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 LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICI CURIAE

This *amicus curiae* brief is jointly submitted by a group of legal scholars who have published extensively on arbitration, contract, and class action law, consumer contracts, civil justice, and the federal courts. They share an interest in this case because it presents novel and important questions that could significantly impact Amici's areas of expertise and various aspects of the American legal landscape, including (among others) consumer protection, employment, class action, product liability law, and the division of responsibility between federal courts and private arbitrators.

Amici are:

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Amici join this brief in their individual capacities, with institutional affiliations listed for identification purposes only.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than Amici or their counsel made a monetary contribution to this brief's preparation or submission.

INTRODUCTION

Amici submit this brief to discuss the proper legal framework for deciding the question presented in this case. Amici agree with Respondents that the Court should affirm the judgment of the Ninth Circuit, but for a different reason. Under well-established principles of state contract law, this is a dispute concerning the existence of a legally cognizable arbitration agreement, not interpretation of that agreement to determine its scope. Such a dispute is reserved for the court, not an arbitrator.

To resolve the issue, this Court has made clear that courts should look to "ordinary state-law principles" of contract law. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Under those principles, whether a delegation clause has been superseded by a subsequent contract between the parties concerns the delegation clause's *existence*, not its scope.

Specifically, at common law, a superseding contract discharges the duties in the original contract. Likewise, a superseding contract that modifies a part of the contract discharges the obligations that have been modified. And a discharged contract, or discharged obligations within that contract, are no longer legally cognizable agreements. So, when courts are tasked with deciding whether a contract (or part of a contract) has been superseded, their task is to determine whether the parties intended for the subsequent contract to supersede the first.

A supersession inquiry is legally and conceptually distinct from the exercise of interpreting the scope of

the first contract. In the latter exercise, the court looks to the meaning of the first contract to ascertain what obligations it places on the parties (*e.g.*, the scope of the duties it imposes). But when the question is one of potential supersession, the court is determining whether the first agreement is legally cognizable in the first place. While the court may still need to look at the original contract's terms to assess whether those terms are covered by or conflict with the subsequent contract, it does so as part of its effort to determine whether the parties intended for the second contract to replace the first. Put differently, comparing the two contracts is part of the inquiry into the parties' conduct surrounding the second contract's formation and what the parties intended the *second* contract to cover or replace. This is a question as to whether the parties revoked the consent they previously memorialized in the first contract, not to the scope of that consent.

These principles are no different when the first contract at issue is or contains an arbitration agreement or, more specifically, a delegation clause. Arbitration and delegation agreements are treated just like all other contracts; they are equally as enforceable and subject to the same formation and execution inquiries. And in arbitration, the power of the arbitrator to decide a dispute is entirely derived from the parties' consent to that forum. As such, before a court can give effect to a delegation clause, it must first find that the parties have validly consented to arbitration at all. It does so using the same ordinary, state-law contract law principles that govern all contracts, arbitration or otherwise.

Numerous courts—including this Court—have repeatedly held that the presumption in favor of arbitration does not apply when the question presented is one concerning the *existence* of a legally cognizable arbitration agreement. *See, e.g., Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 301 (2010) (observing that courts apply the presumption of arbitrability "only where a *validly formed and enforceable* arbitration agreement is ambiguous about whether it covers the dispute at hand") (emphasis added); *Dasher v. RBC Bank (USA)*, 745 F.3d 1111, 1115-16 (11th Cir. 2014) (declining to apply presumption of arbitrability to dispute over whether arbitration agreement was superseded because "courts are to apply 'the presumption of arbitrability only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand'") (quoting *Granite Rock*, 561 U.S. at 301); *Applied Energetics, Inc. v. NewOak Cap. Mkts., LLC*, 645 F.3d 522, 526 (2d Cir. 2011) ("[W]hile doubts concerning the scope of an arbitration clause should be resolved in favor of arbitration, the presumption does not apply to disputes concerning whether an agreement to arbitrate has been made."). And because the question presented here asks whether a legally cognizable agreement to arbitrate exists—not whether the dispute at hand is within the scope of an agreement already shown to be in place between the parties—Amici agree with Respondents and the Ninth Circuit that this dispute should not be delegated to an arbitrator.

ARGUMENT

I. A superseding agreement discharges the obligations in the replaced agreement and extinguishes it as a legally enforceable contract.

"The FAA reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). Thus, this Court has explained that "ordinary state-law principles" of contract law apply to arbitration agreements. *First Options*, 514 U.S. at 944. Accordingly, a natural starting point is to consider how the common law understands the effect of a superseding contract on the original agreement between the parties. In that regard, at common law, superseded contracts, or terms within the contract that have been superseded, are considered to have been discharged and thus without legal effect.

