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 FOR RESPONDENT ABRAHAM BIELSKI

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QUESTION PRESENTED

Does an interlocutory appeal of a denial of a motion to compel arbitration under Section 16(a) of the Federal Arbitration Act require an automatic stay of all district court proceedings pending appeal?

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INTRODUCTION

When Congress drafts a statute, it knows what it is doing. The Federal Arbitration Act (FAA) permits an interlocutory appeal of an order denying a motion to compel arbitration, but it does not require an automatic stay of district court proceedings when a party files such an appeal. 9 U.S.C. § 16(a)(1)(A). The reason for this is as simple as it seems: Congress excluded an automatic-stay requirement in Section 16 because it chose not to impose such a rule.

Basic tenets of statutory interpretation compel this conclusion. First, if the Legislature wanted to impose an automatic stay for Section 16(a) appeals, it would have done so. Second, when "Congress includes particular language in one section" but "omits it in another section of the same Act," courts presume that it "acts intentionally and purposely in the disparate inclusion or exclusion." *Nken v. Holder*, 556 U.S. 418, 430 (2009) (cleaned up). Here, Congress omitted mandatory-stay language in Section 16 of the FAA, but it expressly required stays in Section 3 of the FAA. Further, when Congress created Section 16 in the Judicial Improvements and Access to Justice Act (JIAJA), it included a mandatory-stay provision in another interlocutory appeal provision *in the same Act*. In this context, Congress's silence regarding stays in Section 16 is deafening.

Background principles of federal law confirm that unless Congress says otherwise, stays pending appeal are discretionary. Since the birth of the Republic, Congress and the courts have understood that the power to stay (or not stay) is committed to the equitable discretion of the courts. Generations of federal law and jurisprudence confirm that the

determination of whether to stay a case is an individualized decision left to the courts unless a statute states otherwise, there is risk of the trial court and the appellate court ruling on the same aspects of a case at the same time, or an appeal involves a narrow class of constitutional immunity doctrines.

A handful of special exceptions in different contexts do not justify the creation of one-off procedural rules for interlocutory arbitrability appeals. First, the commonsense case-management principle this Court mentioned in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam), does not require district courts to halt proceedings on the merits pending a Section 16(a) appeal. This Court has already determined that the question of arbitrability is "easily severable from the merits of the underlying dispute[]." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21 (1983). Put differently, arbitrability is an aspect of the case separate from the merits. Thus, while a Section 16(a) appeal is advancing through the circuit court, there is no risk that the district court and the appeals court will decide the same issue at the same time.

Second, unlike appeals involving weighty constitutional immunity concerns—such as sovereign immunity, qualified immunity, and double jeopardy—Section 16 appeals do not demand stays to prevent "the indignity" of being subjected to "the coercive process of judicial tribunals . . . regardless of the forum." *Alden v. Maine*, 527 U.S. 706, 709 (1999). In constitutional immunity appeals, the issue concerns the appellant's "immunity *from suit*." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original). But an arbitration agreement is not a form

of immunity; it is "a specialized kind of forum-selection clause." *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1919 (2022) (internal quotation marks omitted). Contractual forum-selection clauses "obviously" do not confer the constitutional right "to avoid suit altogether." *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 501 (1989).

Therefore, there is no basis—in the FAA, in background principles, or in this Court's precedents—to require freezing all district court proceedings when a Section 16(a) appeal is pending. Instead, district courts retain the discretion to decide whether to stay their cases. That is for the better: the traditional, four-factor discretionary stay test is reliable, fair, and appropriate for Section 16(a) appeals.

STATEMENT OF THE CASE

Coinbase operates a large online currency and cryptocurrency exchange platform. J.A. 130-31. Respondent Abraham Bielski alleges that shortly after creating a Coinbase account in 2021, a scammer fraudulently accessed his account and stole more than $30,000 from him. *Id.* at 5. Bielski immediately sought help from Coinbase, but Coinbase offered none. *Id.* Nearly one and a half years later, Bielski has neither recovered his currency nor been assisted by Coinbase. *Id.*

Bielski alleges that Coinbase's refusal to remedy this fraud on the Coinbase platform violated the Electronic Funds Transfer Act (EFTA), 15 U.S.C. §§ 1693 *et seq.*, and "Regulation E" of its implementing regulations, 12 C.F.R. §§ 1005.1-20, as well as various state laws. J.A. 6-16, 154-176. Because he alleges that Coinbase's violations are routine, he also sued on behalf of all similarly situated victims.

Coinbase moved to compel Bielski's claims to arbitration based on the arbitration agreement in its User Agreement. The District Court denied Coinbase's motion. Pet.App.3a-18a. Applying California contract law, it found that the delegation clause and arbitration agreement in that contract were non-mutual and imposed onerous preconditions on arbitration, making each procedurally and substantively unconscionable. *Id.* at 6a-18a.

Coinbase appealed, under Section 16(a), the denial of its motion to compel arbitration to the Ninth Circuit. It also moved in the District Court for a stay of further proceedings pending that appeal. J.A. 178. After applying the four-factor traditional test for discretionary stays from *Nken*, 556 U.S. at 426, the District Court denied Coinbase's motion, in part because discovery would be usable in arbitration, and a stay would significantly prejudice Bielski's and the public's interest in a "just, speedy, and inexpensive" determination. Pet.App.43a-44a (internal quotation marks omitted). Coinbase moved in the Ninth Circuit for a stay. The Ninth Circuit denied the motion. *Id.* at 1a. Coinbase then filed its petition for a writ of certiorari in this Court, and it applied to Justice Kagan for a stay of district court proceedings on the same day, which the full Court denied. The Ninth Circuit heard oral argument on February 14, 2023 but withheld submission pending resolution of these proceedings.

In *Suski*, plaintiffs allege that Coinbase operated an illegal cryptocurrency lottery in violation of California consumer protection laws. *Id.* at 20a-27a. Coinbase moved to compel arbitration. The District Court denied Coinbase's motion, finding that the contract

governing the parties' dispute did not contain an arbitration clause. *Id.* at 31a-33a. Instead, the governing contract specifically provided that "sole jurisdiction" over "any controversies" would lie in "California courts (state and federal)." *Id.* at 25a-26a (capitalization amended).

Coinbase appealed under Section 16(a) and moved in the District Court for a stay pending that appeal. The District Court denied Coinbase's motion. *Id.* at 45a. Coinbase then moved for a stay in the Ninth Circuit, which likewise denied that motion. *Id.* at 2a. Coinbase applied to Justice Kagan for a stay of *Suski* district court proceedings simultaneously with its application for a stay in *Bielski*, which the full Court denied alongside the *Bielski* application.

This Court granted certiorari in *Bielski* and *Suski*. One week later, the Ninth Circuit affirmed the *Suski* district court's denial of Coinbase's motion to compel arbitration. Coinbase then sought rehearing *en banc*. That petition remains pending as of the submission of this brief.

SUMMARY OF ARGUMENT

I. There is no basis in the law for imposing an automatic stay of all district court proceedings when a party files a Section 16(a) appeal. None of the four historical sources understood to give rise to automatic stays in other contexts—statute, general background rules, the case-management principle discussed in *Griggs*, and special rules for a narrow class of fundamental immunity rights—provide justification for an automatic stay for Section 16(a) appeals.

A. By its plain terms, the FAA does not provide for automatic stays during the pendency of a Section 16(a) appeal. Congress added Section 16 to the existing FAA

in 1988. Another preexisting section of the FAA, Section 3, provided that a district court must "stay the trial of the action" after referring the dispute to arbitration and a party applies for a stay. 9 U.S.C. § 3. Because Congress "legislates against the backdrop of existing law," this stark contrast between the text of two interrelated FAA sections (one that contains mandatory stay language and one that does not) provides clear evidence of Congress's intent. *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) (internal quotation marks omitted).

Additionally, *in the same Act* that created Section 16, Congress also amended 28 U.S.C. § 1292(d)(4)(B), another provision providing for interlocutory appeals, and in that section included express language providing for automatic stays of district court proceedings. "Where 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." *Nken*, 556 U.S. at 430 (cleaned up).

Section 16's legislative history confirms that it requires no automatic stay of district court proceedings. Section 16 was created to address a circuit split over the *appealability* of orders on motions to compel arbitration. No member of Congress said anything about the Section affecting *stays* pending those appeals. It was intended only to be a section about appeals, not stays.

