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

BRIEF OF RESPONDENTS DAVID SUSKI, JAIMEE MARTIN, JONAS CALSBEEK, AND THOMAS MAHER IN SUPPORT OF GRANTING COINBASE, INC.'S JOINT PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The extent to which district courts have discretion to conduct merits proceedings pending a party's interlocutory appeal of a denial of a motion to compel arbitration.

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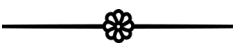
BRIEF OF RESPONDENTS IN SUPPORT OF GRANTING JOINT PETITION FOR WRIT OF CERTIORARI

Respondents David Suski, Jaimee Martin, Jonas Calsbeek, and Thomas Maher (the "*Suski* Respondents") respectfully submit this Response to Petitioner Coinbase, Inc's ("Coinbase") Joint Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in *Suski v. Coinbase, Inc.*, No. 22-15209 ("Joint Petition").



INTRODUCTION

The Court should grant Coinbase's Joint Petition. Coinbase is correct that the courts of appeals are divided on how to answer the question presented. The answer is of nationwide importance, not only to litigants in their access to justice, but also to district courts in their administration of justice.

Six circuits have adopted a procedural policy of halting all district court proceedings indefinitely, whenever a "non-frivolous" interlocutory appeal is filed under the guise of the Federal Arbitration Act ("FAA"). Pet. 14-17. That procedural policy is imprudent, contrary to Congress's chosen policy in the FAA, and otherwise untethered from the law. All courts of appeals concede, as they must, that the policy lacks any textual grounding in the FAA. *See, e.g., McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1160 (10th Cir. 2005) ("[T]he statute does not specify whether a motion to stay

proceedings during an appeal should be granted."). Lacking any textual foundation for their policy, six circuits have resorted to overextending *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982), and to contriving a conflict with appellate "jurisdiction" whenever a district court conducts merits proceedings while a court of appeals reviews arbitrability. *McCauley*, 413 F.3d at 1160 (conceding that this Court "has never explicitly extended" *Griggs*).

Three circuits have correctly discerned the absence of any jurisdictional conflict. Pet. 12-13. Three circuits permit district courts to apply this Court's traditional guidance for determining whether to stay a case pending appeal. *Id.* Such guidance considers not only the strength or weakness of an appeal, but also the facts, circumstances, and stakeholder interests in each case. *E.g., Nken v. Holder*, 556 U.S. 418 (2009). The Court's traditional stay guidance is consistent with the careful balance struck by Congress in the FAA, and with the limited jurisdictional principle explained in *Griggs*. The Fifth, Ninth, and Second Circuits are therefore correct in holding that district courts have discretion to decide whether to stay or conduct merits proceedings pending an appeal on arbitrability.

Coinbase argues that district courts "rarely" grant discretionary stays pending arbitrability appeals, and that such stays are "more theoretical than real." Pet. 2. That argument is simply untrue, as Coinbase itself contended below. When demanding a stay from the District Court in *Suski*, Coinbase contended that "California district courts routinely exercise th[eir] discretion to grant complete stays of all proceedings" pending an "appeal of the denial of a motion to compel arbitration." *See Suski* D. Ct. Dkt. 59 at 2 (emphasis

added). The truth, as Coinbase itself argued below, is that discretionary stays are just as "routinely" granted as they are declined by district courts. *Id.* (collecting cases).

Contrary to Coinbase's suggestion, district courts are not using this Court's traditional stay guidance to serve some ongoing mutiny against private arbitration agreements. Rather, district courts are using the Court's traditional stay guidance to efficiently administer justice, and to pause or exercise their own decided jurisdiction over each case, depending on the particular facts, circumstances, and merits of each case. The *Suski* Respondents' case well exemplifies this.

In *Suski*, the District Court did not invalidate any arbitration agreement. Rather, the *Suski* District Court merely enforced an unambiguous litigation agreement, written in a contract containing no arbitration terms whatsoever. The FAA and its interlocutory appeal provisions exist only to validate and enforce private arbitration agreements. They do not exist to limit or obstruct private litigation agreements like the ones at issue in *Suski*.

The policy of six circuits, however, would significantly obstruct and delay the *Suski* litigation, without advancing any arguable purpose of the FAA. It is one thing to file a "non-frivolous" arbitrability appeal where a district court has invalidated an arbitration agreement. It is another thing to file a "non-frivolous" arbitrability appeal where the appellant expressly agreed to litigate, in a "contract" and "transaction" where the word "arbitration" was never mentioned. 9 U.S.C. § 2.

The *Suski* litigation exemplifies the wisdom of discretionary stays for an additional reason. *Suski* involves another party to some of the contracts at issue, apart from Coinbase and the *Suski* Respondents. When Coinbase noticed its arbitrability appeal, that other party had not even moved to compel arbitration, much less appealed the denial of any motion to compel. *Suski* Respondents' claims against that additional party are substantially similar to their claims against Coinbase. Thus, under the procedural policy of six circuits, the District Court would have to indefinitely stay *Suski* Respondents' claims against the additional party, who submits to litigation, or alternatively, risk adjudicating the same merits issues on two different litigation schedules in the same case.

Nothing in the FAA imposes such inefficient results on district courts and litigants. Nothing in *Griggs* suggests that a district court must relinquish its own decided jurisdiction over a case's merits, whenever any party files an interlocutory appeal challenging the court's jurisdiction to adjudicate some or all of the merits. The policy of six circuits is legally incorrect, and injects unnecessary complications and inefficiencies into the procedural landscape of many contract-related cases.

