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 THE NATIONAL RETAIL FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STEPHANIE A. MARTZ
National Retail Federation
1101 New York Avenue, NW #1200
Washington, DC 20005
[additional counsel on signature page]

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
KEVIN RANLETT
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amicus Curiae

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INTEREST OF THE *AMICUS CURIAE*[1]

Established in 1911, the National Retail Federation (NRF) is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats, and channels of distribution, spanning all industries that sell goods and services to consumers.

The NRF provides courts with the perspective of the retail industry on important legal issues impacting its members. To that end, the NRF often files *amicus* briefs expressing the views of the retail community on numerous topics, including the enforceability of 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); *Am. Express Co.* v. *Italian Colors Rest.*, 570 U.S. 228 (2013).

Retail is by far the largest private-sector employer in the United States. The retail industry directly employs 32 million Americans, and supports one in four jobs—totaling about 52 million workers.

Many NRF members enter into arbitration agreements with their employees and some also do so with their customers. NRF members choose arbitration because it is faster, simpler, more informal, less expensive, and less adversarial than a lawsuit in court.

Most of the benefits of arbitration—benefits that Congress specifically recognized and protected when it enacted the Federal Arbitration Act (FAA)—disappear when a district court erroneously denies a motion

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

to compel arbitration and permits the litigation to continue during an appeal of that order. The defendant will face the very burdens of litigation in court that the arbitration agreement was intended to avoid. Dispute resolution becomes more adversarial, subject to the complex procedural rules that apply in court, and burdened by onerous discovery. The result, among other things, is a significant increase in the costs of dispute resolution for NRF members.

The NRF and its members therefore have a strong interest in the Court's resolution of the question presented here. Staying district court proceedings during the non-frivolous appeal of an order denying arbitration protects the rights guaranteed by the FAA, preserves the benefits of arbitration, and is compelled by the text of the FAA. And even if the Court does not accept Coinbase's argument (with which NRF agrees) that district courts are divested of jurisdiction by an appeal of an order denying arbitration, a stay would be required by the legal standard governing stays pending appeal in other contexts.

INTRODUCTION AND SUMMARY OF ARGUMENT

Coinbase's brief explains that a district court must stay proceedings during a non-frivolous appeal of the denial of a motion to compel arbitration. As this Court has held, "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). "The core subject of an arbitrability appeal is the challenged continuation of proceedings before the district court on the underlying claims." *Levin* v. *Alms & Assocs., Inc.*, 634 F.3d 260, 264 (4th Cir. 2011). Congress legislated against, and incorporated, these background principles when it enacted Section 16 of the FAA to authorize immediate interlocutory appeals from the denial of arbitration. See 1988 Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, tit. X, § 1019(a), 102 Stat. 4671 (Nov. 19, 1988) (codified as amended at 9 U.S.C. § 16).

NRF submits this brief to discuss additional reasons why a stay pending appeal should be automatic. If stays were discretionary, then they often will be denied—albeit wrongly—in cases in which the denial of arbitration ultimately is reversed on appeal.

Defendants in those cases would suffer the permanent loss of the FAA's protections. That is because the entire point of arbitration is to avoid litigation in court. Congress enacted the FAA—requiring courts to enforce arbitration agreements according to their terms (see 9 U.S.C. §§ 3-4)—so that parties can choose with whom they will arbitrate, tailor the applicable rules to their needs, select an expert decisionmaker,

and avoid the undue publicity, disproportionate expense and delay, and adversarial nature of litigation in court.

Each of these substantive rights protected by the FAA would be denied if the defendant must proceed with litigation while an appeal is pending. And the benefits of arbitration, including the cost savings it generates, would disappear entirely.

In other situations in which denial of a stay would effectively deprive the appellant of a right not to litigate in court—such as official immunity—stays pending appeal are automatic. The same principle applies to appeals from the denial of arbitration.

Moreover, even if, contrary to our submission, the FAA does not require a stay, a proper application of the traditional factors governing stays during other types of appeals will require a stay during a non-frivolous appeal of the denial of arbitration. Most significantly, defendants are irreparably harmed because the very right they seek to vindicate on appeal, the right to avoid litigation in court, is lost in the absence of a stay. In addition, the balance of the equities and the public interest weigh in favor of a stay in light of the policy embodied in the FAA's protections, the need to conserve judicial resources, and the availability of pre-judgment interest to protect plaintiffs against any harm that could result from delayed proceedings.

For these reasons, the decisions below should be reversed.

ARGUMENT

District Court Proceedings Should Be Stayed During Non-Frivolous Appeals From The Denial Of Arbitration.

Forcing parties to litigate in court during an appeal from an order denying arbitration necessarily deprives them of the substantive protections of the FAA, which entitles parties to resolve disputes under simplified and streamlined procedures rather than the complex rules governing litigation in court.

That is not mere speculation: litigated cases demonstrate that those burdens often are imposed on parties in the circuits in which a stay of proceedings pending appeal is not automatic.

In addition, courts automatically grant stays pending appeal when parties take interlocutory appeals to vindicate the denial of other rights to avoid litigation—which supports the same rule here. Finally, the factors that govern stays during other types of appeals—which lower courts hostile to arbitration have been misinterpreting—require a stay pending appeal in virtually all non-frivolous appeals from a denial of arbitration.

A. Requiring Parties to Litigate the Underlying Claims During an Appeal Vitiates the Benefits of Arbitration Protected by the FAA.

1. Congress enacted the FAA to enable parties to avoid the disadvantages of litigation in court.

The FAA protects parties' right to agree to "trade[] the procedures and opportunity for review of the

courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp*. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Parties choose to "forgo the procedural rigor" of litigation under court rules to "realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010); see also, *e.g.*, *Lamps Plus, Inc*. v. *Varela*, 139 S. Ct. 1407, 1416 (2019) (same).

Congress has recognized that arbitration avoids the "delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation." Y2K Act of 1999, Pub. L. No. 106-37 § 2(a)(3)(B)(iv), 113 Stat. 185; see also H.R. Rep. No. 542, 97th Cong., 2d Sess. 13 (1982) (arbitration is "cheaper and faster than litigation," has "simpler procedural and evidentiary rules," "minimizes hostility," and is "more flexible in regard to scheduling"). Indeed, the House Report accompanying the FAA declared that "the costliness and delays of litigation * * * can be eliminated by agreements for arbitration[.]" H.R. Rep. No. 68-96, at 2 (1924). And the Senate Report agreed that arbitration allows parties to "avoid the delay and expense of litigation." S. Rep. No. 68-536, at 3 (1924).

