

No. _____

IN THE
Supreme Court of the United States

COINBASE, INC.,
Applicant,

v.

DAVID SUSKI, *et al.*,
Respondents.

**APPLICATION FOR AN EXTENSION OF TIME TO FILE A
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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APPLICATION

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), Applicant Coinbase respectfully requests a 30-day extension of time, to and including June 23, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

1. The Ninth Circuit entered judgment on December 16, 2022. *See Suski v. Coinbase, Inc.*, 55 F.4th 1227 (9th Cir. 2022), App. 1a. The court denied Applicant’s petition for rehearing en banc on February 23, 2023. *See* App. 11a. Unless extended, the time to file a petition for a writ of certiorari will expire on May 24, 2023. This application is being filed more than ten days before a petition is currently due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

2. Applicant Coinbase, Inc. operates one of the largest cryptocurrency exchange platforms in the United States. Coinbase users can transact in myriad digital currencies, such as bitcoin and ether. When a user creates a Coinbase account, the user must agree to terms set out in Coinbase’s User Agreement. That Agreement contains an arbitration clause and a delegation clause—a specific agreement “to arbitrate threshold issues concerning the arbitration” including “whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.” *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010) (addressing proper

analysis of delegation clause); *see also* App. 5a-6a. The delegation clause here states that the arbitrator shall address “the existence, scope, or validity of the arbitration agreement.” App. 6a.

3. Respondents are Coinbase users, each of whom created a Coinbase account, and agreed to Coinbase’s User Agreement, before participating in Coinbase’s Dogecoin Sweepstakes. The Sweepstakes offered entrants the opportunity to win prizes of up to \$1,200,000 in dogecoin, a digital currency. *Id.*

4. Respondents filed a putative class action alleging Coinbase’s promotion of the Sweepstakes violated California law. Respondents’ proposed class consists of users who agreed to various versions of Coinbase’s User Agreement, all of which contain provisions regarding arbitrability and delegation of threshold questions to an arbitrator.

5. Coinbase moved to compel arbitration arguing that, under the User Agreement, the dispute belonged in arbitration, and any dispute about applicability of the arbitration provision to claims regarding the Sweepstakes had been delegated to the arbitrator. App 5a.

6. The District Court refused to compel arbitration. The court recognized that Respondents signed Coinbase’s User Agreement which “delegated to the arbitrator” any “disagreements over the scope of the arbitration provisions,” and that Respondents did not contest that their claims fell within the User Agreement’s arbitration clause. App. 18a. But the District Court determined that a separate forum selection clause in the Sweepstakes “Official Rules” superseded the User

Agreement’s arbitration agreement, including its delegation clause. According to the District Court, for disputes related to the Dogecoin Sweepstakes, the forum selection clause meant the parties agreed to litigate in federal court disputes that would have otherwise been subject to arbitration under the User Agreement—even though the forum selection clause said nothing about the User Agreement or delegation clause. And—contrary to the delegation clause’s express terms—the District Court refused to allow an arbitrator to decide whether the arbitration agreement’s scope had been narrowed by the forum selection clause. App. 19a-20a.

7. Coinbase appealed the denial of the motion to compel arbitration.¹ On appeal, the Ninth Circuit affirmed the denial of Coinbase’s motion to compel. Like the District Court, the Ninth Circuit held that, despite the existence of a valid delegation clause, a judge and not an arbitrator must decide whether the otherwise valid arbitration agreement governed claims regarding the Sweepstakes.

8. The Ninth Circuit recognized that the delegation clause empowered an arbitrator to decide all disputes about “the existence, scope, or validity of the arbitration agreement.” App. 6a. The Ninth Circuit also did not contest that the User Agreement, including both the delegation clause and the arbitration agreement, were generally valid and governed other disputes between Coinbase and Respondent.

¹ The District Court and the Ninth Circuit separately declined to stay proceedings pending the resolution of Coinbase’s interlocutory arbitrability appeal. Coinbase filed a petition for a writ of certiorari, which this Court granted, to determine whether the filing of a notice of appeal divests the district court of authority to proceed during the pending appeal. *See Coinbase, Inc. v. Bielski*, No. 22-105 (U.S.) (argued Mar. 21, 2023).

But the Ninth Circuit nevertheless held that—notwithstanding the valid delegation clause—the Court must decide whether Respondent’s claims fell within the arbitration agreement’s scope.

