No. 23-3

IN THE
Supreme Court of the United States

COINBASE, INC.,
Petitioner,

v.

DAVID SUSKI, *et al.*,
Respondents.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

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?

PARTIES TO THE PROCEEDING

Petitioner in this Court is Coinbase, Inc. Respondents are David Suski, Jaimee Martin, Jonas Calsbeek, and Thomas Maher, individually and on behalf of all others similarly situated.

Marden-Kane, Inc. is also a defendant in the proceedings below.

RULE 29.6 DISCLOSURE STATEMENT

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

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BRIEF FOR PETITIONER

INTRODUCTION

For six decades, this Court has applied a consistent framework for enforcing arbitration agreements under the Federal Arbitration Act (FAA). Under the FAA's severability rule, a court isolates the specific "written provision" constituting the arbitration agreement from the remainder of the contract of which it is a part. 9 U.S.C. § 2. The court then considers only those challenges directed to that severable arbitration agreement. A party may argue, for example, that the severable arbitration agreement *itself* is invalid or unenforceable. But the FAA forbids a court from entertaining "a challenge to another provision of the contract, or to the contract as a whole"—such as an allegation that the entire contract is invalid or unenforceable. *Rent-A-Ctr., W., Inc.* v. *Jackson*, 561 U.S. 63, 70

(2010). Such challenges, where there is an arbitration agreement, fall squarely within the matters the parties agreed to have an arbitrator decide. *Accord Nitro-Lift Techs., LLC* v. *Howard*, 568 U.S. 17, 20 (2012) (per curiam); *Preston* v. *Ferrer*, 552 U.S. 346, 354 (2008); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 445 (2006); *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967).

This case involves a straightforward application of the FAA's severability rule to a delegation clause in a contractual agreement. A delegation clause is a mini-arbitration agreement that sets forth the parties' agreement to have an arbitrator resolve antecedent questions about whether their dispute is arbitrable, such as whether their dispute falls within the scope of the arbitration agreement. Absent a delegation clause, this Court's default rule is that a court decides such threshold issues, which are referred to as "arbitrability issues." But when parties agree in a delegation clause to delegate responsibility for answering arbitrability questions to the arbitrator, the otherwise-applicable default rule is displaced by that mini-arbitration agreement.

As this Court explained in *Rent-A-Center* v. *Jackson*, the FAA "operates on" delegation clauses "just as it does on any other" arbitration provision. *Rent-A-Ctr.*, 561 U.S. at 70. That means a delegation clause itself is severable—and separately enforceable—from the rest of the contract, including any broader arbitration agreement within which the delegation clause may appear. Thus, under the severability rule, when one party invokes a delegation clause, the court analyzes the validity and enforceability of just the delegation

clause. As *Rent-A-Center* explains, the court may consider *only* challenges "*as applied* to the delegation provision" *itself*. *Id.* at 74. Absent a direct and meritorious challenge to the delegation clause, a "court may not override the contract." *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). Instead, the court must enforce the parties' agreement to have the arbitrator decide whether the particular dispute is subject to arbitration.

The FAA's severability rule should have made short work of this case. Petitioner Coinbase and each Respondent contractually agreed to arbitrate a broad set of disputes that might arise between them. They also agreed to a delegation provision, under which any gateway questions about whether a given dispute is arbitrable are reserved for the arbitrator. The delegation clause provides that "an arbitrator and not * * * a court or judge" will decide "the interpretation or application of the arbitration agreement, including the" "existence," "enforceability, revocability, scope, or validity" of the agreement, and "the arbitrability of any claim or counterclaim." JA 568, 569, 584 (capitalizations omitted).

The parties then entered into a second contract: official rules regarding a cryptocurrency sweepstakes Coinbase sponsored. The official rules were silent as to arbitration and delegation and also contained a forum-selection clause. Respondents filed a lawsuit against Coinbase in federal court alleging the sweepstakes had violated California law. Coinbase moved to compel arbitration.

Respondents resisted arbitration: They argued that the sweepstakes' official rules had narrowed the scope of the initial arbitration agreement. Respondents

made no argument specific to the parties' delegation clause, however. Rather, they disputed *only* whether their claims about the sweepstakes belonged in arbitration rather than in court. Because Respondents did not mount a substantive challenge to the delegation clause itself, under the FAA's severability rule, the delegation clause should have remained untouched and controlled the question of who decided arbitrability—namely, an arbitrator.

And in arbitration, one of two things could have happened. The arbitrator could have agreed with Respondents that the arbitration agreement did not apply and sent the case back to federal court. Or the arbitrator could have agreed with Coinbase that the arbitration agreement did apply, and required Respondents to arbitrate their claims.

But the Ninth Circuit did not apply the severability rule or enforce the delegation clause. Instead, the Ninth Circuit reasoned that even where—as here—parties agree to delegate arbitrability questions to an arbitrator, courts can *still* resolve all "contract formation" challenges to an arbitration agreement—without ever defining what it meant by "contract formation." The Ninth Circuit then concluded that, because Respondents had raised a "contract formation" challenge, the court could ignore the delegation clause and decide arbitrability itself. JA 583-586.

The Ninth Circuit's decision was wrong from top to bottom, and this Court should reverse it. For starters, Respondents did not raise an issue about "contract formation." To the contrary, everyone agrees that the parties entered into a contract containing a valid arbitration agreement and delegation clause. In Respond-

ents' own words, there "is no dispute here that the parties' original arbitration agreement remains generally valid and enforceable, as modified by the official rules." JA 454 (cleaned up). Respondents only disagree about the arbitration agreement's *scope*, which Respondents say was modified by the second contract. In short: There was no "contract formation" question for the Ninth Circuit to decide.

Moreover, even if Respondents' challenge could be labeled one of "contract formation," this Court should still apply the FAA's severability rule. The FAA's text does not contain a "contract formation" exception, and this Court has recognized that arbitrators may decide many matters related to contract formation. In this case, it was imperative to apply the FAA's severability rule: No matter what doctrinal label best describes Respondents' arguments about the official rules, the substance of Respondents' argument *only* went to the scope of the *arbitration agreement—i.e.*, what issues are arbitrable—and had no bearing on the parties' delegation clause—*i.e.*, *who decides* what issues are arbitrable. The Ninth Circuit therefore should have enforced the delegation clause. Endorsing the Ninth Circuit's nebulous, labels-based exception for "contract formation" challenges in this case would raise impossible line drawing questions in every case and is fundamentally unworkable. This Court recently rejected efforts to evade the FAA by relabeling arguments "contract formation" challenges. It should do the same here. *See Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 581 U.S. 246, 254 (2017).

Respondents' Brief in Opposition declined to defend the Ninth Circuit's decision on its own terms. Instead, Respondents offered two alternative rationales for

why it was permissible to ignore the delegation clause here. Neither has merit. The first is a case-specific argument about a choice-of-law provision in the sweepstakes official rules. But that choice-of-law provision did not displace the delegation clause. It says nothing about *who decides* arbitrability; instead, it at most identifies what bodies of *law* to apply. Respondents' second argument proposes lowering the threshold for challenging *all* delegation clauses in seemingly *every* case, which has no basis in the FAA's text, directly contradicts this Court's decision in *Rent-A-Center*, and is as unadministrable as the Ninth Circuit's nebulous "contract formation" exception.

Coinbase and Respondents agreed to a delegation clause under which gateway arbitrability questions are to be decided by an arbitrator, including the scope and applicability of the parties' arbitration agreement. This Court should enforce that delegation clause, and reverse the Ninth Circuit's decision.

OPINIONS BELOW

The Ninth Circuit's decision (JA 579-589) is reported at 55 F.4th 1227. The District Court's opinion (JA 557-578) is unreported but is available at 2022 WL 103541 (N.D. Cal. Jan. 11, 2022).

JURISDICTION

The Ninth Circuit entered judgment on December 16, 2022. JA 579-589. The court denied Petitioner's rehearing petition on February 23, 2023. JA 590-591. On May 12, 2023, this Court extended the deadline to petition for a writ of certiorari up to and including June 23, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

9 U.S.C. §§ 2, 4 are reproduced in the appendix to this brief. App. 1a-3a.

STATEMENT OF THE CASE

A. Legal Background

1. In 1925, Congress enacted the Federal Arbitration Act to counteract "judicial hostility to arbitration." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011). Congress recognized that arbitration has much to offer, "not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1621 (2018). But until the FAA's enactment, "American common law courts routinely refused to enforce agreements to arbitrate disputes." *Id.*

The FAA "directed courts to abandon their hostility." *Id.* The Act embodies a "national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing*, 546 U.S. at 443. According to Section 2—the heart of the Act—courts must treat an arbitration "provision" in a contract as "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.

This Court has long interpreted the FAA to impose a rule of severability: As "a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing*, 546 U.S. at 445. The severability rule flows from the FAA's text. Section 2 deems the arbitration "provision" valid "*without mention* of the validity of the contract in which it is contained." *Rent-A-*

Ctr., 561 U.S. at 70. Similarly, Section 4 requires a court to order arbitration "upon being satisfied that the making of the agreement for arbitration * * * is not in issue," again *without mention* of the contract in which it is contained. 9 U.S.C. § 4; *see Prima Paint*, 388 U.S. at 404.

