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

REPLY IN SUPPORT OF JOINT PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

As the *Suski* Respondents ("Suski") agree, the arguments for certiorari are overwhelming and certiorari should be granted. Suski admits (at 12) that the circuits are "sharply divided" on the question presented: Six circuits hold that a non-frivolous appeal from the denial of a motion to compel arbitration divests the district court of jurisdiction and automatically stays proceedings in the district court. Three other circuits—including the Ninth Circuit below—hold the opposite and allow district court litigation to proceed while an arbitrability appeal is pending. Suski further agrees (at 1) that resolving this split is of "nationwide importance." These concessions confirm that this Court should grant review.

After explaining why review should be granted, Suski dedicates most of his brief to arguing that the Ninth Circuit's minority side of the split is correct. It is not. This Court has made clear 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). Where, as here, an appeal is from the denial of a motion to compel arbitration, the only "aspect[] of the case involved in the appeal," *id.*, is whether the case belongs in district court at all. Thus, district courts are divested of jurisdiction to continue litigation pending non-frivolous arbitrability appeals. None of Suski's merits arguments overcome this conclusion, and, more importantly, none provide any reason to deny certiorari.

These arguments include (at 21-29) a novel argument that Coinbase's User Agreements fall outside the

Federal Arbitration Act ("FAA") entirely because the Agreements allegedly do not "evidenc[e] a transaction involving commerce" under 9 U.S.C. § 2. This argument is forfeited, meritless, and irrelevant to the question presented. As Suski acknowledges (at 29), this Court can "answer the question presented, without deciding" it.

Suski has identified no vehicle problem that would prevent this Court from reaching and resolving the important question presented. To the contrary, this Joint Petition offers two independent and excellent vehicles for resolving that question. This Court should grant the Joint Petition. Alternatively, the Court could grant review with respect to either case and hold the other case in abeyance pending the Court's decision.

ARGUMENT

I. AS SUSKI AGREES, THE JOINT PETITION PRESENTS A DEEP AND IMPORTANT SPLIT THAT WARRANTS REVIEW.

The Joint Petition implicates a longstanding, intractable, and important circuit split. Six circuits hold that a nonfrivolous appeal from the denial of a motion to compel arbitration automatically divests the district court of jurisdiction. Three circuits hold the opposite. Pet. 11-18. Only this Court can resolve the split.

The issue recurs in every case in which a party appeals the denial of a motion to compel arbitration. Pet. 22. The issue is also extremely important: Courts on the minority side of the split routinely deny stays in cases that are later reversed on appeal and sent to arbitration. As a result, even when defendants prevail

on appeal, they are forced to endure the burdens of district court litigation in the interim and forever lose the benefits of arbitration. Pet. 22-26. By contrast, the Third, Fourth, Seventh, Tenth, Eleventh and D.C. Circuits protect the right to arbitrate by automatically staying district court litigation while an arbitrability appeal proceeds. The disparity on this critical issue calls out for this Court's review.

Suski does not dispute any of this. In fact, Suski agrees (at 1) that the issue is one of "nationwide importance"; (at 12) that the circuits are "sharply divided," thus "significantly varying the legal rights of identically situated litigants"; (at 14) that "many companies like Coinbase ascribe tremendous value to completely avoiding any litigation"; and (at 16) that the "Court should grant the Joint Petition." Suski also agrees (at 12) that the cramped conception of a circuit split that Bielski has pressed in his brief in opposition is fundamentally flawed.

Suski's acquiescence speaks to the unusually strong case for certiorari. This Court should grant review.

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

Suski spends the bulk of his brief defending the merits of the approach followed by the Ninth Circuit—along with the Second and Fifth Circuits—which allow a district court to proceed with adjudicating a dispute even as an arbitrability appeal is pending. These arguments do not bear on the need for this Court's review, and they are 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 458. 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) (emphases added). Indeed, Suski concedes as much, acknowledging (at 19) that "the only * * * 'aspect' of *Suski* Respondents' case 'involved in' Coinbase's appeal is whether Coinbase has the right to arbitrate." It follows that an arbitrability appeal divests the district court of jurisdiction to proceed with litigation while the appellate court decides whether the case should be litigated.[1]

This conclusion follows from the FAA's text and purpose. The FAA intentionally departs from the usual rule that a party must await a final judgment to appeal. Instead, Congress granted parties an unqualified right to an interlocutory appeal from the denial of a motion to compel arbitration. *See* 9 U.S.C. § 16. 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

