No. 24-3578

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

KRISTI VONDEYLEN,

Plaintiff- Appellee,

v.

APTIVE ENVIRONMENTAL, LLC

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Minnesota
No. 0:24-cv-02051

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SUMMARY OF THE CASE AND STATEMENT ON ORAL ARGUMENT

Years after Aptive Environmental, LLC stopped providing pest-control services at Kristi VonDeylen's home, Aptive sent her a series of intrusive automated texts. After trying to stop the messages, Ms. VonDeylen sued, alleging that Aptive had violated the Telephone Consumer Protection Act and her privacy rights. Aptive then sought to compel arbitration based on the parties' previous Service Agreement.

The district court was correct to deny Aptive's motion as an effort to sweep Ms. VonDeylen's claims into an unrelated arbitration agreement. The arbitration provision in the expired Service Agreement covers only disputes "arising out of or relating to" that agreement, Aptive's services, or the parties' contractual relationship. Both as a matter of ordinary contract interpretation and under this Court's precedent, phrases like "arising out of" or "relating to" an underlying agreement require a direct relationship between that agreement and the dispute at hand. No such relationship exists here. Ms. VonDeylen does not seek to enforce the terms of the Service Agreement, she does not take issue with Aptive's services, and her claims do not relate to the parties' previous contractual relationship. Instead, she seeks to vindicate her statutory and common-law rights to be free from the intrusion of unwanted text messages. This Court should affirm.

Ms. VonDeylen agrees with Aptive that oral argument is warranted here and requests 15 minutes of time for argument.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1.A, the undersigned certifies that there is no publicly traded company or corporation with an interest in the outcome of the case that has not already been disclosed to this Court.

Date: April 28, 2025

/s/ Hannah M. Kieschnick
Hannah M. Kieschnick

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INTRODUCTION

The Telephone Consumer Protection Act ("TCPA"), 42 U.S.C. § 227, protects consumers from unwanted and harassing calls and text messages. Exercising her rights under that statute, Kristi VonDeylen put her name on the national Do-Not-Call ("DNC") registry because, like many consumers, she was fed up with intrusive telemarketing communications. Despite her best efforts, however, Aptive Environmental, LLC ignored this choice and sent her a barrage of automated text messages, including on Thanksgiving. After failing to get the messages to stop, Ms. VonDeylen turned to court to vindicate her rights under the TCPA.

Aptive moved to compel arbitration, seeking refuge in the arbitration clause of its long-expired Service Agreement for the provision of pest-control services at Ms. VonDeylen's home. The district court correctly denied Aptive's request because Ms. VonDeylen's TCPA and privacy claims do not fall within the scope of that arbitration clause. Ordinary contract principles and this Court's precedent require a direct relationship between the dispute and the Service Agreement, Aptive's services, or the parties' contractual relationship. There isn't one. Ignoring this, Aptive repeatedly invokes the "federal policy favoring arbitration." But under Supreme Court precedent, that policy comes into play, if ever, only when contract terms are ambiguous. Because the plain language of the arbitration provision is clear, and does not encompass Ms. VonDeylen's claims, this Court should affirm.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action under 28 U.S.C. § 1331 because Ms. VonDeylen brought federal claims under the TCPA, jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2), and supplemental jurisdiction under 28 U.S.C. § 1367 because Ms. VonDeylen's common-law invasion of privacy claim is so related to her claims arising under the TCPA that it forms part of the same case or controversy.

The district court denied Aptive's motion to compel arbitration on December 9, 2024. (*See* App. 70-79 R. Doc. 33 at 1-9.) Aptive timely appealed on December 18, 2024. (*See* Notice of Appeal, R. Doc. 35.) This Court has jurisdiction under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 16(a)(1), which permits an interlocutory appeal of an order denying a motion to compel arbitration.

STATEMENT OF THE ISSUES

Ms. VonDeylen alleges that Aptive willfully and negligently violated the TCPA and invaded her privacy rights by sending her repeated text messages without her prior express consent. The question presented is whether the district court correctly concluded that these claims do not "arise out of" or "relate to" the parties' expired Service Agreement for Aptive to provide pest-control services.

Apposite cases:

- *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287 (2010)

- *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022)
- *Local Union 97 v. Niagara Mohawk Pwr. Corp.*, 67 F.4th 107 (2d Cir. 2023)
- *Anderson v. Hansen*, 47 F.4th 711 (8th Cir. 2022)

STATEMENT OF THE CASE

I. Aptive sends Ms. VonDeylen a series of intrusive automated text messages years after providing her with pest-control services.

In May 2020, Ms. VonDeylen entered into an agreement for pest-control services with Aptive (the "Service Agreement" or the "Agreement"). (App. 24 R. Doc. 15, ¶ 25.) The Agreement stated that Aptive would provide quarterly pest-control services at Ms. VonDeylen's home for a limited term of twelve months. (App. 24 R. Doc. 15, ¶ 26.) The Agreement also included a provision requiring individual arbitration of "any controversy, dispute or claim between you and Aptive arising out of or relating to this Agreement, or the services performed by Aptive under this Agreement or any other agreement, or the relationship between you and Aptive resulting from any of the foregoing[.]" (App. 52 R. Doc. 19-2, ¶ 12.) The provision also states that it will "survive the termination of this Agreement and any bankruptcy to the extent consistent with applicable bankruptcy law." (*Id.*)

Separate from the Service Agreement, Ms. VonDeylen received another form, a "Welcome Checklist," which included an option for consumers to "agree that Aptive may call, text, and email me for marketing or other purposes[.]" (App. 24 R.

