REDACTED

No. 21-16642

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JONES DAY,

Petitioner-Appellant,

v.

ORRICK, HERRINGTON & SUTCLIFFE LLP, ET AL.

Respondents-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 4:21-mc-80181-JST
Hon. Judge Jon S. Tigar

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TABLE OF CONTENTS

Page

INTRODUCTION 1
JURISDICTIONAL STATEMENT 4
ISSUES PRESENTED 5
STATEMENT OF THE CASE 5
A. The Federal Arbitration Act 6
B. Jones Day's Arbitration [redacted] 10
C. Jones Day's Collateral Litigation in D.C. Superior Court Against Orrick 11
D. Jones Day's Collateral Litigation in the Northern District of California Against Orrick and Two Orrick Partners 13
SUMMARY OF ARGUMENT 14
ARGUMENT 19
I. Federal Courts Lack Subject-Matter Jurisdiction Over Jones Day's Petition 19
A. FAA Chapter 2 Does Not Confer Subject-Matter Jurisdiction Over Petitions to Enforce Arbitral Summonses 20
B. FAA Chapter 1 Does Not Confer Subject-Matter Jurisdiction Here 31
II. Regardless, the FAA Does Not Authorize Venue Within the Northern District of California 32
A. If Chapter 2 Provides Jurisdiction, Then Section 204 Precludes Venue in the Northern District 32
B. Section 7 Also Precludes Venue in the Northern District 36
1. Section 7 Authorizes Venue Only in the District Where the Arbitral Seat Is Located 37
2. Section 7 Does Not Authorize Venue Anywhere the Arbitrators Plan to Hold Hearings 44
3. Venue Under Section 7 Is Not Permissive 50
CONCLUSION 52

TABLE OF AUTHORITIES

Page

Cases:

All. Healthcare Servs., Inc. v. Argonaut Priv. Equity, LLC, 804 F. Supp. 2d 808 (N.D. Ill. 2011) 40
Amgen Inc. v. Kidney Ctr. of Del. Cnty., Ltd., 1994 WL 594372 (E.D. Pa. Oct. 20, 1994) 40
ARC Ecology v. U.S. Dep't of the Air Force, 411 F.3d 1092 (9th Cir. 2005) 48
Burton v. Bish, 614 F.2d 389 (4th Cir. 1980) 29
Cerner Middle E. Ltd. v. Belbadi Enters. LLC, 939 F.3d 1009 (9th Cir. 2019) 26
COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269 (4th Cir. 1999) 49
Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193 (2000) ..... *passim*
CVS Health Corp. v. Vividus, LLC, 878 F.3d 703 (9th Cir. 2017) 48, 49
Dynegy Midstream Servs., LP v. Trammochem, 451 F.3d 89 (2d Cir. 2006) 39, 42
GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637 (2020) 8, 21, 29
Go-Video, Inc. v. Akai Elec. Co., 885 F.2d 1406 (9th Cir. 1989) 34
Grupo Dataflux v. Atlas Glob. Grp., LP, 541 U.S. 568 (2004) 32
Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008) 6, 31
Hay Grp., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404 (3d Cir. 2004) 42, 49
Hickman v. Taylor, 329 U.S. 495 (1947) 43
Howard v. City of Coos Bay, 871 F.3d 1032 (9th Cir. 2017) 45
In re Stevens, 15 F.4th 1214 (9th Cir. 2021) 37
Infuturia Glob. Ltd. v. Sequus Pharm., Inc., 631 F.3d 1133 (9th Cir. 2011) 24
Johnson v. Payless Drug Stores Nw., Inc., 950 F.2d 586 (9th Cir. 1991) 35
Kansas v. Nebraska, 574 U.S. 445 (2015) 48
Kelly v. Wengler, 822 F.3d 1085 (9th Cir. 2016) 19
Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969 (2016) 34
Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc., 939 F.3d 1145 (11th Cir. 2019) 47

Page

Cases—continued:

Matria Healthcare, LLC v. Duthie,
584 F. Supp. 2d 1078 (N.D. Ill. 2008) 43
McDermott Int'l, Inc. v. Wilander, 498 U.S. 337 (1991) 38
Me. Cmty. Health Options v. Albertsons Cos.,
993 F.3d 720 (9th Cir. 2021) 31
Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 6, 30
Murphy v. Smith, 138 S. Ct. 784 (2018) 22
Nat'l Fed'n of Ind. Bus. v. Sebelius, 567 U.S. 519 (2012) 45
NBC v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999) 29
New Prime Inc. v. Oliveira, 139 S. Ct. 532 (2019) 37
Niz-Chavez v. Garland, 141 S. Ct. 1474 (2021) 38
Pine Top Receivables of Ill., LLC v. Banco de Seguros del Estado,
771 F.3d 980 (7th Cir. 2014) 28
Pure Oil Co. v. Suarez, 384 U.S. 202 (1966) 34
Quezada v. Bechtel OG & C Constr. Servs., Inc.,
946 F.3d 837 (5th Cir. 2020) 31
Rembrandt Vision Techs., L.P. v. Bausch & Lomb, Inc.,
2011 WL 13319343 (N.D. Ga. Oct. 7, 2011), *adopted by*
2011 WL 13319422 (N.D. Ga. Oct. 28, 2011) 40
Ren v. Holder, 648 F.3d 1079 (9th Cir. 2011) 45
Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010) 42
Romag Fasteners, Inc. v. Fossil, Inc., 140 S. Ct. 1492 (2020) 23
Rutledge v. Pharm. Care Mgmt. Ass'n, 141 S. Ct. 474 (2020) 23
SchlumbergerSema, Inc. v. Xcel Energy, Inc.,
2004 WL 67647 (D. Minn. Jan. 9, 2004) 40
Seaton Ins. Co. v. Cavell USA,
2007 WL 9657277 (D. Conn. Mar. 21, 2007) 41
Stemcor USA Inc. v. CIA Siderurgica do Para Cosipar,
927 F.3d 906 (5th Cir. 2019) 24, 25, 26
Textile Unlimited, Inc. v. A..BMH & Co.,
240 F.3d 781 (9th Cir. 2001) 35, 50, 51
Thompson v. Greenwood, 507 F.3d 416 (6th Cir. 2007) 34
United States v. McIntosh, 833 F.3d 1163 (9th Cir. 2016) 19
Vaden v. Discover Bank, 556 U.S. 49 (2009) 8, 33

Page

Cases—continued:

Wash. Nat'l Ins. Co. v. OBEX Grp. LLC,
2019 WL 266681 (S.D.N.Y. Jan. 18, 2019).....41
Wash. Nat'l Ins. Co. v. OBEX Grp. LLC, 958 F.3d 126 (2d Cir. 2020).....41

Statutes and Rules:

Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*
Chapter 1—General Provisions
§ 1.....6
§ 2.....6
§ 3.....7, 22
§ 4.....*passim*
§ 5.....7, 9, 22
§ 7.....*passim*
§ 9.....*passim*
§ 10.....*passim*
§ 11.....*passim*
Chapter 2—Convention on the Recogniton and Enforcement of Foreign Arbitral Awards
§ 201.....17, 21, 34
§ 202.....8, 21
§ 203.....*passim*
§ 204.....*passim*
§ 205.....*passim*
§ 206.....*passim*
§ 207.....*passim*
§ 208.....*passim*
12 U.S.C.
§ 2273.....46
§ 4641.....46
15 U.S.C. § 77p.....26
28 U.S.C.
§ 1291.....4
§ 1331.....6, 31
§ 1332.....6, 31
§ 1391.....17, 18, 34, 50
§ 1391 (1970).....36

Page

Statutes and Rules—continued:

28 U.S.C.
§ 1408 34
§ 1441 26
§ 1782 46
42 U.S.C.
§ 2000e–5 35
§ 2000e–16 35
Fed. R. Civ. P.
45 47
81 20

Miscellaneous:

American Treaty of Pacific Settlement ("Pact of Bogotá"), Apr. 30, 1948, *reprinted in* 2 Int'l Ct. Just. Y.B. 142 (1948) 38
Black's Law Dictionary (4th ed. 1968) 20
Gary B. Born, *International Commercial Arbitration* (3d ed. 2020) 37, 38
Convention on the Enforcement and Recognition of Arbitral Awards ("New York Convention"), June 10, 1958, 21 U.S.T. 2517 ..... *passim*
Convention for the Pacific Settlement of Disputes, July 29, 1899, 32 Stat. 1779 37
General Treaty of Inter-American Arbitration, Jan. 5, 1929, 49 Stat. 3153 38
MacMillan Contemporary Dictionary (1979) 20
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Webster's New World Dictionary (2d ed. 1972) 20
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INTRODUCTION

Arbitration carries tradeoffs. Parties who arbitrate under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, obtain many benefits. Speed, limited discovery, and limited collateral litigation are chief among them. Jones Day, a highly sophisticated law firm, surely appreciated those advantages when drafting [redacted] agreement that mandates arbitration under the FAA [redacted]. Jones Day can swiftly resolve sensitive disputes [redacted], while the FAA's limited discovery regime protects [redacted]

Jones Day, however, must take the bitter with the sweet. Jones Day now asks federal courts to enforce a private arbitrator's summonses to third parties—appellees Orrick, Herrington & Sutcliffe LLP, its CEO and Chairman, Mitchell Zuklie, and its former Managing Partner Michael Torpey—none of whom are parties to the arbitration agreement. Jones Day demands that appellees produce testimony and documents for the arbitration. But the FAA forecloses Jones Day's petition at every turn.

