No. ________

IN THE

Supreme Court of the United States

COINBASE, INC.,

Applicant,

v.

DAVID SUSKI, ET AL.,

Respondents.

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

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July 29, 2022

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. Respondents in this Court are David Suski, Jaimee Martin, Jonas Calsbeek, and Thomas Maher, individually and on behalf of all others similarly situated. Marden-Kane, Inc. is a defendant in the proceedings below.

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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 all district court proceedings in *Suski v. Coinbase, Inc.*, No. 3:21-cv-04539 (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, *Bielski v. Coinbase, Inc.*, No. 3:21-cv-07478 (N.D. Cal.).

This stay application arises from the denial of a motion to compel arbitration in a putative class action filed by Respondent David Suski and three other plaintiffs against Coinbase in the Northern District of California. Coinbase appealed the district court's erroneous denial of Coinbase's motion to compel to the Ninth Circuit pursuant to the Federal Arbitration Act, which provides that parties seeking to arbitrate may immediately appeal denials of motions to compel arbitration, 9 U.S.C. § 16(a). That appeal is currently pending in the Ninth Circuit. And as the district court has recognized, its denial of Coinbase's motion to compel may be "wrong."

Upon noticing its appeal of the motion to compel ruling to the Ninth Circuit, Coinbase moved the district court for a stay pending appeal, in order to avoid discovery and further motions practice while it appeals the denial of the motion to compel ruling. The district court denied the motion for a stay, citing settled Ninth Circuit precedent that is in the minority of a circuit split, under which a stay pending

appeal does not issue automatically upon a party's filing an appeal from a district court's order denying a motion to compel arbitration. *See Britton v. Co-op Banking Grp.*, 916 F.2d 1405 (9th Cir. 1990). The district court also denied Coinbase's request for a discretionary stay. Coinbase's stay request to the Ninth Circuit was similarly denied, with the Ninth Circuit denying a discretionary stay without explanation and refusing Coinbase's request for en banc review of *Britton*.

Coinbase now faces open-ended, costly, and burdensome litigation in the district court—including briefing and argument related to Respondents' third amended complaint, followed by discovery—while Coinbase seeks to reverse on appeal the district court's erroneous motion to compel ruling. Allowing district court litigation to proceed in these circumstances is contrary to the Federal Arbitration Act ("FAA") and basic principles of jurisdiction.

Coinbase's joint petition for certiorari seeks review of the Ninth Circuit's orders denying Coinbase's requested stays pending appeal in this case and in *Bielski*. The Ninth Circuit's rule that such a stay does not automatically issue upon a non-frivolous appeal of the denial of a motion to compel arbitration is wrong and in conflict with the rule in several other circuits. This application seeks to stay district court proceedings 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.

The Court is likely to grant certiorari because there is a longstanding, deep, and acknowledged split on that recurring and important question of whether a stay should automatically issue upon the non-frivolous appeal of the denial of a motion to compel arbitration. 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: an appeal of the denial of a motion to dismiss does *not* divest the district court of jurisdiction over the underlying litigation. In those latter circuits (as in this case), unless a party satisfies the traditional, exacting discretionary test for a stay, litigation will proceed. That is precisely what happened here and in *Bielski*: Coinbase moved to compel arbitration, the district court denied that motion, Coinbase appealed and sought a stay pending appeal (from both the district court and Ninth Circuit), and both the district court and Ninth Circuit applied circuit precedent refusing an automatic stay and held that Coinbase was not entitled to a discretionary stay. Both courts rejected stays despite the district courts recognizing in *Bielski* that "reasonable minds may differ" on the merits of the arbitrability question and in *Suski* that the denial of arbitration may well be "wrong." Pet. App. 1a, 53a. These refusals demonstrate that even in close cases, a discretionary stay is insufficient to protect the arbitration right.

The question presented by Coinbase's joint petition and implicated by the split at issue is important and this case and *Bielski* are ideal vehicles for addressing it.

The question presented affects every case in which a motion to compel arbitration is denied—including the voluminous number of putative class actions filed within the Ninth Circuit and other circuits on the minority side of the split. Indeed, as reflected in Coinbase's separately filed joint petition for certiorari, Coinbase itself is presently involved in multiple lawsuits that implicate the question at the heart of this split. And given the depth and duration of the split, absent this Court's intervention, the circuits will remain divided. Additionally, Coinbase preserved the issue below by raising it both before the district court and Ninth Circuit.

If certiorari is granted, the Court is likely to reverse the Ninth Circuit. It is a fundamental principle of appellate procedure that an appeal divests a district court of jurisdiction over the issues being appealed. As the majority of circuits reaching the question have reasoned, when the denial of a motion to compel arbitration is being appealed, the entire purpose of the appeal is to decide whether the case should proceed in district court or in arbitration. Thus, allowing district court litigation to continue while the question of arbitrability is on appeal impermissibly permits the district court, in substance, to retain jurisdiction over the issue on appeal and thwarts the efficiency rationales underlying the FAA.