When a party resists arbitration—as Respondents did here—the FAA's severability rule dictates what types of challenges the court may consider. If a party resisting arbitration challenges "the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement." *Rent-A-Ctr.*, 561 U.S. at 71. But if the party challenges "another provision of the contract, or" "the contract as a whole," the FAA does not permit the court to entertain the challenge. *Id.* at 70. Instead, the severable arbitration agreement remains "valid, irrevocable, and enforceable." 9 U.S.C. § 2. Pursuant to the parties' agreement to arbitrate their differences, the court allows the arbitrator to adjudicate any challenge to the remainder of the contract. *Id.*

2. When parties enter into an arbitration agreement, they may also agree to a "delegation clause." A delegation clause is a discrete contractual term that addresses the question of *who decides* threshold issues such as the applicability, scope, and validity of the broader arbitration agreement. For instance, a delegation clause may require an arbitrator to decide "whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Ctr.*, 561 U.S. at 68-69. These threshold questions are often referred to as "arbitrability issues."

In *Rent-A-Center*, this Court explained that a delegation clause is a mini-agreement to arbitrate arbitrability. *Id.* at 70. The FAA "operates on this additional arbitration agreement just as it does on any other." *Id.* As a result, like any other arbitration agreement, a delegation clause is "severable from the remainder of the contract"—including the wider arbitration agreement in which the delegation clause may appear. *Id.* at 71 (quotation marks omitted). Absent a challenge to "the delegation provision specifically," a court should treat the delegation clause "as valid" and "enforce it." *Id.* at 72.

In *Henry Schein, Inc.*, this Court reiterated that "if a valid [delegation] agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue." 139 S. Ct. at 530.

B. Factual Background

1. Petitioner Coinbase 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. As with many online companies, when a user creates a Coinbase account, the user must agree to a User Agreement.

Coinbase's User Agreement contains both an arbitration agreement and a delegation clause. The arbitration agreement is broad. It provides that the parties will resolve "any dispute arising out of or relating to [the] [User] Agreement or the Coinbase Services." JA 217. The delegation clause is also broad. It provides that the parties will arbitrate:

> without limitation, disputes arising out of or related to the interpretation or application of

> the Arbitration Agreement, including the enforceability, revocability, scope, or validity of the Arbitration Agreement or any portion of the Arbitration Agreement. All such matters shall be decided by an arbitrator and not by a court or judge.

Id. at 218, 270, 335.

In addition, the User Agreement incorporates the American Arbitration Association's (AAA) rules, which also address delegation. Those rules authorize an arbitrator to decide "any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." *Id.* at 569.[1]

2. This case involves a dispute regarding a sweepstakes sponsored by Coinbase regarding a cryptocurrency called "dogecoin." *Id.* at 4.

Under California law, a sponsor of a sweepstakes such as Coinbase must operate the sweepstakes according to "official rules." Cal. Bus. & Prof. Code § 17539.15(k)(2). Official rules must appear as a "formal printed statement" included in every "sweepstakes solicitation." *Id.* The official rules must, among other things, "include a clear and conspicuous

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[1] The version of the User Agreement to which one Respondent agreed incorporated the AAA rules but lacked delegation language in the agreement itself. JA 138. Respondents do not argue that this User Agreement should be treated any differently, and the question whether incorporating the AAA rules creates an enforceable delegation provision is not before this Court. *See generally Blanton* v. *Domino's Pizza Franchising LLC*, 962 F.3d 842, 846 (6th Cir. 2020) (Thapar, J.) (circuit courts uniformly find AAA rules constitute delegation).

statement" that "[n]o purchase or payment of any kind is necessary to enter or win this sweepstakes." *Id.* § 17539.15(b), (k)(1).

Under Coinbase's official rules for its cryptocurrency sweepstakes, participants could enter the sweepstakes in one of two ways. Coinbase users could engage in cryptocurrency transactions of $100 or more on Coinbase's exchange. JA 99. Or anyone could enter the sweepstakes by mailing a postcard to Coinbase—with no purchase necessary. *Id.* at 100. If a mail-in entrant won a prize, the official rules required the winner to create a Coinbase account to claim the prize, and in the process agree to the User Agreement. *Id.*

Paragraph ten of the official rules contained the following two sentences, which the parties have referred to as a "forum-selection clause":

> The California courts (state and federal) shall have sole jurisdiction of any controversies regarding 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.

Id. at 108 (capitalizations omitted).

C. Procedural History

1. Respondents are all Coinbase users. Each Respondent created a Coinbase account, and each agreed to Coinbase's User Agreement. *Id.* at 558. Each Respondent also participated in Coinbase's sweepstakes by transacting in one-hundred dollars or more of cryptocurrency on Coinbase's exchange. *Id.* at 560. Respondents then filed a putative class action, alleging that Coinbase violated various California laws by not

adequately advertising the ability to enter the sweepstakes by mail. *Id.* at 565.

Coinbase moved to compel arbitration under the arbitration agreement, and argued that the parties' delegation clause reserved any disputes about arbitrability for the arbitrator. In opposing Coinbase's motion to compel, Respondents did not "dispute" "that the parties' original arbitration agreement" was "generally valid and enforceable"—and that the arbitration agreement covered at a minimum all *other* claims against Coinbase. *Id.* at 454 (cleaned up). Instead, Respondents argued only that the forum-selection clause in the official rules had "modified the parties' original arbitration agreements," and exempted "sweepstakes-related controversies" from arbitration. *Id.* at 444-445 (capitalization omitted).

In other words, Respondents argued that the arbitration agreement did not apply to their particular claims. The delegation clause says *who decides* this arbitrability dispute: An arbitrator.

But the district court declined to enforce the delegation clause. It recognized that the delegation clause "delegated to the arbitrator" "disagreements over the scope of the arbitration provisions." *Id.* at 569. And it also recognized that Respondents did "not dispute that their claims would fall within the scope of the arbitration provision if they had not agreed to the official rules." *Id.* Nevertheless, the district court held that "the dispute here is not over the scope of the arbitration provision, but rather whether the agreement was superseded by another separate contract." *Id.* According to the district court, this meant a court—not an arbitrator—should "determine which contract applies" to Respondents' claims. *Id.* at 570.

2. Having concluded that the delegation clause did not apply, the district court itself decided the arbitrability dispute, and determined that Respondents' claims were not arbitrable.

Coinbase had presented strong arguments that—under California law—the arbitration agreement and the official rules should be reconciled by reading the forum-selection clause in the official rules to encompass only those claims brought by mail-in entrants. *Id.* at 452.

Coinbase's argument made sense for multiple reasons: As even the Ninth Circuit recognized, "the official rules contain no language specifically revoking the parties' arbitration agreement." *Id.* at 587 (capitalizations omitted). And under California law, a forum-selection clause and an arbitration agreement are not incompatible. The forum-selection clause identifies "the venue for any other claims that were not covered by the arbitration agreement." *Mohamed* v. *Uber Techs., Inc.*, 848 F.3d 1201, 1209 (9th Cir. 2016).

In this case, there were obvious claims *not* covered by the existing arbitration agreement, and which necessitated a forum-selection clause: those brought by individuals who had entered the sweepstakes by mail. Mail-in entrants did not need to sign the User Agreement, and thus were not necessarily bound by an arbitration agreement. But mail-in entrants—of which there were 4,329—might have disputes with Coinbase. The forum-selection clause dictated which courts could resolve such disputes. In contrast, existing users who entered the sweepstakes by purchasing cryptocurrency remained bound by the broad arbitration provision in the User Agreement.

Coinbase's interpretation was bolstered by important contextual clues: The User Agreement outlines a formal modification process. *See, e.g.*, JA 225. But Coinbase did not use that process in promulgating the official rules, a strong indication the parties did not intend the official rules to modify the User Agreement or its arbitration agreement. And although the official rules do not mention the arbitration agreement, they referenced and hyperlinked to the User Agreement, further confirming the two contracts were meant to coexist harmoniously. *Id.* at 104.

The district court disagreed with Coinbase. Instead, the district court concluded that the parties' arbitration agreement in the User Agreement and the forum-selection clause in the official rules irreconcilably conflicted. *Id.* at 570-571. The district court held that the official rules controlled because a "subsequent contract supersedes the first," and that Respondents' claims regarding the sweepstakes therefore belonged in court, not in arbitration. *Id.* at 571.

After denying Coinbase's motion to compel arbitration, the district court addressed Coinbase's alternative motion to dismiss Respondents' claims. The court found only some of Respondents' claims were sufficiently pleaded and dismissed the remainder. *Id.* at 578.

