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Bad Law or Just Bad Timing?: Post-pandemic Implications of Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.'s Ban on the Use of Virtual Technology for Taking Non-party Evidence Under Section 7 of the Federal Arbitration Act

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ARTICLES

Bad Law or Just Bad Timing?: Post-pandemic Implications of *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*'s Ban on the Use of Virtual Technology for Taking Non-party Evidence Under Section 7 of the Federal Arbitration Act

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The COVID-19 pandemic has had an enormous socio-economic impact globally. To continue operations, the legal field, like other sectors, has had to adapt to the exigencies of the pandemic by, inter alia*, becoming increasingly reliant on remote technologies to conduct business. Yet, only a few months before COVID-19 was declared a pandemic, the Eleventh Circuit ruled in* Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145 (11th Cir. 2019), that Section 7 of the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 7, prohibits prehearing discovery and does not allow a summonsed witness to appear*

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in locations outside the physical presence of the arbitrator and, thus, an arbitral summons for a witness to appear via video conference is not enforceable. Intellectually, Managed Care *raises interesting issues concerning the textualist approach to statutory construction. For practical purposes, the opinion stands at odds with the realities of arbitration in the modern world, where remote technology has played a key role in the efficient administration of arbitration proceedings. Further, in light of the pandemic and its related health risks, the Eleventh Circuit's opinion raises concerns about the conduct of arbitration proceedings, particularly when disclosure of information by non-parties is needed for a full and fair hearing. After examining the text of Section 7 and federal circuit courts' opinions interpreting the provision, this Article proposes an alternate, perhaps timelier, textual interpretation of Section 7—one that remains true to the text, comports with the practicalities of modern arbitration, and anticipates challenges that will continue or arise in a post-pandemic world.*

INTRODUCTION

On September 18, 2019, six months before the World Health Organization declared COVID-19 a global pandemic,[1] the United States Court of Appeals for the Eleventh Circuit decided *Managed Care Advisory Group, LLC v. CIGNA Healthcare, Inc*.[2] During this time, legal communities were becoming increasingly reliant on remote technologies such as Zoom Video Communications, Inc.[3] In *Managed Care*, the Eleventh Circuit held, among other things, that the words "attend," "attendance," and "before" contained in Section 7 of the Federal Arbitration Act (the "FAA"), do "not authorize district courts to compel witnesses to appear in locations

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[1] *See* Tedros Adhanom Ghebreyesus, WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 March 2020 (Mar. 11, 2020) (transcript available at https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020) ("We have therefore made the assessment that COVID-19 can be characterized as a pandemic."). COVID-19 is caused by infection with a new coronavirus called severe acute respiratory syndrome coronavirus 2, or SARS-CoV-2. *Symptoms of COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (last updated Feb. 22, 2021). Compared to the flu, COVID-19 seems to spread more easily and causes more serious illnesses in some people. *Id.*

[2] Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc., 939 F.3d 1145, 1151 (11th Cir. 2019).

[3] Matt Torman, *Zoom Court Is Now in Session: How the Legal World Has Pivoted to Virtual During COVID-19*, ZOOM BLOG (July 23, 2020), https://blog.zoom.us/zoom-virtual-law-firm-virtual-courtroom-during-covid-19/.

outside the physical presence of the arbitrator, so the court may not enforce an arbitral summons for a witness to appear via video conference."[4] The Eleventh Circuit reached its conclusion by applying a textual approach to statutory construction, for which it relied in part on "dictionaries" published around the time the FAA was enacted—in 1925.[5]

With *Managed Care*, the Eleventh Circuit became the first, and thus far only, federal circuit to limit the use of video technology in connection with arbitrators' power to summons non-party witnesses and document production under Section 7 of the FAA.[6] While other federal circuit courts had previously addressed and, by majority, limited pre-hearing discovery under Section 7 as it relates to nonparties to the arbitration proceedings,[7] none had considered the role of remote technologies under Section 7.

This Article begins by examining the text of Section 7 and how federal circuit courts' opinions issued prior to *Managed Care* interpreted the language used in that provision. The Article then considers the specific holding of the Eleventh Circuit in *Managed Care.* Then, the Article proposes an alternative, perhaps timelier, textual approach to Section 7, and how that alternative approach comports with standards in the field of arbitration. Finally, the Article examines the implication of *Managed Care* for arbitrations conducted during the COVID-19 pandemic and in a post-pandemic environment.

I. SECTION 7 OF THE FAA

The FAA was enacted in 1925 and then reenacted and codified in 1947 as Title 9 of the United States Code.[8] "It has not been amended since the enactment of Title VII in 1964."[9] The FAA was enacted "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been

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[4] *Managed Care,* 939 F.3d at 1151.
[5] *Id.* at 1160.
[6] *Id.*
[7] *See* discussion *infra* Part II.
[8] EEOC v. Waffle House, Inc., 534 U.S. 279, 288 (2002).
[9] *Id*. at 288–89.

adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."[10] Arbitration is a creature of contract.[11] Thus, the arbitrator's power over the parties to the arbitration proceedings is limited by the contours of the parties' agreement.[12] In like manner, the only power an arbitrator has over non-parties—who have not bargained to submit to arbitration—is the authority granted by the FAA.[13]

Regarding arbitrators' subpoena powers, Section 7 of the FAA provides:

> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may 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 in the case . . . . [I]f any person or persons so summoned to testify shall refuse or neglect to obey said 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 attendance of such person or persons before* said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.[14]

This provision gives arbitrators two powers that are relevant here: "First, arbitrators may compel the attendance of a person 'to attend

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[10] *Id.* at 289 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U. S. 20, 24 (1991)).

[11] *See* Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc., 252 F.3d 218, 224 (2d Cir. 2001).

[12] *See id.*

[13] Kennedy v. Am. Express Travel Related Servs. Co., Inc., 646 F. Supp. 2d 1342, 1343 (S.D. Fla. 2009).

[14] 9 U.S.C. § 7 (alteration in original) (emphasis added).

before them . . . as a witness,' and second, arbitrators may compel such person 'to bring with him or them' relevant documents."[15]

Since an arbitrator's power over parties to an arbitration proceeding stems from the arbitration agreement, notwithstanding limitations in Section 7, where the agreement so provides, the arbitrator may more broadly compel discovery from the parties.[16] Federal courts are split, however, on whether Section 7 authorizes arbitrators to compel pre-hearing document discovery from entities or persons not parties to the arbitration proceeding.[17] Some courts have concluded that Section 7 restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the "physical" presence of the arbitrator and to hand over the documents at that time.[18] This Article proceeds to take a brief look at these decisions.

II. FEDERAL CIRCUITS INTERPRETING SECTION 7 PRIOR TO *MANAGED CARE*

The Eleventh Circuit's decision in *Managed Care* was issued against a backdrop of opinions by the Fourth,[19] Sixth,[20] Eighth,[21] Third,[22] Second,[23] and Ninth[24] Circuits addressing the scope of arbitrators' powers under Section 7 to compel a person "to attend before them . . . as a witness" and "to bring with him or them" relevant documents.[25] The outcome of *Managed Care* was at least

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[15] CVS Health Corp. v. Vividus, LLC, 878 F.3d 703, 706 (9th Cir. 2017).

[16] Life Receivables Tr. v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 217 (2d Cir. 2008); *see also CVS Health*, 878 F.3d at 708.

[17] *See* discussion *infra* Part II.

[18] *See* Hay Grp., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004); Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc., 939 F.3d 1145, 1160–61 (11th Cir. 2019).

[19] COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 275 (4th Cir. 1999).

[20] Am. Fed'n of Television & Radio Artists v. WJBK-TV, 164 F.3d 1004, 1004 (6th Cir. 1999).

[21] In re Sec. Life Ins. Co. of Am., 228 F.3d 865, 868 (8th Cir. 2000).

[22] *Hay Grp.*, 360 F.3d at 405, 407.

[23] Life Receivables Tr. v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 214 (2d Cir. 2008).

[24] CVS Health Corp. v. Vividus, LLC, 878 F.3d 703, 705 (9th Cir. 2017).

[25] *Id.*

partly shaped by this preexisting legal landscape.[26] Therefore, it is important to take a brief look at the factual context of the federal circuits' prior opinions and the reasoning behind those decisions.

A. *Fourth Circuit*

In *COMSAT Corporation v. National Science Foundation*, the Fourth Circuit decided an appeal brought by the National Science Foundation (the "NSF") from an order requiring the agency to comply with subpoenas issued by an arbitrator during prehearing discovery.[27] The subpoenas demanded that the agency, which was not a party to the arbitration agreement at issue, produce documents and employee testimony related to a construction contract between appellee, COMSAT, Inc., and an NSF awardee.[28] The Fourth Circuit reversed the district court's decision and held instead that the FAA does not authorize an arbitrator to subpoena third parties during prehearing discovery, absent a showing of special need or hardship.[29]

The Fourth Circuit stated that "[b]y its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear 'before them;' that is, to compel testimony by non-parties at the arbitration hearing."[30] The FAA does not "grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during prehearing discovery."[31] The court also rejected the proposition that an arbitrator's power was coextensive with that of a federal district court so as to allow "full-blown discovery."[32] The rationale for doing so, the court reasoned, is that "[p]arties to a private arbitration agreement forego certain procedural rights attendant to formal litigation

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[26] *See* Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc., 939 F.3d 1145, 1151 (11th Cir. 2019).

[27] COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 271 (4th Cir. 1999).

[28] *Id.*

[29] *Id.* at 271, 278. The appellate court also analyzed the issues raised by the appeal under the Administrative Procedure Act. *Id.*

[30] *Id.* at 275.

[31] *Id.*

[32] *Id.* at 276.

in return for a more efficient and cost-effective resolution of their disputes."[33] The Fourth Circuit stated, however, that "under unusual circumstances," and upon making the requisite showing, a party may "petition the district court to compel pre-arbitration discovery upon a showing of special need or hardship."[34]

B. *Sixth Circuit*

A few months prior to the Fourth Circuit's decision in *COMSAT*, the Sixth Circuit briefly addressed Section 7, in dicta, in *American Federation of Television & Radio Artists v. WJBK-TV*.[35] That case involved a labor dispute implicating section 301 of the Labor Management Relations Act.[36] The appellant filed an action in federal court seeking to enforce a subpoena *duces tecum* issued by the arbitrator to a nonparty to the underlying arbitration.[37] The Sixth Circuit ultimately agreed with the appellant that the district court had authority to enforce the arbitrator's subpoena under section 301 and looked to Section 7 of the FAA for guidance in reaching its decision.[38]

Specifically, examining Section 7, the Sixth Circuit noted that:

> Just as the subpoena power of an arbitrator under the FAA extends to non-parties, a labor arbitrator conducting an arbitration under a collective bargaining agreement should also have the power to subpoena third parties. *See* Wilkes-Barre, 559 F. Supp. at 880 ("a decision to enforce an arbitrator's subpoena will promote the goals of labor policy if it will foster the effective operation of arbitration machinery"). In addition, the FAA's provision authorizing an arbitrator to compel the production of documents from third parties for purposes of an arbitra-

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[33] *Id.*

[34] *Id.*

[35] Am. Fed'n of Television & Radio Artists v. WJBK-TV 164 F.3d 1004, 1004 (6th Cir. 1999).

[36] *Id.* at 1006–07.

[37] *Id.*

[38] *Id.* at 1008–09.

