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 AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The American Association for Justice is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 75-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

AAJ is concerned that Coinbase's theory effectively "invent[s]," without any textual basis, a "special, arbitration-preferring" rule that does not apply to other kinds of forum-selection clauses. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713–14 (2022). Such a special rule would invite defendants to file interlocutory appeals to strategically delay proceedings. And this special rule would only matter in cases where a stay would not be issued under the traditional stay factors—that is, in weak arbitration appeals where the party seeking a stay is unlikely to succeed on appeal or where the balance of equities tips against a stay.

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[1] No counsel for a party authored this brief in whole or in part and no person other than amicus and its counsel made a monetary contribution to its preparation or submission. Unless otherwise specified, all internal citations, quotation marks, omissions, and alterations are omitted in quotations throughout the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1988, Congress amended the Federal Arbitration Act to allow immediate appeals of orders denying arbitration. The question here is whether the filing of such an appeal mandates a stay of *all* district-court proceedings in *all* cases, thus stripping federal courts of their traditional, case-specific discretion to decide.

In arguing that the answer is yes, Coinbase relies not on the text that Congress enacted but on the "backdrop" against which Congress supposedly acted. But Coinbase never answers an obvious question about that "backdrop": What was the practice across the courts at the time?

Before 1988, it turns out, litigants routinely sought and obtained interlocutory appeals of orders denying motions to compel arbitration. In these cases, the ordinary practice of federal courts was *not* to automatically stay district-court proceedings on the merits. Instead, courts relied on their traditional equitable discretion to determine, in each case, whether a stay was warranted in whole or in part.

The same was true for interlocutory appeals involving the enforcement of other forum-selection clauses and, more generally, appeals challenging a court's authority over a dispute. It was also true for interlocutory appeals taken as a matter of right. In all these scenarios, district-court proceedings on the merits routinely continued unless courts used their discretion to stay the case.

This pre-1988 judicial landscape—which Coinbase ignores—accords with longstanding historical practice. The power of a federal court to use its discretion to grant or deny a stay pending appeal is among the equitable powers conferred by the Judiciary Act of 1789 and the All Writs Act. Following practice in the English Court of Chancery, a stay has never been a matter of right. It is instead an

intrusion into the ordinary judicial process, requiring a careful exercise of judicial discretion.

So Coinbase faces an uphill battle. If section 16 of the FAA—the section added in the 1988 amendment—"were meant to transform" pre-1988 practice "into something sharply contrary to what it had been," we'd expect Congress to say so, *Hall v. Hall*, 138 S. Ct. 1118, 1129 (2018). This Court does "not construe a statute to displace courts' traditional equitable authority absent the 'clearest command,' or an 'inescapable inference' to the contrary." *Miller v. French*, 530 U.S. 327, 340–41 (2000). And the Court has been "loath to conclude that Congress would, without clearly expressing such a purpose, deprive [the federal courts of their] customary power to stay." *Nken v. Holder*, 556 U.S. 418, 432 (2009).

Here, we have no "clearest command," no "inescapable inference," nothing. Congress simply said that "[a]n appeal may be taken" from orders denying applications "to compel arbitration." 9 U.S.C. § 16(a)(1)(C). That's it. And there's abundant textual evidence demonstrating that, had Congress intended that a section 16 appeal would stay district-court proceedings, it would have said so.

Congress knew how to require a stay pending appeal. The *very same Congress* on the *very same day* in the *exact same bill* enacted a different provision that provides for a mandatory stay for other interlocutory appeals concerning the propriety of the forum adjudicating the dispute. But it chose not to provide a mandatory stay for interlocutory arbitration appeals. It therefore couldn't be clearer that "[w]here Congress wished to deprive the courts of this historic power, it knew how to use apt words." *Scripps-Howard Radio v. F.C.C.,* 316 U.S. 4, 17 (1942).

What's more, the FAA isn't silent on mandatory stays. It *requires* them—just not under these circumstances.

