No. _____

IN THE
Supreme Court of the United States

COINBASE, INC.,
Petitioner,

v.

DAVID SUSKI, *et al.,*
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where parties enter into an arbitration agreement with a delegation clause, should an arbitrator or a court decide whether that arbitration agreement is narrowed by a later contract that is silent as to arbitration and delegation?

PARTIES TO THE PROCEEDING

Petitioner in this Court is Coinbase, Inc. Respondents are David Suski, Jaimee Martin, Jonas Calsbeek, and Thomas Maher, individually and on behalf of all others similarly situated.

Marden-Kane, Inc. is also defendant in the proceedings below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Coinbase, Inc. ("Coinbase") hereby states that it is a wholly-owned subsidiary of Coinbase Global, Inc. No publicly held corporation owns 10% or more of the stock of either entity.

STATEMENT OF RELATED CASES

All proceedings directly related to this petition include: *Coinbase, Inc.* v. *Bielski*, No. 22-105 (U.S.); *Suski, et al.* v. *Coinbase, Inc., et al.*, No. 22-15209 (9th Cir.); *Suski, et al.* v. *Coinbase, Inc., et al*., No. 22-16506 (9th Cir.); *Suski, et al.* v. *Marden-Kane, Inc., et al*., No. 22-16508 (9th Cir.); *Suski* v. *Coinbase Global, Inc., et al.*, No. 3:21-cv-04539 (N.D. Cal.).

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JURISDICTION

The Ninth Circuit entered judgment on December 16, 2022. Pet. App. 1a-11a. The court denied Petitioner's rehearing petition on February 23, 2023. Pet. App. 35a-36a. On May 12, this Court extended Petitioner's deadline to petition for a writ of certiorari up to and including June 23, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides in relevant part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract * * * .

INTRODUCTION

This Petition presents a clear split over the enforceability of delegation clauses in arbitration agreements. The split involves four Circuits—the First and

Fifth versus the Third and Ninth—and four state courts of last resort—Alabama (aligned with the First and Fifth Circuits) versus Alaska, Texas, and Wisconsin. This case also presents a clean vehicle for resolving the question presented.

When parties enter into an arbitration agreement, they sometimes also agree to a "delegation clause." A delegation clause specifies that an arbitrator, not a court, will decide threshold questions about the applicability, scope, and validity of the broader arbitration agreement. This Court has explained that a delegation clause is "an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce," and that the Federal Arbitration Act "operates on this additional arbitration agreement just as it does on any other." *Rent-A-Ctr., W., Inc.* v. *Jackson*, 561 U.S. 63, 70 (2010). Courts thus must enforce delegation clauses, unless the party seeking to evade the delegation clause can articulate a meritorious challenge to "the delegation provision specifically." *Id*. at 72. And a delegation clause requires an arbitrator to decide an arbitration agreement's applicability to a dispute even if courts believe "the argument for arbitration is wholly groundless." *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019).

That precedent makes short work of the circumstances presented here: The parties agreed to a contract containing an arbitration agreement with a delegation clause. A dispute arose. Petitioner moved for arbitration. Respondents resisted arbitration, claiming that a *later* contract between the parties narrowed the original arbitration agreement.

Regardless of whether Respondents are right or wrong, the second contract was silent about *who decides* the scope and validity of the arbitration agreement; nothing in the second contract even arguably altered the first contract's delegation clause. Under the delegation clause, only an arbitrator could decide if there is merit to Respondent's contention that the second contract narrowed the arbitration agreement in the first contract.

Indeed, the First and Fifth Circuits, and the Alabama Supreme Court do just that: They compel arbitration under the delegation clause so that the arbitrator can decide whether the second contract narrowed the arbitration agreement.[1] But in the decision below, the Ninth Circuit did the opposite. It permitted the *court* to decide whether the second contract had narrowed the arbitration agreement—and, concluding for itself the answer was yes, the Ninth Circuit refused to compel arbitration. In addition to the Ninth Circuit, the Third Circuit, Alaska, Texas, and Wisconsin all refuse to enforce delegation clauses where a subsequent contract purportedly narrows an earlier arbitration agreement.[2]

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[1] *See Bossé* v. *New York Life Ins. Co.*, 992 F.3d 20 (1st Cir. 2021); *Agere Sys., Inc.* v. *Samsung Elecs. Co.*, 560 F.3d 337 (5th Cir. 2009); *Blanks* v. *TDS Telecomms. LLC*, 294 So. 3d 761 (Ala. 2019).

[2] *See Field Intel. Inc* v. *Xylem Dewatering Sols. Inc*, 49 F.4th 351 (3d Cir. 2022); Pet. App. 1a-11a (9th Cir.); *SMJ Gen. Constr., Inc.* v. *Jet Com. Constr., LLC*, 440 P.3d 210 (Alaska 2019); *Transcor Astra Grp. S.A.* v. *Petrobras Am. Inc.*, 650 S.W.3d 462, 480 (Tex. 2022); *Midwest Neurosciences Assocs., LLC* v. *Great Lakes Neurosurgical Assocs., LLC*, 920 N.W.2d 767 (Wis. 2018).

