No. _____

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

JOINT PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under § 16(a) of the Federal Arbitration Act, when a district court denies a motion to compel arbitration, the party seeking arbitration may file an immediate interlocutory appeal. This Court has held that an appeal "divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam).

The question presented is: Does a non-frivolous appeal of the denial of a motion to compel arbitration oust a district court's jurisdiction to proceed with litigation pending appeal, as the Third, Fourth, Seventh, Tenth, Eleventh and D.C. Circuits have held, or does the district court retain discretion to proceed with litigation while the appeal is pending, as the Second, Fifth, and Ninth Circuits have held?

PARTIES TO THE PROCEEDING

Petitioner in this Court is Coinbase, Inc. Respondent in *Bielski* is Abraham Bielksi, individually and on behalf of all others similarly situated. Respondents in *Suski* are David Suski, Jaimee Martin, Jonas Calsbeek, and Thomas Maher, individually and on behalf of all others similarly situated. In *Suski*, Marden-Kane, Inc. is a defendant in the proceedings below.

CORPORATE DISCLOSURE 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 the stock of either entity.

STATEMENT OF RELATED CASES

Pursuant to Supreme Court Rule 14, Coinbase hereby states that there are no related cases.

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JOINT PETITION FOR WRIT OF CERTIORARI

Coinbase respectfully files this joint petition for a writ of certiorari to review two judgments of the United States Court of Appeals for the Ninth Circuit. This joint petition is permitted by Supreme Court Rule 12.4 and is appropriate in light of the identical question of federal law presented in both cases under review.

OPINIONS BELOW

In *Bielski*, the Ninth Circuit's decision denying a stay pending appeal (Pet. App. 1a) is unreported. The District Court's order denying a stay pending appeal (Pet. App. 41a-44a) is unreported. The District Court's order denying the motion to compel arbitration (Pet. App. 3a-18a) is available at 2022 WL 1062049 (N.D. Cal. Apr. 8, 2022).

In *Suski*, the Ninth Circuit's decision denying a stay pending appeal (Pet. App. 2a) is unreported. The District Court's order denying a stay pending appeal (Pet. App. 45a-48a) is unreported. The District Court's order denying the motions to compel arbitration and to dismiss (Pet. App. 19a-40a) is available at 2022 WL 103541 (N.D. Cal. Jan. 11, 2022).

JURISDICTION

The order of the Ninth Circuit in *Bielski* was entered on July 11, 2022. Pet. App. 1a. The order of the Ninth Circuit in *Suski* was entered on May 27, 2022. Pet. App. 2a. This Court has jurisdiction in both cases under 28 U.S.C. § 1254(1).

INTRODUCTION

Congress in the Federal Arbitration Act ("FAA") provided that when a federal district court denies a motion to compel arbitration, the party seeking to arbitrate may immediately appeal that denial. 9 U.S.C. § 16(a). This joint petition asks this Court to resolve an important and recurring question related to such appeals that has deeply divided the circuits: whether an appeal from the denial of a motion to compel arbitration requires that further proceedings in the district court be stayed until the appeal is resolved, or whether courts have discretion to deny a stay under the traditional stay factors and thus require the parties to litigate in court during the pendency of the appeal.

Nine circuits have addressed this question, and they are deeply split. Six circuits—the Third, Fourth, Seventh, Tenth, Eleventh, and D.C. Circuits—have held 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. Three circuits—the Second, Fifth, and Ninth Circuits—have held the opposite. In these latter circuits, an appeal of the denial of a motion to compel arbitration does not divest the district court of jurisdiction over the underlying litigation, and the appealing party must obtain a stay pending appeal pursuant to the traditional discretionary test or else face ongoing district court litigation pending appeal. The split is acknowledged, longstanding, and intractable. The circuits will remain divided unless this Court intervenes.

The minority rule that the Ninth Circuit followed in the decisions below is wrong. It is a foundational principle of appellate procedure that an appeal "divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam). When, as here, the issue on appeal is whether a case should proceed *at all* in court or whether it should proceed in arbitration, the *entirety* of the federal district court case is involved in the appeal. Indeed, the whole point of the appeal is to decide whether a federal court, applying federal rules of evidence and federal rules of civil procedure, has authority over the dispute. Allowing a district court to demand that the proceedings march onward—through discovery, potential class proceedings, and even a trial—while the arbitrability question is on appeal improperly permits the district court to retain jurisdiction over the core issue on appeal, thwarting the FAA and nullifying the right to an interlocutory appeal.

This joint petition is an excellent vehicle to resolve the split. In both cases, the District Court strained to avoid Coinbase's contracted-for right to arbitration on grounds that even the District Court itself acknowledged may be wrong. *See* Pet. App. 42a, 51a. In both cases, Coinbase immediately sought a stay pending appeal. Applying controlling circuit precedent holding that no automatic stay attaches in these circumstances, *see Britton* v. *Co-op Banking Grp.*, 916 F.2d 1405 (9th Cir. 1990), the Ninth Circuit in both cases denied Coinbase's request for a discretionary stay, and also refused to reconsider *Britton* en banc. Accordingly, both cases are now barreling full speed ahead in the District Courts—even as Coinbase is pursuing its

statutory right to have the Ninth Circuit address on an interlocutory basis whether it is obligated to litigate these cases at all.

