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 OF THE DRI CENTER FOR LAW AND PUBLIC POLICY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The DRI Center for Law and Public Policy is the public policy "think tank" and advocacy voice of DRI—an international organization of around 14,000 attorneys who represent businesses in civil litigation.

DRI's mission includes enhancing the skills, effectiveness, and professionalism of civil litigation defense lawyers, promoting appreciation of the role of defense lawyers in the civil justice system, and anticipating and addressing substantive and procedural issues germane to defense lawyers and the fairness of the civil justice system. The Center participates as an *amicus curiae* in this Court, federal courts of appeals, and state appellate courts, in an ongoing effort to make the civil justice system fair, consistent, and efficient.[2]

DRI members regularly represent parties to arbitration agreements. The Center is interested in ensuring that these clients are protected from needless and costly litigation that will result if the Ninth Circuit's decision remains good law. The Ninth Circuit and other circuits aligned with it conclude that allegedly arbitrable disputes can be

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[1] This brief was authored by amicus curiae and its counsel listed on the front cover and was not authored in whole or in part by counsel for a party. No one other than amicus curiae, its members, or its counsel has made any monetary contribution to the preparation or submission of this brief.

[2] *See* https://www.centerforlawandpublicpolicy.org/center

litigated in district court despite an ongoing, non-frivolous interlocutory appeal of a denial of arbitration.

The Federal Arbitration Act should receive uniform application across federal circuits. This ensures arbitration achieves its basic purpose of resolving disputes efficiently, predictably, and at minimal cost. In support of those goals, The Center submits this brief in support of Petitioner Coinbase, Inc., arguing that the decision of the Ninth Circuit countenancing the district court's discretion to deny a stay of litigation pending interlocutory appeal should be reversed and its opinion vacated.

INTRODUCTION AND SUMMARY OF ARGUMENT

An interlocutory appeal under Section 16(a) of the Federal Arbitration Act addresses the threshold question of arbitrability. This Court should hold that such an appeal divests the district court of jurisdiction and requires a mandatory stay of all litigation.

Arbitration and litigation are distinct mechanisms of dispute resolution. They cannot coexist. Parties choose arbitration to avoid litigation. Once a party has been forced to litigate, this purpose is destroyed. The loud, resonating bell of litigation, once heard by all, cannot be un-rung.[3] Its course

[3] *Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 265 (4th Cir. 2011).

and its effects remain even if an appellate court reverses. Parties who litigate will suffer the consequences, whatever they may be.

The Ninth Circuit (along with the Second and Fifth Circuits) has adopted an untenable rule that will adversely impact the bargained-for rights of millions of American businesses and individuals who are parties to arbitration agreements in many diverse industries and contexts. Since the 1990s, the use of arbitration clauses in consumer, employment, and commercial contracts has increased.

Given the proliferation of arbitration, the Ninth Circuit's holding goes far beyond affecting business interests. Recent scholarship explains an effort by plaintiff-claimants and their sophisticated attorneys to seize upon arbitration provisions in commonplace consumer agreements. Those claimants seek to "turn the tables" on business interests by using arbitration agreements to file mass arbitrations strategically intended to overwhelm and disrupt the operations of their opponents. Put simply, this issue affects a significant number of U.S. people and businesses and is not unique to businesses.

There are valid reasons why parties prefer arbitration. Like Petitioner Coinbase, Inc., a party who bargains for arbitration may seek streamlined, faster procedures; control (such as input on the decisionmaker); limitations on invasive and costly inter-party, third-party, and expert discovery; added protections for confidential information; less adversarial and more collaborative adjudications;

and final resolutions without the risk of protracted appeal.

Civil lawsuits in federal court, by contrast, are not as predictable. Litigation comes with broad discovery and unpredictable delay. Positions are staked out early on as one side or the other scores wins in pretrial motions and depositions held long before trial. Cases are more easily won on technical victories. No one person has any final say about how a lawsuit will take its course. Any given lawsuit has a life of its own, often experiencing a form of self-propelled but uncontrolled momentum.

There are ripple effects. These costs of litigation persist even if an appeal is won and a case is transferred to arbitration after a period of forced litigation. This includes direct costs such as attorney fees, expert fees, and litigation expenses. There are also indirect costs. Indirect costs include dispositive changes to the probable substantive outcome resulting from, for example, damning discovery disclosures, dismissals for technicalities, and pretrial rulings that change the course, tone, and tenor of the case—all of which might not have happened in arbitration.

