No. 23-3

IN THE

Supreme Court of the United States

COINBASE, INC.,

Petitioner,

v.

DAVID SUSKI, ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENTS

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January 29, 2024

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 77-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct. AAJ has participated as amicus curiae in a number of cases before this Court concerning the scope and application of the Federal Arbitration Act, including *Bissonnette v. LePage Bakeries Park St.*, 49 F4th 655 (2d Cir. 2022), *cert. granted*, 216 L. Ed. 2d 1312 (Sept. 29, 2023) (No. 23-51), *Southwest Airlines Co. v. Saxon*, 596 U.S. 450 (2022), and *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022).

AAJ is concerned that Petitioner has advanced a theory that would endow an arbitration agreement with a preferred position with respect to any other contract, thereby overriding state contract law in a manner that this Court rejected most recently in *Morgan v. Sundance, Inc.*, where this Court reiterated that ar-

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission.

bitration contracts should be treated like all other contracts and no better. Here, that principle supports Respondents' pursuit of their claims in a judicial forum.

SUMMARY OF ARGUMENT

General state contract principles control resolution of the Question Presented and leave no federal issue to resolve. Coinbase made a freestanding offer to participate in a sweepstakes, equally available to existing customers and potential new customers, who had no prior contractual relationship with the company. Without any indication that prior customers were subject to different rules, this separate contract neither contained nor referred to an arbitration provision or a delegation clause. Instead, it required entrants to resolve disputes in state or federal court in California and to waive any objection to personal jurisdiction should Coinbase sue them. It left no doubt that it could pursue litigation against an entrant, signaling an intent that was inconsistent with the pursuit of arbitration.

Coinbase is off base when it suggests that the "F[ederal]A[rbitration]A[ct]'s severability rule should have made short work of this case." Pet. Br. 3. To make that claim, it suggests that *some* entrants, including Respondents here, were still obligated by a delegation clause contained in a separate agreement with a different approach to resolving disputes, so that what it calls a "second contract" means something different for those entrants without any language that would provide the requisite notice about that intention. *Id.*

The absence of that notice, a delegation clause, or even an arbitration provision forecloses Coinbase's invocation of the severability rule for one simple reason: There is no arbitration provision to isolate "from the remainder of the contract," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006), and consider separately. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 74 (2010). Instead, Coinbase's position relies on an earlier contract that plainly does not govern this dispute under ordinary California contract principles similar to those that exist in all States.

The FAA establishes the "fundamental principle that arbitration is a matter of contract." *Id.* at 67; 9 U.S.C. § 2. California contract law makes plain that a new written contract supersedes conflicting provisions in an earlier one, as the decisions below recognized. Under this Court's normal practices, it defers to those interpretations of state law, which accurately described the applicable contract principles.

Coinbase acknowledges that those who agreed to the Official Rules but were never a party to the first contract would not be covered by any arbitration agreement. Yet, it illogically argues that the first contract's delegation clause controls the second contract for some entrants, even though the second contract provides no basis for that understanding and is lacking, as California law requires, clear and unequivocal notice that an earlier agreement governs any part of the new transaction. Coinbase had it entirely within its power to make clear what it now claims reflects the intent of the parties. It did not. Coinbase's argument is contrary to how contract law works in California, or in any other State AAJ researched.

The utter absence of a delegation clause from the second contract—or notice that the contract is subject to the delegation clauses of the first contract for those who are existing customers—is not only inconsistent with general California contract law, but easily fits within the rule this Court established that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (citation omitted). Coinbase cannot and does not argue that the second contract makes such a clear and unmistakable declaration, either within the contract or by reference to the earlier agreement.

State contract law principles and this Court's precedents foreclose Coinbase's argument. Yet, even if this Court considered that argument, based as it is on Coinbase's Rube Goldberg-like route to the delegation clause of the first contract, its contention fails. Coinbase argues that ambiguity in the first contract about what "obvious claims" are not "covered by the existing arbitration agreement" supports reference to an arbitrator on the issue of arbitrability. Pet. Br. 13.

