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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN BANKERS ASSOCIATION, CATO INSTITUTE, AMERICAN TORT REFORM ASSOCIATION, AND THE BUSINESS COUNCIL OF NEW YORK STATE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JENNIFER B. DICKEY
JONATHAN D. URICK
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

[additional counsel on signature page]

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.[1]

The American Bankers Association ("ABA") is the voice of the nation's $23.4 trillion banking industry, which is composed of small, regional, and large banks that together employ approximately 2.1 million people, safeguard $18.6 trillion in deposits and extend $12.3 trillion in loans. ABA regularly advocates on behalf of its members on important policy issues and through *amicus curiae* briefs on issues of importance to the industry.

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government. Toward those ends,

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no entity or person other than *amici*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs. This case interests Cato because the freedom to arbitrate and the enforceability of arbitration agreements are vital elements of freedom of contract.

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus* briefs in cases involving important liability issues.

The Business Council of New York State, Inc., serves as the statewide chamber of commerce and manufacturing association of New York State. The Business Council is the dominant voice of business and employers in New York representing large corporations and small businesses across the state, which employ more than 1.2 million New Yorkers. The Business Council serves as an advocate for employers in the State policy-making arena to support a healthier business climate, strong economic growth, and good paying jobs.

Many of *amici*'s members and affiliates regularly rely on arbitration agreements in their contractual relationships. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with litigation in court—because arbitration is speedy, fair, inexpensive, and less adversarial than litigation. Based on the policy reflected in the Federal Arbitration Act (FAA), *amici*'s members and affiliates have structured millions of contractual

relationships around the use of arbitration to resolve disputes.

Amici, and the business community more broadly, have an overarching interest in ensuring that businesses can rely upon settled arbitration precedent and the resultant predictability and stability of enforceable arbitration agreements. The judgment below departs from that precedent and should be reversed.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents entered into two contracts. The first, the Coinbase User Agreement, contained both an arbitration agreement and a broad delegation clause providing that all disputes concerning arbitrability would be resolved by the arbitrator. The second—the official rules governing a sweepstakes promotion—contained a forum-selection clause that said nothing about the prior arbitration agreement or delegation clause.

The parties agree that the User Agreement, arbitration agreement, and delegation provision all were validly formed in the first instance and remain in effect for at least some categories of claims. The Ninth Circuit nonetheless interpreted the sweepstakes rules to override the parties' delegation of arbitrability and to declare the parties' prior arbitration agreement inoperative with respect to claims related to the sweepstakes.

That court viewed the question before it as "the existence rather than the scope of an arbitration agreement," and it concluded that an agreement to arbitrate respondents' claims relating to the sweepstakes no longer exists because it was superseded by

the forum-selection clause in the sweepstakes rules. Pet. App. 7a-11a.

The Ninth Circuit erred in denying the existence of a validly formed arbitration agreement and refusing to enforce the parties' agreement delegating to the arbitrator decisions about the scope of the arbitration agreement. Because the arbitration agreement concededly is in effect for some matters, the only question is one of scope: whether the arbitration agreement in the original contract encompasses this particular dispute.

In other words, once the party seeking to enforce an arbitration agreement demonstrates the existence of an agreement "to arbitrate *some* matters pursuant to an arbitration clause," then the court or arbitrator must move on to addressing the scope of arbitrable issues. *Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 561 U.S. 287, 298 (2010).

Absent any delegation clause, that scope question would be for a court to decide. Here, the task of resolving the scope issue was for the arbitrator. There is no dispute that the parties "clear[ly] and unmistakabl[y]" delegated "threshold arbitrability questions to the arbitrator." *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019). In such circumstances, "the courts must respect the parties' decision as embodied in the contract," and allow an arbitrator to resolve the question of arbitrability; that is so even if a court thinks that the argument that a dispute falls within the scope of the arbitration agreement is "frivolous" or "wholly groundless." *Id.* at 530-31.

The court of appeals' contrary conclusion—framing the issue here as one of contract formation that must always go to a court—is mystifying. There is no

doubt that the arbitration agreement remained valid; the only question is whether it applied to this dispute in light of the parties' subsequent agreement. In other words, whether the arbitration agreement's scope was modified by the later agreement.