9. The Ninth Circuit reached that result by looking to precedent permitting courts to decide disputes over the “existence” of an arbitration agreement. App. 7a. According to the panel, under this circuit precedent, a judge must determine whether the forum selection clause in the Official Rules of the Sweepstakes “superseded” the User Agreement arbitration provision with respect to the Sweepstakes, and thus whether the case belonged in federal court or in arbitration. *Id.* at 6a-10a.

10. The Ninth Circuit’s decision below is wrong and deepens an already entrenched split among federal courts of appeal and state courts of last resort. This Court’s review is urgently needed.

11. The Federal Arbitration Act (FAA or Act) makes clear that arbitration provisions, including delegation clauses, “shall be *valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (emphasis added); *Rent-A-Ctr.*, 561 U.S. at 70. Consistent with the text of the Act, arbitration provisions are “severable from the remainder of the contract,” and a challenge to the contract *as a whole* is not sufficient to invalidate an arbitration agreement within that contract. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967). Unless a party challenges “the arbitration clause itself, the issue of

the contract’s validity is considered by the arbitrator in the first instance.” *Buckeye*, 546 U.S. at 445-446.

12. This Court has explained that a delegation clause is “simply an additional, antecedent agreement” to “arbitrate ‘gateway’ questions” such as “whether [an] agreement covers a particular controversy.” *Rent-A-Center*, 561 U.S. at 68-70 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)). The FAA “operates on this additional arbitration agreement,” too, and courts must rigorously enforce delegation clauses “just as it does any other” arbitration agreement. *Id.* at 70. A party can only invalidate a delegation clause by making arguments “specific to the delegation provision.” *Id.* at 74.

13. The Ninth Circuit failed to follow that settled rule regarding delegation clauses. Instead, it declined to enforce a valid delegation clause because, in its view, the arbitration agreement—*as a whole*—was superseded by the Official Rules with respect to the Sweepstakes. That was not a challenge specific to the delegation provision. *See id.* Instead, that was plainly a threshold question of the scope and validity of the arbitration agreement that the delegation clause assigned to the arbitrator.

14. The Ninth Circuit’s decision below deepens a split with federal courts of appeal and state high courts regarding whether an arbitrator, not the court, must decide whether an arbitration agreement with a valid delegation clause has been superseded, in whole or in part, by another contract. At least two jurisdictions hold that the existence of a valid delegation clause means the arbitrator must decide this

threshold legal question. *See Agere Sys., Inc. v. Samsung Electronics Co.*, 560 F.3d 337 (5th Cir. 2009); *Blanks v. TDS Telecomm. LLC*, 294 So. 3d 761 (Ala. 2019). By contrast, at least five jurisdictions hold that the court must determine the impact of the subsequent contract on the validity of the arbitration agreement. *See McKenzie v. Brannan*, 19 F.4th 8 (1st Cir. 2021); *Field Intelligence Inc. v. Xylem Dewatering Sols. Inc.*, 49 F.4th 351 (3d Cir. 2022); *Transcor Astra Grp. S.A. v. Petrobras Am. Inc.*, 650 S.W.3d 462 (Tex. 2022), *petition for cert. filed*, No. 22-518 (Nov. 30, 2022); *Midwest Neurosciences Assocs., LLC v. Great Lakes Neurosurgical Assocs., LLC*, 920 N.W.2d 767 (Wis. 2018); *SMJ Gen. Constr., Inc. v. Jet Com. Constr., LLC*, 440 P.3d 210 (Alaska 2019).

15. Lower courts regularly confront cases like this one where parties subject to a delegation clause subsequently enter into additional agreements. This Court's guidance will be critical to ensure that courts properly enforce delegation clauses in this recurring scenario.

16. Jessica Ellsworth of Hogan Lovells U.S. LLP, Washington, D.C., was recently retained to file a petition for certiorari in this Court. Over the next several weeks, counsel is occupied with briefing deadlines and argument in a variety of matters, including an expedited reply brief in the Fifth Circuit due on May 12, 2023 in *Alliance for Hippocratic Medicine v. U.S. Food & Drug Administration et al.* (No. 23-10362); argument in the Fifth Circuit on May 17, 2023 in *Alliance for Hippocratic Medicine v. U.S. Food & Drug Administration et al.* (No. 23-10362); and an opening brief in the Ninth Circuit on June 8, 2023 in *Carr et al. v. Google LLC et al.* (No. 23-

15285). Applicant requests this extension of time to permit counsel to research the relevant legal and factual issues and to prepare a petition that fully addresses the important questions raised by the proceedings below.

17. For these reasons, Applicant respectfully requests that an order be entered extending the time to file a petition for certiorari to and including June 23, 2023.

Respectfully Submitted,

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