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

AMICUS CURIAE BRIEF OF ANTHONY MICHAEL SABINO IN SUPPORT OF PETITIONER AND SUGGESTING REVERSAL

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December 2023

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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?

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INTEREST OF *AMICUS CURIAE*

This *amicus curiae* is a law professor with expertise in arbitration generally, securities arbitration, commercial law, and commercial arbitration. Furthermore, this *amicus curiae* has represented parties in arbitration proceedings, frequently chairs arbitrations for the Financial Industry Regulatory Authority and other bodies, and regularly lectures on the precise topics found in the pending controversy. This case addresses the interpretation of the Federal Arbitration Act, implicates the enforcement of agreements to arbitrate, and, hence, shall determine the proper conduct of arbitration proceedings in a wide variety of fora. This *amicus curiae* has a professional and scholarly interest in the proper application and development of the law in these domains.[1]

STATEMENT

This *amicus curiae* respectfully adopts, in relevant part, the Statement of the Case set forth in the Petition for *Certiorari* filed by the Petitioner herein, Coinbase, Inc. (hereinafter, "Petitioner"). Petition for Writ of *Certiorari* at 5.

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. *See* Supreme Court Rule 37.6.

SUMMARY OF ARGUMENT

The question presented should be answered in favor of the Petitioner, to wit, that the arbitrator, and not a court, should decide whether an arbitration agreement is narrowed by a later contract that is silent as to arbitration and delegation. Accordingly, it is respectfully suggested that the decision below be reversed. In the case at bar, reversal is justified for reason of the text of the Federal Arbitration Act, the strong federal policy favoring arbitration, and the lengthy and consistent line of precedents upholding that ideal. The ruling of the lower tribunal denying the arbitrator the authority to decide the "gateway" question of determining arbitrability is unsupported by the statutory regime which empowers arbitration, frustrates the strong federal policy favoring arbitration, and cannot be reconciled with the Court's jurisprudence, which for decades now (including some quite recent arbitration milestones) has robustly upheld the enforceability of arbitral accords generally, and the validity of parties' agreements to delegate "gateway" questions of arbitrability to the arbitrator specifically. Given that the holding now under review denigrated the parties' choice to assign to the arbitrator, and not a court, the power to decide threshold issues of arbitrability, it is respectfully suggested by this *amicus curiae* that the decision below be reversed.

ARGUMENT

I. IN ORDER TO FULFILL THE PROMISE OF THE FEDERAL ARBITRATION ACT, IT IS RESPECTFULLY SUGGESTED THAT THE DECISION BELOW BE REVERSED.

Since 1925, arbitration has been regulated, and, moreover, encouraged, by the Federal Arbitration Act. 9 U.S.C. §§ 1, *et seq.* ("FAA"). The FAA explicitly directs the courts to enforce agreements to arbitrate, empowering them to do so by a variety of means.

Foremost in the statutory scheme is Section 2, the "primary substantive provision of the Act." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983) ("*Moses H. Cone*"). The statute mandates that a written provision in a contract which calls for the arbitration of controversies "*shall* be valid, irrevocable, and enforceable." 9 U.S.C. § 2 (emphasis supplied). *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 474 (1989) ("*Volt*"). It is noteworthy that the proviso is stated in the imperative "shall," and not the permissive "may" or similar.

Subsequent portions of the FAA also unmistakably work towards the goal of enforcing agreements to arbitrate. *See* 9 U.S.C. § 3 (providing for a stay of proceedings for a matter referable to arbitration), § 4 (supplying jurisdiction to compel arbitration), and § 9 (establishing a mechanism for confirming and enforcing an arbitration award). *See also Volt*, *supra*, 489 U.S. at 474 (analyzing Sections 2 and 4). In sum and

substance, every aspect of the FAA supports the enforcement of agreements to arbitrate. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) ("*Concepcion*").

The Court has repeatedly declared that the aim of the FAA is to ensure private agreements to arbitrate are enforced according to their terms. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) ("*Mastrobuono*") (quotation omitted). The Court has frequently held that the FAA places agreements to arbitrate on "an equal footing with other contracts." *Concepcion*, *supra*, 563 U.S. at 339 (quotations omitted), *citing Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). *See also Volt*, *supra*, 489 U.S. at 474 and 478.

