omission of "invalidation" and "nonenforcement" suggest that the exception does not include all defenses applicable to any contract but rather some subset of those defenses.[104]

Further support for the interpretation of "revocation" in the "savings clause" of § 2 as indicating only grounds relating to the existence or formation of arbitration agreements can be found in § 4 of the FAA.[105] Section 4 requires courts, before compelling arbitration in accordance with an arbitration agreement, to be satisfied that "the *making* of the agreement for arbitration . . . is not in issue."[106] If the making of the arbitration agreement is in issue, § 4 permits "the party alleged to be in default [to] demand a *jury trial* of such issue."[107] Therefore, "section 4 is directed at issues that are for a jury to decide," such as a factual determination of whether an arbitration agreement exists, and not at legal determinations of an arbitration agreement's validity

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serve as the basis for compelling arbitration." Doctor's Assocs., Inc. v. Alemayehu, 934 F.3d 245, 251 (2d Cir. 2019).

[104] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 354 (2011) (Thomas, J., concurring). Justice Thomas' interpretation is also in line with the "negative-implication canon" of statutory interpretation, which provides that "[t]he expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)." SCALIA & GARNER, *supra* note 84, at 107. For commentary on AT&T Mobility LLC v. Concepcion, *see, e.g.,* Lisa Tripp, *Arbitration Agreements Used by Nursing Homes: An Empirical Study and Critique of AT&T Mobility v. Concepcion*, 35 AM. J. TRIAL ADVOC. 87, 114–15 (2011); Christopher R. Drahozal, *FAA Preemption after Concepcion*, 35 BERKELEY J. EMP. & LAB. L. 153, 172 n.103 (2014).

[105] *AT&T Mobility LLC*, 563 U.S. at 354–355 (2011) (Thomas, J., concurring) (noting that "[t]o clarify the meaning of § 2, it would be natural to look to other portions of the FAA" and finding that "§ 4 can be read to clarify the scope of § 2's exception to the enforcement of arbitration agreements."). This interpretation is consistent with the interpretative canon that statutory "text must be construed as a whole." SCALIA & GARNER, *supra* note 84, at 167.

[106] 9 U.S.C. § 4 (emphasis added)*; see* MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds, 974 F.3d 386, 397 (3d Cir. 2020) (holding that § 4 of the FAA " 'affirmatively requires' a court to decide questions about the formation or existence of an arbitration agreement."); *see also In re* Auto. Parts Antitrust Litig., 951 F.3d 377, 385–86 (6th Cir. 2020); Berkeley Cty. Sch. Dist. v. Hub Int'l Ltd., 944 F.3d 225, 234 (4th Cir. 2019); Lloyd's Syndicate 457 v. FloaTEC, L.L.C., 921 F.3d 508, 515 (5th Cir. 2019); Neb. Mach. Co. v. Cargotec Sols., LLC, 762 F.3d 737, 741 n.2 (8th Cir. 2014).

[107] 9 U.S.C. § 4 (emphasis added).

or enforceability, which are "exercises of judicial discretion."[108] There is also "no suggestion in the statutory text that the scope of arbitrability should differ from section [2] to section [4]."[109] Rather, these provisions "work together"—the former "defines the types of arbitration agreements that must be enforced in all circumstances (the 'what')" and the latter "provides the manner for obtaining an order compelling arbitration from a federal court (the 'how')."[110] Therefore, the grounds for refusing to enforce an arbitration agreement under § 2 (i.e., grounds for "revocation" of any contract) should mirror the grounds for enforcing an arbitration agreement under § 4 (i.e., upon being satisfied that an arbitration agreement "exists"). In this way, §§ 2 and 4 may be read "harmoniously" as follows:

> [T]he "grounds . . . for the revocation" preserved in § 2 would mean grounds related to the making of the agreement. This would require enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud, duress, or mutual mistake. Contract defenses unrelated to the making of the agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause.[111]

The Supreme Court's pronouncement in *Moses* that the FAA embodies a "liberal federal policy favoring arbitration agreements" simply reflects the fact that § 2 of the Act favors the enforcement of arbitration agreements by explicitly allowing courts to refuse such enforcement only on the most narrow

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[108] Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035, 2059–60 (2011).

[109] INTL FCStone Fin., Inc. v. Jacobson, No. 19-cv-01438, 2021 WL 4477917, at *6 (N.D. Ill. Sept. 30, 2021).

[110] *Id.*

[111] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 355 (2011) (Thomas, J., concurring) (citation omitted); *see also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403 (1967) ("Under § 4 . . . the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply [with the arbitration agreement] is not in issue.' " (alteration in original)); WILLISTON ON CONTRACTS § 57:53 (4th ed.) ("[I]t is only this kind of 'revocation' which can be harmonized with adjudication directed to 'the making of the agreement for arbitration.' " (quoting Middlesex Cnty. v. Gevyn Const. Corp., 450 F.2d 53 (1st Cir. 1971))). Some commentators disagree with this interpretation of § 4. *See, e.g.*, Drahozal, *supra* note 104, at 172 n.103 ("[I]f FAA section 4 means what Justice Thomas says it means, there was no need for him to address the language of the FAA section 2 savings clause. . . . If section 4 did not permit the district court to consider unconscionability as a defense, the court had to compel arbitration without regard to the language of the savings clause.").

contract law defenses—those that would allow for the *revocation* of any contract.[112] It is not necessary that the Act explicitly spell out that enforcement of arbitration agreements is favored.[113] Indeed, even statutes that explicitly declare arbitration to be a "desirable method for settlement" of disputes have been interpreted by the Supreme Court in precisely the same way it has interpreted the FAA—as simply requiring the enforcement of valid arbitration agreements.[114] The *Moses* Presumption is founded upon this interpretation of the FAA's text and establishes "a prophylactic rule governing ambiguities in arbitration clauses."[115] At the same time, the Presumption is "subject to constraints"[116] and is in fact narrower than the explicit language of § 2 of the FAA.

First, the Presumption applies only to questions relating to the *scope* of arbitrable issues and not to questions concerning the

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[112] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) ("The 'liberal federal policy favoring arbitration agreements,' . . . is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply 'creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate.' " (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 25 n.32 (1983))); *see also* Kelly v. Golden, 352 F.3d 344, 349 (8th Cir. 2003) ("There is a liberal federal policy favoring arbitration, grounded in the Federal Arbitration Act, 9 U.S.C. § 2, which provides that contract provisions directing arbitration shall be enforceable in all but limited circumstances." (citing *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24)).

[113] Although some provisions of the FAA clearly show such favor. Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1229–30 (2011) (noting several features of the FAA that "[f]ar from securing equal footing among contracts . . . unabashedly *favor* arbitration agreements."). For instance, § 16 provides for interlocutory appeals when a motion to compel arbitration is denied, but not when such a motion is granted. This provision has been said to evidence "a strong public policy favoring arbitration." Maree v. Deutsche Lufthansa AG Anthony Castanares, No. SACV 20-885, 2021 WL 4352912, at *4 (C.D. Cal. June 21, 2021).

[114] See, for example, 29 U.S.C. § 173(d), which provides that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." The Supreme Court has held, however, that even where the parties have agreed upon arbitration to resolve their disputes, it does not give rise to "a presumption that labor disputes are arbitrable whenever they are not expressly excluded from an arbitration clause." Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 319 n.8 (2010) (citing United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578–82 (1960)). Rather, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id.* (quoting *United Steelworkers of Am.*, 363 U.S. at 582).

[115] Cronus Invs., Inc. v. Concierge Servs., 107 P.3d 217, 223 (Cal. 2005).

[116] Paul Revere Variable Annuity Ins. Co. v. Kirschhofer, 226 F.3d 17, 25 (1st Cir. 2000) (quoting Coady v. Ashcraft & Gerel, 223 F.3d 3, 9 (1st Cir. 2000)).

existence/formation of arbitration agreements *or* their validity.[117] It is therefore narrower than the explicit language of § 2, discussed above, and permits "generally applicable contract defenses, such as fraud, duress, or unconscionability, [to] be applied to invalidate arbitration agreements without contravening § 2."[118] Determining that a dispute falls outside the scope of an arbitration agreement neither revokes nor invalidates that agreement.[119]

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

[118] Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

[119] Some commentators argue that § 2 also restricts the *scope* of arbitration agreements enforceable under the Act through its reference to controversies "arising out of" a contract that includes an arbitration clause. 9 U.S.C. § 2. Commentators have argued that this phrase constitutes a "controversy limitation" that restricts the types of disputes that fall within the FAA's purview "to only a narrow category of controversies," Stephen E. Friedman, *The Lost Controversy Limitation of the Federal Arbitration Act*, 46 U. RICH. L. REV. 1005, 1015, 1026 (2012), or that § 2 requires a "contractual nexus" between the dispute to be arbitrated and the parties' agreement, David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633, 643 (2020). However, the *Moses* Presumption does not negate this interpretation of the phrase "arising out of" in § 2. Whereas the Presumption applies to the scope of arbitration agreements already determined to be valid under the FAA, the phrase "arising out of" in § 2 applies to the scope of the FAA itself. In other words, the Presumption applies to the question of whether a particular controversy falls within the scope of a particular arbitration agreement, while the phrase "arising out of" in § 2 applies to the antecedent question of whether a particular controversy falls within the scope of the FAA. This is evident from the placement of the phrase "arising out of" in § 2 in reference to "any maritime transaction or a contract evidencing a transaction involving commerce," i.e., the scope of the FAA, rather than in the latter part of the section which concerns the treatment of arbitration agreements determined to fall within the scope of the Act. Moreover, the Supreme Court in *Moses* clearly stated that the Presumption applies only to "arbitration agreement[s] within the coverage of the Act." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. In the context of the application of the FAA, the phrase "arising out of" in § 2 should be interpreted to exclude only those arbitration clauses compelling arbitration of controversies that are "wholly unrelated to the contract in which the clause was contained." Revitch v. DIRECTV, LLC, 977 F.3d 713, 723–24 (9th Cir. 2020) (O'Scannlain, J., Concurring). Such an interpretation is preferable because parties should be allowed to determine what type(s) of disputes they wish to resolve by arbitration, for instance by using "broad" arbitration clauses where they wish to arbitrate non-contractual disputes "arising out of" their commercial relationship. The FAA, in turn, ensures a minimum threshold of "some relationship between the controversy and the underlying contract." *Id*. To interpret the phrase "arising out of" in § 2 to mean that parties can never submit to arbitration under the FAA non-contractual disputes would allow a party to "avoid arbitration by casting its complaint in terms of tort rather than contract." Johnson v. Pachmayer, No. 20-cv-170-wmc, 2021 WL 4168663, at *4 (W.D. Wis. 2021) (quoting Dries v. Onebeacon Am. Ins. Co., No. 15-CV-233-WMC, 2016 WL 755655, at *3 (W.D. Wis. Feb. 25, 2016).

Second, the *Moses* Presumption applies only where there are *doubts* concerning the scope of an arbitration agreement and, as is the nature of all presumptions, it is rebuttable.[120] In other words, where it is clear, either "because of express exclusion or other forceful evidence,"[121] that a particular dispute does not fall within the scope of an arbitration agreement, the *Moses* Presumption does not come into play and a court's refusal to enforce the agreement would not violate the FAA or the federal policy favoring arbitration agreements.[122] Accordingly, the *Moses* Presumption should only be triggered in the following scenario: a court has determined that a valid arbitration agreement exists between the parties and there is no express language in the agreement or other strong evidence indicating that the parties intended to exclude the particular dispute from the scope of that agreement. In this scenario, the Presumption operates to implement the federal policy—reflected in the language of § 2 of the FAA—that valid arbitration agreements should be enforced by requiring the court to presume that the parties intended to arbitrate their dispute and resolve any ambiguity in favor of arbitration.[123]

B. The FAA's Legislative History

The FAA's legislative history does not provide solid grounds for any conclusion regarding Congress's intentions in enacting it.[124] Indeed, "[l]ittle emerges from the legislative history [of the

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[120] Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 301 (2010) (explaining that courts are to invoke the federal "policy favoring arbitration" by "(1) applying the presumption of arbitrability only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand; and (2) adhering to the presumption and ordering arbitration only where the presumption is not rebutted."); Knox Waste Serv., LLC v. Sherman, No. 11-19-00407-CV, 2021 WL 4470876, at *13 (Tex. App. 2021) ("[A] conspicuous jury waiver provision is 'prima facie evidence of a knowing and voluntary waiver and shifts the burden to the opposing party to rebut it.' ") (quoting *In re* Gen. Elec. Cap. Corp., 203 S.W. 3d 314, 316 (Tex. 2006)).

[121] AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 652 (1986).

[122] EEOC. v. Waffle House, Inc., 534 U.S. 279, 289 (2002) ("Absent some ambiguity in the agreement, however, it is the language of the contract that defines the scope of disputes subject to arbitration.").

[123] Eckel v. Equitable Life Assur. Soc. of the U.S., 1 F. Supp. 2d 687, 688 (E.D. Mich. 1998) ("If the matter at issue can be construed as within the scope of the arbitration agreement, it should be so construed unless the matter is expressly exempted from arbitration by the contract terms.").

[124] Herbert Burstein, *The United States Arbitration Act—A Reevaluation*, 3 VILL. L. REV. 125, 129 (1958) ("[T]he scanty history is inconclusive and unreliable."). For a

FAA] other than unhappiness with prior law."[125] Nonetheless, critics often cite Congress's stated goal of placing arbitration agreements "upon the same footing as other contracts"[126] as negating any possible preference for arbitration. However, this simple statement is unable to bear the heavy weight that critics seek to place on it. First, it is "not even clear that a given law can apply to literally all contracts without vitiating the entire endeavor of contract law, which plainly requires regulating different types of agreements differently."[127] In other words, different types of contracts may be subject to different legal principles and arbitration agreements are a very distinct type of contract. Second, favoring the enforcement of valid arbitration agreements is necessary precisely in order for them to be treated "as other contracts" and as "a meaningful alternative to litigation."[128] Examining Congress's main motivation for placing arbitration agreements "upon the same footing as other contracts" in the first place makes this clear.[129]

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detailed discussion of the legislative history of the FAA, see, for example, Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101 (2002); Matthew W. Finkin, *Workers' Contracts under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282 (1996); IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNATIONALIZATION 83–147 (1992); IMRE STEPHEN SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA 160–84 (2013).