> tion hearing has been held to implicitly include the authority to compel the production of documents for inspection by a party prior to the hearing.[39]

Accordingly, the court concluded that "a labor arbitrator is authorized to issue a subpoena *duces tecum* to compel a third party to produce records he deems material to the case either before or at an arbitration hearing."[40]

C. *Eighth Circuit*

In re Security Life Insurance Co. of America arose from an underlying arbitration brought by a health insurer to determine its compliance with a reinsurance contract it had in place with Transamerica Occidental Life Insurance Company ("Transamerica") and other insurers.[41] The arbitration panel issued a subpoena to Transamerica "to produce documents and to provide the testimony of a certain employee."[42] However, Transamerica "refused to respond to the subpoena, contending that it was not a party to the arbitration" and, thus, the arbitration panel had no authority to issue the subpoena under the FAA.[43] The Eight Circuit disagreed.[44]

While the Eight Circuit recognized that Section 7 does not "explicitly authorize the arbitration panel to require the production of documents for inspection by a party" and that "the efficient resolution of disputes through arbitration necessarily entails a limited discovery process," it found that "efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing."[45] Therefore, the court held that "implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the

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39 *Id.* at 1009.
40 *Id.*
41 *In re* Sec. Life Ins. Co. of Am., 228 F.3d 865, 867 (2000).
42 *Id.* at 867–68.
43 *Id.* at 868.
44 *Id.* at 870–71.
45 *Id.* at 870.

hearing."[46] And the arbitration panel could exercise its power even if Transamerica was not a party to the arbitration.[47]

Thus, the Eighth Circuit apparently took a policy approach, as opposed to a textual approach, to hold that Section 7 authorizes arbitrators to issue prehearing document-production subpoenas on non-parties.[48] To date, it is the only circuit to reach this conclusion, short of the Sixth Circuit's similar conclusion, in dicta, in *American Federation*.[49]

D. *Third Circuit*

In *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, an employer commenced an arbitration proceeding against its former employee, alleging that the employee violated a non-solicitation clause in his separation agreement.[50] To obtain information for the arbitration, the employer served subpoenas for documents on the employee's new employers, PwC and its division, E.B.S.[51] PwC and E.B.S. objected to the subpoenas, leading the employer to move for enforcement in federal district court.[52] Among other things, PwC and E.B.S. argued that the FAA "did not authorize the arbitration panel to issue subpoenas to non-parties for prehearing document production."[53]

Accepting the view of the Eighth Circuit and other district courts, the district court held "that the FAA authorizes arbitration panels to issue subpoenas to non-parties for prehearing document production."[54] The district court found "that even under the view of the Fourth Circuit, which permits production only when there is

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[46] *Id.* at 870–71.

[47] *Id.* at 871.

[48] *Id.* at 870–71.

[49] Am. Fed'n of Television & Radio Artists v. WJBK-TV, 164 F.3d 1004, 1009 (6th Cir. 1999).

[50] Hay Grp., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 405 (3d Cir. 2004).

[51] *Id.*

[52] *Id*.

[53] *Id.* at 406.

[54] *Id*.

a 'special need,' the panel's subpoenas would be valid."[55] On appeal, the Third Circuit reversed the decision of the district court.[56]

Then-Judge Alito, writing the opinion of the appellate court, began with certain principles of statutory construction, noting "that recourse to legislative history or underlying legislative intent is unnecessary when a statute's text is clear and does not lead to an absurd result" and "a court's policy preferences cannot override the clear meaning of a statute's text."[57] Looking at the "unambiguous" language of Section 7, the Third Circuit found that:

> [t]he power to require a non-party "to bring" items "with him" clearly applies only to situations in which the non-party accompanies the items to the arbitration proceeding, not to situations in which the items are simply sent or brought by a courier. In addition, the use of the word "and" makes it clear that a non-party may be compelled "to bring" items "with him" only when the non-party is summoned "to attend before [the arbitrator] as a witness." Thus, Section 7's language unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time.[58]

For support, and to show that the result of its analysis is not absurd, the court pointed to similarities in the language used in Section 7 of the FAA and in Federal Rule of Civil Procedure 45 at the time it was adopted in 1937, which, as interpreted by courts, did not allow federal courts to issue prehearing document subpoenas on non-parties:

> [W]e believe that a reasonable argument can be made that a literal reading of Section 7 actually furthers arbitration's goal of "resolving disputes in a

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55 *Id.*
56 *Id.*
57 *Id.*
58 *Id.* at 407.

> timely and cost efficient manner." *Painewebber Inc. v. Hofmann*, 984 F.2d 1372, 1380 (3d Cir.1993). First, as noted above, until 1991 the Federal Rules of Civil Procedure themselves did not permit a federal court to compel pre-hearing document production by non-parties. That the federal courts were left for decades to operate with this limitation of their subpoena power strongly suggests that the result produced by interpreting Section 7 of the FAA as embodying a similar limitation is not absurd.[59]

Citing *COMSAT*, the second reason the Third Circuit provided for concluding "it is not absurd to read the FAA as circumscribing an arbitration panel's power to affect those who did not agree to its jurisdiction"[60] is:

> The requirement that document production be made at an actual hearing may, in the long run, discourage the issuance of large-scale subpoenas upon non-parties. This is so because parties that consider obtaining such a subpoena will be forced to consider whether the documents are important enough to justify the time, money, and effort that the subpoenaing parties will be required to expend if an actual appearance before an arbitrator is needed. Under a system of pre-hearing document production, by contrast, there is less incentive to limit the scope of discovery and more incentive to engage in fishing expeditions that undermine some of the advantages of the supposedly shorter and cheaper system of arbitration.[61]

The Third Circuit expressly rejected the Fourth Circuit's "special needs" standard as a potential exception to its holding, and stated that it disagreed with the Eighth Circuit's "power-by-

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[59] *Id*. at 409.

[60] *Id.*

[61] *Id.* (citing COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 269, 276 (4th Cir. 1999)).

implication analysis," reasoning instead that "[i]f the FAA had been meant to confer . . . broader power, . . . the drafters would have said so . . . ."[62] Finally, the Third Circuit noted that if it is desirable for arbitrators to possess the power to require non-parties to produce documents without also subpoenaing them to appear in person before the panel, the way to confer that power is by "amending Section 7 of the FAA, just as Rule 45 of the Federal Rules of Civil Procedure was amended in 1991 to confer such a power on district courts."[63]

E. *Second Circuit*

In *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, Life Settlements Corp. d/b/a Peachtree Life Settlements ("Peachtree") purchased life insurance policies from elderly insureds for its own account and for related entities, such as Life Receivables Trust (the "Trust").[64] Peachtree receives contractual fees from the Trust but it does not hold a financial interest in the Trust.[65] Instead, the Trust "pays the premiums on the policy while the insured remains alive in order to keep the policies in force" and, "[u]pon the insured's demise, the Trust is paid the 'net death benefit' on the policy."[66] "As a hedge against the possibility that the insured might live past his or her projected life expectancy, Peachtree buys contingent cost insurance ("CCI") policies from Syndicate 102 for the benefit of the Trust."[67] Hence, "[i]f the insured lives more than two years beyond his or her life expectancy, Syndicate 102 pays the Trust the net death benefit and assumes the policy itself."[68]

In one instance, Syndicate 102 refused to pay the Trust net death benefits on grounds that the Trust fraudulently misrepresented the date on which it acquired the policies at issue and had

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62 *Id.* at 408.

63 *Id.* at 409.

64 Life Receivables Tr. v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 212 (2d Cir. 2008).

65 *Id.*

66 *Id.*

67 *Id*.

68 *Id.*

fraudulently calculated the insured's life expectancy.[69] The agreement between Peachtree, the Trust, and Syndicate 102 contained an arbitration clause.[70] Pursuant to that clause, the Trust initiated arbitration against Syndicate 102, during which Syndicate 102 submitted certain discovery requests from the Trust and Peachtree, a non-party to the arbitration.[71] Subsequently, "the arbitration panel issued a subpoena requiring Peachtree to produce responsive documents" and "Peachtree filed suit in federal court and moved to quash the subpoena."[72] The district court granted Syndicate 102's motion to enforce the subpoena.[73]

On appeal, the Second Circuit reversed the district court's decision and held that the documents had to be produced by a witness at a hearing before the arbitrators.[74] The Second Circuit began by reiterating the established principle that the court's only role when faced with clear statutory language is to enforce that language "according to its terms."[75] Finding that the "language of section 7 is straightforward and unambiguous," the appellate court interpreted that language to mean that "[d]ocuments are only discoverable in arbitration when brought before arbitrators by a testifying witness."[76] The court further explained:

> The FAA was enacted in a time when pre-hearing discovery in civil litigation was generally not permitted. The fact that the Federal Rules of Civil Procedure were since enacted and subsequently broadened demonstrates that if Congress wants to expand arbitral subpoena authority, it is fully capable of doing so. There may be valid reasons to empower arbitrators to subpoena documents from third parties, but we must interpret a statute as it might be, since "courts must presume that a legislature says in a

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69 *Id.* at 213.
70 *Id.*
71 *Id.*
72 *Id.* at 214.
73 *Id.*
74 *Id.* at 218–19.
75 *Id.* at 216.
76 *Id.*

> statute what it means and means in a statute what it says . . . ." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. [*sic*] 1146, 117 L.Ed.2d 391 (1992). A statute's clear language does not morph into something more just because courts think it makes sense for it to do so.[77]

In reaching this conclusion, the Second Circuit "join[ed] the Third Circuit in holding that Section 7 of the FAA does not authorize arbitrators to compel pre-hearing document discovery from entities not party to the arbitration proceedings."[78]

The Second Circuit noted that this outcome "does not leave arbitrators powerless" as arbitrators had other tools available to compel discovery from non-parties.[79] For instance, "where the non-party to the arbitration is a party to the arbitration agreement, there may be instances where formal joinder is appropriate, enabling arbitrators to exercise their contractual jurisdiction over parties before them."[80] Additionally, the arbitration panel or a single arbitrator could summon a non-party to give testimony and produce documents at a time separate and apart from the conduct of a final hearing.[81]

As a practical matter, it has become commonplace in sophisticated arbitration practice to designate a single member of a tribunal, often the Chair, to travel to the location of non-party witnesses to summons them for the presentation of documents and testimony.[82] This clunky process has permitted parties and arbitrators to obtain essential evidence for decades.[83]

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[77] *Id.* at 217.

[78] *Id.* at 216–17.

[79] *Id.* at 218.

[80] *Id.*

[81] *Id.*

[82] *See Rules of Arbitration*, INT'L TRADE CTR., https://www.intracen.org/Rules-of-Arbitration/ (last visited May 15, 2021) ("The appointed arbitrator can require secretarial assistance from the Center, travel to the residence of the witness or any other place, and summon the witness to the Tribunal.").

[83] *See Call Center Call Out*, NPR (Oct. 2, 2020), https://www.npr.org/transcripts/918195277 (referring to the benefits of private arbitration as opposed to the "clunky" judicial arbitration process).

