No. 22-105

IN THE
Supreme Court of the United States

COINBASE, INC.,
Petitioner,

v.

ABRAHAM BIELSKI,
Respondent.

COINBASE, INC.,
Petitioner,

v.

DAVID SUSKI, *et al.,*
Respondents.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Under Section 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 Bielski, 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.

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BRIEF FOR PETITIONER

INTRODUCTION

In 1988, Congress amended the Federal Arbitration Act (FAA) by adding Section 16(a), which grants parties an unqualified and immediate right to appeal from district court orders denying motions to compel arbitration. *See* 9 U.S.C. § 16(a). Section 16(a) ensures that parties to an arbitration agreement may vindicate their threshold right to arbitrate *before* being forced to proceed through the burdensome district

court litigation they contracted to avoid. Forcing parties to proceed through litigation only to have their arbitration rights vindicated later by an appellate court defeats the purpose of arbitration.

In the decisions below, however, the Ninth Circuit held that Petitioner Coinbase, Inc. must continue defending itself against putative class-action litigation in district court even as it seeks to vindicate on appeal its right to arbitrate these disputes instead of litigating them. The Ninth Circuit's approach cannot be reconciled with Section 16(a).

Congress enacted Section 16(a) against the backdrop of the foundational rule 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). Under a straightforward application of this divestiture rule, when the issue on appeal is whether a case should proceed in court or arbitration, the entirety of the district court case is involved in the appeal. The whole point of the appeal is to determine whether a federal court has authority over the dispute. Allowing district court proceedings to march on—through discovery, potential class proceedings, and even a trial—while the arbitrability question is resolved on appeal improperly permits the district court to retain jurisdiction over the core issue on appeal. It nullifies the right to an interlocutory appeal for the many months or longer it takes for the appellate process to run its course.

The structure and purpose of the FAA underscore that divestiture is required during arbitrability appeals. Section 16(a) creates an exception to the final-judgment rule to allow immediate appellate review of

orders hostile to arbitration, while Section 16(b) in turn adheres to the final-judgment rule for orders favoring arbitration. That structural choice would be self-defeating if Section 16(a) were interpreted to require defendants to proceed in litigation pending appeal. And forcing litigation to continue pending appeal would undermine Congress's core purpose in the FAA—to move parties "out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983).

Interlocutory appeal provisions outside the FAA confirm that Section 16(a) requires divesture. Where Congress seeks to preclude divestiture in other interlocutory appeal statutes, it does so expressly—through provisos specifying that an appeal does not stay district court proceedings. Indeed, Congress included one such proviso in a statute enacted *the day before* Congress enacted Section 16(a). Congress's decision to omit such a proviso in Section 16(a) is powerful evidence that Congress intended normal divestiture principles to apply.

Finally, in other contexts like this one where parties are entitled to an interlocutory appeal to vindicate the right to avoid litigation altogether, it is undisputed that an appeal precludes the district court from proceeding to the merits. By the same logic, district courts lack authority to press ahead with litigation during an arbitrability appeal. Refusing to apply the divestiture rule during arbitrability appeals would treat the right to arbitration less favorably than analogous rights—the exact result Congress enacted the FAA to avoid.

OPINIONS BELOW

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).

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 under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

9 U.S.C. § 16 provides:

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

STATEMENT

A. Legal Background

1. Congress enacted the FAA in 1925 to overcome "judicial hostility to arbitration." *Viking River Cruises, Inc.* v. *Moriana*, 142 S. Ct. 1906, 1917 (2022); *see* 9 U.S.C. § 1 *et seq*. The FAA replaced "judicial indisposition to arbitration with a national policy favoring it and placing arbitration agreements on equal footing with all other contracts." *Hall St. Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 581 (2008) (cleaned up). Under the FAA, "any doubts concerning

the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25. Congress's "clear intent" in the FAA was "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Id.* at 22.

Congress accomplished this goal through multiple provisions requiring courts to honor arbitration agreements. Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. Section 3 of the FAA in turn entitles litigants in federal court to a stay of any action that is "referable to arbitration under an agreement in writing." *Id.* § 3. Section 4 of the FAA entitles parties to petition for an order directing "arbitration [to] proceed" upon "the alleged failure, neglect, or refusal of another to arbitrate" under an arbitration agreement. *Id.* § 4. Section 206 of the FAA then authorizes courts to "compel" arbitration by directing "that arbitration be held in accordance with the agreement." *Id.* § 206.

2. In 1988, Congress amended the FAA to resolve a split among the courts of appeals regarding the appealability of interlocutory orders resolving efforts to compel arbitration.

Prior to 1988, the FAA did not specify whether orders granting or denying efforts to compel arbitration or other threshold arbitrability orders were immediately appealable. In the face of this statutory silence, the circuits split over whether threshold arbitrability orders could be immediately appealed or could be corrected only after final judgment. *See Green Tree Fin. Corp.-Alabama* v. *Randolph*, 531 U.S. 79, 88 & n.5 (2000). Some circuits always allowed interlocutory ar-

bitrability appeals; some never allowed them; and others allowed them in some circumstances but not others.

Congress resolved the split in favor of arbitration in what is now Section 16 (then Section 15) of the FAA. In Section 16(a), Congress first specified that an immediate "appeal *may* be taken from" orders *refusing* arbitration—including orders "denying a petition" to require arbitration under Section 4 of the FAA, orders denying an application "to compel arbitration" under Section 206 of the FAA, and orders "refusing a stay of any action" under Section 3 of the FAA. 9 U.S.C. § 16(a) (emphasis added). By its "clear and unambiguous terms," Section 16(a) means that any litigant who moves to require arbitration "is entitled to an immediate appeal from denial of that motion." *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 627 (2009).

In contrast, Congress specified in Section 16(b) that "appeal *may not* be taken from an interlocutory order" *granting* arbitration—including orders "directing arbitration to proceed" under Section 4, orders "compelling arbitration" under Section 206," and orders "granting a stay of any action" under Section 3. 9 U.S.C. § 16(b) (emphasis added).

Thus, in accordance with "the FAA's policy favoring arbitration," Section 16 "generally permits immediate appeal of orders hostile to arbitration, whether the orders are final or interlocutory, but bars appeal of interlocutory orders favorable to class arbitration." *Green Tree*, 531 U.S. at 86. By including orders denying arbitration in the "small class" of decisions exempt from the final-judgment rule while adhering to the final-judgment rule for orders granting arbitration, Section 16(a) expressed a "congressional judgment" that

the right to arbitrate a dispute is "important enough" to be "vindicable immediately." *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 878, 880 n.7 (1994) (quotation marks omitted).

B. Factual Background

1. 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 and ether. *See* Pet. App. 3a-4a; JA1-2.

Users creating a Coinbase account 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. JA67 (emphasis added); *see also* JA276, 354, 403, 469. The agreement to arbitrate permits both Coinbase and its customers to "realize the benefits of private dispute resolution," which include "lower costs" and "greater efficiency and speed" than federal court litigation. *See Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010).

The User 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 a delegation clause "delegates the arbitrability question to an arbitrator, a court may not override the contract" by resolving arbitrability itself. *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019). The delegation clause at issue here 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*.

JA68 (Bielski delegation clause) (emphases added); *see also* JA355, 404, 470 (identical delegation clauses applicable to three *Suski* plaintiffs); JA276 (incorporation of identical delegation clause in AAA rules applicable to one *Suski* plaintiff).

2. Coinbase's joint petition arises from two cases in which district courts in the Northern District of California refused to compel arbitration in violation of the plain language of the Coinbase User Agreement. In both cases, Coinbase appealed that erroneous refusal to arbitrate to the Ninth Circuit, as authorized by Section 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 simultaneously to defend itself from putative class actions in the district courts and pursue its interlocutory appeals in the Ninth Circuit.

Bielski: Respondent Abraham Bielski agreed to Coinbase's User Agreement and created a Coinbase account in April 2021. JA24. 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. JA96. He granted the scammer "remote access" to his computer, and the scammer exploited that access to

steal approximately $31,000 from Bielski's Coinbase account. *Id.*

Because neither Coinbase nor anyone else can reverse this kind of fraudulent transaction, 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." JA63. Bielski nonetheless filed a putative class action complaint, which he has amended multiple times, alleging that various statutes and common law causes of action require Coinbase to recredit customers' stolen cryptocurrency. JA10-13.

