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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 DISCLOSURE STATEMENT

The disclosure made in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

The briefing before this Court has narrowed the scope of the parties' disagreement. As Respondents now correctly recognize, the Ninth Circuit erred in applying a special "contract formation" exception to the delegation clause in this case. According to Respondents, this "case is not about contract 'formation' or 'existence,' " Response 1, and the Ninth Circuit's "reasoning was inaccurate," *id.* at 50. Regardless of whether a "contract formation" exception is theoretically available in some other case, it would not apply here. This case just does not involve a challenge to contract formation.

Respondents agree they each entered into a contract (the User Agreement) with an arbitration agreement and a delegation clause. *Id.* at 1-2. Respondents also

agree that each arbitration agreement continued to govern disputes between the parties falling within its scope even after they entered into a later contract (the sweepstakes official rules). *Id.*; JA 439, 444, 447, 454. The issue before the Court is narrow: whether a court or the arbitrator should decide if the later contract narrowed the scope of the first contract's arbitration agreement such that Respondents' claims against Coinbase fall outside the arbitration agreement's scope.

The parties also largely see eye-to-eye about how the Ninth Circuit should have approached the question presented: Unless Respondents articulated a meritorious "as applied" challenge "specific to" the delegation clause itself, the court should have enforced the parties' delegation clause and required an arbitrator to decide the scope of the arbitration agreement and whether it covers Respondents' claims. *Rent-A-Ctr., W., Inc.* v. *Jackson*, 561 U.S. 63, 73, 74 (2010) (emphasis omitted); *see, e.g.*, Response 24-27.

Respondents did *not* articulate a meritorious as applied challenge to the delegation clause—not below and not here. When a party challenges a delegation clause, the Federal Arbitration Act's (FAA) severability rule imposes two requirements. Coinbase Br. 23-24. Procedurally, the party must formally "direct[]" the challenge to the delegation clause. *Rent-A-Ctr.*, 561 U.S. at 71. Substantively, the party must explain *why* that challenge negates the delegation clause in particular. *See id.* The severability framework flows directly from the FAA's text, and this Court has repeatedly employed it for decades. *See Nitro-Lift Techs., LLC* v. *Howard*, 568 U.S. 17, 20 (2012) (per

curiam); *Rent-A-Ctr.*, 561 U.S. at 73; *Preston* v. *Ferrer*, 552 U.S. 346, 354 (2008); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 445 (2006); *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967).

Here, Respondents claimed to be challenging the "delegation clause." But their challenge faltered at the substantive step of the severability rule. Nothing in the official rules displaced the delegation clause. The official rules neither reference the delegation clause nor speak to the question that clause answers: *Does a court or an arbitrator decide* whether a dispute is arbitrable or not? Instead, at most, the official rules may be related to the underlying arbitrability question that the arbitrator will have to decide: Do Respondents' claims against Coinbase fall inside or outside the scope of the arbitration agreement? The question about *what disputes* the arbitration agreement covers is entirely distinct from the antecedent question of *who decides* what disputes it covers.

Respondents' arguments muddle these two distinct inquiries. As Respondents see it, the forum selection clause in the sweepstakes' official rules applies to "controversies regarding the promotion," their claims involve the promotion, and thus their case should be litigated rather than arbitrated. Response 26 (capitalizations omitted). But that argument is all about the *scope* of the arbitration clause and has nothing to do with the antecedent question of *delegation* before this Court: Who decides arbitrability in this case, a court or an arbitrator?

Over and over, Respondents try to evade the operation of the parties' delegation clause by portraying

arguments about the scope of the arbitration clause as challenges to the delegation clause. That approach is flatly inconsistent with this Court's precedent. In *Rent-A-Center*, 561 U.S. at 71-72, this Court instructed courts to clearly differentiate between challenges as applied to the delegation clause substantively, and challenges to the broader arbitration agreement. And, in *Henry Schein*, this Court confirmed that, when faced with a delegation clause, a court has "no business weighing" "the threshold issue of arbitrability" and may only consider challenges *to the delegation clause*. *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 529-530 (2019) (quotation marks omitted). *Henry Schein* could not be clearer: Courts may not "short-circuit the process and decide the arbitrability question themselves," even "if the argument that the arbitration agreement applies to the particular dispute is 'wholly groundless.' " *Id.* at 527-528.