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[1] Suski suggests (at 10 n.3) that Coinbase has contradicted itself by arguing that district courts lack jurisdiction during an arbitrability appeal even though Coinbase renewed its motion to compel arbitration in the district court (upon Suski's amendment of the complaint) after Coinbase filed its appeal in this case. There is no contradiction. The Ninth Circuit had refused to issue a stay when Coinbase renewed its motion to compel arbitration. *Suski* D. Ct. Dkt. 88 at 4. Having been forced to proceed with district court litigation during the pendency of the appeal, Coinbase had every right to vigorously pursue its right to arbitrate.

and arbitral forums." *Blinco*, 366 F.3d at 1251. If the appellate court "reverses and orders the dispute arbitrated, then the costs of the litigation in the district court incurred during appellate review have been wasted." *Id.* The automatic stay prevents a successful appeal from amounting to a pyrrhic victory.

The automatic stay also eliminates the risk of inconsistent judgments, such as when a district court resolves a dispute on the merits only for the appellate court to deem that judgment inoperative because the case should have been arbitrated. And the automatic stay avoids a situation where litigation results in a different outcome than the eventual arbitration. *See Bradford-Scott Data Corp.* v. *Physician Comput. Network, Inc.*, 128 F.3d 504, 505 (7th Cir. 1997) ("Continuation of proceedings * * * creates a risk of inconsistent handling of the case by two tribunals.").

Suski's attempts to justify the Ninth Circuit's minority rule flounder. He argues (at 17) that *Griggs* "did not address the FAA" or "the jurisdictional severability of arbitrability and merits decisions." But, as every court of appeals to address the issue has recognized, *Griggs* establishes the rule of decision for determining whether district court proceedings must be stayed pending an arbitrability appeal. *See*, *e.g.*, *Motorola Credit Corp.* v. *Uzan*, 388 F.3d 39, 53 (2d Cir. 2004) (applying *Griggs*). The circuits are split over how to apply *Griggs*, not whether *Griggs* applies.

Suski invokes (at 17-18) *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 21 (1983) for the proposition that "'arbitrability' is 'easily severable from the merits.'" But as Coinbase explained in its reply to Bielski (at 6-7), *Moses H. Cone*

supports rather than undermines the case for an automatic stay. *Moses H. Cone* held that a district court abused its discretion by refusing to resolve a motion to compel arbitration while state litigation proceeded in parallel. 460 U.S. at 19-20. *Moses H. Cone* thus reaffirms federal courts' obligation to respect the "congressional declaration of a liberal federal policy favoring arbitration." *Id*. at 24. It offers no support for allowing arbitration agreements to be ignored during an interlocutory appeal.

Suski labels the majority approach (at 18-21) "imprudent" and "inefficient." But his claimed illustrations of imprudence and inefficiency fall flat. Suski observes (at 19), for example, that when a plaintiff sues multiple defendants in a circuit that follows the majority approach, district courts "retain merits jurisdiction" over defendants that do not move to compel arbitration, but lose jurisdiction over defendants that appeal the refusal to compel arbitration. That result is unsurprising; litigation inefficiencies will occur when a plaintiff like Suski erroneously 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 (inclusion of defendants that do not move to compel arbitration does not "imply that [others] must lose the benefit of their arbitration agreements"). Suski's argument boils down to a disagreement with the statute Congress enacted.

Suski claims (at 20) that the majority approach promotes "procedural gamesmanship" because every defendant can raise "'non-frivolous' arbitrability argument[s]" and thereby obtain an automatic stay during an arbitrability appeal. But Coinbase's appeals cannot credibly be described as gamesmanship: The district court in *Suski* admitted it could be "wrong," Pet. App. 51a, and in *Bielski* conceded "reasonable minds may differ," Pet. App. 42a. 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.

Suski maintains (at 13) that "any harm caused by" district court litigation during an arbitrability appeal "can be repaired by a breach of contract claim." Even assuming a breach-of-contract claim were available in this context, however, it would not remedy the defendant's harm. Forcing a defendant to mount an entirely new action for damages cannot compensate for the time lost to litigation, nor would damages "unring any bell rung by discovery." *Levin* v. *Alms & Assocs., Inc.*, 634 F.3d 260, 265 (4th Cir. 2011).