The Ninth Circuit's approach is deeply flawed and conflicts with this Court's precedent. As a unanimous Court explained just a few years ago in *Henry Schein*, "if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue." 139 S. Ct. at 530. Full stop. That means an arbitrator, not a court, must decide whether another document has narrowed an initial agreement to arbitrate any disputes.

This question is critically important. Parties frequently enter into successive contracts in a wide-variety of contexts. For instance, two companies may enter into multiple purchasing agreements. Or a homeowner may renew a utility service for another year. Those parties need assurance that each new contract that is silent about delegation does not accidentally neuter a prior delegation clause—and, in the process, frustrate the federal right to arbitrate.

This issue was previously presented in *Petrobras America Inc.* v. *Transcor Astra Group S.A.*, No. 22-518 (U.S.). This Court called for a response and relisted *Petrobras* for the May 11, 2023, and May 18, 2023 conferences. But *Petrobras* was a factually complicated case, and the *Petrobras* respondents identified potential vehicle defects in that case. This Court ultimately denied review. By contrast, this Petition offers a simple and clean vehicle to resolve the split. Indeed, the facts of this case are unusually straightforward. The Court should take this opportunity to resolve this split and grant this Petition.

STATEMENT OF THE CASE

A. Legal Background

When parties enter into an arbitration agreement, they can also enter into a "delegation clause." A delegation clause empowers an arbitrator to decide threshold questions about the arbitration agreement itself, "such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Ctr.*, 561 U.S. at 68-69. These threshold questions are referred to as "arbitrability issues."

A delegation clause is its own distinct agreement to arbitrate arbitrability issues. The Federal Arbitration Act operates on delegation clauses "just as it does * * * any other" arbitration agreement. *Id.* at 70. Like all arbitration agreements, delegation clauses are severable from the rest of the contract of which they are a part. *Id.* at 70-71. For that reason, a party cannot escape a delegation clause by challenging the entire contract "as a whole," or even by challenging the broader arbitration agreement. *Id.*; *see Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 445-446 (2006). Instead, a party seeking to challenge a delegation clause must "challenge[] the delegation provision specifically." *Rent-A-Ctr.*, 561 U.S. at 72. Absent a challenge specific to the delegation clause, "a court possesses no power to decide the arbitrability issue." *Henry Schein*, 139 S. Ct. at 529.

Thus, when a defendant moves to compel arbitration pursuant to an arbitration agreement with a delegation clause, a plaintiff's resistance to arbitration on the ground that the dispute falls outside the arbitration agreement must be assessed by an arbitrator, not a court. If the arbitrator agrees that arbitration is not

appropriate, the merits dispute heads to court. If the arbitrator concludes that the dispute is arbitrable, the matter proceeds in arbitration.

B. Statement of Facts and Procedural History

Coinbase, Inc. operates one of the largest cryptocurrency exchange platforms in the United States. Coinbase users can transact in myriad digital currencies, such as bitcoin and ether. As with many online companies, when a user creates a Coinbase account, the user must agree to terms set out in Coinbase's User Agreement. The User Agreement contains both a broad arbitration agreement and a delegation clause. *See* Pet. App. 43a. The arbitration agreement provides that the parties will resolve "any dispute arising out of or relating to [the] Agreement or the Coinbase Services." *Id.* The delegation clause provides that the arbitrator—not a court—shall address disputes regarding "the enforceability, revocability, scope, or validity of the arbitration agreement." *Id*.[3]

Respondents are Coinbase users. Each Respondent created a Coinbase account, and each agreed to Coinbase's User Agreement. *Id*. at 13a-16a. Each Respondent later participated in a sweepstakes run by

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[3] The version of the User Agreement that one Respondent agreed to included an arbitration agreement covering "any dispute," and incorporated separate rules that delegated to an arbitrator the power to rule on the "existence, scope, or validity of the arbitration agreement." Pet. App. 6a, 24a, 37a-38a (quotation marks omitted). Respondents did not dispute that this version of the arbitration agreement and delegation provision are materially identical in legal effect to the one signed by the other Respondents. *Id*. at 23a-24a.

Coinbase and co-defendant Marden-Kane, Inc. The sweepstakes offered entrants the opportunity to win prizes of up to $1,200,000 in dogecoin, a digital currency. *Id*. at 16a.

To participate in the sweepstakes, Respondents agreed to an additional set of "official rules." *Id*. at 46a. The sweepstakes' official rules contained a forum selection clause stating that "California courts (state and federal) shall have sole jurisdiction of any controversies regarding the promotion" of the sweepstakes. *Id*.

Respondents filed a putative class action in the Northern District of California alleging Coinbase's promotion of the sweepstakes violated California law. Respondents' proposed class consists of Coinbase users who agreed to various versions of Coinbase's User Agreement, all of which contain arbitration agreements and provisions delegating threshold arbitrability questions to an arbitrator. *See id*. at 13a.

Coinbase moved to compel arbitration, arguing that, under the User Agreement's arbitration clause, the dispute between Coinbase and its users belonged in arbitration. Coinbase also argued that any potential dispute about the applicability of the arbitration agreement to the sweepstakes had been delegated to the arbitrator. *See id*. at 23a. In response, Respondents argued the official rules' forum selection clause had superseded the arbitration agreement with respect to sweepstakes disputes.

