No. 22-15566

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ABRAHAM BIELSKI,

Plaintiff-Appellee,

v.

COINBASE, INC.,

Defendant-Appellee.

On Appeal from the U.S. District Court
for the Northern District of California
No. 3:21-cv-07478 (Hon. William H. Alsup)

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE, THE NATIONAL CONSUMER LAW CENTER, AND THE CENTER FOR RESPONSIBLE LENDING AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE ABRAHAM BIELSKI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* the American Association for Justice, National Consumer Law Center and Center for Responsible Lending certify that they are non-profit organizations. There are no parent corporations or publicly owned corporations that own 10% or more of either entity's stock.

Respectfully submitted this 3rd day of October, 2022.

/s/ Jeffrey R. White

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are consumers' and plaintiffs' rights organizations who have a special interest in seeing that injured parties retain their right to sue after completing statutory, judicial or contractual pre-suit exhaustion requirements. *Amici* have significant concerns that, should the court reverse the decision below, victims of corporate misconduct will be denied access to justice.[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. For more than 75 years, AAJ has served as a leading advocate of the right of all Americans to seek legal recourse for wrongful injury.

The National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a nonprofit

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and that no person other than *amici* have made any monetary contributions intended to fund the preparation or submission of this brief.

corporation in 1969, NCLC has been a resource center addressing numerous consumer finance issues. NCLC publishes a 21-volume Consumer Credit and Sales Legal Practice Series, including Consumer Arbitration Agreements (8th ed. 2020) and Consumer Class Actions (10th ed. 2020) and actively has been involved in the debate concerning mandatory pre-dispute arbitration clauses, class action waivers and access to justice for consumers. NCLC frequently appears as amicus curiae in consumer law cases before trial and appellate courts throughout the country.

The Center for Responsible Lending (CRL) is a non-partisan, nonprofit research and policy advocacy organization working to promote financial fairness and economic opportunity for all, end predatory lending, and close the racial wealth gap. CRL's expertise gives it trusted insight to evaluate the impact of financial products and policies on the wealth and economic stability of Asian, Black, Latino, rural, military, low-wage, low-wealth, and early-career workers and communities. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions. Our work leverages the strength of partnerships with national and local consumer and civil rights organizations.

SUMMARY OF ARGUMENT

Under Federal Rule of Appellate Procedure 29(a), *amici curiae* proffer this brief to assist the court in addressing the increasing use of pre-arbitration exhaustion requirements in consumer and employment contracts. In particular, *amici* explain how pre-arbitration exhaustion provisions like the one used by Appellant Coinbase, Inc. ("Coinbase") impede injured consumers and employees from effectively vindicating their federal statutory rights and should not be enforced. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 & n.19 (1985). Coinbase properly describes its User Agreement as imposing an "exhaustion requirement" as a precondition to seeking arbitration. Appellant's Br. 44.

Notably absent from Coinbase's User Agreement are any of the protections built into statutory and judicial exhaustion requirements which ensure that aggrieved parties have ample opportunity to exhaust remedies without effectively losing their right to sue once exhaustion is completed. Coinbase's pre-suit exhaustion provisions (a) impose requirements on pursuing federal statutory claims that Congress chose not to impose, (b) do not toll the limitations period while a party exhausts, which could render a claim untimely by the time exhaustion is completed; (c) provide no timeframe for Coinbase to respond to a customer request at the first stage of the exhaustion process, leaving customers without a reasonable

way to know when they can proceed to the second step, and (d) do not explicitly provide that a customer can refile a prematurely-filed claim once exhaustion is completed. By omitting all of these steps, Coinbase turns exhaustion from a mechanism for informally resolving claims into a trap that may deprive injured parties from meaningful access to an arbitral or judicial forum.

Second, irrespective of whether Coinbase's User Agreement impedes parties from vindicating their statutory rights, this Court should hold that pre-suit exhaustion requirements are not "agreements to arbitrate" under 9 U.S.C. § 2 and therefore not governed by the Federal Arbitration Act (FAA). Here, the exhaustion requirements do not involve arbitration but rather constitute prerequisites to arbitration that stifle arbitration rather than promote it. Although contracts containing pre-arbitration exhaustion requirements have been around for a long time, *see, e.g.*, *HIM Portland, LLC v. Devito Builders, Inc.*, 317 F.3d 41, 44 (1st Cir. 2003), they have become much more common in recent years, with many large companies adding them into their contracts.[2] By placing extra requirements

[2] *See, e.g.*, Match.com Terms of Use Agreement, Match.com (Feb. 28, 2022), https://www.match.com/registration/membagr.aspx; Terms and Conditions, Best Buy (Apr. 29, 2022), https://www.bestbuy.com/site/help-topics/terms-and-conditions/pcmcat204400050067.c?id=pcmcat204400050067; U.S. Terms of Use, Uber (Aug. 16, 2022), https://www.uber.com/legal/tr/document/?country=united-states&lang=en&name=general-terms-of-use; Terms & Conditions, Nordstrom (Mar. 10, 2022), https://www.nordstrom.com/browse/customer-service/policy/terms-conditions; Terms of Service (U.S.), Drizly (Feb. 7, 2022),

into their contracts, companies like Coinbase are not promoting dispute resolution by arbitration. Instead, they are making it more difficult, expensive, and time-consuming for injured parties to seek arbitration. This Court should reject Coinbase's misguided attempt to use the FAA or any asserted federal policy favoring arbitration to defend its exhaustion provisions.

