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

MERITS BRIEF OF RESPONDENTS DAVID SUSKI, JAIMEE MARTIN, JONAS CALSBEEK, AND THOMAS MAHER

DAVID J. HARRIS, JR.
COUNSEL OF RECORD
FINKELSTEIN & KRINSK LLP
501 WEST BROADWAY, SUITE 1260
SAN DIEGO, CA 92101
(619) 238-1333
DJH@CLASSACTIONLAW.COM

February 21, 2023 *Counsel for Respondents David Suski et al.*
SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

PARTIES TO THE PROCEEDING

Coinbase, Inc. ("Coinbase") is the Petitioner, Appellant, and Defendant in *Bielski* and *Suski*. The Respondents, Appellees, and Plaintiffs in *Suski* are David Suski, Jaimee Martin, Jonas Calsbeek, and Thomas Maher ("*Suski* Respondents"). Marden-Kane, Inc. ("Marden-Kane") is a Defendant in the District Court and an Appellant in one of three unconsolidated, interlocutory appeals pending before the Ninth Circuit in *Suski*.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

STATUTES

TABLE OF AUTHORITIES – Continued

Page

JUDICIAL RULES

OTHER AUTHORITIES

INTRODUCTION

When Congress enacted the Federal Arbitration Act ("FAA") in 1925, it required courts to stay a "suit or proceeding" only "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration." 9 U.S.C. § 3. The FAA's text thus provided that a judicial finding of arbitrability was a condition precedent to any mandatory "stay." *Id.* Congress could not have been clearer about this.

Congress then amended the FAA in 1988, via the Judicial Improvements and Access to Justice Act ("JIAJA"), creating a statutory right to appeal "an order . . . refusing a stay of any action under section 3." 9 U.S.C. § 16(a). In adding Section 16 to the FAA, Congress chose not to alter or supplement the language of Section 3. Indeed, nothing in Section 16 altered the plain meaning of Section 3, such that stays could be imposed unilaterally, merely "on application of one of the parties." *Id.*; *see also* Pub. L. 100-702, title X, § 1019(a), Nov. 19, 1988, 102 Stat. 4670 (original legislation). This was a deliberate policy choice by Congress, which precluded any "one of the parties" from unilaterally wielding the power of a stay. 9 U.S.C. § 3.

Be there any doubt about this, the Court need look no further than to other, similar provisions of the JIAJA. Elsewhere within the JIAJA, Congress created another right to interlocutory appeal, regarding certain motions to transfer for lack of jurisdiction. *See* Pub. L. 100-702, title V, § 501, Nov. 19, 1988, 102 Stat. 4652 (today's 28 U.S.C. § 1292(d)(4)). Such motions, like motions to stay pending arbitration,

address a district court's authority to resolve a case's merits. *Id.* Yet unlike JIAJA Section 1019(a), JIAJA Section 501 expressly provided for automatic stays upon a motion to transfer being "filed," and continuing "until the appeal has been decided by the Court of Appeals." 28 U.S.C. 1292(d)(4). Such a disparity in language, within the same act of Congress, shows Congress's intent not to impose automatic stays pending interlocutory appeals under the FAA.

Nevertheless, in 1997, the Seventh Circuit effectively erased Section 3's "Satisfaction Clause," and judicially inserted the word "stay" into Section 16. *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504 (7th Cir. 1997) . It did so by holding that courts must stay all potentially arbitrable cases, upon the mere "application of one of the parties," before any court has been "satisfied" of arbitrability. *Id.*; 9 U.S.C. § 3. Worse, it held stays to be required where the only court to have addressed arbitrability is "satisfied" that the case is not "referable to arbitration." *Id.* This approach contradicts Congress's unambiguously expressed intent to "stay" only decidedly arbitrable cases, and not all potentially arbitrable cases. *Id.*

Unfortunately, since 1997, five other Circuits have fallen in line behind *Bradford-Scott*, rendering any case that is theoretically, potentially arbitrable (yet decidedly non-arbitrable) subject to unilateral stay by "one of the of parties." 9 U.S.C. § 3. The FAA explicitly precludes this, and no other law allows for this. Indeed, some of the pro-stay Circuits acknowledge their own holdings as untethered from the FAA's text, and as materially "extend[ing]" this Court's precedent. *See McCauley v. Halliburton Energy Servs., Inc.*, 413

F.3d 1158, 1160 (10th Cir. 2005) (admitting that this Court "has never explicitly extended" the reasoning of *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982)); *McCauley*, 413 F.3d at 1160 (recognizing that the FAA nowhere provides for stays pending arbitrability appeals).

Bradford-Scott's judicially invented, mandatory-stay policy clashes with the plain language Congress enacted, and with this Court's repeated holdings under the FAA. It also creates procedural, legal, and practical problems for litigants and lower courts alike. In contrast, the longstanding, discretionary stay procedures used by the Second, Fifth, and Ninth Circuits are consistent with the statutory text and this Court's precedents. Coupled with Fed. R. App. P. 8(a), discretionary stays fully effect Section 16's purpose as a timely, meaningful check on potential arbitrability errors.

OPINIONS AND ORDERS

I. District Court

The *Suski* District Court's Order Denying Coinbase's First Motion to Compel Arbitration is unofficially reported at 2022 WL 103541 (N.D. Cal. Jan. 11, 2022). The District Court's Order Denying Coinbase's Motion to Stay is unreported. Pet. App. 45a-48a; *Suski v. Coinbase Global, Inc.*, 21-cv-4539, Dkt. 76 (N.D. Cal. Apr. 19, 2022). The District Court's Order Denying Marden-Kane's Motion to Compel Arbitration, and Denying Coinbase's Renewed Motion to Compel Arbitration, is reported at 2022 WL 3974259 (N.D. Cal. Aug. 31, 2022).

II. Court of Appeals

The Ninth Circuit's Order Denying Coinbase's Motion to Stay Pending Appeal is unofficially reported at 2022 WL 3099846 (9th Cir. May 27, 2022). The Ninth Circuit's Opinion Affirming the District Court's Order Denying Coinbase's First Motion to Compel Arbitration is reported at 55 F.4th 1227 (9th Cir. 2022). The Ninth Circuit's Order Denying Coinbase's and *Suski* Respondents' Joint Motion to Consolidate Coinbase's consecutive arbitrability appeals, *Suski v. Coinbase, Inc.*, No. 22-15209, Dkt. 46 (9th Cir. Nov. 1, 2022), is unreported.

STATUTORY PROVISIONS INVOLVED

9 U.S.C. § 2 provides:

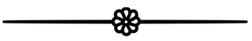
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

9 U.S.C. § 3 provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 6 provides:

> Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.



STATEMENT OF THE CASE

I. Factual Summary

Coinbase operates an online cryptocurrency exchange, which allows users to buy and sell various cryptocurrencies through Coinbase's website and mobile app. App. 487. Coinbase generates revenue by charging purchase and sale transaction fees to its users. *Id.*

Months or years before June 2021, Coinbase required each *Suski* Respondent to accept a "User Agreement" to create a personal Coinbase account and begin trading cryptocurrencies. *Suski* D. Ct. Dkt. 33-1 ("McPherson-Evans Declaration"), ¶ 6. Between January 2018 and May 2021, each *Suski* Respondent created a Coinbase account, and thereby assented (as a matter of state law) to some version of Coinbase's User Agreement. *Id.*, ¶¶ 7-13. Each User Agreement was formed as a contract between Coinbase and each *Suski* Respondent only; the User Agreements did not purport to bind or benefit any third party. *E.g.,* App. 366, 432-33. The User Agreements contained broad, mandatory arbitration provisions, including provisions delegating certain interpretive and jurisdictional disputes to an arbitrator. *E.g.,* App. 403-05, 469-71.

In June 2021, however, Coinbase and its new business partner, Defendant Marden-Kane, Inc. ("Marden-Kane"), began soliciting each *Suski* Respondent to consummate a new "transaction involving commerce." 9 U.S.C. § 2; App. 652-63. The new transaction was a one-week cryptocurrency sweepstakes, to be sponsored by Coinbase and administered by Marden-Kane (collectively, "Defendants"). App. 652-63.

Defendants' new offer was to give each *Suski* Respondent one right of entry into a random drawing to win up to $300,000.00. *Id.*; App. 488-95. All the *Suski* Respondents had to do was click an "Opt in" button, buy or sell at least $100 in so-called "Dogecoins" between June 3, 2021 and June 10, 2021, and pay the attendant transaction fees. *Id.* Upon doing that, Defendants' promise was that each *Suski* Respondent would be entered to win up to $300,000.00 in cash or Dogecoins. *Id.*[1]

[1] "Dogecoin" is one of many types of cryptocurrencies in existence today. For avoidance of doubt about how to pronounce the unofficial word "Dogecoin" or its ticker symbol, "DOGE", the "O" is long and the "G" is soft.

Each *Suski* Respondent accepted Defendants' sweepstakes offer. App. 498-503. They clicked the "Opt in" button, traded $100 or more in Dogecoins between June 3, 2021 and June 10, 2021, and paid all associated transaction fees. *Id.* As an express condition of entry, Defendants required the *Suski* Respondents to adhere to an "Official Rules" Agreement. App. 652-63. Each *Suski* Respondent formed an Official Rules Agreement with Coinbase (as "Sponsor") and Marden-Kane (as "Administrator") between June 3 and June 10, 2021. App. 557, 564.[2]

The Official Rules Agreements did not mention the word "arbitration," or any variant thereof. App. 652-63. Rather, in a section titled "Disputes," the Official Rules provided as follows.