Section 3 of the FAA provides that the district court "*shall*" stay all proceedings if it is "satisfied" that the case is "referable to arbitration." *See* 9 U.S.C. § 3 (emphasis added). But the statute provides no similar requirement for cases that the court is *not* satisfied are referable to arbitration—even if the court's decision is appealed. This Court should defer to Congress's choice to carefully circumscribe the circumstances in which the FAA displaces courts' traditional power to decide whether a stay is warranted.

Lacking any anchor in the text, Coinbase appeals to the narrow, judge-made principle of divestiture, which precludes the district court and the court of appeals from deciding the same issue at the same time. But that principle doesn't prevent courts from considering "matters outside the scope of the appeal." *Price v. Dunn*, 139 S. Ct. 1533, 1537 (2019) (Thomas, J., concurring in the denial of certiorari). As this Court has repeatedly emphasized, the arbitrability of a dispute is entirely separate from the merits of that dispute. Whether an employee was sexually harassed or a product is defective has nothing to do with whether the parties' dispute should be heard in arbitration or in court.

An interlocutory appeal about forum selection doesn't divest the district court of its authority over the merits pending appeal. Because arbitration is just a species of forum selection, the divestiture doctrine applies no differently.

So, in arguing for a new right to a mandatory stay, Coinbase isn't actually asking this Court to apply the divestiture doctrine. It's asking it to "invent" a new "special, arbitration-preferring" rule. *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713–14 (2022). The FAA forbids it from doing so. This Court should reject Coinbase's appeal

and instead "respect the limits up to which Congress was prepared to go when [amending] the Arbitration Act." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019).

ARGUMENT

I. The Federal Arbitration Act does not strip federal courts of their inherent power to decide whether to grant or deny a stay pending appeal.

Since their creation in 1789, the federal courts have always had the inherent authority to control their dockets, including the authority to decide whether to stay proceedings pending an interlocutory appeal. Thus, when Congress amended the FAA in 1988, it did so against a backdrop of courts routinely exercising their discretion to decide whether to stay cases pending appeals on arbitrability, forum selection, and other similar issues about where a case should be decided. Nothing in the 1988 amendment (or anywhere else in the FAA) abrogates this traditional discretion.

A. In 1988, district courts routinely exercised their traditional, equitable stay powers pending arbitrability appeals and comparable interlocutory appeals.

1. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936). That power remains when a litigant appeals: "It has always been held [] that, as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." *Scripps-Howard Radio*, 316 U.S. at 9–10.

The federal courts were granted this power at their very inception, through the equitable powers conferred by the Judiciary Act of 1789 and the All Writs Act. *See Scripps-Howard Radio*, 316 U.S. at 10 n.4; *Nken,* 556 U.S. at 426 (explaining that the "power to hold an order in abeyance while [assessing] the legality of the order has [also] been described as 'inherent'" and therefore "preserved in the grant of authority to federal courts" by the Judiciary and All Writs Acts).

This power derives from English practice at chancery. As this Court has recognized, "the rule [was] well settled in the English courts that an appeal in chancery does not stop the proceedings under the decree from which the appeal was taken without the special order of the subordinate court." *In re Slaughter-house Cases*, 77 U.S. 273, 296 (1869); *see also Hovey v. McDonald*, 109 U.S. 150, 160 (1883). English courts of equity allowed cases to proceed pending an appeal unless "judicial discretion [] induced them upon the application of parties interested to stay . . . on account of such Appeals." *Huguenin v. Baseley* 33 Eng. Rep. 722, 724, (HL 1808). In fact, the House of Lords expressly rejected the notion of an automatic stay when it formally adopted the rule that the courts of equity already followed: An appeal of a judgment from a court of equity would not stay proceedings unless the court decided to exercise its discretion to grant a stay. *Id.*; *see, e.g.*, *The Warden and Minor Canons of St. Pauls v. Morris* 32 Eng. Rep. 624, 625 (HL 1804) .

Since the founding, American courts have followed this historical practice. Absent a court's decision to exercise its inherent power to stay, appeals do not automatically freeze all proceedings in the district court. That is true even if "irreparable injury might otherwise result to the appellant." *Nken*, 556 U.S. at 427. A stay is simply "not a

matter of right." *Id.* It's an exercise of discretion that requires considering the likelihood of success and the balance of equities. *See id.* at 438; *Scripps-Howard Radio*, 316 U.S. at 10–11 (noting that stays are "an exercise of judicial discretion" that depends "upon the circumstances of the particular case").