"[T]he relative informality of arbitration" and "procedures [that] are more streamlined" are among "the chief reasons that parties select arbitration." *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 269 (2009). "[T]he informality of arbitral proceedings * * * reduc[es] the cost and increas[es] the speed of dispute resolution." *AT&T Mobility LLC* v. *Concepcion*, 563

U.S. 333, 345 (2011); see also *Allied-Bruce Terminix Cos., Inc.* v. *Dobson*, 513 U.S. 265, 280 (1995).[2]

For that reason, the FAA, "[n]ot only * * * require[s] courts to respect and enforce agreements to arbitrate; it also specifically direct[s] them to respect and enforce the parties' chosen arbitration procedures." *Epic*, 138 S. Ct. at 1621 (citing 9 U.S.C. §§ 3-4). That "'includ[es] terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted.'" *Ibid.* (quoting *Am. Express*, 570 U.S. at 233).

Judicial "procedures" often are "at odds with arbitration's informal nature." *Viking River Cruises*, 142 S. Ct. at 1918. For example, if class procedures were engrafted onto arbitration, "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace." *Epic*, 138 S. Ct. at 1623.

Similarly, discovery in arbitration typically is "not * * * as extensive as in the federal courts." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31

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[2] Early advocates of the FAA championed arbitration because, unlike in court, "[t]here are no technical pleadings * * * [and] no multiplicity of motions[.]" A.B.A. Committee on Commerce, Trade and Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 156 (1925); Percy Werner, *Voluntary Tribunals*, 56 Am. L. Rev. 852, 866 (1922) ("[Arbitration] does away with * * * the technicalities of pleading, trifling exceptions relating to procedure, and rules of evidence * * * and gets down to the marrow of a controversy in a simple, speedy, direct manner.").

(1991). That is because arbitrators can and do adapt the discovery process to the needs of the case.[3]

Parties also value the "presumption of privacy and confidentiality" of arbitration proceedings. *Stolt-Nielsen*, 559 U.S. at 686 (quoting *amicus* brief of the American Arbitration Association). And the "less adversarial setting" of arbitration is "less toxic to relationships," which is important to parties seeking to preserve ongoing "amical" relationships. Susanna S. Fodor & Steven C. Bennett, *Arbitrating Commercial Real Estate Lease Disputes*, 65 Disp. Resol. J. 90, 92-93 (2010).

Finally, arbitration can lead to better outcomes by permitting the parties to employ specialized decisionmakers. See, *e.g.*, Alan Schwartz & Simone M. Sepe, *Economic Challenges for the Law of Contract*, 38 Yale J. Reg. 678, 699 (2021) ("Arbitrators might be better than courts at evaluating the parties' information."). Indeed, one of the principal reasons that arbitration became popular—and that led to the FAA's enactment—is that specialist arbitrators had greater familiarity with industry customs and the nature of

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[3] See, *e.g.*, Albert Bates, Jr., *Controlling Time and Cost in Arbitration: Actively Managing the Process and "Right-Sizing" Discovery*, 67-Oct. Disp. Resol. J. 54, 58 (2012) (describing arbitral "authority to ensure that discovery * * * matches the needs of the case"); John B. McArthur, *Do Arbitrators Know Something that Judges Don't?*, 94 Judicature 107, 109 (2010) (detailing "skillful arbitrators' case management" of discovery); Hon. Shira A. Sheindlin, *The Intersection of E-Discovery and Arbitration*, 2021 Practitioner Insights Commentators 280 (2021) (arbitrators can prevent the "fishing expeditions" and "scorched earth tactics" common in court).

transactions than generalist judges. See, *e.g.*, Jerold S. Auerbach, *Justice Without Law?* 32-33 (1983).

Arbitration is "consistently faster and less expensive than litigation." John S. Kiernan, *Reducing the Cost and Increasing the Efficiency of Resolving Commercial Disputes*, 40 Cardozo L. Rev. 187, 211 n.20 (2018) (citing studies). The cost savings can be substantial. One recent study of 100,000 cases in arbitration or federal court between 2011 and 2015 found that the increased speed of arbitration allowed the arbitrating parties to save $22.9 billion—and that the reduced court congestion led to savings to the public of $59.2 billion.[4]

To secure these benefits of traditional arbitration the FAA requires courts to "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985).

2. Denying a stay pending appeal subjects parties to the very disadvantages of litigation that the FAA entitles them to avoid.

Requiring appellants to litigate in district court while the court of appeals decides whether the dispute should be arbitrated subjects them to the very court procedures that the arbitration agreement was intended to replace—effectively depriving them of the FAA's substantive protections before a final determination regarding the enforceability of that agreement.

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[4] Roy Weinstein *et al.*, *Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings* 4 (Mar. 2017), https://go.adr.org/impactsofdelay.html.

For example, consider the typical class or collective action in which a motion to compel arbitration on an individual basis is denied. If the dispute were arbitrated, it would take place without class proceedings. That is because class procedures "interfere[] with * * * the traditionally individualized and informal nature of arbitration." *Epic*, 138 S. Ct. at 1622-23. The FAA therefore protects the "intention to use individualized rather than class or collective action procedures" in arbitration * * * pretty absolutely." *Id.* at 1621.

But if the district court refuses to compel arbitration and a stay pending appeal were denied, litigation in the district court would proceed on a classwide basis, with all the "procedural formality" that putative class actions entail. *Concepcion*, 563 U.S. at 349. Classwide discovery would be ordered and class certification briefed and argued; the district court could require that notice be sent to absent class members. See Fed. R. Civ. P. 23(c). And the detailed federal procedural rules that govern every other aspect of a court proceeding—motions to dismiss, summary judgment motions, and other pretrial proceedings, not to mention the trial itself—would apply.

Permitting class proceedings while the appeal is pending strips parties of their right under the FAA to agree "*with whom*" they will arbitrate and "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U.S. at 344, 348.

Litigation pending appeal also subverts the parties' right under the FAA to select "*the rules*" governing adjudication of the dispute. *Epic*, 138 S. Ct. at 1621. Instead, to the extent that litigation proceeds,

the Federal Rules of Civil Procedure and the Federal Rules of Evidence will control.

