NO. 23-3

In the Supreme Court of the United States

COINBASE, INC.,

Petitioner,

v.

DAVID SUSKI, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS DAVID SUSKI, JAIMEE MARTIN, JONAS CALSBEEK, AND THOMAS MAHER

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QUESTIONS PRESENTED

1. Whether the parties' User Agreements are "contract[s] evidencing a transaction" within the meaning of 9 U.S.C. § 2.

and, if so,

2. Whether the parties to the sweepstakes contracts at issue "clearly and unmistakably" intended for an arbitrator to decide the method for resolving sweepstakes disputes.

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INTRODUCTION

This is Coinbase's second interlocutory Petition for a writ of certiorari in this case. In response to Coinbase's first petition last year, Respondents had no problem telling this Court that certiorari was warranted. *See Coinbase, Inc. v. Bielski, et al.*, No. 22-105 (hereinafter "*Coinbase I*"), *Suski* Respondents' Brief in Support (Oct. 31, 2022) at 1 ("The Court should grant Coinbase's Joint Petition. Coinbase is correct that the courts of appeals are divided on how to answer the question presented. The answer is of nationwide importance . . . .").

With the same candor, Respondents now submit that Coinbase's second Petition is different. Unlike the clean procedural issue Coinbase previously raised, the contractual issue Coinbase now raises is a poor suitor for this Court's review. There are unprecedented questions involved, there is no clear split in authority, and the flawed question Coinbase presents addresses a rare circumstance that Coinbase created for itself.

As an initial matter, the Court lacks statutory authority to order arbitration in this case, irrespective of any private agreements to arbitrate anything. This Court holds that "private agreement[s] may be crystal clear and require arbitration of every question under the sun, but that does not mean the [Federal Arbitration Act] authorizes a court to stay litigation and send the parties to an arbitral forum." *New Prime, Inc. v. Oliveira*, 139 S.Ct. 532, 537-38 (2019). "[A] court must first know whether the contract itself falls within or beyond the boundaries of [FAA] §§ 1 and 2." *Id.*

Here, Coinbase says that Respondents agreed to arbitrate a particular dispute, yet Respondents have maintained, throughout this case, that the parties' contracts are "beyond the boundaries of [FAA] § 2." *Id. See generally Coinbase I*, Merits Brief of *Suski* Respondents (Feb. 21, 2023) at 43-52. Under *New Prime*, Respondents contest the Court's power to compel arbitration in this case, even if the Court believes the parties agreed to arbitrate. *Id.*

The Court avoided this unprecedented statutory question in *Coinbase I*, which concerned mere appellate procedure, but the Court would have to reach the statutory question here, "before" ordering arbitration based on the mere contractual rights Coinbase asserts. *New Prime, Inc. v. Oliveira*, 139 S.Ct. at 537-38. For this reason alone, the case is a poor candidate for certiorari. The Court should await a case indisputably involving "a contract evidencing a transaction," if the Court has any interest at all in the contractual disputes being raised. 9 U.S.C. § 2.

Furthermore, Coinbase's second Petition (unlike its first) does not stem from any split in authority, nor does it stem from any court declining to "enforc[e]" an arbitration agreement. 9 U.S.C. § 2. The Petition cites eight federal and state opinions as conflicting with each other, yet none of those opinions recognize any conflict, or even tension, among themselves. Pet.3, n.1 & n.2. The reality is that all eight courts endorse and apply this Court's settled doctrines to the contract terms and circumstances before them. Certiorari is unwarranted in situations like this. *See* Sup. Ct. R. 10 (providing that review is rarely granted where asserted error involves only the "misapplication of a properly stated rule").

Coinbase's Petition stems not from any doctrinal conflict, but instead from Coinbase's own internal conflict, Coinbase's regret of its own personal business decisions. In June 2021, Coinbase made two business decisions, which it later came to regret. The first was to misleadingly solicit Respondents to pay $100 each for a random, low-probability chance to win up to $300,000. D. Ct. Dkt. 1, ¶¶5-6. Coinbase and its contractor, Marden-Kane, Inc. ("Marden-Kane"), labeled the transaction a "Sweepstakes" promotion. D. Ct. Dkt. 22-1. The second business decision was to contractually bind each Respondent to sue—exclusively in specified courts—over any controversies regarding the Sweepstakes. *Id.*

Controversies thereafter arose regarding the Sweepstakes, so Respondents sued in court, as required by their Sweepstakes contracts with Coinbase and Marden-Kane. After being sued, however, Coinbase and Marden-Kane changed their minds; they suddenly preferred to arbitrate all controversies regarding the Sweepstakes. D. Ct. Dkt. 33, 87. They told the courts that Respondents had agreed to arbitrate all Sweepstakes disputes, under prior contracts with Coinbase (only). *Id.* The courts disagreed, but Coinbase's regret remained, so this Petition ensued.

A single company's regret of its own business decisions is not good cause for granting certiorari.