Suski argues (at 13-14) that Coinbase "can avoid * * * harm" by "drafting [clearer] contracts." This argument is circular—the whole point of Coinbase's appeals is to decide whether its contract clearly mandates arbitration. Drafting has nothing to do with Coinbase's predicament. Pet. 23-24. And while Suski

disputes (at 2) Coinbase's statement in its *Bielski* reply[2] that meritorious arbitrability appeals "rarely" receive discretionary stays, the decisions below illustrate that Suski is wrong. Both cases are squarely governed by Coinbase's arbitration agreements, yet in both cases the district court and different panels of the Ninth Circuit refused to grant a stay. As Coinbase explained in its *Bielski* reply (at 8-9), the Ninth Circuit has repeatedly denied a defendant's request for a stay at the start of an appeal only later to agree with the defendant on the merits and send the case to arbitration.

Finally, Suski characterizes (at 30) automatic stays as an improper "arbitration-specific" rule, citing *Morgan* v. *Sundance, Inc.*, 142 S. Ct. 1708, 1714 (2022). But the right to an immediate interlocutory appeal was explicitly provided by Congress, not invented by courts. Nor does Suski explain why Congress would have conferred a right to an immediate interlocutory appeal of a district court's refusal to compel arbitration if Congress had expected litigation to plow ahead in the interim. 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.

III. SUSKI'S REMAINING ARGUMENT IS FORFEITED, MERITLESS, AND IRRELEVANT.

Unable to oppose certiorari or credibly defend the Ninth Circuit's rule, Suski argues that the parties' agreement to arbitrate is not governed by the FAA at all. According to Suski, the Coinbase User Agreement

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[2] Suski incorrectly cites Coinbase's Joint Petition as the source.

is not "a contract evidencing a transaction involving commerce," 9 U.S.C. § 2, and thus cannot support an immediate appeal or stay. Suski's newfound theory is forfeited, meritless, and irrelevant to the question presented.

Suski's argument is forfeited many times over. Suski filed *four* briefs in the district court addressing arbitrability or arbitrability stays. *Suski* D. Ct. Dkts. 40, 67, 89, 90. None argued that the User Agreement falls outside the FAA. On the contrary, Suski *conceded* the validity of the arbitration provisions in district court. *See, e.g.*, *Suski* D. Ct. Dkt. 40 at 6 ("Plaintiffs do not dispute the validity of their * * * 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 does not try to adduce "exceptional circumstances that would warrant reviewing a claim that was waived below." *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994).

Suski's new argument is also wrong. This Court has interpreted the FAA "broadly" to "reach to the limits of Congress' Commerce Clause power." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 268, 274-275 (1995). Accordingly, the FAA applies whenever a contract "*in fact*" "involved interstate commerce." *Id.* at 277-278. Coinbase's User Agreements unquestionably do just that. The User Agreements refer to "buy[ing] and sell[ing] Digital Currencies in transactions," *Suski* D. Ct. Dkt. 33-7 at 2; "buy[ing], sell[ing], or hold[ing] Digital Currency," *Suski* D. Ct. Dkt. 33-8 at 23-24; "buying, selling, holding, or investing in digital currencies," *Suski* D. Ct. Dkt. 33-9 at 2; and using

"Digital Currency private keys * * * to process transactions," *Suski* D. Ct. Dkt. 33-10 at 5. Even Suski's complaint describes the putative class as users who—under the User Agreement—engaged in "buying or selling" cryptocurrency on Coinbase's platform. *Suski* D. Ct. Dkt. 83, ¶ 15.

The User Agreements also involve *interstate* commerce given that Suski is a citizen of New York and Coinbase is a Delaware corporation with its principal place of business in California. *See id.* ¶¶ 18, 22. It is hard to imagine a more clear-cut example of a contract evidencing a transaction in interstate commerce.

In any event, even if this argument were not forfeited (which it is) and were not wrong (which it also is), it would make no difference to this Court's consideration of the Joint Petition. Suski admits (at 29) that the Court can "answer the question presented" without reaching this novel, sideshow theory. Because the theory is not "fairly included" within the question presented, Sup. Ct. R. 14.1(a), it should not prevent the Court from granting review of one or both of these cases.

CONCLUSION

Coinbase's Joint Petition should be granted.

Respectfully submitted,

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November 2022