For example, allowing discovery under the permissive procedures of the Federal Rules of Civil Procedure, which routinely occurs when a stay is denied, would have an enormous impact, especially in class or collective actions. Classwide discovery that is forbidden by the arbitration agreement would nonetheless proceed in the absence of a stay.

Such discovery is asymmetric: the burdens fall almost entirely on defendants.[5] Indeed, in consumer and employment disputes, the named plaintiffs generally have few if any documents to search and produce. By contrast, business defendants often have enormous databases, millions of e-mails, and numerous other sources of electronic documents that must be examined, at great expense.[6]

Thus, "discovery costs now comprise between 50 and 90 percent of the total litigation costs in a case."

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[5] See, *e.g.*, *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 558-59 (2007); Charles Yablon & Nick Landsman-Roos, *Discovery about Discovery: Sampling Practice and the Resolution of Discovery Disputes in an Age of Ever-Increasing Information*, 34 Cardozo L. Rev. 719, 726-27 (2012); Rodney A. Satterwhite & Matthew J. Quatrara, *Asymmetrical Warfare: The Cost of Electronic Discovery in Employment Litigation*, 14 Rich. J.L. & Tech. 9, ¶¶ 6-8 (2008).

[6] See, *e.g.*, *Swanson* v. *Citibank, N.A.*, 614 F.3d 400, 411 (7th Cir. 2010) (Posner, J., dissenting in part) ("[T]he cost of discovery to a defendant" because of e-discovery "has become in many cases astronomical."); Duke Conf. Subcomm., Advisory Comm. on Civ. Rules, *Report of the Duke Conference Subcommittee* 79, 83 (2014) (survey of in-house lawyers found that 90% reported that "discovery costs in federal court are not generally proportional to the needs of the case.").

John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547, 549 (2010). And "discovery costs in cases that do not go to trial"—the vast majority of cases—"are closer to seventy percent of total costs." Andrew M. Pardieck, *The Shifting Sands of Cost Shifting*, 69 Clev. St. L. Rev. 349, 424 (2021). Even relatively minor aspects of the discovery process, such as the preparation of privilege logs, are enormously expensive. See, *e.g.*, *The Sedona Conference Commentary on Protection of Privileged ESI*, 17 Sedona Conf. J. 95, 103 (2016) (preparing privilege logs alone "can consume hundreds of thousands of dollars or more").

In the aggregate, these expenses are enormous. A February 2022 survey of in-house lawyers at 400 Fortune 1000 companies found that, in 2021, spending on the defense of putative class actions for these 400 companies alone had "crossed the $3 billion threshold for the first time."[7] Spending to defend putative class actions was also expected to continue its steep rise in recent years:[8]

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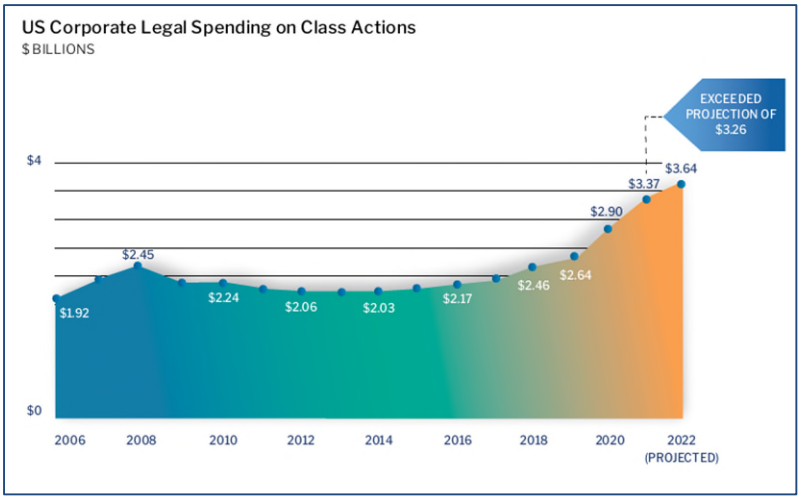
[7] Carlton Fields, *Class Action Survey* 6 (2022), https://www.classactionsurvey.com.

[8] *Id.* at 7.



The burden of discovery is not just monetary. Discovery also entails "disruption of the defendant's operations," as employees must spend time responding to document requests and preparing and sitting for depositions. *Swanson*, 614 F.3d at 411.

If defendants are denied a stay pending appeal of the denial of arbitration, they will face all these costs and burdens of litigation. Even if they ultimately prevail on appeal, the victory would be pyrrhic: they have already been subjected to the complex judicial procedures that the FAA authorized them to avoid.[9]

That scenario has played out on numerous occasions. For example:

- In *In re Pacific Fertility Center Litigation*, 2019 WL 2635539, at *1 (N.D. Cal. June 27, 2019),

[9] See, *e.g.*, Edward H. Cooper, 15B *Federal Practice and Procedure* § 3914.17 (2d ed. Supp. 2022) ("A complete stay of district court proceedings pending appeal from a refusal to order arbitration is desirable" because the "purposes of arbitration include avoiding the burdens of litigation.").

where a stay was denied, the defendants were required to engage in extensive classwide discovery and had to brief discovery and *Daubert* motions as well as motions to dismiss and for class certification, all before the Ninth Circuit reversed the order denying arbitration. *In re Pac. Fertility Ctr. Litig.*, 814 F. App'x 206, 209 (9th Cir. 2020).

- In *Hendricks* v. *UBS Financial Services, Inc.*, 546 F. App'x 514 (5th Cir. 2013), before the denial of arbitration was reversed, the district court denied a stay, required classwide discovery to be completed, decided discovery motions, and certified a class. Dkts. 37-135, *Hendricks v. UBS Fin. Servs., Inc.*, No. 2:12-cv-606-JRG-RSP (E.D. Tex.).

- In *McArdle* v. *AT&T Mobility LLC*, 657 F. Supp. 2d 1140, 1151 (N.D. Cal. 2009), after the denial of a stay pending appeal, the defendant was forced to complete classwide discovery and brief class certification. Dkts. 74-183, *McArdle* v. *AT&T Mobility LLC*, No. 4:09-cv-1117 (N.D. Cal.). The denial of arbitration was then reversed. *McArdle* v. *AT&T Mobility, LLC*, 474 F. App'x 515, 516 (9th Cir. 2012).[10]

[10] After the parties completed an arbitration, the district court vacated the award on the ground that an intervening change in state law had made the arbitration agreement unenforceable, warranting reconsideration of the order compelling arbitration. *McArdle v. AT&T Mobility LLC*, 2017 WL 4354998, at *3 (N.D. Cal. Oct. 2, 2017), aff'd, 772 F. App'x 575 (9th Cir. 2019).