STATEMENT OF THE CASE

Coinbase operates an online cryptocurrency exchange, which allows users to buy and sell various cryptocurrencies via Coinbase's website and mobile app. D. Ct. Dkt. 1, ¶¶1-2. Coinbase generates revenue by charging transaction fees to cryptocurrency traders on its platform. *Id.*

Respondents are Coinbase users who created personal trading accounts with Coinbase at various times between January 2018 and May 2021. D. Ct. Dkt. 33-1, ¶¶6-13. Coinbase required each Respondent to accept an adhesive "User Agreement" upon creating their Coinbase account. *Id.* Each User Agreement was a contract between the Respondent and Coinbase only; none purported to bind or benefit a third party. D. Ct. Dkt. 33-7, 33-8, 33-9, 33-10. All User Agreements contained mandatory arbitration provisions, including provisions delegating certain arbitrability disputes to an arbitrator.[1] By creating Coinbase accounts online, each Respondent accepted an adhesive User Agreement sometime between January 2018 and May 2021. *Id.*; D. Ct. Dkt. 33-1, ¶¶6-13.

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[1] Three of the four Respondents' User Agreements contained express delegation provisions, while all four Respondents' User Agreements provided for arbitration "in accordance with the American Arbitration Association's rules" for "consumer-related disputes." Pet.App.38a, 43a. Those rules provided that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction." *Consumer Arbitration Rules*, American Arbitration Association, R-14(a), *available at* https://www.adr.org/sites/default/files/Consumer-Rules-Web_0.pdf (last visited Sep. 6, 2023).

In June 2021, however, Coinbase made a new business decision. Coinbase decided to promote a new cryptocurrency on its platform, known as "Dogecoin" (or "DOGE"). D. Ct. Dkt. 1, ¶¶2-11. Coinbase promoted Dogecoin by offering its users a random chance to win $300,000, if they would buy Dogecoins from Coinbase. *Id.* Coinbase directed its users to "opt in," and then buy Dogecoins for $100 or more, between June 3 and June 10, 2021, in consideration for a chance to win. *Id.*

To help conduct this one-week Sweepstakes, Coinbase hired Marden-Kane to serve as its third-party "Administrator." *Id.*; D. Ct. Dkt. 22-1. Marden-Kane helped Coinbase advertise the DOGE Sweepstakes to Respondents via the Coinbase website, Coinbase mobile app, and emails from Coinbase to Respondents on June 3, 2021. *Id.*

Each Respondent accepted Coinbase's and Marden-Kane's Sweepstakes offer between June 3 and June 10, 2021. D. Ct. Dkt. 83, ¶¶27-42. They each clicked an "opt in" button, and purchased $100 or more in Dogecoins from Coinbase, as required. *Id.* As an additional condition of Respondents' Sweepstakes entries, Coinbase and Marden-Kane required each Respondent to accept a trilateral, "Official Rules" agree-

ment. *Id.*; D. Ct. Dkt. 22-1. Respondents accepted their Official Rules agreements with Coinbase (as "Sponsor") and Marden-Kane (as "Administrator") between June 3 and June 10, 2021. *Id.*

The parties' Official Rules agreements provided that "[a]ccess to Dogecoin and US Dollar prizes is subject to the Coinbase [User Agreement]." D. Ct. Dkt. 22-1. In contrast, the Official Rules agreements did not provide that Sweepstakes disputes were "subject to the Coinbase [User Agreement]." *Id.* Instead, in a section titled "**Disputes**," the Official Rules provided as follows.

> All federal, state and local laws and regulations apply. THE CALIFORNIA COURTS (STATE AND FEDERAL) SHALL HAVE SOLE JURISDICTION OF ANY CONTROVERSIES REGARDING THE PROMOTION AND THE LAWS OF THE STATE OF CALIFORNIA SHALL GOVERN THE PROMOTION. EACH ENTRANT WAIVES ANY AND ALL OBJECTIONS TO JURISDICTION AND VENUE IN THOSE COURTS FOR ANY REASON AND HEREBY SUBMITS TO THE JURISDICTION OF THOSE COURTS.
>
> [. . .]
>
> By entering and participating in the Promotion, Entrants hereby expressly agree and accept that for all that is related to the interpretation, performance and enforcement of these Official Rules, each of them expressly submit themselves to the laws of the United States of America and the State of California,

> expressly waiving to any other jurisdiction that could correspond to them by virtue of their present or future domicile or by virtue of any other cause.

Id.

Coinbase and Marden-Kane thus required Respondents to litigate, not arbitrate, "ANY CONTROVERSIES REGARDING THE PROMOTION," including "all that is related to the interpretation, performance and enforcement of these Official Rules." *Id.* Arguably, if not unambiguously, the phrases "FOR ANY REASON," and "by virtue of any other cause," prohibited Respondents from invoking any arbitrator's "jurisdiction" based on prior User Agreements with Coinbase. *Id.*; *see also* n.2, *supra* (AAA Consumer Arbitration Rules speaking in terms of an arbitrator's "jurisdiction").

