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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a non-frivolous appeal of the denial of a motion to compel arbitration ousts a district court's jurisdiction to proceed with litigation pending appeal.

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INTEREST OF *AMICUS CURIAE**

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as an *amicus* before this Court in important arbitration cases. *See, e.g., Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018). WLF's Legal Studies division, its publishing arm, routinely publishes articles by outside experts on arbitration. *See, e.g.*, Victor E. Schwartz & Christopher E. Appel, *Setting the Record Straight About the Benefits of Pre-Dispute Arbitration*, WLF Legal Backgrounder (June 7, 2019), www.bit.ly/2Z6rKqg.

To conserve both private and public resources, the Federal Arbitration Act "establishes a federal policy favoring arbitration." *Shearson/Am. Exp. Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Under the FAA, an arbitration clause in a contract involving commerce is both valid and enforceable. 9 U.S.C. § 2. When a district court refuses to compel arbitration as the parties agreed, the FAA allows an immediate appeal as of right. *Id.* § 16(a).

Most courts of appeals recognize that such an appeal automatically divests the district court of jurisdiction and stays the litigation. But the Ninth Circuit—joined by the Second and Fifth Circuits—

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* No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, contributed money for preparing or submitting this brief.

holds otherwise. By forcing a company to proceed with costly and burdensome litigation while its arbitrability appeal is pending, this minority rule wreaks havoc on the FAA and deprives both the parties and the courts of the benefits of arbitration. The Court should reject this self-defeating approach to the FAA.

STATEMENT

Coinbase operates one of the world's largest cryptocurrency exchanges, with 108 million verified users in over 100 countries. Like many successful companies, Coinbase includes in its user agreements a provision in which the parties agree to resolve "any dispute" between them through binding arbitration.

Although they agreed to Coinbase's user agreement, respondents did not honor its arbitration provision. Instead, respondents brought two separate putative class actions in the Northern District of California. Invoking the user agreement's arbitration provision, Coinbase moved to compel arbitration in both cases. In each case, the district court denied Coinbase's motion.

Coinbase timely appealed each of those decisions under 9 U.S.C. § 16(a), which allows defendants to immediately appeal a district court's denial of a motion to compel arbitration. In most circuits, a § 16(a) appeal automatically divests the district court of jurisdiction and stays the litigation. But under the Ninth Circuit's rule announced in *Britton v. Co-op Banking Grp.*, 916 F2d 1405, 1411–12 (9th Cir. 1990), district courts retain jurisdiction to pro-

ceed with litigation while the court of appeals decides arbitrability.

Bound by *Britton*, Coinbase sought discretionary stays from both district courts. Although one district judge conceded that "reasonable minds may differ" on the issue of arbitrability, Pet. App. 42a, and the other acknowledged that significant "time and money" might be wasted without a stay, *id.* at 52a, both courts denied Coinbase's motion for a stay.

Coinbase next sought discretionary stays from the Ninth Circuit. Coinbase marshaled strong arguments for why both disputes belong in arbitration, consistent with the respondents' user agreements. Coinbase also explained how it would be harmed if forced to simultaneously bear the costs and burdens of district court litigation, with its intrusive and protracted discovery, and appeals over arbitrability. Alternatively, Coinbase asked the Ninth Circuit for an administrative stay to allow the court to reconsider en banc its holding in *Britton*. In each case, the Ninth Circuit denied Coinbase's motion without discussion.

Coinbase filed a joint petition for certiorari, and this Court granted review.

SUMMARY OF ARGUMENT

Litigation is expensive. It's expensive for businesses, which must pay lawyers to argue and employees to miss work to testify and produce documents. It's expensive for consumers and workers, who often must cover businesses' costs through higher prices and lower wages. It's expensive for the

judiciary, which must pay for "judges, attendants, light, heat, and power—and even ventilation in some courthouses." Joint Hearings on S. 1005 and H.R. 646 before the Subcomms. on the Judiciary, 68th Cong., 1st Sess. (1924). And it's expensive for the average citizen; for just as corporate litigation expenses become consumer and worker expenses, the judiciary's expenses become taxpayer expenses.