[125] Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1315 (1985) (footnote omitted).

[126] H.R. REP. NO. 68-96, at 1 (1924).

[127] Aragaki, *supra* note 112, at 1205–06.

[128] McCormick v. Am. Online, Inc., 909 F.3d 677, 680 (4th Cir. 2018); *see also* Vera v. Saks & Co., 335 F.3d 109, 116 (2d Cir. 2003) (noting that the FAA "requires the federal courts to enforce arbitration agreements, reflecting Congress' recognition that arbitration is to be encouraged as a means of reducing the costs and delays associated with litigation"); Aragaki, *supra* note 112, at 1223–24 ("[T]he FAA's purpose to make arbitration *agreements* as enforceable as any other contract, while surely important, is a means to an end rather than an end in itself. That end has always been to enable the arbitration *process* to compete on a level playing field with litigation, free of the artificial legal impediments that had once stood in its way.").

[129] Another theory of Congress's intention in enacting the FAA is the need for "procedural reform" in adjudication. *See* Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. 1939, 1942 (2014). Indeed, the Senate Report discussing the Act reflects Congress's recognition of the advantages of arbitration, emphasizing that "[t]he desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expenses increase. The settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests as well as to individuals." S. REP. NO. 68-536, at 3 (1924). The House Report accompanying the Act similarly noted:

As already noted, Congress enacted the FAA to overcome long-standing judicial hostility to arbitration.[130] This judicial hostility was not, however, absolute. In fact, even before the FAA was enacted, courts generally favored the enforcement of arbitration *awards*, i.e., decisions rendered by arbitrators concerning the merits of disputes, and treated these decisions as "conclusive between the parties."[131] Indeed, while *agreements* to submit future disputes to arbitration were revocable at the will of any party, this right was extinguished once the arbitrator rendered an *award*. As early as the mid-19th century it was "well settled law" that such arbitration awards "are to be liberally construed so as to give a full effect and operation to the intention of the arbitrators where it can be done, and every thing is to be presumed and every reasonable intendment made in favor of them."[132] Therefore, the federal policy favoring

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> It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.

H.R. REP. NO. 68-96, at 2 (1924).

[130] Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219–20 (1985) (noting that Congress enacted the FAA "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate"); Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 (1974) (noting that the FAA "revers[ed] centuries of judicial hostility to arbitration agreements").

[131] Fudicar v. Guardian Mut. Life Ins. Co., 62 N.Y. 392, 399–400 (1875) ("It is the general doctrine pervading our jurisprudence on the subject, that the decision of an arbitrator in a matter within his jurisdiction is final and conclusive between the parties. . . . The court possesses no general supervisory power over awards, and if arbitrators keep within their jurisdiction their award will not be set aside because they have erred in judgment either upon the facts or the law."); *see also* Curtis v. Gokey, 68 N.Y. 300, 305 (1877) ("We are not at liberty to be hypercritical for the purpose of overturning the decisions of these domestic tribunals, and compelling a resort to the courts of justice. . . . A liberal interpretation should be given to the submission, and the award made, to uphold the latter when it is not attacked for corruption or misconduct of the arbitrator.").

[132] Ebert v. Ebert, 5 Md. 353, 364 (1854); *see also* Gross v. Zorger, 3 Yeates 521, 524–25 (Pa. 1803) ("On a general reference, the arbitrator has a greater latitude than the court of chancery, in order to do complete justice between the parties. By a submission to arbitration, a court both of law and equity divest themselves of all judgment on the facts." (citation omitted)); IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNATIONALIZATION 19 (1992) (noting that American courts in the 19th century "allowed arbitrators broad leeway in making their awards, far broader respecting both fact and law than would normally be accorded to lower courts."); Horton, *supra* note 119, at 646 (noting that judicial approach to arbitration awards in the early 20th century "meant that the common law 'put a[ ] liberal and comprehensive construction' on contracts to arbitrate" (alteration in original) (quoting Robertson & Creed v. Marshall, 71 S.E. 67, 68 (N.C. 1911)).

arbitration, rather than being a figment of the Supreme Court's imagination, actually has strong roots in pre-FAA judicial practice—at least in terms of enforcement of arbitration *awards*. By enacting the FAA, Congress simply extended this judicial practice to arbitration *agreements* and reversed the revocability doctrine relied on to refuse enforcement of such agreements. Indeed, "[i]t was this non-enforcement ill that the FAA was designed to remedy."[133] Examples of judicial mistreatment of arbitration agreements abound.[134]

For instance, in 1872 the New York Court of Appeals held that, "[T]he rule that a general covenant to submit any differences that may arise in the performance of a contract, or under an executory agreement, is a nullity, is too well established to be now questioned."[135] A common rationale for the revocability of arbitration agreements was that they "oust[ed] the jurisdiction of the courts."[136] As a state court in Maine noted in 1887,

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[133] Frankel, *supra* note 18, at 538–39; *see also* Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 302 (2010) (noting that the federal policy favoring arbitration "is merely an acknowledgment of the FAA's commitment to 'overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts' ") (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989)); Galloway v. Santander Consumer USA, Inc., 819 F.3d 79, 84 (4th Cir. 2016) ("Before the FAA was enacted, 'courts were hostile to the enforcement of arbitration provisions, following a long-standing common law rule which evolved from the judiciary's jealous refusals to oust courts of jurisdiction in favor of other dispute resolution mechanisms.' ") (quoting Whiteside v. Teltech Corp., 940 F.2d 99, 101 (4th Cir. 1991)).

[134] In addition to the cases discussed below, *see, e.g.*, Allen v. Watson, 16 Johns. 205, 209 (N.Y. Sup. Ct. 1819) ("There can be no doubt that the defendant could revoke the powers conferred by the arbitration bond. . . . [T]he plaintiff could recover no more than the actual damages sustained . . . ."); Haggart v. Morgan, 5 N.Y. 422, 427 (1851) ("[T]he agreement to arbitrate, only entitled the party to damages, but was no bar to an action."); Wood v. Lafayette, 46 N.Y. 484, 489 (1871) (the arbitrator's power "was revocable by either party, as is the case in every submission to arbitrators"); Munson v. Straits of Dover, 99 F. 787, 789 (S.D.N.Y. 1900) ("[N]o case is to be found in which, upon a mere refusal to arbitrate and where no action had been taken by either party under the agreement to refer beyond a mere request and refusal to arbitrate, any damages have ever been recovered, or any other than nominal damages have ever been indicated to be recoverable . . . .").

[135] Del. & Hudson Canal Co. v Pa. Coal Co., 50 N.Y. 250, 258 (1872).

[136] Maitland v. Reed, 77 N.E. 290, 291 (Ind. App. 1906) ("[T]hat provision of the contract which assumes to make the decision of the architect, or of an arbitrator, final, is void. It is not competent for parties to a contract, in advance of any dispute, to oust the jurisdiction of the courts by providing that the decision of a party therein named upon a dispute which might thereafter arise shall be final and conclusive."); *see, e.g.*, Ins. Co. v. Morse, 87 U.S. 445, 451 (1874) ("[A]greements in advance to oust

> The right of free access to courts is inalienable. . . . [M]en cannot be compelled, even by their own agreements, to mutually agree upon arbiters whose duties would . . . go to the root of the principal claim or cause of action, and oust courts of their jurisdiction.[137]

This principle was reiterated by the New York Court of Appeals in 1914 as follows:

> If jurisdiction is to be ousted by contract, we must submit to the failure of justice that may result from these and like causes. It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary.[138]

It is this hostile judicial attitude that led to urgent calls for stronger state and federal pro-arbitration legislation as an "emergency measure,"[139] recognizing that courts "will never permit the absorption of all the business growing out of disputes over a contract by any body of arbitrators, unless compelled to such action by statute."[140]

The fact that overturning "the existing rule that performance of [arbitration] agreements could not be compelled" was one of

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the courts of the jurisdiction conferred by law are illegal and void."); Trott v. The City Ins. Co., 24 F. Cas. 215, 217 (C.C.D. Me. 1860) ("[A]ny agreement which is to prevent the suffering party from coming into a court of law, or, in other words, which ousts the courts of their jurisdiction, cannot be supported."); Perkins v. U.S. Elec. Light Co., 16 F. 513, 515 (S.D.N.Y. 1883) ("It is familiar doctrine that a simple agreement inserted in a contract, that the parties will refer any dispute arising thereunder to arbitration, will not oust courts of law of their ordinary jurisdiction."); Munson v. Straits of Dover S.S. Co., 99 F. 787, 788 (S.D.N.Y. 1900) (finding that if the arbitration agreement was found to be valid, "it would debar either party from a resort to the legal tribunals and oust the courts of jurisdiction. Such agreements ever since Lord Coke's time, and even before, have been held to be no defense to an action in the courts.").

[137] Dugan v. Thomas, 9 A. 354, 354–55 (Me. 1887).

[138] Meacham v. Jamestown, F. & C. R. Co., 211 N.Y. 346, 354 (1914). For an earlier contrary approach, see, for example, Curtis v. Gokey, 68 N.Y. 300, 305 (1877) ("It would be better for the people if more of their controversies should be settled [by arbitration tribunals], and justice would be quite as likely to be done as when administered by the more formal methods of litigation in the courts."); Fudicar v. Guardian Mut. Life Ins. Co., 62 N.Y. 392, 399 (1875) ("The jealousy with which, at one time, courts regarded the withdrawal of controversies from their jurisdiction by the agreement of parties, has yielded to a more sensible view, and arbitrations are now encouraged as an easy, expeditious and inexpensive method of settling disputes, and as tending to prevent litigation.").

[139] *Joint Hearing before the Subcommittees of the Committees on the Judiciary*, 68th Cong., 1st Session 19 (1924) (statement of Francis B. James, Westory Building, Washington D.C.).

[140] U.S. Asphalt Refin. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1011 (S.D.N.Y. 1915).

the goals of the FAA is also clear from its drafting history.[141] The Senate Report discussing the proposed Act noted that judicial hostility toward arbitration agreements was rooted in fears that arbitral tribunals "did not possess the means to give full or proper redress," and in the courts' "jealousy of their rights as courts, coupled with the fear that if arbitration agreements were to prevail and be enforced, the courts would be ousted of much of their jurisdiction."[142] The House [R]eport accompanying the Act noted:

> The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so lon [sic] a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it.[143]

How, then, could Congress achieve its stated goal of having hostile courts treat arbitration agreements the same as any contract other than by requiring that their enforcement be "favored"?[144]

Furthermore, the fact that the FAA was meant to be "a broad enactment appropriate in scope to meet the large problems Congress was addressing,"[145] including not only the long-standing judicial hostility to arbitration agreements but also "the delay

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[141] Anaconda v. Am. Sugar Refin. Co., 322 U.S. 42, 44 (1944); Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 270–71 (1995) ("[W]hen Congress passed the Arbitration Act in 1925, it was 'motivated, first and foremost, by a . . . desire' to change this antiarbitration rule.") (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220 (1985).

[142] S. REP. NO. 536, at 2 (1955).

[143] H.R. REP. NO. 96, at 1–2 (1924).

[144] Aragaki, *supra* note 113, at 1230 ("The FAA would therefore need to make arbitration agreements robustly enforceable—perhaps even more than other contracts—in order to reverse the law's discriminatory treatment of arbitration and enable the arbitral process to compete on an equal footing with courtroom adjudication."). *See also* Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1266–67 (2011) (arguing that the national policy favoring arbitration constitutes an anti-discrimination policy, granting preference to arbitration agreements given the historical judicial hostility towards them).

[145] Southland Corp. v. Keating, 465 U.S. 1, 14 (1984).

and expense of litigation,"[146] makes it a remedial statute.[147] A remedial statue is one "enacted for the protection of life and property and to introduce regulations conducive to the public good and is liberally construed to effectuate its purpose."[148] Remedial statutes have therefore been subject to the long-standing canon of construction that "[s]tatutes in derogation of the common law . . . will be liberally construed if their nature is remedial."[149] This liberal construction can be used to "expand the meaning of a statute to meet cases which are clearly within the spirit or reason of the law."[150] As argued above, such an expansion is not required to justify the *Moses* Presumption because the Presumption is not inconsistent with the language of the FAA. However, even if this were the case, the remedial nature of the FAA would justify construing its language "liberally . . . to effectuate its purpose,"[151] namely the enforcement of valid arbitration agreements.

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[146] Sarah E. Bouchard, *Arbitration - The Third Circuit Re-Examines Its Traditional Approach to Adjudication of ERISA Claims*, 39 VILL. L. REV. 957, 958 (1994).

[147] WILLISTON ON CONTRACTS § 57:20 (4th ed.) ("[A]rbitration statutes are remedial and their construction 'ought to be resolved in line with [their] liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of the court calendars.' " (alteration in original)); SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 67:11 (8th ed. 2020); Dombrowski v. Swiftships, Inc., 864 F. Supp. 1242, 1249 (S.D. Fla. 1994) ("[T]he FAA is essentially a remedial statute designed to remedy what the Supreme Court calls a two-fold problem: 'the old common-law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements.' " (quoting *Southland Corp*., 465 U.S. at 14)).

[148] SINGER, *supra* note 147, § 67:11.

[149] KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 522 (1960); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 402 (1950) ("Remedial statutes are to be liberally construed."). *But see* SCALIA & GARNER, *supra* note 84, at 364–66 (concluding that the canon is "either incomprehensible or superfluous"); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1086 (7th Cir. 1984) (noting that "the maxim that remedial statutes should be liberally construed is well recognized" but qualifying that this "concept has reasonable bounds beyond which a court cannot go without transgressing the prerogatives of Congress").