Pursuant to the mandatory terms of the User Agreement that Bielski agreed to follow, Coinbase moved to compel arbitration and to stay district court proceedings pending arbitration. The district court refused. Pet. App. 3a-18a. 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." *Id.* at 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 thus concluded that it could decide whether the arbitration agreement was enforceable, even though the delegation clause provided that "[a]ll" questions about the "enforceability" of the "Arbitration

Agreement" "shall be decided by an arbitrator." *Id.* at 7a-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 it believed 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 immediately appealed, pursuant to Section 16(a), the district court's refusal to compel arbitration. It asked the district court to 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 nonetheless decided that a stay was unwarranted because "Coinbase is a large company," while "Bielski is a single individual." Pet. App. 42a-43a.

Suski: Respondents in *Suski* are 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 in dogecoin, a digital cryptocurrency. *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 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 agreed to

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

Coinbase moved to compel arbitration or to stay proceedings pending arbitration, arguing that under the User Agreement "any dispute about the scope or applicability of the arbitration provision is delegated to the arbitrator." JA232-241. 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. Contrary to the User Agreement's delegation clause, the district court refused to allow an arbitrator to decide the applicability of the arbitration provision, and instead resolved the question itself. *Id.* at 31a-33a.

Coinbase immediately appealed, pursuant to Section 16(a), the district court's refusal to compel arbitration. It asked the district court to stay further proceedings pending appeal. 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, and despite the additional litigation costs being imposed on the parties, the district court denied Coinbase's stay motion.

3. In both *Bielski* and *Suski*, Coinbase asked the Ninth Circuit to stay proceedings in the district courts pending resolution of its interlocutory appeals. Coinbase acknowledged that a decades-old Ninth Circuit decision, *Britton* v. *Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990), held that automatic stays were not warranted for appeals from the denial of a motion to compel arbitration. But in both *Bielski* and *Suski*, Coinbase argued that *Britton* was wrong, detailed the numerous circuits expressly rejecting *Britton*'s reasoning, and urged the Ninth Circuit to reconsider the case en banc. *See* JA183-186, 746-747. In the alternative, Coinbase in both cases urged that a stay was warranted under the four-factor standard governing discretionary stays pending appeal. *See* JA186-198, 738-745.

In both cases, the Ninth Circuit denied Coinbase's motion for a stay pending appeal in unpublished orders and offered no reasoning for declining to revisit *Britton* en banc. *See* Pet. App. 1a-2a.

4. Coinbase filed its joint petition for certiorari on July 29, 2022. On December 9, 2022, this Court granted the joint petition. In the meantime, the Ninth Circuit pressed ahead with both appeals.

In *Suski*, one week after this Court granted certiorari, a Ninth Circuit panel released an opinion affirming the denial of Coinbase's motion to compel. *Suski* v. *Coinbase, Inc.*, 55 F.4th 1227 (9th Cir. 2022). Like the district court, the panel refused to enforce the User

Agreement's delegation clause. Despite recognizing that the delegation clause provided that all disputes about "the existence, scope, or validity of the arbitration agreement," must be decided by the arbitrator, *id.* at 1229, the panel maintained that Ninth Circuit precedent nevertheless permitted disputes over the "existence" of an arbitration agreement to be decided by a court. *Id*. at 1230. The panel then concluded that the arbitration agreement in the User Agreement was "superseded" by the forum selection clause in the Official Rules of the Dogecoin Sweepstakes, and that the case therefore did not belong in arbitration. *Id.* at 1230-31. Coinbase intends to timely petition for rehearing en banc of that determination.

In *Bielski*, the Ninth Circuit has scheduled oral argument for February 2023. JA200. Immediately after this Court granted certiorari, Coinbase filed a motion asking the Ninth Circuit to hold *Bielski* in abeyance pending a decision from this Court, to ensure that proceedings in the Ninth Circuit do not risk interfering with this Court's review of Coinbase's petition. JA199-202. The Ninth Circuit has not yet ruled on that motion.

5. In both cases, the parties have engaged in extensive litigation of these putative class actions in district court pending appeal.

The parties have litigated *Suski* in district court for nearly a year since Coinbase filed its notice of appeal. During that time, Coinbase has completed two rounds of briefing regarding its motion to dismiss a newly amended class-action complaint, filed a new motion to compel arbitration regarding the new complaint, filed five separate briefs, negotiated a protective order and

scheduling orders, responded to written discovery requests, and participated in multiple case management conferences. As of the date of this filing, Coinbase has devoted well over 1,000 attorney hours to district court litigation in *Suski* since appealing. The *Suski* respondents have also expended resources litigating the case, as has the district court. These burdens would have been even more significant had the district court not *sua sponte* stayed its proceedings in November 2022 through the end of March 2023. *See* JA727.

Coinbase has litigated *Bielski* in district court for more than nine months since filing its notice of appeal. During that time, Coinbase has answered an earlier version of the complaint, filed several briefs, opposed a motion to appoint interim class counsel (which the district court promptly denied), attended a case management conference, and is midway through briefing a motion to dismiss a newly amended class-action complaint and to compel arbitration of the claims of two newly added class representatives. The *Bielski* plaintiffs have served discovery on Coinbase, to which Coinbase will respond by the end of January 2023. As of the date of this filing, Coinbase has devoted nearly 500 attorney hours to district court litigation in *Bielski* since appealing. And Coinbase will face further litigation in district court for as long as it takes the Ninth Circuit to issue a decision.

All of this litigation—not just for Coinbase, but for the respondents, and for the district courts overseeing both cases—will be wasted in the event the Ninth Circuit ultimately rules in Coinbase's favor.

SUMMARY OF ARGUMENT

I. Every tool of statutory interpretation confirms that a district court is divested of authority during an arbitrability appeal under Section 16(a).

A. When Congress amended the FAA in 1988 to confer the immediate right to appeal orders refusing to compel arbitration, Congress legislated against the backdrop of the divestiture rule, which provides that an appeal "divests the district court of its control over those aspects of the case involved in the appeal." *Griggs*, 459 U.S. at 58. Under a straightforward application of this rule, district courts cannot proceed with litigation while the court of appeals resolves the threshold question whether the case can be litigated at all. The sole question in an arbitrability appeal is whether district court litigation may go forward. Permitting ongoing litigation while a case is on appeal defeats the purpose of the appeal and subjects defendants to the burdens of discovery, potential class proceedings, and even a trial as they vindicate their right to arbitration. Because Congress enacted Section 16(a) against the backdrop of this Court's divestiture precedent, Congress understood that the textual grant of an interlocutory appeal right in Section 16(a) requires divestiture.

B. The FAA's structure underscores that conclusion. Section 16(a) creates an exception to the final judgment rule for orders hostile to arbitration. Section 16(b), by contrast, adheres to the final judgment rule for orders favoring arbitration. This asymmetry makes sense only if Congress intended arbitrability to be resolved on appeal before parties are forced to litigate in district court. Further, in addition to providing

for immediate appeals from the denial of a motion to compel, Section 16(a) provides for immediate appeals from the refusal to stay litigation pending arbitration. In the latter context, the question on appeal is even more plainly intertwined with ongoing district court proceedings. Divestiture must be required on appeal from refusals to grant a stay, which underscores that it must also be required on appeal from refusals to compel arbitration.

C. Divestiture accords with the purposes of Section 16(a). Congress enacted the FAA to combat judicial hostility to arbitration, and it enacted Section 16(a) specifically to ensure that parties are not subjected to the burdens of litigation before they have an opportunity on appeal vindicate their right to arbitration. There is no plausible explanation why Congress would have authorized parties to immediately appeal the refusal to arbitrate if Congress had intended to subject parties to litigation during the many months or years it takes to complete the appeal. Requiring parties to defend themselves in litigation—particularly class-action litigation—defeats the purpose of the appeal. Interpreting Section 16(a) to permit district courts to press ahead during an appeal would mean that divestiture principles apply in a manner that uniquely burdens arbitration, which is the type of judicial hostility to arbitration Congress enacted the FAA to prohibit.

D. Other interlocutory appeal statutes underscore that the divestiture rule precludes district court litigation pending an arbitrability appeal. Where Congress seeks to depart from the divestiture rule, Congress *expressly* provides that an interlocutory appeal does not stay district court proceedings. Congress included such an express proviso in an interlocutory appeal

statute enacted *the day before* Section 16(a). Congress's decision to include no such proviso in Section 16(a) is powerful evidence that it intended normal divestiture principles to apply.

