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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases like this one that raise issues of concern to the nation's business community. See*, e.g.*, *Morgan* v. *Sundance, Inc.*, No. 21-328 (2022).

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right

[1] Pursuant to this Court's Rule 37.6, no counsel for a party authored this brief in whole or in part and no person or entity other than *amici*, its members, or counsel made a monetary contribution to its preparation or submission.

of its members to own, operate and grow their businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus curiae* briefs in cases that will impact small businesses.

Many of *amici*'s members and members of the broader business community have found that arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. In reliance on the policy reflected in the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, and this Court's consistent endorsement of arbitration, *amici*'s members have structured millions of contractual relationships around arbitration agreements.

Parties seeking to enforce contractual arbitration agreements have a strong interest in avoiding the burdens of civil litigation while they appeal a district court's denial of a motion to compel arbitration. Such decisions are frequently reversed, and without the protections of an automatic stay, parties (and courts) are forced to expend their limited resources litigating disputes that will ultimately be resolved through arbitration in any event.

The FAA protects that interest by divesting the district court of jurisdiction pending an appeal on the question of arbitrability. As a majority of the courts of appeals have recognized, an automatic stay in these circumstances protects all parties from being forced to litigate a dispute that may ultimately be resolved through arbitration; it conserves the limited resources of the trial courts; and it protects against the possibility of

anti-arbitration discrimination by reducing the incentives for objecting parties to attempt to litigate an arbitrable claim.

The Ninth Circuit's contrary approach would undermine the same interest by forcing parties to litigate arbitrable disputes during an arbitrability appeal. Such concurrent litigation erodes the benefits of arbitration and destroys the very purpose of the appeal, which is to determine whether the defendant should be subject to the burdens of civil litigation in the first place. The Ninth Circuit's approach thus invites precisely "the kind of 'hostility to arbitration'" that the FAA is designed to combat and that this Court has repeatedly warned against. See, *e.g.*, *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 581 U.S. 246, 254 (2017) (quoting *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011)).

SUMMARY OF ARGUMENT

1. The right to specify and invoke arbitration as an alternative to litigation is important to many participants in the business community, and the FAA establishes that parties to a contractual arbitration agreement do not sacrifice that right while they appeal a district court's refusal to compel arbitration.

The right to arbitrate is fundamentally a "right not to litigate the dispute in a court," and instead to have the dispute resolved through arbitration. *Blinco* v. *Green Tree Servicing, LLC*, 366 F.3d 1249, 1251-52 (11th Cir. 2004) (per curiam). Under settled and generally applicable principles of appellate procedure, an appeal from a court order refusing to enforce that right "divests the district court of [jurisdiction]" to proceed further with the case—because the appeal attacks directly the propriety of the proceedings. *See Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (holding that a notice of appeal "divests the district court of its control over those aspects of the case involved in the appeal").

The statutory text confirms that common-sense understanding. Congress, in the FAA, took the rare step of creating a mandatory and immediate right to appeal the denial of a motion to compel arbitration. 9 U.S.C. 16(a). Such an interlocutory appeal, as a matter of right, presupposes an automatic stay of further trial proceedings: Congress would not have created a right of immediate appeal, only to have that right destroyed by concurrent trial proceedings—including discovery and possible class proceedings—while the

arbitrability appeal runs its course. Such proceedings would defeat many, if not all, of the practical advantages of arbitration, exposing the appellant to the very burdens from which they are seeking protection on appeal. Accordingly, most courts of appeals correctly recognize that an arbitrability appeal stays further proceedings.

The Ninth Circuit rejected that common-sense approach, based primarily on the notion that arbitrability is "independent" of the legal merits of the dispute. *Britton* v. *Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990); see also *Weingarten Realty Invs.* v. *Miller*, 661 F.3d 904, 909 (5th Cir. 2011). But if arbitration is independent, it is also *antecedent* to the merits; for this reason, arbitrability must always be resolved before the parties are forced to endure the burdens of litigation. *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 68-70 (2010).

