No. 22A91

IN THE

Supreme Court of the United States

COINBASE, INC.,
Petitioner,

v.

ABRAHAM BIELSKI,
Respondent.

COINBASE, INC.,
Petitioner,

v.

DAVID SUSKI, *et al.*,
Respondents.

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

OPPOSITION TO PETITIONER'S APPLICATION FOR A STAY

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INTRODUCTION

This is a case about the timing of appellate review of an arbitrability ruling. Coinbase, Inc. filed a certiorari petition because it believes that it is entitled to an automatic stay of all district court proceedings while the Ninth Circuit reviews a district court's order holding that its dispute with Respondent Abraham Bielski is not arbitrable. Coinbase moved for a stay of district court proceedings pending its appeal of that ruling in both the district court and the Ninth Circuit. Both courts denied its motions. Coinbase now moves for a stay in this Court pending a decision on its petition for certiorari. But Coinbase has failed to meet its "especially heavy burden" to justify a stay in this Court. *Packwood v. Senate Select Comm. on Ethics*, 510 U. S. 1319, 1320 (1994) (Rehnquist, C. J., in chambers).

First, Coinbase's application is doomed because it will not suffer irreparable harm in the absence of a stay. The only injury Coinbase has identified is the additional cost of litigation in the district court that it might not incur in arbitration. But litigation costs, even when "substantial" (Coinbase's would not be, if it incurs any at all), "do[] not constitute irreparable injury." *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 244 (1980) (internal quotation marks omitted). Moreover, such costs would be marginal at best because Mr. Bielski has already agreed to seek only individual (not class) discovery during the pendency of Coinbase's appeal, and that discovery could be used in arbitration if the Ninth Circuit were to reverse the district court's arbitrability ruling.

Second, this Court is unlikely to grant review. The sole issue raised by Coinbase turns on application of this Court's holding in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam), to a specific set of procedural facts. What Coinbase calls an "entrenched" circuit "split" is simply a question of whether to apply *Griggs* broadly or narrowly when a party appeals the denial of a motion to compel arbitration. All the circuit courts that have addressed the issue have faithfully applied the correct standard (*Griggs*), and none have issued decisions that would threaten the right to arbitrate or the right to appeal the district court's arbitrability ruling before the case proceeds to final judgment. The question presented in Coinbase's petition—which concerns the timing of appellate review, and nothing more—does not warrant this Court's intervention to engage in the type of purported error correction Coinbase seeks.

Third, even if the Court were to review the case, Coinbase is unlikely to succeed on the merits. The case turns on whether, under *Griggs*, the arbitrability of a dispute is a separate aspect of the case from the merits. The Ninth Circuit got it right when it held that the two issues are separate. An issue is an aspect of the case on appeal if it results in the district court deciding a question that the appellate court is deciding at the same time. But here, the Ninth Circuit is only deciding arbitrability—it has no jurisdiction to decide the merits of the case. And the district court, having already ruled on arbitrability, need not and will not return to that issue during the remainder of the case. Indeed, this Court has already made clear that considerations of

arbitrability are "easily severable" from the underlying merits of a dispute. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21 (1983).

Finally, the equities weigh against a stay. If no stay is granted, Coinbase faces only the speculative prospect of being required to engage in discovery—discovery limited to Mr. Bielski's individual claims and which it could reuse in arbitration. On the other side of the ledger, a stay will frustrate and delay Mr. Bielski's right to seek civil justice for the loss of more than $30,000 as a result of a fraudulent transaction that occurred on Coinbase's platform. And the public interest does not support the grant of a stay because a party's right to arbitrate only comes into play when a *valid* arbitration agreement exists between the parties. Here, in a straightforward application of California law, the district court found Coinbase's user agreement unconscionable. There is no reason to give Coinbase special treatment by halting litigation during its appeals.

This Court stays cases pending in the courts of appeals only upon a showing of "the weightiest considerations." *Fargo Women's Health Organization v. Schafer*, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of stay application) (internal quotation marks omitted). Coinbase's desire to avoid limited, narrow discovery in the district court is not enough.

