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

BRIEF IN OPPOSITION OF RESPONDENT ABRAHAM BIELSKI

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QUESTION PRESENTED

During the pendency of an appeal, the district court retains control over aspects of the case not involved in the appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam). When a party files an interlocutory appeal of the denial of its motion to compel arbitration, does the district court retain discretion to conduct proceedings unrelated to the arbitrability questions presented to the appellate court, or must it automatically stay all proceedings—involving all aspects of the case—until that interlocutory appeal is resolved?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES – Continued

Page(s)

TABLE OF AUTHORITIES – Continued

Page(s)

TABLE OF AUTHORITIES – Continued

Page(s)

STATUTES

JUDICIAL RULES

TABLE OF AUTHORITIES – Continued

Page(s)

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

This Court recently held that "a court may not devise novel rules to favor arbitration over litigation." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022). Coinbase now seeks exactly that, arguing that because the Federal Arbitration Act ("FAA") creates the right to an interlocutory appeal of an order finding a dispute not to be arbitrable, Coinbase should be entitled to an automatic stay of all district court proceedings while that interlocutory appeal on arbitrability is resolved. But the FAA does not provide for such an automatic stay. As a result, all circuits to have considered the issue apply the general rule that an appeal "divests the district court of its control over those aspects of the case involved in the appeal," *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982), but not over issues not involved in the appeal. Courts have disagreed over the particular application of that properly stated rule to the narrow context of interlocutory appeals of orders denying motions to compel arbitration. In seeking review of the Ninth Circuit's holding that issues of arbitrability are severable from issues on the merits, and that therefore district court proceedings are not automatically stayed during the appeal of an arbitrability ruling, Coinbase is seeking error correction of the lower court's application of a well-settled standard. In so doing, Coinbase overstates both the legal and practical significance of the disagreement between the circuits about the application of *Griggs* to this narrow context.

First, not every disagreement among the circuits necessitates resolution by this Court. The question is therefore not whether there is some sort of identifiable difference between the circuits, but rather whether the

nature of the variance warrants Supreme Court involvement. Here, the courts agree on the underlying standard for determining whether district court proceedings should be automatically stayed while an interlocutory appeal is pending—every circuit applies the standard set out in *Griggs*. And Coinbase does not point to widespread inconsistency in the courts' application of the *Griggs* standard. Instead, Coinbase challenges the Ninth Circuit's 32-year-old application of the *Griggs* standard to a narrow procedural circumstance. More is required to justify this Court's intervention.

Second, there is little distinction in practice between circuits that have determined that an automatic stay is not required—that is, the Second, Fifth, and Ninth Circuits—and those that follow Coinbase's preferred approach. Even in circuits that do not automatically stay district court proceedings, courts frequently grant discretionary stays pending resolution of interlocutory appeals of denials of motions to compel arbitration. Such discretionary stays are particularly likely in cases that pose "substantial questions" regarding the district court's finding that a dispute is not arbitrable. As a result, the cases where the appellate court is most likely to find a dispute to be arbitrable are also the cases most likely to be stayed during the appeal.

Finally, the Ninth Circuit is correct on the merits. The issues considered by courts on appeal—for example, the enforceability of the underlying arbitration provision or the application of the arbitration provision to the dispute—are distinct from the merits of the underlying dispute. There is no risk here of inconsistent judgments from the simultaneous exercise of jurisdiction. At most, a reversal by the appellate court would move the dispute to a different forum. It would not alter the

underlying application of the law to the dispute. Accordingly, under *Griggs*, the issues retained by the district court are not those "involved in the appeal." And circuit courts have found that the district court retains jurisdiction in cases where the issues on appeal and before the district court have much more overlap than they do in this case.

STATEMENT OF THE CASE

1. 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. Pet.App.4a. 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. *Id*. Coinbase did not respond to his repeated communications until after he filed the lawsuit, and even then, the only responses Mr. Bielski received to his grievances were automated. *Id*. Coinbase never took 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 to the arbitrator, including whether a particular dispute between Coinbase and a user is arbitrable. *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. Pet.App.3a. The district court's comprehensive opinion carefully examined the provisions of Coinbase's user agreement, faithfully

applying state unconscionability law. *See id.* at 6a-16a. 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 (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 16a-18a.