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

---

2 Coinbase's Brief asserts that the sweepstakes "signup process" required *Suski* Respondents "to confirm that they agreed to Coinbase's User Agreement." Pet. 8; Pet. Br. 11 (citing nothing). It remains factually undisputed below that this assertion is false. The truth is that *Suski* Respondents were never presented with any User Agreement, or any link or reference to any User Agreement, as part of the sweepstakes "signup process." *Id.*; *see generally* App. 486-529.

> FOR ANY REASON AND HEREBY SUBMITS TO THE JURISDICTION OF THOSE COURTS.
>
> [irrelevant text omitted]
>
> By entering and participating in the Promotion, Entrants hereby expressly agree and accept that for all that is related to the interpretation, performance and enforcement of these Official Rules, each of them expressly submit themselves to the laws of the United States of America and the State of California, expressly waiving to any other jurisdiction that could correspond to them by virtue of their present or future domicile or by virtue of any other cause.

App. 662-63.

Hence, Coinbase and Marden-Kane together required each *Suski* Respondent to litigate, not arbitrate, "ANY CONTROVERSIES REGARDING THE PROMOTION," including "all that is related to the interpretation, performance and enforcement of these Official Rules." *Id.* Unambiguously, the phrase "FOR ANY REASON" prohibited *Suski* Respondents from invoking any arbitrator's "JURISDICTION" based on their original User Agreements with Coinbase. *Id.* This mandatory, exclusive forum-selection agreement also expressly applied to "all" gateway issues "related to the interpretation, performance and enforcement of these Official Rules." *Id.*

Soon after *Suski* Respondents entered the Dogecoin sweepstakes, they realized that they had been duped into paying $100 or more to enter. App. 498-503. The *Suski* Respondents realized that Coinbase and

Marden-Kane had deceptively advertised this sweepstakes, to manipulate them into paying for entries they would not otherwise have paid for. *Id.* In other words, *Suski* Respondents found themselves having "CONTROVERSIES" with Coinbase and Marden-Kane "REGARDING THE PROMOTION." App. 662-63. Hence, each *Suski* Respondent brought his or her claims regarding the sweepstakes before the District Court, as explicitly required by Coinbase and Marden-Kane.

Coinbase has never disputed in the District Court or the Ninth Circuit that all aspects of Plaintiffs' underlying claims constitute "CONTROVERSIES REGARDING THE PROMOTION." *Id.* Coinbase has also never disputed that every arbitrability dispute in *Suski* is "related to," and, indeed, turns on proper "interpretation, performance and enforcement of these Official Rules." Thus, there has never been a genuine arbitrability dispute here; yet there has never been a frivolous arbitrability dispute here either (*i.e.,* a dispute sanctionable under Fed. R. Civ. P. 11). There have, however, been several arbitrability motions and appeals filed by the *Suski* Defendants, consecutively.

II. Procedural History Below

On June 11, 2021, Respondent Suski filed his initial complaint in the District Court, alleging that Defendants falsely advertised the Dogecoin sweepstakes. Suski asserted claims against Coinbase Global, Inc. and Marden-Kane for violations of California's False Advertising Law ("FAL") and Unfair Competition Law ("UCL"). *Suski* D. Ct. Dkt. 1.

On August 31, 2021, Respondents Martin, Calsbeek, and Maher joined Suski in filing a First Amended

Complaint. *Suski* D. Ct. Dkt. 22 ("FAC"). The FAC included similar, more detailed allegations, including claims that the sweepstakes was an illegal lottery, and additional claims for relief under California's Consumer Legal Remedies Act ("CLRA"). *Id.*

On October 19, 2021, Coinbase Global, Inc. filed a motion to compel arbitration, or alternatively, to dismiss the FAC under Fed. R. Civ. P. 12(b)(6). App. 217-18. By stipulation, Coinbase Global, Inc.'s motion applied equally to the FAC and to a subsequently filed Second Amended Complaint ("SAC," App. 486-553), which made only technical amendments to the FAC. App. 217-18.

On January 11, 2022, the District Court denied Coinbase's motion to compel arbitration. App. 554. In denying Coinbase's motion to compel, the District Court held that for all controversies regarding the Dogecoin sweepstakes, the three-party Official Rules Agreements superseded and prevailed over the earlier, two-party User Agreements. App. 554-75.

On February 9, 2022, Coinbase filed its first notice of interlocutory appeal. *Suski* D. Ct. Dkt. 58. The same day, in the District Court, Coinbase filed a motion to stay the claims against itself (but not Marden-Kane) pending appeal. *Suski* D. Ct. Dkt. 59.

On April 19, 2022, the District Court denied Coinbase's motion to stay, finding that "Coinbase fail[ed] to show how the [c]ourt erred" on arbitrability. Pet. App. 45a-48a; *Suski v. Coinbase Global, Inc.*, 21-cv-4539, Dkt. 76 (N.D. Cal. Apr. 19, 2022).

On May 10, 2022, the *Suski* Respondents filed a Third Amended Complaint ("TAC"), alleging additional facts to support claims the District Court had dismis-

sed without prejudice under Fed. R. Civ. P. 12(b)(6). App. 576-651.

On May 11, 2022, Coinbase filed its opening merits brief in the Ninth Circuit, after seeking and obtaining a thirty-day extension. *Suski* C.A. Dkt. 8; *Suski* C.A. Dkt. 13.

On May 16, 2022, Coinbase filed a motion to stay in the Ninth Circuit under Fed. R. App. P. 8(a). *Suski* C.A. Dkt. 16.

On May 27, 2022, the Ninth Circuit denied Coinbase's appellate motion to stay, citing *Nken v. Holder*, 556 U.S. 418, 433-34 (2009), and declining to reconsider *Britton v. Co-op Banking Grp.*, 916 F.2d 1405 (9th Cir. 1990), which affords district courts discretion in deciding whether to stay merits proceedings pending an interlocutory appeal under FAA Section 16. *See* Pet. App. 2a.

On June 9, 2022, Marden-Kane filed its own, piggybacking motion to compel arbitration, though Marden-Kane was admittedly never a signatory to, or beneficiary of, any arbitration agreement with any *Suski* Respondent. *Suski* D. Ct. Dkt. 87. Coinbase joined Marden-Kane's motion to compel arbitration, while also filing a *renewed* motion to compel arbitration. App. 664-693. Thus, while Coinbase's argument is premised on the (incorrect) notion that a district court cannot review merits issues while a court of appeals reviews arbitrability, Coinbase here asked the District Court and the Ninth Circuit *to simultaneously review the same arbitrability issues*. *But see Griggs*, 459 U.S. 56 (precluding, on jurisdictional grounds, simultaneous review of the same decision).

On August 31, 2022, the District Court correctly held that it "no longer ha[d] jurisdiction" over Coinbase's arbitration demand, due to Coinbase's pending appeal regarding arbitrability. *Suski* D. Ct. Dkt. 113 at 5-7 (citing *Griggs*, 459 U.S. at 58). The District Court further held that Marden-Kane lacked standing to enforce any provision of Coinbase's User Agreements. *Id.*

On October 4, 2022, Coinbase filed a second notice of interlocutory appeal under FAA Section 16, challenging the District Court's denial of Coinbase's renewed motion to compel arbitration. App. 714-17. The same day, Marden-Kane also filed a notice of appeal, regarding the District Court's denial of its own motion to compel arbitration. *Id.*

The multiyear, appellate gamesmanship now continues, over written contracts that do not even mention the word "arbitration." App. 652-63.

SUMMARY OF ARGUMENT

I. The purpose of the Federal Arbitration Act is to stay all decidedly arbitrable cases, not to stay all potentially arbitrable cases.

A. This conclusion follows from the unambiguous text of Section 3. Coinbase fails to reconcile the plain language of Section 3's Satisfaction Clause with its extension of this Court's dicta from *Griggs*.

B. Coinbase also fails to reconcile the plain language of Section 6 with its extension of *Griggs*' dicta. As this Court recently explained, Section 6's provision

that Section 3 applications be treated "'in the manner provided by law' for all other motions is simply a command to apply the usual federal procedural rules" to Section 3 applications. *Morgan v. Sundance, Inc.*, 142 S.Ct. 1708, 1714 (2022). The "usual federal procedural rules" for motions and orders subject to interlocutory appeal are that *either* a district or circuit court may exercise their discretion to enter a stay pending appeal. *Id.* Circuit courts' independent discretion to enter stays pending appeal is consistent with Sections 3 and 6, while effecting Section 16's purpose as a meaningful check on potential district court errors regarding arbitrability. Fed. R. App. P. 8(a).