[150] SINGER, *supra* note 147, § 67:11. However, "the doctrine of liberal construction of remedial statutes does not permit a court to redraft a clearly-written statute." Brzowski v. Md. Home Improvement Comm'n, 691 A.2d 699, 708 (Md. Ct. Spec. App. 1997).

[151] SINGER, *supra* note 147, § 67:11*; see* Dombrowski v. Swiftships, Inc., 864 F. Supp. 1242, 1250 (S.D. Fla. 1994) (refusing to read into § 10 of the FAA an implied venue restriction and noting that a "restrictive venue actually obstructs the policy of the FAA and it places upon the judiciary a pointless and wasteful burden that the

In sum, the text of the FAA clearly favors the enforcement—as opposed to the non-enforcement that was prevalent at the time of its enactment—of valid arbitration agreements. The rationale for placing arbitration agreements on the same footing as other contracts and the manner in which Congress set out to achieve this objective in the FAA similarly signal a legislative preference for enforcing valid arbitration agreements.[152] Indeed, given the judicial hostility to arbitration agreements at the time, the only way for Congress to make sure such agreements were treated as other contracts was to enact a remedial statute that expressly prohibited courts from refusing their enforcement on any ground that did not concern their existence or formation or that would not apply to other contracts. From this federal policy favoring arbitration agreements the Supreme Court in *Moses* derived a narrow interpretative Presumption: in cases of *doubts* concerning the *scope* of a valid arbitration agreement, courts should favor the enforcement of the agreement.[153] In the next Part, I examine whether lower courts have departed from this narrow formulation in the 40 years since *Moses* was rendered.

III. THE JURISPRUDENCE

In addition to criticizing the *Moses* Presumption on the basis of the text and legislative history of the FAA, it has also been argued that lower courts have "misread and wrongly extended" the Presumption.[154] Lower courts, critics posit, have tended to interpret *Moses* as requiring them "to construe arbitration clauses as broadly as possible" even where the agreement "is most properly read not to require arbitration of a particular dispute."[155] As a result, courts are said to have created "special

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Congress could not have intended in light of the statute's remedial purpose"). *See also* Deschamps v. Hermosa Outpatient Surgery Ctr., Inc., No. B143092, 2001 WL 1289172, at *5 n.6 (Cal. Ct. App. Oct. 23, 2001) (agreeing with *Dombrowski* and holding "that a permissive interpretation with respect to jurisdiction of a state court to hear a case governed by section 10 of the Federal Arbitration Act is appropriate").

[152] EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002) ("[T]he FAA is 'at bottom a policy guaranteeing the enforcement of private contractual arrangements.' " (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614, 625 (1985))).

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

[154] Frankel, *supra* note 18, at 534.

[155] Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1218, 1221 (11th Cir. 2021) (Newsom, J., concurring) (quoting Collins & Aikman Prods. Co. v. Bldg. Sys., Inc. 58 F.3d 16, 19 (2d Cir. 1995)).

rules" applicable only to arbitration agreements that "conflict with traditional rules of contract interpretation."[156] One such traditional rule that has reportedly been displaced by the *Moses* Presumption is *contra proferentem*.[157] Applying the *Moses* Presumption where *contra proferentem* should normally apply, the argument goes, has resulted in a "substantial[] over-enforc[ement]"[158] of arbitration agreements because "[r]ather than employing the traditional tools of textual interpretation, courts are made to forgo meaningful interpretation."[159]

In this Part, I first examine the interpretation and application of the *Moses* Presumption by state and federal courts generally, and then turn to the Presumption's interaction with the *contra proferentem* rule in the jurisprudence. I find that, both as a general matter and in the specific context of *contra proferentem*, lower courts have largely applied the Presumption narrowly and as intended by the Supreme Court in *Moses*—to resolve ambiguities concerning the scope of valid arbitration agreements. I argue that the nature of such ambiguities, as well as the nature of the *contra proferentem* rule itself, justify the application of the Presumption in this way.

A. 40 Years of Moses Jurisprudence

A detailed examination of the hundreds of state and federal judicial decisions applying the *Moses* Presumption is beyond the scope of the present article. Nonetheless, a representative review of the jurisprudence provides some insight into how courts have tended to interpret and apply the Presumption. Indeed, a relatively consistent trend can be identified of lower courts applying the *Moses* Presumption narrowly and only for its intended purpose—to resolve ambiguities concerning the scope of valid arbitration agreements. The *Moses* Presumption has not been applied by courts where it was clear that the dispute between the parties did not fall within the scope of their arbitration agreement (i.e., there were no "doubts" in this regard triggering the Presumption in the first place), nor to ambiguities concerning the existence/formation or validity of arbitration agreements.

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[156] Frankel, *supra* note 18, at 534.

[157] *Calderon*, 5 F.4th at 1218 (Newsom, J., concurring); Frankel, *supra* note 18, at 555–62.

[158] Frankel, *supra* note 18, at 534.

[159] *Calderon*, 5 F.4th at 1221 (Newsom, J., concurring).

Moreover, many courts have found that the same policy favoring arbitration underlying the FAA and the *Moses* Presumption applies also under state arbitration laws. As the Fifth Circuit noted, "the policy favoring arbitration is not exclusively federal; both federal and state jurisprudence dictate that any doubt as to whether a controversy is arbitrable should be resolved in favor of arbitration."[160] Indeed, many state arbitration laws and policies recognize arbitration "as a speedy and relatively inexpensive means of dispute resolution" and "encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing."[161]

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[160] McKee v. Home Buyers Warranty Corp. II, 45 F.3d 981, 985 (5th Cir. 1995).

[161] Avery v. Integrated Healthcare Holdings, Inc., 218 Cal. App. 4th 50, 59 (2013) (quoting St. Agnes Med. Ctr. v. PacifiCare of Cal., 82 P.3d 727, 738 (Cal. 2003)); *see also* Hudson v. ConAgra Poultry Co., 484 F.3d 496, 500 (8th Cir. 2007) ("[U]nder Arkansas law, 'any doubts and ambiguities must be resolved in favor of arbitration.' " (quoting Pest Mgmt., Inc. v. Langer, 250 S.W.3d 550, 556 (Ark. 2007))); Oldham v. Nova Mud, Inc., No. 2:20-cv-1166-KWR-GBW, 2021 WL 4066691, *12 (D.N.M. Sept. 7, 2021) ("[T]he Court acknowledges the strong public policy favoring arbitration in New Mexico . . . ."); Barrett v. McDonald Invs., Inc., 870 A.2d 146, 149 (Me. 2005) ("Maine has a broad presumption in favor of arbitration."); Barkai v. VHS of Mich., Inc., No. 354587, 2021 WL 3574106, at *5, *8 (Mich. Ct. App. Aug. 12, 2021) (noting that under "Michigan's UAA, an agreement to arbitrate is valid except on grounds that would revoke a contract" and that " '[g]enerally, the parties' agreement determines the scope of arbitration.' Disputes should be resolved in favor of arbitration." (citation omitted) (quoting Rooyaker & Sitz, PLLC v. Plante & Moran, PLLC, 742 N.W.2d 409, 421 (Mich. 2007))); Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 109 (2013) ("It is the policy of [South Carolina] to favor arbitration and 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.' " (quoting Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 92 (4th Cir. 1996))); Emory Healthcare, Inc. v. Farrell, 859 S.E.2d 576, 578 (Ga. Ct. App. 2021) ("Georgia has a robust policy of favoring the resolution of legal disputes through arbitration."); *In re* OneMain Fin. Grp., LLC, 627 S.W.3d 374, 377 (Tex. App. 2021) ("Texas law encourages parties to resolve disputes through arbitration."); Mid-Am. Apartments, L.P. v. Trojan, No. 02-21-00204-CV, 2021 WL 5028794, at *3 (Tex. App. Oct. 28, 2021) ("Once we determine a valid arbitration agreement exists, we apply a strong presumption in favor of arbitration."); Pisano v. Extendicare Homes, Inc., 77 A.3d 651, 660 (Pa. Super. Ct. 2013) ("Pennsylvania has a well-established public policy that favors arbitration."); OTO, L.L.C. v. Kho, 447 P.3d 680, 689 (Cal. 2019) ("California law strongly favors arbitration . . . 'the Legislature has expressed a "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution." ' As with the FAA, California law establishes 'a presumption in favor of arbitrability.' " (citation omitted) (first quoting Moncarsh v. Heily & Blasé, 832 P.2d 899, 902 (Cal. 1992); and then quoting Engalla v. Permanente Med. Grp., Inc., 938 P.2d 903, 915 (Cal. 1997))); Ettienne-Modeste v. Tru, LLC, CV206057513S, 2021 WL 3829823, at *1 (Conn. Super. Ct. Aug. 2, 2021) ("[T]he law in [Connecticut] takes a strongly affirmative view of consensual arbitration. . . . Arbitration is a favored method to prevent litigation, promote tranquility and expedite the equitable settlement of

To be sure, some courts have interpreted the *Moses* Presumption rather broadly, as requiring them to compel arbitration unless "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[162] At the same time, however, courts have also recognized the "fundamental principle that arbitration is a matter of contract" and, therefore, that the Presumption is not intended to compel parties to arbitrate "when they have not agreed to do so" but merely to enforce arbitration agreements "according to their terms."[163] After all, "requiring that arbitration rest on a consensual foundation is wholly

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disputes." (first alteration in original) (quoting Bd. of Educ. v. E. Haven Educ. Assn., 784 A.2d 958, 963 (Conn. 2001))); Wick v. Orange Park Mgt, LLC, 327 So. 3d 369, 372 (Fla. Dist. Ct. App. 2021) ("In Florida, arbitration agreements are favored." (citing Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 593 (Fla. 2013))); Blimpie Int'l, Inc. v. Choi, 822 N.E.2d 1091, 1094 (Ind. Ct. App. 2005) ("Indiana recognizes a strong policy of enforcing valid arbitration agreements."); Kuhn Constr., Inc. v. Diamond State Port Corp., 990 A.2d 393, 396 (Del. 2010) ("The public policy of Delaware favors arbitration."); Tatibouet v. Ellsworth, 54 P.3d 397, 405 (Haw. 2002) ("It is well settled that the [Hawai'i] legislature overwhelmingly favors arbitration as a means of dispute resolution.").

[162] Collins & Aikman Prods. Co. v. Bldg. Sys., Inc., 58 F.3d 16, 19 (2d Cir. 1995) (quoting David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245, 250 (2d. Cir 1991)); ARW Expl. Corp. v. Aguirre, 45 F.3d 1455, 1462 (10th Cir. 1995) (quoting AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 650 (1986)); Mey v. DIRECTV, LLC, 971 F.3d 284, 292 (4th Cir. 2020) (quoting Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 92 (4th Cir. 1996)); Parm v. Bluestem Brands, Inc., 898 F.3d 869, 873-874 (8th Cir. 2018) (quoting Unison Co. v. Juhl Energy Dev., Inc., 789 F.3d 816, 818 (8th Cir. 2015)).

[163] Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67 (2010) ("The FAA reflects the fundamental principle that arbitration is a matter of contract."); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989) ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so."); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 947 (1995) ("[T]he basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms.' " (citation omitted) (quoting Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 54 (1995))); Simon v. Pfizer Inc., 398 F.3d 765, 775 (6th Cir. 2005) ("[N]o matter how strong the federal policy favors arbitration, 'arbitration is a matter of contract between the parties, and one cannot be required to submit to arbitration a dispute which it has not agreed to submit to arbitration.' " (quoting United Steelworkers, Local No. 1617 v. Gen. Fireproofing Corp., 464 F.2d 726, 729 (6th Cir. 1972))); Arrants v. Buck, 130 F.3d 636, 640 (4th Cir. 1997) ("Even though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate."); Belnap v. Iasis Healthcare, 844 F.3d 1272, 1280 (10th Cir. 2017) ("Under the FAA, 'arbitration is a matter of contract,' and courts must 'place[ ] arbitration agreements on an equal footing with other contracts, and . . . enforce them according to their terms.' " (alteration in original) (quoting Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67 (2010))).

consistent with federal policy."[164] Therefore, lower courts have, on the whole, ensured that the *Moses* Presumption is applied narrowly and as prescribed by the Supreme Court. They have done so in two ways. First, courts have clearly distinguished between questions concerning the existence/formation or validity of arbitration agreements—to which the Presumption does *not* apply—and questions concerning the scope of arbitration agreements—to which the Presumption *does* apply. As noted by Judge Gorsuch (as he then was), "[e]veryone knows the Federal Arbitration Act favors arbitration. But before the Act's heavy hand in favor of arbitration swings into play, the parties themselves must *agree* to have their disputes arbitrated [under] state contract formation principles."[165] Second, courts have largely applied the *Moses* Presumption to arbitration agreements that they have concluded are "broad," and where there was no "express exclusion or other forceful evidence" indicating that the parties intended not to arbitrate the particular dispute.[166]

1. Existence/formation and validity versus scope questions

Courts have drawn a clear distinction between questions concerning the existence/formation or validity of arbitration agreements and questions concerning their scope, applying the *Moses* Presumption only to scope ambiguities.[167] Building on this distinction, courts generally engage in the following two-step analysis when deciding whether a particular dispute should be referred to arbitration: first, courts determine whether "there is a valid agreement to arbitrate because the basis for contractual arbitration is consent, not coercion," and, second, courts

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[164] Grundstad v. Ritt, 106 F.3d 201, 205 n.5 (2d Cir. 1997) (quoting McCarthy v. Azure, 22 F. 3d 351, 355 (1st Cir. 1994)).

[165] Howard v. Ferrellgas Partners, L.P., 748 F.3d 975, 977 (10th Cir. 2014).

[166] AT&T Techs., Inc. v. Commnc'ns Workers of Am., 475 U.S. 643, 650, 652 (1986).

