

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

COINBASE, INC.,)
 Petitioner,)
 v.) No. 23-3
DAVID SUSKI, ET AL.,)
 Respondents.)

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10 Washington, D.C.

11 Wednesday, February 28, 2024

12

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 11:36 a.m.

16

17 APPEARANCES:

18 JESSICA L. ELLSWORTH, ESQUIRE, Washington, D.C.; on
19 behalf of the Petitioner.

20 DAVID J. HARRIS, JR., ESQUIRE, San Diego, California;
21 on behalf of the Respondents.

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P R O C E E D I N G S

(11:36 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 23-3, Coinbase versus Suski.

Ms. Ellsworth.

ORAL ARGUMENT OF JESSICA L. ELLSWORTH
ON BEHALF OF THE PETITIONER

MS. ELLSWORTH: Mr. Chief Justice, and may it please the Court:

The Federal Arbitration Act requires courts to enforce arbitration agreements according to their terms. Respondents and Coinbase agreed to arbitrate any disputes about Coinbase services and to delegate to an arbitrator any threshold disputes about whether specific claims were subject to arbitration.

Despite this delegation clause, the parties have spent nearly three years disputing this threshold issue. That's because, instead of enforcing the delegation clause, the courts below came up with rationales to evade it and to instead answer the question of arbitrability for themselves.

The Ninth Circuit did so by

1 characterizing Respondents' challenge as one of
2 contract formation, asserting that contract
3 formation can never be delegated and
4 sidestepping the delegation clause. The issue,
5 as the court of appeals saw it, was whether the
6 parties formed a contract to arbitrate these
7 claims.

8 If that approach were correct, courts
9 in every case could ignore delegation clauses by
10 just characterizing an arbitrability dispute as
11 a question of whether the parties formed a
12 contract to arbitrate the claims at issue.

13 Respondents do not defend that
14 reasoning. They agree the contracts here were
15 formed and that they were in effect. Their
16 argument is that the scope of the otherwise
17 applicable arbitration agreement was narrowed by
18 a later contract to exclude their asserted
19 claims. That question is one of arbitrability,
20 and the parties agreed an arbitrator would
21 decide it.

22 Respondents blur three distinct legal
23 questions in a case like this one. The first is
24 the merits of the claims the Respondents assert.
25 The second is whether those -- the merits of

1 those claims should be arbitrated. And the
2 third, which is the only question that was
3 before the courts below and is before this
4 Court, is who decides whether the merits should
5 be arbitrated. This third question is
6 antecedent to the other two.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Isn't the problem the
9 confusion that results from the difference
10 between the official rules and the agreement?

11 MS. ELLSWORTH: So, Your Honor, at
12 some level, there is some confusion that the
13 Respondents have argued results from looking at
14 these two together. But the only way there is
15 confusion is if you conflate those different
16 layers of questions because the -- the -- the
17 delegation clause that's in the arbitration
18 agreement answers directly the who decides.

19 JUSTICE THOMAS: So what is the source
20 of the disagreement here? Doesn't it come from
21 the -- the -- the rules?

22 MS. ELLSWORTH: So the source of the
23 agreement is --

24 JUSTICE THOMAS: Disagreement.

25 MS. ELLSWORTH: Certainly. The source

1 of the disagreement is that there is a forum
2 selection clause in the official rules that says
3 something about controversies regarding the
4 promotion.

5 And the Respondents have argued that,
6 by using that language, the second contract
7 somehow carved out of the arbitration agreement
8 the claims they want to assert here.

9 JUSTICE THOMAS: Well, couldn't this
10 have been solved in drafting by simply either
11 having an express arbitration provision in the
12 official rules or by referring back to and
13 incorporating the user agreement?

14 MS. ELLSWORTH: So, Your Honor, I
15 think those are certainly questions that could
16 be and should be addressed by the arbitrator
17 when this gets there. But -- but the threshold
18 question is whether the confusion that Your
19 Honor is referencing has anything to do with the
20 who decides issue. And there's nothing in the
21 official rules language --

22 JUSTICE THOMAS: Well, I think it goes
23 a little deeper because you can also say, is
24 there actually an arbitration agreement that
25 comes out of the -- the rules?

1 MS. ELLSWORTH: So -- so, Your Honor,
2 I -- I don't think there is an arbitration
3 agreement anywhere in the official rules. The
4 Respondents' argument is to try to take the
5 official rules to create ambiguity about the --
6 or -- or -- or confusion, as Your Honor said,
7 about what claims are actually subject to
8 arbitration.

9 JUSTICE THOMAS: Yeah.

10 MS. ELLSWORTH: But that is a
11 garden-variety arbitrability question. It
12 doesn't speak to the threshold, gateway who
13 decides question.

14 JUSTICE JACKSON: So can I ask you --
15 oh, go ahead. Go ahead.

16 JUSTICE KAVANAUGH: Go ahead.

17 JUSTICE JACKSON: Can I ask you about
18 the who -- who decides question? Because I --
19 I'm follow -- I think I'm following your
20 argument, but I -- I guess I'm questioning
21 whether you're right that the only way there is
22 confusion is if you conflate the questions.

23 So let me -- let me posit this
24 hypothetical. Suppose we have two contracts,
25 the first of which has a delegation clause that

1 answers the who decides question, and the answer
2 in the first contract is the arbitrator decides.
3 We have a second contract that answers the
4 delegation question, and the answer in that case
5 is the court decides.

6 In that situation, where you have
7 these two different contracts with two different
8 clear delegation principles, isn't the question
9 at that point, which contract controls? Which,
10 you know, I take it is another way of the Ninth
11 Circuit saying, well, this contract superseded
12 that one. But, really, it's a question at that
13 point of what did the parties intend, what was
14 their agreement about which of these two
15 contracts controls the situation.

16 And in that case, I think you go to
17 the court. Why -- why am I wrong about that?
18 And isn't that the situation that's actually
19 being presented on these facts?

