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 RESPONDENTS DAVID SUSKI, JAIMEE MARTIN, JONAS CALSBEEK, AND THOMAS MAHER

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INTRODUCTION

> Lawyers argue about plain and unambiguous language all the time. That is their job: to inject doubt when it is in their clients' interest. But more often the language is not plain and unambiguous, so that to figure out its meaning, the implicit process of interpretation that we apply to plain and unambiguous language must be made express.

A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 54 (2012) (Reading Law).

When a plaintiff files suit, and a defendant demands arbitration, two types of disputes may arise. The first is an "arbitrability dispute," over whether the plaintiff's claims belong in court or arbitration. The second is a "delegation dispute," over whether a court or an arbitrator should decide where the plaintiff's claims belong.

For either type of dispute, "[t]he first principle" of this Court's FAA precedents is that "arbitration is strictly a matter of consent." *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407, 1415-16 (2019). In resolving any arbitrability or delegation dispute, courts must "give effect to the contractual rights and expectations of the parties" and, "as with any other contract, the parties' intentions control." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010). This case presents a delegation dispute over the parties' true intentions.

This case is not about contract "formation" or "existence." All parties concede that their User Agree-

ments and sweepstakes agreements were "formed," and "exist" today. Nor is this case about the "validity," "enforceability," or "revocability" of any contract or provision. All parties agree that their contracts and terms are valid, enforceable, and not revocable by one party. *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, n.3 (2022) (explaining that "revocability" doctrines allowed a party "to revoke consent to arbitrate until the moment an arbitrator entered an award"). All contracts and terms here are equally "valid, irrevocable, and enforceable." 9 U.S.C § 2.

The parties' arbitrability and delegation disputes are purely disputes over contract interpretation. In matters of interpretation, every contract counts. Every clause counts. The specific, interpretive question here is what the parties intended their "delegation" and "forum-selection" clauses to mean in the context of their *current* delegation dispute, not just any old delegation dispute. *Granite Rock Co. v. Intl. Brotherhood of Teamsters*, 561 U.S. 287, 297 (2010) (emphasizing that "a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*"). Non-preempted, State laws of contract interpretation properly answer that question. *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (recognizing that "the interpretation of private contracts is ordinarily a question of state law").

This Court's "severability rule," which Coinbase references 158 times in its brief, is a rule of contract enforcement. It is not a rule of contract interpretation. The rule requires courts to "pluck" arbitration and delegation provisions away from other terms in a con-

tract, when other terms are subject to an affirmative defense against contracts (*e.g.,* unconscionability, or fraud in the inducement). *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 85 (2010) (Stevens, J., dissenting). Unless the arbitration or delegation provisions themselves are subject to an affirmative defense, they remain enforceable. *Id.* (citing *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967)).

The Court's severability rule does not and cannot apply to matters of contract interpretation, at least not in the way Coinbase posits. Like this Court, States have long established that contractual terms and clauses cannot be interpreted in isolation. *O'Brien v. Miller*, 168 U.S. 287, 297 (1897) ("The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them."); Reading Law 167 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.") (quoting Cal. Civ. Code § 1641). To apply the Court's severability rule of *enforcement* to delegation disputes over *interpretation* would be to hold the most fundamental canons of contract construction preempted by the FAA.

Before courts can enforce arbitration or delegation clauses under the FAA, they must first interpret those clauses. 9 U.S.C. § 3. This is true because, as Justice Scalia recognized, "[e]very application of a text to particular circumstances entails interpretation." Reading Law 53. In applying delegation clauses to dis-

putes involving multiple, distinct agreements, courts cannot lawfully isolate those clauses away from all other, enforceable terms.

When faced with a delegation dispute, courts must "sever" the delegation *question* away from other, interpretive questions and merits questions, and answer the delegation question before proceeding to other questions. *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S.Ct. 524 (2019*)* Courts cannot, however, "sever" a delegation *clause* away from all other enforceable clauses and contracts, for purposes of *answering* a delegation question of interpretation. Doing that would violate "[t]he first principle" of the Court's FAA precedents, that "arbitration is strictly a matter of consent." *Lamps Plus*, 139 S.Ct. at 1415-16.

Here, the Court should isolate the parties' delegation dispute, not their delegation clause, and resolve "*that dispute*" by finding: (i) Coinbase expressly consented to courts deciding where Respondents' claims belong; and (ii) Respondents never consented to arbitrators interpreting the parties' sweepstakes agreements. *Granite Rock*, 561 U.S. at 297. Those conclusions flow from ordinary, State-law principles of contract interpretation, as well as this Court's federal rules of contract interpretation.

STATEMENT OF THE CASE

I. FACTS

Coinbase, Inc. offers the public an online platform for buying and selling "cryptocurrencies." JA 30. People create personal, online trading accounts and access them for free via Coinbase's website and mobile app. JA 112-118. Respondents are four people who created Coinbase accounts online between 2018 and 2021. *Id.*

A. The User Agreements

1. Respondent Suski

Respondent David Suski created an account on Coinbase's website in January 2018. *Id.*, ¶13(a). At that time, he accepted a "User Agreement" (JA 119-177) containing arbitration provisions: "you and we agree that any dispute arising under this Agreement shall be finally settled in binding arbitration, on an individual basis, in accordance with the American Arbitration Association's [AAA] Rules for Arbitration of Consumer-Related Disputes (accessible at https://www.adr.org/sites/default/files/Consumer%20Rules.pdf) . . . ." JA138.

Suski's User Agreement contained other provisions relevant to interpreting the parties' intentions. There were "Governing Law" provisions, stating: "You agree that the laws of the State of California . . . will govern this Agreement and any claim or dispute that has arisen or may arise between you and Coinbase, except to the extent governed by federal law." JA 144.

The User Agreement was a bilateral contract, between Suski and Coinbase only. JA 119.

2. Respondent Maher

In April 2020, Respondent Thomas Maher created a Coinbase account. JA 116, ¶13(d). At that time, Maher accepted a Coinbase User Agreement (JA 297-351), which became a bilateral contract between him and Coinbase. JA 116, ¶13(d); JA 297. Maher's User Agreement provided, "you and we agree that any dispute arising out of or relating to this Agreement or the Coinbase Services . . . shall be resolved through binding arbitration, on an individual basis (the 'Arbitration Agreement.')." JA 334. "This Arbitration Agreement includes, 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." JA 334-335.

Maher's User Agreement contained "Governing Law" provisions identical to Suski's. JA 342-343.

3. Respondents Martin and Calsbeek

Respondent Jaimee Martin created her account in February 2021; Respondent Jonas Calsbeek created his in May 2021. JA 115-116, ¶¶13(b), 13(c). Martin's and Calsbeek's User Agreements with Coinbase were materially identical to Maher's. JA 178-230; JA 231-296.

B. The Official Rules Agreements

Leading up to May 2021, Coinbase allowed its users, including Respondents, to trade many brands of "cryptocurrencies" on its platform. JA 30. Examples included the famous "Bitcoin," its younger cousin, "Litecoin," and the brains of the cryptocurrency family, "Ethereum," known for its "smart contract" functionality. *Id.*; JA 47; JA 119; JA 183. Coinbase's crypto-family, however, would never have been complete: without the family dog.

1. The "Dogecoin" Cometh

In early 2021, a lesser-known brand of cryptocurrency began skyrocketing in price on trading platforms other than Coinbase. JA 30-31. Two software engineers had invented their own crypto brand, making light of the rampant financial speculation occurring in cryptocurrencies generally. *Id.* After all, if arbitrary computer codes like "Bitcoins" could be programmed and sold for thousands of dollars each, why not program and sell "Dogecoins" too? *Id.*

In January 2021, the price of a "Dogecoin" was less than $0.01. *Id.* By May 2021, Dogecoin's price had spiked to $0.70 per coin on non-Coinbase trading platforms. *Id.* Coinbase took notice and wanted a piece of that price action. *Id.*

On June 1, 2021, Coinbase announced that Dogecoin would debut for trading on its platform, beginning June 3, if "liquidity conditions [we]re met." *Id.* Coinbase didn't specify what its "liquidity conditions" might be, but it had a plan to fulfill them. Coinbase would "incentivize as much Dogecoin trading as possible" immediately upon the new coin's debut. JA 32.

To incentivize trading, Coinbase hired Marden-Kane, Inc. to help "design, market, and execute a $1.2 million 'Dogecoin sweepstakes.'" *Id.* Unlike Coinbase, Marden-Kane specialized in conducting consumer sweepstakes campaigns, in which companies offer consumers a chance to win prizes for taking company-friendly actions. JA 40. Here, the company-friendly action was buying or selling Dogecoins via Coinbase, for a fee.

The companies' offer was that anyone who bought or sold Dogecoins for $100 or more (inclusive of fees) between June 3 and June 10, 2021 would earn entry into random prize drawings. JA 99-100. Alternatively, people could enter by mailing a handwritten card to Marden-Kane, providing their personal contact information. *Id.*

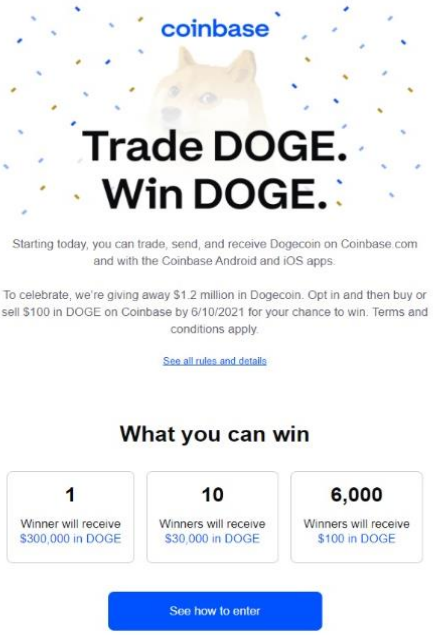
Coinbase, as "Sponsor," would provide the prizes, valued from $100.00, up to $300,000.00. JA 98, 104. Marden-Kane, as "Administrator" of the "Sweepstakes" (or "Promotion"), would conduct prize drawings and

serve as "an independent judging organization" over the Sweepstakes. JA 102.

