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 AMICUS CURIAE PUBLIC JUSTICE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Public Justice is a national public interest legal advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct.[1] Public Justice has long maintained an Access to Justice Project, which seeks to ensure that the civil courts are an effective tool that people with less societal power can use to win just and equitable outcomes and hold to account those with more power.

Towards that end, Public Justice has an interest in the law surrounding mandatory arbitration and ensuring that the Federal Arbitration Act ("FAA") is applied consistently with its text. Public Justice has appeared before this Court as a party or amicus in numerous cases regarding mandatory arbitration and the interpretation of the FAA.

SUMMARY OF ARGUMENT

Coinbase paints a picture of arbitrability appeals that is all straight lines and sharply contrasting colors. In Coinbase's landscape, "the case" as a unitary whole hangs in the balance whenever a party takes an appeal under Section 16 of the Federal Arbitration Act ("FAA"), because the appeal "resolves the threshold question whether the case can be litigated at all." Petr. Br. at 16. Following that appeal, according to Coinbase's binary narrative, "the merits"

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[1] Pursuant to Rule 37.6, Amicus affirms that no counsel for any party authored this brief in whole or in part, and no person or entity other than Amicus, its members and its counsel has made a monetary contribution to support the brief's preparation or submission.

of "the case" will then either proceed entirely in arbitration or entirely in court. Petr. Br. at 20.

In reality, the universe of litigation around arbitration contains far more nuance and complexity than Coinbase's simplified picture suggests. For one thing, courts often find some issues arbitrable, and thus the proper basis for a mandatory stay under § 3 of the FAA, while finding other issues in dispute between the same parties to be non-arbitrable. Even more complex, but still commonplace, scenarios arise when some or all of the parties to the litigation are not parties to any arbitration agreement, or when different contracts governing different time periods are implicated.

Coinbase has nothing to say about any of these complexities. But under the inflexible approach it proposes, when they are part of "the merits" of "the case" in which a § 16 appeal is pending, then they must be automatically stayed without exception—non-arbitrable issues, non-signatory litigants, and all.

This aggressive, inflexible approach has no basis in the text or structure of the FAA. That statute was passed to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Junior Univ.*, 489 U.S. 468, 479 (1989). A statute whose "mandate is to enforce 'arbitration agreements'" may not be hijacked to delay the adjudication in court of disputes no one ever agreed to arbitrate. *See Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1919 (2022) (holding that the FAA does not require enforcement of other contractual terms that would affect rights besides the right to arbitrate).

To justify its automatic-stay rule, Coinbase also makes policy arguments about the inefficiency of litigating issues that may ultimately be arbitrated. Petr. Br. at 22-23. But this Court has recognized that efficiency is not a goal to be accomplished at all costs—and certainly not at the cost of failing to enforce contracts according to their terms. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218-21 (1985). District courts who understand the nuances and complexities of the cases before them, and who know the terms of the applicable arbitration agreements and which issues and parties they do and don't cover, should have the discretion to craft stays appropriate to the circumstances and equities of each unique case, including the choice to deny any stay whatsoever. Coinbase's one-size-fits-all rule, by contrast, would cause delay and prejudice and create incentives for serial, court-clogging interlocutory appeals. This Court should reject it.

ARGUMENT

I. COURTS ROUTINELY SEPARATE CASES INTO ARBITRABLE AND NONARBITRABLE ISSUES, WHICH CAN PROCEED ON SEPARATE TRACKS.

In its effort to paint a broad-brushstrokes picture in which entire cases move forward either in court or in arbitration, Coinbase omits key statutory language from its Legal Background section. Section 3 of the FAA does not, as Coinbase suggests, allow federal-court litigants to seek a stay of an "action 'referable to arbitration under an agreement in writing.'" Petr. Br. at 6. Rather, it allows such litigants to seek a stay if "any issue" in the action is so referable. 9 U.S.C. § 3.

In *Dean Witter Reynolds v. Byrd*, this Court addressed a split among the circuits regarding what the FAA requires courts to do when some issues in a case are arbitrable and some are not. It held that courts must order arbitration "on issues as to which an arbitration agreement has been signed." 470 U.S. at 218. This was true even when other issues in the case were non-arbitrable, and thus sending some but not all claims to arbitration would result in "bifurcated proceedings" and "'piecemeal' litigation." *Id.* at 221.