The Court has declared that the FAA safeguards arbitral accords from "judicial interference." *Epic Systems Corp. v. Lewis*, 584 U.S. ___, ___, *slip op.* at 3 (No. 16-285) (May 21, 2018) ("*Epic*"). *See also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (the plain language of the Act evinces a clear legislative intent to prohibit judicial obstructionism to arbitration). *See also Morgan v. Sundance, Inc.*, 596 U.S. ___, ___, *slip op*. at 6 (No. 21-328) (May 23, 2022) (quotation and citation omitted) (the strong federal policy favoring arbitration acknowledges the FAA's commitment to overrule the judiciary's longstanding refusal to enforce arbitral accords, and to place such agreements on the same footing as other contracts).

As a recent addition to the pantheon of the Court's arbitration jurisprudence, *Epic* confirms that the statutory components of the FAA constitute a cohesive scheme which "require[s] courts to respect and enforce agreements to arbitrate." *Epic*, *supra*, *slip op.* at 5. Quite telling is the closing paragraph of *Epic*, wherein the Court characterizes that statutory regime as a solemn command from Congress "that arbitration agreements . . . must be enforced as written." *Id.*, *slip op.* at 25.

Regrettably, the decision below, as well as certain of the conflicting cases which swirl about it, threatens all or most of the precepts stated above. By aggrandizing to itself the power to decide the vital "gateway" question of what is arbitrable, a matter which the parties specifically reserved to the arbitrator, and not a court, the lower bench usurped a key element of the parties' original bargain.

When a court refuses to permit the arbitrator to exercise a power explicitly bestowed by the relevant arbitral accord, it denies the parties the benefit of their bargain, fails to enforce the pertinent compact as written, places the agreement to arbitrate on a footing different from – -indeed, inferior to – -other contracts, and evinces, at least implicitly, a form of judicial hostility to arbitration, an animosity which the FAA was expressly intended to extinguish.

Reversing the circuit opinion shall reinforce the inexorable statutory edict that agreements to arbitrate *shall* be valid, irrevocable, and enforceable, an

overriding legislative command upheld time and again by the Court. Moreover, correcting the appellate tribunal in this instance shall assure that arbitral accords are enforced according to their terms, are on an equal footing with other contracts, and are safeguarded from judicial interference.

For these reasons, it is respectfully suggested by this *amicus curiae* that the decision below be reversed.

II. IN ORDER TO ENSURE THAT COURTS DO NOT NULLIFY CONTRACTUAL TERMS, NOR DEPRIVE PARTIES OF THE BENEFIT OF THEIR BARGAIN, IT IS RESPECTFULLY SUGGESTED THAT THE DECISION BELOW BE REVERSED.

It is a "fundamental principle that arbitration is a matter of contract." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010) ("*Rent-A-Center*"). *See also American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013) ("*American Express*"). In relation thereto, it has long been a bedrock principle of this Court's jurisprudence that arbitration is a matter of consent, not coercion. *Stolt-Nielsen S.A. v. Animal-Feeds International Corp.*, 559 U.S. 662, 681 (2010) ("*Stolt-Nielsen*"), *quoting Volt*, *supra*, 489 U.S. at 479 (quotations omitted). Precisely for these reasons, the Court's arbitration landmarks have long affirmed that "the FAA requires courts to honor parties' expectations." *Concepcion*, *supra*, 563 U.S. at 351.

Agreements to arbitrate must therefore be rigorously enforced. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). *See also Henry Schein, Inc. v. Archer & White Sales, Inc*., 586 U.S. ___, ___, *slip op*. at 4-5 (No. 17-1272) (January 8, 2019) ("*Henry Schein*") (citation omitted) (courts must enforce arbitration contracts according to their terms, and may not override the parties' agreement). As with any other contract, the parties' intentions control. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("*Mitsubishi*").

The proper role of the courts is to "give effect to the contractual rights and expectations of the parties," as gleaned from the arbitral accord. *Volt*, *supra*, 489 U.S. at 479. As only very recently exemplified by the Court, these contractual rights typically encompass the "asserted benefits of arbitration," among them "efficiency, less expense, less intrusive discovery," and dispensing with a "trial that [the parties] contracted to avoid through arbitration," an expectation "especially pronounced in class actions," where there is a risk of coercive settlements. *Coinbase, Inc. v. Bielski*, 599 U.S. ___, ___, *slip op*. at 6 (No. 22-105) (June 23, 2023) (parentheses omitted).