F. *Ninth Circuit*

In *CVS Health Corp. v. Vividus, LLC*, an arbitration panel in an underlying arbitration had issued a subpoena against the appellee, who was not a party to the arbitration, directing the appellee to produce certain documents prior to an arbitration hearing.[84] The appellee did not comply and, subsequently, the appellants attempted to enforce the subpoena in federal court.[85] The district court held "that the FAA does not grant arbitrators the power to compel the production of documents from third parties outside of a hearing."[86] After considering the text of the FAA, the Ninth Circuit affirmed.[87]The Ninth Circuit explained that:

> A plain reading of the text of section 7 reveals that an arbitrator's power to compel the production of documents is limited to production at an arbitration hearing. The phrase "bring with them," referring to documents or other information, is used in conjunction with language granting an arbitrator the power to "summon . . . any person to attend before them." Under this framework, any document productions ordered against third parties can happen only "before" the arbitrator. The text of section 7 grants an arbitrator no freestanding power to order third parties to produce documents other than in the context of a hearing.[88]

The Ninth Circuit expressly noted the similar interpretation of Section 7 by the Third, Second, and Fourth Circuits.[89] It rejected the approach taken by the Eighth Circuit based on the plain text of the statute and practical consideration—that is, the view taken by other circuits that "third parties did not agree to the arbitrator's

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[84] CVS Health Corp. v. Vividus, LLC, 878 F.3d 703, 704–05 (9th Cir. 2017).

[85] *Id.* at 705.

[86] *Id.*

[87] *Id.* at 706–08.

[88] *Id.* at 706 (citation omitted).

[89] *Id.* at 707.

jurisdiction and this limit on document discovery tends to greatly lessen the production burden upon non-parties."[90]

Two years after the Ninth Circuit's decision in *CVS Health*, the Eleventh Circuit issued *Managed Care*.[91] As explained below, the Eleventh Circuit adopted a similar, but even more limited, view of arbitrators' subpoena power under Section 7, like that taken by the Second, Third, Fourth, and Ninth Circuits.[92]

III. THE ELEVENTH CIRCUIT EXAMINES SECTION 7 IN *MANAGED CARE*

In *Managed Care*, medical providers filed class action lawsuits against managed care insurance companies, like CIGNA Healthcare, Inc. ("CIGNA"), alleging that insurers improperly processed and rejected certain physicians' claims for payment.[93] CIGNA settled with the class plaintiffs and the court approved that

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[90] *Id.* at 708 (citation and internal quotation marks omitted).

[91] Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc., 939 F.3d 1145, 1150 (11th Cir. 2019).

[92] The First, Fifth, Seventh, and Tenth Circuits have apparently not addressed the issue. However, district courts in the Fifth and Seventh Circuits have adopted the majority position above. *See Next Level Planning & Wealth Mgmt., LLC v. Prudential Ins. Co. of Am.,* No. 18-MC-65, 2019 WL 585672, at *4 (E.D. Wis. Feb. 13, 2019) ("The Court of Appeals for the Seventh Circuit has not addressed the question. But district courts within the circuit have agreed with the Second and Third Circuits.") (compiling cases); *Chicago Bridge & Iron Co. N.V. v. TRC Acquisition, LLC*, No. CIV.A. 14-1191, 2014 WL 3796395, at *3 (E.D. La. July 29, 2014) ("This Court agrees with the Second, Third, and Fourth Circuits that Section 7 provides only for the issuance and enforcement of a subpoena *duces tecum* against non-parties who are compelled to testify as witnesses before the arbitrator, not for a subpoena seeking merely the production of documents by a non-party who is not summoned to testify as a witness before the arbitrator."); *Empire Fin. Grp., Inc. v. Penson Fin. Servs., Inc.*, No. CIV.A. 3:09-CV-2155D, 2010 WL 742579, at *3 (N.D. Tex. Mar. 3, 2010) ("The court adopts the reasoning of the Third and Second Circuits and holds that § 7 of the FAA does not authorize arbitrators to compel production of documents from a non-party, unless they are doing so in connection with the non-party's attendance at an arbitration hearing. As the Third Circuit reasoned, the text of § 7 mentions only orders to produce documents when brought with a witness to a hearing.").

[93] *Managed Care*, 939 F.3d at 1150.

settlement agreement.[94] "Following the settlement, Managed Care Advisory Group, LLC ('MCAG'), acting on behalf of some class members, entered into an arbitration agreement with CIGNA in an attempt to resolve a dispute over a portion of the settlement funds."[95] "The Settlement Agreement did not provide for arbitration and MCAG was not a party to it."[96] The settlement administrator and certain reviewers involved in the processing and administration of the settlement agreement (the "Third-Parties") were not parties to the binding arbitration and the arbitration agreement was only between MCAG and CIGNA.[97]

During the arbitration, the arbitrator issued summonses to the Third-Parties requiring them to participate in the arbitration hearing by video and also required the summonsed parties to produce documents.[98] The Third-Parties objected to the summonses, which led MCAG to file a motion in federal court seeking to enforce the arbitration summonses under Section 7.[99] The district court granted MCAG's motion and also noted that "[t]he Arbitrator shall be allowed to arbitrate the claims in the manner he sees fit."[100] On appeal, the Eleventh Circuit held that the "district court abused its discretion in enforcing the arbitral summonses because the court lacked power under Section 7 to order the witnesses to appear at the video conference and provide pre-hearing discovery."[101]

Addressing both of the arbitrator's powers under Section 7, the Eleventh Circuit interpreted the "plain meaning" of Section 7 "as (1) requiring summonsed non-parties to appear in the physical presence of the arbitrator as opposed to a video conference or tele-

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94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.* at 1152.

98 *Id.*at 1150–51.

99 *Id.*

100 *Id.* at 1153.

101 *Id.* at 1161. In addition to ruling on the propriety of prehearing discovery from non-parties to an arbitration, the Eleventh Circuit addressed issues of finality of the district court's order enforcing the arbitral summonses and the order enforcing the settlement agreement; jurisdiction, venue, and service; and the district court's failure to enforce the settlement agreement and compel an accounting. *Id.* at 1154–63.

conference; and (2) prohibiting pre-hearing discovery."[102] Interestingly, none of the earlier circuit court decisions addressed whether arbitrators could compel a non-party to "attend"—either for production of documents or oral testimony, or both—by telephone, video conference, or other communications technology.[103]

Expressly agreeing with the position taken by the Second, Third, Fourth, and Ninth Circuits, the Eleventh Circuit held that:

> [T]he plain language of the statute is unambiguous in requiring witnesses to appear before an arbitrator and bring any documents with them, thus prohibiting pre-hearing discovery from non-parties. The FAA confers the power to compel a non-party to attend an arbitration hearing and bring documents, but it is silent regarding the power to compel documents from non-parties without summoning the non-party to testify. *See* 9 U.S.C. § 7. Thus, the FAA implicitly withholds the power to compel documents from non-parties without summoning the non-party to testify. And if Congress intended the arbitrators to have the broader power to compel documents from non-parties without summoning the non-party to testify, it could have said so. Accordingly, we conclude that 9 U.S.C. § 7 does not permit pre-hearing depositions and discovery from non-parties.[104]

The Eleventh Circuit proceeded to parse this holding. First, it addressed the arbitrator's power to compel attendance.[105] Recall, Section 7 states that "arbitrators . . . may summon in writing any person to *attend before* them . . . as a witness."[106] To "ascertain the meaning of 'attendance' and 'before'" at the time Congress enacted the FAA in 1925, the Eleventh Circuit looked to "dictionaries" from that time.[107] Accordingly, the court concluded that:

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102 *Id.* at 1161.
103 *See* discussion *supra* Part II.
104 *Managed Care*, 939 F.3d at 1159–60.
105 *Id.* at 1154.
106 9 U.S.C. § 7 (emphasis added).
107 *Managed Care*, 939 F.3d at 1160.

> In 1925, "attendance" meant the "[a]ct of attending," and "attend" meant "be present at." *See, e.g.*, H.W. Fowler & F.G. Fowler, *The Concise Oxford Dictionary of Current English* 52 (1926). Similarly, "before" meant "in [the] presence of." *Id.* at 74. And "presence" meant "place where person is," while "present" meant "[b]eing in the place in question." *Id.* at 650. Thus, Section 7 does not authorize district courts to compel witnesses to appear in locations outside the physical presence of the arbitrator, so the court may not enforce an arbitral summons for a witness to appear via video conference.[108]

As applied to the facts of the case, the Eleventh Circuit found that the district court erred in enforcing the summonses when the arbitrator would have been located in Miami while the non-parties were in their respective states, and the hearing would have taken place via video conference.[109]

Moving to the second power granted to arbitrators under Section 7—an arbitrator's power to compel a witness "to bring with him or them" relevant documents—the Eleventh Circuit heavily relied on the Third Circuit's reasoning in *Hay Group* to conclude that prehearing discovery "is not authorized by the FAA."[110] A witness must appear in the physical presence of an arbitrator and bring documents at the time of the hearing.[111] The Eleventh Circuit agreed with *Hay Group* that "[e]nforcing Section 7's prohibition on pre-hearing discovery does not lead to an absurd result because it will force the parties to consider whether the documents are important enough to justify" resources "the subpoenaing parties will be required to expend if an actual appearance before an arbitrator is needed" and "will induce the arbitrator to weigh whether the production of the documents is necessary."[112]

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[108] *Id.*

[109] *Id.*

[110] *Id.* at 1161.

[111] *Id.*

[112] *Id.* (citing Hay Grp., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 409 (3d Cir. 2004)) (internal quotation marks omitted).

The Eleventh Circuit has thus taken a strict textualist approach to Section 7, as the majority of other Circuits have done.[113] This stands in contrast to the Eighth Circuit's—and even the Sixth Circuit's suggested—more policy-based approach to the issue.[114] This Article does not criticize either approach. However, the Eleventh Circuit currently stands alone, even among the textualist courts, in prohibiting the use of video technology under Section 7.[115] As discussed in the next Part, there is room for another textualist approach to the issue of video technology under Section 7.

IV. AN ALTERNATIVE, PERHAPS TIMELIER, TEXTUAL APPROACH TO SECTION 7

On its face, the Eleventh Circuit's opinion in *Managed Care* would appear to be a disciplined textual analysis; it consults a dictionary, one published near the time the FAA was adopted, to aid the court in its interpretation of the language of Section 7.[116] This approach to statutory construction places the Eleventh Circuit firmly on the side of circuits that have embraced a textual approach to Section 7 and rejects the position of other circuits that have gone beyond the text of Section 7 to imply additional authority of arbitrators issuing summonses and courts asked to enforce those sum-

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[113] *See id.* at 1160 ("Looking to dictionaries from the time of Section 7's enactment makes clear that a court order compelling the 'attendance' of a witness 'before' the arbitrator meant compelling the witness to be in the physical presence of the arbitrator."); CVS Health Corp. v. Vividus, LLC, 878 F.3d 703, 706 (9th Cir. 2017) (grounding analysis on the plain text of Section 7); Life Receivables Tr. v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 216 (2d Cir. 2008) (same); *Hay Grp., Inc.*, 360 F.3d at 406 (same); COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d at 269, 275 (4th Cir. 1999) (same).

[114] *See* In re Sec. Life Ins. Co. of Am., 228 F.3d 865, 870–71 (8th Cir. 2000); Am. Fed'n of Television and Radio Artists v. WJBK-TV, 164 F.3d 1004, 1009 (6th Cir. 1999).

[115] *See Managed Care*, 939 F.3d at 1160. Some other circuit courts have discussed arbitrators' power to summon non-parties, but none addressed whether arbitrators could compel a non-party to attend via telephone or video conference. *See CVS Health*, 878 F.3d at 706; *Life Receivables*, 549 F.3d at 216–17; *Hay Grp.*, 360 F.3d at 408; *In re Sec. Life Ins. Co. of Am.*, 228 F.3d at 870–71; *COMSAT Corp.*, 190 F.3d at 269, 275–76; *Am. Fed'n*, 164 F.3d at 1009.