C. Where Congress intended to impose mandatory stays pending interlocutory appeals, it did so expressly and unambiguously. Congress added Section 16's provisions for interlocutory appeals into the FAA via the Judicial Improvements and Access to Justice Act of 1988 ("JIAJA"). Elsewhere in the JIAJA, Congress added similar rights to interlocutory appeal in another context, much like the arbitrability context, where authority to resolve a case's merits lies exclusively in another forum. 28 U.S.C. § 1292(d)(4). In that context, unlike in the FAA, Congress *expressly* provided for automatic stays upon the filing of a district-court motion, and for the duration of any interlocutory appeal. *Id.* This textual disparity, within the JIAJA that enacted Section 16, only further shows Congress's intent *not* to impose mandatory stays pending arbitrability appeals. To impose stays under Section 16 would be to impose statutory stays on the mere "application of one of the parties": explicitly contrary to Section 3, and implicitly contrary to Section 6.

II. The wisdom of Congress's textual choice is clear and consequential. Imposing automatic stays pending arbitrability appeals creates myriad, unnecessary problems for litigants and lower courts alike.

A. With respect to courts, automatic stays create procedural conundrums and inefficiencies in many multiparty cases. Even courts *imposing* automatic stays pending arbitrability appeals recognize that admittedly non-arbitrating litigants cannot be automatically stayed pending appeal. It follows that mandatory stays for some litigants, but not others, in a single case, creates major procedural inefficiencies that Congress never intended. District courts are forced to choose between indefinitely staying *admittedly* non-arbitrating parties (an inefficient result, with limitless potential consequences), or alternatively, adjudicating many of the same merits issues on two different schedules in the same litigation (an impracticable result). Nothing in the FAA or *Griggs* requires such judicial inefficiencies.

B. Additionally, imposing automatic stays pending arbitrability appeals encourages meritless albeit "non-frivolous" appeals that clog appellate dockets. A defendant's innate magnetism toward indefinite stays creates a strong incentive to file *any* interlocutory appeal in which *any* arbitrability argument can be fathomed. In 1997, the Seventh Circuit recognized this as "a serious concern," but deemed it sufficiently addressed by courts' abilities to certify appeals as "frivolous." Nowadays, however, there is no such thing as a "frivolous" arbitrability appeal by a represented party. It's been a quarter-century since *Bradford-Scott*, and Coinbase fails to cite one case in which a Section 16 appeal was deemed frivolously

filed by counsel. The absence of any disincentive against meritless appeals allows counseled defendants to wield the immense power of indefinite stays unilaterally: against claimants, and against the judiciary itself.

C. If that were not enough, automatic stays premised only on principles of federal, appellate jurisdiction (*e.g.,* the *Griggs* rule) risk creating disparate civil procedures for arbitrability disputes in federal versus state courts. If the FAA required automatic stays pending Section 16 appeals, that could bind state courts. But to the extent this Court would hold such stays to be automatic based only on a general division of power between district and circuit courts, state courts would not be bound by this Court's holding. Simply extending the *Griggs* rule, without a statutory command to do so, cannot invalidate state rules of procedure or jurisdiction. *Cf. Secretary of State of Md. v. J. H. Munson Co.*, 467 U.S. 947, 972 (1984) ("We may require federal courts to follow those rules, but we have no power to impose them on state courts."). Absent an express statutory command from the FAA, state courts would remain free to conduct merits proceedings pending arbitrability appeals, while federal courts would be compelled into stays by *Griggs*: an asymmetrical result Congress could not have intended.

D. With respect to litigants, Coinbase focuses only on the potential harm to appellants if stays are discretionary. Coinbase materially overstates the degree and frequency of such harm. Equally important, however, is any harm to appellees or other non-appealing parties that could accrue during a meritless albeit "non-frivolous" arbitrability appeal. Under the

policies of six Circuits, even a stay foreseeably causing irreparable harm to an appellee or non-appealing party would somehow be required by law. There is no justification for such an approach. "[T]he usual federal procedural rules" sufficiently protect both sides of, and any non-parties to, any arbitrability appeal, whether meritless or meritorious. *Morgan*, 142 S.Ct. at 1714.

III. Importantly, it is unclear why we are even talking about any of this, in this particular case. Both the "contract[s]" and the underlying "controvers[ies]" at issue here are outside the scope of the FAA. 9 U.S.C. § 2. Consequently, no court even has the power to order any "stay" of *Suski* under Section 3. *See New Prime Inc. v. Oliveira*, 139 S.Ct. 532, 537-38 (2019) (explaining that the judicial power to stay even a contractually arbitrable case under Section 3 is limited by the statutory "boundaries" of Sections 1 and 2). And without any judicial power to stay a given case under Section 3, it makes little sense to stay the same case pending a Section 16 appeal. Because the contracts and controversies at issue here are outside the scope of Section 2, courts seemingly have no statutory "stay" power whatsoever in this case.

ARGUMENT

I. ALL RELEVANT STATUTORY TEXT PRECLUDES MANDATORY STAYS PENDING SECTION 16 APPEALS.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176 (2009) (quoting *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004)); *see also FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990) (same). The Court does not "construe statutory phrases in isolation," but instead "read[s] statutes as a whole." *U.S. v. Morton*, 467 U.S. 822, 828 (1994); *see also Iancu v. Brunetti*, 139 S. Ct. 2294, 2310 (2019) ("It is foundational that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.") (internal quotation omitted). The FAA presents no exception to this rule; the Court has long recognized that FAA "Sections 1, 2, and 3 are integral parts of a whole." *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 201 (1956).

Importantly, the Court should not "lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply." *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005). The Court's "reluctance" to make such assumptions "is even greater" where, as here, "Congress has shown elsewhere in the same statute

that it knows how to make such a requirement manifest." *Id.*

These settled principles of interpretation, among others, demonstrate Congress's intent not to impose any automatic stay pending interlocutory appeal under Section 16. The relevant statutory text clearly reflects the FAA's purpose of staying decidedly arbitrable disputes, but not all potentially arbitrable disputes. This was a deliberate and wise policy choice made by Congress, in both 1925 and 1988.

A. Section 3's Satisfaction Clause Remains Unambiguous.

Section 2 of the FAA is the statute's "primary substantive provision." *Rent-A-Center v. Jackson*, 561 U.S. 63, 67 (2010) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). It makes covered arbitration agreements as "valid, irrevocable, and enforceable" as any other type of agreement would be under state law. 9 U.S.C. § 2; *cf. New Prime*, 139 S.Ct. at 537-38 (explaining that Section 2, and the FAA as a whole, do not apply to all written arbitration agreements); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010) (explaining that the statute places covered arbitration agreements "on an equal footing with other contracts").

In turn, Section 3 provides that if a "suit or proceeding" is brought in a court "upon any issue referable to arbitration," then "the court in which such suit is pending . . . *shall* on application of one of the parties stay the *trial of* the action." 9 U.S.C. § 3 (emphasis

added).[3] Section 3, however, unambiguously qualifies this stay mandate; it provides that the court "shall" impose the stay "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration." *Id.* This "Satisfaction Clause" unambiguously provides that the court "being satisfied" of arbitrability is a condition precedent to any mandatory stay. *Id.* The mere "application of one of the parties" for a stay has never been sufficient to trigger a stay. *Id.*

If, when adding Section 16 into the FAA, Congress had intended to alter or supplement Section 3's express condition for mandatory stays, then Congress would have altered or supplemented Section 3's unambiguous Satisfaction Clause: the FAA's only existing, mandatory "stay" language. *See Gross*, 557 U.S. at 175 ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.") (citing *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256 (1991)). Congress chose not to alter or supplement Section 3's unambiguous Satisfaction Clause when adding Section 16 into the statute. *See* Pub. L. 100-702, title X, § 1019(a), Nov. 19, 1988, 102 Stat. 4670. Consequently, this Court should not read into the FAA any new, mandatory "stay" provisions that this Court assumes to be accidentally omitted. *See* A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 93 (2012) ("The principle that a matter not covered is not covered is so obvious that it seems absurd to

---

[3] Section 3 unambiguously does not provide for a stay of all pretrial proceedings, so it is unclear how Section 16 could require a stay of anything except, at most, "the trial of the action." 9 U.S.C. § 3.

recite it."); *ibid.* at 94 ("To supply omissions transcends the judicial function.") (quoting *Iselin v. U.S.*, 270 U.S. 245, 251 (1926)).

Furthermore, absent any textual amendment or supplement to Section 3's text, it would defeat the purpose of the Satisfaction Clause to read any automatic stay into Section 16. The Satisfaction Clause's crystal-clear purpose is to impose a stay only "upon" a judicial determination of arbitrability, not merely "upon" one party's assertions of arbitrability. 9 U.S.C. § 3. Legislators could not reasonably have intended to allow for litigation until courts are "satisfied" of arbitrability, while intending to preclude litigation immediately "upon" the same courts being "satisfied" of justiciability. *Id.* Put differently, if a party's *pending* "application" alone cannot "stay" a "suit," then obviously, a party's *rejected* "application" alone cannot "stay" a "suit." *Id.*; *Helvering v. Credit Alliance Co.*, 316 U.S. 107, 112 (1942) ("We should, of course, read the two sections as consistent rather than conflicting, if that be possible.").

Congress was silent about mandatory stays in Section 16, only because it had already been clear and conspicuous about mandatory stays in Section 3. A judicial finding of arbitrability has always been expressly required before Congress would require indefinite, perhaps consecutive stays in a great many contract-related cases.

