No. 22A91

IN THE
Supreme Court of the United States

COINBASE, INC.,

Applicant,

v.

ABRAHAM BIELSKI,

Respondent.

REPLY IN SUPPORT OF APPLICATION FOR STAY PENDING DISPOSITION OF PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Coinbase, Inc. ("Coinbase") hereby states that it is a wholly-owned subsidiary of Coinbase Global, Inc. No publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

Bielski's opposition underscores that a stay is warranted.

This Court is likely to grant certiorari and reverse the Ninth Circuit. The existence of a split is beyond reasonable debate, and Bielski essentially concedes it. He acknowledges that six courts of appeals have held under *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam), that a non-frivolous appeal of the denial of a motion to compel arbitration divests the district court of jurisdiction, thereby automatically staying proceedings in the district court. And he acknowledges that three other circuits—including the Ninth Circuit below—have held the very opposite. Bielski's semantic gymnastics notwithstanding, that is the definition of a circuit split. The split is acknowledged, deep, and longstanding, and only this Court can resolve it. The split implicates an exceptionally important question that affects every case in which a motion to compel arbitration is denied, and Bielski identifies no vehicle problem that would interfere with this Court's review.

If certiorari is granted, this Court is likely to conclude that the Ninth Circuit's minority approach is wrong. 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 a motion to compel arbitration should be granted, the entire point of the appeal is to decide whether the case should proceed in district court or in arbitration. Bielski does not attempt to explain why Congress in the Federal Arbitration Act ("FAA") would have granted defendants the right to an immediate interlocutory appeal of the arbitrability question if Congress

nonetheless intended to permit district court proceedings to march onward—through discovery, potential class proceedings, and even a trial—while the appeal proceeds.

Bielski principally claims that Coinbase will not suffer irreparable harm without a stay. But, absent a stay, Coinbase will forfeit its contracted-for right to resolve disputes through streamlined, individualized arbitration. While Bielski repeatedly emphasizes this Court's statement that litigation costs normally do "not constitute irreparable injury," *FTC* v. *Standard Oil Co. of California*, 449 U.S. 232, 244 (1980) (quotation marks omitted), this statement did not involve a case like this one where the entire question on appeal was whether the case was subject to litigation in the first place—let alone class litigation. While Bielski notes that his opposition to a stay below offered to limit discovery to his individual claims, the District Court did not impose any such limit, raising a real possibility that Coinbase will face class discovery while its arbitrability appeal is ongoing.

In the *Henry Schein* litigation, this Court twice granted stay applications in cases arising in a similar posture, necessarily recognizing the irreparable harm that litigants face when forced to continue litigating in district court while the arbitrability question is on appeal. A stay here is necessary to prevent Coinbase from forever losing out on its right to resolve this case through arbitration—a quintessential irreparable harm.

The equities strongly favor Coinbase. Bielski lacks even a plausible claim to irreparable harm, and instead protests that a stay would delay any ultimate recovery—a harm that is quintessentially reparable. The strong public interest in enforcing arbitration agreements likewise supports the stay. And the equities particularly favor a stay given that not even Bielski contends that the District Court's refusal to compel arbitration will survive appellate

review. There is no basis to subject Coinbase to the burdens of district court litigation during the pendency of an appeal that is overwhelmingly likely to compel arbitration.

In the companion stay application in *Coinbase, Inc.* v. *Suski*, No. 22A92, the respondent has acquiesced, and has agreed that both certiorari and a stay pending certiorari are warranted, reflecting the exceptionally strong grounds for this Court's review and for staying district court proceedings during the pendency of that review. To prevent mootness and protect this Court's jurisdiction, this Court should treat the stay applications in *Bielski* and *Suski* as petitions for certiorari, grant review, consolidate the cases, and set them for expedited briefing and oral argument at the earliest opportunity. In the alternative, the Court should grant this stay application, expedite review of Coinbase's joint petition for certiorari, and grant the petition as soon as is practicable.