Respondents seek what *Henry Schein*, *Rent-A-Center*, and, more fundamentally, the FAA forbid: a court sidestepping the delegation clause and deciding arbitrability for itself. Respondents' view is that because they claim a second contract narrowed the scope of the arbitration agreement in the first contract, it follows that the delegation clause has been similarly narrowed and a court should decide whether the dispute at issue is arbitrable. Response 37. That logic is circular. The whole point of the parties' delegation clause is for the arbitrator to decide "whether their arbitration agreement applies to the particular dispute." *Henry Schein*, 139 S. Ct. at 527. The force of the

delegation clause does *not* turn on the result of that inquiry.

In short, ruling for Respondents would collapse the antecedent question of *who decides* an arbitrability challenge with the merits of that challenge, fatally undermining this Court's clear rules for resolving such disputes under the FAA. This Court should reject that approach and reverse the Ninth Circuit's flawed decision.

ARGUMENT

I. RESPONDENTS HAVE CORRECTLY ABANDONED THE NINTH CIRCUIT'S ERRONEOUS DECISION.

The Ninth Circuit applied what it said was a special exception to the FAA's normal framework for "contract formation" challenges. JA 583. But not even Respondents defend that approach, and the Court should reject it.

A. The FAA's severability rule flows from the statute's plain text. Coinbase Br. 7-9. Section 2 treats all arbitration agreements as " 'valid, irrevocable, and enforceable' *without mention* of the validity of the contract in which it is contained." *Rent-A-Ctr.*, 561 U.S. at 70 (quoting 9 U.S.C. § 2). Section 4 directs a court to enforce a specific arbitration agreement "once it is satisfied that 'the making of the agreement for arbitration * * * is not in issue.' " *Prima Paint Corp.*, 388 U.S. at 403 (quoting 9 U.S.C. § 4).

In this case, the specific arbitration agreement Coinbase seeks to enforce is the parties' delegation clause—a mini-agreement to arbitrate threshold disputes about arbitrability. The severability rule

applies to delegation clauses. *Rent-A-Ctr.*, 561 U.S. at 71. A court may thus adjudicate challenges directed to "the making of the" *delegation clause*. 9 U.S.C. § 4. But if a party does not present a meritorious challenge to the *delegation clause*, the court must enforce that mini-agreement, and allow an arbitrator to decide threshold arbitrability issues. *Rent-A-Ctr.*, 561 U.S. at 71.

The Ninth Circuit did not follow the severability rule or enforce the delegation clause. Instead, the Ninth Circuit characterized Respondents' arbitrability challenge as one of "contract formation" and held that arbitrability disputes involving "contract formation" are categorically excluded from *all* delegation clauses. JA 583 ("Issues of contract formation may not be delegated to an arbitrator."). According to the Ninth Circuit, "the *existence* rather than the scope of an arbitration agreement is at issue here." *Id.* at 585 (emphasis added). Applying that flawed approach, the Ninth Circuit sidestepped the antecedent delegation clause and decided arbitrability for itself. *Id.*

B. Respondents now—correctly—disclaim the Ninth Circuit's reasoning. According to Respondents, this case does not involve "contract 'formation' or existence,' " "Coinbase is correct that those words did not accurately reflect the parties' contractual dispute[]," and "the court's reasoning was inaccurate." Response 1, 20, 50.

There is a reason Respondents run away from the decision below: That decision is wrong.

Even if a "contract formation" or "existence" exception to enforcing a delegation clause might apply in

some other case, it would not apply here. *See* Coinbase Br. 37-38. The parties consented to arbitrate two things: (1) "any dispute arising out of or relating to [the User] Agreement or the Coinbase Services," and (2) gateway questions of arbitrability, including "the enforceability, revocability, scope, or validity of the arbitration agreement or any portion of the arbitration agreement." JA 217, 218 (some capitalizations omitted). When Coinbase moved to compel arbitration, the parties agreed that the arbitration agreement and the delegation clause were validly formed and governed disputes between the parties that fell within their scope. The only disagreement was "whether their arbitration agreement applies to the particular" claims Respondents brought *in this case*. *Henry Schein*, 139 S. Ct. at 527. That is a garden-variety arbitrability dispute routinely delegated to arbitrators. *See* Chamber of Commerce Br. 7-11.

