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 AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and the courts. Public Citizen works on a wide range of issues, including enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has a longstanding interest in issues concerning the enforcement of mandatory predispute arbitration agreements, and it has appeared as amicus curiae in many cases involving such issues in this Court and other federal and state courts.

Issues concerning arbitration agreements with "delegation clauses"—provisions that grant arbitrators authority to decide issues concerning the enforceability and scope of the arbitration agreements of which they are a part—are of particular interest because the question whether a court or arbitrator decides such issues often plays a critical role in arbitration cases. Here, for example, the issue is whether a delegation clause divests the courts of authority to decide whether a subsequent contract supersedes the application of a delegation clause (as well as the arbitration provision of which it is a part) to the subject matter of this lawsuit. Reversal of the decision below would require courts to force parties to arbitrate under a delegation clause without first determining that the delegation remained applicable to the case. The Federal Arbitration Act (FAA), however, does not permit courts to compel arbitration of a dispute without determining that the parties are contractually bound

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief.

to do so. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 301–03 (2010).

In *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019), Public Citizen filed an amicus brief addressing an argument—similar to some of the arguments that petitioner Coinbase advances here—that courts are required to enforce a delegation clause without first determining that the parties' agreement is subject to enforcement under the FAA. Agreeing with our refutation of this argument, this Court held that a delegation clause cannot bootstrap its way to enforceability without regard to the limits imposed by the FAA, because "[a] delegation clause is merely a specialized type of arbitration agreement, and the Act 'operates on this additional arbitration agreement just as it does on any other.' " *Id.* at 538 (quoting *Rent-A-Center, West, Inc. v. Jackson,* 561 U.S. 63, 70 (2010)). Public Citizen submits this brief to explain that this same basic principle requires a court to determine whether a subsequent contract has superseded a delegation clause in whole or in part before it enforces the delegation clause and compels arbitration of whether the parties' underlying substantive dispute is arbitrable.

SUMMARY OF ARGUMENT

Under the FAA, a court cannot require a party to arbitrate a dispute unless, applying ordinary principles of contract law, it finds that the party is bound by a valid agreement to arbitrate that dispute. This cardinal principle applies just as fully to a "delegation clause" as to the broader arbitration agreement of which the clause is a part. A delegation clause is just an agreement to arbitrate the issue whether an underlying dispute between the parties is arbitrable. If the parties never agreed to arbitrate the issue of the

arbitrability of their disputes, or if they subsequently entered into an agreement superseding an earlier agreement to do so, a court cannot compel them to arbitrate the issue of arbitrability.

To be sure, this Court has held that, for purposes of assessing their *validity*, courts must treat delegation clauses as severable from the broader arbitration agreements of which they are part, just as they must treat arbitration agreements as severable from the substantive contracts in which they typically are embedded. Under this "severability principle," parties must specifically challenge the validity of arbitration agreements whose enforcement they wish to avoid.

This Court has not, however, applied the severability principle when a party's challenge involves determining the existence or terms of an arbitration agreement. When a contract between two parties contains an arbitration agreement, or when an arbitration agreement contains a delegation clause, the parties typically do not enter into the agreements separately. Thus, when a party asserts that it did not enter into an agreement at all, that contract-formation challenge necessarily applies to all parts of the agreement, including any arbitration provision that it contains.

The same is obviously true when a party asserts that a subsequent agreement supersedes a contract in its entirety. Likewise, if a later contract between two parties supersedes an earlier arbitration agreement in its entirety, or modifies both the substantive arbitration agreement and the embedded delegation clause, the later contract may be grounds for holding both the delegation clause and the broader arbitration agreement inapplicable to a particular dispute covered by the later agreement.

Moreover, even where the severability principle applies, the Court has never insisted that a challenge *specifically* directed at the validity of an arbitration agreement must be *uniquely* applicable to that agreement: Both an arbitration agreement and a broader agreement of which it is a part may be invalid for the same reasons, as long as those reasons are specifically applicable to both the arbitration agreement and the broader agreement. Similarly, when a party asserts that a later agreement supersedes a contract and an embedded arbitration agreement (or an arbitration agreement and an embedded delegation clause), that challenge necessarily applies to each.

Accordingly, when, as in this case, a party argues that a later agreement supersedes or modifies a delegation clause in a way that makes the clause inapplicable to the arbitrability dispute presented by a case, a court may not enforce the delegation clause without first resolving that argument. And in doing so, a court may not require that the later agreement use any particular form of words to supersede or modify the delegation clause. Delegation clauses themselves are disfavored because they depart from the ordinary expectations of parties to an arbitration agreement, and this Court has held that an agreement to arbitrate arbitrability may be found only if a contract clearly expresses such an agreement. There is no comparable basis for requiring a clear statement to *supersede* a delegation clause. As in other matters involving arbitration agreements, courts should instead apply generally applicable contract law to determine whether a delegation clause continues to bind the parties to a particular dispute.