ARGUMENT

I. COINBASE'S PRE-ARBITRATION EXHAUSTION REQUIREMENTS IMPOSE NEW BURDENS ON PARTIES THAT CONGRESS CHOSE NOT TO IMPOSE AND THAT MAY PREVENT PARTIES FROM EFFECTIVELY VINDICATING THEIR FEDERAL STATUTORY RIGHTS.

An arbitration clause will be enforced only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). If an arbitration provision operates "as a prospective waiver of a party's right to pursue statutory remedies," it should not be enforced. *Id.* at 637 n.19. This principle is not limited only to provisions expressly forbidding the assertion of certain statutory rights. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013). It might also cover administrative or procedural requirements that "make access to the [arbitral] forum impracticable." *Id.*; *see also*

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https://drizly.com/terms/US; Terms of Use, GrubHub (Dec. 14, 2021), https://www.grubhub.com/legal/terms-of-use.

Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 927 (9th Cir. 2013) (finding that the effective vindication doctrine was implicated when "administrative and filing costs, even disregarding the cost to prove the merits, effectively foreclose pursuit of the claim").

As Coinbase acknowledges, it has imposed in its User Agreement a set of grievance requirements that any customer must exhaust before initiating a dispute against Coinbase in arbitration. These exhaustion procedures apply to all claims that a plaintiff may bring against Coinbase, including federal statutory claims like Mr. Bielski's under the Electronic Funds Transfer Act (EFTA). While not every contract that requires a party to exhaust pre-arbitration remedies will automatically preclude that party from effectively vindicating federal statutory rights, the specific features of Coinbase's exhaustion process raise serious concerns about whether plaintiffs like Mr. Bielski can adequately exhaust these pre-arbitration remedies without prejudicing their ability to pursue their federal statutory claims either in court or in arbitration.

When statutes and judicial doctrines require parties to exhaust administrative remedies as a prerequisite to filing claims in court, they also build in specific protections to ensure that the administrative process does not become a graveyard where claims die and never appear in court. Rather, those protections ensure that a plaintiff can exhaust required remedies without unduly prejudicing their ability to

vindicate their rights in court if the administrative process does not resolve the claim.

Comparing the exhaustion doctrines that courts apply to the exhaustion terms mandated by the Coinbase User Agreement shows that Coinbase's agreement lacks many of the protections designed to ensure that exhaustion does not impair a person's ability to effectively vindicate their statutory rights. As discussed below, Coinbase's User Agreement impedes vindication of federal statutory rights in the following ways: (1) it imposes exhaustion requirements for bringing federal claims that Congress declined to impose; (2) it does not toll the statute of limitations during the time that customers pursue pre-arbitration remedies, creating a risk that their claims will be time-barred by the time they get to arbitration; (3) it makes no exception for when pre-arbitration remedies are unavailable; and (4) it is not clear as to whether a dismissal from arbitration for failure to exhaust pre-arbitration remedies is without prejudice, and Coinbase has subsequently amended its User Agreement to remove any suggestion that dismissal should be without prejudice rather than with prejudice. When taken it total, these factors show the Coinbase's exhaustion requirement impedes parties from vindicating their federal rights.

A. Coinbase's Pre-suit Requirements Impede Vindication of Federal Rights by Imposing Burdens on Plaintiffs that Congress Chose Not to Impose.

Coinbase's exhaustion requirements threaten customers' ability to effectively vindicate their federal statutory rights in several ways. Initially, by imposing exhaustion requirements at all, Coinbase erected a new hurdle to bringing EFTA claims that Congress chose not to impose. When Congress enacted EFTA, it did not require administrative exhaustion. Instead, it permitted parties to go to court as soon as their injury occurs. 15 U.S.C. § 1693m(g) (requiring injured party to file suit "within one year from the date of the occurrence of the violation"). By requiring completion of a grievance process that is not included in the statute and that Congress found unnecessary, Coinbase necessarily is making it more difficult for plaintiffs to bring a claim in arbitration than to do so in court.