[167] Southard v. Newcomb Oil Co., LLC, 7 F.4th 451, 454 (6th Cir. 2021) ("[T]he 'presumption' favoring arbitration . . . applies only to the scope of an arbitration agreement, not to its existence."); Raymond James Fin. Servs., Inc. v. Cary, 709 F.3d 382, 385 (4th Cir. 2013) ("[A] court cannot apply any presumption in favor of arbitration unless there already exists an enforceable arbitration agreement between the parties."); Oldham v. Nova Mud, Inc., No. 20-cv-1166-KWR-GBW, 2021 WL 4066691, at *5 (D.N.M. Sept. 7, 2021) ("Although the presence of an arbitration clause generally creates a presumption in favor of arbitration . . . 'this presumption disappears when the parties dispute the existence of a valid arbitration agreement.' " (citation omitted) (quoting Dumais v. Am. Golf Corp., 299 F. 3d 1216, 1220 (10th Cir. 2002))).

determine whether "the parties have agreed to arbitrate the dispute in issue."[168]

Challenges to the existence/formation or validity of arbitration agreements raised at the first stage of this analysis may concern, for instance, fraud,[169] incorporation by reference,[170] illusory agreements,[171] lack of mutual assent,[172] lack of a valid offer[173] or acceptance,[174] and lack of mental capacity.[175] To determine such challenges, courts have applied general principles of state contract law rather than the *Moses* Presumption.[176] Moreover, the law of some states applies the *opposite* presumption at this first stage of analysis—"[w]hen there is a question as to whether a party has agreed to an

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[168] Century Indem. Co. v. Certain Underwriters at Lloyd's, 584 F.3d 513, 523 (3d Cir. 2009) ("The strong federal policy favoring arbitration . . . does not lead automatically to the submission of a dispute to arbitration upon the demand of a party to the dispute. Before compelling a party to arbitrate pursuant to the FAA, a court must determine that (1) there is an agreement to arbitrate and (2) the dispute at issue falls within the scope of that agreement." (citing Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156, 160 (3d Cir. 2009))); China Minmetals Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp., 334 F.3d 274, 281 (3d Cir. 2003); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57, 115 (1995); *see also* Gove v. Career Sys. Dev. Corp., 689 F.3d 1, 2–3 (1st Cir. 2012); Holick v. Cellular Sales of N.Y., LLC, 802 F.3d 391, 394 (2d Cir. 2015); Revitch v. DIRECTV, LLC, 977 F.3d 713, 716 (9th Cir. 2020); Parm v. Bluestem Brands, Inc., 898 F.3d 869, 873 (8th Cir. 2018); Gollick v. Sycamore Creek Healthcare Grp., Inc., No. 1068-WDA-2020, 2021 WL 3206108, at *4 (Pa. Super. Ct. 2021); Sunergon Oil, Gas & Mining Grp., Inc. v. Cuen, No.19-CV-00998, 2021 WL 3775589, at *3 (Tex. App. 2021).

[169] Shivkov v. Artex Risk Sols., Inc., 974 F.3d 1051, 1059 (9th Cir. 2020); Adkins v. Lab. Ready, Inc., 303 F.3d 496, 502 (4th Cir. 2002).

[170] MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds, 974 F.3d 386, 402–03 (3d Cir. 2020); Chan v. Drexel Burnham Lambert, Inc., 178 Cal. App. 3d 632, 645 (Ct. App. 1986).

[171] Braden v. Optum Rx, Inc., No. 21-CV-02046-TC-GEB, 2021 WL 5299402, at *3 (D. Kan. Nov. 15, 2021).

[172] Galloway v. Santander Consumer USA, Inc., 819 F.3d 79, 85 (4th Cir. 2016); Emory Healthcare, Inc. v. Farrell, 859 S.E.2d 576, 582 (Ga. Ct. App. 2021).

[173] Al-Safin v. Cir. City Stores, Inc., 394 F.3d 1254, 1260 (9th Cir. 2005).

[174] Shockley v. PrimeLending, 929 F.3d 1012, 1020 (8th Cir. 2019).

[175] Harrington v. Atl. Sounding Co., Inc., 602 F.3d 113, 127 (2d Cir. 2010).

[176] Walker v. BuildDirect.com Techs., Inc., 733 F.3d 1001, 1004 (10th Cir. 2013) ("Generally, courts should apply ordinary state-law principles that govern the formation of contracts to determine whether a party has agreed to arbitrate a dispute." (quoting Hardin v. First Cash Fin. Servs., Inc., 465 F.3d 470, 475 (10th Cir. 2006)); Mey v. DIRECTV, LLC, 971 F.3d 284, 288 (4th Cir. 2020) ("We resolve th[e] question [of whether an agreement to arbitrate has been formed] according to state law principles governing contract formation."); MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds, 974 F.3d 386, 402 (3d Cir. 2020) ("When determining whether an arbitration agreement exists, we 'apply ordinary state-law principles' governing contract formation." (quoting James v. Glob. TelLink Corp., 852 F.3d 262, 265 (3d Cir. 2017))).

arbitration clause, there is a presumption against arbitration."[177] In addition, questions pertaining to who should be bound by an arbitration agreement, i.e., situations involving non-signatories, have also been considered as "existence" rather than "scope" questions.[178] Therefore, courts have held that the *Moses* Presumption "does not serve to extend the reach of an arbitration provision to parties who never agreed to arbitrate in the first place."[179] Rather, courts have applied principles of state law that allow the enforcement of arbitration agreements by or against non-signatories.[180]

It is only at the second stage of the analysis—once a valid arbitration agreement has been determined to exist—that courts have held that the federal policy favoring arbitration requires them to use "a particular hermeneutical principle for interpreting the breadth of the agreement,"[181] or in other words, to apply the

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[177] CNG Fin. v. Brichler, No. 1:21-CV-460, 2021 WL 4147764, at *2 (S.D. Ohio Sept. 13, 2021) (alteration in original) (quoting Maestle v. Best Buy Co., No. 79827, 2005 WL 1907282, at *5 (Ohio Ct. App. Aug. 11, 2005)).

[178] AtriCure, Inc. v. Meng, 12 F.4th 516, 524–25 (6th Cir. 2021) (noting that the non-signatory question "does not just ask whether the contract should cover a particular claim between two parties who have indisputably consented to arbitrate. The question instead involves parties who have *not* agreed to arbitrate with each other . . . . Because the federal policy favoring arbitration applies 'only when both parties have consented to and are bound by the arbitration clause,' courts have refused to apply it to arbitration claims by or against nonparties." (quoting Griswold v. Coventry First LLC, 762 F. 3d 264, 271 (3d Cir. 2014))); *see also* Revitch v. DIRECTV, LLC, 977 F.3d 713, 716–17 (9th Cir. 2020); Mayer v. Soik, No. 2020AP199, 2021 WL 3073073, at *4 (Wis. Ct. App. July 21, 2021).

[179] Grundstad v. Ritt, 106 F.3d 201, 205 n.5 (7th Cir. 1997); McCarthy v. Azure, 22 F.3d 351, 355 (1st Cir. 1994).

[180] Thomson-CSF, S.A. v. Am. Arb. Ass'n, 64 F.3d 773, 776 (2d Cir. 1995) ("[A] nonsignatory party may be bound to an arbitration agreement if so dictated by the 'ordinary principles of contract and agency.' " (quoting McAllister Bros., Inc. v. A & S Transp. Co., 621 F. 2d 519, 524 (2d Cir. 1980))); Shivkov v. Artex Risk Sols., Inc., 974 F.3d 1051, 1070 (9th Cir. 2020) ("[A] litigant who is not a party to an arbitration agreement may invoke arbitration under the FAA if the relevant state contract law allows the litigant to enforce the agreement." (alteration in original) (quoting Kramer v. Toyota Motor Corp., 705 F. 3d 1122, 1128 (9th Cir. 2013))). The Supreme Court confirmed this principle in Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 631 (2009). In doing so, the Supreme Court referred in passing to the question of "who is bound by" arbitration agreements as one of "scope" rather than "existence." *Id.* at 630–31. However, the Court did not make this reference in the context of applying the *Moses* Presumption. *Id.* at 631. Indeed, the Court held that state contract law principles—rather than the Presumption—govern this non-signatory question, just as they govern other questions of existence, formation and validity of arbitration agreements. *Id.*

[181] *McCarthy*, 22 F.3d at 355.

Moses Presumption.[182] Such scope questions may concern, for instance, whether a particular type of claim is covered by the arbitration agreement[183] or whether a party is obligated to arbitrate disputes stemming from events that occurred prior to concluding the contract containing the arbitration agreement.[184] Unlike existence, formation, and validity questions at the first stage of the analysis, these scope questions are to be determined on the basis of both federal law, including the *Moses* Presumption, and state law principles applied to ascertain the intentions of the contracting parties.[185]

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[182] Century Indem. Co. v. Certain Underwriters at Lloyd's, 584 F.3d 513, 526 (3d Cir. 2009) ("[T]he presumption in favor of arbitration applies to the question whether a particular dispute falls within an existing agreement's scope, but not to the threshold question as to the existence of an agreement between the parties to arbitrate."); Sherer v. Green Tree Servicing LLC, 548 F.3d 379, 381 (5th Cir. 2008) ("We apply the federal policy favoring arbitration when addressing ambiguities regarding whether a question falls within an arbitration agreement's scope, but we do not apply this policy when determining whether a valid agreement exists."); Dumais v. Am. Golf Corp., 299 F.3d 1216, 1220 (10th Cir. 2002) ("The presumption in favor of arbitration is properly applied in interpreting the *scope* of an arbitration agreement; however, this presumption disappears when the parties dispute the existence of a valid arbitration agreement." (emphasis added)); *Grundstad*, 106 F.3d at 205 n.5 ("[T]he federal policy favoring arbitration applies to issues concerning the *scope* of an arbitration agreement entered into consensually by contracting parties; it does not serve to extend the reach of an arbitration provision to parties who never agreed to arbitrate in the first place."); Weckesser v. Knight Enters. S.E., LLC, 735 F. App'x. 816, 821 (4th Cir. 2018) ("[T]he presumption applies 'only when a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand, not when there remains a question as to whether an agreement [to arbitrate] even exists between the parties in the first place.' " (alteration in original) (quoting Raymond James Fin. Serv., Inc. v. Cary, 709 F.3d 382, 386 (4th Cir. 2013))); Lloyd v. J.P. Morgan Chase & Co., 791 F.3d 265, 269 (2d Cir. 2015) ("In interpreting a validly formed arbitration agreement, we apply a 'presumption of arbitrability' if the 'arbitration agreement is ambiguous about whether it covers the dispute at hand.' " (quoting Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 301 (2010))); Mayer v. Soik, No. 2020AP199, 2021 WL 3073073, at *4 (Wis. Ct. App. July 21, 2021) ("[W]e construe th[e] presumption [of arbitrability] as attaching only *after* the court determines that an arbitration agreement between the parties actually exists.").

[183] *In re* Remicade (Direct Purchaser) Antitrust Litig., 938 F.3d 515, 521 (3d Cir. 2019) (concerning antitrust claims); Shivkov v. Artex Risk Sols., Inc., 974 F.3d 1051, 1064 (9th Cir. 2020) (concerning "non-breach of contract claims"); Davis v. ISCO Indus., Inc., 434 S.C. 488, 495, 498–99 (Ct. App. 2021) (concerning negligence claims).

[184] Gove v. Career Sys. Dev. Corp., 689 F.3d 1, 5 (1st Cir. 2012); Shivkov v. Artex Risk Sols., Inc., 974 F.3d 1051, 1060–61 (9th Cir. 2020); Levin v. Alms & Assocs., Inc., 634 F.3d 260, 266–67 (4th Cir. 2011).

[185] *In re* Remicade (Direct Purchaser) Antitrust Litig., 938 F.3d 515, 522 (3d Cir. 2019) ("[W]hile federal law may tip the scales in favor of arbitration where state interpretive principles do not dictate a clear outcome, . . . applicable state law

2. "Broad" arbitration agreements and no strong contrary evidence

To ensure that arbitration agreements are enforced according to the intentions of the parties,[186] courts have generally held that the *Moses* Presumption is triggered at the second stage of the arbitrability analysis only with respect to "broad" arbitration agreements.[187] Accordingly, before applying the Presumption, courts first determine whether " 'the arbitration agreement [is] broad or narrow.' If broad, then there is a presumption that the claims are arbitrable."[188] While the specific

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governs the scope of an arbitration clause . . . in the first instance." (citations omitted)). This is because,

> [I]t would not be practicable . . . to apply state law when it comes to the enforceability or validity of an arbitration provision (i.e. at step one), but to exclusively apply federal law when it comes to interpreting the provision's scope (i.e. step two), particularly given how easily arguments pertaining to scope can be repackaged in terms of enforceability.

Id. at 526 n.4; Parm v. Bluestem Brands, Inc., 898 F.3d 869, 873 (8th Cir. 2018) ("[S]tate contract law governs the threshold question of whether an enforceable arbitration agreement exists between litigants; if an enforceable agreement exists, the federal substantive law of arbitrability governs whether the litigants' dispute falls within the scope of the arbitration agreement." (alteration in original) (quoting Donaldson Co. v. Burroughs Diesel, Inc., 581 F.3d 726, 731 (8th Cir. 2009))); Pattea Tacuba v. Baxter Credit Union, No. 21-CV-618-JPS, 2021 WL 4129317, at *4 (E.D. Wis. Sept. 9, 2021) (" 'To determine whether a contract's arbitration clause applies to a given dispute, federal courts apply state-law principles of contract formation.' However, '[o]nce it is clear . . . that the parties have a contract that provides for arbitration of some issues between them, any doubt concerning the scope of the arbitration clause is resolved in favor of arbitration as a matter of federal law.' " (alteration in original) (citation omitted) (quoting Gore v. Alltel Commc'ns LLC, 666 F.3d 1027, 1032 (7th Cir. 2012))).

