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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

The disclosure statement in the petition for writ of certiorari remains accurate.

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INTRODUCTION

This petition presents a persistent split over an important and recurring question: When parties enter into successive contracts, and the first contains an arbitration agreement with a delegation clause but the second does not, who decides whether the first contract's arbitration agreement governs any later disputes? In the First and Fifth Circuits and Alabama, arbitrators decide such threshold arbitrability questions unless there is a "specific[]" challenge to the first contract's delegation clause. *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 71 (2010). But in the Third and Ninth Circuits and in Alaska, Wisconsin, and Texas, courts decide whether the arbitration agreement remains in effect and covers the dispute, despite these being indisputably arbitrability questions delegated to an arbitrator by the first agreement. This purely legal issue is ripe for this Court's decision, both sides of the question have been fully ventilated in the lower courts, and the decision below by the outsized Ninth Circuit creates a massive lack of uniformity in the way in which courts approach this dispositive issue.

The Brief in Opposition tries to wash away this entrenched split by asserting that all courts apply "the same legal standard" in asking whether it is "clear and unmistakable" the parties meant for an arbitrator rather than a court to decide arbitrability issues. BIO 10. That misses the point: The courts at issue reach different conclusions about *how the relevant standard applies* in the context of successive agreements. And when courts are irrevocably divided over *how* to apply a standard, and reach divergent results in materially similar circumstances, this Court can and does grant review to resolve that conflict.

Respondents hypothesize that the split can be harmonized based on whether the second contract is "utterly silent regarding *any* form of dispute resolution." BIO 19. If so, Respondents say, arbitrators decide arbitrability, while any reference to "dispute resolution" in the second contract means the question is one for a court. *Id.* at 19-20. But the courts in the split cannot be so harmonized, and, in any event, that hypothesis is irreconcilable with *Rent-A-Center*'s rule that a court must enforce a delegation clause absent a "specific[]" challenge to the delegation clause. 561 U.S. at 71. Pointing out a later contract has some reference to "dispute resolution" is not a specific challenge to a delegation clause. At bottom, Respondents' attempt to divine an explanation for the split detached from what the courts themselves have said demonstrates a simpler truth: The lower courts fundamentally disagree over who should decide arbitrability in this context. Only this Court can resolve that split.

Respondents also seek to avoid review of the Ninth Circuit's decision by re-writing its holding. They say the second contract here, containing the sweepstakes' official rules, had a clause invalidating the delegation clause in the first contract, the User Agreement. But that is not what the Ninth Circuit said. Rather, the Ninth Circuit held "that the issue of whether the forum selection clause" "superseded the arbitration clause in the User Agreement was not delegated to the arbitrator, but rather was for the court to decide." Pet. App. 7a-8a. Why? According to the Ninth Circuit, such "issues" concerned "contract formation" and "may not be delegated to an arbitrator." *Id.* at 8a. That sweeping ruling—which is now the law of the nation's largest federal circuit—is the one that merits review.

Finally, none of Respondents' vehicle arguments hold up. This case is an excellent vehicle. Respondents do not dispute that the question presented is fully preserved. The Ninth Circuit addressed the question in a published decision. The facts of this case are unusually simple, and the case comes from federal court, where the Federal Arbitration Act (FAA) unquestionably applied.

ARGUMENT

I. THIS PETITION PRESENTS AN ENTRENCHED AND PERSISTENT SPLIT.

A. Parties frequently enter into successive contracts as part of an ongoing relationship. If the first contract delegates arbitrability questions to an arbitrator, and the second says nothing about that delegation, who decides whether the second contract narrowed the reach of the arbitration agreement in the first?

The First and Fifth Circuits, and Alabama's Supreme Court, enforce delegation clauses in this context—meaning that in these jurisdictions, arbitrators decide threshold arbitrability questions, such as whether the dispute falls within the arbitration agreement and whether the arbitration agreement is enforceable in the circumstances. Those courts stress that delegation clauses are severable, "antecedent agreement[s]" to arbitrate arbitrability. *Blanks* v. *TDS Telecomms. LLC*, 294 So. 3d 761, 766 (Ala. 2019) (quoting *Rent-A-Center*, 561 U.S. at 70). And they recognize that courts may invalidate a delegation clause only if a party challenges "the delegation clause specifically." *Bossé* v. *New York Life Ins. Co.*, 992 F.3d 20, 28 (1st Cir. 2021). Absent such a specific challenge to

the delegation clause, arbitrators decide "if the parties to an agreement containing an arbitration clause are no longer bound by that clause because an amended agreement has allegedly superseded the prior agreement." *Blanks*, 294 So. 3d at 765; *see Agere Sys., Inc.* v. *Samsung Elecs. Co.*, 560 F.3d 337, 340 (5th Cir. 2009) (arbitrator decides "whether the arbitration clause is still in effect").

