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 ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * *

ALF has participated as an *amicus curiae* in many Supreme Court cases to support contracting parties' right, as protected by the Federal Arbitration Act (FAA), 9 U.S.C. § 2, to enter into binding, judicially enforceable arbitration agreements. *See*, *e.g.*, *Viking River Cruises, Inc. v. Moriana*, 142 S.Ct. 1906 (2022); *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612 (2018);

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[1] No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

DIRECTV, Inc. v. Imburgia, 577 U.S. 47 (2015); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

Consistent with the FAA's purpose, ALF long has maintained that arbitration is, or should be, an efficient, speedier, less expensive alternative to litigating disputes between corporations, between companies and individual consumers, and between employers and individual employees. Indeed, a number of members of ALF's Board of Directors and Advisory Council have significant professional experience with arbitration of disputes and are familiar with its many benefits.

Correctly resolving the question presented here—whether an interlocutory appeal in accordance with 9 U.S.C. § 16(a) divests a district court of subject-matter jurisdiction while the appeal is pending—is critical to maintaining the benefits of arbitration. Those benefits are lost if a district court, after denying a motion to compel arbitration, has discretion to require the parties to proceed with discovery, class certification, and even trial while the denial of the motion to compel arbitration is on appeal.

ALF is submitting this brief to highlight the practical problems encountered when a defendant is forced to proceed in district court while exercising its statutory right to appeal the denial of a motion to compel arbitration. The Court should hold that pursuing such an appeal divests a district court of jurisdiction while the appeal is pending.

SUMMARY OF ARGUMENT

The timely filing of a notice of appeal divests the district court of jurisdiction to adjudicate the subject matter of the appeal, and the subject matter of an arbitrability appeal is whether litigation should proceed in the district court at all. Petitioner's position is therefore correct under general principles of federal appellate practice. It is also the only way to ensure that the parties to an arbitration agreement do not lose the benefit of their contractual bargain in the event a district court erroneously denies a motion to compel arbitration.

Proceeding with district court litigation, including costly discovery, pending an appellate decision on arbitrability deprives the parties of the efficiency of arbitration and wastes the courts' and parties' resources. This threat is particularly acute in class action litigation, where the exposure to burdensome discovery costs can pressure even innocent defendants to settle weak claims.

Parties agree to arbitrate their disputes in order to avoid such costs and delays. And Congress enacted the FAA to ensure that courts respect and enforce arbitration agreements. Yet, absent stays pending arbitrability appeals, parties to arbitration agreements are systemically deprived of the efficient dispute resolution to which they agreed. Only a rule mandating that district court litigation is stayed pending a party's appeal from an order denying a motion to compel arbitration honors the parties' contractual bargain by preserving the benefits of arbitration.

This Court should reverse the decisions below, which erroneously refused to stay district court orders denying arbitration pending appeal.

ARGUMENT

I. The Federal Arbitration Act reflects a liberal policy favoring streamlined arbitration.

The FAA provides: "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 . . . 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.

"Congress adopted the Arbitration Act in 1925 in response to a perception that courts were unduly hostile to arbitration." *Epic Sys. Corp.*, 138 S.Ct. at 1621. In "Congress's judgment arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved." *Id.*

The FAA "establishes 'a liberal federal policy favoring arbitration agreements.'" *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The FAA reflects "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

Congress intended "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22.

The FAA's purpose is thus "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

II. Parties choose arbitration because it is more efficient than litigation.

This Court has repeatedly recognized that parties choose to arbitrate their disputes in recognition of arbitration's benefits over traditional litigation. Arbitration provides parties with "a less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995). The benefits of arbitration include "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) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010)). Arbitration also permits parties to design "efficient, streamlined procedures tailored to the type of dispute," *Concepcion*, 563 U.S. at 344, and to preserve the confidentiality of the evidentiary record, or at least the award, if they choose to do so.

To achieve the benefits of arbitration, "parties forego the procedural rigor and appellate review" that characterize litigation in court. *Id.* (citation omitted). Indeed, arbitration's principal advantage over litigation is its informality. *Lamps Plus, Inc.*, 139 S.Ct. at 1416.

III. Staying litigation pending appeal is especially important in putative class actions, where the threat of burdensome discovery is significant.