It's no mystery, then, why Congress passed the FAA. Courts had long refused to enforce most arbitration agreements, and this meant that more and more disputes remained in litigation. To save people time, money, and trouble, Congress charged the courts with enforcing otherwise valid arbitration clauses in contracts "involving commerce." 9 U.S.C. § 9. Over time, it became clear that some courts, in defiance of the FAA, still refused to compel arbitration despite the parties' valid agreement to arbitrate. So Congress created a right to immediately appeal from those erroneous decisions. 9 U.S.C. § 16(a).

But § 16(a) makes sense only if an interlocutory appeal from the trial court's refusal to compel arbitration automatically stays litigation in the district court. Congress never would have granted parties the right to an immediate appeal if it had contemplated that litigation would continue apace while the appeal was pending. On the contrary, Congress crafted § 16(a) against the background principle that an appeal divests a district court of jurisdiction over the case being appealed. And Congress recognized that the main virtues of arbitration—avoiding the costs and inefficiencies of litigation—would be lost if the case proceeds simultaneously in litigation and on appeal, only to be ultimately decided in arbitration.

The majority rule embraced by the Third, Fourth, Seventh, Tenth, Eleventh, and D.C. Circuits reflects this commonsense view, grounded in the text and purpose of the FAA. In those circuits, a non-frivolous appeal from the denial of a motion to compel arbitration divests the district court of jurisdiction and automatically stays the litigation. The minority rule embraced by the Second, Fifth, and Ninth Circuits creates havoc. In those circuits, an appeal from the denial of a motion to compel arbitration does not divest the district court of jurisdiction, so parties seeking to compel arbitration must either obtain a stay pending appeal under the traditional discretionary test or bear the dual burdens of trial litigation and arbitrability appeals.

But the intolerable risk of bearing both those burdens undermines the core policies animating the FAA. *First*, by displacing the very streamlined procedures that Congress enacted the FAA to secure, the minority rule frustrates arbitration's goal of efficiency. *Second*, by forcing parties to simultaneously bear the expense of district court litigation and arbitrability appeals, the minority rule ratchets up the cost of resolving disputes. *Third*, by allowing district courts to try cases to judgments that must be vacated not because they are wrongly decided, but because the case should never have been tried in court to begin with, the minority rule wastes rather than conserves judicial resources. And *fourth*, by obliging contracting commercial parties to litigate their disputes in court even when they have agreed to arbitrate, the minority rule undermines harmonious business relations.

In short, the minority rule "breed[s] litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995). That is the polar opposite of what Congress intended.

ARGUMENT

I. THE MAJORITY RULE BEST FURTHERS § 16'S TEXT AND PURPOSE.

Nearly a century ago, Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Later, as part of the 1988 Judicial Improvements and Access to Justice Act, Congress enacted § 16(a) of the FAA to ensure that a party who escapes its duty to arbitrate with the aid of a sympathetic district judge cannot avoid that obligation for long.

Section 16 "respond[ed] to the needs of arbitration * * * by generally denying immediate appeals from orders giving arbitration precedence over litigation and permitting immediate appeals from orders giving litigation precedence over arbitration." *Court Reform and Access to Justice Act, Part I,* Hearings on H.R. 3152, before the Subcomm. on Courts, Civil Liberties, and Admin. of Justice, of the H. Comm. on the Judiciary, 100th Cong. (1987) (statement of Elmo B. Hunter, Chairman, Comm. on Court Admin., Judicial Conf. of the U.S.).