E. Divestiture is required during analogous interlocutory appeals that protect the right to avoid litigation entirely. Applying the collateral order doctrine, this Court has authorized interlocutory appeals in other contexts where an immediate appeal is necessary to vindicate a party's right to avoid litigation—including, for example, in qualified-immunity cases. In this immunity context, it is settled that district courts are divested of authority to press ahead with litigation during the appeal, because permitting litigation would destroy the immunity at issue on appeal. The same logic requires divestiture in the analogous arbitrability context, which likewise concerns whether litigation is permissible in the first place.

II. None of the justifications for the Ninth Circuit's contrary approach withstand scrutiny.

A. The Ninth Circuit invoked this Court's decision in *Moses H. Cone* to justify permitting district courts to proceed pending arbitrability appeals. But no plausible reading of *Moses H. Cone*—which predates Section 16(a)—supports the Ninth Circuit's view. There, this Court held that a federal district court was *required to resolve* a party's motion to compel arbitration notwithstanding ongoing state-court proceedings involving the same subject matter. Abstention "was plainly erroneous in view of Congress's clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly

and easily as possible." 460 U.S. at 22. That logic strongly supports divestiture here.

B. The Ninth Circuit's belief that discretionary stays suffice to protect the right to arbitrate is equally untenable. Protecting parties from the burdens of litigation is not normally grounds for a discretionary stay under the four-factor stay test—but litigation burdens are precisely the harm that Congress sought to avoid in Section 16(a). Decades of experience confirms that discretionary stays are inadequate. Courts have often refused to grant discretionary stays in arbitration cases only for the court of appeals to reverse and send the case to arbitration—resulting in months or years of needless district court litigation in the meantime.

C. The Ninth Circuit expressed concern that divestiture in this context would encourage frivolous appeals. But Coinbase's appeals here are not remotely frivolous, as the district courts acknowledged. Moreover, there is no evidence of frivolous appeals in the circuits that require divestiture. And this Court has addressed similar concerns, including in arbitration cases, by identifying numerous procedural mechanisms available to courts of appeals for deterring frivolous appeals or promptly disposing of them if they ever arise.

ARGUMENT

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

In Section 16(a) of the FAA, Congress granted defendants like Coinbase an immediate and unqualified

right to appeal orders denying motions to compel arbitration and other threshold refusals to arbitrate. The statutory text, structure, purpose, and context all confirm that Congress intended this interlocutory appeal right to divest district courts of authority to adjudicate the merits of the case pending appeal.

A. The FAA's Text Requires Divestiture During An Arbitrability Appeal.

Section 16(a) grants parties the right to "appeal" interlocutory orders disfavoring arbitration, including orders "denying an application * * * to compel arbitration." 9 U.S.C. § 16(a)(1)(C). In enacting this text, Congress legislated against the backdrop of the divestiture rule, which provides that district courts are divested of authority to proceed with matters implicated by the appeal. Congress's creation of an immediate arbitrability appeal right ensured that district courts would be divested of authority to proceed to the merits while the appeal proceeds.

1. The Divestiture Rule Prevents District Courts From Proceeding To The Merits While An Arbitrability Appeal Proceeds.

"The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs*, 459 U.S. at 58. An appeal divests district courts of all "matters encompassed in the appeal." 16A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure–Jurisdiction* § 3949.1 (5th ed. 2022 update) ("*Wright & Miller*"); *accord* Stephen M. Shapiro et al., *Supreme Court Practice* § 7.5 (11th ed. 2019).

This divestiture rule "is fundamental to a hierarchical judiciary." *Bradford-Scott Data Corp.* v. *Physician Comput. Network, Inc.*, 128 F.3d 504, 505 (7th Cir. 1997) (Easterbrook, J.). It "fosters judicial economy" and guards against "confusion and inefficiency that would result if two courts" purported to exercise jurisdiction over related matters simultaneously. *Doe* v. *Pub. Citizen*, 749 F.3d 246, 258 (4th Cir. 2014). It also protects against the risk that district and appellate courts will reach inconsistent results regarding the same aspect of the same case. *See Bradford-Scott*, 128 F.3d at 505-506.

After an appeal has been taken, district courts retain authority only over matters not involved in the appeal. District courts, for example, retain authority over matters that are genuinely collateral to the matter on appeal—for example, "conduct[ing] proceedings looking toward permanent injunctive relief while an appeal about the grant or denial of a preliminary injunction is pending" or "award[ing] costs and attorneys' fees after the losing side has filed an appeal on the merits." *Id.* at 505. District courts may similarly issue certain orders "in aid of the court of appeals' exercise of its jurisdiction," such as by modifying an injunction to preserve the "status quo." 16A *Wright & Miller* § 3949.1; *see Wolfe* v. *Clarke*, 718 F.3d 277, 281 n.3 (4th Cir. 2013). District courts also retain jurisdiction if a party "frivolously appeals" or a party "takes an interlocutory appeal from a non-appealable order." *United States* v. *DeFries*, 129 F.3d 1293, 1302-03 (D.C. Cir. 1997) (per curiam). Otherwise, however, a district court cannot "alter[] the status of the case" until the court of appeals issues its mandate. *Doe*, 749 F.3d at 259 (quotation marks omitted).

A straightforward application of the divestiture rule makes short work of the question presented. As Judge Easterbrook has explained, 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. That is, "[t]he 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). "The issue of continued litigation in the district court" is therefore "not collateral to the question presented by an appeal." *Id.* On the contrary, "it is the mirror image" of the question on appeal. *Bradford-Scott*, 128 F.3d at 505. "[B]ecause the district court lacks jurisdiction over 'those aspects of the case involved in the appeal,' it must necessarily lack jurisdiction" to proceed with a case while the court of appeals is deciding whether the case belongs in litigation to begin with. *Levin* v. *Alms & Assocs., Inc.*, 634 F.3d 260, 264 (4th Cir. 2011) (quoting *Griggs*, 459 U.S. at 58).

Staying ongoing district court proceedings during an arbitrability appeal comports with the purposes of the divestiture rule. Staying proceedings promotes judicial economy. The efficiency benefits of arbitration "are eroded, and may be lost or even turned into net losses, if it is necessary to proceed in both judicial and arbitral forums, or to do this sequentially." *Bradford-Scott*, 128 F.3d at 506. "The worst possible outcome would be to litigate the dispute, to have the court of appeals reverse and order the dispute arbitrated, to arbitrate the dispute, and finally to return to court to have the award enforced." *Id.* But this outcome will

often be inevitable "if a district court continues with the case while an appeal under § 16(a) is pending." *Id.*

This outcome harms everyone—the parties and courts alike. It forces parties to engage in litigation that will prove pointless if the court of appeals concludes that arbitration is required. And it requires district courts to preside over months or years of active litigation unnecessarily. Here, for example, the district courts in *Bielski* and *Suski* have expended substantial judicial resources weighing motions to dismiss, motions to stay, and motions relating to the appointment of interim class counsel. The district courts have also addressed case-management issues in numerous status conferences, and are otherwise overseeing active litigation. All of this will be entirely wasted if the Ninth Circuit ultimately concludes that these cases belong in arbitration.

In addition to promoting judicial economy, divestiture also avoids any risk of inconsistent judgments. Where a district court proceeds with litigation as a court of appeals decides whether litigation is proper, it "creates a risk of inconsistent handling of the case by two tribunals." *Id.* at 505. Namely, it gives the district court opportunities to issue rulings—up to and including awarding judgment for one party—inconsistent with the conclusion that the case does not belong in litigation at all. For that reason, too, arbitrability appeals are "poor candidates for exceptions to the principle that a notice of appeal divests the district court of power to proceed with the aspects of the case that have been transferred to the court of appeals." *Id.* at 506.