On April 18, 2022, Coinbase filed a notice of appeal to 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 proceedings 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, arguing that the Ninth Circuit's prior decision that an interlocutory appeal of a denial of a motion to compel arbitration does not automatically stay the district court proceedings, *Britton*

v. Co-op Banking Grp., 916 F.2d 1405 (9th Cir. 1990), was erroneously decided, and suggesting that the Ninth Circuit reconsider that decision *en banc*. *Bielski* C.A. Dkt. 10, at 1-2. Coinbase also argued that a stay was warranted under the traditional stay factors. *Id.* at 9-21. The Ninth Circuit denied Coinbase's motion to stay. Pet.App.1a.

On July 21, 2022, Coinbase elected to forego filing a motion to dismiss, and chose instead to file an answer to the operative complaint. *Bielski* D. Ct. Dkt. 63.

2. In *Suski*, plaintiffs David Suski, Jaimee Martin, Jonas Calsbeek and Thomas Maher allege that Coinbase operated an illegal cryptocurrency lottery by falsely representing to customers that they needed to purchase $100 worth of cryptocurrency to be entered into a "sweepstakes" to win more. Pet.App.20a. These plaintiffs alleged that Coinbase's sweepstakes, as well as its solicitations with respect to those sweepstakes, violated California consumer protection laws. *Id.* at 27a. Coinbase moved to compel arbitration, asserting that its user agreement required arbitration of the dispute. After briefing and oral argument, the court found that the user agreement was not the controlling contract for disputes over the "sweepstakes." *Id.* at 31a-33a. Instead, the district court determined Coinbase and Suski had entered into a second, superseding contract governing that contest. *Id.* Not only did that contract contain no arbitration provision, it also specifically provided that "THE CALIFORNIA COURTS (STATE AND FEDERAL) SHALL HAVE SOLE JURISDICTION OF ANY CONTROVERSIES REGARDING THE PROMOTION AND THE LAWS OF THE STATE OF CALIFORNIA SHALL GOVERN THE PROMOTION." Pet.App.25a-26a.

On February 9, 2022, Coinbase filed a notice of appeal, contesting the district court's denial of its motion to compel arbitration, *Suski* D. Ct. Dkt. 58, and moved to stay the district court proceeding pending appeal, *Suski* D. Ct. Dkt. 59. The district court denied the motion to stay. Pet.App.45a. Coinbase then filed a motion in the Ninth Circuit, renewing its request that the district court proceedings be stayed pending appeal and arguing that should the court decline to issue a discretionary stay pending appeal, it should *sua sponte* call for *en banc* reconsideration of *Britton*. *Suski* C.A. Dkt. 16. The Ninth Circuit denied the motion. Pet.App.2a.

On May 10, 2022, the *Suski* plaintiffs filed a third amended complaint, *Suski* D. Ct. Dkt. 83, and on June 9, 2022, Coinbase again moved to compel arbitration, *Suski* D. Ct. Dkt. 88. It also argued, in the alternative, that the district court should dismiss the *Suski* plaintiffs' claims. *Suski* D. Ct. Dkt. 88, at 15-20. The district court partially granted and partially denied the motion to dismiss and denied the motion to compel on August 31, 2022 after finding it lacked jurisdiction over the issue of arbitration, because Coinbase's February 9, 2022 appeal of its previous denial stripped it of jurisdiction "over the issue of arbitration" while the appeal was pending. *Suski* D. Ct. Dkt. 113, at 5.

3. On July 29, 2022, Coinbase filed a joint petition for writ of certiorari in this Court, seeking review of the Ninth Circuit's precedent that an interlocutory appeal of a denial of a motion to compel arbitration does not categorically deny the district court of jurisdiction over the whole case. Along with its joint petition for certiorari, Coinbase filed a motion asking this Court to stay the district court proceedings pending resolution of its joint petition, as well as a motion to expedite

consideration of its joint petition. The Court denied both motions.

