No. 22-15566

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ABRAHAM BIELSKI,

Plaintiff-Appellee,

v.

COINBASE, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of California
Case No. 3:21-cv-07478-WHA (Hon. William H. Alsup)

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INTRODUCTION

Coinbase, Inc. drafted a provision in its form contract requiring its customers to arbitrate all disputes they have with Coinbase. But that provision doesn't require Coinbase to arbitrate anything. In the same contract, it drafted a provision requiring its customers to engage in a burdensome series of preliminary dispute-resolution procedures before commencing an arbitration. But that provision doesn't require Coinbase to take any preliminary steps before taking its customers to court or arbitration. And it drafted a delegation clause that forces its customers to take any threshold issues concerning Coinbase's arbitration provisions to the arbitrator. But that clause doesn't delegate anything to the arbitrator in disputes Coinbase initiates.

Now, Coinbase is facing the consequences of its drafting choices. After Appellee Abraham Bielski was defrauded of more than $30,000 on Coinbase's currency exchange platform, Coinbase ignored his repeated pleas to fulfill its duties under the Electronic Funds Transfer Act, 15 U.S.C. § 1693 *et seq.* ("EFTA"), and help him recover his stolen funds. So Mr. Bielski filed a lawsuit in federal court. After Coinbase moved to compel arbitration, the District Court issued a straightforward ruling: the one-sided structure of these provisions (among other features) renders them unconscionable and thus unenforceable. That ruling was firmly grounded in California law, which holds that to be enforceable, an arbitration provision—like any contract—must possess a "modicum of bilaterality." *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 117 (Cal. 2000).

Undeterred, Coinbase now seeks to avoid federal court by changing horses in midstream. Rather than embrace the plain language of the arbitration provisions it drafted, it asks this Court to discard that language and rewrite the provisions to cure them of their manifest unconscionability by making the requirement to arbitrate mutual. But contracts are interpreted according to what they *say*, not what Coinbase retrospectively asserts they *should* say. Coinbase's contract unambiguously says that customers must fulfill unfair pre-arbitration requirements, arbitrate their claims, and arbitrate any threshold arbitrability issues, while Coinbase is not required to do any of these things. Thanks to Coinbase's drafting, this language is scattered across multiple provisions in Coinbase's contract, but the District Court tracked it down and construed it to give effect to its plain meaning.

Coinbase also tries to impose a novel rule never stated in the Federal Arbitration Act ("FAA") or any court decision: a delegation clause can't be held unconscionable unless it is unconscionable for a *different* reason than the arbitration provision containing it is unconscionable. That is not the law. Contract-law defects like pervasive one-sidedness can make both a delegation clause and the larger arbitration provision unconscionable, so long as the party challenging the delegation clause shows why those defects *as applied* to the delegation clause render *that* clause unconscionable. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 74 (2010). Mr. Bielski made that showing in nine pages of briefing that specifically applied Coinbase's one-sided procedures to the delegation

clause, and the District Court judged the delegation clause on its own merits. Nothing more was required under California or federal law.

Finally, in an effort to avoid accountability for its unlawful arbitration clauses, Coinbase invites the Court to rewrite its contract under the guise of severance. Its proposed revisions would fundamentally change the nature of Coinbase's arbitration scheme, converting it from a unilateral to a mutual agreement to arbitrate that no party agreed to. California law does not permit such an exercise. The District Court correctly rejected Coinbase's invitation, and this Court should do the same.

The District Court's decision to deny Coinbase's motion to compel arbitration was correct. Coinbase's arbitration provisions are substantively unconscionable, procedurally unconscionable, not severable, and their onerous procedural preconditions thwart the right of customers like Mr. Bielski to vindicate their statutory rights under EFTA in arbitration or court. This Court should affirm.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the District Court's April 8, 2022 order under 9 U.S.C. § 16(a)(1).

ISSUES PRESENTED

(1) Did the District Court correctly rule that the Arbitration Agreement in Coinbase's User Agreement is unconscionable under California law because it (a) is an adhesion contract; (b) allows Coinbase to amend it unilaterally; (c) contains terms that differ from standard agreements of this type and which would surprise a reasonable

customer; (d) imposes ambiguous, onerous pre-arbitration/pre-suit procedures that hinder customers' access to an independent tribunal; (e) gives Coinbase a "free peek" into customers' claims, allowing Coinbase to obtain an unfair advantage in arbitration or litigation; and (f) imposes on customers these procedural preconditions and the requirement that they arbitrate their disputes against Coinbase, but does not impose any requirement that Coinbase fulfill any procedural preconditions or arbitrate any disputes that it initiates against customers?

(2) Did the District Court correctly rule that the delegation clause in Coinbase's User Agreement is also independently unconscionable because it (a) expressly incorporates the same onerous procedural preconditions that broadly prohibit access to formal dispute-resolution procedures and (b) requires customers to delegate threshold issues concerning application of the Arbitration Clause to the arbitrator when they initiate disputes but imposes no such requirement on Coinbase when it brings disputes against customers?

(3) Did the District Court abuse its discretion in finding that severance of the unconscionable portions of Coinbase's User Agreement was infeasible, where unilaterality permeates both the delegation clause and the Arbitration Agreement as a whole, and eliminating such unilaterality would require rewriting the User Agreement to contain provisions the parties never agreed to?

(4) May the District Court's decision be affirmed on the alternative ground that Coinbase structured its dispute-resolution procedures in a manner that thwarted Mr.

Bielski's ability to effectively vindicate his statutory rights in either an arbitral or judicial forum?

STATEMENT OF THE CASE

I. Mr. Bielski gets defrauded on Coinbase's platform, and Coinbase abandons him.

Coinbase operates an online currency and cryptocurrency exchange platform that allows users to buy and sell various currencies. ER-162 ¶ 1. Users perform these transactions by sending or receiving money to or from their Coinbase "wallet," which is typically funded via electronic transfers from users' bank accounts. *Id.*

Mr. Bielski alleges that shortly after creating a Coinbase account in 2021, a scammer fraudulently accessed his account and transferred currency from it, stealing more than $30,000. ER-164-65 ¶¶ 12-13. He sought help from Coinbase, but Coinbase stonewalled. He logged into Coinbase's "live chat" feature, called its customer service "hotline," and even sent two letters to Coinbase's office. ER-48 ¶ 8. Coinbase did not respond to his repeated communications until after he filed a lawsuit, and even then, the only responses Mr. Bielski received to his grievances were automated. ER-48-49 ¶ 8. Coinbase never took any steps to remedy or even investigate the fraud perpetrated on Mr. Bielski. ER-164-65 ¶ 13.

Mr. Bielski alleges that Coinbase's refusal to remedy the fraud that occurred through Coinbase's platform violated EFTA and "Regulation E" of its implementing regulations, 12 C.F.R. §§ 1005.1-1005.20c, which require financial institutions like

Coinbase to, among other things, conduct a timely and good-faith investigation of fraudulent transfers, credit or provisionally recredit users' accounts pending investigation, and keep users informed regarding the status of the unauthorized electronic transfers from their accounts. ER-162-63 ¶¶ 3-4.

Mr. Bielski alleges that many "Coinbase users have repeatedly implored Coinbase to help them rectify the unauthorized transfers from their accounts, but Coinbase has routinely and repeatedly effectively ignored such requests" and has "largely turned a blind eye to the systemic breaches of security on its exchange, leaving affected Coinbase users without recourse, short of litigation, to correct these issues." ER-163 ¶ 3. Mr. Bielski thus sued on behalf of himself and all similarly situated fraud victims. ER-163 ¶ 5.

II. Coinbase imposes one-sided arbitration provisions on customers.

Customers like Mr. Bielski who sign up to use the Coinbase platform must assent to Coinbase's "User Agreement." ER-139 ¶ 6. The User Agreement is a 29-page, single-spaced form contract with four appendices that users must accept on a take-it-or-leave-it basis. *See* ER-109-37. Coinbase reserves the right to "amend or modify" the User Agreement "at any time by posting the revised agreement on the Coinbase Site and/or providing a copy" to customers. ER-109.

Among the User Agreement's voluminous provisions is a series of arbitration and pre-arbitration/pre-suit provisions spread across multiple sections. These provisions are discussed in the following paragraphs.

The two-level pre-arbitration/pre-suit requirement. The User Agreement mandates that if a customer presents any dispute to Coinbase, they must engage with Coinbase in a two-step pre-arbitration/pre-suit process—and sit idle waiting for Coinbase to respond—before initiating an arbitration or a suit in small claims court.

First, a customer must contact the so-called "Coinbase support team" through Coinbase's "Customer Support webpage" or, if the customer believes their account has been compromised, using a specified phone number. ER-124. The User Agreement does not require Coinbase's "support team" to respond within any specified time or follow any specified procedure for resolving customer disputes. *See id.* The User Agreement is also unclear as to whether a user must wait for a response from Coinbase before proceeding to the next procedural step. *See id.*

If the customer's informal outreach to Coinbase through its website or phone number does not lead to a resolution, they must then engage in what Coinbase calls the "Formal Complaint Process." *See* ER-124-25. To initiate a "Complaint," the customer must fill out a "Complaint form" that requires the customer to "describe your Complaint, how you would like us to resolve your Complaint, and any other information related to your dispute that you believe to be relevant." ER-125. After the customer submits the Complaint form, Coinbase then gives itself up to 35 business days (though it promises to respond within 15 business days absent "exceptional circumstances") to review the Complaint and either grant the relief requested, reject the

relief requested, or further drag out the Formal Complaint Process by offering the customer an "alternative solution." *Id.*

The penalty for failing to engage in this two-part pre-arbitration/pre-suit process is extermination of the right to seek relief in a neutral forum, as the User Agreement authorizes the dismissal of an arbitration or small claims complaint. *Id.*

The Arbitration Agreement. Once the customer exhausts the User Agreement's multilayered pre-arbitration/pre-suit requirements, they may then seek relief pursuant to Section 8.3 of the User Agreement, which Coinbase christens the "Arbitration Agreement." *Id.*

The Arbitration Agreement provides that disputes subject to the Formal Complaint Process (that is, customer-initiated disputes) must be arbitrated on an individual basis only. It states:

> If we cannot resolve the dispute through the Formal Complaint Process, you and we agree that any dispute arising out of or relating to this Agreement or the Coinbase Services, including, without limitation, federal and state statutory claims, common law claims, and those based in contract, tort, fraud, misrepresentation, or any other legal theory, shall be resolved through binding arbitration, on an individual basis (the "Arbitration Agreement").

