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 OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
INTEREST OF *AMICUS CURIAE* 1
SUMMARY OF ARGUMENT 2
ARGUMENT 5
I. The Federal Arbitration Act reflects a federal policy favoring streamlined arbitration. 5
II. Delegating disputes over arbitrability to the arbitrator is a common method of streamlining dispute resolution. 6
III. Requiring parties to litigate whether a later contract modifies the arbitration clause in an earlier contract is inconsistent with the efficiency-maximizing purpose of delegation clauses and thus contravenes the FAA. 9
CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Cases

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995) 6, 9

Am. Express Co. v. Italian Colors Rest.,
570 U.S. 228 (2013) 2

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) 3, 5, 6

Brown v. RAC Acceptance E., LLC,
809 S.E.2d 801 (Ga. 2018) 3

Cemex Constr. Materials Fla., LLC v. LRA Naples, LLC,
779 S.E.2d 444 (Ga. Ct. App. 2015) 10

Coinbase, Inc. v. Bielski,
599 U.S. 736 (2023) 1

Dean Witter Reynolds, Inc. v. Byrd,
470 U.S. 213 (1985) 6

DIRECTV, Inc. v. Imburgia,
577 U.S. 47 (2015) 2

Epic Sys. Corp. v. Lewis,
138 S.Ct. 1612 (2018) 2, 5

First Options of Chi., Inc. v. Kaplan,
514 U.S. 938 (1995) 3, 7

Henry Schein, Inc. v. Archer & White Sales, Inc.,
139 S.Ct. 524 (2019) 1, 3, 4, 7

Howsam v. Dean Witter Reynolds, Inc.,
537 U.S. 79 (2002) 3, 7

IP Petroleum Co. v. Wevanco Energy, L.L.C.,
116 S.W.3d 888 (Tex. App. 2003) 10

Lamps Plus, Inc. v. Varela,
139 S.Ct. 1407 (2019) 6

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 5, 9

Pacelli v. Augustus Intel., Inc.,
459 F.Supp.3d 597 (S.D.N.Y. 2020) 3

Preston v. Ferrer,
552 U.S. 346 (2008) 9

Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967) 5

Rent-A-Center, W., Inc. v. Jackson,
561 U.S. 63 (2010) 3

SMJ Gen. Constr., Inc. v. Jet Com. Constr., LLC,
440 P.3d 210 (Alaska 2019) 10

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,
559 U.S. 662 (2010) 6

Transcor Astra Grp. S.A. v. Petrobras Am. Inc.,
650 S.W.3d 462 (Tex. 2022) 10

Viking River Cruises, Inc. v. Moriana,
596 U.S. 639 (2022) 1

Miscellaneous

David Horton, *Arbitration About Arbitration*, 70 Stan. L. Rev. 363 (2018) 8

Philip J. Loree, Jr., Schein*'s Remand Decision Goes Back to the Supreme Court. What's Next?*, 38 Alternatives to High Cost Litigation 54 (2020) 8

INTEREST OF *AMICUS CURIAE*[1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * *

ALF has participated as an *amicus curiae* in many Supreme Court cases to support contracting parties' right, protected by the Federal Arbitration Act (FAA), to enter into binding, judicially enforceable arbitration agreements. *See, e.g.*, *Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023); *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022); *Henry Schein, Inc. v. Archer &*

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

White Sales, Inc., 139 S.Ct. 524 (2019); *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612 (2018); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

Consistent with the FAA's purpose, ALF has long maintained that arbitration is, or should be, an efficient, speedier, less expensive alternative to litigating disputes between corporations, between companies and individual consumers, and between employers and individual employees. Indeed, a number of members of ALF's Board of Directors and Advisory Council have significant professional experience with arbitration of disputes and are familiar with its many benefits.

Correctly resolving the question presented here—whether courts must respect parties' decision to delegate questions of arbitrability to the arbitrator when a later contract might modify an earlier one—is critical to maintaining the benefits of arbitration. Those benefits are lost if parties are required to litigate arbitrability in court despite delegating that issue to the arbitrator.

ALF submits this brief to highlight how requiring parties to litigate, rather than arbitrate, the effect of a later contract on an earlier contract disserves the efficiency-promoting goals of the FAA.