The right to arbitrate should be treated no differently than other forms of immunity from litigation that are immediately appealable as of right—like qualified immunity, sovereign immunity, and double jeopardy. In those contexts, courts protect the right being asserted on appeal—a right to avoid the burdens of trial—by recognizing that the district court is divested of jurisdiction to proceed with the case until the appeal is resolved. *Princz* v. *Federal Republic of Germany*, 998 F.2d 1 (D.C. Cir. 1993) (per curiam) (sovereign immunity); *Apostol* v. *Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989) (Easterbrook, J.) (qualified immunity). The case for an automatic stay in this context

is at least as strong because arbitration is fundamentally a protection from the *litigation process*, whereas qualified and other immunities serve primarily as protections from *liability*. If the automatic stay is warranted to protect the secondary features of a judge-made doctrine like qualified immunity, then it is surely warranted to protect the appeal right that Congress authorized to ensure that disputes that belong in arbitration are not erroneously litigated in court.

2. Recognizing that an arbitration appeal automatically stays trial proceedings also furthers the FAA's broader purpose of enforcing binding arbitration agreements as written to promote swift and efficient dispute resolution.

First, an automatic stay protects against the burdens of litigation whenever a district court erroneously denies a motion to compel. Those burdens are substantial because the courts of appeals reverse in arbitration cases far more often than in other civil litigation. An analysis of decisions from the past twenty-plus years reveals that almost *half* of all appeals from the denial of a motion to compel arbitration end in reversal or vacatur. These data confirm that district courts continue to disfavor arbitration, and that the automatic stay is necessary to safeguard arbitration from that lingering hostility. And the data refute the Ninth Circuit's opposing concern—that the automatic stay will incentivize frivolous appeals—because the reversal rate in the "stay circuits" and the "non-stay circuits" is roughly identical.

Second, an automatic stay promotes efficient dispute resolution because it reduces the incentive for parties

opposing arbitration to attempt to litigate claims that they agreed to arbitrate. Absent a stay, such parties may seek to secure the advantages of civil discovery before the circuit court has an opportunity to reverse and enforce the arbitration clause as written. An automatic stay allows the court of appeals to engage in error correction *before* the defendant is subjected to the burdens of litigation. That incentive structure makes everyone better off—because complainants actually do better in arbitration than they do in litigation.

ARGUMENT

I. An Appeal From the Denial of A Motion To Compel Arbitration Divests the District Court of Jurisdiction To Proceed With the Case

The FAA establishes a "national policy favoring arbitration." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006). To implement that policy, the FAA gives parties an immediate right to appeal the denial of a motion to compel arbitration. 9 U.S.C. 16(a). As the majority of courts of appeals recognize, such an appeal divests the district court of jurisdiction over the whole case because it is fundamentally about "whether the case should be litigated *at all* in the district court." *Blinco* v. *Green Tree Servicing, LLC*, 366 F.3d 1249, 1251-1252 (11th Cir. 2004) (per curiam) (emphasis added). The Ninth Circuit's contrary approach undermines the purpose of the statutory appeal, which is to vindicate the right to arbitrate; and it flouts this Court's precedents establishing that arbitrability is an issue antecedent to the merits that must be conclusively resolved before a party is subject to the burdens of litigation.

A. The FAA's Appeal Provision Presupposes An Automatic Stay Of Further Trial Proceedings

"The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Disc. Co.*, 459

U.S. 56, 58 (1982) (per curiam). Under a straightforward application of that principle, a statutorily authorized appeal from the denial of a motion to compel arbitration divests the district court of jurisdiction to proceed with the merits of the case.