The Court should grant Coinbase's Joint Petition, and restore district courts' discretion to pause or exercise their decided jurisdiction to the extent they deem prudent in individual cases.

STATEMENT OF THE CASE

A. Factual Summary

Coinbase is among the world's largest cryptocurrency exchanges. *See Suski* D. Ct. Dkt. 36, ¶ 1. Coinbase allows consumers to buy and sell various cryptocurrencies through its online trading platform. *Id.*, ¶ 2. Coinbase earns revenue by charging transaction fees when its customers buy or sell cryptocurrencies via the Coinbase website or mobile app. *Id.*

Months or years before June 2021, Coinbase required each *Suski* Respondent to accept a "User Agreement" to open a Coinbase account and begin trading cryptocurrencies. *Suski* D. Ct. Dkt. 33-1 ("McPherson-Evans Declaration"), ¶ 6. Between January 2018 and May 2021, each *Suski* Respondent opened a Coinbase account, and thereby assented to some version of Coinbase's adhesive User Agreement. *Id.*, ¶¶ 7-13. The User Agreements were formed as contracts between Coinbase and each *Suski* Respondent only; they did not purport to bind or benefit any third party. *See, e.g., Suski* D. Ct. Dkt. 33-7. Coinbase's User Agreements contained general arbitration provisions, including provisions delegating certain interpretive and jurisdictional disputes to an arbitrator. *Id.*

In June 2021, however, Coinbase and its new business partner, Defendant Marden-Kane, Inc. ("Marden-Kane"), solicited each *Suski* Respondent to enter into a new "transaction." 9 U.S.C. § 2. This new "transaction" was a one-week cryptocurrency sweepstakes, to be sponsored by Coinbase and administered by Marden-Kane (collectively, "Defendants"). *Id.*

Defendants' new offer was to give each *Suski* Respondent one entry into a random drawing to win up to $300,000. *Suski* D. Ct. Dkt. 36, ¶¶ 2, 6-11. All that the *Suski* Respondents had to do was click an "Opt in" button, buy or sell at least $100 in so-called "Dogecoins" between June 3, 2021 and June 10, 2021, and pay the attendant transaction fees. *Id.* Upon doing that, Defendants' promise was that each *Suski* Respondent would be entered to win up to $300,000 in cash or Dogecoins. *Id.*[1]

The *Suski* Respondents all accepted Defendants' sweepstakes offer. *Id.*, ¶¶ 28-39. They clicked the "Opt in" button, traded $100 or more in Dogecoins between June 3, 2021 and June 10, 2021, and paid all associated transaction fees. *Id.* As an express condition of *Suski* Respondents' sweepstakes entries and eligibilities to win prizes, Defendants required *Suski* Respondents to adhere to an "Official Rules" agreement. *See Suski* D. Ct. Dkt. 22-1 ("Official Rules Agreement" or "Official Rules"), §§ 1, 3. Defendants and each *Suski* Respondent formed their Official Rules Agreements between June 3 and June 10, 2021. *Suski* D. Ct. Dkt. 53 at 7.

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[1] Coinbase's Petition asserts that the sweepstakes "signup process" required *Suski* Respondents "to confirm that they agreed to Coinbase's User Agreement." *See* Pet. 8 (citing nothing in any court's record). It was and remains undisputed below that this assertion is false; nobody in the *Suski* case has ever asserted this before, nor could they credibly assert such a thing. The truth is that *Suski* Respondents were never presented with any User Agreement as part of the sweepstakes "signup process." *Id.* The Petition's brand new, uncited factual assertion is fabricated out of thin air, in an apparent attempt to create a "non-frivolous" impression that the *Suski* Respondents' underlying claims are arbitrable. Fortunately, the assertion is immaterial to deciding the question presented.

The Official Rules Agreements did not mention the word "arbitration," or any variant thereof. Rather, in a section titled "Disputes," the Official Rules provided as follows.

> All federal, state and local laws and regulations apply. THE CALIFORNIA COURTS (STATE AND FEDERAL) SHALL HAVE SOLE JURISDICTION OF ANY CONTROVERSIES REGARDING THE PROMOTION AND THE LAWS OF THE STATE OF CALIFORNIA SHALL GOVERN THE PROMOTION. EACH ENTRANT WAIVES ANY AND ALL OBJECTIONS TO JURISDICTION AND VENUE IN THOSE COURTS FOR ANY REASON AND HEREBY SUBMITS TO THE JURISDICTION OF THOSE COURTS.
>
> [irrelevant text omitted]
>
> By entering and participating in the Promotion, Entrants hereby expressly agree and accept that for all that is related to the interpretation, performance and enforcement of these Official Rules, each of them expressly submit themselves to the laws of the United States of America and the State of California, expressly waiving to any other jurisdiction that could correspond to them by virtue of their present or future domicile or by virtue of any other cause.

Suski D. Ct. Dkt. 22-1, § 10.

Thus, Coinbase and Marden-Kane unambiguously required each *Suski* Respondent to litigate, not arbitrate, "ANY CONTROVERSIES REGARDING THE PROMOTION," including "all that is related to the

interpretation, performance, and enforcement of these Official Rules." *Id.*

Soon after *Suski* Respondents entered the Dogecoin sweepstakes, they realized that they had been duped into paying $100 or more to enter. *Suski* D. Ct. Dkt. 36, ¶¶ 28-39. They realized that Coinbase and Marden-Kane had deceptively advertised this sweepstakes, to manipulate them into paying for entries they would not otherwise have paid for. *Id.* In other words, *Suski* Respondents found themselves having "CONTROVERSIES" with Coinbase and Marden-Kane "REGARDING THE PROMOTION." *Suski* D. Ct. Dkt. 22-1, § 10.

