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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

Briefing has narrowed the parties' dispute. All parties agree that the divestiture rule described by this Court in *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56 (1982) (per curiam), applies to appeals taken under Section 16(a) of the Federal Arbitration Act, 9 U.S.C. § 16(a). All parties also agree that, under *Griggs*, an interlocutory appeal "divests the district court of its control over those aspects of the case in-

volved in the appeal." 459 U.S. at 58. The parties dispute only whether a district court exercises "control" over the "aspects of the case involved in the appeal" when it presides over federal court litigation—including discovery, class proceedings, summary judgment, and even trial—while an appellate court considers whether the case belongs in federal court at all.

The answer is yes: When a party appeals the denial of a motion to compel arbitration, "[w]hether the litigation may go forward in the district court is precisely what the court of appeals must decide." *Bradford-Scott Data Corp.* v. *Physician Comput. Network, Inc.*, 128 F.3d 504, 505 (7th Cir. 1997). That is why—unlike the choice it made in certain other federal statutes—Congress preserved the divestiture rule in Section 16(a). Section 16(a) creates an exception to the final judgment rule, allowing interlocutory appeals as a matter of right *only* from orders denying motions to compel arbitration. Section 16(b), by contrast, does not permit immediate appeal of orders favoring arbitration. This asymmetry makes sense *only if* a district court cannot press ahead with litigation while the appellate court decides whether the litigation should proceed.

Respondents contend that the *arbitrability* of the claims in the case and the *merits* of the claims in the case present separate legal questions with different legal elements: one asks who should decide, and the other asks who should win. That's true, as far as it goes. But *Griggs* doesn't ask whether the elements of the legal questions before the district court are *analytically* identical to corresponding legal elements before the court of appeals. *Griggs* asks whether the "aspects of the case" the district court would address absent a

stay are "involved in the appeal." 459 U.S. at 58. That test is plainly satisfied here. The district court's presiding over discovery and further litigation is an "aspect[] of the case" that is "involved in the appeal": "it is the mirror image of the question presented on appeal." *Bradford-Scott*, 128 F.3d at 505. The district court cannot preside over litigation without trampling over the appellant's right to a final decision from the court of appeals on who should preside over the dispute. "Continuation of proceedings in the district court largely defeats the point of the appeal and creates a risk of inconsistent handling of the case by two tribunals." *Id*.

Because it fundamentally defeats Section 16's text, structure, purpose, and history to have the district court preside over litigation while an appeals court determines the district court's very authority to proceed at all, this Court should reverse the decisions below.

ARGUMENT

I. AN ARBITRABILITY APPEAL DIVESTS THE DISTRICT COURT OF AUTHORITY TO PROCEED WITH LITIGATION.

As Respondents concede, *see* Bielski Br. 27; Suski Br. 37, Section 16(a) preserves the longstanding and well-understood background rule that an appeal "divests the district court of its control over those aspects of the case involved in the appeal," *Griggs*, 459 U.S. at 58. When the issue on appeal is whether the district court has authority to hear a claim, continued litigation pertaining to that claim in district court must be stayed. Section 16(a) therefore requires a district court to stay litigation while an appeal from a decision denying arbitration of those claims is pending. That

reading is compelled by the Federal Arbitration Act's (FAA) text, context, and purpose.

A. All Parties Agree: *Griggs* Applies To Section 16(a).

At the outset, it bears emphasis that Respondents expressly agree that *Griggs* sets out the rule for divestiture in Section 16 appeals. Bielski says the Court should apply *Griggs*'s "commonsense and long-understood case-management principle" to arbitrability appeals. Bielski Br. 27. Suski concedes that, "of course, a district court loses jurisdiction * * * over those 'aspects of the case involved in' a pending appeal." Suski Br. 37 (quoting *Griggs*, 459 U.S. at 58). In light of that consensus, there is just one narrow question remaining: What does the divestiture rule require when applied to Section 16's text?