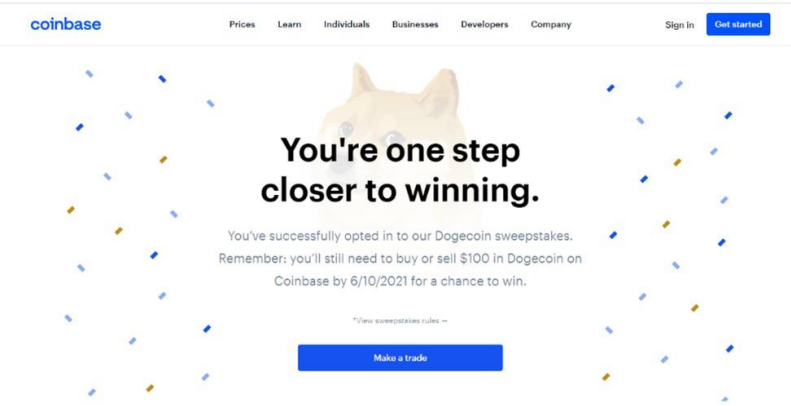
2. Respondents Enter the Dogecoin Sweepstakes

Because the companies' goal was to incentivize Dogecoin trading, they devised digital ads to pitch their offer to the most likely traders: existing Coinbase users. JA 31-39. They wanted as many users as possible to enter by purchasing Dogecoins, not by mailing Marden-Kane an index card. *Id.* Accordingly, the companies structured their digital ads to manipulate Coinbase users into buying Dogecoins for their entries. JA 49-52.

On June 3, 2021, Coinbase emailed its Sweepstakes offer to Respondents and other users. JA 31-39. The ads looked like this.



Id.



When users clicked the "See how to enter" button, they were taken to a similar webpage featuring a large, blue "Opt in" button. *Id.* If users clicked the "Opt in" button, it morphed into a "Make a trade" button, and the webpage displayed a falsehood: "Remember: you'll still need to buy or sell $100 in Dogecoin on Coinbase by 6/10/2021 for a chance to win." *Id.* This was untrue, as Coinbase users could obtain a chance to win without buying or selling Dogecoins. *Id.*

People love dogs, and people love prizes, so Respondents and many other people bit on the companies' Sweepstakes offer. JA 41-46. They opted into the Sweepstakes and spent $100 or more on Dogecoins for a chance to win. *Id.* When Respondents did that, Coinbase and Marden-Kane bound them to a new, three-party agreement.

3. Coinbase's and Marden-Kane's Sweepstakes Agreements with Respondents

While entering the Sweepstakes, each Respondent formed an enforceable, trilateral contract with Coinbase and Marden-Kane. The contracts were labeled "Official Rules" agreements. JA 98-99 ("Participation constitutes entrant's full and unconditional agreement to these Official Rules . . . ."). The Official Rules reflected the basic terms of the transaction, such as the available methods of entry, prizes, and conditions under which prizes would be awarded. JA 98-110.

The agreements provided: "Access to Dogecoin and US Dollar prizes is subject to the Coinbase Terms and Conditions of the Coinbase account." JA 104. That underlined clause linked to Coinbase's standard User Agreements. *Id.* Hence, Coinbase and Marden-Kane wrote that Respondents' "[a]ccess . . . to prizes," if any, would be "subject to" their User Agreements with Coinbase. *Id.*

The Official Rules did not say that any disputes would be "subject to" the User Agreements. *Id.* Rather, in a section titled "Disputes," Coinbase and Marden-Kane wrote*:*

> 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. 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 108-109. They further provided:

> Entrants hereby expressly agree and accept that for all that is related to the interpretation, performance and enforcement of these Official Rules, each of them expressly submit themselves to the laws of the United States of America and the State of California, expressly waiving to any other jurisdiction that could correspond to them by virtue of their present or future domicile or by virtue of any other cause.

Id.

II. PROCEDURAL HISTORY

A. "Controversies Regarding the Promotion" Arise

After entering the Sweepstakes, Respondents reviewed the Official Rules. *Id.* Upon review, Respondents realized that Coinbase and Marden-Kane had deceived them into paying for their entries. *Id.* Had the companies not misrepresented the entry requirements, Respondents would have saved themselves $100 and entered by mail. *Id.* Troubled by the companies' deceptive sales tactics, Respondents sought relief from their losses.

The question then became where, and from whom, could Respondents seek relief? Unlike a legal practitioner or a counseled corporation, Respondents began where most laypersons would begin. Having entered the Sweepstakes, and wanting relief specific-

ally from the Sweepstakes, Respondents reviewed the Official Sweepstakes Rules to evaluate their rights.

To Respondents, their desired claims for relief constituted "Disputes" and "CONTROVERSIES REGARDING THE PROMOTION." JA 108-109. So Respondents asserted their claims for relief (Claims) in a "CALIFORNIA . . . FEDERAL" court. *Id.* Respondents reasonably believed that filing their Claims in court was required by the Official Rules' unambiguous terms. JA 101 ("Participants must comply with these Official Rules . . . ."); JA 107-108 ("[Coinbase] reserves the right to prohibit the participation of an individual . . . if the participant fails to comply with . . . any provision in these Official Rules."). Respondents expressly relied upon the Official Rules' forum-selection terms in filing their Claims in the district court. JA 16-17; JA 73-74.

B. District Court

1. Coinbase's Motion to Stay

Coinbase responded by moving to stay pending arbitration, relying on the User Agreements' arbitration and delegation provisions. D. Ct. Dkt. 33. Yet Coinbase's motion also disputed the complaint's reliance on the Official Rules to establish the court's "SOLE" authority over Respondents' Claims. *Id.*; JA 16-17; JA 73-74. The motion rested on Coinbase's argument that "[t]he 'Disputes' section of the Official Rules applies [only] to Dogecoin Sweepstakes participants who never agreed to the User Agreement." D. Ct. Dkt. 33 at 11-12.

Coinbase argued that, "if [Respondents] dispute whether the arbitration provision in the User Agree-

ment governs these claims," then such disputes must be referred to arbitration under the User Agreements' delegation clauses. *Id.*

2. Respondents' Opposition

Respondents opposed, arguing that "[t]he 'Official Rules' formed a valid and enforceable contract between the parties." JA 439. Coinbase never disputed this. Respondents submitted that "ordinary state-law principles of contract interpretation" applied to resolving Coinbase's motion. JA 443.

Respondents rebutted Coinbase's interpretation of the Official Rules' "Disputes" section. That "Disputes" section "unambiguously applie[d] to 'EACH ENTRANT,' regardless of each 'ENTRANT's' preexisting contractual status with Coinbase." JA 448-450; *see also* JA 441, n.6. Thus, Respondents maintained that their Claims belonged exclusively in "CALIFORNIA COURT."

Consequently, the parties' "arbitrability dispute" itself turned specifically on the meaning of the Official Rules. It followed that a threshold dispute over the meaning of the Official Sweepstakes Rules was a "CONTROVERSY REGARDING THE [Sweepstakes]," which "CALIFORNIA COURTS" had "SOLE JURISDICTION" to resolve. JA 108-109; JA 452.

Respondents asked the court to judicially notice that, when Coinbase intended to arbitrate the arbitrability of other, similar sweepstakes disputes, Coinbase said so, and did not provide exclusively for judicial resolution. JA 471, 487-489. There was no way that Coinbase's other sweepstakes agreements, involving a different third-party administrator, meant

the same thing as these Dogecoin Sweepstakes agreements. *Id.*

3. District Court's Order

The court granted Respondents' request for judicial notice. JA 557-558. It agreed with Respondents on the delegation dispute, finding it less than "clear and unmistakable" that the parties intended to delegate their *current* arbitrability dispute to an arbitrator. JA 566-570.

In resolving the parties' arbitrability dispute, the court "appl[ied] general state-law principles of contract interpretation." JA 570. Coinbase conceded that the court was correct in this. D. Ct. Dkt. 43 (Coinbase Reply Brief) at 2 ("As Plaintiffs note, basic contract principles govern the interpretation of these agreements.").

Acknowledging Coinbase's attempt to "reconcile" the two contracts' dispute terms—by "arguing that the Official Rules only applie[d] to non-Coinbase users"—the court found "no support in the contract language" for Coinbase's interpretation. JA 571. The court's reasoning highlighted that the parties' arbitrability dispute was a dispute over "the interpretation, performance and enforcement of the[] Official Rules." JA 108-109.

C. Ninth Circuit

1. Coinbase's Appeal

Coinbase contrived a new delegation argument before the Ninth Circuit. Coinbase argued that, under *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201 (9th Cir. 2016), "a forum selection clause does not undermine

an existing delegation clause's clear and unmistakable" language. C.A. Dkt. 13 (Coinbase Opening Brief) at 2-3. *Mohamed* had interpreted an exclusive forum-selection clause not to alter the meaning of a delegation clause contained in the same contract. *See generally* 848 F.3d 1201.

