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

SUPPLEMENTAL BRIEF OF RESPONDENTS DAVID SUSKI, JAIMEE MARTIN, JONAS CALSBEEK, AND THOMAS MAHER

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SUPPLEMENTAL BRIEF OF RESPONDENTS

Pursuant to Sup. Ct. R. 25.6, Respondents David Suski, Jaimee Martin, Jonas Calsbeek, and Thomas Maher respectfully submit this Supplemental Brief for Respondents, to address a recent opinion of the Court as it relates to the parties' arguments.

On February 21, 2024, this Court decided *Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC*, 601 U.S. ___ (2024) (Slip Op.), and held that choice-of-law provisions in maritime contracts are presumptively enforceable as a matter of federal law. In its decision, the Court analogized contractual choice-of-law provisions to contractual forum-selection provisions, explaining that "forum-selection provisions respect 'ancient concepts of freedom of contract.'" Slip. Op. at 5 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972)); *accord Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) ("*The Bremen* and *Sherk* establish a strong presumption in favor of freely negotiated contractual choice-of-forum provisions."). The Court further recognized that "forum-selection clauses [should] have 'the salutary effect of dispelling any confusion' on the manner for resolving future disputes, thereby slashing the 'time and expense of pretrial motions.'" Slip. Op. at 5 (quoting *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-94 (1991)); *accord* Response Br. 36-37, 43.

Here, Coinbase and Marden-Kane seek to undermine "ancient concepts of freedom of contract," and to inject "confusion" rather than "dispel" it. *Id.* Voluntarily spending three years, and millions of dollars (not Dogecoins), on endless "pretrial motions," appeals,

and petitions, Coinbase and Marden-Kane alone have multiplied rather than "slash[ed]" the "time and expense" of resolving simple disputes over a *one-week* Sweepstakes and its terms. *Id.*

These defendants, and not Respondents, have reinterpreted the parties' unambiguous, trilateral forum-selection provisions—procured by new consideration, among distinct party groups—only *after* "future disputes" have arisen in the very forum that the defendants alone selected for these "disputes." *Id.* Such *post hoc* reinterpretations constitute willful breaches of contract, which the FAA does not facilitate. 9 U.S.C. §§ 2, 3. There is no congressional policy approving of the defendants' conduct in this case. *But see Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) ("Yet, over the past decade[s], the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.").

The Court's recent decision in *Great Lakes* further highlights that: "When a federal court decides a maritime case, it acts as a 'federal common law court, much as state courts do in state common-law cases.'" Slip. Op. 3 (quoting *Air & Liquid Systems Corp. v. DeVries*, 586 U.S. 446, 452 (2019)). This case is not a maritime case.

"Under the Constitution, federal courts have the ability to create and apply federal maritime law." Slip. Op. 3. In sharp contrast, nowhere does "the Constitution" or the FAA convert federal courts, much less *state* courts, into "federal common law court[s]" of contract interpretation in cases "involving commerce" and arbitrability. *Id.*; 9 U.S.C. § 2; *see also* 9 U.S.C. § 3

(requiring courts to be "satisfied that the issue involved in such suit or proceeding is referable to arbitration" by agreement, *without* creating federal rules of contract interpretation).

Coinbase flouts Congress's unambiguous respect for federalism in matters of contract interpretation, by arguing that any contractual ambiguity must be resolved "in Coinbase's favor": under a federal-judicial rule of contract interpretation. *E.g.,* Reply Br. 19. Coinbase's contention is highly problematic, on multiple levels.

First, Coinbase's preferred, federal-judicial rule of contract interpretation originated from *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). In more recent years, this Court has all but reduced to a logical nullity *Moses H. Cone*'s "federal common law" rule favoring arbitrability interpretations. Slip Op. 3; *see, e.g., Granite Rock Co. v. Intl. Brotherhood of Teamsters*, 561 U.S. 287, 303 (2010) ("We have applied the presumption favoring arbitrability, in FAA and labor cases, only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was . . . *best construed* to encompass the dispute.") (emphasis added); *accord* Response Br. 49 (distinguishing between a "reasonable" contract interpretation, and the "best" interpretation); *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S.Ct. 1637, 1643 (2020) (explaining that the FAA "does not 'alter background principles of state contract law regarding the scope of agreements'") (quoting *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009)).

Second, that federal common-law rule, which the Court has all but nullified already, *id.*, was always contrary to *Erie R. Co. v. Tompkins*. 304 U.S. 64, 71-72, 78-79 (1938) (eliminating "federal common law court[s]," Slip Op. 3, in cases "where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain… the true exposition of [a] contract or instrument"); *accord* 9 U.S.C. § 3. The Court has yet to consider *Erie*'s application to the federal-judicial rule of contract law favoring arbitrability, but the Court should consider it.