Respondents' briefs say almost nothing about that question. Instead, they focus on issues that have been made irrelevant by their concessions. For example, Respondents place particular weight on 28 U.S.C. § 1292(d)(4)(B), which was enacted contemporaneously with Section 16 and contains an express stay provision. *See infra* pp. 14-15; Bielski Br. 12-13; Suski Br. 22-25; *see also* American Association for Justice Br. 3. But Respondents do *not* argue that 28 U.S.C. § 1292(d)(4)(B) means that the divestiture rule does not apply to Section 16(a) or operates differently with respect to that provision. Instead, Respondents concede that Congress left the divestiture rule undisturbed for arbitrability appeals. Because Coinbase is asking only for a straightforward application of the divestiture rule—a longstanding and neutral rule that Respondents agree applies in this case—the operation

of other statutes in which Congress has explicitly codified or altered the divestiture rule to further a particular objective should not affect this Court's analysis.

Similarly, Respondents note that, under *Griggs*, "district courts retain discretion [over] whether to stay trial proceedings touching aspects of the case *other than those at issue in an interlocutory appeal*." Bielski Br. 25 (emphasis added); *see* Public Justice Br. 11. That is of course true, but does not help Respondents here. The question presented is *whether* the district court's authority to proceed is at issue in the arbitrability appeal. Coinbase is not arguing that *every* interlocutory appeal necessarily results in a *complete* district court stay in *all* contexts. Coinbase instead argues that, when the issue on appeal is whether a particular claim should proceed in court or arbitration, the district court lacks authority to proceed with litigation pending appeal.

Respondents stress the fact that courts possess the authority to stay judgments during an appeal. *See* Bielski Br. 18-19; Suski Br. 27-28. This is, again, true but irrelevant. Coinbase's argument is not affected by whether courts have historically possessed residual authority to stay the independent legal force of a judgment during an appeal (during which time the trial court is *also* divested of jurisdiction to reopen its judgment, *see infra* pp. 17-18). Instead, because Respondents agree Congress maintained the *Griggs* rule in Section 16, the *Griggs* rule determines the extent of a district court's powers during an appeal.

Respondents also suggest that the *Griggs* rule is a forfeitable claim-processing requirement instead of a jurisdictional rule. *See* Bielski Br. 27; *see also* Constitutional Accountability Center Br. 5-11. Regardless,

it makes no difference here. Coinbase fully preserved its argument. *Cf. Manrique* v. *United States*, 581 U.S. 116, 121 (2017).

Because all parties agree that *Griggs* applies to Section 16(a), the only dispute that matters is how to apply *Griggs* to a Section 16 appeal.

B. Applying *Griggs* To Section 16(a) Requires Staying District Court Proceedings.

1. The District Court's Authority To Proceed With Litigation Is The Question On Appeal.

The appellate court's consideration of whether a claim is arbitrable is inextricably intertwined with whether a district court can preside over litigation of that claim at all. This Court has rejected attempts by courts to address the substance of a dispute—even "frivolous" or "wholly groundless" claims the Court could simply dismiss—when such disputes belong in arbitration. *See, e.g.*, *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 528-530 (2019); *AT&T Techs., Inc.* v. *Commc'ns Workers of Am.*, 475 U.S. 643, 649-650 (1986). "Whether 'arguable' or not, indeed even if [the claim] appears to the court to be frivolous," the merits of the dispute must "be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator." *AT&T Techs.*, 475 U.S. at 649-650. "[C]ourts * * * have *no business* weighing the merits of the grievance" if the case belongs in arbitration. *United Steelworkers of Am.* v. *Am. Mfg. Co.*, 363 U.S. 564, 568 (1960) (emphasis added).

That same analysis explains why, under *Griggs*, the district court cannot exercise ongoing authority over

merits proceedings while the court of appeals simultaneously determines whether the district court has that authority to proceed. *See* Coinbase Br. 22-25. "The only aspect of the case involved in an appeal from an order denying a motion to compel arbitration is whether the case should be litigated at all in the district court." *Blinco* v. *Green Tree Servicing, LLC*, 366 F.3d 1249, 1251 (11th Cir. 2004) (per curiam). Thus, the district court's act of adjudicating the merits implicates the *entire issue* the court of appeals is simultaneously deciding.

It is no answer to say that a district court may allow some litigation over the merits to move forward so long as the case is not fully resolved pending an arbitrability appeal. Every step taken by the district court towards resolving the merits dispute—such as ordering the parties to engage in discovery—is an exercise of the district court's overarching power to reach the merits of the case. A court thus has power to require discovery only if "relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Likewise, once a district court must dismiss a complaint on the merits, the trial court necessarily lacks authority to proceed further and order "discovery, cabined or otherwise." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 686 (2009). The court's ability to conduct preliminary proceedings is derivative of and bounded by the authority, at the culmination of litigation, to reach a final judgment on the merits.