The problems with continued district court litigation do not disappear if, during the arbitrability appeal, the parties engage in discovery and briefing without a trial on the merits. "Discovery 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." *Levin*, 634 F.3d at 264. Allowing discovery "would cut against the efficiency and cost-saving purposes of arbitration." *Id.* That is especially true for class-wide discovery, but is also true for individual discovery. Conducting individual discovery "could alter the nature of the dispute significantly by requiring parties to disclose sensitive information that could have a bearing on the resolution of the matter" if the case ultimately proceeds in arbitration. *Id.* at 265. If a court of appeals later holds that the case belongs in arbitration, "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.*

The principal federal jurisdiction treatises agree that Section 16(a) requires divestiture. After noting the split on this question, *Wright & Miller* explains that a "complete stay of district-court proceedings pending appeal from a refusal to order arbitration is desirable," because "[c]ontinued trial-court proceedings pending appeal could lead to an entirely wasted trial if arbitration is ordered on appeal." 15B *Wright & Miller* § 3914.17. *Moore's Federal Practice* similarly explains that the "sounder approach" is to require divestiture, because "[a] stay in these circumstances is consistent with the general principle that a district

court should not exercise jurisdiction over those aspects of the case that are involved in the appeal." 19 *Moore's Federal Practice–Civil* § 203.12 (3d ed. 2022).

Applying the divestiture rule in this context therefore does not "invent special, arbitration-preferring procedural rules." *Morgan* v. *Sundance, Inc*., 142 S. Ct. 1708, 1713 (2022). It instead subjects arbitrability appeals to the same generally applicable divestiture principles that always apply during interlocutory appeals.

2. Section 16(a) Codifies The Divestiture Rule For Arbitrability Appeals.

Congress legislates against the backdrop of this Court's decisions. It is "not only appropriate but also realistic to presume that Congress" is familiar with this Court's precedents "and that it expects its enactments to be interpreted in conformity with them." *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34 (1995) (cleaned up); *see, e.g.*, *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 644-648 (2010); *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 116-118 (2002).

When Congress enacted Section 16(a) in 1988, this Court had recently and repeatedly applied the divestiture rule. *See, e.g.*, *Griggs*, 459 U.S. at 58; *Marrese* v. *Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985). In conferring the right to immediately appeal orders hostile to arbitration, Congress in Section 16(a) thus understood that divestiture principles would prohibit district courts from proceeding to the merits during the appeal.

This Court has routinely applied similar reasoning in analogous contexts. In its unanimous decision in

Hall v. *Hall,* 138 S. Ct. 1118 (2018), for example, this Court interpreted the consolidation practice set forth in Federal Rule of Civil Procedure 42(a) in accordance with the long "legal lineage" that predated Rule 42's enactment. *Id*. at 1125. In resolving the meaning of Rule 42(a), this Court explained that "Rule 42(a) did not purport to alter the settled understanding of the consequences of consolidation" and therefore should be read to be consistent with that understanding. *Id*. at 1131.

This Court in other contexts has similarly interpreted statutory text in light of background principles enunciated in this Court's precedent. *See, e.g.*, *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153-154 (2013) ("this Court's interpretations of similar provisions in many years past" is "probative of whether Congress intended a particular provision to rank as jurisdictional") (quotation marks omitted); *Henderson ex rel. Henderson* v. *Shinseki,* 562 U.S. 428, 436 (2011) (this Court "will presume" that Congress intended to make a time limit jurisdictional "[w]hen a long line of this Court's decisions left undisturbed by Congress has treated a similar requirement as 'jurisdictional'") (quotation marks and citation omitted).

Congress's grant of an unqualified right to "appeal" interlocutory orders disfavoring arbitration, 9 U.S.C. § 16(a)(1)(C), therefore "brings the old soil" of the divestiture rule with it, *George* v. *McDonough*, 142 S. Ct. 1953, 1959 (2022) (quotation marks omitted), and confirms that the text of Section 16(a) divests the district court of authority to press ahead with the merits during the appeal.

B. The FAA's Structure Confirms That Divestiture Is Required.

The FAA's structure confirms that an arbitrability appeal taken pursuant to Section 16(a) divests the district court of jurisdiction and stays district court litigation during the arbitrability appeal.

First, by departing from the final-judgment rule that limits parties to a single appeal, Section 16(a) reflects Congress's conclusion that enforcing a party's right to arbitration is too time-sensitive and important to address after the litigation has proceeded.

Tracing to the common law, the final-judgment rule was first codified in the First Judiciary Act of 1789 and is now found in 28 U.S.C. § 1291. *See Di Bella* v. *United States*, 369 U.S. 121, 124 (1962). That rule generally requires "that 'the whole case and every matter in controversy in it must be decided in a single appeal.'" *Microsoft Corp.* v. *Baker*, 137 S. Ct. 1702, 1712 (2017) (alteration omitted) (quoting *McLish* v. *Roff*, 141 U.S. 661, 665-666 (1891)). The final-judgment rule prohibits interlocutory appeals even though it means "certain burdensome rulings will be only imperfectly reparable by the appellate process." *Bullard* v. *Blue Hills Bank*, 575 U.S. 496, 507 (2015) (quotation marks omitted).

As this Court has explained, Congress departs from the final-judgment rule only where it concludes that "the damage of error unreviewed" before final judgment is "greater than the disruption caused by intermediate appeal." *Di Bella*, 369 U.S. at 124-125. Where Congress creates an exception to the final-judgment rule, the exception reflects a legislative judgment that the right being protected is too important to

await vindication and therefore justifies the cost of a piecemeal appeal.

Congress made exactly that judgment in Section 16(a). By creating a statutory exception to the final-judgment rule for arbitrability appeals, Congress signaled its recognition that the costs of requiring parties to litigate a case that belongs in arbitration outweigh the usual efficiency benefits of postponing appeal until final judgment. Congress thus concluded that the question of arbitrability should be resolved *before* the parties are forced to proceed in litigation. That conclusion cannot be reconciled with requiring defendants to litigate while the question of arbitrability is pending on appeal.

That is particularly evident given that Congress in Section 16(a) provided an *unqualified* right to an interlocutory appeal. In other interlocutory appeal contexts, Congress permitted parties to seek an interlocutory appeal at the discretion of a court. *See, e.g.*, 28 U.S.C. § 1292(b) (court of appeals "in its discretion" may permit certain interlocutory appeals); 26 U.S.C. § 7482(a)(2) (similar for interlocutory appeals from Tax Court); 38 U.S.C. § 7292(b)(1) (similar for interlocutory appeals from Court of Appeals for Veterans Claims); 28 U.S.C. § 158(a)(3) (similar for interlocutory bankruptcy appeals); *see also* Fed. R. Civ. P. 23(f) (similar for interlocutory class-certification appeals). The "calibrat[ed]" approach adopted by these provisions allows courts "to balance the benefits of immediate review against the costs of interlocutory appeals" on a case-by-case basis, and to authorize interlocutory appeals in some cases while denying them in others. *Microsoft*, 137 S. Ct. at 1709 (quotation marks omitted). In each of these contexts, Congress "declined to

go further and provide for appeal as a matter of right." *Id.*

Congress in Section 16(a), by contrast, provided for a wholesale appeal as a matter of right, thus highlighting Congress's judgment about the importance of resolving arbitrability denials before proceeding to litigation. It would make little sense for Congress to so thoroughly protect the right to arbitrate, but require defendants to continue litigating for however long it takes for the arbitrability appeal to be decided.

Second, Congress's asymmetrical departure from the final-judgment rule in Section 16(a) reflects a strong preference for arbitration over continued district court litigation. In Section 16(a), Congress authorized parties to appeal from interlocutory orders *denying* a motion to compel arbitration. In Section 16(b), in turn, Congress refused to authorize parties to appeal from interlocutory orders *granting* a motion to compel arbitration.

This asymmetry "reflects a deliberate determination that appeal rules should reflect a strong policy favoring arbitration." 15B *Wright & Miller* § 3914.17. It is one way in which "the FAA was designed to promote arbitration." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 345 (2011). And this asymmetry underscores Congress's recognition that immediate appeals of orders refusing arbitration improve efficiency, whereas immediate appeals of orders requiring arbitration undermine it. As a representative of the Judicial Conference of the United States explained in testimony supporting the legislation, allowing immediate appeal from orders denying a motion to compel will lead to "great savings" if the order is erroneous. *Court Reform and Access to Justice Act: Hearings on H.R.*

3152 Before the Subcomm. on Cts., C.L., & the Admin. of Just., of the H. Comm. on the Judiciary, 100th Cong. 25 (1987) (statement of Hon. Elmo B. Hunter, Comm. on Ct. Admin., Jud. Conf. of the U.S.) ("Hunter Statement"). By contrast, prohibiting immediate appeal from orders granting a motion to compel "should not often be costly" because "district courts usually will be correct" in compelling arbitration, and even if the district court is incorrect, "the arbitration process is apt to produce considerable savings in the process of preparing for trial." *Id.*

The asymmetry in Section 16 is incompatible with the proposition that district courts can require parties to conduct discovery and otherwise address the merits of a dispute while an arbitrability appeal is ongoing. Instead, the statutory structure is coherent only if district courts lack authority to proceed during the appeal.