B. Analogous Provisions of the JIAJA, Which Added Section 16 Into the FAA, Demonstrate Congress's Intent Not to Impose Automatic Stays Pending Section 16 Appeals.

The Court has recognized that reference to "related legislative enactments" is often appropriate "when interpreting specialized statutory terms." *Reno v. Koray*, 515 U.S. 50, 57 (1995) (quoting *Gozlon-Peretz v. U.S.*, 498 U.S. 395, 407-408 (1991)). Moreover, "[w]hen Congress includes particular language in one section of a statute but omits it in another, this Court presumes that Congress intended a difference in meaning." *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) (quoting *Loughrin v. U.S.*, 573 U.S. 351, 358 (2014)) (cleaned up).

Here, Coinbase surveys the histories of various statutes involving interlocutory appeals, all to support the (false) proposition that wherever Congress intends to permit litigation pending appeal, it does so expressly. Pet. Br. 34-38. Yet Coinbase ignores the singular act of Congress that added Section 16 into the FAA. Congress added Section 16 into the FAA via the JIAJA on November 19, 1988. *See generally* Pub. L. 100-702, Nov. 19, 1988, 102 Stat. 4642 – 102 Stat. 4673. The full text of the JIAJA only crystalizes what the FAA's isolated text already makes clear; there are no automatic stays pending appeal under Section 16(a).

JIAJA Section 1019(a) created today's FAA Section 16, which provides for interlocutory appeals regarding arbitrability (*i.e.,* interlocutory appeals regarding the exclusive, proper forum for resolving disputes). *See* Pub. L. 100-702, title X, § 1019(a), Nov. 19, 1988, 102 Stat. 4670. In drafting JIAJA Section 1019(a), Con-

gress provided no express right to any stay pending appeal. *Id.* Congress merely provided the right to *take* an interlocutory appeal regarding the stay denial. *Id.*

Comparatively, JIAJA Section 501 created today's 28 U.S.C. § 1292(d)(4). JIAJA Section 501 also provided for interlocutory appeals regarding the exclusive, proper forum for resolving disputes. *See* Pub. L. 100-702, title V, § 501, Nov. 19, 1988, 102 Stat. 4652. There, in the same act that created Section 16, Congress expressly provided for stays "[w]hen a motion to transfer an action . . . is filed," and when "an appeal is taken from the district court's grant or denial of the motion." *Id.* This is a striking difference in language Congress chose, within the JIAJA, while providing for similar types of interlocutory appeals as a matter of right. This difference in language strongly suggests multiple things, independently and collectively.

First, it only further suggests Congress's intent not to stay any "suit or proceeding" upon the mere filing of a Section 3 stay "application." *Compare* 9 U.S.C. § 3 (imposing stays only where trial courts are "satisfied" of arbitrability), *with* 28 U.S.C. § 1292(d)(4)(B) (expressly imposing stays upon a jurisdictional motion to transfer being "filed").

Second, it suggests that, when Congress amended the FAA to provide for interlocutory appeals, it did not intend to impose mandatory stays upon the mere "tak[ing]" of interlocutory appeals. *Compare* 9 U.S.C. § 16 (nowhere providing for stays pending appeals that demand an arbitral forum), *with* 28 U.S.C. § 1292(d)(4)(B) (expressly providing for stays pending appeals that demand a different judicial forum). Where Congress intended to impose automatic stays pending

appeal in the JIAJA, specifically for statutory forum disputes, Congress imposed such restrictive procedures expressly and unambiguously (along with prudent qualifying language). 28 U.S.C. § 1292(d)(4)(B).

Third, such disparate language—between FAA Sections 3 and 16 on the one hand, and 28 U.S.C. § 1292(d)(4) on the other—shows that Congress takes the commonsense approach of either allowing one party to unilaterally stay a case, or not allowing one party to unilaterally stay a case. Congress does not prevent "one" party's *district-court* "application" from staying a case (9 U.S.C. § 3), only to allow the same party's identical, *appellate-court* "application" to stay the case. 9 U.S.C. § 16. Similarly, where Congress imposes a stay pending "one" party's interlocutory appeal (28 U.S.C. § 1292(d)(4)), it sensibly imposes a stay upon the same party's identical district-court motion. *Id.* One party's request for a forum change is either sufficient to impose an automatic stay, or it is not; there is no imaginable reason for the sufficiency of such a request to turn only on the level of court in which a party files its request.

Finally, the contrasting language of JIAJA Sections 501 and 1019(a) debunks Coinbase's leading theory here. It debunks Coinbase's theory that Section 16's silence regarding stays somehow "codified" Congress's (unspoken) understanding of a generalized "divesture rule." Pet. Br. 25-26. If Congress believed that interlocutory appeals challenging a district court's authority to address merits issues immediately "divested" the district court of *jurisdiction* to address merits issues, then there would have been no reason for Congress to draft Section 501 the way it did. *Digital Realty*, 138 S. Ct. at 777; *see also Scripps-Howard*

Radio v. F.C.C., 316, U.S. 4, 16-17 (1942) ("Indirect light is sometimes cast upon legislation by provisions dealing with the same problem in related enactments."). Section 501 would have simply provided for motions to transfer, provided for interlocutory appeals regarding motions to transfer, and said nothing more, trusting that some unspoken, generalized "divesture rule" would effect a "stay" during every Section 501 appeal. But that is not what happened.

Instead, JIAJA Section 501 expressly required stays pending interlocutory appeals because Congress knew there was no such thing as some generalized "divesture rule" for interlocutory appeals: not even for seemingly dispositive, interlocutory appeals challenging a district court's statutory authority to resolve the merits.

C. Section 6's Language Precludes Any Extension of *Griggs* to Interlocutory Appeals Under Section 16.

In addition to the plain text of Section 3 and the JIAJA, the plain text of Section 6 further indicates Congress's intent not to provide for stays pending Section 16 appeals. Section 6 provides that "except as otherwise herein expressly provided," any "application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions." 9 U.S.C. § 6. This provision "is simply a command to apply the usual federal procedural rules" to arbitrability proceedings under the FAA. *Morgan*, 142 S.Ct. at 1714. It is also "a bar on using custom-made rules, to tilt the playing field" in favor of arbitrability. *Id.*

Here, Coinbase seeks greater stay-relief upon denial of its Section 3 application than the stay-relief to which a sitting President is entitled upon denial of a motion to dismiss. *See generally Clinton v. Jones*, 520 U.S. 681 (1997); *ibid.* at 697 ("The President argues merely for a postponement of the judicial proceedings that will determine whether he violated any law."). Decidedly, district courts lack discretion to *grant* a sitting President this relief after resolving their own jurisdiction. *Id.* Meanwhile, many district courts lack discretion to *deny* Coinbase this same relief after resolving their own jurisdiction. *Id.* "Wow," indeed.

1. The "Usual Federal Procedural Rules" Provide for Discretionary Stays Pending Interlocutory Appeals.

As Coinbase highlights, Section 16 affords parties the unqualified right to appeal "an order . . . refusing a stay of any action under section 3 of this title." 9 U.S.C. § 16(a). It follows that district-court denials of Section 3 "application[s]" are "judgment[s]," under Title VII of the Federal Rules of Civil Procedure. *See*

Fed. R. Civ. P. 54 ("'Judgment' as used in these rules includes . . . any order from which an appeal lies."). And again, any Section 3 "application" itself must be treated as an ordinary "motion" under the "usual federal procedural rules." 9 U.S.C. § 6; *Morgan*, 142 S.Ct. at 1714.

The Federal Rules of Civil Procedure afford district courts broad discretion to "relieve a party or its legal representative from a final judgment, order, or proceeding" for any number of reasons. Fed. R. Civ. P. 60(b). Such reasons include, *inter alia*, mistake, newly discovered evidence, fraud by an opposing party, or "any other reason that justifies relief." *Id.* District courts may also relieve parties from a "judgment that *has been* reversed or vacated." *Id.* (emphasis added). Nowhere, however, do the "usual federal procedural rules" mandate relief from appealable, district-court "order[s]," *see* Fed. R. Civ. P. 54, before such orders are even "reversed or vacated." Fed. R. Civ. P. 60(b); *Morgan*, 142 S.Ct. at 1714.

Here, to the extent the *Suski* District Court denied Coinbase's Section 3 "application" for a stay, Coinbase could and did seek relief from that denial, in the form of a stay pending appeal. Fed. R. Civ. P. 60(b)(6). Under this "usual federal procedural rule," however, it was within the District Court's discretion to grant or deny Coinbase's motion for relief, in the form of a stay pending appeal. *Morgan*, 142 S.Ct. at 1714; Fed. R. Civ. P. 54; Fed. R. Civ. P. 60(b)(6). The same would be true for "*any* order from which an appeal lies." Fed. R. Civ. P. 54 (emphasis added).

Similarly, "the usual federal procedural rules" in appellate courts, *Morgan*, 142 S.Ct. at 1714, provide for discretionary stays pending appeal, not automatic

stays pending appeal. *See* Fed. R. App. P. 8(a)(1)(A) ("A party must ordinarily move first in the district court for . . . a stay of the judgment or order of a district court pending appeal."); Fed. R. App. P. 8(a)(2) ("A motion for the relief mentioned in Rule (a)(1) may be made to the court of appeals or one of its judges."). In short, there is no "default" divesture rule for interlocutory appeals or appeals generally. Pet. Br. 46. The "usual federal procedural rules" expressly provide for discretionary stays, not mandatory stays, pending "any" appealable order. *Morgan*, 142 S.Ct. at 1714; Fed. R. Civ. P. 54.

