No. ___

IN THE
Supreme Court of the United States

COINBASE, INC.,
Applicant,
v.
ABRAHAM BIELSKI,
Respondent.

APPLICATION FOR STAY PENDING DISPOSITION OF PETITION FOR A WRIT OF CERTIORARI

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July 29, 2022

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RULE 29.6 STATEMENT

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

PARTIES TO THE PROCEEDING

Petitioner in this Court is Coinbase, Inc. Respondent in this Court is Abraham Bielksi, individually and on behalf of all others similarly situated.

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

INTRODUCTION

Pursuant to 28 U.S.C. § 1651 and Supreme Court Rule 23, Applicant Coinbase, Inc. respectfully requests that this Court stay district court proceedings in *Bielski* v. *Coinbase, Inc.*, No. 3:21-cv-07478 (N.D. Cal.), pending disposition of Coinbase's joint petition for certiorari, which Coinbase files concurrently with this application. The joint petition for certiorari seeks review of the Ninth Circuit's refusal to grant a stay pending appeal in this case and in another case presenting the same question, *Suski* v. *Coinbase, Inc.*, No. 3:21-cv-04539 (N.D. Cal.).

This stay application arises from the denial of a motion to compel arbitration in a putative class action filed by Respondent Abraham Bielski against Coinbase in the Northern District of California. Pursuant to the Federal Arbitration Act ("FAA"), which provides that when a federal district court denies a motion to compel arbitration, the party seeking to arbitrate may immediately appeal that denial, *see* 9 U.S.C. § 16(a), Coinbase appealed the District Court's order denying the motion to compel. That appeal is currently pending in the Ninth Circuit.

In six circuits, Coinbase's interlocutory appeal of a district court's refusal to compel arbitration would divest the district court of jurisdiction to proceed with the case, and thus would automatically stay district court litigation pending appeal. But in three courts of appeals, including the Ninth Circuit, district courts retain jurisdiction to proceed with a case even while the court of appeals decides whether the case

belongs in litigation in the first place. Accordingly, the District Court below refused to stay litigation against Coinbase even as the Ninth Circuit considers on appeal whether this case belongs in arbitration. The Ninth Circuit similarly denied Coinbase's motion for a stay pending appeal, and denied Coinbase's request for en banc reconsideration of Ninth Circuit precedent foreclosing an automatic stay in these circumstances. *See Britton* v. *Co-op Banking Grp.*, 916 F.2d 1405 (9th Cir. 1990). District court litigation is now proceeding at full tilt even as Coinbase seeks to reverse on appeal the District Court's erroneous refusal to compel arbitration.

Coinbase's joint petition for certiorari seeks review of the Ninth Circuit's orders denying Coinbase's motion for a stay pending appeal in this case and in *Suski*. This application seeks to stay district court proceedings in *Bielski* pending disposition of Coinbase's petition for certiorari. Because the Court is likely to grant certiorari and reverse the Ninth Circuit's refusal to grant an automatic stay, and because a stay pending appeal is necessary to avoid imminent and irreparable harm to Coinbase, the Court should grant this stay application.

Petitioner respectfully submits that the Court is likely to grant certiorari to address the question whether a stay should automatically issue upon the appeal of a district court's refusal to compel arbitration. The circuits are split on that recurring question. Six circuits—the Third, Fourth, Seventh, Tenth, Eleventh, and D.C. Circuits—have held that a non-frivolous appeal of the denial of a motion to compel arbitration divests the district court of jurisdiction, thereby automatically staying proceedings in the district court. Three circuits—the Second, Fifth, and Ninth Circuits—

have held the opposite. In these circuits, an appeal of the denial of a motion to compel arbitration does not divest the district court of jurisdiction over the underlying litigation, and the appealing party must obtain a stay pending appeal pursuant to the traditional discretionary test or else face ongoing district court litigation pending appeal. The split is acknowledged, longstanding, and intractable. The circuits will remain divided unless this Court intervenes.

The question presented by Coinbase's joint petition is exceptionally important, and this case and *Suski* are excellent vehicles for addressing it. The question presented affects every case in which a motion to compel arbitration is denied—including the many putative class actions filed in the Ninth Circuit and the other circuits on the minority side of the split. Coinbase preserved the issue below, and its grounds for obtaining a stay in this case are particularly compelling because the district court's refusal to compel arbitration plainly violated this Court's precedent. *See Rent-a-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 68-69 (2010).

If certiorari is granted, this Court is likely to conclude that the Ninth Circuit's minority approach is wrong. It is a foundational principle of appellate procedure that an appeal "divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam). When, as here, the issue being appealed is whether a motion to compel arbitration should be granted, the entire point of the appeal is to decide whether the case should proceed in district court or in arbitration. Allowing district court proceedings to march onward—through discovery, potential class proceedings, and even

a trial—while the arbitrability question is on appeal improperly permits the district court to retain jurisdiction over the core issue on appeal, thwarting the FAA and nullifying the right to an interlocutory appeal.

