No. 22-105

IN THE
Supreme Court of the United States

COINBASE, INC.,
Petitioner,

v.

ABRAHAM BIELSKI,
Respondent.

COINBASE, INC.,
Petitioner,

v.

DAVID SUSKI, *et al.,*
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF JOINT PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Bielski's brief in opposition underscores why certiorari is warranted. The existence of a split is beyond reasonable debate, and Bielski essentially concedes it. As he acknowledges, six courts of appeals have held under *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam), 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. And he acknowledges that three other circuits—including the Ninth Circuit below—have held the opposite. The split is acknowledged, deep, and longstanding. Only this Court can resolve it.

Bielski lacks a persuasive defense of the Ninth Circuit's decision. An 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 the issue on appeal 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. Bielski does not attempt to explain why Congress in the Federal Arbitration Act ("FAA") would have granted defendants the right to an immediate interlocutory appeal of the arbitrability question if Congress nonetheless intended to permit district court proceedings to march onward—through discovery, potential class proceedings, and even a trial—during the interlocutory appeal.

Bielski's assertion that the question presented is insufficiently important to warrant this Court's review is not credible. The question presented affects every case in which a motion to compel arbitration is

denied in three circuits that span most of the Nation's major commercial centers. While Bielski claims that litigants in those circuits can still obtain a discretionary stay if their case is sufficiently meritorious, it rarely plays out that way. Obtaining a discretionary stay is simply more theoretical than real, as exemplified by the proceedings below. In each case, the district court's basis for refusing to compel arbitration was weak, and in each case, the district court acknowledged that Coinbase's arbitrability appeal raised serious questions. But in each case, Coinbase was denied a stay anyway—a common result in the Ninth Circuit.

That this Court denied Coinbase's stay applications has no bearing on this Court's consideration of the joint petition, and Bielski does not contend otherwise. "Stays pending appeal to this Court are granted only in extraordinary circumstances," and the Court's denial of a stay does not necessarily express a view about the propriety of certiorari. *Graves* v. *Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). In both cases, Coinbase's appeals remain pending, and the Ninth Circuit has yet to schedule oral argument. This Court can therefore resolve this important question presented in the normal course.

ARGUMENT

I. THE CIRCUITS ARE SPLIT, AS BIELSKI EFFECTIVELY CONCEDES.

The existence of a circuit split is not debatable. The courts of appeals have expressly acknowledged they "are split" over whether a non-frivolous arbitrability appeal ousts the district court's jurisdiction to proceed until the appeal is resolved. *Blinco* v. *Green Tree Servicing, LLC*, 366 F.3d 1249, 1251 (11th Cir.

2004) (per curiam). The split has become ever more entrenched. Six circuits correctly hold that an arbitrability appeal automatically divests the district court of jurisdiction. Three hold the opposite. The split will not be resolved without this Court's intervention.

Bielski concedes (at 8) that the circuits "vary" in their approaches to the question presented. Indeed, in opposing a stay, Bielski agreed (Stay Opp. 14) that the circuits have reached different results in the "singular procedural circumstances of an interlocutory appeal of the denial of a motion to compel arbitration." But Bielski says (Br. in Opp. 10-11) this variation is not "a certiorari-worthy conflict" because each "circuit presented with an opportunity to address the issue has applied" this Court's decision in *Griggs*.

But a disagreement over the proper interpretation of this Court's precedent on a question of federal law is a quintessential circuit split warranting review. It is no rebuttal that the circuits all purport to apply *Griggs*; applying *Griggs*, the circuits reach *different conclusions* on how to answer the question presented. This Court routinely grants certiorari to review circuit splits over application of this Court's precedent. In the first sitting of this Term, for example, the Court will hear a case to resolve a split over the application of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). *See Nat'l Pork Producers Council* v. *Ross*, No. 21-468. Indeed, it is difficult to imagine a circuit conflict that is not, at some level of generality, a disagreement over the application of an accepted legal rule.