To summarize, before June 2021, Coinbase and Respondents had agreed to arbitrate controversies over "the enforceability, revocability, scope, or validity of" their arbitration agreements. Pet.App.43a; *see also* n.2, *supra*. Later, in and after June 2021, Coinbase, Respondents, and Marden-Kane agreed that "COURTS" would have "SOLE JURISDICTION" over "ANY CONTROVERSIES REGARDING" the Sweepstakes, including "all that is related to the interpretation, performance and enforcement of these Official Rules." D. Ct. Dkt. 22-1.

Shortly after Respondents entered the DOGE Sweepstakes, they realized that Coinbase and Marden-Kane had deceived them. D. Ct. Dkt. 1, 36, 83. Respondents realized that Coinbase and Marden-Kane had falsely advertised the Sweepstakes, to manipulate them

into paying for entries they would not otherwise have paid for. *Id.* In other words, Respondents found themselves having "CONTROVERSIES" with Coinbase and Marden-Kane "REGARDING THE PROMOTION." Dkt. 22-1. Hence, Respondents brought their Sweepstakes disputes before the District Court, as expressly required by Coinbase and Marden-Kane.

Neither Coinbase nor Marden-Kane has disputed that Respondents' pending claims are "CONTROVERSIES REGARDING THE PROMOTION." *Id.* Neither Coinbase nor Marden-Kane has disputed that the "arbitrability" dispute they now raise is directly "related to the interpretation, performance and enforcement of these Official Rules" agreements. *Id.* In short, there has never been any genuine arbitration or delegation dispute here. *See Coinbase I*, Oral Arg. Tr. (Mar. 21, 2023) at 32:4-5 (Justice Sotomayor recognizing that "[t]he Suski case has a very strong argument on the merits" of arbitrability).

Be there any doubt about Coinbase's contractual intentions, the District Court judicially noticed a different sweepstakes conducted by Coinbase in 2021, using a different third-party administrator. D. Ct. Dkt. 41-3, Pet.App.13a. There, Coinbase and its other administrator provided that disputes regarding that sweepstakes would be resolved "*by following the Dispute Resolution Process (including binding arbitration) specified in Section 8 of the Coinbase [User Agreement]*." D. Ct. Dkt. 41-3 (emphasis added). They further provided for the arbitration of "*all disputes, claims, and causes of action arising out of or related to the interpretation or application of this arbitration provision*." *Id.* To say that the parties' Sweepstakes contracts here "clear[ly] and unmistakabl[y]" mean the same thing

as Coinbase's other sweepstakes contracts would be absurd. *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S.Ct. 524 (2019).

Coinbase manifestly made one business decision in the DOGE Sweepstakes, and a different business decision in another sweepstakes. Anyone can see that in plain English. D. Ct. Dkt. 22-1, 41-3. Coinbase merely regrets its business decisions in the DOGE Sweepstakes, and now asks the Court to redeem the company's poor business judgment. Even bad business decisions, however, remain "irrevocable, and enforceable," under the FAA. 9 U.S.C. § 2. Coinbase cannot use the Court as a mere tool for revoking its Sweepstakes contracts with "EACH ENTRANT" and Respondent here. D. Ct. Dkt. 22-1.

REASONS FOR DENYING THE PETITION

I. ALL COURTS APPLY THE SAME SETTLED LEGAL STANDARD.

Coinbase argues that its "Petition presents a clear split over the enforceability of delegation clauses in arbitration agreements." Pet.1. The Petition presents no such thing. What the Petition presents is a one-sided summary of nuanced appellate decisions, all of which applied the same legal standard to different contract terms and circumstances. Pet.3, n.1 & n.2.

When parties allegedly agreed to arbitrate a pending claim, a "rather arcane" question of contract interpretation sometimes arises. *First Options*, 514 U.S. at 945. The question is whether the court or an arbitrator should decide whether the claim belongs in court, and the answer depends primarily upon "what the parties agreed about *that* matter." *Id.* at 943. Courts apply "ordinary state-law principles" governing contract interpretation to discern what the parties agreed. *Id.* at 944. There is, however, one "qualification" courts should consider when applying state contract law to the question. *Id.*

For decades, this Court has consistently held to a "heightened standard" for discerning the parties' contractual intent. *Rent-A-Center*, 561 U.S. at 69, n.1. The rule is that courts must decide whether a claim belongs in court or arbitration, unless parties show a "clear and unmistakable" intent to the contrary. *Id.* If the parties' intentions are at all ambiguous (*i.e.,* unclear, or reasonably "mistakable"), then the

court must resolve the threshold forum dispute. *First Options*, 514 U.S. at 944-45.