Coinbase did not argue that this Court's "severability rule" requires isolating delegation clauses away from mandatory, exclusive forum-selection clauses for interpretive purposes. In fact, nowhere did Coinbase's opening brief cite *Prima Paint*, 388 U.S. 395, or *Rent-A-Center*, 561 U.S. 63. *See* C.A. Dkt. 13. Instead, Coinbase told the Circuit that interpreting the parties' delegation and forum-selection clauses together—"under California law"—rendered the parties' delegation intentions "clear and unmistakable." *Id.*

2. Respondents' Opposition

Respondents countered that the Ninth Circuit, "like the district court, must apply ordinary state-law rules of contract interpretation to decide whether the parties agreed to litigate or to arbitrate their Sweepstakes-related 'controversies,' *including but not limited to their threshold controversies* 'related to the interpretation, performance, and enforcement of the[] Official Rules." C.A. Dkt. 25 at 12. Respondents reiterated their delegation argument from the district court: that an arbitrability dispute over the Official Sweepstakes Rules is a controversy "REGARDING" the Sweepstakes, expressly intended for judicial resolution. *Id.* at 17-27.

Respondents also supplemented their delegation argument from the district court to counter Coinbase's

new delegation argument under *Mohamed*. Respondents argued that the Official Rules agreement "contained its own form of 'delegation clause' pertaining to so-called 'gateway issues.'" *Id.* at 22. Respondents further contended that the Official Rules' language, "FOR ANY REASON," precluded "ANY" reliance on the User Agreements' delegation terms to "OBJECT[]" to the court's "JURISDICTION." *Id.* at 7-8.

Moreover, Respondents said the Official Rules' express reference to the User Agreements—providing that "[a]ccess to . . . prizes is subject to" the User Agreements—suggested that Sweepstakes "CONTROVERSIES" were not "subject to" the User Agreements. *Id.* at 36.

Finally, Respondents distinguished *Mohamed*, as addressing linguistic conflicts between delegation and forum-selection clauses within one contract. Such conflicts were presumably "artificial," as it was "apparent" that the forum-selection provisions "[t]here" were "*intended* . . . to identify the venue for" non-arbitrable claims. *Mohamed*, 848 F.3d at 1207-09.[1] Respondents argued that the parties' intentions here could well have changed, as the User Agreements and Official Rules governed different transactions, and involved different groups of negotiating parties. C.A. Dkt. 25 at 3.

3. Ninth Circuit's Order

The Circuit affirmed the district court, while disregarding most of Respondents' specific delegation

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[1] All emphasis is added unless otherwise indicated.

arguments.[2] The court interpreted the word "scope" in the User Agreements' delegation clauses to mean the breadth of the arbitration provisions, not whether such provisions were "superseded by a subsequent agreement." JA 585. The court distinguished *Mohamed*, in part because the delegation and forum-selection clauses there "were included in the same contract." JA584-585.

SUMMARY OF ARGUMENT

I. Delegation clauses are not immune from interpretation. This is because arbitration is primarily a matter of consent. Parties' intentions are properly discerned by means of non-preempted, State laws of contract construction and interpretation. The FAA does not alter the meaning of private agreements, so delegation clauses must be neutrally interpreted under the same rules as other contract terms.

II. Respondents' delegation argument remains the same here as it was below; the Official Rules validly modified the User Agreements' delegation clauses for a limited purpose, under non-preempted State laws of interpretation. The Official Rules' clear and express terms suggest an intent for courts to resolve the parties' arbitrability dispute, their forum dispute, in this case. If any ambiguity remains regarding that intent, then non-preempted, State laws for

[2] Respondents ask that this Court not do the same. It would be harmful to Respondents to have this Court disregard their specific arguments about the parties' delegation intentions, under a statute that exists to implement their intentions.

resolving contractual ambiguity confirm the parties' intentions to modify the User Agreements' delegation provisions. All interpretative signs point in one direction.

Coinbase's and its *amici*'s attempts to disclaim any modification of the delegation clauses are meritless. As Coinbase concedes, implied modifications of arbitration and delegation clauses are allowed under the FAA. Requiring express modifications of delegation clauses, as some *amici* suggest, would squarely offend the FAA's equality principle.

III. There is no preemption problem with Respondents' interpretation of the parties' delegation intentions. Coinbase does not argue that any State laws of contract interpretation, relied upon here or below, are preempted by the FAA.

Coinbase rests most of its argument on this Court's "severability" doctrine of contract *enforcement*. That doctrine is facially inapposite to delegation disputes over contract interpretation. Applying *Rent-A-Center*'s "severability rule" to delegation questions of contract interpretation would effectively preempt most State laws of contract interpretation nationwide.

IV. If any federal rules of contract construction apply here, this Court's clear-and-unmistakable rule applies. Coinbase misconstrues the Court's clear-and-unmistakable rule, which favors' Respondents' position on delegation here. Under that rule, Coinbase declines to challenge the Ninth Circuit's interpretation of the parties' delegation clauses as unreasonable.

Coinbase instead prefers to challenge the clear-and-unmistakable rule itself. It contends that the User Agreements' delegation clauses were originally

clear by their own, isolated terms. That argument not only misapprehends the rule, but also offends this Court's century-old holdings concerning contract interpretation.

Coinbase also attacks the clear-and-unmistakable rule as "judge-made," and "arbitration-specific." Yet the alternative rule Coinbase proposes suffers from the very same, alleged defects. Truthfully, there should be no federal presumptions of contract interpretation in either direction. The FAA leaves judges free to choose "the best" interpretation among "reasonable" interpretations, for purposes of resolving commonplace contractual ambiguities. It does not require a court to impose a "reasonable," *10%-likely* interpretation over a "reasonable," *90%-likely* interpretation, under non-preempted State laws.

V. Coinbase challenges the Ninth Circuit's references to contract "formation" and "existence" in resolving the parties' delegation dispute. Coinbase is correct that those words did not accurately reflect the parties' contractual disputes here. Simultaneously, those words did not accurately reflect the Circuit's *own* reasoning or decision concerning the parties' delegation dispute. Ultimately, Coinbase fails to show why or how the Circuit reversibly erred, under federal or State law, in interpreting the parties' delegation clauses specifically. Moreover, Coinbase fails to show why the Circuit's judgment should be reversed, even if some of its reasoning was imperfect.

ARGUMENT

I. LEGAL BACKGROUND

A. The FAA's "First Principle" Is a Matter of State Law

"The first principle" of this Court's FAA precedents is that "arbitration is strictly a matter of consent." *Lamps*, 139 S.Ct. at 1415-16. Consent to arbitration is dispute-specific, not generalized. *Granite Rock*, 561 U.S. at 297 (holding that "a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*") (original emphasis). In resolving any arbitrability or delegation dispute, courts must "give effect to the contractual rights and expectations of the parties," and, "as with any other contract, the parties' intentions control." *Stolt-Nielsen*, 559 U.S. at 682.

Interpreting private intentions is a matter of State law, unless State law is preempted or otherwise unconstitutional. *Volt*, 489 U.S. at 474. The FAA "does not 'alter background principles of state contract law regarding the scope of agreements.'" *GE Energy Power Conversion v. Outokumpu Stainless USA, LLC*, 140 S.Ct. 1637, 1643 (2020) (quoting *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009)).

No party asserts that any State law is preempted here. Hence, State laws of contract interpretation are applicable to, and controlling of, the parties' delegation dispute: over who should decide the arbitrability or justiciability of Respondents' Claims.

B. The FAA's Equality Rule Applies to Delegation Clauses

In discerning parties' intentions, the FAA "requires courts to place arbitration agreements 'on equal footing with all other contracts.'" *Kindred Nursing Centers L.P. v. Clark*, 581 U.S. 246, 248 (2017) (quoting *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54 (2015)). "[A] court must hold a party to its arbitration contract just as the court would to any other kind," and "may not devise novel rules to favor arbitration over litigation." *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022). That equality rule applies similarly to delegation clauses because "the FAA operates on" delegation agreements "just as it does on any other" arbitration agreements. *Henry Schein*, 139 S.Ct. at 529.

In short, delegation clauses are not special under the FAA. They are contract terms. As such, they must be interpreted and applied under non-preempted, applicable State laws of contract construction. The parties' contracts here all selected California law as the governing contract law, unless federal law applies. California's non-preempted laws of contract interpretation thus apply to the parties' agreements.

II. Under State Laws Of Interpretation, The Parties Modified Their User Agreements' Delegation Provisions

Under California law, the "goal" in construing contracts "is to give effect to the parties' mutual intentions." *State v. Allstate Ins. Co.*, 45 Cal.4th 1008, 1018 (2009); *see also* Cal. Civ. Code § 1636 ("A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of con-

tracting."); *Stolt-Nielsen*, 559 U.S. at 682 (holding that, in "construing" an arbitration or delegation clause, "as with any other contract," courts must "give effect to the contractual rights and expectations of the parties"). "Numerous principles of interpretation guide the search for the manifested intention of the parties." *Binder v. Aetna Life Ins. Co.*, 75 Cal.App.4th 832, 852 (1999); *see also* Cal. Civ. Code §§ 1635, *et seq.*; Reading Law 59 ("No [one] canon of interpretation is absolute.").

To ascertain intent, California begins with the parties' written language. *Hameid v. Nat'l Fire Ins. off Hartford*, 31 Cal.4th 16, 21 (2003); Cal. Civ. Code § 1639 ("When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible . . . ."). "Words in a contract are generally understood in their ordinary and popular sense, and technical words are interpreted as usually understood by persons in the profession or business to which they relate." *Gates v. Rowland*, 39 F.3d 1439, 1444 (9th Cir. 1994) (citing Cal. Civ. Code § 1644). In addition to written words, an agreement's factual context may be relevant to discerning parties' intentions. "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Cal. Civ. Code § 1647.

Here, both the language and context of the parties' agreements suggest that their "mutual intentions" changed "at the time of contracting" for the Dogecoin Sweepstakes. Cal. Civ. Code § 1636; *Allstate*, 45 Cal.4th at 1018. As detailed *infra*, nothing in the FAA or the Court's precedents undermines this conclusion.