Chief among the cost-saving benefits of arbitration is its limited discovery. This Court has recognized on multiple occasions that discovery can be burdensome and expensive. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007); *see Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975).

Indeed, the burdens of discovery can be so great that even innocent defendants will settle meritless cases in order to avoid them. "[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stonebridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 163 (2008); *accord Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 268 (2004) (Breyer, J., dissenting) ("[D]iscovery and discovery-related judicial proceedings take time, they are expensive, and cost and delay, or threats of cost and delay, can themselves force parties to settle underlying disputes."). By agreeing in advance to arbitrate disputes, parties can protect themselves from the

burdens of discovery and thus ensure that they are not forced into settling meritless cases to avoid litigation costs.

The burdens of discovery, and the risk of settlements aimed at avoiding those burdens, are particularly acute in class action litigation. Courts and commentators have long "noted the risk of 'in terrorem' settlements that class actions entail." *Concepcion*, 563 U.S. at 350; *see also Petrie v. Elec. Game Card, Inc.*, 761 F.3d 959, 969 (9th Cir. 2014) (describing Congressional efforts "to prevent discovery abuses such as the 'unnecessary imposition of discovery costs on defendants,' particularly as a means to coerce settlement"); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial.").

The risk of devastating liability is not the only reason that class action defendants face intense pressures to settle. The cost of merely litigating such cases is so great that settlement is often the only economically sensible decision. This concern is real, not hypothetical. "Generally, prior to the class certification decision, plaintiffs seek expansive general discovery into the class claims, including discovery relating to the merits of the class claims." Linda S. Mullenix, *Dropping the Spear*: *The Case for Enhanced Summary Judgment Prior to Class Certification*, 43 Akron L. Rev. 1197, 1236 (2010) (footnote omitted).

In view of the onerous discovery obligations that class action defendants face even before class certification, "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Twombly*, 550 U.S. at 559. Staying putative class actions pending appeal of an arbitrability decision is therefore particularly important, as the settlement pressure on even blameless defendants will often prove irresistible if the case proceeds in court.

The costs of settling litigation that belongs in arbitration do not fall exclusively on individual defendants; the costs also necessarily drag down the economy as a whole. "No one sophisticated about markets believes that multiplying liability is free of cost." *SEC v. Tambone*, 597 F.3d 436, 452 (1st Cir. 2010) (en banc) (Boudin, J., concurring). Here, the decisions below multiply potential liability by requiring parties who agreed to arbitrate their disputes to engage in costly discovery and motion practice in court. For many companies in many industries, the inflated costs of settling such claims "get[ ] passed along to the public." *Id.* at 453.

These deleterious consequences flow from allowing trial court litigation to proceed pending appeal of a denial of a motion to compel arbitration. They underscore the importance of preserving the cost-saving benefits of arbitration that the parties bargained for by staying district court proceedings pending such an appeal.

Indeed, the contrary approach cannot be squared with *Concepcion*. In that class action, this Court held that arbitration "pursuant to the Federal Rules of

Civil Procedure," with "a discovery process rivaling that in litigation," is inconsistent with the FAA's purpose and therefore cannot be mandated by courts without the parties' contractual agreement. *Concepcion*, 563 U.S. at 351. This would be a toothless rule if district courts could readily sidestep it and frustrate the FAA's objectives by exposing a party to precisely the same burdens and costs of litigation simply by denying a defendant's motion to compel arbitration and forcing the defendant to litigate in court while it appeals. Since the FAA requires courts to honor the parties' contractual expectations, *id.*, defendants should not be required to proceed with inefficient, expensive litigation in court—especially onerous class proceedings—unless and until appellate courts definitively conclude the parties' contractual bargain for streamlined arbitration cannot be enforced.

IV. Requiring defendants to litigate while pursuing an interlocutory appellate decision on arbitrability deprives them of the benefits of arbitration.

A defendant forced to litigate in the district court while an appeal from an order denying its motion to compel arbitration is pending suffers the very harm it contracted to avoid—litigation in court, with its attendant expenses and inefficiencies. A defendant forced to litigate may also lose the advantage of confidential dispute resolution for which it bargained. In fact, a party required to litigate pending an appellate decision on arbitrability is left in a worse position than a party who had never agreed to arbitrate in the first place: the party who agreed to

arbitrate is faced with the cost of litigating arbitrability in addition to the costs of discovery and other costs of litigating the merits of the plaintiffs' claims.