One could argue that *Moses H. Cone*'s federal, judicial rule of contract interpretation is not "federal common law" within *Erie's* purview, Slip. Op. 3, because it (somehow) derives from the FAA's express or implied terms. Yet *Moses H. Cone* explicitly derived its interpretive rule from federal-judicial "policy," and not the FAA's terms.

> Although our holding in *Prima Paint* extended only to the specific issue presented, *the courts of appeals* have since consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal *policy* favoring arbitration. We agree. The Arbitration Act establishes [somewhere uncited] that, as a matter of federal law, *any* doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself, or an allegation of waiver, delay, or a like defense to arbitrability.

Moses H. Cone, 460 U.S. at 24-25 (emphasis added).

Thus, the federal-judicial rule of contract interpretation favoring arbitrability admittedly hailed from "courts of appeals'" views of federal "policy," and of *Prima Paint*, which was not even a case involving contract interpretation. *See Moses H. Cone*, 460 U.S. at 24-25. That is no statutory rule of contract interpretation. That is a federal-judicial rule of "general [contract] law," which has created "federal common law court[s]" nationwide under a false "pretense" of interpreting the FAA. Slip. Op. 3; *Erie*, 304 U.S. at 71-72; *Allied-Bruce*, 513 U.S. at 283 (1995) (O'Connor, J., concurring).

Perversely, "federal common law court[s]" currently include *state* courts, which are (somehow) bound to apply an ever-expanding body of substantive, federal rules of contract interpretation, which Congress never enacted. Slip. Op. 3. The federal common-law rule favoring arbitrability has also left every court, federal and state, with "the impossibility of discovering a satisfactory line of demarcation between the province of [state contract] law and that of [federal contract] law." *Erie*, 304 U.S. at 74; Response Br. 55-57. Respondents here have proposed a "satisfactory line of demarcation," which even Coinbase feels forced to (pretend to) "agree" with. *Id.*; Reply Br. 8. The proper "line of demarcation" is: absent constitutional preemption, the parties' chosen (or more rarely, default) state contract laws are *exclusively* controlling of every contract-interpretation dispute about arbitrability or delegation. *Id.*

Third, the federal presumption favoring arbitrability was historically applicable regardless of how any contract was "best construed," *Granite Rock*, 561 U.S. at 303, as opposed to "reasonably" construed.

Moses H. Cone., 460 U.S. at 24-25 (1983) (stating, in *dicta* of "less significance," that "*any* [reasonable] doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself, or an allegation of waiver, delay, or a like defense to arbitrability") (emphasis added). *Moses H. Cone*'s "less significan[t]" *dicta*—as written—cannot be squared with the "proper framework" this Court carefully considered and "reemphasized" in *Granite Rock,* 561 U.S. at 297, 303.

Nor can *Moses H. Cone*'s admittedly "less significan[t]" *dicta* be squared with the Court's recent, unanimous decision in *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022), which prohibited federal-judicial rules of "waiver" that favor arbitrability over litigation. *Id. But see Moses H. Cone*, 460 U.S. at 24-25 (stating unequivocally that "any doubts" about "waiver" must be "resolved in favor of arbitration").

The "less significan[t]" *dicta* of *Moses H. Cone* should be decisively and unequivocally overruled. Simply rewriting it and walking it back, *Granite Rock*, 561 U.S. at 303, but then resurrecting it wholesale in a preemption case, *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407, 1418-19 (2019), only to rewrite it and walk it back a second time, *Morgan*, 596 U.S. at 418, makes it impossible for judges to know what the contract law of the land actually is. Nobody is hostile, but everybody is confused, and will remain so for as long as the "*Swift* problem" endures. *Erie*, 304 U.S. at 74; Response Br. 55-57.

Fourth, if there can be any federal-judicial rule of contract interpretation (absent actual preemption), then Coinbase's call for the presumption favoring arbi-

trability opposes this Court's longstanding "delegation" decisions. Those decisions hold that any ambiguity in parties' "manifestation of intent" is resolved in favor of litigation, not arbitration. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69, n.1 (2010) (emphasis removed); *see also Lamps Plus, Inc.*, 139 S.Ct. 1407, 1416-17; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995); Response Br. 44-47.

Unlike Coinbase, Respondents are at least being intellectually honest here, admitting that the clear-and-unmistakable rule is no more permissible than the historical presumption favoring arbitrability (even though the clear-and-mistakable rule favors Respondents). Coinbase's self-contradictions concerning principles of federalism are manifest, as Coinbase purportedly "agrees" that "whether a delegation clause has been [modified] by a later agreement is a matter of *ordinary* state-law contract principles." Reply Br. 8 (emphasis added). Meanwhile, Coinbase insists that this same modification question is controlled by one *federal*-judicial policy: rather than valid, state contract laws that exist to resolve common contractual ambiguities, and to "best construe" the parties' intentions in any given case. Reply Br. 19. *But see Granite Rock*, 561 U.S. at 303. This Court requires "the best" contractual interpretation to control every case, while Coinbase wants one side's "reasonable" (re)interpretation to control every case. *Id.*[1]