Indeed, immunity appeals involve the same question of whether the district court may proceed to litigation on the merits. Coinbase Br. 38-42; Chamber of Commerce et al. Br. 13-16. And it is widely agreed that "the

district court must stay proceedings" such as "discovery" during immunity appeals. *Goshtasby* v. *Bd. of Trs. of Univ. of Illinois*, 123 F.3d 427, 428 (7th Cir. 1997) (Easterbrook, J.); *see, e.g.*, *Hegarty* v. *Somerset County*, 25 F.3d 17, 18 (1st Cir. 1994) (same). The *Griggs* rule requires the same result here.

2. Respondents Ask For A Special Exception To The Normal Griggs *Rule.*

None of Respondents' arguments concerning application of the divestiture rule to Section 16 have merit. Instead, Respondents ask this Court to apply *Griggs* differently here than elsewhere, but provide no basis for treating Section 16 specially.

First, Respondents do not meaningfully dispute that, in the analogous immunity context, the appeal of the denial of immunity prevents a district court from proceeding with litigation. Respondents instead argue that immunity appeals are different from arbitrability appeals because they involve "deeply rooted right[s] to avoid being sued." Bielski Br. 33-35.

But the *Griggs* rule does not turn on substance of the rights involved or the parties' "interest" "in the interlocutory appeal." *Id*. at 34. Instead, *Griggs* asks whether proceeding in district court would implicate the "aspects of the case involved in the appeal." *Griggs*, 459 U.S. at 58. Arbitrability and immunity ask an identical question: whether the suit may proceed in that particular tribunal. *Compare Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) (immunity asks whether further proceedings should "be allowed"), *with Henry Schein*, 139 S. Ct. at 529 (arbitrability addresses whether courts have any "business weighing the merits" (quotation marks omitted)). The analogy

to immunity thus shows that it is Respondents—not Coinbase—who ask this Court to "invent" a "special" arbitration-*defeating* exception to the normal application of the divestiture rule. *Morgan* v. *Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022).

Similarly, Respondents contend that, because immunity rulings are immediately appealable collateral orders, and because one element of the collateral order doctrine is that the issue on appeal is "completely separate from the merits," immunity appeals must actually be separate from the merits under *Griggs*. Bielski Br. 35-36 n.2 (quotation marks omitted). That argument conflates two different doctrines. The legal question "is the defendant immune?" may be "conceptually distinct," *Mitchell* v. *Forsyth*, 472 U.S. 511, 527-528 (1985), from "is the defendant liable?" for purposes of the collateral order doctrine, and permit immediate appeal. But the district court's *act of presiding* over litigation regarding the second question is "inextricably tied to the question of immunity" on appeal. *Apostol* v. *Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989). The same is true for arbitrability appeals: Whether the district court has the authority to preside over litigation is the "aspect[] of the case involved in the appeal" over which the district court loses "control." *Griggs*, 459 U.S. at 58.

Second, Respondents seek to distinguish the immunity precedent by arguing that immunity rights shield parties from "*being sued*" while arbitration rights merely shield parties from suit *in a given forum*. Bielski Br. 34. This attempted distinction fails. Consider the example of state sovereign immunity, the "fundamental principle of" which "limits" the federal courts' "grant of judicial authority" under Article III.

Seminole Tribe of Fla. v. *Florida*, 517 U.S. 44, 64 (1996) (quotation marks omitted). The effect of state sovereign immunity is to channel litigation to state courts, much like the effect of the FAA is to channel arbitrable claims to arbitration. *See Goshtasby*, 123 F.3d at 427-428 (requiring stay of discovery while court of appeals determines whether litigation "must take place in state rather than federal court").

Respondents' assertion that arbitration is just "a *specialized* kind of forum-selection clause" likewise backfires. *Viking River Cruises, Inc.* v. *Moriana*, 142 S. Ct. 1906, 1919 (2022) (emphasis added and quotation marks omitted); *see* Bielski Br. 28. Arbitration is a *special* "forum-selection clause" because an arbitration agreement "posits not only the situs of suit but *also the procedure to be used*." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (emphasis added). Contrary to Respondents' assertion, by design, arbitration does not share the "essential characteristics of litigation." Bielski Br. 29-30. This Court has instead treated arbitration and litigation as fundamentally different, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344-346 (2011), and has routinely recognized that "[a]rbitration is not a 'judicial proceeding,'" *McDonald* v. *City of West Branch*, 466 U.S. 284, 288 (1984), because it displaces litigation altogether, *Epic Systems Corp*. v. *Lewis*, 138 S. Ct. 1612, 1623 (2018).