20 MS. ELLSWORTH: So I think you are
21 right about that, not wrong about it. And I
22 think the distinction between your hypothetical
23 and this issue in this case is -- is -- is a
24 very important one.

25 You're right about it because, in your

1 hypothetical, you identified a -- a contract
2 with a delegation clause and a second contract
3 that isn't silent about delegation; it
4 specifically addresses delegation and has a
5 different provision.

6 So a party could come into court
7 resisting arbitration and make a specific
8 challenge to the delegation clause in the first
9 contract that is directed at whether that
10 particular delegation clause has been superseded
11 by the later delegation clause. It's all at
12 this who decides level.

13 The problem in this case is that the
14 -- from the very beginning, the Respondents have
15 agreed this arbitration agreement remains in
16 effect. This delegation clause remains in
17 effect. It would cover these claims.

18 JUSTICE JACKSON: I understand, but by
19 operation of the law, don't we have the --
20 basically the same thing here? Because the
21 second contract is not completely silent. The
22 second contract says forum selection, go to --
23 you know, disputes go to the court.

24 And I thought that by operation of
25 law, when you don't speak to delegation in a

1 situation like that, it's -- the choice is --
2 the delegation is to the court. So that, in
3 effect, even though we don't have those words in
4 the second contract, we basically achieve the
5 same thing. Am I wrong about that?

6 MS. ELLSWORTH: I -- I think you
7 are --

8 JUSTICE JACKSON: Okay.

9 MS. ELLSWORTH: -- just a little bit
10 off about that.

11 JUSTICE JACKSON: Okay.

12 MS. ELLSWORTH: And the nuance here, I
13 think, is the exact nuance that this Court
14 identified really going all the way back to
15 Prima Paint but through Rent-A-Center itself,
16 where it talked about the fact you can have
17 validity challenges that are -- that occur at
18 these different levels.

19 So you can argue that there's some
20 sort of invalidity or some sort of supersession
21 that occurs at the level of the arbitration
22 agreement. You can also have one that occurs at
23 the level of the delegation clause.

24 And under the severability principle
25 that this Court has consistently applied and

1 that it draws directly from the text of Section
2 2 of the FAA, the only question here is whether
3 the -- the Respondents' argument addresses the
4 who decides question.

5 JUSTICE KAVANAUGH: Can I -- keep
6 going.

7 JUSTICE JACKSON: No, I'm -- it's all
8 right. I'm done.

9 MS. ELLSWORTH: So the only -- only
10 other point I would make that I think is
11 important to understand about this is that a
12 delegation clause by its very nature must reach
13 more broadly than an arbitration agreement, and
14 that's because, when you get to the del -- when
15 you -- when you have the delegation and you end
16 up in front of the arbitrator, sometimes the
17 answer will be yes, this should be arbitrated;
18 sometimes it will be no, it shouldn't be. But
19 the force of the delegation clause does not turn
20 on the reach of the arbitration agreement.

21 JUSTICE KAVANAUGH: So, from the reply
22 brief, page 9, I located a point of possible
23 agreement between you and Respondent on a remand
24 possibility. So you say on page 9 in the reply
25 brief, "Because the Ninth Circuit did not decide

1 whether the sweepstakes' official rules
2 displaced the delegation clause, this Court
3 could vacate the judgment below and instruct the
4 Ninth Circuit to apply the FAA's severability
5 rules. See response 58," the response to the
6 red brief.

7 The red brief said "the Court should
8 remand this case to the Ninth Circuit to more
9 thoroughly consider whether the Official Rules
10 partially modify the User Agreements' delegation
11 clauses" -- they say -- "under non-preempted,
12 State laws of contract interpretation."

13 Are you all saying the same thing
14 there? And if you both agree that the Ninth
15 Circuit's analysis is wrong, it should be
16 remanded, are we done?

17 MS. ELLSWORTH: So I think, Your
18 Honor, that we do both agree that the Ninth
19 Circuit's analysis was wrong. I think we do
20 both agree that this should be remanded.

21 I think we have a disagreement when
22 you get beyond that. And --

23 JUSTICE KAVANAUGH: The -- the under,
24 the -- can we just remand and say that's for the
25 Ninth Circuit to -- to figure out in the first

1 instance?

2 MS. ELLSWORTH: You can. I -- I think
3 it would be important --

4 JUSTICE KAVANAUGH: And if we do that,
5 are we done?

6 (Laughter.)

7 MS. ELLSWORTH: So, Your Honor, I
8 think you -- I think you could stop there.

9 JUSTICE KAVANAUGH: Okay.

10 MS. ELLSWORTH: I think there are some
11 reasons not to stop there and to add a little
12 bit of an explanation.

13 JUSTICE KAVANAUGH: But we could. I
14 just want to get the "could" and the Respondent.

15 (Laughter.)

16 MS. ELLSWORTH: Yes. Yes, Your Honor.
17 Yes. I -- I --

18 JUSTICE KAVANAUGH: And then tell me
19 why we shouldn't, but I just wanted to get the
20 "could." Okay.

21 MS. ELLSWORTH: Well, I -- I think you
22 -- you -- you could stop there, but in saying
23 that you're remanding the case, I think there
24 are three important principles that the Ninth
25 Circuit went astray on that I would recommend

1 that this Court provide as guidance because this
2 is a situation, successive contracts come up not
3 infrequently in all sorts of commercial
4 settings, consumer settings.

5 The first is that the severability
6 principle applies just as much in a successive
7 contract scenario as it does to a single
8 contract scenario. That means that the court
9 can only entertain challenges directly to the
10 validity or enforceability of the delegation
11 clause itself.

12 The second principle that I think
13 would be important to explain is that delegation
14 clauses can and regularly do direct an
15 arbitrator to resolve disputes about whether an
16 arbitration agreement exists and whether it
17 covers a particular dispute.