The minority position says these concerns beg the question. After all, a defendant who loses on appeal had no right to arbitrate to begin with and that defendant has already lost once. If the appellate court affirms, then the plaintiff will be prejudiced by having to wait. That may be. But a plaintiff who is asked to hold tight—and to wait on-

ly for the time it takes to have an appeal decided—does not suffer the same risk of harm. Delay is not like the permanent, possibly irreparable harm associated with discovery, case dynamics, and party positioning in civil litigation undertaken while a case is on appeal on the issue of arbitrability.

A defendant seeking an interlocutory appeal under Section 16(a) of the FAA is asking for protection from the permanent and un-windable litigation process (which it argues it contracted to avoid) during the limited time when arbitrability is an open question. Such a defendant is not asking to arbitrate the dispute in the face of a loss, while on appeal. Delay alone does not outweigh the presumptive prejudice to the party seeking to enforce arbitration. Where the very function of arbitration is to avoid litigation and where the issue on appeal is whether litigation can proceed, the defendant should not have to bear the burden and costs of litigation before that question is finally determined.

This conclusion is buttressed by the differences in reversal rates between appeals from denials of arbitration as compared to appeals in civil cases as a whole. Scholars observe that circuit courts reversed approximately half of cases involving denials of arbitration (as compared to a mere 10 to 20% of civil cases as a whole, depending on the year examined). This statistic is no surprise, however, as it accords with the strong legislative policy in favor of arbitration. This policy would predictably generate more reversals of denials of arbitration.

The majority rule better serves the relevant interests of both individuals/consumers and businesses. Further, a clear, bright-line rule better serves the liberal federal public policy favoring arbitration and federal court judicial economy. The automatic stay rule and the divestiture principle are such rules. They promote judicial economy by freeing up district court resources while cases are on appeal and by preventing needless expenditure of district court resources on litigating applications for discretionary stay. These principles promote consistency of rulings between trial and appellate courts. They also advance the form and structure of the federal civil justice system with its unique functions of district and appellate courts.

The Ninth Circuit got it wrong when it held that a district court retains jurisdiction to proceed with litigation despite a non-frivolous appeal of the denial of a motion to compel arbitration. The Third, Fourth, Seventh, Tenth, Eleventh, and D.C. Circuits decided the issue correctly when they found that an interlocutory appeal under Section 16(a) of the Federal Arbitration Act automatically divests the district court of jurisdiction and requires a complete stay of all litigation. The Ninth Circuit should be reversed. Its opinion should be vacated.

ARGUMENT

I. Strong, well-established federal policy liberally favors arbitration.

The Federal Arbitration Act ("FAA") was passed in 1925. Its goal was "to reverse the longstanding judicial hostility to arbitration agreements."[4] It also sought "to place arbitration agreements 'upon the same footing as other contracts.'"[5] The FAA embodies a "liberal federal policy favoring arbitration."[6] "The overarching purpose of the FAA. . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."[7]

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[4] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-220, 220 n.6 (1985) and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974)).

[5] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 423 (1967) (quoting H.R. Rep. No. 68-96, at 1–2 (1924)).

[6] *See Moses H. Cone Mem'l Hosp. v. Mercury Constr.*, 460 U.S. 1, 24-25 (1983) ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ."); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 n.5 (2009) (citing *Moses H. Cone*, 460 U.S. at 24–25); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) ("In enacting § 2 of the Federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.").

[7] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

The FAA is broad in scope. It preempts state law.[8] It governs cases pending in state court so long as they implicate interstate commerce.[9] It compels arbitration of common law and statutory claims for relief.[10] It controls arbitrable employment disputes other than for employees whose work involves interstate transportation.[11] The FAA limits the defenses available to parties: even arbitration prom-

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[8] *See e.g. Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687-88 (1996) (Montana law imposing requirements on consumer contracts containing arbitration clauses was preempted by FAA); *AT&T Mobility*, 563 U.S. at 341-42 (California law deeming as unconscionable class-action waivers in certain consumer contracts preempted by FAA; FAA overrides state laws "disproportionate[ly] impact[ing] [ ] arbitration."); *Preston v. Ferrer*, 552 U.S. 346, 349-350 (2008) (FAA preempts state law granting jurisdiction to a state agency to resolve certain entertainment industry-related disputes); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (FAA preempts state law providing a state judicial forum for personal injury claims against nursing homes); *Perry v. Thomas*, 482 U.S. 483, 492 (1987) (FAA preempts state law requiring a judicial forum for wage collection actions).