The right to arbitrate is fundamentally a "*right not to litigate the dispute in a court*," and instead to have the dispute resolved through the arbitral process. *Blinco*, 366 F.3d at 1251-1252 (emphasis added). When a party appeals the denial of that right, it is challenging "whether the case should be litigated *at all* in the district court." *Id.* (emphasis added). Allowing litigation to proceed in the district court while that appeal is pending would "defeat[] the point of the appeal," which is to challenge the "continuation of [those very] proceedings." *Bradford-Scott Data Corp.* v. *Physician Comput. Network, Inc.*, 128 F.3d 504, 505-506 (7th Cir. 1997).

The FAA's text confirms that understanding. Congress, in the FAA, enacted a series of unique pro-arbitration procedures specifically to combat judicial "hostility to arbitration." *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 581 U.S. 246, 254 (2017). Sections 3 and 4 of the FAA empower any party to petition the district court for an order compelling arbitration and to stay litigation pending arbitration. 9 U.S.C. 3, 4. District courts have no discretion to deny those motions—they "*shall*" grant them—whenever the binding agreement between the parties assigns the dispute to arbitration. *Id.* But Congress anticipated that some district courts might disfavor and under-enforce arbitration agreements, and so it

created an immediate right of interlocutory appeal whenever a district court denies a motion to compel arbitration. 9 U.S.C. 16(a); see *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 627 (2009). That right reflects a dramatic departure from the default rules of civil litigation, under which parties must generally "wait until after final judgment to vindicate [even the most] valuable [of] rights." *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 108-109 (2009).

It is thus clear, from this series of provisions, that Congress meant for the courts of appeals to settle the question of arbitrability *before* the right to arbitrate has been destroyed through ongoing trial proceedings. "By providing a party who seeks arbitration with swift access to appellate review, Congress acknowledged that one of the principal benefits of arbitration, avoiding the high costs and time involved in judicial dispute resolution, is lost if the case proceeds in both judicial and arbitral forums." *Blinco*, 366 F.3d at 1251. The FAA should not be construed to "give with one hand what it takes with the other." *Greenlaw* v. *United States*, 554 U.S. 237, 251 (2008). There is simply no conceivable reason why Congress would create an automatic right of interlocutory appeal—which is designed specifically to preserve "the right not to litigate"—only to have that right destroyed through ongoing trial proceedings while the appeal runs its course.

Concurrent proceedings would defeat many of the practical advantages of arbitration over litigation—its "simplicity, informality, and expedition." *Mitsubishi*

Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Arbitration is "a fast and economical process" because it places strict limits on the mandatory "exchange of information" between the parties, Am. Arb. Ass'n, Consumer Arb. Rule 22, and because it may avoid the costs and risks associated with class proceedings. *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1622 (2018). Litigation discovery is far more expansive, requiring parties to furnish: initial disclosures, pretrial disclosures, discovery on "any nonprivileged matter," expert discovery, depositions, written interrogatories, and requests for admission. See Fed. R. Civ. P. 26, 30, 33, 36. And class proceedings only further compound those expenses. See *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1414 (2019) (class proceedings "sacrifice[] the principal advantage of arbitration and greatly increases risks to defendants") (citation and quotation marks omitted).

It would make little sense to subject a party to the burdens of civil discovery and possible class proceedings in district court, while the court of appeals sorts out the *antecedent* question of whether the party has a right to be free of those burdens in the first place. *Levin* v. *Alms & Assocs., Inc.*, 634 F.3d 260, 265 (4th Cir. 2011) (explaining that discovery may "alter the nature of the dispute significantly" even if the case is ultimately referred to arbitration). Statutes must be read in light of "[t]he presumption against ineffectiveness." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012). And,

here, the automatic stay is plainly necessary and sufficient to "ensure that [the] text's manifest purpose is furthered, not hindered," in providing a mandatory right of appeal. *Id.*

B. The Ninth Circuit's Contrary Approach Neglects Arbitrability's *Antecedence* to the Merits

The Ninth Circuit rejects this common-sense sequencing and, instead, allows trial courts to persist with litigation, even as the appellant challenges the propriety of those very proceedings on appeal. *Britton* v. *Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990). The Ninth Circuit reasons that, because arbitrability can be resolved "independent" of the merits of the underlying dispute, *id.*, further merits litigation is not technically among "those aspects of the case involved in the [arbitrability] appeal." *Weingarten Realty Invs.* v. *Miller*, 661 F.3d 904, 909 (5th Cir. 2011) (quoting *Griggs*, 459 U.S. at 58).