Besides the fact that such an approach treats the second contract as a nullity and it renders ambiguous what Coinbase calls "obvious," three insuperable difficulties doom Coinbase's argument about the effect of ambiguity. First, an ambiguous delegation cannot meet the *First Options* test because, by definition, it is not "clear and unmistakable." Second, a basic tenet of contract law, in California and every State, construes an ambiguous contract provision against its drafter. *Tahoe Nat'l Bank v. Phillips*, 480 P.2d 320, 327 (1971);

see also Cal. Civ. Proc. Code § 1864. Finally, ambiguities provide no basis to compel arbitration. *See, e.g.*, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417 (2019). Thus, Coinbase cannot prevail in this case, and the decisions below must be affirmed.

The flaw in Coinbase's argument is further exposed if one carries Coinbase's argument to its logical outcome. Under Coinbase's theory, parties to an arbitration agreement cannot contract for new products or services without explicitly addressing the prior agreement, even if the two subjects have no relationship. Coinbase takes the position that a delegation clause defines the parties' relationship for all subsequent contracts, even if the new contract is entirely self-contained and there is no mention of the original contract. Separate and apart from the illogic of that arrangement, Coinbase's approach would put arbitration in a favored position rather than on an equal footing with how all contracts work, as this Court has insisted. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n.12 (1967) (holding "arbitration agreements as enforceable as other contracts, but not more so"). And it asks this court to do what it has said a court *cannot* do: "devise novel rules to favor arbitration over litigation." *Morgan*, 596 U.S. at 418.

The question before this Court is whether the new agreement, containing no arbitration clause, no delegation clause, and no indication that the prior agreement has any relevance to a dispute about the sweepstakes that is the subject of the second contract, imposes any arbitration-related obligation. Under basic and general contract law principles in California (and every other State) that do not conflict with this Court's

arbitration decisions, it does not—and that examination of state contract law entirely resolves this case.

ARGUMENT

I. General California Contract Law Answers the Question Presented.

This Court can resolve the Question Presented by applying the general contract law of California. Indisputably, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) (citation omitted); *Rent-A-Ctr*, 561 U.S. at 67 (calling reliance on state contract law a "fundamental principle" of the FAA).

The interpretation of that contract containing an arbitration clause, consistent with requirements of the FAA, "is generally a matter of state law" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010). *See also* 9 U.S.C. § 2 (providing that an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

A. California Contract Law Ultimately Treats the Two Contracts Independently, Absent "Clear and Unequivocal" Direction to Incorporate an Earlier Agreement.

1. Adoption of a Forum-Selection Clause Indicates that the Parties Intend to Supersede Any Prior Contrary Agreement.

A contract containing a forum-selection clause supersedes an arbitration agreement where "the forum selection clause[] . . . sufficiently demonstrate[s] the parties' intent to do so." *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 741 (9th Cir. 2014). *Cf. Applied Energetics, Inc. v. NewOak Cap. Mkts., LLC*, 645 F.3d 522, 525 (2d Cir. 2011) (holding that a second agreement, which required that any disputes between the parties be "adjudicated" in specific courts, directly conflicts with an earlier contract subjecting any dispute to arbitration and overrides the prior agreement).

Under California law, "'[t]he general rule is that when parties enter into a second contract dealing with the same subject matter as their first contract without stating whether the second contract operates to discharge or substitute for the first contract, the two contracts must be interpreted together and the latter contract prevails to the extent they are inconsistent.'" *Capili v. Finish Line, Inc.*, 116 F. Supp. 3d 1000, 1004 n.1 (N.D. Cal. 2015) (quoting 17A C.J.S. Contracts § 574), *aff'd*, 699 F. Appx. 620 (9th Cir. 2017).

Pursuant to Cal. Civ. Code § 1550, parties form a contract when at least the following elements exist: (1)

parties capable of contracting; (2) consent; (3) a lawful objective; and (4) sufficient cause or consideration.

Here, in conformity with those requirements, the parties do not dispute that they entered into the first contract, which contains a delegation clause. Nor do they dispute that they entered into an otherwise free-standing second contract, equally open to interested parties who were not part of the earlier agreement, with a forum-selection clause and no mention of arbitration. The question then remains: What is the relationship between the two contracts?