[9] *Southland Corp.*, 465 U.S. at 16 (FAA preempted a state law banning the arbitration of franchise disputes).

[10] *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) (Sherman Act); *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987) (Racketeer Influenced and Corrupt Organizations Act and Securities Exchange Act of 1933); *Gilmer*, 500 U.S. 20 (Age Discrimination in Employment Act).

[11] *Gilmer*, 500 U.S. 20 (applying FAA to age-related employment discrimination); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

ises contained in contracts which are fraudulently induced or illegal can be separated and enforced (absent some fraud or illegality running specifically to the arbitration provision).[12] The FAA allows parties to agree to delegate to an arbitrator the exclusive authority to resolve an agreement's validity and enforceability, including unconscionability.[13] It is no bar to enforcement of an arbitration agreement that the arbitration process itself would impair the claimant's substantive rights.[14]

Section 16(a) of the FAA gives the party seeking arbitration the right to immediately appeal the denial of a motion to compel arbitration. Even third-party beneficiaries may appeal a decision declining to enforce an arbitration clause.[15] Interlocutory appeals are a special, infrequent, important creature

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[12] *Prima Paint*, 388 U.S. at 409-10 (separability doctrine; FAA is "national substantive law" and an "arbitration clause is separable from the rest of the contract."); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006) (illegality).

[13] *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010).

[14] *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013); *see also, Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79, 89-90 (2000) ("[E]ven claims arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate [its] statutory cause of action in the arbitral forum, the statute serves its functions.") (quotations omitted).

[15] *Arthur Andersen*, 556 U.S. at 632.

in the law and Congress knew this when it enacted Section 16 with its interlocutory appeal procedure.[16] By providing the right to immediately appeal an order denying arbitration, Section 16 favors enforcement of arbitration agreements and protects the contracting parties' right to more efficient and cost-effective dispute resolution.[17]

Historical data suggests that on appeal of a denial of arbitration, there is nearly a 50% chance of reversing the district court's order.[18] By comparison, in recent years the circuit courts have reversed only 10 to 20% of orders appealed in civil cases.[19]

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[16] *Id.* at 633.

[17] *See* H.R. Rep. No. 889, at 23 (1988) reprinted in 1988 U.S.C.C.A.N. at 5983 ("Alternative forms of dispute resolution, such as arbitration, should be recognized and encouraged by the Congress."); *id.* at 31, 5991; *id.* at 36-37, 5997; *see also, Arthur Andersen*, 556 U.S. at 633.

[18] Roger J. Perlstadt, *Interlocutory Review of Litigation-Avoidance Claims: Insights from Appeals Under the Federal Arbitration Act*, 44 AKRON L. REV. 375, 407 (2011) ("finding an almost even split of affirmance and reversal" of appeals arising from district court orders denying motions to compel arbitration under Section 16 of the FAA). Counsel updated Mr. Perlstadt's research, following his methodology, analyzing Ninth Circuit cases from 2009 to January 2023, and found there to be an approximately 33% rate of reversal for district court orders denying motions to compel arbitration. *See* Appendix A.

[19] Barry C. Edwards, *Why Appeals Courts Rarely Reverse Lower Courts: An Experimental Study to Explore Affirmation Bias*, 68 EMORY L.J. ONLINE 1035, 1038 (2019).

A party seeking to appeal the denial of arbitration appears to have a much better chance at reversal than civil appellants as a whole. This aligns with the strong federal policy favoring arbitration. It also weighs in favor of adopting the automatic stay rule and the divestiture principle. Because these appellants have a comparatively stronger chance of winning on appeal, it is bad policy to allow district courts to proceed with litigation during appeal.