The Court noted concerns about issue preclusion stemming from the fact that related issues would proceed in different forums, but concluded that the "development of collateral-estoppel rules" was a sufficient response to these concerns, and that a "stay of proceedings" was not "necessary." *Id.* at 222. In a separate concurring opinion, Justice White went even further and opined that a stay would not only be unnecessary but undesirable: "once it is decided that the two proceedings are to go forward independently, the concern for speedy resolution suggests that neither should be delayed." *Id.* at 225.

Byrd was decided three years before Congress added § 16 to the FAA, and its discussion of arbitrable and non-arbitrable issues did not arise in the context of an interlocutory appeal. But in the years since *Byrd* was decided, many lower courts have handled § 16 appeals in which they concluded that some of the issues in the appeal were arbitrable while others were not. In other words, contrary to Coinbase's all-or-nothing view, the "threshold question whether the case can be litigated at all," Petr. Br. at 16, sometimes results in a split decision. *See, e.g.*, *Chelsea Family*

Pharmacy, PLLC v. Medco Health Solutions, Inc., 567 F.3d 1191, 1194-95 (10th Cir. 2009) (district court denied stay under § 3, defendant appealed under § 16(a)(1)(A), and Tenth Circuit affirmed in part and reversed in part, finding claims related to reimbursement rates arbitrable but claims alleging anti-competitive conduct not arbitrable); *Summer Rain v. Donning Co. Publishers Inc.*, 964 F.2d 1455, 1461-62 (4th Cir. 1992) (district court denied stay under § 3, defendants appealed, and the Fourth Circuit affirmed in part and vacated in part, finding most of the issues involving breach of contract arbitrable but some issues regarding royalty amounts non-arbitrable).

The *Chelsea Family Pharmacy* case is particularly instructive. The defendant there, much like Coinbase and its tendency to speak in terms of an indivisible "case," focused on the causes of action pled in the complaint and argued that each cause of action must be deemed arbitrable or non-arbitrable in its entirety. *Chelsea*, 567 F.3d at 1197. The Tenth Circuit disagreed, noting that the court must consider the "factual underpinnings of the complaint rather than merely considering the labels attached to each of the causes of action it contains." *Id.* Comparing the factual underpinnings of the complaint's three causes of action to the language of the applicable arbitration clause, the court found that each claim alleged two "distinct factual harms": harms related to reimbursement rates—which fell within the scope of the arbitration agreement; and harms related to anti-competitive conduct—which fell outside its scope. *Id.* at 1198-99.

In other words, separating arbitrable from non-arbitrable issues requires a close reading of both the complaint and the contract. The close contractual reading, in particular, is mandated by the FAA. "Congress's preeminent concern in enacting the FAA—the enforcement of private agreements to arbitrate as entered into by the parties—requires that the parties only be compelled to arbitrate matters within the scope of their agreement, and this is so even when the result may be piecemeal litigation." *Bratt Enters., Inc. v. Noble Intern., Ltd.*, 338 F.3d 609, 613 (6th Cir. 2003). Or as then-Judge Gorsuch put it in his concurring opinion in *Chelsea* explaining why courts must enforce the terms of arbitration agreements with exceptions just as faithfully as they enforce sweeping ones, "[t]here is nothing in the language of the [Federal Arbitration] Act that suggests some clauses are more equal than others—a sort of four legs good, two legs bad." 567 F.3d at 1201 (Gorsuch, J., concurring).

Once a dispute is sorted into arbitrable and non-arbitrable issues and the former set of issues is referred to arbitration, courts must still decide what to do with the remaining non-arbitrable issues. One option that district courts always have at this stage is to stay further litigation of those issues under their inherent docket management authority, but such discretionary stays will typically be refused "when it is feasible to proceed with the litigation." *Klay v. All Defendants*, 389 F.3d 1191, 1204 (11th Cir. 2004) (also considering such factors as "whether arbitrable claims predominate and whether the outcome of the nonarbitrable claims will depend upon the arbitrator's decision"). Other courts employ a balancing test rather than a presumption against a

stay. *See Aukema v. Chesapeake Appalachia LLC*, 839 F. Supp. 2d 555, 558-59 (N.D.N.Y. 2012) (deciding appropriateness of discretionary stay based on considerations of judicial economy, degree of commonality between issues to be resolved in court and issues to be resolved in arbitration, and prejudice to both arbitrating and non-arbitrating parties).