ARGUMENT

I. THIS COURT IS LIKELY TO GRANT REVIEW AND REVERSE THE DECISION BELOW.

A. The Circuits Are Split.

The existence of a circuit split is sometimes debatable, but not in this case. At least seven courts of appeals have expressly acknowledged that the circuits "are split" over whether a non-frivolous arbitrability appeal ousts the district court's jurisdiction to proceed until the appeal is resolved. *Blinco* v. *Green Tree Servicing, LLC*, 366 F.3d 1249, 1251 (11th Cir. 2004) (per curiam).[1] The split has become ever more entrenched since it emerged more

[1] *See also Bradford-Scott Data Corp.* v. *Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997) (noting disagreement with the "two courts of appeals" that had "refused to issue stays while § 16(a) appeals

than two decades ago, with six circuits correctly holding that an arbitrability appeal automatically divests the district court of jurisdiction, and three circuits—including the Ninth Circuit—incorrectly holding the opposite. The split is deep, acknowledged, and will not be resolved without this Court's intervention.

Bielski effectively concedes the split while simultaneously attempting to dispute it. He agrees that the "circuit courts apply *Griggs* differently" (Stay Opp. 14) in the same scenario—the "singular procedural circumstances of an interlocutory appeal of the denial of a motion to compel arbitration" (Stay Opp. 7). He even concedes (Opp. to Motion to Expedite 3) that the "Ninth Circuit's application of *Griggs* comports with that of the Second and Fifth Circuits, but it differs from the approach employed in the Third, Fourth, Seventh, Tenth, Eleventh, and D.C. Circuits." But he nonetheless suggests that because all of the circuits are applying *Griggs*, the circuits are not truly split. According to Bielski (Stay Opp. 2), "[a]ll the circuit courts that have addressed the issue have faithfully applied the correct standard (*Griggs*)."

That attempt to wash away the circuit split falls flat. It is like saying there is no circuit split because the circuits all apply the same precedent from this Court, or the same statute, and have merely reached different conclusions about the governing rules based on those precedents or statutes. That is exactly the sort of circuit split this Court regularly resolves.

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were under consideration"); *Motorola Credit Corp.* v. *Uzan*, 388 F.3d 39, 54 (2d Cir. 2004) ("Other circuits are divided on this question."); *McCauley* v. *Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1160 (10th Cir. 2005) (acknowledging that the circuits "are split"); *Ehleiter* v. *Grapetree Shores, Inc.*, 482 F.3d 207, 215 n.6 (3d Cir. 2007) (noting the split and "the majority rule of automatic divestiture"); *Weingarten Realty Invs.* v. *Miller*, 661 F.3d 904, 907 (5th Cir. 2011) (the circuits are split over "[w]hether an appeal from a denial of a motion to compel arbitration divests the district court of jurisdiction to proceed to the merits"); *Levin* v. *Alms & Assocs., Inc.*, 634 F.3d 260, 263-266 (4th Cir. 2011) (acknowledging the split and explaining that it "find[s] the majority view persuasive").

It is difficult to imagine a circuit conflict that does not, at some level of generality, involve a disagreement over the application of an accepted legal rule. This Court has granted review for the upcoming Term, for example, in a copyright case involving a split over how to apply the fair-use doctrine, *see Andy Warhol Foundation for the Visual Arts, Inc.* v. *Goldsmith*, No. 21-869, and in a Dormant Commerce Clause case involving a split over how to conduct balancing under *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), *see National Pork Producers Council* v. *Ross*, No. 21-468. And last Term, it addressed the circuit split over whether the FAA allows courts to create an arbitration-specific procedural rule for waiver. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1711 (2022). Under Bielski's logic, none of these cases involve a true circuit split because the circuits all agreed that the fair-use doctrine, *Pike*-balancing, or the FAA governed. Yet, in all of those cases, the Court granted certiorari "to resolve" the "circuit split." *Morgan*, 142 S. Ct. at 1712.

Bielski does not dispute that the courts of appeals have answered the question presented differently and, as a result, apply different rules governing stays in identical circumstances. In the First, Third, Fourth, Seventh, Tenth, Eleventh, and D.C. Circuits, district courts are automatically divested of jurisdiction during a non-frivolous arbitrability appeal. In the Second, Fifth, and Ninth Circuits, by contrast, district courts are not automatically divested of jurisdiction in the same circumstances. This Court should resolve that split.

B. This Court Is Likely To Grant Review.

There are no impediments to this Court's review. Coinbase preserved the question presented below. It sought a stay from the District Court and the Ninth Circuit, and also urged the Ninth Circuit to revisit en banc its precedent refusing to automatically stay district

court proceedings during the pendency of an arbitrability appeal. *See Britton* v. *Co-op Banking Grp.*, 916 F.2d 1405 (9th Cir. 1990). Bielski identifies nothing that would make this case an unsuitable vehicle for this Court's review.