If the parties here had entered into their contracts in reverse order—with the arbitration agreement coming second—there could be no issue of that agreement's validity. But the question would be the same: whether the arbitration agreement's scope encompasses this particular dispute. Perhaps the answer to that question could differ, but the legal framework for resolving it should be—and is—the same.

Moreover, the court of appeals' mischaracterization of the issue as involving contract formation threatens widespread adverse consequences. Across all settings—consumer, employment, and commercial—it is common for businesses to enter into multiple contracts with the same counterparty over the course of the parties' relationship. Frequently, only one of those multiple agreements contains an arbitration agreement.

Decisions like the one below create traps for the unwary and disrupt the parties' reasonable expectations that their arbitration agreements will be enforced in reliance on the FAA and this Court's precedents—including the FAA's mandate that "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); accord *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1418-19 (2019). Erroneously treating the issue as one of contract formation that courts must always decide also affords courts hostile to arbitration more leeway to declare arbitration unavailable.

Decisions like the holding below also produce unnecessary ancillary litigation. That is even more true when the parties have also agreed to avoid the courts by delegating arbitrability issues to the arbitrator.

Finally, even if the court of appeals were correct to address the issue as a question of contract formation that must be decided by a court, it still reached the wrong outcome. The same result adheres—the delegation provision must be enforced—because there is no question that the delegation clause itself exists (and, for that matter, that the arbitration agreement does).

The decision below should be reversed.

ARGUMENT

I. The Effect Of A Subsequent Contract On A Prior Arbitration Agreement That Remains In Effect Is A Question Of The Arbitration Agreement's Scope, Not Contract Formation.

A. The FAA requires that valid arbitration agreements be enforced as written.

Congress enacted the FAA in 1925 "in response to judicial hostility to arbitration." *Viking River Cruises, Inc.* v. *Moriana*, 596 U.S. 639, 649 (2022). The "principal purpose" of the FAA, as this Court has held time and again, is to "'ensur[e] that private arbitration agreements are enforced according to their terms.'" *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344 (2011) (quoting *Volt Information Sciences, Inc.* v. *Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)); see also *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-58 (1995) (same).

By providing that arbitration agreements are "valid, irrevocable, and enforceable" (9 U.S.C. § 2), Congress sought to ensure that "arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995) (citations and quotation marks omitted).

To that end, both Section 3 and Section 4 of the FAA require courts to honor the terms of the parties' arbitration agreement. Section 3 provides that if the parties validly agreed to arbitrate, the court "shall * * * stay" any litigation pending the completion of an arbitration proceeding "in accordance with the terms of the agreement." 9 U.S.C. § 3. And Section 4 in turn provides that a party that proves the opposing party's failure to arbitrate a dispute "under a written agreement for arbitration" is entitled to "an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. In other words, when the dispute falls within the scope specified in the arbitration agreement, the court must issue an order compelling arbitration.

B. Whether a subsequent contract narrows the coverage of a prior arbitration agreement is a question of the arbitration agreement's scope.

There is no dispute here that respondents validly agreed to the Coinbase User Agreement, including its arbitration agreement and delegation clause, under general principles of contract formation. Pet. App. 4a, 6a. There is also no dispute that the arbitration agreement remains in effect for at least *some* types of disputes. Coinbase Br. 5 (citing JA 454).

The question, therefore, is whether the particular dispute here is arbitrable under the parties' arbitration agreement. That is an issue of the agreement's scope, not its formation, and it should be resolved under the principles just discussed—even under the Ninth Circuit's approach reserving all questions of contract formation for courts.

This Court's precedents distinguish between the existence of an arbitration agreement and "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); see also *Granite Rock*, 561 U.S. at 298 (distinguishing "whether the clause was *agreed to*" from "the *scope* of the arbitration clause and its enforceability") (emphasis added).

The court of appeals' conclusion that "the existence rather than the scope of an arbitration agreement is at issue here" (Pet. App. 7a) cannot be squared with this Court's precedents.