Therefore, each *Suski* Respondent brought his or her claims regarding the sweepstakes before the District Court, as explicitly required by Coinbase and Marden-Kane.

B. Procedural History

On June 11, 2021, Respondent David Suski filed a class action complaint in the United States District Court for the Northern District of California, asserting claims against Coinbase Global, Inc. and Marden-Kane for violations of California's False Advertising Law ("FAL") and Unfair Competition Law ("UCL"). *Suski* D. Ct. Dkt. 1.

On August 31, 2021, Respondents Jaimee Martin, Jonas Calsbeek, and Thomas Maher joined Respondent Suski in filing a First Amended Class Action Complaint. *Suski* D. Ct. Dkt. 22 ("FAC"). The FAC included additional factual allegations, and additional claims for relief under California's Consumer Legal Remedies Act ("CLRA"). *Id.*

On October 19, 2021, Coinbase Global, Inc. filed a motion to compel arbitration, or alternatively, to dismiss the FAC under Fed. R. Civ. P. 12(b)(6). *Suski* D. Ct. Dkt. 33. By stipulation, Coinbase Global, Inc.'s motion applied equally to the FAC and to a subsequently filed Second Amended Class Action Complaint ("SAC," D. Ct. Dkt. 36), which amended the FAC on October 20, 2021, only to: (1) replace Coinbase Global, Inc. with its subsidiary, Coinbase, Inc., as a Defendant; and (2) allege Plaintiffs' compliance with the CLRA's pre-suit notice requirements. *Suski* D. Ct. Dkt. 35.

On January 11, 2022, the District Court denied Coinbase's motion to compel arbitration. Pet. App. 19a-40a. In denying Coinbase's motion to compel, the District Court held that for all controversies regarding the June 2021 Dogecoin sweepstakes, the three-party Official Rules Agreements had "superseded" and modified the earlier, two-party User Agreements. *Id.* at 19a-33a.

On February 9, 2022, Coinbase filed a notice of appeal. *Suski* D. Ct. Dkt. 58. The same day, in the District Court, Coinbase filed a motion to stay pending appeal. D. Ct. Dkt. 59.

On April 19, 2022, the District Court denied Coinbase's motion to stay, finding that "Coinbase fail[ed] to show how the [c]ourt erred" on arbitrability. Pet. App. 45a-48a.[2]

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[2] Coinbase's motion to stay had declined to address the Ninth Circuit precedent upon which the District Court relied in denying Coinbase's motion to compel arbitration. Coinbase's motion to stay further declined to address the District Court's reasoning for why the parties' User Agreements and Official Rules Agreements were irreconcilable with regard to their dispute resolution terms.

On May 10, 2022, the *Suski* Respondents filed a Third Amended Class Action Complaint ("TAC"). *Suski* D. Ct. Dkt. 83.

Coinbase obtained a thirty-day extension to file its opening brief in the Ninth Circuit, and thus filed its opening brief on May 11, 2022. *Suski* C.A. Dkt. 8; *Suski* C.A. Dkt. 13.

On May 16, 2022, Coinbase filed a motion to stay in the Ninth Circuit. *Suski* C.A. Dkt. 16.

On May 27, 2022, the Ninth Circuit denied Coinbase's motion to stay, citing *Nken v. Holder*, 556 U.S. 418, 433-34 (2009), and declining to reconsider *Britton v. Co-op Banking Grp.*, 916 F.2d 1405 (9th Cir. 1990), which allows district courts broad discretion in determining whether to stay merits proceedings pending an interlocutory appeal on arbitrability. Pet. App. 2a.

On June 9, 2022, Marden-Kane filed its own, piggybacking motion to compel arbitration, even though Marden-Kane was admittedly never a signatory to or beneficiary of any arbitration agreement with any *Suski* Respondent. *Suski* D. Ct. Dkt. 87. Coinbase joined Marden-Kane's motion to compel arbitration, while also filing a renewed motion to compel arbitration based on some new legal arguments, but no new facts. *Suski* D. Ct. Dkt. 88.[3]

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[3] Thus, while Coinbase's Joint Petition is premised on the (incorrect) notion that a district court cannot review merits issues while a court of appeals reviews arbitrability issues, Coinbase here asked the District Court and the Ninth Circuit to simultaneously review the same arbitrability issues. *But see Griggs*, 459 U.S. 56 (precluding, on jurisdictional grounds, a trial court's and an appellate court's simultaneous review of the same decision).

On August 31, 2022, the District Court correctly held that it "no longer ha[d] jurisdiction" over Coinbase's arbitration request, due to Coinbase's pending appeal on arbitrability. *Suski* D. Ct. Dkt. 113 at 5-7 (citing *Griggs*, 459 U.S. at 58). The District Court further held that Defendant Marden-Kane lacked "standing" to enforce Coinbase's two-party User Agreements, including but not limited to the arbitration provisions therein. *Id.*

On October 4, 2022, Coinbase filed a second notice of appeal, challenging the District Court's denial of Coinbase's renewed motion to compel arbitration. *Suski* D. Ct. Dkt. 125. The same day, Marden-Kane filed a notice of appeal, regarding the District Court's denial of Marden-Kane's motion to compel. *Suski* D. Ct. Dkt. 124.