This matter is exceptionally important. While Bielski argues (Stay Opp. 15) that the question presented "has limited impact in practice," the opposite is true. This issue arises in every case in which a party appeals the denial of a motion to compel arbitration. In the Ninth, Second, and Fifth Circuits, arbitration clauses can be effectively nullified during the extended period of time—regularly more than a year—that it takes for an arbitrability appeal to be fully briefed, argued, and decided in an appellate court. All the protective features of an arbitration clause—including avoiding the costs of litigation and the burdens of discovery—can be stripped away during that time. The question is all the more important given that the courts on the minority side of the split encompass many of the Nation's commercial centers and handle disproportionate numbers of arbitration appeals. If Bielski filed this case not in San Francisco, but in Chicago, Atlanta, Washington, D.C., or anywhere encompassed by the six circuits in the majority of the split, the result would be entirely different. Questions of this importance cannot turn on geography.

Bielski claims (Stay Opp. 16) that this Court has denied review in "cases presenting questions like this." But he does not contend that the Court has denied review of petitions raising *this* question. To the contrary, in the only two petitions presenting this question of which Coinbase is aware, the respondent mooted the case by agreeing to a stay rather than risk this Court's review—an indication of the strong likelihood that this Court would grant review. *See PeopleConnect, Inc.* v. *Callahan*, No. 21-885 (cert. petition filed on Dec. 13, 2021 and dismissed pursuant to Rule 46 on Dec. 23, 2021); *PeopleConnect, Inc.* v. *Knapke*, No. 21-

725 (cert. petition filed on Nov. 12, 2021 and dismissed pursuant to Rule 46 on Dec. 1, 2021). And the cases Bielski does cite (Stay Opp. 16) do nothing to call into doubt the need for this Court's review. Those cases may have suffered from any of a number of vehicle problems, unlike this case, and in any event, none involved acknowledged circuit splits, such as the six-to-three split here that has openly divided the circuits on an issue that repeatedly arises.

C. This Court Is Likely To Reverse The Ninth Circuit.

The decision below is wrong. As six courts of appeals have concluded, when a party appeals arbitrability, "[w]hether the litigation may go forward in the district court is precisely what the court of appeals must decide." *Bradford-Scott*, 128 F.3d at 506. A district court lacks jurisdiction to litigate a case while the court of appeals is deciding whether the case should be litigated in the first place. *Id.*

Bielski's defense of the Ninth Circuit's contrary rule is unpersuasive. Quoting this Court's recent decision in *Morgan*, 142 S. Ct. at 1713, Bielski argues (Stay Opp. 17) that federal courts may not "invent special, arbitration-preferring procedural rules." But the right to an immediate interlocutory arbitrability appeal was accorded by Congress, not invented by courts. *See* 9 U.S.C. § 16(a). Bielski offers no plausible basis to conclude that Congress in the FAA would have granted parties a right to an immediate interlocutory appeal of a refusal to compel arbitration if Congress had contemplated that litigation could proceed while the appeal was pending. To the contrary, "[c]ontinuation of proceedings" while an appeal is pending "largely defeats the point of the appeal." *Bradford-Scott*, 128 F.3d at 505.

Bielski maintains (Stay Opp. 18) that there "is no risk" that the simultaneous exercise of jurisdiction by a district court and a court of appeals could yield "inconsistent judgments." But even if "inconsistent judgments" were the standard, whether a case should proceed in

district court "is the mirror image of the question presented" in an arbitrability appeal, and continuing proceedings in the district court while an appeal is pending "creates a risk of inconsistent handling of the case by two tribunals." *Bradford-Scott*, 128 F.3d at 505. For that reason, even Bielski concedes (Stay Opp. 18) the "potential for the waste of litigation resources" if the district court proceeds with litigation only for the court of appeals to send the case to an arbitrator.