The District Court refused to send this threshold arbitrability dispute to the arbitrator pursuant to the delegation clause. Instead, the court addressed the ar-

bitrability issue itself, and held that the forum selection clause in the official rules had narrowed the parties' arbitration agreement.

The District Court recognized that the delegation clause "delegated to the arbitrator" "disagreements over the scope of the arbitration provisions." *Id.* at 24a. The court also recognized that Respondents did "not dispute that their claims would fall within the scope of the arbitration provision if they had not agreed to the [o]fficial [r]ules of the Dogecoin sweepstakes." *Id*. at 24a-25a. But the court nevertheless concluded that the judge, not an arbitrator, should decide whether the sweepstakes' rules had narrowed the arbitration agreement. According to the District Court, "the dispute here is not over the scope of the arbitration provision, but rather whether the agreement was superseded by another separate contract." *Id*. at 24a. According to the court, the parties had not "clearly and unmistakably delegated" "to the arbitrator" "how to address the interaction between two separate contracts." *Id*. at 25a.

Having dispensed with the delegation clause, the District Court then proceeded to decide whether the arbitration agreement or the forum selection clause governed the dispute. The court rejected Coinbase's argument that the two documents can be reconciled because the official rules' forum selection clause applies only to individuals who participated in the sweepstakes by mail (and not through Coinbase's website). *See id*. at 26a. Instead, the Court concluded that the "arbitration clause and the forum selection provision in the two contracts are conflicting," and that the "subsequent contract supersedes the first." *Id*.

Coinbase appealed and moved to stay proceedings pending the resolution of that appeal. The District Court and the Ninth Circuit denied Coinbase's request for a stay. Coinbase petitioned this Court for review, which this Court granted, to determine whether the filing of a notice of appeal divests the district court of authority to proceed during the pending appeal. *See Coinbase, Inc*. v. *Bielski*, No. 22-105 (U.S.) (decided June 23, 2023). On June 23, 2023, the Court issued an opinion in a companion case agreeing with Coinbase that a district court must stay its proceedings, and dismissing the petition as improvidently granted in this particular case. *See id.*

A week after this Court granted certiorari on the stay question, the Ninth Circuit issued a published opinion affirming the denial of Coinbase's motion to compel arbitration. Like the District Court, the Ninth Circuit recognized that the delegation clause required an arbitrator to decide all disputes about "the existence, scope, or validity of the arbitration agreement." Pet. App. 6a. The Ninth Circuit also did not dispute that the User Agreement remained in force and governed all other disputes between Coinbase and Respondents. But the Ninth Circuit nevertheless held that it should determine the effect of the official rules on the arbitration agreement's application to the sweepstakes.

The Ninth Circuit disagreed with Coinbase that the question was an issue of the arbitration agreement's scope delegated to the arbitrator. According to the Ninth Circuit, "[t]he 'scope' of an arbitration clause concerns how widely it applies, not whether it has been superseded by a subsequent agreement." *Id.* at

7a. Instead, according to the Ninth Circuit, "the existence rather than the scope of an arbitration agreement is at issue here," and this issue was "for the court to decide." *Id.* at 7a-8a. Like the District Court, the Ninth Circuit then decided the arbitrability issue and concluded that Respondents' claims belonged in federal court, not in arbitration.

This Petition follows.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve a clear split: Who decides whether a subsequent contract has narrowed an arbitration agreement that contains a delegation clause? In the First and Fifth Circuits and in Alabama, the arbitrator correctly decides this threshold arbitrability issue pursuant to the delegation clause. But in the Third and Ninth Circuits, and in Alaska, Texas, and Wisconsin, courts decide this arbitrability issue. That latter approach, embodied in the Ninth Circuit's decision here, flies in the face of this Court's precedent. Unless and until this Court intervenes, the ability to vindicate this critical aspect of the federal right to arbitrate will vary based on the jurisdiction in which the dispute is heard. *See* Sup. Ct. R. 10. This Court previously showed interest in this precise issue when it twice relisted *Petrobras* in May 2023. But potential vehicle defects may have discouraged this Court's review. This Petition, by contrast, is a clean and simple vehicle for resolving this important question and persistent split.

I. CIRCUITS AND STATE COURTS OF LAST RESORT ARE SPLIT ON THE QUESTION PRESENTED.

The split in this case is clear: The First and Fifth Circuits and Alabama correctly hold that a valid delegation clause commits to the arbitrator any questions about the narrowing or superseding effect of a subsequent agreement. In contrast, the Third and Ninth Circuits, Alaska, Texas, and Wisconsin refuse to enforce a delegation clause in this context and permit trial courts to usurp the arbitrator's authority to decide arbitrability issues.

A. The First Circuit, The Fifth Circuit, And Alabama Enforce The Delegation Clause.

The First Circuit has held that arbitrators must decide whether a subsequent contract has narrowed an existing arbitration agreement. In *Bossé* v. *New York Life Insurance Co.*, 992 F.3d 20 (1st Cir. 2021), an insurance agent signed an employment agreement that included an arbitration agreement and a delegation clause. The delegation clause delegated to the arbitrator questions regarding the "existence, scope or validity" of the arbitration agreement. *Id*. at 24-25 (quotation marks omitted). When the employee subsequently transitioned to a different role as an independent contractor, the parties signed a second agreement, which "did not contain an arbitration clause." *Id*. at 25.