First, federal courts lack subject-matter jurisdiction over Jones Day's petition. The FAA is an unusual federal statute. Chapter 1 (which governs

commercial arbitrations seated in the United States) permits arbitrating parties to petition the federal district court where the arbitrators "are sitting" to enforce arbitrators' summonses to third parties. 9 U.S.C. § 7. But Chapter 1 does not create subject-matter jurisdiction over those petitions, instead requiring some other basis for federal jurisdiction—a requirement Jones Day concedes it cannot satisfy.

Due to this problem, Jones Day first tried to enforce a summons against Orrick in D.C. Superior Court, invoking D.C. law, not the FAA. There, Jones Day pleaded for relief because, as it suggested to the D.C. court, *no* federal court would have subject-matter jurisdiction to enforce that summons. But when the D.C. court held that it lacked personal jurisdiction over Orrick and that Jones Day was bound to its choice of federal law, Jones Day reversed course. Jones Day obtained new summonses purporting to require appellees to appear for a hearing in San Jose, then petitioned the U.S. District Court for the Northern District of California to enforce them. Jones Day asserted that it never needed to proceed in D.C. court because there was federal subject-matter jurisdiction all along under a different part of the FAA—Chapter 2, which grants limited rights in certain international arbitrations.

The FAA's text refutes that claim. Chapter 2 grants federal subject-matter jurisdiction only over "action[s] or proceeding[s] falling under" the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 9 U.S.C. § 203. Nowhere does the Convention or Chapter 2 mention petitions to enforce arbitrators' summonses to third parties. Having picked the FAA, with its well-known jurisdictional limitations, Jones Day cannot complain that the federal courthouse doors are closed to its petition.

Even were there subject-matter jurisdiction, the FAA's venue rules bar Jones Day from enforcing the summonses in the Northern District of California. Jones Day urges this Court to ignore FAA venue rules, and instead apply non-FAA federal venue rules that would allow arbitrating parties to pursue third parties for testimony and documents anywhere those third parties reside. But the relevant FAA venue rules are exclusive—and they foreclose venue here. Jones Day does not dispute that Chapter 2's venue provision, § 204, excludes venue in the Northern District. Jones Day thus pivots to Chapter 1, § 7 for venue. But Jones Day's novel interpretation of § 7—that venue exists wherever an arbitrator schedules a hearing—would transform arbitration into a traveling circus where arbitrators could schedule

hearings in dozens of States and thereby manufacture venue in every federal district nationwide.

Rather than rewriting the FAA, this Court should hold Jones Day to its choices. No one is precluding Jones Day's right to proceed with an arbitration. But Jones Day selected the FAA, and that statute limits when arbitrating parties may resort to federal court, as well as where parties may seek to enforce summonses against third parties who never agreed to arbitration in the first place. Jones Day's contrary interpretations would incentivize endless collateral litigation against third parties, destroying the benefits of efficiency and limited discovery that the FAA promises.

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction under 28 U.S.C. § 1291, but lacks subject-matter jurisdiction over Jones Day's petition to enforce the arbitrator's third-party summonses against Orrick, *see infra* Part I. Jones Day invokes 9 U.S.C. § 203, but that provision confers jurisdiction only over "action[s] or proceeding[s] falling under" the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958. Section 203 does not create subject-matter jurisdiction over petitions to enforce arbitral summonses, and no other basis for jurisdiction exists.

ISSUES PRESENTED

I. Whether 9 U.S.C. § 203, which confers federal jurisdiction over "an action or proceeding falling under" the New York Convention, confers subject-matter jurisdiction over a petition to enforce arbitral summonses for third-party witness testimony and documents.

II. Whether 9 U.S.C. § 204 or 9 U.S.C. § 7 authorize venue in the Northern District of California over a petition to enforce arbitral summonses for third-party witness testimony and documents, when the seat of the arbitration is Washington, D.C.

STATEMENT OF THE CASE

This case involves collateral litigation stemming from an arbitration between Jones Day and [redacted]. The parties agreed the FAA would "govern" the proceedings. 3ER156. FAA Chapter 1 applies because the arbitration is located in the United States and involves interstate and foreign commerce. Because [redacted], the arbitration also implicates FAA Chapter 2, which grants specific rights to parties to enforce arbitration agreements and awards involving international subjects.

A. The Federal Arbitration Act

FAA Chapters 1 and 2 prescribe different rules regarding subject-matter jurisdiction, venue, and procedures for enlisting federal courts to facilitate arbitrations.

1. **FAA Chapter 1,** enacted in 1925, governs arbitrations arising from any "contract evidencing a transaction involving" interstate or foreign "commerce." 9 U.S.C. §§ 1, 2.

Most of Chapter 1—§§ 3 through 13—authorizes procedures for asking federal courts to facilitate arbitration. To file such requests, however, parties must identify some independent basis for federal jurisdiction, *e.g.*, federal-question jurisdiction under 28 U.S.C. § 1331 or diversity jurisdiction under 28 U.S.C. § 1332. Thus, Chapter 1 "is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law . . . , yet it does not create any independent federal-question jurisdiction." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983); *see Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581-82 (2008).

When such jurisdiction exists, Chapter 1 specifies the manner in which parties may file the following requests:

- **Section 3 stays.** Parties may direct requests to stay parallel court proceedings to "the court in which such suit is pending." 9 U.S.C. § 3.
- **Section 4 motions to compel arbitration.** Parties may ask the district court which would have jurisdiction over the underlying controversy "save for" the arbitration agreement to "order that . . . arbitration proceed in the manner provided for" by the agreement. *Id.* § 4.
- **Section 5 requests to appoint arbitrators.** Parties may ask courts to "designate and appoint an arbitrator" if the parties' appointment process breaks down. *Id.* § 5.
- **Section 7 summonses to third parties.** Section 7, implicated here, authorizes the arbitrators, "or a majority of them," to "summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence." *Id.* § 7. If the summoned person refuses or neglects to comply, "upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said

person or persons for contempt" in the same manner as if the person had refused a judicial subpoena. *Id.*

- **Sections 9, 10, and 11 post-award proceedings.** Section 9 authorizes motions for an "order confirming the award" in the court specified in the arbitration agreement or, if unspecified, in "the district within which such award was made." *Id.* § 9. Section 10 authorizes motions to vacate awards, and § 11 authorizes requests to modify or correct awards, both in "the district wherein the award was made." *Id.* §§ 10, 11.

2. **FAA Chapter 2,** enacted in 1970, implements the United States' obligations under the Convention on the Enforcement and Recognition of Arbitral Awards, 21 U.S.T. 2517, commonly called the "New York Convention." *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1644 (2020). Chapter 2 applies to arbitrations involving commercial relationships with foreign parties, or foreign performance of contractual duties. 9 U.S.C. § 202.

Unlike Chapter 1, Chapter 2 "does expressly grant federal courts jurisdiction," but only in limited circumstances. *See Vaden v. Discover Bank*, 556 U.S. 49, 59 n.9 (2009). Specifically, § 203 grants U.S. district courts original

jurisdiction over "[a]n action or proceeding falling under the Convention." 9 U.S.C. § 203. But Chapter 2 identifies only three such actions or proceedings:

- **Section 206 actions to compel arbitration.** Upon a party's request, a court may "direct that arbitration be held in accordance with the agreement" (analogous to Chapter 1, § 4).
- **Section 206 actions to appoint arbitrators**. Upon a party's request, courts may "appoint arbitrators in accordance with the provisions of the agreement" (analogous to Chapter 1, § 5).
- **Section 207 actions to confirm awards**. Upon a party's request, U.S. courts must "confirm the award" absent specific grounds for refusal (analogous to Chapter 1, § 9).

Notably, no provision of Chapter 2 provides for actions to enforce arbitral summonses. In other words, Chapter 2 does not authorize any action or proceeding analogous to Chapter 1, § 7.