Bielski does not dispute that, in other contexts where defendants are entitled to an immediate interlocutory appeal to vindicate the right to avoid litigation entirely, district court proceedings must be stayed pending appeal. Thus, in the context of qualified immunity, sovereign immunity, and double-jeopardy immunity, district courts cannot proceed with litigation while an appeal is pending. *See Apostol* v. *Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989) (Easterbrook, J.). Bielski attempts (Stay Opp. 19) to distinguish those cases from cases involving arbitrability, arguing that the "grant of immunity protects the defendant from being brought before a tribunal at all." But that is incorrect. Double-jeopardy, for example, protects defendants from prosecution in federal court, but does not prevent state prosecution for the same conduct. *See Gamble* v. *United States*, 139 S. Ct. 1960, 1964 (2019). Immunities protect defendants from being forced to proceed in a tribunal that has no authority to hear the case. The same reasoning that requires an automatic stay during immunity appeals therefore applies with equal force in arbitrability appeals. And while Bielski distinguishes qualified immunity (Stay Opp. 19) by quoting the Fifth Circuit's observation that "[t]here is no public policy favoring arbitration agreements that is as powerful as that public interest in freeing officials from the fear of unwarranted litigation," Congress made a different judgment when it codified the right to an immediate interlocutory appeal in the FAA.

Bielski cites (Stay Opp. 18) this Court's decision in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 21 (1983), for the proposition that "considerations of arbitrability are 'easily severable' from the underlying merits of a dispute." But this Court in *Moses Cone* held that a federal court abused its discretion by *refusing to resolve a motion to compel arbitration* while litigation proceeded in parallel. 460 U.S. at 19-20. *Moses Cone* thus reaffirmed federal courts' obligation to respect the "congressional declaration of a liberal federal policy favoring arbitration," *id.* at 24, and offers no support for the Ninth Circuit's rule allowing arbitration agreements to be ignored during an interlocutory appeal. If there were any doubt on the matter, this Court's precedent would eliminate it. Bielski does not even attempt to explain how the Ninth Circuit's rule could survive this Court's intervening arbitration jurisprudence, including the Court's holding in *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 68-70 (2010), which held that arbitrability is an "antecedent" issue that must be decided before a court reaches the merits, and *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019), which held that district courts have "no business weighing the merits of the grievance" if the case belongs in arbitration. Because they are irreconcilable with the Ninth Circuit's rule, Bielski cites neither holding.

II. ABSENT A STAY, COINBASE WILL SUFFER IRREPARABLE HARM.

Without a stay, Coinbase will forever lose a core benefit of arbitration—avoiding litigation in federal court. That is not just Coinbase's assessment; it was Congress' assessment too. In the federal system, the usual rule is that defendants must wait "until after final judgment to vindicate valuable rights, including rights central to our adversarial system." *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 108-109 (2009); *see* 28 U.S.C. § 1291. But Con-

gress made a special exception for arbitration in the FAA and granted defendants the statutory right to an immediate appeal. *See* 9 U.S.C. § 16(a)(1). In doing so, Congress recognized that an arbitration agreement provides "a right not to litigate the dispute in a court." *Blinco*, 366 F.3d at 1252. Once a defendant like Coinbase is wrongfully forced to proceed in federal court, the defendant loses that right forever.

Coinbase's irreparable harm is particularly acute because Coinbase possesses an unusually clear right to compel arbitration. In this case, the District Court refused to enforce a valid delegation clause—one no different from delegation clauses this Court has repeatedly instructed lower courts to enforce. *See Henry Schein*, 139 S. Ct. at 531 (holding a court must enforce a delegation clause even if it believes the arguments for arbitration are "wholly groundless"); *Rent-A-Ctr.*, 561 U.S. at 68-69 (parties can "agree to arbitrate 'gateway' questions of 'arbitrability'"). Even the District Court acknowledged "that reasonable minds may differ over" its strained decision to deny arbitration. Pet. App. 42a. Bielski does not even attempt to argue that he will ultimately prevail in the Ninth Circuit and avoid arbitration. Yet so long as Coinbase's interlocutory appeal remains undecided by the Ninth Circuit, Coinbase must proceed with the very federal litigation the parties contractually agreed would not occur.

Citing this Court's decision in *Standard Oil Co. of California*, 449 U.S. at 244, Bielski mischaracterizes (Stay Opp. 9) Coinbase's harms as mere "litigation expenses." This fundamentally misconstrues the right to arbitrate. Coinbase has the right not to proceed—at *all*—in federal court. That is why Congress authorized interlocutory appeals under these circumstances, rather than require defendants to wait for final judgments to vindicate the right to arbitrate. In any event, the majority of circuits grant defendants an automatic stay precisely

to shield them from incurring the duel "costs of litigation and arbitration" that would arise "if a district court continues with the case while an appeal" "is pending" and the appeal succeeds. *Bradford-Scott*, 128 F.3d at 506. Otherwise, the parties' "preference for non-judicial dispute resolution, which may be faster and cheaper" "may be lost or even turned into net losses." *Id*.; *see also Blinco*, 366 F.3d at 1252 (same).