Under well-settled principles of contract law, a valid superseding agreement discharges the duties contained in the original agreement. As the *Restatement (Second) of Contracts* explains, a contractual duty "may be discharged by the obligee's acceptance of either a performance or a contract in substitution for performance of that duty." *Restatement (Second) of Contracts*, Ch. 12, Topic 2, Intro. Note (Am. L. Inst. 1981). This is true regardless of whether the parties ultimately perform under the new contract. *See id.* § 279 (noting "the original duty is discharged regardless of whether the substituted contract is performed").

There are different types of superseding contracts, but this principle remains the same regardless of type. For example, when the parties agree to a substituted contract—that is, a contract that completely replaces the prior contract—"[t]he substituted contract discharges the original duty[,] and breach of the substituted contract by the obligor does not give the obligee a right to enforce the original duty." *Id.*

Another example is a novation, which is a substituted contract in which one of the parties to the original contract is substituted with a new party. As with any substituted contract, a novation "substitutes a new contract and wholly extinguishes the earlier contract." 58 Am. Jur. 2d *Novation* § 2 (footnotes omitted). When that happens, the common law holds that "[a] novation discharges the original duty, just as any other substituted contract does, so that breach of the new duty gives no right of action on the old duty." *Restatement (Second) of Contracts* § 280.

In a similar vein, a contract may also be discharged via mutual rescission. Williston explains that voluntary rescission "is a mutual agreement by the parties to an existing contract to discharge and terminate the rights and duties thereunder." 29 *Williston on Contracts* § 73:15 (4th ed.) (footnote omitted). Rescission agreements are themselves a form of substitution contract. *See, e.g.*, *Gee v. Nieberg*, 501 S.W.2d 542, 544 (Mo. App. 1973) (collecting cases and explaining, "[u]ndeniably, an agreement to terminate or release one from a contract is a new contract which must be supported by a new consideration"); *Atlanta Trailer Mart, Inc. v. Warr*,

105 S.E.2d 600, 601 (Ga. 1958) (discussing the type of consideration required for a rescission agreement). And a rescission agreement discharges the duties contained in the rescinded contract. *See, e.g.*, *Restatement (Second) of Contracts* § 283 cmt. a (describing an agreement of rescission as "an agreement under which each party agrees to discharge all of the other party's duties of performance").

Similarly, when a contract is modified by a subsequent agreement (rather than replaced in full), any modified duties in the original contract are discharged. *See* 17 C.J.S. *Contracts* § 557 (explaining "[a]n obligation of a former written agreement is discharged only insofar as it is inconsistent with the new agreement"). A modified contract is a form of substitute contract as well: "The modification of a contract results in the establishment of a new agreement between the parties which *pro tanto* supplants the affected provisions of the original agreement while leaving the balance of it intact." *Beacon Terminal Corp. v. Chemprene, Inc.*, 75 A.D.2d 350, 354 (N.Y. App. Div. 1980).

Thus, historical principles of contract law show that, regardless of type, a superseding contract discharges modified obligations in the original contract. And a discharged contract or obligation no longer exists as a legally enforceable agreement. *See, e.g.*, Lionel Smith, *Restitution: The Heart of Corrective Justice*, 79 Tex. L. Rev. 2115, 2145-46 (2001) (observing that when an agreement has been discharged, "the parties' contract no longer exists"). It is not a cognizable obligation at all.

This is crucial to understanding the nature of the dispute in this case. The common law understands a discharge to "destroy" "all legal effect of a previously existing [contractual] right." *Restatement (First) of Contracts* § 385 (Am. L. Inst. 1932). Without a legally enforceable right, an agreement is not a "contract" at all, as that term is understood in the law. *See Restatement (Second) of Contracts* § 1 ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which *the law in some way recognizes as a duty*.") (emphasis added). Thus, when a dispute arises as to whether a superseding agreement replaced an original agreement, the question necessarily concerns the *existence* of a valid legal obligation in the original agreement. Put differently, the dispute concerns whether a party's duties under a contract have been discharged by virtue of a superseding agreement.

This is different than a dispute over the scope or meaning of specific terms in a single contract. For example, litigants might dispute whether the term "claims" in an arbitration agreement includes "the evidentiary doctrines of *res ipsa loquitor* and spoliation," *Mahyari v. Wal-Mart Stores, Inc.*, No. 21-cv-1653, 2022 WL 117772, at *2 (N.D. Tex. Jan. 12, 2022), or whether the word "partners" in an arbitration agreement includes customers of a business, *Castillo v. Alere N. Am., Inc.*, No. 21-cv-1519, 2023 WL 4630621, at *6 (S.D. Cal. July 19, 2023). This is a classic exercise in interpreting an operative contract. But if the parties in those examples instead argued that the arbitration agreements had been superseded by a new contract that did not require

arbitration, the question is not what "claims" or "partners" means but whether those words have any legally enforceable meaning. If the party arguing supersession is right, the provision containing them has been discharged and is thus without legal effect. If the other side wins the day, it is not only because the first contract's language requires it; it is because the second contract did not extinguish the earlier agreement.