Reflecting that arbitral pacts are just like ordinary contracts, it has long been acknowledged that parties are generally free to shape their agreements to arbitrate as they see fit. *Mastrobuono*, *supra*, 514 U.S. at 57. *See also Concepcion*, *supra*, 563 U.S. at 344 ("The point of affording parties discretion in designing arbitration processes" is that it empowers them to adopt

the rules and procedures they deem best suited to their particular needs.). Thus, in yet another hallmark of the Court's arbitration jurisprudence, it is well known that parties may categorize the controversies they wish to submit to the arbitrator for resolution. *See generally Mitsubishi*, *supra*, 473 U.S. at 628 (parties may choose to include or exclude statutory claims from arbitration, but are bound to that choice, once made).

Consistent therewith, the Court recently expressed intolerance for procedures or judicial decisions which unduly circumscribe the freedom of parties to determine the issues subject to arbitration, and the rules by which the parties shall arbitrate. *Viking River Cruises, Inc. v. Moriana*, 596 U.S. ___, ___, *slip op*. at 18 (No. 20-1573) (June 15, 2022) ("*Viking*"), *quoting Lamps Plus, Inc. v. Varela*, 587 U.S. ___, ___, *slip op*. at 7 (No. 17-988) (April 24, 2019) ("*Lamps Plus*"). Such contrivances violate the fundamental principle that arbitration is a matter of consent. *Viking*, *supra*, *slip op*. at 18, *citing Stolt-Nielsen*, *supra*, 559 U.S. at 684. *See also* Anthony M. Sabino, "Supreme Court Illuminates Enforceability of Arbitration Agreements," 262 *New York Law Journal* at p. 4, cl. 4 (July 3, 2019) (analyzing *Lamps Plus*).

The decision below is difficult, if not impossible, to reconcile with the foregoing axioms. The lower court seemingly disregarded the fundamental precept that, like any other contract, an agreement to arbitrate is to be rigorously enforced according to its terms. In the instant case, this would include the parties' original accord to refer all questions of arbitrability to the

arbitrator, and not a court. By denying the arbitrator the power to resolve "gateway" questions of arbitrability, and instead diverting that authority to a court, the appellate panel acted contrary to the Court's precedents, as set forth herein above, choosing instead to substitute judicial intervention for contractual stipulations, consent, and the expectations of the parties.

In all likelihood, certain aspects of the arbitral pact at issue herein should be beyond question. The first is that the agreement to arbitrate was arrived at by consent; it was not imposed by coercion. Second, the signatories contracted to arbitrate all controversies, with the arbitrator, not a court, resolving "gateway" questions of arbitrability. Third and last, no doubt the parties expected a court to honor the terms of their arbitration proviso.

The holding now in controversy confounds the terms of that agreement to arbitrate, as well as the parties' expectations. Among other things, it appears that the circuit tribunal misconstrued the arbitration clause herein, by conflating the matter of the existence of that arrangement with its scope. *Suski v. Coinbase, Inc*., 55 F.4th 1227, 1230 (9th Cir. 2022) ("*Suski*"). That might explain why the court below rerouted the authority to adjudicate "gateway" questions of arbitrability to a jurist, an eventuality contrary to the bargain previously agreed to by the parties, whereby they evidently contracted for and presumed a more delimited role for a court, should some element of their accord prove controversial.

It is respectfully submitted by this *amicus curiae* that the decision now under review is antithetical to the arbitration jurisprudence of the Court, including, but not limited to, the maxims that arbitration is a matter of contract, agreements to arbitrate must be enforced according to their terms, and the expectations of the contracting parties are to be honored. The arbitration landmarks of the Court do not permit the lower courts to nullify contractual terms; nor do the Court's precedents condone judges depriving parties of the benefit of their bargain.

For these reasons, it is respectfully suggested by this *amicus curiae* that the decision below be reversed.