A contrary rule applies in the Third and Ninth Circuits, and in Alaska, Wisconsin, and Texas. Those jurisdictions do not treat delegation clauses as severable from arbitration agreements. Instead, courts may ignore the initial delegation clause and decide arbitrability for themselves. For example, Wisconsin's Supreme Court "distinguish[es]" this Court's severability precedent as involving "only one contract." *Midwest Neurosciences Assocs., LLC* v. *Great Lakes Neurosurgical Assocs., LLC*, 920 N.W.2d 767, 787-788 (Wis. 2018). Because it declines to follow this Court's severability precedent in cases involving successive contracts, Wisconsin holds that a court and not an arbitrator must decide "arbitrability" "when a subsequent contract, if enforceable, does not contain an arbitration clause as is present in an initial contract." *Id.* at 789-790. *But see New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 538 (2019) ("[U]nder the severability principle, we treat a challenge to the validity of an arbitration agreement (or a delegation clause) separately from a challenge to the validity of the entire contract in which it appears.").

Likewise, in *Field Intel. Inc.* v. *Xylem Dewatering Solutions Inc.*, 49 F.4th 351 (3d Cir. 2022), the Third Circuit held that the "so-called 'severability' doctrine" applies only when "the legal effect of the delegation"

"come[s] from an 'independent source' outside the contract whose formation or existence is being disputed." *Id.* at 357 (citation omitted). Thus, in the Third Circuit, a delegation clause is not severable and not enforceable when one party challenges the validity of the "underlying" arbitration agreement. *Id. But see Rent-A-Center*, 561 U.S. at 72 (courts must enforce delegation clause when party challenges "the underlying contract"). That approach is fundamentally irreconcilable with courts on the other side of the split, like the Fifth Circuit, that direct the arbitrator to decide "whether the arbitration clause is still in effect." *Agere Sys.*, 560 F.3d at 340.[1]

B. None of Respondents' efforts to undermine the split contain any merit.

Respondents' primary argument is that all the courts in the split apply "the same legal standard" at a high level of generality, BIO 10, namely that parties must show "clear and unmistakable evidence" of an agreement to arbitrate before compelling arbitration, *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995) (cleaned up). The main driver of the split is that courts like the Ninth Circuit fail to treat the delegation clause as severable and require a specific challenge to the delegation clause. *See supra* pp. 3-5; Pet. 21-25. But Respondents miss the bigger picture:

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[1] Respondents suggest (at 11) that because *Field Intelligence* cited the First Circuit's decision in *McKenzie* v. *Brannan*, 19 F.4th 8 (1st Cir. 2021), there is no split. Not so. The Third Circuit cited *McKenzie* with a "see also" and little analysis. *Field Intel.*, 49 F.4th at 357. *McKenzie* is fully consistent with Petitioner's theory of the split. Pet. 13 n.4. Meanwhile, *Field Intelligence* directly conflicts with the First Circuit's earlier decision in *Bossé*, 992 F.3d at 28.

When courts apply the same rule in materially similar circumstances and reach different results, that is a split only this Court can resolve.

Respondents claim the split can be harmonized by reading the cases to hold that courts can decide arbitrability questions despite a delegation clause when the second contract contains *some* kind of "dispute resolution terms between the parties." BIO 20. According to Respondents, only if the second contract is "utterly silent regarding *any* form of dispute resolution" is the delegation clause enforced. *Id.* at 19.

To begin, Respondents' attempted rationalization directly contradicts *Rent-A-Center*'s requirement that parties must mount challenges to the delegation clause "specifically." *Rent-A-Center*, 561 U.S. at 71. Respondents' theory also fails to describe the cases in the split. For example, in *Blanks*, the Alabama Supreme Court enforced a delegation clause in a first contract even though the second contract contained a different dispute resolution clause and purported to revoke "consent to arbitration." *Blanks*, 294 So. 3d at 763 (citation omitted).