Chapter 2 also contains a specific venue rule, § 204, governing "action[s] or proceeding[s] over which the district courts have jurisdiction pursuant to section 203." Under § 204, venue is proper in the district where "save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought." *Id.* § 204. Alternatively, venue exists

in the district encompassing the place the parties' arbitration agreement prescribed for the arbitration. *Id.*

Finally, § 208 harmonizes the rules for "actions and proceedings brought under" Chapter 2 that have analogues under Chapter 1. Section 208 provides: For "actions and proceedings brought under this chapter," i.e., Chapter 2, "Chapter 1 applies . . . to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States." 9 U.S.C. § 208. Thus, with respect to the specific "actions and proceedings" authorized in Chapter 2—requests to compel arbitration, appoint arbitrators, and confirm awards—§ 208 applies Chapter 1's detailed procedures for matters like service of process. Because § 208 is limited to "actions and proceedings brought under this chapter," it has no application to actions and proceedings that do not fall under Chapter 2—including, as relevant here, a § 7 petition to enforce an arbitral summons to a third party.

B. Jones Day's Arbitration [redacted]

The underlying arbitration here involves [redacted] mandatory arbitration under the FAA to resolve all [redacted] disputes. The arbitration agreement provides that

[redacted] i.e., Washington, D.C. 3ER156.

In 2020, Jones Day invoked this agreement to initiate arbitration [redacted]

Consistent with their arbitration agreement, Jones Day and [redacted] to an arbitration seated in Washington D.C. [redacted]

C. Jones Day's Collateral Litigation in D.C. Superior Court Against Orrick

In September 2020, the arbitrator, at Jones Day's request, issued a summons to Orrick, which is not a party to the arbitration. 3ER165-69. The summons asked Orrick to appear at a Zoom hearing to produce documents for use in the underlying arbitration. 3ER165. Orrick declined.

Jones Day then sought to enforce the summons in local court, under local law. Specifically, in November 2020, Jones Day filed a petition under D.C. law

in D.C. Superior Court to enforce the summons. 2ER29; 3ER149. Orrick objected that Jones Day had chosen the FAA as the applicable standard, and FAA § 7 mandates that Jones Day file any petition to enforce third-party summonses in federal court. Jones Day countered that the "logical consequence" of applying the FAA would be that "there is *not a single court in the entire country* with the jurisdiction to enforce Jones Day's validly-issued subpoena." 2ER015 (emphasis in original). This was so, Jones Day claimed, because FAA Chapter 1 "do[es] not confer subject-matter jurisdiction on the federal courts, and diversity does not exist between Orrick and Jones Day." *Id.*

The D.C. Superior Court dismissed Jones Day's petition. [redacted]

D. Jones Day's Collateral Litigation in the Northern District of California Against Orrick and Two Orrick Partners

Having failed in D.C. court, Jones Day tried a different tack. In June 2021, at Jones Day's request, the arbitrator issued revised summonses requesting that Orrick, along with Orrick partners Zuklie and Torpey, produce documents and appear at a hearing at an arbitration facility in San Jose, California. 3ER185-98. [redacted] When Orrick, Zuklie, and Torpey informed Jones Day that the summonses were improper and they would not comply, [redacted] To date, the arbitrator has never held any hearing in California.

Jones Day then petitioned the U.S. District Court for the Northern District of California to enforce the arbitrator's summonses. There, Jones Day for the first time contended that FAA Chapter 2 conferred federal jurisdiction.

The district court granted Orrick's motion to dismiss, holding "that it lacks the authority to compel compliance with the arbitration summonses" under 9 U.S.C. § 7. 1ER004. Citing a consensus among other courts, the court reasoned that § 7 authorizes only the district court in the district containing the arbitral seat to enforce summonses. 1ER004-06. Because "it is undisputed

that Washington, D.C., is the seat of the underlying arbitration," the district court held that the Northern District of California was "not 'the United States district court for the district in which [the arbitrator is] sitting.'" 1ER004. The court did not reach appellees' other grounds for rejecting the summonses, including that the court lacked subject-matter jurisdiction over Jones Day's petition. 1ER004 n.1. This appeal followed.

SUMMARY OF ARGUMENT

This Court should affirm the district court's order dismissing Jones Day's § 7 petition to enforce the arbitrator's summonses.

I. Federal courts lack subject-matter jurisdiction over this petition.

A. Jones Day concedes that FAA Chapter 2 offers the only possible basis for federal jurisdiction. But Chapter 2 does not grant jurisdiction over petitions to enforce arbitrators' summonses to third parties. FAA Chapter 2 provides original jurisdiction only over an "action or proceeding falling under the Convention." 9 U.S.C. § 203. And Chapter 2, which implements the Convention, authorizes only three actions or proceedings: requests to compel arbitration, appoint arbitrators, and confirm awards. *See* 9 U.S.C. §§ 206, 207. By contrast, Congress mentioned petitions to enforce summonses only in Chapter 1, § 7—a different part of the FAA dealing with U.S.-based

commercial arbitrations—but Congress did not provide freestanding subject-matter jurisdiction for proceedings under Chapter 1. This Court should not read in a jurisdictional grant that Congress deliberately excluded.

Jones Day's counterarguments would rewrite the FAA beyond recognition. Jones Day (at 37) adds words to § 203 to confer jurisdiction over any "action *that relates to an arbitration agreement or award* falling under the Convention." That revision would deluge federal courts with requests tangentially related to international arbitrations, a result that is especially implausible given that the FAA strictly limits federal jurisdiction over domestic arbitrations.

Jones Day also interprets § 206 as authorizing district courts to enforce *anything* in the parties' arbitration agreement through court order. Section 206 says nothing of the sort, merely authorizing courts to order that arbitration "be held in accordance with the agreement at any place therein provided for." Section 206 thus only authorizes orders compelling the parties to arbitrate where they promised to arbitrate—full stop.

Nor is Jones Day correct that § 208 brings every proceeding listed in Chapter 1 within Chapter 2's jurisdictional grant. Section 208 provides rules governing only "actions and proceedings" that appear in *both* Chapters 1 and

2, namely motions to compel arbitration, appoint arbitrators, and confirm awards. Section 208 does not import into Chapter 2 new "actions or proceedings" otherwise absent from Chapter 2.

B. No other basis for jurisdiction exists. Jones Day concedes that FAA Chapter 1 does not supply subject-matter jurisdiction.

II. This Court should alternatively affirm because the Northern District of California is not the proper venue for Jones Day's petition.

A. Having invoked Chapter 2 for jurisdictional purposes, Jones Day must live with Chapter 2 for venue purposes. But Chapter 2's venue provision, 9 U.S.C. § 204, does not authorize venue in the Northern District of California. Rather, § 204 authorizes filings only in the district where the parties' underlying controversy could be litigated "save for the arbitration agreement," or the district containing "the place designated in the agreement as the place of arbitration." The Northern District of California undisputedly satisfies neither option. Jones Day and [redacted]'s underlying [redacted] dispute could not be heard in any federal court, because the parties are not diverse and no federal question is involved. And the parties' arbitration agreement designates Washington, D.C. as the arbitral seat.

Jones Day's lone rejoinder is to treat § 204 as irrelevant because the general venue statute, 28 U.S.C. § 1391, purportedly supplements § 204. But Chapter 2 contains classic language precluding that argument. Section 201 mandates that the New York Convention "*shall* be enforced in United States courts in accordance with this chapter," including in accordance with § 204. 9 U.S.C. § 201 (emphasis added). That is exactly the sort of language that has prompted this Court to deem other venue provisions exclusive in analogous statutory contexts.

B. Despite disavowing Chapter 1 for jurisdictional purposes, Jones Day perversely relies on Chapter 1, § 7 for venue. But, as the district court correctly held, § 7 does not authorize filing this petition in the Northern District.

1. Section 7 authorizes "the United States district court for the district in which [the] arbitrators, or a majority of them, are sitting" to enforce a summons "upon petition." That text prescribes only one venue: the district where the "arbitrators . . . are sitting." When the FAA was enacted in 1925, the established meaning of an arbitral "sitting" was the juridical seat of the arbitration, i.e., the place the parties selected in their arbitration agreement. Here, that is Washington, D.C., not the Northern District of California.

That established meaning remains dispositive. Other courts agree that arbitrators "are sitting" in the arbitral "seat." That textual interpretation makes sense: when Congress enacted § 7 in 1925, all types of discovery were strictly limited, and third-party discovery was virtually unheard of. Congress in § 7 did not give arbitral parties freewheeling authority to enforce third-party summonses nationwide when parties in court lacked that same power.

2. Jones Day instead interprets the place where the "arbitrators . . . are sitting" to mean any place the arbitrators schedule a hearing. Under that reading, arbitrators can create venue anywhere, just by summoning third parties to a future hearing. Jones Day offers no contemporaneous authority for this bold position. Nor does Jones Day explain why other Chapter 1 provisions—but not § 7—refer to "hearing[s]" if Congress meant § 7 to refer to hearings as well. Jones Day turns to policy concerns about undermining arbitration. But those concerns cannot override the text, and also cut the other way. Jones Day's interpretation would destroy the efficiencies of arbitration by inviting nationwide collateral litigation.