While a company's decision to include pre-arbitration exhaustion requirements that Congress did not include may not be per se invalid, it raises the concern that the company is contravening congressional intent. "Of 'paramount importance' to any exhaustion requirement is congressional intent." *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (quoting *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 501 (1982)). Thus, where Congress does not expressly enact an exhaustion requirement, exhaustion normally is not required. *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) ("[W]e have not required exhaustion of

state judicial or administrative remedies [of 42 U.S.C. § 1983 claims], recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights."). Although courts retain some discretion to require administrative exhaustion even when not expressly commanded by statute, they can do so only when it furthers congressional intent. *Patsy*, 457 U.S. at 513 ("[P]olicy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent."); *see also McCarthy*, 503 U.S. at 144 (stating that exhaustion requirements are not permitted unless "consistent with congressional intent and any applicable statutory scheme").

Here, Coinbase has made it more difficult for injured parties to bring EFTA claims. It has added a multilayer exhaustion process to an EFTA claim even though Congress imposed no such requirement. If anything, Congress indicated that informal attempts to resolve an EFTA dispute should not stand in the way of filing a claim. The statute expressly provides for an informal process whereby if the defendant investigates the issue, notifies the consumer, and decides to provide full compensation, it cannot otherwise be held liable. 15 U.S.C. § 1693m(e). But nowhere did Congress *require* the parties to pursue this informal process *prior to* filing suit in court. Rather, the lawsuit and any informal grievance process can proceed concurrently. Coinbase's regime is inconsistent with that approach. Allowing Coinbase to impose exhaustion requirements that Congress did not

impose would thwart congressional intent and make it more difficult for plaintiffs to vindicate their federal statutory rights under EFTA.

B. Coinbase's User Agreement Impedes Vindication of Federal Rights Because It Does Not Provide for Tolling the Limitations Period While a Customer Exhausts Pre-suit Procedures.

Even aside from the fact that Coinbase has imposed its own extra-statutory exhaustion requirement, the specific features of its pre-arbitration process make it difficult for plaintiffs to pursue their statutory rights. Comparing Coinbase's exhaustion requirements to the way that Congress and the judiciary have addressed exhaustion reveals several troubling features of Coinbase's User Agreement.

First, Coinbase's pre-arbitration requirements may prevent injured parties from vindicating their statutory rights because completing the exhaustion process may cause the relevant statute of limitations to expire before they can file an arbitration or a court action. There is a natural tension between exhaustion of pre-suit procedures and filing within the limitations period. *See Soto v. Sweetman*, 882 F.3d 865, 870 (9th Cir. 2018) ("This circuit recognizes the potential unfairness that can result from the intersection of a rule that a claim accrues when the plaintiff knows of the injury and a rule that requires the plaintiff to exhaust administrative remedies before suing on that claim."). Exhausting pre-suit grievance processes takes time, especially where the injured party does not discover their injury or realize that they have a legal claim until after the limitations period already started

running. Yet, EFTA, for example, contains a one-year limitations period that runs from the date the violation occurred. 15 U.S.C. § 1693m(g). Customers may find themselves in a catch-22; by the time they complete the exhaustion requirement, it is too late to file an arbitration or a lawsuit because the statute of limitations has expired. *See Johnson v. Rivera*, 272 F.3d 519, 522 (7th Cir. 2001) ("The 'catch–22' in this case is self-evident: the prisoner who files suit . . . prior to exhausting administrative remedies risks dismissal . . . whereas the prisoner who waits to exhaust his administrative remedies risks dismissal based upon untimeliness.").

Courts manage this problem in two primary ways. One way is to link the limitations period to completion of pre-suit procedures. For example, Title VII and Americans with Disabilities Act (ADA) plaintiffs have 90 days from receipt of a right-to-sue letter upon completion of administrative proceedings before the Equal Employment Opportunity Commission to file suit. 42 U.S.C. § 2000e-5(f)(1); 42 U.S.C. § 12117(a). Similarly, the Federal Tort Claims Act (FTCA) provides that plaintiffs have six months from the date of the agency's final decision denying their claim to file suit, subject to an overall limitations period of six years. 28 U.S.C. § 2401(a)-(b). Designing a limitations period in this fashion—where it is triggered by completion of administrative proceedings—protects plaintiffs from the catch-22 of completing pre-suit requirements only to find that the limitations period elapsed.

Second, courts resolve this tension by tolling the statute of limitations while a party exhausts required pre-suit procedures, to ensure that a plaintiff is not unfairly penalized for pursuing exhaustion. For example, this Court held that the statute of limitations for claims under 42 U.S.C. § 1983 "must be tolled" while a prisoner exhausts required administrative remedies under the Prison Litigation Reform Act (PLRA). *Brown v. Valoff*, 422 F.3d 926, 943 (9th Cir. 2005). Recognizing that "awaiting the completion of a staff misconduct investigation could, absent some adjustment, endanger the prisoner's ability to file his court complaint within the limitations period," this Court concluded, consistently with all other circuits to have addressed the question, that "the applicable statute of limitations must be tolled while a prisoner completes the mandatory exhaustion process."[3] *Id.* at 942-43.