If there is a unifying theme to describe the post-*Byrd* caselaw on arbitrable and non-arbitrable issues presented in a single case, that theme is fact-dependence: scrutiny of a complaint's factual underpinnings, close reading of contract terms to ensure that the parties' intent is honored, and comparison of arbitrable and non-arbitrable issues to assess commonality and potential preclusive effect in determining whether to issue a discretionary stay of non-arbitrable issues. But in the circuits that follow Coinbase's preferred automatic-stay rule, all of these factual nuances are wiped away during the pendency of a § 16 appeal. Non-arbitrable issues are subject to the same mandatory stay as arbitrable issues regardless of what the parties' contract says, regardless of how much or how little commonality there is between the issues that are arbitrable and those that are (at least pending appeal) non-arbitrable, and regardless of what prejudice may result from the stay. *See McCauley v. Haliburton Energy Servs.*, 413 F.3d 1158, 1159, 1163 (10th Cir. 2005) (noting at the outset of the opinion that claims were brought by both a former employee and his family members and that some of those claims were found arbitrable while others were not, then declaring that the district court was divested of jurisdiction over the case as a whole without making any distinction among parties or claims). But whether those courts

acknowledge it or not, the factual complexities, and corresponding risk of prejudice, are even greater when nondiscretionary stays pending appeal are issued in complex, multi-party cases. See Suski Br. at 36-38.

II. CASES INVOLVING NONSIGNATORIES AND COMPETING CONTRACTS DEMAND A FLEXIBLE STAY STANDARD.

The need for bifurcated proceedings does not only arise in cases like *Chelsea Family Pharmacy* where parsing of a single contract reveals that some issues are arbitrable and others are not. In many cases, such as *Suski* here, multiple contracts are at issue, not all of which even contain potentially applicable arbitration provisions. And in yet other cases, some of the litigants are not parties to any contract containing an arbitration clause, such that even if a § 16 appellant succeeds in transforming initially non-arbitrable issues into arbitrable ones, that appeal would still not render all claims of all parties arbitrable.

This was the situation in *Narraganset Electric Co. v. Constellation Energy Commodities Group*, 568 F. Supp.2d 325 (D.R.I. 2008), a case involving prices set by an electricity wholesaler in its contracts with a distributor. The distributor filed a breach of contract action and the wholesaler sought a stay under § 3, invoking arbitration clauses in two of the parties' four contracts. That motion was denied, and the wholesaler filed a § 16 appeal. *Id.* at 327-28. Meanwhile the state of Rhode Island successfully moved to intervene in the action and brought its own claims against the wholesaler. *Id.*

In considering whether to grant the wholesaler's motion for a stay pending appeal, the district court contrasted the case before it with a simpler "two-party litigation involving the application of an arbitration clause in a single contract," where "the entire litigation would be arrested if the First Circuit determined that the arbitration clause applied to the dispute." *Id.* at 329. Observing that arbitration under the FAA "is a matter of consent, not coercion," the court concluded that while it would enforce "any valid arbitration agreements that exist between [the wholesaler and distributor], it will not do so by papering over the contracts without arbitration clauses, or the claims that are not even based on any contract." *Id.* at 330. Yet the approach Coinbase and its amici advocate here would seem to mandate just such papering over, as it makes no distinctions between claims subject to the appeal and other claims and parties in "the case."

Similarly, in *Stiner v. Brookdale Senior* Living, *Inc.*, 383 F. Supp. 3d 949 (N.D. Cal. 2019), a case brought by residents of senior living facilities who alleged the facilities were not accessible to people with disabilities, the facilities' operator moved to compel two of the plaintiffs' claims into arbitration based on agreements they or their alleged agents had signed. *Id.* at 952. The district court denied that motion, and while the operator's § 16 appeal was pending, moved for a stay in the district court. But because the appeal only pertained to two of the plaintiffs and "the cost of litigating this case is not likely to be meaningfully reduced if only two plaintiffs are compelled to arbitrate," the district court, acting within a circuit where such stays are discretionary,