- In *Fernandez* v. *Bridgecrest Credit Co.*, 2020 WL 7711837, at *4 (C.D. Cal. May 4, 2020), after the denial of a stay, the defendant was forced to complete classwide discovery before reversal of the denial of the motion to compel arbitration. *Fernandez* v. *Bridgecrest Credit Co.*, 2022 WL 898593, at *1 (9th Cir. Mar. 28, 2022).

- In *Momot* v. *Mastro*, 2010 WL 11538047, at *2 (D. Nev. Feb. 24, 2010), after a stay was denied, the defendant was forced to litigate all the way through summary judgment before the order denying arbitration was reversed. *Momot* v. *Mastro*, 652 F.3d 982, 983-84 (9th Cir. 2011).

- In *Geier* v. *m-Qube Inc.*, 824 F.3d 797, 799 (9th Cir. 2016), after a stay was denied but before the reversal of the denial of arbitration, the parties completed discovery and the court decided class certification. *Geier* v. *m-Qube Inc.*, 314 F.R.D. 692, 701 (W.D. Wash. 2016).

- In *Manigault* v. *Macy's East, LLC*, 506 F. Supp. 2d 156, 165 (E.D.N.Y. 2007), after a stay was denied, the defendant was subjected to over a year of classwide discovery before the denial of arbitration was reversed. *Manigault* v. *Macy's East, LLC*, 318 F. App'x 6 (2d Cir. 2009).

In other cases, defendants that were denied stays were forced to proceed with discovery and sometimes engage in various types of motion practice. See, *e.g.*, *Ohring* v. *UniSea, Inc.*, 2021 WL 2936641 (W.D. Wash. July 13, 2021), rev'd, 2022 WL 1599127, at *1

(9th Cir. May 20, 2022) (merits discovery); *Cottrell* v. *AT&T Inc.*, 2020 WL 2747774 (N.D. Cal. May 27, 2020), rev'd, 2021 4963246, at *2 (9th Cir. Oct. 26, 2021) (classwide discovery and motions to dismiss and regarding discovery disputes); *Mohamed* v. *Uber Techs., Inc.*, 109 F. Supp. 3d 1185 (N.D. Cal. 2015), rev'd, 848 F.3d 1201, 1206 (9th Cir. 2016) (merits discovery); *Meeks* v. *Experian Info. Sols., Inc.*, 2021 WL 5149066 (N.D. Cal. Nov. 5, 2021), rev'd, *Meeks* v. *Experian Info. Servs., Inc.*, 2022 WL 17958634, at *2 (9th Cir. Dec. 27, 2022) (classwide discovery); *Kilgore* v. *Keybank Nat'l Ass'n*, 2009 WL 1975271 (N.D. Cal. July 8, 2009), rev'd, 718 F.3d 1052, 1057, 1060-61 (9th Cir. 2013) (merits discovery and motion to dismiss).

These cases are likely only the tip of the iceberg—not every denial of a stay is readily located from searching electronic databases.

This permanent deprivation of the FAA's protections cannot be justified on the assumption that appeals of arbitration denials are meritless. To the contrary, courts of appeals regularly reverse or vacate orders denying motions to compel arbitration. Since 2018, *at least 99* such decisions have been reversed or vacated in whole or in part by the courts of appeals.[11]

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[11] *Meeks* v. *Experian Info. Servs., Inc.*, 2022 WL 17958634, at *2 (9th Cir. Dec. 27, 2022); *Ballou* v. *Asset Mktg. Servs., LLC*, 46 F.4th 844 (8th Cir. 2022); *Robert D. Mabe, Inc.* v. *OptumRX*, 43 F.4th 307 (3d Cir. 2022); *Becker* v. *Delek US Energy, Inc.*, 39 F.4th 351 (6th Cir. 2022); *United Steel* v. *Nat'l Grid*, 38 F.4th 279 (1st Cir. 2022); *Benchmark Ins. Co.* v. *SUNZ Ins. Co.*, 36 F.4th 766 (8th Cir. 2022); *Attix* v. *Carrington Mortg. Servs., LLC*, 35 F.4th 1284 (11th Cir. 2022); *Ohring* v. *UniSea, Inc.*, 2022 WL 1599127, at *1 (9th Cir. May 20, 2022); *Fernandez* v. *Bridgecrest Credit Co.*, 2022 WL 898593 (9th Cir. Mar. 28, 2022); *Casa Arena*