The agent filed a discrimination suit. The insurance company moved to compel arbitration, and argued that the delegation clause required an arbitrator to decide whether the discrimination claim fell within the parties' arbitration agreement. The district court

refused to compel arbitration, and held that whether the arbitration agreement "survive[d]" after the agent "terminat[ed]" his employment relationship was a question for the court to decide. *Bossé* v. *New York Life Ins. Co.*, No. 19-CV-016-SM, 2019 WL 5967204, at *1, *3 (D.N.H. Nov. 13, 2019).

The First Circuit reversed and enforced the delegation clause. Quoting this Court's decision in *Henry Schein*, the First Circuit explained that "where the parties 'by clear and unmistakable evidence' delegate issues of arbitrability to the arbitrator, 'the courts must respect the parties' decision as embodied in the contract' and send the issue to the arbitrator to decide." *Bossé*, 992 F.3d at 27 (quoting *Henry Schein*, 139 S. Ct. at 528, 530). The First Circuit explained that the agent did not "challenge the validity or formation of the delegation clause specifically." *Id*. at 28. The delegation clause thus remained in force and required the arbitrator to determine "the dispute about whether [the agent's] claims [were] arbitrable." *Id*.

Indeed, the First Circuit explained that the agent's alternative approach was convoluted: It required the court to determine "whether the particular dispute falls within the scope of the arbitration agreement to determine whether the arbitrability of that dispute was delegated to the arbitrator." *Id*. at 30. This reasoning is "circular," would render "the delegation clause" "meaningless," and is "precisely the type of 'short-circuit[ing] [of] the process' which concerned [this Court] in *Henry Schein*." *Id*. at 30-31 (quoting *Henry Schein*, 139 S. Ct. at 527).

Judge Barron dissented. He read the delegation clause at issue differently than the majority. But Judge Barron did not "dispute that" a broadly-worded

clause would mean "a court could not decide" the arbitrability issue. *Id*. at 34 (Barron, J., dissenting).[4]

The Fifth Circuit follows the same approach as the First. In *Agere Systems, Inc*. v. *Samsung Electronics Co.*, 560 F.3d 337 (5th Cir. 2009), two parties entered into successive patent licensing and payment agreements, *id*. at 338-339. The earlier agreement included an arbitration provision and incorporated rules delegating "*issues of arbitrability*" to the arbitrator. *Id*. at 339-340 (emphasis in original). In contrast, the later agreement "did not contain an arbitration clause." *Id*.

In a dispute over breach of the second agreement, one party invoked the first agreement's arbitration provision and sought to arbitrate the threshold question of whether the dispute was arbitrable. The district court refused to compel arbitration, holding the second licensing agreement had "superceded" [sic] the first one. *Id*. at 340. In a published opinion, the Fifth Circuit reversed and enforced the delegation clause. Because the delegation clause "explicitly confer[red] upon an arbitrator" the power to decide "arbitrability" questions, the "resolution of" whether the arbitration

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[4] In a later case, *McKenzie* v. *Brannan*, 19 F.4th 8, 12 (1st Cir. 2021), the First Circuit again examined two contracts—an initial contract with arbitration and delegation provisions, and a later term sheet specifically terminating the prior contract. The First Circuit correctly recognized the need to mount a specific attack to an arbitration agreement, not "a sweeping challenge" to the "underlying agreement." *Id*. at 21 (requiring district court to determine whether second contract "specifically extinguish[ed] the arbitration provision"). The First Circuit thus permitted the district court to decide the arbitrability dispute on remand, provided it concluded that the second contract overrode the arbitration agreement and delegation clause specifically.

clause covered the dispute "[wa]s left for the arbitrator." *Id*. (quotation marks omitted).

The Alabama Supreme Court has likewise concluded that an arbitrator must decide whether a subsequent contract narrows an arbitration agreement. In *Blanks* v. *TDS Telecommunications LLC*, 294 So. 3d 761 (Ala. 2019), the court examined consecutive internet service agreements. An initial terms of service agreement contained an arbitration provision and incorporated rules delegating arbitrability issues. But a later version of that agreement stated that the service provider did *not* consent to arbitrate certain disputes. *Id*. at 762-763. Consumers filed arbitration demands alleging their internet speed was slower than promised. *Id*. The service provider sued, seeking a declaratory judgment that the subsequent terms applied and voided the prior arbitration provisions. *Id*. at 763. The trial court agreed with the service provider, issued a declaratory judgment, and denied the consumers' motion to compel arbitration. *Id*.

The Alabama Supreme Court reversed, holding that "[w]hether the updated Terms of Service validly 'terminated' the arbitration clause" was "an issue of arbitrability" "delegated to an arbitrator." *Id*. at 766. Applying this Court's decision in *Rent-A-Center*, the Alabama Supreme Court explained there was "no dispute" that the parties "evidenced an agreement to delegate." *Id*. There was likewise "no real dispute" that the parties "were bound by the prior" agreement—and its delegation clause—when it was "unquestionably in effect." *Id*. Thus, any later arbitrability dispute, such as whether the arbitration agreement was "purportedly terminated or superseded by mutual agreement"

or whether it "effectively excluded the customers' disputes from arbitration," was for the arbitrator to decide. *Id*. at 767; *see also Managed Health Care Admin., Inc.* v. *Blue Cross & Blue Shield of Ala.*, 249 So. 3d 486, 492 (Ala. 2017) (per curiam) (explaining that "the arbitrability issue[] whether the arbitration provision in [a] contract has been terminated * * * [is] for the arbitrator, not the circuit court").