Id. It also provides that such disputes may instead be brought in small claims court, again on an individual basis only. *Id.*

The delegation clause. The last arbitration provision in Coinbase's User Agreement delegates threshold issues concerning the Arbitration Agreement to the arbitrator. The delegation clause states:

> This Arbitration Agreement includes, without limitation, disputes arising out of or related to the interpretation or application of the Arbitration Agreement, including the enforceability, revocability, scope, or validity of the Arbitration Agreement or any portion of the Arbitration Agreement. All such matters shall be decided by an arbitrator and not by a court or judge.

Id.

Coinbase-initiated disputes. As indicated by the plain language quoted above, the nested arbitration provisions in Coinbase's User Agreement all apply to disputes initiated by customers against Coinbase. This is because (1) the initial customer service outreach requirement and the subsequent Formal Complaint Process only apply to user-initiated disputes, (2) the Arbitration Agreement only applies to disputes funneled through the Formal Complaint Process, and (3) the delegation clause applies only to threshold issues concerning the Arbitration Agreement. As to any pre-suit/pre-arbitration requirements or forum restrictions on actions brought by Coinbase against customers, the User Agreement says nothing.

III. The District Court rules that Coinbase's arbitration provisions are unenforceable.

Mr. Bielski filed the operative complaint in November 2021. ER-176. Coinbase moved to compel arbitration based on its User Agreement. ER-142. With the benefit

of full briefing, oral argument, and supplemental briefing, the District Court denied the motion to compel, concluding that both the arbitration clause and the delegation clause were substantively and procedurally unconscionable and inseverable. ER-6-17.

A bevy of factors led the District Court to find the arbitration and delegation clauses unconscionable. The District Court began with the User Agreement's delegation clause, finding that the clause was substantively unconscionable because it imposed a burdensome and unnecessary pre-arbitration dispute-resolution procedure on customers, but not on Coinbase, and required only users, not Coinbase, to delegate disputes subject to the clause to the arbitrator. ER-8-14. It further held that the delegation clause was procedurally unconscionable because it (a contract of adhesion) incorporated the User Agreement's pre-arbitration/pre-suit requirements, which are "onerous procedural preconditions" that serve as "a broad prohibition on access to formal resolution procedures." ER-14-15. Such preconditions "would surprise the average customer for this type of service." ER-15.

The District Court further found that the same factors rendered the larger Arbitration Agreement unconscionable as well. ER-15.

Finally, the District Court found that severance of the unconscionable portions of the arbitration provisions was not possible because the Arbitration Agreement "defined terms such that the various provisions outlining the informal complaint, formal complaint, and arbitration procedures are nested one inside the other," rendering Coinbase's complicated arbitration procedure inseverable. ER-15-16.

Coinbase appealed the District Court's order denying the motion to compel arbitration on April 18, 2022. ER-177. Thereafter, it sought unsuccessfully in the District Court and this Court to obtain a stay of District Court proceedings pending this appeal. ER-5.[1]

SUMMARY OF THE ARGUMENT

The District Court ruled correctly that both the Arbitration Agreement and the delegation clause in Coinbase's User Agreement are unenforceable.

First, both the Arbitration Agreement and the delegation clause are substantively unconscionable because both lack mutuality of obligation. The Arbitration Agreement requires customers to arbitrate their claims against Coinbase, but it gives Coinbase free rein to choose any forum it wants for claims that it brings against customers. It also requires customers to engage in onerous pre-suit/pre-arbitration procedures that do nothing more than erect ambiguous, unjustified procedural hurdles with unclear timelines for Coinbase to act and give Coinbase an unfair "free peek" at future claims

[1] Coinbase also filed a petition for certiorari in the United States Supreme Court, which seeks review of this Court's decision to deny Coinbase's motion to stay district court proceedings pending resolution of this appeal. The petition does not concern the merits of this appeal, but rather concerns the District Court's authority to allow discovery and merits proceedings unrelated to arbitrability to proceed while the appeal is pending. The petition remains pending as of the filing date of this brief. The Supreme Court denied Coinbase's application to stay proceedings in the District Court pending resolution of the petition for certiorari and its motion to expedite consideration of the petition for certiorari. *Coinbase, Inc. v. Bielski*, No. 22-105 (U.S.).

in a judicial or arbitrable forum. And like the Arbitration Agreement, the one-sided delegation clause requires issues concerning the arbitrability of *customer* claims to be delegated to the arbitrator, but it contains no similar requirement for claims brought by Coinbase against customers.

Second, both clauses are contained in a contract of adhesion. The one-sided, take-it-or-leave-it aspect of an adhesion contract alone establishes procedural unconscionability. Further, the Arbitration Agreement's onerous pre-arbitration procedures—which Coinbase expressly incorporates into the delegation clause as well—would surprise the reasonable average customer. And Coinbase's unilateral right to amend the User Agreement further cranks up the oppression.

Third, severability is impossible because unilaterality permeates both the delegation clause and the Arbitration Agreement, and eliminating such unilaterality would require rewriting the User Agreement to contain provisions the parties never agreed to.

Fourth, the arbitration provisions in Coinbase's User Agreement are independently unenforceable because Coinbase can use the pre-arbitration/pre-suit procedures to prevent Mr. Bielski and other customers like him from ever pursuing their claims under EFTA in either small claims court or arbitration. These procedures thus frustrate Mr. Bielski's ability to "effectively vindicate" a "statutory cause of action." *American Exp. Co. v. Italian Colors Restaurant*, 570 U.S. 228, 235 (2013).

STANDARD OF REVIEW

This Court reviews the denial of a motion to compel arbitration de novo, *Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1009 (9th Cir. 2005), and findings of fact underlying the district court's decision for clear error, *Lim v. TForce Logistics, LLC*, 8 F.4th 992, 999 (9th Cir. 2021). The Court reviews a district court's decision not to sever unconscionable portions of an arbitration agreement for abuse of discretion. *Bridge Fund Cap. Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1000 (9th Cir. 2010).

Under the abuse-of-discretion standard, this Court will not reverse a district court unless it has "a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 798 (9th Cir. 2005) (internal quotation omitted). Thus, even if this Court has "significant and serious concerns" with a district court's exercise of its discretion, the district court's ruling must stand unless there is "a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *Wing v. Asarco, Inc.*, 114 F.3d 986, 988 (9th Cir. 1997).

ARGUMENT

Under California law, a contract or contractual provision is unenforceable if it was "unconscionable at the time it was made." Cal. Civ. Code § 1670.5(a). To be unenforceable, a contract or provision must have both substantively unconscionable and procedurally unconscionable elements. *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251,

1260 (9th Cir. 2017). The District Court's ruling that both the Arbitration Agreement and the delegation clause met this standard was correct in every aspect, and its ruling that severability is infeasible was likewise correct and did not evince any abuse of discretion.

In addition, an arbitration clause is unenforceable if, because of barriers it presents, a "prospective litigant" is unable to "effectively vindicate its statutory cause of action." *Italian Colors*, 570 U.S. at 235. Because the arbitration provisions in Coinbase's User Agreement prevent customers like Mr. Bielski from vindicating their statutory rights under EFTA, the District Court's ruling may also be affirmed on this alternative basis.

I. The Arbitration Agreement is substantively and procedurally unconscionable.

"Substantive unconscionability examines the fairness of a contract's terms." *OTO, L.L.C. v. Kho*, 447 P.3d 680, 692 (Cal. 2019). The doctrine "seeks to ensure that contracts, particularly contracts of adhesion, do not impose terms that are overly harsh, unduly oppressive, or unfairly one-sided." *Lim*, 8 F.4th at 1001-02. It thus prohibits contractual terms that are "unreasonably favorable to the more powerful party." *Kho*, 447 P.3d at 693.

Procedural unconscionability is present where there is "oppression or surprise due to unequal bargaining power." *Pinnacle Museum Tower Ass'n. v. Pinnacle Mkt. Dev. (US), LLC*, 282 P.3d 1217, 1232 (Cal. 2012). Such oppression arises from "inequality

of bargaining power that results in no real negotiation and an absence of meaningful choice." *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 182 Cal. Rptr. 3d 235, 248 (Cal. App. 2015). "Oppression can be established by showing the contract was one of adhesion or by showing from the totality of the circumstances surrounding the negotiation and formation of the contract that it was oppressive." *Lim*, 8 F.4th at 1000 (cleaned up).

Although substantive and procedural unconscionability must both be present, they "need not be present in the same degree." *Poublon*, 846 F.3d at 1260 (cleaned up). "Instead, a sliding scale exists such that the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Lim*, 8 F.4th at 1000 (cleaned up).

The arbitration clauses in Coinbase's User Agreement go beyond tipping the sliding scale into unconscionability—they break it.

A. The District Court correctly held that the Arbitration Agreement is substantively unconscionable.

Under California law, the question of substantive unconscionability "focuses on the one-sidedness of the contract terms," *Ting v. AT&T*, 319 F.3d 1126, 1149 (9th Cir. 2003), with "mutuality" as a court's "paramount consideration," *Abramson v. Juniper Networks, Inc.*, 9 Cal. Rptr. 3d 422, 442 (Cal. App. 2004). One-sided contract terms are often found to be substantively unconscionable. *See, e.g.*, *Pokorny v. Quixtar, Inc.*, 601

F.3d 987 (9th Cir. 2010); *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257 (9th Cir. 2006) (en banc); *Bakersfield Coll. v. Cal. Cmty. Coll. Athletic Ass'n*, 254 Cal. Rptr. 3d 470 (Cal. App. 2019). A "paradigmatic" example of unconscionable one-sidedness is when a contract "[r]equir[es] one party to arbitrate its claims but not the other." *Pokorny*, 601 F.3d at 1001. When a contract subjects "only the weaker party's claims . . . to arbitration, and there is no reasonable justification for that lack of symmetry," the contract "lacks the requisite degree of mutuality" and is substantively unconscionable. *Abramson*, 9 Cal. Rptr. 3d at 437.