Doc. 15, ¶ 27.) Ms. VonDeylen did not check the box to agree to this option. (App. 25 R. Doc. 15, ¶ 28.)

Aptive performed some of the promised pest-control services, but it stopped doing so a few months before the Service Agreement expired. (App. 25 R. Doc. 15, ¶ 30.) The parties did not renew their contract. (App. 25 R. Doc. 15, ¶ 31.)

More than two years later, even though Ms. VonDeylen's name had been on the DNC registry for almost two decades (App. 25 R. Doc. 15, ¶ 23), Ms. VonDeylen began receiving unsolicited automated text messages from Aptive. The first, received on June 2, 2023, asked her to set up "autopay." (App. 25 R. Doc. 15, ¶ 32.) Ms. VonDeylen replied "Stop," and received an automated response that she had been unsubscribed. (App. 26 R. Doc. 15, ¶ 35.) She received another automated text a few months later, on Thanksgiving morning. (App. 26 R. Doc. 15, ¶ 36.) This text message reminded her of an "upcoming appointment" that she had not scheduled. (*Id.*) Again, Ms. VonDeylen replied "Stop," and received an automated response that she had been unsubscribed. (App. 26 R. Doc. 15, ¶ 37.) Later that day, however, she received yet another unsolicited automated text. (App. 26 R. Doc. 15, ¶ 38.) A few days later, Ms. VonDeylen received another message, this time telling her that "Anna," an Aptive technician, would arrive at Ms. VonDeylen's house that morning. (App. 26 R. Doc. 15, ¶ 40.) After Ms. VonDeylen responded that she had not

requested any service, "Anna" apologized and said that a "glitch" in Aptive's system had added previous customers from years ago. (App. 26 R. Doc. 15, ¶¶ 42-43.)

Despite this apology, Ms. VonDeylen received another text message a few hours later, stating that she had another unscheduled upcoming appointment. (App. 27 R. Doc. 15, ¶ 44.) When Ms. VonDeylen again attempted to unsubscribe (App. 27 R. Doc. 15, ¶ 45), she received a direct message stating that Aptive had closed her account because her home had not been serviced since 2021. (App. 27 R. Doc. 15, ¶ 46.)

II. The district court denies Aptive's attempt to force Ms. VonDeylen to arbitrate her TCPA and privacy claims based on an unrelated and expired contract.

After trying and failing to correct the situation with Aptive directly, Ms. VonDeylen filed this action, seeking to certify a class for claims of injunctive, monetary, and any other available relief. (*See generally* App. 19-36 R. Doc. 15.) Her operative complaint challenges Aptive's negligent and willful violations of the TCPA and invasion of privacy. In particular, she alleges that Aptive used an automatic telephone dialing system to send her, and others similarly situated, non-emergency text messages without prior express consent. She seeks certification of two classes, one where consent was lacking because the recipients of Aptive's messages were on the DNC registry and one where consent was lacking because the

recipients of Aptive's messages had requested that Aptive stop contacting them. (App. 28 R. Doc. 15, ¶ 52.)

In July 2024, Aptive moved under the FAA to compel arbitration and to stay Ms. VonDeylen's claims based on the arbitration provision contained in the parties' previous Service Agreement. (*See generally* App. 37-47 R. Doc. 18.) Ms. VonDeylen opposed that motion on narrow grounds. She did not contest that the Service Agreement contained a valid arbitration agreement; instead, she argued that her claims are not subject to arbitration because they fall outside the scope of that agreement to arbitrate. (*See* App. 62-65 R. Doc. 24, at 5-8.)

After a hearing on the motion, the district court agreed with Ms. VonDeylen and denied the motion to compel arbitration. (*See* App. 78 R. Doc. 33, at 9.) Specifically, the court explained that, although the Service Agreement's arbitration provision is broad, it does "not cover[]" Ms. VonDeylen's claims. (App. 76 R. Doc. 33, at 7.) Her "claims center on unsolicited text messages that were sent more than two years after the expiration of the parties' contractual relationship," and "do not relate to the services provided to [Ms. VonDeylen] under the [Service] Agreement." (*Id.*) As a result, the court concluded, Ms. VonDeylen's claims do not "arise out of" or "relate to" the Service Agreement and so are not subject to arbitration. (App. 77 R. Doc. 33, at 8.)

Aptive timely appealed. (*See* Notice of Appeal, R. Doc. 35.)

SUMMARY OF THE ARGUMENT

The district court correctly held that Ms. VonDeylen's TCPA and related privacy claims are not subject to arbitration under the Service Agreement. Aptive disagrees, arguing that the Service Agreement's "broad" arbitration provision required the court to apply a "federal policy favoring arbitration" and compel Ms. VonDeylen's claims into arbitration. This argument skips over the contract interpretation analysis that the Supreme Court and this Court require. It also conflicts with Supreme Court precedent making clear that the federal policy favoring arbitration comes into play, if at all, only when the contract's terms are ambiguous.