The multiyear, appellate gamesmanship now continues, over written contracts that do not even mention the word "arbitration." *Suski* D. Ct. Dkt. 22-1. Rewarding such gamesmanship with blanket, automatic stays pending appeal would be imprudent and contrary to law.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE CIRCUIT SPLIT IS CLEAR AND CONSEQUENTIAL

As explained in Coinbase's Joint Petition, the courts of appeals are sharply divided on how to answer the question presented. *See generally* Pet. 11-17 (discussing the relevant precedent).

Respondent Abraham Bielski ("Respondent Bielski") tries to minimize the division among circuits by arguing that every circuit "to address the issue has applied *Griggs*." Br. in Opp. 10. The problem, however, is that the courts of appeals have "applied" (really, interpreted) *Griggs* in conflicting ways, to require conflicting results. Pet. 11-17. For purposes of certiorari, conflicting interpretations of this Court's precedent are practically indistinguishable from conflicting interpretations of statutory or constitutional provisions. Whether courts of appeals interpret the Supremacy Clause, the FAA, or *Griggs*, the bottom line is that they are significantly varying the legal rights of identically situated litigants nationwide.

This variance in litigants' rights is important. Coinbase focuses only on the appellant's side of a case, as if every appellant has some "presumptive" right to arbitrate under the FAA, which automatically gets violated absent a stay. Such presumptive rights to arbitrate or to stay a suit, regardless of any district court's findings or decisions, contravenes the FAA's text. 9 U.S.C. § 3 (requiring stays only where district courts themselves are "satisfied that the issue

involved in such suit or proceeding is referable to arbitration"). If any presumptive right should exist following the denial of a motion to compel arbitration, that "presumptive" right should be an appellee's decided right to litigate.

Nevertheless, as Coinbase points out (Pet. 21-24), there have been cases in which a discretionary stay standard caused appellants to litigate temporarily, when they should have been enjoying "the benefits of private dispute resolution." *AT&T v. Concepcion*, 563 U.S. 333, 348 (2011) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010)). Coinbase makes much of this economic harm (Pet. 21-22), and casually labels it "irreparable." *Suski* C.A. Dkt. 16-1 at 3 ("Coinbase will suffer irreparable harm without a stay. Absent a stay, Coinbase will be forced to bear the cost of litigating the putative class action, even though its User Agreement mandates individual arbitration of all disputes between Plaintiffs and Coinbase."). Such "irreparable harm" rhetoric overstates the potential harm to appellants under a discretionary stay standard for at least two reasons.

First, any harm caused by an appellee's breach of an arbitration agreement can be repaired by a breach of contract claim. *See, e.g., Sealey v. Johanson*, 175 F. Supp. 3d 681, 685 (S.D. Miss. 2016) ("If any party breaches its obligation to arbitrate by filing litigation, the breaching party may be required by the arbitrator to pay the costs, including attorneys' fees, occasioned by that breach."). Second, in a world of adhesive arbitration agreements, FAA appellants can avoid any possible litigation harm in advance, by not drafting contracts that read like this.

> Disputes: All federal, state and local laws and regulations apply. THE CALIFORNIA COURTS (STATE AND FEDERAL) SHALL HAVE SOLE JURISDICTION OF ANY CONTROVERSIES REGARDING THE PROMOTION AND THE LAWS OF THE STATE OF CALIFORNIA SHALL GOVERN THE PROMOTION. EACH ENTRANT WAIVES ANY AND ALL OBJECTIONS TO JURISDICTION AND VENUE IN THOSE COURTS FOR ANY REASON AND HEREBY SUBMITS TO THE JURISDICTION OF THOSE COURTS.

Suski D. Ct. Dkt. 22-1, § 10. Before blaming the District Court for the *Suski* litigation, Coinbase might first reexamine its own use of the English language in purported pursuit of arbitration.

Regardless, the point for certiorari purposes is that many companies like Coinbase ascribe tremendous value to completely avoiding any litigation. They strongly prefer to enjoy what Coinbase, ironically, compares to blanket "immunity" from suit. Pet. 19. In short, the answer to the question presented is purportedly important to multibillion-dollar corporations and to other FAA appellants nationwide.

At least as important, however, is any harm to appellees that might accrue while an appellant's asserted right to arbitrate is being rejected for a second time on appeal. Under the policy of six circuits, even a stay foreseeably causing irreparable harm to an appellee—during a predictably meritless albeit "non-frivolous" appeal—would somehow be a stay mandated by *Griggs*. Pet. 14-17. Yet *Griggs* did not mandate such stays; *Griggs* merely precluded a district court and a

court of appeals from simultaneously reviewing the same decision. *See generally Griggs*, 459 U.S. 56.

In sum, the question presented is just as important to FAA appellees as it is to FAA appellants. FAA appellees could well suffer serious and preventable harms that six circuits categorically refuse to prevent, solely because they would rather "cogitate" on arbitrability in perfect peace. Pet. 19 (quoting *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989)). Such undesirable results are not required by law, as some of the pro-stay circuits themselves concede. *See McCauley*, 413 F.3d at 1160 (recognizing that this Court "has never explicitly extended" *Griggs* to preclude merits litigation during an FAA appeal); *ibid.* (recognizing that the FAA nowhere provides for stays pending arbitrability appeals).