Bielski's other attempts to disclaim the split are even less persuasive. He asserts (at 12) that "there is

no widespread 'confusion' over how *Griggs* is to be applied" to arbitrability appeals. That is quite wrong; the circuits are intractably split on this question. He argues that reviewing this case would amount to "error correction." That is similarly groundless. A petition calls for error-correction where it raises factbound questions that do not implicate any disputed legal issue. *See* Stephen M. Shapiro et al., *Supreme Court Practice* § 5.12(c)(3) (11th ed. 2019). That is nothing like this case. And Bielski's suggestion (at 11) that this Court only reviews splits involving "fundamental rights and duties" is both incorrect and ignores the importance of the question presented.

Nor does Bielski's assertion (at 13) that this Court has denied review "in cases presenting questions like this" call into doubt the propriety of certiorari. He does not contend that the Court has denied review of petitions raising *this* question. To the contrary, in the two petitions presenting this question, respondents mooted the case by agreeing to a stay rather than risk this Court's review—an indication of the strong likelihood that this Court would grant review. *See PeopleConnect, Inc.* v. *Callahan*, No. 21-885; *PeopleConnect, Inc.* v. *Knapke*, No. 21-725. The cases that Bielski cites as analogous (at 13) may have suffered from any number of vehicle problems, and none involved a six-to-three split on a recurring question of federal law.

II. THE NINTH CIRCUIT'S DECISION IS WRONG.

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 Data Corp.* v. *Physician Comput. Network,*

Inc., 128 F.3d 504, 506 (7th Cir. 1997). A district court lacks jurisdiction to litigate a case while the court of appeals is deciding whether the case should be litigated in the first place. *Id.*

This conclusion follows from the FAA. In the federal system, defendants must usually "wait until after final judgment to vindicate valuable rights, including rights central to our adversarial system." *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 108-109 (2009); *see* 28 U.S.C. § 1291. But Congress made an exception for arbitration in the FAA and granted defendants the statutory right to an immediate appeal. *See* 9 U.S.C. § 16(a). In doing so, Congress recognized that an arbitration agreement provides "a right not to litigate the dispute in a court." *Blinco*, 366 F.3d at 1252. Once a defendant like Coinbase is wrongfully forced to proceed in federal court, the defendant loses that right forever.

Bielski's defense of the Ninth Circuit is unpersuasive. Quoting *Morgan* v. *Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022), Bielski argues (at 17) that federal courts may not "invent special, arbitration-preferring procedural rules." But the right to an immediate interlocutory arbitrability appeal was accorded by Congress, not invented by courts. Bielski does not explain why Congress would have granted parties a right to an immediate interlocutory appeal of a refusal to compel arbitration if Congress had contemplated that litigation could proceed while the appeal was pending. To the contrary, "[c]ontinuation of proceedings" while an appeal is pending "largely defeats the point of the appeal." *Bradford-Scott*, 128 F.3d at 505.

Bielski compares (at 20) denials of motions to compel arbitration with "preliminary injunctions and

other rulings a party may appeal before final judgment" that do not automatically stay district-court litigation. But these examples undermine Bielski's argument. A successful appeal of a preliminary injunction, for example, does not affect the district court's authority over the remainder of the case. By contrast, a successful appeal of a refusal to compel arbitration entirely deprives the district court of authority over the case.

The closer analogue is to cases where defendants are entitled to an immediate interlocutory appeal to vindicate their right to avoid litigation entirely. Bielski does not dispute that, in such cases, a stay is automatic and mandatory. Thus, in the context of qualified immunity, sovereign immunity, and double jeopardy, district courts cannot proceed with litigation while an appeal is pending. *See Apostol* v. *Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989). Bielski attempts (at 19) to distinguish those cases from arbitration on the ground that the "grant of immunity protects the defendant from being brought before a tribunal at all." But that is incorrect. Double-jeopardy, for example, protects defendants from prosecution in federal court, but does not prevent state prosecution for the same conduct. *See Gamble* v. *United States*, 139 S. Ct. 1960, 1964 (2019). Immunities protect defendants from being forced to proceed in a tribunal that lacks authority to hear the case. The same reasoning that requires an automatic stay during immunity appeals applies with equal force in arbitrability appeals.

