ANOTHER NAIL IN THE COFFIN OF CIVIL LITIGATION: COINBASE, INC. V. BIELSKI AND THE CONCERNING EXPANSION OF ARBITRATION

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INTRODUCTION

Everyday experiences require agreeing to arbitrate future claims: calling an Uber, attending a Zoom meeting, using the McDonald's app, and even opening a bank account.[1] Most people think nothing of these commonplace agreements, but perhaps they should, as arbitration agreements have become nearly impossible to escape.[2]

Over the last twenty-five years, there has been rapid growth in the use of arbitration agreements, especially in contracts of adhesion.[3] Despite this trend, Congress and the judiciary have declined to protect

1. *See generally U.S. Terms of Use*, UBER https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=united-states&lang=en [https://perma.cc/2DBG-DDM6]; *Zoom Terms of Service*, ZOOM, https://explore.zoom.us/en/terms/ [https://perma.cc/T236-A9YM]; *Terms and Conditions for McDonald's Online Services (USA),* MCDONALD'S, https://www.mcdonalds.com/us/en-us/terms-and-conditions.html#disputes-anchor [https://perma.cc/6XDZ-T7SH]; Cora Ganzglass Hume et al., *Banking on Arbitration*, THE PEW CHARITABLE TRUSTS (2012), https://www.pewtrusts.org/-/media/assets/2012/11/27/pew_arbitration_report.pdf [https://perma.cc/G3E4-SV3Z].

2. *See* Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic,* ECON. POL'Y INST. 1, 4 (2015), https://www.epi.org/publication/the-arbitration-epidemic/ [https://perma.cc/KER4-3LB4].

3. *Id.* at 11, 14-17 ("[C]ontract of adhesion—i.e., a form contract presented by a powerful party to a weaker party on a take-it-or-leave-it basis").

parties subject to arbitration.[4] In fact, Supreme Court decisions have increasingly favored parties who have contracted for arbitration, adopting a pro-arbitration presumption.[5] At their core, arbitration cases weigh the right of the freedom of contract against the right to pursue traditional litigation and have disputes decided in a public court according to rules of law.[6] Perhaps the juxtaposition of these competing values is what makes the arbitration debate so controversial.

When a party bound by an arbitration agreement files a claim in court contrary to the agreement, the opposing party may file a motion to compel arbitration.[7] If the plaintiff fails to persuade the court that the arbitration agreement is void, the court will grant the defendant's motion, directing the claim to arbitration.[8] Conversely, if the plaintiff succeeds, and the motion to compel arbitration is denied, the case continues in court.

Parties may immediately file an interlocutory appeal of an order denying a motion to compel arbitration.[9] This right to appeal raises the question of whether the interlocutory appeal requires the lower court stay its proceedings. This issue split the U.S. Circuit Courts of Appeal until 2023 when the U.S. Supreme Court settled the question in *Coinbase, Inc. v. Bielski*.[10] The Court held that when a party files an interlocutory appeal of a motion to compel arbitration, all proceedings in the case must be stayed until the appellate court decides the appeal.[11] This decision created an additional obstacle to parties challenging arbitration agreements and reflects the Court's continued trend of deference to arbitration agreements.

This Note argues that the Court wrongly decided *Coinbase*, and that Congress, rather than the judiciary, should clarify plaintiffs' rights as they relate to arbitration. Part I will discuss the state of modern arbitration law, examining concerns arising from the lack of due process protections in arbitration proceedings and the procedural obstacles that make it difficult for parties to challenge arbitration agreements. Part II will analyze the Supreme Court's decision in *Coinbase, Inc. v. Bielski*, arguing that the decision lacked sufficient basis in

4. *Id.* at 9.

5. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U. S. 1, 24-25 (1983).

6. *See* Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration, 67 Law & Contemp. Probs. 279, 305-06 (2004).*

7. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 337 (2011); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 231 (2013).

8. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995); 9 U.S.C. § 3 (2018).

9. 9 U.S.C. § 16 (2018).

10. Coinbase, Inc. v. Bielski, No. 22-105, slip op. at 13 (U.S. Jun. 23, 2023) (Jackson, J., dissenting).

11. *Id.* at 14 (Jackson, J., dissenting).

positive law to justify the mandatory stay rule it created. This analysis will consider, in turn, the governing statutes, the *Grigg's* principle, and the parties' interests. Part III will describe the effects of the Court's holding on future dispute resolution and propose that Congress act to amend the Federal Arbitration Act ("FAA"). The state of modern arbitration law compels courts to create rules for arbitration out of thin air. To improve arbitration law and adequately protect plaintiffs' rights, Congress should intervene and relieve the courts of this challenging task.