Coinbase will suffer irreparable harm if its application is denied. Absent a stay, Coinbase will be forced to litigate this case in the District Court, will face the demands of discovery, and may even face class-action proceedings, thereby forfeiting its contracted-for right to resolve disputes through streamlined, individualized arbitration. This harm has already begun: Coinbase has been forced to engage in further dispositive motion briefing and begin discovery in *Suski* and to answer the complaint and begin discovery in *Bielski*, while its arbitrability appeals are pending. This Court has twice recently granted stay applications in cases arising in this posture, recognizing the irreparable harm that litigants face when forced to continue litigating in district court while the arbitrability question is on appeal. *See* 3/2/18 Order, *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524 (No. 17-1272) (granting stay); Order, *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, No. 19A766 (Jan. 24, 2020) (granting stay). A stay here is necessary to prevent Coinbase from forever losing out on its right to resolve this case through arbitration.

Should the Court grant its stay application, Coinbase respectfully requests that the Court ensure that this case is heard expeditiously. Questions concerning the legal standard for stays pending appeal become moot when the court of appeals issues its mandate in the underlying appeal. Coinbase therefore requests that the Court construe this stay application as a petition for certiorari, grant the stay application

and certiorari, issue an expedited briefing schedule, and schedule the case for argument at the earliest opportunity. That was this Court's approach in *Nken* v. *Holder*, 556 U.S. 418 (2009), this Court's most recent merits decision addressing the appropriate legal standard for stays pending appeal. Should the Court take that path here, Coinbase would dismiss the joint petition for certiorari it has separately and contemporaneously filed. If the Court declines to treat this stay application as a petition for certiorari, however, Coinbase asks that the Court grant its separately-filed motion to expedite consideration of its joint petition for certiorari, and grant the petition as soon as is practicable.

STATEMENT OF THE CASE

A. Coinbase And The User Agreement

Coinbase operates one of the largest cryptocurrency exchange platforms in the United States. Coinbase users can buy, sell, and transact in myriad digital currencies, including bitcoin, ether, and dogecoin. *See* Pet. App. 3a-4a; *Bielski* D. Ct. Dkt. 22, at 1.[1]

Before creating a Coinbase account, a user must agree to Coinbase's User Agreement. *See Bielski* D. Ct. Dkt. 27, at 2. That User Agreement states that the parties agree that "*any* dispute" between them will be resolved through arbitration. *Bielski* D. Ct. Dkt. 28-1, at 17 (emphasis added). The Agreement also contains a delegation clause—a specific agreement "to arbitrate threshold issues concerning the

[1] Citations to *Bielski* district court filings reference original page numbers as indicated in the document footers. Citations to the Pet. App. refer to the Appendix to the *Bielski* and *Suski* Joint Petition for a Writ of Certiorari filed concurrently with this Application.

arbitration agreement" itself, "such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center*, 561 U.S. at 68-69. When an arbitration agreement contains a delegation clause, gateway questions of arbitrability must be resolved by an arbitrator, not a court. The delegation clause in Coinbase's User Agreement unequivocally provides:

> 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*.

Bielski D. Ct. Dkt. 28-1, at 17 (emphases added).

B. Bielski's Suit

On April 10, 2021, Abraham Bielski agreed to Coinbase's User Agreement and created a Coinbase account. *Bielski* D. Ct. Dkt. 27, at 2-3. According to Bielski, five months later, he "became the target of a scam by an individual who purported to be a representative of PayPal," a payment-processing company unrelated to Coinbase. *Bielski* D. Ct. Dkt. 29-1, at 1. He granted the scammer "remote access" to his computer, and the scammer exploited that access to steal more than $31,000 from Bielski's Coinbase account. *Id*.

Neither Coinbase nor anyone else can reverse the kind of fraudulent transaction to which Bielski fell victim. "Due to the nature of digital currency protocols,

transactions cannot be cancelled or altered once they are initiated. This is what allows merchants to accept digital currency without the risk of chargebacks."[2] For that reason, the User Agreement expressly warns users to "never allow remote access or share your computer screen with someone else when you are logged on to your Coinbase Account"—which, apparently, is what Bielski did. *Bielski* D. Ct. Dkt. 28-1, at 15. Bielski nonetheless filed a putative class action complaint in the Northern District of California alleging that the Electronic Funds Transfer Act requires Coinbase to recredit customers stolen cryptocurrency. *Bielski* D. Ct. Dkt. 22, at 8-9.

Coinbase moved to compel arbitration, but the District Court refused. The District Court acknowledged that the User Agreement contained a delegation clause, and that "[w]here a delegation provision exists, courts first must focus on the enforceability of that specific provision, not the enforceability of the arbitration agreement as a whole." Pet. App. 5a (quotation marks omitted). But the District Court maintained that because the delegation clause referred to disputes arising out of the "Arbitration Agreement," the delegation clause "incorporated" the broader arbitration agreement, and thus its enforceability depended on "backtracking through the nested provisions" of the overarching arbitration agreement and assessing whether the arbitration agreement itself was invalid. *Id.* at 8a-9a.

The District Court then held the arbitration agreement unconscionable under California law. With no independent analysis of the delegation clause, the District

[2] *See Can I Cancel a Cryptocurrency Transaction?*, Coinbase, https://help.coinbase.com/en/coinbase/getting-started/crypto-education/can-i-cancel-a-digital-currency-transaction (last visited July 29, 2022).