18 The third point I think that this
19 Court should make in remanding it is that a
20 court cannot refuse to enforce a delegation
21 clause based on the court's view that a later
22 contract changes the scope of what disputes are
23 arbitrable because, as I said in -- to -- in
24 response to your earlier question, the force of
25 a delegation clause does not rise or fall on the

1 scope of --

2 JUSTICE SOTOMAYOR: These are huge
3 changes.

4 CHIEF JUSTICE ROBERTS: Well, you --
5 you do --

6 JUSTICE SOTOMAYOR: I'm sorry. These
7 are huge changes. You are now creating a whole
8 set of federal rules on what constitutes a
9 superseding agreement or not.

10 I don't -- we didn't grant cert on
11 that. We granted cert on a very narrow
12 question, and the narrow question was where
13 parties enter into an agreement -- an
14 arbitration agreement with a delegation clause,
15 should an arbitrator or a court decide whether
16 that agreement is narrowed by a later contract
17 that is silent as to arbitration and delegation.

18 I don't know whether the silence or
19 not is relevant. The question is what does
20 state law do. We didn't answer -- we didn't ask
21 for briefing on that. The short answer is the
22 court decides what state law says or doesn't
23 say.

24 Here, the Ninth Circuit decided that
25 three years into this litigation, two appeals to

1 -- to the Supreme Court that have been accepted.
2 Why shouldn't we just answer that question? The
3 Court decides it. State law may guide the Court
4 in whether there's been a superseding agreement,
5 but we shouldn't be creating federal rules for
6 the state to follow or not follow in
7 interpreting contracts.

8 MS. ELLSWORTH: Justice Sotomayor, we
9 are not asking for you to create any federal
10 rules in resolving this case. The severability
11 rule is something this Court has applied
12 consistently. It has drawn directly from the
13 text of Sections 2, 3, and 4.

14 And all we're asking is that in -- in
15 remanding this, you make clear that the
16 severability rule applies here, just as it
17 always does.

18 JUSTICE SOTOMAYOR: No, they've --

19 CHIEF JUSTICE ROBERTS: Well --

20 JUSTICE SOTOMAYOR: -- answered that
21 -- I'm sorry.

22 CHIEF JUSTICE ROBERTS: -- I'm -- I --
23 I would suppose that your answer could be that
24 it -- it depends. I mean, simply because
25 there's a subsequent contract that is silent

1 doesn't mean that the delegation clause covers
2 all of that, right?

3 You could have a big enterprise and
4 you have a delegation clause in a particular
5 arbitration agreement, and there's a contract
6 entered between the same parties somewhere down
7 the line concerning a totally different issue.
8 And do you think in that situation it still goes
9 to the arbitrator --

10 MS. ELLSWORTH: So, Your Honor --

11 CHIEF JUSTICE ROBERTS: -- to decide
12 whether he or she's been delegated the authority
13 to arbitrate that agreement?

14 MS. ELLSWORTH: Mr. Chief Justice, I
15 think there is a practical answer to that and
16 there is a doctrinal answer to that.

17 The -- the practical answer is that a
18 -- a party only invokes a delegation clause when
19 it thinks it has a real claim that the dispute
20 is actually subject to arbitration.

21 So -- so, for example, in this case,
22 the Respondents have agreed that absent the
23 official rules changing it, their claims are
24 subject to -- to arbitration. So that's the --
25 that's the practical answer.

1 CHIEF JUSTICE ROBERTS: Well, put that
2 aside. Well -- or, no, I'll answer it now. I
3 mean, the parties invoke it or not depending
4 upon how they regard their self-interest. I
5 mean, they may well have a favorable view of the
6 person who is arbitrating or not. They may well
7 have a particular reason to proceed more
8 promptly than litigation would.

9 What is the internal limit that you
10 have that says no, that contract is not
11 sufficiently connected to why we have a
12 delegation clause under the other one?

13 MS. ELLSWORTH: Your Honor, when a
14 party invokes a delegation clause, this Court
15 unanimously in the Henry -- Henry Schein
16 decision from a few terms ago made clear that
17 courts have no power and no business answering
18 the arbitrability question for themselves, even
19 in a case where they think the invocation of the
20 delegation clause was wholly groundless.

21 We are a far cry from that scenario
22 here. I think Your Honor's hypothetical where
23 there are two contracts that really address
24 totally disconnected scenarios might be closer
25 to Henry Schein, but Henry Schein then, I think,

1 provides the appropriate avenue.

2 And -- and as the Court said in that
3 case, if someone really is frivolously or
4 improperly invoking a delegation clause,
5 arbitrators have ways to quickly move the matter
6 back to court. There may be sanctions
7 available. There are other tools --

8 CHIEF JUSTICE ROBERTS: Yeah, but at
9 some point, you get into the fundamental
10 principle of arbitration that the parties must
11 have agreed to turn something over to the
12 arbitrator. And it seems to me that if you get
13 a contract that is way out of the -- however you
14 want to describe it -- the scope, that saying
15 it's up for the arbitrator kind of skips over
16 that pretty important part.

17 MS. ELLSWORTH: Your Honor, in -- in
18 this case, there is undisputedly a clear and
19 unmistakable delegation clause of all disputes
20 about Coinbase services.

21 These claims are about Coinbase
22 services. The Respondents say that they used
23 Coinbase services to enter into a sweepstakes
24 when they wished they had mailed in a postcard
25 instead. That is absolutely a dispute about

1 Coinbase services. It is covered by the
2 arbitration agreement as written.

3 The question becomes does the -- do
4 the official rules somehow carve out that
5 particular set of claims from arbitration, but
6 there's not a carveout from delegation. And
7 that makes sense because the purpose of
8 delegation is to set up a streamlined, efficient
9 process for resolving these arbitrability
10 disputes.

11 It is about consent to have an
12 arbitrator quickly and efficiently tell the
13 parties, does this dispute belong in court or
14 does this dispute belong in arbitration?

15 JUSTICE JACKSON: But on the --

16 JUSTICE ALITO: On the pure -- on the
17 pure who question, which is what we agreed to
18 review, you say on page 12 of your reply brief,
19 "Coinbase agrees that the Court can and should
20 assess whether the official rules displace the
21 parties' consent to have an arbitrator decide
22 arbitrability...". I mean, that seems to answer
23 and concede the who question.