B. Centuries of federal law demonstrate that district courts retain the discretion over whether to stay proceedings—including during the pendency of interlocutory appeals. Congress established this

understanding in its earliest interlocutory appeal statutes, and decades of subsequent federal court jurisprudence confirm and illuminate this understanding.

Congress legislated against this background in 1988. Its decision to not include an automatic-stay provision for Section 16 appeals made clear that this background presumption of district court discretion over whether to stay an action pending interlocutory appeals applies.

C. Arbitration clauses are "a specialized kind of forum-selection clause." *Viking River*, 142 S. Ct. at 1919 (internal quotation marks omitted). As such, arbitrability is an aspect of the case separate from the merits. Arbitration clauses confer no substantive rights on their contractual parties, but instead provide procedural rights as to the forum in which substantive disputes will be heard. Thus, when a district court denies a motion to compel arbitration and the movant files a Section 16(a) appeal, the only question for the court of appeals is where the dispute should be "processed." *Id.*

Because arbitrability "is easily severable from the merits," *Moses H. Cone*, 460 U.S. at 20-21, the long-understood case-management principle discussed in *Griggs* does not require a district court to abstain from merits proceedings while a Section 16(a) appeal is pending.

D. The contractual right to arbitrate is nothing like a core constitutional right to be immune from being sued or prosecuted, such as sovereign immunity, qualified immunity, and double jeopardy immunity. These protections guard against "the indignity" of being subjected to "the coercive process of judicial

tribunals . . . regardless of the forum." *Alden*, 527 U.S. at 709. Arbitration clauses establish the forum in which claims will be processed. These rights are not forever lost when the lower court proceeds during the pendency of a Section 16(a) appeal, and they are treated differently than deeply rooted constitutional immunity rights. The Court should therefore reject Coinbase's invitation to "invent special, arbitration-preferring procedural rules." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022) (internal quotation marks omitted).

II. Because no automatic stay applies upon the filing of a Section 16(a) appeal, district courts retain discretion to stay or not stay merits proceedings pending those appeals. Accordingly, the traditional four-factor test applies. *Nken*, 556 U.S. at 434. That test is well-understood, fair, and allows district courts to make fact-based decisions tailored to the individual circumstances of each case. Each factor reflects important considerations in Section 16(a) appeals and gives the district court opportunities to balance the interests and harms of all litigants while considering those factors in the context of the appellant's likelihood of success.

ARGUMENT

I. There is no legal basis for imposing an automatic stay on the whole case when a party files a Section 16(a) appeal.

Coinbase seeks an automatic stay of all district court proceedings pending disposition of a Section 16(a) appeal. But if such a requirement exists, it must come from some basis in the law. Historically, four sources have been understood to give rise to automatic stays in other contexts: statutory law, general background

rules, the case-management principle discussed in *Griggs*, and special rules for a narrow class of fundamental immunity rights. None of those four sources provide justification for an automatic stay for Section 16(a) appeals.

A. The FAA's text, structure, and history confirm that Congress did not create an automatic stay for Section 16(a) appeals.

Section 16 of the FAA does not impose an automatic stay. The statute's text, structure, and history all rebut the inclusion—express or implied—of such a stay.

As in all statutory interpretation cases, the Court must "begin [its] search for Congress's intent" in the FAA by analyzing the statute's "text and structure." *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2497 (2022) (cleaned up). Here, the Court presumes that Congress "says what it means and means what it says." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (cleaned up). Statutory text controls over any judicial "speculation as to Congress' intent," *Magwood v. Patterson*, 561 U.S. 320, 334 (2010), because the "search for significance" in Congress's silence is "often the pursuit of a mirage," *Scripps-Howard Radio v. Fed. Commc'ns Comm'n*, 316 U.S. 4, 11 (1942).

Section 16 makes for quick work textually. It lists seven specific instances in which appeals (most of them interlocutory) "may be taken," § 16(a), and it lists four specific instances in which interlocutory appeals "may not be taken," § 16(b). Relevant here, Section 16(a)(1)(B) allows a party to immediately appeal an order denying a motion to compel

arbitration. The text does not require a district court to stay its proceedings if a Section 16(a) appeal is taken.

The FAA's structure further confirms that no automatic stay happens upon filing of a Section 16(a) appeal. Fundamental rules of statutory interpretation require that when "Congress includes particular language in one section" but "omits it in another section of the same Act," courts presume that Congress "acts intentionally and purposely in the disparate inclusion or exclusion." *Nken*, 556 U.S. at 430 (internal quotation marks omitted). That principle decides the question because both another section of the FAA as well as another amendment to an interlocutory appeal statute in the same Act that created Section 16 include *explicit* automatic stay language.

Consider first the preexisting provisions of the FAA that Section 16 was engrafted upon. Before Section 16, Section 3 included an explicit provision for an automatic stay. That section provides that when a court finds an issue in a case "is referable to arbitration"—*i.e.*, when a district court grants a motion to compel arbitration—the court "shall on application of one of the parties stay the trial of the action" until arbitration is complete. 9 U.S.C. § 3. This stay is mandatory; Section 3 "requires courts to stay litigation of arbitral claims" once compelled. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

This Court has long read the FAA holistically, understanding that its sections talk to each other and form "integral parts of a whole." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019) (quoting *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201 (1956)).

When Congress added Section 16 in 1988, it wove the new section into the FAA's existing fabric. That Section provided appealability rules for Section 3 (among others), allowing appeals to be taken from orders "refusing a stay" under Section 3, § 16(a)(1)(A), but barring appeals from orders "granting a stay" under Section 3, § 16(b)(1).

When Congress wrote Section 16 and tied it to Section 3, it was aware of Section 3's explicit mandatory-stay provision. After all, Section 16 twice refers to Section 3 stays. § 16(a)(1)(A), (b)(1). The text and structure make plain Congress's awareness, and the canon that "Congress legislates against the backdrop of existing law" further confirms it. *Parker Drilling*, 139 S. Ct. at 1890 (internal quotation marks omitted). Congress knew that Section 3 contained a mandatory-stay provision when it wrote Section 16 without one.

Comparing the structure of Sections 3 and 16 highlights the implausibility of Coinbase's interpretation. Section 3's automatic stay applies if two conditions are satisfied: (1) the district court finds an issue is referable to arbitration, and (2) a party applies for a stay. 9 U.S.C. § 3. But Coinbase would have the Court determine that Section 16 impliedly adds a second set of mandatory-stay conditions: (1) the district court finds an issue is *not* referable to arbitration (by denying a motion to compel), and (2) a party appeals. Congress specifically provided for a stay after a district court determined arbitration *should* be had in Section 3. It did not impose a second avenue for automatic stays, shrouded in silence, meant also for when a court determined arbitration should *not* be had. In those instances, Congress

elected to make Section 16(a) appeals available immediately—not to stay the whole case. "Congress designed the [FAA] in a specific way," and it is not the "proper role" of the courts "to redesign the statute." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019).

Given the threads that link Sections 3 and 16, as well as the statutory text that separates them, the Court can confidently draw conclusions about Congress's intent. Two interconnected parts of the FAA work in tandem—in one, Congress requires automatic stays; in the other, it does not.

Now consider other provisions of the *same legislation* that enacted Section 16. The JIAJA created Section 16 and added it to the existing FAA. Pub. L. No. 100-702, 102 Stat. 4642 (1988). The JIAJA also amended other laws affecting the judiciary, like the amount in controversy requirement in diversity cases, *id.* tit. II, § 201, 102 Stat. at 4646, or where venue lies for defendant-corporations, *id.* tit. X, § 1013, 102 at 4669.

Most importantly here, the JIAJA amended 28 U.S.C. § 1292, the general interlocutory appeal statute. One amendment provided jurisdiction in the Federal Circuit over appeals of interlocutory orders granting or denying motions to transfer actions to the Court of Federal Claims. *Id.* tit. V, § 501, 102 Stat. at 4652 (codified at 28 U.S.C. § 1292(d)(4)). And that same amendment provided for automatic stays pending certain appeals:

> When a motion to transfer an action to the [Court of Federal Claims] is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon

> the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit.

28 U.S.C. § 1292(d)(4)(B) (created by the JIAJA).

So, when Congress passed the JIAJA, it chose to include explicit stay language in this interlocutory appeal provision, but at the same time, in the same Act, it chose not to include that language in the interlocutory appeal provision at Section 16(a). *Compare id.*, *with* Pub. L. No. 100-702, tit. X, § 1019, 102 Stat. at 4670-71 (Section 16).