Third, the interaction of Section 16(a) with Section 3 of the FAA lends further support for divestiture. Section 3 of the FAA provides that district courts "shall on application of one of the parties stay" a case in federal court once the district court is "satisfied that the issue involved in such suit or proceeding is referable to arbitration." 9 U.S.C. § 3. If the district court denies a motion to stay under Section 3, then Section 16(a) authorizes the party seeking the stay to immediately appeal. "By that provision's clear and unambiguous terms, any litigant who asks for a stay under § 3 is entitled to an immediate appeal" if the motion is denied. *Carlisle*, 556 U.S. at 627.

Having given parties the right to a stay pending arbitration, and the right to appeal from the denial of a stay, Congress cannot have intended to require parties

to litigate the case while an appeal over the denial of a stay proceeds. When a party appeals such a denial, the issue of continued litigation in the district court is not just a "mirror image" of the question being litigated on appeal, *see Bradford-Scott*, 128 F.3d at 505, it is *exactly the same* question being litigated on appeal. Congress's express grant of an interlocutory appeal from a refusal to stay pending arbitration makes sense only if district courts are prohibited from pressing ahead with litigation while the appellate court decides whether the litigation should be stayed.

Congress cannot possibly have intended different divestiture rules to apply in the different interlocutory appeals authorized by Section 16(a). Indeed, parties—including Coinbase in both *Bielski* and *Suski*—typically file both a motion to compel arbitration and a motion for a stay pending completion of that arbitration.

C. Divesture Comports With The Purpose Of Section 16.

Congress enacted Section 16 in 1988 to resolve a circuit split over whether threshold arbitrability orders are immediately appealable. The split emerged in the absence of statutory text on point and resulted from a disagreement over the application of a since-abrogated line of this Court's precedent known as the *Enelow-Ettelson* doctrine. *See Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 279 (1988). Applying then-existing doctrine, one appeals court held that threshold arbitrability orders were immediately appealable, *see Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO* v. *Aloha Airlines, Inc.*, 776 F.2d 812, 814-815 (9th Cir. 1985); other appeals courts held

that threshold arbitrability orders were not immediately appealable, *see, e.g., Stateside Mach. Co.* v. *Alperin*, 526 F.2d 480, 482-484 (3d Cir. 1975); and still other appeals courts held that some threshold arbitrability orders were immediately appealable and some were not, *see*, *e.g.*, *Buffler* v. *Elec. Comput. Programming Inst., Inc.*, 466 F.2d 694, 698-699 (6th Cir. 1972). Congress resolved the split by clarifying the "confused and irrational" precedent in this area in favor of arbitration. Hunter Statement, *supra*, at 24.

Requiring a defendant to participate in discovery and continue litigating a case during an arbitrability appeal is irreconcilable with that purpose. To the contrary, "[c]ontinuation of proceedings in the district court largely defeats the point of the appeal." *Bradford-Scott*, 128 F.3d at 505. Congress's goal in Section 16(a)—to "maintain arbitration's essential virtue of resolving disputes straightaway," *Hall Street*, 552 U.S. at 588—would be self-defeating if parties could be required to litigate the case for the many months or years it takes for the appellate process to conclude.

This conclusion is all the more apparent given that Congress intended arbitrability to be a "gateway matter," *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002), or a "threshold" issue, *Rent-A-Center*, 561 U.S. at 68, that must be resolved *before* a dispute is litigated. Given Congress's purpose of resolving arbitrability before permitting litigation, this Court has refused to interpret the FAA in a manner that would "risk[] the very kind of costs and delay through litigation * * * that Congress wrote the [FAA] to help the parties avoid." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 278 (1995). And this Court has confirmed that courts have "no business weighing the

merits" of a case that belongs in arbitration, "because the agreement is to submit all grievances to arbitration." *Henry Schein*, 139 S. Ct. at 529 (quotation marks omitted). Absent divestiture, however, district courts will be able to proceed to the merits of a case that the court of appeals later determines belonged in arbitration—exactly what this Court has held is impermissible.

The conflict with FAA's purposes is particularly acute where, as here, the ongoing district court litigation is class-action litigation. As this Court has explained, class proceedings "interfere[] with fundamental attributes of arbitration" and are "inconsistent with the FAA." *Concepcion*, 563 U.S. at 344; *see also Viking River Cruises*, 142 S. Ct. at 1918. A class proceeding "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U.S. at 348. The costs and risks associated with defending a class action pending the outcome of an arbitrability appeal could even pressure defendants "into settling questionable claims" in the face of "a small chance of a devastating loss." *Id.* at 350.

Permitting district courts to proceed with arbitration pending an arbitrability appeal would be especially anomalous given that the FAA was enacted to overcome "widespread judicial hostility to arbitration agreements." *Id.* at 339. The statute's "overarching purpose," "evident in the text" was "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id.* at 344; *see also Moses H. Cone*, 460 U.S. at 23 (the FAA

sought to create a "statutory policy of rapid and unobstructed enforcement of arbitration agreements"). Interpreting the FAA to endorse continued district court litigation unless the high bar for a discretionary stay is met would be wholly at odds with this purpose. By amending the FAA in 1988 to *strengthen* protections for arbitration, Congress cannot reasonably be understood to have given district courts an easy mechanism to flout the FAA's central purpose.

D. Context Confirms That Divestiture Is Required.

Other statutes and procedural rules dating back more than a century confirm that where Congress authorizes parties to take an interlocutory appeal, the appeal divests the district court of authority to proceed. Where Congress seeks to depart from the presumption of divestiture, it does so expressly. But Congress did not do so in Section 16(a).

In the Judiciary Act of 1891, ch. 517, 26 Stat. 826, Congress enacted the precursor to 28 U.S.C. § 1292(a)(1), which for the first time authorized interlocutory injunction appeals. Congress *expressly* included in the original injunction-appeal statute a proviso making clear that "the proceedings in other respects in the court below *shall not be stayed* unless otherwise ordered by that court during the pendency of such appeal." Judiciary Act of 1891, § 7, 26 Stat. at 828 (emphasis added). That proviso reflected Congress's understanding that an interlocutory appeal would trigger divestiture in the absence of an express provision stating otherwise. Congress removed the proviso in 1948 only because it was "superseded" by the Federal Rules of Civil Procedure. H.R. Rep. No.

308, at A111 (1947); *see, e.g.*, Judiciary Act of 1948, § 1292, 62 Stat. 869, 929. Specifically, Rule 62 contained a proviso making clear that "an interlocutory" judgment "in an action for an injunction" "shall not be stayed" "during the pendency of an appeal" unless specifically ordered. Fed. R. Civ. P. 62(a) (1946). Rule 62 contains a similar proviso today. *See* Fed. R. Civ. P. 62(c)(1).

The story is much the same for the other provisions of § 1292(a). In 1900, Congress provided for appeals of interlocutory orders appointing receivers, now codified as § 1292(a)(2). Then, in 1926, Congress provided for appeals of interlocutory orders in admiralty cases, now codified as § 1292(a)(3). The original versions of both provisions *expressly* provided that proceedings in the lower court "shall not be stayed" pending appeal absent a court order. *See* Act of June 6, 1900, ch. 803, 31 Stat. 660-661; Act of Apr. 3, 1926, ch. 102, 44 Stat. 233-234. Again, these provisos would have been unnecessary had the interlocutory appeals not otherwise resulted in divestiture. In 1948, Congress removed the provisos, again based on the understanding that the Federal Rules of Civil Procedure made them redundant. *See* H.R. Rep. No. 308, at A111 (1947).