24 And then there is the what question.
25 But we didn't grant review on the what question.

1 MS. ELLSWORTH: Right. You -- that's
2 absolutely right, Justice Alito. You granted
3 review on the -- on the who -- who decides
4 question.

5 JUSTICE ALITO: Right.

6 MS. ELLSWORTH: And the answer to the
7 who decides question in a case like this where
8 there is a delegation clause that remains in
9 effect is absolutely that the arbitrator does.
10 That --

11 JUSTICE ALITO: Well, you -- haven't
12 you -- you've -- you've begged the question when
13 you say that remains in effect. The question is
14 whether it remains in effect after the official
15 rules.

16 MS. ELLSWORTH: Your Honor, that's
17 correct. And that is a --

18 JUSTICE ALITO: And who decides that?

19 MS. ELLSWORTH: So, if the parties
20 came to court and made an argument that was
21 specifically directed at the delegation clause
22 somehow being undermined, this would require
23 showing that your argument addresses the same
24 level of concern as who decides.

25 Again, if we think about you've got

1 who decides, you've got arbitrability, and you
2 have the merits.

3 They pointed to a provision that talks
4 about a court deciding controversies regarding
5 the promotion. This threshold question is not a
6 controversy regarding the promotion.

7 And I think that's why, in the
8 district court, in the court of appeals, in this
9 Court, the way Respondents see to get to a
10 delegation invalidation is to argue that the
11 arbitration agreement has been narrowed and
12 there's been some corresponding narrowing of the
13 delegation clause.

14 JUSTICE JACKSON: Can we set aside the
15 way they framed it? Because I agree it's a
16 little confusing if you start from the world of
17 we have a delegation agreement, then we have a
18 subsequent agreement, and the question is to
19 what extent the subsequent agreement is a
20 carveout or narrows or whatever.

21 Let's say we don't frame it that way.
22 Let's say we frame it in the way that I want to
23 -- want to think about it, which is we have
24 contract A that absolutely answers the who
25 decides question, and then we have contract B

1 that implicitly decides the who -- who decides
2 question, because I understood by operation of
3 law, based on basic -- you know, what the Chief
4 Justice was saying, is that if you don't pick
5 arbitration, if you're silent about it, then the
6 background rule operating is that arbitration is
7 not what happens and any question about whether
8 or not arbitration is what happens, the who
9 decides, goes to the court. So we have contract
10 number 1 that is picking arbitrator is the one
11 who decides, and we have contract number 2 that
12 is implicitly picking court is the one that
13 decides.

14 I thought you agreed with me at the
15 beginning that in that situation, it's a
16 question for the court. And that's what we're
17 -- which of these contracts is actually operable
18 today?

19 MS. ELLSWORTH: Justice Jackson, I
20 think the difference between your earlier
21 hypothetical, as I --

22 JUSTICE JACKSON: Yes.

23 MS. ELLSWORTH: -- understood it, and
24 this one is that the second contract, in your
25 earlier hypothetical, specifically said that the

1 delegation clause -- it -- it identified that
2 there wouldn't be a delegation; it would be on
3 some sort of different terms.

4 In this case, the second contract says
5 nothing --

6 JUSTICE JACKSON: Right, but --

7 MS. ELLSWORTH: -- about delegation.

8 JUSTICE JACKSON: -- do you disagree
9 with me that, by operation of law, when a
10 contract says nothing, we're -- it -- it -- the
11 court is the one that decides what it means and
12 what happens?

13 MS. ELLSWORTH: In -- in the abstract.
14 If the only --

15 JUSTICE JACKSON: No, not in the
16 abstract. In -- in -- in the way we look at the
17 law. If it doesn't say anything about
18 arbitration --

19 MS. ELLSWORTH: So if it -- if it --
20 the contract didn't say anything about
21 arbitration --

22 JUSTICE JACKSON: Yeah.

23 MS. ELLSWORTH: -- we wouldn't be able
24 to invoke it as part of a motion to compel
25 arbitration.

1 JUSTICE JACKSON: No. What you're
2 doing is you're invoking contract 1. So --

3 MS. ELLSWORTH: That's right.

4 JUSTICE JACKSON: -- what I'm saying,
5 he's invoking contract 2. We have two people
6 running in with contracts, one of which suggests
7 that this is supposed to be decided by the
8 court. The other is -- suggests that this is
9 supposed to be decided by the arbitrator.

10 And so, in that situation, isn't the
11 question which contract controls in this
12 situation?

13 MS. ELLSWORTH: So, Justice Jackson, I
14 -- I think it's important to figure out what the
15 correct starting point is. And I think one of
16 the remaining places of daylight between the
17 Respondents and the Petitioner here is what the
18 right starting point is.

19 We say the right starting point is the
20 arbitration agreement that we seek to enforce.

21 JUSTICE JACKSON: Yeah.

22 MS. ELLSWORTH: And, here, that is the
23 delegation clause in the first contract. That
24 delegation clause, under the -- the
25 straightforward operation of Section 2 of the

1 FAA, remains valid, enforceable, and irrevocable
2 unless they can make some state law challenge
3 that would displace it.

4 And so the question becomes -- and
5 this is the analysis the Ninth Circuit didn't do
6 -- have they -- by pointing to the forum
7 selection clause that talks about resolving
8 controversies about the promotion, have they
9 done anything under state law to displace the
10 who decides delegation clause in the first
11 contract?

12 JUSTICE GORSUCH: Counsel, can I ask
13 you just a practical question? I fully
14 appreciate your argument that parties might send
15 to the arbitrator the question of who decides
16 and, at the same time, have the -- the merits
17 decided in one place or the other, even within a
18 single arbitration agreement. The arbitrator
19 decides whether agreements go to court or
20 arbitration. Some will; some won't. I get
21 that.