Coinbase claims the second contract did not affect continuing obligations under the first contract because Coinbase did not follow the formal modification process outlined in the original User Agreement. Pet. Br. 14. In Coinbase's estimation, the fact that it eschewed the written modification process provides "a strong indication the parties did not intend the official rules to modify the User Agreement or its arbitration agreement." Pet. Br. 14. However, a far less strained reading of the fact that Coinbase did not follow the formal modification process it devised would conclude that the contracts were entirely independent and addressed distinct subject matter, especially since it was equally applicable in all its explicit terms to parties who had no prior contractual relationship with Coinbase.

2. To Incorporate a Prior Contract by Reference, the Agreement Must Contain "Clear and Unequivocal" Language, "Called to the Attention of the Other Party."

To make a determination about the relationship between successive contracts, California courts(like courts throughout the Nation) first seek to ascertain "the parties' mutual intent at the time of contracting." *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, 135 Cal. Rptr. 2d 505, 513 (Cal. App. 2003) (citing Cal. Civ. Code § 1636). This Court's instructions to lower courts do not suggest otherwise. *See Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("[A]s with any other contract, the parties' intentions control . . . .").

California's courts undertake the task of divining the parties' intentions by examining the contract's language, which governs its interpretation, provided that the "the language is clear and explicit, and does not involve an absurdity." Cal. Civ. Code § 1638. No further inquiry need be undertaken if the contractual language provides an answer. *Id.* at § 1639. If the intention is not clear, a court may consult extrinsic evidence, but only if "relevant to prove a meaning to which the language of the instrument is reasonably susceptible." *Founding Members*, 135 Cal. Rptr. 2d at 515-16 (citation omitted).

Of course, "parties may validly incorporate by reference into their contract the terms of another document." *Baker v. Aubry*, 265 Cal. Rptr. 381, 383 (Cal.

App. 1989). However, to incorporate a separate document or agreement,

> the reference [to the other document] must be *clear and unequivocal*, the reference must be *called to the attention of the other party* and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties.

Shaw v. Regents of Univ. of Cal, 67 Cal. Rptr. 2d 850, 856 (1997) (emphasis added) (citations omitted).

In that respect, the standard is similar to the one this Court articulated for the application of delegation clauses; namely, that the evidence of that intent be "clear and unmistakable," rather than somehow be signaled by textual silence or ambiguity. *First Options*, 514 U.S. at 944-45.

3. Coinbase's Attempts to Avoid the Requirements for Incorporation by Reference Fail.

Coinbase makes an inapposite argument that wseeks to avoid California's requirements for incorporation by reference. It is clear that the sweepstakes' Official Rules did not contain "clear and unequivocal" language that was "called to the attention of the other party" about the application of any part of the earlier User Agreement. It would not have been hard to do so. The Official Rules call to entrants' attention how some contest rules do not apply to everyone. In recognition that certain liability limitations expressed in the rules

are impermissible in some States, Coinbase's agreement provides that, depending on your jurisdiction, these limitations "MAY NOT APPLY TO YOU". J.A. 108-09 (capitalization in original). The provision demonstrates that Coinbase knows how to provide clear and unequivocal notice called to another party's attention when it deems it necessary.

However, because it chose not to provide the requisite notice that California requires to incorporate by reference, Coinbase erroneously argues that California law treats a "later-in-time" contract as being only one of two possible legally cognizable instruments, leaving out*, inter alia*, the possibility that a second contract can be an entirely independent and free-standing agreement.

To Coinbase, the new contract must be either a "novation which supplants the original agreement' entirely," Pet. Br. 31 (citing *Wells Fargo Bank v. Bank of Am.*, 38 Cal. Rptr. 2d 521, 525 (Cal. App. 1995)), or a "modification," which "displaces 'only those portions of the written contract directly affected,' and leaves 'the remaining portions intact.'" Pet. Br. 32 (quoting *Eluschuk v. Chem. Eng'rs Termite Control, Inc.*, 54 Cal. Rptr. 711, 715 (Cal. App. 1966)).

The novation it properly dismisses as applicable must reflect an intention to substitute a "new obligation for an existing one." *Wells Fargo*, 38 Cal. Rptr. 2d at 525 (quoting Cal. Civ. Code § 1530). It "completely extinguishes the original obligation" and not "merely modify the original agreement." *Id.* To accomplish that result, any "intention to discharge the old contract

must be clearly indicated." *Eluschuk*. 54 Cal. Rptr. at 714.