I. THE TROUBLING STATE OF MODERN ARBITRATION LAW

In 1925, Congress passed the FAA with the intent to place arbitration contracts on equal footing with non-arbitration contracts and to counteract the hostility towards arbitration which was widespread at the time.[12] In the approximately one hundred years since its passage, the FAA has evolved into an extremely powerful tool for parties wishing to avoid traditional litigation.[13] The Supreme Court has placed the FAA on a pedestal, interpreting it broadly and finding it preempts conflicting statutes.[14]

Unfortunately, arbitration, like many legal tools, represents a trade-off. In arbitration agreements, parties trade the institutional protections offered by courts in exchange for a more efficient final resolution of the conflict.[15] Arbitration is thought to be more efficient because of the minimized discovery process and the relative flexibility of arbitrators' schedules.[16] Moreover, arbitration is sometimes preferable because it includes privacy protections for the parties involved, whereas court proceedings are subject to public records laws.[17] Additionally, arbitration agreements often allow the parties to choose the arbitrator, which enables them to select an expert on the subject matter of the claim.[18] Another common reason parties choose arbitration

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12. JON O. SHIMABUKURO, CONG. RSCH. SERV., RL30934, THE FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENTS 2-3 (2003).

13. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L. J. 1215, 1260-63 (2001).

14. *Id.*

15. Susan Leader et al., *Litigation or Arbitration? Seven Factors to Consider*, AM. BAR ASS'N (Jan. 20, 2023), https://www.americanbar.org/groups/litigation/resources/newsletters/corporate-counsel/litigation-or-arbitration-seven-factors-consider/ [https://perma.cc/4C3F-VMYB].

16. *Id.* ("Parties to an arbitration can play a larger part in determining how and when that arbitration will occur than they would in a court setting (where an assigned judge can hand down deadlines and sua sponte rulings)").

17. *Id.* ("[T]he existence of the arbitration itself is typically confidential.").

18. LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS, A CONTEMPORARY APPROACH 507 (Alyson Carrel, Managing Ed., 6th ed. 2019).

is that it can be more cost-efficient than traditional litigation.[19] Due to these benefits, arbitration has become an increasingly common practice.[20] This section of the Note focuses on the due process concerns and the procedural obstacles inherent in arbitration and challenges to arbitration agreements.

A. Due Process Concerns

The Fifth and Fourteenth Amendments guarantee all Americans the right to due process of law.[21] However, arbitration proceedings lack many of the essential due process safeguards that are inherent in traditional civil litigation. Examples of these shortcomings include the absence of a jury, mandatory private hearings, and restricted grounds for appeal.[22] These distinctions between typical court proceedings and arbitration raise important considerations regarding constitutional protections. Understanding these differences is crucial to grasping the concerns associated with the growing prevalence of arbitration agreements.

The first aspect of arbitration proceedings that raises due process concerns is the arbitrators themselves. One or a few individuals, as opposed to a judge or jury, are responsible for making factual and legal conclusions.[23] The Seventh Amendment, which is limited to "suits at common law," does not apply to arbitration.[24] Juries play an important role in the civil law system and are thought to award more generous

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19. While this may have been true in the initial era of arbitration, it is by no means a guarantee in modern arbitration proceedings. Leader et al., *supra* note 15 ("However, arbitration is not *always* cheaper than litigation. Parties to an arbitration must pay for the arbitrator's time, which can add up–particularly in a complex or lengthy arbitration").

20. RISKIN ET AL., *supra* note 18, at 507; Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Sept. 27, 2017), 1,1, https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/ ("This study finds that since the early 2000s, the share of workers subject to mandatory arbitration has more than doubled and now exceeds 55 percent.") [https://perma.cc/3KMY-3XWE].

21. U.S. CONST. amend. V.; U.S. CONST. amend. XIV.

22. John L. Hardiman et al., *Discovery in Arbitration*, GLOB. ARB. REV. (October 29, 2009), https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2010/article/discovery-in-arbitration [https://perma.cc/QNP6-ZZR5]; PETER B. RUTLEDGE, ARBITRATION AND THE CONSTITUTION, 170-72 (2012) (ebook); *Id*. at 4 ("The use of arbitration in these areas, coupled with extremely limited opportunity for judicial or other review of the arbitrator's action, raised concerns about whether the U.S. government is delegating too much power to democratically unaccountable actors.").

23. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 407 (1967) (Black, J., dissenting) ("I am by no means sure that thus forcing a person to forgo his opportunity to try his legal issues in the courts where, unlike the situation in arbitration, he may have a jury trial and right to appeal, is not a denial of due process of law."); RISKIN ET AL., *supra* note 18, at 509 (explaining that most arbitrators are male and white, and thus the pool of potential arbitrators has been referred to as a "good old boys club.").

24. U.S. CONST. amend. VII.

damages than judges.[25] By waiving the right to a jury, arbitration agreements alter the incentives to settle for both plaintiffs and defendants.[26] While this aspect of arbitration may be uncontroversial, it is key to understanding the grand scheme of things.