3. Coinbase appealed and moved to stay proceedings pending appeal. The district court denied the stay, but admitted it was "just not sure" that it had correctly decided Coinbase's motion to compel. *Id.* at 543. The Ninth Circuit also denied a stay pending appeal. Coinbase petitioned this Court, which granted review to determine whether the filing of a notice of an interloc-

utory appeal under Section 16 of the FAA automatically stays district court proceedings. *Coinbase, Inc.* v. *Bielski*, 143 S. Ct. 521 (2022) (mem.).[2]

A week after this Court granted certiorari on the automatic-stay question, the Ninth Circuit affirmed the denial of Coinbase's motion to compel arbitration. JA 579-589. The Ninth Circuit recognized that the delegation clause in the User Agreement required an arbitrator to decide all disputes about "the existence, scope, or validity of the arbitration agreement." *Id.* at 584. But the Ninth Circuit held that "[i]ssues of contract formation may not be delegated to an arbitrator." *Id.* at 583. The Ninth Circuit then stated that Respondents have challenged "the existence rather than the scope of an arbitration agreement"—apparently meaning Respondents had raised a matter of contract formation that only a court could decide. *Id.* at 585.

Having dispensed with the delegation clause, the Ninth Circuit proceeded to decide Respondents' challenge to the arbitration agreement, and agreed with the district court that Respondents' claims were not arbitrable. *Id.* at 586-589.

This Court granted Coinbase's petition for review, this time to determine whether the Ninth Circuit erred by refusing to enforce the parties' delegation

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[2] In a companion case, *Bielski*, this Court agreed with Coinbase and held that an appeal automatically stays district court proceedings. *Coinbase, Inc.* v. *Bielski*, 599 U.S. 736 (2023). This Court dismissed the petition in *Suski* as improvidently granted, and avoided mootness questions raised by the Ninth Circuit's having already decided the arbitrability appeal at the time of this Court's decision. *Id.* at 747 n.7.

clause, so that the arbitrator could decide if the parties' dispute was arbitrable or not.

SUMMARY OF ARGUMENT

I. This Court's FAA precedent makes short work of this case.

I.A. When a party resists arbitration, the FAA's severability rule requires the court to isolate "an arbitration provision" "from the remainder of the contract." *Buckeye Check Cashing*, 546 U.S. at 445. A court may consider *only* those arguments "specific to" the arbitration provision. *Rent-A-Ctr.*, 561 U.S. at 74. A court may not consider a challenge "to another provision of the contract, or to the contract as a whole." *Id.* at 70.

I.B. Delegation clauses are mini-arbitration agreements. The "FAA operates" on a delegation clause "just as it does on any other" arbitration agreement. *Id.* at 70. This means a court must apply the severability rule and enforce a delegation clause unless a party can articulate a meritorious challenge "*as applied* to the delegation provision." *Id.* at 74.

This Court, however, has articulated one rule specific to delegation clauses: "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995). This "is an interpretive rule, based on an assumption about the parties' expectations." *Rent-A-Ctr.*, 561 U.S. at 69 n.1. This Court will not read "silence" or genuine "ambiguity" in a given arbitration agreement to constitute a delegation clause. *First Options*, 514 U.S. at 945. But in *Rent-A-Center*, this Court confirmed that once parties agree to a clear-and-unmistakable delegation clause, this

judge-made rule has no further application. *Rent-A-Ctr.*, 561 U.S. at 69 n.1. Instead, when adjudicating an allegation that the parties revoked a prior delegation clause, the court should apply those principles "as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

I.C. The FAA's severability rule resolves the question presented. Unless a party articulates a meritorious challenge to the delegation clause *specifically*, a court must enforce the delegation clause and allow an arbitrator to determine arbitrability—including, as here, whether a second contract narrowed an initial arbitration agreement.

Respondents did not articulate a meritorious as-applied challenge to the delegation clause. Instead, before the district court, Respondents argued that the official rules had narrowed the arbitration agreement, and the *arbitration agreement* therefore did not apply to claims regarding the sweepstakes. That argument had no bearing on the severable *delegation clause*, which remained valid and enforceable. And a close reading of the forum-selection clause confirms that provision did not displace the delegation clause. The district court should have enforced the severable delegation clause, and honored the parties' agreement about *who decides* arbitrability.

II.A. The Ninth Circuit held that parties may never delegate issues of "contract formation" to an arbitrator—and then classified Respondents' challenge as involving "contract formation" so as to side-step the FAA's severability rule. That was all wrong. To begin, Respondents did not challenge the formation of a contract, and thus any contract-formation exception to

delegation clauses would not even apply here. Instead, Respondents *agreed* that the parties formed the "original arbitration agreement," and that it "remains generally valid and enforceable, as modified by the official rules contract." JA 454 (cleaned up). At most, Respondents challenged the scope of the arbitration agreement as allegedly "modified." *Id.*

But even if Respondents could label their argument one of "contract formation," it would not matter. Nothing in the FAA prevents parties from arbitrating and delegating matters of contract formation. Instead, the severability rule requires a court to determine that "the making of the" delegation clause *itself* "is not in issue." 9 U.S.C. § 4. But absent a challenge to the delegation clause *specifically*—whether contract formation or otherwise—the court must enforce the delegation clause. It was particularly important to enforce the FAA's severability rule here: No matter how Respondents label their challenge, their challenge could *only* go to the arbitration agreement, and had no bearing on the delegation clause itself. Because the delegation clause was totally unaffected by the official rules, it should have been enforced, regardless of the label of Respondents' challenge. *Kindred Nursing*, 581 U.S. at 255.

It is of course true that in some cases—not here—a defect in contract formation may infect the entire contract, the arbitration agreement, *and* a delegation clause "equally." *Rent-A-Ctr.*, 561 U.S. at 71. For instance, a party might allege "fraud in the inducement of the contract"—which taints the formation of the entire contract and all its components. *See Prima Paint*, 388 U.S. at 400. Even then, the FAA's text imposes a

formal pleading requirement: The party resisting arbitration must "direct[]" "the basis of challenge * * * specifically to the" discrete arbitration provision sought to be enforced. *Rent-A-Ctr.*, 561 U.S. at 70. Thus, unless the party resisting delegation articulates a specific challenge to the delegation clause, the court should enforce that mini-arbitration agreement.

This pleading requirement reflects the FAA's plain text and honors basic principles of party presentation. It also prevents courts from mistakenly assuming—as the Ninth Circuit likely did here—that a challenge applies "equally" to a delegation clause and to other parts of the contract. *Id.*

II.B. In their Brief in Opposition, Respondents offered two alternative justifications for the Ninth Circuit's refusal to enforce the delegation clause, both of which this Court should reject. *First*, Respondents argue that a separate choice-of-law provision displaced the delegation clause—an argument they did not advance in the district court. That argument is wrong. The choice-of-law provision speaks to an entirely different question than the delegation clause. It does not say *who* must decide whether the official rules narrowed the arbitration agreement, but, at most, the choice-of-law provision says *what* laws a decider might use. *Second*, Respondents argue that the clear-and-unmistakable standard for determining whether a particular arbitration agreement contains a delegation clause lowers the threshold for later challenging delegation clauses. This Court rejected that argument in *Rent-A-Center*, and should do so as well here.

III. Petitioner's position—that courts should enforce delegation clauses in line with the FAA's severability rule and this Court's precedent—offers this Court a

bright line and administrable standard that protects the freedom to contract. By contrast, both the Ninth Circuit and Respondents' approaches pose impossible line-drawing problems. If the Court rules for Respondents, in every FAA case, a lower court will need to decide whether to apply the severability rule, or some new exception for delegation clauses. That litigation will hinder the FAA's purpose, will enmesh this Court in countless follow-on disputes, and will provide an excuse for parties and courts hostile to arbitration to evade the FAA's clear directive.

ARGUMENT

I. THIS COURT SHOULD ENFORCE THE PARTIES' DELEGATION CLAUSE.

This is a straightforward case. Delegation clauses are just specialized, mini-arbitration agreements. In deciding whether to enforce a delegation clause, a court treats the delegation clause like a stand-alone arbitration agreement, and the FAA's severability rule permits a court to consider only those challenges "*as applied* to the delegation provision." *Rent-A-Ctr.*, 561 U.S. at 74. But Respondents did not meaningfully challenge "the delegation provision specifically." *Id.* Instead, in the district court, Respondents challenged whether the scope of the wider arbitration agreement covered their claims about the sweepstakes. Just as in *Rent-A-Center*, the delegation clause remained undisturbed, and an arbitrator should decide whether the arbitration agreement applies to Respondents' claims.

A. The FAA's Severability Rule Protects An Arbitration Agreement Absent A Specific Challenge To That "Written Provision."

1. Arbitration agreements are severable.

This Court's precedent paves a roadmap for enforcing arbitration agreements under the FAA. Because delegation clauses are just mini-arbitration agreements, the framework that applies to all arbitration agreements sets the stage.

Under the severability rule, courts isolate the written arbitration provision "from the remainder of" the "contract" of which the arbitration provision is a part. *Buckeye Check Cashing*, 546 U.S. at 445. Because "arbitration is a matter of contract," courts must analyze the arbitration provision's terms to determine "whether the parties have submitted a particular dispute to arbitration." *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quotation marks omitted); *accord Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010). The FAA permits courts to entertain state-law contract "challenges" "specific" to the severable arbitration provision. *Rent-A-Ctr.*, 561 U.S. at 73; *accord Buckeye Check Cashing*, 546 U.S. at 445-446; *Nitro-Lift*, 568 U.S. at 20; *Preston*, 552 U.S. at 354; *Prima Paint*, 388 U.S. at 403-404. But challenges framed generally—such as arguments that the entire contract is void against public policy—are for the arbitrator to decide.