All courts agree on and apply these rules in the common course of adjudication. Every decision the Petition cites here endorsed and applied this Court's "clear and unmistakable" standard to the question of who would resolve the arbitrability or justiciability of claims. *Bosse*, 992 F.3d at 28 (endorsing and applying the "clear and unmistakable" standard to particular contract terms); *Agere Sys.*, 560 F.3d at 339-40 (same); *Blanks*, 294 So.3d at 764 (same); *Field Intel.*, 49 F.4th at 356-57 (same); *Suski*, 55 F.4th at 1229 (same); *SMJ Gen. Constr.*, 440 P.3d at 214 (same); *Transcor Astra Grp.*, 650 S.W.3d at 481 (same); *Midwest Neurosciences*, 920 N.W.2d at 779 (same). There is simply no conflict among courts over the proper legal standard for deciding "delegation" questions. Courts arriving at different answers to the same, fact-dependent question under different circumstances is not a "split," let alone one that warrants the Court's immediate intervention. *See* Sup. Ct. R. 10.

The absence of a split is especially evident in the Third Circuit decision Coinbase cites as being "split" with the First Circuit. Pet.1-2 ("The split involves four Circuits—the First and Fifth versus the Third and Ninth . . . ."); Pet.3, n.1 & n.2 (citing *Bosse*, 992 F.3d 20, as being opposed to *Field Intel.*, 49 F.4th 351). There is no split between these courts. In *Field Intelligence*, the Third Circuit affirmatively cited and relied upon First Circuit precedent in applying this Court's "clear and unmistakable" standard. *Field Intel.*, 49 F.4th at 357 (citing *McKenzie v. Brannan*, 19 F.4th 8, 18-20 (1st Cir. 2021)). One Circuit citing another in support of its own decision hardly reflects

a conflict in authority over the question presented. It reflects consistency.

Even more granularly, the Third Circuit cited the First Circuit for the proposition that "clear and unmistakable" evidence is sometimes lacking, where an agreement containing arbitration and delegation provisions is allegedly "superseded by a later agreement." *Id.* Such a limited proposition is uncontroversial among courts, and it is precisely what the District Court and Ninth Circuit recognized in this case. Pet.App.25a; Pet.App.5a-7a. Far from being "split," these courts are all in accord by their own terms.

Coinbase further contends that a similar "issue" involving multiple contracts "was previously presented in *Petrobras America Inc. v. Transcor Astra Grp. S.A.*, No. 22-518 (U.S.)," and "[t]his Court called for a response" to that petition. Pet.4. The Court, however, summarily denied the *Petrobras* petition upon reviewing the respondents' response.

Coinbase implies that this Court denied the *Petrobras* petition because "*Petrobras* was a factually complicated case, and the *Petrobras* respondents identified potential vehicle defects in that case." *Id.* Yet the *Petrobras* respondents identified another, more existential defect, by demonstrating that "there is no true conflict" in the same case law Coinbase presents here. *Petrobras America Inc. v. Transcor Astra Grp. S.A.*, No. 22-518 (U.S.), Brief in Opposition (Mar. 23, 2023) at 13; *id.* at 15 (explaining that petitioner "cannot establish what does not exist—a conflict in the cases"). The *Petrobras* respondents were correct that no true conflict exists.

II. NO COURT HAS ASKED OR ANSWERED COINBASE'S FLAWED QUESTION.

Before delving further into the cases, it is important to recognize that none of them even purport to answer the question Coinbase presents. Coinbase presents the following question, verbatim:

> Where parties enter into an arbitration agreement with a delegation clause, should an arbitrator or a court decide whether that arbitration agreement is narrowed by a later contract that is silent as to arbitration and delegation?

Pet.(i). To paraphrase, Coinbase asks whether "an arbitration agreement with a delegation clause" (*regardless of its terms*) always requires an arbitrator to decide whether a "later contract" (*regardless of its terms*) modified the "arbitration agreement." *Id.* No court has asked or answered such a broad-sweeping question, a question so utterly agnostic to the contract language at issue. Thus, even if there were a clear split in authority (and there is not), it would not be a split over the question Coinbase presents.

There is a reason why no court has addressed the question Coinbase asks, and the reason is that settled law forecloses answering it. "This Court has consistently held that parties may delegate threshold arbitrability questions to an arbitrator, so long as the parties' agreement does so by '"clear and unmistakable' evidence." *Henry Schein*, 139 S.Ct. at 530 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), and *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010)). This "clear and unmistakable" requirement is an "interpretive rule" of contract law

that "pertains to the parties' *manifestation of intent*." *Rent-A-Center*, 561 U.S. at 69, n.1. Contracting parties' "*manifestation[s] of intent*," and whether their intentions are "clear and unmistakable" in any given case, are inherently case-specific issues. *Id.*

Such issues cannot be decided once and for all, for every "arbitration agreement with a delegation clause" and every "later contract" that might arise to nullify, modify, or clarify the text or applicability of a delegation clause. Unavoidably, courts must analyze the specific contract terms and evidence in each case, to determine whether the parties' "manifestation[s] of intent" were "clear and unmistakable." *Id.* This Court would have to overrule its own precedent *sub silentio*, just to answer (in either direction) the broad, binary question framed by Coinbase.