B. The Third Circuit, The Ninth Circuit, Alaska, Texas, And Wisconsin Do Not Enforce The Delegation Clause.

The Third and Ninth Circuits, and Alaska, Texas, and Wisconsin take the opposite approach from the First and Fifth Circuits and Alabama. Those courts, including in the decision on review here, have authorized trial courts to ignore delegation clauses and decide a subsequent contract's effect on an earlier arbitration agreement.

Start with the Third Circuit. In *Field Intelligence Inc.* v. *Xylem Dewatering Solutions Inc*, 49 F.4th 351, 353 (3d Cir. 2022), a manufacturer entered into two contracts with a technology company. An initial contract contained an arbitration provision and delegation clause. A second contract was silent regarding arbitration, but required "any 'action under or concerning' that contract to be litigated in a state or federal court in New Jersey." *Id*. at 354 (citation omitted). A dispute arose. One party filed suit and, among other things, alleged a violation of the initial contract. The other party demanded arbitration under the initial contract. The district court held "that it—rather than an arbitrator—needed to determine whether the" initial "contract was still in effect." *Id*. at 355.

The Third Circuit agreed and held "that the parties' supersession dispute is for a court, not an arbitrator, to decide." *Id*. at 356. The Third Circuit recognized that the case involved a "threshold question" about arbitrability: whether the company filing suit was "bound by the arbitration provision," "or whether the" later purchasing "agreement superseded that contract completely, thereby eliminating its duty to arbitrate." *Id*. at 355-356. But the Third Circuit refused to enforce the delegation clause because it concluded the "there is *no arbitration agreement* for [it] to enforce." *Id*. at 356 (emphasis added).

The Third Circuit acknowledged that, like any arbitration agreement, a delegation clause "is severable from the contract in which it is contained." *Id*. at 357. And the Third Circuit also recognized that a delegation clause "may be enforced despite an assertion that the container contract is invalid." *Id*. (citing *Rent-A-Ctr.*, 561 U.S. at 70-71, and *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967)). But the Third Circuit nevertheless held that the severability rule "does not apply" where a party's challenge could be framed as an attack on "the existence of the parties' arbitration agreement." *Id*.

In the decision below, the Ninth Circuit similarly held that the court, not an arbitrator, must decide whether an initial arbitration agreement containing a delegation clause was rendered unenforceable through a subsequent contract. The Ninth Circuit recognized that parties may delegate "all arguments going to the scope or enforceability of the arbitration provision," Pet. App. 5a (quotation marks omitted), and that the delegation clause in this case broadly empow-

ered the arbitrator to decide the "enforceability, *revocability*, *scope*, or *validity* of the Arbitration Agreement," *id*. at 6a (emphasis added and quotation marks omitted).[5]

Even so, according to the Ninth Circuit, whether the second agreement narrowed the first agreement was not subject to the delegation clause because "[i]ssues of contract formation may not be delegated to an arbitrator." *Id*. at 5a. The Ninth Circuit also reasoned that delegating questions about the " 'scope' of an arbitration clause" meant only that questions about "how widely it applies" are for the arbitrator, "not whether it has been superseded by a subsequent agreement." *Id*. at 7a. Thus, according to the Ninth Circuit, whether the official rules of the sweepstakes "superseded the arbitration clause" in the Coinbase User Agreement "was not delegated to the arbitrator, but rather was for the court to decide." *Id*. at 7a-8a.

Three state courts similarly refuse to enforce delegation clauses where one party alleges that a second contract narrowed or superseded an earlier arbitration agreement.

First, Wisconsin. In *Midwest Neurosciences Associates, LLC* v. *Great Lakes Neurosurgical Associates, LLC*, 920 N.W.2d 767 (Wis. 2018), an initial contract contained an arbitration agreement and a delegation provision. *Id*. at 770, 771-772 & n.7. A second agree-

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[5] A version of the agreement one Respondent signed incorporated rules that similarly delegated to "the arbitrator the power to rule on 'the *existence*, scope, or validity of the arbitration agreement.' " Pet. App. 6a (emphasis added); *see supra* p. 6 n.3.

ment was silent as to arbitration but contained a merger clause purportedly displacing "all prior contracts." *Id*. at 770

In a subsequent lawsuit, a divided Wisconsin Supreme Court declined to enforce the delegation clause and have an arbitrator resolve "the determination of arbitrability," *i.e.*, "whether a second written contract, which does not have an arbitration clause, supersedes the first written contract which does." *Id*. at 771, 786. The majority recognized that parties "may contract broadly and agree to arbitrate, even the issue of arbitrability." *Id*. at 779. The majority also recognized that, under this Court's precedent, it is not enough for a party to challenge a contract generally. Instead, a party can only invalidate a discrete arbitration provision by challenging "the arbitration provision" "itself." *Id*. at 786-787 (citing *Buckeye*, 546 U.S. at 445-446, and *Prima Paint*, 388 U.S. at 404). But the majority deemed this Court's decisions "distinguishable" because they involved "only one contract." *Id*. at 787.