STATEMENT OF THE CASE

Coinbase operates an online currency and cryptocurrency exchange platform. Pet. 5. Respondent Bielski alleges that shortly after creating a Coinbase account in 2021, a scammer fraudulently accessed his account and transferred currency from it,

stealing more than $30,000. *Bielski* D. Ct. Dkt. 22, ¶ 13. Thereafter, he sought help from Coinbase, but Coinbase stonewalled. He logged into Coinbase's "live chat" feature, called its customer service "hotline," and even wrote two letters and sent them to Coinbase's office. *Bielski* D. Ct. Dkt. 29-1, ¶ 8. Coinbase did not even respond to his repeated communications until after he filed the lawsuit, much less take any steps to remedy or even investigate the fraud perpetrated on Mr. Bielski. *Id.*

Mr. Bielski alleges that Coinbase's refusal to remedy the fraud that occurred through Coinbase's platform violated the Electronic Funds Transfer Act, 15 U.S.C. § 1693 *et seq.* ("EFTA"), and "Regulation E" of its implementing regulations, 12 C.F.R. §§ 1005.1-1005.20. Specifically, Coinbase—a "financial institution" that must comply with the EFTA and its implementing regulations—failed to perform its responsibilities to remedy unauthorized electronic fund transfers by, *inter alia*, failing to conduct a timely and good-faith investigation of fraudulent transfers, failing to timely credit or provisionally recredit users' accounts pending investigation, and failing to provide users with information concerning the status of the unauthorized electronic transfers from their accounts upon request. *See Bielski* D. Ct. Dkt. 22, ¶¶ 3-4.

Mr. Bielski's experience is far from isolated; Coinbase's failures to comply with the EFTA and its implementing regulations are systemic and have harmed many similarly situated persons. Mr. Bielski alleges that "Coinbase users have repeatedly implored Coinbase to help them rectify the unauthorized transfers from their accounts, but Coinbase has routinely and repeatedly effectively ignored such

requests," and has "largely turned a blind eye to the systemic breaches of security on its exchange, leaving affected Coinbase users without recourse, short of litigation, to correct these issues." *Id.* ¶ 3. Mr. Bielski thus sued on behalf of himself and all similarly situated victims. *Id.* ¶ 5.

Mr. Bielski filed the operative complaint in November 2021. *Id.* Coinbase moved to compel arbitration based on its user agreement. *Bielski* D. Ct. Dkt. 26. The user agreement contained both an arbitration clause and a "delegation clause"—a provision purporting to consign questions concerning the arbitration agreement itself, including whether a particular dispute between Coinbase and a user is arbitrable, to the arbitrator. *See Bielski* D. Ct. Dkt. 28-1.

With the benefit of full briefing and oral argument, the district court denied the motion to compel, concluding that both the arbitration clause and the delegation clause were unconscionable. *Bielski* D. Ct. Dkt. 42, at 1. The district court's comprehensive opinion carefully examined the provisions of Coinbase's user agreement, faithfully applying California unconscionability law. *See id.* at 3-10. A bevy of factors led the court to find the arbitration and delegation clauses unconscionable. For example, the delegation clause was a contract of adhesion that (1) imposed a burdensome and unnecessary pre-arbitration dispute-resolution procedure on consumers, but not on Coinbase, and it (2) required only users, not Coinbase, to arbitrate disputes subject to the clause. *Id.* The district court further found that the same factors also rendered the larger arbitration clause unconscionable. The clause "defined terms such that the various provisions outlining

the informal complaint, formal complaint, and arbitration procedures are nested one inside the other," rendering the various portions of the complex arbitration procedure inseverable. *Id.* at 10-11.

On April 18, 2022, Coinbase filed a notice of appeal in the Ninth Circuit contesting the district court's order denying the motion to compel. *Bielski* D. Ct. Dkt. 43. Then, on May 5, 2022, Coinbase filed a motion to stay the district court proceeding pending appeal. *Bielski* D. Ct. Dkt. 48. Mr. Bielski opposed the motion but agreed to limit motion practice and discovery to individual issues during the appeal. *Bielski* D. Ct. Dkt. 50, at 2-3. The district court denied the motion to stay on June 7, 2022. Pet. App. 41a. In denying the motion, the district court pointed out that the equities weighed against staying the proceedings because halting the district court proceedings during the pendency of the appeal would "significantly prejudice" Mr. Bielski. Pet. App. 43a. Coinbase then sought a stay pending appeal in the Ninth Circuit, which the Ninth Circuit denied. Pet. App. 1a.