[116] *See Managed Care*, 939 F.3d at 1160.

monses.[117] Certainly, a textualist approach to interpreting the FAA is not new, nor is it free of controversy.[118] In fact, it is the dominant method employed by courts in the United States.[119] In the words of Justice Elena Kagan, "we're all textualists now . . . ."[120]

For textualists, "[t]he only relevant congressional intent is the intent that a court can glean from the plain meaning of the statutory language."[121] Consequently, textualists do not advocate "judicial review of legislative history and other materials that are not contained in a statute's language . . . ."[122] This supposedly guards against "judicial activism through the manipulation of legislative history and other extrinsic materials."[123] To this end, "[d]ictionaries and canons of statutory interpretation assist textualist[s] in their efforts to garner a statute's plain meaning."[124]

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[117] *Compare Managed Care*, 939 F.3d at 1160 (embracing textual approach to Section 7 in its use of dictionary to interpret Section 7), *CVS Health*, 878 F.3d at 706 (reaching a conclusion after "[a] plain reading of the text of section 7" and "considering the text of the FAA"), *Life Receivables*, 549 F.3d at 216 (emphasizing court's role to enforce statute's language "according to its terms"), *Hay Grp.*, 360 F.3d at 406 (looking at "unambiguous" language of Section 7, which overrides "a court's policy preferences"), *and COMSAT Corp.*, 190 F.3d at 275 (interpreting Section 7 "[b]y its own terms"), *with In re Sec. Life Ins. Co. of Am.*, 228 F.3d at 870–71 (ruling with a policy approach rather than a textual approach)*, and Am. Fed'n*, 164 F.3d at 1009 (taking a more policy-based approach in interpreting Section 7).

[118] *See* Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress,* 34 FLA. ST. U. L. REV. 99, 157 (2006); Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 830 (2002).

[119] *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

[120] *Id.* (quoting Justice Elena Kagan as saying: "I think we're all textualists now in a way that just was not remotely true when Justice Scalia joined the bench." (citation omitted)).

[121] Pittman, *supra* note 118, at 802.

[122] *Id.*

[123] *Id.* at 802–03. Justice Scalia "support[ed] a 'holistic textualism' approach whereby a court should obtain the plain meaning of the relevant statutory provision by examining both similar language in other provisions of the same statute and similar language in other statutes." *Id.* at 803.

[124] *Id.*

In this Part, this Article will first examine how the U.S. Supreme Court has used a textualist approach to interpret language in Sections 1 and 2 of the FAA, reviewing two decisions that analyzed the impact of the Court's subsequent expansion of the Commerce Clause, on the meaning of the terms used by Congress in 1925—"involving commerce" in Section 2 and "engaged in foreign or interstate commerce" in Section 1.[125] The two decisions, *Allied-Bruce Terminix Cos. Inc. v. Dobson* and *Circuit City Stores, Inc. v. Adams*, served to expand the applicability of the FAA to nearly all employment agreements in the United States, effectively preempting state law governing such employment relations.[126]

Then, the Article will propose an alternative interpretation of Section 7 based on a textual analysis.[127] This alternate interpretation is particularly timely considering the limitations on in-person interactions following the COVID-19 pandemic.[128] Finally, the Article will compare its proposed alternate textual interpretation of Section 7 to the framework of existing rules on virtual proceedings by arbitral bodies.[129]

A. *The Supreme Court, Textualism, and the FAA*

Perhaps no federal statute has undergone greater modification through decades of decisions by the Supreme Court than has the FAA.[130] The Supreme Court has employed a textual analysis in some of the most consequential decisions regarding the FAA.[131] And no single Supreme Court decision interpreting the FAA arouses greater controversy than its 5-4 decision in *Circuit City Stores*, in which it held that the FAA applies and preempts state

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[125] *See* Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 273–74 (1995); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 118 (2001).

[126] *See Allied-Bruce*, 513 U.S. at 272, 279; *Circuit City*, 532 U.S. at 119.

[127] *See* discussion *infra* Part IV.B.

[128] *See Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last updated Mar. 8, 2021) (recommending at least six feet of distance between individuals and that persons avoid crowds and poorly ventilated indoor spaces).

[129] *See* discussion *infra* Part IV.C.

[130] *See* Moses, *supra* note 118, at 112–13.

[131] *Id.* at 131.

law that seeks to prohibit or limit mandatory arbitration provisions in employment contracts.[132] That decision, and the controversy it engendered, arises from differing applications of textual analysis to the scope of the FAA as expressed in Section 2[133] and the scope of the exception to its scope as expressed in Section 1.[134]

In *Allied-Bruce*, the Court interpreted Section 2's "contract evidencing a transaction involving commerce"[135] phrase as implementing Congress's intent "to exercise [its] commerce power to the full."[136] In *Circuit City*, the Court, in a highly charged decision,[137] interpreted Section 1's "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"[138] phrase as implementing Congress's intent to exempt from the FAA *only* employment contracts of "transportation workers."[139] The majority reached its conclusion by applying a textual analysis that relied on "the maxim *ejusdem generis,* the statutory canon that '[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'"[140]

In a dissenting opinion joined by Justices Stevens, Ginsburg, and Breyer, Justice Souter criticized the majority's application of the textualist approach and applied his own textual analysis to

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[132] *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 122 (2001).

[133] *See* Allied-Bruce Terminix Cos., Inc. v. Dobson*,* 513 U.S. 265, 273–74 (1995).

[134] *See Circuit City*, 532 U.S. at 119.

[135] 9 U.S.C. § 2.

[136] *See Allied-Bruce,* 513 U.S. at 277.

[137] Justice Kennedy, writing for the majority, noted that twenty-one attorneys general had joined an amicus opposing the preemption of state laws restricting or limiting the inclusion of arbitration clauses in employment contracts. *Circuit City*, 532 U.S. at 121. Sidestepping the argument, he simply pointed out that the argument was misdirected because it is relevant instead to the Court's decision in *Southland Corp. v. Keating,* 465 U.S. 1 (1984), holding that Congress intended the FAA to apply in state courts, and to pre-empt state antiarbitration laws to the contrary, and that Congress had not amended the FAA in response to the *Southland* decision. *Id.* at 122.

[138] 9 U.S.C. § 1.

[139] *Circuit City*, 532 U.S. at 119.

[140] *Id.* at 114–15 (citations omitted).

reach a different outcome; that is, Justice Souter would have affirmed the decision of the Ninth Circuit, particularly its interpretation of Section 1 of the FAA as excluding *all* "contracts of employment."[141] Justice Souter reasoned:

> In [*Allied-Bruce*,] . . . we decided that the elastic understanding of § 2 was the more sensible way to give effect to what Congress intended when it legislated to cover contracts "involving commerce," a phrase that we found an apt way of providing that coverage would extend to the outer constitutional limits under the Commerce Clause.[142]

Justice Souter concluded that "a correspondingly evolutionary reading" of Section 1 should be applied.[143] Thus, the dissenters in *Circuit City* took the position that Section 1 of the FAA should be given the same expansive interpretation previously applied by the Court in *Allied-Bruce* to Section 2.[144]

The majority, in an opinion written by Justice Kennedy, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas, disagreed.[145] In the Court's opinion, Justice Kennedy explained the impact of the maxim *ejusdim generis* as follows:

> Under this rule of construction the residual clause should be read to give effect to the terms "seamen" and "railroad employees," and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it; the interpretation of the clause pressed by respondent fails to produce these results.[146]

Thus, the majority concluded that only employment agreements of seamen, railroad employees, and transportation workers engaged in interstate commerce were excluded from the scope of the FAA by

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141 *Id.* at 136–37 (Souter, J., dissenting).
142 *Id.* at 134.
143 *Id.*
144 *See id.* at 135.
145 *Id.* at 114 (majority opinion).
146 *Id.* at 115.

the exclusion language in Section 1.[147] Only two members of the *Circuit City* court remain on the bench—Justice Thomas from the majority and Justice Breyer from the dissent.[148] However, textualism has become the dominant method of statutory interpretation by the Court.[149]

The result of just these two Supreme Court decisions made the FAA preemptively applicable to all employment contracts, other than those involving maritime, railroad, and transportation workers engaged in interstate commerce.[150] Similar decisions by the Court interpreting the FAA to apply to consumer and other contracts of adhesion have made millions of employment and consumer disputes and countless commercial disputes involving an arbitration clause subject to the jurisdiction of the FAA.[151] In all such cases, the authority of arbitrators to compel the production of evidence from non-parties is solely derived from Section 7 of the FAA, unless the parties have chosen alternative arbitration law.[152] This

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[147] *Id.* at 109.

[148] *See Current Members*, SUP. CT. U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited May 15, 2021).

[149] *See* Kavanaugh, *supra* note 119, at 2118.

[150] *See* Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 272–73 (1995); *Circuit City*, 532 U.S. at 119, 122.

[151] These decisions expanding the applicability of the FAA include: *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (FAA preempts California state law rule that contracts barring class actions are unconscionable.); *Preston v. Ferrer,* 552 U.S. 346, 359 (2008) (FAA requires arbitration first even when state law provides for administrative dispute resolution); *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 449 (2006) (arbitrators must first hear challenge to legality of contract); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (courts may not invalidate arbitration agreements under state laws applicable *only* to arbitration provisions); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995) (punitive damages may be awarded by arbitrators); *Shearson/Am. Express, Inc. v. McMahon,* 482 U.S. 220, 238 (1989) (Securities Exchange Act claims are arbitrable under the FAA); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (FAA pre-empts § 229 of California Labor Code); *Southland Corp. v. Keating,* 465 U.S. 1, 16 (1984) (FAA applicable to contracts under state law).

[152] The provisions of the Revised Uniform Arbitration Act, enacted by twenty-two states, permit more extensive arbitrator summonses, but courts have not yet addressed whether Section 7 of the FAA preempts such conflicting provisions. Arbitration Act, *Uniform Law Commission*, https://www.

means, following *Managed Care*, in the Eleventh Circuit, arbitrators may not require non-parties to appear at hearings by video link or other technology if the arbitration is governed by the FAA.[153] There are meaningful consequences to this position—consequences that could have been avoided had the Eleventh Circuit employed an alternative textual interpretation of Section 7.[154] This Article discusses one such alternative interpretation in the next Part.[155]

B. *Alternative Textual Interpretation of Section 7*

As then-Judge Alito said in *Hay Group,* "[i]n interpreting a statute, [courts] must, of course, begin with the text. 'The Supreme Court has repeatedly explained that recourse to legislative history or underlying legislative intent is unnecessary when a statute's text is clear and does not lead to an absurd result.'" [156] Consequently, this Part's alternative interpretation of Section 7 starts with an analysis of the language of Section 7 (aided by hypothetical facts), followed by an analysis of whether the proposed interpretation would yield an absurd result.

1. ANALYSIS OF SECTION 7'S TEXT

To aid in the analysis of the language of Section 7, consider the following hypothetical: Assume an arbitrator, in a case administered by the American Arbitration Association (the "AAA"), issued a summons to a non-party, John Doe, to provide testimony and bring documents responsive to a *duces tecum* request attached to the summons. Mr. Doe resides in Michigan. The arbitrator is a lawyer in Miami. The case was initiated by a Notice of Arbitration

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uniformlaws.org/committees/community-home?CommunityKey=a0ad71d6-085f-4648-857a-e9e893ae2736 (last visited May 15, 2021); *see* Albert Bates, *Non-Party Discovery in Commercial Arbitration: Legal Arbitration: Legal Hurdles and Practical Suggestions*, 10 PENN. BAR ASS'N 9, 10 (2005); *infra* Part IV.C.