Justice Bradley dissented. She explained that the relevant delegation provision evidenced "a clear and unmistakable agreement" to delegate arbitrability issues. *Id*. at 797 (Bradley, J., dissenting). Although the subsequent agreement raised "serious questions" about whether the original arbitration agreement still applied, Judge Bradley determined that "the arbitrator, not a court, must answer [those] questions." *Id*. at 798 (quotation marks omitted). Because the parties "did not dispute the formation" of the initial arbitration agreement, any supersession dispute challenged its ongoing "validity"—a question the delegation provision expressly specified an arbitrator must decide. *Id*. at 799.

The Alaska Supreme Court has adopted the same approach. In *SMJ General Construction, Inc.* v. *Jet Commercial Construction, LLC*, 440 P.3d 210 (Alaska 2019), an initial construction contract directed the parties to arbitrate any disputes that could not be resolved in mediation and incorporated rules allowing "the arbitrator to determine arbitrability." *Id*. at 214. The parties later settled a number of disputes under that contract and signed an agreement that was silent as to arbitration, but purported to release "any and all claims, demands, and obligations" from that earlier agreement. *Id*. at 212. When one party sought to compel arbitration in a subsequent dispute, the trial court refused, and the Alaska Supreme Court affirmed.

The Alaska Supreme Court held that it "is the task of the courts to decide whether the parties' two successive contracts" require them "to arbitrate [their] claims." *Id*. at 214. The court recognized that, by incorporating rules providing for delegation, the first agreement could evidence a clear agreement "that questions of arbitrability are for the arbitrator." *Id*. at 214 & n.13. But the panel did not decide that question. Instead, it determined that "whatever obligations the parties had under the subcontract have been explicitly released" by the second agreement. *Id*. at 214.

Finally, the Texas Supreme Court also declines to enforce delegation clauses in this context. In *Transcor Astra Group S.A.* v. *Petrobras America Inc*., 650 S.W.3d 462 (Tex. 2022), the court faced a joint venture that soured. The parties' initial contract contained an arbitration agreement that delegated any controversy about the "validity or effect" of that clause to an arbitrator. *Id.* at 468 & n.4 (quotation marks omitted).

When the relationship devolved, the parties asserted numerous claims against each other and later resolved their differences in a settlement agreement. Relevant here, the settlement contained a merger clause, released all claims related to the first contract, and designated certain Texas courts as the "exclusive forums" for disputes regarding the settlement. *Id*. at 481 (quotation marks omitted). One of the parties later issued an arbitration demand raising fraud claims under the first agreement, and the other party successfully obtained a declaratory judgment barring arbitration over those claims. *Id*. at 481-482.

The Texas Supreme Court affirmed and held that "courts, rather than the arbitrator, must decide whether an agreement to arbitrate claims" "presently exists." *Id*. at 482. The court held that the initial agreement "indisputably includes a clear and unmistakable" commitment to arbitrate "any question regarding the 'validity' of the parties' arbitration agreement." *Id*. at 481 (citing *Henry Schein*, 139 U.S. at 531). Nevertheless, the court determined that the parties "later" agreed "to supersede the [initial] agreement," including its arbitration provisions. *Id*. Reading those two agreements "together," the court could not find "that a presently enforceable arbitration agreement clearly and unmistakably exists." *Id*. at 481-482.

The party seeking to arbitrate in *Petrobras* filed a petition presenting this exact split. This Court called for a response, relisted the petition twice in May 2023, but ultimately denied review. The split is clear and persistent. This Court should take this case and resolve this recurring question presented.

II. THE NINTH CIRCUIT'S APPROACH IS WRONG.

The Ninth Circuit's approach—embodied in the decision below—is clearly wrong under this Court's precedent. A delegation clause is a distinct agreement to arbitrate arbitrability. As a distinct agreement, a delegation clause is "severable from the remainder of the contract," even if the "underlying contract is itself an arbitration agreement." *Rent-A-Ctr.*, 561 U.S. at 70-72 (quotation marks omitted). When faced with a delegation clause, a court may examine whether a delegation clause "*was in fact agreed to*." *Id.* at 69 n.1 (emphasis added). A court may also entertain arguments "specific to the delegation provision." *Id.* at 73. For example, if a party argues a delegation clause *itself* was fraudulently induced, or a delegation clause *itself* was revoked, a court must resolve the question before enforcing the delegation clause. *Id*. at 71 (citing *Prima Paint*, 388 U.S. at 403-404).

But when faced with a delegation clause, a court may not consider broader challenges to the underlying arbitration agreement "as a whole." *Id*. at 72. And the court "possesses no power to decide the arbitrability issue[s]" which are reserved for the arbitrator. *Henry Schein*, 139 S. Ct. at 529. As a result, even if the court thinks the arbitrability issue to be delegated is "wholly groundless" the court must permit the arbitrator to decide the threshold question. *Id*.