2. When the FAA was amended in 1988, courts routinely applied this traditional stay rule to appeals concerning arbitrability. Although the FAA itself did not provide for an interlocutory appeal, litigants often relied on other statutes to appeal orders denying motions to compel arbitration. *See*, *e.g.*, *Nesslage v. York Secs., Inc.*, 823 F.2d 231, 232 (8th Cir. 1987) (invoking 28 U.S.C. § 1292(a)(1)); *Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Aloha Airlines, Inc.*, 776 F.2d 812, 814–15 (9th Cir. 1985) (similar); *Langley v. Colonial Leasing Co.*, 707 F.2d 1, 3 (1st Cir. 1983) (similar).

Those litigants were not entitled to a mandatory stay pending appeal simply because they requested one. Instead, the traditional rule applied. For example, in *Pearce v. E.F. Hutton Group, Inc.*, the D.C. Circuit noted the grant—as a matter of discretion—of one appellant's "motion for a stay pending appeal" from an order denying arbitration because the appeal "raised issues of first impression" and the appellant would "suffer [] harm if [the] action were not stayed." 828 F.2d 826, 829 (D.C. Cir. 1987). But in the same case, another appellant's "motion for a similar stay" was denied because the district court "saw no reason" the case could not proceed. *Id.*.

The D.C. Circuit was not alone. Across the circuits and in district courts nationwide, judges used their discretion to determine whether to stay proceedings pending an interlocutory arbitration appeal. *See, e.g.*, *Maxum Founds., Inc. v. Salus Corp.*, 779 F.2d 974, 977 (4th Cir. 1985);

Matterhorn, Inc. v. NCR Corp., 727 F.2d 629, 630 (7th Cir. 1984); *Great Am. Boat Co. v. Alsthom Atl., Inc.*, 1987 WL 4766, at *1 (E.D. La. Apr. 8, 1987); *Nesslage v. York Secs., Inc.*, 107 F.R.D. 389, 390 (E.D. Mo. 1985); *see also Scharp v. Cralin & Co.*, 617 F. Supp. 476, 479 (S.D. Fla. 1985).

This practice was no different for other interlocutory appeals about where a dispute could be heard: Litigants were not entitled to a mandatory stay of the merits when they appealed. *See, e.g.*, *Yellowfish v. City of Stillwater*, 691 F.2d 926, 928 (10th Cir. 1982) (denying a request for a stay pending interlocutory appeal from an order declining to dismiss for lack of subject matter jurisdiction); *see also Schmitt v. Ins. Co. of N. Am.*, 845 F.2d 1546, 1548 (9th Cir. 1988) (granting a stay pending appeal from a motion to remand based on a forum-selection clause); *Pelleport Invs., Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276 (9th Cir. 1984) (noting denial of stay pending appeal from a motion to remand involving a forum-selection clause); *Weaver v. United Mine Workers of Am.*, 492 F.2d 580, 582 (D.C. Cir. 1973) (denying a stay pending appeal of a motion to dismiss based on standing); *N.L R.B. v. Interstate Dress Carriers, Inc.*, 610 F.2d 99, 103 (3d Cir. 1979) (granting a stay pending appeal from a motion to dismiss based on subject matter jurisdiction); *Shipping Ltd. v. N. Star Nav. Inc.,* 659 F. Supp. 189, 191 (S.D.N.Y. 1987) (granting a stay pending appeal from an order to vacate based on a forum-selection clause); *A. O. Smith Corp. v. F.T.C.,* 396 F. Supp. 1125, 1137–38 (D. Del. 1975) (denying a stay pending appeal from a motion to dismiss based on a jurisdictional issue); *cf. M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 2 (1972) (describing how district-court proceedings unfolded while a litigant appealed the district court's refusal to enforce a forum-selection clause).