3. Jones Day alternatively dismisses § 7 as irrelevant and rests on the general federal venue statute, 28 U.S.C. § 1391, to create venue in the Northern District. Jones Day relies on *Cortez Byrd Chips, Inc. v. Bill Harbert*

Construction Co., 529 U.S. 193 (2000), which held that some other FAA venue provisions do not supplant the general venue statute. But that reasoning does not apply to § 7, which uniquely involves nonparties to the arbitration, not the usual scenario of considering a venue convenient for defendants. For *nonparties*, broad venue is the inconvenience, subjecting them to summonses anywhere they reside even though they are strangers to the arbitration.

ARGUMENT

I. Federal Courts Lack Subject-Matter Jurisdiction Over Jones Day's Petition

"Federal courts are courts of limited subject-matter jurisdiction." *United States v. McIntosh*, 833 F.3d 1163, 1170 (9th Cir. 2016). Jones Day, as the party invoking federal jurisdiction, bears the burden of establishing jurisdiction. *Kelly v. Wengler*, 822 F.3d 1085, 1094 (9th Cir. 2016). And Jones Day (at 34) offers just one purported basis for jurisdiction: Chapter 2's limited grant of original jurisdiction for federal courts to entertain certain actions or proceedings concerning international arbitration. But that grant does not reach petitions to compel third-party testimony. And, as Jones Day does not dispute, no other basis for jurisdiction exists.

A. FAA Chapter 2 Does Not Confer Subject-Matter Jurisdiction Over Petitions to Enforce Arbitral Summonses

Chapter 2, § 203 grants federal subject-matter jurisdiction over "[a]n action or proceeding falling under the [New York] Convention." 9 U.S.C. § 203. Jones Day's petition is not such an "action or proceeding." Neither the Convention nor Chapter 2, which implements the Convention, mentions petitions to enforce arbitral summonses anywhere. By definition, then, such petitions are not "action[s] or proceeding[s] falling under the Convention."

1. By its plain terms, § 203 forecloses jurisdiction here. "Actions" and "proceedings" are familiar concepts. An "action" is a "legal and formal demand of one's right from another person or party made and insisted on in a court of justice." *Black's Law Dictionary* 49 (4th ed. 1968). A "proceeding" includes "all possible steps in an action from its commencement to the execution of judgment." *Id.* at 1368. Thus, as the Federal Rules of Civil Procedure recognize, FAA motions are "proceedings." Fed. R. Civ. P. 81(a)(6)(B).

To "fall under" means "to be listed or classified as" or "included in"; for example, "a case that falls under the jurisdiction of a lower court." *Webster's New World Dictionary* 504 (2d ed. 1972); *MacMillan Contemporary Dictionary* 365 (1979). Other Chapter 2 provisions use "fall under" or "falling

under" just this way. *See* 9 U.S.C. § 202 (describing when an "arbitration agreement or arbitral award . . . falls under the Convention"); *id.* § 205 (authorizing removal of state-court actions which "relate[] to an arbitration agreement or award falling under the Convention"); *id.* § 207 (authorizing confirmation of an "award falling under the Convention").

Thus, an "action or proceeding falling under the Convention" refers to a judicial tool covered by the Convention. That conclusion dooms Jones Day's petition, because neither the Convention nor Chapter 2 provides any tool to enforce arbitral summonses. In keeping with its title—the Convention on the Recognition and Enforcement of Arbitral Awards—the Convention "focuses almost entirely on arbitral awards," not the arbitral process. *GE Energy*, 140 S. Ct. at 1644. Aside from one provision instructing courts to refer parties to arbitration, the Convention deals exclusively with the recognition and enforcement of completed arbitral awards. *See id.* Unsurprisingly, the Convention is completely silent as to third parties to an arbitration.

Chapter 2, which creates the Convention's procedural mechanisms for U.S. courts, *see* 9 U.S.C. § 201, similarly omits any authority for enforcing arbitral summonses. Parties may petition the federal district courts to issue an "[o]rder to compel arbitration." *Id.* § 206. Likewise, Chapter 2 allows

parties to ask federal courts to "appoint arbitrators in accordance with the provisions of the agreement," *id.*, and to "apply to any court having jurisdiction under this chapter for an order confirming the award," *id.* § 207. But Congress conspicuously failed to mention petitions to enforce summonses. Thus, Jones Day's motion cannot be an "action or proceeding falling under the Convention" over which the district court could have jurisdiction.

Congress easily could have included additional proceedings in Chapter 2. Chapter 1, governing commercial arbitrations located in the United States, offers a full toolbox of arbitration procedures. Besides motions to compel (§ 4), appoint arbitrators (§ 5), and confirm (§ 9), Chapter 1 authorizes motions for stays (§ 3), vacatur (§ 10), modification (§ 11), and, of course, summons enforcement (§ 7). Congress was plainly aware of petitions to enforce arbitral summonses. "If Congress had wished" to include such petitions in Chapter 2 for international arbitrations, it would not "have bothered to write a new law" that included analogues to Chapter 1, §§ 4, 5, and 9, but "omit[ted]" any § 7 analogue. *See Murphy v. Smith*, 138 S. Ct. 784, 789 (2018).

2. Jones Day impermissibly invokes several different Chapter 2 provisions for jurisdiction. Each of Jones Day's theories would flood federal courts with innumerable, petty arbitration disputes.

Section 203. Jones Day (at 37) interprets the language of § 203—an "action or proceeding falling under the Convention"—as encompassing anything "relat[ing] to an arbitration agreement or award falling under the Convention." Jones Day (at 35-36) notes that its arbitration agreement with [redacted] falls under the Convention. Thus, in Jones Day's view, federal courts automatically have jurisdiction over any motion relating to that agreement, including Jones Day's petition here.

That interpretation would rewrite § 203 by inserting language—"relates to an arbitration agreement or award"—that Congress omitted from § 203, but included in § 205 (the Chapter 2 provision dealing with removal jurisdiction). Courts do not "usually read into statutes words that aren't there." *Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020). Courts are "doubly careful to avoid" doing so when Congress has "included the term in question elsewhere in the very same statutory provision." *Id.* Congress's inclusion of "relates to an arbitration agreement or award" in § 205, but not § 203, forecloses reading that language into § 203.

Jones Day's rewriting would explode federal jurisdiction. Taken literally, the phrase "relates to" "is so broad that it is meaningless." *Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474, 484 (2020) (Thomas, J.,

concurring). In the context of § 205, this Court has interpreted "relates to an arbitration agreement or award" to reach any case where the agreement or award "could *conceivably* affect the outcome of the plaintiff's suit." *Infuturia Glob. Ltd. v. Sequus Pharm., Inc.*, 631 F.3d 1133, 1135 (9th Cir. 2011) (emphasis added). So in Jones Day's view, § 203 would create original jurisdiction over anything conceivably connected to the underlying international arbitration. Requests for emergency review of strict page limits set by a German arbitration agreement, confidentiality rules under Japanese arbitration law, or sanctions for misleading a Brazilian arbitrator in Portuguese could all head to federal court.

Jones Day (at 37, 39-41) relies on *Stemcor USA Inc. v. CIA Siderurgica do Para Cosipar*, 927 F.3d 906 (5th Cir. 2019), which equated the phrase "falling under the Convention" with "relates to an arbitration agreement or award falling under the Convention." *Id.* at 909. But *Stemcor* is distinguishable. There, a petitioner sought both an order compelling respondent to arbitrate the dispute and attachment of some of the respondent's assets to "facilitate arbitration." *Id.* at 908, 911. All agreed that § 203 conferred jurisdiction over petitioner's § 206 action to compel arbitration. *Id.* at 910. Someone else had already attached the same property

in a different proceeding, *id.* at 908, so without attachment, the order compelling arbitration could have been a dead letter. In short, *Stemcor*—along with the cases Jones Day (at 39-40) highlights—involved preliminary remedies between the parties to the arbitration agreement to effectuate court orders compelling arbitration, an issue not raised here.

Stemcor's textual analysis is also wrong. *Stemcor* treated "falling under" (in § 203) and "relate to" (in § 205) as synonyms. 927 F.3d at 909. But *Stemcor* defined "falling under" as to "come within the limits … of something," and "relate to" as having "some connection" to something. *Id.* Even accepting those definitions, there is a world of difference between (say) coming within Miami city limits and having "some connection" to Miami, like having an aunt from there. Even were "falling under" and "relate to" synonyms (they are not), that would at most justify reading § 203 to confer jurisdiction over "an action or proceeding *relating to* the Convention." Yet *Stemcor* (and Jones Day) inexplicably misread § 203 as if it says "an action or proceeding *relating to an arbitration agreement or award* under the Convention" when those italicized words appear nowhere in § 203.