II. An automatic stay protects contract rights and prevents or deters litigation burdens, costs, and harms.

In recent decades, the use of arbitration agreements has significantly increased in the United States. This is true for employment, commercial, and consumer contracts.[20] Most "households in the

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[20] *See* Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?,* EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL, 11(2): 405–447 (2008) (nonunion employment settings); Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233 (2019) (consumer contracts); *see also*, CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY REPORT TO CONGRESS, PURSUANT TO DODD–FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) (March 2015) (contracts regarding consumer financial products), available at https://www.consumerfinance.gov/data-research/research-reports/arbitration-study-report-to-congress-2015/; Christopher R. Drahozal, Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25

United States (and possibly almost two-thirds) are covered by broad consumer arbitration agreements."[21]

Though some scholars are critical of this Court's FAA jurisprudence, claiming it enables business interests to use mandatory arbitration in consumer and employment contracts to disadvantage the rights of individuals,[22] this conclusion should not be assumed. "In recent years, aggrieved plaintiffs, [previously] shackled by mandatory bilateral arbitration agreements, took matters into their own hands."[23] "Armed with highly capitalized law firms and frequently untapped arbitration provisions, plaintiffs acquiesced to corporate demands and

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OHIO ST. J. ON DISP. RESOL. 433, 463-466 (2010) (contracts for sale of goods, construction contracts, and joint ventures).

[21] Szalai, 52 U.C. DAVIS L. REV. ONLINE at 234.

[22] *See e.g.,* Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 116 (2016) (arguing "individuals often do not comprehend the significance of arbitration clauses and how these clauses block access to courts" and that some claimants subject to arbitration agreements have difficulty finding lawyers and "do not continue pursuing relief through arbitration after a court compels arbitration").

[23] Andrew B. Nissensohn, *Mass Arbitration 2.0*, 79 WASH. & LEE L. REV. 1225, 1226 (2022); *see also*, *Mass Arbitration is an Abuse of the Arbitration System*, U.S. Chamber Inst. For Legal Reform (June 4, 2021) ("plaintiffs' lawyers are now using the same tactics they perfected to abuse the class action and mass tort systems to turn arbitration into a new money-making scheme called mass arbitration") (available at https://perma.cc/HH6K-A5EZ).

filed their disputes in arbitration." "But this time they did it differently than others before them: compiling thousands of nearly identical claims and filing demands for individual arbitration en masse."[24] In other words: consumers and their lawyers demand arbitration and use it to their advantage. Staying litigation safeguards contract rights of individuals and businesses on both sides of the "v."[25]

Parties who negotiate for the right to arbitrate generally bargain for far more control over the process, including input on the decisionmaker. Arbitration agreements often embody broader protections for confidential information than matters in court. Arbitration, with its attendant informality, often is not as adversarial or antagonistic as litigation.

The concern about being forced into a hostile, adversarial setting is a valid one. "Society has a strong interest in maintaining efficient commerce through the preservation of business relation-

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[24] *Id.*

[25] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) ("Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties. In this endeavor, as with any other contract, the parties' intentions control. This is because an arbitrator derives his or her powers from the parties' agreement . . . .") (citations omitted); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties.") (citations omitted).

ships."[26] "Companies that regularly use arbitration as a dispute resolution method are more likely to strengthen relationships with suppliers and business partners, which is 'an effective way of ensuring that goals and expectations are' met."[27] "Preserving long-term business relationships is a vital requirement for businesses to succeed in commercial exchange."[28] Additionally, "the promotion of efficient commerce [i]s a broad governmental interest."[29] Foisting parties into litigation thus has the potential to adversely impact interstate commerce and the U.S. economy.

When parties agree to arbitrate, one of the benefits that they typically receive is a truncated discovery process. For example, most federal circuits hold that the FAA does not grant arbitrators the

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[26] Travis M. Pfannenstiel, *The Entitlement to Avoid Litigation-Denied: How the Fifth Circuit's Rejuvenated Hostility Toward Arbitration Agreements Deprives Parties of Their Bargained-for Benefits*, 52 WASHBURN L.J. 177, 197 (2012) (citing Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the "New Litigation*," 7 DEPAUL BUS. & COM. L.J. 383, 394 (2009)).

[27] *Id*.

[28] Pfannenstiel, 52 WASHBURN L.J. at 197, n.184 (citing Shankar Ganesan, *Determinants of Long-Term Orientation in Buyer-Seller Relationships*, J. OF MKTG., Apr. 1994, at 1, 1 (1994)).