In six circuits, Coinbase's appeals would have automatically divested the district courts of jurisdiction and stayed ongoing proceedings, including discovery, pending resolution of Coinbase's appeal. But because respondents filed these cases in the Ninth Circuit, Coinbase had to meet the exacting standards for a discretionary stay pending appeal, which the Ninth Circuit determined Coinbase had not done. Coinbase must now devote significant time, energy, and resources to burdensome putative class actions in two District Courts even though the Ninth Circuit is likely to conclude that neither case belongs in federal court to begin with. Imposing such time and resource burdens on Coinbase during the time its congressionally authorized interlocutory appeals are pending thwarts the parties' signed contracts requiring respondents to proceed individually in arbitration and the legislative purpose underlying the FAA. In short, these cases exemplify the legal and practical issues at the heart of the entrenched circuit split.

The question presented is exceptionally important. It affects every case in which a party appeals from the denial of a motion to compel arbitration. The question presented also has tended to evade this Court's review. Last year, this Court received two certiorari petitions presenting the same question, but the respondents then mooted the petitions by agreeing to a voluntary stay rather than risking this Court deciding the question presented. *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). The Court should take this opportunity to review this important question. It should also expedite review of this case to ensure that the question presented—which will remain live only while the underlying Ninth Circuit appeals remain pending—does not become moot during the pendency of this Court's review.

STATEMENT OF THE CASE

A. Coinbase And The User Agreement

Coinbase operates one of the largest cryptocurrency exchange platforms in the United States. Coinbase users can buy, sell, and transact in myriad digital currencies, including bitcoin, ether, and dogecoin. *See* Pet. App. 3a-4a; *Bielski* D. Ct. Dkt. 22, at 1.[1]

When a user like respondent Bielski or respondent Suski creates a Coinbase account, he must agree to the terms set out in Coinbase's User Agreement. That User Agreement states that the parties agree that "*any* dispute" between them will be resolved through arbitration. *Bielski* D. Ct. Dkt. 28-1, at 17 (emphasis added); *see also, e.g.*, *Suski* C.A. ER-93, ER-100, ER-108, ER-116. The Agreement also contains a delegation clause—a specific agreement "to arbitrate threshold issues concerning the arbitration agreement" itself, "such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 68-69 (2010). When an arbitration agreement

[1] Citations to *Bielski* and *Suski* district court filings reference original page numbers as indicated in the document footers.

contains a delegation clause, gateway questions of arbitrability must be resolved by an arbitrator, not a court. The delegation clause here unequivocally provides:

> This Arbitration Agreement includes, *without limitation*, disputes arising out of or related to the interpretation or application of the Arbitration Agreement, *including the enforceability, revocability, scope, or validity of the Arbitration Agreement* or any portion of the Arbitration Agreement. *All such matters shall be decided by an arbitrator and not by a court or judge*.

Bielski D. Ct. Dkt. 28-1, at 17 (emphases added).

B. Bielski's And Suski's Suits

This joint petition arises from two cases in which District Courts refused to compel arbitration in violation of the plain language of the Coinbase User Agreement. In both cases, Coinbase appealed that erroneous denial of arbitration to the Ninth Circuit, as authorized by § 16(a) of the FAA. And in both cases, the District Court and the Ninth Circuit refused to stay the litigation in District Court pending appeal, thus forcing Coinbase to simultaneously defend itself from putative class actions in the District Courts and pursue its interlocutory appeals contending that respondents' claims fall squarely within a binding and enforceable agreement to arbitrate on an individual basis.

1. Bielski

Respondent Abraham Bielski agreed to Coinbase's User Agreement and created a Coinbase account in April 2021. *Bielski* D. Ct. Dkt. 27, at 2-3. According to Bielski, he later "became the target of a scam by an individual who purported to be a representative of

PayPal," a payment-processing company unrelated to Coinbase. *Bielski* D. Ct. Dkt. 29-1, at 1. He granted the scammer "remote access" to his computer, and the scammer exploited that access to steal more than $31,000 from Bielski's Coinbase account. *Id*.

Neither Coinbase nor anyone else can reverse the kind of fraudulent transaction to which Bielski fell victim. For that reason, the User Agreement warns users to "never allow remote access or share your computer screen with someone else when you are logged on to your Coinbase Account." *Bielski* D. Ct. Dkt. 28-1, at 15. Bielski nonetheless filed a putative class action complaint in the Northern District of California alleging that the Electronic Funds Transfer Act requires Coinbase to recredit customers' stolen cryptocurrency. *Bielski* D. Ct. Dkt. 22, at 8-9.

When Coinbase moved to compel arbitration, the District Court refused to do so. The District Court acknowledged that the User Agreement contained a delegation clause, and that "[w]here a delegation provision exists, courts first must focus on the enforceability of that specific provision, not the enforceability of the arbitration agreement as a whole." Pet. App. 5a (quotation marks omitted). But the District Court maintained that because the delegation clause referred to disputes arising out of the "Arbitration Agreement," the delegation clause "incorporated" the broader arbitration agreement, and thus its enforceability depended on "backtracking through the nested provisions" of the overarching arbitration agreement and assessing whether the arbitration agreement itself was invalid. *Id.* at 8a-9a.