There is no doubt that the arbitration agreement here continues to "exist[]." The parties agree that the User Agreement was validly formed and that its arbitration agreement remains in effect for at least some types of disputes between the parties. See Coinbase Br. 5.

The issue would be different if the second agreement had expressly revoked or otherwise completely vitiated the arbitration agreement, so that there was no longer an operative arbitration agreement. In keeping with the "fundamental principle that arbitration is a matter of contract" (*Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010) (citing *First Options*,

514 U.S. at 943)), parties can agree subsequently to extinguish their prior arbitration agreements.

But respondents have never contended that the sweepstakes rules amounted to a novation under California law, which would require showing a "substitution of a new obligation between the same parties, with *intent to extinguish the old obligation*." Cal. Civ. Code § 1531(1) (emphasis added); see Coinbase Br. 31-32. The First Circuit made a similar point in another case involving successive contracts, noting that the plaintiff waived the argument that a subsequent employment contract amounted to a novation, but that the argument would fail on the merits in any event because there was no explicit intent to "terminate the earlier arbitration agreement." *Bossé* v. *New York Life Ins.*, 992 F.3d 20, 29 n.11 (1st Cir. 2021).

If parties intend for a subsequent contract to invalidate their existing arbitration agreement, they surely would include an express statement to that effect. As the Fourth Circuit has put it, "one would reasonably expect that a clause designed to supersede, displace, or waive arbitration *would mention arbitration*." *UBS Fin. Servs., Inc.* v. *Carilion Clinic*, 706 F.3d 319, 329 (4th Cir. 2013) (emphasis added).

The sweepstakes rules do not mention arbitration at all, much less expressly displace the parties' existing arbitration agreement. Nor is there any argument that the existing arbitration agreement has expired on its own terms.

The court of appeals did not meaningfully explain its contrary conclusion. Rather, it simply asserted that the question was whether the arbitration agreement was "superseded by a subsequent agreement." Pet. App. 7a. But, as discussed, the court did not, and

could not, find the arbitration agreement vitiated in its entirety.

Because there is a valid arbitration agreement here, the question for decision is not one of contract formation, but whether the arbitration agreement that remains in effect encompasses the claims asserted in this case. That is a quintessential scope question: whether the parties' "concededly binding contract" covers their dispute. *Howsam*, 537 U.S. at 84. The observation in the decision below that "[t]he 'scope' of an arbitration clause concerns how widely it applies" (Pet. App. 7a) therefore aptly describes, rather than distinguishes, the legal question presented in this case.

It is true that, in resolving that scope question, a court or arbitrator may consider the effect of the subsequent contract. But the interpretive question remains the meaning of the arbitration agreement, accounting for that separate contract.

Framing the issue here as one of contract formation that a court must decide would have the peculiar consequence that the legal issue would differ depending on the order in which the parties entered into the agreements. Thus, if the order of the contracts were reversed and respondents had agreed to the sweepstakes rules before the User Agreement, there could be no question about the formation of the arbitration agreement. Cf. Coinbase Br. 33-34.

Nor would there be a legitimate question of contract formation if parties agree to multiple contracts at the same time, or to a single contract containing allegedly inconsistent provisions. That is why, in an earlier case, the Ninth Circuit, correctly applying principles of contract interpretation rather than

formation, held that a venue provision did not conflict with the arbitration agreement and delegation provision within the same contract. *Mohamed* v. *Uber Techs., Inc.*, 848 F.3d 1201, 1208-09 (9th Cir. 2016).

All of these scenarios present the same interpretive question—how the arbitration agreement should be construed in light of other contracts or contract provisions. It makes no sense to address that issue under different standards, although the time at which the parties entered into the different agreements might be relevant to the issue's outcome. So long as the arbitration agreement's very existence is not challenged, questions about its reach or interaction with other agreements involve the arbitration agreement's scope, not its formation.

C. Because the parties here agreed to delegate questions of arbitrability to an arbitrator, it was for the arbitrator to decide the effect of the subsequent contract.

Here, the dispute over the effect of the subsequent contract on the scope of the parties' arbitration agreement was for the arbitrator to decide. The parties entered into a valid delegation clause, stating that the arbitrator must decide all disputes about the "enforceability, revocability, scope, or validity" of the arbitration agreement. Coinbase Br. 3.