SUMMARY OF ARGUMENT

To achieve efficient and cost-effective dispute resolution, parties often delegate the adjudication of preliminary disagreements over arbitrability to the arbitrator. The parties here did just that, but the

Ninth Circuit overrode their choice and decided arbitrability itself because the parties entered into two contracts. That approach clashes with the FAA, which Congress enacted to "ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

Parties to arbitration agreements often disagree about "whether the parties are bound by a given arbitration clause" or "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). This Court has repeatedly held that parties may delegate these arbitrability questions to the arbitrator. *See Henry Schein*, 139 S.Ct. at 527, 530; *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

To achieve this end, "[a]rbitration agreements these days often contain what is known in arbitration law as a 'delegation provision'—that is, 'an agreement to arbitrate threshold issues concerning the arbitration agreement.'" *Brown v. RAC Acceptance E., LLC*, 809 S.E.2d 801, 805 (Ga. 2018). An arbitration agreement with a delegation clause "permits a single decisionmaker to make efficient decisions both as to arbitrability and as to the merits of the dispute," *Pacelli v. Augustus Intel., Inc.*, 459 F.Supp.3d 597, 609 (S.D.N.Y. 2020), consistent with the FAA's aim of "affording parties discretion in designing arbitration processes" so they can develop "efficient, streamlined procedures tailored to the type of dispute," *Concepcion*, 563 U.S. at 344.

This Court recently held that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, ... a court possesses no power to decide the arbitrability issue." *Henry Schein,* 139 S.Ct. at 529. "Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." *Id.* at 530.

The Ninth Circuit violated this rule here. The court refused to honor the parties' delegation clause, holding that the district court, not the arbitrator, must decide whether a later contract between the parties modified the parties' earlier arbitration agreement.[2] The Ninth Circuit then went on to decide arbitrability for itself, in violation of the parties' agreement.

By declining to allow the arbitrator to resolve the arbitrability issue, the Ninth Circuit subjected the parties to the very type of threshold litigation they contractually agreed to avoid. Determining the effect of a later agreement on an earlier agreement can be complicated, and the Ninth Circuit's blanket rule that courts (rather than arbitrators) must resolve such issues deprives parties of the efficiency-enhancing benefits of delegation clauses, in violation of the FAA.

For these reasons, this Court should reverse the Ninth Circuit's judgment and send a clear message that courts must enforce arbitrability delegation clauses.

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[2] The delegation clause here provides that the arbitrator, not a court, shall address disputes regarding "the enforceability, revocability, scope, or validity of the Arbitration Agreement or any portion of the Arbitration Agreement." Pet. App. 43a.

ARGUMENT

I. The Federal Arbitration Act reflects a federal policy favoring streamlined arbitration.

"Congress adopted the [FAA] in 1925 in response to a perception that courts were unduly hostile to arbitration." *Epic Sys. Corp.*, 138 S.Ct. at 1621. In "Congress's judgment arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved." *Id.*

The FAA "establishes 'a liberal federal policy favoring arbitration agreements.'" *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). It reflects "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). Congress intended "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22.

The FAA's purpose is thus "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 563 U.S. at 344. The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has

been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

Consistent with the FAA's purpose, parties choose to arbitrate their disputes in recognition of arbitration's benefits over traditional litigation. Arbitration provides "a less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995). The benefits of arbitration include "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407, 1416 (2019) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010)). Arbitration also permits parties to design "efficient, streamlined procedures tailored to the type of dispute," *Concepcion*, 563 U.S. at 344, and to preserve the confidentiality of the evidentiary record, or at least the award, if they choose to do so.

To achieve the benefits of arbitration, "parties forgo the procedural rigor and appellate review" that characterize litigation in court. *Concepcion*, 563 U.S. at 348 (citation omitted). Indeed, arbitration's principal advantage over litigation is its informality. *Lamps Plus, Inc.*, 139 S.Ct. at 1416.

II. Delegating disputes over arbitrability to the arbitrator is a common method of streamlining dispute resolution.

A common option for making dispute resolution more efficient and less expensive is to delegate to the arbitrator the resolution of disagreements about the arbitrability of a dispute. To understand why, it helps to conceptualize the different types and levels of disputes that can arise in the arbitration context.

At the first level is the parties' disagreement about the merits of their claims. At the next level, the parties sometimes disagree about whether they agreed to arbitrate the merits (that is, whether the dispute is arbitrable), which encompasses the questions of whether there is a binding arbitration agreement at all and, if so, whether that agreement applies to the dispute at issue. At the highest level, the parties may also disagree about who has the power to decide the arbitrability of the dispute. *See Henry Schein*, 139 S.Ct. at 527 (explaining these distinctions); *see also Howsam*, 537 U.S. at 84 (explaining the two inquiries that fall under the rubric of a "question of arbitrability" (citation omitted)). When parties include a delegation clause in their arbitration agreement, they address the third type of dispute by agreeing that the arbitrator has the power to decide the arbitrability of any dispute arising between them.