Stemcor also treated § 203 and § 205 as equivalent in scope based on a faulty assumption that removal jurisdiction and original jurisdiction share the

same scope. *Id.* This Court's precedents refute that misconception: removal jurisdiction and original subject-matter jurisdiction are "distinct forms of jurisdiction" that need not be coextensive. *Cerner Middle E. Ltd. v. Belbadi Enters. LLC*, 939 F.3d 1009, 1013 (9th Cir. 2019). In ordinary removal cases, Congress expressly gave federal courts jurisdiction in removed cases over which federal courts would have original jurisdiction. *See* 28 U.S.C. § 1441(a). But in Chapter 2, Congress prescribed a broader rule for removal jurisdiction in § 205 and a narrower rule for original jurisdiction in § 203. That structure—broad removal jurisdiction, narrow original jurisdiction—is common when state-court litigation would impinge federal interests. For example, disfavored state-law securities class actions can be removed for the sole purpose of precluding such suits. 15 U.S.C. § 77p(c). *Stemcor* thus overrode a key textual feature of Chapter 2 based on a mistaken understanding of jurisdictional concepts.

Section 206. Jones Day (at 47-48) also looks to § 206, which states: "A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for." 9 U.S.C. § 206. Jones Day (at 47-48) proposes that the phrase "in accordance with the agreement" empowers courts to enforce all provisions in arbitration

agreements, including provisions incorporating the rules of arbitral bodies, which often authorize arbitrators to issue summonses to third parties. In Jones Day's world, parties could include expansive obligations on third parties in their arbitration agreement and then demand federal-court enforcement when the third parties balk. Not only that, Jones Day says, § 206 lets courts take any other steps necessary to facilitate arbitration.

That absurd interpretation bears no resemblance to § 206's text. Section 206 does not say that courts can order that the "arbitration be held in accordance with the agreement"; rather, it authorizes courts to order that the arbitration "be held," i.e., occur, "at any place . . . provided for" in "the agreement." In other words, § 206's title gets it right: courts can issue "[o]rder[s] to compel arbitration." Section 206 does not vest federal courts with freewheeling authority to enforce any term in an arbitration agreement against third parties who never signed that agreement.

Section 208. Jones Day (at 45-47) argues that Chapter 2's residual clause, 9 U.S.C. § 208, confers jurisdiction by incorporating all Chapter 1 provisions, including § 7, so long as they do not conflict with Chapter 2. That reading again rewrites the FAA. If Congress wished to authorize parties to file motions that Chapter 1 authorizes but Chapter 2 omits—including § 7

petitions to enforce summonses—Congress would have said "Chapter 1 *supplements* actions and proceedings brought under" Chapter 2. Section 208 instead states that "Chapter 1 applies to *actions and proceedings brought under this chapter* [Chapter 2] to the extent that chapter [Chapter 1] is not in conflict with this chapter or the Convention." *Id.* § 208 (emphasis added). Section 208 thus renders Chapter 1's rules "appli[cable]" only to "actions and proceedings" that already exist under Chapter 2. Section 208 does not create jurisdiction over proceedings that Chapter 2 does *not* authorize.

Instead, § 208 provides a rule of priority. When "actions and proceedings" under Chapter 2 overlap with analogues authorized under Chapter 1, Chapter 2's terms control. For instance, both Chapter 1 (in § 9) and Chapter 2 (in § 207) authorize motions to confirm arbitral awards. But Chapter 1 sets a one-year deadline, whereas Chapter 2 gives parties three years to request confirmation. Under § 208, Chapter 2 prevails. Conversely, Chapter 1 (in § 4) details procedures for filing motions to compel arbitration—details that Chapter 2 omits. Under § 208, because those procedures do not "conflict" with Chapter 2 or the Convention, those procedures apply to § 206 motions to compel, too. *See Pine Top Receivables of Ill., LLC v. Banco de Seguros del Estado*, 771 F.3d 980, 989 (7th Cir. 2014). Similarly, trans-

substantive doctrines, like equitable estoppel, can apply to existing Chapter 2 proceedings so long as those doctrines do not conflict with the Convention's text. *GE Energy*, 140 S. Ct. at 1645; *contra* Jones Day Br. 47. But § 208 is not a gateway for smuggling whole new categories of "action[s] or proceeding[s]" into Chapter 2's jurisdictional ambit.

3. Jones Day (at 38-39) stresses "the strong policy in favor of arbitration," yet its position undermines that policy. Giving federal courts original jurisdiction over any third-party discovery disputes that arise in the course of an international arbitration would destroy the chief benefit of arbitration: efficient dispute resolution with minimal judicial fuss. Arbitration involves "relinquish[ing] the right to certain procedural niceties which are normally associated with a formal trial," including "the right to pre-trial discovery." *Burton v. Bish*, 614 F.2d 389, 390 (4th Cir. 1980). And arbitration's "efficiency and cost-effectiveness" is "especially at odds with . . . broad-ranging discovery." *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 190-91 (2d Cir. 1999). Parties would not pick arbitration if doing so risked a litigation morass over collateral discovery fights.

Jones Day's theory also bizarrely favors international arbitrations over American ones in a way Congress could not have intended. Disputes over § 7

petitions under Chapter 1 (which governs U.S.-based commercial arbitrations) cannot come into federal court absent an independent basis for jurisdiction. *Infra* pp. 31-32. Yet if Jones Day were correct that § 203 confers federal jurisdiction over any proceeding "related to" a foreign arbitration, the FAA would give U.S. courts jurisdiction over *every* arbitral summons in a Chapter 2 international arbitration. Congress did not grant foreign parties arbitrating foreign disputes free access to American judicial process while denying those same benefits to U.S. parties.

Jones Day objects that without Chapter 2 jurisdiction, no court will have jurisdiction to enforce the summons. But Jones Day's inability to enforce the third-party summonses here is a problem of its own making. For decades, the Supreme Court has held that Chapter 1 does not create independent subject-matter jurisdiction. *See Moses H. Cone.*, 460 U.S. at 25 n.32. So it should come as no surprise that Jones Day's [redacted], as well as Jones Day's collateral litigation with Orrick and its partners, all belong in state court. If Jones Day boxed itself out of court by picking the FAA instead of state law, that is no reason to overhaul the FAA.

Indeed, this purported lack-of-forum problem plays strongly to Jones Day's advantage when [redacted]

[redacted]. In those circumstances, [redacted] cannot enlist federal courts to force [redacted] to testify, and cannot rely on FAA procedures in state courts. [redacted]. Here, the shoe is on the other foot.

B. FAA Chapter 1 Does Not Confer Subject-Matter Jurisdiction Here

Jones Day identifies no other jurisdictional basis for its petition. Chapter 1 is not an option, because it "bestow[s] no federal jurisdiction but rather require[s] an independent jurisdictional basis." *Hall St.*, 552 U.S. at 582. Thus, this Court assesses jurisdiction over § 7 petitions as if they were freestanding lawsuits. *See Me. Cmty. Health Options v. Albertsons Cos.*, 993 F.3d 720, 723 (9th Cir. 2021). Jones Day's petition does not present a federal question, so jurisdiction would not lie under 28 U.S.C. § 1331. Nor does the petition satisfy diversity jurisdiction under 28 U.S.C. § 1332. This Court examines diversity in § 7 petitions by looking to the "parties to the enforcement action." *Me. Cmty.*, 993 F.3d at 722. But Orrick and Jones Day are non-diverse, as Jones Day recognizes. 2ER015.

Other circuits ascertain subject-matter jurisdiction over some FAA motions by asking whether federal courts could exercise jurisdiction over the underlying controversy being arbitrated. *See, e.g.*, *Quezada v. Bechtel OG & C Constr. Servs., Inc.*, 946 F.3d 837, 842 (5th Cir. 2020) (collecting cases). But,

under that approach, there is also no federal jurisdiction over the controversy between Jones Day and [redacted]. The matter involves [redacted], so there is no federal-question jurisdiction. And diversity jurisdiction is equally unavailable, because Jones Day [redacted] *See Grupo Dataflux v. Atlas Glob. Grp., LP*, 541 U.S. 568, 569 (2004). The Supreme Court is currently considering which jurisdictional test should govern motions to confirm or vacate arbitral awards under 9 U.S.C. §§ 9, 10. *Badgerow v. Walters*, No. 20-1143 (argued Nov. 2, 2021). But, no matter how one cuts the jurisdictional inquiry, the answer is the same: this case simply does not belong in federal court.

II. Regardless, the FAA Does Not Authorize Venue Within the Northern District of California

Even if the district court below had subject-matter jurisdiction, venue would not lie in the Northern District of California.