Moreover, even where automatic stays do not directly or irreparably harm appellees, six circuits' policy of requiring automatic stays reduces many individuals' access to justice. Most individuals' civil claims are asserted only because of the individuals' access to counsel operating on contingency. For example, while *Suski* Respondents' claims are for only about $100 to $200 each, even pleading those claims has involved complex issues of contract interpretation, statutory interpretation, federal preemption, and other nuanced legal and factual issues. *Suski* Respondents' claims, like most individuals' civil claims, would never be asserted apart from competent counsel willing to represent individuals on contingency.

This Court's FAA precedents have already broadly discouraged contingency lawyers from taking on any case (no matter how meritorious) in which any arbitrability argument (no matter how unmeritorious) can

be fathomed. The risk of taking a complete economic loss on even the most meritorious and worthwhile litigation is often too high to justify representing individuals in cases where any arbitrability argument is discernable. To add to that lofty risk the certainty of being delayed for years, on claims that are both meritorious and non-arbitrable, is to render unfeasible for most contingency lawyers any litigation in which any arbitrability argument can be fathomed.

Indeed, "non-frivolous" arbitrability arguments can be unilaterally manufactured in advance by any defendant having adhesive contracting power. With one side's stroke of a pen, in any "transaction involving commerce" (9 U.S.C. § 2), that side's argument for compelling arbitration in all future disputes becomes non-frivolous, even if unmeritorious. Six circuits' policy of imposing automatic stays pending FAA appeals only further extends and solidifies the *de facto* "immunity" that most corporations already enjoy under this Court's FAA precedent. Pet. 19. That includes *de facto* immunity from liability even where, as here, the "transaction[s]" and "contract[s]" at issue expressly require litigation by their own terms. *Suski* D. Ct. Dkt. 22-1.

In short, the question presented is important to numerous stakeholders: not only to companies asserting their purported rights to arbitrate, but also to individuals asserting their decided rights to litigate. This Court should grant the Joint Petition and decisively settle the question.

II. THE MAJORITY VIEW IS WRONG AND IMPRUDENT.

A. *Griggs* Does Not Support the Majority View.

Four decades ago, the Court resolved conflicting appellate interpretations of Rule 4(a)(4) of the Federal Rules of Appellate Procedure. *See generally Griggs*, 459 U.S. 56.

In *Griggs*, a district court had entered a final judgment. *Id.* at 57. The defendant filed a motion to alter or amend the judgment, and subsequently noticed an appeal while that motion was still pending. *Id.* The Court held that a court of appeals lacks jurisdiction over an appeal noticed while a motion to alter or amend the appealed-from judgment is pending in the district court. *Id.* at 57-60. In so holding, the Court clearly explained its reasoning.

The only jurisdictional "danger" was that "a district court and a court of appeals would be simultaneously analyzing the same judgment." *Id.* at 59; *see also id.* at 59-60 (explaining that a jurisdictional "conflict" exists where a district court and court of appeals simultaneously have "the power to modify the same judgment"). *Griggs* did not address the FAA, nor did it address the jurisdictional severability of arbitrability and merits decisions.

By contrast, in *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), the Court did address the FAA, as well as the severability of arbitrability and merits decisions. In holding that a district court had wrongly stayed its own arbitrability proceedings, the Court reasoned that, for jurisdictional purposes, the issue of "arbitrability" is "easily severable

from the merits of the underlying disputes." *Id.* at 20-21. The Court further explained that a district court's "refusal to adjudicate the merits plainly represents an important issue separate from the merits." *Id.* at 11-12. If that is true, then it is equally true that a district court's mere decision to adjudicate the merits is an issue "completely separate from the merits" themselves. *Id.* (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). Thus, a court of appeals' review of that decision alone creates no jurisdictional conflict with a district court's simultaneous review of pure merits issues. *See* 16A C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE § 3949.1 (4th ed.) ("An interlocutory appeal ordinarily suspends the power of the district court to modify the order subject to appeal, but does not oust district-court jurisdiction to continue with proceedings that do not threaten the orderly disposition of the interlocutory appeal").

At bottom, the procedural policy of six circuits is unsupported by *Griggs*, contrary to the reasoning of *Moses H. Cone*, and otherwise untethered from long-standing law.

B. The Majority View Is Imprudent Because It Imposes Substantial Inefficiencies on Litigants and District Courts.

It is well established that federal courts must determine their own jurisdiction, not on a case-by-base basis, but on a claim-by-claim basis. *See, e.g., Santiago-Lugo v. Warden*, 785 F.3d 467, 471 (11th Cir. 2015) ("This Court and the district court must have subject matter jurisdiction over a claim in order to decide it on the merits."); *Stop Reckless Econ. Instability Caused by Democrats v. Fed. Election Comm'n*, 814 F.3d 221,

228 (4th Cir. 2016) (explaining that "federal courts must determine whether they have subject-matter jurisdiction over a claim before proceeding to address its merits") (emphasis added). And of course, a district court loses jurisdiction only over those "aspects of the case involved in" a pending appeal. *Griggs*, 459 U.S. at 58.

Here, the only issue and "aspect" of *Suski* Respondents' case "involved in" Coinbase's appeal is whether Coinbase has the right to arbitrate the *Suski* Respondents' claims against Coinbase. *Id.* Indeed, when Coinbase noticed its first appeal in *Suski*, there was no argument before any court that any party could arbitrate the claims pending against *Marden-Kane*. Thus, even under the "jurisdictional" theory espoused by six circuits, Coinbase's arbitrability appeal did not divest the district court of "jurisdiction" over *Suski* Respondents' claims against Marden-Kane. Those claims were, are, and will forever remain wholly unaffected by Coinbase's interlocutory appeal.