2. The *Bradford-Scott* Rule Is "Arbitration-Specific."

Four decades ago, this Court resolved conflicting appellate interpretations of Fed. R. App. P. 4(a)(4). *See generally Griggs*, 459 U.S. 56. In *Griggs*, a district court had entered a final, summary judgment on the merits against a defendant. *Id.* at 57. The defendant filed a Fed. R. Civ. P. 59 motion to alter or amend that judgment, but then also noticed an appeal of that judgment while its Fed. R. Civ. P. 59 motion was still pending. *Id.* The Court held that a court of appeals lacks jurisdiction over an appeal noticed while a motion to alter the *appealed-from* "judgment" is pending. *Id.* at 57-60.

The Court explained that a jurisdictional conflict existed between the courts because they "would be simultaneously analyzing the same judgment." *Id.* at 59; *see also id.* at 59-60 (explaining that a jurisdictional "conflict" exists where a district court and court of appeals simultaneously have "the power to modify the same judgment"). Because *Griggs* addressed Fed.

R. Civ. P. 59 motions in relation to appeals, it was clear that when *Griggs* said "the same judgment," it meant "the same 'order from which [the] appeal lies.'" *Id.*; Fed. R. Civ. P. 54 ("'Judgment' as used in these rules includes . . . any *order* from which an appeal lies."); *see also* 16A C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE § 3949.1 (4th ed.) ("An interlocutory appeal ordinarily suspends the power of the district court to modify *the order* subject to appeal, but does not oust district-court jurisdiction to continue with proceedings that do not threaten the orderly disposition of the interlocutory appeal.") (emphasis added).

The jurisdictional problem in *Griggs* was not that the appellate court's ruling might invalidate or moot the district court's ongoing proceedings (as in the context of an arbitrability appeal); this much is true of substantially every appeal, whether interlocutory or from a final judgment. The problem was that the district court's ongoing proceedings might moot the appellate proceedings. For this reason, *Griggs* held, it was the appellate court, not the district court, who lacked the power to act under Fed. R. App. P. 4(a)(4). *Id.* at 60-61.

Griggs did not address interlocutory appeals, the FAA, or any issue concerning district courts' obligations to refrain from enforcing—as opposed to reconsidering—"judgment[s]" during an appeal. *Id.* The Tenth Circuit, which currently requires automatic stays pending arbitrability appeals, acknowledges that this Court "has never explicitly extended" *Griggs* to require stays pending arbitrability appeals. *McCauley*, 413 F.3d at 1160. Therefore, the judicial policy of imposing stays pending arbitrability appeals—which originated *sua sponte*, in *Bradford-Scott*, 128 F.3d 504—consti-

tutes a "novel," material "variant" of *Griggs*. *Morgan*, 142 S.Ct. at 1710-13.[4]

The *Bradford-Scott* rule is also impermissibly "arbitration-specific," as it judicially "favor[s] arbitration over litigation." *Id.* In *Bradford-Scott*, the Seventh Circuit quoted *Griggs* for the proposition that "[t]he filing of a notice of appeal . . . 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." *Bradford-Scott*, 128 F.3d at 505 (quoting *Griggs*, 49 U.S. at 58). The Seventh Circuit admitted that "[t]he qualification 'involved in the appeal' is *essential*" to *Griggs'* holding. *Id.* (emphasis added); 16A C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE § 3949.1 (4th ed.) ("An interlocutory appeal ordinarily suspends the power of the district court to modify the order subject to appeal, but does not oust district-court jurisdiction to continue with proceedings that do not threaten the orderly disposition of the interlocutory appeal.").

As an example of how limited *Griggs'* holding was, *Bradford-Scott* explained that district courts "may conduct proceedings looking toward permanent injunctive relief while an appeal about the grant or denial of a preliminary injunction is pending." *Id.* Nevertheless, *Bradford-Scott* justified extending *Griggs'* dicta to arbitrability appeals, *sua sponte*, by reasoning as follows.

---

[4] *See Bradford-Scott*, 128 F.3d at 505 (explaining that "the parties have approached the issue as if appellants were seeking a [*discretionary*] stay," but "[w]e approach the subject from a different perspective," without anyone even arguing for that perspective).

> An appeal authorized by § 16(a)(1)(A) presents the question whether the district court must stay its own proceedings pending arbitration. Whether the litigation may go forward in the district court is precisely what the court of appeals must decide.

Id. at 506.

Bradford-Scott's own example regarding preliminary injunction appeals exposes its above-quoted reasoning as "arbitration-specific." *Morgan*, 142 S.Ct. at 1710, 1712. Under the same reasoning, district courts would be precluded from granting or denying *permanent* injunctive relief while identical, *preliminary* injunctive relief is under appellate review. In such situations, the district and appellate courts are simultaneously reviewing the same issue: whether the defendant may continue, or must discontinue, its challenged conduct in real time. Moreover, in the preliminary injunction context (28 U.S.C. § 1292(a)(1)), both courts are simultaneously reviewing *the same merits issues* to decide whether the challenged conduct will continue to be enjoined or allowed. *E.g., Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 340 (1999) ("Under standards governing preliminary injunctive relief generally, a plaintiff must show a likelihood of success on the merits. . . . "). To apply *Bradford-Scott*'s reasoning to simultaneous reviews of arbitrability and merits issues, respectively—but not to simultaneous review of the same standing injunction *and* the same merits issues—is to clearly favor arbitrability appeals over injunction appeals. *Morgan*, 142 S.Ct. at 1710-13.

There is no statutory reason for favoring one over the other, when: (i) Congress provided an unqual-

ified, statutory right to both types of interlocutory appeals; and (ii) Congress, in both statutes, declined to expressly provide for any "stay" pending appeal. 9 U.S.C. § 16; 28 U.S.C. § 1292(a)(1). And as in *Griggs*, a district court's grant or denial of permanent injunctive relief, while a preliminary-injunction appeal is pending, threatens to effectively moot the appeal. It also, as in *Griggs*, risks conflicting merits decisions of law and fact by appellate and district courts, simultaneously.

Despite such facial affronts to the (purported) *Griggs* rule, the Seventh Circuit allows those affronts to persist for injunction appeals, on the premise that *Griggs*' "essential" qualification is narrow. *Bradford-Scott*, 128 F.3d at 505. For arbitrability appeals, however, the court broadly "extended" *Griggs'* "essential" qualification *sua sponte*. *McCauley*, 413 F.3d at 1160; *Bradford-Scott*, 128 F.3d at 505. The *Bradford-Scott* rule is clearly a "novel," "arbitration-specific procedural rule" judicially created to "favor arbitration over litigation." *Morgan*, 142 S.Ct. at 1710-13. For this reason alone, the *Bradford-Scott* rule cannot stand.

3. The *Bradford-Scott* Rule Renders Arbitration Agreements More Enforceable Than Forum-Selection Agreements.

The FAA merely "places arbitration agreements on an equal footing with other contracts." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010). It "make[s] arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, n.12 (1967). "Accordingly, a court must hold a party to its arbitration contract just as the court would to any

other kind." *Morgan*, 142 S.Ct. at 1713. "The federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Id.*

In this case, the *Suski* District Court did not invalidate any private arbitration agreement. App. 554-75. It simply enforced all three litigating parties' *judicial* forum-selection agreements, which—admittedly by both Defendants—apply to all of *Suski* Respondents' claims in the District Court. The *Suski* District Court found the parties to have privately agreed to litigate all "CONTROVERSIES REGARDING THE PROMOTION," in a "written . . . contract" nowhere mentioning the word "arbitration." 9 U.S.C. § 3; App. 652-63.

Here, application of the *Bradford-Scott* rule would render *Suski* Respondents' arbitration agreements (with Coinbase only) "more" enforceable than their judicial forum-selection agreements (with Coinbase and Marden-Kane). *Prima Paint Corp.*, 388 U.S. 395, n.12. Specifically, any trial court in "CALIFORNIA" would have power to enforce the parties' arbitration agreements. 9 U.S.C. § 3; App. 662-63. Meanwhile, no district court in "CALIFORNIA" would have power to enforce the parties' *judicial* forum-selection agreements. *Id.* Only the Ninth Circuit, and perhaps this Court, would have the power to enforce those. Such asymmetric levels of enforceability between arbitration agreements and judicial forum-selection agreements would render arbitration agreements "more" enforceable than "other contracts." *Prima Paint Corp.*, 388 U.S. 395, n.12.

For this additional, independent reason, the *Bradford-Scott* rule cannot apply to *Suski* Respondents' claims, which are subject to an unambiguous,

equally "enforceable," judicial forum-selection clause. *Id.*

4. The "Usual," Four-Factor Test for Discretionary Stays Fulfills the Purpose of Section 16, Without Favoring Arbitration Agreements over Litigation Agreements.