C. Despite Respondents' recognition that the Ninth Circuit's reasoning cannot stand, *amici* seek to resuscitate it, arguing that this case does in fact concern contract formation. But there is little real daylight between their approach and Coinbase's. Instead, if anything, Respondents' *amici* confirm the Ninth Circuit erred, and provide this Court a roadmap for reversing.[1]

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[1] *Amici* cannot resurrect arguments in defense of the Ninth Circuit's opinion that Respondents affirmatively waived. *See United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 267 n.4 (2010) ("[W]e do not ordinarily address issues raised only by *amici*.") (citation omitted).

Amici argue that whether a delegation clause has been displaced by a later agreement is a matter of ordinary state-law contract principles. *See* Public Citizen Br. 2; Scholars Br. 13. Coinbase agrees: The FAA's severability rule permits a court to hear and resolve such *as-applied* challenges to delegation clauses. *See* Coinbase Br. 38-44. The problem is that the Ninth Circuit did *not* ask whether the official rules altered the parties' contractual agreement that an arbitrator should resolve any disputes concerning whether claims were subject to arbitration. Instead, the Ninth Circuit labeled the parties' dispute over whether Respondents' claims are *arbitrable* as a "contract formation" challenge, and held that such challenges can never be delegated. JA 583-586. In other words, the Ninth Circuit did not focus on whether the official rules superseded the delegation clause or the consent that clause embodies.

Amici also spend pages trying to distinguish "formation" from "scope" challenges. *See* Scholars Br. 5-11. But that distinction is irrelevant under *amici*'s own approach. The Ninth Circuit sought to distinguish "scope" from "formation" challenges because it held that the latter could not be delegated to an arbitrator. In contrast, *amici* appear to agree that the correct question is whether the official rules displaced the delegation clause itself. Regardless, *amici*'s hairsplitting exercise demonstrates the folly in the Ninth Circuit's decision—which, again, neither party defends. The Ninth Circuit's framework invites impossible line-drawing questions about whether a challenge involves "formation" versus "scope," encourages parties resisting arbitration to recharacterize every

challenge as involving "formation," and will enmesh this Court in countless follow-on cases.

* * *

The Court has vigorously policed lower court efforts to "engraft [their] own exceptions onto the" FAA's plain "statutory text." *Henry Schein*, 139 S. Ct. at 530, and rejected the notion that "the FAA has 'no application' to 'contract formation issues,' " *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 581 U.S. 246, 254 (2017). It should hold the same again, and reject the Ninth Circuit's exception to the severability rule—one that, even by its own terms, does not apply here.[2]

II. THE OFFICIAL RULES DID NOT DISPLACE THE PARTIES' DELEGATION CLAUSE.

Because the Ninth Circuit did not decide whether the sweepstakes' official rules displaced the delegation clause, this Court could vacate the judgment below, and instruct the Ninth Circuit to apply the FAA's severability rule. *See* Response 58. However,

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[2] This Court did not endorse a sweeping contract-formation exception to delegation clauses in *Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 561 U.S. 287 (2010). *Granite Rock* was a labor arbitration case with "unusual facts," *id.* at 297, that did not analyze the substantive and procedural aspects of the severability rule. *Granite Rock* referred to certain contract-formation questions as distinct from enforceability or applicability questions of an arbitration agreement. *Id.* at 299-300. But *Granite Rock* never suggested that the contract-formation question in that case could not have been delegated to an arbitrator. *See id.* at 299 n.5. Moreover, *Granite Rock* never suggested that the type of challenge here—*i.e.*, whether a subsequent agreement narrowed the scope of the arbitration agreement—was anything other than an enforceability or applicability challenge. *Id.* at 299-300.

Coinbase respectfully submits that the Court can—and should—decide that issue itself. Doing so will provide guidance on how to apply the severability rule where parties have multiple contracts with different terms. The severability analysis is at the heart of the question presented, and it is straightforward. The split that led this Court to grant certiorari shows that the question presented is a not uncommon occurrence in today's world. A clear decision from this Court would provide important direction to lower courts on the correct application of *Henry Schein* and *Rent-A-Center* in this context.