This inclusion/omission dichotomy within "the same Act" compels a presumption that Congress acted "intentionally and purposely in the disparate inclusion or exclusion." *Nken*, 556 U.S. at 430 (internal quotation marks omitted). A statute's "failure to mention" certain procedures (such as automatic stays) "only reinforces that the statute doesn't speak to such procedures." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1625 (2018). The presence of an automatic-stay proviso in one part and the conspicuous absence of such a provision in another part of the same bill is far more probative than language in a different bill passed on a different day on a different subject matter. *See* Pet'r.Br.3, 17-18, 36, 37, 38.

This is not the first time the Court has confronted an argument attempting to graft implicit superpowers onto Section 16. In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), petitioner argued that the FAA was "special" because Section 16 allowed appellate courts "to conduct interlocutory review of

. . . orders enjoining arbitrations," but not "orders refusing to enjoin" them. *Id.* at 948-49. In petitioner's view, this scheme favoring arbitration meant Congress had impliedly imposed a "specially lenient" abuse of discretion standard of review for appellate courts analyzing orders in favor of arbitration awards. *Id.* at 941, 948. The Court examined Section 16 and found instead that it simply "governs the timing of review" and "says nothing about standards of review." *Id.* at 949. In light of statutory silence, the Court unanimously rejected petitioner's argument. *Id.*

Here, too, Congress has hidden no mandatory-stay elephants in the mouseholes of Section 16's silence. Instead, Section 16 "says nothing about" stays at all. *Id.* at 949. It is a provision that "governs the timing of review," and nothing more. *Id.* The Court should thus find the FAA "says what it means and means what it says," and nothing more. *Henson*, 137 S. Ct. at 1725 (cleaned up).

The legislative history of Section 16 confirms its plain meaning. Before Section 16, the courts of appeals treated orders relating to motions to compel arbitration differently. 133 Cong. Rec. 9656 (Extension of Remarks, Apr. 23, 1987) (Statement of Hon. Robert W. Kastenmeier). This led to a "patchwork set of rules" requiring Congress's action. *Id.* To address this circuit split, the American Bar Association (ABA) proposed the substance of what is now Section 16. Judicial Branch Improvements Act of 1987: Hearings on S. 1482 Before the Subcomm. on Cts. & Admin. Prac. of the Comm. on the Judiciary, U.S. Senate, 100th Cong. 85 (1988). The idea behind Section 16, according to the ABA President, was to end "confusion about whether or when a party may file an

interlocutory appeal concerning arbitration." Court Reform and Access to Justice Act: Hearings on H.R. 3152 Before the Subcomm. on Cts., C.L., & the Admin. of Justice of the Comm. on the Judiciary, House of Representatives, 100th Cong. 153 (1987-88).

The Chairman of the relevant House Judiciary Subcommittee confirmed this purpose, remarking that what became Section 16 was meant to provide "clear standards" as to which orders affecting arbitration can be "immediately appealed." 133 Cong. Rec. 9656 (Extension of Remarks, Apr. 23, 1987). Because the FAA "contained no provisions governing appeals," the Chairman said, the "primary purpose of the proposed legislation" was "to clarify and simplify the law relating to interlocutory appeals" on arbitrability. *Id.*

The Chairman said nothing about stays pending appeal under Section 16(a). Nor did the ABA President. Nor did *any* member of Congress. Section 16 was simply intended as an interlocutory appeal provision. That is what it was meant to address, and that is what it says. It "permits an appeal" where the court denies a motion to compel arbitration, and it "would not permit an appeal" where the court compels arbitration. Hearings on S. 1482, 100th Cong. 49 (1988) (Statement of Hon. Richard M. Bilby).

The FAA's "policy favoring arbitration" does not affect the analysis. *See* Pet'r.Br.7 (internal quotation marks omitted). Courts may not "pave over" the text of the statute to "more expeditiously advanc[e]" the FAA's purpose. *New Prime Inc.*, 139 S. Ct. at 543. The FAA speaks only to Congress's interest in the enforcement of arbitration agreements. This policy "make[s] arbitration agreements as enforceable as other contracts, but not more so." *Morgan*, 142 S. Ct.

at 1713 (internal quotation marks omitted). It says nothing about the rules governing district court discretion during the pendency of interlocutory appeals. *See Lauro Lines*, 490 U.S. at 501 (determining that any federal policy in favor of enforcing foreign forum-selection clauses goes only to the merits of the forum question, not to appellate procedures).

Coinbase states that "Congress here *already* engaged in the relevant [policy] balancing in Section 16(a)" by prescribing the right to immediately appeal an order denying a motion to compel arbitration. Pet'r.Br.42 (emphasis in original). But the "balancing" Congress performed in Section 16 simply related to "the timing of review" of court orders affecting arbitration. *First Options*, 514 U.S. at 949. Congress and this Court have chosen to confer an interlocutory appeal right in numerous contexts—preliminary injunctions, receivership orders, class certification orders, and others—while at the same time concluding that those rights nevertheless do not delay district court proceedings addressing other aspects of the case. Congress's intentional silence concerning divestiture or an automatic stay in Section 16(a) shows that it reached the same conclusion regarding arbitrability appeals.

Section 16's text, structure, and history establish that there is no automatic stay of all district court proceedings when a Section 16(a) appeal is filed.

B. Background rules of federal law establish that stays pending appeal are discretionary.

The "short answer" as to why Section 16 does not require automatic stays, then, is because "Congress

did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773 (1979). This alone decides the question, because "the text of the statute controls" the Court's interpretation of its meaning. *Castro-Huerta*, 142 S. Ct. at 2497 (cleaned up) (internal quotation marks omitted).

Nevertheless, even if the FAA provided no answer, background rules of federal law require the same conclusion. The Court has long recognized that when a statute is "silent" on a point, "general" background rules apply. *Pa. Co. v. Bender*, 148 U.S. 255, 259 (1893). Statutory silence "leaves the matter where it was pre-codification." *George v. McDonough*, 142 S. Ct. 1953, 1963 (2022) (cleaned up) (internal quotation marks omitted); *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2060 (2019) (Kavanaugh, J., concurring). When interpreting a statute that is materially silent, courts may not "freely supply" language under the guise of gap-filling, because a court "cannot be sure Congress would have chosen" whatever it would add. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1574 (2022). This principle has special force when the question concerns alteration of the courts' ancient equity powers: "[I]f Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain." *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944).

Such an "abrupt departure" is exactly what Coinbase seeks: alteration by implication of centuries' worth of equitable discretion entrusted to the district courts to decide whether to stay proceedings. "It has always been held" that the power to issue a stay pending appeal is part of the court's "traditional equipment for

the administration of justice." *Scripps-Howard*, 316 U.S. at 9-10. The very first Congress codified this principle in the nation's inaugural Judiciary Act, granting federal courts the authority to issue all "writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." 1 Cong. Ch. 20, 1 Stat. 73, 81-82 (1789).[1] Since those early days, this Court has understood that where "Congress said nothing about the power of the Court of Appeals to issue stay orders," the "denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts." *Scripps-Howard*, 316 U.S. at 11. A study of the history of Congress's treatment of stays pending interlocutory appeals teaches that there is and was no such thing as a "presumption of divestiture" for interlocutory appeals, as Coinbase contends.

The story begins with the Judiciary Act of 1891, ch. 517, 26 Stat. 826, the precursor to 28 U.S.C. § 1292(a)(1). The Act said that an interlocutory appeal of an injunction ruling does not automatically stay district court "proceedings in other respects." Judiciary Act of 1891, § 7, 26 Stat. at 828. The Act was the first to provide for interlocutory appeals in the federal courts. *Balt. Contractors v. Bodinger*, 348 U.S. 176, 180 (1955); *Ex parte Nat'l Enameling & Stamping Co.*, 201 U.S. 156, 161 (1906). Prior to that, federal appellate jurisdiction was restricted to "final judgments and decrees in the case specified." *McLish v. Roff*, 141 U.S. 661, 665 (1891). In this regard,

[1] This provision was later codified in the All Writs Act and appears, as amended, at 28 U.S.C. § 1651(a).

American federal jurisprudence differed from the common law of England. *See id.* ("In respect to appeals there is a difference in the practice of the English chancery courts, in which appeals may be taken from an interlocutory order of the chancellor to the house of lords, and the practice of the United States chancery courts, where the right of appeal is by statute restricted to final decrees, so that a case cannot be brought to this court in fragments.").

Congress provided for additional types of interlocutory appeals in 1900 (receivership orders) and 1926 (admiralty cases), including provisions in both laws functionally identical to the 1891 Act's provision precluding automatic stays. *See* Act of June 6, 1900, ch. 803, 31 Stat. 660-61; Act of Apr. 3, 1926, ch. 102, 44 Stat. 233-34.