153 *See infra* Part V (discussing practical impact of *Managed Care* on arbitration proceedings conducted during and after the pandemic).

154 *See* discussion *infra* Part V.

155 *Id.*

156 Hay Grp., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 406 (3d Cir. 2004) (citation omitted).

filed with the AAA. Also, assume that the summons was issued after May 15, 2020, and that the arbitrator ordered a final hearing in the case to be held by Zoom video conference commencing December 4, 2020, over Respondent's objection. The summons requests the non-party witness to make available electronic copies of any responsive documents he may have two weeks in advance of the hearing by delivering them to the arbitrator, but the summons assures him that if he does not want to produce them in advance, he may prepare electronic copies and have them available with him when he accepts the Zoom invitation issued by the arbitrator (or case manager) pursuant to the summons to present testimony during the Zoom hearing.

The summons requests the non-party witness to inform the arbitrator and the parties' counsel not later than June 15, 2020, whether the witness intends to comply with the summons. The Respondent and the non-party witness both object to the summons on June 15, and the arbitrator rules it must be honored after hearing objections from Respondent and counsel who appears for the limited purpose of objecting to the summons. Respondent and the non-party witness file motions to quash in the United States District Court for the Southern District of Florida. With these hypothetical facts, this Article now walks through the textual analysis.

i. *Consulting Dictionaries to Assist in Textual Analysis*

As the district court would do in the above hypothetical, the analysis begins with the text of Section 7 and the language of the summons. Recall, in pertinent part, Section 7 provides that arbitrators "may 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 in the case."[157] As the Eleventh Circuit did in *Managed Care*,[158] the hypothetical district court would consult dictionaries from the time of FAA's enactment to understand the language used by Congress in Section 7.

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[157] 9 U.S.C. § 7.

[158] *See* Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc., 939 F.3d 1145, 1160 (11th Cir. 2019).

Assume for this hypothetical, however, that the district court utilizes more than a single dictionary. Therefore, in addition to the one used by the Eleventh Circuit—H.W. Fowler & F.G. Fowler, *The Concise Oxford Dictionary of Current English* 52 (1926) (the "*Concise Oxford*")[159]—this analysis also consults the *Webster's Home and Office Dictionary* (1921) ("*Webster's*") and *Collier's New Dictionary of the English Language* (1926) ("*Collier's*").[160] In both *Webster's* and *Collier's*, "attend" is defined as: "to wait upon; accompany or be present with; serve or look after in any capacity; be present at; accompany or follow; v.i. *to pay heed or regard to*; listen; be in attendance upon."[161]

"Attendance" is defined as "the act of attending," or "waiting on."[162] And "before" is defined as: "before (be-for'), prep, in front of; preceding in space, time, or rank; *in presence or sight of; under jurisdiction of*; rather than; earlier than: adv. in front; in advance; previously; formerly; already."[163]

Based on the Eleventh Circuit's discussion in *Managed Care*, the *Concise Oxford* dictionary apparently does not include the italicized options as possible definitions of the pertinent terms of Section 7 being analyzed here.[164] There are at least four dictionaries from the relevant time period that the author has considered; two have the above referenced definitions used by the Eleventh Circuit (the *Concise Oxford* and the *Pocket Oxford Dictionary* (the "*Pocket Oxford*")) and two have alternative definitions (*Webster's* and *Collier's*) that could lead to a different meaning for Section 7.

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[159] *See id*. Similar to the Concise Oxford dictionary used by the *Managed Care* court, the Pocket Oxford Dictionary from 1924 ("Pocket Oxford") defines "attend" as "turn or apply one's mind" or "be present, be at or with, accompany." F. G. FOWLER & H. W. FOWLER, THE POCKET OXFORD DICTIONARY OF CURRENT ENGLISH 45 (1924).

[160] NOAH WEBSTER, WEBSTER'S HOME, SCHOOL AND OFFICE DICTIONARY 50, 64 (1921); P. F. COLLIER & SON COMPANY, COLLIER'S NEW DICTIONARY OF THE ENGLISH LANGUAGE 64, 93 (1926).

[161] WEBSTER, *supra* note 160, at 50; COLLIER, *supra* note 160, at 64.

[162] WEBSTER, *supra* note 160, at 50; COLLIER, *supra* note 160, at 64.

[163] WEBSTER, *supra* note 160, at 64; COLLIER, *supra* note 160, at 93.

[164] The 1921 edition of the *Concise Oxford* dictionary does not define "attend," "attendance," and "before" to mean, by interpretation, "to pay heed or regard to . . . the jurisdiction of." *See* FOWLER & FOWLER, *supra* note 159, at 52–53, 74.

Consulting *Webster's* or *Collier's,* Section 7's "to attend before them or any of them"[165] phrase may be interpreted to mean "*to pay heed or regard to . . . the jurisdiction of*"[166] the arbitrators, or any of them. It could also be interpreted to mean "*to be in attendance upon . . . the presence or sight of*" the arbitrators, or any of them.[167] Alternatively, this language may be interpreted the way the Eleventh Circuit interpreted it in *Managed Care*, using the 1926 edition of the *Concise Oxford*.[168]

The analysis does not end here. Courts should be disciplined in their use of dictionaries. Thus, this Article proceeds to determine whether the analysis displays such discipline.

ii. *Employing "Best Practices" for Using Dictionaries*

Numerous authors have criticized the Supreme Court's use of dictionaries in support of textual interpretation of statutes.[169] In a 2010 Duke Law Journal article, one author captured the issue well:

> Textualism demands adherence to an objective, original meaning of the text. Thus, it is no surprise that dictionaries are so appealing to textualists: dictionaries present an aura of objective authority, and there are dictionaries from any time period relevant for legal analysis. But fidelity to textualist principles requires a disciplined approach to using dictionaries because they are neither as objective nor as

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[165] Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc., 939 F.3d 1145, 1160 (11th Cir. 2019).

[166] WEBSTER, *supra* note 160, at 50, 64; COLLIER*, supra* note 160, at 64, 93 (emphasis added).

[167] *Webster's* dictionary defines presence as "the state or quality of being present; quickness at expedients; society"; and defines "present" as "being in a certain place; at hand or in sight; at this time; not past or future; instant or immediate . . . ." WEBSTER, *supra* note 160, at 391.

[168] *See Managed Care,* 939 F.3d at 1160.

[169] *See, e.g.,* James J. Brudney and Lawrence Baum*, Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras,* 55 WM. & MARY L. REV. 483, 502 (2013); John Calhoun, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 YALE L.J. 484, 487 (2014); Kevin Werbach, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1438–42 (1994).

> authoritative as they seem. And their misuse can lead to exactly what textualists often bemoan: the personal preferences of judges creeping into their interpretations of statutes or the Constitution.[170]

Many have suggested ways in which courts might do a better job of using dictionaries. For example, Professors Brudney and Baum have recommended the Supreme Court consider adopting a "three-step plan in order to foster a healthier approach to its dictionary habit."[171] Stated simply, the three steps are to: (1) recognize that it has a problem (e.g., that it is over-emphasizing the value of dictionaries and misusing them); (2) change its method of using dictionaries so it is more transparent; and (3) stop using dictionaries as a barrier to larger contextual considerations.[172] In another instance, the Harvard Symposium has suggested that "[i]f the Court relies on a dictionary, it should make at least some prima facie argument about the relevance of that particular dictionary for interpretation of the statute or constitutional provision under consideration."[173]

Building on the Harvard Symposium's position, the author of the 2010 Duke Law Journal article developed, and proposed that courts adopt, a detailed framework of best practices for textualist use of dictionaries.[174] The framework begins with the basic observation that a dictionary "is simply the window through which one seeks to find . . . meaning" and that "the end goal is finding the correct meaning within the *lexicon*—not the *dictionary* . . . ."[175] From there, it proposes courts: (1) use only contextual analysis, not the definition to verify a presumed definition; (2) establish only outer boundaries; (3) use contemporaneous research on word meaning; (4) justify the choice of dictionary and definition; (5) use multiple dictionaries; (6) acknowledge contrary definitions and dictionaries; (7) account for weaknesses in older dictionaries; and

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170 Phillip A. Rubin, *War of the Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles*, 60 DUKE L.J. 167, 206 (2010).

171 Brudney & Baum, *supra* note 169, at 579.

172 *Id.* at 579–80.

173 Werbach, s*upra* note 169, at 1453.

174 Rubin, *supra* note 170, at 189.

175 *Id.* at 189.

(8) recognize the limitations.[176] Regarding points five and six, Part IV.B.1.i. consulted multiple dictionaries and acknowledged the existence of contrary definitions.[177] These parts of the framework are, therefore, already met. This Article briefly examines the other points.

Using only contextual analysis means the court should attempt to place the meaning of the word into the context of its use and time.[178] In 1925, telephones had recently become a tool of business,[179] television had not yet been invented,[180] and the idea of an internet would have been considered in only the creative mind of Jules Verne.[181] As can be seen from the Supreme Court's analysis of Sections 1 and 2 of the FAA in *Circuit City* and *Allied-Bruce*, respectively, the scope of the U.S. Constitution's Interstate Commerce Clause as a source of authority for Congress to legislate was significantly restricted but would later become less so.[182] Therefore, considering the text of Section 7 in the context of 1925 America and without resorting to legislative history, this paper concludes that it is likely Congress was using the words "attend," "attendance," and "before" in their physical sense.

To the next point under the framework—establishing only outer boundaries——the dictionary should not be used to limit or constrict the possible meanings listed in contemporary dictionaries, but rather to establish only the broadest reasonable meaning. [183] As applied here, this is where the hypothetical textual analysis departs from the majority of circuits that have interpreted Section 7 to require a live witness, physically delivering documents to an arbitra-

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176 *Id.* at 190–98.

177 *See* discussion *supra* Part IV.B.1.i.

178 *See id.* at 190–91.

179 BELL TEL. SYS., THE MAGIC OF COMMUNICATION 41 (1953) ("1914, Feb. 26 - Boston-Washington underground telephone cable placed in commercial service.").

180 Mitchell Stephens, *History of Television*, GROLIER ENCYC., https://stephens.hosting.nyu.edu/History%20of%20Television%20page.html (last visited May 15, 2021).

181 *See Jules Verne*, NEW WORLD ENCYCLOPEDIA, https://www.newworldencyclopedia.org/entry/Jules_Verne (last visited May 15, 2021).

182 *See supra* Part IV.A.

183 Rubin, *supra* note 170, at 191.

tor.[184] It also departs from the holding of *Managed Care* to the extent that case prohibits use of video technology.[185] This Article concludes, instead, that physical presence is not a necessary component in a clear and unambiguous meaning of "attend before" under the definitions derived from *Webster's* or *Collier's.* Rather, "attend before" and "to be in attendance before" more likely invoke a type of *adjudicative*[186] presence before the arbitrators. Thus, to the extent a dictionary should only establish an outer boundary, this Article concludes that ignoring the possible meanings available under *Webster's* and *Collier's* would not comply with the suggested "best practices" for using dictionaries.