Congress was not writing on a blank slate in 1988. Long before Congress enacted § 16, "one general rule in all cases" was that "an appeal suspends the power of the court below to proceed further in the cause." *Hovey v. McDonald*, 109 U.S. 150, 157 (1883). By the time of § 16's enactment, it was "generally understood that a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). As this Court reiterated in *Griggs*, "the 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.*

Congress "legislate[s] against a background of common-law adjudicatory principles," and it "expect[s]" those principles to "apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (cleaned up). By 1988, the default divestiture rule was just such a background principle. And Congress gave no indication in § 16 of wanting to disturb or deviate from it.

True, there are exceptions. But the exceptions prove the rule. Take Federal Rule of Civil Procedure 23(f), which permits interlocutory appeals from orders granting or denying class certification. Fed. R. Civ. P. 23(f). In its decision embracing the minority rule, the Fifth Circuit analogized to one of its Rule 23(f) precedents. *Weingarten Realty Inves. v. Miller*, 661 F.3d 904, 909 (5th Cir. 2011) (citing *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 233 (5th Cir. 2009)). "Even though the district court was

hearing an issue that was 'practically identical' to that on appeal," *Weingarten* explained, "it could proceed because, as a matter of law, the findings on class certification would not resolve the merits issue." 661 F.3d at 909.

But that analogy falls apart under the slightest scrutiny. First, under Rule 23(f) "[a]n appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders." Fed. R. Civ. P. 23(f). This language was included precisely to avoid the default divestiture rule. Congress could have included similar language in § 16(a), but it chose not to do so. That choice must be given effect.

Second, appeals under Rule 23(f) are discretionary, not a matter of right. Heeding this Court's warnings in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) about excessive appeals of class certification rulings, those who fashioned Rule 23(f) left the matter to the appellate courts. *See* Fed. R. Civ. P. 23(f) advisory comm. note to 1998 amendment ("Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals.").

Under § 16, by contrast, district court orders denying motions to compel arbitration are immediately appealable, 9 U.S.C. § 16(a)(1)(B), while orders compelling arbitration are not, *id.* § 16(b)(2). This reflects Congress's considered belief that refusals to compel arbitration will often be wrong, while decisions compelling arbitration will usually be right. Hearings on H.R. 3152, *supra* ("Denial of appeal when arbitration is given precedence should not often be costly: district courts usually will be correct,

and the arbitration process is apt to produce considerable savings in the process of preparing for trial if the dispute is ultimately found non-arbitrable.")

Rule 23(f) aside, the "central reason and justification" for interlocutory appeals is the "interruption of the trial proceedings." *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1162 (10th Cir. 2005). Above all, Congress sought in § 16 to minimize any judicial obstruction of arbitration by allowing the courts of appeals to resolve arbitrability questions *before* litigation gets underway. Congress never would have granted parties the right to an immediate interlocutory appeal from refusals to compel arbitration if it had contemplated that litigation could proceed to discovery and even judgment while the appeal was pending.

Respondents contend that arbitrability is a separate matter not involved in the interlocutory appeal. Yet when the issue on appeal is whether the district court should proceed at all, *every* matter is subsumed within that question. Put differently, the question of arbitrability is no more "separate" from the underlying dispute than one's nose is "separate" from one's face. In this sense, the district court's proceedings are at the core of—not collateral to—the appeal.

II. THE MINORITY RULE UNDERMINES THE FAA'S CORE POLICIES.

By ensuring that "arbitration agreements are made valid and enforceable," Congress sought to eliminate "the costliness and delays of litigation." H.R. Rep. No. 68-96, at 2 (1924). The Senate Report

likewise reveals that Congress intended for the FAA to help Americans "avoid the delay and expense of litigation." S. Rep. No. 68-536, at 3 (1924).

Over a half-century later, Congress reaffirmed the FAA's core policies favoring private arbitration over litigation. Arbitration (1) "is usually cheaper and faster than litigation"; (2) "can have simpler procedural and evidentiary rules"; (3) "normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties"; (4) "is often more flexible in regard to scheduling of times and places of hearings and discovery devices"; and (5) "could relieve some of the burdens of the overworked Federal courts." H.R. Rep. No. 97-542, at 13 (1982).