Therefore, when the question concerns supersession, courts ask whether the parties intended the second contract to replace (or modify) the first.[2] This begins with looking to the text of the superseding contract, because the text is almost always held to be the best indicator of the parties' intent. 11 *Williston on Contracts* § 32:3. Often, the text of the second contract alone decides the question because it is conclusive evidence of the parties' intent to supersede.[3] And

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[2] *See, e.g.*, 17 C.J.S. *Contracts* § 603 ("Whether the prior contract is discharged depends on the intention of the parties, and a discharge will not result from a new contract, where the contrary intention of the parties is apparent.") (footnote omitted); *id.* § 557 ("An obligation of a former written agreement is discharged only insofar as it is inconsistent with the new agreement, unless it is shown that the parties intended the new contract to supersede the old contract entirely.") (footnote omitted); *Mut. Rsrv. Ass'n v. Zeran*, 277 P. 984, 987 (Wash. 1929) (examining the parties' conduct surrounding the formation of the second contract because "[t]o work a novation it must appear from what was done that the parties intended the new contract to cancel and supersede the original contract").

[3] *See, e.g.*, *Mich. Civ. Jur. Contracts* § 224 ("[T]he existence of an integration clause in a later contract necessarily indicates that the parties intended the later contract to supersede the earlier contract and, thus, provides dispositive evidence with regard to

while the court may need to examine the language in the first contract as well, it looks at it for a different reason. Specifically, it is not an exercise in "interpretation" of the first contract (as that word is usually employed) but rather to determine whether the second contract conflicts with the first, because courts treat such a conflict as evidence that the parties intended for the second contract to replace or modify the first.[4]

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which contract is controlling."); *ADR N. Am., L.L.C. v. Agway, Inc.*, 303 F.3d 653, 658 (6th Cir. 2002) (applying Michigan law) ("A written integration clause is conclusive evidence that the parties intended the document to be the final and complete expression of their agreement. It is also conclusive evidence that the parties intended to supersede any prior contract on the same subject matter.") (citations omitted); *Ryan v. BuckleySandler, LLP*, 69 F. Supp. 3d 140, 145-46 (D.D.C. 2014) (looking solely to subject matter of subsequent termination agreement to determine whether the parties intended that it supersede previously agreed arbitration agreement).

[4] *See, e.g.*, 17 C.J.S. *Contracts* § 557 ("When a modification is inconsistent with a term of the original contract, the modification is interpreted as including an agreement to rescind the inconsistent term."); *Lanning Constr., Inc. v. Rozell*, 320 N.W.2d 522, 523-24 (S.D. 1982) (stating that "to determine the preliminary question of whether the parties intended to have the written contract supersede the alleged oral agreement," the court "may examine extrinsic evidence of the circumstances surrounding the making of the agreement" and "must determine whether the writing concerned itself with the same matter as the oral negotiations or stipulations did") (footnote and citations omitted); *In re Wise's Est.*, 13 N.W.2d 146, 152 (Neb. 1944) ("A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter, where the terms of the later are inconsistent with those of the former so that

In sum, when the dispute concerns the potential supersession of a contract or terms within a contract, that is fundamentally a dispute over whether the at-issue obligations from the first contract still *exist*.

II. There is no basis for treating arbitration agreements (including delegation agreements) differently when a dispute arises over whether they have been superseded.

As this Court has repeatedly emphasized, the FAA places arbitration contracts on equal footing with all other types. The congressional policy regarding arbitration enacted in the FAA "is about treating arbitration contracts like all others," and not any differently. *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022). The statute makes arbitration agreements "as enforceable" as any other contract, "but not more so" (or less so). *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). To decide whether an arbitration or delegation agreement has been superseded, then, a court should do what it always does under the FAA and apply "ordinary state-law principles" of contract law. *First Options*, 514 U.S. at 944.

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they cannot subsist together."); *St. Croix Co. v. Sea Coast Canning Co.*, 96 A. 1059, 1062 (Me. 1916) ("[T]he two alleged contracts embrace for the most part the same subject–matter, and, as to matters embraced, they are inconsistent. It could not have been intended that both should be in force at the same time.").