[29] *Id*. (citing Steve Sheppard, *The State Interest in the Good Citizen: Constitutional Balance Between the Citizen and the Perfectionist State*, 45 HASTINGS L.J. 969, 983-84 n.48 (1994) (and cases cited)).

power to issue discovery subpoenas to a non-party for production of documents before an arbitration hearing. The Second, Third, Seventh, Ninth, and Eleventh Circuits have all held that the FAA does not grant arbitrators the authority to issue pre-hearing discovery subpoenas to non-parties.[30] The Eighth Circuit is the lone circuit concluding otherwise.[31] The Fourth Circuit says under "unusual circumstances" it will allow pre-arbitration discovery "upon a showing of special need or hardship."[32]

On the other hand, the Federal Rules of Civil Procedure grant broad third-party discovery including the ability to compel production of documents and sworn testimony at pretrial depositions.[33] Discovery from third parties who do not have a stake in the outcome of the dispute is a principal source of the kind of "smoking gun" evidence that can dis-

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[30] *Life Receivables Tr. v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 215-16 (2d Cir. 2008); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3rd Cir. 2004); *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 695-96 (7th Cir. 2020); *CVS Health Corporation v. Vividus, LLC*, 878 F.3d 703, 708 (9th Cir. 2017); *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1160 (11th Cir. 2019).

[31] *In re Security Life Ins. Co. of America*, 228 F.3d 865, 870 (8th Cir. 2000) (FAA grants arbitrators implicit authority to order pre-hearing production of documents from non-parties).

[32] *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999).

[33] *See* FED. R. CIV. P. 45 (subpoenas); 30 (depositions).

positively change the outcome of a case.[34] This type of third-party discovery is not available in arbitration.

Requiring a party to participate in invasive pre-trial discovery while it still has a shot at reversing the denial of arbitration is game-changing—because the litigation process and the consequences of it are permanent. They cannot be undone if the appellate court reverses. The proverbial "cat is out of the bag." "[A]llowing discovery to proceed 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."[35]

As observed by the Fourth Circuit in *Levin v. Alms & Assocs., Inc.*, "If we later hold that the claims were indeed subject to mandatory 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."[36]

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[34] *See e.g. Qantum Comm. Corp. v. Star Broadcasting, Inc.*, 473 F.Supp.2d 1249, 1276 (S.D. Fla. Feb. 9, 2007) (discussing use of third-party discovery to contradict the defendant's testimony and prove the defendant defrauded the plaintiff).

[35] *Levin*, 634 F.3d at 265.

[36] *Id.* Courts on the other side of the circuit split acknowledge *Levin's* wisdom. The Fifth Circuit in *Weingarten Realty Inv. v. Miller* found the district court has discretion to deny a stay. 661 F.3d 904, 907, 916 n.18 (5th Cir. 2011). Despite its holding, its analysis comports with the Fourth Circuit's reasoning in *Levin* about why a stay should be

A party subjected to litigation while trying to enforce an arbitration on appeal faces far greater "negative ramifications" than the other side.[37] This is because "the cost and time devoted to litigation [can] greatly exceed that which is necessary for arbitration alone."[38] Litigation costs have been deemed "not irreparable injury."[39] But economists have found significant "cost to business associated with delays in obtaining adjudication."[40] Some of these costs result from allocating "resources that neither party can rely upon until the dispute is re-

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automatically granted. The *Weingarten* court observes that engaging in discovery, which would occur absent an automatic stay, could irreparably harm the party seeking the stay because of the potential for substantial cost increases due to discovery, and more importantly, the possibility of revealing sensitive information that could corrode the parties' right to arbitrate.

[37] Michael P. Winkler, *Interlocutory Appeals Under the Federal Arbitration Act and the Effect on the District Court's Proceedings*, 59 OKLA. L. REV. 597, 635 (2006) (citing Edith H. Jones, *Appeals of Arbitration Orders-Coming Out of the Serbonian Bog*, 31 S. TEX. L. REV. 361, 376-376 (1990)).

[38] *Id.*

[39] *Bradford-Scott Data Corp. v. Physician Comp. Network, Inc.*, 128 F.3d 504, 505 (7th Cir. 1997).

[40] Roy Weinstein, Cullen Edes, Joe Hale and Nels Pearsall, *Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings*, Micronomics Economic Research and Consulting, March 2017 (available online at https://www.micronomics.com/s/Efficiency Economic Benefits Dispute Resolution through Arbitration Compared with US District Court .pdf).

solved," such as money (payment reserves, litigation budgets, etc.) and human resources.[41] There are also opportunity costs arising from unrealized returns on missed investments not pursued due to burdens of litigation (but which could have been realized had a dispute been arbitrated rather than litigated).[42]

These "direct" and "secondary" losses "reflect an estimate for the overall negative impact to society of delays associated with the district court system relative to arbitration."[43] "Based on the direct, indirect, and induced losses associated with additional time to trial for district court cases compared with AAA arbitration, estimated total losses are approximately $28.3 – $35.3 billion between 2011 and 2015 (i.e., more than $470 million per month)."[44] "The estimated total losses associated with additional time through appeal required for district and circuit court cases compared with arbitration are approximately $51.9 – $59.2 billion over the same period (i.e. more than $860 million per month)."[45] These profound dollar figures carry the potential for broad harm to American society and economy.