A. If Chapter 2 Provides Jurisdiction, Then Section 204 Precludes Venue in the Northern District

If Jones Day's petition were a Chapter 2 "action or proceeding" for jurisdictional purposes, the petition is necessarily a Chapter 2 "action or proceeding" for venue purposes. *See* 9 U.S.C. §§ 203, 204. Chapter 2's venue

rule, § 204, trumps any contrary rule in Chapter 1, *see id.* § 208, and forecloses venue in the Northern District of California.

1. Section 204 prescribes which federal district courts have venue over Chapter 2 "action[s] or proceeding[s]." Such "action[s] or proceeding[s] . . . may be brought in any . . . court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought." *Id.* § 204. Translation: parties can file in any federal district court that would be a permissible venue for the underlying controversy, had the parties litigated rather than arbitrated. *Cf. Vaden*, 556 U.S. at 62-63 (interpreting "controversy between the parties" in 9 U.S.C. § 4 to mean the parties' underlying controversy, not the dispute over a particular motion). But Jones Day could not file its [redacted] claims [redacted] in *any* federal court, *supra* p. 32, so this provision does not help Jones Day.

Section 204 also authorizes filing in "the place designated in the agreement as the place of arbitration," if "within the United States." *Id.* But here, all agree the "designated . . . place of arbitration" is Washington, D.C. So that clause does not establish venue in the Northern District, either.

2. Jones Day's cursory response (at 22-23 n.1) is that § 204 is nonexclusive. Under Jones Day's view, § 204 coexists alongside the default

federal venue statute, 28 U.S.C. § 1391, which authorizes venue in a district in which the defendant resides. *Id.* § 1391(b). That reading is incorrect. The default venue statute only applies "[e]xcept as otherwise provided by law." *Id.* § 1391(a). And § 204 is the type of venue statute "that Congress intended . . . to be exclusive or . . . restrictively applied." *See Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406, 1409 (9th Cir. 1989); *Pure Oil Co. v. Suarez*, 384 U.S. 202, 205-07 (1966).

True, § 204 specifies where parties "may" file, not where they "shall" file. But "the mere use of 'may' is not necessarily conclusive of congressional intent to provide for a permissive or discretionary authority." *Cortez Byrd*, 529 U.S. at 198; *see also Thompson v. Greenwood*, 507 F.3d 416, 424 (6th Cir. 2007) (venue under 28 U.S.C. § 1408, which provides that an action "may be commenced" in certain districts, is "mandatory"). Elsewhere, Congress made clear § 204's exclusivity. Section 201 provides that the Convention "*shall* be enforced in United States courts in accordance with" Chapter 2. 9 U.S.C. § 201 (emphasis added). "Congress' use of the word 'shall' . . . mandates the use of" Chapter 2's provisions, including § 204, in Chapter 2 proceedings. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016).

This Court has construed parallel provisions in Title VII the same way. That statute provides that an action "may be brought" in specified districts. 42 U.S.C. § 2000e–5(f)(3). That venue provision is exclusive because Title VII's provisions "shall govern" Title VII claims, *id.* § 2000e–16(d), demonstrating Congress's intent to displace the general venue statute with Title VII's more specific rules. *Johnson v. Payless Drug Stores Nw., Inc.*, 950 F.2d 586, 587 (9th Cir. 1991). Section 204 operates the same way.

Jones Day also invokes Chapter 1 provisions that feature nonexclusive venue rules. But the reason why those rules are nonexclusive proves why § 204 *is* exclusive. In *Cortez Byrd*, 529 U.S. at 199-200, the Supreme Court held that §§ 9-11's venue provisions (governing where to file motions to confirm, vacate, or modify awards) are nonexclusive because they authorize venue in several places where no one could have filed under the default venue rules of 1925. At the time, the general federal venue statute restricted venue to the defendant's residence. *Cortez Byrd* considered it wildly implausible that Congress would in §§ 9-11 supply significantly broader venue rules, yet simultaneously withdraw venue from the defendant's residence, which the Court considered the most convenient venue in many circumstances. *Id.*; *accord Textile*

Unlimited, Inc. v. A..BMH & Co., 240 F.3d 781, 784 (9th Cir. 2001) (applying *Cortez Byrd*'s reasoning to FAA § 4).

By contrast, in 1970, when Congress enacted Chapter 2, the default venue rules were far more complex and far more expansive. Non-U.S. persons could "be sued in any district," and a corporation could "be sued in any judicial district in which it is incorporated or licensed to do business or is doing business," for instance. 28 U.S.C. § 1391(c), (d) (1970). So, in 1970, Congress logically enacted § 204 as a separate, fairly broad venue provision that would *supplant* the broad but different rules in the default federal venue statute. Applying the two sets of rules together would transform routine venue questions into a complicated mess.

B. Section 7 Also Precludes Venue in the Northern District

Even if Chapter 1, § 7 governs venue, that provision does not authorize Jones Day to petition the Northern District of California to enforce the arbitrator's summonses. Section 7 mandates that if anyone declines the summons, "upon petition the United States district court for the district in which such arbitrators, or a majority of them, *are sitting* may compel" the person's attendance. 9 U.S.C. § 7 (emphasis added). That provision mandates venue in the seat of the arbitration—here, Washington, D.C. Jones Day's

contrary interpretation of § 7—to refer to any location where the arbitrator announces a willingness to hold a hearing—is absurd.

1. *Section 7 Authorizes Venue Only in the District Where the Arbitral Seat Is Located*

When interpreting terms in Chapter 1, courts look to their meaning "at the time of the [FAA]'s adoption at 1925." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019). Then as now, the place where arbitrators "are sitting" means the "seat" of the arbitration, i.e., the location where the parties agree in advance the arbitration will be deemed to occur. Here, that place is indisputably Washington, D.C. 1ER004.

a. "Seat" is the nominal form of the verb "to sit," so the words are construed together. *See In re Stevens*, 15 F.4th 1214, 1218 (9th Cir. 2021) (construing "schedule" and "scheduled" alike because "they share the same root"). A "seat" is a term of art in the arbitration context, referring to the "legal domicile or juridical home of the arbitration," which the parties will "virtually always" select in advance by agreement. Gary B. Born, *International Commercial Arbitration* § 11.01[B], at 1650 (3d ed. 2020). That term-of-art meaning is longstanding.[1]

[1] *E.g.*, Convention for the Pacific Settlement of Disputes art. 25, July 29, 1899, 32 Stat. 1779, 1791 (distinguishing between the Permanent Court of

Thus, an arbitration has just one "seat," fixed in a single location in advance. Born, *supra*, § 11.03[A], at 1659-61; *accord* Jones Day Br. 24. By contrast, arbitrators can conduct hearings in various places during the arbitration, without changing the "seat." Born, *supra*, § 11.03[E], at 1667-69. By referring to the place where the arbitrators "are sitting," Congress incorporated the specialized understanding of an arbitral "seat." When Congress "uses such a term [of art]," courts assume that "Congress intended it to have its established meaning." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991).

Further, § 7 requires a party to petition "*the* United States district court for the district in which such arbitrators, or a majority of them, are sitting." 9 U.S.C. § 7 (emphasis added). This language—"using a definite article with a singular noun"—most naturally refers to "a discrete thing." *Niz-Chavez v.*

Arbitration's "ordinary seat," which is fixed at The Hague, and its "place of session," which may be altered with the parties' consent); General Treaty of Inter-American Arbitration art. 4, Jan. 5, 1929, 49 Stat. 3153, 3160 ("The parties . . . shall formulate by common accord, in each case, a special agreement which shall clearly define . . . the seat of the court."); American Treaty of Pacific Settlement ("Pact of Bogotá") art. 43, Apr. 30, 1948, *reprinted in* 2 Int'l Ct. Just. Y.B. 142, 150 (1948) (similar); *see also* Alan Redfern et al., *Law and Practice of International Commercial Arbitration*, at 2-14 (4th ed. 2004) (recognizing as "well-established" the "concept that an arbitration is governed by the law of the place in which it is held, which is the 'seat' . . . of the arbitration," dating at least to the 1923 Geneva Protocol).

Garland, 141 S. Ct. 1474, 1483 (2021). That language reinforces that there is only one place where the arbitrators sit—the formal seat of the arbitration.

Jones Day (at 25-26) argues that, because § 7 refers to where the "arbitrators, *or a majority of them*, are sitting," the word "sitting" must refer to a physical location where the majority of arbitrators are present. But the majority requirement just reinforces the rule recited throughout § 7 that a majority of arbitrators must agree for an act to have legal effect. For instance, all agree that the arbitrators issue their award from the arbitral seat (here, Washington, D.C.), even if they are physically located somewhere else (say, Florida). *See* Jones Day Br. 24. The FAA would not change that rule just by providing venue in the district "where the arbitrators, or a majority of them, issue their award"; such a provision would simply clarify that only a majority of arbitrators can issue a binding award. Without this language, § 7 could read as if an arbitral panel had to be unanimous to act at all.