There is no ambiguity here. Both under ordinary principles of Minnesota contract law and this Court's precedent interpreting language similar to that in the Service Agreement, there must be a direct relationship between Ms. VonDeylen's claims and the Service Agreement, Aptive's services, or the parties' contractual relationship. Ms. VonDeylen's claims lack this nexus. In particular, she seeks to vindicate her statutory and common-law rights to be free from the intrusion of unwanted text messages, not to enforce the terms of the parties' expired Service Agreement or take issue with Aptive's previous services. And while Aptive makes much of the survival clause in the Service Agreement's arbitration provision, that clause does not extend the life of the parties' contractual relationship or sweep otherwise unrelated claims into the scope of the agreement to arbitrate. The parties'

previous Agreement simply has no bearing on the legality of Aptive's communications sent more than two years later. This Court should affirm.

ARGUMENT

I. Courts apply ordinary principles of state contract law to interpret the scope of an agreement to arbitrate.

The district court correctly concluded that Ms. Deylen's TCPA and privacy claims fall outside the scope of the Service Agreement's arbitration clause. In arguing to the contrary, Aptive urges this Court to apply a standard, rooted in the "federal policy favoring arbitration," Opening Br. at 12, that is at odds with Supreme Court precedent. That precedent first requires the application of ordinary state-law principles of contract interpretation to determine whether a dispute is covered by an agreement to arbitrate. Any federal policy applies, if at all, only under the narrow circumstance in which the initial application of contract-law principles yields an ambiguous result.

The Supreme Court clarified the "proper framework" for deciding questions of scope in *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287, 297 (2010). Because "arbitration is a matter of contract," *id.* at 296, "a court may order arbitration of a particular dispute" pursuant to the FAA "only where the court is satisfied that the parties agreed to arbitrate *that dispute*." *Id.* at 297 (emphasis in original); *see also First Options of Chi. Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (Parties may be compelled "to resolve those disputes—*but only those disputes*—that

[they] have agreed to submit to arbitration.") (emphasis added); *Pro Tech Indus., Inc. v. URS Corp.*, 377 F.3d 868, 871 (8th Cir. 2004) (same). So, although a court enforces a valid arbitration clause pursuant to federal law (that is, the FAA), ordinary principles of contract law guide the inquiry into whether the parties formed an agreement to arbitrate and, if so, whether the parties' dispute falls within the scope of that agreement. *Granite Rock*, 561 U.S. at 296; *see also First Options*, 514 U.S. at 944 ("ordinary state-law principles" apply to questions of, *inter alia*, "scope"); *Hudson v. ConAgra Poultry Co.*, 484 F.3d 496, 500 (8th Cir. 2007) (same); *Keymer v. Mgmt. Recruiters Int'l, Inc.*, 169 F.3d 501, 504 (8th Cir. 1999) (same). And, as a general matter, under those principles, "it is the language of the contract that defines the scope of disputes subject to arbitration." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002); *Morgan v. Smith Barney, Harris Upham & Co.*, 729 F.2d 1163, 1165 (8th Cir. 1984) (It is "a matter of contract interpretation" to determine "whether the parties intended the particular dispute to be arbitrated as evidenced by the language contained in the agreement.").

Aptive skips this step of contract interpretation entirely, seizing instead on a "federal policy favoring arbitration" and related "presumption of arbitrability" to effectively argue that the mere fact of an arbitration clause is dispositive of its scope. Opening Br. at 12 (citing, *inter alia*, *Donaldson Co. v. Burroughs Diesel Inc.*, 581 F.3d 726, 731 (8th Cir. 2009)). Aptive overstates the role of federal law here.

Granite Rock explained that any such presumption plays a limited role, if any, in determining whether a dispute falls within an arbitration agreement's scope. The Supreme Court acknowledged its prior description of a "presumption of arbitrability" such that "any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration." 561 U.S. at 298 (citation omitted); *see also Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983) (articulating this presumption); *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (applying a similar presumption). After tracing this presumption to its previous discussions of a "policy favoring arbitration," however, the Supreme Court clarified that "this 'policy' is merely an acknowledgement of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Granite Rock*, 561 U.S. at 302 (citation omitted).

Granite Rock thus cautioned that "policy considerations" cannot "substitute for party agreement." *Id.* at 303. In other words, nothing in the FAA "purports to alter background principles of state contract law regarding the scope of agreements." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009). Rather, "[b]ecause the FAA is at bottom a policy guaranteeing the enforcement of private contractual arrangements, [courts] look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement." *Waffle House*,

534 U.S. at 294. They do not "override . . . the plain text of the contract, simply because the policy favoring arbitration is implicated." *Id.* Thus, after confirming the controlling question is whether, as a matter of contract interpretation, the agreement is "best construed to encompass the dispute," *Granite Rock* cabined the "rebuttable" "presumption of arbitrability" to apply only when it is truly "ambiguous about whether [an arbitration clause] covers the dispute at hand." 561 U.S. at 301, 303.