Arbitration can be quite expensive, however, the Supreme Court has held that expense alone is not a valid ground for challenging the enforcement of an arbitration agreement.[27] The cost of arbitration quickly accumulates, especially when a claim is heard by a panel of arbitrators or lasts multiple days.[28] This expense may encourage parties to settle or discourage them from bringing a case.

Furthermore, arbitration proceedings do not follow the Federal Rules of Evidence, creating the potential for arbitrators to be influenced by questionable witnesses and hearsay evidence.[29] Different arbitration forums establish their own rules regarding evidence, and these rules are typically broad.[30] For example, the American Arbitration Association Rules simply state that "[c]onformity to legal rules of evidence shall not be necessary."[31] Part of the rationale for this is that the scope of discovery in arbitration proceedings is limited, so parties are allowed to use non-expert witnesses and hearsay evidence to enable them to fully state their case.[32] The downside is that information may be presented to the arbitrator that has not been thoroughly substantiated and would be inadmissible in a federal court.[33] The absence of strict evidence rules in arbitration can lead to potential bias in final decisions, likely favoring parties with superior evidence-gathering abilities, regardless of the evidence's authenticity.[34]

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25. RUTLEDGE, *supra* note 22, at 171 ("Juries generally are believed to award more generous damages than judges in bench trials . . . the specter of a jury and the perceived risk of runaway verdicts can press defendants to settle before a jury ever sees the case.").

26. *Id.*

27. Green Tree Fin. Corp. Ala. v. Randolph, 531 U.S. 79, 91 (2000).

28. *How Much Does Arbitration Cost? And, Who Pays for It?*, ARB. INFO, UNIV. OF MO. SCH. OF L. (Oct. 11, 2015), https://law.missouri.edu/arbitrationinfo/2015/10/11/how-much-does-arbitration-cost/ [https://perma.cc/XZA4-2TCD].

29. Henry Zhuhao Wang, *Alternative Evidence Rules for Arbitration*, 24 NEV. L. J. 73, 81 (2024).

30. *Id.* at 78; Paul Radvany, *The Importance of the Federal Rules of Evidence in Arbitration*, 36 THE REV. OF LITIG. 469, 471 (2016).

31. AM. ARB. ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R-35 (2022).

32. Radvany, *supra* note 30, at 509-10.

33. Wang, *supra* note 29, at 81 ("[W]ithout rules of evidence in arbitration proceedings, hearsay evidence would be made by witnesses without any personal knowledge; character evidence with significant effect of prejudice would come in; and unauthenticated photos, doctored electronic evidence, and deepfakes could hardly be identified by arbitrators as false or tampered with.").

34. *Id.* at 81 ("Recent research suggests that cognitive and implicit biases, which may be triggered or exacerbated by exposure to evidence of questionable relevance or reliability, may play a much larger role in arbitrators' decisions than they may understand or admit. The let-it-all-in approach fails to take account of this concern.").

Moreover, arbitration proceedings are usually private and, therefore, not subject to the public records laws that govern courts.[35] This may prevent parties from initiating arbitration cases, either because they are not aware that they have a claim or because they are not aware that similar claims were successful.[36] The privacy surrounding arbitration proceedings makes the process unaccountable to the public and raises deep questions about the accountability of arbitrators and how this system reconciles with liberal democracy.[37] The privacy aspect of arbitration also limits the body of precedent that accumulates. Regardless, arbitrators are not required to follow precedent, and they have substantial leeway in their decisionmaking.[38]

Finally, arbitral decisions are rarely overturned on appeal.[39] The FAA specifies four grounds on which a court can void an arbitration award: (1) bias, (2) misconduct, (3) fraud or corruption, or (4) the arbitrator exceeding their authority.[40] In the rare event that a court does invalidate an award, it might only order a rehearing by the arbitrators.[41] The limited grounds for appeal prevents the reversal of awards on the basis of procedural issues. The Supreme Court has upheld these stringent rules, suggesting that parties must have an exceedingly strong claim that meets one of the four criteria in order to obtain relief.[42] The Court even goes so far as to state, "It is not enough for petitioners to show that the [arbitrators] committed an error—or even a serious error."[43]

Coinciding with the rise of arbitration, legislative proposals in Congress have called for imposing due process protocols on arbitration proceedings.[44] Unfortunately, broad legislation to this effect has not been enacted.[45] In large part, the law surrounding arbitration

35. Leader et al., *supra* note 15 at 9.

36. Stone & Colvin, *supra* note 2 at 15.

37. Cornelis J.W. Baaij, *Liberal Justice and the Creeping Privatization of State Power*, 67 DRAKE L. REV. 561, 571 (2019) ("Liberal justice resists the allocation of control of state power to actors that are under no obligation to account for the use or authorization of it.").