Court concluded that the delegation clause was unenforceable solely because the broader arbitration agreement was unenforceable. Indeed, the District Court acknowledged that "all the analysis" regarding the two provisions was the same. *Id.* at 16a.

C. The District Court and the Ninth Circuit Refuse to Grant a Stay Pending Appeal

Coinbase asked the District Court to stay further proceedings pending the resolution of an appeal. Although the District Court recognized "that reasonable minds may differ over" its decision to invalidate the delegation agreement and arbitration agreement, the Court refused to grant a stay because "Coinbase is a large company," while "Bielski is a single individual," and he "would suffer if forced to wait for a remedy." *Id.* at 42a-43a.

Coinbase then requested an emergency stay from the Ninth Circuit. Coinbase argued that the Ninth Circuit should reconsider its *Britton* decision en banc given that *Britton* cannot be reconciled with this Court's intervening precedent making clear that a valid arbitration agreement means the district court "has no business weighing the merits of the grievance." *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) (quotation marks omitted); *see* C.A. Stay Mot. 7. Coinbase also argued that it was entitled to a discretionary stay because the District Court itself had conceded that "reasonable minds may differ" about its arbitrability holding, and because permitting litigation pending appeal would amount to irreparable harm. C.A. Stay Mot. 10, 18. The Ninth Circuit denied the request for a stay in a one-sentence unreasoned order. Pet. App. 1a.

ARGUMENT

Because Coinbase's arbitrability appeal automatically ousted the District Court's jurisdiction to proceed before the appeal is resolved, Coinbase is entitled to an automatic stay of district court proceedings.

Separately, Coinbase meets this Court's traditional test for a discretionary stay pending disposition of a petition for certiorari. *Maryland* v. *King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers). Under that test, a stay is warranted where there is "(1) a reasonable probability that this court will grant certiorari, (2) a fair prospect that the Court will then reverse the decision below, and (3) a likelihood that irreparable harm [will] result from the denial of a stay." *Id.* (quotation marks omitted). Coinbase satisfies each of these factors. There is a reasonable probability that the Court will grant certiorari to resolve a longstanding 6-3 circuit split over an important question. There is more than a fair prospect that this Court will reverse. And if a stay were denied, Coinbase would suffer the irreparable harm of being compelled to litigate in court despite contracting specifically for arbitration.

I. THIS COURT IS LIKELY TO GRANT CERTIORARI TO REVIEW THE NINTH CIRCUIT'S DENIAL OF A STAY PENDING APPEAL.

Given the longstanding, deep, and acknowledged circuit split over whether a non-frivolous appeal of the denial of a motion to compel arbitration divests the district court of jurisdiction, this Court is likely to grant certiorari.

A. There Is A Clear And Acknowledged Circuit Split.

Six courts of appeals—the Third, Fourth, Seventh, Tenth, Eleventh, and D.C. Circuits—hold that a non-frivolous arbitrability appeal ousts the district court's jurisdiction to proceed until the appeal is resolved. By contrast, the Second, Fifth, and Ninth Circuits hold that a district court may proceed with litigation while a non-frivolous arbitrability appeal is pending. Courts on both sides of the split have acknowledged the divide, provided responses to the other side's positions, and remain entrenched.

1. Three circuits hold that a district court may proceed with litigation while a non-frivolous arbitrability appeal is pending.

In *Britton*, the Ninth Circuit became the first court of appeals to address whether an appeal from the denial of a motion to compel arbitration divests the district court of jurisdiction and triggers a mandatory stay. It adopted what has become the minority position—that district court litigation can continue throughout the pendency of an arbitrability appeal. *See* 916 F.2d 1405. The Ninth Circuit acknowledged the "general rule" that an appeal ousts the district court's jurisdiction to exercise control over matters involved in the appeal. *Id.* at 1411 (citing *Griggs*, 459 U.S. at 58). But the court maintained that a district court's power "to proceed with the case on the merits" is an "independent issue[]" from arbitrability. *Id.* at 1411-12. The Ninth Circuit adopted this rule in part based on the belief that automatic jurisdictional ouster "would allow a defendant to stall a trial simply by bringing a frivolous motion to compel arbitration." *Id.* at 1412. The Ninth Circuit has adhered to this rule ever

since. *See Knapke* v. *PeopleConnect, Inc.*, No. 21-35690, 2021 WL 5352163, at *1 (9th Cir. Oct. 20, 2021) (denying request for a stay "to permit en banc reconsideration of *Britton*").

The Second Circuit later followed suit in *Motorola Credit Corp.* v. *Uzan*, 388 F.3d 39, 53-54 (2d Cir. 2004). There, an entire trial occurred in the district court while the arbitrability appeal was pending. *Id.* at 46. The Second Circuit acknowledged that "[o]ther circuits are divided" on the question and "explicitly adopt[ed] the Ninth Circuit's position"—i.e., "that further district court proceedings in a case are not 'involved in' the appeal of an order refusing arbitration, and that a district court therefore has jurisdiction to proceed with a case absent a stay from this Court." *Id.* at 54.