This Court's two-step framework for deciding questions of scope—examined most recently in *Parm v. Bluestem Brands, Inc.*, 898 F.3d 839 (8th Cir. 2018)—must be understood in the context of *Granite Rock*. *Parm* described the "first question" as "whether the arbitration clause is broad or narrow." *Id.* at 869 (citation omitted). If the clause is broad, *Parm* said that "the liberal federal policy favoring arbitration" requires a court to resolve "any doubts in favor of arbitration" and send the claim to arbitration "as long as the underlying factual allegations simply touch matters covered by the arbitration provision." *Id*. (quoting *Unison Co. v. Juhly Energy Dev., Inc.*, 789 F.3d 816, 818 (8th Cir. 2015)). Given *Granite Rock*'s caution that "policy considerations" not "substitute for party agreement," 561 U.S. at 303, however, this Circuit's two-step framework must be understood as a direction to "look first" to the "plain text" of the arbitration clause using ordinary principles of contract interpretation. *See Waffle House*, 534 U.S. at 294. Then, only if state interpretive principles do not dictate a clear outcome should a court consider applying a

presumption of arbitrability as a final tool to ascertain the parties' intent. *See Granite Rock*, 561 U.S. at 303. Those are the two steps most consistent with the Supreme Court and this Court's longstanding recognition that "'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit'" pursuant to "'ordinary state-law principles.'" *Hudson*, 484 F.3d at 500 (first quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); then quoting *First Options*, 514 U.S. at 944).[1]

This reading is also consistent with the approach of the Second Circuit, whose case law this Circuit relied on when first articulating its two-step framework and which recently re-addressed how to answer questions of scope.[2] In *Local Union 97*

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[1] Aptive entirely misses the role of state contract law by focusing solely on this Court's passing comment in *Donaldson* that scope questions are governed by the "federal substantive law of arbitrability." Opening Br. at 12 (quoting *Donaldson*, 581 F.3d at 731). But that comment was dicta, as *Donaldson* involved a question of non-signatory enforcement rather than scope. 581 F.3d at 732-33. And, in any event, even if a court enforces a valid arbitration agreement pursuant to federal law, relying solely on federal law to *interpret* arbitration provisions would be inconsistent with Supreme Court and Eighth Circuit precedent expressly holding that scope questions, like other questions of interpretation of arbitration agreements, are governed by ordinary state-law principles.

[2] The Eighth Circuit first "adopted the broad/narrow approach" to questions of scope in *Fleet Tire Serv. of North Little Rock v. Oliver Rubber Co.*, 118 F.3d 619 (8th Cir. 1997). *See Parm*, 898 F.3d at 874. In *Fleet Tire*, the Court relied on precedent from the Second Circuit to identify the "two inquiries a court must make when determining whether an arbitration clause applies." 118 F.3d at 621 (citing *Prudential Lines, Inc. v. Exxon Corp.*, 704 F.2d 59, 63 (2d Cir. 1983)); *see also Prudential Lines*, 704 F.2d at 63 ("If the arbitration clause is broad and arguably covers [the] disputes . . . , arbitration should be compelled[.]") (citation omitted).

v. Niagara Mohawk Pwr. Corp., 67 F.4th 107 (2d Cir. 2023), the Second Circuit held that its prior standard—which, as in *Parm*, started by classifying an arbitration clause as broad or narrow and then, if the clause was broad, presumed arbitrability—was inconsistent with *Granite Rock*'s mandate to start with "ordinary principles of contract interpretation" and to invoke the presumption only as a "last, rather than first, resort." *Id.* at 114. As the court explained, starting by interpreting the scope of an arbitration clause through the lens of a presumption favoring arbitrability "runs the risk of requiring parties to arbitrate disputes they did not consent to be arbitrated." *Id.* To counter that risk, the Second Circuit declined to continue to embrace the two-step interpretive framework this Circuit adopted.

Intervening Supreme Court precedent since *Granite Rock* and *Parm*, however, gives this Court reason to go beyond the Second Circuit's clarification and eliminate any presumption of arbitrability. Picking up where *Granite Rock* left off, *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022), further defined the limits of the federal "policy favoring arbitration" and held that the FAA does not permit courts to create contract rules that apply only to arbitration, even where an arbitration-specific rule *favors* arbitration. *Id.* at 418. Instead, courts must use generally applicable contract principles to interpret and enforce arbitration agreements. *Id.* Specifically, *Morgan* held that prejudice was not a condition to finding that a party had waived its right to compel arbitration under the FAA because it is not a condition outside the context

of arbitration, reversing the majority of circuits, including this one, which had adopted an arbitration-specific rule of waiver based on prejudice. *Id.* at 417-18.

What is most significant about *Morgan* for this case is why the Supreme Court said federal courts were wrong to create a "bespoke rule of waiver for arbitration." *See id.* at 417. Courts, explained *Morgan*, had relied on cases like *Moses* and its "policy favoring arbitration" to create their arbitration-specific waiver rules. *Id.* at 418 (quoting *Moses*, 460 U.S. at 24). But, pointing to subsequent cases like *Granite Rock*, the Supreme Court in *Morgan* confirmed that the federal policy is "to place such agreements upon the *same footing* as other contracts." *Id.* at 418 (quoting *Granite Rock*, 561 U.S. at 302) (emphasis added). In other words, the "favoring" in the phrase "policy favoring arbitration" is a bit of a misnomer because the actual "federal policy is about treating arbitration contracts like all others, not about fostering arbitration" or placing a thumb on the scale in favor of arbitration. *Id.*; *see also, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (Arbitration agreements must be placed "on an *equal footing* with other contracts.") (emphasis added); *Keymer*, 169 F.3d at 504 ("[W]e examine arbitration agreements in the same light as any other contractual agreement.").