38. While arbitrators are not legally bound to follow precedent, parties often present evidence of prior awards in their arguments and briefs. *See* Carlton J. Snow, *An Arbitrator's Use of Precedent*, 94 DICKINSON L. REV. 665, 666 (1990).

39. *See Broker-Dealer/Customer Arbitration: Investor Bulletin*, U.S. SEC. & EXCH. COMM'N (Jun. 14, 2022), https://www.sec.gov/resources-for-investors/investor-alerts-bulletins/broker-dealercustomer-arbitration-investor-bulletin [https://perma.cc/UV9B-JL7Q].

40. 9 U.S.C. § 10 (2018).

41. *Id.*

42. Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 559 U.S. 662, 671 (2015).

43. *Id.*

44. *See generally* RUTLEDGE, *supra* note 22.

45. Stone & Colvin, *supra* note 2 at 25.

agreements is created by the courts, which have been deferential to arbitration, and is now affirmed by *Coinbase, Inc. v. Bielski*.[46]

B. Procedural Obstacles

Alongside the due process concerns raised by arbitration agreements, parties who wish to challenge arbitration also face procedural obstacles that make it difficult to have their substantive claims heard in court.[47] The Supreme Court has controversially upheld four prominent obstacles to substantive court claims, including: the saving clause of the FAA, the severability of arbitration clauses, delegation clauses, and class-action waivers.[48]

First, the saving clause of the FAA "requires courts to treat the validity or enforceability of arbitration agreements and arbitration clauses no less favorably than agreements and contractual clauses generally."[49] The Court has interpreted this to mean that state legislation treats arbitration clauses differently from other contracts that are preempted and invalid.[50] Moreover, arbitration clauses are considered severable from other parts of a contract. This counterintuitive rule means that an invalidated contract does not render the arbitration clause within the contract invalid.[51] A court may only consider the issue of the validity of the arbitration agreement; claims related to the invalidity of the contract are reserved to the arbitrator.[52] Similarly, a delegation clause is severable from the rest of the contract it is found in.[53]

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46. Coinbase, Inc. v. Bielski, No. 22-105, slip op. at 3 (U.S. Jun. 23, 2023); *see infra* Section II.

47. Baaij, *supra* note 37 at 592 ("[T]hree doctrines the U.S. Supreme Court developed over the last six decades illustrate a precedent that is incrementally moving the FAA in the direction of ousting courts of their enforcive jurisdiction.").

48. *Infra* Part I.B.

49. 9 U.S.C. § 2 (2018); Baaij, *supra* note 37, at 601.

50. *State Courts and the Federalization of Arbitration Law*, 134 HARV. L. REV. 1184, 1189 (2021) ("In *Doctor's Associates, Inc. v. Casarotto*, the Court invalidated a state rule mandating that arbitration clauses be set out in all capital letters on the first page of a contract, holding that the rule 'singl[ed] out arbitration provisions for suspect status.' " (citation omitted)).

51. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1966) ("[I]f the claim is fraud in the inducement of the arbitration clause itself . . . the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally."*); see also* Richard L. Barnes, Prima Paint *Pushed Compulsory Arbitration Under the* Erie *Train*, 2 BROOK. J. CORP. FIN. & COM. L. 1, 2 (2007) ("Supreme Court cases, by urging severance of the arbitration clause and then enforcing it, have formed a counterintuitive position.").

52. *Prima Paint Corp.*, 388 U.S. at 404*; see also id.* at 407, (Black, J., dissenting) ("The Court holds, what is to me fantastic, that the legal issue of a contract's voidness because of fraud is to be decided by persons designated to arbitrate factual controversies arising out of a valid contract between the parties.").

53. Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 70-72 (2010).

A delegation clause is a powerful tool for a party wishing to ensure a claim remains in arbitration. Delegation clauses bind the parties to submit the issue of whether they must arbitrate their disputes to an arbitrator, often referred to as "arbitration about arbitration."[54] In the absence of a delegation clause, trial courts may hear motions to compel arbitration and grant or deny the motion based on the validity of the agreement to arbitrate.[55] When a delegation clause is present, this decision is taken out of the judge's hands and assigned to the arbitrator.[56] Parties must successfully challenge both the delegation clause and the arbitration agreement before their substantive claims may be heard by a judge.[57]

The Supreme Court endorsed delegation clauses in *Rent-A-Center, West, Inc. v. Jackson*.[58] The Court held that when an arbitration agreement includes a delegation clause, a plaintiff cannot ask a judge to review the fairness of the agreement to arbitrate unless the party first proves that the delegation clause is invalid.[59] Justice Scalia, writing for the majority, noted that the plaintiff's arguments about the arbitration clause being unfair, as it related to the substantive claim, had little relevance to the threshold question of whether it would be unfair to uphold the delegation clause.[60] The decision in *Rent-A-Center* was controversial, as the Justices split 5-4.[61] Justice Stevens, writing the dissent, referenced Justice Black's dissent in *Prima Paint*, stating, "[W]hile I may have to accept the 'fantastic' holding in *Prima Paint* . . . I most certainly do not accept the Court's even more fantastic reasoning today."[62]

Furthermore, modern arbitration agreements may contain class-action waivers, which eliminate the ability for plaintiffs to join their

54. David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 370 (2018).

55. *Id.* at 369-70.