This Court and other courts have applied similar principles to other federal claims. *See, e.g.*, *Gonzalez v. Hasty*, 651 F.3d 318, 319 (2d Cir. 2011) (finding that statute of limitations for *Bivens* claim could be tolled while prisoner exhausted administrative remedies); *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d

[3] Other circuits have held that exhausting administrative remedies tolls the limitations period. *See, e.g.*, *Johnson v. Garrison*, 805 F. App'x 589, 594 (10th Cir. 2020); *Battle v. Ledford*, 912 F.3d 708, 718-20 (4th Cir. 2019); *Messa v. Goord,* 652 F.3d 305, 310 (2d Cir. 2011); *Johnson*, 272 F.3d at 522; *Brown v. Morgan*, 209 F.3d 595, 596 (6th Cir. 2000); *Harris v. Hegmann*, 198 F.3d 153, 157-59 (5th Cir. 1999).

1131, 1133, 1141 (9th Cir. 2001) (en banc) (holding that district court erred in refusing to toll the Rehabilitation Act's one-year statute of limitations while the plaintiffs pursued an administrative complaint with the Office of Civil Rights of the U.S. Department of Health and Human Services).

A primary rationale for tolling the limitations period while a plaintiff exhausts pre-suit remedies is that tolling is necessary to allow parties to effectively vindicate their federal rights. The Supreme Court has warned in the § 1983 context that refusing to toll the limitations period while pre-suit exhaustion occurs "might result in the effective repeal of § 1983." *Patsy*, 457 U.S. at 514 n.17. Tolling can be "essential to the vindication of federal rights" and a refusal to provide for tolling will preclude plaintiffs from seeking a "complete federal remedy" under relevant federal law. *Heck v. Humphrey*, 997 F.2d 355, 358 (7th Cir. 1993), *aff'd on other grounds*, 512 U.S. 477 (1994).[4]

[4] This directly parallels the arbitration context, in which some courts have refused to enforce arbitration clauses that shorten the limitations period for bringing a federal claim. *See, e.g.*, *Adams v. Inter-Con Sec. Sys., Inc.*, No. C 06-05428, 2007 WL 9810966, at *6 (N.D. Cal. Mar. 13, 2007) (finding unenforceable an arbitration clause that imposed a one-year statute of limitations because it prevented plaintiffs from effectively vindicating their federal rights); *Veliz v. Cintas Corp.*, No. C 03-1180, 2004 WL 2452851, at *20 (N.D. Cal. Apr. 5, 2004), *modified on reconsideration*, 2005 WL 1048699 (N.D. Cal. May 4, 2005) (finding unenforceable an arbitration clause that imposed a one-year statute of limitations because it prevented plaintiffs from effectively vindicating their rights under the Fair Labor Standards Act).

Coinbase's user agreement, by contrast, incorporates neither of those protections against the running of the limitations period. It does not state that the limitations period will toll while plaintiffs exhaust pre-suit remedies. As a result, it creates the risk that plaintiffs who attempt to exhaust Coinbase's pre-suit requirements will find that they cannot go to arbitration or to court because the statute of limitations expired.

Coinbase requires its customers to go through two steps prior to initiating an arbitration. First, customers must contact the Coinbase customer support team "to attempt to resolve any such dispute amicably." ER-124. The User Agreement provides no timeframe for how long this process will take, how long Coinbase has to respond, or when this first step is complete such that the customer can proceed to the second step. The agreement merely states that if "we cannot resolve the dispute through the Coinbase support team," then the customer must complete the formal complaint process before initiating arbitration. ER-125. Coinbase then will issue a decision within 15 days, or in some cases within 35 days. *Id.* Only after these procedures are completed may a customer pursue arbitration. Failure to complete any of these steps authorizes the arbitrator "to dismiss your filing unless and until you complete the following steps." ER-125.

This process takes time. A customer planning for arbitration or litigation will need to time to investigate and find an attorney, who in turn will need time to

investigate and prepare the case before filing. However, the customer may not undertake that time-consuming attorney search while the customer service process is ongoing, and an attorney may not even consider the case before the customer has exhausted pre-suit remedies. And that is on top of the time required for the customer to complete the pre-suit process, which itself requires the customer to gather and submit documentary and other supporting evidence. ER-125 (stating that Coinbase will resolve the complaint "based on the information you have provided and information in the possession of Coinbase").