The Ninth Circuit's analysis, however, misses the key point, which is that arbitration is not merely independent of the merits; it is "antecedent" to them. *Rent-A-Center, W., Inc.* v. *Jackson*, 561 U.S. 63, 68-70 (2010). The right to arbitrate is a "right not to litigate the dispute in a court," *Blinco*, 366 F.3d at 1251-1252, which is why it must be resolved conclusively *before* the district court decides the merits of the dispute. *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) (explaining that a court has "no business weighing the merits of the grievance" in the face of binding delegation clause).

Arbitration should thus be treated no differently than other forms of immunity from litigation that are immediately appealable as of right—like qualified immunity, sovereign immunity, and double jeopardy. Appeals like these undisputedly divest the trial court of jurisdiction until the court of appeals settles the threshold immunity question. *Princz* v. *Federal Republic of Germany*, 998 F.2d 1 (D.C. Cir. 1993) (per curiam) (sovereign immunity); *Apostol* v. *Gallion*, 870 F.2d 1335, 1338 (7th Cir. 1989) (Easterbrook, J.) (qualified immunity). In these cases, although the immunity is "conceptually distinct from the merits of the plaintiff's claims," it still operates to divest the trial court of jurisdiction precisely because it is antecedent to the merits, and the very purpose of the appeal is "to protect against the burdens of trial." 15A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3914.10.9 (3d ed. 2008) (hereinafter "Wright & Miller"); *cf. Mitchell* v. *Forsyth*, 472 U.S. 511, 527 (1985) (explaining that immunity from litigation "is effectively lost if a case is erroneously permitted to go to trial"); *Abney* v. *United States*, 431 U.S. 651, 661-662 (1977) (same for double jeopardy). Arbitration is no different: Congress created an immediate right of appeal—and an attendant stay of further trial proceedings—because it understood that the "legal and practical value [of arbitration] would be destroyed if [the right] were not vindicated *before* trial." *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 799 (1989) (emphasis added) (quoting *United States* v. *MacDonald*, 435 U.S. 850, 860 (1978)).

Indeed, the case for an automatic stay in the arbitration context is at least as strong as in the qualified immunity context. The right to arbitrate is fundamentally a *process* right: it is the "right not to litigate," to avoid burdens of civil discovery, and to have one's claims decided through a cheaper and faster forum. *Blinco*, 366 F.3d at 1251-1252. That process right would not merely be eroded if the appellant were forced to endure trial proceedings pending appeal—it would be irretrievably destroyed by that litigation. *Id.* Qualified immunity, by contrast, is fundamentally a substantive immunity, designed to "shield[] [governmental defendants] from liability for civil damages," no matter the forum in which the claim is brought. *Harlow* v. *Fitzgerald,* 457 U.S. 800, 818 (1982). While that immunity has also been extended to cover the pre-judgment process of "trial" and "pretrial . . . discovery," *id.*, the primary right to avoid liability can still be vindicated even at the end of litigation and even in the absence of a mandatory stay. Hence, if the automatic stay is warranted to protect the *secondary* aspects of a judge-made doctrine like qualified immunity, then it is surely warranted to protect the *primary* aspects of arbitration and the appeal right explicitly codified in the FAA.

In short, the right to arbitrate is by definition a right to avoid litigation, and it must therefore be resolved definitively on appeal *before* the defendant is forced to endure the burdens of civil discovery. *Rent-A-Center*, 561 U.S. at 68-70; *Henry Schein*, 139 S. Ct. at 529. Because the Ninth Circuit's approach cannot

square with that basic conception, this Court should reverse.