The Fifth Circuit later embraced the Ninth and Second Circuits' position. *See Weingarten Realty Invs.* v. *Miller*, 661 F.3d 904 (5th Cir. 2011). The Fifth Circuit acknowledged the split over "[w]hether an appeal from a denial of a motion to compel arbitration divests the district court of jurisdiction to proceed to the merits." *Id.* at 907. The court explained that the circuit's divergent views turned on "whether the merits of an arbitration claim are an aspect of a denial of an order to compel arbitration." *Id.* at 908. In the Fifth Circuit's view, a "determination on the arbitrability of a claim has an impact on what arbiter—judge or arbitrator—will decide the merits, but that determination does not itself decide the merits." *Id.* at 909. Accordingly, the court held, "[a]n appeal of a denial of a motion to compel arbitration does not involve

the merits of the claims pending in the district court" and does not deprive the district court of jurisdiction. *Id.*

2. Six circuits hold that a non-frivolous arbitrability appeal automatically ousts the district court's jurisdiction until the appeal is resolved.

Six courts of appeals have squarely rejected the minority view. The Seventh Circuit was the first to hold that an arbitrability appeal divests the district court of jurisdiction. *See Bradford-Scott Data Corp.* v. *Physician Comput. Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997). Considering and rejecting the Ninth Circuit's contrary view, the court, in an opinion by Judge Easterbrook, explained that when a party appeals arbitrability, "[w]hether the litigation may go forward in the district court is precisely what the court of appeals must decide." *Id.* The district court's power to continue proceedings "is the mirror image of the question presented on appeal," and "[c]ontinuation of proceedings in the district court largely defeats the point of the appeal." *Id.* at 505. In reaching this conclusion, the court analogized to interlocutory appeals involving double jeopardy and qualified immunity, which, like arbitrability, challenge the "continuation of proceedings in the district court." *Id.* at 506. As the court explained, an appeal "brings those proceedings to a halt unless the appeal is frivolous," and the same result was warranted for arbitrability. *Id.* The court acknowledged the Ninth Circuit's concern "that an automatic stay would give an obstinate or crafty litigant too much ability to disrupt the district judge's schedule by

filing frivolous appeals," but deemed this concern "met by the response that the appellee may ask the court of appeals to dismiss the appeal as frivolous or to affirm summarily." *Id.*

The Eleventh Circuit agreed with the Seventh. *See Blinco* v. *Green Tree Servicing, LLC*, 366 F.3d 1249, 1251-52 (11th Cir. 2004) (per curiam). Acknowledging that the circuits "are split," the Eleventh Circuit announced that it was "persuaded by the reasoning of the Seventh Circuit" and "unpersuaded" by the reasoning of the Ninth Circuit. *Id.* at 1251-52. The Eleventh Circuit concluded that the "only aspect of the case involved in an appeal from an order denying a motion to compel arbitration is whether the case should be litigated at all in the district court," and "continued litigation in the district court" is therefore "not collateral to" the appeal. *Id.* at 1251. That is why Congress permitted interlocutory arbitrability appeals in the first place: "By providing a party who seeks arbitration with swift access to appellate review, Congress acknowledged" that the main benefits of arbitration would be "lost" if the case proceeded while an appeal was pending. *Id.* Like the Seventh Circuit, the Eleventh Circuit noted that an arbitrability appeal resembles an interlocutory qualified-immunity appeal—both assert "a right not to litigate the dispute in a court," and both "involve the threshold issue of the authority of the district court to entertain the litigation." *Id.* at 1252. In the Eleventh Circuit's view, both types of appeal therefore deprive the district court of jurisdiction pending appeal. *See also Attix* v. *Carrington Mortg. Servs., LLC*, 35 F.4th 1284, 1293 n.5 (11th Cir. 2022) (adhering to conclusion that a stay is automatic pending an arbitrability appeal).

The Tenth Circuit agreed. *See McCauley* v. *Haliburton Energy Servs., Inc.*, 413 F.3d 1158 (10th Cir. 2005). Acknowledging the "split," the Tenth Circuit was "persuaded by the reasoning" of circuits holding "that upon the filing of a non-frivolous § 16(a) appeal, the district court is divested of jurisdiction until the appeal is resolved on the merits." *Id.* at 1160. The Tenth Circuit, like the Seventh and Eleventh, analogized arbitrability to qualified immunity, noting that in both contexts the failure to grant a stay pending appeal results in a denial of the party's "legal entitlement to avoidance of litigation." *Id.* at 1162. The Tenth Circuit has continued to adhere to this approach ever since. *See Belnap* v. *Iasis Healthcare*, 844 F.3d 1272, 1278 n.3 (10th Cir. 2017) ("On the filing of this appeal, the district court properly stayed the case.").