III. FOR REASON THAT IT IS CONTRARY TO THE STRONG FEDERAL POLICY FAVORING ARBITRATION, IT IS RESPECTFULLY SUGGESTED THAT THE DECISION BELOW BE REVERSED.

The long and unbroken line of this Court's arbitration landmarks informs us that, well into the opening decades of the Twentieth Century, there was widespread judicial hostility towards arbitration as an alternative to traditional litigation. Not long ago, the Court reminded that, once upon a time, "courts routinely refused to enforce agreements to arbitrate" or found other means to undermine their effectiveness. *Epic*, *supra*, *slip op.* at 5.

The strong federal policy validating arbitration closed that unfortunate chapter in American law.

Moses H. Cone, *supra*, 460 U.S. at 24. *See also* Anthony Michael Sabino, "Awarding Punitive Damages in Securities Industry Arbitration: Working For A Just Result," 27 *U. of Richmond L. Rev.* 33, 34-39 (1992) (summarizing the then-extant landmarks announcing the strong federal policy favoring arbitration). Consonant with that mandate, for many decades now the Court has repeatedly and consistently put aside obstacles to the fulfillment of the robust policy favoring arbitration. *See generally Epic*, *supra*, *slip op.* at 16 ("In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes.").

The decision now at the bar is untethered from the strong federal policy favoring arbitration. In contravention of that policy, and the legislative mandate which codified it nearly one hundred years ago, the lower court waylaid the instant controversy from the parties' chosen path of arbitration, and instead redirected the dispute to litigation, a track which the parties had eschewed in their original pact.

This ruling by the panel thwarted contractual terms stipulating arbitration for the resolution of all controversies, precisely, questions of arbitrability, and thereby frustrated the expectations of the parties as signatories to that arbitral accord. All this is inapposite to the strong federal policy favoring arbitration. Now, in order to uphold that policy, the holding of the court below must be undone.

For these reasons, it is respectfully suggested by this *amicus curiae* that the decision below be reversed.

IV. FOR REASON THAT IT IS A JUDICIAL INTERPRETATION WHICH IMPERMISSIBLY FRUSTRATES ARBITRATION, IT IS RESPECTFULLY SUGGESTED THAT THE DECISION BELOW BE REVERSED.

Time and again, consistently, and without hesitation, the Court has set aside judge-made law which frustrates agreements to arbitrate. *See Concepcion*, *supra*, 563 U.S. at 340-41. In dismantling one such obstacle to arbitration, that one emanating from a state tribunal, the Court warned that judicial hostility towards arbitration "manifest[s] itself in a great variety of devices and formulas." *Id.* at 342 (quotations and citations omitted). Given that *Concepcion*'s most powerful lessons have already been well illustrated in the arguments preceding this one, there is no need to regurgitate them here.

The salient point to be made at this juncture is that the axiom announced in *Concepcion* held no ambiguity. It pronounced that, whenever judicial interpretations from whatever source prohibit or impede arbitration, "the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id.* at 341. *Concepcion* provides the rule for decision in the case at bar, as it has in other, recent arbitration landmarks. *See American Express*, *supra*, 570 U.S. at 238 ("Truth to tell," *Concepcion* "all but resolves" the question.).

The decision below is little different from the state court construct disavowed in *Concepcion*. The former suffers from the same flaws as the latter: it is antithetical to the strong federal policy favoring arbitration; it usurps the contractual terms of the parties' arbitral accord; and it defeats the parties' expectations.

It must be noted that, even as the FAA approaches its centennial, "remnants of [a] 'litigation only' ideology occasionally crop up" in the form of judicially crafted obstacles to arbitration. Anthony M. Sabino & Michael A. Sabino, "Law of the Land: U.S. Supreme Court Upholds Arbitration Agreements, Despite State Court Resistance," 61 *Nassau Lawyer* at p. 3, cl. 2 (December 2011). Small wonder, then, that the Court not long ago reaffirmed its obligation to guard against "new devices" intended to confound agreements to arbitrate. *Epic*, *supra*, *slip op.* at 9, *quoted by* Michael A. Sabino & Anthony M. Sabino, "'Epic' Decision by Supreme Court Orders Arbitration, Prohibits Class Action," 259 *New York Law Journal* at p. 4, cl. 4 (June 6, 2018).