II. The Automatic Stay Conserves Party Resources and Promotes Swift Dispute Resolution

Businesses, individuals, and others have structured countless contracts in reliance on the FAA and this Court's precedents interpreting it. It is by now well-established that arbitration confers many advantages over litigation by virtue of its "simplicity, informality, and expedition." *Mitsubishi Motors*, 473 U.S. at 628. For at least two reasons, the automatic stay plays an indispensable role in promoting those interests. *First*, decisions denying motions to compel arbitration are reversed with striking frequency; and each time that happens, the automatic stay prevents wasteful, duplicative litigation over a dispute that is ultimately bound for arbitration. *Second*, the automatic stay encourages plaintiffs to proceed more quickly to arbitration by eliminating any of the potential ill-gotten gains that a plaintiff might secure through litigation of otherwise arbitrable claims. That swift recourse to arbitration makes *everyone* better off—because arbitration is faster, cheaper, and more favorable to consumers than litigation.

A. The Automatic Stay Protects Against Duplicative Proceedings Whenever A District Court Erroneously Denies A Motion To Compel

Parties choose arbitration for a variety of reasons, including because it is "faster and cheaper" than litigation. *Bradford-Scott*, 128 F.3d at 506. But without an

automatic stay, those "benefits are eroded, and may be lost or even turned into net losses" whenever the trial court's decision denying arbitration is reversed on appeal, *id.*, and the parties have been forced to endure "an entirely wasted trial." Wright & Miller, § 3914.17. The mandatory stay prevents that "worst possible outcome" by deferring litigation until the court of appeals conclusively resolves the threshold question of arbitrability. *Bradford-Scott*, 128 F.3d at 506.

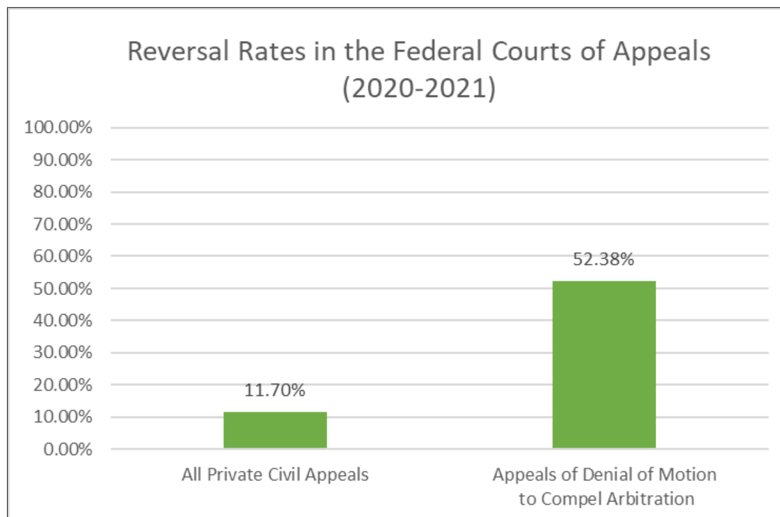
These unnecessary costs are particularly concerning because decisions denying motions to compel arbitration are reversed or vacated with alarming regularity. Whereas the average reversal rate in civil litigation between private parties is around ten percent, the reversal rate for decisions denying motions to compel is closer to *forty to fifty* percent. About half the time, therefore, the Ninth Circuit's approach risks destroying many of the benefits of arbitration, draining the trial courts of limited resources, and subjecting the parties senselessly to the burdens of duplicative proceedings.