The Fourth Circuit adopted the majority view as well. *See Levin* v. *Alms & Assocs., Inc.*, 634 F.3d 260, 263-266 (4th Cir. 2011). The Fourth Circuit acknowledged the split and explained that it "find[s] the majority view persuasive" because "[t]he core subject of an arbitrability appeal is the challenged continuation of proceedings before the district court on the underlying claims." *Id.* at 264. And "because the district court lacks jurisdiction over 'those aspects of the case involved in the appeal,' it must necessarily lack jurisdiction over the continuation of any proceedings relating to the claims at issue." *Id.* (quoting *Griggs*, 459 U.S. at 58). The Fourth Circuit specifically rejected the argument that a district court retains jurisdiction to proceed with discovery pending appeal, explaining that "[d]iscovery is a vital part of the litigation process and permitting discovery constitutes permitting the continuation of

the litigation, over which the district court lacks jurisdiction." *Id.* Even if the appeal succeeds, "the parties will not be able to unring any bell rung by discovery, and they will be forced to endure the consequences of litigation discovery in the arbitration process." *Id.* at 265.

The Third and D.C. Circuits agree, too. *Ehleiter* v. *Grapetree Shores, Inc.*, 482 F.3d 207, 215 n.6 (3d Cir. 2007) (adopting "the majority rule of automatic divestiture where the [arbitrability] appeal is neither frivolous nor forfeited"); *Bombardier Corp.* v. *Nat'l R.R. Passenger Corp.*, 333 F.3d 250, 252 (D.C. Cir. 2003) (district court was "divested of jurisdiction over the underlying action" while the appellate court addressed "the threshold issue of whether the dispute between the parties is arbitrable under the FAA").

B. The Question Presented Is Important And This Case And *Suski* Are Excellent Vehicles.

The question presented is exceptionally important. This issue arises in every case in which a party appeals the denial of a motion to compel arbitration. In three circuits, including the outsized Ninth Circuit, arbitration clauses can be effectively nullified while an appellate court considers the merits of an arbitrability appeal, undermining the FAA's "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). All the protective features of an arbitration clause, including avoiding the costs of litigation and the burdens of discovery, can be stripped away during the pendency of an appeal. As with doctrines of immunity, if a district court's rejection of a defend-

ant's request for arbitration is not stayed, the defense loses its practical force, as virtually every aspect of litigation that the arbitration clause was supposed to prevent (from discovery to the trial itself) can now unfold during the months and years that the appellate court considers the merits of the arbitration defense.

While *Britton* predicted that the pitfalls of declining to stay district court litigation automatically could be addressed through discretionary stays, *see* 916 F.2d at 1412, experience has shown otherwise. After refusing to enforce an arbitration clause, a district court is unlikely voluntarily to stay its own proceedings. And courts of appeals have proven similarly unlikely to grant the "extraordinary remedy" of a discretionary stay, *Nken*, 556 U.S. at 428 (quotation marks omitted), as the Ninth Circuit's one-line stay denials in *Bielski* and *Suski* confirm.

Recent experience confirms that the Ninth Circuit's approach is unworkable. District courts and the Ninth Circuit have proven unwilling to stay decisions refusing to compel arbitration even where those decisions are later found patently erroneous on appeal. In one illustrative recent case, the district court and Ninth Circuit refused the defendant's request to stay discovery pending appeal even though the Ninth Circuit later concluded that the district court had "improperly assumed the authority to decide whether the arbitration agreements were enforceable." *Mohamed* v. *Uber Techs., Inc.*, 848 F.3d 1201, 1206 (9th Cir. 2016); *see also* 10/22/2015 Order, *Mohamed*, 848 F.3d 1201 (No. 15-16178) (order denying stay). In another recent case, the district court and Ninth Circuit denied a stay even though the Ninth Circuit later easily concluded that the dispute "falls squarely within the scope of the delegation clause,

and it should have been left to the arbitrator." *Dekker* v. *Vivint Solar, Inc.*, No. 20-16584, 2021 WL 4958856, at *1 (9th Cir. Oct. 26, 2021); *see also* Order, *Dekker*, No. 20-16584 (9th Cir. Nov. 18, 2020) (order denying stay). In yet another recent case, both the district court and Ninth Circuit denied a stay even though the Ninth Circuit later concluded that the "district court erred" in denying the motion to compel arbitration. *Knapke* v. *PeopleConnect, Inc.*, 38 F.4th 824, 828-829 (9th Cir. 2022); *see also* 10/20/2021 Order, *PeopleConnect*, 38 F.4th 824 (No. 21-35690) (order denying stay).

This case and the companion case *Suski* present ideal vehicles for addressing the split. In both cases, the District Court itself acknowledged that Coinbase's appeal of the refusal to compel arbitration was not frivolous—noting in *Bielski* that "reasonable minds may differ" on the merits of the arbitrability question, Pet. App. 42a, and in *Suski* that the refusal to compel arbitration could be "wrong," Pet. App. 51a. Thus, even if—as some courts have held—a frivolous appeal presents an exception to the rule that an appeal divests the district court of jurisdiction, there can be no doubt that the exception does not apply here. Additionally, in both *Bielski* and *Suski*, the District Court and Ninth Circuit denied Coinbase's request to stay the case pending appellate resolution of Coinbase's motion to compel arbitration. And in both *Bielski* and *Suski*, Coinbase sought en banc reconsideration of *Britton*, and the Ninth Circuit denied that request as well. Both cases thus squarely implicate the question presented. And because Coinbase has filed a joint certiorari petition, even if an unforeseen vehicle problem existed as to one case, that problem would not prevent this Court from reaching the merits.