Blanca LLC v. *Rainwater by Estate of Green*, 2022 WL 839800 (10th Cir. Mar. 22, 2022); *In re Rotavirus Vaccines Antitrust Litig.*, 30 F.4th 148 (3d Cir. 2022); *Alvarez* v. *Sheraton Operating Corp.*, 2022 WL 67339 (9th Cir. Jan. 6, 2022); *Hause* v. *City of Sunbury*, 2022 WL 738611 (3d Cir. Mar. 11, 2022); *Zachman* v. *Hudson Valley Fed. Credit Union*, 49 F.4th 95 (2d Cir. 2022); *Knapke* v. *PeopleConnect, Inc.*, 38 F.4th 824 (9th Cir. 2022); *Triplet* v. *Menard, Inc.*, 42 F.4th 868 (8th Cir. 2022); *Zirpoli* v. *Midland Funding, LLC*, 48 F.4th 136 (3d Cir. 2022); *Berkeley Cnty. Sch. Dist.* v. *Hub Int'l Ltd.*, 2022 WL 17974626 (4th Cir. Dec. 28, 2022); *Barnett* v. *Am. Express Nat'l Bank*, 37 F.4th 1100 (5th Cir. 2022); *Ferrell* v. *Cypress Env't Mgmt.-TIR, LLC*, 2021 WL 5576677 (10th Cir. Nov. 30, 2021); *Reeves* v. *Enter. Prods. Partners, LP*, 17 F.4th 1008 (10th Cir. 2021); *Cunningham* v. *Lyft, Inc.*, 17 F.4th 244 (1st Cir. 2021); *Martinez-Gonzalez* v. *Elkhorn Packing Co.*, 25 F.4th 613 (9th Cir. 2022); *Local Union 97* v. *NRG Energy, Inc.*, 53 F.4th 42 (2d Cir. 2022); *Dekker* v. *Vivint Solar, Inc.*, 2021 WL 4958856 (9th Cir. 2021); *Cottrell* v. *AT&T Inc.*, 2021 WL 4963246, at *2 (9th Cir. Oct. 26, 2021); *Foster* v. *Walmart, Inc.*, 15 F.4th 860 (8th Cir. 2021); *Brice* v. *Sequoia Cap. Operations, LLC*, 859 F. App'x 31 (9th Cir. 2021); *Hodges* v. *Comcast Cable Commc'ns, LLC*, 21 F.4th 535 (9th Cir. 2021); *Gallagher* v. *Vokey*, 860 F. App'x 354 (5th Cir. 2021); *Ciccio* v. *SmileDirectClub, LLC*, 2 F.4th 577 (6th Cir. 2021); *Hamrick* v. *Partsfleet, LLC*, 1 F.4th 1337 (11th Cir. 2021); *Donelson* v. *Ameriprise Fin. Servs., Inc.*, 999 F.3d 1080 (8th Cir. 2021); *Zoller* v. *GCA Advisors, LLC*, 993 F.3d 1198 (9th Cir. 2021); *Hearn* v. *Comcast Cable Commc'ns, LLC*, 992 F.3d 1209 (11th Cir. 2021); *Polyflow, L.L.C.* v. *Specialty RTP, L.L.C.*, 993 F.3d 295 (5th Cir. 2021); *Balan* v. *Tesla, Inc.*, 840 F. App'x 303 (9th Cir. 2021); *Swiger* v. *Rosette*, 989 F.3d 501 (6th Cir. 2021); *Air-Con, Inc.* v. *Daikin Applied Latin Am., LLC*, 21 F.4th 168 (1st Cir. 2021); *Hansen* v. *LMB Mortg. Servs., Inc.*, 1 F.4th 667 (9th Cir. 2021); *Harper* v. *Amazon.com Servs., Inc.*, 12 F.4th 287 (3d Cir. 2021); *Frederick* v. *Law Off. of Fox Kohler & Assocs. PLLC*, 852 F. App'x 673 (3d Cir. 2021); *Commc'ns Workers of Am.* v. *AT&T Inc.*, 6 F.4th 1344 (D.C. Cir. 2021); *ADT, L.L.C.* v. *Richmond*, 18 F.4th 149 (5th Cir. 2021); *Berk* v. *Coinbase, Inc.*, 840 F. App'x 914 (9th Cir. 2020); *Nettles* v. *Midland Funding LLC*, 983 F.3d 896 (7th Cir. 2020); *Solomon* v. *CARite Corporate LLC*, 837 F. App'x 355

(6th Cir. 2020); *Borror Prop. Mgmt., LLC* v. *Oro Karric N., LLC*, 979 F.3d 491 (6th Cir. 2020); *Neal* v. *Navient Sols., LLC*, 978 F.3d 572 (8th Cir. 2020); *Mendoza* v. *Fred Haas Motors, Ltd.*, 825 F. App'x 200 (5th Cir. 2020); *Dohrmann* v. *Intuit, Inc.*, 823 F. App'x 482 (9th Cir. 2020); *Mey* v. *DIRECTV, LLC*, 971 F.3d 284 (4th Cir. 2020); *In re Pac. Fertility Ctr. Litig.*, 814 F. App'x 206, 209 (9th Cir. 2020); *Mason* v. *Midland Funding LLC*, 815 F. App'x 320 (11th Cir. 2020); *Darrington* v. *Milton Hershey Sch.*, 958 F.3d 188 (3d Cir. 2020); *Richardson* v. *Coverall N. Am., Inc.*, 811 F. App'x 100 (3d Cir. 2020); *Stiner* v. *Brookdale Senior Living, Inc.*, 810 F. App'x 531 (9th Cir. 2020); *Ashford* v. *Pricewaterhouse-Coopers LLP*, 954 F.3d 678 (4th Cir. 2020); *Int'l Union* v. *Trane U.S. Inc.*, 946 F.3d 1031 (8th Cir. 2020); *In re Mercedes-Benz Emissions Litig.*, 797 F. App'x 695 (3d Cir. 2020); *Cipolla* v. *Team Enters., LLC*, 810 F. App'x 562 (9th Cir. 2020); *Noe* v. *City Nat'l Bank of W. Va.*, 828 F. App'x 163 (4th Cir. 2020); *McCullough* v. *AIG Ins. Hong Kong Ltd.*, 828 F. App'x 704 (11th Cir. 2020); *Reichert* v. *Rapid Invs., Inc.*, 826 F. App'x 656 (9th Cir. 2020); *Matter of Willis*, 944 F.3d 577 (5th Cir. 2019); *Hudson* v. *P.I.P. Inc.*, 793 F. App'x 935 (11th Cir. 2019); *Plummer* v. *McSweeney*, 941 F.3d 341 (8th Cir. 2019); *In re Remicade (Direct Purchaser) Antitrust Litig.*, 938 F.3d 515 (3d Cir. 2019); *Dorman* v. *Charles Schwab Corp.*, 934 F.3d 1107 (9th Cir. 2019); *Abdullayeva* v. *Attending Homecare Servs. LLC*, 928 F.3d 218 (2d Cir. 2019); *Griggs* v. *Kenworth of Montgomery, Inc.*, 775 F. App'x 608 (11th Cir. 2019); *Am. Trucking & Transp. Ins. Co.* v. *Nelson*, 771 F. App'x 445 (9th Cir. 2019); *Halliburton Energy Servs., Inc.* v. *Ironshore Specialty Ins. Co.*, 921 F.3d 522 (5th Cir. 2019); *Berkeley Cnty. Sch. Dist.* v. *Hub Int'l Ltd.*, 944 F.3d 225 (4th Cir. 2019); *Egan* v. *Live Nation Worldwide, Inc.*, 764 F. App'x 204 (3d Cir. 2019); *Doctor's Assocs., Inc.* v. *Alemayehu*, 934 F.3d 245 (2d Cir. 2019); *Int'l Corrugated & Packing Supplies, Inc.* v. *Lear Corp.*, 771 F. App'x 545 (5th Cir. 2019); *Novic* v. *Credit One Bank, Nat'l Assoc.*, 757 F. App'x 263 (4th Cir. 2019); *Noye* v. *Johnson & Johnson Servs., Inc.*, 765 F. App'x 742 (3d Cir. 2019); *Southard* v. *Newcomb Oil Co., LLC*, 2019 WL 8111958 (6th Cir. Nov. 12, 2019); *Am. Fam. Life Assurance Co. of N.Y.* v. *Baker*, 778 F. App'x 24 (2d Cir. 2019); *Conduragis* v. *Prospect Chartercare, LLC*, 909 F.3d 516 (1st Cir. 2018); *Parks IP Law, LLC* v. *Wood*, 755 F. App'x 884 (11th Cir. 2018); *Beltran* v. *AuPairCare, Inc.*, 907 F.3d

Even this large number of errors understates the problem, because many defendants capitulate to settlements and thus abandon their appeals to stop the mounting cost of litigation.