Here, the parties plainly did not intend to substitute Official Rules for the earlier agreement because no such intention is expressed, and the new contract concerns only a new sweepstakes that Coinbase instituted, rather than the continuing relationship that the User Agreement addresses.

On the other hand, a modification seeks "change in one or more respects which introduces new elements into the details of the contract, or cancels some of them, but leaves the general purpose and effect undisturbed." *Id*. at 715 (citation omitted). Coinbase labels the new contract an "alleged modification," Pet. Br. 32, suggesting that it disclaims that status for the contract and attributes the description to the Respondents. As a result, it is unclear what Coinbase considers the Official Rules to be.

Still, the Official Rules do not comfortably fit the modification pigeonhole either. The sweepstakes contract was open to anyone, including people without a prior contractual relationship with Coinbase. It was, therefore, written and intended to stand alone. As such, it does not govern the same types of transactions contemplated in the original contract, but a set of distinct and unrelated transactions that were set for separate treatment.

Most importantly, the Official Rules introduce a new system to resolve disputes relating solely to its

limited subject matter. Rather than require arbitration as the original contract did, the Official Rules, which serve as the contract's terms, state:

> 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. 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.

J.A. 108 (capitalizations in original).

A logical reading of the provision supports treatment of the second contract as an independent agreement concerned with a discrete set of transactions not intended to relate to the original contract. The Rules delineate a distinct dispute resolution mechanism for the sweepstakes without suggesting that there are any other considerations relating back to any other agreement. Certainly, if Coinbase sued an entrant who is a current customer for breach of the rules in California, having waived personal jurisdiction by the terms of the agreement, no defendant would likely read the agreements to allow them to bring an action to compel arbitration instead of having the matter heard in court. Looking at the agreement that way confirms that the second contract fails to signal that

the delegation clause of a prior agreement applies or that an entrant could resist a judicial determination of contractual rights by seeking an arbitrator's decision on the proper forum. Because it is not apparent that an arbitrator's decision must precede such a lawsuit, the example provides a powerful argument that Coinbase is similarly disabled from doing so when it is named a defendant.

That reading, denying applicability of any delegation clause, finds additional support from the fact that the contract was open to potential customers with no prior contractual relationship to Coinbase and no purchase required to enter. Pet. Br. 11. Plainly, no reference to an arbitrator for any purpose applies when such an outsider agrees to the subject contract.

That example shows that Coinbase has it backwards when it claims that a reading different from its version results in a "quintessential absurdity." Pet. Br. 34. It claims that such an absurdity occurs if the contracts could be read to mean that "two users could sign identical contracts and could bring identical claims, but the question of who decides where those claims should be brought will vary . . . ." Pet. Br. 34. In Coinbase's version, what causes absurd differential treatment turns on which agreement comes second. Pet. Br. 34. Of course, rather than be absurd, it is simply the application of a standard contract rule—a subsequent contract will supersede contrary provisions in an earlier contract as explained *infra*.

However, what *is* absurd is that the situation Coinbase describes occurs naturally through its interpretation. An existing Coinbase customer and a person who solely enters the sweepstakes sign identical contracts and bring identical claims, but only the former must seek an arbitrator's blessing before going to court, under Coinbase's construction.[2] That absurdity is entirely avoided by treating the User Agreement and the Official Rules as entirely distinct contracts because the latter contract does not reference the earlier one.

4. If Treated as a Modification, This Court Should Still Affirm the Decision Below.

Even if treated as a modification as Coinbase appears to suggest, the result is the same: no delegation clause applies. California's consistent approach to contract law holds that "[w]here there is an inconsistency between two agreements both of which are executed by all of the parties, the later contract supersedes the former." *Frangipani v. Boecker*, 75 Cal. Rptr. 2d 407,

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[2] As Coinbase tells this Court, "[m]ail-in entrants did not need to sign the User Agreement, and thus were not necessarily bound by an arbitration agreement." Pet. Br. 13. According to Coinbase, 4,329 entrants participated as mail-in entrants. Pet. Br. 13. That status, Coinbase admits, "dictated which courts could resolve such disputes," while it contends that "existing users who entered the sweepstakes by purchasing cryptocurrency remained bound by the broad arbitration provision in the User Agreement." Pet. Br. 13. Coinbase's formulation appears to render the forum-selection clause a nullity for existing users, yet nothing in the agreement would convey that to an entrant with a Coinbase User Agreement. Thus, Coinbase's position is not limited to the delegation clause issue, but to arbitration more generally.