Like any contract, the "first principle" of an arbitration agreement is that it is "strictly a matter of consent." *Viking River Cruises v. Moriana*, 596 U.S. 639, 651 (2022) (internal quotation marks omitted). Absent that consent, a court cannot compel a dispute to arbitration. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348-49 (2011). And in arbitration, an arbitrator's power is derived solely from the parties' consent. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682-83 (2010). Arbitrators "wield only the authority they are given" under the parties' contract, and their task, "at bottom," is "to give effect to the intent of the parties" as manifested in that contract. *Lamps Plus*, 139 S. Ct. at 1416 (quotation omitted).

Here, the central question is whether the parties consented to a superseding contract with terms discharging their prior agreement to arbitrate. Only a court may answer this question, because before it has answered it, the court does not know whether the parties have validly consented to arbitration. No dispute can be referred to arbitration without some finding of consent, and here, that requires the court to first decide whether the original terms were superseded and extinguished by the second contract. If the court finds the parties did discharge their prior arbitration agreement, the superseding contract controls—whatever its terms may be. But a court cannot abstain from deciding whether superseding contract terms have been formed in the first instance, because that decision is necessary to determine

whether the parties have presently consented to arbitration *at all*.

Thus, no matter how broad the language in a delegation clause may be, that language is irrelevant if it is not legally cognizable, *e.g.*, it has been discharged by a subsequent agreement. The parties cannot delegate the issue of whether they assented to the contract that contains the delegation clause; if there is no consent, there is no authority to delegate. That is true when the question is whether they ever assented or whether they originally assented but revoked that consent in a superseding contract. Without valid consent by the counterparties, there can be no delegation. *See* David Horton, *Infinite Arbitration Clauses*, 168 U. Pa. L. Rev. 633, 683-84 (2020) (explaining, and discussing the principles behind, why "an agreement challenge to a delegation provision" cannot be delegated to an arbitrator because "the FAA preserves for the courts any claim at all that necessarily calls an agreement to arbitrate into question") (cleaned up).

Indeed, Section 4 of the FAA evinces this division of authority between the courts and arbitrators. That provision creates a procedure for courts to resolve disputes over whether there is a valid agreement to arbitrate in the first instance before granting a petition seeking an order to compel arbitration. Section 4 provides that a court "shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement" only after hearing from the parties and "being satisfied that the making of the agreement for arbitration . . .

is not in issue." 9 U.S.C. § 4. Section 4 is not directly at issue in this case, but the procedure it creates is further evidence Congress envisioned that precisely these kinds of disputes are the ones reserved for the court.

This case is distinct from one in which an enforceable arbitration agreement exists between two parties, but they disagree whether that agreement covers a particular dispute. That would be a paradigmatic example of an argument over the scope of an arbitration agreement. Indeed, Coinbase itself acknowledges this idea: the "scope" of an arbitration agreement is about "what issues are arbitrable" under that agreement, Pet. Br. at 5, not about whether the arbitration agreement itself remains valid after a later contract. When parties sign delegation agreements, they often agree to arbitrate questions of scope. But they do not—and cannot—arbitrate whether they have even consented to arbitration. That question must come first. Otherwise, two parties "would never" be able to agree to superseding contract terms that "rid themselves" of a prior delegation agreement; they would "forever be bound" by it, no matter their later agreements. *Field Intel. Inc. v. Xylem Dewatering Sols. Inc.*, 49 F.4th 351, 358 (3d Cir. 2022).

Because this is about whether consent was extinguished by a subsequent contract, and not the scope of that consent, there is no presumption in favor of arbitration. This Court has emphasized that a presumption favoring arbitration can be applied "only where a *validly formed and enforceable* arbitration agreement is ambiguous about whether it covers the

dispute" at issue. *Granite Rock*, 561 U.S. at 301 (emphasis added); *see also First Options*, 514 U.S. at 944-45 (presumptions reversed for the questions "*who* (primarily) should decide arbitrability," *i.e.*, whether "the parties agreed" to a delegation clause, and "*whether* a particular merits-related dispute is arbitrable because it is within the scope" of a valid agreement) (emphasis in original).

Under ordinary contract law principles, there is no room for a presumption favoring arbitration until a court first finds that the parties consented to arbitrate in the first place. Before the Court answers the foundational "who should decide" question—here, after determining whether the superseding contract extinguished the previous arbitration agreement—it cannot presume that there is a current, legally cognizable agreement between the parties to commit their disputes (including disputes over the scope of delegation) to a private arbitral forum. Inverting this sequence by asking the arbitrator to decide this question would create a special rule for arbitration agreements not found in the common law of contracts.

CONCLUSION

The Court should affirm the Ninth Circuit's decision.

Respectfully submitted,

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