Coinbase also will suffer irreparable harm if its stay application is denied. Absent a stay, Coinbase will be forced to litigate a putative class action, thereby forfeiting its contracted-for right to resolve disputes through streamlined, individualized arbitration. This harm has already begun: Respondents propounded interrogatories on Coinbase on May 6 and the current case schedule requires

Respondents' motion for class certification to be filed by October 14, 2022, such that the parties would have to complete all class certification discovery by early this fall. And Respondents filed a third amended class action complaint on May 10, which Coinbase moved to dismiss on June 9. While Respondents have agreed to temporarily pause discovery until Coinbase's motion to dismiss the third amended class action complaint is decided, that motion is now fully briefed and set for argument on August 22, just a few weeks away. Once the motion is decided, Coinbase will face immediate and burdensome class discovery, unless further litigation is stayed. The harms from this ongoing litigation cannot be undone in the future, as Coinbase cannot recoup its right to arbitrate on an individual basis after having been compelled to litigate a putative class action for months (or longer) in court. As in several recent cases in which this Court has granted stays pending appeals from lower court denials of motions to compel arbitration, a stay here would safeguard against Coinbase 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. Time is thus of the essence in order to resolve the longstanding circuit split implicated by this case.

Accordingly, Coinbase requests that the Court construe this stay application as a petition for certiorari, grant the stay application, grant certiorari, consolidate this case with *Bielski*, issue an expedited briefing schedule, and schedule the case for

argument at the earliest opportunity. That was the path taken in *Nken v. Holder*, 556 U.S. 418 (2009), which also concerned the appropriate legal standard for stays pending appeal, there in the context of removal orders of noncitizens. Should the Court take that path here, Coinbase would dismiss the 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 petition for certiorari.

STATEMENT OF THE CASE

A. Factual Background.

Coinbase operates one of the largest cryptocurrency exchange platforms in the United States. Second Amended Class Action Compl. ¶ 1, *Suski v. Coinbase, Inc.*, No. 3:21-cv-04539 (N.D. Cal. Oct. 19, 2021), ECF No. 32-2. Coinbase users can buy, sell, and transact in myriad digital currencies, including "Dogecoin" (DOGE), a popular cryptocurrency. *Id.* ¶ 3. As a condition of using the platform, Coinbase requires all users—including Respondents here—to agree to the Coinbase User Agreement and its binding arbitration provision and delegation clause. Carter McPherson-Evans Decl. ¶¶ 6, 8–9, *Suski v. Coinbase, Inc.*, No. 3:21-cv-04539 (N.D. Cal. Oct. 19, 2021), ECF No. 33-1.

Respondents are now-former Coinbase users, each of whom created a Coinbase account before participating in a "Dogecoin Sweepstakes" held in early June 2021. Pet. App. 20a–22a. The Sweepstakes offered entrants (not limited to registered Coinbase users) the opportunity to win prizes of up to $1,200,000 in Dogecoin.

Coinbase's Motion to Compel Arbitration or Dismiss at 2, *Suski v. Coinbase, Inc.*, No. 3:21-cv-04539 (N.D. Cal. Oct. 19, 2021), ECF No. 33. The signup process required Respondents to each click a checkbox confirming agreement to Coinbase's User Agreement, which contains an arbitration provision and a delegation clause. Pet. App. 20a–21a. The arbitration provision applies to any dispute with Coinbase related to Respondents' use of Coinbase services and requires all disputes to be settled in binding arbitration on an individualized basis. Pet. App. 21a. The delegation clause provides that an arbitrator must decide all threshold questions of arbitrability. Pet. App. 30a.[1]

Coinbase's "Official Rules" for the Dogecoin Sweepstakes stated that participants could enter using one of "[t]wo methods of entry." Pet. App. 26a. The first method was for "account holders" to trade Dogecoin on Coinbase's platform. Pet. App. 26a. The second was to mail an index card containing the entrant's contact information. Pet. App. 26a. Although entrants were not required to be Coinbase users, pursuant to the Official Rules an entrant had to become a user (and agree to the Coinbase User Agreement) in order to claim a prize. Pet. App. 26a. The Official Rules also contained a forum selection clause providing for jurisdiction in the state and federal courts of California. Pet. App. 26a.

[1] The district court noted textual differences between Respondents' individually executed versions of the Coinbase User Agreement, but treated all versions as materially the same for purposes of deciding the arbitrability question. Pet. App. 20a–21a, 30a.

B. Coinbase's Motion to Compel Arbitration.

On June 11, 2021, the day after the Dogecoin Sweepstakes entry period ended, Respondents filed a putative class action complaint in the Northern District of California. The complaint was filed on behalf of Respondents and other Coinbase users who—after agreeing to comply with Coinbase's User Agreement—opted into the Sweepstakes by trading Dogecoin on Coinbase's platform. Pet. App. 20a. The putative class is likewise comprised exclusively of Coinbase users who participated in the Sweepstakes and agreed to the User Agreement, including the provisions governing arbitrability and delegation of arbitrability questions to an arbitrator.

On October 19, 2021, Coinbase moved to, *inter alia*, compel arbitration or, alternatively, to stay the litigation pending arbitration pursuant to 9 U.S.C. § 3. Coinbase's Motion to Compel Arbitration or Dismiss at 9–15. Coinbase argued that Respondents were "clearly on notice of the User Agreement and its arbitration provision," that this valid and enforceable arbitration provision did not conflict with the forum selection clause in the Official Rules, and that, in any event, "any dispute about the scope or applicability of the arbitration provision is delegated to the arbitrator." *Id.* at 10–12.