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[1] This Court is currently reviewing the legality of *Chevron* deference, and thankfully so. What Coinbase requests here is analogous to *Auer* deference for private parties. Coinbase and its *amici* want power not only to "reasonably" write the rules of dispute resolution (which they already have), but also to "reasonably" *reinterpret* their own written rules *after* a case arises,

As "Coinbase agrees" today, the Court should apply "ordinary state-law contract principles," Reply Br. 8, to determine whether "a subsequent agreement implicitly displaced or modified" the parties' original delegation agreements. Pet'r Br. 52-53. Alternatively, the Court should remand this case to the Ninth Circuit, to more thoroughly apply the "ordinary state-law contract principles" that Coinbase suddenly concedes are controlling. *See* Reply Br. 8 ("The [only] problem is that the Ninth Circuit did not ask whether the official rules altered the parties' [delegation] agreement.…").[2]

The Court should further note that, after *Coinbase* drafted and imposed its judicial forum-selection clause on Respondents, Coinbase intends to charge *Respondents* and their counsel with its own "costs and attorneys' fees" in every "proceeding" that Coinbase has since initiated "to enforce" its prior delegation clauses. *See* JA 139; JA 219; 271; JA 336 (adhesive

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and *regardless* of whether their own "reasonable," *post hoc* reinterpretations were foreseeable to the reader when the reader acted. Whether asserted by federal agencies or large companies, these are the arguments of entities who want unmitigated, unilateral power over the citizenry. They want the unilateral power to effectively control the outcome of every court case, *after* the court case arises. Such limitless, unilateral power derives no more from the consent of a counterparty than from the consent of the governed.

[2] Coinbase's Reply Brief repetitively uses the word "displaced" instead of "modified," yet "displaced" is not a legal term under state or federal contract law. *See generally* Reply Br. Coinbase's delegation *clauses* may not have been "displaced," as they have not moved from their "place" somewhere on Coinbase's website. But the parties' delegation *intentions* objectively changed, and their delegation *agreements* were validly and mutually modified (not revoked) in June of 2021.

fee-shifting clauses). *But see Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63, n.10 (1995) (noting that, "[w]here one party chooses the terms of a contract," they are "more likely than the other party to have reason to know of uncertainties of meaning," and may even "leave meaning *deliberately* obscure, *intending* to decide at a later date what meaning to assert") (quoting RESTATEMENT (SECOND) OF CONTRACTS § 206, Comment (a) (1979)) (emphasis added).

The Court has since suggested the opposite of what it duly noted in *Mastrobuono*, but only in an actual preemption case. *Lamps Plus*, 139 S.Ct. at 1417-18 (suggesting that *contra proferentem* has nothing to do with "the intent of the parties," or with "the meaning that a reasonable person would have given to the language used") (quoting 3 Corbin, CORBIN ON CONTRACTS § 559, at 269-270). This *Lamps Plus* dicta is difficult to understand logically, as the Court itself has said that contractual ambiguity is defined precisely by whether a party's interpretation is "reasonable." *E.g., CNH Indus. N.V. v. Reese*, 583 U.S. 133, 139 (2018). Everyone agrees that *contra proferentem* does not "determine" the reasonableness of an interpretation. *Lamps Plus,* 139 S.Ct. at 1417-18. Yet the rule's application is entirely *contingent* upon the reasonableness of a proponent's interpretation in the first place: consistent with the FAA in at least some contract cases (like this one) that differ markedly from *Lamps Plus*.

Moreover, Coinbase's self-selected "costs and attorneys' fees" probably total millions of dollars now, which it fully intends to charge to a few individual-Respondents and their contingency lawyers. This sets

a new high-water mark for "blackmail settlement" pressure against a party. *Compare Coinbase, Inc. v. Bielski*, 599 U.S. 736, 743 (2023) (worried only about potential shakedowns of arbitration-seeking parties), *with id.* at 758 (Jackson, J., dissenting) (recognizing real-life potential for abusive "settlement pressure in the opposite direction").

Coinbase's case in this Court is not what the FAA provides for. The FAA does not provide for Corporate America's imposition of *objectively confusing* combinations of forum-selection provisions—followed by million-dollar contractual awards against individuals, as penalties for *reasonably* interpreting the confusing language that Corporate America created.

CONCLUSION

This case presents an opportunity for the Court to maintain neutrality as between private parties' arbitration or litigation intentions: and more importantly, as between Corporate America and the citizenry. Any ruling finding a "mutual" intent to arbitrate anything in this case—which even Coinbase calls a "case involv[ing] a dispute regarding a sweepstakes," *see* Pet'r Br. 10—would seriously risk creating an appearance of something other than neutrality. *See Lamps Plus*, 139 S.Ct. at 1420-22 (Ginsburg, J., dissenting).

Respectfully submitted,

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