Coinbase then filed on July 29 a petition for certiorari in this Court. It presents a single question for review: Does a non-frivolous appeal of the denial of a motion to compel arbitration categorically deny the district court's jurisdiction over the whole case, or does the district court retain jurisdiction over other aspects of the case not at issue in the appeal, including the merits of the case? Pet. (i). If the appeal strips the district court of all jurisdiction, then district court proceedings must be stayed automatically. If the district court retains jurisdiction over issues independent of those at stake in the appeal, then the appealing party (like everyone else in federal

court) may still obtain a stay pending appeal, but to do so it must satisfy the requirements set forth by this Court in *Nken v. Holder*, 556 U.S. 418, 434 (2009) (movant must show (1) they are likely to succeed on the merits; (2) they will be irreparably injured absent a stay; (3) the balance of equities favors a stay; and (4) the public interest favors a stay).

Every circuit that has addressed this question to date has examined it under the standard articulated by this Court in *Griggs*, which holds that an appeal "divests the district court of its control over those aspects of the case involved in the appeal," 459 U.S. at 58. Each circuit has considered whether, under this standard and in these singular procedural circumstances of an interlocutory appeal of the denial of a motion to compel arbitration, arbitrability is a separate aspect of the case from the merits of the dispute. *See infra* Part II. Some courts apply the *Griggs* standard broadly to these facts, while others—including the Ninth Circuit—apply it narrowly, but none disagree over the governing legal standard to be applied. Coinbase now seeks review of the Ninth Circuit's application of *Griggs*, which Coinbase asserts is "wrong." Pet. 18.

Simultaneous with its petition for certiorari, Coinbase filed this application for a stay and a motion to expedite consideration of the case.

ARGUMENT

An applicant for a stay pending certiorari review must show "(1) a reasonable probability that this court will grant certiorari, (2) a fair prospect that the Court will then reverse the decision below, and (3) a likelihood that irreparable harm [will]

result from the denial of a stay." *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (internal quotation marks omitted).

"When a matter is pending before a court of appeals, it long has been the practice of Members of this Court to grant stay applications only upon the weightiest considerations." *Schafer*, 507 U.S. at 1014 (internal quotation marks omitted). And when the lower courts have denied motions to stay, an applicant bears "an especially heavy burden" to justify a stay in this Court. *Packwood*, 510 U. S. at 1320; *Beame v. Friends of the Earth*, 434 U.S. 1310, 1312 (1977) (Marshall, J., in chambers) (a stay applicant's "burden is particularly heavy when . . . a stay has been denied by the District Court and by a unanimous panel of the Court of Appeals").

Coinbase has failed to meet its weighty burden. It will suffer no irreparable harm in the absence of a stay. This Court is unlikely to grant certiorari review, and even if it does, Coinbase is unlikely to succeed on the merits. And the public interest weighs against granting a stay because the prejudice to Mr. Bielski's ability to vindicate his rights is far greater than any inconvenience Coinbase might face if litigation proceeds in the district court.

I. Coinbase will not suffer irreparable harm from the continuation of limited, routine litigation.

To obtain the extraordinary relief of a stay pending the disposition of a petition for certiorari, an applicant "must demonstrate . . . a likelihood that irreparable harm will result from the denial of a stay." *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (brackets omitted). Coinbase has come nowhere close.

Coinbase claims the benefits of arbitration will be "lost forever if Coinbase must undergo the expense and delay of litigation," which means participating in discovery.[1] Stay App. at 22-23 (quotation omitted). But this is not irreparable harm. It is black-letter law that litigation expenses, even those with "substantial and unrecoupable cost," "do[] not constitute irreparable injury." *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 244 (1980) (internal quotation marks omitted); *see also PaineWebber Inc. v. Farnam*, 843 F.2d 1050, 1051 (7th Cir. 1988) ("ordinary incidents" of "litigating (or arbitrating) a case" cannot constitute irreparable injury). This proposition is common-sense: otherwise, every discovery order imposing an obligation on any party could constitute irreparable harm.