This historical context is telling. Before Congress enacted these laws, there was no expectation that an interlocutory appeal would require an automatic stay of all district court proceedings, because interlocutory appeals did not then exist in America. The only expectation was that stays pending appeal were a matter of the trial court's discretion. *See In re Haberman Mfg. Co.*, 147 U.S. 525, 530 (1893) (holding that absent an "express provision" in the operative statute and "made clear by legislation," stays of injunctions pending appeal are discretionary). Thus, rather than reflect some existing background assumption about interlocutory appeals (as Coinbase illogically concludes), Congress's legislative choices in these early interlocutory appeal provisions *established* that the traditional background presumption of district court discretion to decide stay motions

operated with equal force in the interlocutory appeal context.

Over a century of subsequent federal court jurisprudence confirms the default understanding Congress established in these early statutes. *See, e.g.*, *Johnson v. 3M Co.*, 55 F.4th 1304, 1309 (11th Cir. 2022) ("[A]n interlocutory appeal does not completely divest the district court of jurisdiction. The district court has authority to proceed forward with portions of the case not related to the claims on appeal.") (cleaned up); *Kaszuk v. Bakery & Confectionery Union & Indus. Int'l Pension Fund*, 791 F.2d 548, 558-59 (7th Cir. 1986) (articulating same principle); *Taylor v. Sterrett*, 640 F.2d 663, 668 (5th Cir. 1981) (articulating same principle).

Interlocutory appeals taken pursuant to the collateral-order doctrine are instructive. The Court recognized the doctrine for the first time in 1949. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546. From that moment, it was understood that—outside the unique context of appeals involving constitutional immunity—interlocutory appeals of collateral orders do not alter the district court's power to issue or not issue discretionary stays of merits proceedings. Just two years after this Court recognized the doctrine in *Cohen*, Justice Robert Jackson (who authored *Cohen*) noted that "an order fixing bail" could be reviewed on interlocutory appeal "without halting the main trial" because "its issues are entirely independent of the issues to be tried." *Stack v. Boyle*, 342 U.S. 1, 12 (1951) (Jackson, J., concurring).

In the following decades, numerous courts observed that district court proceedings may continue during

the pendency of collateral-order appeals. *See Apostol v. Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989) ("Appeals based on the 'collateral order doctrine' . . . present issues separate from the merits . . ., and the court of appeals can consider these segregable issues while the district court presses ahead with the case."); *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1350 (2d Cir. 1989) ("[T]he filing of a notice of appeal only divests the district court of jurisdiction respecting the questions raised and decided in the order that is on appeal."); *Silberman v. Bogle*, 486 F. Supp. 70, 73 (E.D. Pa. 1980) ("The carefully circumscribed nature of the jurisdiction of the Court of Appeals under the collateral order doctrine signifies that we are not divested of jurisdiction over the remaining issues."). "Indeed," the Seventh Circuit observed, "one of the rationales for the doctrine is precisely that an appeal of a collateral order does not disrupt the litigation in the district court." *Apostol*, 870 F.2d at 1338.

In interlocutory appeals of admiralty orders under 28 U.S.C. § 1292(a)(3), multiple courts treated as a given that the district court may proceed with aspects of the case separate from those on appeal. *See Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 203 F.3d 291, 302 (4th Cir. 2000) (stating "the trial court has authority to pursue its own proceedings filed when a § 1292(a)(3) appeal is pending"); *Landry v. United States*, No. 93-4351, 1994 WL 122184, at *7 (5th Cir. Mar. 29, 1994) ("If an appeal is allowed from an interlocutory order, the district court may proceed with matters not involved in the appeal."); *Coumou v. United States*, No. 93-cv-1465, 1995 WL 144581, at *1 (E.D. La. Mar. 30, 1995) (rejecting argument that notice of appeal prevents district courts from

proceeding with damages phase of trial; rather, the district court may not proceed with the "bifurcated liability portions" on appeal).

Similarly, courts have presumed that the trial court may continue with aspects of the case separate from those on appeal in interlocutory appeals taken pursuant to 28 U.S.C. § 1447(d) (allowing review of remand orders in cases removed under 28 U.S.C. § 1442 or § 1443). For example, in 1965, Justice Harlan agreed with the district court's discretionary decision to permit state proceedings to "go forward in normal course, notwithstanding the pendency of petitioners' appeal . . . from the District Court's order of remand," in a case removed under Section 1443 and then remanded. *Hutchinson v. People of State of N.Y.*, 86 S. Ct. 5, 6 (1965); *see also Bd. of Educ. of City of N.Y. v. City-Wide Comm. for Integration of Schs.*, 342 F.2d 284, 285-86 (2d Cir. 1965) (court treated stay of state trial court proceedings pending appeal under Section 1447(d) as discretionary).

Indeed, before Section 16's enactment, where interlocutory appeals of arbitrability rulings were allowed, multiple courts assumed stays of district court proceedings were discretionary. *See Health Commc'ns v. Delphos*, No. 87-cv-1899, 1988 WL 13180, at *2 (D.D.C. Feb. 11, 1988) (applying the traditional test for discretionary stays to motion for stay pending appeal of arbitrability ruling); *Great Am. Boat Co. v. Alsthom Atl., Inc.*, No. 84-cv-105, 1987 WL 4766, at *1 (E.D. La. Apr. 8, 1987) (declining to stay case pending interlocutory arbitration appeal).

In 1982, *Griggs*'s rationale also refuted the idea of a "presumption of divestiture" for interlocutory appeals. *Griggs* explained that the 1979 amendments to the

Federal Rules of Appellate Procedure were crafted to avoid situations in which "district courts and courts of appeals would both have had the power to modify the same judgment." 459 U.S. at 59-60. It then harmonized circuit court decisions holding that district courts were not divested of jurisdiction to decide a motion to vacate, alter, or amend a judgment when a party filed a notice of appeal while such a motion was still pending. *See id.* at 58-59 (collecting cases). The *Griggs* Court observed that this custom was "tolerable in practice" because "there was . . . little danger a district court and a court of appeals would be simultaneously analyzing the same judgment." *Id.* at 59. Thus, *Griggs* simply elucidated the baseline assumption, understood by all the circuit courts, that a district court may proceed with a case to the extent it will not encroach on the appeals court's ability to review the challenged judgment or order. In those circumstances, there is no risk that the district court and appeals court will modify the same order or judgment at the same time.

This Court further confirmed the background understanding in 1985, holding that a district court could amend an order denying a motion to dismiss while an interlocutory appeal of a contempt order was pending. *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 378-79 (1985). Justice O'Connor wrote that *Griggs* "does not imply" that an interlocutory appeal "transfers jurisdiction over the entire case to the court of appeals." *Id.* at 379.

That same year, the Court further underscored this principle in *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985), which Coinbase relies upon. The *Koller* Court lamented that delay "inherently

accompanies time-consuming interlocutory appeals." *Id.* at 434. However, the Court then observed that when an appellate court accepts interlocutory jurisdiction of an order disqualifying counsel, "the appellate court *may* stay all proceedings during appellate review." *Id.* (emphasis added). An appeals court would have no need, and no discretion, to stay district court proceedings if divestiture had already happened upon filing of the appeal—the stay would be automatic. The Court even mentioned that "an intrepid District Judge" could choose "to proceed to trial with alternate counsel while her decision disqualifying an attorney is being examined in the Court of Appeals." *Id.* This would be impossible if divestiture was automatic upon appeal.

All this authority reflects straightforward application of the general presumption of district court discretion in the specific context of interlocutory appeals. There has never been a "presumption of divestiture" or an automatic stay where, as here, an interlocutory appeal addresses an aspect of the case separate from the merits. The most prominent federal treatises agree with this weighty precedent—and have agreed for decades. *See* Wright & Miller, 15A *Federal Practice and Procedure* § 3911.2 (3d ed. Sept. 2022 update) ("So long as the order appealed is fully independent of the merits, it may be sensible for the trial court to continue its own proceedings . . . ."); 9 *Moore's Federal Practice* § 203.11 (2d ed. 1986) ("[W]here an appeal is taken from a judgment which does not finally determine the entire action, the appeal does not prevent the district court from proceeding with matters not involved in the appeal.").