56. *Id.* at 401 (explaining that delegation clauses override the default, that questions related to the validity or scope of the arbitration agreements are allocated to judges, and instead assign those questions to arbitrators).

57. *Rent-A-Ctr., W., Inc.*, 561 U.S. at 76 (Stevens, J., dissenting) ("Even when a litigant has specifically challenged the validity of an agreement to arbitrate he must submit that challenge *to the arbitrator* unless he has lodged an objection to the particular line in the agreement that purports to assign such challenges to the arbitrator—the so-called 'delegation clause.' ").

58. *See generally* 561 U.S. 63 (2015).

59. *See* Horton, *supra* note 54, at 396; *see also Rent-A-Ctr., W., Inc.*, 561 U.S. at 76 (Stevens, J., dissenting) ("Even when a litigant has specifically challenged the validity of an agreement to arbitrate he must submit that challenge *to the arbitrator* unless he has lodged an objection to the particular line in the agreement that purports to assign such challenges to the arbitrator—the so-called 'delegation clause.' ").

60. *Rent-A-Ctr., W., Inc.*, 561 U.S. at 73.

61. *Id.* at 64.

62. *Id.* at 88 (Stevens, J., dissenting).

claims.[63] This is concerning for individuals' rights because class-action waivers are often used in contracts of adhesion.[64] In many of these contracts, such as phone service and credit card agreements, the potential damages are so small that the only way plaintiffs can collect enough money to make the claim profitable is by joining claims in a class-action suit.[65] Despite this, class-action waivers are almost always upheld by courts.[66]

In the landmark case *AT&T Mobility LLC v. Concepcion* in 2011, the Supreme Court reversed the Ninth Circuit and upheld an arbitration agreement which included a class-action arbitration waiver.[67] The Ninth Circuit, in finding the arbitration agreement void, relied on the California Supreme Court's reasoning in *Discover Bank v. Superior Court*.[68] The court in *Discover Bank* reasoned that "the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions."[69] The Ninth Circuit assessed whether the FAA preempted the *Discover Bank* rule, and found that it does not, based on its analysis of both the rule and the FAA.[70] The court reasoned that since the *Discover Bank* rule applied to the revocation of any contract, regardless of whether or not it included an arbitration agreement, it fell outside the scope of the FAA.[71]

The Supreme Court disagreed with this interpretation of the FAA, asserting that a federal statute's saving clause shall not be interpreted as to allow a common law right that is at odds with the provisions of the Act.[72] After establishing that the purpose of the FAA was to ensure the enforcement of arbitration agreements and facilitate streamlined proceedings, the Court asserted that a statute or judgment mandating class arbitration or deeming all class-action waivers unconscionable

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63. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [https://perma.cc/7EZJ-CRLC].

64. *Id.*

65. *See id.* ("By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies like American Express devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices."); *see also* Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class-actions Impact Low-Wage Workers*, 2012 MICH. ST. L. REV. 1103, 1115 (2012).

66. Silver-Greenberg & Gebeloff, *supra* note 63 ("In 2014 alone, judges upheld class-action bans in 134 out of 162 cases.").

67. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011).

68. *See generally* Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005).

69. *AT&T Mobility LLC*, 563 U.S. at 338.

70. Laster v. AT&T Mobility LLC, 584 F.3d 849, 857-58 (9th Cir. 2009).

71. *Id.* at 857 (explaining the rule was " 'simply a refinement of the unconscionability analysis applicable to contracts generally in California.' ").

72. *AT&T Mobility LLC*, 563 U.S. at 343.

established a scheme inconsistent with the FAA.[73] The majority's analysis in *Concepcion* of the FAA's purpose and saving clause is insightful and demonstrates the Court's intense commitment to facilitating arbitration.

The Supreme Court's expansive interpretation of the FAA in *Concepcion* was the first of several cases in the trend of a "preemptive federal arbitration procedural paradigm" which the Court's most recent decision in *Coinbase, Inc. v. Bielski* has furthered.[74] In *Epic Systems Corp. v. Lewis* in 2018, the Supreme Court expanded on its holding in *Concepcion* by resolving a conflict between the FAA and the National Labor Relations Act in favor of the FAA.[75] This decision further curtailed the rights of workers to access courts in favor of arbitration.[76]

The preceding Supreme Court cases illustrate a consistent trend favoring arbitration agreements and the FAA above all—even other federal statutes. Significantly, these cases share several commonalities: they rest on tenuous legal rationale, are controversial, and the Justices' votes (almost always) reflect party allegiance.[77] This suggests the possibility of these cases being decided for political reasons. The Supreme Court's opinion in *Coinbase, Inc. v. Bielski*, follows this trend and deals yet another blow to parties' abilities to challenge arbitration agreements.