Even if Coinbase alleges a cognizable "harm," it is *de minimis*. Coinbase seeks a stay pending the Court's disposition of its petition for certiorari, which has already been filed. Respondent's brief in opposition to that petition is due September 2, 2022. The Court is likely to act on the petition shortly thereafter. The only "harm" Coinbase might suffer would arise from discovery obligations between now and the Court's disposition of its petition. But a "requirement to produce documents" is not generally "the type of injury that is irreparable." *In re Platinum Partners Value Arbitrage Fund L.P.*, No. 18-cv-5176, 2018 WL 3207119 at *6 (S.D.N.Y. June 29, 2018).

This Court also has explained that "simply showing some 'possibility of irreparable harm'" is not sufficient. *Nken*, 556 U.S. at 434 (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)). An applicant must demonstrate a *likelihood*. *King*,

[1] Coinbase cannot argue that its "harm" absent a stay includes filing an answer, *see* Stay App. at 22, because it already filed one to the operative complaint, *see Bielski* D. Ct. Dkt. 63.

567 U.S. at 1302. Coinbase has not made this showing, because its complaints are merely about the possibility that it might need to respond to discovery within the next few weeks. No discovery is outstanding. The parties have not exchanged initial disclosures, nor has the court entered a case management schedule. *See* Fed. R. Civ. P. 26(a)(1), (f)(3). The "harm" Coinbase alleges is only speculative. Even if Coinbase could show more than a "possibility" of harm, and even if participating in discovery *could* constitute irreparable harm, this discovery could be equally useful in arbitration—mitigating that harm. *Cf. Am. Trucking & Transp. Ins. Co. v. Nelson*, No. 9:16-cv-00160, 2018 WL 3609538 at *4 (D. Mont. July 27, 2018) (denying stay because parties could use "portions of . . . discovery in arbitration"). If any costs related to discovery that cannot be used in arbitration are incurred between today and the date (likely within weeks) the Court acts on the petition for certiorari, those costs will be minimal.

To the extent Coinbase's "harm" is increased because its (speculative) discovery obligations are heavier in this putative class action than they would be in an individual arbitration, that issue is moot. Respondent has offered to limit discovery only to matters pertaining to his individual claims during the pendency of the Ninth Circuit appeal, *Bielski* D. Ct. Dkt. 50 at 2-3, and thus Respondent is seeking only individual-claim discovery during the pendency of the petition for certiorari. Such limited individual discovery can hardly be called "harm" and it falls well short of demonstrating that the extraordinary remedy of a stay is warranted.

Coinbase's attempts to lean on dissimilar examples like *Henry Schein* are unfounded.[2] The Court granted a stay in that case when the applicant—who argued the dispute was controlled by an arbitration agreement that the district court did not enforce—moved for a stay just *three months* before the trial date. *See* 2/12/18 Application for Stay at 29, *Henry Schein, Inc. v. Archer & White Sales, Inc.* (No. 17-1272). After the Fifth Circuit did not enforce arbitration based on other grounds, the applicant returned to this Court and again moved for a stay *one month* before trial. *See* 1/8/20 Application for Stay at 28, *Henry Schein* (No. 19A766). This case stands in stark contrast to *Henry Schein*: it has barely gotten off the ground. Coinbase filed its answer on July 21, 2022. *See Bielski* D. Ct. Dkt. 63. The parties have not even exchanged initial discovery disclosures or proposed a discovery schedule. *See* Fed. R. Civ. P. 26(a)(1), (f)(3). There is no real possibility—let alone likelihood—that Coinbase will be sent to trial (or even to summary judgment briefing) before the courts can address its appeal or petition for certiorari.

Coinbase has failed to demonstrate a likelihood that irreparable harm will result from the denial of a stay. This failure is sufficient, on its own, for the Court to