denied the stay.[2] *Id.* at 955. *See also Congdon v. Uber Techns., Inc.*, 226 F. Supp. 3d 983, 991 (N.D. Cal. 2016) (granting motion to compel certain Uber drivers' claims into arbitration but denying motion to stay claims of other drivers who had opted out of the arbitration agreement, because "regardless of the outcome of the arbitration, the claims of the opt-out plaintiffs will need to be litigated in this court," and delaying the adjudication of the opt-out plaintiffs' claims "would frustrate the intent of the opt-out plaintiffs in choosing not to arbitrate their claims in the first place"). If stays pending § 16 appeals become automatic in the Ninth Circuit, district courts would not be able to reach entirely reasonable results like these in multi-party cases going forward.

Finally, a rule staying all district court proceedings during an arbitrability appeal would be particularly prejudicial to non-appealing litigants in certain types of cases that allow plaintiffs to opt-in to the litigation over time, such as collective actions under the Age Discrimination in Employment Act, Equal Pay Act, and Fair Labor Standards Act. If the district court is without jurisdiction to either accept

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[2] Even in circuits where stays pending § 16 appeals are not discretionary, at least some courts seem to allow for some discretion regarding claims and parties that are not part of the § 16 appeal. *See Bradford-Scott Data Corp., Inc. v. Physician Comput. Network, Inc.*, 128 F.3d 504, 507 (7th Cir. 1997) (noting that only two of four defendants had appealed under § 16 and holding that the district court should decide whether to stay discovery involving the two non-appealing defendants depending on whether discovery could meaningfully continue without the participation of the appealing defendants). Coinbase's maximalist position focused on staying "the case" in its entirety seems to allow for no such discretion even as to non-appealing parties.

opt-in plaintiffs' motions to join the litigation or to equitably toll their statutes of limitations, plaintiffs with otherwise timely claims may be barred from exercising their statutory right to opt in because someone else's arbitrability appeal is being litigated. Meanwhile, a defendant could take advantage of the time during which the appeal is pending to promulgate a new arbitration agreement with more favorable terms and attempt to bind as many potential opt-ins as possible to those new terms before the litigation resumes. *See Prowant v. Fed. Nat. Mortg. Ass'n*, 255 F. Supp. 3d 1291, 1302 (N.D. Ga. 2017) (describing "compelling points about the timing of the new [arbitration] agreement and its potential adverse impact on putative opt-ins" in a case where the defendant had been engaged in a long-running dispute about whether its original arbitration agreement allowed collective-action claims to be arbitrated).

Where an arbitrability appeal involves fewer than all parties and fewer than all claims, the notion that "those aspects of the case related to the appeal" should encompass the entire case, including the non-appealing parties and claims, is particularly far-fetched. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). Meanwhile, the admonitions and limitations of the FAA take on particular importance in these non-party contexts. For while the FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms," it "does not require parties to arbitrate when they have not agreed to do so." *Volt Info. Sciences*, 489 U.S. at 478. Nor does it give courts license to strip anyone of rights unrelated to arbitration—not a party to the

agreement and certainly not a stranger to it. *See Viking River*, 142 S. Ct. at 1919 and n.5 (the FAA "does not require courts to enforce contractual waivers of substantive rights and remedies" because it only mandates that courts enforce "arbitration agreements").

Nothing in § 3 regarding mandatory stays of arbitrable issues or § 16 regarding immediate appeals permits a court to deprive parties of the right to access a judicial forum when those parties never agreed to arbitrate. For non-arbitrating parties, a § 16 appeal will not determine whether their claims will go forward in arbitration or in court. Their claims will go forward in court if they go forward at all; the only question is when. And the district court is best situated to answer that "when" question using its inherent powers to manage its docket based on the particular circumstances and equities of each case, as with all discretionary stays.

III. THE FAA'S POLICIES ARE BEST SERVED BY DISTRICT COURT DISCRETION, NOT AUTOMATIC STAYS.

In *Byrd*, this Court rejected the argument that the FAA's "goal of speedy and efficient decisionmaking is thwarted by bifurcated proceedings." 470 U.S. at 219. It reasoned that the FAA "does not mandate the arbitration of all claims, but merely the enforcement—upon the motion of one of the parties—of privately negotiated arbitration agreements." *Id.* While streamlined resolution of disputes was a secondary objective, "passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principal

objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation." *Id.* at 220.