Repetitiously, Coinbase claims that in the lower courts, Respondents offered no argument specifically

concerning the User Agreements' delegation provisions. Pet'r Br. 3-4 ("Respondents made no argument specific to the parties' delegation clause, however."); *id.* at 5, 17, 18, 20, 27, 29, 31, 38 (same). Coinbase must view that repeated assertion as critical to its case. Coinbase, however, conceded the opposite before both courts below. C.A. Dkt. 39 (Coinbase Reply Brief) at 2 ("Plaintiffs strain to avoid the delegation clause by contending that the Dogecoin Sweepstakes' Official Rules . . . 'modified or superseded the earlier, more general arbitration *and delegation agreements* between each Plaintiff and Coinbase.'"); D. Ct. Dkt. 43 (Coinbase Reply Brief) at 5 ("Plaintiffs rely on the phrase 'any controversies regarding' the Sweepstakes in the Official Rules to suggest that the Rules superseded or modified *the clause delegating issues of arbitrability to the arbitrator*."). Indeed, that was Respondents' position below, and that is Respondents' position here. The Official Rules contractually "modified the clause delegating issues of arbitrability to the arbitrator." D. Ct. Dkt. 43 at 5.

A. The Parties Modified Their Delegation Clauses Using Clear and Unambiguous Language

As a statutory matter, any "contract in writing may be modified by a contract in writing." Cal. Civ. Code § 1698. "It is fundamental that contracting parties, lawfully agreeing in the first instance, may thereafter change or modify such an agreement by assent lawfully expressed." *Warfield v. Anglo & London Paris Nat'l Bank*, 202 Cal. 345, 359 (1927) (Shenk, J., concurring). "Modification is a change in the obligation by a modifying agreement, which requires mutual assent, and must ordinarily be sup-

ported by consideration." *Asmus v. Pacific Bell*, 23 Cal.4th 1, 31-32 (2000).

Here, the parties agree that their Official Rules contracts were formed by "mutual assent" among Marden-Kane and themselves, "supported by consideration." *Id.* Respondents gave consideration via their Dogecoin purchases; Coinbase and Marden-Kane gave consideration by promising to provide and administer prizes. The Official Rules thus satisfied all statutory and common-law elements necessary to form a valid and enforceable, "modifying agreement" under California law. *Id.*

Moreover, the Official Rules' language plainly evinces the parties' "mutual intention" for "a change in the[ir] obligation" to delegate threshold, contractual disputes to an arbitrator. *Id.*

1. The Phrases "ANY AND ALL OBJECTIONS" and "ANY REASON" Unambiguously Included the User Agreements' Delegation Clauses

Coinbase concedes the meaning of multiple, relevant provisions of the Official Rules. First, it concedes that Respondents were always Sweepstakes "participant[s]" and "ENTRANT[S]," under the Official Rules. JA 107-108; Pet'r Br. 11. Second, it concedes that Respondents' pending Claims are "CONTROVERSIES REGARDING THE PROMOTION." JA 108; Pet'r Br. 10 ("This case involves a dispute regarding a sweepstakes sponsored by Coinbase . . . ."). Third, Coinbase concedes that its own arbitrability arguments concern the proper "interpretation, performance, and enforcement of the[] Official Rules." JA 109; Pet'r Br. 35 ("Before an arbitrator,

Coinbase will present strong [arbitrability] arguments that the forum-selection clause applies to individuals who entered the sweepstakes by mail."). Those three concessions alone should effectively end the parties' delegation dispute.

Additionally, Coinbase and Marden-Kane undertook to affirmatively preclude "ANY AND ALL OBJECTIONS" to the courts' "SOLE JURISDICTION," "FOR ANY REASON." JA 108. Here, after Respondents filed their Sweepstakes Claims, Coinbase and Marden-Kane "OBJECT[ED]" to the district court's "JURISDICTION" over such Claims. *Id.*; *Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023) (holding that the district court was divested of "jurisdiction" to resolve Respondents' Claims). Coinbase's "REASON[S]" for objecting included—and still include—the User Agreements' delegation provisions. D. Ct. Dkt. 33 at 12-14; *see generally* Pet'r Br. Yet those provisions themselves are among the "[M]ANY," prohibited "REASON[S]" for "OBJECTI[NG]" to the district court's "JURISDICTION" over Respondents' Claims.

In sum, assuming *arguendo* that the User Agreements' delegation clauses applied (by their isolated terms) to all imaginable arbitrability disputes, the Official Rules clearly effected "a change in th[at] obligation by . . . mutual assent." *Asmus*, 23 Cal.4th at 31-32. By explicit agreement, the delegation clauses became prohibited "REASON[s]" for objecting to the district court's exclusive authority over "ANY CONTROVERSIES REGARDING THE PROMOTION." The Official Rules thus modified the User Agreements' delegation provisions under California law.

It is not just the phrase "ANY REASON" that shows the parties' intent to modify their prior delega-

tion provisions. Other, express terms of the Official Rules strongly suggest the same intent.

2. The Parties Intended Threshold, Contractual Disputes "REGARDING THE PROMOTION" for Judicial Resolution

While granting courts "SOLE JURISDICTION OF ANY CONTROVERSIES REGARDING THE PROMOTION," the Official Rules provided: "for all that is related to the interpretation, performance and enforcement of these Official Rules," the "laws of the United States of America and the State of California" will govern, notwithstanding "any other cause." JA 109.

Coinbase says that was merely a "choice-of-law provision," which did not specify "that disputes over 'the interpretation, performance and enforcement' of the official rules . . . must be heard in court." Pet'r Br. at 46. Yet Coinbase overlooks the plainest interpretation of that choice-of-law clause. A dispute over "the interpretation, performance and enforcement" of the Official Sweepstakes Rules is itself a "CONTROVERS[Y] REGARDING THE [Sweepstakes]." JA 108-109; *Sampson v. Century Indemnity Co.*, 8 Cal.2d 476, 480 (1937) ("No term of a contract is either uncertain or ambiguous if its meaning can be ascertained by fair inference from other terms thereof."). The only way Coinbase can label that choice-of-law clause ambiguous, as to forum, is by *un*fairly inferring that a dispute over the Official Sweepstakes Rules is not a dispute regarding the Sweepstakes. *But see* Cal. Civ. Code § 1644 ("The words of a contract are to be understood in their ordinary and popular sense . . . .").

If Coinbase wants to get more technical than that, Respondents can. Coinbase might ask, "if the forum-selection clause was so clearly applicable to disputes over the Official Rules, why include that choice-of-law clause at all?" The reason is that the preceding choice-of-law clause—"SHALL GOVERN THE PROMOTION—was facially narrower than the preceding forum-selection clause, "ANY CONTROVERSIES REGARDING THE PROMOTION." JA 108. The proper forum for threshold, contractual disputes was already covered by the broad forum-selection clause; but the substantive law for threshold, contractual disputes was not necessarily covered by the narrower, preceding choice-of-law clause. *Id.* In any event, none of this suggests that a controversy over the Official Sweepstakes Rules is not a "CONTROVERS[Y] REGARDING THE [Sweepstakes]"; it plainly is.

There is no textual evidence in the Official Rules or User Agreements that Coinbase, Marden-Kane, or Respondents intended for an *arbitrator* to authoritatively interpret "these Official Rules." JA 109. Yet that is what Coinbase demands in this delegation dispute. Coinbase demands that an arbitrator interpret the meaning of the Official Sweepstakes Rules, apart from any substantive judicial review. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568-69 (2009) (recognizing strict limits on judicial review of arbitrators' decisions). That is not "SOLE JURISDICTION." JA 108. That is Coinbase and Marden-Kane looking for "ANY REASON" to "OBJECT[]" to the district court's agreed-upon jurisdiction over Respondents' Claims. *Id.*; *Bielski*, 599 U.S. 736.

The Official Rules expressly contemplated threshold, contractual disputes regarding the Sweepstakes,

and unambiguously intended such disputes for judicial resolution. JA 108-109. Other express terms further suggest the same conclusion.

3. The Implied Exclusion Canon Further Reflects an Intent to Exclude the Delegation Clauses from Sweepstakes Controversies

In appropriate circumstances, a contract's "express" provision for specific rights or conditions "tends to negate any inference that the parties also intended" for other rights and conditions. *Stephenson v. Drever*, 16 Cal.4th 1167, 1174-75 (1997); *see also* Reading Law 107 (explaining that, in a proper context, "the principle that specification of [one thing] implies exclusion of the other validly describes how people express themselves and understand verbal expression").

Coinbase and Marden-Kane expressly provided for how Coinbase's User Agreements would relate to this Sweepstakes. They provided that "[a]ccess to Dogecoin and US Dollar prizes" would be "subject to" the User Agreements. JA 104. In contrast, nowhere did they provide that "CONTROVERSIES REGARDING THE PROMOTION" were "subject to" the User Agreements. This was a choice, not an accident.

Under the "circumstances" of this Sweepstakes, the companies' choice made sense. Cal. Civ. Code § 1647. If a winner accessed their Coinbase account to get a prize, that would be an interaction between Coinbase and its user only. It made sense for the bilateral User Agreements to apply to that limited interaction, occurring only on Coinbase's platform.

In contrast, Sweepstakes "CONTROVERSIES" would foreseeably be trilateral and transcend the platform: involving not only Coinbase, its platform, and its user, but also Marden-Kane as Sweepstakes Administrator. Unlike Coinbase, Marden-Kane never agreed pre-lawsuit to arbitration, in any context; given that reality, "ANY" Sweepstakes controversies would risk inefficient claim-splitting, with the same disputes being resolved in two separate forums simultaneously. While the FAA allows for such "piecemeal resolution," *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983), Coinbase likely viewed such claim-splitting as undesirable, especially knowing its own arbitration proceedings might be stayed indefinitely, while judicial proceedings involving Marden-Kane played out. *Volt*, 489 U.S. 468.