A. The Official Rules Do Not Disrupt The Delegation Clause.

Respondents styled their challenge as an attack on the delegation clause. In substance, however, the official rules' forum selection clause has no bearing "*as applied* to the delegation provision." *Rent-A-Ctr.*, 561 U.S. at 74. Nothing in the forum selection clause revoked the parties' consent—as embodied in the delegation clause—to have an arbitrator resolve all threshold arbitrability disputes. The parties disagree on whether the official rules, in fact, narrowed or superseded the arbitration agreement such that Respondents' claims fall outside their agreement to arbitrate. But that dispute must be resolved, according to the delegation clause, by an arbitrator and not a court. When an agreement delegates the threshold issue of arbitrability to an arbitrator, a court has "no power to decide the arbitrability issue," even in cases where the invocation of arbitration "appears to the court to be frivolous." *Henry Schein*, 139 S. Ct. at 529 (citation omitted).

The language of the official rules confirms the rules do not displace the delegation clause. The forum selection clause in the official rules consists of two sentences. The first states: "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*." JA 108 (capitalizations omitted and emphasis added). The word "Promotion" is defined to mean the "Dogecoin Sweepstakes." JA 98. While this sentence may bear on the *scope* of the arbitration agreement, it says nothing about *who decides* the scope of the arbitration agreement as allegedly modified by the official rules, and whether a particular dispute falls within or outside that scope.

The second sentence states: "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 (capitalizations omitted). This second sentence similarly does not speak to *who decides* arbitrability. Instead, read in context, this sentence bars an entrant from raising personal jurisdiction or venue defenses for those claims subject to the forum selection clause.

B. Respondents' Counterarguments Are Wrong.

1. Respondents Mischaracterize Coinbase's Argument.

Respondents strive to create the appearance of conflict over the proper legal framework. There is no conflict. Both sides ask the Court to determine whether the official rules specifically invalidate the delegation

clause itself. This is the inquiry mandated by the FAA's severability rule. The parties just disagree on the answer. *Compare* Response 26 (arguing the official rules "modified the User Agreement's delegation provisions"), *with* Coinbase Br. 31 (arguing "the official rules did not displace the delegation clause").

Nevertheless, Respondents (at 42) accuse Coinbase of demanding that the Court interpret the delegation clause in isolation and without reference to any other "relevant and enforceable term[]." Not so. Coinbase agrees that the Court can and should assess whether the official rules displaced the parties' consent to have an arbitrator decide arbitrability, according to ordinary California state-law principles. *See* Coinbase Br. 31-35.

Nor is Coinbase arguing that a defect must be *unique* to a delegation clause to negate it. Some asserted defects can negate both a delegation clause and another contract provision. *See id.* at 23-24, 41-44. Coinbase's argument is that no such defect is presented here. And Coinbase does not demand that parties use magic words to revoke a delegation clause. *Id.* at 52-53; *see* Response 35. The question is whether the parties revoked their delegation clause under ordinary state-law contract principles.

Finally, Coinbase is not asking the Court to apply a novel rule that favors arbitration over litigation. *See Morgan* v. *Sundance, Inc.*, 596 U.S. 411, 418 (2022). Instead, Coinbase is asking the Court to apply the severability rule that flows directly from the FAA's plain text and that has been the lodestar of this Court's precedent for decades. The FAA's severability rule permits a court to consider any contractual term

outside the delegation clause when adjudicating a challenge to a delegation clause. But the term must have some bearing "*as applied* to the delegation" clause. *Rent-A-Ctr.*, 561 U.S. at 74. In this case, the question is whether the official rules have any bearing on the delegation clause—and they do not.[3]

2. Respondents Continue To Conflate Challenges To The Delegation Clause With Challenges To The Arbitration Agreement.

Despite identifying the proper legal inquiry before the Court—did the official rules displace *the delegation clause* as to the arbitrability of certain claims—Respondents make arguments to this Court about *the scope of the parties' arbitration agreement*. *See, e.g.*, Response Br. 25, 29, 37. In doing so, Respondents conflate the question of *who decides* the arbitrability of Respondents' claims with the underlying question of arbitrability.