As even the Seventh Circuit recognizes, district courts retain merits jurisdiction over claims against any non-moving, non-appealing defendant like Marden-Kane, notwithstanding any arbitrability appeal filed over claims against a different defendant. *Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506-07 (7th Cir. 1997). Coinbase fails to explain why the *Suski* District Court must stay *Suski* Respondents' claims against Marden-Kane on "jurisdictional" grounds or any other grounds. And where, as here, no stay requirement exists for some claims, any blanket policy of imposing automatic stays causes significant procedural inefficiencies. The *Suski* District Court would have to indefinitely stay the

pending claims against Marden-Kane, without any legal or practical need to do so, or alternatively, risk adjudicating substantially similar merits issues on two different litigation schedules, spaced years apart: one litigation schedule for Marden-Kane, and one litigation schedule for Coinbase after it loses its arbitrability appeal.

Absent a clear statutory or constitutional mandate, it cannot be that a plaintiff's claims, upon which relief may admittedly be granted (Fed. R. Civ. P. 12(b)(6)), are delayed indefinitely just because one defendant involved in a case can fathom a "non-frivolous" argument for why they alone are "immune" from suit. Pet. 19. Nor can it be that a district court must adjudicate substantially the same merits issues, on completely disjointed litigation schedules, just because any one defendant can fathom any "non-frivolous" arbitrability argument for itself (only).

To take such a heavy-handed approach is legally unnecessary, inefficient, and imprudent. It broadly discourages the filing of even meritorious and predictably non-arbitrable claims against any defendant for whom a plaintiff's lawyer can fathom a "non-frivolous" arbitrability argument. This heavy-handed approach also encourages expensive, procedural gamesmanship by many defendants seeking to delay and obstruct claims for judicial relief at all costs.

The Seventh Circuit itself admitted that such gamesmanship is a "serious concern," but countered—in 1997—that such concerns are lessened by courts' abilities to certify or dismiss any arbitrability appeal as "frivolous." *Bradford-Scott, Inc.*, 128 F.3d at 506-07. In practice, however, following this Court's arbitrability decisions in recent years, there is literally no such

thing as a "frivolous" arbitrability appeal filed by a represented party. *See generally Concepcion*, 563 U.S. 333; *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019). If any lawyer can fathom any arbitrability argument in any case, then no other lawyer or judge in the case will be able to label the argument "frivolous" under this Court's FAA precedents.

Indefinitely staying every litigation, in which any lawyer can contrive any "non-frivolous" arbitrability argument, is simply an imprudent judicial solution to a "jurisdictional" problem that does not exist in the first place.

III. EVEN IF AUTOMATIC STAYS PENDING FAA APPEALS ARE REQUIRED, THEY MUST BE LIMITED TO CASES IN WHICH ARBITRATION PROVISIONS IN "A CONTRACT EVIDENCING A TRANSACTION" ARE JUDICIALLY INVALIDATED.

A. No Automatic Stay Should Be Imposed Over Arbitration Provisions in Written Contracts Which Themselves "Evidenc[e]" No "Transaction in Commerce".

"The Court has often said that every clause and word of a statute should, if possible, be given effect." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (internal quotations omitted). The Court has also recognized that Section 2 of the FAA is the statute's "primary substantive provision." *Rent-A-Center v. Jackson*, 561 U.S. 63, 67 (2010) (quoting *Moses H. Cone*, 460 U.S. at 24). Importantly, Section 2 of the FAA does not read as follows.

> A written provision in any maritime transaction or a contract involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . . .

9 U.S.C. § 2 (slightly revised). Rather, Section 2 of the FAA reads as follows.

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract . . . .

Id. (emphasis added).

Under the plain meaning of these terms, a written arbitration provision in a "contract" that does not itself "evidenc[e] a transaction involving commerce" is a written arbitration provision outside the scope of the FAA's "primary substantive provision." *Id.*; *Rent-A-Ctr.*, 561 U.S. at 67. Further evidence of this can be seen in the distinction Congress made between "written

provision[s] . . . to settle" future controversies by arbitration, and "agreement[s] in writing" to "submit an existing controversy" to arbitration. 9 U.S.C. § 2 (emphasis added).

For existing controversies, an arbitration "agreement in writing" need not itself "evidence a transaction involving commerce"; rather, only the underlying "contract" or "transaction," out of which the "controversy" arises, must "involv[e] commerce." *Id.* For all future controversies, however, any written arbitration provisions must be contained "in a contract evidencing a transaction involving commerce." *Id.* (emphasis added).

A simplistic example may be helpful to illuminate the statutory distinction here. If Respondent Suski and Respondent Martin had a claim and counterclaim, respectively, pending against each other in California state court, they might agree as follows in a mutually signed writing, dated today.

> Plaintiff and Counter-Defendant David Suski and Defendant and Counterclaimant Jaimee Martin, respectively, hereby mutually agree to voluntarily dismiss from court each and all of their pending claims and disputes in *Suski v. Martin*, Case No. 22-cv-12345, and to submit such claims and disputes to binding arbitration within a reasonable time period not to exceed 90 days from the date of this agreement.