That is because, when putative class or collective actions are not stayed, plaintiffs can leverage the enormous costs of litigation to pressure defendants into what Judge Friendly termed "blackmail settlements" that are reached regardless of the merits of the arbitration appeal or even the underlying claims. Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973); see also, *e.g.*, *Amgen Inc.* v. *Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 474-75 (2013) (explaining that class actions place defendants under "substantial pressure * * * to settle"); *Concepcion*, 563 U.S. at 350 (noting "the risk of 'in terrorem' settlements that class actions entail[ed]"). The denial of a stay thus effectively prevents these defendants from any chance of vindicating their right to arbitrate.

1240 (10th Cir. 2018); *JPay, Inc.* v. *Kobel*, 904 F.3d 923 (11th Cir. 2018); *O'Connor* v. *Uber Techs., Inc.*, 904 F.3d 1087 (9th Cir. 2018); *Dickson* v. *Gospel for ASIA, Inc.*, 902 F.3d 831 (8th Cir. 2018); *Gaffers* v. *Kelly Servs., Inc.*, 900 F.3d 293 (6th Cir. 2018); *Arnold* v. *Homeaway, Inc.*, 890 F.3d 546 (5th Cir. 2018); *Williams-Jackson* v. *Innovative Senior Care Home Health of Edmond, LLC*, 727 F. App'x 965 (10th Cir. 2018); *Tassy* v. *Lindsay Ent. Enters., Inc.*, 2018 WL 1582226 (6th Cir. Feb. 22, 2018); *Ridgeway* v. *Nabors Completion & Prod. Servs. Co.*, 725 F. App'x 472 (9th Cir. 2018); *Atkins* v. *CGI Techs. & Sols., Inc.*, 724 F. App'x 383 (6th Cir. 2018); *Mandviwala* v. *Five Star Quality Care, Inc.*, 723 F. App'x 415 (9th Cir. 2018); *Ziglar* v. *Express Messenger Sys., Inc.*, 739 F. App'x 444 (9th Cir. 2018); *Weiss* v. *Macy's Retail Holdings, Inc.*, 741 F. App'x 24 (2d Cir. 2018); *Gutierrez* v. *Wells Fargo Bank, NA*, 889 F.3d 1230 (11th Cir. 2018); *Miner* v. *Ecolab, Inc.*, 744 F. App'x 399 (9th Cir. 2018).

The bottom line is that, without a stay, defendants routinely will permanently be deprived of the FAA's protections. And everyone suffers as a result—the resulting rise in the cost of dispute resolution ripples out throughout the rest of the economy in the form of higher prices to consumers and lower wages to workers.

B. District Court Proceedings Should Virtually Always Be Stayed During Appeals of a Denial of Arbitration.

Petitioner's brief (at 20-38) explains that, as a matter of text and structure, the FAA requires a stay of district court proceedings. Two key points reinforce that conclusion. First, as petitioner notes (at 38-43) in other contexts in which a defendant appeals the denial of a right to avoid litigation, stays pending appeal are automatic—and the same approach should apply here, where the FAA confers a right to avoid litigation in court. Second, even if an appeal did not divest the district court of jurisdiction, a proper assessment of the traditional factors governing stays pending appeal demonstrates that a stay should be granted in any non-frivolous appeal from the denial of arbitration.

1. Stays pending appeal are automatic in comparable interlocutory appeals.

Appeals from the denial of arbitration are not the only ones in which courts have held that a stay of district court proceedings is necessary to avoid impairing the underlying right during the appeal.

Consider an appeal from the denial of absolute or qualified immunity. As this Court has explained, both are "an *immunity from suit* rather than a mere defense to liability"; that immunity "is effectively lost if

a case is erroneously permitted to go to trial." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). This Court warned "that even such pretrial matters as discovery are to be avoided[.]" *Ibid.* (citing *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817 (1982)). So "when a public official takes an interlocutory appeal to assert a colorable claim to absolute or qualified immunity from damages, the district court *must* stay proceedings." *Allman* v. *Smith*, 764 F.3d 682, 684 (7th Cir. 2014) (emphasis added; internal quotation marks omitted); see also, *e.g.*, *Hegarty* v. *Somerset Cnty.*, 25 F.3d 17, 18 (1st Cir. 1994).

The same is true if the appeal is from a denial of sovereign immunity, see, *e.g.*, *Princz* v. *Fed. Rep. of Germany*, 998 F.2d 1, 1 (D.C. Cir. 1993) (per curiam), or from the denial of double-jeopardy protections, see, *e.g.*, *United States* v. *LaMere*, 951 F.2d 1106, 1108 (9th Cir. 1991). As one treatise observes, during a non-frivolous appeal of an order denying immunity, "all proceedings must be stayed." Edward H. Cooper, 15A *Federal Practice and Procedure* § 3914.10.8 (3d ed. Supp. 2022).

This principle—that the right to avoid litigation in court would be compromised without a stay—applies with equal force to appeals from the denial of arbitration. In both situations, withholding a stay "results in a denial or impairment of the appellant's ability to obtain its legal entitlement to avoidance of litigation." *McCauley* v. *Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1162 (10th Cir. 2005) (analogizing to qualified immunity appeals); see also *Blinco* v. *Green Tree Serv., LLC*, 366 F.3d 1249, 1252-53 (11th Cir.

2004) (per curiam); *Bradford-Scott Data Corp.* v. *Physician Comp. Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997).

In sum, forcing a defendant to litigate while appealing from the denial of arbitration, as with any other appeal seeking to vindicate an immunity from suit, effectively renders a victory on appeal futile. An automatic stay is needed for precisely the same reason—to protect the underlying right to arbitrate rather than nullifying it by proceeding in court.