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[3] Respondents' argument (at 40) that the FAA's severability rule applies "to matters of contract enforcement" but not "matters of contract interpretation" is inscrutable. Enforcing a contract requires interpreting it. Respondents' further suggestion (at 40 n.5) that Coinbase forfeited something below is irrelevant and meritless. The parties agree on the inquiry before the Court, which Coinbase ventilated below. *See, e.g.*, D. Ct. Dkt. 43 at 6 ("[T]he Official Rules say nothing about whether disputes about arbitrability should be delegated to the arbitrator, and therefore the Official Rules do not supersede or modify this delegation clause."); 9th Cir. Dkt. 39 at 17 ("[T]he supposed conflicts between the delegation clause and the forum selection clause neither exist nor preclude the arbitrator from determining arbitrability."). Respondents "waived" any argument to the contrary by failing to raise it their Brief in Opposition. S. Ct. R. 15.2; *see also* Pet. 27.

This Court should emphatically reject Respondents' invitation to ignore the delegation clause and opine on matters of arbitrability reserved for the arbitrator. In *Rent-A-Center*, the Court explained that a delegation clause is a mini-arbitration agreement, "and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Ctr.*, 561 U.S. at 70. When applying the severability rule, a court must carefully differentiate between attacks on the arbitration agreement and the delegation clause. The court may only consider those arguments "*as applied* to the delegation provision." *Id.* at 74. In *Henry Schein*, this Court reiterated that a court has "no business" deciding "an arbitrability question that the parties have delegated to an arbitrator." 139 S. Ct. at 529-530 (citation omitted).

But here Respondents essentially argue that wherever parties narrow the scope of an arbitration agreement to exclude certain claims, they *also* necessarily carve out exceptions to the delegation clause such that an arbitrator cannot decide the application of the arbitration agreement for those claims. This circular logic conflates two separate issues: (i) what is the *scope* of the parties' consent to arbitrate claims, and (ii) *who decides* the scope of that consent. The whole point of the delegation clause is to allow an arbitrator to determine the scope of an arbitration agreement. A delegation clause's force is not somehow dependent on the scope of the arbitration agreement.

Indeed, the opposite is true: Whenever an arbitrator acts pursuant to a delegation clause and determines that claims fall outside the arbitration agreement, the parties consented to the arbitrator making that

threshold arbitrability determination—even if the parties did not consent to arbitrating the merits of those claims.

Each of Respondents' arguments repeats the same basic mistake of conflating *who decides* the arbitrability of claims and the underlying arbitrability question. Consider Respondents' argument that their "pending claims are controversies regarding the promotion," and are not subject to arbitration. Response 25 (capitalizations and quotation marks omitted); *see id.* at 37 (similar argument). That is an argument about whether their claims fall inside or outside of the arbitration clause. No matter whether a court thinks the answer is obvious, a delegation clause means the court "possesses no power to decide the arbitrability issue." *Henry Schein*, 139 S. Ct. at 529. An arbitrator might agree with Respondents and conclude their claims fall outside the arbitration agreement. Or the arbitrator might disagree. But the User Agreement requires an *arbitrator*—not a court—to decide that threshold issue.[4]

The same shortcoming appears in Respondents' argument that claims regarding "[a]ccess to Dogecoin and US Dollar prizes" remain subject to arbitration, even if related to the sweepstakes. Response 29 (citing JA 104). As Respondents see it, all claims that are not about access to the sweepstakes prizes fall outside the scope of the arbitration agreement. But that again highlights the antecedent question present for every

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[4] *Amicus*' argument that the arbitration agreement "plainly does not govern this dispute" is likewise about the scope of the arbitration agreement. American Association for Justice Br. 3.

potential claim: whether a court or arbitrator should decide whether a given claim—regarding "access" to prizes or anything else—falls within or outside the arbitration agreement. The official rules do not say *who decides*. Only the delegation clause does. As a result, the delegation clause continues to control.[5]

3. *The Word "Promotion" Does Not Mean "The Official Rules."*

Respondents also argue that the phrase "controvers[y] regarding the promotion" in the forum selection clause encompasses "[a] dispute over" the official rules. Response 27 (capitalizations omitted). Respondents then argue that the question whether the scope of the arbitration agreement was narrowed is really a dispute over the official rules. This argument is of a piece with Respondents' broader efforts to conflate *who decides* the scope of the arbitration agreement with the scope of the arbitration agreement. But it separately fails for two additional reasons.