The district court denied Coinbase's motion to compel. Pet. App. 33a. In doing so, the district court acknowledged (as did Respondents) that Respondents agreed to Coinbase's User Agreement and that the Agreement contains a valid agreement to arbitrate. Pet. App. 29a. The district court also recognized that "disagreements over the scope of the arbitration provisions were delegated to the arbitrator," Pet.

App. 31a, and that the FAA codifies "the 'liberal federal policy favoring arbitration agreements' and 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration,'" Pet. App. 28a (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)). Nevertheless, the district court refused to enforce the delegation clause and denied Coinbase's motion to compel, reasoning that the forum selection clause in the Sweepstakes' Official Rules superseded the User Agreement's arbitration provision. Pet. App. 31a–33a.

Coinbase timely noticed an appeal of the district court's order denying Coinbase's motion to compel arbitration, pursuant to 9 U.S.C. § 16(a)(1). Notice of Appeal, *Suski v. Coinbase, Inc.*, No. 3:21-cv-04539 (N.D. Cal. Feb. 9, 2022), ECF No. 58. Coinbase filed its opening appeal brief with the Ninth Circuit on May 11, 2022; Respondents' brief is currently due on July 11, 2022; and Coinbase's reply brief is currently due on August 1, 2022.

C. Coinbase's Motion to Stay Pending Appeal.

After noticing its appeal of the denial of the motion to compel to the Ninth Circuit, Coinbase moved the district court to stay district court proceedings during the pendency of that appeal. Coinbase's Motion to Stay Pending Appeal, *Suski v. Coinbase, Inc.*, No. 3:21-cv-04539 (N.D. Cal. Feb. 9, 2022) At the stay hearing, the district court observed that Coinbase may succeed on appeal, remarking that, "I could see a different set of legal minds looking at this factual pattern and saying I was wrong." Pet. App. 51a. The district court also explained that it had "not seen a case that has a similar set of facts" and described itself as "right on the edge on this motion

. . . [u]sually, . . . on the motions to compel, I feel pretty confident. On this one I'm just not sure." Pet. App. 51a–52a. The district court added that it was "really hesitating" because "[i]f I'm wrong, then you'll go forward in arbitration, but the parties will have spent a lot of . . . time and money dealing with things that you would not have otherwise had to deal with if I'm wrong." Pet. App. 52a. Despite voicing these doubts, the district court denied Coinbase's stay motion on April 19, 2022. Pet. App. 46a. As the district court explained, "[i]n the Ninth Circuit, a district court's order denying a motion to compel arbitration does not automatically result in a mandatory stay of proceedings pending appeal of that order." Pet. App. 46a (citing *Britton*, 916 F.2d at 1412). The district court further denied Coinbase's request for a discretionary stay. Pet. App. 46a–48a.

On May 16, 2022, Coinbase filed a motion in the Ninth Circuit to stay district court proceedings pending appeal of the denial of its motion to compel arbitration. Coinbase's Motion to Stay Pending Appeal, *Suski v. Coinbase, Inc.*, No. 22-15209 (9th Cir. May 16, 2022), ECF No. 16-1. In light of circuit precedent refusing automatic stays in this circumstance, Coinbase sought a stay under the discretionary standard set forth in *Britton*. *Id.* at 2. Coinbase also identified the entrenched circuit split on the applicable legal standard; pointed out that six circuits have held that an appeal from an order denying a motion to compel arbitration triggers a mandatory stay because the district court is divested of jurisdiction during the appeal; and asked the Ninth Circuit, absent the grant of a discretionary stay, to en banc "revisit . . . the

outlier *Britton* standard and hold that an automatic stay pending appeal is required upon appeal of the denial of a motion to compel arbitration." *Id.* at 9 & n.7, 19.

On May 27, 2022, the Ninth Circuit denied Coinbase's motion for a stay pending appeal. Pet. App. 2a. The Ninth Circuit also declined to grant Coinbase's request to reconsider the *Britton* standard en banc. Pet. App. 2a.

ARGUMENT

The question presented by this case is whether Coinbase is entitled to an automatic stay of district court proceedings pending Coinbase's appeal from the district court's denial of Coinbase's motion to compel arbitration. Coinbase's position is—consistent with the law in six circuits—that a non-frivolous appeal from the denial of a motion to compel arbitration divests jurisdiction from the district court, and thus Coinbase is entitled to a stay as of right of district court proceedings.

Separately, Coinbase respectfully submits that it 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 traditional test, a stay is called for when 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.* (quoting *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)). 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 the important and recurring question of whether an appeal from

the denial of a motion to compel arbitration divests the district court of jurisdiction and requires an automatic stay of district court proceedings. There is a fair prospect that this Court will reverse the Ninth Circuit and endorse the majority view. Last, if a stay were denied, Coinbase would suffer the irreparable harm of being compelled to litigate a putative class action in court despite contracting specifically for individualized 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. The Circuits Are Split On Whether A Stay Is Required Pending Appeal Of A District Court's Denial Of A Motion To Compel Arbitration.