Thus, courts may determine whether the severable arbitration provision—here, a mini-arbitration agreement referred to as a "delegation clause"— "was in fact agreed to." *Rent-A-Ctr.*, 561 U.S. at 69 n.1. Courts may also determine whether that provision is invalid

under contract doctrines such as unconscionability. *Id.* at 70. But absent a specific attack to the arbitration agreement itself, courts may not entertain any other "challenge to another provision of the contract, or to the contract as a whole." *Id.*; *accord Buckeye Check Cashing*, 546 U.S. at 445-446; *Prima Paint*, 388 U.S. at 404. Instead, courts must honor the parties' agreement regarding who—an arbitrator or a judge—decides disputes about the entire contract. *See Buckeye Check Cashing*, 546 U.S. at 446.

2. The severability rule flows from the FAA's plain language.

As this Court has explained, the severability rule flows from the FAA's text. Section 2—the heart of the FAA—states that "a written provision" to arbitrate is " 'valid, irrevocable, and enforceable,' *without mention* of the validity of the contract in which it is contained." *Rent-A-Ctr.*, 561 U.S. at 70. In other words, the FAA isolates the specific arbitration clause—"[a] written provision"—from the rest of the contract. *See id.* Section 2 places that written provision "on equal footing with all other contracts." *Kindred Nursing*, 581 U.S. at 248. Courts must enforce the severable provision to arbitrate "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Section 4 of the FAA empowers courts to hear motions to compel arbitration, and likewise reflects the severability rule. According to Section 4, the "court shall hear the parties, and upon being satisfied that the making of *the agreement for arbitration* or the failure to comply therewith is not in issue, the court shall" order arbitration. 9 U.S.C. § 4 (emphasis added). The italicized language isolates the severable "agreement for arbitration" and permits the court to consider the

making of the arbitration agreement "[w]here such an issue is raised" by the parties. *Id.* But Section 4's "statutory language does not permit the federal court to consider" other arguments regarding the making of "the contract generally." *Prima Paint*, 388 U.S. at 404.

Finally, as this Court reiterated in *Henry Schein*, nothing in the FAA's text provides an exception from arbitration in cases where a judge thinks the ultimate resolution of a dispute is obvious. *See* 139 S. Ct. at 529. Only after arbitration may courts review arbitral awards to determine if "arbitrators exceeded their powers," were corrupt or partial, or "prejudiced the rights of any party." 9 U.S.C. § 10.

3. The severability rule imposes both substantive and procedural requirements.

That "agreements to arbitrate are severable does not mean that they are unassailable." *Rent-A-Ctr.*, 561 U.S. at 73. For instance, a party resisting arbitration may challenge "the precise agreement to arbitrate at issue." *Id.* at 71. A party may thus argue that an arbitration agreement itself is unconscionable because, for example, arbitration must occur in a faraway location. *See id.* at 73.

But in many cases, "the claimed basis of invalidity for the contract as a whole" will often not apply to the "severable agreement to arbitrate." *Id.* at 71. For instance, certain "elements of alleged unconscionability applicable" to an employment contract such as "outrageously low wages" will "not affect the" severable "agreement to arbitrate." *Id.* In that circumstance, the "written provision" to arbitrate disputes regarding the contract remains "valid, irrevocable, and enforceable." 9 U.S.C. § 2. Thus, an arbitrator will decide the

underlying unconscionability challenge to the entire contract. That result protects the freedom to contract: The parties agreed that an arbitrator would decide the challenge to the entire contract, and the severability rule ensures courts honor that choice.

In certain instances, the same defect may infect both the entire contract and the specific written provision to arbitrate. For example, a party might argue that an "alleged fraud" induced "the whole contract" and the specific subsection in which the parties agreed to arbitrate their differences. *Rent-A-Ctr.*, 561 U.S. at 71. But even in that circumstance, the severability rule imposes an important pleading requirement. According to Section 4, only "[w]here such an issue is raised" by the parties may the court consider challenges to "the making of the agreement to arbitrate." 9 U.S.C. § 4. This Court's precedent thus "require[s] the basis of challenge to be directed specifically to the agreement to arbitrate before the court will intervene." *Rent-A-Ctr.*, 561 U.S. at 71.

B. The FAA's Severability Rule Applies To Delegation Clauses.

1. Delegation clauses are severable arbitration agreements.

This case involves a party seeking to enforce a delegation clause. Delegation clauses are just "antecedent" and severable arbitration agreements. *Rent-A-Ctr.*, 561 U.S. at 70. The "FAA operates on" delegation clauses "just as it does on any other" arbitration agreement. *Id.*

Thus, when a party seeks to enforce a delegation clause, this Court applies the same FAA severability

rule. The Court isolates the written provision constituting the delegation clause; ensures the parties agreed to arbitrate the arbitrability issues in dispute; and resolves any challenges "specific to the delegation provision." *Id.* at 73.

In its recent decision in *Henry Schein*, this Court was emphatic: Absent challenges specific to the delegation clause, a court may not intervene. Instead, a court must enforce a delegation clause even if the court thinks that "the argument that the arbitration agreement applies to the particular dispute is 'wholly groundless.' " 139 S. Ct. at 528.

2. The clear-and-unmistakable standard imposes a judge-made rule unique to delegation clauses.

This Court has created one specific rule for delegation clauses: A court may "not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options*, 514 U.S. at 944. This standard imposes a presumption that "silence" or genuine "ambiguity" in a given arbitration agreement is not construed as an agreement to arbitrate arbitrability. *Id.* at 945.

The clear-and-unmistakable standard is "an interpretive rule, based on" the Court's "assumption about the parties' expectations." *Rent-A-Ctr.*, 561 U.S. at 69 n.1 (quotation marks omitted). This Court normally resolves "any doubts concerning the scope of arbitrable issues * * * in favor of arbitration." *First Options*, 514 U.S. at 945 (cleaned up). But the question of delegation "is rather arcane," and parties may "not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers." *Id.* The clear-and-unmistakable standard ensures that,

where arbitration agreements are silent or truly ambiguous about delegation, "unwilling parties" do not "arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.*

3. Rent-A-Center *applied the FAA's severability rule to delegation clauses.*

This Court's decision in *Rent-A-Center* confirmed the FAA's severability rule applies to delegation clauses.

In *Rent-A-Center*, an employee had sued his former employer for employment discrimination. 561 U.S. at 65. The employer moved to compel arbitration based on an arbitration agreement. *Id.* The arbitration agreement also contained a delegation clause. The employee resisted arbitration on the theory that the entire arbitration agreement was unconscionable because, for instance, the employee lacked rights to discovery in arbitration. *See id.* at 74-75. The employer countered that the delegation clause meant the parties "had expressly agreed that the arbitrator would have exclusive authority to resolve any dispute about the enforceability of the" entire arbitration agreement. *Id.* at 65.

This Court applied the severability rule, isolated the delegation clause, and held that it must enforce the delegation clause unless the employee could "challenge[] the delegation provision specifically." *Id.* at 72. Because the employee had made no arguments "*as applied* to the delegation provision," the delegation clause remained valid, and the threshold arbitrability dispute headed to arbitration. *Id.* at 74.

This Court also rejected the argument that the clear-and-unmistakable standard for drafting delegation

clauses has any impact on how to adjudicate challenges to a clearly articulated delegation clause. Much like Respondents attempt to do here, *see infra* pp. 46-48, the employee and the dissent in *Rent-A-Center* argued that the employee's "claim that the" entire "arbitration agreement is unconscionable undermines any suggestion that he 'clearly' and 'unmistakably' assented to" the delegation clause. *Id.* at 81 (Stevens, J., dissenting).

The Court disagreed, and explained that the clear-and-unmistakable test was an "interpretative rule" "based on an assumption about the parties' expectations." *Id.* at 69 n.1 (majority op.) (quotation marks omitted). That interpretative rule helps courts analyze the meaning of a given text to determine whether that text is a delegation clause. But the clear-and-unmistakable standard has no bearing on subsequent challenges regarding the "revocation" of an otherwise crystal-clear delegation clause. *Id.*

C. The Court Should Apply The FAA's Severability Rule And Enforce The Parties' Delegation Clause.

The severability rule makes short work of the question presented. Unless a party can articulate a "specific" challenge "as applied" to a "delegation provision" revoking "that provision," an arbitrator must decide whether a subsequent contract has narrowed an arbitration agreement. *Id.* at 73-74 (emphasis omitted). In this case, Respondents did not articulate a specific challenge to the delegation clause. As a result, an arbitrator must decide whether the parties' dispute is within the scope of the arbitration agreement in the User Agreement or whether the sweepstakes official

rules narrowed the reach of that arbitration agreement.

1. Respondents agreed to a broad delegation clause.

Respondents do not—and cannot—dispute that the User Agreement contains a clear and unmistakable delegation clause. *First Options*, 514 U.S. at 944.

In the User Agreement, the parties agreed an arbitrator must decide disputes regarding "the interpretation or application of the arbitration agreement, including the enforceability, revocability, scope, or validity of the arbitration agreement." JA 218, 270, 335 (capitalizations omitted).

