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

RESPONSE OF RESPONDENTS DAVID SUSKI, JAIMEE MARTIN, JONAS CALSBEEK, AND THOMAS MAHER TO SUGGESTION OF MOOTNESS

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

March 13, 2023 *Counsel for Respondents David Suski et al.*

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INTRODUCTION

Respondents David Suski, Jaimee Martin, Jonas Calsbeek, and Thomas Maher ("*Suski* Respondents") respectfully submit this Response to Abraham Bielski's Suggestion of Mootness, and to Petitioner Coinbase's Response to the Suggestion of Mootness.

ARGUMENT

I. The Question Presented Is Far From "Moot" In *Suski*.

This Court has "well-established standards for determining whether a case is moot." *New York State Rifle & Pistol Ass'n. v. City of New York*, 140 S. Ct. 1525, 1528 (2020). The core question is whether "it is impossible for [the Court] to grant any effectual relief whatever to the prevailing party." *Id.* (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)). In this case, the Court can easily grant "effectual relief" to either Coinbase or the *Suski* Respondents, depending on how the Court resolves the question presented. *Id.*

The question presented is whether a "non-frivolous" FAA appeal divests a district court of jurisdiction over the underlying merits. In *Suski*, Coinbase filed two consecutive, unconsolidated FAA appeals, and Defendant-Appellant Marden-Kane filed a third appeal. *Suski* Respondents have now prevailed on Coinbase's first appeal, *Suski v. Coinbase, Inc.*, 55 F.4th 1227 (9th Cir. 2022), but even as to that appeal, the question presented is not moot. This is because Coin-

base will soon file a "non-frivolous" certiorari petition regarding arbitrability, and demand a stay pending its petition. *See* Coinbase's Supplemental Brief (Nov. 17, 2022), at 2 ("[I]f this Court were to hold that the district court lacks jurisdiction during the pendency of Coinbase's arbitrability appeal, a stay would be mandatory through rehearing proceedings *and any proceedings in this Court*.") (emphasis added). Hence, even viewing Coinbase's first appeal in isolation from the rest of *Suski*, the question presented is not "moot."

Furthermore, the *Suski* District Court first stayed its merits proceedings pending Coinbase's first appeal only (not Defendants' other appeals), and now, only pending oral argument before this Court. The Ninth Circuit has decided Coinbase's first appeal, but not the others, which will not be briefed or argued for at least several months. Consequently, if the Court resolves this case in Coinbase's favor, Coinbase may be entitled to at least one, and perhaps all, of the following:

(i) a stay pending its certiorari petition challenging *Suski*, 55 F.4th 1227;

(ii) a stay pending its second FAA appeal in *Suski*; and

(iii) a stay pending Marden-Kane's FAA appeal.[1, 2]

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[1] If Coinbase agrees with Bielski that its second appeal no longer matters, then Coinbase should dismiss that appeal, rather than back-pocketing it as a *stay mechanism* if this Court decides the question presented in Coinbase's favor.

[2] Marden-Kane's "equitable estoppel" appeal in *Suski* is the same, "farfetched" appeal that this Court deemed "non-frivolous" in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009). *Compare Carlisle*, 556 U.S. at 634 (Souter, J., dissenting) (recognizing that

Inversely, if the Court decides this case in *Suski* Respondents' favor, then they will be entitled to exactly what they seek here: namely, the right to timely proceed against both Defendants in the District Court, regardless of whatever "non-frivolous" arbitrability musings Defendants might conjure up now or in the future. In sum, Coinbase and *Suski* Respondents all continue to have strong, vested interests in this case. Someone among them will get immediate, "effectual relief" from the Court's decision here, so *Suski* is not even arguably moot. *New York State Rifle*, 140 S. Ct. at 1528.

Bielski's assertions to the contrary are obviously wrong. He says that "a stay pending appeal would not grant [Coinbase] any relief—and indeed would not be possible—because no appeal remains pending." *See* Suggestion of Mootness at 3. That is an odd assertion to make, while two FAA appeals remain pending in *Suski*. If this Court rules in Coinbase's favor here, then a stay in *Suski* would not only be "possible," but automatic because the District Court would suddenly lack jurisdiction over *Suski*. *Id*.