[186] First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 947 (1995) ("[T]he basic objective in this area is . . . to ensure that commercial arbitration agreements . . . 'are enforced . . . ' according to the intentions of the parties." (quoting Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 54 (1995))).

[187] Century Indem. Co. v. Certain Underwriters at Lloyd's, 584 F.3d 513, 556 (3d Cir. 2009).

[188] Collins & Aikman Prods. Co. v. Bldg. Sys., Inc., 58 F.3d 16, 20 (2d Cir. 1995) (alteration in original) (citation omitted) (quoting Prudential Lines, Inc. v. Exxon Corp., 704 F.2d 59, 63 (2d Cir.1983)); Simon v. Pfizer Inc., 398 F.3d 765, 775 (6th Cir. 2005) ("When faced with a broad arbitration clause, such as one covering *any* dispute arising out of an agreement, a court should follow the presumption of arbitration and resolve doubts in favor of arbitration."); *Century Indem. Co.*, 584 F.3d at 556 ("Where the arbitration provision is narrowly crafted, we cannot presume, as we might if it were drafted broadly, that the parties here agreed to submit all disputes to arbitration." (quoting Local 827, Int'l Bhd. of Elec. Workers v. Verizon N.J., Inc., 458 F.3d 305, 310 (3d Cir. 2006))); *Parm*, 898 F.3d at 874 ("[T]he first question is 'whether the arbitration clause is broad or narrow.' . . . 'If the clause is broad, the liberal federal policy favoring arbitration agreements requires that a district court send a claim to arbitration as long as the underlying factual

language of arbitration clauses varies, the general principle is that an arbitration clause is considered to be "broad" where "the language of the clause, taken as a whole, evidences the parties' intent to have arbitration serve as the primary recourse for disputes connected to the agreement containing the clause."[189] A "broad" arbitration agreement typically purports to cover any claim "arising out of" or "relating to" the agreement.[190] Such an agreement can be presumed to reflect the parties' intentions to arbitrate any dispute in connection with their contract, whether contractual or not.[191] Therefore, when faced with a "broad"

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allegations simply touch matters covered by the arbitration provision.' " (citation omitted) (quoting Unison Co. v. Juhl Energy Dev., Inc., 789 F.3d 816, 818 (8th Cir. 2015))); Hudson v. ConAgra Poultry Co., 484 F.3d 496, 500 (8th Cir. 2007) (noting that the arbitration clause at issue was "[o]n its face . . . both broad and unambiguous" and, therefore, that "absent some indication that the parties intended to limit the scope of arbitrable matters more narrowly than the bare language of the arbitration provision suggests," arbitration should be compelled).

[189] Downing v. A&E Television Networks, LLC, No. 20-CV-4747, 2021 WL 4131652, at *6 (S.D.N.Y. Sept. 10, 2021) (quoting Cheng v. HSBC Bank USA, N.A., 467 F. Supp. 3d 46, 51 (E.D.N.Y. 2020)); Mayer v. Soik, No. 2020AP199, 2021 WL 3073073, at *8 (Wis. Ct. App. July 21, 2021).

[190] Campbell v. Anesthesia Mgmt. Sols., LLC, No. 20-cv-3538, 2021 WL 4167530, at *7 (D.S.C. Sept. 14, 2021) ("The terms 'arising out of' and 'related to' are broad, but limit arbitration to issues that have a 'direct relationship between the dispute and the performance of duties specified by the contract.' " (quoting Doe v. Princess Cruise Lines, Ltd., 657 F.3d 1204, 1218 (11th Cir. 2011))); *see also Parm*, 898 F.3d at 874 ("Arbitration clauses covering claims 'arising out of' or 'relating to' an agreement are broad." (quoting Zetor N. Am., Inc. v. Rozeboom, 861 F.3d 807, 810 (8th Cir. 2017))); Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 109 (2013) ("A clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly."). For examples of "broad" arbitration clauses, see, for example, Holick v. Cellular Sales of N.Y., LLC, 802 F.3d 391, 394 (2d Cir. 2015) (noting that the arbitration clause covered "[a]ll claims, disputes, or controversies arising out of, or in relation to this document or Employee's employment" (alteration in original)); *Hudson*, 484 F.3d at 500 (the arbitration clause covered " '[a]ll claims . . . relating in any way' to performance of the contract" (alteration in original)); JLM Indus., Inc. v. Stolt-Nielsen SA, 387 F.3d 163, 171-72 (2d Cir 2004) (noting that the arbitration clause covered "[a]ny and all differences and disputes of whatsoever nature arising out of this Charter" (alteration in original)); Mey v. DIRECTV, LLC, 971 F.3d 284, 293 (4th Cir. 2020) (covering "all disputes and claims between us," including "claims that arose before this or any prior Agreement" and "claims that may arise after the termination of this Agreement" (emphasis omitted)); Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596 (2001) (covering "any controversy or claim arising out of the partnership agreement").

[191] Martin Marietta Magnesia Specialties, LLC v. Pub. Utils. Comm'n of Ohio, 954 N.E.2d. 104, 110 (Ohio 2011) ("The court examines the contract as a whole and presumes that the intent of the parties is reflected in the language used in the agreement."); Knox Waste Serv., LLC v. Sherman, No. 11-19-00407-CV, 2021 WL 4470876, at *11 (Tex. App. Sept. 30, 2021) ("[W]e look not for the parties' actual

arbitration clause, a court is to refer to arbitration "any issues that touch on contract rights or contract performance,"[192] including "a collateral matter . . . if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it."[193] Any doubts regarding the scope of such a "broad" arbitration clause should then be resolved in favor of arbitration pursuant to the *Moses* Presumption.

In contrast, an arbitration clause is considered to be "narrow" where "the arbitration was designed to play a more limited role in any future dispute."[194] A "narrow" arbitration agreement may only refer disputes arising "under" it to arbitration,[195] or may be limited in temporal scope.[196] A "narrow" arbitration agreement may also be explicitly restricted to certain disputes, for instance those concerning "the performance or interpretation of the Agreement,"[197] a party's "employment and/or cessation of employment,"[198] or acts "to terminate" the

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intent but for their intent as expressed in the written document." (alteration in original) (quoting Piranha Partners v. Neuhoff, 596 S.W.3d 740, 744 (Tex. 2020))).

[192] Parfi Holding AB v. Mirror Image Internet, Inc., 817 A.2d 149, 155 (Del. 2002).

[193] T. Park Cent. v. Bluegreen Vacations Unlimited, Inc., 21 CV 4346, 2021 WL 5826296, at *5 (S.D.N.Y. Dec. 7, 2021) (quoting Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc., 252 F.3d 218, 224 (2d Cir. 2001)); *see also JLM Industries, Inc.*, 387 F.3d at 172 ("Because the . . . arbitration clause is broad, its coverage extends to 'collateral matters.' "); Reza Bokhari v. FSD Pharma, 2021, No. 2:21-cv-03136, WL 5711829, at *1 (E.D. Pa. Dec. 2, 2021) ("When parties use broad language in an arbitration provision, they indicate their intent to channel a broad range of disputes to an arbitral forum, not just disputes about the breach of the contract containing the arbitration provision.").

[194] Downing v. A&E Television Networks, LLC, 20-CV-4747, 2021 WL 4131652, at *6 (S.D.N.Y. Sept. 10, 2021) (quoting Ji Dong Cheng v. HSBC Bank USA, N.A., 467 F. Supp. 3d 46, 51 (E.D.N.Y. 2020)); Mayer v. Soik, No. 2020AP199, 2021 WL 3073073, at *8 (Wis. Ct. App. July 21, 2021).

[195] BREA 3-2 LLC v. Hagshama Fla. 8 Sarasota, LLC, 327 So. 3d 926, 932 (Fla. Dist. Ct. App. 2021) (finding an arbitration clause referring "[a]ny dispute under this Agreement" to arbitration to be "narrow" and distinguishing this language from "arising out of or relating to," which indicates a "broad" arbitration clause).

[196] Peerless Imps., Inc. v. Wine, Liquor & Distillery Workers Union Loc. One, 903 F.2d 924, 927–28 (2d Cir. 1990) (finding that the language "arising under this Agreement and during its term" did not apply retroactively); Kristian v. Comcast Corp., 446 F.3d 25, 33 (1st Cir. 2006) (referring to language such as "pursuant to *this* Agreement" as specifically excluding the retroactive effect of the arbitration agreement).

[197] CardioNet, Inc. v. Cigna Health Corp., 751 F.3d 165, 173 (3d Cir. 2014) (emphasis omitted).

[198] Davis v. Isco Indus., Inc, 864 S.E.2d 391, 393 (S.C. Ct. App. 2021).

agreement.[199] When faced with such a "narrow" arbitration clause, a court is to refer to arbitration only claims that "directly relate[ ] to a right in the contract"[200] or that are "on [their] face within the purview of the clause."[201] Therefore, a "narrow" arbitration agreement by its own language tends to prevent any ambiguities as to its scope that would require the application of the *Moses* Presumption.[202]

Even where an arbitration agreement is considered to be "broad," it generally does not trigger the *Moses* Presumption if there is clear evidence that the parties' dispute does *not* fall within the scope of the arbitration agreement.[203] This might be the case given the "plain language of the contract," for instance language elsewhere in the contract that limits the scope of the arbitration clause.[204] A court might also go beyond "the four corners of the contract"[205] and consider "forceful evidence of a purpose to exclude the claim from arbitration" in order to

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[199] Cummings v. FedEx Ground Package Sys., Inc., 404 F.3d 1258, 1261 (10th Cir. 2005).

[200] Parfi Holding AB v. Mirror Image Internet, Inc., 817 A.2d 149, 155 (Del. 2002).

[201] T. Park Cent. v. Bluegreen Vacations Unlimited, Inc., No. 21-CV-4346, 2021 WL 5826296, at *5 (S.D.N.Y. Dec. 7, 2021) (quoting Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc., 252 F.3d 218, 224 (2d Cir. 2001)).

[202] Nonetheless, "narrow" arbitration clauses may also be ambiguous in scope. A court would then need to determine whether the parties' dispute is a "collateral issue" or "fall[s] reasonably within the scope of the clause" and may apply the *Moses* Presumption to this determination. News Corp. v. CB Neptune Holdings, LLC No. 21-CV-4610, 2021 WL 5042859, at *3 (S.D.N.Y. Oct. 29, 2021) (quoting Keystone Food Holdings Ltd., 492 F. Supp. 3d 136, 144 (S.D.N.Y 2020).

[203] CardioNet, Inc. v. Cigna Health Corp., 751 F.3d 165, 171 (3d Cir. 2014).

[204] *Id.* at 173 ("[T]he presumption of arbitrability applies only where an arbitration agreement is ambiguous about whether it covers the dispute at hand. Otherwise, the plain language of the contract controls." (citation omitted)); Parm v. Bluestem Brands, Inc., 898 F.3d 869, 874 (8th Cir. 2018) ("[T]he broad/narrow approach [applies] so long as there was not limiting language elsewhere in the contract."); Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l., Ltd., 1 F.3d 639, 643 (7th Cir. 1993) ("[C]ontracting parties control their own fate when it comes to deciding which disputes to consign to arbitration. On the one hand, they may delineate precisely those claims that are subject to arbitration or, on the other, they may employ general—even vague—language in their arbitration provisions. They may also combine these techniques by using general language to authorize arbitration together with specific language to identify the types of disputes that are *not* subject to arbitration, thereby limiting the reach of phrases such as 'arising out of,' 'arising under' or 'arising out of or relating to.' ") (quoting S.A. Mineracao Da Trindade-Samitri, 745 F.2d 191, 194 (2d Cir. 1984)).

[205] Holick v. Cellular Sales of N.Y., LLC, 802 F.3d 391, 397 (2d Cir. 2015).

ascertain the parties' true intentions.[206] For instance, the parties' conduct may "overcome" the *Moses* Presumption "because [of] positive assurance that the arbitration clause's scope" does not cover a particular dispute.[207] In addition, the *Moses* Presumption may not apply because the particular dispute does not "arise under" or "relate to" the agreement containing the arbitration clause but rather concerns another agreement between the same parties[208] or "rights and obligations that are independent of any contract."[209] In all of these cases, there are no real "doubts" regarding the scope of the arbitration agreement because there is clear evidence indicating that the dispute falls outside this scope. If "an agreement is truly ambiguous," however, the *Moses* Presumption will "tip the scale"[210] by presuming that the parties intended to arbitrate the particular dispute before the court.[211]

In sum, the *Moses* Presumption has been generally applied by lower courts only to questions concerning the scope, rather than the existence/formation or validity, of arbitration agreements, and only once the court has determined that a valid arbitration agreement exists between the parties. Moreover, courts have tended to apply the Presumption only to arbitration agreements having "broad" scope, and only where ambiguities remain in language of the agreement and no other evidence reveals a contrary intention of the parties.[212] In these

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[206] Simon v. Pfizer Inc., 398 F.3d 765, 775 (6th Cir. 2005) (quoting Masco Corp. v. Zurich Am. Ins. Co., 382 F.3d 624, 627 (6th Cir. 2004)); *Holick,* 802 F.3d at 397; Blimpie Intern., Inc. v. Choi, 822 N.E.2d 1091, 1096 (Ct. App. Ind. 2005).

[207] *Holick*, 802 F.3d at 391, 398; *see also In re* Cox Enters., Inc. Set-top Cable Television Box Antitrust Litig., 835 F.3d 1195, 1201 (10th Cir. 2016).

[208] Collins & Aikman Prods. Co. v. Bldg. Sys., Inc., 58 F.3d 16, 22 (2d Cir. 1995); *see also Simon*, 398 F.3d at 776 ("[A] claim that is truly outside of an arbitration agreement likewise cannot be forced into arbitration, even though there may be factual allegations in common."); *CardioNet*, 751 F.3d at 172 ("[W]hether a dispute falls within the scope of an arbitration clause depends upon the relationship between (1) the breadth of the arbitration clause, and (2) the nature of the given claim.").