II. COINBASE, INC. V. BIELSKI: HOW THE MAJORITY GOT IT WRONG

A. Background

In 2021, Abraham Bielski opened an account on Coinbase, an online currency exchange platform that enables users to exchange fiat and cryptocurrencies.[78] Shortly after opening his account, Bielski fell victim to a scam in which he lost nearly $30,000 he had stored in his Coinbase wallet.[79] Coinbase was allegedly unresponsive to Bielski's requests for help, leading him to sue Coinbase, claiming they violated

73. *Id.* at 344.

74. Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration: Towards a Preemptive Federal Arbitration Procedural Paradigm?*, 42 SW. L. REV. 131, 133-34 (2012).

75. Epic Sys. Corp. v. Lewis, 584 U.S. 497, 502 (2018) (holding that there was no right to class-action litigation under the NLRA because, "It is this Court's duty to interpret Congress's statutes as a harmonious whole.").

76. *Id.* at 526-27 (Ginsburg, J., dissenting).

77. *See generally* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Epic Systems Corp. v. Lewis, 584 U.S. 497 (2018).

78. Bielski v. Coinbase, Inc., No. C 21-07478 WHA, 2022 U.S. Dist. LEXIS 65689, at *1-2 (N.D. Cal. 2022).

79. *Id.*

the Electronic Funds Transfer Act.[80] Bielski also sought to create a class-action claim and represent a class of similarly situated individuals.[81]

The case was initially heard in the United States District for the Northern District of California, where Coinbase filed a motion to compel arbitration.[82] The district court found that both the delegation clause and the arbitration agreement in the Coinbase user agreement were unconscionable and unenforceable.[83] Consequently, the district court denied Coinbase's motion to compel arbitration.[84]

Following this decision, Coinbase filed an interlocutory appeal of the order denying the motion to compel arbitration and a motion to stay the proceedings in the district court pending the appeal in the Ninth Circuit Court of Appeals.[85] The Circuit Court denied Coinbase's motion to stay the proceedings.[86] Coinbase appealed that order to the United States Supreme Court, which granted certiorari.[87]

The Supreme Court considered if a district court must stay its proceedings while an interlocutory appeal of a motion to compel arbitration is pending.[88] The Court reversed the Ninth Circuit in a 5-4 decision, largely along party lines.[89] In its decision, the Court stated that in such instances, a district court must stay its proceedings.[90] The majority and the dissent in *Coinbase* came to deeply different analyses of the issues presented. A spirited debate, like the one seen in this case, is at odds with the relatively narrow procedural question presented here. The contentiousness between these opinions indicates that *Coinbase* represents a broader and more principled debate about the

80. *Id.* at *3.

81. Coinbase, Inc. v. Bielski, No. 22-105, slip op. at 1 (U.S. Jun. 23, 2023).

82. *Id.*

83. Bielski v. Coinbase, Inc., No. C 21-07478 WHA, 2022 U.S. Dist. LEXIS 65689, at *3-5 (N.D. Cal. 2022) (explaining that "[T]o be enforceable, a delegation provision, as well as an arbitration agreement generally, must have a 'modicum' of bilaterality." And finding that here, the delegation clause and the arbitration agreement lacked bilaterality because they obligate only the user, not Coinbase, to arbitrate their claims)(citing Armendariz v. Found. Health Psycare Servs., Inc., 24 Cal. 4th 83, 117 (2000)).

84. Coinbase, Inc. v. Bielski, No. 22-105, slip op. at 1-2 (U.S. Jun. 23, 2023).

85. *Id.* at 2. The Ninth Circuit Court of Appeals ultimately affirmed the district court's order denying the motion to compel arbitration. The Supreme Court granted certiorari on this issue and the case went to the Supreme Court for a second time, this time under the name *Coinbase v. Suski*. The Court, in a unanimous opinion authored by Justice Jackson, held that when two contracts exist and one requires arbitration and the other one does not, a court, rather than an arbitrator, must decide which contract applies. Coinbase, Inc. v. Suski, No. 23-3, slip op. 1, 1-3 (U.S. 2024).

86. *Coinbase, Inc.*, slip op. at 2.

87. *Id.*

88. *Id.* at 2.

89. Justice Kavanaugh authored the majority opinion. The dissent was authored by Justice Jackson; Justices Sotomayor and Kagan joined the dissent in full and Justice Thomas joined Parts II, III, and IV. *Id*. at 1.

90. *Id.* at 10.

conflict between interests supporting the right to litigation and those supporting the right to arbitration. The *Coinbase* decision will be dissected in three parts: statutory analysis, *Griggs* principle analysis, and the weighing of the parties' interests.