The District Court then held the arbitration agreement unconscionable under California law. With no

independent analysis of the delegation clause, the District Court concluded that the delegation clause was unenforceable solely because the broader arbitration agreement was unenforceable. Indeed, the District Court acknowledged that "all the analysis" regarding the two provisions was the same. *Id.* at 16a.

Coinbase filed an interlocutory appeal of the denial of the motion to compel pursuant to § 16(a) of the FAA and asked the District Court stay further proceedings pending the resolution of that appeal. The District Court recognized "that reasonable minds may differ over" its refusal to compel arbitration, but it nonetheless decided that a stay was unwarranted because "Coinbase is a large company," while "Bielski is a single individual," and he "would suffer if forced to wait for a remedy." Pet. App. 42a-43a.

2. Suski

Respondents in *Suski* are now-former Coinbase users, each of whom created a Coinbase account before participating in a "Dogecoin Sweepstakes" held in early June 2021. Pet. App. 20a, 22a-24a. The Sweepstakes offered entrants the opportunity to win prizes of up to $1,200,000 in dogecoin. *See id.* at 22a-23a. The signup process required respondents to confirm that they agreed to Coinbase's User Agreement.

The day after the Dogecoin Sweepstakes entry period ended, the *Suski* respondents filed a putative class action complaint in the Northern District of California alleging that Coinbase's promotion of the Sweepstakes violated California law in certain respects. *See id.* at 27a. The putative class was composed exclusively of Coinbase users who participated

in the Sweepstakes and agreed to the User Agreement, including the provisions governing arbitrability and delegation of arbitrability questions to an arbitrator.

Coinbase moved to compel arbitration, arguing that, under the User Agreement, "any dispute about the scope or applicability of the arbitration provision is delegated to the arbitrator." *Suski* D. Ct. Dkt. 33, at 9-15. As in *Bielski*, however, the District Court refused to compel arbitration. The District Court acknowledged that the *Suski* respondents agreed to Coinbase's User Agreement under which "disagreements over the scope of the arbitration provisions were delegated to the arbitrator." Pet. App. 31a. But the District Court maintained that a forum selection clause in the "Official Rules" for the Sweepstakes superseded the User Agreement's arbitration provision and—contrary to the User Agreement's delegation clause—refused to allow an arbitrator to pass on any dispute about the scope or applicability of the arbitration provision. *Id.* at 31a-33a.

Coinbase filed an interlocutory appeal of the denial of the motion to compel and asked the District Court to stay further proceedings. At the stay hearing, the District Court observed that Coinbase may succeed on appeal, remarking that, "I could see a different legal set of minds looking at this factual pattern and saying I was wrong." *Id.* at 51a (capitalization altered). The District Court added that it was "really hesitating" because "if I'm wrong, then you'll go forward in arbitration, but the parties will have spent a lot of * * * time and money dealing with things that you would not have otherwise had to deal with if I'm wrong." *Id.* at 52a (capitalization altered). Despite voicing these

doubts, the District Court denied Coinbase's stay motion.

C. The Ninth Circuit Refuses To Stay The District Court Proceedings Pending Appeal

In both *Bielski* and *Suski*, Coinbase asked the Ninth Circuit to stay the District Courts' proceedings pending resolution of its interlocutory appeals presenting the question whether its motions to compel arbitration were wrongly denied. Coinbase acknowledged that the Ninth Circuit's 1990 decision in *Britton* held that automatic stays were not warranted for appeals from the denial of a motion to compel arbitration. In both *Bielski* and *Suski*, Coinbase argued that *Britton* was wrong, detailed the numerous circuits directly and expressly rejecting *Britton*'s reasoning, and urged the Ninth Circuit to reconsider the case en banc. *See Bielski* C.A. Stay Mot. 6-9; *Suski* C.A. Stay Mot. 19-20. In the alternative, Coinbase in both cases urged that a stay was warranted under the four-factor standard governing discretionary stays pending appeal. *See Bielski* C.A. Stay Mot. 9-21; *Suski* C.A. Stay Mot. 10-19.

In both cases, the Ninth Circuit denied Coinbase's motion for a stay pending appeal in one-sentence orders and offered no reasoning for declining to revisit *Britton* en banc. The Ninth Circuit denied the stay in *Suski* on May 27, 2022, Pet. App. 2a, and denied the stay in *Bielski* on July 11, 2022, Pet. App. 1a. This joint petition followed.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve the acknowledged and longstanding circuit split over whether an appeal of the denial of a motion to compel arbitration divests the district court of jurisdiction and thus requires that district court proceedings be stayed pending appeal.

This matter is exceptionally important. In three circuits—notably, circuits that handle considerable numbers of arbitration-related appeals—arbitration clauses can be effectively nullified while an appellate court considers the merits of an arbitrability appeal. 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 interim period, which often lasts years. As with doctrines of immunity, if a district court's rejection of a defendant's request for arbitration is not stayed, the defense loses its practical force, as virtually every aspect of litigation that the arbitration clause was supposed to prevent, from discovery to the trial itself, can now unfold during the months and years that the appellate court considers the merits of the arbitration defense. This Court's review is urgently needed.