The best interpretation here is that different negotiating parties had different delegation intentions in two, different economic contexts (bilateral account "[a]ccess," versus trilateral Sweepstakes transactions and obligations). Cal. Civ. Code § 1642 ("Several contracts relating to the same matters, *between the same parties*, and made as parts of substantially *one transaction*, are to be taken together."). The Official Rules' explicit reference to prize-access, as being "subject to" the User Agreements, clearly implied that "CONTROVERSIES" were not "subject to" the User Agreements. Reading Law 107.

Coinbase, however, says none of its contrasting language was calculated. Coinbase says it's just too "difficult for drafters to foreclose any argument that a later contract conflicts with an earlier one." Pet'r Br. 50. But when Coinbase itself hired another sweep-

stakes administrator, Ventura Associates, Coinbase and Ventura "foreclose[d]" exactly that argument, without "difficult[y]." *Id.* They "subject[ed]" sweepstakes disputes "to" the User Agreements' dispute terms, easily "foreclos[ing] any argument" over "conflict[ing]" intentions. JA 476, 487-489. The notion that Coinbase and Ventura had the same intentions for those sweepstakes agreements, as Coinbase and Marden-Kane had for "these Official Rules," is untenable. *Compare id.*, *with* JA 98, 108-109.[3]

"Access to Dogecoin and US Dollar prizes" was "subject to" the User Agreements. JA 104. Disputes over the Sweepstakes and its Rules were subject to judicial resolution: no "OBJECTIONS," "FOR ANY REASON." JA 108-109. This was and remains the parties' true "agreement in writing." 9 U.S.C. § 3.

B. Non-Preempted, State Laws of Interpretation Properly Resolve Any Lingering Ambiguity in The Parties' Intentions

On one hand, Respondents rely on the Official Rules to say their Claims are justiciable. On the other hand, Coinbase relies on the User Agreements to say Respondents' Claims are arbitrable. Yet Coinbase's arbitrability arguments have always rested substantially on its interpretation of *the Official Rules*. Pet'r

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[3] Coinbase also says that "California law mandated" Coinbase to "include separate sweepstakes official rules in a standalone contract." Pet'r Br. 50. Nothing in "California law mandated" that Coinbase "include" an exclusive, judicial forum-selection clause in its Official Rules, along with express waivers of any rights to any other forum. *Id.* Coinbase's compliance argument here only further illustrates how the parties' arbitrability dispute is one regarding the "sweepstakes." *Id.*

Br. at 13 ("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.").

The parties' delegation dispute similarly implicates both agreements. Coinbase relies on the User Agreements' delegation provisions to say that all arbitrability disputes are for arbitrators. Respondents rely on the Official Rules' forum-selection provisions to say that the arbitrability dispute here is a "CONTROVERSY REGARDING THE PROMOTION" and its Rules, intended "SOLE[LY]" for courts. Pet'r Br. at 35 ("Before an arbitrator, Coinbase will present strong [arbitrability] arguments *that the forum-selection clause applies to individuals who entered the sweepstakes by mail*.").

1. The More Recent Agreements Are Controlling

As the Ninth Circuit held, "[t]he general rule" in California "is that when parties enter into a second contract dealing with the same subject matter as their first contract . . . the latter contract prevails to the extent they are inconsistent." JA 586. Here, Coinbase, Marden-Kane and Respondents formed their Official Rules contracts in June 2021: months or years after Coinbase and Respondents formed their User Agreements. Therefore, to the extent the User Agreements and Official Rules "are inconsistent" as to who should resolve the parties' arbitrability dispute, the more recent Official Rules agreements control as a matter of law. *Id.*

California's legislature has provided that in ascertaining private intentions, timing is important. Cal. Civ. Code § 1636 ("A contract must be so interpreted as to give effect to the mutual intention of the parties *as it existed at the time of contracting*."); *accord Stolt-Nielsen*, 559 U.S. at 682. Private parties can and do change their intentions over time, for innumerable reasons. For the reasons explained *supra*, there is no factual basis for inferring that the parties here intended to arbitrate threshold disputes regarding *the Official Rules* "at the time of contracting" for the Sweepstakes. Cal. Civ. Code § 1636.

2. Specific Terms Control Over General Terms

Under State law, "[a] standard rule of contract interpretation is that when provisions are inconsistent, specific terms control over general ones." *Southern Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 891 (9th Cir. 2003); *see also Chan v. Society Expeditions, Inc.*, 123 F.3d 1287, 1296 (9th Cir. 1997) ("Under well-settled contract principles, specific provisions control over more general terms."). "[T]he general/specific canon does not mean that the existence of a contrary specific provision voids the general provision." Reading Law 184. Instead, only the general provision's "application to cases covered by the specific provision is suspended," and the general provision "continues to govern all other cases." *Id.*

Here, Coinbase says the parties "agreed to a broad delegation clause," which by its terms "assigns all conceivable threshold arbitrability disputes to an arbitrator." Pet'r Br. 28. True or not, Coinbase's position is that the delegation provisions' "broad lan-

guage," covering "all conceivable" arbitrability disputes, necessarily "encompasses the particular arbitrability question at the heart of this case." *Id.*

At the same time, "the particular arbitrability question at the heart of this case," *id.*, is a "question" specifically concerning the Sweepstakes and its Rules, which the Rules delegate "SOLE[LY]" to "CALIFORNIA COURTS," not arbitrators. JA 108-109; Pet'r Br. at 35 ("Before an arbitrator, Coinbase will present strong [arbitrability] arguments that the forum-selection clause applies to individuals who entered the sweepstakes by mail.").

Even if the User Agreements' delegation provisions cover "all conceivable" arbitrability disputes generally, the Official Rules' forum-selection provisions cover only "the particular arbitrability question at the heart of this case." Pet'r Br. 28. The more specific Official Rules agreements thus control, under ordinary State laws of interpretation. "The specific provision does not negate the general one entirely, but only its application to the situation that the specific provision covers." Reading Law 185; *accord* Cal. Civ. Code § 1652.

C. Coinbase's Attempts to Disclaim Any Modification of Its Delegation Clauses Are Meritless

Coinbase offers several arguments against finding that its delegation clauses were intentionally modified. All are meritless.

1. The FAA Precludes Courts from Requiring Parties to Use Specific Words to Modify Delegations Clauses

Coinbase's supporting *amici* propose a new, federal common-law rule of contract interpretation. Specifically, they suggest that delegation clauses must be "expressly . . . alter[ed]" by subsequent agreement to be modified. Pet'r Br. 52; *see also* Chamber of Commerce et al. Br. 9 ("If parties intend for a subsequent contract to [modify] their existing [delegation] agreement, they surely would include an express statement to that effect.") (citing *UBS Fin. Servs., Inc. v. Carilion Clinic*, 706 F.3d 319, 329 (4th Cir. 2013)). That federal, substantive rule of contract interpretation contradicts the Court's holding in *Morgan*.

In *Morgan*, this Court allowed parties to implicitly—not expressly—alter their existing rights to arbitration through their voluntary litigation conduct. *See generally* 596 U.S. 411. The Court of Appeals had required a showing of prejudice, before finding that a party waived its arbitration rights by litigating. *Id.* at 413-16. Recognizing that "prejudice" is not generally required to find waivers of various rights in court, this Court reversed, holding that courts "may not devise novel rules to favor arbitration over litigation." *Id.* at 417-418.

Morgan is highly instructive here. First, if parties can implicitly alter their arbitration rights through their own, voluntary litigation *conduct*, then surely, they can implicitly alter their arbitration rights through their own, voluntary litigation *contract*. That is what happened here. Whether Coinbase did something that clearly implied its consent to litiga-

tion, or wrote something that clearly implied its consent to litigation, the bottom line is: Coinbase clearly consented to litigation.

Furthermore, this Court has long recognized that arbitration and delegation clauses are merely "specialized kind[s] of forum-selection clause[s]." *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974); *Viking River Cruises*, 596 U.S. at 653. Judicial forum-selection clauses were historically disfavored by courts, for the same reasons as arbitration and delegation clauses. *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 9-10 (1972). Yet today, judicial forum-selection clauses are as federally valid, enforceable, and even "severable" as arbitration and delegation clauses. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (deeming forum-selection clauses in consumer contracts "*prima facie* valid"); *Atlantic Marine Constr. Co., Inc. v. U.S. Dist. Court for Western Dist. of Texas*, 571 U.S. 49 (2013) (holding forum-selection clauses federally enforceable, through statutory motions to transfer or dismissals for *forum non conveniens*); *Sherk* 417 U.S. at 519 & n.14 (explaining that forum-selection clauses are as severable as arbitration clauses are under *Prima Paint*).

It follows that courts must "hold a party to" its judicial forum-selection clause, the same way it would "hold a party to" its arbitration or delegation clause. *Morgan*, 596 U.S. at 418. There is no law requiring parties to modify a judicial forum-selection clause by expressly referencing that clause in a subsequent agreement. To create such a rule of contract construction for arbitration or delegation clauses (only) would be to create "novel rules [that] favor arbitration over litigation." *Id.* at 417-18.

Suppose the User Agreements here had provided for Virginia courts, rather than an arbitral forum, and had included otherwise identical terms "delegating" threshold disputes to Virginia courts. This Court would be hard-pressed to send this "case involv[ing] a dispute regarding a sweepstakes" to Virginia, for a decision on where Respondents' Claims belong. Pet'r Br. 10. Why: because there would be no serious indication of any private intent for such a transfer or dismissal.