Answering Coinbase's broad, binary question would make parties' intentions for contracts formed *after* a delegation agreement irrelevant. The only relevant contractual intent would be the parties' previous intent, manifested in their previous delegation agreement, whether it subsequently changed or not. The ink or pixels painting a delegation clause might not change over time, but parties' mutual *intentions* can certainly change over time, and then be reasonably manifested as changed by a "later contract." Pet.(i). To honor ink and pixels at the expense of the parties' latest, mutually expressed intentions would clearly contradict precedent. *E.g., Rent-A-Center*, 561 U.S. at 69, n.1.

In addition to being contract-agnostic, Coinbase's question is inherently flawed in other respects. For example, the question assumes that the parties' "later contract" allegedly "narrow[s]" the "arbitration

agreement" generally, but does *not* "narrow" the delegation clause itself. *Id.* Coinbase's question conceals this key distinction from the naked eye because Coinbase knows that, here, the parties' "later contract" includes an exclusive forum-selection clause *that expressly covers threshold disputes* just like a "delegation clause" would. D. Ct. Dkt. 22-1 (exclusive forum-selection agreement expressly applies to "the interpretation, performance and enforcement of the[] Official Rules"). Thus, the issue here is not just whether a later contract "narrowed" an "arbitration agreement," but rather, whether a "later contract" modified or otherwise affected *a prior delegation agreement* specifically.

There are only two high-level categories of arbitrability disputes. The first is who decides whether a pending claim belongs in court or arbitration ("delegation"), and the second is whether the pending claim belongs in court or arbitration ("arbitrability"). Courts must sometimes resolve the latter, but they must always resolve the former. And they cannot fairly resolve the former in cases of multiple agreements, without considering assertions that a "later contract" subsequently "narrowed" or otherwise affected *the delegation agreement itself*. Pet.(i); *see generally Rent-A-Center*, 561 U.S. 63.

Coinbase simply reframes the true question presented by this case into a novel, legally misleading question, which bakes key decisions for Coinbase *into the Court's review* without having to argue for those decisions. Accepting Coinbase's question at face value, and answering it in Coinbase's favor, would make it logically impossible for courts to ever find that a delegation agreement was altered or affected

in any way by any subsequent agreement. There is no precedent supporting such a result.

The Petition further fails to clarify what the words "narrowed" and "silent" even mean. Pet.(i). Is a contract necessarily "silent as to arbitration and delegation" merely because it omits the *word* "arbitration"? *Id.* This seems doubtful, but it appears to be what Coinbase means by "silent." The Official Rules agreements omit the word "arbitration," but they affirmatively preclude objecting to judicial authority "FOR ANY REASON" or "by virtue of any other cause." Dkt. 22-1.

Additionally, none of the opinions the Petition cites contemplated "narrow[ing]" contracts; they contemplated "superseding" contracts, a familiar doctrine of contract law. Pet.3, n.1 & n.2 (collecting cases). It appears Coinbase chose the word "narrowed" not based on any law, but instead to presumptively frame the parties' arbitrability disputes as disputes over the arbitration agreements' "scope," and *not* as arbitrability disputes "REGARDING THE PROMOTION" or the "the interpretation, performance and enforcement of the[] Official Rules" agreements.

The parties' arbitrability dispute here is whether a court or an arbitrator has contractual authority to resolve "CONTROVERSIES REGARDING" the Sweepstakes; at least arguably, a controversy over the proper method for resolving Sweepstakes disputes is itself a "CONTROVERS[Y] REGARDING" the Sweepstakes. D. Ct. Dkt. 22-1. Moreover, the parties' arbitrability arguments here are directly "related to," and in fact turn on, the proper "interpretation, performance and enforcement of the[ir] Official Rules" agreements. *Id.*

Coinbase simply presumes the answers to those dispositive, interpretive questions by framing its own question in terms of "silen[ce]," and a "narrow[ing]" of "th[e] arbitration agreement," but *not* the delegation agreement. This framing of the question is legally misleading in multiple respects. The above defects in Coinbase's question presented warrant a summary denial of the company's Petition. The Court would necessarily contradict itself, and otherwise open a sizable can of worms, just by undertaking to answer the question as Coinbase has framed it.

III. THE PETITION'S ARGUMENTS ARE LIKEWISE FALSELY PREMISED.

The Petition highlights a purported conflict in authority over whether a "later contract" supersedes an earlier one that includes a delegation clause. Pet.(i). According to Coinbase, the First and Fifth Circuits "enforce the delegation clause," while the Third and Ninth Circuits "do not enforce the delegation clause." Pet.11, 15. These arguments are falsely premised.

The question is not whether to "enforce the delegation clause." *Id.* Everyone knows delegation clauses are "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *Henry Schein*, 139 S.Ct. 524. Yet to enforce a delegation clause by its own, isolated terms—while disregarding a more recent, applicable contract—would erase § 2's savings clause, and render "delegation" clauses more enforceable than other contracts. *But see Morgan v. Sundance, Inc.*, 142 S.Ct. 1708, 1713 (2022) ("The policy is to make 'arbitration agreements as enforceable as other contracts, but not more so.'") (quoting *Prima Paint*

Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404, n.12 (1967)); *Rent-A-Center*, 561 U.S. at 70 (explaining that the FAA operates on a delegation agreement "just as it does any other" arbitration agreement). If contracting parties can delegate specific disputes to an arbitrator by agreement, then surely, they can delegate the same disputes to a court by "later" agreement. Pet.(i).