I. THE CIRCUITS ARE DEEPLY SPLIT ON THE QUESTION PRESENTED.

The circuits are intractably split over whether an appeal from the denial of a motion to compel arbitration divests the district court of jurisdiction and triggers a mandatory stay of district court proceedings pending appeal. Three circuits—the Second, Fifth, and Ninth Circuits—hold that litigation may continue

unabated in district court while an arbitrability appeal is pending. Six circuits—the Third, Fourth, Seventh, Tenth, Eleventh, and D.C. Circuits—hold the opposite: that a non-frivolous arbitrability appeal ousts the district court of jurisdiction. Only this Court can resolve the split.

A. Three Circuits Hold That A District Court May Proceed With Litigation While An Arbitrability Appeal Is Pending.

In *Britton*, the Ninth Circuit became the first court of appeals to address whether an appeal from the denial of a motion to compel arbitration divests the district court of jurisdiction and triggers a mandatory stay. It adopted what has become the minority position—that district court litigation can continue throughout the pendency of an arbitrability appeal. *See* 916 F.2d 1405. The Ninth Circuit acknowledged the "general rule" that an appeal ousts the district court's jurisdiction to exercise control over matters involved in the appeal. *Id.* at 1411 (citing *Griggs*, 459 U.S. at 58). But the court maintained that a district court's power "to proceed with the case on the merits" is an "independent issue[]" from arbitrability. *Id.* at 1411-12. The Ninth Circuit adopted this rule in part based on the belief that automatic jurisdictional ouster "would allow a defendant to stall a trial simply by bringing a frivolous motion to compel arbitration." *Id.* at 1412. And the Ninth Circuit has adhered to this rule ever since. *See*, *e.g.*, *Knapke* v. *PeopleConnect, Inc.*, No. 21-35690, 2021 WL 5352163, at *1 (9th Cir. Oct. 20, 2021) (denying request for a stay "to permit en banc reconsideration of *Britton*"); Pet. App. 2a ("The request for an administrative stay to permit en

banc reconsideration of *Britton* * * * is denied."); Pet. App. 1a (denying request to reconsider *Britton* en banc).

The Second Circuit later followed suit in *Motorola Credit Corp.* v. *Uzan*, 388 F.3d 39, 53-54 (2d Cir. 2004). There, an entire trial occurred in the district court while the arbitrability appeal was pending. *Id.* at 46. The Second Circuit acknowledged that "[o]ther circuits are divided" on the question and "explicitly adopt[ed] the Ninth Circuit's position"—i.e., "that further district court proceedings in a case are not 'involved in' the appeal of an order refusing arbitration, and that a district court therefore has jurisdiction to proceed with a case absent a stay from this Court." *Id.* at 54.

The Fifth Circuit later embraced the Ninth and Second Circuit's position. *See Weingarten Realty Invs.* v. *Miller*, 661 F.3d 904 (5th Cir. 2011). The court acknowledged the 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." *Id.* at 907. The court explained that the circuit's divergent views turned on "whether the merits of an arbitration claim are an aspect of a denial of an order to compel arbitration." *Id.* at 908. In the Fifth Circuit's view, a "determination on the arbitrability of a claim has an impact on what arbiter—judge or arbitrator—will decide the merits, but that determination does not itself decide the merits." *Id.* at 909. Accordingly, the court held, "[a]n appeal of a denial of a motion to compel arbitration does not involve the merits of the claims pending in the district court" and does not deprive the district court of jurisdiction while the appeal proceeds. *Id.*

B. Six Circuits Hold That A Non-Frivolous Arbitrability Appeal Automatically Ousts The District Court Of Jurisdiction.

Six courts of appeals have squarely rejected the minority view. The Seventh Circuit was the first to hold that an arbitrability appeal divests the district court of jurisdiction. *See Bradford-Scott Data Corp.* v. *Physician Comput. Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997). Considering and declining to follow the Ninth Circuit's contrary view, the court, in an opinion by Judge Easterbrook, explained that 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." *Id.* The district court's power to continue proceedings "is the mirror image of the question presented on appeal," and "[c]ontinuation of proceedings in the district court largely defeats the point of the appeal." *Id.* at 505. In reaching this conclusion, the court analogized to interlocutory appeals involving double jeopardy and qualified immunity, which, like arbitrability, challenge the "continuation of proceedings in the district court." *Id.* at 506. As the court explained, an appeal "brings those proceedings to a halt unless the appeal is frivolous," and the same result was warranted for arbitrability. *Id.* The court acknowledged the Ninth Circuit's concern "that an automatic stay would give an obstinate or crafty litigant too much ability to disrupt the district judge's schedule by filing frivolous appeals," but deemed this concern "met by the response that the appellee may ask the court of appeals to dismiss the appeal as frivolous or to affirm summarily." *Id.*