The instant matter is the latest test of the Court's commitment to the ideals exemplified in its arbitration jurisprudence. Refuting the appellate tribunal's ruling is not merely imperative for today; it is urgently required to assure that future judicial manifestations hostile to arbitration, but yet to be conceived, shall not survive the Court's scrutiny.

It is respectfully submitted by this *amicus curiae* that the decision of the court below is yet another judicial construct irremediably opposed to the text of the

FAA, and the strong federal policy favoring arbitration. As with any judicial interpretation which impermissibly frustrates arbitration, the determination of the lower court cannot be permitted to stand.

For these reasons, it is respectfully suggested by this *amicus curiae* that the decision below be reversed.

V. IN ORDER TO ENSURE THAT COURTS DO NOT DEPRIVE PARTIES OF THEIR PREROGATIVE TO DELEGATE "QUESTIONS OF ARBITRABILITY" TO THE ARBITRATOR, IT IS RESPECTFULLY SUGGESTED THAT THE DECISION BELOW BE REVERSED.

It is a basic tenet of the Court's arbitration jurisprudence that "questions of arbitrability" are ordinarily for a court to decide. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) ("*Howsam*"). Yet the Court issued a contemporaneous warning that this postulation is to be applied narrowly, and then solely to prevent the injustice of forcing arbitration upon a party that had never consented to same. *Id.* at 83-84 (cautioning that not every threshold or "gateway" controversy amounts to a "question of arbitrability").

The foregoing is offset by a rule of equal efficacy; parties to an arbitral accord "may choose *who* will resolve specific disputes." *Stolt-Nielsen*, *supra*, 559 U.S. at 683 (emphasis supplied). *See also Henry Schein, supra*, *slip op*. at 4 (citation and internal quotations omitted) ("[P]arties may agree to have an arbitrator decide

not only the merits of a particular dispute but also 'gateway' questions of arbitrability."). Accordingly, parties to an arbitral pact enjoy the liberty of delegating questions of arbitrability to the arbitrator, provided they do so in clear and unmistakable terms. *Howsam*, *supra*, 537 U.S. at 83, *quoting AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986) ("*AT&T Technologies*") (quotation omitted).

The Court has long "recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability.'" *Rent-A-Center*, *supra*, 561 U.S. at 68-69. This line of cases "merely reflects the principle that arbitration is a matter of contract." *Id*. at 69-70 (footnote and citations omitted). As a corollary to the foregoing, the Court has characterized "[a]n agreement to arbitrate a gateway issue [as] simply an *additional, antecedent* agreement the party seeking arbitration asks the federal court to enforce." *Id*. at 70 (emphasis supplied). Finally, "the FAA operates on this additional arbitration agreement just as it does on any other," thereby assuring the dignity of the arbitral accord, unless and until it is repudiated upon such grounds as exist in law or equity for the revocation of any contract. *Id*.

It is therefore unsurprising that the Court's landmarks authorize parties to diverge from the ostensible norm, and delegate questions of arbitrability to the arbitrator. For decades now, the Court has looked on with approval as parties have entrusted arbitrators with the power to decide issues arising under solemn and complex statutory schemes, such as the federal securities laws, *Shearson/American Express*

Inc. v. McMahon, 482 U.S. 220, 238 (1987), the Racketeer Influenced and Corrupt Organizations Act, *id.* at 242, and the federal antitrust laws. *American Express*, *supra*, 570 U.S. at 233-34. *See also Epic*, *supra*, *slip op.* at 16 (summarizing the above and additional precedents "reject[ing] efforts to conjure conflicts" between the FAA and other federal statutes). Provided it is clearly and unmistakably stated, the parties' delegation of questions of arbitrability to the arbitrator is indistinguishable from these other, far-reaching assignments of adjudicative authority to arbitrators.

Who determines questions of arbitrability turns upon "what the parties agreed to about *that* matter." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("*First Options*") (emphasis in the original). *See also AT&T Technologies*, *supra*, 475 U.S. at 649-50 (parties may agree to submit questions of arbitrability to the arbitrator, and not a court). The primacy accorded to the choice of the parties is firmly grounded in "the fact that arbitration is simply a matter of contract," *First Options*, *supra*, 514 U.S. at 943, and arbitral pacts, "like other contracts, are enforced according to their terms." *Id.* at 947 (quotations and citations omitted). *See also Henry Schein*, *supra*, *slip op*. at 5 ("[A] court may not decide an arbitrability question that the parties have delegated to an arbitrator.").