To pick just a few examples: Arbitration does not require intrusive discovery, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 648 n.14 (1985), or class proceedings, *AT&T Mobility*, 563 U.S. at 348. Arbitration "carries no right to a jury trial." *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 664 (1965). Arbitrators "need not be instructed in the

law" and "are not bound by rules of evidence." *Id*. And arbitration proceedings are usually presumed confidential. *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (2010).

The fundamental differences between litigation and arbitration are *why* parties transfer authority to preside over disputes from courts to arbitrators. *See* National Retail Federation Br. 5-9. But the core benefits of arbitration—tailored discovery, limited expense, individual proceedings, and privacy—are lost *forever* if the district court exercises authority over a case while the court of appeals reviews an erroneous arbitrability ruling. *See id*. at 13-16 (collecting cases where district courts proceeded only to be reversed on arbitrability). And because of these substantive differences, arbitration cannot be dismissed as merely a "procedural" choice that lacks "substantive" effect. Bielski Br. 28.

Third, *Griggs*'s divesture rule applies in the same way even if arbitration agreements are properly viewed as forum selection clauses. For some forum selection clauses, "the law does not deem the right *important enough*" to require an immediate interlocutory appeal. *Lauro Lines s.r.l.* v. *Chasser*, 490 U.S. 495, 502-503 (1989) (Scalia, J., concurring). But Congress made *the exact opposite policy determination* when it adopted Section 16(a). As this Court has explained, Section 16 reflects Congress's assessment that the right to arbitrate *is* "important enough to warrant immediate appeal," and is on par with immunity. *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 880 n.7 (1994). This Court should "give full effect to this

express congressional judgment," and should not permit the right to be destroyed by creating a one-time exception to the *Griggs* rule. *Id*.

Fourth, Respondents once again cite *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983). But that case does not displace the straightforward conclusion that—under the *Griggs* rule—the *act* of a lower court proceeding with litigation is the mirror image of the issue presented by an arbitrability appeal. *See* Coinbase Br. 43-45. In *Moses H. Cone*, the Court stated that arbitrability was *analytically* "severable from the merits." 460 U.S. at 20-21. But this statement simply explains that a federal court could decide arbitrability, even if a state court (or an arbitrator) would actually adjudicate the dispute. *Id.* These four words from *Moses H. Cone* did not address *Griggs* and cannot bear the weight Bielski places on it. Indeed, the *Moses H. Cone* majority did not contest then-Justice Rehnquist's conclusion that an interlocutory appeal implicates "the power of district courts to control their own cases." *Id*. at 31 (Rehnquist, J., dissenting). That is the obvious result of applying *Griggs* to arbitrability appeals.

C. Statutory Context Confirms Congress Intended To Stay Litigation.

1. The FAA's Other Sections Confirm That An Arbitrability Appeal Prevents Litigating In District Court.

The interaction of Section 16(a) with Section 3 of the FAA further demonstrates why divestiture is appropriate. Section 3 requires a district court to stay proceedings referable to arbitration. If the district court denies a motion to stay under Section 3, then

Section 16(a) authorizes the party seeking the stay to immediately appeal. And when a party appeals an order denying a stay of district court proceedings, whether the district court may proceed is *exactly* the question at issue in the appeal. *See* Coinbase Br. 30-31.

Respondents suggest that Section 16(a)'s express reference to Section 3 reflects a choice not to impose a "mandatory stay" during Section 16 appeals. Bielski Br. 10-11; Suski Br. 19-21. That suggestion collapses two entirely different types of stays. Section 3 provides for stays "*pending arbitration*," *AT&T Mobility*, 563 U.S. at 344 (emphasis added), while *Griggs* governs divestiture *pending appeal*. Congress needed to be explicit about stays pending arbitration because, unlike for stays pending appeal, there was no preexisting doctrine requiring divestiture. But Section 3's provision of stays pending *arbitration* does not change the "backdrop of existing law" on stays pending *appeal*. *See Parker Drilling Mgmt. Servs., Ltd.* v. *Newton*, 139 S. Ct. 1881, 1890 (2019) (quotation marks omitted).