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[2] Coinbase argues that lower courts "have broadly agreed" with its position. *See* Stay App. at 24 n.3. But district court decisions regarding stays are fact-bound "exercise[s] of judicial discretion" and are "dependent upon the circumstances of the particular case." *Nken*, 556 U.S. at 433 (2009) (quoting *Virginian Ry. Co. v. U.S.*, 272 U.S. 658, 672-73 (1926)). An even broader collection of lower courts have denied motions to stay pending the appeal of a denial of a motion to compel arbitration. *See, e.g., Robertson v. REP Processing, LLC*, No. 19-cv-02910, 2021 WL 5354713 at *4-5 (D. Colo. Oct. 12, 2021); *Owino v. CoreCivic, Inc.*, No. 17-cv-1112, 2021 WL 3186500 at *3-5 (S.D. Cal. July 28, 2021); *Vine v. PLS Fin. Servs., Inc.*, No. 4:18-cv-00450, 2019 WL 4257108 at *7-8 (E.D. Tex. Sept. 9, 2019); *Am. Trucking*, 2018 WL 3609538 at *3-4; *Munro v. Univ. of Southern California*, No. 16-cv-6191, 2017 WL 5592904 at *3-4 (C.D. Cal. July 7, 2017); *Cesca Therapeutics Inc. v. SynGen Inc.*, No. 2:14-cv-2085, 2017 WL 1174062 at *4-5 (E.D. Cal. Mar. 30, 2017); *Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co.*, No. 3:16-cv-00495, 2016 WL 9226389 at *2-3 (D. Or. Oct. 5, 2016); *Jimenez v. Menzies Aviation Inc.*, No. 15-cv-02392, 2015 WL 5591722 at *3-4 (N.D. Cal. Sept. 23, 2015); *R & L Ltd. Inv., Inc. v. Cabot Inv. Props., LLC*, No. 09-cv-1525, 2010 WL 3789401 at *2 (D. Ariz. Sept. 21, 2010).

deny its application. *See King*, 567 U.S. at 1302 (explaining three-factor test). But Coinbase has also failed to establish any of the other factors the Court considers in an application for stay.

II. This Court is unlikely to grant certiorari.

Coinbase is also unlikely to succeed in obtaining this Court's review. "A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Moreover, this Court does not sit as a "court of error correction," *Martin v. Blessing*, 571 U.S. 1040, 1043 (2013) (Alito, J., respecting the denial of certiorari), and certiorari jurisdiction is rarely appropriate where the claimed error involves "misapplication of a properly stated rule of law," Sup. Ct. R. 10. That's exactly what we have here, and no circumstances present here justify a departure from the Court's reluctance to intervene in such issues.

In both *Bielski* and *Suski*, Coinbase seeks to challenge the Ninth Circuit's holding that district courts have jurisdiction over the merits of a case pending the denial of a motion to compel arbitration, and thus there is no automatic stay of district court proceedings during such an appeal. *See Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990). That holding is a specific application of this Court's precedent in *Griggs*, which holds that an appeal "divests the district court of its control over those aspects of the case involved in the appeal," 459 U.S. at 58; *see Britton*, 916 F.2d at 1411 (discussing *Griggs*). In that regard, the Ninth Circuit held that "[s]ince the issue of arbitrability was the only substantive issue presented in this appeal, the district court was not divested of jurisdiction to proceed with the case on the merits." *Britton*, 916 F.2d at 1412. Stated differently, the operative question is

whether the arbitrability of a dispute and the merits are separate "aspects of the case." *Id.* If they are, the district court has jurisdiction over the merits phase of the case during the arbitrability appeal. If they are not, it doesn't.

The Second and Fifth Circuits apply *Griggs* to these facts consistently with the Ninth Circuit. Quoting and discussing *Griggs*, the Second Circuit acknowledged that "'the filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.'" *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 53 (2d Cir. 2004) (cleaned up) (quoting *Griggs*). Under *Griggs*, it observed that "[t]he issue, therefore, is whether the trial of a case on the merits is 'involved in' an appeal of an order denying arbitration." *Id.* (quoting *Griggs*). On that question, it concluded "that a district court has jurisdiction to proceed with a case despite the pendency of an appeal from an order denying a motion to compel arbitration" because "further district court proceedings in a case are not 'involved in' the appeal of an order refusing arbitration." *Id.* at 53-54 (quoting *Griggs*).

Likewise, when presented with the same facts, the Fifth Circuit explained that the question "turn[ed] on *Griggs*" because the issue was "whether the merits of an arbitration claim are an aspect of a denial of an order to compel arbitration." *Weingarten Realty Invs. v. Miller*, 661 F.3d 904, 908 (5th Cir. 2011). Explaining that this Court has "made it plain" that the merits of claims are "'easily severable' from the dispute over the arbitrability of those claims," the Fifth Circuit concluded that

"the merits are not an aspect of arbitrability." *Id.* at 909 (quoting *Moses H. Cone*, 460 U.S. at 21).