409 (Cal. App. 1998). Specifically, in *Frangipani*, the court held that inconsistent provisions in the newer agreement, which related only to escrow instructions, "supersede the inconsistent contract provisions." *Id.*

The Ninth Circuit took that approach in this case, relying on the same principle that a subsequent contract supersedes an earlier one. Pet. App. 8a (recognizing that the forum-selection clause was irreconcilable with arbitration). Such a general contract rule is not absurd, nor does it discriminate against arbitration.

In *Williams v. Atria Las Posas*, 24 Cal. Rptr. 3d 341, 345 (Ct. App. 2018), a California appellate court applied the rule to hold that a subsequent agreement *with an arbitration clause* superseded an earlier one that contained none. At issue was a Residency Agreement that declared that it was the final and complete expression of the parties' agreement, which California terms an "integration clause" and forecloses other actions that would otherwise modify the agreement *Id.* The Residency Agreement did not contain an arbitration clause. *Id.* at 341.

Immediately after signing the Residency Agreement, the parties signed an "Agreement to Arbitrate Disputes" that, by its plain language, covered "any and all legal claims or civil actions arising out of or relating to care or services provided to you . . . or relating to the validity or enforceability of the Residency Agreement." *Id.* The trial court had held that the integration clause made the subsequent arbitration agreement invalid. The appellate court reversed. It held that, because the arbitration agreement was signed *after* the Residency

Agreement, it superseded the integration clause, even though it supposedly did not admit to future modifications, and created a valid arbitration agreement between the parties. *Id*. at 345.

In this case, the Ninth Circuit properly identified and applied this principle of ordinary California contract law. Although Coinbase disputes the Ninth Circuit's understanding, this Court's "normal practice" is to defer to a circuit court's "interpretation and application of state law." *Lamps Plus*, 139 S. Ct. at 1415. It "render[s] unnecessary review of their decisions in this respect" and is justified "because lower federal courts 'are better schooled in and more able to interpret the laws of their respective States.'" *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 45 (2017) (citations omitted).

5. The Forum-Selection Clause Is Inconsistent with an Intent to Arbitrate.

Even if this Court were to engage in further scrutiny of that conclusion, the Official Rules make the Ninth Circuit's resolution inescapable. Here, the forum-selection clause, assigning "*sole jurisdiction of any controversies regarding the promotion*," plainly makes disputes concerning the promotion a matter for litigation in a court of law. Such an assignment is inconsistent with an intention to arbitrate on Coinbase's part. It conveys to potential customers that no arbitration obligation applies to this commercial arrangement because a forum-selection clause identifies "the venue for any other claims that were not covered by

the arbitration agreement." *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1209 (9th Cir. 2016).

In other circumstances, courts treat "act[ing] in a manner inconsistent with an intent to arbitrate" as a form of waiver of any contractual obligation in that respect. *See Zuckerman Spaeder, LLP v. Auffenberg*, 646 F.3d 919, 921 (D.C. Cir. 2011); *see also White v. Samsung Elecs. Am., Inc.*, 61 F.4th 334, 341 (3d Cir. 2023); *In re Cox Enters., Inc. Set-top Cable Television Box Antitrust Litig.*, 790 F.3d 1112, 1117 (10th Cir. 2015); *In re Checking Acct. Overdraft Litig.*, 754 F.3d 1290, 1294 (11th Cir. 2014) (waiving arbitration, including delegation clause); *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 347 (5th Cir. 2004).

No different approach should apply here. The inclusion of a forum-selection clause signals an intent to litigate. By contrast, an agreement to arbitrate "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors*, 473 U.S. at 628. As *Mitsubishi Motors* recognizes, it does not evince any commitment to submit to the "review of the courtroom." It thus supersedes any contrary earlier agreement.