Those principles should have governed here, making this a straightforward case. Respondents signed two contracts. In the first contract, Respondents signed the User Agreement when they opened their Coinbase accounts, and it contained an arbitration

agreement and a delegation provision. Pet. App. 43a. In the second contract, Respondents entered into Coinbase's Dogecoin Sweepstakes by purchasing dogecoin on Coinbase, thereby accepting the sweepstakes' official rules, which contain a forum selection clause. As the Ninth Circuit recognized, those rules contain no language "specifically revoking" the delegation clause or even the arbitration agreement. *Id.* at 9a. Respondents also never challenged anything "specific to the delegation provision." *Rent-A-Ctr.*, 561 U.S. at 73. Instead, Respondents made a general argument: that "the forum selection clause" in the official rules "superseded the arbitration clause." Pet. App. 7a-8a. That attack on the arbitration agreement "as a whole" is precisely the type of argument that this Court has long rejected in the face of a valid delegation clause. *Rent-A-Ctr.*, 561 U.S. at 72.

The case for enforcing the delegation clause is particularly strong here for two additional reasons. *First*, the forum selection clause in the official rules speaks *only* to disputes arising out of the sweepstakes. It says absolutely *nothing* about who decides arbitrability disputes about the enforceability, scope, or validity of the User Agreement's arbitration provision. In fact, Respondents agree the User Agreement—including both the arbitration agreement *and the delegation clause*—remains in full force for *everything* else. Thus, even if a court thought the forum selection clause might narrow the arbitration agreement's scope, there is no meaningful argument that the official rules specifically invalidated the delegation clause.

Second, the delegation provisions here expressly contemplate that only an arbitrator could decide

whether the arbitration agreement had been superseded. These provisions require an arbitrator to decide disputes related to the "*enforceability*, *revocability*, scope, or *validity*" and the "*existence*" of the arbitration agreement. Pet. App. 6a, 24a, 43a (emphasis added). That is exactly the nature of the dispute at issue here. Thus, however one slices the salami, the parties here specifically agreed that only an arbitrator—not a court—could decide whether the official rules' forum selection clause excluded sweepstakes disputes from the User Agreement's arbitration provision.

In reaching the opposite conclusion, the Ninth Circuit made two errors.

First, the Ninth Circuit erred in holding that all "[i]ssues of contract formation may not be delegated to an arbitrator." *Id.* at 5a. Not so. As this Court has repeatedly explained, parties can delegate any and all "gateway" questions to the arbitrator, including "whether the parties have a valid arbitration agreement *at all*." *E.g.*, *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444, 452 (2003) (plurality op.) (emphasis added). The parties did just that here. They delegated questions over the "enforceability," "validity," "existence" or "revocability" of the arbitration agreement to the arbitrator. *See supra* p. 6. Thus, a court must refer to arbitration any dispute about whether a broader contractual obligation to arbitrate exists.

To be sure, a court must initially determine whether the parties "clearly and unmistakably" intended to delegate arbitrability issues. *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995) (cleaned up). And even when a court so determines, it

can of course consider challenges specific to the delegation clause itself. If, for example, the official rules provided that questions about the enforceability, revocability, scope, and validity of the User Agreement's arbitration agreement would be decided by a court, then a court could absolutely hold that the User Agreement's delegation provision was no longer in force. But that is not this case, or the issue courts are split on. The official rules' forum selection clause says nothing about who decides threshold arbitrability issues related to the arbitration agreement in the User Agreement. Once parties enter into a delegation clause—and they clearly did here—they have delegated arbitrability issues. Absent a challenge specific to the delegation clause, "a court possesses no power to decide the arbitrability issue." *Henry Schein*, 139 S. Ct. at 529.

Second, the Ninth Circuit drew an artificial distinction between questions of an arbitration agreement's scope and whether an arbitration agreement "has been superseded by a subsequent agreement." Pet. App. 7a. This distinction makes no sense. This case presents only a question about the "scope" of the arbitration agreement, *i.e.*, "how widely it applies." *Id*. At most, the second contract narrowed the arbitration agreement's scope with respect to claims arising out of the sweepstakes. Indeed, the Ninth Circuit's supposed distinction misconstrues the straightforward issue: whether a forum selection clause—which says nothing about who decides the scope, revocability, or validity of an arbitration agreement—somehow displaced that arbitration agreement's delegation clause. Whatever an arbitrator might say about how the forum selection narrowed the arbitration agreement,

the forum selection clause did *no* violence to the arbitration agreement's delegation clause. The delegation clause should be enforced. *See supra* p. 22.

In sum, the Ninth Circuit's approach—and the corresponding approach in the Third Circuit, Alaska, Texas, and Wisconsin—is incompatible with this Court's precedent. The Ninth Circuit declined to enforce a clear and unmistakable delegation clause. This Court should grant the petition and ensure courts enforce such agreements by their terms.

III. THE QUESTION PRESENTED IS CRITICALLY IMPORTANT AND THIS CASE PRESENTS AN IDEAL VEHICLE.

The question presented is important, and this case presents a clean vehicle for resolving the split.