"Different Rules of Procedure govern the power of district courts and courts of appeals to stay an order pending appeal." *Hilton v. Braunskill*, 481 U.S. 770, 776-77 (1987). Nevertheless, "the factors regulating the issuance of a stay are generally the same." *Id.* The normal, discretionary factors that district courts, courts of appeals, and this Court consider in determining whether to grant a stay pending appeal are: (1) the relative strength of the appeal; (2) whether an appellant may suffer irreparable harm absent a stay; (3) whether other parties may be substantially injured by a stay; and (4) the public interest. *Id.*; *see also Scripps-Howard*, 316, U.S. at 10-11 (explaining that in general, "a stay is not a matter of right," but "an exercise of judicial discretion," even where "irreparable injury might otherwise result to the appellant").

Coinbase argues that discretionary stays based on these traditional factors are impotent to protect parties asserting contractual rights to arbitration. Pet. Br. 33-34. This argument is premised on the notion that Section 16 guards against district-court "hostility" toward Section 3 applications. *Id.* It is further premised on the notion that absent automatic stays, "district courts [have] an easy mechanism to flout the FAA's central purpose" (as if that is what district courts are up to nowadays). *Id.* In any event,

such judiciary-disparaging arguments overlook one key point.

It is true that Section 16 aims to provide a timely check on potential arbitrability errors by district courts. Coinbase, however, overlooks the fact that Federal Rule of Appellate Procedure 8(a) allows courts of appeals to provide that very check. It is not merely district courts who have discretion to impose stays. It also courts of appeals who have their own, independent discretion to impose stays; and these are the same courts to whom Congress has entrusted arbitrability determinations. 9 U.S.C. § 16(a). Federal Rule of Appellate Procedure 8(a) thus furthers Section 16's purpose by allowing appellate courts to provide a meaningful check on district courts' *potential* arbitrability errors, but without favoring arbitration agreements over litigation agreements and other contracts.

Coinbase's arguments to the contrary are meritless. The company says that "[i]f the discretionary stay were *always* sufficient to protect a party's interests, then divesture would *never* be necessary." Pet. Br. 46. It is unclear what Coinbase is even trying to argue here. The *Griggs* rule has nothing to do with "protect[ing] a party's interests," and everything to do with jurisdiction. *Id.* Furthermore, the fact that a "discretionary stay is [what's] available in *any* interlocutory appeal," *id.*, only further proves that discretionary stays are what the FAA requires. 9 U.S.C. § 6 (providing for normal civil procedures, "except as otherwise herein expressly provided"); *Morgan*, 142 S.Ct. at 1710-14.

Coinbase contends that "district courts are unlikely to grant stays . . . even where the arguments in favor of a stay are compelling." Pet. Br. 46-47. This is just

another judiciary-disparaging argument, which should ring especially hollow after Coinbase truthfully argued the exact opposite below. *See Suski* D. Ct. Dkt. 59 at 2 (Coinbase arguing that "California district courts *routinely* exercise th[eir] discretion to grant complete stays of all proceedings" pending an "appeal of the denial of a motion to compel arbitration") (emphasis added). Contrary to Coinbase's suggestion in this Court, district courts are not using this Court's traditional stay guidance to serve some ongoing mutiny against private arbitration agreements. Rather, district courts are using the Court's traditional stay guidance to efficiently administer justice, and to pause or exercise their own decided jurisdiction over each case depending on the particular facts, circumstances, and merits of each case.

The *Suski* case well exemplifies this. Again, the *Suski* District Court did not invalidate any private arbitration agreement. Rather, the District Court enforced a private, judicial forum-selection agreement, written in a contract containing no "arbitration" terms whatsoever. App. 652-63. The FAA and its interlocutory appeal provisions exist to validate and enforce covered arbitration agreements. They do not exist to limit or obstruct private litigation agreements like the ones at issue in *Suski*.

II. THE *BRADFORD-SCOTT* RULE CREATES UNNECESSARY PROBLEMS FOR LITIGANTS AND COURTS.

Indiscriminate stays pending arbitrability appeals are not only lawless, but problematic. Any indefinite delay in civil proceedings creates the potential for harm or prejudice to one or more parties. *See, e.g., Clinton*, 520 U.S. at 707-08 (explaining that delayed

proceedings "increase the danger of prejudice from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party"); *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 434 (1985) ("Although delay is anathema in criminal cases, it is also undesirable in civil disputes. . . . "). Substantial or even irreparable harm may manifest or multiply against non-appealing litigants during one or more indefinite stays. Nowhere is the potential for serious, gratuitous harm more evident than in complex, multiparty litigation.

A. Automatic Stays Make Messes Out of Multi-Party Cases.

Federal courts determine their own jurisdiction, not on a case-by-case basis, but on a claim-by-claim basis. *See, e.g., Santiago-Lugo v. Warden*, 785 F.3d 467, 471 (11th Cir. 2015) ("This Court and the district court must have subject matter jurisdiction over a *claim* in order to decide it on the merits."); *Stop Reckless Econ. Instability Caused by Democrats v. Fed. Election Comm'n*, 814 F.3d 221, 228 (4th Cir. 2016) (explaining that "federal courts must determine whether they have subject-matter jurisdiction over a *claim* before proceeding to address its merits") (emphasis added). And of course, a district court loses jurisdiction only over those "aspects of the case involved in" a pending appeal. *Griggs*, 459 U.S. at 58.

Here, the only "aspect" of *Suski* Respondents' case "involved in" Coinbase's first appeal was whether Coinbase had the right to arbitrate *Suski* Respondents' claims against Coinbase. *Id.* When Coinbase noticed its first appeal in *Suski*, there was no argument before any court that any party could arbitrate

Suski Respondents' claims against Marden-Kane. Thus, even under Coinbase's "divesture" theory, Coinbase's first arbitrability appeal could not divest the District Court of jurisdiction over claims pending against Marden-Kane.

As even the Seventh Circuit recognizes, district courts retain jurisdiction over claims against non-appealing defendants, notwithstanding an arbitrability appeal filed over claims against another defendant. *Bradford-Scott*, 128 F.3d at 506-07. In many cases with one Section 16 appellant, there will be groups of parties—on both sides of the litigation—whose claims, defenses, and counterclaims will remain unaffected by any arbitrability appeal. Coinbase fails to explain why courts must withhold justice from concededly non-arbitrating parties on "jurisdictional" grounds or otherwise. Courts would have to stay the non-arbitrating parties indefinitely—without any legal or practical need to do so—or alternatively, risk adjudicating related or identical merits issues on consecutive litigation schedules, spaced years apart.

Absent a clear statutory or constitutional mandate, it cannot be that a plaintiff's claims, upon which relief may admittedly be granted (Fed. R. Civ. P. 12(b)(6)), are delayed indefinitely just because one defendant can fathom a "non-frivolous" argument for why they alone are "immune" from suit. Pet. Br. 38-42. Nor can it be that a district court must adjudicate similar or related merits issues, on disjointed litigation schedules, just because any one defendant can fathom any "non-frivolous" arbitrability argument for itself (only). Indefinitely staying every litigation, in which any lawyer can contrive any "non-frivolous" arbitrability

argument, is simply a myopic solution to a "jurisdictional" problem that does not exist in the first place.

B. The "Frivolous" Exception Presents No Barrier Against Extensive, Expensive Appellate Gamesmanship.

Automatic stays pending arbitrability appeals also attract extensive, expensive procedural gamesmanship by many defendants seeking to delay and obstruct claims for judicial relief at all costs.

> Why not move for a § 3 stay? If granted, arbitration will be mandated, and if denied, a lengthy appeal may wear down the opponent. The majority contends, *ante,* at 5, that "there are ways of minimizing the impact of abusive appeals." Yes, but the sanctions suggested *apply to the frivolous, not to the farfetched*; and as the majority's opinion concludes, such an attenuated claim of equitable estoppel as petitioners raise here falls well short of the sanctionable.

Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 634, (2009) (Souter, J., dissenting) (emphasis added).[5]

---

[5] The *Carlisle* majority appears to have assumed, in passing, that a Section 16 appeal could divest a district court of jurisdiction over an underlying claim. *Carlisle*, 556 U.S. at 629 ("Appellate courts can streamline the disposition of meritless claims and even authorize the district court's retention of jurisdiction when an appeal is certified as frivolous."). But the question of a district court's merits jurisdiction pending a Section 16 appeal was not actually considered or decided in *Carlisle*. This passing assumption is therefore of no precedential value here. *Cooper v. Aviall*, 543 U.S. 157, 170 (2004) ("Questions which merely lurk in the record, neither brought to the attention of the court nor

In 1997, the Seventh Circuit admitted that interlocutory gamesmanship was a "serious concern," but countered that such concerns were lessened by courts' abilities to certify arbitrability appeals as "frivolous." *Bradford-Scott, Inc.*, 128 F.3d at 506-07. In practice, however, following this Court's arbitrability decisions in recent years, there is no such thing as a "frivolous" arbitrability appeal filed by a represented party. *See generally, e.g., AT&T v. Concepcion*, 563 U.S. 333 (2011) *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019); *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407 (2019). That is why Coinbase, a quarter-century after Section 16's enactment, does not cite one case in which any court has labeled a Section 16 appeal "frivolous." *See generally* Pet. Br.