This Court has explained that the FAA not only directs courts to enforce agreements to arbitrate, but "also specifically direct[s] them to respect and enforce the parties' chosen arbitration procedures." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1621 (2018) (citing Sections 3 and 4). That ability to tailor arbitration agreements includes the ability to choose whether

disputes over arbitrability will be decided by a court or the arbitrator.[2]

The FAA requires courts to "interpret the contract as written. When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract." *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.

As Coinbase explains in its brief (at 20-36), that reasoning applies with equal force here. Under the delegation clause, it was for the arbitrator to decide whether the sweepstakes rules' narrowed the scope of the arbitration agreement to exclude the underlying claims asserted by respondents.[3]

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[2] If an arbitration agreement contains unfair procedural rules or unfair processes for selecting arbitrators, Section 2 of the FAA provides that those unfair terms are subject to invalidation under generally applicable unconscionability principles. See *Marmet Health Care Ctr., Inc.* v. *Brown*, 565 U.S. 530, 533-34 (2012) (per curiam). But if the parties have validly agreed to delegate questions of arbitrability to an arbitrator, then any such unconscionability challenges are for the arbitrator to decide as well.

[3] Respondents were obligated to mount a "specific" challenge to the continued applicability of the delegation clause. *Rent-A-Center*, 561 U.S. at 73-74. As Coinbase explains in its brief (at 27-31), they failed to do so, further requiring enforcement of the delegation.

D. Failing to properly distinguish between contract-formation and scope issues will create widespread uncertainty, undermining Congress's purpose in enacting the FAA.

Businesses frequently enter into multiple contracts with the same counterparty over the course of an extended relationship. The contracts—particularly, as in this case, form contracts targeting different but overlapping categories of counterparties—may contain dispute-resolution provisions other than arbitration agreements. Or, if the parties have an extensive or complex relationship, different aspects of that relationship might be governed by different contract terms. Sometimes the first contract will contain an arbitration agreement. Sometimes only the second agreement will contain an arbitration agreement. Sometimes both will contain arbitration agreements but the terms of the agreements may not be identical.

These types of multiple-contract scenarios can arise in all settings—including consumer, employment, and commercial contexts. For example, the counterparties in even the subset of cases featured in the petition that involve delegation clauses run the gamut from internet service customers (*Blanks* v. *TDS Telecomms. LLC*, 294 So. 3d 761 (Ala. 2019)) to employees (*Bossé*, 992 F.3d at 24-25) to patent licensees (*Agere Sys., Inc.* v. *Samsung Elecs. Co.*, 560 F.3d 337, 338-40 (5th Cir. 2009)). And there are numerous examples of parties entering into multiple or successive contracts outside of the delegation context as well.[4]

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[4] See, *e.g.*, *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 666, 668 (2010); *Johnson* v. *Walmart, Inc.*, 57 F.4th 677,

1. To give parties certainty about how their agreements will be enforced, this Court should apply a clear and easily administrable rule for interpreting the interaction among multiple contracts: If the arbitration agreement that a party seeks to enforce remains operative then the question is one of its scope. And when, as here, there is a delegation clause that remains operative, that means that issues regarding scope are for an arbitrator to decide.

Accepting the Ninth Circuit's contrary approach—framing the issue here as one of contract formation that a court must always decide—would create considerable uncertainty. As discussed above (at 11), the legal issue would depend on the order in which the parties enter into the agreements—and that order might differ counterparty by counterparty, even for the same two form contracts. For example, it would not be surprising if some individuals entered into the sweepstakes rules before becoming Coinbase users who then entered into the User Agreement.

Moreover, permitting courts to override parties' arbitration agreements under the guise of contract formation invites collateral litigation and facilitates just the sort of "judicial hostility to arbitration agreements" that the FAA was meant to prevent." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 118 (2001) (quoting *Allied-Bruce Terminix Cos., Inc.* v.