Other courts have similarly held that the place where the arbitrators "are sitting" under § 7 is the arbitral seat. The Second Circuit, for instance, concluded that in a case where the parties' agreement provided for arbitration in New York City, "FAA Section 7 required that any enforcement action be brought there." *Dynegy Midstream Servs., LP v. Trammochem*, 451 F.3d 89,

91, 95 (2d Cir. 2006). The Second Circuit thus rejected the notion that a party could enforce a summons the arbitrators had issued to obtain third-party documents in Texas. *Id.* at 96. As the district court here observed, numerous other district courts likewise recognize that arbitrators "are sitting" at the arbitral seat. 1ER005-06.[2]

Against this precedent, Jones Day's two district court cases (at 32-33) do not support its position. *See* 1ER004-07 (distinguishing these cases). In both, the § 7 petition was properly filed in the district containing the arbitral seat. In *Seaton Insurance Co. v. Cavell USA*, the parties "mutually agree[d]" to move the arbitration from New York to Connecticut, so the summoned

[2] *See, e.g.*, *All. Healthcare Servs., Inc. v. Argonaut Priv. Equity, LLC*, 804 F. Supp. 2d 808, 809, 811-12 (N.D. Ill. 2011) ("Because the arbitration proceeding is being conducted in Chicago, only a court in this district may enforce a subpoena issued by the arbitrators," even though the testimony would be taken at a hearing before an arbitrator in San Francisco.); *Rembrandt Vision Techs., L.P. v. Bausch & Lomb, Inc.*, 2011 WL 13319343, at *3 (N.D. Ga. Oct. 7, 2011) ("Omitted from the statutory text is any indication that 'the *district* in which such arbitrators, or a majority of them, *are* sitting' is a flexible term meaning wherever the arbitrators or a majority of them happen to be at the time of a hearing."), *adopted by* 2011 WL 13319422 (N.D. Ga. Oct. 28, 2011); *SchlumbergerSema, Inc. v. Xcel Energy, Inc.*, 2004 WL 67647, at *1-2 (D. Minn. Jan. 9, 2004) ("[T]his Court, as the court for the district in which the arbitration panel is sitting, has the exclusive authority to enforce that panel's subpoenas," even though the evidence would be collected in another district); *Amgen Inc. v. Kidney Ctr. of Del. Cnty., Ltd.*, 1994 WL 594372, at *1-2 (E.D. Pa. Oct. 20, 1994) (transferring case to the Northern District of Illinois because "the underlying arbitration is sitting in Chicago," even though the evidence would be collected in Pennsylvania).

party could not complain that the arbitration agreement specified New York. 2007 WL 9657277, at *2 (D. Conn. Mar. 21, 2007). And in *Washington National Insurance Co. v. OBEX Group LLC*, the summons hearing and the designated site of arbitration were both in New York. 2019 WL 266681, at *5 (S.D.N.Y. Jan. 18, 2019); 958 F.3d 126, 139 (2d Cir. 2020). The validity of a prior hearing held outside New York was not at issue. This Court should not break ranks and adopt Jones Day's anomalous interpretation.

b. Interpreting where the "arbitrators . . . are sitting" to refer to the arbitral seat also advances the FAA's objective of simple, efficient rules that avoid collateral litigation. Because the seat is a single, fixed location, a single federal court—the court at the arbitral seat—exercises authority over any disputes over enforcing § 7 arbitral summonses. This interpretation also applies even-handedly to both parties, avoiding gamesmanship. In some cases, plaintiffs might not be able to enforce a summons to faraway third parties; in others, defendants might lose out.

Jones Day (at 28, 30-31) counters that § 7 should not be limited to reaching witnesses whose residence coincides with the arbitral seat. But that limitation hardly "gut[s]" § 7, as Jones Day claims. Because the parties pick the arbitral seat in advance, they can account ex ante for considerations like

where relevant evidence or witnesses in the event of a dispute might be. And here, Jones Day, [redacted], clearly knew it was selecting a single place [redacted] and understood the ramifications.

Further, this interpretation of § 7 protects third parties from burdensome summonses. "The FAA reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). Non-parties to the arbitration agreement have not agreed to participate in the arbitration, abide by the arbitrator's decisions, or follow the arbitral body's rules. So "[a]n arbitrator's authority over parties that are not contractually bound by the arbitration agreement is strictly limited to that granted by the Federal Arbitration Act." *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406 (3d Cir. 2004) (Alito, J.). Congress "could well have desired to limit the issuance and enforcement of arbitration subpoenas in order to protect non-parties from having to participate in an arbitration to a greater extent than they would if the dispute had been filed in a court of law." *Dynegy*, 451 F.3d at 96.

Interpreting the place where the "arbitrators . . . are sitting" as the arbitral seat also makes sense given the state of third-party discovery when

Congress enacted the FAA in 1925. "It was a time when '[t]o require the disclosure to an adversary of the evidence that is to be produced would be repugnant to all sportsmanlike instincts.'" *Matria Healthcare, LLC v. Duthie*, 584 F. Supp. 2d 1078, 1080 (N.D. Ill. 2008) (quoting 6 John Henry Wigmore, *Discovery* § 1845, at 490 (3d ed. 1940)). "Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome." *Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947).

Discovery from third parties was even more unusual. Before the Federal Rules of Civil Procedure were promulgated in 1938, "the only provision in the entire federal system intended for discovery" could only be used against parties, "not mere [third-party] witnesses." Edson R. Sunderland, *The New Federal Rules*, 45 W. Va. L.Q. 5, 20-21 (1938). Given this background, Congress in 1925 logically limited where federal courts could enforce third-party arbitral summonses. Courts could not routinely compel third parties to testify in judicial proceedings, so it would have been highly anomalous for Congress to have opened the floodgates to third-party discovery only in arbitration.

2. *Section 7 Does Not Authorize Venue Anywhere the Arbitrators Plan to Hold Hearings*

Jones Day (at 27) instead interprets the place where the "arbitrators . . . are sitting" under § 7 to mean any place the arbitrators select for a future hearing to receive requested testimony or evidence. That interpretation fails many times over.

a. Jones Day equates "sitting" with "holding a hearing," but fails to cite a single contemporaneous source suggesting that anyone in 1925 would have understood § 7 this way. Jones Day (at 29) asserts that in "common usage," judges "sit" at places besides "their usual courtroom," so arbitrators may also be "sitting" somewhere besides the arbitral seat. But that is no response to the wealth of authority confirming that "seat" (and thus "sitting") has special meaning in the arbitration context.

Elsewhere in Chapter 1, Congress repeatedly referred to a "hearing," not a "sitting." For instance, § 4 mandates that when a district court compels arbitration, "[t]he hearing and proceedings, under [the arbitration] agreement," must take place in that district. In other words, if a party petitions the District of Montana to compel arbitration, any ensuing arbitral "hearing" must happen in Montana. Similarly, under § 10, grounds for vacating an award include "misconduct in refusing to postpone the hearing."

Congress did not refer to "hearings" throughout Chapter 1, yet throw in a purported synonym ("sitting") in § 7 alone. *Nat'l Fed'n of Ind. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) (finding "significant" Congress's use of "'penalty' rather than . . . tax" when the same statute often refers to "taxes").

b. The present-tense framing of § 7 (where the "arbitrators . . . *are sitting*") also presents insurmountable problems for Jones Day. Section 7 requires filing petitions where the "arbitrators . . . are sitting," i.e., the location where the arbitrators sit at the time the petition is filed, *not* where a hearing to obtain witness testimony happens. If, as Jones Day contends, "sitting" means "holding a hearing," then "are sitting" would refer to wherever the arbitrators are holding a hearing at the time the petition is filed. *See Ren v. Holder*, 648 F.3d 1079, 1091 (9th Cir. 2011) ("Congress's use of verb tense is significant in construing statutes." (citation omitted)); *Howard v. City of Coos Bay*, 871 F.3d 1032, 1048 (9th Cir. 2017).

That position would mandate ludicrous, question-begging procedures. Must the arbitrators be in session at the very moment the petition is filed? If so, arbitrators could ride circuit across the country holding hearings for the sole purpose of letting one party get a timestamp at the clerk's office before the arbitrator adjourns. If the hearing need not be in progress, then when

must the party file the petition? Before the arbitrator boards a plane? Before the plane exits California airspace? Before the next session in D.C. begins?