Other circuit courts apply *Griggs* differently to this factual scenario, concluding that arbitrability is not a separate "aspect" of the case from the merits. *See Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 263-266 (4th Cir. 2011); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 215 n.6 (3d Cir. 2007); *McCauley v. Haliburton Energy Servs., Inc.*, 413 F.3d 1158, 1160-62 (10th Cir. 2005); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1251-52 (11th Cir. 2004) (per curiam); *Bombardier Corp. v. Nat'l R.R. Passenger Corp.*, No. 02-7125, 2002 WL 31818924, at *1 (D.C. Cir. Dec. 12, 2002); *Bradford-Scott Data Corp. v. Physician Comput. Network, Inc.*, 128 F.3d 504, 505-06 (7th Cir. 1997).

All these circuit courts followed the same rule—the rule from *Griggs* that an appeal divests the district court of jurisdiction over aspects of the case presented on appeal—and all sought to faithfully apply it. *See Miller*, 661 F.3d at 908 ("The legal debate turns on *Griggs* . . . . At issue here is whether the merits of an arbitration claim are an aspect of a denial of an order to compel arbitration." (cleaned up)); *Uzan*, 388 F.3d at 53 ("The Supreme Court has stated that '[t]he filing of a notice of appeal . . . divests the district court of its control over those aspects of the case involved in the appeal.' The issue, therefore, is whether the trial of a case on the merits is 'involved in' an appeal of an order denying arbitration.") (cleaned up) (quoting *Griggs*); *Britton*, 916 F.2d at 1411-12 (noting the standard from *Griggs* that "the filing of a notice of appeal divests the district court of jurisdiction and transfers jurisdiction

to the appellate court," but "the independent issues presented in the underlying case" are separate aspects of the case from arbitrability).

The fact that the Ninth, Second, and Fifth Circuits applied the rule in a narrower fashion than some other circuits does not create a certiorari-worthy conflict among the circuits. Try as it might to frame the issue as an "entrenched" circuit "split," Coinbase asks this Court to intervene solely to "correct" what it perceives to be an unduly narrow application of *Griggs* to a specific procedural circumstance. But even where the Court disagrees with a lower court's conclusion, "error correction is outside the mainstream of the Court's functions and not among the compelling reasons that govern the grant of certiorari." *Barnes v. Ahlman*, 140 S. Ct. 2620, 2622-23 (2020) (Sotomayor, J., dissenting from the grant of a stay) (cleaned up).

No circuit court decision on this issue takes away arbitration rights or limits the right to immediately challenge a district court's arbitrability ruling without waiting for a final judgment on the merits. Nor does any decision take away the right to obtain a stay of the case pending appellate review if the party satisfies the standard articulated in *Nken*, 556 U.S. at 434—a standard that applies to virtually any person seeking a stay pending appeal in any federal court. The only issue at stake here concerns the *timing* of appellate review, not the right to seek it.

That timing has limited impact in practice. The upshot of letting the case proceed on the merits pending appellate review is that the litigant seeking arbitration might have to incur additional expenses associated with litigation in federal court while awaiting the outcome of the appeal. But recipients of unfavorable district court

rulings must face additional litigation expenses all the time—when their motion to dismiss is denied, when their summary judgment motion is denied, when a class is certified against them, and any number of other similar circumstances. As this Court explained, "the expense and annoyance of litigation," even when "substantial," "is part of the social burden of living under government." *Standard Oil*, 449 U.S. at 244 (internal quotation marks omitted). It is not the type of concern that warrants certiorari review.