Suski's reference to Section 6 (at 25-27) is inapposite. That provision provides that "[a]ny application to the court"—including applications to stay litigation under Section 3 and to compel arbitration under Section 4—functions like a motion. 9 U.S.C. § 6; *see Morgan*, 142 S. Ct. at 1714. By its terms, Section 6 does not address whether appeals of orders denying such applications stay proceedings. The rules it references—including "waiver, forfeiture, estoppel, laches, or procedural timeliness"—likewise do not make or break the divestiture inquiry. *See Morgan*, 142 S. Ct. at 1712. Insofar as the "usual federal procedural rules," Suski Br. 27

(quoting *Morgan*, 142 S. Ct. at 1712), matter, they incorporate background principles that require divestiture.

2. Broader Statutory Context Confirms Congress Did Not Intend Litigation To Proceed During Arbitrability Appeals.

In nearly a dozen statutes passed since 1891—including a statute passed *the day before* Congress enacted Section 16—Congress expressly displaced the *Griggs* divestiture rule. *See* Coinbase Br. 34-38. By contrast, Congress has *never* included a limiting proviso in Section 16, and has instead preserved the divestiture rule to its fullest extent. Only Coinbase offers an explanation for that textual difference: Congress intended Section 16 appeals to stay district court proceedings. *See* Coinbase Br. 34-38.

The few contextual arguments Respondents advance are meritless.

First, Respondents point to 28 U.S.C. § 1292(d)(4)(B), which contains an express stay provision halting district court proceedings while a party appeals the grant or denial of a transfer request to the Court of Federal Claims. 28 U.S.C. § 1292(d)(4)(B). Respondents argue that Congress would not have needed to include an express stay provision if *Griggs* would have provided an automatic stay. *See* Bielski Br. 12-13; Suski Br. 22-25.

But simply reading Section 1292 shows why Congress chose to expressly codify the divestiture rule there. Unlike Section 16, which Congress drafted from scratch, Congress embedded Section 1292(d)(4)'s interlocutory appeal provision in a *preexisting* subdivision that expressly displaced *Griggs*, providing that

"an appeal under this subsection" does *not* "stay proceedings" in the Court of Federal Claims. 28 U.S.C. § 1292(d)(3); *see* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 125, 96 Stat 25, 36-37. To both add an interlocutory appeal right and also ensure divestiture for interlocutory appeals in Section 1292(d)(4), Congress needed to expressly revive the divestiture rule in Section 1292(d)(4) that it overrode in Section 1292(d)(3).

By contrast, Section 16 lacks any limiting proviso, and Congress could rely on *Griggs*'s background rule instead. Section 1292(d)(4) therefore rebounds on Respondents: Because Section 1292(d)(4) recodifies the divestiture rule Congress overrode in Section 1292(d)(3), it confirms how Congress understood that rule to operate. In Section 16, Congress relied on the default *Griggs* rule to produce the same result for arbitrability appeals.

Section 1292(d)(4)'s express provision for a stay pending appeal was also necessary for another, related reason. Section 1292(d)(4) imposes a district court stay which lasts for "60 days after the court has ruled upon the motion," preventing the case's premature transfer to the Court of Federal Claims, and thereby preserving jurisdiction for an interlocutory appeal. 28 U.S.C. § 1292(d)(4)(B); *see* H.R. Rep. No. 100-889, at 53 (1988). But without an express extension of the stay pending appeal, the statute could have implied that a stay lasts *only* for the initial 60 days, not during the appeal as well. The express reference to a stay pending appeal precludes that result.

Second, Bielski points (at 26) to 18 U.S.C. § 2339B(f)(5)(B)(ii)-(iii), which permits the government to appeal orders involving classified information

during certain terrorism trials, and prevents the start of a trial during an appeal. But Bielski once again ignores context. Section 2339B provides detailed procedural instructions requiring the court of appeals to "expedite[]" and "hear argument" within "4 days," and "render its decision" by "4 days" later. 18 U.S.C. § 2339B(f)(5)(B)(i)-(iii). Given that careful choreography, it is no surprise that Congress explained the entire process, and expressly confirmed that a "trial shall not commence until the appeal is resolved," and that a court must "adjourn the trial" if "an appeal is taken during trial." *Id*. § 2339B(f)(5)(B)(ii)-(iii).