During the last four decades, an entrenched split has developed over whether a non-frivolous appeal from the denial of a motion to compel arbitration divests the district court of jurisdiction and triggers a mandatory stay. Three Circuits—the Second, Fifth, and Ninth Circuits—have held that it does not, and six Circuits—the Third, Fourth, Seventh, Tenth, Eleventh, and D.C. Circuits—have held that it does. The decision below from the Ninth Circuit follows the minority approach. Courts in both the majority and minority have acknowledged the divide, provided justifications for their positions and responses to the other side, and remain split.

1. Three Circuits Hold That An Appeal Of The Denial Of A Motion To Compel Arbitration Does Not Divest The District Court Of Jurisdiction.

The Ninth Circuit was the first to hold, in 1990, that an appeal from the denial of a motion to compel arbitration does not divest the district court of jurisdiction and trigger a mandatory stay. *Britton*, 916 F.2d at 1405. Although *Britton* acknowledged "the general rule that the filing of a notice of appeal divests the district court of jurisdiction and transfers jurisdiction to the appellate court," it also observed that "where an appeal is taken from a judgment which does not finally determine the entire action, the appeal does not prevent the district court from proceeding with matters not involved in the appeal." *Id.* at 1411 (quotation marks omitted). The Ninth Circuit explained that "[a]bsent a stay, an appeal seeking review of collateral orders does not deprive the trial court of jurisdiction over other proceedings in the case, and an appeal of an interlocutory order does not ordinarily deprive the district court of jurisdiction except with regard to the matters that are the subject of the appeal." *Id.* at 1412. It concluded that the "issue of arbitrability" is collateral to the merits and so held that the appeal of the denial of the motion to compel arbitration did not divest the district court "of jurisdiction to proceed with the case on the merits," reasoning that a contrary rule "would allow a defendant to stall a trial simply by bringing a frivolous motion to compel arbitration." *Id.* As the result of *Britton*, in the Ninth Circuit a litigant appealing the denial of a motion to compel arbitration—like Coinbase here—must satisfy the traditional discretionary test for a stay to obtain a

stay of district court proceedings pending appeal of the denial of a motion to compel arbitration. *Id.*

The Second Circuit adopted the same position in *Motorola Credit Corp. v. Uzan*, 388 F.3d 39 (2d Cir. 2004). In that case, an entire trial took place in the district court while the arbitrability appeal was pending. *Id.* at 46. In joining the Ninth Circuit, the Second Circuit acknowledged that "[o]ther circuits are divided on this question," with the Ninth Circuit holding that "the district court or the court of appeals may—but is not required to—stay the proceedings upon determining that the appeal presents a substantial question," and other circuits holding that "a district court may not proceed after the filing of a nonfrivolous appeal from an order denying arbitration." *Id.* at 54. The Second Circuit "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.*

A few years later, the Fifth Circuit joined the Second and Ninth Circuits in *Weingarten Realty Investors v. Miller*, 661 F.3d 904 (5th Cir. 2011). The Fifth Circuit acknowledged the split over "[w]hether an appeal from the denial of a motion to compel arbitration divests the district court of jurisdiction to proceed to the merits," *id.* at 907, and explained that the divergent views between the Circuits turned on "whether the merits of an arbitration claim are an aspect of a denial of an order to compel arbitration." *Id.* at 908. The Fifth Circuit reached the conclusion that "[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 Fifth Circuit joined the minority side of the split in holding that "[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." *Id.*

2. Six Circuits Hold That An Appeal Of The Denial Of A Motion To Compel Arbitration Divests The District Court Of Jurisdiction.

Six circuits have taken the opposite view, holding that a non-frivolous appeal of a denial of a motion to compel arbitration divests the district court of jurisdiction and therefore automatically stays proceedings in the district court.

The Seventh Circuit was the first court of appeals to address this issue after the Ninth Circuit's decision in *Britton*. *See Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504 (7th Cir. 1997). According to the Seventh Circuit, the appeal of a decision denying a motion to compel arbitration automatically divests the district court of jurisdiction over the case and so automatically stays proceedings there. The Seventh Circuit reasoned that "'a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously,'" and "'[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.'" *Id.* at 505 (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)). As examples of "aspects of the case" *not* "involved in the appeal," the Seventh Circuit pointed to "award[ing] costs and attorneys' fees after the losing side has filed an

appeal on the merits" and "conduct[ing] proceedings looking toward permanent injunctive relief while an appeal about the grant or denial of a preliminary injunction is granted." *Id.* In contrast to those examples, the Seventh Circuit concluded that "[w]hether the case should be litigated in the district court" or in arbitration *is* an "aspect of the case involved in the appeal" of a denial of a motion to compel arbitration—indeed, "it is the mirror image of the question presented on appeal." *Id.* "Continuation of proceedings in the district court largely defeats the point of the appeal and creates a risk of inconsistent handling of the case by two tribunals." *Id.*

The Seventh Circuit's ruling expressly rejected the Ninth Circuit's reasoning in *Britton*. First, the Seventh Circuit disagreed with *Britton*'s conclusion that "an appeal concerning arbitrability does not affect proceedings to resolve the merits." *Id.* at 506. To the contrary, "[w]hether the litigation may go forward in the district court is precisely what the court of appeals must decide." *Id.* And as to *Britton*'s point "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," the Seventh Circuit reasoned that the better response to that concern was for the appellee to "ask the court of appeals to dismiss the appeal as frivolous or to affirm summarily." *Id.*