Further, an assumption against automatic district court stays for interlocutory appeals harmonizes with the well-established policy ensuring that interlocutory appeals do not delay administration of justice in the district court. As the Court observed in *Koller*, delay is "anathema in criminal cases" and "undesirable in civil disputes." *Koller*, 472 U.S. at 433-34. Because quick, efficient resolution furthers public policy, and because a default-divestiture rule would make delays the norm rather than the exception, a presumption *against* divestiture makes much more sense from a public-policy perspective.

Thus, by the time Congress enacted Section 16 of the FAA in 1988, a century of legislation and jurisprudence did nothing to change the baseline assumption that district courts retain discretion whether to stay trial proceedings touching aspects of the case other than those at issue in an interlocutory appeal. It is no surprise, then, that the drafters of Section 16 saw no need to include an express prohibition on automatic stays for interlocutory appeals under that section. It is also no surprise that in the same legislation, Congress saw the need to include a proviso *mandating* automatic stays for interlocutory appeals under 28 U.S.C. § 1292(d)(4)(B). *See supra* pp. 12-13.

Coinbase places great stock in other, later statutes explicitly stating that no automatic stays apply in certain interlocutory appeals. *See* Pet'r.Br.37-38. But overreading these provisions to find a grand unifying expectation of "divestiture" is neither reasonable nor appropriate. Within the same timeframe it enacted the interlocutory appeal provisions Coinbase relies on, Congress and an agency with authority delegated by

Congress included express provisions *requiring* automatic stays for other interlocutory appeals.

First, at the same time and in the same bill in which it created Section 16, Congress included an express automatic-stay requirement in what became 28 U.S.C. § 1292(d)(4)(B). *See supra* pp. 12-13. Second, in 1996, Congress created the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. 104-132, § 302, 110 Stat. 1214, 1248 (1996). That law included an authorization for expedited interlocutory appeals of certain rulings pertaining to classified information. In the same section, Congress mandated that "the trial shall not commence until the appeal is resolved." 18 U.S.C. § 2339B(f)(5)(B)(ii). Third, in 1998, the Department of Homeland Security promulgated a rule authorizing appeals to the Board of Immigration Appeals of certain orders establishing the conditions of custody for aliens. *See* 8 C.F.R. § 1003.19(f) (1998). The rule included an express provision for discretionary stays pending certain of those appeals and, for appeals of release orders, a requirement that such orders "shall be stayed upon [DHS]'s filing" of a notice of intent to appeal and "shall remain in abeyance pending decision of the appeal by the Board." *Id.* § 1003.19(i)(2).

Because Congress and other lawmaking bodies included provisions both requiring and rejecting automatic stays of interlocutory appeals in different laws enacted within the same timeframe, this drafting history cannot do the extraordinary work Coinbase relies on it to do. As this Court cautioned, "[l]anguage in one statute usually sheds little light upon the meaning of different language in another statute, even when the two are enacted at or about the same

time." *Russello v. United States*, 464 U.S. 16, 25 (1983). Here, such language is far from compelling enough to displace centuries of jurisprudence establishing district court discretion as the baseline rule. The "presumption of divestiture" that Coinbase advocates for would unravel more than a century of commonsense federal policy.

C. Arbitrability and the merits are separate aspects of a case.

Grasping for some legal support for its desired automatic stay, Coinbase relies heavily on the Court's unremarkable observation in *Griggs* that the filing of a notice of appeal "divests the district court of its control over those aspects of the case involved in the appeal." 459 U.S. at 58 (citing *United States v. Hitchmon*, 587 F.2d 1357 (5th Cir. 1979) (Tjoflat, J.)). Coinbase repeatedly characterizes this statement from *Griggs* as a jurisdictional "divestiture rule." But this incessant incantation is insufficient to conjure up a jurisdictional rule out of whole cloth. The Court has clarified that the term "jurisdictional" in *Griggs* and other contemporary cases "is a characterization left over from days" when the Court was "less than meticulous" in its "use of the term 'jurisdictional.'" *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 21 (2017) (internal quotation marks omitted). *Griggs* simply referenced the commonsense and long-understood case-management principle that a district court must refrain from taking action if that action would result in the district court and the appeals court "simultaneously analyzing the same judgment." 459 U.S. at 59. In other words, the judge-made principle repeated in *Griggs* is an exception to the standard presumption that, absent a discretionary stay, district

court proceedings continue when an interlocutory appeal is pending.

Section 16(a) appeals do not fall within that exception. When a party appeals the denial of its motion to compel arbitration, the "aspect" of the case on appeal is arbitrability—not the merits. This Court's precedents establish that arbitration is a type of forum selection, and forum selection is separate from the merits.

Arbitration is an alternative place to resolve legal claims. Agreements to arbitrate allow prospective litigants "a broader right to select the forum for resolving disputes." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483 (1989). They do not eliminate plaintiffs' rights to pursue their causes of action, and they do not immunize defendants from suit or limit the type of claims that may be brought against them. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

Arbitration is thus not a *substantive* right that undermines the right to sue or eliminates the burden of being sued. It is a *procedural* right that specifies the tribunal in which a party's claim will be resolved. *See Viking River*, 142 S. Ct. at 1919 ("An arbitration agreement thus does not alter or abridge substantive rights; it merely changes how those rights will be processed.").

Arbitration proceedings involve written motions practice, exchange of evidence and exhibits to be used in a hearing, presentation of evidence, and resolution

by a decision-maker who has agreed to serve as an impartial adjudicator. *See, e.g.*, Am. Arbitration Ass'n, *Consumer Arbitration Rules* (effective Sept. 1, 2014) at R-19 (arbitrator must be neutral and impartial); *id.* at R-22 (rule on exchange of documents or information between parties, overseen by arbitrator); *id.* at R-24 (setting forth procedure to consider written motions); JAMS, *JAMS Comprehensive Arbitration Rules & Procedures* (effective June 1, 2021) at Rule 7(a) (arbitrator must be "neutral"); *id.* at Rule 17 (rule governing exchange of evidence and depositions); *id.* at Rule 18 (rule governing motions for summary disposition). Arbitration decisions are appealable—indeed, the FAA itself gives federal courts jurisdiction to review an arbitrator's decision for certain deficiencies. *See* 9 U.S.C. § 10.

In some arbitration agreements, these procedures may be more streamlined than in most courts, but the point is not that they are identical to procedures in court. Rather, the point is that arbitration retains all the essential characteristics of litigation, which is simply the "process of carrying on a lawsuit." *Litigation*, Black's Law Dictionary (11th ed. 2019). Indeed, this Court has "repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court." *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 101 (2012). And while these proceedings may vary in their nature depending on the specific arbitration agreement at issue, so too will they vary from court to court. Just as a party may wish to contract to bring claims in arbitration because of perceived efficiencies or the specialization of the arbitrator, they may likewise wish to contract to bring their claims in a particular judicial forum. *See, e.g.*, *The Bremen v.*

Zapata Off-Shore Co., 407 U.S. 1, 17 (1972) (observing that parties' choice of an English tribunal reflected the desire "to provide a neutral forum experienced and capable in the resolution of admiralty litigation").

Thus, as this Court has recognized repeatedly, an arbitration agreement is "a specialized kind of forum-selection clause." *Viking River*, 142 S. Ct. at 1919 (internal quotation marks omitted); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (same quote); *see also Preston v. Ferrer*, 552 U.S. 346, 359 (2008) (explaining that petition regarding validity of arbitration agreement "presents precisely and only a question concerning the forum in which the parties' dispute will be heard").

Accordingly, when a district court denies a motion to compel arbitration and the moving party files an interlocutory appeal under Section 16(a), the only question for the court of appeals is where the dispute should be processed. There are no merits questions involved in such an appeal. For this reason, this Court recognized in *Moses H. Cone* that the issue of "arbitrability" is "easily severable from the merits of the underlying disputes." 460 U.S. at 20-21. *Moses H. Cone* held that a federal district court erred when it stayed—under the *Colorado River* abstention doctrine—the federal case seeking an order compelling arbitration under Section 4 of the FAA pending the outcome of a parallel state-court proceeding. *Id.* at 18. One of the "paramount" considerations under the *Colorado River* abstention doctrine is whether allowing parallel federal and state actions to proceed simultaneously would create a "danger of piecemeal litigation." *Id.* at 19. In evaluating this factor, this Court found that no such

risk existed if the parties had to litigate the merits of their claims in state court while litigating the arbitrability of the dispute in federal court, because "the arbitrability issue in federal . . . court" was "easily severable from the merits of the underlying disputes." *Id.* at 20-21.