Data compiled by the Administrative Office of the U.S. Courts show that, during the one-year period from October 2020 through September 2021, the courts of appeals reversed in just 11.7 percent of civil appeals between private parties.[2] Yet, during that same period, the courts of appeals vacated or reversed

[2] See Admin. Off. of the U.S. Courts, Table B-5: U.S. Courts of Appeals—Decisions in Cases Terminated on the Merits, by Circuit and Nature of Proceeding, During the 12-Month Period Ending September 30, 2021, *available at* https://www.uscourts.gov/sites/default/files/data_tables/jb_b5_0930.2021.pdf.

in *over 50 percent* of appeals involving the denial of a motion to compel arbitration (22/42).[3]

CHART 1: Reversal Rates In One Year

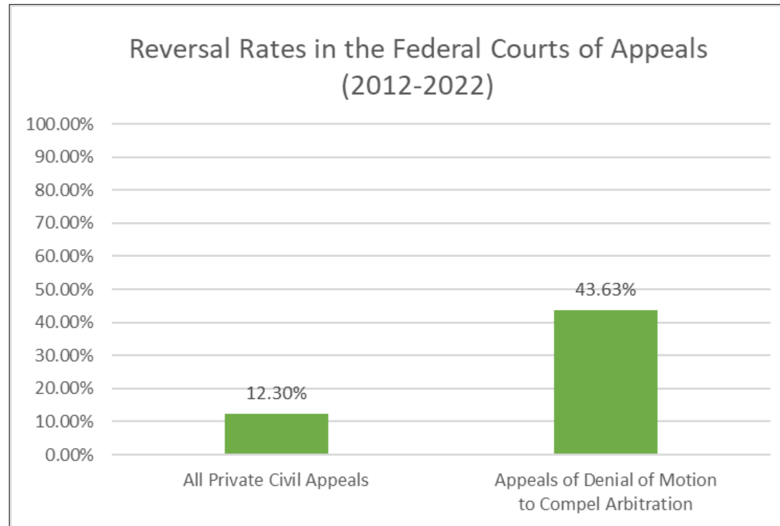


That year was no anomaly. Westlaw Precision indicates that there were 353 appeals challenging the denial of a motion to compel decided between January 2012 and December 2022, and that the district courts' decisions in those cases were reversed or vacated 154

[3] Reversal rates for motions to compel arbitration were calculated through Westlaw Precision by running a search for "Motion Type and Outcome" set to "Motion to Compel Arbitration," then filtered by outcome "Denied," jurisdiction "Courts of Appeal," and date range "10/1/2020 through 9/30/2021." Search results were reviewed individually to screen out any misclassified decisions and to determine whether the district court's denial was upheld or reversed. Vacaturs and reversals in part are counted as reversals for purposes of calculating the reversal rate.

times.[4] That is a reversal rate of roughly 43.6 percent, nearly four times higher than the rate of reversal for private civil appeals taken during that same period.

CHART 2: Reversal Rates 2012-2022



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[4] These figures were calculated following the methodology described *supra* at note 3, with an adjusted date range of "01/01/2012 through 12/31/2022." Reversal rates for all private civil appeals were calculated by averaging the annual figures provided by the Administrative Office of the U.S. Courts, available at https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (type "B-5" in search by table number; then choose "ending September 30" from reporting period dropdown; then individually select years 2012 through 2022 from reporting period end year dropdown; then click "apply"; then follow hyperlink for "U.S. Courts – Decisions in Cases Terminated on the Merits, by Nature of Proceeding" for each year).

Data from the prior decade tell the same story. One empirical study has found that, between 2000 and 2008, roughly 48.5 percent of appeals from the denial of a motion to compel arbitration resulted in reversal. Roger J. Perlstadt, *Interlocutory Review of Litigation-Avoidance Claims: Insights From Appeals Under the Federal Arbitration Act*, 44 AKRON L. REV. 375, 406-407 (2011).