At bottom, this Court's analysis of the question presented should essentially mirror the Court's final analysis in *Morgan*. Objectively speaking: "Did [Coinbase] knowingly relinquish the right to arbitrate by [writing] inconsistently with that right?" *Morgan*, 596 U.S. at 418. The answer is yes. Tellingly, unlike its *amici*, Coinbase concedes that implied, written modifications of delegation clauses must be permitted "if the facts support it." Pet'r Br. 52-53. If any "facts support it," the facts of this case support it. *Id.*

2. Reading the Official Rules to Mean What They Say Yields No "Absurdity" or "Chaos"

Coinbase says Respondents' interpretation of the Official Rules works an "absurdity" under "California law," because it would yield different results based on "when an entrant created a Coinbase account." Pet'r Br. 33-34. Coinbase surmises that if somebody "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." *Id.* Coinbase's reasoning is irrelevant, and incorrect. It is irrelevant because there are no

mail-in entrants in this action. It is incorrect because it presumes that the timing of agreements is all that matters for interpretive purposes.

That is not how interpretation works under any State's contract laws. "No canon of interpretation is absolute[;] [e]ach may be overcome by the strength of differing principles that point in other directions." Reading Law 59 (citing *Chickasaw Nation v. United States* 534 U.S. 84, 93 (2001)). If a hypothetical, mail-in entrant won the Sweepstakes and then created a Coinbase account "to claim a prize," then yes, "the User Agreement's delegation clause would be the later contract." Pet'r Br. 34.

But even then, the canon that later agreements trump earlier agreements would not necessarily control by itself. The implied exclusion canon, or the general-specific canon, coupled with the forum-selection clauses' plain language, might "control." *Id.* "Access to . . . prizes" might remain "subject to" the User Agreements, while "CONTROVERSIES" might remain "subject to" the Official Rules' forum-selection provisions. In any event, whatever the outcomes of Coinbase's imaginary contractual disputes might be, they need not work any absurdity.

Nor does Respondents' traditional, interpretive approach work any "chaos." Pet'r Br. 50-52. Courts have been interpreting contracts for centuries, and the FAA requires courts to interpret delegation clauses before enforcing them. 9 U.S.C. § 3. Even Coinbase's own approach allows for the same types of interpretative inquiries; Coinbase simply demands a different interpretative conclusion in this case. Pet'r Br. at 52-53.

Interpreting delegation clauses alongside other, relevant clauses and contracts is not a judicially created "exception" that invites "collateral litigation." *Id.* at 50. It is the statutory rule of the FAA, which requires the same, non-preempted laws of interpretation to be applied in arbitrability and delegation disputes as have always been applied in contract disputes generally. *Volt*, 489 U.S. at 474; *GE Energy*, 140 S.Ct. at 1643; *Arthur Andersen LLP*, 556 U.S. at 630.[4]

3. The User Agreements' Modification Provisions Are Irrelevant

Coinbase argues that the Official Rules could not modify the User Agreements' delegation clauses because the "User Agreement outlines a formal modification process," which "Coinbase did not use . . . in promulgating the official rules." Pet'r Br. 14. This is a red herring.

In California, any "contract in writing may be modified by a contract in writing." Cal. Civ. Code § 1698. That statute "has no application" in situations where "a modification is *in accordance with* a provision authorizing and setting forth a method for [the original contract's] revision." *Jones v. Citigroup, Inc.*, 135 Cal.App.4th 1491, 1496 (2006); *Mandel v. Household Bank*, 105 Cal.App.4th 75, 82 (2003) (same). In such situations, "there is no alteration," since the "modification is in accordance with the terms of the [original] contract." *Id.* California's modification

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[4] Coinbase argues that FAA § 4 controls this case, rather than § 3. Coinbase has that backwards. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 293-94 (1995) (Thomas, J., dissenting) (explaining the distinct, uncontroverted purposes of §§ 3 and 4).

statute exists specifically for situations like this, where a subsequent writing alters an initial writing's obligations, without adhering to the initial writing's modification method(s). *Id.*

III. THERE IS NO PREEMPTION PROBLEM IN THIS CASE, AND COINBASE CONCEDES THIS

Coinbase's brief uses the word "severability" or its variants 158 times, and the word "preempt" or its variants 0 times. There are good reasons for why Coinbase declines to argue for preemption in this case.

A. This Court's "Severability Rule" Is Inapplicable to Matters of Contract Interpretation

The closest Coinbase comes to arguing for preemption is in arguing that the Court's "severability rule" governs the parties' interpretive disputes.[5] This Court's "severability rule" under the FAA applies to matters of contract enforcement; it has no application to matters of contract interpretation.

The "severability rule" allows for enforcing delegation clauses, where they form parts of otherwise unenforceable agreements. It requires courts to "pluck" arbitration and delegation provisions away from other terms in a contract, when other terms are judicially invalidated for whatever reason (*e.g.*, unconscionability, or illegality). *Rent-A-Center*, 561 U.S. at 85 (Stevens, J., dissenting). Unless the arbitration or delegation provisions themselves are unen-

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[5] This was not properly argued below; nowhere did Coinbase's opening appellate brief even cite *Prima Paint*, 388 U.S. 395, or *Rent-A-Center*, 561 U.S. 63: not once. C.A. Dkt. 13.

forceable, those provisions remain enforceable even as all others effectively disappear. *Id.* (citing *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*).

The Court found that rule in § 2's text, which renders a "written provision [to arbitrate] . . . valid, irrevocable, and unenforceable," seemingly "*without mention* of the . . . contract in which it is contained." *Rent-A-Center*, 561 U.S. at 70-71 (original emphasis). But nothing in the FAA's text allows courts to "sever" or isolate delegation clauses away from all other, *enforceable* terms and contracts to which the parties agreed, for purposes of interpreting whether the parties *intended* to arbitrate a dispute. The very label of "severability" in law derives from the fact that other provisions of the parties' contract are being "severed": they're going away, being nullified, being invalidated. A written provision is severed to preserve its relevance, not to discern its meaning or applicability.

"The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them." *O'Brien*, 168 U.S. at 297; *see also* Reading Law 167 (quoting Cal. Civ. Code § 1641). It is axiomatic that courts must consider all potentially relevant terms and agreements to discern the parties' delegation intentions, without favoring a particular result. Even Coinbase agrees with this. Pet'r Br. 52-53 ("[A] party resisting a delegation clause may argue (if the facts support it) that a subsequent agreement implicitly displaced or modified the 'delegation provision specif-

ically.'"). Bizarrely, much of Coinbase's brief seems to contradict that correct concession.

Much of Coinbase's brief seems to demand that delegation clauses be treated as "mini-agreements," to be *interpreted and applied* in isolation from all other, relevant and enforceable terms. *See generally* Pet'r Br. No law allows that. Doing that would routinely violate the FAA's "first principle" that "the parties' intentions control*.*" *Lamps Plus*, 139 S.Ct. at 1415-16; *Stolt-Nielsen*, 559 U.S. at 682. Doing that would instantly preempt most State laws of contract interpretation, across all 50 States. Unless the whole-text canon—and most other State laws of contract construction—are preempted by the FAA, delegation provisions are subject to the same old, State laws of interpretation as other contract provisions. That means they are not interpreted or applied in a vacuum.

Coinbase does not argue for the preemption of any State contract law, let alone broad-sweeping preemption of many contract laws. Consequently, Coinbase's "mini-agreement" labeling cannot save delegation clauses from ordinary principles of interpretation. This Court's "severability rule" is simply out of place in any pure interpretive dispute.

B. This Case Is Different from The Court's Preemption Precedents

This Court has found the FAA to preempt State laws of interpretation, if they take contractual "silence or ambiguity" as a reason to impose class proceedings on parties who have definitely agreed to arbitration. *See generally Lamps Plus*, 139 S.Ct. 1407; *Stolt-Nielsen*, 559 U.S. 662. The Court has reasoned that "silence or ambiguity" in a contract "does not pro-

vide a sufficient basis to conclude that parties to an arbitration agreement agreed to sacrifice the principle advantage[s] of arbitration." *Lamps Plus*, 139 S.Ct. at 1416 (cleaned up).

One might argue (though Coinbase hasn't) that similar reasoning should apply here. The argument might go like this: once parties have agreed to arbitration and delegation, "silence or ambiguity" from any later contract should be insufficient "to conclude that parties . . . agreed to sacrifice the principle advantage[s] of arbitration." *Id.* If the Court is at all tempted by such reasoning, the Court should resist applying it here.

First, while the agreements in *Lamps Plus* and *Stolt-Nielson* were "silent or ambiguous" as to class arbitration, the Official Rules agreements here are neither silent nor ambiguous in their expressed intentions for judicial resolution. JA 108-109. They are as clear and as explicit as any parties desiring a judicial forum could reasonably be expected to be. Requiring more—requiring express modifications of arbitration or delegation terms, when express modifications of other forum-selection terms are not generally required—would be counterintuitive and offend *Morgan*. *Accord* Pet'r Br. 52-53 (allowing for implied modifications).

Second, the parties in *Lamps Plus* and *Stolt Nielsen* had already, decidedly chosen "the advantage[s] of arbitration" for their particular disputes. In that context, it's fair to presume that parties don't want arbitration proceedings that look exactly like court cases. It would be far less fair, however, to judicially presume that parties don't want court cases, after they have expressly said they want court cases only. *E.g.,* JA 108-109.