Yet, Coinbase's User Agreement nowhere states that complying with its pre-suit requirements will toll the limitations period. It therefore creates the precise catch-22 between exhaustion and the statute of limitations that courts have found to impede "the vindication of federal rights." *Heck*, 997 F.2d at 358. The risk is particularly high here, as EFTA has a short, one-year limitations period. 15 U.S.C. § 1693m(g). The Supreme Court has refused to apply a one-year state statute of limitations to EEOC-initiated lawsuits under Title VII, finding that a one-year limitations period would be inconsistent with the statute's pre-suit administrative grievance process. *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 368-69 (1977). The Court found not only that a one-year limitations period could "directly conflict" with the statute's "timetable for administrative action," but also that imposing the limitations period would undermine Title VII's purposes "even in

cases involving no inevitable and direct conflict with the express time periods provided in the Act." *Id.* at 369. Similarly here, imposing exhaustion requirements while also holding customers to a one-year limitations period will make it harder for plaintiffs to seek remedies and protections guaranteed by federal law.

Moreover, Coinbase's procedures make it likely that the statute of limitations could elapse during the exhaustion process because the first step of Coinbase's mandatory exhaustion regime has no fixed timeframe. It provides no deadline for Coinbase customer support to respond to a customer's inquiry, and nothing indicates when or how customer support will respond. Although a customer can proceed to the formal complaint process if the initial step fails to resolve the dispute, the User Agreement provides no information that allows a customer to determine when a customer support representative's response or lack of response changes from an attempt to resolve the dispute into a failure to resolve the dispute that permits the customer to move to the next step.[5] This is important, because a customer can proceed to the second step only after completing the first step, and the customer has no way of knowing when the first step has run through to completion. If the customer proceeds to the second step prematurely, the

[5] Here, that appears to be exactly what happened. As the district court found, Mr. Bielski attempted to seek help from customer support on two different occasions but was never connected to a live human being. ER-7. After that, he wrote two letters to Coinbase's San Francisco office "pleading for help." *Id.* Coinbase failed to respond to those letters until after Bielski filed his lawsuit. *Id.*

customer has violated the User Agreement and faces dismissal of any subsequent arbitration for failure to exhaust. ER-125.

Although parties can sometimes contract for a shorter limitations period than prescribed by law, *see Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 571 U.S. 99 (2013), the framework for addressing such contracts merely highlights the problems with Coinbase's User Agreement. While parties traditionally can contract for shorter limitations periods, even in a context with an administrative exhaustion process, any such restriction must be reasonable.[6] *See id.* at 109 (citing *Order of United Comm. Travelers of Am. v. Wolfe*, 331 U.S. 586, 608 (1947)). One important factor for assessing reasonableness—particularly in a regime that requires exhaustion of pre-suit remedies prior to filing—is whether tolling is available for the time period when the plaintiff is pursuing those remedies. *See id.* at 114-15 (upholding contract to shorten ERISA's limitations period to three years as reasonable in part because courts retained authority to apply tolling doctrines where the exhaustion process prevented a party from filing within the limitations period). Here, however, Coinbase's User Agreement does not provide for tolling during the pre-suit exhaustion process.

[6] In this case, Coinbase is not contractually shortening the applicable statute of limitations. Rather it is contractually imposing an exhaustion process that customers must complete.

Finally, the fact that Coinbase's agreement states that a failure to exhaust pre-arbitration procedures authorizes "dismissal unless and until you complete" the exhaustion process does not resolve this tension between exhaustion and the limitations period.[7] ER-125. Even if an arbitrator must dismiss the arbitration until the customer completes the exhaustion process, that does not mean that the customer can complete that process and file a new arbitration after the limitations period has expired. Any customer that does so still faces dismissal on statute-of-limitations grounds. Notably, the User Agreement does not state that the arbitrator should stay proceedings while the plaintiff completes the exhaustion process—in which case the arbitration would remain timely. Rather, it calls for "dismissal" of the arbitration, which means that the customer would have to refile after completing the exhaustion process. And when the customer refiles, the new filing date would control—a date that is much more likely to fall outside the limitations period than the initial filing date. By not providing for tolling while customers

[7] Coinbase has since changed its User Agreement to remove the "unless and until you complete" the exhaustion process and to require unqualified dismissal. The February 2022 version of the User Agreement states that if a customer fails to complete the pre-suit exhaustion process, then any claims the customer brings in arbitration "must be dismissed." ER-73. Coinbase's most recently published User Agreement is the same and requires that the claim "must be dismissed. *See* Coinbase User Agreement § 7.2, (Aug. 30, 2022), https://www.coinbase.com/legal/user_agreement/united_states.

exhaust the pre-suit process, Coinbase's User Agreement impedes injured parties from effectively vindicating their federal rights.

C. Coinbase's Unbounded User Agreement that Establishes No Timeframe for Coinbase To Respond During the First Step of the Exhaustion Process Prevents Parties from Vindicating their Federal Statutory Rights.

Another infirmity with Coinbase's User Agreement, even aside from failing to toll the limitation period, is that it provides no timeframe for the completion of the first step of its two-step pre-suit exhaustion process. This allows Coinbase to claim, as it claims here, that a plaintiff who initiates the exhaustion process but receives no response from Coinbase has nonetheless failed to exhaust and cannot proceed to arbitration. This view that customers have not exhausted even when they properly file an initial grievance and Coinbase fails to adequately respond is inconsistent with federal exhaustion doctrine and impedes plaintiffs from vindicating their federal statutory rights.