In 1927, Congress enacted the precursor to 28 U.S.C. § 1292(c), which allows for interlocutory appeals from judgments of patent infringement before a final accounting of damages. *See* Act of Feb. 28, 1927, ch. 228, 44 Stat. 1261; *McCullough* v. *Kammerer Corp.*, 331 U.S. 96, 98 (1947). As with Section 1292(a), the original version of 1292(c) *expressly* provided that the "accounting in the court below shall not be stayed unless so ordered by that court." Ch. 228, 44 Stat. 1261. As with Section 1292(a), that proviso was removed only

after Rule 62 separately provided that infringement appeals did not require an automatic stay. *See* H.R. Rep. No. 308, at A111 (1947); Fed. R. Civ. P. 62(a) (1946); Fed. R. Civ. P. 62(c)(2); *see also* 16 *Wright & Miller* § 3928.

In 1958, Congress enacted § 1292(b), which allows appellate courts to permit certain interlocutory appeals involving "a controlling question of law as to which there is substantial ground for difference of opinion." Act of Sept. 2, 1958, Pub. L. No. 85-919, 72 Stat. 1770. Like the original versions of Section 1292(a) and Section 1292(c), this provision *expressly* stated that an "application for an appeal hereunder *shall not stay proceedings in the district court*" automatically. *Id.* (emphasis added). That proviso, which remains in the statute today, further underscores that divestiture was presumed absent an express statement to the contrary. Congress included similar provisos in other permissive interlocutory appeal statutes enacted in 1982, *see* 28 U.S.C. § 1292(d)(3) (appeals shall not "stay proceedings" "unless a stay is ordered"), and in 1986, *see* 26 U.S.C. § 7482(a)(2)(A) (same). These provisos, too, remain in force today.

On November 18, 1988—the day before Congress amended the FAA to add Section 16(a)—Congress enacted a statute providing for permissive interlocutory appeals from the Court of Appeals for Veterans Claims to the Federal Circuit. *See* Veterans' Judicial Review Act, Pub. L. No. 100-687, § 301, 102 Stat. 4105, 4105 (1988); *see also* 38 U.S.C. § 7292(b)(1). Once again, Congress *expressly* provided that "[n]either the application for, nor the granting of, an appeal under this paragraph *shall stay proceedings*" "unless a stay is ordered." 38 U.S.C. § 7292(b)(1) (emphasis added). This

proviso, contained in a statute enacted one day before Section 16(a), confirms Congress's recognition that divestiture is presumed absent a statement to the contrary.

After enacting Section 16, Congress continued to note expressly where it displaces the presumption of divestiture for interlocutory appeals. In 2005, Congress amended the Bankruptcy Code to allow for permissive appeals of certain interlocutory bankruptcy orders, but *expressly* specified that an "appeal under this paragraph does not stay any proceeding" unless the court "issues a stay of such proceeding pending the appeal." 28 U.S.C. § 158(d)(2)(D). And when Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act in 2016, it once more provided for a discretionary interlocutory appeal, but *expressly* specified that such an interlocutory appeal "does not stay any proceeding" unless the district court or court of appeals issues a discretionary stay. 48 U.S.C. § 2166(e)(6).

This Court has adhered to the divestiture rule when exercising its own rulemaking authority. Congress in 28 U.S.C. § 1292(e) authorized this Court to "prescribe rules" "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for." *See* Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 101, 106 Stat. 4506, 4506. This Court exercised that authority in 1998 to prescribe Federal Rule of Civil Procedure 23(f), which provides for permissive appeals of orders granting or denying class certification. Rule 23(f) *expressly* provides that "[a]n appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders." Fed. R. Civ. P. 23(f). Again, this

proviso would be unnecessary if the interlocutory appeal did not otherwise result in divestiture.

These provisions supply compelling evidence that when Congress or this Court creates an interlocutory appeal right, the appeal presumptively results in divestiture, and an express exception is required to overcome the presumption. Congress declined to provide such an exception in Section 16(a)—even though it provided an exception in comparable statutes, including a statute enacted one day before Section 16(a). Congress's decision to omit such an exemption in Section 16(a) "indicates that Congress intended no such exception" to apply. *Elgin* v. *Dep't of Treasury*, 567 U.S. 1, 13 (2012).

E. Divestiture Is Required In Comparable Immunity Contexts.

In other contexts where a party is entitled to an interlocutory appeal to vindicate a right to avoid litigation altogether, divestiture is required. The same principles require divestiture here.

Although the final-judgment rule prohibits almost all appeals of interlocutory orders unless Congress specifies otherwise, the collateral order doctrine permits defendants to take certain interlocutory appeals to vindicate their right to avoid litigation entirely. Immediate appeals are permitted in this context because these cases involve "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 799 (1989) (quoting *United States* v. *MacDonald*, 435 U.S. 850, 860 (1978)).

Thus, this Court has authorized immediate appeals from orders denying claims of immunity under the Double Jeopardy Clause, *see Abney* v. *United States*, 431 U.S. 651, 660-662 (1977); orders denying immunity under the Speech or Debate Clause, *see Helstoski* v. *Meanor*, 442 U.S. 500, 506-508 (1979); orders denying absolute immunity, *see Nixon* v. *Fitzgerald*, 457 U.S. 731, 742 (1982); orders denying qualified immunity, *see Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985), and orders denying Eleventh Amendment immunity, *see Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-145, 147 (1993). Because defendants in these cases assert an entitlement to avoid suit altogether "rather than a mere defense to liability," the entitlement "is effectively lost if a case is erroneously permitted to go to trial." *Forsyth*, 472 U.S. at 526.

In each of these contexts, it is uncontroversial that the divestiture rule prohibits district courts from proceeding with the merits during the pendency of the appeal. Where "further district court proceedings would violate the very right being asserted in the appeal," "the pendency of the appeal does oust the district court of authority to proceed." 16A *Wright & Miller* § 3949.1. Immunity appeals divest the district court of authority because forcing a party to litigate pending appeal "destroys rights created by the 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 principle prevents not only trial, but also prevents "burdensome pretrial proceedings, including, most notably, discovery." *May* v. *Sheahan*, 226 F.3d 876, 880 (7th Cir.

2000); *accord Wooten* v. *Roach*, 964 F.3d 395, 401-403 (5th Cir. 2020).

The same logic requires divestiture during appeals under Section 16(a). As in an immunity appeal, a defendant who invokes an arbitration agreement is asserting a right to avoid judicial proceedings entirely. As in an immunity appeal, pressing ahead with district court proceedings during the appeal destroys the very right a party is authorized to enforce through immediate appeal. And as in an immunity appeal, it makes no sense to press ahead with litigation while the court of appeals decides whether litigation is permitted in the first place. The divestiture rule's application in immunity cases—that "[a]ppeals based on rejection of a right not to be tried ordinarily require that the district court stay proceedings"—has therefore "been extended to arbitration appeals on the theory that the very purpose of permitting the appeal is to avoid the costs that can arise from duplicating judicial and arbitral proceedings." 15B *Wright & Miller* § 3914.17.

The Congress that amended the FAA to allow interlocutory appeals in 1988 was legislating against the backdrop of appellate precedent making clear that nonfrivolous interlocutory appeals from denials of immunity deprived district courts of authority to proceed under the "divestiture rule." *United States* v. *Dunbar*, 611 F.2d 985, 988 (5th Cir. 1980) (en banc) ("If nonfrivolous, of course, the trial cannot proceed until a determination is made of the merits" of the double jeopardy appeal); *accord United States* v. *Hines*, 689 F.2d 934, 936-937 (10th Cir. 1982). This history provides yet further evidence that Congress in 1988 would have

understood that an interlocutory arbitrability appeal results in divestiture.

The contrary approach has led to anomalous results in the courts that refuse to require divestiture under Section 16(a). The Ninth Circuit, for example, refuses to require divestiture during arbitrability appeals but nonetheless recognizes in the context of immunity that the "divestiture rule is clearly applicable in a case where the defendant claims a right not to be tried at all." *United States* v. *Powell*, 24 F.3d 28, 31 (9th Cir. 1994). The Fifth Circuit similarly refuses to require divesture during arbitrability appeals while recognizing that ongoing proceedings during immunity appeals impermissibly deprive a defendant of the entitlement "to be free from suit and the burden of avoidable pretrial matters." *Helton* v. *Clements*, 787 F.2d 1016, 1017 (5th Cir. 1986) (per curiam).