The D.C. Circuit was the next to conclude that the district court was "divested of jurisdiction over the underlying action" while the appellate court addressed a "facially non-frivolous" appeal concerning "the threshold issue of whether the dispute between the parties is arbitrable under the FAA." *Bombardier Corp. v. Nat'l R.R.*

Passenger Corp., 333 F.3d 250, 252 (D.C. Cir. 2003).[2] In reaching this conclusion, the D.C. Circuit cited to its earlier unpublished opinion in *Bombardier Corp. v. National R.R. Passenger Corp.*, No. 02-7125, 2002 WL 31818924 (D.C. Cir. Dec. 12, 2002), which in turn approvingly cited the Seventh Circuit's decision in *Bradford*.

One year later, the Eleventh Circuit joined the Seventh and D.C. Circuits in *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249 (11th Cir. 2004). After acknowledging that the circuit courts to have considered the question "are split," the Eleventh Circuit announced that it was "persuaded by the reasoning of the Seventh Circuit." *Id.* at 1251. Like the Seventh Circuit, the Eleventh Circuit reasoned that "[t]he 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." *Id.* "The issue of continued litigation in the district court" thus is not "collateral to" the appeal, but rather is "the mirror image of the question presented on appeal." *Id.* (quotation marks omitted). As the Eleventh Circuit explained, the very reasons that the FAA allows the denial of a motion to compel arbitration to be immediately appealed "are inconsistent with continuation of proceedings in the district court, and a non-frivolous appeal warrants a stay of those proceedings." *Id.* at 1252.

The Tenth Circuit weighed in one year later in *McCauly v. Halliburton Energy Services, Inc.*, 413 F.3d 1158 (10th Cir. 2005). It too acknowledged the circuit split,

[2] Besides *Britton*, the D.C. Circuit is the only Circuit not to expressly acknowledge the discordant authority on the question of whether a non-frivolous appeal from an order denying a motion to compel arbitration automatically divests the district court of jurisdiction.

id. at 1160, and held that it was "persuaded by the reasoning" of those 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.* The Tenth Circuit "recognize[d] the Ninth Circuit's legitimate concerns regarding potential exploitation of the divestiture rule through dilatory appeals," but reasoned that those concerns could be addressed with an exception for frivolous appeals. *Id.* at 1162.

Two years later, the Third Circuit was next to join this side of the split. *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207 (3d Cir. 2007). It noted the existence of "a circuit split on the question of whether the filing of an interlocutory appeal pursuant to Section 16(a) of the FAA automatically deprives the trial court of jurisdiction to proceed until such time as the appeal is fully litigated or determined to be frivolous or forfeited," and "expressed agreement with the majority rule of automatic divestiture where the Section 16(a) appeal is neither frivolous nor forfeited." *Id.* at 215 n.6.

Most recently, the Fourth Circuit "join[ed] the position adopted by the majority of the circuits." *Levin v. Alms & Associates, Inc.*, 634 F.3d 260 (4th Cir. 2011). The Fourth Circuit began with the premise that "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 related to the claims at issue." *Id.* at 264 (quotation marks omitted). In an "arbitrability appeal," "[t]he core subject . . . is the challenged continuation of proceedings before the district court on the underlying claims." *Id.* Thus, allowing discovery to proceed while the denial of a

motion to compel arbitration was on appeal would "constitute[] permitting the continuation of the litigation, over which the district court lacks jurisdiction," "would cut against the efficiency and cost-saving purposes of arbitration," and "could alter the nature of the dispute significantly by requiring parties to disclose sensitive information that could have a bearing on the resolution of the matter." *Id.* Consistent with the other circuits on the majority side of the split, the Fourth Circuit excepted frivolous appeals from this rule providing for an automatic stay pending appeal. *Id.* at 265.

In sum, the Circuits are split 6-3 over whether a non-frivolous appeal of a district court's denial of a motion to compel arbitration (as Coinbase is currently pursuing) divests the district court of jurisdiction and so automatically stays proceedings in the district court.

B. The Court Should Grant Certiorari Because the Split Will Not Resolve on its Own, The Question Presented is Important, and this Case and *Bielski* are Ideal Vehicles.

This case merits this Court's review, for multiple reasons.

First, there is a clean, longstanding, deep, and acknowledged circuit split on the question presented. This split is not a lopsided split involving a single outlier circuit that might resolve on its own. To the contrary, the split emerged twenty-five years ago, when the Seventh Circuit disagreed with the Ninth, and it has deepened over time to include six circuits in one camp and three in the other. Coinbase sought a stay to permit en banc review of the Ninth Circuit's minority position but the Ninth Circuit refused—not just in this case, but in *Bielski* as well. *See also 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*"). Thus, there is simply no chance that this split will resolve unless this Court weighs in.

Further percolation also will not aid this Court's review. The nine courts of appeals that have weighed in on the question presented in published opinions have done so in reasoned decisions that provided both legal and practical explanations for the chosen rule. *See McCauley*, 413 F.3d at 1160-61 ("[T]he courts on each side of the divide have provided legal justification as well as supporting prudential rationales related to the competing interests and concerns about potential abuse of litigation and appeals. . . . [T]he opposing circuit positions have each presented a reasoned response to each other's prudential rationales.").