The same was true for interlocutory appeals taken as a matter of right. The Norris-LaGuardia Act, for example, permits parties to appeal any temporary injunction growing out of a labor dispute. *See* 29 U.S.C. § 110. But it says nothing about the right to a mandatory stay pending such an appeal. And so courts exercised their discretion to decide on a case-by-case basis whether a stay was warranted. *See, e.g.*, *Elsinore Shore Assocs. v. Loc. 54, Hotel Emps. & Rest. Emps. Int'l Union*, 820 F.2d 62, 65 (3d Cir. 1987).

Similarly, the general statute concerning "Interlocutory decisions" provided a right to appeal interlocutory orders involving injunctions, receivers, and admiralty. 28 U.S.C. § 1292(a) (1988). Nothing in the statute provided for a mandatory stay pending appeal, and so courts simply applied the traditional, discretionary stay rule. *See, e.g.*, *Avery v. Sec'y of Health & Hum. Servs.*, 762 F.2d 158, 160 (1st Cir. 1985) (exercising discretion to grant in part and deny in part a stay pending appeal); *Inv. Co. Inst. v. Fed. Deposit Ins. Corp.*, 728 F.2d 518, 522 (D.C. Cir. 1984) (invoking 28 U.S.C. § 1292(a)(1)); *Yeargin Const. Co. v. Parsons & Whittemore Ala. Machinery & Servs. Corp.*, 609 F.2d 829, 830–31 (5th Cir. 1980) (same); *Reed v. Rhodes*, 549 F.2d 1050, 1051 (6th Cir. 1976) (invoking 28 U.S.C. § 1292(a)(1) and (b)(2)); *Robbins v. George W. Prescott Pub. Co.*, 614 F.2d 3, 4–5 (1st Cir. 1980) (invoking 28 U.S.C. § 1292(a)(1)); *Nat'l Ass'n for Advancement of Colored People, Lansing Branch v. Lansing Bd. of Ed.*, 485 F.2d 569, 570 (6th Cir. 1973) (invoking 28 U.S.C. § 1292(a)(1)); *Fitzgerald v. Compania Naviera La Molinera*, 394 F. Supp. 402, 412 (E.D. La. 1974) (invoking 28 U.S.C. § 1292(a)(3)); *In re Delphinus Maritima, S.A.*, 1981 WL 6769661 (S.D.N.Y. Apr. 24, 1981) (invoking 28 U.S.C. § 1292(a)(3)).[2]

[2] Coinbase entirely disregards statutes like the Norris-LaGuardia

Thus, the relevant "backdrop" against which Congress amended the FAA in 1988 was that whether to stay a proceeding pending appeal—including arbitration appeals—was a matter of discretion.

B. Congress did not alter the discretionary-stay backdrop in enacting section 16.

Had Congress intended to deviate from this longstanding discretionary-stay framework, it would have said so. *See Hall*, 138 S. Ct. at 1125. As this Court has emphasized, courts "should not construe a statute to displace courts' traditional equitable authority absent the clearest command." *Miller,* 530 U.S. at 340–41.

Nothing here supplies the required clear statement that Congress intended "to remove [courts'] discretion" to determine whether a stay is warranted. *Id.*

1. Section 16 of the FAA—the section Congress added in 1988 to govern "Appeals"—does not mention stays pending interlocutory appeals. 9 U.S.C. § 16. That alone is fatal to Coinbase's theory: The statute lacks the clear

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Act. It does mention 28 U.S.C. § 1292, but it draws the wrong conclusion. The company argues that because that statute contained some explicit language about stays, Congress clearly sought "to depart from the presumption" that the filing of an appeal would divest the district court of jurisdiction over all proceedings. Pet. Br. 34. But as Coinbase itself admits (at 35), 28 U.S.C. § 1292(a) had no such language in the 1960s, 1970s, or 1980s. And 28 U.S.C. § 1292(b) says only that an "*application* for an appeal" does not automatically stay district-court proceedings—nothing about the appeal itself. *Compare* 28 U.S.C. § 1292(b) (providing that an "application for an appeal hereunder shall not stay proceedings in the district court"), *with id.* § 1292(d)(3) (providing that "neither the application for nor the granting of an appeal . . . shall stay proceedings in the Court of International Trade or in the Court of Federal Claims"). Yet courts routinely exercised their discretion to decide whether to stay cases pending interlocutory appeal under these sections.

command required to displace courts' inherent power. *Miller*, 530 U.S. at 340–41; *see Scripps-Howard Radio*, 316 U.S. at 11.