The Arbitration Agreement is unconscionably one-sided because its arbitration and pre-suit/pre-arbitration dispute-resolution procedures all place burdens only on customers, not Coinbase. The plain language of the User Agreement unambiguously demonstrates these facts.

1. The plain text of the Arbitration Agreement renders it unconscionable, and the Court should reject Coinbase's attempts to rewrite it.

The one-sidedness of Coinbase's Arbitration Agreement is a "paradigmatic" example of substantive unconscionability. *Pokorny*, 601 F.3d at 1001. Coinbase strains to rewrite the contract in order to avoid this conclusion, but its arguments ignore plain language, context, and bedrock canons of contract interpretation.

Coinbase's argument is simple: it claims the phrase "any dispute" in Section 8.3 requires the arbitration of disputes brought by customers as well as by Coinbase. *See*

ER-125; Opening Br. 37-46. According to Coinbase, the District Court's analysis was wrong because it misinterpreted the sentence below:

> If we cannot resolve the dispute through the Formal Complaint Process, you and we agree that any dispute arising out of or relating to this Agreement or the Coinbase Services . . . shall be resolved through binding arbitration, on an individual basis (the "Arbitration Agreement").

ER-125 (emphasis removed). This is the only provision in the User Agreement that Coinbase can point to in support of its argument that the District Court erred.[2] At bottom, Coinbase's argument puts forth a tortured re-write of contract language that, when properly construed, is unambiguously one-sided.

In California contract disputes, courts "will not strain to create an ambiguity where none exists." *Int'l Bhd. of Teamsters v. NASA Servs., Inc.*, 957 F.3d 1038, 1044 (9th Cir. 2020) (internal quotation omitted). Instead, courts interpret the contract "as a whole, and in the circumstances of the case" to determine whether the agreement is unambiguous or ambiguous, and they cannot simply find a contract to be "ambiguous in the abstract." *Id.* (internal quotation omitted). Contracts are not "made ambiguous

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[2] Coinbase falsely suggests that the phrase "all disputes" appears in the User Agreement between it and Mr. Bielski. *See* Opening Br. 37 ("The User Agreement requires Coinbase and its users to arbitrate 'all disputes' . . . ."). That phrase appears nowhere in the controlling User Agreement. Coinbase appears to have added that phrase to subsequent user agreements, but it does not control this dispute between Mr. Bielski and Coinbase. *Compare* ER-61 (Feb. 1, 2022 User Agreement; "Dispute Resolution" section referencing "ALL DISPUTES") *with* ER-109 (Apr. 9, 2021 User Agreement; no such section).

simply because" the litigants "urge different interpretations" of them. *Id.* (internal quotation omitted).

Coinbase's urgings of contract ambiguity are unfounded. For one, it isolates the words "any dispute" in the User Agreement and claims they are "expansive." Opening Br. 47. True, if the User Agreement said simply "Customer and Coinbase must arbitrate any dispute either of them has," this case would be different. Under that hypothetical, this action would be far more like the cases Coinbase offers in support of its "any dispute" argument. *See Roman v. Superior Ct.*, 92 Cal. Rptr. 3d 153, 161 (Cal. App. 2009) (agreeing that "all disputes and claims that might arise out of my employment with the company will be submitted to binding arbitration"); *Serpa v. Cal. Surety Investigations, Inc.*, 155 Cal. Rptr. 3d 506, 513 (Cal. App. 2013) (agreement contained "unmistakable mutual obligation" to arbitrate "any dispute," without reference to any condition such as here); *McManus v. CIBC World Markets Corp.*, 134 Cal. Rptr. 2d 446, 450 (Cal. App. 2003) ("All disputes arising out of your employment or the termination of your employment . . . will be submitted to [arbitration]."). But this User Agreement does not say what Coinbase claims it says, and it does not have the same language as those other cases.

Instead, the User Agreement sets up an unambiguous procedure to resolve a customer's dispute against Coinbase. That procedure includes, among many other things, the two words Coinbase quotes repeatedly.

> If you have a dispute with Coinbase (a "Complaint"), you agree to contact Coinbase through our support team to attempt to resolve any such dispute amicably.

> If we cannot resolve the dispute through the Coinbase support team, you and we agree to use the Formal Complaint Process set forth below.
>
> [. . .]
>
> If we cannot resolve the dispute through the Formal Complaint Process, you and we agree that any dispute arising out of or relating to this Agreement or the Coinbase Services . . . shall be resolved through binding arbitration, on an individual basis (the "Arbitration Agreement").

ER-124-25 (emphasis removed). The procedure is one-sided at every turn. It contemplates only customers' disputes with Coinbase—*not* Coinbase's disputes with them. It describes the procedure for attempts to resolve those (customer) disputes before initiating arbitration. And it says if the customer's dispute cannot be resolved through the Formal Complaint Process, then any of those disputes that "aris[e] out of or relat[e] to" the User Agreement must be arbitrated.

Courts have found this type of one-sided construction unconscionable under California law. An arbitration provision providing "[s]hould EMPLOYEE exhaust the remedies provided by the grievance procedures of ECC International, EMPLOYEE and ECC International agree and understand that any controversy or claim arising out of or relating to EMPLOYEE's employment shall be [arbitrated]" was found to lack mutuality and was unconscionable for many of the same reasons as here. *Dunham v. Envtl. Chem. Corp.*, No. 3:06-cv-03389, 2006 WL 2374703 at *2 (N.D. Cal. Aug. 16, 2006). The plain language and context explained that, if *one* of the parties exhausted pre-

suit dispute-resolution processes (the equivalent of the Formal Complaint Process here), then "any controversy or claim" was arbitrable. The court correctly found this term to be unconscionably one-sided. *Id.* at *5-7. More recently, a provision stating that, "[a]s a condition of using Tawkify's services, each user agrees that any and all disputes and causes of action arising out of or connected with Tawkify, shall be resolved through arbitration" was a one-sided unconscionable provision. *Stanfield v. Tawkify, Inc.*, 517 F. Supp. 3d 1002, 1006-07 (N.D. Cal. 2021). The court examined the language of this provision and held that it bound users to arbitrate disputes with Tawkify, but not Tawkify to do the same in its disputes with users.

Coinbase's talismanic invocation of the phrase "any dispute" ignores the rest of the words, including those in the same sentence, that provide similar context and limitation: "If we cannot resolve the dispute through the Formal Complaint Process, you and we agree that any dispute arising out of or relating to this Agreement or the Coinbase Services . . . shall be resolved through binding arbitration . . . ." ER-125 (emphasis removed). This if/then structure provides unambiguous context to the sentence, just as additional language gave context to "any controversy or claim" in *Dunham*, 2006 WL 2374703 at *2, and to "any and all disputes" in *Stanfield*, 517 F. Supp. 3d at 1006-07.

Here, if the dispute can't be resolved by the Formal Complaint Process, then "any dispute arising out of or relating to this Agreement or the Coinbase Services" will go to arbitration. The "dispute[s]" referenced by this sentence are those that first

proceeded into the Formal Complaint Process (which are customers' disputes with Coinbase). The phrase "any dispute arising out of or relating to this Agreement or the Coinbase Services" is naturally meant to limit the scope of arbitrable disputes—only those related to the User Agreement or Coinbase Services—rather than to broaden it wildly beyond the customer-dispute scope as Coinbase argues.

Coinbase's contextual arguments fare no better. Coinbase argues that, because a customer dispute is defined as a "Complaint," *see* ER-124, the "more capacious" phrase "any dispute" is meant to encompass Coinbase's disputes with its customers in addition to customer Complaints. Opening Br. 40. Extending this argument, it claims the District Court's interpretation of the arbitration provision renders the term "Complaint" surplusage, because the Court used "Complaint" interchangeably with "dispute" while the User Agreement means them to be different. *Id.* at 44. This argument falls apart quickly. The User Agreement itself refers to customer "Complaints" as "disputes" even more often than it calls them "Complaints." *See, e.g.*, ER-124-25; §§ 8.2, 8.2.1, 8.3. It does this even immediately after defining these disputes as "Complaints": "If you have a dispute with Coinbase (a "Complaint"), you agree to contact Coinbase through our support team to attempt to resolve **any such dispute** amicably. If we cannot resolve **the dispute** through the Coinbase support team, you and we agree to use the Formal Complaint Process . . . ." ER-124-25 (emphasis amended). Coinbase's observation about an intentionally "capacious" term is wrong—instead, Coinbase just drafted the User Agreement to use the terms interchangeably.

Courts should interpret these terms by how they are used, not how Coinbase now wishes they had been used.[3]

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[3] The Arbitration Agreement is not ambiguous, but to the extent ambiguity exists concerning the meaning of the term "dispute," California law requires that it be resolved in favor of Mr. Bielski's interpretation. "Where the drafter of a form contract has prepared an arbitration provision whose application to a particular dispute is uncertain, ordinary contract principles require that the provision be construed against the drafter's interpretation and in favor of the nondrafter's interpretation." *Sandquist v. Lebo Auto., Inc.*, 376 P.3d 506, 514 (Cal. 2016). This interpretive rule has "particular force" where, as here, "the contract is one of adhesion." *Castillo v. CleanNet USA, Inc.*, 358 F. Supp. 3d 912, 946 (N.D. Cal. 2018) (citing *Sandquist*). Thus, even if the Arbitration Agreement has some ambiguity, Mr. Bielski's interpretation prevails.