II. THIS COURT IS LIKELY TO REVERSE THE NINTH CIRCUIT.

Like the majority of Circuits, this Court is likely to conclude that minority approach followed by the Ninth Circuit below is wrong.

"The filing of a notice of appeal * * * divests the district court of its control over those aspects of the case involved in the appeal." *Griggs*, 459 U.S. at 58. When a party appeals arbitrability, "[w]hether the litigation may go forward in the district court is precisely what the court of appeals must decide." *Bradford-Scott*, 128 F.3d at 506. Accordingly, the district court's continuation of proceedings "is the mirror image" of the question being litigated on appeal, and a district court lacks jurisdiction to proceed with a case while the court of appeals is deciding whether the case belongs in litigation to begin with. *Id.* at 505.

That conclusion follows from the FAA itself. Congress in the FAA would not have granted parties the right to an immediate interlocutory appeal of refusals to compel arbitration if Congress had contemplated that litigation could proceed while the appeal was pending. Indeed, unlike in other circumstances where an interlocutory appeal is discretionary, *see, e.g.*, 28 U.S.C. § 1292(b) (permitting a court of appeals "in its discretion" to permit certain interlocutory appeals); Fed. R. Civ. P. 23(f) (court of appeals "may" permit certain interlocutory appeals), Congress in the FAA gave parties a *mandatory right* to an interlocutory appeal from a district court's refusal to compel arbitration. *See* 9 U.S.C. § 16(a). "By providing a party who seeks arbitration with swift access to appellate review, Congress acknowledged that one of

the principal benefits of arbitration, avoiding the high costs and time involved in judicial dispute resolution, is lost if the case proceeds in both judicial and arbitral forums." *Blinco*, 366 F.3d at 1251. "Continuation of proceedings" while an appeal is pending "largely defeats the point of the appeal." *Bradford-Scott*, 128 F.3d at 505.

Because interlocutory arbitrability appeals seek to vindicate the appellant's right to avoid litigation entirely, they resemble interlocutory appeals involving immunity from suit, which similarly seek to vindicate a party's right to avoid litigation. It is uncontroversial that interlocutory appeals of the denial of immunity—including qualified immunity, sovereign immunity, and double-jeopardy immunity—oust the district court of jurisdiction to proceed while the appeal is pending, because forcing a party to litigate pending appeal of the immunity question "destroys rights created by" immunity. *Apostol* v. *Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989) (Easterbrook, J.). "It makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one." *Id.* This reasoning applies with equal force to arbitrability appeals.

In reaching the contrary conclusion, the Ninth Circuit maintained that arbitrability and the merits of a dispute are "independent" legal issues. *Britton*, 916 F.2d at 1412. But while they may be distinct, an arbitrability appeal raises the fundamental issue whether "the litigation may go forward in the district court" at all. *Bradford-Scott*, 128 F.3d at 506. When a district court proceeds while an arbitrability appeal is pending, the court assumes the answer to the question being addressed on appeal.

The Ninth Circuit adopted its rule in *Britton* for fear that a defendant may seek "to stall a trial simply by bringing a frivolous motion to compel arbitration" and obtaining a "stay [of] the proceedings pending an appeal." 916 F.2d at 1412. But the flawed *Britton* rule was unnecessary to address that concern. As the courts on the majority side of the split have recognized, frivolous appeals in this context can be addressed by a rule explicitly carving them out from the general divestiture rule, or by appellees "ask[ing] the court of appeals to dismiss the appeal as frivolous or to affirm summarily." *Bradford-Scott*, 128 F.3d at 505. Indeed, the Federal Rules of Appellate Procedure deter frivolous appeals by allowing an appellate court to award "just damages" and "double costs" when it "determines that an appeal is frivolous." Fed. R. App. P. 38.

While *Britton* was flawed from the outset, it has become especially dissonant with this Court's intervening cases concerning the FAA's "liberal federal policy favoring arbitration." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (quotation marks omitted). Since *Britton*, this Court has repeatedly reversed lower courts for failing to enforce valid delegation clauses in arbitration agreements much like the ones Coinbase seeks to enforce below. *See Rent-A-Center*, 561 U.S. at 68-69 & n.1 (parties can delegate "gateway" questions of arbitrability to an arbitrator where they do so "clearly and unmistakably" (citing *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995))); *id.* at 561 U.S. at 72 (arbitrator can decide validity of entire Agreement unless validity of delegation clause itself is specifically challenged); *Henry*

Schein, 139 S. Ct. at 529-531 (delegation clause enforceable even where a court thinks arbitrability argument is "wholly groundless").

The Ninth Circuit's *Britton* rule cannot be reconciled with these decisions. For example, while *Britton*'s conclusion that arbitrability was "severable" from the merits always rested on a misreading of this Court's precedent, *see Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 21 (1983), this misreading has only become more apparent under this Court's subsequent decisions clarifying that arbitrability is an "antecedent" issue that must be decided before a court reaches the merits. *Rent-a-Center*, 561 U.S. at 68-70. And while the Ninth Circuit in *Britton* believed that district courts could address the merits before the arbitrability question was settled, that reasoning has been refuted by this Court's emphatic reminder that district courts have "no business weighing the merits of the grievance" if the case belongs in arbitration. *Henry Schein*, 139 S. Ct. at 529 (quotation marks omitted).