The Fifth Circuit has defended that discrepancy by invoking the collateral order doctrine and maintaining 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." *Weingarten Realty Invs.* v. *Miller*, 661 F.3d 904, 910 (5th Cir. 2011). But such interest balancing has no place in this context. Collateral-order-doctrine cases require this Court to consider whether to permit an immediate appeal even though Congress has not expressly provided one. In resolving that question, this Court considers, among other factors, whether the right at issue is "too important to be denied review." *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *see also Forsyth*, 472 U.S. at 524 (right to qualified immunity was sufficiently "important" to

warrant an immediate appeal) (quotation marks omitted); *Digital Equip. Corp.*, 511 U.S. at 878 ("right by private agreement of the parties" to enforce a settlement agreement "does not rise to the level of importance needed" to justify an immediate appeal); *but see Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 117 (2009) (Thomas, J., concurring in part and concurring in judgment) (criticizing this balancing approach).

Unlike in the collateral-order-doctrine context, however, Congress here *already* engaged in the relevant balancing in Section 16(a), where it chose to confer the right to an immediate appeal of refusals to compel arbitration. This Court need not reweigh the importance of the right at issue because Congress has *already* determined that the right to arbitrate is "important enough to warrant immediate appeal." *Digital Equip. Corp.*, 511 U.S. at 880 n.7. And "courts must give full effect to this express congressional judgment" that the right to arbitrate be "vindicable immediately" even though they should not "make similar judgments for themselves." *Id.*

Rather than asking whether to authorize an immediate appeal, this case asks instead whether divestiture is required during an interlocutory appeal that Congress has already authorized. That question turns not on a judicial second-guessing of the importance of arbitration, but rather on an assessment whether retaining jurisdiction would embroil the district court in "aspects of the case involved in the appeal." *Griggs*, 459 U.S. at 58. As to that question, proceeding with district court litigation during an arbitrability appeal is impermissible for precisely the same reason it is impermissible during an immunity appeal.

II. THE ARGUMENTS AGAINST DIVESTITURE FAIL.

The majority of courts of appeals that have addressed the question presented correctly hold that an arbitrability appeal divests the district court of authority to proceed on the merits. But the Ninth Circuit below, adhering to its decades-old decision in *Britton*, permitted the district courts in both *Bielski* and *Suski* to continue litigation of these cases pending Coinbase's arbitrability appeals. Most of the rationales for *Britton* boil down to policy disagreements with Section 16(a). None support permitting continued district court proceedings during an arbitrability appeal.

A. Precedent Does Not Support The Ninth Circuit's Rule.

The Ninth Circuit in *Britton* concluded that divestiture was not required during an arbitrability appeal because "the issue of arbitrability" is "independent" from the merits of the plaintiff's claims. *Britton*, 916 F.2d at 1412. The Ninth Circuit's sole support for that proposition was a footnote citation to this Court's statement in *Moses H. Cone* that questions of arbitrability are "severable from [the] merits" of an underlying dispute. *Id.* at 1412 n.7 (citing *Moses H. Cone*, 460 U.S. at 21). *Moses H. Cone* did not interpret Section 16 and predated by five years the 1988 amendments to the FAA. But in any event, *Moses H. Cone* undermines rather than supports the Ninth Circuit's conclusion.

In *Moses H. Cone*, a hospital sued its contractor and other parties in state court even though the hospital and contractor had entered into an arbitration agreement providing that "[a]ll" disputes "shall be decided by arbitration." 460 U.S. at 5. The contractor then

filed a separate suit in federal district court seeking to compel arbitration under the FAA. The federal court abstained from addressing the motion to compel on the ground that "the identical issue" was being litigated in state court. *Id.* at 7.

This Court held that the district court's abstention "was plainly erroneous in view of Congress's clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Id.* at 22. Rejecting the hospital's assertion that abstention was warranted because the hospital would otherwise be required to litigate in federal court against the contractor while also litigating in state court against parties with no arbitration agreement, the Court explained that the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Id.* at 20. Any other result would "frustrate[] the statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Id.* at 23.

It was in that context—the context of *requiring a district court to enforce an arbitration agreement* notwithstanding parallel state-court proceedings—that this Court stated arbitrability was "severable from the merits" being litigated in state court. *Id.* at 20-21. The reasoning of *Moses H. Cone*—the need to avoid frustrating "the statutory policy of rapid and unobstructed enforcement of arbitration agreements," *id.* at 23—supports the conclusion that courts should resolve arbitrability before progressing to the merits, not the other way around. *See Bradford-Scott*, 128 F.3d at 506 (rejecting the Ninth Circuit's interpretation of *Moses H. Cone*).

Moses H. Cone also undermines the *Britton* rule in another respect. Before addressing whether abstention was appropriate, the Court in *Moses H. Cone* addressed the threshold question whether the district court's abstention order was immediately appealable. The Court held that the abstention order was immediately appealable because it "amount[ed] to a dismissal of the suit" in favor of state-court litigation. *Moses H. Cone*, 460 U.S. at 10. Then-Justice Rehnquist, joined by Chief Justice Burger and Justice O'Connor, dissented from that appealability holding (but did not challenge the Court's ultimate holding that abstention was improper). In dissent, Justice Rehnquist recognized that *if* an appeal from the refusal to compel arbitration were immediately available, the result would be that "colorable appeals from interlocutory orders" would "delay" district court proceedings. *Id.* at 31-32 (Rehnquist, J., dissenting).

Justice Rehnquist thus understood that an immediate interlocutory appeal of an arbitration denial would divest district courts of authority and stay the proceedings below. Five years later, Congress in Section 16(a) codified the interpretation that Justice Rehnquist recognized would result in divestiture. Justice Rehnquist's evident understanding that an immediate appeal would result in divestiture—undisputed by the majority—further supports the conclusion that an interlocutory arbitrability appeal divests the district court of authority to proceed.

B. The Availability of Discretionary Stays Does Not Support The Ninth Circuit's Rule.

The Ninth Circuit in *Britton* maintained that the availability of discretionary stays could adequately

protect parties during arbitrability appeals, and that whether to grant a stay pending appeal "is a proper subject for the exercise of discretion by the trial court." *Britton*, 916 F.2d at 1412. That was wrong.

For one thing, pointing to the availability of discretionary stays proves too much. A discretionary stay is theoretically available in *any* interlocutory appeal. If the discretionary stay were *always* sufficient to protect a party's interests, then divestiture would *never* be necessary. Yet divestiture is the default. *See Griggs*, 459 U.S. at 58. The argument that divestiture is unnecessary because discretionary stays are available cannot be correct.

For another, the discretionary stay standard is fundamentally incompatible with Congress's goals in enacting Section 16(a). To secure a stay pending appeal under the discretionary standard, a party must show that, without the stay, it would suffer an injury that is "categorically irreparable." *Nken* v. *Holder*, 556 U.S. 418, 435 (2009). Courts have found in most contexts that the burdens of further litigation—for example, devoting resources to discovery requests, paying court costs and attorney's fees—are not categorically irreparable. *See, e.g.*, *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); *Nationwide Biweekly Admin., Inc.* v. *Owen*, 873 F.3d 716, 735 n.20 (9th Cir. 2017) (similar). But litigation burdens are precisely the harm that Congress sought to avoid in Section 16(a).

Practical experience bears out the theoretical mismatch between the discretionary stay standard and Section 16(a). After refusing to compel arbitration,

district courts are unlikely to grant stays of that decision, even where the arguments in favor of a stay are compelling. The district courts in both *Bielski* and *Suski*, for example, refused to compel arbitration despite acknowledging that their refusal to arbitrate could well be incorrect. *See* Pet. App. 42a-43a, 51a-52a.