REASONS FOR DENYING THE WRIT

In arguing for certiorari, Coinbase overstates both the legal and practical variation between the circuits. This is not a case where the circuits disagree on the governing standard for determining when an appeal of an interlocutory order automatically stays proceedings in the district court. Each circuit agrees that the operative question is whether the issues remaining before the district court are "involved in the appeal" or whether they are severable. The circuits vary only with respect to their application of this standard to the narrow context of interlocutory appeals of denials of motions to compel arbitration.

Nor has the Ninth Circuit's 32-year-old decision in *Britton* had great practical effect. Even in circuits where district court proceedings are not automatically stayed, courts frequently grant discretionary stays pending appeal, especially where there is greater risk of reversal. Moreover, at the end of the day, what Coinbase ultimately seeks is a pause to all discovery during the appellate court's review of a denial to compel arbitration —discovery that would likely be had in arbitration even if the denial of the motion to compel arbitration was reversed. This is hardly the kind of "harm" that would justify this Court's intervention.

Finally, the Ninth Circuit's decision was correct on the merits.

I. Coinbase argues only about an alleged misapplication of a properly stated rule.

Coinbase's petition fixates on the existence of what Coinbase calls a "split" among the circuits on the issue presented. But formulaic labels alone—like "circuit split"—do not dictate whether a case is suitable for certiorari review. The more important question concerns the nature of the question presented. Where, as here, the question presented concerns application of a well-established standard to one set of procedural facts with no larger impact on the law, this Court has made clear that certiorari review is rarely, if ever, appropriate. *See* Sup. Ct. R. 10 (certiorari review is rarely appropriate where the claimed error involves "misapplication of a properly stated rule of law"). Moreover, Coinbase cannot show that application of the *Griggs* standard is so inconsistent among the circuits or in such disarray that Supreme Court involvement is warranted. These reasons further counsel against certiorari review.

Here, there is no "split" among the circuits regarding what legal standard should apply—all apply *Griggs*. Rather, Coinbase challenges the Ninth Circuit's application of *Griggs* to a narrow, specific procedural circumstance—an application that will not have any broader impact on the application of *Griggs* in other contexts. In both *Bielski* and *Suski*, Coinbase seeks to challenge the Ninth Circuit's 32-year-old holding that a party who loses a motion to compel arbitration is not entitled to an automatic stay of all proceedings pending its appeal of the ruling. *See Britton*, 916 F.2d at 1412. That holding is a specific application of this Court's precedent in *Griggs*, which holds that when an appeal is pending, the district court may not proceed with "those aspects of the case involved in the appeal." 459

U.S. at 58; *see Britton*, 916 F.2d at 1411 (discussing *Griggs*). The Ninth Circuit held that "[s]ince the issue of arbitrability was the only substantive issue presented in this appeal," the district court could "proceed with the case on the merits." *Britton*, 916 F.2d at 1412.

Every circuit presented with an opportunity to address the issue has applied *Griggs*. Quoting and citing *Griggs*, the Second Circuit 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." *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 53 (2d Cir. 2004) (cleaned up) (quoting *Griggs*). On that question, it concluded that "further district court proceedings in a case are not 'involved in' the appeal of an order refusing arbitration." *Id.* at 54 (quoting *Griggs*).

When finally presented with similar facts 21 years after *Britton*, 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 Inv'rs 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 Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21 (1983)).

Every other circuit court that has addressed the issue applied the same standard, considering whether arbitrability is a separate "aspect" of the case from the merits. *See Levin v. Alms & Assocs., Inc.*, 634 F.3d 260, 263-66 (4th Cir. 2011); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 214-15 (3d Cir. 2007); *McCauley*

v. Halliburton Energy Servs., Inc., 413 F.3d 1158, 1160-62 (10th Cir. 2005); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1251-53 (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).

The fact that the Second, Fifth, and Ninth Circuits (correctly) applied the rule in a narrower fashion than some other appeals courts does not create a certiorari-worthy conflict among the circuits. The circuit courts' decisions are limited to the isolated procedural context of the denial of a motion to compel arbitration. They do not evince a drift away from the *Griggs* standard or reasoning that would create inconsistent applications of that standard in any larger context. Coinbase declares the Ninth Circuit got it "wrong" on *Griggs*, Pet.3, 18, but even where the Court disagrees with a lower court's application of a previously announced standard, "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 (2020) (Sotomayor, J., dissenting from the grant of a stay) (cleaned up) (quoting Stephen M. Shapiro et al., SUPREME COURT PRACTICE § 5.12(c)(3), p. 5-45 (11th ed. 2019)).