[209] Parfi Holding AB v. Mirror Image Internet, Inc., 817 A.2d 149, 157 (Sup. Ct. Del. 2002). This is also in line with the language of § 2 of the FAA. 9 U.S.C. § 2.

[210] Lloyd v. J.P. Morgan Chase & Co., 791 F.3d 265, 270 (2d Cir. 2015).

[211] Mey v. DIRECTV, LLC, 971 F.3d 284, 294 (4th Cir. 2020) ("In light of the expansive text of the arbitration agreement, the categories of claims it specifically includes, and the parties' instruction to interpret its provisions broadly . . . . The text of the agreement arguably contemplates arbitration of [plaintiff's] claims, and any ambiguity about whether those claims are included 'must be resolved in favor of arbitration.' " (quoting Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1418 (2019)).

[212] *See id*; *see also* Weckesser v. Knight Enters. S.E., LLC, 735 F. App'x 816, 820–21 (4th Cir. 2018).

circumstances, the Presumption operates to place "a feather . . . upon the scale on the side of arbitrating claims"[213] by ensuring that courts do not find "a way to interpret the claims as falling outside the scope of the agreements,"[214] even though there is no real evidence to support such a finding.

B. The Moses Presumption and the Contra Proferentem Rule

Contra proferentem is "[t]he doctrine that, in the interpretation of documents, ambiguities are to be construed unfavorably to the drafter."[215] As critics of the *Moses* Presumption correctly point out, some courts have applied the *Moses* Presumption rather than the *contra proferentem* rule in cases of ambiguities concerning the *scope* of valid arbitration agreements.[216] Both state and federal courts have held that "[w]here the federal policy favoring arbitration is in tension with the tenet of *contra proferentem* for adhesion contracts, and there is a scope question at issue, the federal policy favoring arbitration trumps the state contract law tenet."[217] However,

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[213] *Weckesser*, 735 F. App'x at 821.

[214] Parm v. Bluestem Brands, Inc., 898 F.3d 869, 878 (8th Cir. 2018).

[215] *Contra proferentem*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[216] Kristian v. Comcast Corp., 446 F.3d 25, 29 (1st Cir. 2006) (concerning antitrust claims); Hudson v. ConAgra Poultry Co., 484 F.3d 496, 503 (8th Cir. 2007) (concerning tort claims); Huffman v. Hilltop Cos., LLC, 747 F.3d 391, 395 (6th Cir. 2014) (concerning the survival of an arbitration clause after the expiration of the contract in which it is contained); Raytheon Co. v. Donovan, 208 F. Supp. 2d 99, 105 (D. Mass. 2002) (concerning whether the arbitration agreement limited the arbitrators' power); Sentinel Prods. Corp. v. Scriptoria, 124 F. Supp. 2d 115, 119 (D. Mass. 2000) (concerning the interpretation of a term of the arbitration agreement "regarding the scope of arbitration"); Western Bagel Co., Inc. v. Superior Ct. of L.A., 281 Cal. Rptr. 3d 329, 340–41 (Ct. App. 2021) (concerning whether the parties agreed to "binding" or "nonbinding" arbitration); Gulf Ins. Co. v. Neel-Schaffer, Inc., 904 So. 2d 1036, 1049–50 (Miss. 2004) (concerning whether a claim for punitive damages fell within the scope of the parties' arbitration agreement); Vicor Corp. v. Concurrent Comput. Corp., No. 051437A, 2006 WL 1047522, at *2–3 (Sup. Ct. Mass. Mar. 6, 2006) (concerning a modifying clause that arguably limited the scope of the parties' arbitration agreement); Welch v. Sterne, Agee & Leach, Inc., 879 So. 2d 368, 372–74 (La. Ct. App. 2004) (concerning whether the parties' arbitration agreement applied retroactively).

[217] Kristian v. Comcast Corp., 446 F.3d 25, 35 (1st Cir. 2006). However, there have also been cases in which courts applied *contra proferentem* rather than the Presumption to scope questions. In Gove v. Career Sys. Dev. Corp., 689 F.3d 1 (1st Cir. 2012), the court recognized that "[n]ormally, in evaluating the scope of an arbitration agreement, we would give significant weight to the federal policy favoring arbitration and the presumption of arbitrability," but applied *contra proferentem* as a matter of state law nonetheless since the party seeking to enforce the arbitration agreement did not "rel[y] on federal law or explained the interaction of the federal policy favoring arbitration with Maine contract law." *Id.* at 6. In

ambiguities concerning the existence/formation or validity of an arbitration agreement, rather than its scope, have generally not been subject to the *Moses* Presumption but rather to the *contra proferentem* rule, where appropriate.[218] Of course, both the Presumption and the *contra proferentem* rule apply only where there are actual *doubts* as to the scope of an arbitration agreement. If there are no such doubts, that is, if the court can discern the intentions of the parties from the ordinary meaning of words and the contractual context, there is no need to invoke either the *Moses* Presumption or the *contra proferentem* rule.[219]

In the specific context of adhesion contracts, critics have argued that overriding the rule of *contra proferentem*, even if

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Borecki v. Raymours Furniture Co., Inc., No. 17-cv-1188, 2017 WL 5953172 (S.D.N.Y. Nov. 28, 2017), the court applied *contra proferentem* and found that "the only reasonable reading" of the arbitration clause was a narrow one and that "the dispute [did] not even arguably relate" to the claims. *Id.* at *2–4. In Barrett v. McDonald Invs., Inc., 870 A.2d 146 (Me. 2005), the court applied *contra proferentem* rather than the Presumption to determine whether "claims that [were] unrelated to the substance of the [contract]" fell within the scope of an arbitration agreement contained in an adhesion contract. The court concluded that "where an individual with little leverage is entering into an agreement with a larger entity that offers its services on a 'take it or leave it' basis, we conclude that the balance tips in favor of applying the equitable rule favoring the construction of the contract against the drafter." *Id.* at 151. In Luke v. Gentry Realty, Ltd., 105 Haw. 241 (Sup. Ct. Haw. 2004), the court found that "the scope of the binding arbitration provision [was] unclear. . . . The ambiguity must be resolved in favor of the [non-drafter]." *Id.* at 249. However, the court seemed to view this ambiguity as a question pertaining to the existence of the arbitration agreement, noting that "it is axiomatic that there must be an *agreement* to arbitrate in the first instance." *Id.* at 250 n.12.

[218] Paul Revere Variable Annuity Ins. Co. v. Kirschhofer, 226 F.3d 15, 25 (1st Cir. 2000) (concerning a party's standing to compel arbitration); Weckesser v. Knight Enters. S.E., LLC, 735 F. App'x 816, 821 (4th Cir. 2018) (concerning "who must arbitrate"); Smith v. Jax, LLC, NO. 3:19-CV-707-RJC-DCK, 2020 WL 9349684, at *3–4 (W.D.N.C. Sep. 16, 2020) (concerning contract formation). This dichotomy between scope questions—to which the Presumption should apply—and questions concerning the existence/formation and validity of arbitration agreements—to which it should not apply—is not always followed in the jurisprudence. For instance, some courts have not applied the Presumption even to scope questions, applying *contra proferentem* instead. *See*, e.g., Cornwall v. Virgin Islands Indus. Maint. Corp., 71 V.I. 203, 234–35 (Sup. Ct. 2019) (concerning whether the parties' arbitration agreement "encompass[ed] claims that predate the contract"). To the extent that courts are not consistent in their application of the Presumption, a clarification by the Supreme Court might be called for. However, inconsistency as such does not justify the elimination of the *Moses* Presumption or the federal policy underlying it.

[219] Mey v. DIRECTV, LLC, 971 F.3d 284, 291 (4th Cir. 2020) (compelling arbitration); Opalinski v. Robert Half Int'l Inc., 677 F. App'x 738, 743–44 (3d Cir. 2017) (refusing to compel arbitration); *see also* Porter Cap. Corp. v. Thomas, 101 So. 3d 1209, 1219 (Ala. Civ. App. 2012) (noting the rule "that ambiguities in arbitration clauses will be construed in favor of arbitration . . . only if there *is* an ambiguity").

only in relation to scope-related questions, "encourages manipulative behavior by entities that use arbitration clauses."[220] Such entities, the argument goes, make arbitration clauses "increasingly vague as to which disputes require arbitration" thereby "undermin[ing] the fairness and distributive justice concerns that the [*contra proferentem*] doctrine protects."[221] An examination of the jurisprudence, however, again suggests that these concerns are overstated. Where an entity who drafted an arbitration clause contained in an adhesion contract is found to have done so with manipulative intentions, a court is likely to invalidate the clause for being unconscionable or beyond the counterparty's "reasonable expectations."[222] In such circumstances, the court need not even reach the question of the scope of the arbitration clause.

Take the doctrine of unconscionability.[223] Courts have found arbitration agreements to be unconscionable, for instance, where they contained unilateral modification provisions,[224] provisions limiting statutory remedies,[225] cost-and-fee-shifting provisions,[226]

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[220] Frankel, *supra* note 18, at 560–61.

[221] *Id.*

[222] Rose v. Sabala, 632 S.W.3d 428, 434–36 (Mo. Ct. App. 2021). The mere fact that a contract is one of adhesion, without more, is generally insufficient to establish unconscionability. The same generally applies to an arbitration agreement contained in such a contract. *See, e.g.*, Adkins v. Lab. Ready, Inc., 303 F.3d 496, 501–02 (4th Cir. 2002). However, some federal courts have considered "adhere-or-reject" arbitration agreements to be oppressive and therefore procedurally unconscionable. *See, e.g.,* Cir. City Stores, Inc. v. Mantor, 335 F.3d 1101, 1107 (9th Cir. 2003); Alexander v. Anthony Int'l., L.P., 341 F.3d 256, 266 (3d Cir. 2003). At least one state court has also invalidated an arbitration agreement contained in a contract of adhesion not because it was unconscionable, but because it did not "comport with the reasonable expectations of the parties." *Rose*, 632 S.W.3d at 434–36. *But see* Horton, *supra* note 70, at 1220 (arguing that the FAA in fact "immunizes arbitration clauses from the contract defense of violation of public policy").

[223] For a detailed discussion of the unconscionability doctrine as applied to arbitration agreements, including cases where courts arguably "misapply, or perhaps even manipulate [it] so as to nullify arbitration agreements," see Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration La*w, 83 N.Y.U. L. REV. 1420, 1422 (2008). While some commentators have argued that the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* left "very little room for the *actual* application of the [unconscionability] doctrine", Stephen E. Friedman, *A Pro-Congress Approach to Arbitration and Unconscionability*, 106 NW. L. REV. 53, 53–55 (2011), a review of the jurisprudence both before and after *Concepcion* shows that the doctrine continues to be frequently applied by courts to arbitration agreements.

[224] Al-Safin v. Cir. City Stores, Inc., 394 F.3d 1254, 1259 (9th Cir. 2005).

[225] Hadnot v. Bay, Ltd., 344 F.3d 474, 478 (5th Cir. 2003); *In re* Poly-Am., L.P., 262 S.W.3d 337, 352 (Tex. 2008).

attorneys' fees provisions,[227] confidentiality provisions,[228] and "loser pays" provisions.[229] Arbitration agreements providing for a one-sided duty to arbitrate,[230] unreasonable time-limits to submit a claim to arbitration,[231] unequal process for the selection of arbitrators,[232] or requiring the parties to "keep confidential any decision of an arbitrator,"[233] have also typically been held unconscionable. In many of these cases, the courts have also refused to sever the unconscionable provisions from the arbitration agreement and compel arbitration in accordance with the remaining non-offending provisions.[234] These outcomes, as some courts have expressly recognized, are in line with the *Moses* Presumption and the federal policy on which it is based, which allow courts to refuse to enforce invalid arbitration agreements regardless of their scope.[235]

There are two additional reasons why the *Moses* Presumption should trump the *contra proferentem* rule with respect to ambiguities concerning the *scope* of arbitration agreement: (1) the nature of such ambiguities, and (2) the nature of the *contra proferentem* rule itself.

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[226] *In re* Checking Acct. Overdraft Litig. MDL No. 2036, 485 F. App'x 403, 406 (11th Cir. 2012).

[227] Casa Ford, Inc. v. Armendariz, No. 08-20-00084-CV, 2021 WL 3721718, at *3 (Tex. App. Aug. 23, 2021).

[228] Ward v. Crow Vote LLC, No. SACV 21-cv-01110-JVS, 2021 WL 5927803, at *8 (C.D. Cal. Oct. 7, 2021).

[229] Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 267–70 (3d Cir. 2003).

[230] Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 170–71 (5th Cir. 2004); Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 118 (2000).

[231] *Alexander*, 341 F.3d at 266–67.

[232] Nino v. Jewelry Exch., Inc., 609 F.3d 191, 205 (3d Cir. 2010); Beltran v. AuPairCare, Inc., 907 F.3d 1240, 1258 (10th Cir. 2018).

[233] Larsen v. Citibank FSB, 871 F.3d 1295, 1318–19 (11th Cir. 2017).

[234] Al-Safin v. Cir. City Stores, Inc., 394 F.3d 1254, 1262 (9th Cir. 2005); *Alexander*, 341 F.3d at 271; *Nino*, 609 F.3d at 207–08; *Iberia Credit Bureau, Inc.*, 379 F.3d at 171; *Armendariz*, 24 Cal. 4th at 124–25.

[235] *Alexande*r, 341 F.3d at 267–70 ("[W]e do not challenge the liberal policy in favor of arbitration. We also continue to recognize the real benefits of arbitration in the employment context and do not by any means intend to discourage the adoption of fair and appropriate arbitration arrangements by employers and their employees."). For a contrary view of the application of the unconscionability doctrine to arbitration agreements, see Friedman, *supra* note 107, at 2067 (arguing that "courts applying the unconscionability doctrine to arbitration provisions are not acting in a manner consistent with the FAA.").