ARGUMENT

I. Before enforcing *any* arbitration agreement—including a delegation clause—a court must determine whether the agreement was formed, whether it still exists, whether it has been superseded or modified by subsequent agreements, and whether it requires the parties to arbitrate the question at issue.

This Court has repeatedly insisted that arbitration is a "matter of contract." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). "The most basic corollary of the principle that arbitration is a matter of consent is that 'a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration.'" *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 659–60 (2022) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995)). Under the FAA, a party "cannot be coerced into arbitrating a claim, issue, or dispute absent an affirmative contractual basis for concluding that the party *agreed* to do so." *Id.* at 660 (cleaned up). Accordingly, before a court may compel a party to arbitrate any issue, it must conclude that an existing, valid contract requires the party to arbitrate it. Thus, as the Court emphasized in *Granite Rock*, the existence of an applicable arbitration clause is "always" an issue for a court to decide in a controversy over whether to compel arbitration. 561 U.S. at 297.

In this respect, a delegation clause is no different from any other arbitration agreement. As the Court held in *Rent-A-Center*, a delegation clause is nothing more than a specialized type of arbitration provision: one that requires arbitration concerning the

applicability or validity of the arbitration provision of which it is a part (in the same way that that arbitration provision may in turn require arbitration concerning the applicability or validity of the broader contract of which *it* is a part). 561 U.S. at 68–70. Critically, *Rent-A-Center* explained that "the FAA operates on this additional arbitration agreement just as it does any other." *Id.* at 70.

The consequence of treating a delegation clause as "an additional, antecedent agreement [that] the party seeking arbitration asks [a] federal court to enforce," *id.*, is that a court may enforce it only under the conditions in which the FAA permits enforcement of an arbitration agreement. Thus, a court must determine whether the delegation clause was formed and is binding on the parties before the court, *see Granite Rock*, 561 U.S. at 303, whether it applies to the arbitrability question at issue, *see id.*, whether it is valid and enforceable under generally applicable contract law, *see Rent-A-Center*, 561 U.S. at 70, and whether the contract in which the clause is found is subject to the FAA, *see New Prime*, 139 S. Ct. at 538.

Similarly, in determining whether to compel a party to arbitrate a question of arbitrability under a delegation clause, a court must consider whether a subsequent agreement between the parties has supplanted application of the delegation clause to the arbitrability issue presented in the case. After all, a party's obligation to arbitrate *anything*—including arbitrability—depends on whether the party is contractually bound to arbitrate that question. If two parties, having earlier entered into an arbitration agreement with a purported delegation clause, later enter into an agreement *not* to arbitrate certain matters of arbitrability, the required "affirmative contractual basis for

concluding that the parties *agreed*" to arbitrate those issues, *Viking River*, 596 U.S. at 660, is necessarily absent.

II. The severability doctrine cannot prevent a court from deciding whether a subsequent agreement supersedes or modifies a delegation clause.

Petitioner Coinbase argues at length that the FAA's severability rule, announced in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 402–04 (1967), and applied to delegation clauses in *Rent-A-Center*, 561 U.S. at 70–71, precludes a court from applying normal principles of contract construction to determine whether a subsequent agreement supersedes or modifies a delegation clause. That argument rests on significant misunderstandings of the scope and meaning of the severability doctrine.

Under that doctrine, the *validity* of an agreement to arbitrate (including a delegation clause) is a separate question from the validity of the larger contract of which it is a part. *See Rent-A-Center*, 561 U.S. at 70–71; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444–46 (2006); *Prima Paint*, 388 U.S. at 402–04. Thus, unless the validity of an arbitration provision is specifically challenged, the provision may be enforceable even if the contract of which it is a part is invalid, and a party may therefore be required to arbitrate its challenge to the validity of the contract as a whole. *See Rent-A-Center*, 561 U.S. at 71; *Buckeye*, 546 U.S. at 444–45; *Prima Paint*, 388 U.S. at 404.

In *Rent-A-Center*, the Court treated a delegation clause as a separate arbitration agreement that is severable from the arbitration provision of which it is a part, in the same way that the arbitration provision is

severable from the larger contract that encompasses it. *See* 561 U.S. at 68–72. The Court's treatment of delegation clauses as specialized arbitration provisions severable from the larger arbitration provisions of which they are a part means that a valid delegation clause may require arbitration of the validity of the arbitration provision as a whole. *Rent-A-Center*, 561 U.S. at 72. A court may not, therefore, deny enforcement of a delegation clause solely because *other* aspects of the arbitration agreement that includes it are invalid. Rather, when a party seeks to avoid enforcement of the delegation clause on grounds of invalidity, "the basis of challenge [must] be directed specifically" to that separate agreement to arbitrate. *Id.* at 71.