In addition, the User Agreement incorporated AAA rules authorizing an arbitrator to decide "any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." *Id.* at 569.

There is no dispute that each Respondent "in fact agreed to" a delegation clause when creating a Coinbase user account. *Rent-A-Ctr.*, 561 U.S. at 69 n.1; *see Buckeye Check Cashing*, 546 U.S. at 444 n.1; JA 119-351 (detailing each Respondents' assent). There is likewise no dispute that this language "clear[ly] and unmistakabl[y]" assigns all conceivable threshold arbitrability disputes to an arbitrator. *First Options*, 514 U.S. at 944 (brackets omitted and added). Nor is there any meaningful dispute that this broad language encompasses the particular arbitrability question at the heart of this case.

Thus, absent a meritorious challenge "as applied to the delegation provision" itself, an arbitrator must decide the gateway question of whether Respondents'

claims should proceed in arbitration or in court. *Rent-A-Ctr.*, 561 U.S. at 74.

2. Respondents did not challenge the delegation clause.

An analysis of Respondents' filings in the district court confirms they did not "challenge[] the delegation provision specifically." *Rent-A-Ctr.*, 561 U.S. at 73. Instead, in opposing Coinbase's "motion to compel," Respondents argued only that the forum-selection clause in the official rules had narrowed the scope of *the entire arbitration agreement*. *Id.* at 72; *see Preston*, 552 U.S. at 354. As a result, the delegation clause went unchallenged and the district court should have enforced it.

In the district court, Respondents summarized their argument as follows: "Plaintiffs say that official rules ¶10"—the paragraph containing the forum-selection clause—"modified and superseded the parties' earlier, generalized arbitration agreements, by specifically and unambiguously requiring 'each' sweepstakes 'entrant' to litigate all sweepstakes-related 'controversies' in a federal or state court in California." JA 445 (capitalizations omitted).

In other words, Respondents argued the arbitration agreement *as a whole* did not apply to Respondents' claims because those claims involved the sweepstakes. That was an argument about the scope and applicability of the arbitration agreement to Respondents' state-law claims. That was not an argument "specific[]" to the delegation clause and the important questions that clause answers: Who decides whether the official rules narrowed the arbitration agreement, and

whether the latter applies to this dispute? *Rent-A-Ctr.*, 561 U.S. at 71.

The section of Respondents' district court brief ostensibly regarding the delegation clause confirms Respondents did not substantively challenge the delegation clause. JA 449. Instead, Respondents regurgitated arguments challenging the applicability of the *entire* arbitration agreement to Respondents' state law claims. Thus Respondents argued that:

- "since official rules ¶10 'superseded' the parties' prior arbitration agreements, any prior agreement to arbitrate *sweepstakes*-related disputes no longer exists." *Id.* at 451 (emphasis original, capitalizations omitted).
- "when ¶10 invoked the exclusive 'jurisdiction' of the courts to decide[] 'any controversies' *regarding the sweepstakes*, it necessarily excluded any arbitrator's 'jurisdiction.' " *Id.* at 452 (emphasis added, capitalization omitted).
- "Coinbase manifestly intended ¶10 to displace any arbitrator's 'jurisdiction,' and to disclaim any influence from the FAA, *over the parties' sweepstakes-related* 'controversies.' " *Id.* (emphasis added, capitalization omitted).

As the italicized words make clear, the substance of Respondents' arguments in the district court pertained solely to the scope and applicability of the arbitration agreement: Does the arbitration agreement apply to what Respondents call "sweepstakes-related disputes"? These arguments had no bearing on the antecedent question: *Who decides* the scope of the arbitration agreement?

One more point proves that Respondents did not challenge the delegation clause itself. Respondents agreed that "the parties' original arbitration agreement remains generally valid and enforceable," and governs all other non-sweepstakes related disputes. *Id.* at 454 (cleaned up). That shows Respondents are only contesting the scope of the arbitration agreement generally, *i.e.* whether the arbitration agreement applies to these claims. And Respondents' concession that the arbitration agreement applies in other cases raises a natural next question: Who decides the gateway question about the arbitration agreement's scope and applicability, in this or any other case?

The delegation clause provides the answer: An arbitrator.

3. The official rules did not modify the delegation clause.

An application of "ordinary" California contract "principles" likewise confirms the text of the official rules did not displace the delegation clause. *First Options*, 514 U.S. at 944.

Under California law, a later-in-time contract can have one of two effects on an earlier contract. The later contract can constitute a novation "which supplants the original agreement" entirely. *Wells Fargo Bank* v. *Bank of Am.*, 38 Cal. Rptr. 2d 521, 525 (Cal. Ct. App. 1995). "Essential to a novation is that it clearly appear that the parties intended to extinguish rather than merely modify the original agreement." *Howard* v. *Cnty. of Amador*, 269 Cal. Rptr. 807, 817 (Cal. Ct. App. 1990). "The burden of proof is on the party asserting that a novation has been consummated." *Id.*

Alternatively, a subsequent contract may modify an earlier agreement. Unlike a novation, a modification displaces "only those portions of the written contract directly affected," and leaves "the remaining portions intact." *Eluschuk* v. *Chemical Eng'rs Termite Control, Inc.*, 54 Cal. Rptr. 711, 715 (Cal. Ct. App. 1966); *see Travelers Ins. Co*. v. *Workmen's Comp. Appeals Bd.*, 434 P.2d 992, 998 (Cal. 1967), *disapproved of on other grounds by LeVesque* v. *Workmen's Comp. Appeals Bd.*, 463 P.2d 432, 439 (Cal. 1970); *Sass* v. *Hank*, 238 P.2d 652, 655 (Cal. Dist. Ct. App. 1951); 3 Martin D. Carr & Ann Taylor Schwing, *California Affirmative Defenses* § 65:1 (2d ed. July 2023 update) ("The original contract remains in force to the extent not altered by the modification."); *see generally* 13 *Corbin on Contracts* § 71.2.3 (2023).

This case involves an alleged modification. As Respondents stated in the district court, there "is no dispute here that the parties' original arbitration agreement remains generally valid and enforceable, *as modified* by the official rules contract." JA 454 (cleaned up, emphasis added). The delegation clause thus remains in force unless altered by the official rules.

But the official rules do not directly affect the delegation clause. Indeed, the official rules do not mention the delegation clause at all. The official rules likewise say nothing about *who decides* the proper interpretation and application of the arbitration agreement in the User Agreement. And the official rules also say nothing about *who decides* the proper interpretation and application of the official rules. *See id.* at 98-110.

In opposing Coinbase's motion to compel, Respondents focused on a two sentence forum-selection clause

in paragraph ten of the official rules. That forum-selection clause does not displace the delegation clause.

The first sentence of the forum-selection clause states: "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*." *Id.* at 108 (capitalizations omitted, emphasis added). At most, that sentence may address which courts can decide certain claims "regarding *the promotion*," which is defined to mean the "Dogecoin Sweepstakes." *Id.* at 98; *cf. supra* pp. 13-14 (describing Coinbase's interpretation of the clause). That sentence, however, does not answer *who decides* whether a given controversy must be resolved in arbitration or in court.

The second sentence in the forum-selection clause likewise does not modify the delegation clause. It states that "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." JA 108 (capitalizations omitted). Read in concert with the first sentence, this sentence prevents an entrant from asserting a lack of personal jurisdiction, lack of venue, and other similar defenses to appearing in a California court (rather than a different court) for disputes "regarding the promotion." *Id.* (capitalizations omitted). But that sentence does not speak to *who decides* whether the arbitration agreement governs a particular dispute. Because the severable delegation clause remains undisturbed, an arbitrator must decide whether this case should proceed in arbitration or in court.

To the extent there is any ambiguity, California law prefers Coinbase's interpretation of the official rules

because it avoids "an absurdity." Cal. Civ. Code § 1638; *see W. Pueblo Partners, LLC* v. *Stone Brewing Co., LLC*, 307 Cal. Rptr. 3d 626, 631 (Cal. Ct. App. 2023). Under Respondents' theory, *who decides* arbitrability often depends on when an entrant created a Coinbase account. In particular, if an entrant first entered the sweepstakes by mail and later created an account (for instance, to claim a prize), the User Agreement's delegation clause would be the later contract and would control. But if an existing user entered the sweepstakes by mail, which is what Respondents claim they would have done had Coinbase advertised the sweepstakes differently, the official rules would be the later contract and would allegedly displace the delegation clause.

That would mean two users could sign *identical* contracts and could bring *identical* claims, but the question of *who decides* where those claims should be brought will vary depending on when each user created her Coinbase account. That is a quintessential absurdity. No rational actor would draft a contract so that an issue as important as *who decides* arbitrability depends on an immaterial accident of timing.

Coinbase, by contrast, offered a sensible reading of the official rules: Because the official rules do not displace the delegation clause, the delegation clause dictates who decides whether the arbitration agreement applies to a particular dispute. If the arbitrator concludes the arbitration agreement does not apply, the official rules then identify which courts may decide claims regarding the promotion.

Finally, were there any lingering doubt, this Court could apply the federal presumption in favor of arbitrability. The delegation clause is just an arbitration

agreement, like "any other," *Rent-A-Ctr.*, 561 U.S. at 70, and "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Thus, to the extent there is a doubt whether the official rules narrowed the otherwise crystal-clear delegation clause—to be clear, there is none—that doubt is resolved in favor of arbitration.