Under the above arbitrability precedents and others, if any lawyer can fathom any arbitrability argument in any case, then no other lawyer or judge in the case will be able to label that argument "frivolous" under the Court's recent precedents. *Carlisle*, 556 U.S. 624, 634, (2009) (Souter, J., dissenting). The frivolous exception in six Circuits is no exception at all. Congress properly addressed the "serious concern" of attracting meritless appeals in 1988, by refraining from imposing automatic stays pending Section 16 appeals. *See* Part I, *supra*. This Court should do the same, rather than redrafting the FAA or reframing *Griggs* to "supply" some perceived statutory "omission." Scalia & Garner, *supra*, at 94 (quoting *Iselin*, 270 U.S. at 251).

---

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

C. Automatic Stays Reduce Access to Justice and Blindly Risk Serious, Gratuitous Harm to Non-Appealing Parties.

Coinbase focuses only on an appellant's side of a case, as if every appellant has some presumptive right to arbitrate, which automatically gets violated absent a stay. As an initial matter, such presumptive rights to arbitrate or stay a suit, regardless of any district court's findings, contravenes the FAA's text. 9 U.S.C. § 3 (requiring a stay of "the trial," not pretrial proceedings, and only where the court is "satisfied" of arbitrability). If any presumptive right should exist following the denial of a Section 3 application, the "presumptive" right should be an appellee's decided right to litigate. *Id.*

Contrary to Coinbase's view, courts must consider the harm to plaintiffs-appellees that might accrue while an appellant's *asserted* right to arbitration is being rejected for a second (or third, or fourth) time on appeal. *Cf. Clinton*, 520 U.S. at 707 ("Such a lengthy and categorical stay [is an abuse of discretion because it] takes no account whatever of the respondent's interest in bringing the case to trial."). Yet under *Bradford-Scott*, even a stay foreseeably causing *irreparable* harm to an appellee, during a predictably meritless appeal, would somehow be a stay mandated by *Griggs*. Pet. 14-17. *Griggs* did not mandate such results; *Griggs* merely precluded a district court and a court of appeals from simultaneously reviewing the same order. *See generally Griggs*, 459 U.S. 56.

Non-appealing parties in contract-related cases could well suffer serious, preventable harms that six Circuits categorically refuse to prevent, solely because

they would rather "cogitate" in perfect peace on arbitrability. *Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989)). Such results lack any foundation in law. *See McCauley*, 413 F.3d at 1160 (recognizing that this Court "has never explicitly extended" *Griggs* to preclude litigation during arbitrability appeals); *id.* (recognizing that the FAA nowhere provides for stays pending arbitrability appeals).

Even where automatic stays do not directly harm appellees, automatic stays largely reduce individuals' access to justice. Most individuals' civil claims are asserted only because of access to plaintiffs' counsel operating on contingency. For example, while *Suski* Respondents' claims are for only about $100 to $200 each, just pleading those claims has involved issues of contract interpretation, statutory interpretation, federal preemption, and other nuanced legal and factual issues. Like most individuals' claims, *Suski* Respondents' claims would never be successfully asserted (if at all) apart from competent counsel willing to represent individuals on contingency.

This Court's FAA precedents have already discouraged contingency lawyers from taking on any case (no matter how meritorious) in which any arbitrability argument (no matter how unmeritorious) can be fathomed. The risk of taking a complete economic loss on even the most meritorious cases is often too high to justify representing individuals in cases where any arbitrability argument is discernable. To add to such lofty risks the certainty of being delayed for years in meritorious, non-arbitrable cases, is to render unfeasible for most contingency lawyers any case in which any arbitrability argument can be fathomed.

In sum, automatic stays pending FAA appeals only further extend the *de facto* "immunity" that most corporations already enjoy under this Court's FAA precedents. Pet. Br. 38-42. Absent an "express" congressional or constitutional command, such results should be avoided. 9 U.S.C. § 6.

III. COURTS LACK ANY POWER TO "STAY" THIS CASE UNDER THE FAA, BECAUSE THE "CONTRACT[S]" AND "CONTROVERS[IES]" HERE ARE OUTSIDE THE FAA'S SCOPE.

Read together, the FAA's individual sections become clearer in their respective meanings and purposes. Section 1 provides both "positive" and "negative" definitions that govern the whole act. 9 U.S.C. § 1 (defining, for example, what the phrase "maritime transactions" means, and what the word "contract" does not mean).

Section 2 is the FAA's "primary substantive provision." *Rent-A-Center*, 561 U.S. at 67 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). It "requires courts to enforce *covered* arbitration agreements according to their terms." *Lamps Plus*, 139 S.Ct. at 1412 (emphasis added); 9 U.S.C. § 2.

Section 3 protects defendants from claimants, who could otherwise abrogate their obligations to arbitrate by suing defendants in a court, which has jurisdiction absent an "enforceable" arbitration obligation. *Id.*; 9 U.S.C. §§ 2, 3.

Conversely, Section 4 protects *claimants* from *defendants*, who could otherwise willfully default in an arbitral forum that lacks the governing power to do anything about the default. By allowing *claimants*

to get a court order "compelling" the defendant to arbitrate, the power of the State now stands behind the arbitrator's authority to resolve a dispute. 9 U.S.C. § 4. This causes defendants to actually show up for arbitration proceedings, which they might otherwise disregard.[6]

And of course, Section 16 allows for appeals of denials of Section 3 "application[s]" for stays, or denials of Section 4 "petition[s]" to compel appearances. 9 U.S.C. §§ 3, 4, 16(a).

In *New Prime*, this Court provided helpful teaching on the relationships between the above Sections, and how those different Sections work (or do not work) together. *New Prime*, 139 S. Ct. at 537-38. The Court explained that as "antecedent statutory provisions," Sections 1 and 2 "limit the scope of the court's powers under §§ 3 and 4" to enter a stay or compel an appearance. *Id.* In other words, for a court "to invoke its statutory powers under §§ 3 and 4 to stay litigation and compel arbitration according to a contract's terms, a court must first know whether the contract itself falls within or beyond the boundaries of §§ 1 and 2." *Id.* "The parties' agreement [like Coinbase's User Agreements] may be crystal clear and require

---

6 While most corporate defendants like to file motions styled as "motions to compel arbitration," there is literally no such motion available to *defendants* under the FAA. A court can no more "compel" a private plaintiff to assert a private dispute in an arbitral forum than it can "compel" a private plaintiff to assert a private dispute in a judicial forum. Section 4 is for claimants, not for defendants. And Section 3 affords no power to "compel" anyone to do anything, except to "stay" put. In this regard, most trial-court motions to "compel" arbitration (like Coinbase's and Marden-Kane's below) are incorrectly styled.

arbitration of every question under the sun, but that does not necessarily mean the [FAA] authorizes a court to stay litigation and send the parties to an arbitral forum." *Id.*

Here, as shown below, each of the underlying "controvers[ies]" between the parties, and the "written provision[s]" to arbitrate "in" Coinbase's User Agreements, are independently "beyond the boundaries" of Section 2. *Id.*; 9 U.S.C. § 2. Thus, no court even has the "statutory powers under §§ 3 and 4 to stay litigation and compel arbitration" in this case, *even if* Coinbase's User Agreements were to "require arbitration of every question under the sun." *Id.* Indeed, in *Suski* at least, both the relevant "contract[s]" and the relevant "controvers[ies]" are plainly outside the scope of Section 2. There is therefore no judicial "stay" power over *Suski* under *any* Section of the FAA.

A. The Two, Distinct Types of Agreements and Controversies Covered by Section 2.

By its plain terms, Section 2 addresses not one, but two distinct categories of arbitration agreements: agreements to arbitrate "an *existing* controversy," and agreements to arbitrate a "controversy *thereafter* arising." 9 U.S.C. § 2 (emphasis added). Indeed, Section 2 contains materially different language and terms for agreements to arbitrate "existing" controversies, versus agreements to arbitrate controversies arising "after" an arbitration agreement is formed (*i.e.,* future controversies).

For a controversy "existing" at the time of contract formation, there are two statutory "boundaries." *New Prime*, 139 S. Ct. at 537-38. First, the "agreement" must be "in writing." 9 U.S.C. § 2. That's easy

enough. Second, the "controversy" ***to be arbitrated*** must "aris[e] out of" one of three things: (i) "***a[ny]*** contract evidencing a transaction involving commerce"; (ii) "***a[ny]*** transaction involving commerce"; or (iii) a "refusal to perform the whole or any part" of (i) or (ii). These "boundaries" are unambiguously wider than the "boundaries" provided for agreements to arbitrate future controversies. *New Prime*, 139 S. Ct. at 537-38.

For "written provision[s]" to arbitrate a future controversy—a "controversy thereafter arising," 9 U.S.C. § 2—Section 2 unambiguously provides a different, materially stricter pair of "boundaries." *New Prime*, 139 S. Ct. at 537-38. First, a "written provision" to arbitrate a future controversy must be "in" a "***contract evidencing a transaction*** involving commerce," not just "in" any old "***agreement in writing***." 9 U.S.C. § 2 (emphasis added). Second, unlike "an existing controversy," a future, arbitrable controversy must "aris[e] out of": (i) ***the*** "contract" ***containing*** the "written provision" to arbitrate; (ii) ***the*** "transaction" ***evidenced by*** that "contract"; or (iii) a "refusal to perform the whole or any part" of (i) or (ii). *Id.*

In short, Congress expressly demanded more of "written provision[s]" to arbitrate future controversies than it demanded of "agreement[s] in writing" to arbitrate "an existing controversy." 9 U.S.C. § 2. For "written provision[s]" to arbitrate future controversies, like those in Coinbase's User Agreements: (i) the "provision[s]" must be "in" a "*contract evidencing a transaction* involving commerce"; *and* (ii) the future "controversy" must "aris[e] out of" ***that*** "contract or transaction," or some non-performance thereof. *Id.* (emphasis added).