IV. IF ANY FEDERAL RULES OF CONTRACT INTERPRETATION APPLY, THE "CLEAR AND UNMISTAKABLE" RULE APPLIES

This Court "presume[s] that parties have not authorized arbitrators to resolve certain gateway questions, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." *Lamps Plus*, 139 S.Ct. at 1416-17 (cleaned up). "Although parties are free to authorize arbitrators to resolve such questions," the Court "will not conclude that they have done so based on 'silence *or* ambiguity' in their agreement." *Id.* (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995)). "[D]oing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.*

Here, Respondents "reasonably would have thought a judge, not an arbitrator, would decide" their own "JURISDICTION [in] ANY CONTROVERSIES REGARDING THE PROMOTION." *Id.* Respondents "reasonably would have thought that a judge, not an arbitrator," would decide all "gateway questions" about "the interpretation, performance and enforcement of the[] Official Rules." *Id.* Coinbase does not and cannot contend that Respondents' "thought[s]" about these issues are so obviously wrong as to be unreasonable. *See generally supra.*

Instead, Coinbase says that its delegation clauses (standing alone) are unambiguous as to who should resolve any arbitrability disputes. Pet'r Br. 47. Coinbase's "confusion of thought consists in failing to distinguish between the contract[s] as a whole and

some of the words found therein." *O'Brien*, 168 U.S. at 297. "The fallacy which underlies the assertion as to want of all ambiguity in the [agreement] arises, therefore, from presupposing that, in order to establish want of ambiguity in a contract, a few words can be segregated from the entire contract, and that, because the words thus set apart are not intrinsically ambiguous, there is no room for construing the contract itself." *Id.* This Court debunked Coinbase's interpretive "fallacy" 127 years ago, long before Coinbase and Marden-Kane wrote the parties' Sweepstakes agreements. *Id.*

A. Coinbase Does Not Challenge the Circuit's Interpretation of the Delegation Clauses as Unreasonable

The Ninth Circuit interpreted and applied Coinbase's delegation clauses specifically to the parties' arbitrability dispute, before resolving the parties' arbitrability dispute. JA 585-586; *accord Granite Rock*, 561 U.S. at 297; *Henry Schein*, 139 S.Ct. 524. Coinbase does not contend otherwise, nor does Coinbase contend that the Circuit's interpretation of the parties' delegation clauses was unreasonable. *See generally* Pet'r Br.

The Circuit adhered to this Court's longstanding, clear-and-unmistakable rule, affirming "that the User Agreement did not [clearly] delegate to an arbitrator the question of *whether the forum selection clause in the Sweepstakes' Official Rules* superseded the arbitration clause in the User Agreement." JA 583. In other words, the Circuit found that the delegation clauses were not clearly meant for arbitrators to interpret all future contracts the parties might execute,

with or without third parties, and regardless of any future contracts' terms or contexts.[6] Nowhere does Coinbase argue that the Circuit's "delegation" interpretation in that regard was so wrong as to be unreasonable.[7]

Coinbase instead challenges the Court's clear-and-unmistakable standard itself: first by labeling it "judge-made," then by rewriting it into something unrecognizable. Neither challenge holds water.

B. "Manifestation of Intent" Means Considering All Terms, Not Some

Coinbase contends that this Court's "clear-and-unmistakable standard is at most a presumption against reading [silent or ambiguous language] *to constitute a delegation clause*." Pet'r Br. 47. Coinbase is mistaken. Answering whether particular contract language "constitute[s] a delegation clause" does not answer the necessary delegation question: whether the parties intended to delegate their arbitrability dispute to an arbitrator. *Rent-A-Center*, 569 U.S. at 69, n.1.

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[6] Even if the User Agreements' delegation terms *did* sufficiently express such an intent, the Official Rules clearly expressed a different intent. *See generally, supra.*

[7] The Circuit could have done more to analyze the delegation intentions evidenced by the Official Rules themselves, as Respondents did below, and as Respondents have done here. *E.g.,* C.A. Dkt. 25 at 8 ("Coinbase and Marden-Kane unambiguously required each Appellee to litigate, not arbitrate, . . . 'all that is related to the interpretation, performance, and enforcement of the[] Official Rules': notwithstanding 'ANY' prior agreement to arbitrate anything.").

A clause stating—"arbitrators shall decide whether this arbitration agreement is unconscionable"—would clearly "constitute a delegation clause." Pet'r Br. 47. But it would not clearly allow arbitrators to decide whether the arbitration agreement *applied* to any given merits dispute. Whether selected language "constitute[s] a delegation clause"—whatever that means—may be a relevant inquiry, but it is not dispositive of the parties' delegation intentions for every arbitrability dispute.

This Court's clear-and-unmistakable standard was always an "interpretive rule," asking whether the parties' "manifestation of intent" is clear and unambiguous. *Rent-A-Center*, 569 U.S. at 69, n.1 (emphasis removed). That has been the Court's rule for 64 years. *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 583 at n.7 (1960). Coinbase posits that "once parties have agreed to a clear-and-unmistakable delegation clause," the "standard is fulfilled." Pet'r Br. 47. Coinbase is essentially saying that "once parties" manifest clear intentions to arbitrate arbitrability disputes, those intentions cannot be rendered unclear by any future, contractual "manifestation of intent," *Rent-A-Center*, 569 U.S. at 69, n.1, short of explicit references to the prior delegation language. That "novel," proposed rule is precluded by *Morgan*. *See* 596 U.S. at 418.

Coinbase's "once clear, always clear" stance is meritless. Coinbase properly concedes the opposing stance elsewhere in its brief. Pet'r Br. 52-53 (allowing implied modifications). Coinbase's revision of the Court's clear-and-unmistakable rule is nonsensical, unworkable, and contrary to law.

C. Federal "Judge-Made," Rules of Interpretation Should Work Both Ways, or Not at All

Coinbase challenges the clear-and-unmistakable rule as a "judge-made, 'arbitration-specific' 'interpretive rule' disfavoring delegation clauses." Pet'r Br. 47. The implication is that this Court's clear-and-unmistakable rule is precluded by the FAA. The alternative rule Coinbase proposes, however, is just as problematic in the opposite direction.

Coinbase argues that if there is any "lingering doubt" about whether the Official Rules modified the parties' delegation clauses, the "Court could apply the federal presumption in favor of arbitrability." Pet'r. Br. 34. Coinbase fails to explain how that presumption is not equally precluded by the FAA, as a "judge-made, 'arbitration-specific' 'interpretative rule'" overtly favoring arbitration and delegation clauses over (for example) judicial forum-selection clauses. *Id.*

Truthfully, the FAA's equality rule requires that commonplace contractual ambiguities in arbitrability or delegation disputes be resolved by non-preempted, State laws of contract interpretation. The problem with applying federal, interpretative presumptions in any direction is that they effectively preempt most State laws of contract construction, without engaging in any preemption analysis.

Most State contract laws exist to resolve commonplace ambiguities, which no policymaker can ever eliminate. If every routine ambiguity, however slight or intractable, is always resolved in one direction, that means most applicable State contract laws are being silently and unconstitutionally displaced by the feder-

al judiciary, under the "pretense" of interpreting the FAA. *Allied-Bruce*, 513 U.S. at 283 (O'Connor, J., concurring).

The Court might respond that its own, federal presumptions apply only after State rules of interpretation are exhausted. *Granite Rock*, 561 U.S. at 303. But even that observation misses the preemption point.

Ambiguity only means that there are two, "reasonable" interpretations. *CNH Indus. N.V. v. Reese*, 583 U.S. 133, 139 (2018). "Reasonable" is often far from "best." In a normal contract dispute, judges apply valid, State rules of interpretation to resolve ambiguity. Then, if ambiguity still remains, judges are free to choose what they believe is the *best* interpretation among "reasonable" ones. A court is not "hold[ing] a party to its arbitration contract just as the court would to any other kind," if every time the court must choose between "reasonable" interpretations, the same result must flow regardless of what the best interpretation is, and regardless of how far "best" is from "reasonable." *Morgan*, 596 U.S. at 418. If the Court declares equality, it must uphold equality.

There should be no federal rules or presumptions of contract interpretation, absent a thorough preemption analysis in any case where federal interpretive rules are applied. That said, if any federal rules apply here, the clear-and-unmistakable rule applies. This is so because the Court is addressing an "arcane" delegation issue that relatively few humans even know about, including lawyers and businesspersons. *First Options*, 514 U.S. at 945.

V. THE NINTH CIRCUIT'S OPINION USED IMPRECISE TERMINOLOGY, BUT ITS JUDGMENT WAS CORRECT

The Ninth Circuit used some imprecise terminology in discussing the parties' delegation intentions. But the Circuit's substantive reasoning and decisions were not contrary to California law or the FAA. Even if some of the court's reasoning was inaccurate, its judgment should be upheld because the court asked a permissible delegation question, and ultimately reached the right conclusion regarding the parties' delegation intentions.

A. True Formation Disputes Are Never Delegated

Coinbase suggests that disputes over whether any agreement was "formed" can somehow be delegated to an arbitrator *by agreement*. Pet'r Br. 38-39. That suggestion is hopelessly circular. It would allow a defendant to present courts with any sheet of paper displaying delegation language, and have plaintiffs ousted from court even if they swear, "I never signed that." Defense counsel could point to the delegation language, assert a formation dispute regarding the (never extant) contract as a whole, and demand that the "severable" delegation language be enforced: even against a plaintiff whose want-of-assent story is unopposed.

Setting aside due process issues, if the FAA's first principle of arbitrability is consent, then true formation disputes like that can never be delegated by way of an *alleged* contract's language. The Court has held this explicitly. *Granite Rock*, 561 U.S. at 299-300.

The Circuit simply misused the words "existence" and "formation," JA 583-586, when it should have used words accurately describing what it actually did, and was required to do: "resolve any issue that calls into question the formation *or applicability* of the specific [delegation] clause that a party seeks to have the court enforce." *Id.* at 297; JA 585-586. That is what the Circuit did in substance here; it determined the applicability of Coinbase's delegation clauses to the parties' arbitrability dispute. JA 585 ("The 'scope' of an arbitration clause concerns how widely it applies, not whether it has been superseded by a subsequent agreement."); JA 586 (holding that "the issue of whether the forum-selection clause . . . supersedes [or modifies] the arbitration clause was not delegated to the arbitrator"). Right or wrong, that was a decision concerning the delegation clauses' applicability to the parties' arbitrability dispute.