D. This Court Should Enforce The Delegation Clause Regardless Of Its Views On Arbitrability.

A court should enforce a delegation clause "even if the court thinks that the argument that the arbitration agreement applies * * * is wholly groundless." *Henry Schein*, 139 S. Ct. at 529. Thus, the district court had "no business weighing" threshold arbitrability questions, and evaluating whether the forum-selection clause narrowed the scope of the arbitration agreement. *Id.* (quotation marks omitted). That was all a matter for the arbitrator.

Before an arbitrator, Coinbase will present strong arguments that the forum-selection clause applies to individuals who enter the sweepstakes by mail. *See supra* pp. 13-14. The courts below disagreed with Coinbase. But that does not preclude "another fair-minded adjudicator" from deciding "the matter the other way" in an arbitration. *Henry Schein*, 139 S. Ct. at 531. An "arbitrator might hold a different view of the arbitrability issue than a court does, even if the court finds the answer obvious." *Id.*

II. THE DECISION BELOW IS WRONG.

A. This Court Should Reject The Ninth Circuit's Nebulous Exception To Delegation Clauses.

In the decision below, the Ninth Circuit ignored the severability rule and never analyzed whether the official rules altered the parties' agreement that an arbitrator would decide arbitrability disputes. The court never addressed the interaction of the official rules and the "delegation provision specifically." *Rent-A-Ctr.*, 561 U.S. at 72. Instead, the Ninth Circuit first held that "[i]ssues of contract formation may not be delegated to an arbitrator"—full stop—without explaining what it meant by "contract formation." JA 583. The Ninth Circuit then simply declared that Respondents had challenged "the existence rather than the scope of [the] arbitration agreement"—which it held was not an issue the parties could agree to delegate to an arbitrator. *Id.* at 585.

The Ninth Circuit's approach and its conclusion were wrong from start to finish. Respondents' challenge in no way went to the formation or existence of a contract. Respondents *agree* they signed the User Agreement and that it included an arbitration provision and delegation clause—both of which initially were and through today "remain[] generally 'valid.' " JA 454. Respondents argued instead that the official rules allegedly "modified" the scope of the otherwise valid and enforceable arbitration agreement—by essentially adding an after-the-fact carveout for specific claims. *Id.*

But even putting aside the Ninth Circuit's fundamental error in mischaracterizing Respondents' argument as one of "contract formation," the Court should reject the Ninth Circuit's nebulous, labels-based exception. As set out below, applying such an exception in this case would violate the FAA's text and this Court's precedent, undermine the freedom to contract, and invite "time-consuming" litigation over what issues fall within this exception. *Henry Schein*, 139 S. Ct. at 531. This Court has recently rejected efforts to evade the FAA by relabeling novel arguments against arbitration as involving "contract formation." *Kindred Nursing*, 581 U.S. at 254. It should do the same here.

1. Respondents dispute neither the formation nor the continued existence of the arbitration agreement.

The Ninth Circuit's reasoning fails on its own terms. Even if there were some kind of contract-formation exception for delegation, it would not apply in this case. Respondents challenged neither the *formation* nor continued *existence* of the arbitration agreement. Quite the opposite. Respondents do not contest that they each signed the User Agreement. And they agree that "the parties' original arbitration agreement remains generally valid and enforceable" and governs all *other* potential controversies arising out of or related to their use of Coinbase's services. JA 454 (cleaned up).

Rather, Respondents dispute whether the official rules narrowed the arbitration agreement, and whether that "agreement covers" this "particular controversy." *Rent-A-Ctr.*, 561 U.S. at 69. Thus, this is a debate about the arbitration agreement's *scope—i.e.*,

does the allegedly-narrowed arbitration agreement apply to this case, or not. *Id.* That threshold question about the agreement's alleged narrowing and applicability to this dispute is undoubtedly a matter parties may delegate to an arbitrator. *Id.*

2. The FAA's severability rule applies to all challenges, regardless of their label.

But even if Respondents *had* raised something that could be categorized as a "contract formation" challenge, the Ninth Circuit still should have applied the FAA's severability rule. According to the FAA's text, courts should consider only "contract formation" arguments regarding "the specific arbitration clause that a party seeks to have the court enforce." *Granite Rock*, 561 U.S. at 296-297. In this case, the specific arbitration agreement Coinbase seeks to enforce before this Court is the delegation clause—the parties' mini-arbitration agreement to arbitrate arbitrability. Under the FAA's text, the Ninth Circuit thus could have considered only questions about the formation of the delegation clause—not questions about the wider arbitration agreement nor questions about the contract as a whole. And carefully applying the FAA's severability rule mattered in this case because Respondents' challenge did *not* affect the delegation clause in any way.

The FAA's text expressly applies the Act's severability rule to contract-formation challenges. A court must determine "that the making of the *agreement for arbitration* * * * is not in issue" before enforcing *that specific provision*. 9 U.S.C. § 4 (emphasis added). But in the face of a valid arbitration provision, the FAA "does not permit the federal court to consider claims" regarding the making "of the contract generally."

Prima Paint, 388 U.S. at 404. Thus, contract defenses "such as fraud, duress, or mutual mistake" all concern "contract formation." *AT&T Mobility LLC*, 563 U.S. at 355 & n.* (Thomas, J., concurring); *see Morgan Stanley Cap. Grp. Inc.* v. *Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 547 (2008) (allegations of "fraud or duress" involve "unfair dealing at the contract formation stage"). But in *Prima Paint*, this Court held that the FAA permits parties to commit to arbitration such formation disputes regarding the entire contract. *See* 388 U.S. at 403-404. Relying on that longstanding precedent, the AAA rules incorporated into the User Agreement state that arbitrators may determine "the existence * * * of a contract of which an arbitration clause forms a part."[3]

Delegation clauses are just mini-agreements to arbitrate which this Court treats like "any other" arbitration agreement. *Rent-A-Ctr.*, 561 U.S. at 70. As a result, before enforcing the *delegation clause*, the FAA's text requires a court to isolate the delegation clause and entertain those contract-formation arguments regarding "the 'making' of the" *delegation clause* itself. *Prima Paint*, 388 U.S. at 404. But the FAA does not permit a court to entertain arguments—whether labeled contract formation, or otherwise—attacking the wider arbitration agreement or the whole contract of which the delegation clause is a part. *Id.*

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[3] *See, e.g.*, AAA Commercial Arbitration Rule R-7(b) (eff. Oct. 1, 2013); AAA Consumer Arbitration Rule R-14(b) (eff. Sept. 1, 2018); AAA Employment Arbitration R-6(b) (eff. May 15, 2013); AAA Labor Arbitration R-3(b) (eff. Jan. 1, 2019).

It is no surprise, then, that this Court has recognized parties may agree to delegate contract-formation disputes to an arbitrator, including the arbitrability of a dispute over when the parties formed an arbitration agreement, *see Granite Rock*, 561 U.S. at 297 n.5, and the question "whether the parties have agreed to arbitrate." *Henry Schein Inc.*, 139 S. Ct. at 529 (quotation marks omitted); *accord Rent-A-Ctr.*, 561 U.S. at 68-69. Relying on this Court's precedent, the AAA's rules—incorporated into Coinbase's User Agreement—empower arbitrators to decide "any objections with respect to the existence * * * of the arbitration agreement."[4] And other prominent arbitral rules likewise authorize an arbitrator to decide challenges to the "formation" and "existence" of the arbitration agreement.[5]

In this case, carefully applying the FAA's severability rule makes all the difference. Respondents' challenge to the arbitration agreement *generally* is fundamentally distinct from any possible challenge to the delegation clause *specifically*. Respondents argued that the official rules narrowed the scope of the arbitration agreement to exclude claims regarding the sweepstakes. That argument has no bearing on the "*who decides arbitrability*" question. *See supra* pp. 29-34. As a result, the delegation clause remains valid, and an arbitrator should decide whether the official rules in fact narrowed the arbitration agreement.

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[4] AAA Consumer Arbitration R-14(a); *see also* AAA Commercial Arbitration R-7(a) (same); AAA Employment Arbitration R-6(a) (same); AAA Labor Arbitration R-3(a) (same).

[5] JAMS Comprehensive Arbitration R. 11(b) (eff. July 1, 2014).

3. The FAA's severability rule permits challenges if a contract-formation defect infects all parts of the contract equally, but that narrow issue is not before this Court.

As with all challenges brought under the FAA, some "contract formation" arguments targeting the whole contract or the broader arbitration agreement may at times mirror "as applied" challenges to a severable delegation clause. *Rent-A-Ctr.*, 561 U.S. at 74 (emphasis omitted). That is *not* the case here. But even in that context, the FAA's severability rule imposes a pleading requirement: The "basis of challenge" must "be directed specifically to the agreement to arbitrate before the court will intervene." *Id.* at 71. This minimal pleading requirement—a party must explain why the arbitration agreement in question is invalid—enforces principles of party presentation and reduces judicial error in FAA cases.