The next requirement under the framework is to justify the choice of dictionary and definition.[187] Of course, it may be more appropriate to use the two British dictionaries (*Concise Oxford* and *Pocket Oxford* rather than the two American dictionaries (e.g., *Collier's* and *Webster's*)) to determine the intent of Congress in 1925,[188] but this Article decides that the dictionaries published in

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[184] CVS Health Corp. v. Vividus, LLC, 878 F.3d 703, 706 (9th Cir. 2017); Life Receivables v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 216 (2d Cir. 2008); Hay Grp., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004); COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 275 (4th Cir. 1999).

[185] *See* Managed Care Advisory Group v. Cigna Healthcare, 939 F.3d 1145, 1161 (11th Cir. 2019).

[186] Judge Alito interpreted Section 7 as requiring "physical presence." *Hay Grp.*, 360 F.3d at 407; *see infra* Part IV.B.1.ii. *But see* Int'l Com. Disp. Committee Arb. Committee N.Y. City B. Ass'n, *A Model Federal Arbitration Summons to Testify and Present Documentary Evidence at an Arbitration Hearing*, 26 AM. REV. INT'L ARB. 157, 170 (2015) [hereinafter NYCB White Paper] ("[W]e believe FAA Section 7 is reasonably read not to impose any requirement that the arbitrator appear in the physical presence of the witness—that *adjudicative* presence of the arbitrator (to rule on objections and declare evidence admitted) is the touchstone of Section 7 according to the interpretation given in the *Life Receivables* and *Hay Group* decisions . . . .").

[187] Rubin, *supra* note 170, at 192.

[188] *See* Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries,* 47 BUFF. L. REV. 227, 238 (1999) ("Called the 'most masterly and ambitious philological exercise ever undertaken,' the first edition of the Oxford English Dictionary was completed in 1933 and contained more than 400,000 entries supported by nearly two million citations.").

America more likely provide a better window or proxy for the lexicon of the United States in the early twentieth century. As noted in the Publishers' Preface to the 1926 edition of *Collier's*:

> The Vocabulary, carefully chosen, is not only more comprehensive than that of any other dictionary of equal size, but it is also more modern. It is thoroughly up-to-date, and meets all the wants of the general reader of the present day. The words brought into our language by the World War, the new technical terms that mark recent advances in science, and the words that great political changes in nations have made a feature of modern speech are here collected and defined—a boon to the student of current world progress.[189]

This Article concludes, therefore, that *Webster's* and *Collier's* are appropriate for interpreting Section 7.

To the final point in the framework—accounting for weaknesses in older dictionaries[190]—notwithstanding *Collier's* glowing prefatory note quoted above, the creation of dictionaries in the early twentieth century was a laborious and imprecise process.[191] Still, the fact that *Collier's* and *Webster's* include definitions provided in the Oxford dictionary and add additional possible definitions, particularly the possible use of "before" to include the concept of "jurisdiction," is a reasonable indication that *Collier's* Preface was not merely marketing. Rather, it is likely that this additional use of the word "before" had recently become a part of the American lexicon and is a reliable indication of its value.

Having gone through the suggested "best practices" for using dictionaries, this Article concludes that Congress's language in Section 7 is sufficiently broad to permit use of technology that did not exist and that would not possibly have been contemplated when the statute was drafted and adopted in 1925. The analysis here is similar to the textual interpretation employed by the Su-

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189 COLLIER, *supra* note 160, at iii.

190 Rubin, *supra* note 170, at 196.

191 *Id.* at 178–82.

preme Court in *Allied-Bruce*, where it concluded that by using the phrase "involving commerce," Congress intended to extend to the outer limits under the Commerce Clause.[192] Here, based on the textual analysis of the language in Section 7, it seems more likely that Congress intended for arbitrators to have the authority to issue summonses compelling non-party witnesses to be in attendance under the jurisdiction of the arbitrators to provide oral and documentary evidence relevant to the proceeding. While this certainly includes the authority to compel attendance in the physical presence of the arbitrator, that is not the outer boundary of Congress's intent. Rather, it also includes the intent that as "new technical terms that mark recent advances in science" were added to *Collier's*,[193] the power of arbitrators should include the authority to compel a witness to "attend" in the presence of the arbitrators through telephone, and later video or other future technology, and to bring with him electronic versions of responsive documents that are provided to the arbitrators in the first instance to "pay heed or regard to" their "jurisdiction[al]" authority.

2. DOES THE ALTERNATIVE INTERPRETATION OF SECTION 7 PRODUCE AN ABSURD RESULT?

It would be difficult to find a lawyer today serving as counsel in domestic arbitration proceedings who has not requested an arbitrator or tribunal to summons a person to appear before the arbitrator of the tribunal by Zoom or other video conference technology and to have with him responsive documents, which through scanning or other similar technology, may be made available to the tribunal at the same time as the witness appears. It has probably happened hundreds of times each day since pandemic restrictions forced arbitral tribunals to conduct their proceedings by video conference technology.[194] Moreover, it is not only since the pandemic

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[192] Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 273–74 (1995); *see also* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 112 (2001) ("We had occasion in *Allied–Bruce* . . . , 115 S.Ct. 834, to consider the significance of Congress' use of the words 'involving commerce.'").

[193] COLLIER, *supra* note 160, at iii.

[194] *See* Al Tamimi, *Use of Modern Technology in Arbitration: Evolution Through Necessity* (July 31, 2020), https://www.lexology.com/library/

that lawyers and others involved in arbitration have embraced an interpretation of Section 7 like the one reached by the analysis in this Article.[195]

In fact, following the 2013 amendment of Federal Rule of Civil Procedure 45 to provide for nationwide service of subpoenas, the International Commercial Disputes Committee and the Arbitration Committee of the New York City Bar Association developed an annotated "Model Federal Arbitration Summons to Testify and Present Documentary Evidence at an Arbitration Hearing" (the "NYCB White Paper").[196] The NYCB White Paper was designed to bring "together in one resource guidance on law and practice in regard to the issuance by arbitrators of compulsory process for evidence to be obtained from non-party witnesses."[197] The annotations provide guidance to counsel and tribunals to effectively obtain documentary evidence from non-parties in light of the split among the federal circuits and between the Second Circuit and New York state courts with respect to pre-hearing discovery from non-parties in arbitration.[198] In 2015, when the NYCB White Paper was completed, regarding the place of the hearing, the authors opined:

> Hearing witnesses by video link. . . . Section 7's objectives (as considered by some courts) of requiring a hearing are achieved, even though the witness and the arbitrators come together by electronic means. Electronic presence of the arbitrator is an adequate substitute for physical presence, because the arbitrator *could* lawfully attend in person.[199]

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detail.aspx?g=8869fc87-e787-419c-ab6a-23e33905a366 (explaining how international arbitration practitioners had to rely on technological means to resolve disputes given the restrictions of COVID-19 pandemic).

[195] *See supra* Part IV.B.1. (concluding that text of Section 7 permits use of remote technology).

[196] NYCB White Paper, *supra* note 186.

[197] *Id.* at 158.

[198] *See id.* at 161–71.

[199] *Id.* at 170 (emphasis in original).

Notwithstanding this position on hearing by video link, the NYCB White Paper cautioned counsel and arbitrators to attempt to provide in the subpoena that the arbitrators will attend in person:

> While we believe FAA Section 7 is reasonably read not to impose any requirement that the arbitrator appear in the physical presence of the witness—that *adjudicative* presence of the arbitrator (to rule on objections and declare evidence admitted) is the touchstone of Section 7 according to the interpretation given in the *Life Receivables* and *Hay Group* decisions—it is prudent to avoid controversy on this point by providing in the subpoena that the arbitrators will attend in person unless otherwise agreed. However, if a subpoena does call for video-linked hearing, enforceability of the subpoena might be supported by reference to FRCP 43, which expresses the judicial preference for testimony in open court but provides that "for good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location."[200]

Whether one agrees with the NYCB White Paper's interpretation of Judge Alito's decision, when the Third Circuit entered its decision in *Hay Group* in 2004, use of video technology to conduct arbitral proceedings and court proceedings was in its infancy, later to be thrown into young adulthood by the pandemic in 2020.[201] The narrow issue before the Third Circuit was whether pre-hearing production of documents without requiring a witness was permissible under Section 7.[202] As discussed in Part II above, the *Hay Group* court held that "documents only" compulsory production

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[200] *Id.* (internal citation omitted).

[201] *See The History of Videoconferencing*, BUS. MATTERS (Jan. 8, 2015), https://bmmagazine.co.uk/tech/history-video-conferencing/ (noting that Skype only first became available in 2003).

[202] *See* Hay Grp., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 406 (3d Cir. 2004).

and compulsory pre-hearing testimony, with or without documents, were not permissible under the clear and unambiguous language of Section 7.[203] The Third Circuit concluded that its interpretation of Section 7 did not produce an absurd result based on similar language used in Federal Rule of Civil Procedure 45 at the time it was adopted in 1937 and practical considerations of how broader discovery powers under Section 7 could undermine arbitration's goal of being a "shorter and cheaper system."[204] There is no suggestion, however, in the majority opinion or the concurring opinion by Judge Chertoff that the possible use of video technology under Section 7 was even considered.

Apparently, also considering whether the result was absurd, Judge Chertoff noted in his concurrence:

> Under section 7 of the Federal Arbitration Act, arbitrators have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings. . . . To be sure, this procedure requires the arbitrators to decide that they are prepared to suffer some inconvenience of their own in order to mandate what is, in reality, an advance production of documents. But that is not necessarily a bad thing, since it will induce the arbitrators and parties to weigh whether advance production is really needed. And the availability of this procedure within the existing statutory language should satisfy the desire that there be some mechanism "to compel pre-arbitration discovery upon a showing of special need or hardship."[205]

One wonders whether Judge Alito or Judge Chertoff would have reached the same conclusion about the absurdity of requiring "physical presence" when neither word appears in the language of Section 7 if they had been focused on video technology as an adequate substitute for "physical presence" at a hearing before the ar-

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[203] *See supra* notes 50–62 and accompanying text.

[204] *Hay Grp.*, 360 F.3d at 409; *see supra* note 63 and accompanying text.

[205] *Hay Grp.*, 360 F.3d at 413–14 (citing COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 276 (4th Cir. 1999)) (Chertoff, J., concurring).

bitrators and within the meaning of Section's 7 to "attend before" phrase.[206]

However differently the Third Circuit might have performed its textual analysis had the summons called for the documents to be produced by a witness by means of a video link at the time of a hearing that included the arbitrators, in the post-pandemic world, this Article's alternative textual interpretation of Section 7 is a proper result of consulting contemporaneous dictionaries and it does not produce an absurd result. To the contrary, it produces a result entirely consistent with the normal practices in arbitration that both preceded and succeeded the pandemic without altering the outcome of the *Hay Group* decision, other than to link the presence of the arbitrators to the witness and the production by means of new technology.

C. *The Alternative Textual Interpretation Comports with Existing Standards in the Field of Arbitration*

Finding that Section 7 of the FAA requires adjudicative as opposed to physical presence not only passes the absurdity test, but it is also a result that reflects the practicalities of arbitration in the modern world.[207] Even before COVID-19, parties and arbitration institutions have employed virtual technology to streamline and add efficiencies to the arbitration process, all while aiming to preserve arbitration's purpose of being an expeditious process.[208]

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[206] *See* Gaela R. Normile, *Virtually Impossible: Eleventh Circuit's Denial of Non-Parties Attending Arbitration Hearings via Video or Telephone*, MARTINDALE (Oct. 27, 2020), https://www.martindale.com/legal-news/article_vandeventer-black-llp_2534575.htm ("Although it was not a possibility to virtually appear at an arbitration hearing in 1925, such a strict interpretation of Section 7 of the FAA may unnecessarily burden arbitration.").