This Court did not have the benefit of *Morgan* the last time it closely examined the standard that applies to questions of scope. *See Parm*, 898 F.3d at 873-74. Under *Morgan*, however, it follows that when it comes to whether an arbitration clause

applies to a particular dispute, the federal policy requires a court to use the same principles of contract interpretation to evaluate the scope of that clause as it would interpret the scope of any other contractual clause. And because a "fundamental principle of contract" interpretation is that "ambiguous contract terms" must be "construed against the drafter," *Qwinstar Corp. v. Anthony*, 882 F.3d 748, 755 (8th Cir. 2018) (quoting *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 148 (Minn. 2002)), applying a presumption of arbitrability as an "interpretive rule" to resolve questions of scope in favor of arbitration "departs from ordinary principles of contract interpretation." *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173, 186 (2d Cir. 2021) (Sullivan, J., dissenting) (citing *John Hancock Life Ins. v. Wilson*, 254 F.3d 48, 58 (2d Cir. 2001)); *see also Rusthoven v. Com. Standard Ins. Co.*, 387 N.W.2d 642, 645 (Minn. 1986) ("One of the ancient principles of contract law is that an ambiguous contract, especially an adhesion contract, is construed against the drafter."); Restatement (Second) of Contracts § 206 (1981).[3] Requiring arbitration "unless it may be said with positive assurance that the arbitration clause is *not susceptible* of an interpretation that covers the asserted dispute," *Parm*, 898 F.3d at

[3] As Aptive seems to agree, *see* Opening Br. at 12, Minnesota law applies to questions of contract formation and interpretation here as the state with the "most significant relationship" to the parties' dispute over arbitration. *See* Restatement (Second) of Conflict of Laws § 188 (1971).

873-74 (citation omitted) (emphasis added), flips this principle on its head when it is the drafting party that seeks arbitration.[4]

Because *Morgan* is a "supervening Supreme Court decision [that] 'undermines,'" or at the very least "casts doubt on," *Parm*'s articulation of the presumption of arbitrability, this Court should "reconsider" that framing. *See United States v. Villareal-Amarillas*, 562 F.3d 892, 898 n.4 (8th Cir. 2009) (citation omitted). Upon reconsideration, it will be clear that a court's analysis of the scope of an agreement to arbitrate starts, and stops, with ordinary state-law contract principles. But even if this Court is not inclined to revisit its framework in light of *Morgan*, *Granite Rock* is clear that a court only turns to a presumption of arbitrability as a last resort if the application of ordinary state-law contract principles yields an

[4] Although Minnesota courts have discussed a presumption of arbitrability under the Minnesota Revised Uniform Arbitration Act (MRUAA), *see, e.g.*, *Local No. 320 v. Cnty. of St. Louis*, 611 N.W.2d 355, 358-59 (Minn. Ct. App. 2000), that state-law presumption has no bearing here. For one, while Minnesota contract law applies to the contract interpretation question of whether Ms. VonDeylen's claims fall within the scope of the Service Agreement's arbitration clause, that clause is governed by the FAA, not the MRUAA, because this case involves interstate commerce. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271-72 (1995). What is more, Minnesota courts have largely relied on the federal policy favoring arbitration when discussing any state policy. *See, e.g.*, *Provost v. Lundmark*, 15 N.W.3d 664, 669-70 (Minn. Ct. App. 2024) (discussing presumption of arbitrability under both FAA and MRUAA and citing *Churchill Env't & Indus. Equity Partners, L.P. v. Ernst & Young, LLP*, 643 N.W.2d 333, 337 (Minn. Ct. App. 2002)); *but see Churchill*, 643 N.W.2d at 336 (relying on *Moses* to discuss presumption of arbitrability under FAA). There are thus good reasons to believe Minnesota courts would reconsider any presumption of arbitrability following *Morgan*.

ambiguous result. There is no need to apply such a presumption here because there is nothing ambiguous about it: The Service Agreement's arbitration clause does not encompass Ms. VonDeylen's claims.

II. The district court correctly determined that Ms. VonDeylen's TCPA and privacy claims do not arise out of or relate to the Service Agreement.

Applying this framework, Ms. VonDeylen's claims do not fall within the scope of the agreement to arbitrate in Aptive's Service Agreement. The Agreement requires arbitration of disputes "arising out of or relating to this Agreement, or the services performed by Aptive under this Agreement or any other agreement, or the relationship between you and Aptive resulting from any of the foregoing." (App. 52 R. Doc. 19-2, ¶ 12.) As a matter of ordinary contract interpretation and this Court's case law interpreting the scope of similar phrases, the plain language of this clause requires a "direct relationship" between the Service Agreement and the dispute. Because there is no such relationship here, the district court correctly concluded that Ms. VonDeylen's claims are not arbitrable.

As explained above, a court determines the scope of an agreement to arbitrate by first applying ordinary state-law contract principles. The "primary goal of contract interpretation" under Minnesota law "is to determine and enforce the intent of the parties." *Ascente Bus. Consulting, LLC v. DR myCommerce*, 9 F.4th 849, 847 (8th Cir. 2021) (quoting *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003)). To determine the parties' intent, a court "give[s]

unambiguous words their plain, ordinary, and popular meaning" in accordance with "context," "common sense," *Hampton v. Kohler*, 989 F.3d 619, 623 (8th Cir. 2021) (applying Minnesota law), and what a "reasonable person" would understand, *Asia Pac. Indus. Corp. v. Rainforest Café, Inc.*, 380 F.3d 383, 385-86 (8th Cir. 2004). If a term is ambiguous, Minnesota law requires a court to construe the meaning of the term against the drafter. *See Qwinstar*, 882 F.3d at 755 (citation omitted).