A comparison to the general criminal interlocutory appeal statute—18 U.S.C. § 3731—proves that Congress relies on *Griggs* where not expressly stating otherwise. Unlike Section 2339B, Section 3731 contains neither detailed instructions on the appellate process, nor an express stay provision. In this circumstance, courts have readily concluded that Congress relied on *Griggs*. *See United States* v. *Centracchio*, 236 F.3d 812, 813 (7th Cir. 2001) (Posner, J.) ("[T]he notice of appeal [under § 3731] bars the district court from proceeding" to trial.). Section 16 of the FAA is like Section 3731 (with its straightforward right to appeal), and unlike Section 2339B (with its more complex rules). As a result, when Congress drafted Section 16, Congress relied on standard divestiture principles to stay district court proceedings during the arbitrability appeal.

Third, Suski notes that preliminary-injunction appeals do not produce an automatic stay, meaning that district courts proceed to evaluate the merits while courts of appeals simultaneously evaluate the likelihood of success on the same merits. Suski argues that

for arbitration appeals to be treated differently would create an "impermissibly arbitration-specific" application of the *Griggs* rule. Suski Br. 30 (quotation marks omitted). That fundamentally misunderstands *Griggs*. Determining the "aspect[] of the case involved in the appeal" requires determining the substantive issue in the appeal, not superficially comparing the elements of the legal analysis before each court. *Griggs*, 459 U.S. at 58; *see supra* pp. 7-9. In any event, Section 1292(a)(1) initially *did* contain a proviso displacing the *Griggs* rule, which Congress removed only because Congress concluded that a Federal Rule of Civil Procedure made the proviso unnecessary. *See* Coinbase Br. 34-35. In contrast, Section 16 never contained a proviso, and the *Griggs* rule fully applies.

Fourth, Bielski similarly draws the wrong conclusion from the fact that "Congress and this Court have chosen to confer an interlocutory appeal right in numerous contexts" but also not to "delay district court proceedings." Bielski Br. 16. Precisely because other statutes typically contain provisos displacing the *Griggs* rule, the absence of such language in Section 16 is a meaningful indicator of Congress's intent to *retain* the *Griggs* rule and pause district court proceedings. *See* Coinbase Br. 34-38.

Fifth, Bielski stresses (at 18-19) the background principle that courts possess discretionary authority to stay a judgment during an appeal. That particular rule, or any other, is irrelevant because Bielski does *not* argue that it displaces the *Griggs* rule. *See supra* pp. 4-5. Regardless, Bielski's argument conflates distinct concepts. A trial court's authority to continue adjudicating the same issue that is on appeal is separate

from a court's residual authority to stay the legal effect of a judgment during that appeal. An appeal simultaneously "suspends further proceedings" in the trial court, "generally" "operates as a *supersedeas* of execution," and *also* provides the court "discretionary power" to suspend the decree's legal effect where "the decree itself, without further proceedings, may have an intrinsic effect." *Hovey* v. *McDonald*, 109 U.S. 150, 160-161 (1883). This case involves only the application of the first principle: How and when district courts may proceed during an appeal.

D. Staying District Court Proceedings Furthers Section 16's Purpose.

Section 16 is not value neutral. It "reflects a deliberate determination that appeal rules should reflect a strong policy favoring arbitration." 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure–Jurisdiction* § 3914.17 (2d ed. 2022 update). Permitting immediate appeal and divestiture protects the right to avoid federal court litigation. To permit the district court to plow ahead during the arbitrability appeal would frustrate that purpose. That is why Congress coupled an unqualified right to appeal with an unqualified application of the divestiture rule. *See* Coinbase Br. 27-31.

Respondents have no meaningful response. Suski ignores Section 16's pro-arbitration appeal structure and purpose. For his part, Bielski says the Court should not " 'pave over' the text of the statute" to further *the FAA's* pro-arbitration purpose. Bielski Br. 15 (citation omitted). But here the pro-arbitration ap-

peals purpose does not come from the FAA in some abstract sense. It comes from Section 16's text and structure.