Exhaustion typically is not required where administrative remedies are effectively unavailable. The PLRA, for example, requires plaintiffs to exhaust only "such administrative remedies as are available." 42 U.S.C. § 1997e(a). Under the PLRA, an inmate "must exhaust available remedies, but need not exhaust unavailable ones." *Ross v. Blake*, 578 U.S. 632, 642 (2016). The reasoning for limiting exhaustion to "available" administrative remedies is straightforward. If there are no remedies for plaintiffs to exhaust, or if the available processes are

constructed such that a plaintiff cannot reasonably exhaust them, then requiring a plaintiff to utilize them does not serve the purposes of exhaustion and merely creates an undue barrier to filing suit. *See McBride v. Lopez*, 807 F.3d 982, 987 (9th Cir. 2015) ("At the same time, we must discourage prisons from actions that might deter prisoners from using grievance procedures. We therefore allow prison inmates to bring these claims in federal court when prison officials have rendered the grievance process effectively unavailable.").

Administrative remedies are considered unavailable when the agency fails to respond to the plaintiff's initial grievance or fails to respond in a timely fashion. Specifically, exhaustion is unavailable when agency officials "do not respond to a properly filed grievance." *Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006); *accord Hernandez v. Dart*, 814 F.3d 836, 842 (7th Cir. 2016). Other circuits have held similarly that failure to respond at an initial grievance stage renders remedies unavailable if completion of that initial stage is necessary to proceed to later stages of the exhaustion process. *See, e.g.*, *Robinson v. Superintendent Rockview SCI*, 831 F.3d 148, 153 (3d Cir. 2016) (agreeing with five other circuits that "a prison's failure to timely respond to an inmate's properly filed grievance renders its remedies 'unavailable' under the PLRA."); *Boyd v. Corr. Corp. of Am.*, 380 F.3d 989, 996 (6th Cir. 2004) ("Following the lead of the [10th, 7th, 8th, and 5th] circuits . . . we conclude that administrative remedies are exhausted when prison

officials fail to timely respond to a properly filed grievance."). Where a plaintiff must complete a first grievance step before proceeding to the second step and never receives a response at the first stage, that failure to respond renders remedies unavailable. *See Brown v. Croak*, 312 F.3d 109, 111-12 (3d Cir. 2002) (holding that prisoner did not fail to exhaust where the prisoner alleged that he filed an informal grievance but the agency never completed its investigation in response to that initial grievance).

Here, as Mr. Bielski's experience shows, Coinbase's unbounded first-step grievance process—which provides no time frame for a customer support response and does not require customer support to respond at all—risks rendering exhaustion unavailable. Mr. Bielski followed the first step by repeatedly contacting customer service and by taking other measures to bring his concerns to Coinbase's attention. The record shows that Mr. Bielski attempted to seek help from customer support on two different occasions but was never connected to a live human being. ER-7. After that, he wrote two letters to Coinbase's San Francisco office "pleading for help," to which Coinbase did not respond. *Id.* Ironically, the only action that prompted Coinbase to respond to him was his filing of this lawsuit.

Under these circumstances, Mr. Bielski did what he was supposed to do, but Coinbase never issued a final response or connected him to a live human being. To hold, as Coinbase argues, that Mr. Bielski is at fault for failing to exhaust pre-suit

procedures would hold him accountable for Coinbase's failure to act. "It is not incumbent on the prisoner 'to divine the availability' of grievance procedures" when seeking to exhaust administrative remedies. *Hernandez*, 814 F.3d at 842 (citation omitted). Once he contacts customer service Mr. Bielski should not have to guess about his next course of action and face dismissal if he guesses wrong. That is exactly the kind of procedural trap that prevents plaintiffs like Mr. Bielski from effectively vindicating their federal rights. If this case involved a state actor rather than a private actor like Coinbase, penalizing Mr. Bielski for failing to pursue remedies that were not meaningfully available to him would raise significant due process concerns. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) (holding that the state violated the plaintiff's due process rights by dismissing the plaintiff's claim where the state failed to follow its own grievance review procedures through no fault of the plaintiff).

To be sure, Coinbase's User Agreement does not appear to expressly require a customer to receive a response from Coinbase at the first stage before proceeding to the second stage, which is the formal complaint process. ER-125. It states that "[i]f we cannot resolve the dispute through the Coinbase support team," then the parties agree to use the formal complaint process. *Id.* The problem is that the User Agreement provides no timetable for the "Coinbase support team" to issue a

response at the first stage. Thus, there is no way for a customer to know whether a response is coming, or if the parties "cannot resolve the dispute" at the first stage.