Courts of appeals likewise rarely grant discretionary stays, consistent with the admonition that such stays are reserved for "rare and exceptional cases." *Fargo Women's Health Org.* v. *Schafer*, 507 U.S. 1013, 1013 (1993) (O'Connor, J., concurring in denial of a stay). The Ninth Circuit's one-sentence orders in these cases exemplify the cursory treatment such stay requests often receive, which in turn encourages the very judicial hostility to arbitration the FAA was designed to prevent. The upshot is that parties are often denied a stay—and thus forced to litigate in district court—only for the court of appeals to conclude that the district court was wrong to refuse arbitration.[1]

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[1] *See, e.g.*, *Fernandez* v. *Bridgecrest Credit Co.*, No. 19-56378, 2022 WL 898593, at *1 (9th Cir. March 28, 2022) (reversing refusal to compel arbitration); *see* Order, *Fernandez*, No. 19-56378 (9th Cir. Jun. 24, 2020) (order denying stay). There are many others. *See Knapke* v. *PeopleConnect*, Inc., 38 F.4th 824, 828-829 (9th Cir. 2022); 10/20/2021 Order, *PeopleConnect*, 38 F.4th 824 (No. 21-35690); *Dekker* v. *Vivint Solar, Inc.*, No. 20-16584, 2021 WL 4958856, at *1 (9th Cir. Oct. 26, 2021); Order, *Dekker*, No. 20-16584 (9th Cir. Nov. 18, 2020); *Berk* v. *Coinbase, Inc.*, 840 F. App'x 914, 916 (9th Cir. 2020); 8/21/2019 Order, *Berk*, 840 F. App'x 914 (No. 18-01364); *Stiner* v. *Brookdale Senior Living, Inc.*,

Such stay denials are far from harmless. The Ninth Circuit takes nearly a year and a half on average to resolve an appeal in argued cases[2]—and often takes considerably longer. *See Stromberg* v. *Qualcomm Inc.*, 14 F.4th 1059 (9th Cir. 2021) (taking nearly three years to resolve interlocutory appeal). Substantial resources are wasted in district court in the meantime—not just by defendants like Coinbase, but plaintiffs and courts as well. *See supra* pp. 14-15, 22-23.

This Court is no stranger to the problem of ongoing district court proceedings pending arbitrability appeals: It experienced the problem firsthand in the *Henry Schein* litigation. Because *Henry Schein* arose from the denial of a motion to compel arbitration in the Fifth Circuit—which, like the Ninth Circuit, does not automatically stay proceedings pending an arbitrability appeal—district court litigation there continued during the appeal. After the Fifth Circuit refused to compel arbitration, petitioners sought an emergency stay of the district court proceedings in this

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810 F. App'x 531, 534 (9th Cir. 2020); 10/31/2019 Order, *Stiner*, 810 F. App'x 531 (No. 19-15334); *Mohamed* v. *Uber Techs., Inc.*, 848 F.3d 1201, 1206 (9th Cir. 2016); 10//22/2015 Order, *Mohamed*, 848 F.3d 1201 (Nos. 15-16178, 15-16181, 15-16250); *Reyna* v. *Int'l Bank of Com.*, 839 F.3d 373, 379 (5th Cir. 2016); 2/25/2016 Order, *Reyna*, 839 F.3d 373 (No. 16-40057); *Cox* v. *Ocean View Hotel Corp.*, 533 F.3d 1114, 1119-26 (9th Cir. 2008); 9/21/2006 Order, *Cox*, 533 F.3d 1114 (No. 06-15903); *Arciniaga* v. *Gen. Motors Corp.*, 460 F.3d 231, 234-235, 237-238 (2d Cir. 2006); 3/13/2006 Order, *Arciniaga*, 460 F.3d 231 (No. 05-6299).

[2] *See* Admin. Off. of the U.S. Courts, Annual Report 2021 Table B-4: U.S. Courts of Appeals–Median Time Intervals in Months for Cases Terminated on the Merits (Sept. 30, 2021), *available at* https://www.uscourts.gov/statistics/table/b-4/judicial-business/2021/09/30.

Court. *See* Application for a Stay at 2-3, *Henry Schein*, 139 S. Ct. 524 (No. 17-1272). This Court granted the stay application. *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 once again forced to seek an emergency stay from this Court, which this Court once again granted. *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 the divesture rule should have prevented.

Arbitration is an attractive alternative to litigation precisely because it offers "streamlined proceedings and expeditious results." *Preston* v. *Ferrer*, 552 U.S. 346, 357 (2008) (quotation marks omitted); *see also Hall St. Assocs.*, 552 U.S. at 588 (emphasizing "arbitration's essential virtue of resolving disputes straightaway"). When litigation proceeds in the district court in parallel with the arbitrability appeal, those benefits dissipate.

C. Concern Over Frivolous Appeals Does Not Support The Ninth Circuit's Rule.

The Ninth Circuit in *Britton* claimed that a contrary rule "would allow a defendant to stall a trial simply by bringing a frivolous motion to compel arbitration." *Britton*, 916 F.2d at 1412. This Court has addressed

this same concern in comparable contexts and has rejected it every time.

In *Carlisle*, this Court addressed the provision of Section 16(a) granting parties the right to appeal from a district court's refusal to stay litigation pending arbitration. 556 U.S. at 625-626, 627. In rejecting the suggestion that enforcing that provision by its terms would encourage frivolous appeals, the Court explained that "there are ways of minimizing the impact of abusive appeals," including by allowing appellate courts to "streamline the disposition of meritless claims and even authorize the district court's retention of jurisdiction when an appeal is certified as frivolous." *Id.* at 629. The Court added that "those inclined to file dilatory appeals" may further be deterred "by courts' authority to 'award just damages and single or double costs to the appellee' whenever an appeal is 'frivolous.'" *Id.* (quoting Fed. R. App. P. 38).

The Court in *Carlisle* supported its conclusion by referring to *Behrens* v. *Pelletier*, 516 U.S. 299 (1996), which endorsed a practice "embraced by several Circuits" that allows courts to certify an appeal as "frivolous" in qualified immunity cases, thereby "enabl[ing] the district court to retain jurisdiction pending summary disposition of the appeal." *Id.* at 310-311; *see also Abney*, 431 U.S. at 662 & n.8 (holding that denials of double-jeopardy claims are immediately appealable and noting that it "is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims").

The same reasoning dispels any concern over abusive appeals here. For one thing, no one contends that Coinbase's appeals here were frivolous. Nor is there evidence that abusive appeals occur at all—let alone

that they are more common—in the six circuits that have for two decades or more required divestiture pending arbitrability appeals. *See Behrens*, 516 U.S. at 310 (noting that there is "no reason to believe that abuse has often occurred"); *cf. Henry Schein*, 139 S. Ct. at 531 ("We are not aware that frivolous motions to compel arbitration have caused a substantial problem in those Circuits that have not recognized a 'wholly groundless' exception."). If anything, the risk runs in the opposite direction: In circuits that refuse to follow the divestiture rule, plaintiffs have strong incentives to make frivolous objections to arbitration, knowing that if the district court refuses to compel arbitration discovery may be available pending appeal.

Courts of appeals have many tools to weed out truly frivolous appeals. Courts can summarily affirm, which would result in the prompt return of the case to the district court. And, as this Court has noted, almost every circuit has developed a process by which district courts may keep jurisdiction by certifying that an appeal is frivolous.[3] That practice rests on the principle that a frivolous appeal is "ineffectual," *Apostol*, 870 F.2d at 1339, and thus fails "to divest the district court of jurisdiction" for the same reason a district court retains jurisdiction when a party purports to appeal

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[3] *See BancPass, Inc.* v. *Highway Toll Admin., L.L.C.*, 863 F.3d 391, 398-399 (5th Cir. 2017); *Rivera-Torres* v. *Ortiz Velez*, 341 F.3d 86, 96 (1st Cir. 2003); *Chuman* v. *Wright*, 960 F.2d 104, 105 (9th Cir. 1992); *Yates* v. *City of Cleveland*, 941 F.2d 444, 448-449 (6th Cir. 1991); *Stewart* v. *Donges*, 915 F.2d 572, 576-577 (10th Cir. 1990); *Apostol* v. *Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989); *United States* v. *Head*, 697 F.2d 1200, 1204 n.4 (4th Cir. 1982); *United States* v. *Grabinski*, 674 F.2d 677, 679 (8th Cir. 1982) (en banc); *United States* v. *Leppo*, 634 F.2d 101, 104 (3rd Cir. 1980).

from a nonappealable order, *Rivera-Torres* v. *Ortiz Velez*, 341 F.3d 86, 96 (1st Cir. 2003).

In any event, the question presented here is "whether there is jurisdiction over the appeal," which "must be determined by focusing upon the category of order appealed from," not "the strength of the grounds for reversing the order." *Behrens*, 516 U.S. at 311. Speculative concern over frivolous appeals that have never actually come to pass cannot justify refusing to abide by ordinary divestiture principles.

CONCLUSION

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

Respectfully submitted,

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