Nothing in *Moses H. Cone* can be read to suggest the contrary, including its dissent. The *Moses H. Cone* Court affirmed an interlocutory decision requiring parties to arbitrate their dispute over a dissent lamenting that the Court's opinion "gives litigants opportunities to disrupt or delay proceedings by taking colorable appeals from interlocutory orders" regarding arbitrability. *Id.* at 31-32 (Rehnquist, J., dissenting); *see also* Pet'r.Br.45 (partially quoting same sentence). But the Court was unconcerned with this portion of the dissent's parade of horribles. Because the Court determined arbitrability is "easily severable from the merits," *Moses H. Cone*, 460 U.S. at 20-21, there would be no "disrupt[ion] or delay" in the district court pending interlocutory appeals of arbitrability, *see id.* at 31-32 (Rehnquist, J., dissenting). The district court would continue with the merits while the Section 16(a) appeal was pending. Contrary to Coinbase's assertion, the dissent's worry about "opportunities to disrupt or delay proceedings" aligns with district courts retaining discretion to decide whether to stay proceedings pending those appeals. *Id.* If the dissent understood these appeals to automatically stay district court proceedings, as Coinbase contends, they would not provide "opportunities" to either "disrupt or delay" cases—they would immediately and indefinitely pause them by operation of law.

Moses H. Cone's rationale applies with equal force in the *Griggs* analysis. The circuit courts have long understood that piecemeal litigation "occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results." *Gannett Co., Inc. v. Clark Constr. Grp., Inc.*, 286 F.3d 737, 744 (4th Cir. 2002) (internal quotation marks omitted); *LaDuke v. Burlington R.R. Co.*, 879 F.2d 1556, 1560 (7th Cir. 1989) (same quote). That is the same concern animating *Griggs*, which recognized the common understanding that dual-track litigation in the district and circuit courts is proper where there is "little danger a district court and a court of appeals would be simultaneously analyzing the same judgment." 459 U.S. at 59. *Moses H. Cone* thus illuminates why those concerns do not warrant a stay of merits proceedings when one court is considering arbitrability and one court is considering the merits—because "the arbitrability issue" is "easily severable from the merits of the underlying disputes." 460 U.S. at 21.

Appeals of orders deciding the proper forum also highlight the distinction between forum selection (such as arbitrability) and the merits. Numerous lower courts have properly understood that other forum issues are not the same "aspect[] of the case" as the underlying merits. Thus, lower courts retain the discretion to proceed on the merits—or to stay the case—during appeals of orders over forum-selection clauses, *forum non conveniens*, personal jurisdiction, and CAFA jurisdiction. *See, e.g.*, *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 712 (1st Cir. 1996) (denying stay in personal jurisdiction appeal); *Medtronic Sofamor Danek, Inc. v. Gannon*, No. 17-cv-943, 2017 WL 5135556, at *2-4 (D. Minn. Nov. 3, 2017) (declining

to stay remand order pending forum-selection clause appeal); *Overlook Gardens Props., LLC v. Orix USA, L.P.*, No. 17-cv-101, 2017 WL 4953905, at *6-7 (M.D. Ga. Nov. 1, 2017) (applying discretionary stay factors and granting 14-day stay of state court action pending appeal of order interpreting forum-selection clause); *Philipp v. Fed. Republic of Germany*, 253 F. Supp. 3d 84, 87-89 (D.D.C. 2017) (discretionary stay in *forum non conveniens* appeal); *Albury v. Daymar Colls. Grp., LLC*, No. 11-cv-157, 2012 WL 1190894, at *1-4 (W.D. Ky. Apr. 6, 2012) (granting discretionary stay pending appeal of CAFA remand ruling after applying traditional factors). Section 16(a) appeals are no different.

In each of these contexts, the question "Is this the right place for the dispute?" is severable from the *merits* of the dispute. Section 16(a) appeals fit squarely among these examples. Just like all of these other forum questions, arbitration issues are not merits issues—they are "easily severable." *Moses H. Cone*, 460 U.S. at 21.

D. The special rules applicable to interlocutory appeals involving constitutional immunity from suit do not apply to arbitrability appeals.

Coinbase further seeks to stretch the special rules applicable to constitutional immunity rights to fit interlocutory arbitrability appeals. But this immunity fallacy relies on a mischaracterization of the nature of those appeals. Constitutional immunity rights are special because the deeply rooted right to avoid being sued or prosecuted is forever lost if a case proceeds to trial during an interlocutory appeal. By contrast, the

contractual right to arbitrate is a specialized form of forum selection, not the right to "avoid litigation altogether," as Coinbase claims. Pet'r.Br.3. Such contractual rights do not rise to the level of importance needed to disrupt orderly proceedings in the district court.

In constitutional immunity appeals, the forum is irrelevant; it is the right not to be haled in front of any tribunal that matters. For example, state sovereign immunity prevents "the indignity of subjecting a nonconsenting State to the coercive process of judicial tribunals . . . *regardless* of the forum." *Alden*, 527 U.S. at 709 (emphasis added). The Double Jeopardy Clause confers a constitutional right "against being twice put to trial for the same offense," not merely "being twice *convicted*" of it. *Abney v. United States*, 431 U.S. 651, 660-61 (1977) (emphasis added). And absolute and qualified immunity are each "an *immunity from suit*," not a "mere defense to liability." *Forsyth*, 472 U.S. at 526 (emphasis in original). Thus, in those cases, the interest itself in the interlocutory appeal—and the harm that would flow from continued trial court proceedings during the appeal—is the act of *being sued* (or prosecuted).

Interlocutory arbitrability appeals do not involve the constitutional right to be immune from suit or prosecution. They involve the contractual right to be sued (or sue) before a certain tribunal. *Lauro Lines* is instructive. There, a defendant moved to dismiss to enforce a contractual clause selecting Italy as the forum for disputes. *Lauro Lines*, 490 U.S. at 496. Analyzing the collateral-order doctrine, the Court found that the Italian forum-selection clause was not "an entitlement to avoid suit" altogether. *Id.* at 499-

501. Instead, the clause was totally "different in kind" from entitlements to avoid suit—it was an "entitlement to be sued only in a particular forum." *Id.* at 501. The *Lauro Lines* Court explicitly rejected the defendant's argument that its contractual right to a forum outside of the American judiciary was a "'right not to be haled for trial before tribunals outside the agreed forum.'" *Id.* at 500 (quoting petitioner). Coinbase now comes to this Court decades later to make the very same failed argument. Its only proffered distinction is that Section 16 of the FAA has imbued arbitrability with special importance not present in forum-selection disputes like *Lauro Lines*. But the FAA does not manifest this "special" treatment by silent implication. *See supra* pp. 13-14; *First Options*, 514 U.S. at 949.

Comparing the right to avoid the indignity of suit with the right to have a case resolved by one neutral adjudicator versus another neutral adjudicator is comparing apples to oranges. Thus, assuming *arguendo* that the principle mentioned in *Griggs* counsels in favor of an automatic stay of district court proceedings pending interlocutory sovereign immunity, qualified immunity, and double jeopardy appeals,[2] it does not require the same for Section 16(a) appeals.

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[2] Some circuit courts have reasoned that district court proceedings must be automatically stayed during interlocutory immunity appeals because of the principle discussed in *Griggs*. These courts view the right to not be tried as intrinsically intertwined with the merits. *See, e.g.*, *Stewart v. Donges*, 915 F.2d 572, 575-76 (10th Cir. 1990); *Apostol*, 870 F.2d at 1338. However, orders denying sovereign immunity, qualified immunity, and double jeopardy immunity are appealable under the collateral-order doctrine, and one of the requirements for being cognizable

Because arbitrability is separate from the merits and does not involve immunity from suit, the only other possible reason for analogizing to sovereign immunity, qualified immunity, and double jeopardy would be if the contractual right to arbitrate is ascribed the same importance as the constitutional right to be immune from suit. But elevating arbitration appeals onto the same pedestal as constitutional immunity appeals in this way would allow "public policy" to "be trumped routinely" by private contractual parties, *Digit. Equip.*, 511 U.S. at 879-80, and doing so would thus violate the Court's directive against creating "special, arbitration-preferring procedural rules," *Morgan*, 142 S. Ct. at 1713.