This Court, too, has repeatedly recognized arbitration's many advantages over litigation. Arbitration offers "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019) (cleaned up); *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011) (arbitration "reduc[es] the cost and increas[es] the speed of dispute resolution").

But these salutary benefits may be realized only if parties who agree to arbitrate their disputes are free from the costs and burdens of litigation. That is why Congress gave parties an immediate right to appeal from district court refusals to compel arbitration. Yet under the minority rule, all "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness," are "shorn away" as arbitration comes to resemble

"the litigation it was meant to displace." *Epic Sys.*, 138 S. Ct. at 1623.

A. The minority rule upends the FAA's goal of streamlined efficiency.

"The overarching purpose of the FAA * * * is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 563 U.S. at 344. The FAA accomplishes this goal by affording the parties discretion to craft arbitration procedures as they see fit. This "allow[s] for efficient, streamlined procedures tailored to the type of dispute." *Id*. And "the informality of arbitral proceedings is itself desirable." *Id*. at 344–45.

The minority rule jettisons efficiency by impairing the very streamlined procedures that Congress enacted the FAA to secure. Proceeding in court with discovery, motion practice, and even trial under the shadow of an ultimately successful arbitrability appeal is hardly efficient. On the contrary, it frustrates a "prime objective" of arbitration, which is "to achieve 'streamlined proceedings.'" *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)).

If this Court embraces the minority rule, businesses entering contracts premised on "the relative informality of arbitration" and procedures "more streamlined than federal litigation," *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009), will find themselves unable to avoid civil litigation. That would undermine one of the FAA's core purposes.

B. The minority rule raises the costs of resolving disputes.

Parties "favor arbitration precisely because of the economics of dispute resolution." *14 Penn Plaza*, 556 U.S. at 257. "Arbitration agreements allow parties to avoid the costs of litigation." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). In contrast, the minority rule imposes unacceptable deadweight litigation costs on a dispute that rightly belongs in arbitration.

Start with discovery. Judicially supervised discovery under court rules—rules that would not apply under the more informal process of arbitration—is "time-consuming and expensive; it protracts and complicates litigation." *Olivieri v. Rodriguez*, 122 F.3d 406, 409 (7th Cir. 1997). By some estimates, discovery costs "comprise between 50 and 90 percent of the total costs of adjudicating a case." John H. Beisner, *The Centre Cannot Hold: The Need for Effective Reform of the U.S. Civil Discovery Process* 2, Institute for Legal Reform (2010), https://bit.ly/3Xlyiie. Discovery costs alone in "complex litigation can be so steep as to coerce a settlement on terms favorable to the plaintiff even when his claim is very weak." *Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir. 2009).

Judicially supervised discovery also subjects parties to more formal (and therefore more costly) discovery-dispute resolution. For instance, parties in arbitration may resolve discovery disputes through telephonic hearings, correspondence, or letter briefs, rather than by formally noticed motions accompanied by courtroom hearings and full legal briefs—as

litigation requires. *See* JAMS, Arbitration Discovery Protocols (2010), https://bit.ly/3ixHXUe. Arbitration typically dispenses with pretrial depositions, authenticating documents, and qualifying experts. *Id.*

What's more, arbitration provides for narrower discovery than the free-ranging fishing expeditions that can occur under the Federal Rules of Civil Procedure. Allowing intrusive discovery to proceed while an arbitrability appeal is pending alters the nature of the dispute by requiring parties to disclose sensitive information that could damage or interfere with future proceedings. This includes enabling a party to take information it improperly received during discovery and later use it against its opponent in arbitration over the same dispute. Even if the court of appeals later holds "that the claims were indeed subject to mandatory arbitration, the parties will not be able to unring any bell rung by discovery." *Levin v. Alms and Assocs., Inc.*, 634 F.3d 260, 265 (4th Cir. 2011). On the contrary, "they will be forced to endure the consequences of litigation discovery in the arbitration process." *Id.*