Coinbase cites dicta from *Moses H. Cone* and other Supreme Court cases to support its interpretation of the Arbitration Agreement, but those cases did not establish a default interpretive rule construing *all* ambiguities in favor of arbitration. None decided that issue. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19 (1983) (issue presented was whether *Calvert* or *Colorado River* abstention was warranted in case involving parallel proceedings in state and federal courts); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418 (2019) (FAA preempted state interpretive rule only in the specific context of discerning whether the parties agreed to class arbitration, because its application in that specific context "target[ed] arbitration" and "interfer[ed] with fundamental attributes of arbitration") (cleaned up); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624-25 (1985) (challenger did not question lower court's exercise of "standard contract interpretation," but instead argued for a categorical, policy-oriented common law rule that arbitration clause must specifically reference statutory claims by name to make such claims arbitrable, where the statute invoked was designed to protect the persons challenging arbitration). Such a rule would run roughshod over neutral state interpretive law applicable to all contracts.

And in any event, the Supreme Court clarified in *Sundance* that the FAA's "policy is to make arbitration agreements as enforceable as other contracts, but not more so." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713-14 (2022) (cleaned up). "Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation." *Id.*

Coinbase asks the Court to grant a second wish about what the contract *should* say, musing that, if it truly had not agreed to arbitrate, it would have included a forum selection clause in the User Agreement. Opening Br. 41. There is no basis for Coinbase's suggestion that the Court should guess at the ideal content of the contracts that Coinbase drafts, or that the Court should presume this provision should be present in contracts like these.[4] On the contrary, the Court should examine its plain language and conclude the User Agreement says what it says and includes unenforceable and unconscionable provisions because Coinbase wrote it that way. Coinbase's decisions in drafting the User Agreement led to a one-sided arbitration provision and the absence of a forum selection clause for Coinbase's lawsuits.

Contrary to Coinbase's requests to rewrite the contract, the District Court's contextual analysis is sound. It discerned that Section 8.3 of the User Agreement only imposes obligations on customers—not on Coinbase. ER-12-13. Coinbase's

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A default rule requiring courts to override longstanding, neutral state-law principles of contract interpretation that do not discriminate against arbitration—and thereby impose different rules of construction than those employed to construe other contracts—would favor arbitration, not "treat[] arbitration contracts like all others," as the FAA requires. *Id.*

[4] Similarly, Coinbase's self-serving representation regarding its "repeated[]" position about the scope of the arbitration provision is irrelevant. Opening Br. 44. This representation, which was only made when it became advantageous for Coinbase's litigation position, cannot change the text of the User Agreement; the unambiguous contract controls the parties' agreement.

interpretation would insert the obligation for *Coinbase* to arbitrate disputes smack in the middle of multiple obligations the User Agreement places on *customers*.

> If we cannot resolve the dispute through the Formal Complaint Process, you and we agree that any dispute arising out of or relating to this Agreement or the Coinbase Services . . . shall be resolved through binding arbitration, on an individual basis (the "Arbitration Agreement"). Subject to applicable jurisdictional requirements, you may elect to pursue your claim in your local small claims court rather than through arbitration so long as your matter remains in small claims court and proceeds only on an individual (non-class and nonrepresentative) basis.

ER-125 (emphasis removed). Coinbase asks the Court to interpret Section 8.3 to impose obligation #1 on only customers (submitting a Complaint and then initiating the Formal Complaint Process), then read obligation #2 to apply to customers *and* *Coinbase* (arbitrating remaining disputes), and then return back to a customer-only obligation #3 (small claims court). But the natural, unambiguous text and context places all these obligations on customers, and none on Coinbase. The quoted portion of Section 8.3 describes what customers must do to resolve customer disputes, just as the relevant dispute-resolution portions describe customer disputes throughout the User Agreement.

The District Court also correctly identified that Coinbase's proffered interpretation would cause a portion of the User Agreement to be rendered as surplusage. ER-12. When a court reviews contract language, "an interpretation which renders part of the instrument to be surplusage should be avoided." *Flores v. Barr*, 934

F.3d 910, 915 (9th Cir. 2019) (internal quotation omitted). Coinbase's proposed definition would render meaningless the following bolded portion of the provision: "**If we cannot resolve the dispute through the Formal Complaint Process**, you and we agree that any dispute arising out of or relating to this Agreement" shall be arbitrated. ER-125 (emphasis removed to bold only the portion being discussed). After all, if the provision provides for all disputes, from either customers or Coinbase, to proceed to arbitration—but for only customers' disputes to go through the Formal Complaint Process before they are arbitrated (lest Coinbase move to dismiss them, *see supra* at 8)—then the bolded portion has no purpose. It could be deleted without changing the meaning of the User Agreement; it would be surplusage. The natural, correct reading of the provision is that it continues the dispute-resolution funnel set forth in the User Agreement: customer Complaints are filed; those disputes go through the Formal Complaint Process; if they cannot be resolved there, then those disputes are subject to arbitration.

The Arbitration Agreement unambiguously provides for a *customer's* dispute with Coinbase to be arbitrated (or sent to small claims court)—but it does not require Coinbase to be arbitrated or sent to small claims court. This stark example of one-sidedness is substantively unconscionable.

2. The required pre-suit/pre-arbitration dispute-resolution procedures are unconscionable.

The User Agreement is substantively unconscionable for the additional independent reason that the pre-arbitration/pre-suit dispute-resolution procedures are pretextual, unduly onerous, and provide Coinbase an unfair "free peek" at future claims in a judicial or arbitrable forum.

If a customer has "feedback, or general questions," they are directed to a Coinbase website, support.coinbase.com. ER-124. But if their account has been compromised, they should report their claim to a telephone hotline. *Id.* If they have a "dispute," they must contact Coinbase's "support team." *Id.* Failure to do so before filing suit can result in Coinbase asking "the arbitrator or small claims court to dismiss [the customer's] filing" and make the customer start over. ER-125. (In this portion of the User Agreement, Coinbase does not explain how to contact its "support team" or if the method of contacting this "team" is different from the Coinbase website above.)

If the issue is not resolved after the customer contacts the "support team," the customer must then use Coinbase's "Complaint form" and proceed through the "Formal Complaint Process." ER-124-25. Again, failure to properly do so triggers Coinbase's right to ask for the customer's lawsuit or arbitration proceeding to be dismissed. ER-125. The "Formal Complaint Process" contemplates that a Coinbase "Agent" will review the "Complaint" and respond within three weeks of its submission. *Id.* The Arbitration Agreement allows the "Agent's" response to resolve the

"Complaint" as requested, reject the "Complaint" entirely, or anything in between. *Id.* And if Coinbase cannot respond within three weeks, the Arbitration Agreement allows it seven weeks to respond to the Complaint. *Id.* Only if the "Formal Complaint Process" is completed and unsuccessful does the Arbitration Agreement allow a customer to initiate arbitration. *Id.* But Coinbase is subject to no venue limitation at all: it is free to sue its customers in any state or federal court, for any dollar amount (or any non-monetary relief), without any pre-suit resolution procedure.

Coinbase spins its pre-suit procedures as a "call-us-before-you-sue-us" scheme, Opening Br. 4, but it is much more than that. Coinbase has constructed a procedure meant to stymie customers' attempts to resolve disputes. One-sided duties to exhaust pre-arbitration remedies serve as a "free peek" that gives companies like Coinbase "an advantage if and when [a customer] were to later demand arbitration." *Nyulassy v. Lockheed Martin Corp.*, 16 Cal. Rptr. 3d 296, 307 (Cal. App. 2004). They "add[] to the contract's substantive unconscionability," because they permit Coinbase "to preview" its customers' claims and develop a defense strategy in advance. *Dunham*, 2006 WL 2374703 at *8. Coinbase allows itself as much as seven weeks to respond to a "Complaint." ER-125. During this time, a customer cannot file a lawsuit or initiate arbitration without risking Coinbase later moving to dismiss that proceeding. *See id.* Coinbase is free to spend those weeks developing its defense, while the customer is contractually frozen. As the District Court found, there is no legitimate commercial need for a maze of this size and scope simply to resolve disputes brought by Coinbase's

customers. *See Armendariz*, 24 Cal. 4th at 117 (the "business realities" supporting "extra protection" for stronger contractual party must be "factually established" to be valid).

Whenever Coinbase eventually issues its response in the Formal Complaint Process, the User Agreement allows it to "(i) offer to resolve your complaint in the way you requested; (ii) make a determination rejecting your Complaint and set out the reasons for the rejection; or (iii) offer to resolve your Complaint with an alternative solution." ER-125. It provides Coinbase the "unilateral right" to "accept[], reject[], or modify[]" the customer's proposed resolution, and in so doing, it turns the "Formal Complaint Process" into "little more than an exploratory evidentiary hearing" for Coinbase. *See Pokorny*, 601 F.3d at 999 (describing advisory dispute-resolution panel as unconscionable).

The pre-suit/pre-arbitration procedures simply give Coinbase an unfair "free peek" at a customer's claim. They do not serve a legitimate commercial need, and they are substantively unconscionable.

B. The District Court correctly found that procedural unconscionability permeates the Arbitration Agreement.

1. As a contract of adhesion, Coinbase's User Agreement is inherently procedurally unconscionable.

The Arbitration Agreement is also procedurally unconscionable because it is an adhesive contract. As the District Court observed, "Coinbase drafted and presented the user agreement [of which the Arbitration Agreement is part] to Bielski on a take-it-or-leave-it basis, which deprived him of both the ability to negotiate and meaningful

choice." ER-14. Such absence of arm's-length negotiation creates inherent procedural unconscionability in all adhesion contracts governed by California law. *See Sanchez v. Valencia Holding Co., LLC*, 353 P.3d 741, 751 (Cal. 2015) ("*Sanchez II*") ("Here the adhesive nature of the contract is sufficient to establish some degree of procedural unconscionability."); *Poublon*, 846 F.3d at 1260 ("California courts have held that oppression may be established by showing the contract was one of adhesion . . . .").