In sum, the Court's arbitration jurisprudence assigns the first priority to determining what the parties agreed to with regard to who decides questions of arbitrability. If it appears that the parties have delegated questions of arbitrability to the arbitrator, the next

step is to confirm that such a delegation was expressed in clear and categorical terms.

In the case at bar, a plain reading of the relevant language should result in the foregoing two inquiries being answered in favor of the arbitrator, and not a court, deciding questions of arbitrability. The arbitration clause comprehensively and unequivocally endows the arbitrator, and not a court, with the power to resolve, *inter alia*, all issues of the enforceability, revocability, scope, and validity of the arbitral accord. And even a variant of that base agreement incorporated rules of the American Arbitration Association, which were just as unqualified and unmistakable in granting the arbitrator the power to resolve all disputes regarding the existence, scope or validity of the arbitration pact. *Suski*, *supra*, 55 F.4th at 1229.

Unfortunately, the decision below cannot be easily squared with these self-evident facts nor, more importantly, the precepts set forth herein above. For one, it appears that the circuit bench unjustifiably disregarded the parties' original agreement, precisely, to refer all questions of arbitrability to the arbitrator, and not a court. In setting aside that fundamental component of the seminal accord, the appellate panel irreparably harmed the parties' freedom to craft the arbitral process to their liking.

Furthermore, this unwarranted judicial intervention provoked an outcome clearly at odds with the parties' original agreement, by expropriating from the arbitrator the authority to resolve a pivotal threshold

issue, and instead rechanneling that power to a judicial officer.

Next, the axioms discussed herein above sit in counterpoise; yet the tribunal below upset that fine balance, by abruptly tipping the scales toward a court, contrary to the parties' evident choice that the arbitrator should determine "gateway" questions of arbitrability.

With due respect for the underlying opinion, it is difficult to comprehend why the issue of supersession, if indeed there is one, was declared to be so distinct that it must be resolved by a court, and not the arbitrator. That conclusion seems especially incongruous when one contemplates that the parties' initial agreement clearly and unmistakably vested sweeping authority in the arbitrator to decide a broad range of controversies, including the existence, scope or validity of the arbitral agreement. *Suski*, *supra*, 55 F.4th at 1229.

Indeed, the foregoing inevitably leads to the following, closing observations. Respectfully, it would seem to make little sense that mere contest rules are capable of vitiating a contractual commitment to refer all "gateway" questions of arbitrability to the arbitrator, and not a court, especially given that, as the lower court found, said rules "contain no language specifically revoking the parties' arbitration agreement." *Id*. at 1231. In any event, should not that question be decided, in the first instance, by the arbitrator, and not a jurist, just as the parties agreed?

Finally, the signatories to the initial accord are distinguishable from other contest entrants: the former expressly assigned all questions of arbitrability to the arbitrator, and not a court; the latter, while they might have consented to the contest rules, never subscribed to the arbitral pact. *See id*. at 1231. Respectfully, it is the proverbial "apples versus oranges" scenario, which the circuit panel seemingly did not take into account. Moreover, should the Court decide to reverse the appellate tribunal, such a ruling shall not impact the distinct rights of the other contest entrants, as they stand separate and apart from the parties herein.

It is respectfully submitted by this *amicus curiae* that the decision now under review misapprehends the Court's arbitration jurisprudence regarding who decides questions of arbitrability, fails to recognize the ability of parties to contractually delegate the determination of such issues to the arbitrator, and unjustifiably amplifies judges' discretion to decide questions of arbitrability. Accordingly, the holding now at issue should be reversed, in order to ensure that the lower courts do not deprive parties of their prerogative to delegate "gateway" questions of arbitrability to the arbitrator, and to further augment the Court's well settled jurisprudence in this domain.

For these reasons, it is respectfully suggested by this *amicus curiae* that the decision below be reversed.

CONCLUSION

Respectfully, for all the reasons set forth herein above, it is suggested by this *amicus curiae* that the decision below be reversed.

Respectfully submitted,

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December 2023