Nor is discovery the only cost associated with litigation. Hiring attorneys by the hour is hardly cheap. Whether the attorney charges $500 per hour or $1500 per hour, those hours mount quickly. And litigation requires many more hours than arbitration. In litigation, there are hearings, motions to dismiss, interrogatories and depositions, motions for summary judgment, pretrial briefs, jury selection, and trial. A district court can hold an entire trial while an arbitrability appeal is still pending. *See, e.g., Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 46 (2d Cir. 2004). "[A]verage arbitration cases take

about seven months, while average litigation can take from 23 to 30 months." *Arbitration vs. Litigation: the differences*, Thomson Reuters (Oct. 4, 2022), http://bit.ly/3COFr2W. Measured in mounting billable hours, the cost-effectiveness of arbitration over litigation isn't even close.

There is "an almost even split of affirmance and reversal" on appeals from district court orders denying motions to compel arbitration. *See* Roger J. Perlstadt, *Interlocutory Review of Litigation-Avoidance Claims: Insights from Appeals Under the Federal Arbitration Act*, 44 Akron L. Rev. 375, 407 (2011). That reversal rate is much higher than the reversal rate for civil appeals generally, underscoring the unfair costs imposed on parties forced to proceed with district court litigation pending appeal.

By stacking the simultaneous costs of district court litigation on top of an arbitrability appeal, the minority rule prohibitively increases the costs of resolving disputes. And in cases when arbitrability is confirmed on appeal, the minority rule imposes significant litigation and discovery burdens that should never have been incurred. A party who enters arbitration only after being required to exhaust considerable resources litigating in district court has been denied the fundamental benefits of arbitration. Again, that result simply cannot be squared with either Congress's intent or the FAA's goals.

C. The minority rule squanders judicial resources.

The FAA "recognizes that arbitration is an expeditious way to resolve disputes and conserve judi-

cial resources." *Degidio v. Crazy Horse Saloon & Rest.*, 880 F.3d 135, 140 (4th Cir. 2018). By requiring courts to compel arbitration when a valid arbitration agreement exists, the FAA "prevents parties from rushing to court whenever the prospect of arbitration appears uninviting." *Hightower v. GMRI, Inc.*, 272 F.3d 239, 241 (4th Cir. 2001). But if parties must litigate validly arbitrable disputes pending arbitrability appeals, the FAA's policy of conserving judicial resources becomes a dead letter.

It's no secret that the federal judiciary has long been overwhelmed because judicial resources are "scarce." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). The COVID pandemic has only made matters worse. Indeed, an "already overburdened and backlogged federal court system got worse during the coronavirus pandemic, prompting some legal experts and lawmakers to call for an expansion of the judicial bench." Kaelan Deese, *Justice delayed: Federal case backlog prompts calls to expand courts*, Washington Examiner (Sep. 5, 2022), http://bit.ly/3kml9r4.

In 2020, there were 397,492 pending civil cases in federal court. By 2021, that number jumped to 590,288—a nearly 50% spike on one year. *See* United States Courts, Judicial Caseload Indicators, Federal Judicial Caseload Statistics 2021, http://bit.ly/3kfIJ8M. The number of civil cases pending longer than three years has likewise ballooned. *See* United States Courts, March 2022 Civil Justice Reform Act, http://bit.ly/3XFS8oB (showing a 21 percent increase, from 49,171 on September 30, 2021, to 59,348 on March 31, 2022).

Arbitration lightens the load on the federal courts and helps the judiciary reach its civil-justice goals. It's therefore no surprise that Congress enacted § 16 as part of a larger scheme—the 1988 Judicial Improvements and Access to Justice Act—to improve the operation of the federal judiciary by clearing up the backlogs in the courts. *See* H.R. Rep. No. 100-889, at 23 (1988) ("[T]he Federal judiciary is beset by problems in all three of these areas: delay caused by rising caseloads and insufficient support services; spiraling costs caused by litigation expenses and attorneys' fees; and unfair and inconsistent decision caused by the pressures placed on judges who must cope with the torrent of litigation.").