Coinbase concedes that its User Agreement is a take-it-or-leave-it adhesion contract. Opening Br. 52. That alone establishes procedural unconscionability. *See Sanchez II*, 353 P.3d at 751; *Poublon*, 846 F.3d at 1260. To be clear, the facts in *Sanchez II* differ from those in this case, but its differences prove the rule. Even though the buyer in *Sanchez II* was able to negotiate the price, and even though the court specifically noted that the plaintiff's failure to read the contract was "unreasonable," it *still* found "the adhesive nature of the contract [] sufficient to establish some degree of procedural unconscionability." 353 P.3d at 750-51.

Coinbase's and amicus's arguments about the ubiquity or supposed commercial necessity of form contracts are beside the point. "Necessary" is not the same thing as "fair," and commercial realities don't somehow make adhesion contracts any less oppressive. *See Baltazar v. Forever 21, Inc.*, 367 P.3d 6, 11 (Cal. 2016) ("Although they are indispensable facts of modern life that are generally enforced, [all adhesive contracts]

contain a degree of procedural unconscionability even without any notable surprises, and bear within them the clear danger of oppression and overreaching.") (cleaned up).

The Court can also dispense with Coinbase's contention that the availability of other cryptocurrency exchanges defeats procedural unconscionability. This Court has rejected this proposition at least six times. Sitting en banc, this Court first explained in *Nagrampa* that "the availability in the marketplace of substitute employment, goods, or services *alone* cannot defeat a claim of procedural unconscionability" when there is a contract of adhesion and a disparity in bargaining power between the parties. 469 F.3d at 1283 (emphasis in original). The Court has adhered to this position multiple times since. See *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 985 (9th Cir. 2007) (collecting four Ninth Circuit cases "reject[ing] the notion that the existence of 'marketplace alternatives' bars a finding of procedural unconscionability").[5]

Subsequent decisions by California's high court have confirmed the correctness of this Court's approach. In *Sanchez II*, the California Supreme Court found procedural unconscionability in an adhesive contract to buy a car, where the consumer undoubtedly

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[5] *See also Hall v. FCA US LLC*, No. 21-55895, 2022 WL 1714291, at *1 (9th Cir. May 27, 2022) (adhesive contract had some "minimal" procedural unconscionability, even though the plaintiff made no showing "that he lacked access to 'meaningful alternatives'"); *Smith v. Ford Motor Co.*, 462 F. App'x 660, 663-64 (9th Cir. 2011) (confirming rejection of "market alternatives" approach by distinguishing "meaningful alternatives" (which can in some circumstances defeat procedural unconscionability) from "substitute" goods or services (which cannot)).

had reasonable market alternatives. *See* 353 P.3d at 751. Indeed, in the Court of Appeal, the car dealer made the same "market alternatives" argument Coinbase makes here, and the Court of Appeal rejected it. *Sanchez v. Valencia Holding Co., LLC*, 135 Cal. Rptr. 3d 19, 31 (Cal. App. 2011) ("*Sanchez I*") (rejecting argument that "procedural unconscionability is lacking because Sanchez could have gone elsewhere to buy a Mercedes–Benz from a dealer who did not require arbitration"). In *Baltazar*, the court confirmed that *all* adhesive contracts have at least some procedural unconscionability. 367 P.3d at 11. And in *De La Torre v. CashCall, Inc.*, the court stated that "the availability of alternatives" is one of "the various factors tending to show relative bargaining power" when determining the *degree* of procedural unfairness, thus confirming that a baseline level of procedural unconscionability is inherent in all adhesive contracts. 422 P.3d 1004, 1007, 1014 (Cal. 2018).

Further, three Court of Appeal decisions have noted and expressly endorsed this Court's rejection of the "market alternatives" theory. *See Sanchez I*, 135 Cal. Rptr. 3d at 31 (citing and endorsing *Nagrampa*); *Parada v. Superior Ct.*, 98 Cal. Rptr. 3d 743, 758 (Cal. App. 2009) (same); *Gatton v. T-Mobile USA, Inc.*, Cal. Rptr. 3d 344, 356 (Cal. App. 2007) (same). None have expressly rejected it.

As a result, Coinbase's reliance on cherry picked Court of Appeal decisions seemingly approving of the reasonable market alternatives theory, Opening Br. 53-55, is misplaced. As this Court observed in *Shroyer*, these courts were divided on this issue when this Court found the "market alternatives" theory unconvincing in *Nagrampa* and

its progeny. *See Shroyer*, 498 F.3d at 985 (collecting Ninth Circuit cases and explaining, "Although there is clearly some disagreement among the California Courts of Appeal over this issue . . . we have consistently followed the courts that reject the notion that the existence of 'marketplace alternatives' bars a finding of procedural unconscionability"). Nothing has changed in the intermediate courts, as *Sanchez I*, *Parada*, and *Gatton* have since affirmed this Court's approach, along with at least one other Court of Appeal decision in 2020. *See Swain v. LaserAway Med. Grp., Inc.*, 270 Cal. Rptr. 3d 786, 797 (Cal. App. 2020) (collecting cases).

In re Watts, 298 F.3d 1077 (9th Cir. 2002), is inapplicable here. In *Watts*, two intervening Court of Appeal decisions rejected this Court's interpretation of a California statute. *Id.* at 1082. This Court had decided the issue "without the benefit of any California cases to guide our interpretation." *Id.* at 1081. In *that* circumstance, the Court reaffirmed that it is "bound to follow" intermediate California appellate decisions "absent convincing evidence that the California Supreme Court" would reject those decisions. *Id. Watts* has no impact here, where this Court considered the preexisting division among the intermediate courts and decided which side of the divide was most likely correct, and subsequent decisions by the California Supreme Court and Court of Appeal have reaffirmed that interpretation. This Court may disregard its prior precedent on issues of state law where "recent decisions from the courts of appeal cast a new light on the question." *Owen By & Through Owen v. United States*, 713 F.2d 1461, 1464-65 (9th Cir. 1983). The Court of Appeal has shed no new light here. This Court's prior decisions

rejecting the "market alternatives" argument remain binding.

Further, even if Coinbase's theory were correct, *Fisher v. MoneyGram International, Inc.* shows why *this* contract is still procedurally unconscionable. As the Court of Appeal explained in *Fisher*, the "'meaningful choice' rationale is employed only where surprise is not seriously in issue, and the plaintiff relies solely on the defendant's use of an adhesion contract to show procedural unconscionability." 281 Cal. Rptr. 3d 771, 781 (Cal. App. 2021). Here, as in *Fisher*, surprise is at issue. Procedural surprise exists, *inter alia*, where the challenged term is "*beyond the reasonable expectation of the weaker party*." *Morris v. Redwood Empire Bancorp*, 27 Cal. Rptr. 3d 797, 808 (Cal. App. 2005) (emphasis added); *see also Parada*, 98 Cal Rptr. at 757-58 (finding heightened procedural unconscionability where "the weaker party would not expect" term providing for a panel of three arbitrators). The District Court found heightened procedural unconscionability because the User Agreement's onerous pre-arbitration dispute-resolution requirements would surprise the ordinary customer. ER-15.

Coinbase makes four other arguments, but they are similarly unpersuasive. It argues (1) procedural unconscionability is limited to questions of contract formation, (2) Coinbase's pre-arbitration procedures are not onerous, (3) the pre-arbitration procedures are not surprising; and (4) "the District Court's analysis suggests a general disapproval of arbitration." Opening Br. 55-57. Coinbase is wrong on all four points.

First, the surprise prong of the procedural unconscionability analysis is not limited only to technicalities of "contract formation," Opening Br. 53, but also

considers whether contract terms are outside the weaker party's reasonable expectations, *see, e.g.*, *Morris*, 27 Cal. Rptr. 3d at 808; *Parada*, 98 Cal Rptr. at 757-58.

Second, Coinbase cites no basis for its assertion that the District Court incorrectly concluded that the pre-arbitration procedures are onerous. It instead argues only that sometimes consumers resort to customer-service tools "to resolve all kinds of daily emergencies." Opening Br. 55. But this case is not about a daily emergency. It is about a scam perpetrated on Mr. Bielski that resulted in the scammer getting access to his computer and stealing money from his account, and Coinbase's subsequent failure to even respond to Mr. Bielski's attempts to use the informal complaint process, let alone to address the issue. ER-162-75. Indeed, Mr. Bielski's declaration explains why these procedures are not only onerous but also ineffective, because despite the loss of all of the funds in his account, Mr. Bielski's repeated calls and letters using the procedures required by the Coinbase User Agreement went unanswered until he filed this lawsuit. ER-48 ¶ 8.

Third, the District Court explained why the Formal Complaint Process would surprise the average user, who would not expect their right to arbitration to be conditioned on onerous procedural preconditions. ER-14-15.

Finally, the District Court's decision did not evince hostility toward arbitration; it applied California's unconscionability doctrine to the Arbitration Agreement just as it would any other contract. *See Morgan*, 142 S. Ct. at 1713 (explaining that the FAA seeks to "make arbitration agreements as enforceable as other contracts, but not more

so," and courts "may not devise novel rules to favor arbitration over litigation") (cleaned up).

And again, regardless of these considerations, the adhesive nature of the contract alone is sufficient to uphold the District Court's finding that the Arbitration Agreement is procedurally unconscionable. *Nyulassy*, 16 Cal. Rptr. 3d at 306 ("Where an adhesive contract is oppressive, surprise need not be shown.") (cleaned up).