22 I guess I'm a little curious why your
23 -- your client is fighting this so hard if at
24 the end of the day you're going to wind up
25 saying, yeah, sweepstakes disputes go to court.

1 So, if the arbitrator is going to have to send
2 it to court anyway, why -- why are we here?

3 MS. ELLSWORTH: So, Your Honor, that's
4 the practical point that I tried to make in
5 response to the Chief Justice. I think, if we
6 thought this was going to end up back in court,
7 we wouldn't have invoked --

8 JUSTICE GORSUCH: No, I -- I --

9 MS. ELLSWORTH: -- the delegation
10 clause.

11 JUSTICE GORSUCH: -- I fully
12 appreciate that, and I also appreciate that
13 under Schein that an arbitrator has -- could
14 sanction you for frivolous effort to keep this
15 in arbitration. My question is more practical
16 than that even and more nitty-gritty.

17 Why in this case are you fighting it
18 when you have this second agreement that would
19 seem to route -- I -- I accept maybe the
20 arbitrator should have decided this. I'm -- I'm
21 spotting you that.

22 MS. ELLSWORTH: So, Your Honor --

23 JUSTICE GORSUCH: Why?

24 MS. ELLSWORTH: -- the answer is
25 because, when we get to the arbitrator, we think

1 we have very good reasons --

2 JUSTICE GORSUCH: I -- I know that.
3 What are they?

4 MS. ELLSWORTH: I'm -- I'm happy to --
5 to talk you through a number of them. One is
6 that this provision is in the contract. It
7 applies to mail-in applicants who participate in
8 the sweepstakes that way.

9 The second is that the contract -- the
10 -- the official rules speak about jurisdiction,
11 and a motion to compel arbitration and an
12 arbitration agreement are not about removing the
13 jurisdiction of the court.

14 It speaks to -- to personal
15 jurisdiction. Really, that's what paragraph 10
16 is about. And we don't think it operates as a
17 carveout on the arbitration agreement's scope in
18 the way that the Respondents have argued.

19 So -- so those are exactly the points
20 that we would make to an arbitrator. And I
21 think Henry Schein makes clear an arbitrator may
22 agree, it may disagree with us, but the
23 arbitrator gets to make that decision in the
24 first instance.

25 JUSTICE BARRETT: Counsel, can I --

1 are you done?

2 JUSTICE GORSUCH: Yeah.

3 JUSTICE BARRETT: Can I just return to
4 Justice Kavanaugh's point about what the common
5 ground is here? So you agree that the question
6 of whether there is a valid delegation clause is
7 one for the court?

8 MS. ELLSWORTH: The question of
9 whether there is a -- under the severability
10 principle, yes.

11 JUSTICE BARRETT: You agree that
12 courts make that decision by clear and
13 convincing evidence?

14 MS. ELLSWORTH: I think courts make
15 that -- they -- they make that decision, yes.

16 JUSTICE BARRETT: Okay. And you agree
17 that there is a dispute here about whether there
18 is a delegation of the arbitrability question to
19 the arbitrator?

20 MS. ELLSWORTH: I'm sorry. We agree
21 or disagree?

22 JUSTICE BARRETT: You -- I'm saying --
23 I'm asking, do you agree with me that the
24 dispute between you right now is about whether
25 there is a delegation that will send, taking

1 these two contracts together, send this dispute
2 to arbitration on the arbitrability question?

3 MS. ELLSWORTH: So I think we agree
4 that there is a -- I think both sides agree that
5 there is a delegation clause and that, as
6 originally formulated, it would cover this
7 dispute. The Respondents say --

8 JUSTICE BARRETT: Right, but -- but
9 we're looking at two -- we're looking at two
10 contracts. So you -- you agree -- let's finish
11 this up very quickly. You agree that there's a
12 dispute about whether there's a valid delegation
13 clause that applies here to send it to the
14 arbitrator?

15 MS. ELLSWORTH: We -- our position is
16 that there is a valid delegation clause and it
17 should be enforced.

18 JUSTICE BARRETT: But the -- no. I'm
19 sorry. Maybe I was unclear. But the question
20 is, do you agree that there -- the question here
21 is about the existence, the validity, of a
22 delegation clause?

23 MS. ELLSWORTH: Absolutely, Your
24 Honor. The -- the validity of the delegation
25 clause, I think, is reserved for a court to

1 resolve, applying the severability principle,
2 which limits the arguments that can be --

3 JUSTICE BARRETT: Okay.

4 MS. ELLSWORTH: -- offered to
5 undermine it.

6 JUSTICE BARRETT: But you agree on
7 those three questions, though?

8 MS. ELLSWORTH: Yes.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas?

12 Justice Alito?

13 Justice Sotomayor?

14 Justice Kagan?

15 Justice Gorsuch?

16 Justice Kavanaugh?

17 JUSTICE KAVANAUGH: Any change from
18 when I said "could remand"? No?

19 (Laughter.)

20 MS. ELLSWORTH: No change, Your Honor.

21 JUSTICE KAVANAUGH: Okay. Okay.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 Justice Jackson?

25 Okay. Thank you, counsel.

1 Mr. Harris?

2 ORAL ARGUMENT OF DAVID J. HARRIS, JR.

3 ON BEHALF OF THE RESPONDENTS

4 MR. HARRIS: Mr. Chief Justice, and
5 may it please the Court:

6 I'm going to abandon what I planned to
7 talk about and try to answer Justice Gorsuch's
8 question. Why are they fighting this so hard?
9 And that only occurred to me within the last
10 week or so.

11 And the answer is there's a strategic
12 reason. They want the Court -- they don't care
13 who decides arbitrability. All they care about
14 is how arbitrability gets decided because that's
15 what goes to liability at the end of the day.
16 And so the plan is we need the Supreme Court to
17 overrule the Ninth Circuit's weird "existence"
18 language.