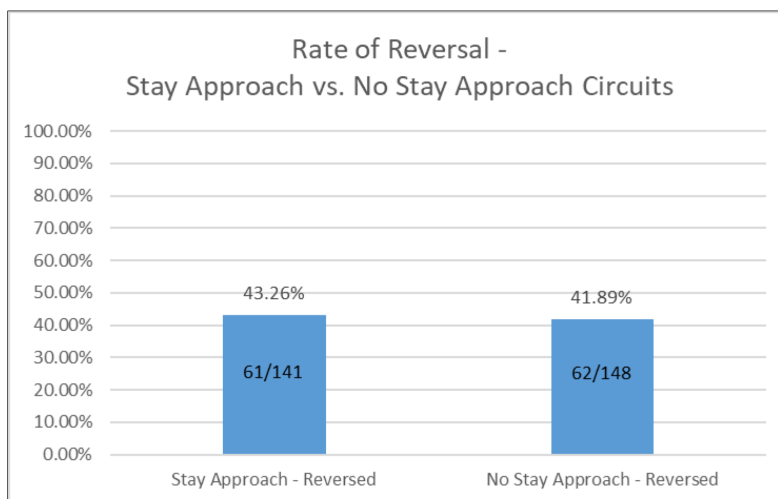
Congress enacted Section 16(a) because it understood that trial courts might continue to display the "'hostility to arbitration' that led Congress to enact the FAA" in the first place. *Kindred Nursing*, 581 U.S. at 254 (citation omitted). These sky-high reversal rates confirm Congress's prescience, and they underscore the importance of the automatic stay in promoting the FAA's principal objective in overcoming hostility to arbitration.

The Ninth Circuit, however, has expressed the opposite concern. It worries that a defendant might "stall a trial simply by bringing a frivolous motion to compel arbitration" and thereby obtain a "stay [of] the proceedings pending an appeal[.]" *Britton*, 916 F.2d at 1412. But a majority of the circuits have been living with the automatic stay for decades, and their experience dispels this hypothesis. If the Ninth Circuit were correct, then one would expect to see many more frivolous appeals in the circuits that apply the automatic stay and, thus, a lower overall reversal rate in those circuits than in the circuits without an automatic stay. But the numbers tell a very different story: There are an equal number of appeals between the stay and non-stay circuits, and the

rate of reversal in the stay and non-stay circuits is roughly equivalent.

Specifically, between January 2012 and December 2022, the "stay circuits" reversed or vacated in 43 percent of appeals involving decisions denying motion to compel arbitration (61/141), and the "no-stay circuits" reversed or vacated in 41 percent of such cases (62/148).[5]

CHART 3: Reversal Rates
Stay Versus No-Stay Circuits



These data indicate strongly that the Ninth Circuit's concerns are unfounded. An appeal challenging the denial of a motion to compel is around four times more

[5] Reversal rates were calculated following the methodology described *supra* at note 3, with an adjusted date range of "01/01/2012 through 12/31/2022," and filtered by circuit.

likely to succeed than an ordinary civil appeal, regardless of whether or not the appeal triggers an automatic stay of trial proceedings.

One possible explanation lies in the fact that the stay circuits have developed multiple procedures to deter frivolous appeals. For example, the appellee may "ask the court of appeals to dismiss the appeal as frivolous or to affirm summarily." *Bradford-Scott*, 128 F.3d at 506. Similarly, district courts in several of the circuits may retain jurisdiction over the case by "certifying the § 16(a) appeal as frivolous or forfeited." *McCauley* v. *Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1162 (10th Cir. 2005); see also *Levin*, 634 F.3d at 265. These data confirm that certification and similar procedures are adequate to address the Ninth Circuit's concern and have sufficiently "stymied" the risk of frivolous appeals. *Halliburton*, 413 F.3d at 1162; see also *Behrens* v. *Pelletier*, 516 U.S. 299, 310-311 (1996) (endorsing certification in the qualified immunity context because it allows "the district court to retain jurisdiction pending summary disposition of the appeal," thereby "minimiz[ing] disruption of the ongoing proceedings").

From the standpoint of judicial efficiency, this is therefore an easy case: Courts can resolve the problem of duplicative and wasteful litigation of arbitrable claims through the provision of an automatic stay. And they can preempt even the possibility of frivolous appeals through certification procedures that this Court has endorsed in other contexts. Given the persistently high reversal rate in this context, the automatic stay is the only plausible way forward.