Second, the question presented is important. It arises in each and every case involving the appeal of a district court's denial of a motion to compel arbitration, of which there are countless such cases every year. Coinbase itself is currently involved in not one but two lawsuits that raise this exact question. Further, the question involves Congress's core policy determination underlying the FAA's rules governing appeals of arbitration-related orders, namely, the federal policy favoring economical arbitration and judicial efficiency. And while *Britton* predicted that discretionary stays would be sufficient to protect the arbitration right, *see* 916 F.2d at 1412, time has shown otherwise. As this case and *Bielski* illustrate, district courts are unlikely to stay their own proceedings and courts of appeals may not grant discretionary stays

even when—as here—the lower court acknowledges it might be "wrong" and, as such, the case does not belong in federal court at all.

Third, this case and the companion case in *Bielski* present excellent vehicles for review.[3] In both cases, the district court acknowledged that Coinbase's appeal was non-frivolous—noting in *Bielski* that "reasonable minds may differ" on the merits and in this case that the decision on Coinbase's motion to compel could be "wrong." Thus, even if a frivolous appeal were cause for an exception to the rule that an appeal divests the district court of jurisdiction, that exception does not apply here. Further, in both cases, the district court and Ninth Circuit denied Coinbase's request to stay the case pending appellate resolution of Coinbase's motion to compel arbitration, expressly recognizing that circuit precedent precluded a mandatory stay. And finally, in both cases, Coinbase also asked for a stay pending en banc reconsideration of *Britton*, and the Ninth Circuit denied that as well.

In this case (*Suski*), discovery is now under way in the district court. On May 6, Respondents served 23 wide-ranging interrogatories. Respondents later agreed to pause discovery only through litigation of Coinbase's pending motion to dismiss Respondent's third amended complaint, which may be decided as soon as August 22. Additionally, because no stay is in place, Coinbase has been forced to respond to

[3] 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 of the important question presented. And given the fact that petitions for certiorari on this precise question will always present a risk of mootness, a joint petition of the kind presented by Coinbase is the optimal way to ensure this Court has a path to the merits.

Respondents' third amended complaint through a motion to dismiss that is currently being briefed and will be argued on August 22. And, more broadly, absent a stay, Coinbase will need to prepare for class certification, despite the class action waiver in its arbitration agreement. In short, under the Ninth Circuit's flawed minority approach, Coinbase must devote significant time and resources to ongoing district court litigation despite the court of appeals' pending consideration of whether the case should be in arbitration or court in the first place.

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

Like the majority of circuits, this Court is likely to conclude that *Britton* was wrongly decided. The Ninth Circuit misunderstood the centrality of arbitrability to the merits of an appeal of an order denying a motion to compel arbitration. It also failed to appreciate the negative practical ramifications of its holding and the extent to which those ramifications flout Congress's purpose in enacting the FAA.

Britton began with the basic principle that "[a]bsent a stay, an appeal seeking review of collateral orders does not deprive the trial court of jurisdiction over other proceedings in the case, and an appeal of an interlocutory order does not ordinarily deprive the district court of jurisdiction except with regard to the matters that are the subject of the appeal." 916 F.2d at 1412. But it then incorrectly reasoned that the "issue of arbitrability" was collateral to the merits, such that "the district court was not divested of jurisdiction to proceed with the case on the merits." *Id.*

That observation is beside the point and *Britton*'s result no sense. As the six circuits that rejected *Britton* have recognized, "[t]he 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." *Levin*, 634 F.3d at 264 (quoting *Blinco*, 366 F.3d at 1251). Therefore, the "issue of continued litigation in the district court is not collateral to the question presented." *Id.* The whole point of an appeal of an order denying a motion to compel arbitration is to determine whether litigation should proceed in district court or before an arbitrator. Allowing proceedings to continue in district court pending resolution of the appeal of arbitrability "largely defeats the point of the appeal and creates a risk of inconsistent handling of the case by two tribunals." *Id.* As the Seventh Circuit observed in the context of appeals that involve immunity from suit (which similarly seek to vindicate the defendant's right to avoid litigation altogether), "[i]t makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one." *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989).

Furthermore, the flawed rule adopted by the Ninth Circuit in *Britton* was unnecessary to address the court's concern that a defendant would 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. As the circuits in the majority 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.

The majority rule—unlike *Britton*—also comports with this Court's jurisprudence from the last several decades concerning the reach and application of the FAA.[4] Since *Britton*, this Court has repeatedly reversed lower courts for failing to enforce valid delegation clauses in arbitration agreements. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (parties can delegate "gateway" questions of arbitrability to an arbitrator where they do so "clearly and unmistakably"); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010) (arbitrator can decide validity of entire Agreement unless validity of delegation clause itself is specifically challenged); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529-31 (2019) (delegation clause enforceable even where a court thinks the arbitrability argument is "wholly groundless"). Here, for example, Coinbase asks the Ninth Circuit to enforce its delegation clause in an appeal from a decision the district court recognized may be "wrong." And yet, the Ninth Circuit is requiring Coinbase to litigate in district court pending its review. That state of affairs undermines, not advances, this Court's command that delegation clauses should be fully enforced.