And as this Court has explained, that principal objective of contractual enforcement comes with three important corollaries: 1) that agreements to arbitrate are "'as enforceable as other contracts, but not more so,'" *Morgan v. Sundance Inc.*, 142 S. Ct. 1708, 1713 (2022) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)); 2) that the FAA authorizes enforcement of arbitration agreements, not abridgment of any other rights, *Viking River*, 142 S. Ct. at 1919; and 3) that the FAA "does not require parties to arbitrate when they have not agreed to do so," *Volt Info. Sciences*, 489 U.S. at 478.

As discussed in the previous section, an automatic-stay rule would violate the second and third of these corollaries by subordinating the rights of non-arbitrating parties in multi-party litigation and binding them to the timeline of an arbitration proceeding to which they did not consent. And it violates the first corollary by granting an automatic stay of all district court proceedings instead of the right to seek a discretionary stay that can be sought by interlocutory appellants seeking to enforce other types of contracts. *See, e.g.*, *In re Lloyd's Am. Trust Fund Litig.*, 1997 WL 458739, at *5-7 (S.D.N.Y. Aug. 12, 1997) (granting interlocutory appeal under 28 U.S.C. § 1292(b) of order denying motion to dismiss based on forum selection clause plaintiffs had signed that required litigation in London, but denying stay of district court proceedings).

The traditional, discretionary stay approach, by contrast, would allow district courts to satisfy the FAA's primary objective of enforcing privately formed arbitration agreements without violating any of its corollaries. District courts would have the flexibility to grant stays that cover only the parties and claims in the appeal or litigants that actually agreed to a contract containing a potentially applicable arbitration clause. And they would have the flexibility to deny stays when delay might be particularly prejudicial to a litigant, or when claims covered by the appeal are so distinct from other claims in the action that there is no risk of the unrelated claims being preclusively affected by anything that happens in the appeal or in a subsequent arbitration.

As to the differential treatment of arbitration clauses and forum selection clauses, Coinbase and its amici may argue that Congress already chose to treat arbitration agreements differently by authorizing certain types of automatic appeals in § 16. See *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 501 (1989) (no right of automatic appeal for denials of forum selection clauses). But § 16 places no thumb on the scale regarding how the arbitrability appeals it authorizes are to be decided, or what standard of review courts handling such appeals should use. It simply ensures that arbitrable issues will reach an arbitrator quickly, and that once in arbitration, such disputes will quickly reach a final resolution. *See* 9 U.S.C. § 16(a)(1)(D) (authorizing immediate appeal of both orders confirming arbitral awards and orders denying confirmation of arbitral awards). Thus, the policy animating § 16 of the FAA appears to be the secondary policy discussed in *Byrd*, that of

"facilitate[ing] streamlined proceedings." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

Empowering district courts to craft discretionary stays tailored to the needs of each case can serve this desire for expedited proceedings as well. Because almost all arbitration agreements provide for some discovery, for example, district courts can supervise discovery, limited if appropriate to match any constraints imposed by the contract, during the pendency of the arbitrability appeal, and if the § 16 appellant prevails and some or all of the claims in the case are moved to arbitration, the parties will still be able to use that discovery in the arbitration proceeding.

Whether discovery takes place in the district court will not get the parties to arbitration any faster (only the speed of the appeals court can determine that), but it will ensure that if they do wind up in arbitration following that appeal, they are more prepared to schedule a hearing and bring the case to a close. Such an outcome would certainly better serve goals of efficient dispute resolution than allowing the merits of the entire case to lie dormant while waiting to find out which forum—court or arbitration—will ultimately resolve them.

District courts have immense firsthand experience managing dockets, moving cases towards resolution, and balancing multiple interests, including interests in avoiding inconsistent judgments from different decisionmakers. They should be trusted to manage these complexities in the context of cases with pending § 16 appeals just as they do in a myriad of other litigation contexts. An automatic-stay rule would needlessly take away their power to reach the

right result in each case based on the parties and contracts before them. That rule is at odds with the FAA and would cause havoc in cases with non-arbitrating parties and multiple operative contracts. This Court should not adopt it.

CONCLUSION

The opinions of the Ninth Circuit in *Bielski* and *Suski* should be affirmed.

Respectfully submitted,

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