The saga of the *Henry Schein* litigation underscores why the minority view is indefensible. Because *Henry Schein* arose from the denial of a motion to compel arbitration in the Fifth Circuit, which adheres to the Ninth Circuit's minority position, district court litigation there continued even as the case proceeded on appeal. After the Fifth Circuit refused to compel arbitration, petitioners sought an emergency stay of the district court proceedings in this Court, explaining that forcing them "to engage in further litigation will forever deprive them of their bargained-for right to resolve their claims efficiently, privately, and expeditiously through arbitration." Application for a Stay at 2-3, *Henry Schein*, 139 S. Ct. 524 (No. 17-1272). This Court granted

the stay application with no noted dissents. *See* 3/2/18 Order, *Henry Schein*, 139 S. Ct. 524 (No. 17-1272). It then granted certiorari, heard the case on the merits, and vacated the Fifth Circuit's decision refusing to send the case to an arbitrator. *See Henry Schein*, 139 S. Ct. at 528-529, 531.

On remand, the Fifth Circuit *again* refused to compel arbitration. Petitioners—now on the eve of trial and following extensive discovery—were thus forced *again* to seek an emergency stay from this Court, and this Court *again* granted the stay pending resolution of another certiorari petition. *See* Order, No. 19A766 (Jan. 24, 2020). This Court was thus required to expend resources by twice considering and twice granting emergency stay applications to prevent ongoing district court litigation that should not have been occurring in the first place.

III. ABSENT A STAY, COINBASE WILL SUFFER IRREPARABLE HARM.

A stay is necessary to protect Coinbase from irreparable harm. Absent a stay, Coinbase will be forced to litigate this case in district court even though its User Agreement subjects disputes with its users to arbitration. Moreover, absent a stay, Coinbase will be forced to endure burdensome discovery that would not occur if the case was arbitrated.

This harm has already begun: Coinbase has had to answer Bielski's complaint, and discovery will follow. This harm cannot be undone after the fact. If the Ninth Circuit (or this Court) ultimately concludes that Coinbase's motion to compel should have been granted, "the parties will not be able to unring any bell rung by discovery,

and they will be forced to endure the consequences of litigation discovery in the arbitration process." *Levin*, 634 F.3d at 265. Coinbase's User Agreement is designed to funnel all disputes into efficient, economical, and private arbitration procedures and those benefits will be "lost forever" if Coinbase must undergo the expense and delay of litigation. *Alascom, Inc.* v. *ITT N. Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984); *see Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO* v. *Aloha Airlines, Inc.*, 776 F.2d 812, 815 (9th Cir. 1985) (observing that denying a motion to compel arbitration "has serious consequences that can only be challenged by immediate appeal" to determine whether the party claiming the case is arbitrable can be "deprive[d] of an inexpensive and expeditious" arbitration process).

That this case is a putative class action only exacerbates the irreparable harm Coinbase would face absent a stay. While respondent sought to avoid a stay by offering to wait before seeking class discovery, *see Bielski* D. Ct. Dkt. 50, at 2-3, there is no guarantee that class discovery will be postponed through the duration of Coinbase's appeal, which could take a year or more. As this Court has repeatedly explained, responding to class-wide claims is far more complicated and burdensome than proceeding on an individual basis, "interfer[ing] with one of arbitration's fundamental attributes." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1622 (2018); *see also Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1414 (2019) (being required to engage in class proceedings "sacrifices the principal advantage of arbitration and greatly increases risks to defendants" (quotation marks omitted)); *Concepcion*, 563 U.S. at 348 ("[T]he switch from bilateral to class arbitration sacrifices the principal advantage of

arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."). Coinbase contracted for individualized arbitration; compelling Coinbase to endure class action litigation in district court while it awaits an appellate ruling on the District Court's order denying arbitration would deprive Coinbase of both its right to arbitrate and its right to do so on an individualized basis.

This Court twice granted stays in the *Henry Schein* litigation arising in a similar posture, agreeing with the petitioners' contention that they would "suffer irreparable harm if the Court does not stay this case" because further litigation would "forever deprive them of their bargained-for right to resolve their claims efficiently, privately, and expeditiously through arbitration." *See* Application for a Stay at 2-3, *Henry Schein*, 139 S. Ct. 524 (No. 17-1272); *see also* Order, No. 19A766 (Jan. 24, 2020) (granting another stay in a similar posture). Coinbase respectfully submits that the same result is appropriate here.[3]