Such an "agreement in writing" does not itself "evidence" any "transaction in commerce," at least not any "transaction in commerce" out of which the "existing "controvers[ies]" might have "aris[en]." *Id.* The underlying controversies in this example might well be

Suski's tort claim that Martin physically assaulted him, and Martin's counterclaim might be one of intentional infliction of emotional distress. Nevertheless, under the FAA, the above arbitration "agreement in writing" would still be enforceable—despite its failure to "evidenc[e] a transaction in commerce"—so long as the "existing controvers[ies]" in *Suski v. Martin* did, in fact, "aris[e] out of" a contract or transaction "involving commerce." *Id.*

Under the plain language of Section 2, however, the same could not be said of written contractual provisions to arbitrate future controversies. Written provisions to arbitrate future controversies must be contained "in a contract evidencing a transaction involving commerce." *Id.* (emphasis added). If the written arbitration provisions are not so contained, then the FAA expressly does not require their enforcement, regardless of how desirable they might be.

Here, the "written" arbitration "provision[s] in" Coinbase's User Agreement with each *Suski* Respondent are certainly "written provision[s]" in "a contract." *Id.*; *see generally Suski* D. Ct. Dkt. 33-7; Dkt. 33-8; Dkt. 33-9; Dkt. 33-10. They are not, however, "written provisions" in "a contract evidencing a transaction." *Id.* (emphasis added). Specifically, Coinbase's adhesive User Agreement states only that "[t]his is a contract between you and Coinbase, Inc. ('Coinbase'). By signing up to use an account . . . , you agree that you . . . accept all of the terms and conditions contained in this Agreement . . . ." *Suski* D. Ct. Dkt. 33-7 at 2 (docket pagination).[4] The

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[4] *See also Suski* D. Ct. Dkt. 33-8 at 2-3 (docket pagination); *Suski* D. Ct. Dkt. 33-9 at 2 (docket pagination); *Suski* D. Ct. Dkt. 33-10

User Agreements do not state that anyone has "sign[ed] up" for a Coinbase account, nor do they state that anyone has promised to sign up for a Coinbase account.

Coinbase's written contract with each *Suski* Respondent essentially provides only that "if you sign up for a Coinbase account (*i.e.,* if you ever commence a 'transaction in commerce' with Coinbase), then you agree to this contract." *Id.* Each User Agreement expressly provides that it constitutes the "entire agreement" between Coinbase and its counterparty (whoever that might be). *Suski* D. Ct. Dkt. 33-7 at § 8.4; *Suski* D. Ct. Dkt. 33-8 at § 9.4; *Suski* D. Ct. Dkt. 33-9 at § 9.4; *Suski* D. Ct. Dkt. 33-10 at § 9.4. Such fully integrated, written contracts are not even arguably contracts that "evidence a[ny] transaction in commerce." 9 U.S.C. § 2. Rather, it is only evidence of a "transaction in commerce" that could possibly "evidenc[e]" the "contract" in the first place. *Id.*

Coinbase's User Agreements say nothing about any "transaction in commerce" having occurred, or about any "transaction in commerce" having been promised to occur. Indeed, the only "evidenc[e]" of any "transaction in commerce" here is the McPherson-Evans Declaration and the non-contract, electronic records Coinbase purportedly has of each *Suski* Respondent's account-creation "transaction." *See generally Suski* D. Ct. Dkt. 33-1. Because Coinbase's fully integrated "contract" with each *Suski* Respondent fails to evidence any "transaction" at all, McPherson-Evans is forced to do far more as a witness than authenticate a

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at 2-3 (docket pagination). Coinbase's adhesive User Agreement with each *Suski* Respondent provides substantially identical text.

"written . . . contract," which itself "evidenc[es] a transaction in commerce." 9 U.S.C. § 2.

Indeed, McPherson-Evans' personal testimony is the only "evidence" which even purports to show the "transaction in commerce" necessary to form any "contract" in the first place: that statutory "transaction" being each *Suski* Respondent's creation of a Coinbase account. *Suski* D. Ct. Dkt. 33-1. It is only by first, independently "evidencing" *Suski* Respondents' account-creation "transaction[s]" that Coinbase is able to show that its User Agreement with each *Suski* Respondent is a "contract," rather than merely an Internet webpage. *Id.*, ¶ 11 ("It was impossible for a customer to create a Coinbase account without expressly indicating his or her agreement to the User Agreement by tapping 'I Agree.'"); *ibid.*, ¶ 9 ("[I]t was impossible for users to create Coinbase accounts on Coinbase's website without checking the box to expressly indicate their acceptance of the Coinbase User Agreement.") (emphasis added). In other words, McPherson-Evans is independently testifying, apart from any contract, that "because I have business records 'evidencing' that each *Suski* Respondent commenced a transaction in commerce (*i.e.,* created a Coinbase account), this webpage is a 'contract.'" *Id.*; 9 U.S.C. § 2.

It was never the parties' User Agreements—their contracts—that "evidenc[ed] a[ny] transaction in commerce" here. 9 U.S.C. § 2. Quite the opposite: it was always and only the statutory "transaction[s]" that "evidenc[ed]" the "contract[s]" in the first place. *Id.*

The same would be true of any twentieth century "shrinkwrap" agreement. *See, e.g., Stomp, Inc. v. NeatO, LLC*, 61 F. Supp. 2d 1074, n.11 (C.D. Cal. 1999) ("The term 'clickwrap agreement' is borrowed from the idea

of 'shrinkwrap agreements,' which are generally license agreements placed inside the cellophane 'shrinkwrap' of computer software boxes that, by their terms, become effective once the 'shrinkwrap' is opened."). In the physical shrinkwrap context, as in the digital "clickwrap" context of Coinbase's User Agreements, it could only be evidence of a "transaction in commerce" that could possibly "evidenc[e]" the existence of a written "contract" in the first place. *Id.* It is not the "contract evidencing [the] transaction" (9 U.S.C. § 2), but instead, the "transaction" evidencing the "contract." *Id.* The above statutory and contractual language always categorically excluded Coinbase's User Agreements from the true scope of the FAA.