B. The Second Contract Contained No "Clear and Unequivocal" Language Incorporating Any Terms from the First Contract.

Coinbase's claim that only two possible forms of contract exist, novation or modification, erroneously excludes the possibility that parties to an agreement may enter into additional separate agreements. A

party, for example, may hire a contractor to construct an addition to a home. Pleased with the experience even before completion, the homeowner may then enter into an additional, separate contract to turn an attic space into a living space. If the first contract includes an arbitration agreement over any disputes and includes a broadly written delegation clause, the second contract, containing a forum-selection clause but making no reference to the first contract, cannot be understood to require submission of a dispute about the attic to an arbitrator to determine the proper forum. Each contract is self-contained.

The present controversy fits the same rubric. To signal otherwise, California law requires incorporation of a prior agreement in a later agreement to include "clear and unequivocal" reference to the earlier agreement that is called to the other party's attention. *Shaw*, 67 Cal. Rptr. 2d at 856.

Coinbase does not point to any language in the second contract that even suggests incorporation by reference or that calls attention to the delegation clause's applicability to any sweepstakes dispute that might arise, because there is none. Instead, Coinbase acknowledges that the "official rules do not mention the arbitration agreement." Pet. Br. 14. Instead, it asks this Court to credit as a sufficient incorporation by refence that the official rules still "referenced and hyperlinked" to the original agreement as confirmation that the "two contracts were meant to coexist harmoniously." Pet. Br. 14. The contracts can, in fact, coexist harmoniously as separate agreements.

What Coinbase describes does not call anyone's attention to the applicability of a prior agreement, let alone provide "clear and unequivocal" notice that a prior agreement controls any part of the new agreement.[3]

Because there is no "arbitration provision" or "delegation clause" in the Official Rules and no incorporation of them by clear and legitimate reference, there is also no reason to isolate a delegation clause "from the remainder of the contract," *Buckeye Check Cashing*, 546 U.S. at 445, and consider it separately. *Rent-A-Ctr.*, 561 U.S. at 74, as Coinbase advocates.

II. Any Ambiguity Must Be Construed Against Coinbase.

Coinbase also argues that the original User Agreement has an unambiguous delegation clause, and its existence forecloses any examination of the Official Rules that serve as a second contract. Instead, the second contract, as AAJ has argued, critically dictates the relevance, if any, of the prior agreement – and here it

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[3] A review of the Joint Appendix's version of the Official Rules does not show any discernible reference or hyperlink to the User Agreement. It does reveal a hyperlink to the Coinbase website home page (J.A. 99), where a new user may open a Coinbase account, and another to access Coinbase's privacy policy (J.A. 109), but nothing that might alert anyone to the User Agreement. That other references to documents are that much more apparent than the User Agreement, at least in the Joint Appendix, also supports finding that there is no "clear and unequivocal" notice that would qualify for incorporation under California contract law. Still, even relying on Coinbase's description of the reference fails to meet California's rather simple requirements.

makes it immaterial. Coinbase concedes that the second contract does not impose arbitration of any issue when the sweepstakes entrant is new to Coinbase and makes no purchase to enter. Pet. Br. 3, Moreover, Coinbase does not advise, as it does for other purposes, that its terms might not apply to certain entrants. *See* J.A. 108-09 (informing entrants that "some jurisdictions" prohibit the Official Rules' liability limitations, "so the above might not apply to you.") (capitalization omitted).[4]

Lacking clear and unequivocal language that notifies an entrant that some may still be subject to the delegation clause of the User Agreement that applies to all other Coinbase transactions, the best that can be said if the Official Rules' hyperlink to the User Agreement means anything, is that silence or ambiguity characterizes the relationship between the two agreements, it the first agreement is not ruled superseded by the newer contract.

California interprets an ambiguous contract clause against its drafter. *Tahoe Nat'l Bank*, 480 P.2d at 327; *see also* Cal. Civ. Proc. Code § 1864 (codifying

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[4] California law requires that "official rules" govern a sweepstakes and be placed in a "formal printed statement" in every solicitation for participation. Cal. Bus. & Prof. Code § 17539.15(k)(2). One requirement that the printed rules must reflect is "a clear and conspicuous statement" that no purchase or payment is necessary to enter or win the sweepstakes. *Id.* at § 17539.15(b), (k)(1). As the additional clear and conspicuous statement Coinbase added made plain, it was free to add others, including one that would have incorporated the earlier agreement by reference for all who were parties to the User Agreement.

this rule of interpretation). That approach to interpretation is commonplace among the States and "frequently described by the Latin term *contra proferentem*, literally, against the offeror, the party who puts forth, or proffers or offers, the language." 11 Williston on Contracts § 32:12 (4th ed. 2023) (footnotes omitted). This Court has recognized both its common law origins, as well as the logic of denying to those who drafted the agreement, a claim to the "benefit of the doubt." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995).