More is required to justify this Court's intervention. For example, this Court has granted certiorari to steer the law in the right direction where a series of decisions among lower courts had eroded the governing standard and upended fundamental rights and duties (such as a plaintiff's right to present their case to the jury and the jury's consequent fact-finding function). *See Wilkerson*

v. McCarthy, 336 U.S. 53, 69 (1949) (Douglas, J., concurring) (lower courts strayed from statutory negligence standard so badly that the standard and the jury's fact-finding function was being steadily eroded). This Court has also granted certiorari to clear up "conflict, confusion and uncertainty" on issues of widespread application even after the Court previously attempted to clarify the legal standard without success. *See Owens v. Okure*, 488 U.S. 235, 240-41 (1989) (internal quotations omitted) (Court granted certiorari in light of enduring confusion over "the appropriate limitations period for § 1983 claims" and "the wide array of claims now embraced by that provision," even after addressing the issue once before).

Here, by contrast, there is no widespread "confusion" over how *Griggs* is to be applied, no pattern of lower court decisions that threaten the standard articulated in *Griggs*, and no drift in the law that threatens important rights or functions. For example, no decision by any of the circuit courts cited in Coinbase's petition threaten or weaken the right to immediately challenge a district court's arbitrability ruling without waiting for a final judgment on the merits, or even the ability to seek a stay of the case pending appellate review if the litigant faces irreparable harm. At worst, a party appealing the denial of a motion to compel arbitration and who wishes to stay district court proceedings will be required to satisfy the standard articulated in *Nken v. Holder*, 556 U.S. 419 (2009).[1] That standard applies to virtually any person seeking a stay pending appeal in

[1] To obtain a stay under *Nken*, the movant must show (1) a likelihood of success on the merits, (2) irreparable harm in the absence of a stay, (3) the balance of equities favors a stay, and (4) a stay would further the public interest. *Id.* at 434.

any federal court. The *Nken* standard is manageable, workable, and widely developed in federal courts across the country, and there is nothing that alters that calculus when the standard is applied to a party seeking to compel arbitration.

This Court has denied certiorari in cases presenting questions like this many times over the years. *See, e.g.*, *Day & Zimmermann NPS, Inc. v. Waters*, 142 S. Ct. 2777 (2022) (denying petition for certiorari seeking review of diverging applications of this Court's jurisdictional rule in *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773 (2017)); *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); *Sai v. Transp. Sec. Admin.*, 137 S. Ct. 2234 (2017) (denying certiorari petition asking court to resolve circuit split with respect to whether the collateral order doctrine permits interlocutory appeal of orders denying the appointment of counsel in civil rights litigation); *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); *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 Constr. Co. v. U.S. Dist. Ct.*, 571 U.S. 49 (2013), should be applied in one specific context); *Schoppe v. Comm'r*, 571 U.S. 939 (2013) (denying review of certiorari petition in case involving

circuit split over the application of automatic stay provision of 11 U.S.C. § 362(a) to appeals from the United States Tax Court). It should likewise deny Coinbase's petition here.

II. The question presented is not worthy of certiorari because its practical effects are minimal.

Coinbase's petition should also be denied because the question presented on which it asks this Court to intervene has minimal real-world effects, making it unworthy of review. *See Nurre v. Whitehead*, 559 U.S. 1025 (2010) (Alito, J., dissenting from denial of certiorari) (a case's "important practical implications" contribute to certiorari worthiness). First, the issue affects an extraordinarily small subset of litigants. Only those who are (1) defendants, (2) in cases within the Second, Fifth, or Ninth Circuits, (3) who moved to compel arbitration, (4) were denied, (5) appealed that denial under 9 U.S.C. § 16(a), (6) actually moved for a stay of district court proceedings pending appeal, and (7) were again denied (because they could not show they would succeed on the merits or would be irreparably harmed) are affected. Very few parties satisfy all seven criteria. Second, the handful of defendants within that subset are not meaningfully injured. In essence, the "harm" that these parties face is participation in discovery. In Coinbase's case, the harm is the mere *potential* of participating in discovery. But participation in discovery is not a "harm," even if Coinbase may spend money to issue and respond to discovery requests. These effects are not compelling or important, and their insignificance makes the issue unworthy of this Court's review.