19 Why do they need that and that only?
20 The reason is that "existence" language
21 originated from the Goldman Sachs case that was
22 cited in our Ninth Circuit opinion. The Goldman
23 Sachs case was somewhat similar to this case in
24 that there was a preexisting agreement to
25 arbitrate but then a subsequent, more specific

1 agreement to litigate.

2 The Ninth Circuit was looking at that
3 situation and thinking: Shoot, we're bound to
4 apply the old presumption in favor of
5 arbitrability under federal law, but we know
6 that as a matter of contract law, there was no
7 real, mutual intent to arbitrate this dispute
8 under the most recent, most specific agreement.

9 So they made up a new federal rule.
10 Oh, this is a formation dispute, this is an
11 existence dispute, so that they could avoid the
12 presumption of -- in favor of arbitrability and
13 do the right thing under state law.

14 We've gone to great pains to argue
15 that non-preempted state laws are what apply
16 here because, at the end of the day, those are
17 the only laws that are capable of accurately
18 discerning the parties' true intentions, no
19 matter what type of contractual mess gets thrown
20 in front of judges.

21 It's impossible to make one federal
22 rule, two federal rules, three federal rules
23 that are going to accurately discern the
24 parties' contractual intentions in -- in an
25 infinite number of business situations.

1 Traditional state law can do that. And we ask
2 that the Court apply that here and welcome to
3 answer any questions.

4 JUSTICE THOMAS: But why wouldn't a --
5 a later agreement that modifies the earlier
6 contract simply go to what the scope of the
7 agreement is?

8 MR. HARRIS: So it goes to two scopes.
9 It goes to the scope of the agreement to
10 arbitrate the merits of the dispute, and in our
11 position that we've tried to brief very heavily
12 is that it goes to the scope of the agreement to
13 delegate this arbitrability dispute to the
14 arbitrator.

15 And our reason for doing that is that
16 under Granite Rock, consent to arbitrate is
17 dispute-specific. If that's true in the context
18 of an arbitration agreement, it also has to be
19 true in the context of a delegation agreement.

20 JUSTICE GORSUCH: But -- but, counsel,
21 the arbitration agreement, you concede, is still
22 operative, right?

23 MR. HARRIS: For -- for disputes
24 unrelated to the sweepstakes, absolutely.

25 JUSTICE GORSUCH: Yeah. Well --

1 well -- and it says it applies to everything,
2 all disputes about Coinbase services, right?
3 The answer has to be yes.

4 MR. HARRIS: Yeah. On -- on -- on its
5 -- its isolated terms, that's what the --

6 JUSTICE GORSUCH: That's what it says,
7 that's what it says, isolated terms, okay.

8 And I -- I guess my question for you
9 is the inverse of the one I asked your friend on
10 the other side. The point in Schein was, if you
11 agree to say the arbitrator gets to direct
12 things, if this were all in one contract, it's
13 possible some things would be arbitrated, agreed
14 to arbitrate and some things would be -- you
15 agree to send to court. And if it were in one
16 contract, there's no doubt that the arbitrator
17 would decide which -- which direction to route
18 things, right?

19 The only question is does the second
20 contract make this different than it being in a
21 single contract. And I struggle to see why that
22 would be the case. And I furthermore struggle
23 to see why you would care because your real
24 argument is that the agreement is to litigate
25 this in court. And the routing, who's going to

1 do the routing? Now we're at the Supreme Court
2 of the United States, years have passed, we
3 still don't know where this case is going to be.

4 You could have had an answer from an
5 arbitrator that you belong in -- in court years
6 ago. Why didn't you? Again, I just struggle to
7 see both sides why we're here.

8 MR. HARRIS: So, to deal with the
9 first part with the Ninth Circuit and the user
10 agreement, I just want to make clear that the
11 Ninth Circuit didn't just rely on this existence
12 language. After it sort of regurgitated that --

13 JUSTICE GORSUCH: I'm not asking about
14 the Ninth Circuit because it --

15 MR. HARRIS: Well -- well -- well --

16 JUSTICE GORSUCH: -- seems to me both
17 sides have disavowed the Ninth Circuit's
18 opinion.

19 MR. HARRIS: -- it -- it really --

20 JUSTICE GORSUCH: I'm asking why you
21 are here because you could have had an answer
22 from an arbitrator --

23 MR. HARRIS: Sure.

24 JUSTICE GORSUCH: -- because I think
25 your -- your argument's really quite strong as

1 to where this gets routed.

2 MR. HARRIS: Well, we've -- we've
3 already won in court. We've already won
4 arbitrability in court. And they haven't
5 challenged that here. So the only way they
6 resurrect the arbitrability dispute at all is by
7 winning the delegation agreement.

8 JUSTICE GORSUCH: My question is,
9 though, if -- if -- if you -- if you think you
10 can win on -- on where this goes, why didn't you
11 just go to the arbitrator to get a quick answer?
12 Why -- why -- why litigate it all the way to the
13 Supreme Court of the United States?

14 I'll try it one more time.

15 MR. HARRIS: So -- so, I mean, I guess
16 I'd have to go back and think about why I did it
17 in the trial court, why I did it in the --

18 JUSTICE GORSUCH: Yeah.

19 MR. HARRIS: -- in the Ninth Circuit.
20 But, here, so arbitrability, not delegation,
21 arbitrability is finally resolved by the federal
22 courts because -- unless this Court sends that
23 dispute back to an arbitrator.

24 JUSTICE GORSUCH: Right. Right.

25 MR. HARRIS: Or -- or the Ninth

1 Circuit sends it back.

2 JUSTICE GORSUCH: That's why -- that's
3 why we're here. We're at the -- at the
4 antecedent question.

5 MR. HARRIS: Well, I don't want them
6 to have a second chance to win arbitrability.
7 They've already lost that.

8 JUSTICE JACKSON: Can I ask you about
9 Justice Gorsuch's hypothetical about things
10 being in one contract? Because I think it
11 actually matters with respect to what's going on
12 here.

13 So, if we had one contract that just
14 had one delegation provision and then later
15 underneath it, it had user agreements,
16 sweepstakes, or whatever, it didn't say
17 anything, you would agree that that delegation
18 clause would apply to the whole thing?