Here, both the "written provision[s]" in Coinbase's User Agreements and the *Suski* parties' sweepstakes "controvers[ies]" happen to "fall . . . beyond the boundaries" of Section 2, and thus beyond the judicial "stay" power authorized by Section 3. *Id.*; *New Prime*, 139 S. Ct. at 537-38.

B. "If 'You' Transact, Then This Is a Contract."

Coinbase's User Agreement with each *Suski* Respondent facially fails to "evidenc[e] a transaction involving commerce." 9 U.S.C. § 2. In fact, the User Agreements fail to "evidenc[e]" any "transaction" at all. For this reason alone, the User Agreements are outside "the boundaries" of Section 2. *New Prime*, 139 S. Ct. at 537-38. Hence, it is outside the statutory "power" of any court to enter any "stay" of this "suit" under Section 3. *Id.*; 9 U.S.C. § 3.

As evidenced by the McPherson-Evans Declaration in *Suski*, each *Suski* Respondent created a personal Coinbase account months or years before June 2021. *Suski* D. Ct. Dkt. 33-1, ¶ 6. "By signing up to use" a Coinbase account, each *Suski* Respondent agreed (as a matter of state law) to be bound by "all of the terms and conditions contained in" a written User Agreement somewhere on Coinbase's website or mobile app. App. 257, 316-17, 366, 432-33.

Each User Agreement contained a "written provision . . . to settle by arbitration a[ny] controversy thereafter arising out of," or in any way relating to, the User Agreements or Coinbase's services. 9 U.S.C. § 2; App. 276, 354-56, 403-05, 469-71. For three *Suski* Respondents, that "written provision" included any controversy thereafter "arising out of or related

to . . . the enforceability, revocability, scope, or validity of the Arbitration Agreement or any portion of the Arbitration Agreement. . . . " *Id.*

Critically, each User Agreement references only two parties: "Coinbase, Inc." and "you," without identifying who "you" might be. "You" could be an individual. "You" could be a corporation. "You" could be a federal, state, or foreign government. There is nothing in any User Agreement "evidencing" who "you" is. 9 U.S.C. § 2. It is questionable whether a contract identifying only one party can possibly be a contract "evidencing a[ny] transaction" at all, let alone "a[ny] transaction involving commerce." *Id.*

Furthermore, according to its terms, each User Agreement purports to be merely a potential "contract": one that might later, or might have already, become a "contract" by virtue of someone, somewhere ("you," whoever you are) creating a Coinbase account. *E.g.,* App. 433 ("*By signing up to use an account* . . . , you [whoever you are] agree that you have read, understand, and *accept* all of the terms and conditions contained in this [potential] Agreement. . . . "). According to each User Agreement, the same is true of any amendment or modification thereof. *E.g.,* App. 433-34 ("Your continued use of the Services after the posting of a Revised Agreement [on our website] constitutes your acceptance of such a Revised Agreement."). These User Agreements do not reflect that anyone has "sign[ed] up" for a Coinbase account or engaged in any "use of the Services." *Id.* Nor do they reflect that anyone has even promised to do any such thing. *Id.*

In essence, Coinbase's written contracts with *Suski* Respondents provide only that "***if*** you ever create or

use a Coinbase account, ***then you agree*** to these 'written provisions.'" App. 257, 316-17, 366, 432-33; 9 U.S.C. § 2. In other words, these User Agreements provide only that, ***"If 'you' transact, then this is a contract."*** *Id.*

Moreover, each User Agreement provides that it is the "entire agreement" between Coinbase and its counterparty (whoever that might be). App. 280, 360, 409, 475. Such fully integrated, "written" contracts are not even arguably contracts "evidencing a transaction" involving commerce. 9 U.S.C. § 2. Rather, only independent evidence of a "transaction involving commerce" could "evidenc[e]" the "contract" in the first place. *Id.* It is not the statutory "contract evidencing" the "transaction," but rather the statutory "transaction" evidencing the "contract," *post hoc*. The above statutory and contractual language excludes Coinbase's User Agreements from the FAA's scope.

If this Court has ever found the FAA applicable to unsigned, adhesive contracts like Coinbase's—identifying only ***one*** party, and providing ***only*** that that "if 'you' transact, then this is a contract"—the Court has done this without addressing the FAA's clear, textual "boundaries" for future, as opposed to "existing," controversies. *New Prime*, 139 S. Ct. at 537-38. 9 U.S.C. § 2; *see also Cooper v. Aviall*, 543 U.S. 157, 170 (2004) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").[7]

---

[7] The Court once glossed over the word "evidencing," in the process of deciding the meaning of the phrase "involving commerce." *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995)

At bottom, because Coinbase's arbitration "contract[s]" are facially outside the scope of Section 2, courts lack the power to "stay" this case under Section 3. 9 U.S.C. §§ 2, 3. Even if the Court disagrees with this, it should definitely agree with the fact that the parties' Dogecoin sweepstakes "controvers[ies]" are outside the FAA's scope. *Id.*

C. The Parties' Sweepstakes "Controvers[ies]" Do Not "Aris[e] Out Of" the Statutory "Contract" or "Transaction."

Additionally, to be covered by Section 2, the allegedly arbitrable "controvers[ies]" here must "aris[e] out of": (i) the User Agreements; (ii) some "transaction" evidenced by the User Agreements; or (iii) someone's non-performance of (i) or (ii). 9 U.S.C. § 2.

In this case, the parties' allegedly arbitrable "controvers[ies]" arise out of a single "transaction involving commerce," the Dogecoin sweepstakes. Specifically, *Suski* Respondents allege that the Dogecoin sweepstakes was a lottery, that Defendants falsely advertised the sweepstakes, and that Defendants are liable for *Suski* Respondents' financial losses in the sweepstakes. The parties' sweepstakes controversies—including "all that is related to the interpretation,

---

("That interpretation, we concede, leaves little work for the word 'evidencing' (in the phrase 'a contract evidencing a transaction') to perform, for every contract evidences some transaction. But, perhaps Congress did not want that word to perform much work."). This never-decided assumption was inaccurate. *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) ("The Court has often said that every clause and word of a statute should, if possible, be given effect."). And such passing, unsupported assumptions "are not to be considered as having been so decided as to constitute precedents." *Cooper*, 543 U.S. at 170.

performance and enforcement of th[e] Official Rules"—simply do not "aris[e] out of" the User Agreements. 9 U.S.C. § 2. If anything, they "aris[e] out of" the Official Rules Agreements among Coinbase, Marden-Kane, and each *Suski* Respondent. App. 652-63. Nor do the parties' sweepstakes controversies arise out of anyone's "refusal" to perform the User Agreements or any account-creation "transaction[s]." 9 U.S.C. § 2.

Nor do the parties' sweepstakes controversies arise out of any transaction "evidenc[ed]" by the User Agreements. If the User Agreements evidence any "transaction" (and they don't, *see supra*), they merely "evidenc[e]" *Suski* Respondents' account-creation transactions. They certainly do not "evidenc[e]" any sweepstakes "transaction." 9 U.S.C. § 2. They do not evidence that anyone was ever going to pay $100 for a chance to win $300,000. And this is the "transaction" out of which *Suski* arises. *Id.*

Hence, the parties' sweepstakes controversies are outside the textual "boundaries" of Section 2. *New Prime*, 139 S. Ct. at 537-38; 9 U.S.C. § 2. For this reason alone, there is no statutory, judicial "stay" power over the *Suski* "suit" under Section 3. *Id.* And without any judicial power to enter a stay under Section 3, or to compel arbitration under Section 4, *id.*, any stay pending a Section 16 appeal would be pointless. There is no reason for the Ninth Circuit to enter an opinion that the "issue" in *Suski* is contractually "referable to arbitration," *without* the power to stay the *Suski* litigation pending arbitration under Section 3. 9 U.S.C. § 3. There is, in turn, no reason for the *Suski* District Court to stay "the trial," 9 U.S.C. § 3, much less to stay all pretrial proceedings,

when there is no "stay" power in the first place under Section 3 here. *New Prime*, 139 S. Ct. at 537-38.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the Ninth Circuit's judgment, and hold that the traditional, four-part test for imposing discretionary stays pending interlocutory appeals applies equally to interlocutory appeals under Section 16 of the FAA.

Respectfully submitted,

DAVID J. HARRIS, JR.
COUNSEL OF RECORD
FINKELSTEIN & KRINSK LLP
501 WEST BROADWAY, SUITE 1260
SAN DIEGO, CA 92101
(619) 238-1333
DJH@CLASSACTIONLAW.COM

COUNSEL FOR RESPONDENTS

FEBRUARY 21, 2023