Bielski also leans on legislative history to imply that Congress enacted Section 16 solely to resolve the circuit split on appealability. Bielski Br. 14-15. That, too, is irrelevant. The circuit court's doctrinal "confusion," Bielski Br. 14 (quotation mark omitted), may well explain why some courts might have applied a discretionary-stay test prior to Section 16's enactment, *see id*. at 22. But Section 16's legislative history readily confirms that Congress resolved the existing circuit split *to favor arbitration*. Coinbase Br. 6-8, 31-32. And when Congress enacted a new right to appeal, Congress did so with awareness of the divestiture rule. Indeed, the day before Congress enacted Section 16, Congress passed a different interlocutory appeal statute that expressly limited *Griggs*'s application there. *See* Coinbase Br. 36-37. Its failure to do so here is dispositive.

II. RESPONDENTS' INTERPRETATION OF THE FAA IS UNWORKABLE AND INEFFICIENT.

A. The Discretionary Stay Test Is Unworkable For Arbitration.

Bielski argues that the availability of discretionary stays pending appeal is sufficient to protect arbitration and also suggests (at 41) that the discretionary stay test's "interest-balancing approach" is a strength. But that approach is a poor fit for the arbitration context.

First, this Court generally holds that litigation burdens are not irreparable. *See Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). The

courts of appeals have therefore applied the discretionary stay test to reject arguments that a party is irreparably harmed by devoting resources to preparing for trial, *e.g.*, *Sherwood* v. *Marquette Transp. Co.*, 587 F.3d 841, 844-845 (7th Cir. 2009), or by being forced to resolve a dispute in a hostile forum, *e.g.*, *Tilton* v. *SEC*, 824 F.3d 276, 286 (2d Cir. 2016); *Morgan Drexen, Inc.* v. *Consumer Fin. Prot. Bureau*, 785 F.3d 684, 695 & n.3 (D.C. Cir. 2015). Because litigation burdens are the harm that Congress sought to avoid in the FAA, the discretionary stay standard is a mismatch. *See* Coinbase Br. 46-47. If irreparable injury is required and litigation burdens are not irreparable, a stay could be denied even for the most meritorious of appeals *See, e.g.*, *Siegel* v. *LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc) (calling irreparable injury "the sine qua non of injunctive relief" (quotation marks omitted)).

Unable to reconcile the precedent regarding the traditional stay factors with the purposes of the FAA, Bielski devotes several pages of his brief (43-46) to collecting cases in which courts have granted—either in whole or in part—a stay pending appeal of the denial of a motion to compel arbitration. The handful of cases Bielski cites demonstrates how lower courts have struggled to fit arbitrability appeals into the traditional discretionary stay framework. Some courts have developed an exception for what irreparable injury means in this context, holding that although it is "[g]enerally" true that "monetary expenses incurred in litigation are not considered irreparable harm," "*arbitration is unique* in this aspect." *Zaborowski* v. *MHN Gov't Servs., Inc.*, No. C 12-05109 SI, 2013 WL 1832638, at *2 (N.D. Cal. May 1, 2013) (emphasis

added); *see also, e.g. Eberle* v. *Smith*, No. 07-CV-0120 W (WMC), 2008 WL 238450, at *3 (S.D. Cal. Jan. 29, 2008); *Murphy* v. *DirecTV, Inc.*, No. 2:07-cv-06465-FMC-VBKx, 2008 WL 8608808, at *2-3 (C.D. Cal. July 1, 2008).

That potentially makes discretionary stays available only if a court is willing to loosen otherwise generally-applicable irreparable-harm principles. *Contra Morgan*, 142 S. Ct. at 1713. Rather than endorsing an arbitration-specific exception to a generally applicable rule (and inviting new litigation elsewhere about whether the traditional stay factors should be altered), the Court can avoid this problem entirely by holding the divestiture rule prevents district courts from proceeding to the merits while a Section 16(a) appeal is pending.

Second, the "case-by-case * * * tailor[ing]" that Bielski advocates (at 44) fails to account for the fundamental differences between arbitration and litigation. For example, federal court discovery is significantly more onerous than the more limited discovery permitted in arbitration. *See* National Retail Federation Br. at 5-13. More documents are exchanged, and more parties are involved. *Id*. And absent a stay, "the parties will not be able to unring any bell rung by discovery, and they will be forced to endure the consequences of litigation discovery in the arbitration process." *Levin* v. *Alms & Assocs., Inc.*, 634 F.3d 260, 265 (4th Cir. 2011). Thus, Bielski's suggestion (at 44) that federal discovery conducted in district court during a Section 16(a) appeal might later be used in arbitration is a flaw, not a feature, of the discretionary stay approach.