19 MR. HARRIS: I -- I think that's the
20 best reading of the user agreements in
21 isolation.

22 JUSTICE JACKSON: All right. So --
23 but -- but -- but you're saying that, I guess,
24 if we had one contract that had different parts
25 and there was a delegation agreement that was in

1 one part of it and then the other -- that went
2 to the arbitrator and then, in the other, it was
3 pretty clear the parties were saying this is
4 delegated to the court, that you're saying that
5 would be a contract formation, the court would
6 have to decide which one of those parts -- which
7 one of those delegation intents was operable?

8 MR. HARRIS: It would definitely be a
9 different question if it -- if the two types of
10 terms were contained in a single agreement
11 between the same two parties.

12 JUSTICE JACKSON: Yes.

13 MR. HARRIS: Here, we have two
14 separate agreements, two separate economic
15 transactions, two separate groups of contracting
16 parties, and that changes the intent analysis
17 under -- under traditional rules of
18 interpretation.

19 JUSTICE KAVANAUGH: The -- are you
20 done?

21 The -- the brief, you agree with
22 Coinbase that the Ninth Circuit's opinion did
23 not accurately reflect the parties' contractual
24 disputes here, right, particularly the
25 references to formation and existence?

1 MR. HARRIS: Only that part, Your
2 Honor, yes.

3 JUSTICE KAVANAUGH: Right. And then
4 you say the Court can correct the Ninth
5 Circuit's reasonings. The Court should
6 remand -- "Alternatively the Court should remand
7 this case to the Ninth Circuit..."

8 Are you -- I'm asking the same
9 question I asked the other -- other side. Can
10 we correct the Ninth Circuit's reasoning as both
11 sides agree it's wrong and then send it back --

12 MR. HARRIS: So -- so -- so I only --

13 JUSTICE KAVANAUGH: -- for a
14 determination of whether the sweepstakes
15 displace the other contract, which could involve
16 a debate about which law controls and all sorts
17 of other things?

18 MR. HARRIS: So I only agree that the
19 existence and formation part of the Ninth
20 Circuit's analysis was wrong. I do not view
21 that part of what they said as what controlled
22 their analysis.

23 So, if you look carefully at their
24 opinion, they have two headings, delegation
25 clause and arbitration or whatever the second

1 heading was. But they have a heading for
2 delegation clause.

3 Under that, Coinbase had argued that,
4 well, this is a dispute about the scope of the
5 arbitration agreement, and, therefore, that's
6 the end of the analysis. It must go to the
7 arbitrator.

8 The Ninth Circuit said: Wait a
9 minute, we're going to actually ask whether that
10 scope language was intended to apply to a future
11 contract like this one that says court only,
12 that has a different set of parties.

13 So -- so all that to say, they did
14 directly address the delegation question before
15 reaching arbitrability. And that's correct
16 under Henry Schein.

17 And they also, in addressing
18 delegation, the question they answered is, is
19 this delegation clause intended to be applicable
20 to this arbitrability dispute?

21 And that's -- that's one correct
22 question to ask under Granite Rock because
23 arbitration is always dispute-specific. It's --
24 we can't just label this an arbitrability
25 dispute and move on.

1 We can't do that because it's also a
2 forum dispute. It's also in substance a dispute
3 about the official rules. We don't actually
4 agree about the scope of the user agreements.
5 We disagree about the scope of the official
6 rules of the June 2021 sweepstakes. How is that
7 not a controversy regarding the sweepstakes as
8 to arbitrability? It's about the arbitrability
9 of the sweepstakes.

10 JUSTICE KAGAN: Do you think --

11 MR. HARRIS: And that was intended for
12 the courts.

13 JUSTICE KAGAN: -- do you think that
14 the Ninth Circuit decided whether the official
15 rules supplant the original arbitration
16 agreement's delegation clause?

17 MR. HARRIS: No. And that -- that's
18 where I think they went wrong if anywhere.

19 JUSTICE KAGAN: So that -- so -- so
20 you think that this is not like, oh, they just
21 forgot to put in a sentence. You think that
22 they never addressed that question?

23 MR. HARRIS: Correct. They stopped at
24 the question before it, which is, look, we don't
25 even have to reach the official rules because

1 we're just looking at the clause, the delegation
2 clause, and we're looking at the arbitrability
3 dispute and we're saying we don't think this was
4 meant to cover this.

5 And -- and -- and that's an
6 applicability decision that is
7 delegation-specific. That's not preempted by
8 the FAA. They haven't -- they haven't addressed
9 it at all.

10 They haven't addressed it under state
11 law. They haven't addressed it under federal
12 law. There's actually -- they just want to
13 focus on this existence language so that they
14 can go back and down and say, hey, this
15 existence rule no longer exists, and, by the
16 way, that was your excuse to apply state law.
17 Now you have to apply the presumption in favor
18 of arbitrability.

19 JUSTICE SOTOMAYOR: I think you just
20 gave away your case. I think you just gave away
21 your case.

22 MR. HARRIS: Well, no, Your Honor.

23 JUSTICE SOTOMAYOR: Your -- your --
24 they came in saying vacate and remand because
25 they didn't address delegation and whether the

1 -- the user agreement -- the -- the sweepstakes
2 agreement superseded that. And you're saying
3 the Ninth Circuit didn't do that.

4 MR. HARRIS: Right. And -- and in my
5 view, they didn't necessarily have to because
6 they asked whether the delegation clause was
7 applicable to this arbitrability dispute about
8 the sweepstakes. They -- they looked at the
9 delegation clause and they said: This wasn't
10 intended to cover this particular arbitrability
11 dispute. And so they said it's not delegated.

12 But, to -- to some of the Justices'
13 point, if we look at just the language of the
14 delegation clause, it's broad enough to cover
15 any arbitrability dispute. So the safer, better
16 way to address this delegation question is were
17 the official rules intended -- or -- or -- or
18 did the official rules have the effect of
19 modifying the delegation clause as to these
20 types of arbitrability disputes?