Consider challenges involving assent to a contract. A party may allege it never "signed the contract"; that "the signor lacked authority to commit the alleged principal"; or that "the signor lacked the mental capacity to assent." *Buckeye Check Cashing*, 546 U.S. at 444 n.1. Each allegation could be framed as a challenge that a person never assented to the entire contract or the arbitration agreement "generally." *Prima Paint*, 388 U.S. at 404. Alternatively, each allegation could be recast—without too much effort—as a challenge that a person never assented to the delegation clause "specifically." *Rent-A-Ctr.*, 561 U.S. at 71.

Thus, in the case on which the Ninth Circuit relied for its holding that "[i]ssues of contract formation may

not be delegated," JA 583, the motion to compel arbitration was filed by a non-party to the contract, *see Ahlstrom* v. *DHI Mortg. Co.*, 21 F.4th 631, 636 (9th Cir. 2021). From a logical perspective, arguments against a non-party's authority to enforce an arbitration agreement and a non-party's authority to enforce the delegation clause assert the same defect, which could "equally" undermine *both* the arbitration agreement generally and the delegation clause "specifically," and for the same reasons. *Rent-A-Ctr.*, 561 U.S. at 70-71. In that circumstance—which is *not* present here—some courts "short-circuit" the severability rule, ignore the delegation clause, and decide the parallel question regarding the entire arbitration agreement. *Henry Schein*, 139 S. Ct. at 527.

Nevertheless, first in *Prima Paint* and then emphatically in *Rent-A-Center*, this Court told courts not to revise a challenge framed as applied against other parts of a contract into a challenge as applied to the specific arbitration provision sought to be enforced under FAA. *Rent-A-Ctr.*, 561 U.S. at 71; *Prima Paint*, 388 U.S. at 403-404. And as this Court recently confirmed, the FAA's fundamental rules apply to "contract formation issues" too. *Kindred Nursing*, 581 U.S. at 254 (quotation marks omitted).[6]

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[6] This Court previously reserved the question whether arguments that no "agreement between the parties 'was ever concluded' "—including arguments about the failure to sign a con-

The FAA's pleading requirement—a party must formally explain why the challenge applies to the specific arbitration provision to be enforced—reflects the FAA's text, which is uncompromising. *See* 9 U.S.C. §§ 2, 4. Under the FAA, courts "shall hear the parties," and may resolve an issue regarding "the making of the agreement for arbitration," but only "[where] such an issue *is raised*." *Id.* § 4 (emphasis added). Thus, if a party does not herself explicitly articulate a challenge to the "the making of the agreement for arbitration," Section 4 does not permit the court to manufacture one for her. *Id.*

Requiring parties to carefully articulate their challenge—whether a contract formation challenge or something else—has important benefits: It ensures courts apply principles of party presentation that govern all cases, and thereby furthers the FAA's goal of equal treatment for arbitration cases. *See Morgan* v. *Sundance, Inc.*, 596 U.S. 411, 418 (2022); *Blanton*, 962 F.3d at 845 n.1 (Thapar, J.) (declining to consider argument that non-signatory lacked "right to enforce the *specific*" delegation clause and invoking principle of party presentation). Moreover, as this case demonstrates, not all challenges a party or court labels as

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tract or mental capacity to sign—are subject to all the requirements of the FAA's severability rule. *Rent-A-Ctr.*, 561 U.S. at 70 n.2 (quoting *Buckeye Check Cashing*, 546 U.S. at 444 n.1). To be clear: That issue is not presented by this case. Respondents do not dispute that they agreed to the User Agreement, and that the User Agreement continues to govern all other aspects of Respondents' use of Coinbase's service. Respondents only argue that the official rules narrowed the arbitration agreement's scope. Nevertheless, as explained above, the severability rule's pleading requirement logically applies to signing or capacity arguments, too.

involving "contract formation" will apply equally to all parts of the contract. By forcing parties to explain why every challenge actually affects (for example) the delegation clause at issue, the FAA reduces the risk that a court mistakenly assumes a particular challenge applies "equally" to that delegation clause and other parts of the contract. In contrast, creating a judge-made exception to the severability rule for a subset of contract-formation arguments provides cover for courts hostile to arbitration to frustrate the FAA's purpose and invites "time-consuming" litigation over whether the exception applies, or *Prima Paint*'s contrary rule governs. *Henry Schein*, 139 S. Ct. at 531; *see infra* pp. 50-51.

But it bears emphasis: Even if a limited "contract formation" exception to the severability rule were a good idea in some other case, this case does not involve a contract-formation challenge—let alone a challenge that could apply "equally" to the delegation provision and the wider arbitration clause. *Rent-A-Ctr.*, 561 U.S. at 71. As a result, there was no reason for the Ninth Circuit to decline to enforce the delegation clause.

B. This Court Should Reject Respondents' Alternative Rationales For The Ninth Circuit's Decision.

Respondents' Brief in Opposition abandoned the Ninth Circuit's decision and offered two alternative rationales for ignoring the delegation clause. This Court should reject them both.

1. The choice-of-law provision does not displace the delegation clause.

Below, in opposing Coinbase's motion to compel, Respondents had challenged the arbitration agreement based on the forum-selection clause. Before this Court, however, Respondents now argue that a separate choice-of-law provision in the official rules displaced the delegation clause. BIO 6-8, 15-17.

This Court may decline to consider Respondents' case-specific argument, which appears nowhere in the district court's opinion or the Ninth Circuit's decision. *Rent-A-Ctr.*, 561 U.S. at 75. "This court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan* v. *United States*, 274 U.S. 195, 200 (1927); *accord Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 39 (1989) ("Although we could consider grounds supporting the judgment different from those on which the Court of Appeals rested its decision, where the ground presented here has not been raised below we exercise this authority only in exceptional cases.") (cleaned up).

This Court alternatively may reject Respondents' argument on the merits because the choice-of-law provision in the official rules does not displace the delegation clause. The choice-of-law provision states that California and U.S. law applies to "the interpretation, performance and enforcement of these official rules." JA 109 (capitalization omitted). The choice-of-law provision does not say *who* decides whether the official rules narrowed the arbitration agreement. Instead, at most, the choice-of-law provision identifies *what body of law* a decider will use.

If anything, the language in the choice-of-law provision proves Coinbase's argument that the official rules' forum-selection clause says nothing about who decides whether the arbitration agreement in the User Agreement applies to Respondents' claims. *See* Cal. Civ. Code § 1641 (directing courts to interpret the "[w]hole contract," "each clause helping to interpret the other"). The choice-of-law provision demonstrates that the drafters knew how to refer to "the interpretation, performance and enforcement" of the "official rules"—and likewise of the arbitration agreement as well. But the drafters did not state in the forum-selection clause that disputes over "the interpretation, performance and enforcement" of the official rules or the arbitration agreement must be heard in court, or otherwise state in the official rules who must decide such disputes. Instead, at most, the drafters identified *what law* applies to the "interpretation, performance and enforcement" of the official rules, and left the delegation clause untouched. As a result, the delegation clause applies, and governs *who decides* how to reconcile these two contracts.

2. The "clear and unmistakable" standard does not apply here.

Respondents also argue that even if the official rules did not displace the delegation clause, the official rules created just enough ambiguity that the otherwise crystal clear delegation clause in the User Agreement no longer provides "clear and unmistakable evidence" of the parties' intent to delegate arbitrability questions. *First Options*, 514 U.S. at 944 (cleaned up); *see*, *e.g.*, BIO 18. In *Rent-A-Center*, this Court rejected similar efforts to expand the clear-and-unmistakable

standard, and it should do so again here. *See Rent-A-Ctr.*, 561 U.S. at 69 n.1.

The clear-and-unmistakable standard is a judge-made, "arbitration-specific" "interpretive rule" disfavoring delegation clauses. *Kindred Nursing*, 581 U.S. at 254; *Howsam*, 537 U.S. at 83. The rule subjects "delegation clauses" "by virtue of their defining trait, to uncommon barriers." *Kindred Nursing*, 581 U.S. at 252. The rule does not apply to all arbitration agreements under the FAA, let alone all other contracts at common law, and is in some tension with the FAA's text. *See Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1431 n.4 (2019) (Kagan, J., dissenting) (recognizing that the clear-and-unmistakable rule displaces "[w]hatever state law might say"). The heightened standard reflects this Court's assessment of parties' most-likely behavior: Because the question of who decides arbitrarily is "arcane," a "party often might not focus upon" that question or its "significance." *First Options*, 514 U.S. at 945. The clear-and-unmistakable standard is at most a presumption against reading "silence" or genuine "ambiguity" in an arbitration agreement to constitute a delegation clause. *Id.*; *accord Lamps Plus*, 139 S. Ct. at 1416.

But once parties have agreed to a clear-and-unmistakable delegation clause—as the parties emphatically did here—the heightened standard's purpose is fulfilled: The parties deliberately considered "who * * * decides" the scope of the arbitration agreement, and agreed that an arbitrator should decide gateway arbitrability questions. *First Options*, 514 U.S. at 944 (emphasis omitted). Indeed, given the heightened intentionality this Court requires to create a delegation clause, it should arguably be *more* difficult to show the

parties revoked their carefully considered agreement. At a minimum, however, the Court should not treat delegation clauses as easier to revoke than "any" other "contract." 9 U.S.C. § 2.