This Court has denied certiorari in cases presenting questions like this many times over the years. *See, e.g.*, *Bristol-Myers Squibb Co. v. Connors*, 141 S. Ct. 2796 (2021) (denying certiorari petition in which petitioner challenged the Ninth Circuit's application of this Court's *Younger* abstention precedent, which petitioner asserted was at odds with many other circuits' application); *Bentley v. Vooys*, 139 S. Ct. 1600 (2019) (denying certiorari petition seeking review of territorial supreme court's application of this Court's Privileges and Immunities Clause precedent, which petitioner asserted was at odds with the application by other state and territorial courts of last resort); *PHI Inc. v. Rolls Royce Corp.*, 577 U.S. 817 (2015) (denying certiorari petition seeking review of how this Court's holding in *Atlantic Marine* should be applied in one specific context); *Robinson v. Lehman*, 560 U.S. 924 (2010) (denying certiorari petition seeking review of Ninth Circuit's application of this Court's qualified immunity precedent, which petitioner asserted conflicted with the application by other circuits). It should likewise deny Coinbase's petition here.

III. Coinbase is not likely to prevail on the merits if this Court exercises review.

Having failed to persuade the district court and the Ninth Circuit to issue a discretionary stay pending appeal,[3] Coinbase now seeks to transform the question into a jurisdictional one, asking this Court to adopt a categorical rule, applicable only to cases involving arbitration, that would *mandate* a stay of all district court proceedings any time a party files a non-frivolous interlocutory appeal pursuant to 9 U.S.C. § 16(a). Because neither the Federal Arbitration Act ("FAA") nor this Court's prior precedents requires such a rule, Coinbase is unlikely to prevail on the merits if this Court exercises its review.

The FAA's "liberal federal policy favoring arbitration," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011), only ensures that courts enforce arbitration agreements in the same manner as other contracts, *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022). It does not, however, "authorize federal courts to invent special, arbitration-preferring procedural rules." *Id.* Accordingly, the general rule that an interlocutory appeal divests the district court of jurisdiction only "over those aspects

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[3] District courts in the Ninth Circuit often issue discretionary stays pending the appeal of a motion to compel arbitration. *See, e.g., Aviles v. Quik Pick Express, LLC*, No. CV-15-5214, 2016 WL 6902458 (C.D. Cal. Jan. 25, 2016); *Hansen v. Rock Holdings, Inc.*, No. 2:19-cv-00179, 2020 WL 3867652 (E.D. Cal. July 9, 2020); *Velasquez-Reyes v. Samsung Elecs. Am., Inc.*, No. EDCV161953DMGKK, 2018 WL 6074573 (C.D. Cal. Mar. 8, 2018); *Murphy v. DirecTV, Inc.*, No. 2:07-CV-06465-FMC, 2008 WL 8608808 (C.D. Cal. July 1, 2008); *Revitch v. DirecTV, LLC*, No. 18-CV-01127-JCS, 2018 WL 5906077 (N.D. Cal. Nov. 9, 2018); *McGhee v. N. Am. Bancard, LLC*, No. 17-CV-0586-AJB, 2018 WL 11267348 (S.D. Cal. Feb. 6, 2018); *Ward v. Estate of Goossen*, No. 14-CV-03510-TEH, 2014 WL 7273911 (N.D. Cal. Dec. 22, 2014); *Zaborowski v. MHN Gov't Servs., Inc.*, No. 12-CV-05109-SI, 2013 WL 1832638 (N.D. Cal. May 1, 2013); *Pokorny v. Quixtar Inc.*, No. 07-CV-00201-SC, 2008 WL 1787111 (N.D. Cal. Apr. 17, 2008); *Jones v. Deutsche Bank AG*, No. 04-CV-05357-JW, 2007 WL 1456041 (N.D. Cal. May 17, 2007); *Stern v. Cingular Wireless Corp.*, No. 05-CV-8842-CAS, 2006 WL 2790243 (C.D. Cal. Sept. 11, 2006); *Winig v. Cingular Wireless LLC*, No. 06-CV-4297-MMC, 2006 WL 3201047 (N.D. Cal. Nov. 6, 2006).

of the case involved in the appeal," *Griggs*, 459 U.S. at 58, applies equally to cases involving arbitration. District courts remain free to adjudicate matters that are not involved in the interlocutory appeal. *See, e.g., Alice L. v. Dusek*, 492 F.3d 563 (5th Cir. 2007).