21 JUSTICE GORSUCH: I -- I -- I -- I
22 just -- I'm struggling. I -- I -- I certainly
23 see the argument that the second agreement
24 modifies where this thing should go and should
25 be resolved and by whom ultimately. But I think

1 you've just conceded over and over again that
2 the first agreement says those questions go to
3 the arbitrator and it's broad in scope and it
4 covers everything, all relationships with
5 Coinbase. So you want us to vacate and remand
6 for more proceedings in the Ninth Circuit on
7 whether that first agreement modifies the second
8 rather than just going to get an answer from the
9 arbitrator.

10 MR. HARRIS: I mean, remand is not our
11 -- our first request. Our first request is to
12 affirm the judgment and -- and just make clear
13 that that "existence" language isn't the way to
14 go about it. The way to go about it is ask
15 whether the parties intended the delegation
16 clause to apply to this arbitrability dispute.

17 And as -- I mean, I could give you a
18 long, economic, strategic answer --

19 JUSTICE GORSUCH: Well, I'm kind of --

20 MR. HARRIS: -- for why we're --

21 JUSTICE GORSUCH: -- kind of curious,
22 I admit. I mean, this is about a sweepstakes,
23 you know, entry. And how much money is at
24 stake? And why are we litigating all the way to
25 the Supreme Court of the United States up and

1 down and up and down over where this goes when,
2 frankly, I would have thought you had a really
3 good shot of getting an arbitrator to say this
4 belongs in court.

5 MR. HARRIS: I would agree, but -- but
6 that wasn't -- that wasn't the -- we don't want
7 to take this to an arbitrator. And they don't
8 -- they don't care where it goes. We care where
9 it goes. But they don't care where the -- they
10 don't care who decides arbitrability. They just
11 care where the case ends up.

12 We've already won the issue in court
13 of where the case ends up, so we don't want it
14 to go to an arbitrator now to review the Ninth
15 Circuit's arbitrability decision.

16 I'm just answering the question of why
17 are we here.

18 (Laughter.)

19 JUSTICE KAGAN: I mean, because you
20 think an arbitrator will be less likely to send
21 it to court? Is that the reason why you're
22 here?

23 MR. HARRIS: Well, we -- what we have
24 right now is a hundred percent certainty. And
25 if an arbitrator is reviewing it, it's less than

1 a hundred percent certainty.

2 JUSTICE BARRETT: How much money are
3 you seeking in your complaint for this
4 sweepstakes entry thing?

5 MR. HARRIS: So it -- I mean, at the
6 time we filed, we didn't know. At the time we
7 filed, all we knew is that entrants were
8 manipulated into being -- into paying \$100 per
9 person or more to -- to enter the sweepstakes.

10 We are left to estimate, you know, how
11 -- how many people were affected by that.

12 JUSTICE KAVANAUGH: It's a class
13 action, putative, right?

14 MR. HARRIS: Putative.

15 JUSTICE BARRETT: Putative?

16 JUSTICE KAVANAUGH: Yeah. That's --
17 that's the answer, isn't it?

18 MR. HARRIS: Yes, Your Honor. That's
19 essentially the answer.

20 CHIEF JUSTICE ROBERTS: Thank --
21 counsel, if you have --

22 Justice Thomas?

23 Anyone on that end? Anything further?

24 Thank you, counsel.

25 MR. HARRIS: Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Ms. Ellsworth?

2 REBUTTAL ARGUMENT OF JESSICA L. ELLSWORTH

3 ON BEHALF OF THE PETITIONER

4 MS. ELLSWORTH: I think, as Justice
5 Sotomayor's question made clear, this case needs
6 to be remanded. The Respondents and the
7 Petitioners are in agreement on that. We're
8 here because the Ninth Circuit failed to apply
9 the FAA's federal severability framework and, as
10 a result, failed to do the state law analysis as
11 applied to the delegation clause that it was
12 required to do. The Ninth Circuit never asked
13 whether the later contract specifically overrode
14 the delegation clause under ordinary state law
15 principles.

16 And, Justice Jackson, I think some of
17 your questions were getting at how a delegation
18 clause could actually be overridden in a later
19 contract. And I just want to respond to that
20 briefly because I think it could be expressed as
21 it was in one of your hypotheticals. It
22 could -- a later contract could wipe out
23 arbitration entirely from the parties' business
24 relationship, and then someone could come into
25 court and say that that has, under state law

1 principles, also wiped out the delegation
2 clause. There could be a merger agreement -- a
3 merger clause. There are a number of ways in
4 which it could happen. The fact is that none of
5 them happened here.

6 Everyone agrees the Ninth Circuit
7 didn't decide if the second contract displaced
8 the delegation clause and, instead, just made a
9 ruling on arbitrability. As I think my friend's
10 argument shows, and it's important for this
11 Court on remand to make clear, lower courts
12 cannot collapse the who decides question and the
13 Section 2 analysis for a delegation clause with
14 the later arbitrability question.

15 Justice Gorsuch, in response to your
16 question about what an arbitrator would say
17 here, one other thing to note is that the only
18 Ninth Circuit case on point specifically finds
19 that a forum selection clause does not displace
20 a delegation clause. That's the Mohamed case.
21 It's one of the many reasons that we think these
22 operate on different levels.

23 Just like in the Prima Paint case,
24 where fraud in the inducement could operate
25 differently at the level of the contract and at

1 the level of the arbitration agreement; in
2 Rent-A-Center, where unconscionability could
3 apply differently at the contract level, the
4 arbitration agreement level, and the delegation
5 clause level; so too here the forum selection
6 clause could apply differently, and it's
7 important that the Court address it at the
8 specific who decides layer.

9 For all of these reasons, we think the
10 Court should reverse and remand. Thank you very
11 much.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 The case is submitted.

15 (Whereupon, at 12:19 p.m., the case
16 was submitted.)

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Official

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