2. The traditional stay factors will virtually always favor a stay until arbitrability is resolved.

Another reason that an automatic stay is appropriate is that a proper assessment of the factors governing stays pending appeal will always require a stay during any non-frivolous appeal from the denial of arbitration. Contrary lower court decisions rest on a misapplication of those factors.

This Court has identified four factors to consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. *Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987)).

These factors favor a stay in the context of an appeal of the denial of arbitration. That is another reason why an automatic stay is appropriate. But if the Court were to conclude that an automatic stay is not

warranted, the Court should explain why these factors will virtually always require a stay during any non-frivolous appeal from the denial of arbitration.

a. *Non-frivolous appeals would involve a serious question as to whether the claim belongs in arbitration.*

As to the first factor—the appellant's likelihood of success—the courts of appeals agree that regardless of whether the appellant can show that success is probable, if the other stay factors weigh in their favor, any "serious question[]" on appeal is enough to warrant a stay. See, *e.g.*, *Luxshare, Ltd.* v. *ZF Automotive US, Inc.*, 15 F.4th 780, 783 (6th Cir. 2021); *Flores* v. *Barr*, 977 F.3d 742, 746 (9th Cir. 2020); *Tex. Democratic Party* v. *Abbott*, 961 F.3d 389, 397 (5th Cir. 2020); *Cuomo* v. *U.S. Nuclear Regul. Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985). This Court has not questioned that assumption. See *Ala. Ass'n of Realtors* v. *Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2487 (2021).

Any non-frivolous appeal in this context should be treated as raising serious questions. As noted above (at 16-19), the courts of appeals often reverse denials of motions to compel arbitration. Unless all (non-frivolous) appeals are deemed serious, there is a substantial risk that district courts would regularly deny stays improperly, as "it is unlikely that a district court would ever be able to find that defendants will be likely to succeed on the merits of their appeal." *C.B.S. Emps. Fed. Credit Union* v. *Donaldson, Lufkin & Jenrette Secs. Corp.*, 716 F. Supp. 307, 309 (W.D. Tenn. 1989); see also, *e.g.*, *Murphy* v. *DIRECTV, Inc.*, 2008 WL 8608808, at *2 (C.D. Cal. July 1, 2008); *Eberle* v. *Smith*, 2008 WL 238450, at *2 (S.D. Cal. Jan. 29,

2008). Indeed, as explained above (at 13-15), numerous district courts have denied stays and then been reversed on appeal. In fact, in the two cases at issue here, the district court denied stays, even though, in the words of one district judge, "I could see a different legal set of minds looking at this factual pattern and saying I was wrong." Joint App'x 754-56.

b. *The defendant would be irreparably harmed by the denial of a stay in any appeal from the denial of arbitration.*

The irreparable-harm factor weighs heavily in favor of a stay. As discussed above (at 3-4), the FAA mandates that courts compel arbitration according to their terms (9 U.S.C. §§ 3-4), which includes terms specifying with whom parties will arbitrate and under what rules. *Epic*, 138 S. Ct. at 1621. Forcing a party to litigate during the appeal irrevocably strips the defendant of these statutory rights, including:

- The right to "use individualized rather than class or collective action procedures," which the FAA "seems to protect pretty absolutely" (*ibid.*);
- The right to choose specialized, "expert adjudicators" rather than generalist judges (*Stolt-Nielsen*, 559 U.S. at 685);
- The right to choose streamlined rules, which focuses discovery on important issues and curtails motion practice (as opposed to the broad discovery, class-certification, summary judgment, and evidentiary motion practice common in courts); and

- The right to shield adjudicating parties from publicity and the contentiousness that litigation in court promotes. See 1 Thomas H. Oehmke & Joan M. Brovins, *Commercial Arbitration* § 17:1 (Supp. 2023) (arbitration is "less adversarial than 'winner-take-all" litigation" and allows "'airing dirty laundry' in private" rather than in public).

Denial of a stay also deprives parties of the benefits of arbitration, including its cost savings and reduced burdens on the litigating parties' personnel. See pages 9-13, *supra*.

In some contexts, this Court (and others) have concluded that the cost of further litigation does not count as irreparable injury. See, *e.g.*, *F.T.C.* v. *Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (addressing preliminary injunction); *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *Morgan Drexen, Inc.* v. *Consumer Fin. Prot. Bureau*, 785 F.3d 684, 695 n.3 (D.C. Cir. 2015) (permanent injunction).

But litigation costs are not the irreparable harm resulting from denial of a stay pending appeal here. That harm is the irreparable, and permanent, deprivation of the core right protected by the FAA: the right to resolve disputes through streamlined rules and procedures before an agreed-upon decisionmaker available in arbitration. Indeed, the only purpose of the appeal is to avoid the loss of these rights and the resulting coerced litigation in court. Congress enacted the FAA to authorize such motions and interlocutory ap-

peals, 9 U.S.C. §§ 3-4, 16(a), specifically to entitle parties to vindicate these rights. See *Concepcion*, 563 U.S. at 346.[12]

To be sure, the most extreme example of an irreparable injury would be forcing the defendant to try the merits in district court while the appeal was pending. As the Seventh Circuit has observed, "[t]he worst possible outcome would be to litigate the dispute, to have the court of appeals reverse and order the dispute arbitrated, to arbitrate the dispute, and finally to return to court to have the award enforced." *Bradford-Scott*, 128 F.3d at 506.

But the defendant is just as irreparably harmed if the district court purports to limit its role to presiding over discovery. Discovery under court rules usurps the province of the arbitrators to manage discovery. In other words, allowing discovery before "the issue of arbitrability is resolved puts the cart before the horse." *CIGNA HealthCare of St. Louis, Inc.* v. *Kaiser*, 294 F.3d 849, 855 (7th Cir. 2002).

Similarly, allowing wide-ranging discovery under court rules "would cut against the efficiency and cost-saving purposes of arbitration." *Levin*, 634 F.3d at 264. The deadweight loss is especially pernicious if classwide discovery is permitted, which would be irrelevant in an individual arbitration. See, *e.g.*, *Del Rio* v. *CreditAnswers, LLC*, 2010 WL 3418430, at *4 (S.D.