Finally, *Britton* is at odds with the policy rationale underlying Congress's decision in the FAA to allow a party seeking arbitration to immediately appeal the denial of a request for arbitration. *See* 9 U.S.C. § 16(a). "By providing a party who

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[4] *Britton* is difficult if not impossible to square with this Court's most recent arbitrability jurisprudence, which has emphasized the "liberal federal policy favoring arbitration," *AT&T Mobility*, 563 U.S. at 339 (cleaned up), and made clear that a valid arbitration leaves the district court with "no business weighing the merits of the grievance," *Henry Schein*, 139 S. Ct. at 529 (quotation marks omitted). If a district court has "no business weighing the merits of the grievance," then a district court's power to plow ahead on the merits of a case is not independent from the arbitrability question up on appeal.

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. If the court of appeals reverses and orders the dispute arbitrated, then the costs of the litigation in the district court incurred during appellate review have been wasted and the parties must begin again in arbitration." *Blinco*, 366 F.3d at 1251.

This case perfectly illustrates the scenario that Congress sought to avoid. If litigation proceeds in the district court while Coinbase's arbitrability appeal is pending, per *Britton*, the benefit of the FAA's interlocutory appeal provision is lost. To avoid duplicative proceedings in district court and arbitration, and also to avoid unpredictable case-by-case determinations whether to stay proceedings pending an arbitrability appeal, the most legally and prudentially sound approach is the rule that the majority of circuits in the split have adopted: a bright line rule that a non-frivolous appeal of an order denying a motion to compel arbitration divests a district court of jurisdiction.

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

A stay is necessary to protect Coinbase from irreparable harm. Absent a stay, Coinbase will be forced to litigate a putative class action in district court, even though its User Agreement subjects disputes with its users to individualized arbitration. Moreover, absent a stay, Coinbase will be forced to endure burdensome discovery on both individual and class-wide claims, despite the arbitration provision's class waiver. Notably, this harm has already begun: On May 6, Respondents propounded

23 interrogatories on Coinbase. In contrast, the American Arbitration Association's Consumer Rules, which apply under the User Agreement, provide for a low-cost and streamlined process, and do not permit such interrogatories. Carter McPherson-Evans Decl. Exs. 6–9, *Suski v. Coinbase, Inc.*, No. 3:21-cv-04539 (N.D. Cal. Oct. 19, 2021), ECF Nos. 33-7–33-10. Additionally, Coinbase is in the midst of responding to Respondents' third amended complaint. Thus, absent a stay, Coinbase will be forced to continue with active, full-blown district court litigation.

These harms 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 v. Alms and Associates, Inc.*, 634 F.3d 260, 265 (4th Cir. 2011). 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) ("If [a] party must undergo the expense and delay of a trial before being able to appeal, the advantages of arbitration—speed and economy—are lost forever."); *Int'l Ass'n of Machinists and 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.[5] As this Court has repeatedly explained, responding to class-wide claims is far more complicated and burdensome than proceeding on an individual basis. Thus, "shifting from individual to class arbitration . . . sacrifices the principal advantage of arbitration and greatly increases risks to defendants." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1414 (2019) (quotation marks omitted); *see also*, *e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) ("[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."); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018) (recognizing that preventing the

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[5] 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.*, 16 Civ. 7036, 2017 WL 11504834, at *2 (E.D.N.Y. Dec. 15, 2017); *Ward v. Est. of Goossen*, 14 Civ. 3510, 2014 WL 7273911, at *4 (N.D. Cal. Dec. 22, 2014); *Sutherland v. Ernst & Young, LLP*, 856 F. Supp. 2d 638, 643 (S.D.N.Y. 2012); *MC Asset Recovery, LLC v. Castex Energy, Inc.*, 07 Civ. 76, 2009 WL 10674184, at *1 (N.D. Tex. June 19, 2009); *Jones v. Deutsche Bank AG*, 04 Civ. 5357, 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.*, 20 Civ. 22, 2021 WL 8055644, at *5 (W.D. Tex. Dec. 21, 2021); *Zachman v. Hudson Valley Fed. Credit Union*, 20 Civ. 1579, 2021 WL 1873235, at *2 (S.D.N.Y. May 10, 2021); *B.F. v. Amazon.com, Inc.*, 19 Civ. 910, 2020 WL 3548010, at *4 (W.D. Wash. May 15, 2020); *Wilson v. Huuuge, Inc.*, 18 Civ. 5276, 2019 WL 998319, at *4 (W.D. Wash. Mar. 1, 2019); *Zaborowski v. MHN Gov't Servs., Inc.*, 12 Civ. 5109, 2013 WL 1832638, at *2–3 (N.D. Cal. May 1, 2013); *Ontiveros v. Zamora*, 08 Civ. 567, 2013 WL 1785891, at *5 (E.D. Cal. Apr. 25, 2013); *Steiner v. Apple Computer, Inc.*, 07 Civ. 4486, 2008 WL 1925197, at *5 (N.D. Cal. Apr. 29, 2008).

"individualized nature of . . . arbitration proceedings" would "interfere with one of arbitration's fundamental attributes"). 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.