First, only the small group of parties that meet all seven criteria is affected by this issue at all. Litigants

in the Second, Fifth, and Ninth Circuits who receive a discretionary stay are treated the same as all those in automatic-stay circuits.[2] So, the only group affected by the issue are those who do not meet the criteria for a discretionary stay, *i.e.*, those who are not likely to succeed on the merits or are not irreparably harmed, or do not bother to seek a stay at all. The small number of affected parties is likely a reason why the Ninth Circuit's decision in *Britton*—and the smattering of related circuit court decisions in the 32 years since—has not created an unworkable web of clashing rules, as Coinbase argues. On the contrary, district courts in the Ninth Circuit have ably managed litigation proceedings during the pendency of these interlocutory appeals since *Britton* was issued in 1990, as have those in the Second Circuit since *Motorola Credit Corp.* in 2004, and in the Fifth Circuit since *Weingarten* in 2011. And, if the factual circumstances later change to warrant a stay, district courts retain the discretion to issue one.

Further, the "harm" to this small group of affected parties is *de minimis* (if it exists at all). By the very nature of the relevant factors, the parties denied a discretionary stay are those who are least deserving of one —often because they are unable to demonstrate a likelihood of success on the merits and because they will not suffer irreparable harm. For example, there is no realistic chance that Coinbase will be taken to trial

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[2] District courts within these circuits often grant motions for discretionary stays in this context. *See, e.g.*, *Hansen v. Rock Holdings, Inc.*, No. 2:19-cv-00179, 2020 WL 3867652 at *3–4 (E.D. Cal. July 9, 2020); *Gingras v. Rosette*, No. 5:15-cv-101, 2016 WL 4442792, at *6–7 (D. Vt. Aug. 22, 2016); *Vine v. PLS Fin. Servs., Inc.*, 226 F. Supp. 3d 708, 718–19 (W.D. Tex. 2016).

while its appeals are pending (or even to summary judgment briefing), and the same is often true for other parties who fail the *Nken* discretionary stay test. *See, e.g.*, *Mohamed v. Uber Techs., Inc.*, 115 F. Supp. 3d 1024, 1033-35 (N.D. Cal. 2015) (partially denying motion to stay, with respect to discovery, when case was "far from trial"); *compare id. with Henry Schein, Inc. v. Archer & White Sales, Inc.*, Supreme Court No. 17A859 (Mar. 2, 2018) (granting application for stay three months before trial date).

The parties that are denied stays—like Coinbase—essentially seek a broad rule pausing discovery for the months that their interlocutory appeals are pending. But the cases in which discretionary stays are denied are often so premature that discovery has not even begun. Here, in *Bielski*, the parties have not exchanged initial discovery disclosures, and the district court has not entered a case management schedule. *See* Fed. R. Civ. P. 26(a)(1), (f)(3). When discovery commences in the future, Bielski has agreed to seek only individual (not class) discovery during the pendency of Coinbase's appeal of its motion to compel arbitration. *Bielski* D. Ct. Dkt. 50 at 2-3. In *Suski*, the district court only recently partially granted and partially denied Coinbase's motion to dismiss on August 31, 2022.

Even when discovery eventually commences, parties in Coinbase's position suffer minimal harms (if any) through participation in discovery. In the discretionary stay context, 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 Cal.*, 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).[3] Participating in discovery, especially when some of that discovery will be useful whether or not the case ends up in arbitration, is not a "harm" sufficient to justify the Court's intervention. Because the practical effect of the issue is *de minimis*, the Court should deny the petition.