The irreparable injury caused by requiring parties to litigate disputes they agreed to arbitrate supports a blanket rule that an appeal from an order denying a motion to compel arbitration deprives the district court of jurisdiction to proceed during the pendency of the appeal. Some district courts in the Second and Ninth Circuits—which have not adopted this rule—have recognized that proceeding with litigation pending an arbitrability appeal can impose an irreparable injury on parties to an arbitration clause for that very reason. *See, e.g., Miles v. Brusco Tug & Barge, Inc.*, No. 18-cv-02860, 2022 WL 16739566, at *1–2 (E.D. Cal. Nov. 7, 2022); *Zachman v. Hudson Valley Fed. Credit Union*, No. 20 CV 1579, 2021 WL 1873235, at *2 (S.D.N.Y. May 10, 2021); *Zaborowski v. MHN Gov't Servs., Inc.*, No. C 12-05109, 2013 WL 1832638, at *2–3 (N.D. Cal. May 1, 2013); *Sutherland v. Ernst & Young LLP*, 856 F.Supp.2d 638, 643–44 (S.D.N.Y. 2012).

Nonetheless, the fact that some district courts have been willing to stay litigation pending appeal on a discretionary basis is not an adequate substitute for instituting the blanket rule described above. For starters, the Fifth Circuit has categorically "reject[ed] the idea that arbitration ensures substantial speed and cost savings," and it has held that "these considerations alone do not constitute irreparable injury" justifying a stay. *Weingarten Realty Invs. v. Miller*, 661 F.3d 904, 913 (5th Cir. 2011) Case-by-case

stays are thus unavailable in the Fifth Circuit when sought in order to avoid the costs of litigating a dispute subject to an arbitration clause.

Likewise, multiple district courts in the Second and Ninth Circuits have refused to issue stays pending appeal of orders denying motions to compel arbitration. *See, e.g.*, *Benson v. Casa De Capri Enters. LLC*, No. CV-18-00006-PHX, 2023 WL 129533, at *3 (D. Ariz. Jan. 9, 2023); *Callahan v. PeopleConnect, Inc.*, No. 20-cv-09203, 2021 WL 5050079, at *1–3 (N.D. Cal. Nov. 1, 2021); *Hatemi v. M & T Bank Corp.*, No. 13-CV-1103S, 2015 WL 224421, at *4 (W.D.N.Y. Jan. 15, 2015); *Manigault v. Macy's E., LLC*, No. 06-CV-3337, 2008 WL 238566, at *1 (E.D.N.Y. Jan. 28, 2008). Indeed, several district courts refused to grant stays even when this Court had granted certiorari to decide the arbitrability of the very claims at issue. *See, e.g., Daugherty v. SolarCity Corp.*, No. C 16-05155, 2017 WL 386253, at *3–4 (N.D. Cal. Jan. 26, 2017); *Reed v. Autonation, Inc.*, No. CV 16-08916, 2017 WL 10592157, at *1, 4 (C.D. Cal. Mar. 6, 2017); *Rivera v. Saul Chevrolet, Inc.*, No. 16-CV-05966, 2017 WL 1862509, at *5 (N.D. Cal. May 9, 2017).

Relying on case-by-case discretionary stay determinations thus does not adequately protect the parties' interest in preserving or retaining the benefits of arbitration for which they bargained. Whether parties' contractual rights to streamlined arbitration are protected in accordance with the FAA's purpose should not turn on the happenstance of whether a district judge in a particular case is inclined to safeguard those rights with a stay pending appeal. Moreover, even parties who succeed in obtaining a

discretionary stay must incur the considerable cost and inconvenience of motion practice requesting such a stay from the district court and, if necessary, the court of appeals. Only a rule recognizing that district courts have no jurisdiction to proceed with litigation pending an appeal from the denial of a motion to compel arbitration sufficiently protects the parties' bargained-for interest in efficient dispute resolution that animated the FAA's enactment.

CONCLUSION

For the foregoing reasons, the judgments of the Ninth Circuit should be reversed.

Respectfully submitted,

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