Bielski cites (at 18) *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 21 (1983), for the proposition that "considerations of arbitrability are 'easily severable' from the underlying

merits of a dispute." But context shows that *Moses H. Cone* likewise undermines rather than supports Bielski's argument. There, this Court held that a federal court abused its discretion by *refusing* to resolve a motion to compel arbitration while litigation proceeded in parallel, and that district courts should not abstain from addressing arbitrability even if related litigation is ongoing. 460 U.S. at 19-20. *Moses H. Cone* thus reaffirms federal courts' obligation to respect the "congressional declaration of a liberal federal policy favoring arbitration." *Id.* at 24. It offers no support for the Ninth Circuit's rule allowing arbitration agreements to be ignored during an interlocutory appeal.

Nor does Bielski even attempt to explain how the Ninth Circuit's rule could survive this Court's more recent arbitration jurisprudence, including *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 68-70 (2010) (holding arbitrability is an "antecedent" issue that must be decided before a court reaches the merits), and *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) (holding district courts have "no business weighing the merits of the grievance" if the case belongs in arbitration (internal quotation marks omitted)). Because they are irreconcilable with the Ninth Circuit's rule, Bielski simply ignores these holdings.

III. THE QUESTION PRESENTED HAS IMPORTANT REAL-WORLD CONSEQUENCES.

Lacking a plausible basis to dispute the split or defend the Ninth Circuit's position on the merits, Bielski principally argues that the question presented is insufficiently consequential to warrant review. But the

question presented is exceptionally important. In three circuits—encompassing most of the Nation's major commercial centers—arbitration clauses can be effectively nullified for however long it takes for an appellate court to hear and decide the merits of an arbitrability appeal. All the protective features of an arbitration clause—including avoiding the costs of litigation and the burdens of discovery—are stripped away during that interim period, which often lasts years. Without a stay, the arbitration agreement loses its practical force, as virtually every aspect of litigation that the arbitration clause was supposed to prevent can now unfold during the months and years until an appellate court hears and rules on the merits of the arbitration question.

Bielski claims (at 2) that "there is little distinction in practice between circuits" that impose a mandatory stay and circuits where stay is discretionary. Experience proves otherwise. District courts and circuit courts have routinely refused to grant discretionary stays of district court proceedings during arbitrability appeals, only for the circuit court to later hold that the dispute must be arbitrated. Defendants like Coinbase are thereby required to proceed with district court litigation even in cases where the court of appeals later easily concludes that district court litigation was improper.

In one illustrative and recent case, the district court and Ninth Circuit both denied a discretionary stay even though, as the Ninth Circuit held a year later when it resolved the appeal, the parties' 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* Order, *Dekker*, No. 20-16584 (9th Cir. Nov. 18, 2020) (denying stay). Similarly, the district court and Ninth Circuit both denied a stay in another case even though—two years later—the Ninth Circuit held that the "district court erred" in refusing to compel arbitration. *Fernandez* v. *Bridgecrest Credit Co.*, No. 19-56378, 2022 WL 898593, at *1 (9th Cir. March 28, 2022); *see* Order, *Fernandez*, No. 19-56378 (9th Cir. Jun. 24, 2020) (denying stay). These examples are not aberrations.[1]

The two cases at issue in this petition further underscore the practical importance of the question presented. In both cases, the district court's basis for refusing to compel arbitration was exceptionally weak, and both decisions are likely to be reversed on appeal. In fact, in each case, the district court *acknowledged* "that reasonable minds may differ over" its decision to deny arbitration. Pet. App. 42a; *see id.* at 51a. Yet in both cases, the district court has required the cases to plow ahead, and the Ninth Circuit likewise denied a discretionary stay in an unreasoned order. The decisions below thus belie Bielski's assertion (at 2) that "discretionary stays are particularly likely in cases that pose 'substantial questions' " on the merits. The district courts below recognized that these cases pose