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[3] Lower courts have broadly agreed that compelling a party to litigate while the party's appeal from a district court's denial of a motion to compel arbitration remains pending constitutes irreparable harm. *See, e.g.*, *Starke* v. *Square Trade, Inc.*, No. 16-CV-7036-NGG-SJB, 2017 WL 11504834, at *2 (E.D.N.Y. Dec. 15, 2017); *Ward* v. *Est. of Goossen*, No. 14-cv-03510-TEH, 2014 WL 7273911, at *3-4 (N.D. Cal. Dec. 22, 2014); *Sutherland* v. *Ernst & Young LLP*, 856 F. Supp. 2d 638, 643-644 (S.D.N.Y. 2012); *MC Asset Recovery, LLC* v. *Castex Energy, Inc*., No. 4:07-CV-076-Y, 2009 WL 10674184, at *1 (N.D. Tex. June 19, 2009); *Jones* v. *Deutsche Bank AG*, No. C 04-05357, 2007 WL 1456041, at *2 (N.D. Cal. May 17, 2007). Lower courts have similarly found that defendants face especially acute risk of irreparable harm when they have appealed an order refusing to compel arbitration of a potential class action. *See, e.g.*, *Hinkle* v. *Phillips 66 Co.*, No. PE:20-CV-22-DC-DF, 2021 WL 8055644, at *5 (W.D. Tex. Dec. 21, 2021); *Zachman* v. *Hudson Valley Fed. Credit Union*, No. 20 CV 1579 (VB), 2021 WL 1873235, at *2 (S.D.N.Y. May 10, 2021); *B.F.* v. *Amazon.com Inc.*, No. C19-910-RAJ-MLP, 2020 WL 3548010, at *3-4 (W.D. Wash. May 15, 2020); *Wilson* v. *Huuuge, Inc.*, No. 3:18-cv-05276-RBL, 2019 WL 998319, at *4 (W.D. Wash. Mar. 1, 2019); *Zaborowski* v. *MHN Gov't Servs., Inc.*, No. C 12-05109 SI, 2013 WL 1832638, at *2-3 (N.D. Cal. May 1, 2013); *Ontiveros* v. *Zamora*, No. CIV. S-08-567 LKK/DAD, 2013 WL 1785891, at *4-5 (E.D. Cal. Apr. 25, 2013); *Steiner* v. *Apple Comput., Inc.*, No. C 07-04486 SBA, 2008 WL 1925197, at *5 (N.D. Cal. Apr. 29, 2008).

Respondent, by contrast, will suffer no irreparable injury from a stay. Respondent seeks neither injunctive nor prospective relief. The only harm the District Court identified in denying Coinbase's stay motion was that respondent "is a single individual" who "would suffer if forced to wait for a remedy." Pet. App. 42a-43a. But any delay in potentially obtaining monetary damages is fully compensable. *See Marlyn Nutraceuticals, Inc.* v. *Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (litigant generally does not incur irreparable harm "where the injury complained of is capable of compensation in damages" (quotation marks omitted)). And any delay would be minimal, given that Coinbase is seeking expedited review before this Court. Especially given the "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi Motors*, 473 U.S. at 631, the balance of equities favor a stay.

IV. THE COURT SHOULD EXPEDITE ITS REVIEW.

Because this case concerns the standard governing stays pending appeal, the question presented in this case will remain live only until the Ninth Circuit issues its mandate in Coinbase's underlying appeal. After Coinbase's appeal is resolved, the dispute over the proper legal standard for a stay pending appeal will be moot.

Experience shows that the question presented is particularly susceptible to mootness. At least two certiorari petitions filed last year raised the same question as this case but were mooted before this Court had an opportunity to consider the petitions. In both cases, after the petitions were filed, respondents reversed course and agreed to a stay of district court proceedings pending appeal rather than allowing this Court to resolve the question. *See PeopleConnect, Inc.* v. *Callahan*, No. 21-885

(cert. petition filed on Dec. 13, 2021 and dismissed pursuant to Rule 46 on Dec. 23, 2021); *PeopleConnect, Inc.* v. *Knapke*, No. 21-725 (cert. petition filed on Nov. 12, 2021 and dismissed pursuant to Rule 46 on Dec. 1, 2021). In light of this tactic to insulate the Ninth Circuit's minority approach from this Court's review, this Court should take care to ensure that mootness does not thwart review of this important question.

If the Court agrees that this case warrants review, Coinbase respectfully requests that the Court adopt a schedule to ensure that the case will be decided before the question becomes moot. Coinbase submits that two pathways would permit expeditious review.

First, and preferably, this Court could treat this stay application and the similar application in *Suski* as a petitions for certiorari, grant the stay, grant certiorari, consolidate *Bielski* and *Suski*, issue a briefing schedule, and set the possible earliest argument date. The Court took a similar approach in *Nken v. Holder*, 556 U.S. 418 (2009), its most recent decision addressing the appropriate standard for a stay pending appeal. Were the Court to proceed that way here, Coinbase would dismiss its joint petition for certiorari and would be prepared to brief this case on whatever expedited timeline this Court deems appropriate.

Second, the Court could grant this stay application, then expedite its consideration of the joint petition for certiorari to ensure that the case does not become moot before this Court can resolve the joint petition.[4]

[4] Alternatively, the Court could stay not only the District Court proceedings, but also the Ninth Circuit appeal. With proceedings in both the District Court and the Ninth Circuit stayed, there would be no need for this Court to expedite its disposition of the joint petition.

CONCLUSION

The application for a stay should be granted.

Respectfully submitted,

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