Respondents realize *Blanks* is problem, so they try to dismiss it as a "rare outlier" in which "consumer plaintiffs" sought arbitration. BIO 21. But even if the fact that consumers had sought arbitration were relevant (it is not), *Blanks* is not an "outlier": *Blanks* followed another Alabama decision involving a similar dispute between two companies. *Blanks*, 294 So. 3d at 766 (no "meaningful difference" between *Blanks* and *Managed Health Care Admin., Inc*. v. *Blue Cross & Blue Shield of Alabama*, 249 So. 3d 486 (Ala. 2017)); *see* Pet. 15 (citing *Managed Health*).

Respondents also seek to explain *Blanks* away by saying that "nothing" in the second contract—which, again, purported to revoke consent to arbitration—"called into doubt" "intentions concerning delegation" in the first contract, "so the Alabama court fairly referred the threshold dispute to arbitration." BIO 21. But that is *precisely* Petitioner's theory of the question presented. In every case in the split, the later contracts did not call "into doubt" the delegation clause specifically. *Id.* The later contracts said *nothing* about the delegation clause. Under *Rent-A-Center*, the lack of specific challenge to the delegation clause means that clause remains valid, and an arbitrator must decide the scope and validity of the initial arbitration agreement.[2]

In a last ditch effort to avoid review, Respondents suggest there is no split because courts always "answer[] a fact-dependent question" unique to each case. *Id.* at 19. But arbitration cases need not involve identical arbitration agreements to be in conflict. Nor is this case "a one-off." *Id.* at 25. The facts here mirror the fundamental facts of every case in this split: Parties enter into two contracts, the first speaks to delegation and the second does not. Courts should treat all such contracts the same.

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[2] *Blanks* is not the only case that defies Respondents' taxonomy. For instance, in *SMJ General Construction, Inc.* v. *Jet Commercial Construction, LLC*, 440 P.3d 210 (Alaska 2019), the second agreement made "no mention of dispute resolution," *id.* at 215. But the court nevertheless refused to enforce the delegation clause.

II. RESPONDENTS DO NOT DEFEND THE NINTH CIRCUIT'S APPROACH.

A. The decision below is wrong, in a published opinion that will govern future two-contract scenarios arising in the nation's largest Circuit. The facts of this case are straightforward: The parties first entered into the User Agreement, which included an arbitration agreement and delegation clause. According to the delegation clause, an arbitrator must decide all disputes regarding the "the enforceability, revocability, scope, or validity of the Arbitration Agreement." Pet. App. 6a (quotation marks omitted). The parties later entered into the sweepstakes' official rules. That second contract contains a forum-selection clause that pertains to "controversies regarding the sweepstakes," and says *nothing* about who decides the effect of the later official rules on the earlier Arbitration Agreement. *Id.* at 4a.

Because nothing in the second contract's forum-selection clause displaced the delegation clause specifically, the Ninth Circuit possessed "no power to decide the arbitrability issue." *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). Under a simple application of this Court's precedent, the Ninth Circuit should have sent the case to the arbitrator "even if the court" thought "that the argument that

the arbitration agreement applies to" this "particular dispute is wholly groundless." *Id.*[3]

But the Ninth Circuit did not direct the arbitrator to decide "the enforceability, revocability, scope, or validity of the Arbitration Agreement." Pet. App. 6a. Instead, the court held that because "the existence rather than the scope of an arbitration agreement is at issue here," and "issues of contract formation may not be delegated to an arbitrator," a judge must decide whether the official rules "superseded the arbitration clause." *Id.* at 7a-8a.

As the Petition explained, the Ninth Circuit's approach is fatally flawed. Parties may delegate *all* threshold arbitrability questions to an arbitrator, including disputes over the existence and validity of the arbitration agreement. That is precisely what the parties did here. *See* Pet. 23-24. And the Ninth Circuit should have enforced the parties' delegation clause. Moreover, the Ninth Circuit's distinction between the "scope" versus "existence" of the arbitration agreement makes no sense. Everyone agrees the User Agreement, its arbitration agreement, and the delegation clause *all* continue to exist. At a minimum, the User Agreement governs Respondents' other interactions with Coinbase. The question thus is only whether the official rules narrowed the arbitration

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[3] Notably, Petitioner's argument for arbitration is far from groundless, including because the forum selection clause can be read as applicable only to individuals who participated in the sweepstakes by mail and thus did not sign the User Agreement. The Ninth Circuit disagreed, Pet. App. 10a, but "an arbitrator might hold a different view of the arbitrability issue," *Henry Schein*, 139 S. Ct. at 531.

agreement's scope with respect to the sweepstakes in particular. *See* Pet. 24-25. Because of the delegation clause, an arbitrator must decide that question.