First, even if Respondents were correct that the term "promotion" includes disputes over "the official rules" (it does not, *see infra* pp. 17-19), the arbitrator does not "authoritatively interpret" the official rules when deciding the arbitrability of a claim. Response

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[5] Respondents' concession that the arbitration agreement continues to govern claims about "access" to Dogecoin and monetary prizes (at 29) demonstrates why Coinbase will have a strong arbitrability argument before an arbitrator. Respondents' claims involve "[a]cesss," "buy[ing]," and "sell[ing]" Dogecoin using Coinbase's platform and services—which they agree are activities that remain subject to the arbitration agreement. JA 104; *see* Coinbase Br. 13-14.

28 (capitalizations omitted). Instead, the arbitrator focuses on *the arbitration agreement*, determines *the arbitration agreement*'s scope, and determines *the arbitration agreement*'s application to Respondents' claims. Answering that question may at times require the arbitrator to reference external sources, such as the official rules or another contract. "But the interpretive question" delegated to the arbitrator "remains the meaning of the arbitration agreement, accounting for that separate contract." Chamber of Commerce Br. 10.[6]

Second, the word "promotion" does not mean "disputes regarding the official rules." Instead, the word "[p]romotion" is defined to mean the sweepstakes *itself*. JA 98. The contract separately refers to the official rules as the "official rules." JA 99.

If there were any doubt about the meaning of the word "promotion," Respondents' overbroad interpretation creates surplusage, which California law abhors. *See In re Tobacco Cases I*, 111 Cal. Rptr. 3d 313, 318 (Cal. Ct. App. 2010). Here's why: Paragraph ten contains two different choice-of-law provisions. One choice-of-law clause governs the "promotion" and appears in the first sentence of the forum-selection

[6] *Amici* incorrectly suggest that the Court should view its task as enforcing the official rules. *See* American Association for Justice Br. 25; Scholars Br. 9. The FAA empowers parties to enforce arbitration agreements and requires courts to home in on the precise arbitration agreement to be enforced—here, the delegation clause. *See* 9 U.S.C. §§ 2-4. The parties' briefing and the Court's focus is thus properly on the delegation clause, which is "valid, irrevocable, and enforceable," *unless* displaced by the official rules. 9 U.S.C. § 2.

clause. JA 108 ("The laws of the State of California shall govern the promotion.") (capitalizations omitted). The other choice-of-law clause governs the interpretation of the *official rules* and appears later in the same paragraph. *Id*. at 109 (providing that "the laws of the United States of America and the State of California" govern "the interpretation, performance and enforcement of these Official Rules"). Under Respondents' interpretation, the term "promotion" in the first choice-of-law provision also includes disputes regarding the "official rules." But this renders unnecessary the second choice-of-law provision pertaining exclusively to the "official rules."

Respondents recognize their expansive interpretation of the word "promotion" creates surplusage, but they cannot solve it. Respondents suggest (at 28) that the second choice-of-law provision was necessary because the first choice-of-law provision was underinclusive. According to Respondents, the first choice-of-law provision applies to "the promotion," while the forum-selection clause applies to "controversies *regarding* the promotion"—a category which Respondents say is *broader* than the promotion itself and necessitated an additional choice-of-law provision. JA 108 (capitalizations omitted and emphasis added).

This does not compute. The word "regarding" means "with respect to" or "concerning."[7] It is a preposition linking the word "controversies" and "promotion." The word "regarding" does not expand the scope of the controversies beyond the promotion itself. In short,

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[7] Merriam-Webster, *available at* https://www.merriam-webster.com/dictionary/regarding.

there is no way out of Respondents' surplusage problem. Controversies regarding "the promotion" do not include disputes over the official rules—and the forum selection clause says nothing about *who decides* arbitrability.

C. California Law And The FAA Resolve Ambiguities In Coinbase's Favor.

Because the text of the parties' agreements with respect to who decides arbitrability is clear, the Court can stop here. Were there any doubt, however, California law and the FAA resolve ambiguity in Coinbase's favor. Coinbase's reading of the contract avoids an "[un]reasonable" and "absurd[]" result. Cal. Civ. Code §§ 1638, 1643; *see* Coinbase Br. 34. Additionally, any "ambiguities about the scope of an arbitration agreement"—including a delegation clause, which is a specialized arbitration agreement—"must be resolved in favor of arbitration." *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1418 (2019); *see* Chamber of Commerce Br. 17.