Finding that parties nullified, modified or clarified a prior delegation agreement—by their own subsequent agreement—is not tantamount to refusing to "enforce the delegation agreement." Pet.11, 15. It is tantamount to finding that the parties *did not agree* to delegation at the time when their arbitrability dispute arose. The only way Coinbase can make a case for itself here is by presenting the Court with a false choice, and an obvious dog whistle at that: namely, whether to "enforce the delegation clause." Pet.11, 15.

Again, the opinions Coinbase cites are not about whether to "enforce the delegation clause." Pet.3, n.1 & n.2. They are about whether parties "clear[ly] and unmistakabl[y]" intended to arbitrate particular arbitrability disputes, considering all—not merely some—of their contract(s) governing dispute resolution. *Henry Schein*, 139 S.Ct. at 530; *Rent-A-Center*, 561 U.S. at 69, n.1; *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (explaining that "a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit"); *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 297 (2010) ("reemphasiz[ing]" that "a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*").

Only by reframing core issues into ones that impliedly contradict settled law can Coinbase argue that certiorari is warranted here. There simply is no problem with any applicable law as it stands.

IV. THERE IS NO CLEAR SPLIT AMONG CIRCUITS OR STATE COURTS .

The Petition highlights that some courts have undertaken, and some courts have declined, to determine the arbitrability of claims in cases involving multiple contracts. That alone is no conflict of law; it is merely the result of courts answering a fact-dependent question in different cases, a question concerning parties' "manifestation[s] of intent." *Rent-A-Center*, 561 U.S. at 69, n.1 (emphasis removed). Some parties simply draft contracts that are more "clear and unmistakable" than others. *Id.*

A. The Petition's Selected Cases Address Materially Distinct Contract Terms and Circumstances.

Coinbase erects a paper conflict involving "four Circuits—the First and Fifth versus the Third and Ninth." Pet.1-2; *id.* at 3, n.1 & n.2 (comparing *Bosse*, 992 F.3d 20, *and Agere Sys. Agere Sys.*, 560 F.3d 337, *with Field Intel.*, 49 F.4th 351, *and Suski*, 55 F.4th 1227). Examination of these cases reveals only that different parties' contracts provided different levels of clarity regarding the parties' intentions.

In *Bosse* and *Agere Systems*, the parties' allegedly "superseding" agreements were utterly silent regarding *any* form of dispute resolution. *See Bosse*, 992 F.3d at 25 ("That [later] contract did not contain an arbitration clause."); *ibid.* ("The District Agent Agreement did

not contain an arbitration clause."); *Agere Systems*, 560 F.3d at 339 ("The 2006 agreement did not reference an alternative dispute procedure or any of the prior agreements . . . ."); *id.* at 340 (explaining that the allegedly superseding agreement "did not contain an arbitration clause."). In those cases, the *only* dispute resolution agreements to consider were arbitration agreements with delegation provisions. *Bosse*, 992 F.3d at 24 (delegating to arbitrator "any dispute as to whether such Claim is arbitrable"); *Agere Systems*, 560 F.3d at 340 (providing that an arbitrator "shall determine issues of arbitrability"). There were simply no other dispute resolution terms between the parties creating any "ambiguity" as to delegation. *See First Options*, 514 U.S. at 944-45 (explaining that courts must resolve an arbitrability dispute, when faced with contractual "ambiguity" regarding who should resolve the dispute).

By contrast, in *Field Intelligence* and *Suski*, the parties' allegedly superseding agreements were not "silent" on dispute resolution. Pet.(i). They specifically addressed dispute resolution with mandatory, exclusive forum-selection agreements. *See Field Intelligence*, 49 F.4th at 354 ("[U]nlike its predecessor, the 2017 contract contained no arbitration provision, *instead requiring* any 'action under or concerning' that contract to be litigated in a state or federal court in New Jersey.") (emphasis added); *Suski* 55. F.4th at 1231 (explaining that the parties' multiple agreements "conflict[ed] on the question of whether the parties' dispute must be resolved by an arbitrator or by a California court"). The fact that these parties, in their most recent agreements, arguably agreed to litigate their contract disputes made it less than "clear and

unmistakable" that they intended an arbitrator to resolve the same disputes. *Id.*

Had the *Suski* and *Field Intelligence* parties' "later contract[s]" been "silent" regarding dispute resolution (Pet.(i)), the results in both cases could have mirrored the results in *Bosse* and *Agere Systems*. There simply is no clear conflict among Circuits.