The Ninth Circuit's rule creates the potential for eroding the contract rights of businesses and indi-

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41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.* at 4.

45 *Id.*

viduals and permanently negates the bargained-for efficiencies inherent in arbitration. It also poses a situation in which a party could endure the direct and indirect costs of litigation despite being vindicated on appeal with a positive determination it was never supposed to be in court. Under the minority position, the default posture is ongoing litigation. This means defendants who seek arbitration are left exposed to the burdens of litigation despite having a good chance of winning on appeal (and a much better chance than appellants as a whole). This is highly inequitable. Conversely, the automatic stay rule, the divestiture principle, and the frivolous appeal exception appropriately balance the rights of all parties.

The question of arbitrability is a threshold question that must be decided before one party confronts the burdens of litigation, the very burdens arbitration is designed to avoid. District courts should not be allowed to proceed with discovery and litigation during the appeal which is deciding that very issue: whether the district court can proceed with discovery and litigation at all.[46]

Any conclusion to the contrary eviscerates the right to arbitration. "[I]f litigation is not stayed pending the appeal and the district court was wrong about the defendant's amenability to suit,

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[46] *See Arthur Andersen*, 556 U.S. at 629-30.

the defendant will have been subjected to litigation that it was actually entitled to avoid."[47]

III. An automatic stay conserves judicial economy and promotes consistency.

"Clear, bright-line rules cost less to administer because they prevent courts from interpreting ambiguous rules."[48] "Bright-line rules for stays pending arbitrability appeals are favorable because the discretionary stay test allows for ineffective adjudication."[49]

"The discretionary stay test's first factor requires a showing of a likelihood of success on appeal, which is always difficult for a party to demonstrate because the showing is made to the district court that ruled against the applicant."[50] "Because the satisfaction of this factor is nearly impossible, the rule wastes judicial resources through its ineffectiveness."[51] On the other hand, the automatic stay

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[47] Perlstadt, 44 AKRON L. REV. at 376.

[48] Pfannenstiel, 52 WASHBURN L.J. at 198, n.196 (citing A.C. Pritchard, *Government Promises and Due Process: An Economic Analysis of the "New Property"*, 77 VA. L. REV. 1053, 1073 (1991) (explaining how clear rules lower costs of judicial administration in numerous contexts)).

[49] *Id.* (citing 8 William L. Norton, Jr., Norton Bankruptcy Law & Practice 3d §170:81 (2012)).

[50] *Id.*

[51] *See id.*

rule "promote[s] judicial economy."[52] A stay of litigation reduces the workload of the district court, allowing it to focus on other matters.

The automatic stay rule also promotes consistency.[53] "The federal judiciary is organized in a hierarchical structure in which appellate courts perform different functions from trial courts while maintaining a supervisory role in which appellate decisions have a degree of finality."[54] "The simultaneous litigation and arbitration of the same issues of law or fact creates an increased risk of inconsistent rulings that would undermine this structure, especially when the issue of arbitrability requires findings that are closely related to the merits of the case."[55] Staying litigation ensures consistency in the application of the FAA and interpretive case law.

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[52] *McCauley v. Halliburton Energy Servs.*, 413 F.3d 1158, 1162 n.1 (10th Cir. 2005); *Doe v. Pub. Citizen*, 749 F.3d 246, 258 (4th Cir. 2014) (divestiture rule "fosters judicial economy").

[53] Pfannenstiel, 52 WASHBURN L.J. at 199.

[54] *Id.* at 199, n.198 (citing Evan Caminker, *Allocating the Judicial Power in a "Unified Judiciary"*, 78 TEX. L. REV. 1513, 1528 (2000)).

[55] *Id.* (citing 2 Thomas H. Oehmke, Oehmke Commercial Arbitration § 25:116 (3d ed. 2012)).

CONCLUSION

For all these reasons and for the reasons stated in Petitioner Coinbase, Inc.'s brief on the merits, this Court should vacate the Ninth Circuit's decision and remand for further proceedings consistent with this Court's opinion.

Dated: January 27, 2023

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