679-80 (9th Cir. 2023); *Cavlovic* v. *J.C. Penney Corp.*, 884 F.3d 1051, 1054-56 (10th Cir. 2018); *Ragab* v. *Howard*, 841 F.3d 1134, 1137 (10th Cir. 2016); *Nestle Waters North Am., Inc.* v. *Bollman*, 505 F.3d 498, 501 (6th Cir. 2007); *Cara's Notions, Inc.* v. *Hallmark Cards, Inc.*, 140 F.3d 566, 567-69 (4th Cir. 1998); *S.A. Mineracao Da Trindade-Samitri* v. *Utah Int'l, Inc.*, 745 F.2d 190, 195-96 (2d Cir. 1984).

Dobson, 513 U.S. 265, 272 (1995)); cf. *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94-95 (2010) (recognizing that simple and predictable jurisdictional rules allow parties and courts to avoid wasteful litigation ancillary to the merits of the parties' dispute); Coinbase Br. 44. That hostility unfortunately still persists among some courts today. See, *e.g.*, Lyra Haas, *The Endless Battleground: California's Continued Opposition to the Supreme Court's Federal Arbitration Act Jurisprudence*, 94 B.U. L. Rev. 1419, 1433-40 (2014).

To be sure, the FAA requires that state-law contract-formation principles be generally applicable rather than "singling out" arbitration agreements "for disfavored treatment." *Kindred Nursing Ctrs. Ltd. P'Ship* v. *Clark*, 581 U.S. 246, 252 (2017). But uneven application of facially neutral contract principles is not always simple to detect—nor can this Court correct every overreach.

Kindred itself provides a prime example. This Court vacated and remanded the Kentucky court's judgment as to one of the two power-of-attorney documents at issue, noting that it was "uncertain as to whether" the state court's interpretation of that document was tainted by the arbitration-specific rule this Court rejected. 581 U.S. at 256. On remand, a closely divided Kentucky court, by a 4-3 vote, again refused to enforce the arbitration agreement entered into by the attorney-in-fact. *Kentucky Nursing Ctrs. Ltd. P'Ship* v. *Wellner*, 533 S.W.3d 189 (Ky. 2017), *cert. denied*, 139 S. Ct. 319 (2018). The majority interpreted the power of attorney not to authorize entering into an arbitration agreement and insisted—over a vigorous dissent—that its interpretation was free "from the taint of anti-arbitration bias." *Id.* at 192.

The divided Tenth Circuit's decision in *Ragab* also exemplifies how some courts can misuse contract-formation doctrines to undermine parties' arbitration agreements. The parties in that case entered into six contracts governing their business relationship, *all* of which contained arbitration clauses. 841 F.3d at 1136. Because of conflicts among the arbitration agreements' terms, however, the majority held that the parties had never agreed to arbitrate at all. *Id.* at 1138.

As then-Judge Gorsuch explained in dissent, a party who assents to multiple "arbitration clauses" cannot "seriously claim that he never intended to arbitrate." 841 F.3d at 1141 (Gorsuch, J., dissenting). Application of ordinary contract-interpretation principles could have been used to resolve any conflicts, a result that would "effectuate the intent of the parties much better than eradicating all six arbitration agreements root and branch." *Id.* at 1140.

A bright-line rule framing the issue as the scope of the arbitration agreement also affords parties the benefit of the FAA's clear standard for determining whether an arbitration agreement encompasses a dispute.

This Court held four decades ago that Section 2 of the FAA creates "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone*, 460 U.S. at 14. And under that body of substantive federal law, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 24-25. Accordingly, "[a]n order to arbitrate a particular grievance should not be denied unless it may be said with

positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of Am.* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960).

As the Court recently reiterated, there is "a long line of cases holding that the FAA provides the default rule for resolving certain ambiguities in arbitration agreements," including "that ambiguities about the scope of an arbitration agreement must be resolved in favor of arbitration." *Lamps Plus*, 139 S. Ct. at 1418-19 (citing *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *Moses H. Cone*, 460 U.S. at 24-25).[5]

2. When, as here, parties agree to delegate questions of arbitrability to an arbitrator, conflating contract formation and scope also threatens to deprive the parties of the benefits of their agreement to resolve threshold arbitrability questions in arbitration and avoid a slow and costly detour through the courts.