Such "applicability" decisions are required by the FAA and this Court's precedents, when parties contest the applicability of delegation language to an arbitrability dispute. 9 U.S.C. § 3. *Granite Rock*, 561 U.S. at 297. Because the Circuit asked and answered whether the delegation clauses were applicable to the parties' arbitrability dispute, the Circuit's use of imprecise "formation" and "existence" terminology is not the real issue here.[8]

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[8] The statute governing modifications (Cal Civ. Code § 1698) is codified under Division 3, Title 5 of the Civil Code, titled "Extinction of Contracts." Perhaps this is why the Circuit spoke of the "existence" of an agreement to arbitrate, instead of "modification." California also uses the word "supersede" in tandem with "modification." *Crossen v. Foremost-McKesson, Inc.*, 537 537 F.Supp. 1076, 1077 (N.D. Cal. 1982) (using the words "alteration"

B. The Circuit Was Right to "Sever" the Delegation Question, but Not the Delegation Clauses

While Coinbase observes that the Circuit "never analyzed whether the official rules altered the parties' [delegation] agreement," the Circuit took a different approach to conducting the same, delegation-only "analysis" that Coinbase (and the FAA) demand. Pet'r Br. 36. Rather than asking "whether the official rules altered the parties' [delegation] agreement,"[9] the Circuit asked whether the delegation clauses—"altered" or not—were intended to allow arbitrators to interpret future, "superseding" contracts. The Circuit answered that federally permissible, delegation-only inquiry in the negative. JA 583 (interpreting "the User Agreement [to] not delegate to an arbitrator the question of whether the forum selection clause in the Sweepstakes' Official Rules superseded the arbitration clause"). Whether the Circuit was wrong to find those delegation clauses inapplicable (by their own, isolated terms) to the parties' arbitrability dispute is a separate question.

In Respondents' view, the better approach would have been to ask "whether the official rules altered the parties' [delegation] agreement," under non-preempted, State laws of contract interpretation. Pet'r Br. 36. Instead, the Circuit did something closer to

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and "supersede" interchangeably, and citing § 1698); *Han v. Mobil Oil Corp.*, 73 F.3d 872, 877 (9th Cir. 1995) (explaining that "a modification supersedes those terms to which it relates"). Using the normal syntax of a State's contract laws is not itself a judicial error under the FAA.

[9] This was always Respondents' preferred approach.

what *Coinbase* demands; it asked whether the isolated delegation clauses facially applied to the parties' arbitrability dispute. That is probably a necessary interpretive inquiry in every delegation dispute, regardless of whether the Circuit answered it correctly, and regardless of whether that was a *complete* interpretive inquiry (it was not complete).

The Circuit addressed the delegation question and clauses directly, before proceeding to the arbitrability of Respondents' Claims. So it properly severed the delegation question. Coinbase didn't like the delegation answer, and so seeks the opposite delegation result before this Court. Pet'r Br. 37 ("Thus, this is a debate about the arbitration agreement's scope . . . ."). Yet Coinbase declines to argue how the Ninth Circuit's purportedly incorrect *interpretation* of its delegation clauses (or the word "scope" therein) is actually preempted by the FAA, or wrong under California law.

In any event, Respondents are not here to say that the parties' arbitrability dispute does not literally concern the "scope" of an agreement to arbitrate. Rather, they are here to say that the parties' arbitrability dispute is one "REGARDING" the Sweepstakes and its Rules, intended for judicial resolution. They are here to say that the User Agreements' delegation clauses were validly modified under federal and State law, with respect to Sweepstakes disputes only. They are here to say that they did not consent, "at the time of contracting" for this Sweepstakes, to an *arbitrator* interpreting their rights and obligations under the Official Rules, without any substantive judicial review. Cal. Civ. Code § 1636. Respondents reasonably believed they had the same Sweep-

stakes deal with Coinbase as they had with Marden-Kane.

C. Coinbase Fails to Show That the Circuit's Delegation Interpretation Was Reversible Error

The Circuit decided "that the User Agreement did not delegate to an arbitrator the question of *whether the forum selection clause in the Sweepstakes' Official Rules* superseded the arbitration clause in the User Agreement." JA 583. In other words, the Circuit found the delegation clauses not to have been intended to allow arbitrators to interpret the parties' Official Rules agreements. Rather than basing that conclusion on the Official Rules' terms—like Respondents do, and have consistently done—the Circuit based that conclusion on its interpretation of the word "scope" in the delegation clauses.

Coinbase fails to explain how the Circuit's interpretation of the parties' original delegation clauses (in isolation) erred under California law. And even if the Circuit's interpretation did err under California law, "this Court does not sit to review" the Circuit's interpretation or application of State contract law. *Volt*, 489 U.S. at 474; *DIRECTTV, Inc.*, 577 U.S. at 54. Furthermore, Coinbase does not explain how the Circuit's *State-law* interpretation of those delegation clauses (presumed correct here, *see id.*) is conflict-preempted by the FAA.

This Court should affirm the Ninth Circuit's judgment, even if it must clarify or correct some of the Circuit's imperfect reasoning or terminology used in arriving at a correct *resolution* of the parties' delegation dispute.

D. The Source of Nationwide Judicial Confusion Under the FAA

In *Swift v. Tyson*, 41 U.S. 1 (1842), this Court interpreted the Federal Judiciary Act to render federal courts, sitting in diversity, unconstrained to follow State judicial decisions in matters of "general law," like "the construction of ordinary contracts." *Erie R. v. Tompkins*, 304 U.S. 64, 71-72 (1939). Courts sitting in diversity were bound only by States' "local" laws, which included the State courts' "construction[s]" of "positive statutes." *Id.*

In *Erie*, the Court famously overruled *Swift*, holding that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." *Id.* at 78. The law of the State would govern regardless of whether it was legislative or judicial in origin. *Id.* One of the Court's reasons for overruling *Swift* was "the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law." *Id.* at 74.

Over the past 60 years or so, a judicial "impossibility" analogous to the *Swift* problem has resurfaced. It is the nationwide, judicial "impossibility" of finding a "satisfactory line of demarcation" between: (i) applying this Court's federal rules of contract interpretation under the FAA (analogous to *Swift*'s "local law"), and (ii) applying non-preempted, State rules of contract interpretation that exist to resolve contractual ambiguities generally ("general law").

On the one hand, the Court has repeatedly held that ordinary State contract laws govern *interpretive* arbitrability and delegation disputes. On the other

hand, the Court has repeatedly held that "doubts" or "ambiguities" in arbitrability and delegation disputes (a low bar) must be resolved in one direction. The Court has seemingly walked back that latter line of holdings in recent years, but far too quietly for most courts to notice, and far too generously to what some of those decisions actually said.

Consequently, most courts still feel compelled to apply this Court's older, interpretive presumptions and "policies" wholesale, without even *attempting* to resolve contractual ambiguities under State law in FAA cases. In many cases, that mistaken understanding causes judges to feel either: (i) bound by this Court's presumptions to impose a barely "reasonable" interpretation that is the *worst* interpretation; or (ii) fearful of being overruled for actually being non-discriminatory. Aiming to avoid one of those apparent errors, courts respond by inventing new *federal* interpretive standards, exceptions, and conditions—like "formation" disputes, "wholly groundless" exceptions, or "prejudice" requirements (*e.g.,* JA 585; *Henry Schein*, 139 S.Ct. 524; *Morgan*, 596 U.S. 411)—rather than neutrally applying the non-preempted, State contract laws they've been applying since law school.

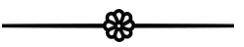
What the Court is seeing today is not judicial hostility against arbitration. It is judicial confusion regarding how free (if at all) courts are to use non-preempted, State principles of contract interpretation to resolve commonplace ambiguities in arbitration and delegation disputes. What happens is judges are maybe 80%, maybe 90% certain of the parties' intentions under ordinary contract laws, but they can't call the situation "doubtless" or perfectly "unambiguous." In such situations, judges face the "impossibility of

discovering a satisfactory line" between where their duties to apply State law end, and where this Court's federal presumptions take over. *Erie*, 304 U.S. at 74.

What the Court is seeing is not an "arbitration-specific" problem. It is a *Swift* problem. It is not judicial hostility against arbitration. It is judicial hostility against obvious errors of ordinary contract laws, in either direction. It is also concern about being overruled for being truly neutral as to litigation or arbitration.

Ninety years after *Erie*, this Court can and should solve the *Swift* problem again. It should solve the resurrected *Swift* problem by holding that in all *interpretive* arbitrability and delegation disputes under the FAA, only non-preempted, State laws of contract interpretation are controlling. Full stop. The Court should set judges free to impartially choose the "best" interpretation among "reasonable" ones in every arbitrability and delegation dispute, without fear of being overruled on federal-policy grounds.

Counterintuitively, returning these interpretive disputes to the States will create greater uniformity than federal interpretive rules have created. Judges will know exactly what to do, and how to do it, in every case: as we trust them to do what Congress expressly trusted them to do in 1925. Interpret contracts. 9 U.S.C. § 3.



CONCLUSION

The Court should affirm the Ninth Circuit's judgment, while correcting some of its reasoning if necessary. Alternatively, the Court should remand this case to the Ninth Circuit, to more thoroughly consider whether the Official Rules partially modified the User Agreements' delegation clauses under non-preempted, State laws of contract interpretation. This remand option, however, is undesirable because it would prompt a fourth or fifth year of arbitrability proceedings in this case. Respondents respectfully ask this Court to squarely resolve the parties' delegation dispute, as the Court is free to do under FAA § 3.

Respectfully submitted,

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