Respondents' efforts to tip the scales in their favor are meritless.

First, Respondents ask (at 32-34) this Court to apply the principle that a later-in-time contract controls, and the principle that a specific provision governs a more general one. But these principles are tiebreakers of last resort that apply only if two conflicting terms are "inconsistent," Cal. Civ. Proc. Code § 1859; *Frangipani* v. *Boecker*, 75 Cal. Rptr. 2d 407, 409 (Cal. Ct. App. 1998), and "no permissible meaning can eliminate the conflict," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183

(2012). The delegation clause and the official rules are far from irreconcilable. If there is an ambiguity, it is resolved in Coinbase's favor to avoid an absurdity and in favor of arbitration.

Second, Respondents attempt to wish away the unreasonable results of their interpretation: Under Respondents' interpretation, the all-important question of *who decides* arbitrability turns on when a person entered the sweepstakes. Thus, under Respondents' theory, for individuals who entered by mail, and later created a Coinbase account, the delegation clause controls. But for users who first created a Coinbase account and later entered the sweepstakes, the official rules allegedly displace the delegation clause. This bizarre result is an important clue Respondents are wrong. Coinbase Br. 34.

Respondents initially argue (at 38-39) that the Court should ignore the obvious ramifications of their interpretation "because there are no mail-in entrants" before the Court in this case. But there were 4,329 mail-in entrants. *See* Coinbase Br. 13. When interpreting a text, a court does not blind itself to the unreasonable consequences of an interpretation that may arise in the next case. *See* Cal. Civ. Code § 1643. Instead, the existence of the bizarre result is a sign that the interpretation is wrong. *See, e.g.*, *Comm'n on Peace Officer Standards & Training* v. *Superior Ct.*, 165 P.3d 462, 468 (Cal. 2007); *Sequeira* v. *Lincoln Nat'l Life Ins. Co.*, 192 Cal. Rptr. 3d 127, 133 (Cal. Ct. App. 2015).

Respondents alternatively suggest (at 38) that, for mail-in entrants who later agree to the User Agreement, the official rules will still control because the

forum selection clause is more specific than the delegation clause. But the User Agreement contains a merger clause. JA 142-143, 224-225, 275-276, 341. A later-in-time User Agreement would therefore control over a more-specific-but-earlier provision in a different contract. *See* Restatement (Second) of Contracts § 213 (1981).

In any event, even under Respondents' interpretation, the forum selection clause is not obviously more specific than the delegation clause. *See* Response 33. The delegation clause applies to arbitrability disputes related to the User Agreement. Under Respondents' erroneous reading, the official rules govern disputes regarding the official rules. Neither provision is necessarily more specific than the other. *See* Scalia & Garner, *supra* at 188.

Third, Respondents briefly ask (at 48-49) for the Court to take the extraordinary step of overruling the longstanding federal presumption construing ambiguity in favor of arbitration. But California law applies the same rule. *See Gravillis* v. *Coldwell Banker Residential Brokerage Co.*, 49 Cal. Rptr. 3d 531, 537 (Cal. Ct. App. 2006) ("Doubts as to whether an arbitration provision applies to a particular dispute are to be resolved in favor of sending the parties to arbitration.") (brackets and quotation marks omitted). And this Court's longstanding construction of the FAA receives the "superpowered form" of statutory *stare decisis*, and Respondents offer no "superspecial justification to warrant reversing" settled precedent. *Kimble* v. *Marvel Ent., LLC*, 576 U.S. 446, 458 (2015); *see* Chamber of Commerce Br. 16-17.

Fourth, Respondents ask (at 46-47) the Court to water down the standard for challenging delegation clauses. According to Respondents, even if the official rules did not displace the delegation clause, the rules sufficiently muddled the parties' otherwise clear-and-unmistakable intent to delegate all threshold arbitrability disputes. *Rent-A-Center* rejected much the same argument, and Respondents offer no coherent rationale for adopting a different result in this case. 561 U.S. at 69 n.1; *see* Coinbase Br. 46-47.