Given this untenable burden on the courts, it simply makes no sense to adopt a rule allowing district courts to try cases to judgments that must be vacated not because they are decided wrongly, but because the case should never have been tried in court to begin with. If the court of appeals reverses and orders the parties to arbitrate, then the judicial resources the district court expended during the appeal will have been frittered away. Any judgment it might enter must be vacated once the court of appeals decides that the case belongs in arbitration. If one set out to design a rule that would squander precious judicial resources, it would be hard to top the minority rule.

What's more, forcing the parties to litigate pending appeal "creates a risk of inconsistent handling of the case by both tribunals." *Bradford-Scott*, 128 F.3d at 505. This risk undermines the finality that is one of the chief goals of our civil judicial system—resolving disputes between parties once and

for all. Such finality is essential for "achieving a healthy legal system." *Cobbledick v. United States*, 309 U.S. 323, 326 (1940). That is precisely why most circuits construing § 16(a) have embraced a "bright-line jurisdictional rule" of divestment—to avoid "the risk of inconsistent handling" by two different courts. *McCauley*, 413 F.3d at 1162.

In sum, an automatic stay conserves judicial resources, avoids anomalous results, and furthers Congress's legislative aims behind the FAA. The minority rule does none of those things.

D. The minority rule imperils harmonious business relationships.

Although the petition arises in a consumer-agreement context, the rule this Court announces will apply in every case—including commercial contracts among businesses. The FAA furthers Congress's strong interest in fostering interstate commerce by preserving harmonious business relationships. Arbitration "minimizes hostility and is less disruptive of ongoing and future business dealings among the parties." H.R. Rep. No. 97-542, at 13 (1982). The minority rule, by forcing the parties to bear the dual burdens of trial litigation and arbitrability appeals, undermines that goal.

Relying on the FAA's liberal policy favoring arbitration and this Court's steadfast endorsement of that policy, millions of American businesses have structured their contractual relationships with other businesses around arbitration agreements. Because businesses may appear as plaintiffs or defendants (or both) in litigation, they have strong interests in

clear, predictable, and balanced rules for how and when they must incur the costs and burdens of litigation.

For many businesses, arbitration's biggest advantage over litigation in resolving commercial disputes stems from the relatively non-confrontational nature of arbitration. "The logic is that if companies have good relationships with one another, they might be more inclined to use a dispute resolution process other than litigation, because they will be more likely to resolve disputes informally or can better predict the nature and magnitude of potential disputes." Douglas Shontz et al., RAND Institute for Civil Justice, *Business-to-Business Arbitration in the United States: Perceptions of Corporate Counsel* 21 (2011), https:// bit.ly/3GNXqaR. A RAND Corporation survey confirms that corporate counsel favor arbitration over litigation not only to reduce costs but also to help preserve good business relationships for the future. *Id.* at 21–22.

The choice of arbitration over litigation thus lends stability and predictability to the contracting parties' relationship, especially in business-to-business dealings. Arbitration allows companies to anticipate and adequately price their rights and duties based on the dispute-resolution mechanism that will be used. *See, e.g.*, Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 Notre Dame L. Rev. 523, 531–33 (2005). But arbitration's advantages become illusory when parties are forced to bear all the costs and burdens of litigation as well as arbitration.

* * *

No one is asking this Court "to devise novel rules to favor arbitration over litigation." Resp. Bielski's BIO at 1 (citing *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022)). There's no need. Congress already enacted an entire statute, the FAA, which strongly favors arbitration over litigation. And § 16 goes further still. By allowing immediate appeals from orders denying motions to compel arbitration but denying immediate appeals from orders granting those same motions, Congress itself was devising appellate rules "to favor arbitration over litigation." This Court does nothing "novel" by honoring that policy choice.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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