Nor is there any conflict among state courts. The Petition pits Alabama against Alaska, Texas, and Wisconsin. Pet.14-15. It highlights that the Alabama Supreme Court in *Blanks* referred an arbitrability dispute to arbitration, where the parties formed multiple *arbitration* agreements with each other at different times. Oddly, it was the consumer plaintiffs in *Blanks* seeking arbitration under an agreement drafted and imposed by the defendants; meanwhile, the defendants demanded litigation. *Blanks*, 294 So.3d at 762-63. These facts render *Blanks* a rare outlier, and the uniqueness of *Blanks* does not end there. *Id.*

When the *Blanks* parties' disputes arose, their only contracts contained admittedly applicable arbitration and delegation provisions. *Id.* It was only *after* plaintiffs demanded the arbitration of a dispute that defendants changed course, quietly "updating" their own adhesive terms to create exceptions to arbitration. *Id.* But nothing about the defendants' *post-dispute* contract edits called into doubt the parties' *pre-dispute* intentions concerning delegation, so the Alabama court fairly referred the threshold dispute to arbitration.

Unlike *Blanks*, Coinbase's selected cases out of Alaska, Texas, and Wisconsin did not address adhesive arbitration agreements revised by one party, post-

dispute, specifically to create arbitration exceptions for itself. For example, the parties' "manifestation of intent"[2] in *Transcor* was materially different from that of the *Blanks* parties. The *Transcor* parties had entered into a settlement agreement—before, not after, their dispute arose—exclusively mandating a judicial forum for the relevant dispute. *See Transcor*, 650 S.W.3d at 481 ("[T]he settlement agreement includes a forum-selection clause in which the parties agreed that [courts] would be 'the exclusive forums for any dispute arising out of or related to this Settlement Agreement.'").

Because the parties' arbitrability dispute "related to th[e] Settlement Agreement," it was not "clear and unmistakable" that they still agreed post-Settlement to arbitrate their arbitrability dispute. *Id.* The parties had at least arguably agreed to *litigate* "*that dispute*," *Granite Rock*, 561 U.S. at 297, because it directly "related to th[e] Settlement Agreement." *Transcor*, 650 S.W.3d at 481. Thus, the Texas court resolved the parties' arbitrability dispute based on their apparent (or at least unclear) intentions, not based on legal doctrines of "enforceability." 9 U.S.C. § 2.

In *SMJ General*, the parties likewise executed a settlement agreement, which by its terms, made their intent to delegate their arbitrability dispute to an arbitrator less than clear. Specifically, each party had expressly and "absolutely release[d] the other of and from any and all claims, demands and *obligations of any kind* arising from" the contract containing arbitration and delegation provisions. *SMJ General*, 440 P.3d at 215 (emphasis added). It was thus unclear,

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[2] *Rent-A-Center*, 561 U.S. at 69, n.1

or at least reasonably mistakable, whether the parties still agreed to delegate their arbitrability dispute to an arbitrator, even post-settlement. *Id.* at 214. The settlement itself purported to "release" the parties from "any" such "obligation." *Id.* at 215.

Midwest Neurosciences, for its part, was a complex case involving multiple, potentially applicable contracts governing dispute resolution. Ultimately, the Wisconsin court simply found the parties' intentions to be less than "clear and unmistakable," recognizing that "[n]o Wisconsin *or federal* case establishes that once arbitration is contracted as the forum for dispute resolution, parties can never later contract for an alternative forum for dispute resolution." 384 Wis.2d at 705-06 (emphasis added). This is an unremarkable proposition, wholly uncontested among courts. *E.g.*, *Field Intel.*, 49 F.4th at 358 ("[P]arties would never be able to execute a superseding agreement to *rid themselves* of a prior agreement to arbitrate arbitrability," and instead, "would forever be bound by that [delegation] agreement *even if their later dealings show an intent to avoid it*") (emphasis added). In other words, such a "once delegated, always delegated" rule would restrict the very freedom to contract.

In sum, the Petition's selected opinions are readily distinguishable from each other. None of them recognize any conflict or tension among themselves in applying this Court's "clear and unmistakable" standard. The Petition's selected cases are also distinguishable from this case, regardless of how each one ultimately answered the delegation question. In fact, no court has ever referred an arbitrability dispute to arbitration, in the face of agreements like the parties' Sweepstakes agreements here.

B. None of Coinbase's Selected Cases Addressed Later Contracts and Transactions Like the Ones Disputed Here.

The Petition highlights different cases addressing delegation disputes and yielding different outcomes. Regardless of their respective outcomes, however, the cited cases consistently involved multiple contracts executed by the same sets of contracting parties (or their successors). In contrast, this case involves different groups of parties, forming separate agreements, to govern different "transaction[s]." 9 U.S.C. § 2. Where different parties and economic transactions are involved, contract negotiations and intentions can and do often differ.

Here, Coinbase acted alone in drafting its adhesive User Agreements to govern Coinbase accounts. Later, when Coinbase offered the public a random chance to win $300,000, in exchange for $100 each, Coinbase was not acting alone. Coinbase negotiated and drafted its adhesive Sweepstakes agreements in tandem with Marden-Kane, a third-party specializing in consumer sweepstakes promotions.