1. Scope ambiguities

Ambiguities concerning the scope of arbitration agreements differ from ambiguities concerning their existence/formation or validity, which are not covered by the *Moses* Presumption. As already noted, courts resolve doubts regarding whether a particular dispute falls within the scope of an arbitration agreement only once it has determined, or the parties do not contest, that a valid arbitration agreement exists between them. At this stage, there is no doubt that the parties intended to arbitrate at least *some* disputes, and the only remaining question is what those disputes are. It is likely that the parties "gave at least some thought to the scope of arbitration" and thus "one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter."[236] Accordingly, in cases of scope ambiguity, it makes more sense to presume that the parties intended to arbitrate all disputes arising from their contract than to interpret an arbitration agreement narrowly if the drafter is seeking arbitration and broadly if the drafter is resisting arbitration pursuant to the *contra proferentem* rule.

Moreover, even where a dispute is presumed to fall within the scope of an arbitration agreement pursuant to the *Moses* Presumption, this does not affect the determination of the parties' underlying dispute on the merits. It simply directs the dispute to be resolved by an arbitrator, rather than a court.[237] In the context of interpreting the substantive terms of the parties' underlying contract, *contra proferentem* remains available both in court and in arbitration.[238]

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[236] First Options of Chic., Inc. v. Kaplan, 514 U.S. 938, 945 (1995).

[237] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."); Sequoia Benefits & Ins. Servs., LLC v. Costantini, 553 F. Supp. 3d 752, 757 (N.D. Cal. 2021) ("[T]he FAA imposes a strong preference for arbitration, which dictates that issues affecting the allocation of power between courts and arbitrators should be decided by federal standards.").

[238] Kristian v. Comcast Corp., 446 F.3d 25, 65 n.7 (1st Cir. 2006) ("[O]nce the dispute is in arbitration, the tenet of *contra proferentem* can still be applied by the arbitrator on non-scope issues."). Therefore, the following scenario is not an accurate depiction of how the *Moses* Presumption interacts with the *contra proferentem* rule:

> Imagine that an employer drafts a contract with two provisions, Provision X about benefits and Provision Y about arbitration. If X gets litigated, the reviewing court would construe any murky language against the employer. But

It is also not unusual to apply different rules in a motion to compel arbitration, where the court must determine whether a valid arbitration exists and what is its scope, and in other stages of a court proceeding.

For instance, courts may apply the collateral-source rule[239] as an affirmative defense[240] in personal injury cases to "preclude[ ] consideration of benefits received by a plaintiff to reduce the amount of a defendant's liability."[241] But, as one state court has recently held, applying this rule when determining the arbitrability of a dispute is inappropriate where it is used to argue that an arbitration agreement is unconscionable and should not be enforced because the plaintiff cannot meet the costs of the arbitration.[242] Therefore, if a plaintiff has received financial benefits that will allow them to proceed with the arbitration, such benefits should be taken into account in determining the plaintiff's ability to meet the costs of the arbitration. The plaintiff's financial ability may, in turn, determine the validity of the arbitration agreement.

At a preliminary stage of a court proceeding, a defendant may also invoke as an affirmative defense that a plaintiff has

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if the employer seeks arbitration, then the court would construe any doubt about Y in his favor.

Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1219 (11th Cir. 2021) (Newsom, J., concurring). Provision X and Provision Y are of entirely different breeds. Provision X goes to the substantive rights of the employee under the contract, which is the subject of the underlying dispute between the parties. Provision Y does not, as such, impact these substantive rights of the employee, but merely dictates the forum in which these rights are to be determined. Therefore, the fact that Provision Y is construed in favor of the drafter does not mean that Provision X, whether before the court or the arbitrator, will be similarly construed. Moreover, the *Moses* Presumption does not require a court to "construe any doubt about Y in [the employer's] favor," as the scenario suggests, but only to construe doubts about Y's *scope* in the employer's favor. *See also* Scott v. Barlett, No. D077675, 2021 WL 3876889, at *10 (Cal. Ct. App. Aug. 31, 2021) (distinguishing between the enforcement of a party's rights and obligations arising from a contract and that party's rights and obligations "regarding the manner of that enforcement," such as by arbitration).

[239] The collateral-source rule is the doctrine that "if an injured party receives compensation for the injuries from a source independent of the tortfeasor, the payment should not be deducted from the damages that the tortfeasor must pay." *Collateral Source Rule*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[240] Hassan v. U.S. Postal Serv., 842 F.2d 260, 263 (11th Cir. 1988).

[241] Rizzio v. Surpass Senior Living LLC, 492 P.3d 1031, 1037 (Ariz. 2021).

[242] *Id.* (finding that applying the collateral-source rule to a determination of whether an arbitration agreement is unconscionable due to plaintiff's alleged inability to meet the costs of arbitration has been held to be "misplaced . . . regardless of the nature of the action" in tort or contract).

failed to exhaust particular administrative grievance procedures before filing suit.[243] However, relying on this exhaustion defense, whether based in statute or contract, to challenge the enforcement of an arbitration agreement would be inappropriate. The Supreme Court has held that a state law requiring exhaustion of administrative remedies before resorting to contractual arbitration is preempted by the FAA because "[a] prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results,' " which would be "frustrated" by requiring a dispute to first be heard by an administrative agency.[244] As for contractual conditions precedent to arbitration, such as a multistep grievance procedure, the Supreme Court has held that these are "procedural questions" that are "presumptively *not* for the judge, but for an arbitrator, to decide."[245] So, a defense based on either a statutory or a contractual requirement to exhaust other grievance procedures may apply in a typical motion to dismiss, but not in a challenge to a motion to compel arbitration.[246]

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[243] Jones v. Bock, 549 U.S. 199, 199, 216 (2007) (holding that the requirement under the Prison Litigation Reform Act of 1995 (PLRA) for "prisoners to exhaust prison grievance procedures before filing suit" is an "affirmative defense"); A.P. v. Johnson, No. 14-CV-4022-DEO, 2015 WL 1297534, at *4, *6 (N.D. Iowa Mar. 23, 2015) (holding that the requirement under the Individuals with Disabilities Education Act (IDEA) that "before parties may bring a claim in district court under a different statute for which they seek relief which is also available under the IDEA, the parties must first exhaust the administrative remedies under the IDEA" is an affirmative defense.); Richardson v. Kellogg Co., No. 14-CV-2372-DDC-JPO, 2014 WL 7338844, at *4 (D. Kan. Dec. 22, 2014) (holding that the requirement under the Employee Retirement Income Security Act (ERISA) that a claimant exhaust administrative remedies is an "affirmative defense").

[244] Preston v. Ferrer, 552 U.S. 346, 357–58 (2008) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633 (1985)). The Court in AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) referred to the Court's decision in *Preston* as "holding preempted a state-law rule requiring exhaustion of administrative remedies before arbitration." *Id.* at 346.

[245] Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84–85 (2002) (discussing an arbitration rule of the National Association of Securities Dealers (NASD) placing a time limit on submissions to arbitration); *see also* Daniel v. Christian Care Ministry, Inc., No. 3:21-cv-484-DWD, 2021 WL 4263181, at *2 (S.D. Ill. Sept. 20, 2021) ("Issues of procedural arbitrability—for example, whether conditions precedent to arbitration have been fulfilled—are presumptively for the arbitrator, not the Court, to decide.").

[246] *See, e.g.*, Barrasso v. Macy's Retail Holdings, Inc., No. 1:15-cv-13098-ADB, 2016 WL 1449567, at *9–10 (D. Mass. Apr. 12, 2016) (rejecting the argument that the arbitration agreement is unenforceable because plaintiff did not comply with its pre-arbitration dispute resolution steps and holding that this was "more properly resolved by the arbitrator"); Rost v. Liberty Coca-Cola Beverages, LLC, No. 20 CV 10559, 2021 WL 3723092, at *4 (S.D.N.Y. Aug. 23, 2021) (rejecting the argument

Finally, long before *Moses* the Supreme Court held that there is no place for a challenge to an underlying contract, such as fraudulent inducement (also an affirmative defense)[247] in a motion to compel an arbitration agreement contained in that contract. Such a challenge, much like procedural questions, belongs with the arbitrator.[248] This is known as the "severability doctrine,"[249] according to which in determining whether to compel arbitration a court "may consider only issues relating to the making and performance of the agreement to arbitrate" and not the underlying contract.[250] Therefore, challenges to a contract containing an arbitration clause "may be at the heart of the underlying litigation, [but] they do not affect whether the Court will sever and enforce the Arbitration Agreement."[251]

While all of these examples concern affirmative defenses rather than rules of contract interpretation such as *contra proferentem*, the point is simply that placing arbitration agreements "on the same footing as other contracts" cannot ignore their distinctiveness or the fact that different considerations may be at play in determining their enforceability, particularly regarding scope questions.

2. The nature of the contra proferentem rule

The nature of the *contra proferentem* rule itself also explains why courts should not insist on its application in instances of doubts regarding the scope of valid arbitration agreements. As the Supreme Court has held, "the reach of the canon construing contract language against the drafter must have limits, no matter who the drafter was,"[252] and this rule cannot " 'stand[ ] as an obstacle to the accomplishment and execution of the full

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that the arbitration agreement is unenforceable because defendant failed to engage in the first two steps of the contractual dispute resolution procedure and holding that "presents a gateway procedural dispute for the arbitrator to decide").

[247] ADP Com. Leasing, Inc. v. M.G. Santos, Inc., No. CV F 13-0587, 2013 WL 3863897, at *10 (E.D. Cal. Sept. 27, 2013); State St. Glob. Advisors Tr. Co. v. Visbal, 462 F. Supp. 3d 435, 439–40 (S.D.N.Y. 2020).

[248] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967).

[249] MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds, 974 F.3d 386, 396–97 (3d Cir. 2020).

[250] *Prima Paint Corp*., 388 U.S. at 404 (1967).

[251] Pattea Tacuba v. Baxter Credit Union, No. 21-CV-618-JPS, 2021 WL 4129317, at *4 (E.D. Wis. Sept. 9, 2021).

[252] DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 58 (2015) (holding that the *contra proferentem* rule cannot justify interpreting the phrase "law of your state" to include invalid state laws).

purposes and objectives' of the FAA."[253] Indeed, the *Moses* Presumption is not the only rule of interpretation that may offset *contra proferentem*, given that the latter has "low priority" in some states,[254] applies only "so long as other factors are not decisive"[255] and only as a rule "of last resort."[256] The *contra proferentem* rule is not considered a primary rule of contract interpretation[257] nor a default secondary rule.[258] Some courts have even found that it is not a rule of interpretation at all but rather "chiefly a rule of policy."[259] Often the goal of the *contra proferentem* rule can be achieved in other ways, such as by applying the doctrine of unconscionability, which, as discussed above, courts continue to apply to the validity of arbitration agreements notwithstanding the *Moses* Presumption.[260]

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[253] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416–17 (2019) (holding that the *contra proferentem* rule cannot substitute for the requisite affirmative contractual basis for concluding that the parties agreed to class arbitration) (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011)).

[254] Balanoff v. 83 Maiden L.L.C., No. 98 CIV. 6442 RPP., 2000 WL 16947, at *16 n.4 (S.D.N.Y. Jan. 10, 2000).

[255] RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. a (AM. L. INST. 1981).

[256] Rec. Club of Am. v. United Artists Recs., 890 F.2d 1264, 1271 (2d Cir. 1989) (*contra proferentem* is a principle "of last resort, to be invoked when efforts to fathom the parties' intent have proved fruitless"). Examples of "countervailing principles" to *contra proferentem* include, for instance, that "a contract should be construed 'to give effect to all the provisions of the contract so that none will be rendered meaningless' " and that "every provision of a contract was included for a particular purpose." Organizational Strategies, Inc. v. Feldman L. Firm LLP, 15 F. Supp. 3d 527, 530–31 (D. Del. 2014) (first quoting El Paso Field Servs., L.P. v. MasTec N. Am., Inc., 389 S.W. 3d 802, 808 (Tex. 2012); and then quoting TM Prods., Inc. v. Nichols, 542 S.W. 2d 704, 708 (Tex. Civ. App. 1976)).

[257] Primary rules of contract interpretation include, e.g., the rules that "[t]he plain, common, or normal meaning of language will be given to the words of a contract," that "[a] contract will be read as a whole and every part will be read with reference to the whole," and that "the meanings of particular words may be indicated or controlled by associated words." WILLISTON ON CONTRACTS § 32:3, § 32:5, § 32:6 (4th ed.).

[258] Other secondary rules of contract interpretation include, e.g., "the main purpose doctrine" and the "*Ejusdem Generis* doctrine." WILLISTON ON CONTRACTS § 32:9, § 32:10 (4th ed.). *Contra proferentem* applies "only when other secondary rules of interpretation have failed to elucidate the contract's meaning." *Id.* at § 32:12.

[259] Klapp v. United Ins. Grp. Agency, Inc., 468 Mich. 459, 474 (2003) (quoting 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.27 (Joseph M. Perillo ed., rev. ed. 1998)).

[260] RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. a (AM. L. INST. 1981) (noting with respect to the *contra proferentem* rule that "sometimes the result is hard to distinguish from a denial of effect to an unconscionable clause."); *see also* Barrett v. McDonald Invs., Inc., 870 A.2d 146, 151 (Me. 2005). While the majority of the court relied on *contra proferentem* to find that the parties' dispute was outside

The *contra proferentem* rule also differs fundamentally from the *Moses* Presumption. The *contra proferentem* rule is "triggered only after a court determines that it *cannot* discern the intent of the parties," because it does *not* operate to determine such intentions.[261] In contrast, the *Moses* Presumption is triggered where the scope of an arbitration agreement is ambiguous precisely *in order to* ascertain the parties' intentions.[262] Therefore, courts are to:

> [L]ook first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement. While ambiguities in the language of the agreement should be resolved in favor of arbitration, we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated.[263]

For instance, in a case where a broadly worded arbitration clause seemed to conflict with a choice-of-law provision, the Eight Circuit relied, *inter alia*, on the *Moses* Presumption in order to "give the direct statement of the parties' *intent* in the arbitration provision greater weight than the indirect insinuation of a contrary intent that arguably arises from the choice-of-law provision."[264] In a case involving an arbitration agreement contained in an expired contract, an Arkansas federal district court similarly relied on the *Moses* Presumption to "discern the *intent* of the parties" by applying the Presumption to a broadly

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the scope of the arbitration agreement, the concurring opinion found that arbitration should not be enforced because the parties' contract was one of adhesion and unconscionable. *Id.* at 156 (Alexander, J., concurring).