That's not because Congress did not know how to do so. In the same bill in which Congress authorized interlocutory appeals of orders denying arbitration, Congress also provided that interlocutory appeals of orders ruling on motions to transfer actions to the Court of Claims should be heard by the Federal Circuit. Pub. L. 100–702, title V, § 501, Nov. 19, 1988, 102 Stat. 4652 (codified as 28 U.S.C. § 1292(d)(4)(A)). And although Congress did not provide a mandatory stay for interlocutory arbitration appeals, it did provide such a stay for interlocutory appeals of Claims Court transfer orders—in clear, unambiguous language. *Id.* ("If an appeal is taken from the district court's grant or denial of the motion [to transfer an action to the Court of Federal Claims], proceedings shall be [] stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit.").

Thus, "[w]here Congress wished to deprive the courts of [their] historic power" to issue discretionary stays, "it knew how to use apt words." *Scripps-Howard Radio*, 316 U.S. at 17. This Court should not override Congress's choice *not* to use those words in section 16.

2. Indeed, the FAA itself specifies when mandatory stays are required, and interlocutory appeals do not count. Section 3 of the FAA governs mandatory stays, and it says:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to

> arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3.

In other words, the FAA requires a mandatory stay if, and only if, three conditions are met: (1) the court is "satisfied" that the dispute must be arbitrated; (2) one of the parties has asked for a stay; and (3) that party is not in default. *Cf. Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (the "express" listing of some circumstances "implies that there are no other circumstances under which" the provision applies); *see also* A. Scalia & B. Garner, Reading Law 107 (2012) (explaining that the "expression of one thing implies the exclusion of others").

By definition, if a party is appealing an order denying arbitration, the district court was *not* "satisfied" that the dispute is arbitrable. The first condition, therefore, is not fulfilled, and no stay is required. But Coinbase asks this Court to hold the opposite.

If Coinbase were right, section 3 would have to be rewritten as follows:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement **or upon reaching exactly the opposite conclusion**, shall on application of one of the parties stay the trial of the

> action until such arbitration has been had in accordance with the terms of the agreement, **or until a circuit court has affirmed the district court's conclusion**.

9 U.S.C. 3 (edited).

If Congress had wanted to amend section 3 in that way, it easily could have done so. Or it could have added a mandatory stay provision to section 16, when it authorized interlocutory appeals—just as it did for Court of Claims transfer motions. *See Nken*, 556 U.S. at 430 ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). It did neither.

"The short answer" to Coinbase's request that this Court add a mandatory stay pending appeal "is that Congress did not write the statute that way." *Russello v. U.S.*, 464 U.S. 16, 23 (1983). This Court may not rewrite the statute on its behalf.

II. Coinbase's arguments to the contrary lack merit.

None of Coinbase's remaining arguments justifies its request that this Court rewrite section 16 to abrogate courts' traditional discretion to issue (or deny) stays.

A. Coinbase's appeals to pro-arbitration policy conflict with this Court's precedent.

Sidestepping the FAA's text, Coinbase appeals to the so-called policy favoring arbitration. But Coinbase's appeal to policy fails twice over. *First*, as this Court recently explained, the policy favoring arbitration is, essentially, a misnomer. *See Morgan*, 142 S. Ct. at 1714. It "is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements

to arbitrate and to place such agreements upon the *same* footing as other contracts." *Id.* at 1713 (emphasis added). Put simply, it is an equal-treatment rule: "The federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Id.*

Because stays pending other interlocutory forum-selection appeals are discretionary, imposing a mandatory stay solely for arbitration appeals would *violate* this equal-treatment rule. *Cf. e.g.*, *Intell. Ventures II LLC v. FedEx Corp.*, 2017 WL 6559172, at *4 (E.D. Tex. Dec. 22, 2017); *Freeman Expositions, Inc. v. Glob. Experience Specialists, Inc.*, 2017 WL 6940557, at *1 (C.D. Cal. June 27, 2017); *Waste Mgmt. of La., L.L.C. v. Jefferson*, 2014 WL 5393362, at *4 (E.D. La. Oct. 22, 2014).