In all likelihood, Coinbase and Marden-Kane thought carefully about the Sweepstakes agreements they were offering to "EACH ENTRANT." D. Ct. Dkt. 22-1. The Court cannot presume that the Sweepstakes agreements' dispute terms read differently from the User Agreements' dispute terms *by accident*. To presume that such disparate agreements, using contrasting language, and involving different parties and transactions, were necessarily intended to require the same method of dispute resolution, would be nothing short of ridiculous.

No court has found a clear and unmistakable delegation agreement in a case that looks anything like this one. This case is truly a one-off case, and thus poorly suited for certiorari review.

V. THIS CASE IS A POOR VEHICLE FOR ADDRESSING CONTRACTUAL ARBITRABILITY BECAUSE IT RAISES A STATUTORY QUESTION OF FIRST IMPRESSION.

In *Coinbase I*, the question presented was whether district courts must stay all merits proceedings pending a non-frivolous interlocutory appeal under 9 U.S.C. § 16. *See generally Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023). In a 5-4 decision, the Court answered that question in the affirmative. *Id.* Though Respondents were parties to all merits arguments in *Coinbase I*, including oral argument, the Court dismissed Respondents from *Coinbase I*, presumably to avoid an unnecessary mootness issue raised by then-respondent Abraham Bielski. *See id.* at n.7.

Regardless, the substance of Respondents' merits briefing in *Coinbase I* is pertinent to why the Court should deny Coinbase's Petition here. In *Coinbase I*, Respondents thoroughly argued—and still maintain—that Coinbase's User Agreements are not "contract[s] evidencing a transaction" within the meaning of 9 U.S.C. § 2. *See Coinbase I*, Merits Brief of *Suski* Respondents (Feb. 21, 2023) at 43-52. If this non-frivolous argument is correct, it immediately follows under *New Prime* that the Court lacks the statutory power to order arbitration in this case, even if the parties agreed to arbitrate as a contractual matter. *New Prime*, 139 S.Ct. at 537-38 (explaining that before compelling arbitration, "a court must first know

whether the contract itself falls within or beyond the boundaries of [FAA] §§ 1 and 2").

Somewhat surprisingly, no court has ever considered or decided what it means for a "contract" to "*evidenc[e]* a transaction" within the meaning of the FAA. 9 U.S.C. § 2 (emphasis added). The Court has decided what "a transaction involving commerce" means, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), but in deciding that, the Court appeared puzzled by the statute's usage of the word "evidencing." *Ibid.* at 280. ("That interpretation, we concede, leaves little work for the word 'evidencing' (in the phrase 'a contract evidencing a transaction') to perform, for every contract evidences some transaction. But, *perhaps* Congress did not want that word to perform much work.") (emphasis added). In using the word "perhaps," the Court left wide open the question of how "much work" Congress really intended the word "evidencing" to perform. *Id.*

Far be it from the Court to casually write-off a statutory term as superfluous, particularly when the term is used as conspicuously and unnaturally as the word "evidencing" in § 2. *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) ("The Court has often said that every clause and word of a statute should, if possible, be given effect."). The word "evidencing" is way too technical and specific to be as superfluous as the Court passingly surmised in *Allied-Bruce*.

And surely, the Court's passing, equivocal assumptions about the word "evidencing" in *Allied-Bruce* "are not to be considered as having been so decided as to constitute precedents." *Cooper v. Aviall*, 543 U.S. 157, 170 (2004). The question of what statutory "boundaries" are set by the word "evidencing" in § 2

remains an open, judicially unanswered question to date. *New Prime*, 139 S.Ct. at 537-38. Like a challenge to the Court's jurisdiction, this statutory question implicates the Court's power to order arbitration here. *Id.* Thus, the Court would have to reach this novel, statutory issue "before" the Court could order arbitration based on "written provision[s]" in the parties' User Agreements. *Id.*; 9 U.S.C. § 2.

If the Court grants Coinbase's Petition, Respondents intend to press this statutory point, and more thoroughly contest the Court's power to compel arbitration in this particular case. There is no good reason for the Court to review what is already a novel contractual issue, especially when such an issue is inextricably intertwined with a statutory question of first impression. If the Court has any interest in the contractual issue Coinbase raises, then the Court can easily await another case in which the parties' arbitration provisions are undisputedly written in "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2; *see generally Coinbase I*, Merits Brief of *Suski* Respondents (Feb. 21, 2023) at 43-52.

CONCLUSION

The Court should deny Coinbase's Petition because it presents a novel, wrongly premised question, over which there is no clear split in authority. The Court should also deny the Petition because it presents an unavoidable, statutory question of first impression among courts.

The law is clear and reasonable. "Where parties enter into an arbitration agreement with a delegation clause," they need not regurgitate it in every "later contract." Pet.(i). They need only ensure that a later contract does not clearly (or arguably) contradict it, thereby creating "ambiguity" and calling the parties' intentions into fair question. *First Options*, 514 U.S. at 944-45. In this case, settled law was always there for Coinbase to take advantage of. Coinbase failed or deliberately declined to take advantage of it. Whatever happened between Coinbase and Marden-Kane, behind closed corporate doors, it is their problem, not Respondents' or the Court's.

Respectfully submitted,

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September 22, 2023