Consistent with these principles, this Court looks to the "plain language of the arbitration agreement" to evaluate its scope. *See Berkley v. Dillard's Inc.*, 450 F.3d 775, 777-78 (8th Cir. 2006). In so doing, it has interpreted the phrase "arising under or related" to— language similar to that in the Service Agreement's arbitration clause—as requiring a "direct relationship" between the claims and the underlying contract for those claims to be arbitrable. *See Anderson v. Hansen*, 47 F.4th 711, 717-18 (8th Cir. 2022) (citations omitted). In *Anderson*, for example, this Court concluded that tort claims based on a sexual assault that took place during a work trip did not fall within the scope of a clause requiring arbitration of "dispute[s] arising under or related in any way to [the plaintiff's employment] Agreement." *Id.* at 718. Relying on analogous case law from the Fifth and Eleventh Circuits, *Anderson* held that although the clause appeared "broad," it was not "all encompassing." *Id.* at 717 (quoting *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1218 (11th Cir. 2011); citing *Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir.

2009)). Instead, the phrase "arising under or related in any way" "limit[ed]" arbitrable claims to those that had a "direct relationship between the dispute and the performance of duties specified by the contract." *Id.* at 715, 717 (citing *Doe*, 657 F.3d at 1218). Applying those definitions to the contract language at hand, *Anderson* held that the "underlying factual allegations of sexual assault" did not have a "'direct relationship' with the [employment] agreements" because the parties could have "fulfilled all of their duties" in those agreements, and "still be embroiled in the dispute alleged." *Id.* at 718 (citations omitted); *see also, e.g.*, *U.S. ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791, 798 (9th Cir. 2017) (similarly interpreting "the phrases, 'arising out of' and 'related to,'" as "indicating some direct relationship"). Any other interpretation would be "an interpretative no-no" because it would read the specific "limiting language" out of the contract. *Anderson*, 47 F.4th at 717 (quoting *Doe*, 657 F.3d at 1218).

Anderson rejected the argument that there was a "direct relationship" between the claims and the employment contract just because the plaintiff and the assailant would not have come into contact "but for" their work responsibilities. *Id.* at 718; *see also Doe*, 657 F.3d at 1219-20; *Jones*, 583 F.3d at 236. As this Court explained, the "'fact that [the plaintiff] might not have been' at a bar and staying in a hotel but for" the work trip "was an 'incidental' fact." because, again, the dispute alleged did not depend on whether the parties had fulfilled their respective duties under the

employment agreements. *Anderson*, 47 F.4th at 718 (quoting *Doe*, 657 F.3d at 1219-20).[5] In other words, whether there is a "direct relationship" to an agreement at issue turns on whether the claim stems from a duty created by that agreement, not on whether the factual circumstances of the claim would not have arisen but for the contract. *See Doe*, 657 F.3d at 1218-19 ("direct relationship" when claims are based on the "performance of duties specified by the contract").

This Circuit similarly focused on whether the duties giving rise to the claim arose from the terms of the contract in *Zetor North America, Inc. v. Rozeboom*, 861 F.3d 807 (8th Cir. 2017). In that case, the question was whether the plaintiff's trademark and related claims "arise out of or relate to" the parties' previous settlement agreement that resolved a separate dispute over similar conduct years prior. *Id.* at 810 (cleaned up). This Court said no. As *Zetor* emphasized, the plaintiff's claims "in no way depend[ed] on [the] existence" of the settlement agreement. *Id.* at 811. For one, the settlement resolved an earlier dispute regarding the defendant's past infringement of the Zetor mark; it did not create an ongoing "relationship between the parties to be governed by the terms of the Agreement." *Id.* And—like

[5] Other courts are in accord. *See, e.g.*, *Welch*, 871 F.3d at 799 (finding persuasive *Doe*'s and *Jones*'s rejection of an interpretation of the phrases "arise out of" or "relate to" as requiring a "but for" relationship between the claims and a contract); *Seifert v. U.S. Home Corp.*, 750 So.2d 633, 638 (Fla. 1999) ("[T]he mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one 'arising out of or relating to' the agreement.").

here—Zetor was "not attempting to enforce the terms of the Agreement." *Id.* Instead, it was "suing to enforce trademark and unfair competition laws." *Id.* Because the "plain language of the contract" did not apply to "wholly independent claims arising several years later," the new claims about new conduct did not fall within the scope of the arbitration clause and were not arbitrable. *Id.*

Consistent with this precedent, and as a matter of generally applicable Minnesota contract law, there must be a "direct relationship" between Ms. VonDeylen's claims and Aptive's Service Agreement. Ignoring the plain language of its own contract, Aptive asserts that "*all* claims between Ms. VonDeylen and Aptive" must be arbitrated. *See* Opening Br. at 16 (emphasis added). But, although the phrase "arising out of or relating to" is broad, as in *Anderson* and *Zetor*, it is not "all encompassing." *See Anderson*, 47 F.4th at 717. The Service Agreement contains express limiting language requiring a direct relationship between Ms. VonDeylen's dispute and (1) the "Service Agreement," (2) "the services performed by Aptive under [the Service] Agreement or any other agreement," or (3) the "relationship" between the parties "resulting from any of the foregoing." (App. 52 R. Doc. 19-2, ¶ 12.) These categories are contract based, from the Service Agreement itself, to the services Aptive performs pursuant to an agreement, to the parties' contractual relationship resulting from the "foregoing" agreements or services. *See Savage v. Citibank N.A.*, No. 14-cv-3633, 2015 WL 2214229, at *4 (N.D. Cal. May 12, 2015)

(interpreting "'our relationship' language in the agreements" to be "limited to the relationship created by those agreements"). It would be an "interpretative no-no" to, as Aptive does, read this limiting language out of the contract.