The legal issue of how to enforce a delegation clause in light of a subsequent contract is a recurring problem that can arise in nearly every consumer, employment, and commercial context. The issue affects everything from customer interactions with internet service providers, *Blanks*, 294 So. 3d at 762, to employment disputes, *Bossé*, 992 F.3d at 24-25, to patent fights, *Agere*, 560 F.3d at 338-340, to failed joint ventures, *Petrobras*, 650 S.W.3d at 480. That makes sense: In the real world, individuals and companies alike routinely enter successive agreements. For example, two companies may frequently enter into successive rounds of purchasing agreements. But until this Court intervenes, parties that enter into multiple agreements—one of which contains a delegation clause—will receive disparate treatment depending on the jurisdiction in which their dispute arises. Only

this Court can resolve this critical issue that affects every industry.

The Ninth Circuit's erroneous approach unfairly robs parties of the benefits of arbitration—benefits which accrue to individual consumers just as much as businesses. *See, e.g.*, *Blanks*, 294 So. 3d at 762-763 (consumers sought arbitration, which business resisted). As this Court has recognized time and again, arbitration provides an efficient, streamlined, and confidential way to resolve disputes. *See, e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 348 (2011). Those same efficiencies extend to arbitration over the enforceability of an arbitration agreement itself. That is exactly why parties transfer authority to preside over threshold arbitrability issues to arbitrators.

The Ninth Circuit's ruling below instead forces parties to litigate in federal court any time a subsequent agreement purportedly conflicts with a prior arbitration clause. That approach will "inevitably spark collateral litigation" and produce the kind of "time-consuming sideshow" delegation clauses are designed to avoid. *Henry Schein*, 139 S. Ct. at 531. Worse still, the Ninth Circuit's rule threatens to deny parties the right to arbitrate altogether. Courts may be predisposed against arbitration and conclude that disputes are not arbitrable. In contrast, as this Court explained in *Henry Schein*, an arbitrator "might hold a different view of arbitrability," and might allow the matter to proceed in arbitration. *Id*. at 531.

This Court has already recognized the importance of the question presented by twice relisting a petition last month presenting the same question. *See Petrobras Am. Inc.* v. *Transcor Astra Grp. S.A.*, No. 22-518 (U.S.) (relisted on May 8, 2023, and May 15, 2023).

In contrast to *Petrobras*, where the respondents identified potential vehicle issues, this petition is an ideal vehicle to decide the question presented. Both the District Court and the Ninth Circuit recognized the existence of a valid arbitration agreement and a valid delegation clause. Unlike *Petrobras*, this case comes from federal court, meaning there is no question this Court can review the matter. And the question presented is preserved. If the Court had concerns that a vehicle issue precluded review in *Petrobras*, this petition provides a more suitable vehicle for three independent reasons.

First, in *Petrobras*, the respondents purported to distinguish between cases in which the entire initial contract was purportedly revoked, and cases in which the initial contract remained alive to some degree. According to the *Petrobras* respondents, *Petrobras* supposedly involved a *complete* revocation of a prior agreement, presumably including the delegation clause. By contrast, cases like "*Agere* and *Blanks*" which enforced delegation clauses had not involved "a revocation claim challenging the continued existence of a prior arbitration agreement delegating arbitrability issues to the arbitrators." Brief in Opposition at 21, *Petrobras*, No. 22-518 (U.S. Mar. 23, 2023) ("*Petrobras* BIO").

To the extent the *Petrobras* respondents' distinction matters, this case is like *Agere* and *Blanks*. As the Ninth Circuit recognized, "the Official Rules contain no language specifically revoking the parties' arbitration agreement" or its delegation clause. Pet. App. 9a. Nor do the official rules contain a merger clause, integration clause, or other language specifically displacing prior agreements. Instead, the User

Agreement's arbitration agreement remains in effect and governs—at a minimum—all claims between Coinbase and its users other than claims regarding the sweepstakes.[6]

Second, looking under the *Petrobras* hood shows that there were potentially thorny facts that may have led this Court to deny review. The *Petrobras* petitioners had asked the Texas Supreme Court to enforce a delegation clause in an agreement they also claimed was fraudulently induced as part of a "substantial corruption" scheme involving multiple payments totaling over $100 million. *Petrobras*, 650 S.W.3d at 468. The specific claims petitioners attempted to arbitrate were also covered by "the broadest type of general release" possible. *Id*. at 470 (quotation marks omitted).

By contrast, this Petition involves the simplest permutation of the question presented. The record is short and straightforward. The first contract Respondents signed contained an arbitration agreement and delegation provisions. The second contract was completely silent about arbitration—and said absolutely nothing about who would decide threshold arbitrability questions regarding the first contract's arbitration agreement. Coinbase pressed the question presented below, and the Ninth Circuit squarely addressed it in a published opinion. This is an ideal case for appellate review.

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[6] The *Petrobras* respondents suggested that this case involved a revocation. *Petrobras* BIO at 19. But that was clearly incorrect: There is no plausible allegation that the official rules revoked the User Agreement. Instead, the User Agreement continues to govern the relationship between Coinbase and Respondents.

Third, *Petrobras* was litigated in state court. One member of this Court has questioned whether the Federal Arbitration Act applies in that context. *See, e.g.*, *Preston* v. *Ferrer*, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting). By contrast, this case began in, and remains in, federal court where the Federal Arbitration Act unquestionably controls. This Court may have been similarly concerned about the degree to which *Petrobras* presented a reviewable issue of federal law. This case, by contrast, presents a pure question of federal law which arose in a federal court, and which this Court can clearly review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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