The fact that this Court twice granted stays in the *Henry Schein* litigation dispels Bielski's theory that Coinbase suffers no harm. *See* Stay App. 21-22. After all, from Bielski's perspective, the *Henry Schein* defendant also only faced "litigation expenses" of proceeding with a potentially unnecessary trial. Yet Bielski maintains (Stay Opp. 9) that no amount of such expenses can ever "constitute irreparable injury." In granting the *Henry Schein* stays, this Court rejected Bielski's theory, and confirmed that defendants denied their rights to arbitrate face irreparable harms.

Bielski suggests (Stay Opp. 9) that the practical harm to Coinbase is minimal because the parties will later conduct the same discovery in arbitration. He is wrong. Federal discovery is vastly more onerous than the more limited discovery permitted in arbitration.[2] 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*, 634 F.3d at 265. In fact, when Bielski argues (Stay Opp. 10) that his federal court discovery "could be" "useful in arbitration" against Coinbase, he demonstrates why a stay is

[2] *Compare* AAA Consumer Rule 22 (allowing arbitrator to direct limited document sharing and identification of witnesses, "keeping in mind that arbitration must remain a fast and economical process," but "[n]o other exchange of information" absent a fundamental fairness concern), *with, e.g.*, Fed. R. Civ. P. 26 (requirements for initial disclosures, expert testimony and reports, pretrial disclosures, and discovery on "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case"), Fed. R. Civ. P. 30 (allowing 10 depositions without leave of court), Fed. R. Civ. P. 33 (allowing 25 written interrogatories); Fed. R. Civ. P. 36 (allowing requests for admission).

necessary. A purpose of Coinbase's arbitration agreement is to preempt the intrusive discovery Bielski wants to exploit.

As litigation progresses, Coinbase may be forced to proceed into class-discovery and certification, despite Coinbase's contractual right to avoid class litigation. Bielski asserts (Stay Opp. 10) that he previously "offered to limit discovery" to "his individual claims," but that gratuitous statement has no legal force. The District Court did not limit discovery in any way. The court merely suggested that it would be willing to consider "possibly postponing any merits motions." Pet. App. 44a. In his papers before the Ninth Circuit, Bielski was not shy about his desire to pursue class litigation. *See Bielski* Ct. App. Dkt. 13 at 20 ("[A] ruling that Coinbase is subject to the EFTA, though it would obviously not resolve the case, would be relevant to Coinbase's ongoing relationship with legions of consumers."). And before this Court, Bielski carefully states that he "is seeking only individual-claim discovery *during the pendency of the petition for certiorari*." Stay Opp. 10 (emphasis added). A stay would not, as Bielski claims (Stay Opp. 9-10) merely pause litigation "within the next few weeks" "between now and the Court's disposition of" Coinbase's petition. It would protect Coinbase from irreparably losing the benefits of arbitration while this Court decides this case.

III. THE REMAINING EQUITIES FAVOR A STAY.

In sharp contrast to Coinbase's irreparable harm, Bielski will suffer no meaningful harm from a stay pending this Court's resolution of this case. Any potential delay Bielski faces in receiving a money judgment does not constitute irreparable harm. Stay Opp. 9. That disposes of the only rationale articulated by the District Court for denying Coinbase a stay: that "Coinbase is a large Company," while "Bielski is a single individual" who will have "to wait for a remedy." Pet. App. 43a.

Bielski asserts (Stay Opp. 20) that "[c]ritical information and records may be lost, and witness memories may fade." But that is pure speculation. And if Bielski were truly concerned about the pace of litigation, he could have consented to expedited consideration in this Court. Yet he has opposed that request.

Finally, the public interest favors a stay. Bielski does not deny the emphatic public policy favoring arbitration, which is reflected in the federal right to immediately appeal denials of arbitration. *See* Stay App. 25. Bielski instead argues that this strong public policy must give way because a single district court judge "found" Coinbase's "arbitration agreement invalid." Stay Op. 20. But the entire purpose of the interlocutory appeal is to permit swift review of such a decision, and, in this case, the District Court's refusal to enforce a delegation clause was egregiously wrong. Pausing litigation to protect Coinbase would further the public policy embodied by the FAA.

CONCLUSION

The application for a stay should be granted.

Respectfully submitted,

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