Third, if a district court strikes the wrong balance, and tips the scales towards litigation rather than arbitration, the "robust procedural protections for litigants seeking to compel arbitration" that Bielski cites (at 47)—"a stay in the circuit court, and then in this Court"—are cold comfort. As Bielski acknowledges elsewhere (at 42-43), discretionary stays are hard to get. And as *amici*'s data shows, district courts' error rate is staggering: Courts of appeal reverse *nearly half* of all denials of arbitration that are appealed—including in *many* cases where discretionary stays are denied. *See* National Retail Federation Br. 13-19 & n.11; Chamber of Commerce et al. Br. 17-22; Retail Litigation Center Br. 6.

B. Section 16(a)'s Automatic Stay Is Efficient.

Congress codified an interlocutory appeal in Section 16(a) to expedite the enforcement of arbitration agreements and thereby prevent duplicative processes that waste resources of both courts and parties. These efficiencies are lost without the automatic stay required under *Griggs*. *See* Coinbase Br. 22-24. Respondents don't dispute that. Instead, Respondents attempt to develop efficiency arguments of their own. But there are no such benefits to an approach that hinges on discretionary stays.

For example, Suski observes (at 38), that when a plaintiff sues multiple defendants, "district courts retain jurisdiction over claims against non-appealing defendants." That result is unsurprising; litigation inefficiencies will occur when a plaintiff sues a defendant with whom he has an arbitration agreement along with other defendants with whom he does not. And that result is compelled by the FAA; as this Court has

explained, the FAA not only tolerates, but "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone*, 460 U.S. at 20; *see Bradford-Scott*, 128 F.3d at 506-507.

Next, Suski suggests (at 39-40) that the automatic stay promotes "procedural gamesmanship" because every defendant can raise non-frivolous arbitrability arguments and thereby obtain an automatic stay during an arbitrability appeal. *See also* Bielski Br. 41-43. But Coinbase's appeals cannot credibly be described as gamesmanship. The district courts here admitted they could be "wrong" and that "reasonable minds may differ." Pet. App. 42a, 51a. As these cases highlight, defendants with strong arguments in favor of arbitration require the protection of an automatic stay, or they risk losing all the benefits of arbitration as they are forced to litigate. *See* National Retail Federation Br. 13-16, 19. Moreover, the courts already have developed a variety of means to deal with frivolous appeals. Coinbase Br. 49-52.

Finally, Suski asserts (at 42) that "automatic stays largely reduce individuals' access to justice" because "contingency lawyers" are less likely to pursue potentially arbitrable claims. That argument rests on the premise that justice comes only in federal courts and only through a lawyer. Congress rejected that premise in the FAA, finding instead that "arbitration's advantages often would seem helpful to individuals * * * who need a less expensive alternative to litigation." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 280 (1995); *see* Retail Litigation Center Br. 13-15 (consumers fair better in arbitration); *id*. at 22 (costs of unnecessary litigation are passed on to consumers).

The automatic stay preserves those benefits for individuals.

III. SUSKI'S REMAINING ARGUMENTS ARE FORFEITED, MERITLESS, AND IRRELEVANT.

In a last ditch effort at avoiding the question presented, Suski argues (at 43-52) that the parties' agreement to arbitrate is not governed by the FAA at all. Because the theory is not fairly included within the question presented, the Court need not address it. *See Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 17 (2011).

In any event, Suski's argument is forfeited. Suski disclaimed this argument in district court. *See, e.g.*, *Suski* D. Ct. Dkt. 40, at 6 ("Plaintiffs do not dispute the validity of their original arbitration agreements with Coinbase * * * ."). Only in the Ninth Circuit did Suski raise this argument, which he conceded was "new." *Suski* 9th Cir. Dkt. 25, at 41-42.

Suski's new argument is also wrong. The FAA "reach[es] to the limits of Congress' Commerce Clause power," and applies whenever a contract involves interstate commerce. *Allied-Bruce*, 513 U.S. at 268, 274-275. Coinbase's User Agreements involve commerce because they govern the "buying, selling, holding, or investing in digital currencies" on Coinbase's platform. *See, e.g.*, JA317, 366, 433; *see also* JA257-258. And they involve *interstate* commerce because Suski is a citizen of New York and Coinbase is a Delaware corporation with its principal place of business in California. *See* JA586.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's decisions should be reversed.

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