Respondents also misunderstand the purpose of the clear-and-unmistakable standard. When a court interprets a contract, the court seeks to determine "the mutual intention of the parties." Cal. Civ. Code § 1636; *accord Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010). This Court requires a clear-and-unmistakable indication that an arbitration agreement contains a delegation clause because the Court seeks to best approximate the "parties' expectations." *Rent-A-Ctr.*, 561 U.S. at 69 n.1. Parties may not consider "the significance of having arbitrators decide the scope of their own powers," and therefore may not intend their "silence or ambiguity" to constitute a delegation clause. *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 944-945 (1995).

But in this case and others like it, the Court knows the parties considered the question of who decides arbitrability. The parties agreed to a crystal-clear delegation clause. As a result, any presumption about the most-likely "intention of the parties" flips. Cal. Civ. Code § 1636. Where parties have consented to an express delegation of arbitrability questions once, one would expect the parties to be explicit if they sought

to modify that existing delegation. At a minimum, given the heightened intention required to create the delegation clause in the first place, the Court should not tilt the playing field in favor of revoking it. Doing so would lead to wasteful litigation over whether an "unmeritorious argument"—which would not otherwise displace a delegation clause under ordinary state-law contract principles—creates just enough ambiguity to allow a party to evade an otherwise binding agreement. *Henry Schein*, 139 S. Ct. at 531; *see* Coinbase Br. 52.

III. COINBASE'S POSITION PROTECTS PRECEDENT AND PREVENTS GAMESMANSHIP.

Ruling for Coinbase will protect this Court's foundational arbitrability precedent. By contrast, the Response confirms that ruling for Respondents invites chaos.

First, accepting Respondents' current theory would collapse the question of *who decides* the scope of the arbitration agreement with the resolution of the scope of the arbitration agreement—potentially in every case. *See supra* pp. 13-16. That would fatally undermine *Henry Schein* and *Rent-A-Center*. Creative litigants would soon seek to exploit the Court's decision as a pretext for escaping delegation clauses, and this Court will be called upon to resolve the eventual confusion. *See* Chamber of Commerce Br. 14-15.

Second, enforcing the delegation clause here will not mean parties cannot ever "rid themselves of a prior delegation agreement." Scholars Br. 13 (quotation marks omitted). Everyone agrees: A subsequent contract can displace a delegation clause. For instance,

parties may revoke a delegation clause expressly, revoke in its entirety a contract containing a delegation clause, and—depending on the facts of the case—displace a delegation clause via a merger clause in a later contract.

It is true that it may be much rarer for a second contract to *implicitly* carve out *exceptions* to an existing delegation clause for the arbitrability of certain specific claims. But that is the product of ordinary state-law principles and the unique terms of a delegation clause. So long as the arbitration agreement exists to some degree and applies to some claims—as all agree is the case here—the very purpose of the delegation clause is to identify *who decides* which claims. It would make no sense for the parties' antecedent mini-agreement about *who decides* the scope of an arbitration agreement to be so easily and accidentally displaced by potential amendments to the scope of the underlying arbitration agreement.

Third, enforcing a delegation clause does not mean that parties are irrevocably bound to arbitrate everything under the sun. A delegation clause creates a streamlined process for determining which disputes are subject to arbitration. If the arbitrator agrees the matter falls outside the scope of the arbitration agreement, the case quickly returns to federal court. Moreover, as the opening brief highlights—and as Respondents do not dispute—arbitrators are presumed to be impartial and possess ample tools to "deter frivolous motions to compel arbitration." *Henry Schein*, 139 S. Ct. at 531; Coinbase Br. 53.

Fourth, the specific scenario presented in this case—in which parties agree to successive contracts—arises

frequently across a wide swath of commercial and consumer contexts. *See* Chamber of Commerce Br. 13. Contrary to Respondents' suggestion (at 30), it can be difficult for even the most sophisticated party to eliminate every hint of potential ambiguity between multiple agreements. And that is why parties enter into delegation clauses: to resolve any threshold disputes quickly and efficiently. *See* Atlantic Legal Foundation Br. 9-10.[8]

CONCLUSION

For the forgoing reasons, and those in the opening brief, the Ninth Circuit's decision should be reversed.

Respectfully submitted,

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[8] The other sweepstakes to which Respondents point (at 31) occurred in November 2021. The November official rules were presumably tailored in response to the specific arguments Respondents made in this case, which was filed in June 2021.