III. The Ninth Circuit's decision is correct.

Having failed to persuade the district court and the Ninth Circuit to issue a discretionary stay pending appeal, Coinbase asks 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 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) (internal quotation marks omitted), only ensures that courts enforce arbitration agreements in the same manner as other contracts, *Morgan*, 142 S. Ct. at 1713. It does not, however, "authorize federal courts to invent special, arbitration-preferring procedural rules." *Id.* Accordingly, the general rule that an

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[3] This principle has been specifically recognized in the discovery context, too. 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).

interlocutory appeal divests the district court of jurisdiction only "over those aspects of the case involved in the appeal," *Griggs*, 459 U.S. at 58, and that 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), applies equally to cases involving arbitration.

"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*, 661 F.3d at 909. As this Court explained in *Moses H. Cone*, considerations of arbitrability are "easily severable" from the underlying merits of a dispute. 460 U.S. at 21. 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 concurrent analysis of "the same legal question" or inconsistent judgments. *Weingarten*, 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 and any of the individual discovery completed while the Ninth Circuit considers Coinbase's interlocutory appeal is equally relevant to the arbitration.

Although there is some small potential for litigation inefficiencies, 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"); *Janousek v. Doyle*, 313 F.2d 916, 920 (8th Cir. 1963) (interlocutory appeal of ruling on preliminary injunction did not divest district court of jurisdiction to proceed on the merits); *Zundel v. Holder*, 687 F.3d 271, 282 (6th Cir. 2012) (same); *Contour Design, Inc. v. Chance Mold Steel Co.*, 649 F.3d 31, 34 (1st Cir. 2011) (same); *Ry. Labor Execs.' Ass'n v. City of Galveston*, 898 F.2d 481, 481 (5th Cir. 1990) (same); *United States v. Price*, 688 F.2d 204, 215 (3d Cir. 1982) (same); *see also Soc'y for Animal Rights, Inc. v. Schlesinger*, 512 F.2d 915, 918 (D.C. Cir. 1975) ("We assume that the case will proceed forward expeditiously in the district court despite the pendency of the § 1292(a) appeal in this court.").

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*, 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. On the other hand, an automatic stay means that, even where a district court thinks an appeal is unlikely to succeed and that denying a stay would not irreparably harm the defendant, the defendant can still delay,

Coinbase argues that the FAA itself militates towards finding that an automatic stay is required because Congress "would not have granted parties the right to an immediate interlocutory appeal of refusals to compel arbitration if Congress had contemplated that litigation could proceed while the appeal was pending." Pet.18. But nothing in the text of the FAA or its legislative history suggests that Congress intended this result. As with preliminary injunctions and other rulings a party may appeal before final judgment, that Congress allowed litigants to pursue an interlocutory appeal says nothing about whether that appeal strips the district court of jurisdiction. Moreover, given that Congress chose to specifically address interlocutory appeals in the FAA, if Congress had wanted to change the default rule regarding such appeals, it likely would have said so.

Nor does the fact that 9 U.S.C. § 16 provide a mandatory right to appeal, rather than a discretionary right to appeal, alter the analysis. For example, litigants also have a mandatory right to appeal grants or denials of injunctions, *see* 28 U.S.C. § 1292(a), but district courts routinely retain jurisdiction during the pendency of interlocutory appeals of rulings on preliminary injunctions. *See, e.g.*, *Janousek*, 313 F.2d at 920. Regardless of whether the appeal is permissive or as of right, the question is whether the issue on appeal is severable from the merits. If it is, then the district court retains jurisdiction.

Finally, even if the Court agrees that there is a practical benefit to imposing an automatic stay in this context, it should implement such a change in procedure through rulemaking pursuant to the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, not by granting certiorari in this matter. As this Court has noted, "the rulemaking process has important virtues. It draws on the collective experience of bench and bar, and it facilitates the adoption of measured, practical solutions." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 114 (2009) (citation omitted); *see also Adler v. Elk Glenn, LLC*, 758 F.3d 737, 741 (6th Cir. 2014) (Sutton, J., concurring) ("[R]ulemaking [is] a more reliable vehicle than appellate decisionmaking for assessing the pros and cons."). Until the rulemakers act, district courts should retain discretion to issue or deny a stay pending an interlocutory appeal.

CONCLUSION

As there are no compelling reasons for this Court's review, Coinbase's petition for a writ of certiorari should be denied.

Respectfully submitted,

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