2. The unilateral modification clause ratchets up the procedural unfairness.

Additionally, the User Agreement's provision allowing Coinbase to unilaterally change its terms further heightens its procedural unconscionability. ER-109 ("We may amend or modify this Agreement at any time by posting the revised agreement on the Coinbase Site and/or providing a copy to you."). The District Court did not address this point (it did not need to), but that does not reduce its salience. This Court has found similar provisions in adhesion contracts to be highly oppressive. *See Pokorny*, 601 F.3d at 997 (higher degree of procedural unconscionability where rules incorporated into contract "were subject to unilateral amendment by [the defendant] at any time"); *see also Merkin v. Vonage Am., Inc.*, 639 F. App'x 481, 482 (9th Cir. 2016) (finding arbitration provision procedurally unconscionable "because it is adhesive and can be

unilaterally modified").[6] Indeed, Coinbase has taken advantage of this unilateral prerogative to change the terms of its User Agreement on more than one occasion. *Compare, e.g.*, ER-60-98 (February 1, 2022 version) *with* ER-109-37 (April 9, 2021 version). This fact further buttresses the District Court's finding of procedural unconscionability.

For this litany of reasons, the District Court correctly found the User Agreement procedurally unconscionable.

II. Separately, the delegation provision is a substantively and procedurally unconscionable adhesion contract that lacks mutuality of obligation.

Separate from the Arbitration Agreement, the User Agreement's delegation clause is one-sided, lacking in mutuality, and unconscionable.

"An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010). And because the FAA treats arbitration agreements equally, not preferentially, *see Morgan*, 142 S. Ct. at 1713, courts are prohibited from inventing special rules that favor delegation clauses. Thus, as the District Court correctly observed, the delegation clause in Coinbase's User Agreement

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[6] The *Merkin* court reversed on severability because the sole substantively unconscionable provision could be cleanly excised from the contract, which, for the reasons set forth in Part III, *infra*, is not the case here.

is subject to the same "general contract principles" as any other contract. ER-2 (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)).

A. The delegation clause is substantively and procedurally unconscionable.

Mutuality is "[t]he paramount consideration in assessing substantive conscionability." *Nyulassy*, 16 Cal. Rptr. 3d at 306 (cleaned up). Thus, as with any contract, a delegation clause is substantively unconscionable if it "impose[s] unfair or one-sided burdens that are different from the clause['s] inherent features and consequences." *Pinela v. Neiman Marcus Grp., Inc.*, 190 Cal. Rptr. 3d 159, 175 (Cal. App. 2015) (emphasis omitted). A delegation provision must contain a "modicum of bilaterality," because it is "unfairly one-sided" for the party with superior bargaining power to "impose arbitration" on the other party while refusing to accept such limitations on its ability to "prosecute a claim" against the other party. *Armendariz*, 24 Cal. 4th at 117.

The District Court got it right when it concluded that Coinbase's delegation clause lacks any modicum of bilaterality and is thus substantively unconscionable. The clause, which appears in Section 8.3 of the User Agreement, reads in full:

> This Arbitration Agreement includes, without limitation, disputes arising out of or related to the interpretation or application of the Arbitration Agreement, including the enforceability, revocability, scope, or validity of the Arbitration Agreement or any portion of the Arbitration Agreement. All such matters shall be decided by an arbitrator and not by a court or judge.

ER-125 (emphasis removed).

As with any contract, to assess the clause's substantive unconscionability, the Court must examine the obligations it places on the parties to the agreement. *See Sanchez II*, 353 P.3d at 749 (courts analyzing unconscionability must assess the "commercial setting, purpose, and *effect* of the contract or contract provision") (cleaned up) (emphasis added). That, in turn, requires the Court to ascertain the delegation clause's scope and mutual obligations—in other words, to what disputes does it apply, and what does it require of each contracting party?

The delegation clause's text answers this question.[7] Only disputes "arising out of or related to" the "Arbitration Agreement" are within the scope of the clause. Thus, the delegation clause applies only to a defined term, the "Arbitration Agreement." In California, "precisely-defined terms" incorporated into an agreement govern the agreement's interpretation. *Kanno v. Marwit Cap. Partners II, L.P.*, 227 Cal. Rptr. 3d 334, 354 (Cal. App. 2017).

Another portion of Section 8.3 defines the term "Arbitration Agreement":

> If we cannot resolve the dispute through the Formal Complaint Process, you and we agree that any dispute arising out of or relating to this Agreement or the Coinbase Services

[7] Like any contractual provision, the delegation clause must be interpreted according to its plain language. *Valencia v. Smyth*, 110 Cal. Rptr. 3d 180, 185 (Cal. App. 2010); *Adams v. Postmates, Inc.*, 414 F. Supp. 3d 1246, 1253 (N.D. Cal. 2019), *aff'd*, 823 F. App'x 535 (9th Cir. 2020) (looking to delegation clause's "plain language and structure").

> . . . shall be resolved through binding arbitration, on an individual basis (the "Arbitration Agreement").

ER-125 (emphasis removed).

Just as the delegation clause is limited by the definition of the Arbitration Agreement, the Arbitration Agreement is limited to disputes that entered the Formal Complaint Process. Put another way, the Arbitration Agreement's application to only disputes that the parties "cannot resolve . . . through the Formal Complaint Process" means that only disputes subject to the Formal Complaint Process must be arbitrated.

In turn, Section 8.2 provides that the Formal Complaint Process applies only to a dispute that the customer originates against Coinbase, and not the other way around:

> Formal Complaint Process. If **you** have a dispute with Coinbase (a "Complaint"), you agree to contact Coinbase through our support team to attempt to resolve any such dispute amicably. If we cannot resolve the dispute through the Coinbase support team, you and we agree to use the Formal Complaint Process set forth below. **You** agree to use this process before filing any arbitration claim or small claims action.

ER124-25 (emphases added). The Formal Complaint Process arises when a "Complaint" has been submitted by a customer to Coinbase's support team, but Coinbase could not resolve the Complaint. The initiating event of the delegation process is the submission of a "Complaint." And a "Complaint," as defined, arises *only* when a customer has a dispute with Coinbase—but not the reverse.

As this analysis shows, Coinbase's decision to incorporate the defined term "Arbitration Agreement" into the delegation clause and then condition application of

the "Arbitration Agreement" only to disputes subject to the Formal Complaint Process requires multiple levels of backtracking to assess the benefits and burdens conferred by the delegation clause. So, let's summarize by reviewing the life cycle of any dispute to which the delegation clause applies. The delegation clause works like this:

- If a customer has a dispute with Coinbase, then the customer agrees first to contact Coinbase's support team to attempt to resolve the dispute. ER-124, § 8.2.
- If that dispute cannot be resolved by Coinbase's support team, then the customer and Coinbase agree to use the Formal Complaint Process. ER-124-25, § 8.2.
- If Coinbase cannot resolve the dispute through the Formal Complaint Process, then the customer and Coinbase agree that any dispute arising from the User Agreement shall be resolved in arbitration (the "Arbitration Agreement"). ER-125, § 8.3.
- Disputes arising out of or related to the Arbitration Agreement are to be decided by an arbitrator. ER-125, § 8.3.

As such, Coinbase's User Agreement structures the delegation clause to be purely unilateral. The delegation clause can only apply if the first step of the process is initiated: a customer submitting a Complaint to Coinbase's support team. For this reason, it

applies only to customers' disputes with Coinbase (which it sometimes calls "Complaints"). Coinbase, on the other hand, has no obligation to take such questions to the arbitrator if *it* initiates a dispute with its customers. The requirement to delegate applies to one hundred percent of customer "Complaints," and zero percent of Coinbase complaints.

This kind of "one-sidedness" is "precisely the type" of contract that the substantive unconscionability doctrine "is designed to protect against." *Pokorny*, 601 F.3d at 1000; *see also Nagrampa*, 469 F.3d at 1285-86 (substantive unconscionability finding supported by contract requiring arbitration only for claims by "weaker party").

Moreover, the delegation clause is procedurally unconscionable. It is a contract of adhesion just like the rest of the User Agreement of which it is part. *See Sanchez II*, 353 P.3d at 751; *Poublon*, 846 F.3d at 1260. Its incorporation of the term "Arbitration Agreement" also means it brings with it all of Coinbase's one-sided pre-arbitration requirements, which would surprise the ordinary customer. *See supra* at 33. A customer like Mr. Bielski could not even reach the point of taking disputes over the application of the Arbitration Agreement to the arbitrator without first participating in Coinbase's pre-suit procedures. And the delegation clause, like all the provisions of the User Agreement, is subject to the provision allowing Coinbase to unilaterally change its terms, which further heightens its procedural unconscionability. *See supra* at 35-36. Thus, the District Court correctly ruled that the delegation clause is both substantively and procedurally unconscionable and is therefore unenforceable.

B. Mr. Bielski specifically challenged the delegation clause, and the District Court specifically analyzed and invalidated it.

Although the just-discussed analysis of the delegation clause's unconscionability intersects with the analysis of the Arbitration Agreement set out above, the two inquiries are still distinct. The overlap exists because Coinbase chose to incorporate the defined term "Arbitration Agreement" into the delegation clause. Common sense dictates that when one contractual provision incorporates another contractual provision, a court can't assess the conscionability of the incorporat*ing* provision without interpreting the incorporat*ed* term.

Thus, the District Court did not, as Coinbase asserts, employ "semantic gymnastics." Opening Br. 30. The District Court simply analyzed the delegation clause's operation to understand its results—according to the terms Coinbase itself included in its contract of adhesion. Under California law, that is exactly what the District Court was supposed to do in assessing whether the delegation clause was unconscionable. *See Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 194 (Cal. 2013) (substantive unconscionability considers whether a provision produces "overly harsh or one-sided *results*") (emphasis added).

Coinbase vaguely references "[r]esolving the delegation-clause issue," Opening Br. 32, but it does not articulate exactly what it means. The "delegation-clause issue" presented to the District Court was to assess whether the delegation clause was substantively unconscionable. That inquiry required assessing the clause's "results,"

Moreno, 311 P.3d at 194, and that assessment could not be done without understanding to whom it applied and when. For that reason, Coinbase's argument that resolving this "issue" did not depend on "backtracking through the arbitration agreement itself," Opening Br. 32, is nonsense. Because of Coinbase's own drafting decisions, there is no way to assess the mutuality (or not) of the obligations imposed by the delegation clause without such "backtracking." The only way to understand the effect of Coinbase's delegation clause is to assess which disputes it delegates to the arbitrator.