B. Statutory Analysis

As in many of the previous Supreme Court decisions regarding arbitration, a key point of contention in *Coinbase* was how to analyze the FAA. The analysis in this case centered on §16 of the FAA, an amendment that was enacted in 1988.[91] Section 16 grants a party the right to file an interlocutory appeal when a district court denies a motion to compel arbitration.[92] The question facing the Court in *Coinbase* was whether the interlocutory appeal must be accompanied by a stay of the district court proceedings.[93] Complicating the matter, §16 says nothing about stays in this regard, causing the opinions in this case to rely on background principles and similar statutes to discern Congress's intent.[94] While the majority claims that Congress's silence in the FAA was intended to indicate that these interlocutory appeals should be automatically accompanied by a stay, this section of the Note demonstrates that the majority derived its broad rule from inadequate sources of law.

The typical procedure when a statute does not address stays is for the judge presiding over the case to use their discretion and consider a four-factor test to determine if a stay is necessary.[95] Stays are often utilized to prevent simultaneous adjudication of the same issue by a district court and an appellate court.[96] This background principle reflects the broader *Griggs* principle, which is integral to the majority's argument, and will be further examined in the discussion below.[97]

In some instances, a statute will state that stays shall not be granted for a specific type of interlocutory appeal. The majority points to these "non-stay provisions" as evidence of its conclusion that Congress can create a mandatory stay rule through silence.[98] The majority

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91. 9 U.S.C. § 16 (2018).

92. 9 U.S.C. § 16(a)(2) (2018).

93. *Coinbase, Inc.*, slip op. at 1.

94. 9 U.S.C. § 16 (2018).

95. Va. Petrol. Jobbers Ass'n v. Fed. Power Comm'n., 259 F.2d 921, 925 (D.C. Cir. 1958); Long v. Robinson, 432 F.2d 977, 979-81 (4th Cir. 1970) (explaining that the four factors a court typically considers are: (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? (2) Has the petitioner shown that without such relief, it will be irreparably injured? (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? (4) Where lies the public interest?).

96. *Coinbase, Inc.*, slip op. at 3 (citing Griggs v. Provident Consumer Disc. Co., 459 U. S. 56, 58 (1982)).

97. *See infra* Part II.C.

98. Coinbase, Inc. v. Bielski, No. 22-105, slip op. at 7 (U.S. Jun. 23, 2023).

explains that Congress did not need to mandate stays in §16 because the background principle adequately does so.[99] Under the majority's rule, when Congress is silent, the background principle applies, and all proceedings in the district court related to aspects of the case involved in the appeal must be stayed.[100] Following the majority's reasoning, to overcome the default of a stay, a statute must include a non-stay provision.[101]

The dissent points out an inconsistency within this argument.[102] The majority's interpretation requires the stay of all trial court proceedings; however, the majority says that a district court may proceed on some issues, such as costs during the appeal.[103] Additionally, the majority's conclusion fails to account for statutes that include explicit stay provisions. Why would Congress sometimes be silent when it wants to create a right to a stay and sometimes be explicit? Instead, the majority waives away two similar statutes that include stay provisions, claiming the stay provisions are only due to the specific circumstances of those statutes.[104]

In its analysis of §16, the Court considers section three of the FAA and 28 U.S.C. §1292, which include explicit stay provisions. The majority explains away these counterexamples, contending that section three included the stay provision because it was not governed by the *Griggs* principle, and §1292 included the stay provision to avoid confusion.[105] This rationale is insufficient to overcome the example these statutes provide of Congress being explicit when it intends for mandatory stays.

First, section three provides that when a motion to compel arbitration is granted, the case in the district court must be stayed until the arbitration proceedings are concluded.[106] Section three is the inverse of §16, which governs interlocutory appeals when a motion to compel arbitration is denied.[107] The majority claims that while section three explicitly provides for mandatory stays and §16 is silent regarding mandatory stays, both provisions have the same effect of creating a right to a mandatory stay.[108] The dissent draws the opposite meaning

99. *Id.*
100. *Id.*
101. *Id.*
102. Coinbase, Inc., slip op. at 5 (Jackson, J., dissenting).
103. *Id.* at 4 n.2.
104. *Id.* at 8-9.
105. *Id.*
106. 9 U.S.C. § 3 (2018).
107. 9 U.S.C. § 16 (2018).
108. *See Coinbase, Inc.*, slip op. at 3, 8.

from the silence in §16 regarding stays and finds that a mandatory stay rule cannot be implied from §16.[109]

The majority, in describing section three, writes, "Section 3 of the Act provides for a stay of court proceedings pending *arbitration*, not pending an appeal. This situation does not fall within the *Griggs* rule."[110] The majority explains that the explicit stay provision was included in section three only because the *Griggs* principle did not apply.[111] Conversely, the dissent argues that the inclusion of stay provisions in section three, and 28 U.S.C. §1292, demonstrate that "Congress focused on stays when crafting the 1988 law and the Federal Arbitration Act. And when it intended to mandate interlocutory stays, it said so expressly."[112]

The inclusion of a stay provision in section three is strong evidence of the congressional intent behind §16 because both statutes are part of the FAA. Since one provision of the FAA includes a mandatory stay provision, it would be logical to include a mandatory stay provision in the other portion of the FAA which discusses interlocutory appeals. Regardless of the majority's claim that a stay provision in §16 was unnecessary because of the background principle, the statute would have been clearer and more consistent with section three if it included an explicit mandatory stay provision.