Jones Day (at 26-27) sidesteps these textual problems by reasoning that, because § 7 generally concerns arbitrators' authority to compel witnesses to appear at in-person hearings, venue for enforcing these summonses should track the location of those hearings. Were that true, Congress in § 7 would have authorized filing petitions in the district "where the arbitrators will be sitting" (for future hearings) or "would have been sitting" (for hearings that never occurred due to the third party's "refus[al] . . . to obey said summons," 9 U.S.C. § 7). Or Congress could have simply authorized filing petitions in the district "where the witness resides," as Congress did in many other statutes—but not here. *Cf.* 28 U.S.C. § 1782(a) (authorizing parties to enlist federal courts in "the district in which a person resides or is found" to subpoena witnesses for evidence for use in overseas litigation); 12 U.S.C. § 2273 (authorizing administrative subpoena enforcement in, *inter alia*, the district "where the witness resides or carries on business"); *id.* § 4641(c)(1) (same).

Rewriting § 7 to provide venue in places the arbitrators *might* be sitting would also authorize suit before parties establish any connection with the forum. Private arbitrators could enlist federal courts in all 94 federal districts

just by scheduling a hearing there. The arbitrator need not even set foot in the jurisdiction. Section 7 petitions asserting the arbitrators "are sitting" in that district could be filed in the U.S. District Courts for Guam and Maine simultaneously. Congress in 1925 did not authorize arbitrators to create nationwide enforcement in U.S. courts through calendar invites.

c. Jones Day (at 27) tries to leverage § 7's command that arbitration summonses "be served in" and enforced "in the same manner" as court subpoenas. Because Federal Rule of Civil Procedure 45 authorizes actions to compel compliance with subpoenas in "the district where compliance is required," Jones Day reasons that § 7 must impose a similar rule for enforcing arbitral summonses. But prescribing that summonses "be served in" and enforced "in the same manner" as court subpoenas merely harmonizes *procedures* for serving and enforcing arbitral summonses with procedures for equivalent court subpoenas (*e.g.*, service of process rules). *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1158 (11th Cir. 2019). The fact that Rule 45 now allows nationwide service is irrelevant: Section 7 "does not incorporate Rule 45 regarding *where* motions to compel must be filed." *Id.*

Jones Day (at 29-30) notes that a draft 2019 Restatement agrees with Jones Day that "sitting" should mean the place where the arbitrators hold hearings. Restatement (Third) of Int'l Com. & Inv.-State Arb. § 3.4 cmt. b(ii) (Am. L. Inst., Proposed Final Draft 2019). But such policy-based "aspirations for what the law ought to be" deserve "no weight whatever as to the current state of the law," let alone what § 7 meant in 1925. *See Kansas v. Nebraska*, 574 U.S. 445, 475-76 (2015) (Scalia, J., concurring in part and dissenting in part); *see also ARC Ecology v. U.S. Dep't of the Air Force*, 411 F.3d 1092, 1102 n.8 (9th Cir. 2005) ("The Restatement of course is not law." (citation omitted)).

Finally, Jones Day (at 15-17) emphasizes that various arbitral bodies' rules allow arbitrators to convene hearings anywhere. In a similar vein, Jones Day (at 14-15) observes that the summonses here comply with other requirements for valid § 7 summonses, for instance by ordering witnesses' appearances at a live hearing, not pre-trial depositions. *See CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703, 706 (9th Cir. 2017). All true, but irrelevant. Just because arbitrators can hold hearings in many places does not mean they "are sitting" within the meaning of § 7 when they do so. And just because the summonses do not violate a separate § 7 requirement does not vindicate Jones Day's interpretation of "sitting."

d. Jones Day (at 33) claims to make § 7 "fully functional" by guaranteeing judicial enforcement of arbitral summons wherever the witness lives. But that interpretation simply creates a nationwide enforcement mechanism that Congress conspicuously omitted from § 7. The FAA comes with limited discovery to streamline dispute resolution: the "limited discovery process" is both a "hallmark of arbitration" and "a necessary precursor to its efficient operation." *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999). Far from "mak[ing] Section 7 work properly," Jones Day Br. 33, Jones Day's interpretation vitiates that objective.

Section 7's narrow scope also undercuts Jones Day's claim that its position is essential to functional arbitration. Section 7 does not govern discovery from the parties to the arbitration agreement (or their employees), which is already available based on the parties' consent to the arbitrator's jurisdiction and the arbitral body's rules. *See CVS*, 878 F.3d at 706-07 n.1. By contrast, the only powers an arbitrator has over a third party who has not consented to the contractual arrangement are the strictly limited powers that FAA § 7 grants. *Hay Grp.*, 360 F.3d at 406.

3. *Venue Under Section 7 Is Not Permissive*

Jones Day (at 18-23) alternatively deems § 7's scope irrelevant. Jones Day contends that § 7 is not an "exclusive venue provision" and that the general venue statute, 28 U.S.C. § 1391, would authorize venue in the Northern District. But § 7 sets out the exclusive venue rule for enforcing arbitral summonses. Several features of § 7 distinguish it from §§ 4 and 9-11, provisions that this Court and the Supreme Court respectively have considered nonexclusive. *See Textile Unlimited*, 240 F.3d at 784 (§ 4); *Cortez Byrd*, 529 U.S. at 195 (§§ 9-11).

First, unlike other FAA motions, which center on the arbitral parties, § 7 involves enlisting courts to act against third parties. Especially in 1925, when the FAA was enacted, it would have been unprecedented for courts to enforce summonses against third parties *anywhere*, even to obtain testimony for use in court. As discussed, *supra* pp. 35-36, the Supreme Court in *Cortez Byrd* held that the general venue statute operated alongside §§ 9-11 motions in part because the "most convenient forum for a defendant is normally the forum of residence." 529 U.S. at 200. But there is nothing "convenient" about being subjected to nationwide summonses from an arbitrator the third party

never agreed to obey. Section 7's limited venue rule thus protects many third parties from burdensome requests that would have been unheard of in 1925.

Second, unlike § 7, the permissive-venue provisions in the FAA repeatedly use the word "may" to refer to the party's choice of where to file. Section 4 states that "[a] party . . . *may* petition" certain courts to compel arbitration. 9 U.S.C. § 4 (emphasis added); *see Textile Unlimited*, 240 F.3d at 785. Section 9 provides that if the parties' agreement identifies a particular court that will enforce the ensuing award, "any party to the arbitration *may* apply to the court so specified" for confirmation. 9 U.S.C. § 9 (emphasis added). Otherwise, "such application *may* be made" in "the district within which such award was made." *Id.* (emphasis added). By contrast, § 7 provides that if anyone refuses to obey the summons, "upon petition the . . . district court . . . may compel" the witness's attendance. *Id.* § 7. There, "may" refers to the district court's discretion whether to compel testimony, not to discretion about where to petition.

True, §§ 10 and 11 also use "may" in relation to the court. But *Cortez Byrd* reasoned that reading § 9 as a permissive-venue provision and §§ 10 and 11 as exclusive would be unworkable given how those specific provisions work together. 529 U.S. at 200-01. The district the parties' agreement specified

could entertain a § 9 motion to confirm an award, but would lack venue over §§ 10 and 11 motions to vacate or modify the same award, since those provisions only expressly mention venue in the district "wherein the award was made." *Id.*; *see* 9 U.S.C. §§ 10, 11. *Cortez Byrd* concluded that "Congress simply cannot be tagged with such a taste for the bizarre." *Id.* at 201. That reasoning does not carry over to § 7, which does not operate in conjunction with other motions.[3]

* * *

Jones Day's efforts to enforce third-party summonses against Orrick and two current partners have now spawned two rounds of collateral litigation and produced the type of litigation quagmire the FAA exists to prevent. This Court should reject Jones Day's attempted rewrite of the FAA to create jurisdiction and venue that Congress withheld and put an end to this saga.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

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[3] Jones Day (at 50) improperly asks this Court to direct the district court to "enter an order compelling appellees to appear." Orrick has numerous other defenses to these improper summonses, Mot. to Dismiss at 18-20, but focuses its appellate briefing on the jurisdictional flaws and the issues decided below. In doing so, Orrick does not concede that the summonses were otherwise proper. Thus, even were this Court to conclude that jurisdiction and venue exist, the district court would need to consider these contentions on remand.

Respectfully submitted,

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DATED: NOVEMBER 22, 2021

STATEMENT OF RELATED CASES

Appellees are unaware of any cases related to the presently pending action.

/s/ Sarah M. Harris
SARAH M. HARRIS

DATED: NOVEMBER 22, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,183 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 and Century Expanded 14-point font.

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DATED: NOVEMBER 22, 2021

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2021, I electronically filed the foregoing brief on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

I further certify that I caused the foregoing brief to be served via email to all registered case participants on this date because it is a sealed filing.

/s/ Sarah M. Harris
SARAH M. HARRIS

DATED: NOVEMBER 22, 2021