This Court's decision in *Lim* is instructive. *Lim* affirmed a district court's finding that a delegation clause in an employment agreement was substantively and procedurally unconscionable. 8 F.4th at 999. Its rationale was simple: the district court correctly held that the "take-it-or-leave-it circumstances" in which the employee signed the agreement and a series of "cost-splitting, fee-shifting, and Texas venue provisions" rendered both the delegation clause and the larger arbitration agreement substantively and procedurally unconscionable under California law. *Id.* at 1006.

Coinbase tries to manufacture daylight between *Lim* and this case by arguing that in *Lim*, "the party showed how the offending provision actually operated on the delegation clause specifically." Opening Br. 34. That is no different from what Mr. Bielski did here. He explained in detail how Coinbase's definition of "Arbitration Agreement"—which appears in both the delegation clause and the larger arbitration provision—"actually operate[s] on the delegation clause specifically" by fixing the scope of the delegation clause in such a way that threshold questions concerning the

arbitrability of only customer-initiated disputes get delegated. *See* ER-29. The District Court agreed with Mr. Bielski, and it specifically discussed this unilateral feature of the delegation clause separately from its analysis of the larger Arbitration Agreement. ER-9-13. Accordingly, the District Court found that "the delegation clause imposes an unconscionable burden that differs from a generic delegation clause," rendering it unconscionable under California law. ER-10.

Casting about for favorable precedent, Coinbase next offers a twisted reading of the Supreme Court's decision in *Rent-A-Center*, but *Rent-A-Center* further supports affirming the District Court here. In *Rent-A-Center*, the plaintiff argued that an arbitration agreement was unconscionable "as a whole," and he failed to "contest the validity of the delegation provision in particular." *Rent-A-Ctr.*, 561 U.S. at 74-75. "Nowhere in his opposition to Rent-A-Center's motion to compel arbitration did he even mention the delegation provision." *Id.* at 72. And his Ninth Circuit brief merely "noted the existence of the delegation provision, but his unconscionability arguments made no mention of it." *Id.* at 74.

The Supreme Court noted that two of the plaintiff's substantive unconscionability arguments challenged aspects of the at-issue contract that applied to both the agreement to arbitrate and the delegation provision. *Id.* at 74. Justice Scalia explained that if the plaintiff had "challenged the delegation provision by arguing that these common procedures *as applied* to the delegation provision rendered *that provision* unconscionable, the challenge should have been considered by the court." *Id.* (emphases

in original). He would have prevailed if he had shown that one or both procedures "cause[d] the arbitration of his claim that the Agreement is unenforceable to be unconscionable." *Id.* But he "did not make any arguments specific to the delegation provision" and instead only argued that the procedures "rendered the entire Agreement invalid." *Id.*

Mr. Bielski did what the *Rent-A-Center* plaintiff failed to do. He dedicated *nine pages* of his opposition to Coinbase's motion to compel arbitration arguing specifically that the delegation clause was substantively and procedurally unconscionable. ER-31-40. He made arguments specific to the delegation provision, asserting that "the delegation provision (as well as the larger agreement to arbitrate . . .) does not contain even a modicum of bilaterality." ER-35. He argued that "any disputes Coinbase might have with users—including disputes pertaining to the delegation provision—simply do not trigger the obligation to arbitrate." *Id.* He argued that the Formal Complaint Process improperly gave Coinbase a "'free peek' at potential legal theories, including theories pertaining to the delegation provision." ER-38. And he argued that "the arbitration agreement's lengthy one-sided prearbitration procedure" applied to the "disputes identified in the delegation provision." ER-39. This is a far cry from the plaintiff in *Rent-A-Center*, who did not "even *mention* the delegation provision" in his opposition to the

motion to compel arbitration. 561 U.S. at 72 (emphasis added).[8]

Coinbase claims that *Rent-A-Center* and *Lim* stand for the extraordinary proposition that a delegation provision can be held unconscionable only if there are "independent reasons" to invalidate the delegation clause apart from those that make the larger arbitration agreement unenforceable. Opening Br. 34. This conflates unconscionability arguments made *specifically* about a delegation provision with those made *only* about a delegation provision. No precedent sets forth such a nonsensical rule. To the contrary, *Rent-A-Center* puts to rest all doubt that the same provisions can make both an arbitration agreement and an antecedent delegation clause unconscionable, just as long as the challenger argues that the provisions "*as applied* to the delegation provision render[] *that provision* unconscionable." *Rent-A-Ctr.*, 561 U.S. at 74 (emphases in original).

Coinbase also asserts the delegation clause doesn't "send only user-raised questions of arbitrability to the arbitrator" because it supposedly states that "[a]ll" "disputes arising out of or related to the interpretation or application of the Arbitration Agreement" get delegated. Opening Br. 30 (quoting User Agreement at ER-125). Wrong again. First, the phrase "all disputes" doesn't appear in the governing User

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[8] Coinbase's discussion concerning the language of the delegation clause in *Rent-A-Center*, Opening Br. 36, is flimflam. The Supreme Court's opinion had nothing to do with that language. Its ruling centered solely on the plaintiff's failure to make any specific challenge to the validity of the delegation clause or even mention it in its opposition to the motion to compel arbitration. *See Rent-A-Ctr.*, 561 U.S. at 74-75.

Agreement—it is found in a later version. *See supra* at n.2. Coinbase perhaps meant to instead reference the phrase "[a]ll such matters," which does appear in the operative version, *see* ER-125, but the "such" in that phrase refers back to threshold issues concerning the "Arbitration Agreement" discussed in the preceding sentence, and the "Arbitration Agreement" only applies to customer-initiated disputes. *See supra* at 16-25. Again, Coinbase cannot divorce the delegation clause, or its application, from the defined term it chose to incorporate into the clause.

Mr. Bielski specifically challenged the delegation clause in Coinbase's User Agreement, and he explained why the unilateral features of the Arbitration Agreement were unconscionable as applied to the delegation clause. Subsequently, the District Court specifically analyzed the delegation clause and found it substantively and procedurally unconscionable independently of the larger Arbitration Agreement. The District Court committed no error.

III. The District Court properly concluded that severance is not feasible.

The District Court correctly concluded that severance is not feasible because both the delegation and arbitration clauses are permeated by unconscionability. Coinbase suggested below that the District Court strike a "mere eleven words" from the Arbitration Agreement, but its proposed excision would instead rewrite the contract, and in any event there is no way to cleanly remove all the unconscionable language. The District Court therefore did not abuse its discretion in finding severance infeasible and instead refusing to enforce the delegation and arbitration clauses.

In determining severability, "[c]ourts are to look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced." *Armendariz,* 24 Cal. 4th at 124. Multiple defects in an arbitration agreement also weigh against severability, although even a single unconscionable term, drafted in bad faith, can preclude severance. *Id.* And where a contract's illegal terms cannot be cleanly excised without, in effect, reworking the parties' agreement, severance is not appropriate. *Id.*; *cf. Lim*, 8 F.4th at 1005 (California law does not allow courts to rewrite contracts to save them).

Each of these factors weighs against severance of the unconscionable terms here. First, the Arbitration Agreement is tainted with illegality because the central purpose of the Arbitration Agreement was not to subject all claims to arbitration, but rather to subject all of *Mr. Bielski's* claims—and his disputes about their arbitrability—to arbitration. Only users like Mr. Bielski are required to exhaust Coinbase's informal and Formal Dispute Process; only Mr. Bielski is required to arbitrate; only Mr. Bielski's claims are subject to delegation. That one-sided purpose is illegal under California law. *See, e.g., Dunham*, 2006 WL 2374703, at *13 (one-sided arbitration agreement and unilateral requirement to exhaust internal company resources rendered arbitration agreement tainted with illegality).

Coinbase's reliance on *Poublon* is therefore misplaced. *Poublon* involved an arbitration agreement that first subjected all disputes by both parties to mediation and then to arbitration, but it carved out injunctive and equitable claims by the defendant

employer. 846 F.3d at 1257-58. The Court severed the carve-out clause (the sole unconscionable clause in the arbitration provision) because it could be cleanly excised and because the main purpose of the contract was "to require arbitration of disputes." *See* 846 F.3d at 1273. Here, again, the main purpose is to require only Mr. Bielski to arbitrate his disputes. *Poublon* is simply not this case.

Second, Coinbase's suggestion that the Court could strike a "mere eleven words" from the Arbitration Agreement misreads the contract and the District Court's analysis and would in effect rewrite the Arbitration Agreement. Coinbase proposes to rewrite the Arbitration Agreement to read:

> "~~If we cannot resolve the dispute through the Formal Complaint Process,~~ [Y]ou and we agree that any dispute arising out of or relating to this Agreement or the Coinbase Services, including, without limitation, federal and state statutory claims, common law claims, and those based in contract, tort, fraud, misrepresentation, or any other legal theory, shall be resolved through binding arbitration, on an individual basis (the "Arbitration Agreement")."

ER-125 (strikethrough added). But removing this language would fundamentally change the nature of the defined term "Arbitration Agreement" from a unilateral to a mutual agreement to arbitrate. As the California Supreme Court explained in *Armendariz*, California law does not authorize a Court to reform a one-sided arbitration agreement into a mutual one. 24 Cal. 4th at 125-26. And because the defined term "Arbitration Agreement" is used throughout the User Agreement, Coinbase's proposed excision would not only rewrite that clause, but multiple clauses.

Third, the existence of those multiple unconscionable terms—the unilateral delegation clause, the unilateral, onerous pre-arbitration procedures, and the unilateral arbitration agreement—further supports the District Court's holding. *Armendariz*, 24 Cal. 4th at 124 (holding that trial court did not abuse its discretion where it determined the arbitration agreement was "permeated by an unlawful purpose" because it had multiple unlawful provisions). Indeed, removing the "mere eleven words" still leaves in place the onerous pre-arbitration dispute process that, for the reasons identified by the District Court, is unconscionable. *See supra* at 7-8, 34. Coinbase's proposed solution is no solution at all.