This case is analogous to *Rent-A-Center*, where this Court rejected similar efforts to expand the clear-and-unmistakable standard, and lower the threshold for the "revocation" of a delegation clause. *See supra* pp. 26-27; *Rent-A-Ctr.*, 561 U.S. at 69 n.1. Like the employee in *Rent-A-Center*, Respondents here do not dispute that they agreed to the delegation clause, or that "the text of the" delegation clause itself "was clear and unmistakable" on its face. 561 U.S. at 69 n.1. Instead, much like the employee in *Rent-A-Center*, Respondents raised a "revocation" argument after-the-fact to a crystal-clear delegation clause. *Id.* (quoting 9 U.S.C. § 2); *see* BIO 17 (characterizing Respondents' argument as a "revocation" challenge under "§ 2's savings clause"). The result here should be the same as in *Rent-A-Center*: The Court should enforce the delegation clause like "any contract." 9 U.S.C. § 2. Anything less would improperly "tilt the playing field" "against" delegation clauses by radically lowering the threshold to challenging their revocation. *Morgan*, 596 U.S. at 419.

Finally, even if a heightened standard—which is again no more than a presumption—applied in this context, it would not help Respondents. The text of the User Agreement is exceptionally clear, and the arbitral rules incorporated into the User Agreement are equally explicit. Meanwhile, the official rules say *nothing* about who decides arbitrability disputes regarding the arbitration agreement, nor *anything*

about who decides similar disputes regarding the official rules. The parties' intent to authorize the arbitrator to decide this arbitrability dispute thus remains clear and unmistakable.

III. RULING FOR PETITIONER WILL PROTECT THE FREEDOM TO CONTRACT AND REDUCE FOLLOW-ON LITIGATION.

Ruling for Petitioner—consistent with the FAA's text and this Court's precedent—will ensure an administrable system, and advance the FAA's core purpose. In contrast, ruling for Respondents will raise difficult line-drawing problems and will undermine the freedom to contract.

A. Petitioner's Rule Is Administrable And Furthers The FAA's Purpose.

Petitioner asks the Court to continue to adhere to a universal and bright-line severability rule that applies equally to all challenges to all arbitration agreements—including delegation clauses. *See Rent-A-Ctr.*, 561 U.S. at 73; *Nitro-Lift*, 568 U.S. at 20; *Preston*, 552 U.S. at 354; *Buckeye Check Cashing*, 546 U.S. at 445-446; *Prima Paint*, 388 U.S. at 403-404. Applying this consistent standard across all FAA cases is the most administrable approach.

In addition, ruling for Petitioner will further the FAA's purpose. Petitioner's approach places delegation clauses "on equal footing with all other contracts," and protects the benefits offered by these specialized arbitration agreements. *Buckeye Check Cashing*, 546 U.S. at 443. Like all other arbitration agreements, delegation clauses provide "quicker, more informal, and often cheaper" dispute resolution. *Epic Sys.*, 138

S. Ct. at 1621. And like all other arbitration agreements, delegation clauses provide parties access to "expert[]" decisionmakers. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985); *see Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010) (looking to the "tradition of" "maritime law" in deciding whether to permit class arbitration). Petitioner's rule ensures these important arbitration agreements are protected, as Congress and the parties' intended.

It is imperative to enforce delegation clauses in multiple contract scenarios, like this case. Parties of all stripes routinely sign successive agreements. *See, e.g.*, *Stolt-Nielsen*, 559 U.S. at 666, 668 (shipping companies and commodities firms entered into an initial "charter party" and a subsequent "supplemental agreement"). Indeed, California law mandated that Coinbase include separate sweepstakes official rules in a standalone contract. In practice, it is often difficult for drafters to foreclose any argument that a later contract conflicts with an earlier one. In agreeing to arbitrate all disputes, including arbitrability issues, parties commit to resolving any putative conflicts between contracts in arbitration.

B. Ruling For Respondents Will Invite Chaos.

In sharp contrast, the Ninth Circuit's approach is fundamentally unworkable. The Ninth Circuit would exempt a nebulous category of "contract formation" disputes from the scope of every delegation clause. Were this Court to adopt that ill-defined "exception," it "would inevitably spark collateral litigation * * * over whether" the exception to delegation applies in a given case. *Henry Schein*, 139 S. Ct. at 531. At a minimum, these "time-consuming sideshow[s]" will rob

parties of cost-savings, speed, and other efficiencies of arbitration. *Id.* And adopting the Ninth Circuit's approach could unsettle existing expectations, including the expectations of so many parties whose existing contracts authorize arbitrators to determine the "existence" and "formation" of an arbitration agreement. *See supra* p. 40 & nn. 4, 5.

Worse, the Ninth Circuit's exception could provide cover for "new devices and formulas" that seek to undermine delegation clauses. *Epic Sys.*, 138 S. Ct. at 1623. So long as a party resisting delegation couches its anti-arbitration theory as involving "contract formation"—and many legal doctrines have some plausible relationship to the formation of a contract—a party could now hope to evade delegation. *See Kindred Nursing*, 581 U.S. at 254 (rejecting attempt to justify state law hostile to arbitration as involving "contract formation"). Meanwhile, when lower courts disagree over how to apply the Ninth Circuit's new anti-delegation exception—as they undoubtedly will—this Court will be called upon to resolve conflicts as only it can.

Respondents' alternative theory—which asks this Court to lower the threshold for revoking delegation clauses under Section 2 of the FAA—poses similar dangers. In every case, lower courts will need to determine whether to apply Respondents' reduced threshold for attacking delegation clauses, or whether to apply *Rent-A-Center*'s contrary rule that treats delegation clauses like any other arbitration agreement. *Rent-A-Ctr.*, 561 U.S. at 69 n.1. There will likely be considerable confusion over which rule applies, just as there is even ambiguity today regarding whether a given issue concerns a threshold arbitrability dispute subject to the clear-and-unmistakable standard. *See*

Oxford Health Plans LLC v. *Sutter*, 569 U.S. 564, 569 n.2 (2013) ("[T]his Court has not yet decided whether the availability of class arbitration is a question of arbitrability."); *Howsam*, 537 U.S. at 83 (explaining that "one might call any potentially dispositive gateway question a 'question of arbitrability,' " but the Court's use of the "phrase" "has a far more limited scope").

If a court decides Respondents' new standard applies to a particular case, the court will then need to determine whether an otherwise "unmeritorious argument"—which on its own would not revoke a delegation clause—creates just enough ambiguity to tip the balance against delegation. *Henry Schein*, 139 S. Ct. at 531. In short, like the Ninth Circuit's approach, Respondents' alternative theory poses considerable line-drawing problems, will encourage meritless challenges to delegation clauses, could provide a haven for "new devices and formulas" hostile to arbitration, and will enmesh this Court in considerable follow-on litigation. *Epic Sys.*, 138 S. Ct. at 1623.

C. Petitioner's Approach Facilitates Challenges To Delegation Clauses.

It also bears emphasis what ruling for Petitioner—and enforcing the FAA as it is written—does not mean.

First, contrary to what Respondents have claimed, enforcing the FAA in this case will not "make it logically impossible for courts to ever find that a delegation agreement was altered or affected *in any way* by any subsequent agreement." BIO 15-16. Parties remain free to expressly revoke or alter delegation clauses. In addition, a party resisting a delegation clause may argue (if the facts support it) that a subsequent agreement implicitly displaced or modified the

"delegation provision specifically." *Rent-A-Ctr.*, 561 U.S. at 72. What a ruling for Petitioner will prevent is parties asking a court to "short-circuit" a delegation clause that assigns the scope of an arbitration clause to an arbitrator so that the court decides that very question itself. *Henry Schein*, 139 S. Ct. at 527.

Second, ruling for Petitioner will not give carte blanche to arbitrators. As an initial matter, the law presumes arbitrators are "competent, conscientious, and impartial." *Mitsubishi Motors*, 473 U.S. at 634. But in the event that arbitrators stray from these principles, the FAA "provides for back-end judicial review of an arbitrator's decision." *Henry Schein*, 139 S. Ct. at 530. If "arbitrators exceed[] their powers," courts may intervene and "vacat[e] the award." 9 U.S.C. § 10(a)(4).

Third, as this Court recently explained in *Henry Schein*, enforcing a valid delegation clause will not leave arbitrators powerless "to deter frivolous motions to compel arbitration." *Henry Schein*, 139 S. Ct. at 531. "Arbitrators can efficiently dispose of frivolous cases by quickly ruling that a claim is not in fact arbitrable," and "under certain circumstances" "arbitrators may" impose "fee-shifting and cost-shifting sanctions." *Id.* But a court should not hesitate to enforce delegation clauses as written—in this case or any other—because it thinks the result is preordained. "After all, an arbitrator might hold a different view of the arbitrability issue than a court does, even if the court finds the answer obvious." *Id.*

CONCLUSION

For the foregoing reasons, the Ninth Circuit's decision should be reversed.

Respectfully submitted,

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APPENDIX

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APPENDIX A

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9 U.S.C. § 2

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§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

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A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

APPENDIX B

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9 U.S.C. § 4

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§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

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A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform

the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.