"[T]he FAA's policy favoring arbitration does not authorize federal courts to invent special, arbitration-preferring" rules. *See Morgan*, 142 S. Ct. at 1713.

Second, even if the FAA did embody some amorphous goal of fostering arbitration, this Court has repeatedly rejected the contention that the FAA authorizes courts to "elevate vague invocations of statutory purpose over the words Congress chose." *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1792–93 (2022). To the contrary, this Court has emphasized that courts interpreting the FAA are *not "*free to pave over bumpy statutory text[ ] in the name of more expeditiously advancing a policy goal." *New Prime Inc.,* 139 S. Ct. at 543; *see also Scripps-Howard Radio*, 316 U.S. at 11 ("The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions.").

Nothing in the FAA requires a mandatory stay pending appeal. This Court should "respect the limits up to which Congress was prepared to go," *New Prime*, 139 S.

Ct. at 543: Parties have a right to appeal a denial of arbitration, but there is no right to a stay.

B. Coinbase's reliance on the narrow "divestiture" principle is unsound.

Lacking any support for its position in the FAA's text, Coinbase seeks refuge in the principle of "divestiture," a narrow, judge-made doctrine of judicial management. Divestiture is designed to prevent the "danger [that] a district court and a court of appeals would be simultaneously analyzing the same judgment." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 59 (1982). Arbitration appeals present no such danger. Properly understood, the divestiture doctrine only reinforces what the statutory text and history already make clear: that arbitration appeals do not warrant a mandatory stay.

1. For starters, divestiture is limited to matters within "the scope of the appeal." *Price*, 139 S. Ct. at 1537 (Thomas, J., concurring in the denial of certiorari) (citing 16A Wright & Miller § 3949.1). The point is to ensure that the district court and the court of appeals are not "simultaneously" exercising control over the same "aspects of the case" at the same time. *Griggs,* 459 U.S. at 58–59. The scope of divestiture is thus narrowly circumscribed. An interlocutory appeal divests the district court of control over the "aspects of the case" that are on appeal. *Id.* A district court may not, for example, "hear the identical claim and award the exact same relief" that is currently pending before the Court of Appeals. *Price*, 139 S. Ct. at 1538. But that does not preclude the district court from continuing with aspects of the case that are not on appeal. *See id.*; *Marrese v. Am. Acad. of Orthopaedic Surgeons,* 470 U.S. 373, 379 (1985) (explaining that a criminal contempt judgment resulted from "a separate and independent proceeding . . . to vindicate the authority of the court" and thus its

interlocutory appeal did not "transfer[] jurisdiction over the entire case to the court of appeals").

That's why stays pending interlocutory appeal of forum-selection orders (and other orders governing where and whether a case should be heard) have been discretionary. *See, e.g., supra* Part I.A.2 (discussing cases from before 1988); *Intell. Ventures II*, 2017 WL 6559172, at *3–4 (exercising discretion to deny a stay request pending appeal from order denying motion to dismiss based on improper venue); *Freeman Expositions*, 2017 WL 6940557, at *1 (exercising discretion to stay pending appeal from an order refusing to enforce a forum-selection clause); *Eshelman v. Puma Biotechnology, Inc.*, 2017 WL 9440363, at *5 (E.D.N.C. May 24, 2017) (exercising discretion to deny a stay request pending appeal from order denying motion to dismiss for lack of personal jurisdiction and motion to transfer venue); *Waste Mgmt. of La.*, 2014 WL 5393362, at *4 (exercising discretion to grant stay request pending appeal of order refusing to enforce a forum-selection clause); *GTE New Media Servs. Inc. v. Ameritech Corp.*, 44 F. Supp. 2d 313, 314 (D.D.C. 1999) (exercising discretion to stay pending appeal of order denying motion to dismiss for lack of personal jurisdiction). The merits of a case ordinarily have nothing to do with where that case should be heard.