Coinbase nevertheless argues that it "intended this arbitration agreement to be bilateral" and that it will "never be able to evade arbitration under its User Agreement after this case." Opening Br. 58, 60. But that is not what the contract says. Coinbase's request that *the judiciary* cure the defects in its unilateral arbitration agreement by rewriting it to make it mutual is impermissible under California law. *Armendariz*, 24 Cal. 4th at 125 ("No existing rule of contract law permits a party to resuscitate a legally defective contract merely by offering to change it.") (citation omitted).

Ultimately, "[t]he overarching inquiry" in deciding whether to sever illegal terms or instead void the agreement "is whether the interests of justice would be furthered by severance." *Armendariz*, 24 Cal. 4th at 124. The adhesive contract Coinbase imposed on Mr. Bielski included multiple one-sided, unconscionable provisions, drafted by Coinbase, that were illegal at the time they were written. *See De Leon v. Pinnacle Prop.*

Mgmt. Servs., LLC, 287 Cal. Rptr. 3d 402, 416 (Cal. App. 2021) ("*Armendariz* suggests we should look to whether the law was 'sufficiently clear at the time the arbitration agreement was signed to lead to the conclusion that [the provision] was drafted in bad faith.'") (cleaned up).

Now the company seeks to fundamentally rewrite its agreement under the guise of severing a "mere eleven words," which would in effect allow Coinbase to take a "heads I win / tails you lose" approach to contracts. Such a decision would allow Coinbase to go beyond the limits of California contract law and, when a court finds that it has crossed into unconscionability, instead fall back onto whatever it later argues is in its best interest, irrespective of the contractual language. *See Armendariz*, 24 Cal. 4th at 124 n.13 (a company "will not be deterred from routinely inserting such a deliberately illegal clause into the arbitration agreements it mandates . . . if it knows that the worst penalty for such illegality is the severance of the clause after the [customer] has litigated the matter"). The Court should reject this cynical ploy and uphold the District Court's finding that severance is infeasible here.

IV. Coinbase's dispute-resolution procedures thwart Mr. Bielski's ability to effectively vindicate his statutory rights in either an arbitral or judicial forum.

This Court may affirm the District Court's decision on any ground supported by the record. *Franklin v. Terr*, 201 F.3d 1098, 1100 n.2 (9th Cir. 2000). In addition to being unconscionable, Coinbase's Arbitration Agreement is independently unenforceable because Coinbase can use the pre-arbitration/pre-suit procedures to prevent Mr. Bielski

or others subject to Coinbase's agreement from ever pursuing their claims under EFTA in either small claims court or arbitration. Coinbase's unilateral ability to shut down Mr. Bielski's attempt to pursue his EFTA claim in any forum implicates what the Supreme Court has called the effective-vindication doctrine: an arbitration clause may be invalidated if, because of barriers it presents, a "prospective litigant" is unable to "effectively vindicate its statutory cause of action." *Italian Colors*, 570 U.S. at 235.

The effective-vindication exception to enforcing arbitration agreements arose as a corollary to the Supreme Court's pronouncement that when a party agrees to arbitrate a statutory claim, that party "does not forgo the substantive rights afforded by the statute." *Mitsubishi Motors Corp.*, 473 U.S. at 628.[9] If a party tries to use the terms of a contract to foreclose statutory remedies, courts will not tolerate such a prospective waiver, even if it is embedded in an arbitration clause. *See, e.g.*, *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1919, 1925 (2022); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009). And the barrier to statutory enforcement need not be as blatant as an explicit bar on pursuing a certain statutory claim: filing fees that are so high as to present an insurmountable barrier to accessing the forum, or a provision that allows the company's CEO to serve as arbitrator so that neutral adjudication is impossible, also

[9] A long line of Supreme Court cases have reiterated this point from *Mitsubishi Motors*. *See, e.g.*, *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 229-30 (1987); *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 481 (1989); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

block effective vindication of statutory claims. *Italian Colors*, 570 U.S. at 241-43 (Kagan, J., dissenting) (citing *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000)); *see also Mohamed v. Uber Techns., Inc.*, 848 F.3d 1201, 1212 (9th Cir. 2016) (discussing effective-vindication doctrine in terms of barriers that make access to the arbitral forum for resolving statutory claims "impracticable").

Ultimately, the effective-vindication doctrine seeks to draw a line between agreements through which parties choose arbitration as an alternative forum for adjudicating statutory claims, which the FAA protects, and agreements that establish roadblocks that make it less likely statutory claims will ever get resolved at all. The FAA affords no protection to this latter type of agreement. *Viking River*, 142 S. Ct. at 1919 & n.5; *see also Nesbitt v. FCNH, Inc.*, 811 F.3d 371, 376-79 (10th Cir. 2016) (refusing to enforce arbitration provision on effective-vindication grounds despite opt-out clause); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39, 941 (4th Cir. 1999) (refusing to enforce arbitration agreement under which employer had promulgated rules that gave it "unrestricted control" over makeup of arbitral panel because these unfair and one-sided rules denied the employee "arbitration in any meaningful sense of the word").[10]

[10] Nor does the presence of a delegation clause prevent application of the effective-vindication exception. *See, e.g.*, *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 225, 237-38 (3d Cir. 2020).

Here, the two steps of the pre-arbitration/pre-suit process, and Coinbase's "unrestricted control" over those steps, present substantial barriers to Mr. Bielski's or any Coinbase customer's ability to effectively vindicate their statutory claims in either the arbitral forum or small claims court, the only two forums the agreement allows. Mr. Bielski would ordinarily be able to pursue his EFTA claim as soon as he learned of the misappropriation of his funds, subject to EFTA's one-year statute of limitations. But because he is subject to Coinbase's procedural preconditions, he must first initiate an informal complaint with a member of Coinbase's "support team." ER-124. Unlike the Formal Complaint Process, no time limit is given for how long the discussions with the "support team" may take, nor does the agreement specify the standard for when they will be deemed to have reached an impasse. A consumer like Mr. Bielski with viable EFTA claims would thus have to begin the process of contacting Coinbase's support team significantly in advance of the statutory filing deadline to allow enough time for the indeterminate customer service process to run its course. And if this process does not resolve the dispute, they would have to allow an additional seven weeks for the formal complaint procedure, since both must be completed before initiating arbitration or a small-claims court proceeding. ER-124-25.

This shrinking of the time in which to bring a statutory claim is itself a curtailment of a statutory right or remedy at odds with the effective-vindication doctrine. But it is compounded by the subjectivity of determining when the procedural preconditions have been satisfied so that the next step in the process can commence.

Unlike in arbitration agreements with mediation prerequisites, where the mediator can stipulate that the parties have reached an impasse and mediation has failed, nothing would prevent Coinbase from stalling at the first step indefinitely by continuing to investigate the dispute, perpetually asking for more information from the customer, or (as happened to Mr. Bielski) simply failing to respond at all.

If the frustrated customer proceeds to the Formal Complaint step or to arbitration, Coinbase would always be able to contend that the customer did so prematurely before Coinbase had a sufficient opportunity to investigate and resolve the dispute at the "support team" step. And because of the mandatory term in the User Agreement requiring that any arbitration or small-claims court proceeding be dismissed if the customer did not satisfactorily complete all previous steps, ER-125, Coinbase could ask the arbitrator or judge to send the customer back to the drawing board to begin the pre-arbitration/pre-suit procedures all over again if, in Coinbase's opinion, the customer had not diligently pursued them the first time. All this would happen while the statute of limitations on their EFTA claims continues to run.

This is not a speculative concern, as Coinbase has maintained throughout this litigation that Mr. Bielski breached his agreement with Coinbase by, among other things, failing to file a formal complaint. And when one party retains complete control over an essential element of the arbitration process, effective vindication of statutory rights in the arbitral forum is undermined. *See McMullen v. Meijer, Inc.*, 355 F.3d 485, 494 (6th Cir. 2004) (effective-vindication doctrine implicated by employer's control over pool of

arbitrators, and the concern was not speculative, because "the inherent fairness of the arbitration process" was at issue).

Whether the complete control exercised by one party relates to who the arbitrators are, as in *McMullen*, or when arbitration may commence, as here, the result is the same: an arbitration process infected by such unilateral control is not an effective alternative forum for pursuing statutory claims. And here, Coinbase purports to exercise the same preemptive control over the small-claims court forum as well, giving itself the ability to call for dismissal in that forum too if, in its view, the customer has not satisfactorily completed the pre-suit procedures. Such obstacles to the effective vindication of statutory rights cannot take refuge within the four corners of an arbitration agreement, for it is not the type of alternative-dispute-resolution mechanism the FAA protects. *See Viking River*, 142 S. Ct. at 1919.

For that alternative reason, this Court should affirm the District Court's decision.

CONCLUSION

The arbitration provisions in Coinbase's User Agreement are unenforceable under California law. The Arbitration Agreement is both substantively and procedurally unconscionable. So is the delegation clause. And the unconscionable portions of these clauses cannot feasibly be severed. Further, these provisions are designed to thwart the ability of customers like Mr. Bielski to effectively vindicate their statutory rights in either an arbitral or judicial forum. Accordingly, this Court should affirm the District Court's decision denying Coinbase's motion to compel arbitration.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the undersigned counsel for Plaintiff-Appellee Abraham Bielski is not aware of any other related cases pending before this court.

s/ Glenn E. Chappell

September 26, 2022

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) and 9th Circuit Rule 32-1(a), because it contains 13,839 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typefacing using Microsoft Office Word in Garamond 14-point font.

s/ Glenn E. Chappell

September 26, 2022

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Appellee's Answering Brief to be filed using the Court's CM/ECF system on September 26, 2022. All counsel to parties to the case are ECF users.

s/ Glenn E. Chappell

September 26, 2022