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[12] See, *e.g.*, Edith H. Jones, *Appeals of Arbitration Orders—Coming Out of the Serbonian Bog*, 31 S. Tex. L. Rev. 361, 375-76 (1990) ("[Congress's] choice [in Section 16 to allow immediate appeals of the denial of arbitration] is a "practical one because * * * the expense and delay associated with preparation for trial would obviate the benefits of arbitration, producing a costly error should the district court's refusal to enforce an arbitration agreement be reversed on appeal.").

Cal. Aug. 26, 2010) (finding defendant will suffer "irreparable injury absent a stay" because the "difference in litigation expenses between a two-party case and a class action is substantial").

c. *The balance of the equities always favors a stay pending appeal.*

The balance of the equities also favors a stay during any non-frivolous appeal from the denial of arbitration. As noted above, without a stay, the defendant would be deprived of the many benefits of arbitration, which the FAA protects. See pages 5-20, *supra*.

On the other side of the ledger, however, the plaintiffs would not suffer any comparable irreparable harm from a stay pending appeal. In virtually all cases, the plaintiff is seeking monetary relief, such as damages or restitution. An award of prejudgment interest would therefore compensate for any injury resulting from delay if the plaintiffs ultimately prevail. See, *e.g.*, *Zaborowski* v. *MHN Gov't Servs., Inc.*, 2013 WL 1832638, at *3 (N.D. Cal. May 1, 2013); *Murphy*, 2008 WL 8608808, at *3. And if the plaintiff were seeking injunctive relief, she often remains free to seek a preliminary injunction or temporary restraining order either from the court or an arbitrator to preserve the status quo until the case is arbitrated or litigated. See, *e.g.*, American Arbitration Association Commercial Arbitration Rule R-38; JAMS Streamlined Arbitration Rules R-19(d); *Performance Unlimited, Inc.* v. *Questar Publishers, Inc.*, 52 F.3d 1373, 1380 (6th Cir. 1995).

The balancing of the equities also must consider arbitration's benefits to plaintiffs. Like the defendant, plaintiffs realize the efficiencies, cost savings, expedition, improved accuracy of results, greater privacy

and control over the selection of the adjudicator, and the reduced adversarial nature of arbitration.

Nor can class or collective actions substitute for informal arbitration. Most claims are individualized and thus cannot be aggregated. See, *e.g.*, *Am. Express*, 570 U.S. at 229 (Rule 23 "imposes stringent requirements for certification that exclude most claims[.]"). Even when putative class actions are brought, they are certified only about 20 percent of the time.[13] And in the inevitable settlement for pennies on the dollar that follows, only a tiny fraction of class members—often less than one percent—submit claims.[14]

Moreover, studies repeatedly have shown that consumers and employees who arbitrate fare better than those who litigate in court—they win more often and receive larger awards.[15]

In addition, because arbitration reduces the cost of dispute resolution, the forces of market competition generally cause much of that cost savings to be passed

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[13] See Thomas Willging & Shannon Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 635-36 (2006).

[14] See, *e.g.*, *Pollard* v. *Remington Arms Co.*, 320 F.R.D. 198, 214-15 (W.D. Mo. 2017) (citing cases approving settlements with claims rate under one percent).

[15] See*, e.g.*, Nam D. Pham & Mary Donovan, *An Empirical Assessment of Employment Arbitration*, 16 J.L. Econ. & Pol'y 45, 47 (2021) (employees were "three times more likely to win in arbitration than in court" and win "approximately two times the amount received in judgments obtained in litigation cases"); Nam D. Pham & Mary Donovan, *Fairer, Faster, Better III: An Empirical Assessment of Consumer & Employment Arbitration*, U.S. Chamber of Commerce Institute for Legal Reform 11, 14 (Mar. 2022), https://bit.ly/3SK7QwA (similar numbers for consumer arbitrations).

along to consumers in the form of lower prices and to employees in the form of higher wages.[16] Without arbitration, those cost savings are lost, with negative effects throughout the economy.

d. *The public interest favors a stay pending appeal.*

Finally, the important public policies supporting the use of arbitration and conservation of judicial and party resources tip the balance even further in favor of a stay.

The FAA protects parties seeking to enforce arbitration agreements from being required to litigate claims. Those protections would be frustrated by the denial of a stay because those denials sharply raise the cost of enforcing arbitration agreements. The "FAA does not sanction" imposition of "preliminary litigating hurdle[s]" on arbitration that "would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure." *Am. Express*, 570 U.S. at 239. Indeed, by diluting the benefits of arbitration, the denial of a stay would undermine the

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[16] Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 Harv. Negotiation L. Rev. 29, 85 (2017) ("[S]tandard economic analysis suggests that enforcement of adhesive consumer arbitration agreements tends over time to lower the prices of the goods and services consumers buy."); Omri Ben-Shahar, *Arbitration and Access to Courts: Economic Analysis*, in *Regulatory Competition in Contract Law and Dispute Resolution* 461 (Horst Eidenmüller, ed. 2013) (because "arbitration is cheaper for business than litigation," without arbitration, "some of the cost of access to litigation would be rolled into the price of the service," and "most if not all this cost would be reflected in higher prices to consumers").

FAA's goal of "promot[ing] arbitration." *Concepcion*, 563 U.S. at 345.

Moreover, "the interests of judicial efficiency and conservation of resources favor a stay" because, as one court observed, "[i]t does not make sense for this Court to expend its time and energy preparing this case for trial * * * only to learn at a later date from the court of appeals that it was not the proper forum to hear the case." *Aviles* v. *Quick Pick Express, LLC*, 2016 WL 6902458, at *4 (N.D. Cal. Jan. 25, 2016) (internal quotation marks omitted); see also *Aviles* v. *Quick Pick Express, LLC*, 703 F. App'x 631, 632 (9th Cir. 2017) (vacating order denying motion to compel arbitration).

Similarly, the many other parties whose cases await the district court's attention would be harmed by the denial of stays pending appeal. Courts' already busy dockets would become even more congested as a result of the diversion of resources towards cases that may belong in arbitration.

In sum, the traditional factors all weigh in favor of a stay pending appeal in every case in which a party brings a non-frivolous appeal from the denial of arbitration.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

STEPHANIE A. MARTZ
National Retail Federation
1101 New York Avenue, NW #1200
Washington, DC 20005

BENJAMIN D. BRIGHT
Mayer Brown LLP
1221 Avenue of the Americas
New York, NY 10020

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
KEVIN RANLETT
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amicus Curiae

JANUARY 2023