The Eleventh Circuit has agreed with the Seventh. *See Blinco* v. *Green Tree Servicing, LLC*, 366 F.3d 1249, 1251-52 (11th Cir. 2004) (per curiam). Acknowledging that the circuits "are split," the Eleventh Circuit announced that it was "persuaded by the reasoning of the Seventh Circuit" and "unpersuaded" by the reasoning of the Ninth Circuit. *Id.* at 1251-52. The Eleventh Circuit concluded that 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," and "continued litigation in the district court" is therefore "not collateral to" the appeal. *Id.* at 1251. That is why Congress permitted interlocutory arbitrability appeals in the first place: "By providing a party who seeks arbitration with swift access to appellate review, Congress acknowledged" that the main benefits of arbitration would be "lost" if the case proceeded while an appeal was pending. *Id.* Like the Seventh Circuit, the Eleventh Circuit noted that an arbitrability appeal resembles an interlocutory qualified-immunity appeal—both assert "a right not to litigate the dispute in a court," and both "involve the threshold issue of the authority of the district court to entertain the litigation." *Id.* at 1252. In the Eleventh Circuit's view, both types of appeal therefore deprive the district court of jurisdiction pending appeal. *See also Attix* v. *Carrington Mortg. Servs., LLC*, 35 F.4th 1284, 1293 n.5 (11th Cir. 2022) (adhering to conclusion that a stay is automatic pending an arbitrability appeal).

The Tenth Circuit also has agreed. *See McCauley* v. *Haliburton Energy Servs., Inc.*, 413 F.3d 1158 (10th Cir. 2005). Acknowledging the "split," the Tenth Cir-

cuit was "persuaded by the reasoning" of circuits holding "that upon the filing of a non-frivolous § 16(a) appeal, the district court is divested of jurisdiction until the appeal is resolved on the merits." *Id.* at 1160. The Tenth Circuit, like the Seventh and Eleventh, analogized arbitrability to qualified immunity, noting that in both contexts the failure to grant a stay pending appeal results in a denial of the party's "legal entitlement to avoidance of litigation." *Id.* at 1162. And the Tenth Circuit has continued to adhere to this approach ever since. *See Belnap* v. *Iasis Healthcare*, 844 F.3d 1272, 1278 n.3 (10th Cir. 2017) ("On the filing of this appeal, the district court properly stayed the case.").

The Fourth Circuit has adopted the majority view as well. *See Levin* v. *Alms and Assocs., Inc.*, 634 F.3d 260, 263-266 (4th Cir. 2011). The Fourth Circuit acknowledged the split and explained that it "find[s] the majority view persuasive" because "[t]he core subject of an arbitrability appeal is the challenged continuation of proceedings before the district court on the underlying claims." *Id.* at 264. And "because the district court lacks jurisdiction over 'those aspects of the case involved in the appeal,' it must necessarily lack jurisdiction over the continuation of any proceedings relating to the claims at issue." *Id.* (quoting *Griggs*, 459 U.S. at 58). The Fourth Circuit specifically rejected the argument that a district court retains jurisdiction to proceed with discovery pending appeal, explaining that "[d]iscovery is a vital part of the litigation process and permitting discovery constitutes permitting the continuation of the litigation, over which the district court lacks jurisdiction." *Id.* Even if the appeal succeeds, "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." *Id.* at 265.

The Third and D.C. Circuits also agree with the majority position. *Ehleiter* v. *Grapetree Shores, Inc.*, 482 F.3d 207, 215 n.6 (3d Cir. 2007) (adopting "the majority rule of automatic divestiture where the [arbitrability] appeal is neither frivolous nor forfeited"); *Bombardier Corp.* v. *Nat'l R.R. Passenger Corp.*, 333 F.3d 250, 252 (D.C. Cir. 2003) (district court was "divested of jurisdiction over the underlying action" while the appellate court addressed "the threshold issue of whether the dispute between the parties is arbitrable under the FAA").

C. Further Percolation Would Serve No Purpose.

Further percolation would not aid this Court's resolution of the circuit split. Nine circuits have already weighed in, and nearly every court to consider this issue since *Britton* has acknowledged the split and weighed the rationales on both sides. As the Tenth Circuit observed, "the courts on each side of the divide have provided legal justifications" for their respective positions and "presented a reasoned response" to the other side. *McCauley*, 413 F.3d at 1160-61.

Nor is this a lopsided split involving an outlier circuit that might resolve on its own. To the contrary, the split emerged twenty-five years ago, and it has deepened over time to include six circuits in one camp and three in the other. The Ninth Circuit has repeatedly denied requests to rehear this issue *en banc*, including in both cases below. *See* Pet. App. 1a-2a; *PeopleConnect, Inc.*, 2021 WL 5352163, at *1. There is no

chance that the split will resolve itself without this Court's intervention.

II. THE NINTH CIRCUIT'S MINORITY VIEW IS WRONG.

The majority of circuits that have addressed this issue are correct: A non-frivolous interlocutory appeal of the denial of a motion to compel arbitration divests the district court of jurisdiction to proceed with the case.

"The filing of a notice of 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 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. Accordingly, the district court's continuation of proceedings "is the mirror image" of the question being litigated on appeal, and a district court lacks jurisdiction to proceed with a case while the court of appeals is deciding whether the case belongs in litigation to begin with. *Id.* at 505.