Ms. VonDeylen's claims do not have the requisite direct relationship. Most fundamentally, they are not based on any duties Aptive had under the Agreement, *Anderson*, 47 F.4th at 717, nor is she "attempting to enforce the terms of the Agreement," *Zetor*, 861 F.3d at 811, by arguing, for example, that she was improperly charged for services or that Aptive failed to address her pest problem. Instead, she is "suing to enforce [consumer protection] laws that are independent of the Agreement." *Id.* That is, as the district court explained, Ms. VonDeylen's "claims relate solely to the propriety of the texts in light of [her] cell number being on the DNC registry" (App. 76 R. Doc. 33, at 7), and her efforts to unsubscribe from further messages.

The Service Agreement has no bearing on that question even if, as Aptive emphasized below, Aptive may not have had Ms. VonDeylen's phone number "[b]ut for the [Service A]greement." (App. 67 R. Doc. 26, at 2.) Aptive's reasoning would stretch language like "relate to" to the "furthest stretch of its indeterminacy," entirely nullifying its limiting purpose and re-writing the Agreement to encompass claims flowing from *any* possible interaction between the two parties. *See Doe*, 657 F.3d at 1218. Indeed, this Court and others have expressly declined to interpret phrases like

"arising under" or "relating to" to encompass each and every claim that flows from a contractual relationship. *See Anderson*, 47 F.4th at 718; *supra* at 20 & 20 n.5 (listing cases). Rather, the fact that Aptive had Ms. VonDeylen's phone number because of their prior Service Agreement is "an incidental fact" given that Aptive still "could [] have fulfilled all [its] duties" under the Agreement to provide pest-control services without violating the TCPA or invading her privacy. *See Anderson*, 47 F.4th at 717 (quoting *Doe*, 657 F.3d at 1219-20).

The district court's interpretation of the scope of the Service Agreement's arbitration provision accords with the Eleventh Circuit's decision in *Gamble v. New England Auto Finance, Inc.*, 735 F. App'x 664 (11th Cir. 2018). In that case, the plaintiff alleged that an auto financing company started texting her about car loans without her consent *after* she had already paid off her previous car loan with the company. The Eleventh Circuit rejected the defendant's argument that the plaintiff's TCPA claims were tied to the prior loan agreement, which included an optional, unsigned provision consenting to text communications. *Id.* at 666. As the court emphasized, "it is not the unsigned Text Consent Provision which gives Ms. Gamble the right not to receive unconsented-to text messages . . . . Congress provided Ms. Gamble that right through the TCPA, and she had that right . . . before she signed

the Loan Agreement and refused to sign the Text Consent Provision." *Id.*[6] As a result, the plaintiff's claims were not arbitrable because they did not arise "from the Loan Agreement or any breach of it," but "from post-agreement conduct that allegedly violate[d] a separate, distinct federal law"—the TCPA. *Gamble*, 735 F. App'x at 666; *see also, e.g.*, *Breda v. Cellco P'ship*, 934 F.3d 1, 8 (1st Cir. 2019) (explaining that plaintiff's "TCPA claims are entirely unrelated to the parties' prior relationship as memorialized in the Agreement, that of customer and telephone service provider"); *Rahmany v. T-Mobile USA Inc.*, 717 F. App'x 752, 753 (9th Cir. 2018) ("The TCPA, not the Wireless Agreement, creates and defines any alleged duty to refrain from sending an unwanted text message."). That was also the case even though the company would not have had the plaintiff's phone number but for their previous loan agreement.

Zean v. Comcast Broadband Security, LLC, 322 F. Supp. 3d 913 (D. Minn. 2018), on which Aptive relies to assert that courts "generally recognize" that TCPA claims are "subject to arbitration," is not to the contrary. *See* Opening Br. at 14. In *Zean*, the *pro se* plaintiff alleged that Comcast had improperly used an automated

[6] The district court had no trouble rejecting a similar argument from Aptive below. (App. 76 n.1 R. Doc. 33, at 7 n.1.) With good reason, Aptive has not renewed, and has therefore forfeited, an argument based on the clause allowing Ms. VonDeylen to consent to receiving text messages as part of the "Welcome Checklist" separate from the Service Agreement. Ms. VonDeylen did not provide such consent (App. 24 R. Doc. 15, ¶ 27), and her "claims are based on the alleged violation of the TCPA, not on the unsigned consent provision" (App. 76 n.1 R. Doc. 33, at 7 n.1).

telephone dialing system to try to collect on a debt related to a Comcast technician's effort to fix the plaintiff's connectivity issue. The district court easily concluded that the plaintiff's TCPA and other consumer protection claims fell within the scope of the arbitration provision, which required arbitration of "any claim or controversy related to Comcast." *Zean*, 322 F. Supp. 3d at 919. *Zean* is entirely distinguishable. That provision is much broader in scope than the provision in Aptive's Service Agreement because, by focusing on Comcast rather than the Comcast Subscriber Agreement, it encompasses far more than contract-related disputes. And, in any event, the claims in *Zean* were directly related to the parties' respective duties under the Comcast Subscriber Agreement and whether the customer was required to pay for the service visit. *Id.* at 916-17.