[261] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1417 (2019) ("Unlike contract rules that help to interpret the meaning of a term, and thereby uncover the intent of the parties, *contra proferentem* is by definition triggered only after a court determines that it *cannot* discern the intent of the parties.").

[262] Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010) ("[C]ourts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties."); Dodson Int'l Parts, Inc. v. Williams Int'l Co. LLC, 12 F.4th 1212, 1219 (10th Cir. 2021) ("[I]t is the court's duty to interpret the agreement and to determine whether the parties *intended* to arbitrate grievances concerning a particular matter." (emphasis added) (quoting Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 301 (2010))).

[263] EEOC v. Waffle House, Inc., 534 U.S. 279, 294 (2002) (citations omitted).

[264] Hudson v. ConAgra Poultry Co., 484 F.3d 496, 503 (8th Cir. 2007) (emphasis added). This was not the only rule of interpretation the Eight Circuit used. It also noted that the arbitration agreement was "clear, broad, and unqualified" and employed the rule that "a document should be read to give effect to all its provisions and to render them consistent with each other." *Id.* at 502–03 (quoting Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63 (1995)).

worded arbitration clause.[265] Rather than simply ruling against the interest of the drafter, then, the *Moses* Presumption constitutes an actual "aid[ ] to construction"[266] that assists courts in ascertaining the parties' intentions by interpreting ambiguities regarding the scope of valid arbitration agreements in favor of arbitration. This makes sense because where "contracting parties agree in general terms to arbitration of disputes" and do not expressly limit the scope of their arbitration agreement, such agreement "indicates a determination that their interests will be better served by arbitration than by resort to the courts if problems arise."[267]

Furthermore, the *contra proferentem* rule is primarily concerned with the power of a drafting party to protect its own interests by deliberately using obscure language in a contract.[268] In other words, the rule is based "primarily [on] equitable considerations about the parties' relative bargaining strength"[269] and is intended specifically "to protect the party who did not choose the language from an unintended or unfair result."[270] *Contra proferentem* is therefore most relevant in the context of adhesion contracts or in cases involving unequal bargaining power and has "less force" in run-of-the-mill business contracts, many of which are subject to the FAA.[271] As one court applying

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[265] Patterson v. Am. Income Life Ins. Co., No. 4:19-CV-00918, 2020 WL 6387555, at *5 (E.D. Ark. Oct. 30, 2020) (emphasis added) (quoting Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1417 (2019)).

[266] Scarduzio v. N. Shore Towers Apartments, Inc., No. 20-CV-02226, 2021 WL 786064, at *6 (E.D.N.Y. 2021) ("[*C*]*ontra preferentem* [sic] is used only as a matter of last resort after all aids to construction have been employed but have failed to resolve the ambiguities in the written instrument." (citation omitted)).

[267] WILLISTON ON CONTRACTS § 57:21 (4th ed.).

[268] RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. a (AM. L. INST. 1981).

[269] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1417 (2019).

[270] Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63 (1995).

[271] RESTATEMENT (SECOND) OF CONTRACTS § 206 Reporter's Note to cmt. a (AM. L. INST. 1981); *see also* Williston, *supra* note 90, at § 32:12 ("Application of the rule may be further limited by the degree of sophistication of the contracting parties or the degree to which the contract was negotiated."). For this reason, courts have also held that *contra proferentem* does not apply to forum selection clauses concluded by sophisticated parties (New Jersey v. Merrill Lynch & Co., Inc., 640 F.3d 545, 550 (3d Cir. 2011)) or to arbitration clauses concluded by such parties (Hudson Specialty Ins. Co. v. N.J. Transit Corp., No. 15–cv–89, 2015 WL 3542548, at *6 (S.D.N.Y. June 5, 2015)). In California, state courts have held that "state adhesion contract principles are inapplicable to the enforcement of arbitration clauses in an agreement governed by the Federal Arbitration Act [because] the validity of the arbitration clause must be determined by reference to the principles applicable to contracts generally rather than the special rules applicable to adhesion contracts." Erickson v. Aetna Health Plans of Cal., Inc., 71 Cal. App. 4th 646, 654 (1999) (citation omitted).

contra proferentem to an arbitration clause in an adhesion contract emphasized, "[t]his holding does not affect the presumption favoring arbitrability when such provisions are actually negotiated, or when parties of equal bargaining power are involved."[272] In contrast to the *contra proferentem* rule, the *Moses* Presumption is not concerned with "who drafted the agreement,"[273] but rather with the enforcement of valid arbitration agreements in accordance with the intentions of the parties. To reiterate, this Presumption originates in the text of the FAA, which "provides the default rule for resolving certain ambiguities in arbitration agreements."[274] The *Moses* Presumption is therefore a default rule of interpretation that operates as a tool for discerning the parties' intentions, while *contra proferentem* is a rule of last resort that applies in limited circumstances for equitable reasons and only where the parties' intentions cannot be otherwise ascertained.

In sum, the *Moses* Presumption and the *contra proferentem* rule are distinct in their origins and objectives and are not interchangeable. The *Moses* Presumption does not replace the *contra proferentem* rule as a rule of last resort. The Presumption, rather, preempts the application of *contra proferentem* because it provides superior guidance to courts in cases of doubt concerning the scope of arbitration agreements. But the *Moses* Presumption does not entirely displace the *contra proferentem* rule either. At the preliminary stage of deciding whether a particular dispute should be referred to arbitration, courts are generally to apply the *Moses* Presumption when faced with ambiguities in the scope of the arbitration agreement rather than *contra proferentem*. At this stage, concerns about inequality in bargaining power or deceptive tactics of the stronger drafting party may be addressed under the doctrine of unconscionability when determining the validity of the arbitration agreement. However, at the merits stage of the dispute the court or the arbitrator, as the case may be, may resort to the *contra proferentem* rule to resolve ambiguities in the substantive

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[272] Barrett v. McDonald Invs., Inc., 870 A.2d 146, 152 (Me. 2005).

[273] Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1419 (2019).

[274] *Id.* at 1418; *see also* WILLISTON ON CONTRACTS § 57:20 (4th ed.) ("[I]f an arbitration agreement is ambiguous as to whether an issue in dispute is arbitrable, the Federal Arbitration Act requires the court to resolve the ambiguity in favor of arbitration of that issue.").

provisions of an adhesion contract where the parties' intentions cannot be otherwise ascertained.

CONCLUSION

Prior to 1925 there was a presumption among state and federal courts of "disfavoring arbitration proceedings."[275] Congress enacted the FAA in order to reverse this "outmoded"[276] presumption and establish that valid arbitration agreements are to be "rigorously enforce[d]."[277] The FAA accomplishes this objective by explicitly mandating courts to treat arbitration agreements as "valid, irrevocable, and enforceable" unless they are "revoca[ble]" on contract law grounds applicable to "any contract."[278] Many states have followed suit in their own arbitration laws and policies. In *Moses*, the Supreme Court interpreted the FAA as embodying a federal policy "favoring arbitration agreements" and implemented this policy by setting out a narrow Presumption that any *doubts* concerning the *scope* of arbitrable issues should be resolved in favor of arbitration.[279]

Since *Moses*, lower courts have generally relied on the federal policy favoring arbitration merely to guide their interpretation of arbitration agreements.[280] As for the *Moses* Presumption, it has generally operated alongside general state-law principles governing the existence/formation and validity of arbitration agreements, as well as traditional rules of contract interpretation designed to ascertain the parties' intentions.[281] Where, after examining the parties' agreement and other evidence, doubts remain concerning the scope of a valid arbitration agreement, the *Moses* Presumption comes into play and presumes that the parties intended to arbitrate their dispute.

Some commentators have argued that "challenging the scope and reach of an arbitration clause is one of the few remaining

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[275] Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 481 (1989).

[276] *Id*.

[277] Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985).

[278] 9 U.S.C. § 2.

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

[280] *See* Brennan v. King, 139 F.3d 258, 266 n.8 (1st Cir. 1998) ("[T]he federal policy favoring arbitration is not a free-standing ground upon which to remit parties to arbitration, but one that informs the court's interpretation.").

[281] *Id.* at 264 ("The presumption of arbitrability is a weighty additive to state-law principles of contract construction, but it does not wholly supplant these principles.").

avenues for parties to keep a dispute in court and out of arbitration."[282] Not so. Plenty of grounds remain, and are frequently invoked, by parties to challenge the existence, formation, or validity of arbitration agreements to which the *Moses* Presumption does not apply. It remains open for Congress to place further limits on the enforceability of arbitration agreements falling under the FAA or to expand judicial discretion to refuse such enforcement.[283] However, until Congress overrides the *Moses* Presumption, its continued application by the courts may be viewed as "done with the Congress' implied approbation."[284]

The real dissatisfaction of those criticizing the *Moses* Presumption seems to be rooted not in the Presumption as such but rather in the types of disputes to which it might apply, such as employment and consumer disputes.[285] This dissatisfaction, however, is in reality with the Supreme Court's broad interpretation of "interstate commerce," which determines what disputes fall within the purview of the FAA.[286] It may convincingly be argued that not every dispute is the proper subject of out-of-court resolution, and where the line ought to be drawn may fairly be debated. Yet many critics do not distinguish in their wholesale rejection of the *Moses* Presumption between commercial disputes and employment/consumer disputes, negotiated agreements and adhesion contracts, and issues of existence/formation/validity and scope of arbitration agreements. Moreover, simply eliminating the *Moses* Presumption will not

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[282] Frankel, *supra* note 18, at 535.

[283] The FAA has only been amended a handful of times since its enactment in 1925, and most of these amendments have not been substantive. A notable exception is the 1970 enactment of Chapter 2, which implemented the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Pub. L. No. 91–368, §§ 1, 4, 84 Stat. 692, 693 (1970). In addition, in 1988 § 16 was enacted to govern appeals. Finally, in 2022, Chapter 4 was enacted to prohibit predispute abitration of agreements involving sexual assault and sexual harassment claims. Pub. L. No. 117-90, § 2(a), 136 Stat. 27 (2022).

[284] Carbonneau, *supra* note 44, at 250. On "legislative inaction doctrines," *see* ESKRIDGE, *supra* note 79, at 241–46. Some have rejected this argument as unpersuasive. *See* Frankel, *supra* note 18, at 550 n.87.

[285] Carbonneau, *supra* note 44, at 238–39 ("The Court's policy on arbitration avoided serious objections until the development of employment and consumer arbitration in the late 1980s and early 1990s." (footnotes omitted)). For critiques of the use of arbitration in the employment and consumer contexts, *see supra* note 9.

[286] Section 2 of the FAA defines the scope of application of the Act to include arbitration agreements in "any maritime transaction or a contract evidencing a transaction involving commerce."

change the Supreme Court's interpretation of "interstate commerce" as encompassing employment and consumer contracts or make the FAA inapplicable to arbitration agreements contained in such contracts. It will, however, undermine the Act's text and objectives as well as many commercial contracts across the country.[287]

At bottom, the *Moses* Presumption is simply intended to "guarantee citizen access to a functional and effective process of adjudication" to which they have contractually agreed.[288] To be sure, doing away with an interpretative tool that favors the enforcement of arbitration agreements is likely to reduce the number of disputes referred to arbitration and thereby, at least theoretically, increase parties' access to the courts.[289] But without creating more courts, appointing more judges, and "correcting the abuses and dysfunctionality of judicial litigation,"[290] the court system is unlikely to be able to "produce an acceptable result in the shortest possible time, with the least possible expense and with the minimum of stress on the

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[287] *In re* McPherson, 630 B.R. 160, 167 (Bankr. D. Md. 2021) ("[T]he reality [is] that, at least in contracts subject to negotiation, the arbitration clause may be a critical piece of the parties' bargain and integral to their cost-benefit analysis of the contract itself.").

[288] Carbonneau, *supra* note 44, at 249. In other words, "[w]hen parties have agreed to arbitrate, courts enforce those agreements vigorously to protect the parties' justified expectations concerning their choice of dispute resolution mechanisms and their potential exposure to liability." Raymond James Fin. Servs., Inc. v. Cary, 709 F.3d 382, 388 (4th Cir. 2013).

[289] As one commentator notes:

> [Alternative dispute resolution] is selling a product that many customers don't want to buy. Countless litigants, not to mention their lawyers, would actively resist being shunted off into something more quiet, private, and predictable than today's courts. They wish to pursue the heady allurements of getting rich or getting even, the glamor of publicity, the grim satisfactions of ideological combat. The sober advocates of [arbitration] can preach only the less passionate virtues of thrift, reliability, and repose.

WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT 305 (1992).

[290] Carbonneau, *supra* note 44, at 249 ("Eliminating the option for arbitration is equivalent to relegating American citizens to the emergency room for their health care needs."); *see also* Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1706, 1710 (2022) (examining lawsuits in state courts filed by large repeat player plaintiffs against individual unrepresented and absent defendants and concluding that "[i]n a wide swath of cases around the country, our civil courts no longer look like bilateral dispute resolution systems. Instead, they appear more as systems for the unilateral petitioning of the government for permission to transfer ownership over assets.").

participants."[291] And, whether in litigation or arbitration, in the words of former Chief Justice Warren F. Burger, is this not "what justice is all about?"[292]

[291] PETER R. HIBBERD & PAUL NEWMAN, ADR AND ADJUDICATION IN CONSTRUCTION DISPUTES 16 (1999) (quoting former Chief Justice Warren F. Burger).

[292] *Id.*