"An issue is generally an aspect of the case on appeal if it results in the district court's deciding an issue that the appellate court is deciding at the same time." *Weingarten Realty Invs. v. Miller*, 661 F.3d 904, 909 (5th Cir. 2011). As this Court explained in *Moses H. Cone*, 460 U.S. at 21, considerations of arbitrability are "easily severable" from the underlying merits of a dispute. Here, for example, determining arbitrability requires ruling on the enforceability of the underlying arbitration provisions, while evaluating the merits requires only a consideration of Coinbase's duties under the ETFA and its implementing regulations. There is no risk that the simultaneous exercise of jurisdiction by the district court and the Ninth Circuit would lead to simultaneous analysis of "the same legal question" or inconsistent judgments. *Weingarten Realty Invs.*, 661 F.3d at 909. If the Ninth Circuit reverses the district court's decision on arbitrability, the case would simply move to a different forum.

Although there is some small potential for the waste of litigation resources, this result is hardly comparable to the potential for inconsistent *judgments* contemplated by *Griggs*. Indeed, circuit courts have held that *Griggs* does not mandate an automatic halt to district court proceedings pending appeal in cases where the line separating the aspects of the case on appeal and those in the trial court was blurrier than the line between arbitrability and the merits. *See Alaska Elec.*

Pension Fund v. Flowserve Corp., 572 F.3d 221, 233 (5th Cir. 2009) (applying *Griggs* and concluding "a district court's findings in connection with a holding on class certification do not resolve loss-causation issues on the merits" at summary judgment, "even when . . . the two issues are practically identical"); *Ry. Labor Executives' Ass'n v. City of Galveston*, 898 F.2d 481, 481 (5th Cir. 1990) (interlocutory appeal of ruling on preliminary injunction did not divest district court of jurisdiction to proceed on the merits).

Coinbase's comparison to cases involving issues such as double jeopardy, sovereign immunity, or qualified immunity is also inapposite. In those examples, a grant of immunity protects the defendant from being brought before a tribunal at all. By contrast, "[a] determination on the arbitrability of a claim has an impact on what arbiter—judge or arbitrator—will decide the merits, but that determination does not itself decide the merits." *Weingarten Realty Invs.*, 661 F.3d at 909. Moreover, as the Fifth Circuit explained, "[t]here is no public policy favoring arbitration agreements that is as powerful as that public interest in freeing officials from the fear of unwarranted litigation." *Id.* at 910. Accordingly, the Ninth Circuit did not err in failing to impose an automatic stay pending appeal.

IV. The equities favor Respondent.

In close cases, in addition to considering whether irreparable harm is likely to occur absent a stay, whether certiorari is likely to be granted, and whether there is a fair prospect that the Court will reverse the judgment below, the Court will also "balance the equities and weigh the relative harms to the applicant and to the

respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). This is not a close case, but even if it were, the balance of equities weighs against granting a stay.

First, as explained in Part I, denying Coinbase's requested stay will not irreparably harm it. Even if Coinbase is required to participate in discovery before this Court considers Coinbase's petition, that discovery obligation will place *de minimis* burden on it. And even that marginal burden is speculative, given Mr. Bielski's agreement to move forward with discovery only with respect to the individual claims while the appeal is pending. Moreover, even if Coinbase prevails before the Ninth Circuit, any discovery that occurs while the petition for certiorari is pending will not be wasted, as Mr. Bielski is entitled to discovery in arbitration proceedings as well and there is no reason to duplicate efforts.

By contrast, granting a stay here will further delay Mr. Bielski's ability to investigate Coinbase's refusal to take reasonable steps to remedy the $30,000 fraudulent transaction that occurred on its platform. Critical information and records may be lost, and witness memories may fade. Mr. Bielski has a strong interest in expeditiously investigating and pursuing his claims.

Finally, the public interest does not favor a stay. The right to arbitrate exists only where a *valid* arbitration agreement exists. There is no policy of giving litigants special treatment when a federal court has found their arbitration agreement invalid. *See Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022) ("[A] court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation."). And there is nothing

unique or exceptional about this case that should prevent the litigation from proceeding.

CONCLUSION

Coinbase will suffer no irreparable harm in the absence of a stay. This Court is unlikely to grant certiorari review, and even if it does, Coinbase is unlikely to succeed on the merits. And the public interest weights against granting a stay because the prejudice to Mr. Bielski's ability to vindicate his rights is far greater than any inconvenience Coinbase might face if litigation proceeds in the district court. For all these reasons, the Court should deny the application for a stay.

Respectfully submitted,

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