This Court's discussion of the nature of contractual rights in *Digital Equipment* lights the way. *Digital Equipment* held that an order vacating the dismissal of an action based on a settlement agreement that purported to immunize a defendant from suit is not an immediately appealable collateral order. The defendant argued that its settlement agreement gave it a "'right not to stand trial altogether,'" which justified the special procedural exceptions afforded to appeals of double jeopardy, sovereign immunity, and

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under that doctrine is that the issue on appeal be "completely separate from the merits." *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). Therefore, it is possible that the inherent nature of these rights simply requires an automatic stay to protect them. Either way, these collateral-order appeals provide no support for inventing a right to an automatic stay for Section 16(a) appeals, because the nature and importance of the rights at stake in these immunity appeals are categorically different from the forum-selection rights at stake in arbitrability appeals.

qualified immunity orders. 511 U.S. at 869-71 (quoting petitioner). The Court disagreed, holding that even if the defendant's characterization was correct, a contractual right "to be trial free" does not "rise to the level of importance needed for recognition" under the collateral-order doctrine. *Id.* at 877-78. It warned that elevating "the expectations or clever drafting of private parties" to the level of those found in the Constitution or statutes would disproportionately favor those rights over those of the public. *See id.* at 879-80.

In addition, the Court cautioned that "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" *Id.* at 873 (citation omitted). That principle is crucial here, where Coinbase claims that its appeal is designed to "vindicate its right to avoid litigation altogether."[3] As this Court explained, however, the same could be said for lower court rulings that "the district court lacks personal jurisdiction, that the statute of limitations has run, that the movant has been denied his Sixth Amendment right to a speedy trial, that an action is barred on claim preclusion principles, that no material fact is in dispute and the moving party is entitled to judgment as a matter of law, or merely that the complaint fails to state a claim." *Id.* at 873. Rather than treating such decisions like those involving immunity, the Court cautioned that courts must treat "claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." *Id.*

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[3] *See* Pet'r.Br.3, 16, 38, 40.

Lauro Lines and *Digital Equipment* analyzed an aspect of the collateral-order doctrine, not the principles governing stays during interlocutory appeals. But they make clear that courts should not treat alteration of long-held background rules and the orderly disposition of cases lightly. Such alteration is only necessary in special cases involving extraordinary, fundamental rights. A specialized form of contractual forum selection is not such a right.[4]

* * *

Nothing in the FAA, background principles of federal law, or *Griggs* supports creating a special rule imposing an automatic stay or stripping jurisdiction when a party appeals the denial of a motion to compel arbitration. "[S]uch a major departure from" the flexibility and practicality inherent in equitable jurisdiction should not "be lightly implied." *Bowles*, 321 U.S. at 329-30. The presumption of district court discretion to grant or deny a stay pending interlocutory appeal applies to Section 16(a) appeals.

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[4] It is on this point that many of the circuits analyzing whether Section 16(a) appeals strip district court jurisdiction or require an automatic stay have gone astray. *See, e.g.*, *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1162 (10th Cir. 2005) (conflating "the constitutional entitlement to qualified immunity" with "the contractual entitlement to arbitration"); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1252 (11th Cir. 2004) (determining arbitration contracts confer "a right not to litigate"); *Bradford-Scott Data Corp., Inc. v. Physician Comput. Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997) (analogizing arbitration to "immunity from suit" cases in which "the question [is] whether discovery and trial should proceed" at all).

II. The traditional discretionary test applies in Section 16(a) appeals, and it works well for this context.

Coinbase has not overcome the "presumption favoring the retention of long-established and familiar principles." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952); *see also Nken*, 556 U.S. at 433 (applying same presumption). Accordingly, when considering a motion to stay proceedings pending a Section 16(a) interlocutory appeal, the proper course of action is for a district court to apply the traditional discretionary test. *See, e.g.*, *Nken*, 556 U.S. at 426.

The traditional test considers four factors: (1) likelihood of success on the merits, (2) the prospect of irreparable injury absent a stay, (3) the balance of the equities, and (4) the public interest. *Nken*, 556 U.S. at 434. This test is appropriate when an appellant seeks a stay pending appeal, because it accounts for the concerns that arise "whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Id.* Because those same concerns are presented when a party files an interlocutory appeal of an arbitrability ruling—namely, whether to allow or disallow further district court proceedings while one party challenges the legality of those proceedings—this is the appropriate test for deciding whether to stay an action in the district court while a Section 16(a) appeal is pending. This inquiry enables courts to account for a Section 16(a) appellant's interest in obtaining an appellate ruling on arbitrability early in the case while also considering the interests of parties other than the appellant. *See Hilton v. Braunskill*, 481 U.S. 770, 777 (1987) (observing "the traditional stay factors

contemplate individualized judgments in each case"). But Coinbase's categorical rule would require courts to ignore these factors in *every* case because Section 16(a) appellants could be harmed in *some* cases.

The traditional test works in this context. The first prong—likelihood of success on the merits—is a carefully balanced requirement. It gives great weight to meritorious or potentially meritorious appeals. At the same time, requiring a movant to show they have a fair prospect of ultimate success properly acknowledges that the nonmovant has already prevailed in a federal court on the issue of arbitrability.

This balance plays out in practice. District courts often find that the likelihood of success factor weighs in favor of a stay pending a Section 16(a) appeal. *E.g.*, *Hinkle v. Phillips 66 Co.*, No. 20-cv-22, 2021 WL 8055644, at *2 (W.D. Tex. Dec. 21, 2021); *Jackson v. Amazon.com, Inc.*, No. 20-cv-2365, 2021 WL 5579205, at *2 (S.D. Cal. Nov. 30, 2021). But they have the discretion to assess the situation and find otherwise where warranted—and they do so. For example, in *Suski*, Coinbase moved to compel arbitration where the contract governing the dispute did not even include an arbitration clause. *See Suski v. Coinbase, Inc.*, 55 F.4th 1227, 1228 (9th Cir. 2022). The district court denied the motion to compel and later denied Coinbase's motion for a discretionary stay pending appeal. *Suski v. Marden-Kane, Inc.*, No. 21-cv-4539, Dkt. 76 (N.D. Cal. April 19, 2022). Coinbase soon after lost that appeal in a decision that quickly dispatched Coinbase's thin arguments. J.A. 761-69. But where there are questions with genuine uncertainty, or a split among courts on a material issue of law, this

factor allows the district court to give those considerations significant weight. *Compare Jackson*, 2021 WL 5579205, at *2 (finding likelihood of success on the merits where legal issues were novel), *with Vine v. PLS Fin. Servs., Inc.*, No. 18-cv-450, 2019 WL 4257108, at *5 (E.D. Tex. Sept. 9, 2019) (finding low likelihood of success where Fifth Circuit had already addressed and dismissed movant's arguments).

The likelihood of success factor bears some shallow resemblance to the "frivolousness" standard adopted for automatic stays in other contexts, but because it is a higher (yet still reasonable) bar to meet, it better reflects the interest-balancing approach embodied in the traditional test. Coinbase argues that a bar on frivolous appeals here would protect the courts from a barrage of meritless grasps at free automatic stays. Pet'r.Br.50-51. But protecting the courts is not the key interest when assessing the propriety of a stay. Rather, balancing an appellant's right to a quick decision on a threshold issue against the appellee's right to prompt resolution of their lawsuit—after the appellee has already prevailed once on that threshold issue—is the primary consideration.

The frivolity standard is too toothless to take these interests into account. For a claim to be frivolous, it must be "so attenuated and unsubstantial as to be absolutely devoid of merit." *Hagans v. Lavine*, 415 U.S. 528, 536 (1974) (collecting cases). This bar is so low that few arbitrability appeals would ever fail to clear it. *See, e.g.*, *Black v. Wigington*, 811 F.3d 1259, 1270 (11th Cir. 2016) (to be non-frivolous, immunity claim must only have "a plausible foundation" and must not be "clearly foreclosed by a prior decision of the Supreme Court") (cleaned up); *Simon v. Republic*

of Hungary, 812 F.3d 127, 141 (D.C. Cir. 2016), *abrogated on other grounds by Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021) (describing the "exceptionally low bar of non-frivolousness") (internal quotation marks omitted).

The frailty of the frivolousness standard would undercut the "first principle" of arbitration, which is that it is "strictly a matter of consent." *Viking River*, 142 S. Ct. at 1918 (internal quotation marks omitted). With such a weak protection, non-consenting parties—who were already found to be non-consenting by a district court in *refusing* to compel them to arbitrate—would be forced into an arbitration-specific stay while the court of appeals addressed the question a second time. Rather than "move the parties to an arbitrable dispute out of court and into arbitration as quickly as possible," as Coinbase argues, this standard would force parties to *all* disputes that district courts already found *not* to be arbitrable into automatic stays that would do nothing to speed up the resolution of the arbitrability questions. *See* Pet'r.Br.6 (quoting *Moses H. Cone*, 460 U.S. at 22).