As the Court explained in *Rent-A-Center*, the severability doctrine is based on the language of section 2 of the FAA, 9 U.S.C. §2, which makes an arbitration provision that is subject to the FAA " 'valid, irrevocable and enforceable' *without mention* of the validity of the contract in which it is contained." 561 U.S. at 70. This language, as the Court has explained, requires severability specifically of validity (and presumably also enforceability and irrevocability) issues, which are different from other prerequisites to application of the FAA, such as whether a contract containing an arbitration provision was ever formed. *Rent-A-Center*, 561 U.S. at 69 & n.1, 70 & n.2; *Buckeye*, 546 U.S. at 444 & n.1. Reflecting the statutory basis of the severability doctrine, this Court has applied the doctrine only to validity and related issues.

The severability doctrine does not encompass the question whether a contractual obligation to arbitrate the arbitrability of a particular dispute exists at all. For example, as the Court's decisions teach, the severability doctrine does not apply to the fundamental

question whether the parties have entered into a contract containing an arbitration provision. The FAA provides for enforcement of an arbitration provision if it is in a "contract," 9 U.S.C. § 2, and the existence, though not the validity, of that contract is a prerequisite to any application of the FAA, which is always "a matter of contract between the parties." *First Options*, 514 U.S. at 943. Thus, the Court in both *Rent-A-Center* and *Buckeye* specifically noted that it was not holding that the severability principle applies to the issue whether a contract exists at all. *See Rent-A-Center*, 561 U.S. at 70 n.2; *Buckeye*, 546 U.S. at 444 n.1.

Confirming this limitation on the severability holdings of *Rent-A-Center* and *Buckeye*, the Court held in *Granite Rock* that a court must "always" decide whether the parties entered into the agreement to arbitrate, 561 U.S. at 297, 301—an issue that will typically be the same as the question whether they entered into the contract of which the arbitration provision is a part. *See id.* at 303 (noting that formation of the arbitration agreement at issue depended on formation of the collective bargaining agreement in which it was found). The severability principle, the Court held, does not apply where a party claims the agreement to arbitrate was never concluded. *Id.* at 301. A successful demonstration that the parties did not enter into the contract containing the arbitration provision will necessarily preclude enforcement of the purported arbitration agreement, because a party who has not agreed to *anything* cannot have agreed to arbitrate. *See, e.g.*, *Janiga v. Questar Cap. Corp.*, 615

F.3d 735, 741–42 (7th Cir.), *cert. denied*, 562 U.S. 1110 (2010).[2]

In the same way, claims that a later agreement supersedes an earlier agreement in its entirety, including all its parts, necessarily raise challenges to the continued existence of an embedded arbitration agreement that a court cannot evade by invoking the severability doctrine. The same is true when a party contends that a later agreement has supplanted both an arbitration clause and its delegation clause either in their entirety or, as in this case, in particular circumstances presented by the case. The statutory basis for applying the severability principle to issues of validity, irrevocability, and enforceability is not present in such a case. Rather, such an argument challenges whether the party is subject to an agreement to arbitrate the issue as to which arbitration is sought (arbitrability of a specific dispute, in the case of a delegation clause)—a question that the court must always resolve. *See Granite Rock*, 561 U.S. at 297. This inquiry may require consideration of the effect of the later contract on the existence and nature of the contract containing the arbitration provision, unlike the issue of the *validity* of the arbitration provision, which *Prima Paint* and its progeny hold to be a separate question from the validity of the contract in which it is embedded.

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[2] Similarly, cases postdating *Granite Rock* have held that a court must decide the basic question whether a third party is bound to arbitrate anything, including arbitrability, under a contract. *See, e.g.*, *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1127 (9th Cir.), *cert. denied sub nom. Toyota Motor Corp. v. Choi*, 571 U.S. 818 (2013).

Moreover, even where the severability principle applies, it does not provide that an arbitration provision cannot be invalid for a reason that may *also* apply to the agreement of which it is a part. The Court's decisions "require the basis of challenge to be directed *specifically* to the agreement to arbitrate" that a court has been asked to enforce, *Rent-A-Center*, 561 U.S. at 71 (emphasis added), not that the basis of the challenge must apply *uniquely* to that agreement. As long as the ground of invalidity applies to the arbitration provision directly, it may also apply to other provisions of the contract or the contract as a whole. *See MacDonald v. CashCall, Inc.*, 883 F.3d 220, 226–27, 227 n.5 (3d Cir. 2018) ("In specifically challenging a delegation clause, a party may rely on the same arguments that it employs to contest the enforceability of other arbitration agreement provisions." (citing *Rent-A-Center*, 561 U.S. at 74)). For example, where a state statute prohibits enforcement of any arbitration agreement in an insurance contract, that statute provides a specific basis for challenging a delegation clause in an insurance contract even though it is equally a basis for challenging the arbitration provision that includes the delegation clause. *See Minnieland Priv. Day Sch., Inc. v. Applied Underwriters Captive Risk Assur. Co.*, 867 F.3d 449, 455–56 (4th Cir. 2017), *cert. denied*, 583 U.S. 1102 (2018).