That conclusion follows from the FAA itself. Congress in the FAA would not have granted parties the right to an immediate interlocutory appeal of refusals to compel arbitration if Congress had contemplated that litigation could proceed while the appeal was pending. Indeed, unlike in other circumstances where an interlocutory appeal is discretionary, *see, e.g.*, 28 U.S.C. § 1292(b) (permitting a court of appeal "in its discretion" to permit certain interlocutory appeals); Fed. R. Civ. P. 23(f) (court of appeal "may" permit certain interlocutory appeals), Congress in the FAA gave parties a *mandatory right* to an interlocutory appeal

from a district court's refusal to compel arbitration. *See* 9 U.S.C. § 16(a). "By providing a party who seeks arbitration with swift access to appellate review, Congress acknowledged that one of the principal benefits of arbitration, avoiding the high costs and time involved in judicial dispute resolution, is lost if the case proceeds in both judicial and arbitral forums." *Blinco*, 366 F.3d at 1251. "Continuation of proceedings" while an appeal is pending "largely defeats the point of the appeal." *Bradford-Scott*, 128 F.3d at 505.

Because interlocutory arbitrability appeals seek to vindicate the appellant's right to avoid litigation entirely, they resemble interlocutory appeals involving immunity from suit, which similarly seek to vindicate a party's right to avoid litigation. It is uncontroversial that interlocutory appeals of the denial of immunity—including qualified immunity, sovereign immunity, and double-jeopardy immunity—oust the district court of jurisdiction to proceed while the appeal is pending, because forcing a party to litigate pending appeal of the immunity question "destroys rights created by" immunity. *Apostol* v. *Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989) (Easterbrook, J.). "It makes no sense for trial to go forward while the court of appeals cogitates on whether there should be one." *Id.* This reasoning applies with equal force to arbitrability appeals.

In reaching the contrary conclusion, the Ninth Circuit maintained that arbitrability and the merits of a dispute are "independent" legal issues. *Britton*, 916 F.2d at 1412. But this misses the point. An arbitrability appeal raises the fundamental issue whether "the litigation may go forward in the district court" at all. *Bradford-Scott*, 128 F.3d at 506. Thus, when a

district court proceeds with litigation while an arbitrability appeal is pending, the court assumes the answer to the question being addressed on appeal—*i.e.*, that the litigation should proceed in court, not arbitration.

The Ninth Circuit adopted its rule in *Britton* for fear that a defendant may seek "to stall a trial simply by bringing a frivolous motion to compel arbitration" and obtaining a "stay [of] the proceedings pending an appeal." 916 F.2d at 1412. But the flawed *Britton* rule was unnecessary to address that concern. As the courts on the majority side of the split have recognized, frivolous appeals in this context can be addressed by a rule explicitly carving them out from the general divestiture rule, or by appellees "ask[ing] the court of appeals to dismiss the appeal as frivolous or to affirm summarily." *Bradford-Scott*, 128 F.3d at 505. Indeed, the Federal Rules of Appellate Procedure further deter frivolous appeals by allowing an appellate court to award "just damages" and "double costs" when it "determines that an appeal is frivolous." Fed. R. App. P. 38.

Although *Britton* was flawed from the outset, it has become especially dissonant with this Court's intervening cases concerning the FAA's "liberal federal policy favoring arbitration." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (quotation marks omitted). Since *Britton*, this Court has repeatedly reversed lower courts for failing to enforce valid delegation clauses in arbitration agreements much like the ones Coinbase seeks to enforce below. *See Rent-A-Center*, 561 U.S. at 68-69 & n.1 (parties can delegate "gateway" questions of arbitrability to an arbitrator where they do so "clearly and unmistakably" (citing *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995)));

id. at 72 (arbitrator can decide validity of entire Agreement unless validity of delegation clause itself is specifically challenged); *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 529-531 (2019) (delegation clause enforceable even where a court thinks arbitrability argument is "wholly groundless").

The Ninth Circuit's *Britton* rule cannot be reconciled with these decisions. For example, while *Britton*'s conclusion that arbitrability was "severable" from the merits always rested on a misreading of this Court's precedent, *see Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 21 (1983), this misreading has only become more apparent under this Court's subsequent decisions clarifying that arbitrability is an "antecedent" issue that *must* be decided before a court reaches the merits. *Rent-a-Center*, 561 U.S. at 68-70. And while the Ninth Circuit in *Britton* believed that district courts could address the merits before the arbitrability question was settled, that reasoning has been refuted by this Court's emphatic reminder that district courts have "no business weighing the merits of the grievance" if the case belongs in arbitration. *Henry Schein*, 139 S. Ct. at 529 (quotation marks omitted).