B. The Automatic Stay Reduces the Incentives For Parties Opposing Arbitration To Attempt To Litigate Arbitrable Claims

The automatic stay not only protects against erroneous district court decisions after the fact; it also eliminates any incentive for parties opposing arbitration even to pursue such decisions in the first place.

Absent an automatic stay, plaintiffs may attempt to litigate arbitrable issues, in an effort to secure the advantages of civil discovery before the circuit court has an opportunity to reverse and send the dispute to arbitration. This is a serious concern for small businesses because they often lack the resources to defend against concurrent litigation. And it is especially problematic in the Ninth Circuit, because that court has historically been the slowest of all the circuits in resolving merits appeals.[6] Hence, when consumers file lawsuits in the district courts of California, as the plaintiffs did here, the parties may be subjected to *a year or more* of civil discovery, even when the trial court's refusal to compel arbitration is deemed manifestly incorrect on appeal.[7]

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[6] See Admin. Off. of the U.S. Courts, Table B-4A: U.S. Courts of Appeals—Median Time for Civil and Criminal Cases Terminated on the Merits, During the 12-Month Period Ending September 30, 2021, available at https://www.uscourts.gov/sites/default/files/data_tables/jb_b4a_0930.2021.pdf (showing that the Ninth Circuit is among the slowest of all the circuits, taking nearly a year and a half to decide argued cases, second only to the Second Circuit).

[7] See, *e.g., Dekker* v. *Vivint Solar, Inc.*, No. 20-16584, 2021 WL 4958856, at *1 (9th Cir. Oct. 26, 2021) (holding that the parties'

The mandatory stay prevents that unwarranted litigation and incentivizes plaintiffs to comply with their arbitration agreements by withholding the benefits of civil discovery until *after* the court of appeals conclusively determines arbitrability.

That incentive structure makes everyone better off, plaintiffs included. A recent empirical study funded by the Chamber's Institute For Legal Reform shows that (1) consumers are more likely to win in arbitration than in court, (2) they receive higher awards in arbitration than in litigation, and (3) their claims are resolved more quickly through arbitration than litigation. See Nam D. Fam & Mary Donavan, *Fairer, Faster, Better II: An Empirical Assessment of Consumer Arbitration* (Nov. 2020), available at https://instituteforlegalreform.com/wp-content/uploads/2020/11/FINAL-Consumer-Arbitration-Paper.pdf. Analyzing a dataset of over 100,000 disputes involving consumers terminated between 2014 and 2020, Fam and Donavan have shown that, for litigation or arbitration that ends in a decision: (1) consumers prevailed 44% of time in arbitration, but just 30% of time

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dispute "falls squarely within the scope of the delegation clause, and it should have been left to the arbitrator," roughly a year after denying the appellant's motion for a stay pending appeal); *Fernandez* v. *Bridgecrest Credit Co.*, No. 19-56378, 2022 WL 898593, at *1 (9th Cir. March 28, 2022) (holding that the "district court erred" in refusing to compel arbitration, nearly *two years* after denying a stay pending appeal); *Knapke* v. *PeopleConnect, Inc.*, 38 F.4th 824, 828-829 (9th Cir. 2022) (similar); *Mohamed* v. *Uber Techs., Inc.*, 848 F.3d 1201, 1206 (9th Cir. 2016) (similar); *Cox* v. *Ocean View Hotel Corp.*, 533 F.3d 1114, 1119-1126 (9th Cir. 2008) (similar).

in litigation; (2) the median award in arbitration was $20,019, more than *three times higher* than the $6,565 median award in litigation; (3) the mean award in arbitration was $68,198, compared to just $57,285 in litigation; and (4) arbitration took just 299 days on average, as compared to 429 days for litigation. *Id.* at 8-12. The automatic stay amplifies those benefits by channeling consumer complaints more quickly to the forum in which they belong.

An automatic stay thus presents the more sensible rule, and it is clearly the one Congress anticipated when it created an immediate right to appeal the denial of a motion to compel arbitration.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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