The irreparable harm also will continue to accrue. Not only has discovery commenced, but class certification briefing is currently set to begin on October 14, 2022, which would require class certification discovery to take place this summer and early fall. Case Management and Pretrial Order, *Suski v. Coinbase, Inc.*, No. 3:21-cv-04539 (N.D. Cal. May 3, 2022), ECF No. 82. Additionally, on May 10, 2022, Respondents filed a third amended complaint. Third Amended Class Action Complaint, *Suski v. Coinbase, Inc.*, No. 3:21-cv-04539 (N.D. Cal. May 10, 2022), ECF No. 83. Coinbase moved to dismiss that Complaint and—unless this case is stayed—will need to prepare for oral argument on that motion set for August 22, 2022. While Respondents have agreed to temporarily pause discovery until a ruling on Coinbase's pending motion to dismiss, that ruling could come as soon as August 22, triggering immediate and onerous discovery. All of these resources would prove wasted if Coinbase ultimately prevails and the district court's order denying arbitration is overturned on appeal.[6]

[6] Coinbase filed its motion to dismiss the third amended complaint on June 9, 2022, which motion included a renewed request to compel arbitration. That motion will be fully briefed

Under these circumstances, a stay is plainly justified. This case and *Bielski* are ideal vehicles to resolve a deeply entrenched circuit split; there is a significant likelihood that, upon granting review, this Court will reverse the Ninth Circuit; and, absent a stay, Coinbase will forever forfeit its contracted-for right to resolve its claims quickly, privately, and economically. This Court has recently granted similar stays in matters involving appeals from lower court denials of motions to compel arbitration. *See Henry Schein, Inc. v. Archer and White Sales, Inc.*, No. 19A766 (granting stay pending final disposition of the petition for certiorari); *Henry Schein, Inc. v. Archer and White Sales, Inc.*, No. 17A859 (same). Coinbase requests that this Court follow this same practice here and stay the district court proceedings pending the disposition of Coinbase's petition for certiorari.[7]

IV. TO AVOID MOOTNESS, THE COURT SHOULD HEAR THE CASE EARLY NEXT TERM.

Because it concerns the standard applicable to a stay pending appeal, the question presented in this case will remain live for only a limited time. Once the

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as of Monday, August 1, 2022, and is set for argument on August 22, 2022, less than a month away. This ongoing district court litigation during Coinbase's appeal of the denial of its motion to compel arbitration only reinforces why this Court should grant a stay: it would be wasteful for Coinbase to be compelled to repeatedly respond to amended pleadings and other district court filings while the Ninth Circuit determines whether this case should be in court at all. The urgency is especially acute here, where Coinbase is suffering these burdens both in this case and in *Bielski*.

[7] Respondents will suffer no irreparable injury from a stay. Respondents seek neither injunctive nor prospective relief. The only "harm" they might face is a delay in potentially obtaining monetary damages, which are fully compensable. Plus, 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 Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631 (1985), the balance of equities favor a stay.

court of appeals issues its mandate in Coinbase's appeal of the denial of its motion to compel arbitration, the dispute over the proper legal standard for a stay pending appeal will be moot.

Experience shows that the issue presented by this petition is particularly subject to mootness so as to prevent this Court from reaching the important question presented. Petitioner is aware of at least two petitions filed in the last two years that raised the same question presented as this case but were mooted out and dismissed pursuant to joint stipulations even before a brief in opposition to the petition was filed—because, after the petitions were filed, respondents reversed course and agreed to a stay of district court proceedings pending appeal. *See PeopleConnect, Inc. v. Callahan*, No. 21-16040 (cert petition filed Dec. 13, 2021; petition dismissed pursuant to Rule 46 on Dec. 23, 2021); *PeopleConnect, Inc. v. Knapke*, No. 21-35690 (cert petition filed Nov. 12, 2021; petition dismissed pursuant to Rule 46 on Dec. 1, 2021).

Accordingly, if the Court agrees that this case warrants review, it should adopt a schedule to ensure that the case is decided expeditiously, before the divestiture question becomes moot. Coinbase respectfully submits that the following two pathways would permit expeditious review.

First, and preferably, the Court could treat this stay application and the similar application in *Bielski* as petitions for certiorari, grant the stay, grant certiorari, consolidate *Suski* and *Bielski*, and set the case for argument on the earliest possible calendar. The Court took this approach in *Nken v. Holder*, 556 U.S. 418 (2009), where the applicant filed a stay application seeking review of a circuit split

on the appropriate standard for stays pending appeal in cases involving the removal of noncitizens. The Court granted the stay application, treated it as a petition for certiorari, granted certiorari, and set an expedited briefing schedule to avoid mootness. Were the Court to proceed that way here, Coinbase would dismiss its contemporaneously filed joint petition for certiorari and be prepared to brief this case on whatever expedited timeline this Court deems appropriate.

Second, and alternatively, the Court could grant this stay application and set an expedited briefing schedule on the joint petition for certiorari. To that end, Coinbase has simultaneously filed a joint petition for certiorari and a motion to expedite consideration of that petition.[8]

CONCLUSION

The application for a stay should be granted.

Respectfully submitted,

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[8] A further alternative would be for the Court to stay not only the district court proceedings, but also the Ninth Circuit appeal. With district court and Ninth Circuit proceedings stayed, there would be no need for this Court to expedite its disposition of the joint petition.