[207] *See* Kateryna Honcharenko & Mercy McBrayer, *Guidance Note on Remote Dispute Resolution Proceedings*, CHARTERED INST. ARB., https://www.ciarb.org/media/9013/remote-hearings-guidance-note_final_140420.pdf (last visited May 15, 2021) (noting the need for virtual proceeding as "travel bans and severe government restrictions become more widespread").

[208] *See Virtual Hearings,* AAA-ICDR, https://go.adr.org/covid-19-virtual-hearings.htmlhttps://go.adr.org/covid-19-virtual-hearings.html (last visited May 15, 2021) (stressing that "[v]irtual hearings are not a new concept" and have been an "option to parties for years").

Likewise, rules and guidelines have been in place to facilitate pre-hearing discovery, including for non-parties to the arbitration proceedings.[209]

1. THE REVISED UNIFORM ARBITRATION ACT

To illustrate, "to make the [arbitration] proceedings fair, expeditious, and cost effective," at the request of a party or witness, Section 17 of the revised Uniform Arbitration Act (the "RUAA") authorizes an arbitrator to "permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing."[210] This provision covers non-parties to the arbitration proceedings.[211] Still, the RUAA was mindful of preserving "the main advantages of arbitration in terms of cost, speed and efficiency" and "safeguard[ing] the rights of third parties," while also "insuring that there is sufficient disclosure of information to provide for a full and fair hearing."[212] Thus, as it relates to non-parties to the arbitration, the RUAA anticipates that the arbitrator will take "the interests of such 'affected persons' into account in determining whether and to what extent discovery is appropriate."[213]

Historically, the UAA, which is drafted by the National Conference of Commissioners on Uniform State Laws, is modeled on the FAA.[214] Due to "the increasing use of arbitration, the greater complexity of many disputes resolved by arbitration, and the developments of the law in th[e] area,"[215] many issues have arisen in modern arbitration that were not present in 1955, when the UAA was adopted.[216] The RUAA examines these issues and aims to

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[209] *See Hay Grp.*, 360 F.3d at 407 n.1 (noting that many states have adopted statutes that "explicitly grant arbitrators the power to issue pre-hearing document production subpoenas on third parties").

[210] UNIF. ARB. ACT § 17(b) (NAT'L CONF. OF COMM'R ON UNIF. STATE L. 2000).

[211] *Id.*

[212] *Id.* at § 17 cmt. 2, 8.

[213] *Id.* at § 17 cmt. 5.

[214] *See id.* at prefatory note.

[215] *Id*.

[216] *See* JOHN COOLEY, THE ARBITRATORS HANDBOOK: REVISED 435 (2009) ("This growth in arbitration caused the Conference to appoint a Drafting Com-

provide "state legislatures with a more up-to-date statute to resolve disputes through arbitration."[217] The RUAA has been adopted by twenty-one states including D.C., and was introduced in two other states in 2020.[218]

In the summer of 2000, when the RUAA was enacted, the Fourth Circuit had already issued *COMSAT*, which limited the arbitrator's power to issue subpoenas to non-parties to produce materials prior to the arbitration hearing.[219] This holding contradicted three federal district court opinions that had enforced arbitral subpoenas for prehearing discovery.[220] The language stated, "[b]ecause of the unclear case law, Section 17(d) specifically states that arbitrators have subpoena authority for discovery matters under the RUAA."[221]

While *COMSAT* was issued before the RUAA was approved, other circuits had not directly addressed Section 7.[222] Since then, as discussed above, a majority position has emerged among the circuits interpreting Section 7 as requiring a non-party's "physical" presence before the arbitrator or precluding pre-hearing discovery.[223]

2. ARBITRAL INSTITUTIONS

Notwithstanding the majority of circuits implying a "physical presence" into the language of Section 7, arbitration institutions have long permitted the use, and seen the value, of virtual technol-

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mittee to consider revising the Act in light of the increasing use of arbitration, the greater complexity in many disputes resolved in arbitration and the development of the law in this area.").

[217] UNIF. ARB. ACT. pmbl.

[218] *2000 Arbitration Act – Enactment Map*, UNIF. LAW COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=a0ad71d6-085f-4648-857a-e9e893ae2736 (last visited May 15, 2021).

[219] *See supra* Part II.A.

[220] *See* UNIF. ARB. ACT § 17 cmt. 6; Amgen, Inc. v. Kidney Ctr. of Delaware County, 879 F. Supp. 878 (N.D. Ill. 1995); Meadows Indemnity Co. v. Nutmeg Ins. Co., 157 F.R.D. 42 (M.D. Tenn. 1994); Stanton v. Paine Webber Jackson & Curtis, Inc., 685 F. Supp. 1241 (S.D. Fla. 1988).

[221] *See* UNIF. ARB. ACT § 17 cmt. 6.

[222] *See* discussion *supra* Part II.

[223] *See supra* Parts II & III (discussing opinions issued by Fourth, Third, Second, Ninth, and Eleventh Circuits).

ogies in arbitration proceedings.[224] And, with the increasing use of remote technologies during the COVID-19 pandemic, some institutions have provided additional guidelines.[225] FINRA, for example, has noted how "COVID 19 has increased the demand for virtual arbitration and mediation hearings to ensure that cases can proceed without lengthy delays."[226] Consequently, FINRA issued a Resource Guide to help arbitrators conduct effective virtual arbitration hearings via the Zoom platform.[227] The guide encourages arbitrators to be mindful of issues of fairness and impartiality by, *inter alia*, allowing parties to present evidence and testimony, including direct and cross-examination of witnesses, and to postpone the virtual hearing until further notice if the arbitration panel believes the virtual hearing will result in unfairness to any party.[228]

The American Arbitration Association International Centre for Dispute Resolution has provided similar guidance with its Virtual Hearing Guide for Arbitrators and Parties, Model Order and Procedures for a Virtual Hearing via Videoconference ("Model Order"), and Virtual Hearing Guide for Arbitrators and Parties Utilizing Zoom.[229] Interestingly, the Model Order allows for the parties, by agreement or order of the arbitrator (if no agreement by the parties), to deem the hearing as having taken place "in the locale of the arbitration."[230] It also adds language addressing any objections

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[224] *Id.*; *Virtual Hearings*, *supra* note 208 (stressing that "[v]irtual hearings are not a new concept" and have been an "option to parties for years").

[225] *See* Tamimi, *supra* note 194 ("In the face of the ever-increasing restrictions on the movement of people and institutional shutdowns in Spring 2020, arbitration practitioners demonstrated the resilience and flexibility of international arbitration by continuing to resolve disputes remotely with the assistance of various technological means.").

[226] *Arbitrator Resource Guide for Virtual Hearings*, FINRA, https://www.finra.org/arbitration-mediation/case-guidance-resources/arbitrator-resource-guide-virtual-hearings (last visited May 15, 2021).

[227] *Id.* ("FINRA Dispute Resolution Services is providing the Resource Guide to help arbitrators conduct effective virtual arbitration hearings via the Zoom platform.").

[228] *Id.*

[229] *Virtual Hearings*, *supra* note 208.

[230] *AA-ICDR Model Order and Procedures for a Virtual Hearing via Videoconference*, AM. ARB. ASS'N 1, 1 [hereinafter *AA-ICDR Model Order*], https://go.adr.org/rs/294-SFS-516/images/AAA270_AAA-ICDR%20Model%

to the virtual forum by noting the exigencies of the pandemic and that "videoconference is a reasonable alternative to an in-person hearing."[231] There is also guidance on witnesses appearing and presenting evidence virtually.[232]

20Order%20and%20Procedures%20for%20a%20Virtual%20Hearing%20via%20Videoconference.pdf (last visited May 15, 2021). The Model Order states:

> 1a. Agreement to Videoconference: [if it's been agreed to]
>
> A. The parties and the panel/arbitrator agree that the hearing in this case will be conducted via [Platform Name] videoconference. This confirms that the hearing will be deemed to have taken place in [locale/place of arbitration].
>
> B. The parties acknowledge that they have made their own investigation as to the suitability and adequacy of [Platform Name] for its proposed use for the video conferenced hearing and of any risks of using [Platform Name], including any risks regarding its security, privacy or confidentiality, and they agree to use [Platform Name] for the hearing.
>
> [or]
>
> 1b. Order for Videoconference Hearing: [if ordered by the arbitrator/panel and not agreed to by all parties]
>
> A. The arbitrator/panel hereby orders that the hearing in this case be conducted via [Platform Name]
> videoconference in accordance with the procedures set forth below. This confirms that the hearing will be deemed to have taken place in [locale/place of arbitration].
>
> B. The arbitrator/panel notes the [claimant's/respondent's/other parties'] objections to holding the hearing via [Platform Name]. The arbitrator/panel finds, however, that conducting the hearing via videoconference is a reasonable alternative to an in-person hearing in light of the COVID-19 pandemic, stay-at-home orders, and travel limitations. Videoconferencing technology will provide the parties a fair and reasonable opportunity to present their case and will allow the hearing to move forward on the dates previously scheduled instead of postponing the hearing to a future date.

Id.

[231] *Id.*

[232] *Id.*

Thus, the arbitration community has adapted to the modern realities of arbitration—a reality that is very different from 1925 when the FAA was enacted.[233] By applying a textual approach to conclude that Section 7 requires only an adjudicative presence and permits pre-hearing discovery, courts may remain true to the text of the FAA while accommodating procedures that will avoid unnecessary delay and expense, while simultaneously providing a fair, efficient, and expeditious means for the final resolution of the parties' dispute.[234] This is not an absurd result.

V. IMPLICATIONS FOR SECTION 7 DURING AND AFTER COVID-19

If another circuit is faced with a similar challenge in the post-COVID era, how will it be presented to the court? Perhaps a case will arise where an arbitrator issues a summons pursuant to Section 17(d) of a state-enacted version of RUAA for a prehearing discov-

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[233] Other dispute resolution institutions have similar measures in place or provide similar support for virtual hearings. *See, e.g.*, *ICC Virtual Hearings,* INT'L CHAMBER =COM., https://iccwbo.org/dispute-resolution-services/hearing-centre/icc-virtual-hearings/ (last visited May 15, 2021); *Virtual Hearings*, INT'L CTR. FOR SETTLEMENT INV. DISPUTES, https://icsid.worldbank.org/services/hearing-facilities/virtual-hearings (last visited May 15, 2021); *LCIA Arbitration Rules*, LONDON CTR. INT'L. ARB. https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx#Article%2014 ("[A] hearing may take place in person, or virtually by conference call, videoconference or using other communications technology with participants in one or more geographical places (or in a combined form)."); *HKIAC Guidelines for Virtual Hearings,* HONG KONG INT'L ARB, CTR., https://www.hkiac.org/sites/default/files/ck_filebrowser/HKIAC%20Guidelines%20for%20Virtual%20Hearings_3.pdf (last visited May 15, 2021); Press Release, Seoul Protocol on Video Conference in International Arbitration is Released, KCAB INT'L (Mar. 18, 2020), http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=548&BD_NO=169&CURRENT_MENU_CODE=MENU0025&TOP_MENU_CODE=MENU0024pdf (last visited May 15, 2021); *Guidance Note on Remote Dispute Resolution Proceedings*, CHARTERED INST. ARB., https://www.ciarb.org/media/9013/remote-hearings-guidance-note_final_140420.pdf (last visited May 15, 2021).