B. Rather than defend the Ninth Circuit's decision on its own terms, Respondents seek to avoid this Court's review by offering a *different* rationale that they claim would have supported disregarding the delegation clause in the first agreement. BIO 8-9, 15-17. But offering a different basis for the Ninth Circuit's ruling is not a valid basis to avoid review of that ruling, where future cases in the Ninth Circuit will be governed by what the panel actually held.

Nor is Respondents' alternative argument persuasive. Respondents suggest the "forum-selection clause" in the second contract, the official rules, "*expressly covers threshold disputes* just like a 'delegation clause' would," and somehow displaces the delegation clause specifically. *Id.* at 15 (emphasis in original, citation omitted). Wrong. The forum-selection clause says that California courts may decide "controversies regarding *the promotion*." Pet. App. 46a (capitalizations omitted, emphasis added). It says nothing about *who decides* whether the User Agreement's arbitration agreement applies to a dispute. Respondents attempt to expand the forum-selection clause by invoking a different choice-of-law provision applying U.S. and California law to "the interpretation, performance and enforcement of these Official Rules." *Id.* at 47a. But that choice-of-law provision also does not say *who* decides. Instead, it at most identifies *laws* a decider will use.

Respondents also argue that courts may consider whether a "later contract subsequently narrowed or otherwise affected *the delegation agreement itself*."

BIO 15 (quotation marks omitted, emphasis in original). But that is *not* what the Ninth Circuit did. The Ninth Circuit focused exclusively on the broader arbitration agreement. And "under the severability principle, [this Court] treat[s] a challenge to the validity of an arbitration agreement (or a delegation clause) separately from a challenge to the validity of the entire contract in which it appears." *New Prime*, 139 S. Ct. at 538. Respondents similarly suggest (at 15) that Petitioner's approach makes it "impossible" for parties to revoke or alter a delegation clause. Not so. Parties can specifically revoke a prior delegation clause. But the parties here did not revoke the delegation clause. Instead, the second contract says absolutely nothing about *who decides* arbitrability. As a result, an arbitrator, not a court, must decide "the enforceability, revocability, scope, or validity of the Arbitration Agreement." Pet. App. 6a (quotation marks omitted).

III. THE QUESTION PRESENTED IS ONE OF NATIONAL IMPORTANCE AND THIS CASE PRESENTS AN IDEAL VEHICLE.

The question presented is important. It arises frequently in consumer, employment, and commercial contexts. *See* Pet. 25. And this case is an ideal vehicle. The issue is fully preserved, the Ninth Circuit squarely addressed it in a published opinion, and the case involves a straightforward record.

Respondents do not dispute this. Instead, seeking to muddy the vehicle, Respondents ask the Court to decide that Petitioner's User Agreement is not a "contract evidencing a transaction involving commerce." 9 U.S.C. § 2. But Respondents waived this argument in

the district court. *See, e.g.*, D. Ct. Dkt. 40 at 6 ("Plaintiffs do not dispute the validity of their original arbitration agreements * * * ."). Only in the Ninth Circuit did Respondents raise this argument, which they conceded was "new." 9th Cir. Dkt. 25 at 42. This Court need not consider a waived argument. In addition, the Court need not consider this argument because it was not passed on below, is not jurisdictional, and is not fairly included within Petitioner's question presented. *See* S. Ct. R. 14.1.

The new argument also is wrong. Section 2 of the FAA "reach[es] to the limits of Congress' Commerce Clause power." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 258, 274-275 (1995). The User Agreement clearly evidences a transaction within Congress' Commerce Clause power. It governs the "buying, selling, holding, or investing in digital currencies" on Coinbase's platform. D. Ct. Dkt. 33-8 at 3. And the named plaintiffs include citizens of New York, Oregon, and Missouri, while Coinbase is a Delaware corporation with its principal place of business in California. *See* D. Ct. Dkt. 83 at 8-9.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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