Based on the plain text of FAA Section 2, Congress never intended to require every American court to robotically enforce every unsigned, "written" arbitration "agreement" that is mailed out or otherwise transmitted by bad actors to their victims, to become formed as "contract[s]" only after and because an illegal "transaction in commerce" has already occurred. 9 U.S.C. § 2. Manifestly, as a textual matter, Congress never intended to allow all private persons to unilaterally immunize themselves from all civil-judicial accountability, for violating virtually every statute in America, including statutes under which Congress expressly provided a private right of action in court. *See, e.g.,* 18 U.S.C. § 1964(c) (providing a private right of action in federal courts for victims of racketeering and organized crime). *But see Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("[I]n recent years, we have held enforceable arbitration agreements relating to claims arising under . . . the Racketeer Influenced and Corrupt Organizations Act (RICO) . . . .").

The civil RICO statute is just one of many examples, but it ought to be acutely instructive. Congress—in enacting 18 U.S.C. § 1964(c), decades after 9 U.S.C. § 2—never textually or otherwise manifested an intent to bar all organized crime victims from all civil courts, so long as criminal gangs and mobs email their victims unsigned, adhesive arbitration agreements immediately upon destroying the victims' "business or property." 18 U.S.C. § 1964(c). Yet that is somehow the law of the land today; all it takes is one mailing or one website scarcely satisfying the common law of contract formation, and every victim is forever barred from American courts regardless of what happened to them.

Such an outcome is contrary to the plain text of Section 2, in addition to being a policy disaster of limitless proportions. The solution to this policy disaster is found, as it often is, in the statutory text, which applies not to all written "contracts," and not to all written "contracts involving commerce," but rather, only to "written provisions" in "contracts" that independently "evidenc[e] a transaction." 9 U.S.C. § 2.

To the extent that this Court has ever found the FAA applicable to contracts like Coinbase's User Agreements, the Court has done so without squarely addressing the FAA's express limitation that only contracts "evidencing a transaction in commerce" can possibly contain any federally "valid, irrevocable, and enforceable" provisions to arbitrate a future "controversy." 9 U.S.C. § 2; *Cooper v. Aviall*, 543 U.S. 157, 170 (2004) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled

upon, are not to be considered as having been so decided as to constitute precedents.").[5]

This case presents a unique opportunity for the Court to begin righting decades of lawless wrongs, which have been done to a great many people under the false guise of the FAA. The Court may well be able to answer the question presented, without deciding this important statutory issue. The Court, however, could and should properly reach the issue, or at least acknowledge the issue without deciding it, as the issue is relevant to the question presented.

B. No Stay Should Be Imposed Where a District Court Determines That the Parties Privately Agreed to Litigate Via an Unambiguous Forum Selection Clause.

The FAA merely "places arbitration agreements on an equal footing with other contracts." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, n.12 (1967) (explaining that the FAA "make[s] arbitration agreements as enforceable as other contracts, but not more so"). "And indeed, the text of the FAA makes clear that courts are not to create

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[5] The Court once glossed over the word "evidencing," in the process of deciding the meaning of the phrase "involving commerce." *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) ("That interpretation, we concede, leaves little work for the word 'evidencing' (in the phrase 'a contract evidencing a transaction') to perform, for every contract evidences some transaction. But, perhaps Congress did not want that word to perform much work."). As shown herein, that never-decided assumption is inaccurate. Such passing, unsupported assumptions "are not to be considered as having been so decided as to constitute precedents." *Cooper*, 543 U.S. at 170.

arbitration-specific procedural rules . . . ." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1714 (2022) (citing 9 U.S.C. § 6).

Here, the *Suski* District Court did not invalidate any private arbitration agreement. Pet. App. 19a-33a. Rather, the District Court found that the parties expressly agreed to litigate their controversies, via a mandatory, exclusive forum selection clause contained in a written contract that did not even mention the word "arbitration."

To automatically stay *Suski* Respondents' claims pending an interlocutory appeal, solely because Coinbase can formulate a "non-frivolous" arbitrability argument, would be to render the parties' arbitration agreements more enforceable than their forum selection agreements. *Prima Paint*, 388 U.S. at n.12. Specifically, the arbitration agreements would be fully enforceable only upon a finding by a district court that the parties' controversies are arbitrable; meanwhile, the forum selection agreements would be fully enforceable only upon findings by both a district court and a court of appeals that the parties' controversies are justiciable.

In addition, to automatically stay *Suski* Respondents' claims pending appeal, solely because Coinbase can formulate a "non-frivolous" arbitrability argument, would be to create "arbitration-specific procedural rules" in federal court. *Morgan*, 142 S. Ct. at 1714. The law does not allow for that to happen. *Id.* Yet as of today, it is happening throughout the jurisdictions of six different circuits. Pet. 14-17.

CONCLUSION

For all of the foregoing reasons, and some of the reasons articulated in Coinbase's Joint Petition, the *Suski* Respondents hereby respectfully request that the Court grant Coinbase's Joint Petition, and finally resolve the question presented as framed herein by the *Suski* Respondents.

Respectfully submitted,

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