The saga of the *Henry Schein* litigation underscores why the minority view is indefensible. Because *Henry Schein* arose from the denial of a motion to compel arbitration in the Fifth Circuit—which adheres to the Ninth Circuit's minority position—district court litigation there continued even as the case proceeded on appeal. After the Fifth Circuit refused to compel arbitration, petitioners sought an emergency stay of the district court proceedings in this Court, explaining that forcing them "to engage in further litigation will

forever deprive them of their bargained-for right to resolve their claims efficiently, privately, and expeditiously through arbitration." Application for a Stay at 2-3, *Henry Schein*, 139 S. Ct. 524 (No. 17-1272). This Court granted the stay application with no noted dissents. *See* 3/2/18 Order, *Henry Schein*, 139 S. Ct. 524 (No. 17-1272). It then granted certiorari, heard the case on the merits, and vacated the Fifth Circuit's decision refusing to send the case to an arbitrator. *See Henry Schein*, 139 S. Ct. at 528-529, 531.

On remand, the Fifth Circuit *again* refused to compel arbitration. Petitioners—now on the eve of trial and following extensive discovery—were thus forced *again* to seek an emergency stay from this Court, and this Court *again* granted the stay pending resolution of another certiorari petition. *See* Order, No. 19A766 (Jan. 24, 2020). This Court was thus required to expend resources by twice considering and twice granting emergency stay applications to prevent ongoing district court litigation that should not have been occurring in the first place.

III. THIS PETITION IS AN IDEAL VEHICLE FOR RESOLVING THIS IMPORTANT QUESTION.

The question presented is exceptionally important. This issue arises in every case in which a party appeals the denial of a motion to compel arbitration. And the Ninth Circuit's minority approach permits district courts to continue adjudicating cases that the court of appeals may well conclude belong in arbitration, undermining the FAA's "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614,

631 (1985). Because the Ninth, Second, and Fifth Circuits encompass many of this nation's commercial centers, the real-world consequences of the split are particularly acute—indeed, Coinbase alone is currently involved in two separate lawsuits implicating this split.

While *Britton* predicted that the pitfalls of declining to stay district court litigation automatically could be addressed through discretionary stays, *see* 916 F.2d at 1412, experience has shown otherwise. After refusing to enforce an arbitration clause, a district court is unlikely voluntarily to stay its own proceedings. And courts of appeals have proven similarly unlikely to grant the "extraordinary remedy" of a discretionary stay, *Nken* v. *Holder*, 556 U.S. 418, 428 (2009) (quotation marks omitted), as the Ninth Circuit's one-line stay denials in *Bielski* and *Suski* confirm.

Recent experience further confirms that the Ninth Circuit's approach is unworkable. District courts and the Ninth Circuit have proven unwilling to stay decisions refusing to compel arbitration even where those decisions are later found patently erroneous on appeal. In one illustrative recent case, the district court and Ninth Circuit both refused the defendant's request to stay discovery pending appeal even though the Ninth Circuit later concluded that the district court had "improperly assumed the authority to decide whether the arbitration agreements were enforceable." *Mohamed* v. *Uber Techs., Inc.*, 848 F.3d 1201, 1206 (9th Cir. 2016); *see also* 10/22/2015 Order, *Mohamed*, 848 F.3d 1201 (No. 15-16178) (order denying stay). In another recent case, the district court and the Ninth Circuit both denied a stay even though the Ninth Circuit later concluded that the dispute "falls

squarely within the scope of the delegation clause, and it should have been left to the arbitrator." *Dekker* v. *Vivint Solar, Inc.*, No. 20-16584, 2021 WL 4958856, at *1 (9th Cir. Oct. 26, 2021); *see also* Order, *Dekker*, No. 20-16584 (9th Cir. Nov. 18, 2020) (order denying stay). And in yet another recent case, both the district court and Ninth Circuit denied a stay even though the Ninth Circuit later easily concluded that the "district court erred" in denying the motion to compel arbitration. *Knapke* v. *PeopleConnect, Inc.*, 38 F.4th 824, 828-829 (9th Cir. 2022); *see also* 10/20/2021 Order, *PeopleConnect*, 38 F.4th 824 (No. 21-35690) (order denying stay).

The errors committed by the District Courts in *Bielski* and *Suski* resemble errors that the Ninth Circuit has repeatedly recently corrected. The District Courts' refusals to compel arbitration in *Bielski* and *Suski* are accordingly likely to be reversed on appeal. In the interim, Coinbase should not be required to defend itself, conduct discovery, and otherwise proceed to litigate these cases, which belong in arbitration and over which the District Courts lack authority.

Bringing the minority circuits into conformity with the majority rule will not only spare litigants from irreparable harm while the arbitrability question is resolved on appeal, but will also reduce the demands on this Court's emergency docket. Parties forced to continue district court litigation during the pendency of arbitrability appeals have repeatedly sought emergency relief in this Court in recent years to prevent the irreparable harm that ongoing litigation inflicts. As already noted, this Court twice considered and granted emergency stays in the *Henry Schein* litigation. *See* Order, No. 19A766 (Jan. 24, 2020); 3/2/18 Order, *Henry Schein*, 139 S. Ct. 524 (No. 17-1272).

And applicants filed at least two similar emergency stay applications from the Ninth Circuit just last year. *See PeopleConnect, Inc.* v. *Knapke*, No. 21A160 (stay requested Nov. 12, 2021); *PeopleConnect, Inc.* v. *Callahan*, No. 21A230 (stay requested Dec. 13, 2021). Such emergency applications can be expected to continue until this Court addresses the circuit split and holds that district courts lack jurisdiction to proceed while an arbitrability appeal is pending.