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even "an attenuated claim of equitable estoppel . . . falls well short of" a "frivolous" appeal), *with Suski* D. Ct. Dkt. 109 (Marden-Kane seeking to compel arbitration under an "equitable estoppel" theory), *and Suski* D. Ct. Dkt. 122 (Marden-Kane's Notice of Appeal). While Marden-Kane's arbitrability appeal could well be labeled "frivolous" under *Suski* 55 F.4th 1227, it is unclear what "frivolous" even means relative to the question presented. Does an arbitrability appeal divest a district court of jurisdiction if it (like Marden-Kane's) is frivolous or summarily disposable under *Circuit* precedent (*id.*), yet "non-frivolous" under *this* Court's precedent (*Carlisle*, 556 U.S. 624)? This Court must decisively answer the question presented, once and for all, to clarify the procedural future of *Suski*.

Bielski also says that "the district court in *Suski* already stayed proceedings there, pursuant to the parties' agreement." Suggestion of Mootness at 5. Yet Bielski himself recognizes that this stipulated stay expires ten days after this Court holds oral argument. *Id.* So contrary to Bielski's assertion, Coinbase has every "need" for an *automatic* stay "pending the new appeal[s]" in *Suski*, the moment the parties' *stipulated* stay expires on March 31, 2023. *Id.* Moreover, Coinbase has no hope of obtaining any *discretionary* stay "pending the new appeal[s]" in *Suski*. *Id.* Given that the District Court and Ninth Circuit both denied Coinbase a discretionary stay *before* the Circuit resolved arbitrability, neither court would ever grant Coinbase a discretionary stay *after* the Circuit resolved arbitrability. *Id.*

Thus, Coinbase has every "need"—yet no hope—for a continuing stay in *Suski*, apart from this Court answering the question presented in Coinbase's favor. Likewise, *Suski* Respondents have little hope of having their underlying claims resolved this decade, unless this Court answers the question presented in their favor. In short, the controversy between Coinbase and *Suski* Respondents could not be more live. Much of the procedural future of *Suski* depends entirely on this Court's ruling.

II. *Suski* Respondents Respectfully Request to Be Heard.

Surprisingly, 48 hours after moving jointly with *Suski* Respondents for divided argument, Respondent Bielski filed his "Suggestion of Mootness" to oust *Suski* Respondents from this case. Coinbase, for its part, could not sincerely agree with Bielski on mootness, having already taken the opposite position repeatedly.

Coinbase's Supplemental Brief, at 2 (Nov. 17, 2022); Coinbase's Jan. 17, 2023 Letter Regarding Mootness, at 2. Coinbase nevertheless counsels the Court to "dismiss" *Suski*, even though Coinbase itself admits *Suski* "is not moot." Coinbase's Response to Suggestion of Mootness at 1, 4. It is unclear why dismissal would be necessary or desirable here in the absence of any mootness problem.

The only thing that *is* clear is that Bielski and Coinbase both want *Suski* Respondents out of this case. This is ironic because *Suski* Respondents—unlike the other parties—have consistently maintained that this case should be heard and never mooted. *Compare Suski* Response to Joint Petition, at 1 ("The Court should grant Coinbase's Joint Petition."), *with Bielski* Response to Joint Petition, at 1 (disputing the "legal and practical significance" of the question presented, and arguing for the Court to ignore the question); *compare Suski* Supplemental Brief at 3-4 (explaining that mootness was and would remain impossible), *and* Coinbase's Letter-Brief (Jan. 24, 2023) at 2 ("Even if the Ninth Circuit issues the mandate in both *Suski* and *Bielski* before this Court resolves this case, the case would fall within the category of cases 'that are not moot. . . . '"), *with* Coinbase's Application for Stay, at 5 ("Questions concerning the legal standard for stays pending appeal become moot when the court of appeals issues its mandate.") (citing no law). In sharp contrast to the other parties here, *Suski* Respondents have always maintained that the Court should decide the question presented, and deem it not "moot."

The answer to the question presented is important to *Suski* Respondents. The specific ways in which this Court answers the question are also important

to *Suski* Respondents, and to the future of *Suski*. After the myriad FAA proceedings they have endured here and in both courts below, *Suski* Respondents ask this Court not to deprive them of the opportunity to be heard here, even if only on paper.[3]

CONCLUSION

The Court should reject Bielski's unnecessary mootness argument, as well as Coinbase's gratuitous dismissal argument, and proceed to hear all parties on the merits of the question presented.

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
DAVID SUSKI, JAIMEE MARTIN,
JONAS CALSBEEK, AND THOMAS MAHER

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[3] All parties agreed that divided argument was appropriate in this case, but the Court recently denied Respondents' unopposed, joint motion for divided argument. The Court's unexplained denial in this regard has left *Suski* Respondents with no wise choice, but to concede the oral argument to Bielski and his counsel, lest any in-fighting among Respondents' counsel create a risk of *Suski* being gratuitously dismissed.