Under *Rent-A-Center*, *Buckeye*, and *Prima Paint*, when a court orders arbitration of the validity of a contract under an arbitration provision contained in that contract—or arbitration of the validity of an arbitration provision under a delegation clause contained in the provision—the court is determining that there is a valid and enforceable arbitration agreement that is subject to the FAA and that requires arbitration of the

matter in question. Thus, if an arbitration provision, such as a delegation clause, is not itself valid, a court *cannot* enforce it: The court "must consider" a challenge to the validity of any agreement to arbitrate (including a delegation clause) "before ordering compliance with that agreement." *Rent-A-Center*, 561 U.S. at 71.

By the same token, before ordering compliance with any arbitration provision, a court must consider whether a party is subject to an agreement to arbitrate the issue as to which an opposing party seeks to compel arbitration. An argument that a later agreement has superseded a prior delegation clause applies specifically to whether a party can be required to arbitrate by the delegation clause regardless of whether the later agreement also superseded the entire arbitration agreement and/or the broader contract of which the arbitration agreement is a part. Simply put, a later contract is a specific basis for refusing enforcement of any and all parts of a previous contract that it supersedes.

III. The FAA does not require a clear statement to supersede or modify a delegation clause.

Petitioner's argument effectively asks this Court to require a clear statement before a later contract can be deemed to supersede or limit a delegation clause in an earlier arbitration agreement. As demonstrated above, the severability principle provides no basis for preventing a court from fully considering the argument that a later agreement between the parties should be read to foreclose enforcement of an earlier delegation clause. Nor does anything in this Court's FAA jurisprudence support the view that, in deciding that issue, a court should rely on a newly minted clear-

statement rule rather than ordinary principles of contract construction.

On the contrary, this Court has held that it takes a clear statement to *create* a delegation clause because a contract that is silent or ambiguous with respect to whether an arbitrator can determine the validity or scope of an arbitration agreement is unlikely to have been intended to allow "arbitrators [to] decide the scope of their own powers." *First Options*, 514 U.S. at 945. Thus, courts may not "interpret silence or ambiguity on the 'who should decide arbitrability' point as giving an arbitrator that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.*; *see Rent-A-Center*, 561 U.S. at 69 n.1 (describing the basis for the "heightened standard" imposed by *First Options*). Similarly, the Court has read the FAA to impose a heightened standard of clarity before an arbitration agreement will be read to authorize class proceedings, which the Court has viewed as so far beyond the normal understanding of what arbitration entails as to "fundamentally change[ ] the nature" of arbitration as "envisioned by the FAA." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412 (2019).

No similar basis exists for imposing a clear-statement standard here, because a contract that supersedes a delegation clause merely *restores* the status quo to what parties to an arbitration agreement would reasonably expect. *See First Options*, 514 U.S. at 945. And limiting or eliminating a delegation clause does not fundamentally change the nature of arbitration as contemplated by the FAA, under which issues of arbitrability are "typically … for judicial determination." *Granite Rock*, 561 U.S. at 296. Rather, because

construing a contract to supersede a delegation clause does not "tak[e] the individualized and informal *procedures* characteristic of traditional arbitration off the table," such a construction presents no conflict with the FAA's requirements. *Viking River*, 596 U.S. at 656. Nor does application of ordinary principles of contract law in this setting discriminate against arbitration or otherwise conflict with policies embodied in the FAA. *See Lamps Plus*, 139 S. Ct. at 1417–18. Indeed, given that the FAA's own policies *disfavor* delegation clauses, *see id.* at 1416–17, application of neutral principles of contract law to determine whether parties intended to displace such a clause could not possibly pose such a conflict.

Thus, as is generally true in matters involving issues concerning the formation and construction of arbitration agreements, a court determining whether the parties have superseded a delegation clause should "rely[ ] on state contract principles." *Id.* at 1415. Depending on the language and context of the relevant agreements, a court may determine that a subsequent agreement was intended to supersede both an arbitration agreement and its embedded delegation clause, either in their entirety or as applied to particular issues. In other circumstances, a court may conclude that a later contract modifies only the substantive scope of an arbitration agreement while leaving its delegation clause intact (or, conversely, that it modifies only the delegation clause without modifying the substantive scope of the arbitration agreement). The FAA does not impose any applicable requirements of clarity on this inquiry beyond the *First Options* rule that the relevant contracts must clearly and unmistakably reflect intent to delegate the specific contested issue of arbitrability to the arbitrator. The decision of

the court of appeals in this case is fully consistent with these principles.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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