This joint petition is an ideal vehicle for addressing the split. In both *Bielski* and *Suski*, the District Courts acknowledged that Coinbase's appeal of the refusal to compel arbitration was not frivolous—noting in *Bielski* that "reasonable minds may differ" on the merits of the arbitrability question, Pet. App. 42a, and in *Suski* that the refusal to compel arbitration could be "wrong," Pet. App. 51a. Thus, even if a frivolous appeal presents an exception to the rule that an appeal divests the district court of jurisdiction, there can be no doubt that the exception does not apply here. Additionally, in both *Bielski* and *Suski*, the District Court and Ninth Circuit denied Coinbase's request to stay the case pending appellate resolution of Coinbase's motion to compel arbitration. And in both *Bielski* and *Suski*, Coinbase sought en banc reconsideration of *Britton*, and the Ninth Circuit denied that request as well. Both cases thus squarely implicate the question presented. And with two separate cases presented for this Court's review, it is exceptionally likely that this Court will reach the merits and resolve the question presented.

Both cases also reveal the irreparably harmful consequences of the Ninth Circuit's approach. In *Bielski*, Coinbase has been forced to answer the complaint

while the arbitrability appeal is pending, with discovery to follow. In *Suski*, discovery is already underway, and respondents have served Coinbase with wide-ranging interrogatories—a bell which Coinbase "will not be able to unring" even if it prevails on appeal. *Levin*, 634 F.3d at 265. Additionally, Coinbase has had to, and will continue to have to, engage in further motions practice during the pendency of its appeal, as well as potentially imminent discovery.[2] And in both cases, respondents' operative complaints seek to proceed as a class action, even though Coinbase's User Agreement specifically and unequivocally requires claims to be brought in arbitration "on an individual basis." *Bielski* D. Ct. Dkt. 28-1, at 17. The risk of being subject to class discovery and class certification proceedings before the Ninth Circuit resolves Coinbase's interlocutory appeals "interfere[s] with one of arbitration's fundamental attributes." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1622 (2018); *see also Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1414 (2019) (being subjected to class proceedings "sacrifices the principal advantage of arbitration and greatly increases risks to defendants" (quotation marks omitted)).

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[2] Coinbase filed its motion to dismiss the third amended class action complaint in *Suski* on June 9, 2022, and its motion included a renewed request to compel arbitration. This ongoing district court litigation during Coinbase's appeal of the denial of its motion to compel arbitration only further reinforces why this Court should grant Coinbase's contemporaneously filed stay. Additionally, while the respondents in *Suski* have agreed to temporarily pause discovery until the District Court rules on the motion to dismiss, that motion will be fully briefed as of Monday, August 1, 2022, and is set for argument on August 22. Once the motion is decided (which may be as soon as August 22), Coinbase will immediately face full-blown discovery.

IV. THE COURT SHOULD EXPEDITE REVIEW.

Because this joint petition concerns the standard governing stays pending appeal, the petition will remain live only until the Ninth Circuit issues its mandates in Coinbase's underlying appeals in *Bielski* and *Suski*. After Coinbase's appeals are resolved, the dispute over the proper legal standard for a stay pending appeal will be moot.

Experience shows that the question presented by this petition is particularly susceptible to mootness. At least two certiorari petitions filed last year raised the same question as this case but were mooted before this Court had an opportunity to consider the petitions. In both cases, after the petitions were filed, respondents reversed course and agreed to a stay of district court proceedings pending appeal rather than allowing this Court to resolve the question. *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). In light of this transparent tactic to insulate the Ninth Circuit's minority approach from this Court's review, this Court should take care to ensure that mootness does not thwart review of this important question.

If the Court agrees that this case warrants review, Coinbase respectfully requests that the Court adopt a schedule to ensure that the case will be decided expeditiously, before the question at issue becomes moot. Coinbase submits that two pathways would permit expeditious review.

First, and preferably, the Court could treat Coinbase's contemporaneously filed stay applications in *Bielski* and *Suski* as petitions for certiorari, grant certiorari, consolidate the cases, and set the cases for argument on the earliest possible calendar. The Court took a similar approach in *Nken* v. *Holder*, 556 U.S. 418 (2009), where the applicant filed a stay application seeking review of a circuit split on the appropriate standard for stays pending appeal. The Court granted the stay application, treated it as a petition for certiorari, granted certiorari, and set an expedited briefing schedule to avoid mootness. Were the Court to proceed that way here, Coinbase would dismiss this joint petition for certiorari and would be prepared to brief this case on whatever expedited timeline this Court deems appropriate.

Second, and alternatively, the Court could grant the contemporaneously filed stay applications in *Bielski* and *Suski* and set an expedited briefing schedule on this joint petition for certiorari. To that end, Coinbase is filing motions to expedite this Court's consideration of the joint petition contemporaneously with this joint petition.[3]

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[3] Alternatively, the Court could stay not only the District Court proceedings, but also the Ninth Circuit appeal. With proceedings in both the District Court and the Ninth Circuit stayed, there would be no need for this Court to expedite its disposition of this joint petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

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