Under California law, a contract contains ambiguity "when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing." *Benedek v. PLC Santa Monica, LLC*, 129 Cal. Rptr. 2d 197, 202 (Cal. App. 2002). Another way to look at it is that a contract provision is ambiguous "when it is capable of two or more constructions, both of which are reasonable." *Powerine Oil Co. v. Superior Ct.*, 118 P.3d 589, 598 (Cal. 2005).

Here, it is wholly reasonable to read the Official Rules and conclude that the language intends to resolve all disputes through litigation. *See Mohamed*, 848 F.3d at 1209. The agreement's text makes that indisputable.

Not only did the Respondents read the provision that way, but the lower courts in this case did as well. It is then incontrovertible that this reading comprises an "alternative, semantically reasonable" reading that establishes good reason to construe the agreement against Coinbase.

This Court's treatment of ambiguities and silence in arbitration agreements also aligns with that approach. In *Lamps Plus*, this Court reiterated that arbitration is "strictly a matter of consent." 139 S. Ct. at 1415 (quoting *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299 (2010)). Parties often use an agreement to indicate who will arbitrate and on what issues. *Id.* at 1416. Although the rule of *contra proferentem* is an interpretive tool of last resort, *Id.* at 1417 (citing 3 Corbin on Contracts § 559, ¶¶ 268-270 (1960)), it provides a logical means of determining which intent of two competing views receives credit.

Coinbase drafted two standardized contracts that it intended to use over and over again with many different people. It had every opportunity to adopt a language of a crystalline quality to the agreements so that everyone would be on the same page. Instead, it drafted a second contract that did not mention the arbitration clause and gave every impression that it had elected litigation in California as the means to resolve every dispute that arose with respect to the sweepstakes. When the parties it contracted with understood the contract to choose litigation as a dispute-resolution mechanism, it cannot claim that these users consented to arbitration, or to resolving the arbitration versus litigation determination through arbitration.

Because there is no mention of arbitration in the document and no clear and unequivocal reference back to the original contract, ambiguity, just like silence, should default to the position this Court has consist-

ently taken that, absent "clear and unmistakable evidence," the parties did not agree to arbitrate arbitrability. *First Options*, 514 U.S. at 944. That evidence is utterly absent from the second agreement and means that the default position this Court has emphasized should apply: arbitrability is "an issue for judicial determination." *AT&T Techs.*, 475 U.S. at 649. In this instance, the agreement's language foretells that result.

As this Court said about class arbitration, "[c]ourts may not infer from an ambiguous agreement that parties have consented to arbitrate." *Lamps Plus*, 139 S. Ct. at 1419. The opposing view "is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Stolt-Nielsen*, 559 U.S. at 684. In this agreement, consent to arbitrate the proper forum is absent.

III. Respondents Had No Obligation to Challenge the Delegation Clause to Remain in Court.

Coinbase posits that Respondents needed to challenge the delegation clause of the first contract in order to remain in court. Pet. Br. 40. Because that did not occur, Coinbase then claims that "the delegation clause remains valid, and an arbitrator should decide whether the official rules in fact narrowed the arbitration agreement." Pet. Br. 40.

This is a straw-man argument. It treats the second contract as an addendum to the first, even though the second fails to contain any of the necessary indicia

that it adds to the first one. It applies equally to existing customers and strangers. On its face, then, it cannot be an addendum. Yet, if for any potential parties with prior agreements Coinbase intended to treat the Official Rules as a part of the earlier agreement, a simple notice to existing customers would have accomplished that goal without necessitating a visit to this Court's docket to resolve.

If, as amici contend, the better view is that the Official Rules stand as a separate and distinct contract, then there is no reason to challenge the first contract's delegation clause; it is simply not part of the contract. To view it otherwise, as Coinbase argues, is to treat the second contract as though it were the remainder of the same contract, to conform to what *Rent-a-Center* describes as the process of severing the delegation clause for independent review separate and apart from any question about the overall validity of a contract. 561 U.S. at 72. Yet, without the connective tissue necessary to make the second contract subject to the first, that process would focus on the wrong instrument.