This places the customer in an untenable position. If the customer prematurely concludes that the claim cannot be resolved at the first stage and goes to the second stage, Coinbase could argue that it was still planning to respond, and that the customer failed to adequately complete the first stage. The customer has no guidance about how long Coinbase will take to respond at the first stage or what constitutes sufficient completion in the absence of a response to turn to the second stage.

This is not simply an academic argument about exhaustion procedures. Rather, it goes to the heart of Coinbase's defense of its pre-suit exhaustion process. Coinbase argues that requiring customers to contact the customer support team first is necessary "because that team is best equipped to fix users' problems." Appellants' Br. 48. It claims that this process "can resolve concerns quickly and cheaply before users resort to comparatively longer and more costly arbitration procedures" and also can "cut[] down on frivolous arbitration and litigation." *Id.* If the process is that important, one would expect Coinbase to use it. Here, Coinbase failed to use it, and now seeks to bar Bielski from pursuing his claims in *any* forum on account of Coinbase's failure. That is not exhaustion as informal dispute resolution. That is exhaustion as claim suppression. By making exhaustion

effectively unavailable, Coinbase has made it more difficult for individuals to vindicate their federal rights.

D. Coinbase's User Agreement Does Not Expressly Provide that Customers Whose Claims Are Dismissed Can Refile Once They Complete the Exhaustion Process.

Finally, Coinbase's pre-suit exhaustion requirement threatens to prevent the effective vindication of federal rights because it does not expressly provide that customers who file an arbitration prematurely can refile once they exhaust pre-suit remedies. Because exhaustion does not go to the merits, "failure to exhaust administrative remedies is properly treated as a curable defect and should generally result in a dismissal without prejudice." *City of Oakland, Cal. v. Hotels.com LP*, 572 F.3d 958, 962 (9th Cir. 2009). This makes sense, because if customers have an opportunity to exhaust remedies, they should not be forever barred from pursuing arbitration simply because they initially acted prematurely.

Yet, Coinbase's User Agreement does not expressly clarify whether prematurely filed arbitrations should be dismissed with or without prejudice. To be fair, the language in Coinbase's *earlier* User Agreement stating that an arbitration will be dismissed "until you complete" the pre-suit requirements is at least open to the interpretation that a customer whose initial arbitration is dismissed can refile upon completing the exhaustion requirements. However, Coinbase has since removed that language to eliminate any language suggesting that a dismissal could

be without prejudice. Both its February 2022 User Agreement and its current User Agreement state that any prematurely filed arbitration "must be dismissed." *See supra* note 7. This language provides no indication of whether a customer can refile an arbitration. Given that an involuntary dismissal is presumed to be with prejudice, *see* Fed. R. Civ. P. 41(b), an arbitrator (or a court) might have a basis to believe that it lacks authority to consider a now-properly-exhausted refiled arbitration claim. By potentially imposing such a strict remedy of mandatory dismissal with prejudice for a prematurely filed claim, with no avenue for refiling upon completing the exhaustion process, Coinbase's User Agreement further threatens to impede customers from vindicating their federal rights.

When these features are considered as a whole, they paint a troubling picture for customers seeking to get their disputes with Coinbase resolved. Coinbase's User Agreement: (a) imposes exhaustion requirements on pursuing federal remedies that Congress chose not to impose; (b) does not provide that exhaustion will toll the statute-of-limitations; (c) does not provide a clear framework for responding to initial complaints and punishes customers who do not receive a response at the first stage of the grievance process; and (d) does not expressly provide that prematurely-filed claims can be refiled once exhaustion is satisfied, especially in its current User Agreement. Even if pre-suit provisions may be enforceable as a general matter, Coinbase's exhaustion process contains so many

defects that it undermines the enforcement of federal rights. Accordingly, the district court correctly refused to enforce those provisions here.

II. THE FEDERAL ARBITRATION ACT SHOULD NOT GOVERN THE VALIDITY OF COINBASE'S NON-ARBITRATION EXHAUSTION PROVISIONS, PROVISIONS THAT UNDERMINE ARBITRATION RATHER THAN FACILITATE IT.

Coinbase relies on the Federal Arbitration Act and its assertion of a federal policy favoring arbitration in trying to justify its pre-suit exhaustion requirements. Appellant's Br. 23. This is a perplexing argument, because Coinbase does not seem to want an arbitrator to decide the merits of Bielski's claims. Rather, it wants to compel arbitration so that an arbitrator can dismiss the entire suit. Instead of supporting arbitration as a form of dispute resolution, Coinbase seeks to place barriers to arbitration in front of any customer who is aggrieved by Coinbase's conduct. It suggests that Coinbase is not trying to promote arbitration as a form of dispute resolution, but is trying to keep cases from being resolved on the merits at all.