[234] *See AA-ICDR Model Order*, *supra* note 230 (referencing the reality that Section 7 allows for technology use in arbitration based on the party's circumstances and needs).

ery deposition and it is challenged on the ground that such procedure conflicts with the majority holdings of the federal circuits regarding use of Section 7 of the FAA for prehearing evidence. Would the court hold that FAA Section 7 preempts RUAA Section 17(d)?[235] Is the Eleventh Circuit's decision in *Managed Care* more likely to arise in the context of a challenge to compulsory use of video technology to conduct a final arbitral hearing?[236] Predicting how the issue first presents itself may be unwise, but hopefully, the alternative textual analysis performed in this Article will help inform the court's analysis.

In fairness, prior to March 1, 2020, nobody forced to analyze the propriety of using remote technology for various aspects of dispute resolution, either as a part of the justice system or alternative dispute resolution systems, could have anticipated the impact COVID-19 would have on the willingness of participants in the legal process to convert to video technology for the conduct of many, if not all, of its most essential processes.[237] Restrictions related to the COVID-19 pandemic have imposed limitations that prevent or severely limit people from appearing "in the physical presence of" other people—particularly indoors.[238] It is highly unlikely that Congress in 1925, having survived the 1918 Influenza

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[235] Preemption issues relating to the FAA are massively complicated and beyond the scope of this Article, but it is certainly conceivable that the issue might arise in such a setting. *See, e.g.,* Christopher Drahozal, *Federal Arbitration Act Preemption,* 79 IND. L.J. 393, 393 (2004).

[236] As of the date of submission of this Article, the author is aware of only one U.S. case involving a challenge to compulsory conduct of an arbitration hearing by video technology. *See* Legaspy v. Fin. Indus. Regul. Auth., Inc., No. 20-cv-4700, 2020 WL 4696818, at *1 (N.D. Ill. Aug. 12, 2020) (denying preliminary injunctive relief sought by a party objecting to the conduct of a FINRA arbitration via Zoom).

[237] *See* Tamimi, *supra* note 194 ("However as a result of the necessity brought about by the sudden resurgence of the COVID-19, it should come as no surprise to the arbitral community that the utilization of technology at all levels of the international arbitration system has rocketed in the past few months.").

[238] *See Protect Yourself & Others*, s*upra* note 128 (recommending at least six feet of distance between individuals and that persons avoid crowds and poorly ventilated indoor spaces).

pandemic,[239] used language that was intended to restrict arbitrators acting under Section 7 of the FAA from adopting procedures to protect the health of citizens summoned to appear and provide evidence relevant to the disputes entrusted to them, even at the risk of exposure to the flu or other communicable diseases. However, in practice, *Managed Care* may have such an unintended consequence.[240] And if a party to an arbitration, or a non-party witness, refuses to be physically present with at least one of the arbitrators, a Section 7 summons is likely unenforceable.[241]

This is not hypothetical. Arbitral tribunals have faced the issue throughout 2020[242] and will continue to face it as long as the pandemic continues. When arbitrators issue summonses to non-party witnesses, at least one of the arbitrators must be prepared to invite the witness to appear in-person.[243] The arbitrator, therefore, must take steps to insure against transmission of COVID-19—to the extent possible, and must comply with any government-mandated procedures, such as installation of plexiglass shields between the witness and the arbitrator.[244] If the witness reasonably insists that

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[239] *1918 Pandemic (H1N1 virus)*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html (last updated Mar. 20, 2019).

[240] *See* Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc., 939 F.3d 1145, 1158 (11th Cir. 2019) ("[T]he district court for the district in which the arbitrators are sitting may compel the attendance of a person refusing to obey an arbitral summons."). Also, in the case the court noted that the inconvenience of traveling across state lines was not sufficient to rise to the level of "constitutional concern." *Id.*

[241] *Id.* at 1161 ("The district court abused its discretion in enforcing the arbitral summons because the court lacked power under Section 7 to order the witness to appear at the video conference and provide pre-hearing discovery.").

[242] *See* Tamimi, *supra* note 194 (noting that, because of COVID-19, "in order to ensure the legitimacy of the arbitral process and the subsequent successful recognition and enforcement of arbitral awards, it is essential to ascertain the basis on which the use of technology in international arbitration . . . may be permitted.").

[243] *See Managed Care*, 939 F.3d at 1161 (holding that summonsed witness testimony and documents must be presented in the physical presence of arbitrators).

[244] *See* UNIF. ARB. ACT § 15 ("An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding."). Circumstances of what is fair during COVID-

the arbitrator be in one office and the witness in a separate conference room, with the other arbitrators and counsel all attending by Zoom connections, would that comply with the requirement that the witness be "in the physical presence of" the arbitrator?[245] Hopefully, most parties and witnesses are agreeing to permit such examinations by video link so that parties and arbitrators are not faced with the decision to postpone hearings or forego relevant evidence.

In practice, Section 7 presents numerous potential scenarios for attempting to obtain evidence from non-parties to an arbitration governed by the FAA. In light of the circuit split, even in the absence of the technology issue, these potential scenarios will continue to challenge counsel and arbitrators. *Managed Care* complicates the problem for counsel and arbitrators within the Eleventh Circuit attempting to use video technology to efficiently process arbitration disputes entrusted to them.[246] There are many potential scenarios in which arbitrators seek evidence from non-parties, and the cases sometimes blur them. These scenarios may include:

1. Summons for documents only seeking pre-hearing production outside the presence of the arbitrators or at least one of them. This summons would be unenforceable under the textual analysis of the majority of circuits to have examined Section 7.[247]

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19 likely involves plexiglass and other preventive measures. *See Manufacturing Workers and Employers*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-manufacturing-workers-employers.html (suggesting the "[u]se of physical barriers, such as strip curtains, plexiglass or similar materials, or other impermeable dividers or partitions to separate" individuals) (last updated Apr. 16, 2021).

[245] *See* NYCB White Paper, *supra* note 186 at 15, 29 (stating "it is not inevitable that the physical presence of the arbitrator and the witness in the same place is necessary," and that "[e]lectronic presence of the arbitrator is an adequate substitute for physical presence, because the arbitrator *could* lawfully attend in person.").

[246] *See Managed Care*, 939 F.3d at 1161 ("Accordingly, we interpret the plain meaning of Section 7 as (1) requiring summonsed non-parties to appear in the physical presence of the arbitrator as opposed to a video conference or teleconference; and (2) prohibiting pre-hearing discovery.").

[247] *See supra* Parts II & III (discussing opinions issued by Fourth, Third, Second, Ninth, and Eleventh Circuits).

2. Summons for documents only seeking pre-hearing production in the physical presence of the arbitrators or at least one of them. This was close, but not quite the fact pattern addressed by Judge Chertoff's concurring opinion in *Hay Group*.[248]

3. Summons for documents only seeking pre-hearing production through electronic means outside presence of the arbitrators or at least one of them. As the law now stands, this scenario, too, is likely to result in an unenforceable summons in a majority of circuits.[249]

4. Summons for documents only seeking production in the presence of the arbitrators at a final hearing. If the summonsed non-party is not appearing as a witness, this summons may face challenges under existing case law.[250]

5. Summons for documents only seeking production by video link with the arbitrators on video only. This fact pattern was not presented in any reported decision reviewed for this Article. It is covered by the NYCB White Paper[251] and the Alternative Textual Analysis performed in Part IV of this Article.[252] It would be permitted under both.

6. Summons for documents and witness seeking pre-hearing production outside presence of the arbitrators or at least one of

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[248] *See* Hay Grp., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 413–14 (3d Cir. 2004) (Chertoff, J., concurring).

[249] *See supra* Parts II & III (discussing opinions issued by Fourth, Third, Second, Ninth, and Eleventh Circuits).

[250] *See Hay Grp.*, 360 F.3d at 407 ("[T]he use of the word 'and' makes it clear that a non-party may be compelled 'to bring' items 'with him' only when the non-party is summoned 'to attend before [the arbitrator] as a witness.'"); Life Receivables Tr. v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 216 (2d Cir. 2008) ("The language of section 7 is straightforward and unambiguous. Documents are only discoverable in arbitration when brought before arbitrators by a testifying witness."); *Managed Care*, 939 F.3d at 1159–60 ("[T]he FAA implicitly withholds the power to compel documents from non-parties without summoning the non-party to testify. And if Congress intended the arbitrators to have the broader power to compel documents from non-parties without summoning the non-party to testify, it could have said so.").

[251] *Supra* note 186 and accompanying text.

[252] *Supra* Part IV.

them. This summons is susceptible to challenges under cases reviewed in this Article.[253]

7. Summons for documents and witness seeking pre-hearing production in physical presence of the arbitrators or at least one of them. This is the recommended procedure set forth in Judge Chertoff's concurrence in *Hay Group*.[254]

8. Summons for documents and witness seeking pre-hearing video link with the arbitrators or at least one of them on the video. The Eleventh Circuit, in *Managed Care*, is the only circuit that has specifically addressed the use of video technology. The Eleventh Circuit prohibits non-party witnesses from appearing via video conference and, instead, requires the physical presence of arbitrators.[255] The Alternative Textual Analysis performed in Part IV of this Article would permit this scenario.[256]

9. Summons for documents and witness seeking production in presence of the arbitrators at the hearing. This is the only enforceable summons under Section 7 as interpreted by the *Managed Care* court.[257] At present, unless parties and non-party witnesses waive their objections, this is the only available avenue for obtaining non-party evidence in arbitrations conducted in the Eleventh Circuit.

10. Summons for documents and witness seeking production at hearing by video link with the arbitrators and all parties on video.

As arbitrations continue during the pandemic and produce awards that are subject to enforcement and vacatur proceedings, it seems likely that some of them will include compulsory summonses to third parties and may present opportunities for courts to review the use of video technology under Section 7 as well as challenges to use of such technology more generally. The Alternative Textual Analysis performed in Part IV of this Article would permit enforcement of such a summons.

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253 *See supra* Parts II & III (discussing opinions issued by Fourth, Third, Second, Ninth, and Eleventh Circuits).

254 *See id.* at 413–14 (Chertoff, J., concurring).

255 *See Managed Care*, 939 F.3d at 1159–61.

256 *Supra* Part IV.

257 *See Managed Care,* 939 F.3d at 1161.

No single case can present a court with all or even a significant number of the scenarios outlined above. Hopefully, future courts will consider the multiple ways Section 7 is utilized as they face whatever fact pattern is presented to them.

CONCLUSION

The issues presented by the circuit split and the *Managed Care* decision will likely present themselves to other circuits and eventually to the Supreme Court in the not-too-distant future.[258] When they do, the courts should take a broad look at how Section 7 is utilized by counsel and arbitrators. This Article has suggested an alternative textual analysis utilizing multiple dictionaries from the 1920s that a court might consider.[259] Whatever approach the courts take in resolving the circuit split, this Article strongly suggests that Section 7 not be interpreted in a fashion that prohibits compulsory use of video technology to obtain evidence in arbitrations governed by the FAA.[260]

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[258] *See* discussion *supra* Parts II & III.
[259] *See* discussion *supra* Part IV.
[260] *See* discussion *supra* Part V.