Even if the Official Rules were regarded as a modification of the first agreement, a proper analysis begins with the second agreement, not the delegation clause in the first agreement. If, for example, the modification effectuated by the second agreement was limited to an explicit abrogation of the delegation clause contained in the first, any analysis appropriately starts with that text in the second agreement. If it is clear in reflection a mutual intention to cut arbitration out of the dispute process, there would be no reason to

look at the first contract's delegation clause. A second written agreement would have rendered it null and void, making any consultation of it unnecessary.

Coinbase's theory creates the opposite effect. Parties can never abrogate a delegation clause or even an arbitration agreement through a future contract because a court may never look at the new contract. Its focus must remain on the original delegation clause. That approach is not mandated by this Court's cases when, as here, a new instrument is at issue.

Nor does it treat arbitration on an equal footing as other contracts, as this Court has repeatedly held. *See Buckeye Check Cashing*, 546 U.S. at 443. Instead, it creates an unwarranted favoritism for arbitration, even when the parties have not consented to arbitration, as a contract abrogating that agreement would indicate. This Court recently reminded everyone that the "FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules." *Morgan*, 596 U.S. at 418 (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Yet, by asking this Court to go to the delegation clause prior to examining the second contract, which determines whether that clause is even relevant, that is exactly what Coinbase is asking.

Yet another reason that Coinbase's gambit is unavailing is that it fails to honor the agreement and intent of the parties as expressed in the second agreement. Courts are obliged to "give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA." *Volt*

Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989). Adopting an ostrich-like stance so that the second agreement is unseen while an earlier untethered agreement provides the hole that blinds the court to the subsequent agreement, even though it governs all disputes arising from the sweepstakes, fails to accord any weight to those rights and expectations expressed in the second contract.

Although this Court recently discussed why a challenge to a delegation clause was necessary to obtain a court's intervention, *see Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019), Coinbase gives the decision a scope and meaning it does not support. *See* Pet. Br. 25. At issue in *Henry Schein* was whether a court, in the interests of efficiency, could short-circuit the arbitrability question when the claim to arbitration was "wholly groundless." However tempting it is to resolve such an easily answered question, this Court instructed that courts must defer to the parties' decision so that where a delegation clause validly applies, the decision in the first instance must go to an arbitrator in order to implement the parties' choice. *Henry Schein*, 139 S. Ct. at 528.

Nothing in that analysis requires a challenge to the delegation clause in the context of this case. Nor does *Prima Paint* or *Rent-A-Center*, as Coinbase contends. Pet. Br. 42 (citing *Rent-A-Ctr.*, 561 U.S. at 71; *Prima Paint*, 388 U.S. at 403-04). Those cases "require the basis of challenge to be directed specifically to the

agreement to arbitrate before the court will intervene." *Rent-A-Ctr.*, 561 U.S. 71 (characterizing the holding in *Prima Paint*), but do not address the situation this case presents of a second contract without an arbitration or delegation clause.

The absence of any indicia that incorporates the prior agreement in any manner that satisfies California law means that the second contract is the proper focus of a court entertaining the arbitrability question. If it stands on its own, if it modifies the original agreement, if it displaces the arbitration and delegation clauses, as it does as a matter of ordinary California contract law, then there is no delegation clause to challenge, and the second agreement provides the correct starting point for any analysis.

Beyond the absence of any proper reference back to the original agreement, the presence of the forum-selection clause has the same effect as explicit abrogation of any arbitration or delegation agreement. It assigns, inconsistently with arbitration, dispute resolution to the courts. And it makes both a challenge and a review to the original delegation clause, still valid for other purposes, irrelevant to this dispute. This Court should reject Coinbase's invitation to treat it otherwise.

In the end, "arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options*, 514 U.S. at 943. The "second contract," as Coinbase called it, evinces no agreement to submit anything to

arbitration because it establishes the courts of California, state or federal, as the proper forum to resolve any dispute. Honoring that explicit choice properly "give[s] effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA." *Volt Info. Scis.*, 489 U.S. at 479.

CONCLUSION

For the foregoing reasons, amicus urges this Court to affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

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January 29, 2024