Arbitration is no different. As this Court has repeatedly held, the merits of a dispute have nothing to do with whether that dispute must be arbitrated—"the arbitrability issue . . . is easily severable from the merits of the underlying disputes." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20–21 (1983); *see, e.g. First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (separating the "the merits of the dispute," which involved "whether the Kaplans are personally liable for MKI's debt

to First Options," from the "the arbitrability of the dispute," which involved "whether they agreed to arbitrate the merits"). And if a proceeding that might change the scope of the appeal did, in fact, present itself—for instance, if part or all of the arbitrability question somehow confronted the district court in another form—that court would only be divested of its authority over *that specific proceeding*.

There's no reason the divestiture doctrine should apply any differently to arbitration appeals than to any other forum-selection appeal. Thus, Coinbase isn't actually asking this Court to apply the divestiture doctrine; it's asking it to create a novel doctrine solely for arbitration appeals. The FAA prohibits it from doing so. *See Morgan*, 142 S. Ct. at 1713–14.

2. Unable to demonstrate the availability of a mandatory stay in any analogous context, Coinbase reaches even further afield to immunity. But immunity is unique: The question there is not *where* a defendant may face civil proceedings, but *whether* they may face them at all. The judge-made stay rules that lower courts have developed in this context, therefore, are grounded in the need to protect a defendant's immunity from suit—not the need to prevent the district court and the Court of Appeals from considering the same issue at the same time. *See, e.g.*, *Stewart v. Donges*, 915 F.2d 572, 576 (10th Cir. 1990) ("[T]he central issue in the appeal is the defendant's asserted right not to have to proceed to trial."). These rules, therefore, are not really an application of the divestiture doctrine at all.

But whether these judge-made immunity rules are properly considered divestiture or not, there is no justification for extending them to the arbitration context. As this Court has repeatedly held, arbitration is *not* an

immunity from suit. It is merely "a specialized kind of forum-selection clause." *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1919 (2022). An arbitration clause does not change what claims a party can bring or must defend; it merely alters where those claims will be heard. *Id.* There is, therefore, no basis for exempting arbitration from the traditional rule that stays pending appeal are within the district court's discretion—especially when Congress could have done so, but chose not to.

3. Coinbase fares no better appealing to efficiency. *See* Pet. Br. 22–23. It is not more efficient to stay every case—unnecessarily delaying litigation for months or years even where a defendant is unlikely to succeed—than it is to allow district courts discretion to permit some cases to proceed (and to tailor how they do so). Indeed, district courts routinely use their discretion to *promote* efficiency by, for example, allowing only those proceedings that would also be permitted in arbitration to continue during the appeal; protecting important evidence that would otherwise be lost; or continuing proceedings on the merits where an appeal is not frivolous but will almost certainly not succeed. *See, e.g.*, *WEX Health, Inc. v. Basic Benefits, LLC*, 2022 WL 819558, at *3 (D. Conn. Mar. 17, 2022); *Yeomans v. World Fin. Grp. Ins. Agency, Inc*, 2021 WL 1772808, at *5 (N.D. Cal. Mar. 19, 2021); *Nygaard v. Prop. Damage Appraisers, Inc.*, 2018 WL 9516071, at *1 (E.D. Cal. Feb. 13, 2018); *Mahamedi IP L., LLP v. Paradice & Li, LLP*, 2017 WL 2727874, at *2 (N.D. Cal. Feb. 14, 2017); *Lucy v. Bay Area Credit Serv. LLC*, 2011 WL 13344167, at *2 (D. Conn. July 28, 2011).

Coinbase's novel, expansive version of divestiture would ultimately undermine the very goal the company says it's trying to achieve: judicial economy. Indeed, the only cases in which a mandatory-stay rule would make a

difference are cases in which district courts don't believe the party seeking arbitration is likely to succeed on appeal or in which the equities weigh against a stay.

In contrast, judicial economy has been well served for centuries by allowing district court judges to maintain control over their own dockets. Doing so also furthers the goals of the FAA: Dispute resolution is inevitably going to be more "speedy and efficient" if parties do not need to wait a year or more to start resolving their dispute. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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