Aptive cites two other TCPA cases, but neither advances its cause either. In *Schultz v. Verizon Wireless Services, LLC*, 833 F.3d 975 (8th Cir. 2016) (cited at Opening Br. at 15), this Court had no occasion to interpret the scope of the arbitration clause in Verizon's Customer Agreement or consider whether it encompassed the plaintiffs' "billing dispute" (a quintessential, contract-based claim), because the plaintiffs had stated in a pleading that they would "consent to this matter being sent to arbitration." *Id.* at 980. And in *Klutho v. JD Powerhouse, LLC*, 542 F. Supp. 3d 893 (E.D. Mo. 2021) (cited at Opening Br. at 15), any discussion of whether the consumer's TCPA claims fell within the scope of the arbitration provision was dicta

because the court concluded that the parties' agreement "clearly and unmistakably" evinced the parties' intent to delegate "this threshold question of arbitrability" to the arbitrator. *Id.* at 897.

Perhaps recognizing that the arbitration provision does not in fact cover "all claims," Aptive also argues that Ms. VonDeylen's claims must be arbitrable because its provision covers disputes related to Aptive's "services," and the "content" of the challenged text messages "all directly relate[] to the services provided by Aptive"—i.e., appointments and payment options for "pest control services." Opening Br. at 16. The plain language of the Service Agreement says otherwise. The Agreement requires arbitration when a dispute arises out of or relates to "the services performed by Aptive *under this Agreement or any other agreement*." (App. 52 R. Doc. 19-2, ¶ 12 (emphasis added).) The Agreement expired in 2021, and the parties did not enter into a new one. (*See* App. 25 R. Doc. 15, ¶¶ 29, 30.) Indeed, as an Aptive employee allegedly admitted, Aptive sent the unsolicited text messages because of a "glitch" in its system (App. 26 R. Doc. 15, ¶ 43), not because of any ongoing contractual obligations or relationship between the parties. So, as in *Zetor*, even though the challenged conduct may be similar to conduct covered by a previous agreement, that agreement did "not create a structure of forward-looking rights and obligations" and is not the basis for an ongoing relationship that could sweep in present claims. *See* 861 F.3d at 811.

Aptive counters that the parties' relationship survived the expiration of the Service Agreement because the Agreement expressly provides that the arbitration "provision shall survive the termination of this Agreement[.]" Opening Br. at 17 (quoting App. 52 R. Doc. 19-2, ¶ 12). Aptive misses the point. The question is whether Ms. VonDeylen's claims arise out of or relate to the Service Agreement, Aptive's contracted-for services, or the parties' contractual relationship. The survival clause does not extend the life of the *Service Agreement* or the parties' contractual relationship.[7] It just means that if, for example, Ms. VonDeylen discovered years later that Aptive had negligently performed its contractual duties under the Service Agreement, those claims could still be subject to arbitration. In other words, the survival clause impacts the analysis if the claims otherwise have the requisite direct relationship; because Ms. VonDeylen's claims do not, the clause has no bearing here.

* * *

In sum, both under Minnesota contract law and this Court's prior interpretation of similar contract language, the plain text of the Service Agreement's arbitration clause does not encompass Ms. VonDeylen's TCPA and privacy claims.

[7] As a result, even if Ms. VonDeylen had agreed to "notifications" about service times and dates or her account (*see* App. 72 R. Doc. 33, at 3 (district court citing ¶ 13 of the Service Agreement); *see also* App. 52 R. Doc. 19-2, ¶ 13), that term, and therefore consent, expired when the Service Agreement expired and the parties' contractual relationship ended.

This unambiguous result ends the analysis because there is no reason to apply a presumption of arbitrability here, regardless of whether the Court is inclined to revisit its two-step framework for scope following *Morgan*. In *Anderson* and *Zetor*, because this Court interpreted similar contractual language to require a direct relationship, and because that relationship was lacking, the plaintiffs' claims did not even "touch matters covered by the [arbitration provisions]." *See Anderson*, 47 F.4th at 718; *Zetor*, 861 F.3d at 811. As a result, the presumption of arbitrability did not apply and the claims were not subject to arbitration. So too here. Because Ms. VonDeylen's claims do not have a direct relationship to the Service Agreement, they certainly do not touch matters covered by the Agreement's arbitration clause. This Court, therefore, has no occasion to reach for what is, at most, a "last resort" presumption of arbitrability.

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CONCLUSION

For the foregoing reasons, Ms. VonDeylen respectfully asks this Court to affirm the order of the district court denying Aptive's motion to compel arbitration.

Date: April 28, 2025

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CERTIFICATE OF COMPLIANCE

The undersigned attorney for Ms. VonDeylen certifies that this brief complies with the type-volume and type-face limitations of Federal Rule of Appellate Procedure 32. The brief has 7,152 words, proportionally spaced using Times New Roman, 14-point font. The brief was prepared using Word for Microsoft 365. Pursuant to Eighth Circuit R. 28A(h), the undersigned attorney also certifies that the brief has been scanned for viruses and, to the best of our ability and technology, believes that it is virus free.

Date: April 28, 2025

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