Under the FAA, "the question of who decides arbitrability is itself a question of contract. The [FAA] allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes." *Henry Schein*, 139 S.Ct. at 527. While "courts 'should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so,'" *id.* at 531 (quoting *First Options*, 514 U.S. at 944), "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract," *id.*

Arbitrability delegation clauses enhance the efficiency and cost-effectiveness of the arbitration process. In many European countries, the default rule affords arbitrators the power to determine the scope of their own jurisdiction in the first instance. David Horton, *Arbitration About Arbitration*, 70 Stan. L. Rev. 363, 382 (2018). "This straight-to-arbitration pipeline prevented parties from exploiting their right to a judicial forum to thwart the streamlined private dispute resolution process." *Id.* Delegating arbitrability to the arbitrator also "gained a foothold in the field of labor arbitration in the mid-twentieth century" because "it sometimes made sense to allow the parties to 'economize time and effort' by asking the arbitrators to say whether an arbitration clause covered a particular grievance." *Id.* at 382–83 (citations omitted).

More recently, delegation clauses have proliferated in this country outside the labor relations context. *See id.* at 393; *see also* Philip J. Loree, Jr., Schein*'s Remand Decision Goes Back to the Supreme Court. What's Next?*, 38 Alternatives to High Cost Litigation 54, 68 (2020). Parties increasingly recognize the efficiency gains achieved when an arbitrator, rather than a court, resolves arbitrability disputes. Such an arrangement allows the arbitrator to quickly and informally decide whether the parties agreed to arbitration and whether a given dispute falls within the scope of an arbitration agreement, without the need for lengthy proceedings in court to adjudicate a dispute's arbitrability.

III. Requiring parties to litigate whether a later contract modifies the arbitration clause in an earlier contract is inconsistent with the efficiency-maximizing purpose of delegation clauses and thus contravenes the FAA.

When parties have agreed to arbitrate a dispute, the FAA requires that their dispute be sent to arbitration as soon as possible. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22. Courts frustrate that goal when they require parties to litigate in court before heading to arbitration. This Court has therefore rejected procedures that invite pre-arbitration litigation and so "risk[ ] the very kind of costs and delay through litigation . . . that Congress wrote the [FAA] to help the parties avoid." *Allied-Bruce Terminix Cos.*, 513 U.S. at 278; *see Preston v. Ferrer*, 552 U.S. 346, 358 (2008) (rejecting imposition of pre-arbitration proceedings that would "hinder speedy resolution of the controversy").

The decision below improperly calls for precisely the type of costly pre-arbitration litigation foreclosed by the FAA. According to the Ninth Circuit, pre-arbitration litigation is necessary whenever a party contends that a later contract has modified the arbitration clause in an earlier agreement. Pet. App. 7a–8a. The Ninth Circuit mandates such litigation even when, as here, the parties agreed to delegate all disputes about arbitrability to the arbitrator rather than a court—and the delegation clause itself was not revoked. *Id.* That rule clashes with the efficiency-maximizing goals of the FAA, and with the parties' intent to streamline dispute resolution even further by delegating arbitrability issues to the arbitrator.

Litigating the effect of a later contract on an earlier contract can be complicated. Appellate courts across the country have addressed the issue in complex published opinions, sometimes remanding for even more litigation over this question. *See, e.g.*, *Transcor Astra Grp. S.A. v. Petrobras Am. Inc.*, 650 S.W.3d 462, 480–82 (Tex. 2022) (holding that a settlement agreement superseded an earlier arbitration agreement); *SMJ Gen. Constr., Inc. v. Jet Com. Constr., LLC*, 440 P.3d 210, 214–16 (Alaska 2019) (remanding for consideration of extrinsic evidence about whether parties intended later agreement to supersede earlier agreement); *Cemex Constr. Materials Fla., LLC v. LRA Naples, LLC*, 779 S.E.2d 444, 445–46 (Ga. Ct. App. 2015) (analyzing whether forum selection clause in later contract applied despite different language in earlier contracts); *IP Petroleum Co. v. Wevanco Energy, L.L.C.*, 116 S.W.3d 888, 899 (Tex. App. 2003) (addressing, after jury trial, whether later agreement superseded earlier agreement).

As these decisions confirm, it can be difficult and time consuming to determine how a later contract affects the meaning and enforcement of an earlier arbitration agreement. Requiring parties to pursue that complex litigation in court when they have delegated the issue to an arbitrator for resolution undermines the efficiency-maximizing purpose of the FAA. This Court should reject the Ninth Circuit's approach, which does just that.

CONCLUSION

For these reasons, this Court should reverse the Ninth Circuit's judgment.

Respectfully submitted,

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