By imposing pre-suit exhaustion remedies, Coinbase makes arbitration less accessible, not more. Those procedures make the dispute resolution process more time-consuming and more expensive for customers. And it is especially troubling here, where Coinbase's support team failed to adequately respond after Bielski contacted them. Given the increasing number of entities that are imposing pre-arbitration exhaustion requirements in their standard-form contracts, this case

presents an opportunity for this Court to clarify the limits of the FAA with respect to such requirements and to clarify how such terms may stifle arbitration rather than support it.

First, the FAA does not apply to these non-arbitration pre-suit customer service complaint provisions and Coinbase is wrong to rely on the FAA. The FAA applies to "agreements to arbitrate." 9 U.S.C. § 2. Not all forms of dispute resolution constitute an "agreement to arbitrate." *See Southard v. Newcomb Oil Co., LLC*, 7 F.4th 451, 455 (6th Cir. 2021) ("Not all forms of ADR involve the hallmark of arbitration."). Rather, for a dispute resolution agreement to be an agreement to arbitrate, it often requires a neutral third-party adjudicator who will hear evidence and issue a decision that finally resolves the claim. *See Advanced Bodycare Sols., LLC v. Thione Int'l, Inc.*, 524 F.3d 1235, 1239 (11th Cir. 2008); *Salt Lake Trib. Publ'g Co. v. Mgmt. Plan., Inc.*, 390 F.3d 684, 689 (10th Cir. 2004) (stating that arbitration is characterized by "empower[ing] a third party to render a decision settling [the] dispute"). This Court looks to state law to define an agreement to arbitrate. *Goldman Sachs & Co. v. City of Reno*, 747 F.3d 733, 743 (9th Cir. 2014). California law, like the law discussed above, defines arbitration as a process where "a neutral third party (arbitrator) renders a decision after a hearing." *Baten v. Mich. Logistics, Inc.*, 830 F. App'x 808, 810 (9th Cir. 2020) (unpublished) (citing *Saeta v. Superior Ct.*, 117 Cal. App. 4th 261, 268 (2004)).

Coinbase's required two-step exhaustion procedures are decidedly non-arbitral. They do not involve a neutral third-party decision-maker. Instead, both steps involve a Coinbase-employed decision-maker. Nor is any decision final. Coinbase's exhaustion process may constitute a form of alternate dispute resolution. But it is not arbitration. Indeed, Coinbase concedes that the entire purpose of these additional requirements is to avoid arbitration. Coinbase states that it imposed an exhaustion requirement to "prevent[] users" from initiating what Coinbase would label as "unnecessary arbitrations" or to "cut[] down" on what it perceives as frivolous arbitrations. Appellants' Br. 48. Accordingly, the FAA and any associated federal policy favoring arbitration have no role to play in assessing the validity of Coinbase's pre-arbitration requirements.

If anything, Coinbase's pre-arbitration requirements conflict with what the Supreme Court has described as arbitration's fundamental attributes of expediency and cost-efficiency. *Cf. AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 344-45 (2011) (describing arbitration's goals as promoting "efficient, streamlined proceedings" that reduce the cost and increase the speed of dispute resolution). Requiring customers (but not Coinbase) to go through additional procedures prior to initiating arbitration undermines those goals. It makes the dispute resolution process longer and more involved. It requires additional time and expense from customers as they must navigate both the customer support process and the formal

complaint process. All this delays the onset of arbitration and discourages customers from seeking arbitration because of the pre-suit barriers they face.

It is important to recognize that requiring exhaustion of pre-suit remedies can be used to deny injured parties their day in court (or arbitration) and that this increasingly popular practice represents the latest iteration of attempts by defendants to keep cases from being decided on the merits. As Professor Maria Glover has explained, corporations have not been content with using class action waivers to prohibit collective actions and require individual arbitration; many now want to stop parties from bringing individual arbitrations as well. *See* J. Maria Glover, *Mass Arbitration*, 74 Stan. L. Rev. 1283 (June 2022), https://www.stanfordlawreview.org/print/article/mass-arbitration/. Many companies have now imposed exhaustion requirements to make it harder for claims to go forward. *See, e.g.*, *As Mass Arbitrations Proliferate, Companies Have Deployed Strategies for Deterring and Defending Against Them*, Gibson, Dunn & Crutcher LLP (May 24, 2021), https://www.gibsondunn.com/as-mass-arbitrations-proliferate-companies-have-deployed-strategies-for-deterring-and-defending-against-them/ (recommending exhaustion requirements as one strategy for "deterring" mass individual arbitrations). The more barriers that plaintiffs face, the less likely they will be able to bring their claim in any forum. The reality of

Coinbase's User Agreement is that it does not promote dispute resolution. It simply makes it more likely that victims' injuries will go unredressed.

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and Circuit Rule 29-2 because this brief contains 6,774 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type style.

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October 3, 2022

CERTIFICATE OF SERVICE

I, Richard H. Frankel, counsel for *amici curiae* and a member of the Bar of this Court, hereby certify that on October 3, 2022, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF. All participants in this case are registered CM/ECF users:

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