Framing the issue as one of contract formation would make disputes over arbitrability reviewable by courts under the guise of addressing whether a successive contract supersedes the parties' delegation clause in a prior arbitration agreement. That denies contracting parties the flexibility to delegate threshold questions of arbitrability to the arbitrator and "breed[s] litigation from a statute that seeks to avoid it." *Allied-Bruce*, 513 U.S. at 275. Businesses that

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[5] Accord, *e.g.*, *KPMG* v. *Cocchi*, 565 U.S. 18, 21 (2011) (per curiam); *Granite Rock*, 561 U.S. at 302-03; *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444, 452 (2003) (plurality op.); *First Options*, 514 U.S. at 944-45; *Mastrobuono*, 514 U.S. at 62 & n.8; *Volt*, 489 U.S. at 475-76.

have entered into numerous contracts premised on "the relative informality of arbitration" and procedures "more streamlined than federal litigation" (*14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 269 (2009)) would still be unable to avoid civil litigation.

Lengthy court proceedings thwart contracting parties' reasonable expectations based on this Court's precedents on delegation clauses. Such lengthy proceedings also threaten to discourage the use of arbitration by depriving the parties of the informality and expediency they sought to achieve by agreeing to arbitrate a broad range of disputes, including any threshold disputes over arbitrability.

II. The Court Of Appeals Should Have Enforced The Delegation Clause Even If The Issue Here Involves Contract Formation.

Even if the Court were to determine that the question here is one of contract formation—that is, whether the forum-selection clause in the sweepstakes rules revoked or superseded the arbitration agreement and delegation clauses in the User Agreement—the court of appeals erred in holding that the forum-selection clause in the sweepstakes rules could *sub silentio* vitiate the delegation clause.

For the reasons explained above (at 9-10) and in Coinbase's brief (at 45-49), far more express language is needed to vitiate or supersede a delegation clause.

It is true that in deciding whether a valid delegation provision exists, a court must apply the *First Options* "clear and unmistakable" standard. 514 U.S. at 944. But no one disputes that the delegation clause was formed in the first instance and that its explicit language met that requirement.

Once the clear and unmistakable standard is satisfied, the delegation cannot be undone by mere silence or ambiguity in a subsequent contract. The rationale behind the clear and unmistakable standard is to ensure that the parties considered the "rather arcane" question of who decides arbitrability and "the significance of having arbitrators decide the scope of their own power." *First Options*, 514 U.S. at 944. If that standard has been satisfied, the risk of inadvertent delegation of issues to the arbitrator is eliminated. There is no reason to apply that same standard in assessing the *continued* validity of the delegation. Cf. *Puerto Rico* v. *Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016) ("[B]ecause the statute contains an express pre-emption clause, we do not invoke any presumption against pre-emption.") (quotation marks omitted).

Finally, regardless of whether the sweepstakes rules narrow the reach of the arbitration agreement, they do not affect the reach of the delegation provision itself. Here, therefore, any question about the continued reach of the underlying arbitration agreement is for an arbitrator to decide.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
DANIEL E. JONES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amici Curiae

JENNIFER B. DICKEY
JONATHAN D. URICK
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062

Counsel for Amicus Curiae *the Chamber of Commerce of the United States of America*

THOMAS PINDER
ANDREW DOERSAM
American Bankers Association
1333 New Hampshire Ave., NW
Washington, DC 20036

Counsel for Amicus Curiae *American Bankers Association*

ANASTASIA P. BODEN
Cato Institute
1000 Mass. Ave., NW
Washington, DC 20001

Counsel for Amicus Curiae *Cato Institute*

H. SHERMAN JOYCE
LAUREN SHEETS JARRELL
American Tort Reform Association
1101 Connecticut Avenue, NW
Suite 400
Washington, DC 20036

Counsel for Amicus Curiae *American Tort Reform Association*

HEATHER C. MULLIGAN
The Business Council of New York State, Inc.
111 Washington Ave, Suite 400
Albany, NY 12210

Counsel for Amicus Curiae *The Business Council of New York State, Inc.*

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