Applying a "non-frivolous" standard would thus render a stay the default result rather than the exception, even though "[a] stay pending appeal is an extraordinary remedy," *Merrill v. Milligan*, 142 S. Ct. 879, 883 n.1 (2022) (Kagan, J., dissenting) (internal quotation marks omitted), and even though such relief is an "intrusion into the ordinary processes of administration and judicial review," *Nken*, 556 U.S. at 427. It would graft this "extraordinary remedy" onto arbitration, *Merrill*, 142 S. Ct. at 883 n.1, despite the courts having been cautioned against creating "arbitration-specific variants of federal procedural

rules," *Morgan*, 142 S. Ct. at 1712. By contrast, there is nothing arbitration-specific about the traditional stay factors.

The irreparable harm factor further empowers district courts to assess the facts of each case. It is well established that participation in litigation can burden the parties, but that is not categorically irreparable. *F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (concluding that litigation expenses alone, even when they are "substantial and unrecoupable," do not constitute irreparable harm) (cleaned up). The "money, time and energy necessarily expended" to litigate a lawsuit "are not enough." *Sampson v. Murray*, 415 U.S. 61, 90 (1974). But this does not, as Coinbase suggests, mean that a party seeking to compel arbitration could never establish irreparable harm. It simply means that they are not entitled to a categorical rule providing them with a stay regardless of whether they will *actually* suffer harm absent a stay.

Movants frequently make a showing of a likelihood of irreparable harm. For example, courts have found irreparable harm is likely from the posture of litigation, like when a case is nearing trial rather than meandering through early discovery. *See, e.g.*, *Richards v. Ernst & Young LLP*, No. 08-cv-4988, 2012 WL 92738, at *3 (N.D. Cal. Jan. 11, 2012) (post-class certification); *Zaborowski v. MHN Gov't Servs., Inc.*, No. 12-cv-5109, 2013 WL 1832638, at *2 (N.D. Cal. May 1, 2013) (trial). Courts have found irreparable harm upon a showing that participation in the case would be uniquely burdensome or unnecessary—such as when the governing arbitration agreement strictly limits the scope of discovery. *See, e.g.*, *Weingarten*

Realty Invs. v. Miller, 661 F.3d 904, 913, n.19 (5th Cir. 2011) (discovery may cause irreparable injury when "parties contract for arbitration to limit discovery of sensitive information"). And courts have found irreparable harm where a movant shows that the appeal is anticipated to be especially lengthy. *See Ellison v. Am. Petroleum Inst.*, No. 20-cv-1636, 2021 WL 3711072, at *3 (D. Minn. Aug. 20, 2021) ("heightened" likelihood of harm where "prolonged" appeal "may exceed typical timelines").

Crucially, courts can evaluate the irreparable harm factor on a case-by-case basis, and where they find that this factor favors the movant, they can tailor a remedy to avoid such harm while also avoiding or minimizing harm to the non-movant. *See, e.g.*, *Camara v. Mastro's Restaurants LLC*, No. 18-cv-724, 2018 WL 11249123, at *1 (D.D.C. Nov. 26, 2018) (permitting class-action notice pending Section 16(a) appeal to avoid prejudice to class members, while not permitting other proceedings to protect defendant-appellant from harm). In the Section 16 context, district courts applying the irreparable harm standard have carefully analyzed arbitration agreements to determine whether continuing district court proceedings would differ meaningfully from the arbitral proceedings contemplated by the parties' agreement. In that vein, district courts have observed that irreparable harm is unlikely "where the proposed arbitration included substantial discovery and motions practice such that continuing to litigate in federal court would have resulted in little to no loss of time and money." *Ward v. Est. of Goossen*, No. 14-cv-3510, 2014 WL 7273911, at *1 (N.D. Cal. Dec. 22, 2014) (collecting cases); *see also Guifu Li v. A Perfect Franchise, Inc.*, No. 10-cv-1189, 2011 WL 2293221, at

*4 (N.D. Cal. June 8, 2011) (recognizing that where an agreement "provides the parties adequate opportunity to conduct discovery," "even if Defendants[']] appeal is successful, it appears that the discovery costs arising during the appeal are inevitable").

On the other hand, courts may find the irreparable harm factor favors the Section 16(a) appellant if the arbitration agreement at issue contemplates an arbitral process that greatly differs in length and substance from litigation in court. *See Ward*, 2014 WL 7273911, at *4 (irreparable harm factor favored appellant where "[t]he contrast, in time and expense, between the arbitration process . . . and the process of litigation in federal court [wa]s substantial" because the arbitration agreement set forth a procedure with "no formal discovery, law and motion practice, or other pre-trial hearings" (cleaned up)).

Courts finding that the irreparable harm factor favored the party seeking to compel arbitration have then tailored stays to avoid such harms while allowing aspects of the case that do not risk those harms to proceed during the appeal. One district court took a middle-ground approach, refusing to grant a motion to stay the whole case, in part because "conducting basic pre-trial discovery . . . would not prejudice [d]efendants because they w[ould] have to conduct that similar discovery if the case [were] to proceed . . . in arbitration." *Yeomans v. World Fin. Grp. Ins. Agency, Inc.*, No. 19-cv-792, 2021 WL 1772808, at *3-4 (N.D. Cal. Mar. 19, 2021) (staying action based on mandamus petition seeking transfer). The district court thus permitted "reasonable discovery commensurate with that which would likely be permitted if the case were arbitrated" during the

appeal, but stayed other aspects of the case. *Id.*; *see also Zaborowski*, 2013 WL 1832638, at *3 (refusing to stay portions of the case that would proceed regardless of the ultimate forum).

The final two factors task the court with balancing the movant's rights against those of the non-moving party and the interests of the public and the court. Motions for discretionary stays will usually involve competing interests among the litigants, but those interests often carry different weight. For example, the non-moving party's interests are greater when a stay pending appeal could cause a delay resulting in evidence spoliation. *See, e.g.*, *Trompeter v. Ally Fin., Inc.*, 914 F. Supp. 2d 1067, 1078 (N.D. Cal. 2012).

As for Section 16(a) appellants, variances in arbitration agreements can make one appellant's interest stronger or weaker than another's in a different case, depending on the agreed arbitration procedure. The hardships, too, will vary from case to case. For example, a litigant experiencing ongoing harm and seeking injunctive relief has a particularly strong interest in expeditious resolution of the case. Someone who lost a large sum of money from their personal account (like Respondent Bielski) and is seeking help from their financial institution to try to salvage it may also have an especially strong interest in continued district court proceedings. And parties like those in *Suski* who are plainly *not* subject to the arbitration agreement at issue in the appeal (or any arbitration agreement) have a strong interest in pressing forward with the case. Balancing the equities allows district courts to take these and countless other individualized interests into consideration. Further, these factors can also account for the nonmoving party

already prevailing on the arbitrability question and therefore having a justified expectation that their case will proceed on the merits in a federal forum.

The third and fourth prongs of the traditional test account for these individualized considerations. This weighing of the equities is appropriate in the context of Section 16(a) appeals because, as with many types of appeals, the interests at stake will differ from case to case.

Moreover, the traditional discretionary test offers robust procedural protections for litigants seeking to compel arbitration. If a district court denies a motion to stay pending its Section 16(a) appeal, the movant may immediately seek a stay in the circuit court, and then in this Court. Indeed, Coinbase sought stays in both *Bielski* and *Suski* in all three levels of the federal courts (and was denied each time). Thus, if the movant believes that the district court abused its discretion, it has an immediate and swift pathway for seeking correction. This stands in stark contrast to a categorical rule that would strip jurisdiction or impose an automatic stay pending a Section 16(a) appeal without an opportunity for any court to review the propriety of that extraordinary action.

In sum, the traditional test provides the flexibility to ensure justice is done based on the facts of each case. As the Court explained long ago, "[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case," and "[f]lexibility rather than rigidity has distinguished it." *Bowles*, 321 U.S. at 329. That flexibility allows "reconciliation between the public interest and private needs as well as between competing private claims." *Id.* at 329-30.

Such balancing makes the traditional test tailor-made for this context. In stark contrast, a categorical rule automatically staying all Section 16(a) appeals at the moment the notice is filed would impose a "rigidity and lack of discriminating application which Congress sought to remove by making stays discretionary." *Boone v. Lightner*, 319 U.S. 561, 570 (1943).

CONCLUSION

This Court should affirm the Ninth Circuit's decision.

Respectfully Submitted,

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