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[1] *See, e.g.*, *Knapke* v. *PeopleConnect, Inc.*, 38 F.4th 824, 828-829 (9th Cir. 2022); 10/20/2021 Order, *PeopleConnect*, 38 F.4th 824 (No. 21-35690); *Mohamed* v. *Uber Techs., Inc.*, 848 F.3d 1201, 1206 (9th Cir. 2016); 10/22/2015 Order, *Mohamed*, 848 F.3d 1201 (Nos. 15-16178, 15-16181, 15-16250); *Cox* v. *Ocean View Hotel Corp.*, 533 F.3d 1114, 1119-26 (9th Cir. 2008); 09/21/2006 Order, *Cox*, 533 F.3d 1114 (No. 06-15903); *Arciniaga* v. *Gen. Motors Corp.*, 460 F.3d 231, 234-235 (2d Cir. 2006); 03/13/2006 Order, *Arciniaga*, 460 F.3d 231 (2d Cir. No. 05-6299).

substantial questions, but Coinbase was denied a stay anyway.

Citing *Federal Trade Commission* v. *Standard Oil Co. of California*, 449 U.S 232, 244 (1980), Bielski mischaracterizes (at 16) the harms to defendants of proceeding in district court while an appeal is pending as mere "litigation expenses." This fundamentally misconstrues the right to arbitrate. Defendants like Coinbase have the right not to proceed—at *all*—in federal court, from the intrusive discovery process through trial. That is why Congress authorized interlocutory appeals under these circumstances, rather than require defendants to wait for final judgments to vindicate the right to arbitrate. It is also why most circuits grant defendants an automatic stay to prevent the dual "costs of litigation and arbitration" that would arise "if a district court continues with the case while an appeal" "is pending" and the appeal succeeds. *Bradford-Scott*, 128 F.3d at 506. Otherwise, "the parties' preference for non-judicial dispute resolution, which may be faster and cheaper" "may be lost or even turned into net losses." *Id.*; *see Blinco*, 366 F.3d at 1252 (same).

Bielski declares (at 15) "*de minimis*" the practical effects of forcing defendants to litigate in district court. But federal court discovery is vastly more oner-

ous than the more limited discovery permitted in arbitration.[2] Absent a stay, "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 & Assocs., Inc.*, 634 F.3d 260, 265 (4th Cir. 2011). Thus, Bielski's suggestion (at 17) that federal "discovery" might be used "in arbitration" is a flaw, not a feature, of the Ninth Circuit's approach. And the Ninth Circuit's approach even permits district courts to proceed with trial while arbitration appeals are pending. *See, e.g.*, Order, *Henry Schein Inc.* v. *Archer & White Sales, Inc.*, No. 19A766 (U.S. Jan. 24, 2020) (granting stay where litigation was set for trial while arbitrability question remained on appeal); *Motorola Credit Corp.* v. *Uzan*, 388 F.3d 39, 53-54 (2d Cir. 2004) (holding no stay was required even though trial occurred while arbitrability appeal was pending).

Bielski's assertion (at 16) that the parties in his particular case have only just begun discovery is not a reason to deny review. Initial disclosures are due in ten days, and discovery will follow. In fact, all discovery on Bielski's claims may well conclude *before* the Ninth Circuit rules on Coinbase's appeal of the denial to compel arbitration. Nor does it matter that—in his

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[2] *Compare* Am. Arb. Ass'n, Consumer Arb. Rule 22 (allowing arbitrator to direct limited document sharing and identification of witnesses, "keeping in mind that arbitration must remain a fast and economical process," but permitting "[n]o other exchange of information" absent a fundamental fairness concern), *with, e.g.*, Fed. R. Civ. P. 26 (initial disclosures, expert testimony and reports, pretrial disclosures, and discovery on "any nonprivileged matter"), Fed. R. Civ. P. 30 (depositions), Fed. R. Civ. P. 33 (written interrogatories); Fed. R. Civ. P. 36 (requests for admission).

particular case—"Bielski has agreed to seek only individual (not class) discovery." Br. in Opp. 16. The *Bielski* District Court has not limited discovery to Bielski's individual claims, and it is unclear how long it will take for the appellate process to play out. And much of the federal-rule-authorized discovery on Bielski's individual claims would not occur in arbitration. This petition therefore remains an ideal vehicle to resolve the question presented.

CONCLUSION

For the foregoing reasons, and those in Coinbase's joint petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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