A potential problem with relying on section three of the FAA to determine congressional intent in passing §16 of the FAA is that §16 was added as part of an amendment in 1988, while section three dates back to 1947.[113] To balance this, the opinions in this case also consider 28 U.S.C. §1292, which was a part of the same law that passed §16 in 1988.[114] Like section three, §1292 includes an explicit stay provision, further demonstrating that Congress includes mandatory stay provisions when it intends them to exist–exactly what Congress had in mind when it drafted §16.

Section 1292(d)(3) states that in permissive interlocutory appeals, a stay is not automatically granted but can be granted by the judge.[115] The following paragraph, which governs a different category of interlocutory appeals, states that these appeals will automatically stay proceedings in district court.[116] The majority's interpretation is that Congress included an explicit stay provision in paragraph (4) to avoid

109. *Coinbase, Inc.*, slip op. at 3 (Jackson, J., dissenting).

110. The *Griggs* principle prevents two courts from hearing the same issue at the same time; it does not apply to a claim being heard in a trial court and in an arbitration proceeding. *Coinbase, Inc.*, slip op. at 8.

111. *Id.*

112. *Coinbase, Inc.*, slip op. at 3 (Jackson, J., dissenting).

113. 9 U.S.C. §§ 3, 16 (2018).

114. *Coinbase, Inc.*, slip op. at 3 (Jackson, J., dissenting).

115. 28 U.S.C. § 1292(d)(3) (2018).

116. *Id.* at § 1292(d)(4)(B).

confusion and overlap with paragraph (3). The majority explains that the explicit mandatory stay provision in paragraph (4) is simply a statement of the general rule.[117] Further, the majority argues that the inclusion of the mandatory stay provision in paragraph (4) is purely a result of unusual circumstances and does not diminish the general rule that mandatory stays do not need to be explicit in statutes.[118] The dissent strongly disagrees with the majority's interpretation and refers to the reasoning that paragraph (4) included a mandatory stay provision to avoid overlap with paragraph (3) as a "red herring."[119] The dissent points out that paragraphs (3) and (4) govern different types of appeals so they do not overlap, and there was little risk of the discretionary stay provision in paragraph (3) being read into paragraph (4).[120]

The principle of statutory interpretation against mere surplusage states that every word within a statute is there for a purpose and should be given its due significance, pointing in favor of the dissent's interpretation of §1292.[121] Further, if Congress included a mandatory stay provision in paragraph (4) purely to avoid confusion with paragraph (3), why would it have not included a similar provision in §16 of the FAA to avoid confusion with section three of the FAA? An additional principle of statutory interpretation is that the Court has a "duty to refrain from reading a phrase into the statute when Congress has left it out."[122] In this case, the majority does exactly the opposite of this, and reads a mandatory stay rule into the statute. The dissent follows this rule, and interprets the exclusion of a stay rule from §16 as intentional.

Furthermore, Congress did not intend for §16 to include a mandatory stay provision, as such provisions are detailed and cannot be replaced by a general background principle. For example, §1292, paragraph (4) specifies that "no further proceeding shall be taken in the district court until 60 days after the court has ruled upon the motion."[123] The statute provides limitations to the stay, namely that the stay does not "bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary."[124] The detail in this statute suggests that Congress included this

117. *Coinbase, Inc.*, slip op. at 8-9.

118. *Id.* at 9 ("That unusual circumstance does not diminish the operation of the *Griggs* rule in the context of arbitrability appeals.").

119. *Id.* at 4, n.1 (Jackson, J., dissenting).

120. *Id.*

121. LARRY M. EIG, CONG. RSCH. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (2014).

122. Keene Corp. v. United States, 508 U.S. 200, 208 (1993); *see also Coinbase, Inc.*, slip op. at 2 (Jackson, J., dissenting).

123. 28 U.S.C. § 1292(d)(4)(B) (2018).

124. *Id.*

provision because it intended to adopt a mandatory stay rule in these cases and did not think the background principle governing stays was sufficient either in applicability, level of detail, or both.

The rule the majority adopts–mandatory stays provisions can be inferred from background principles–is not nearly specific enough to govern the situations that might arise while an interlocutory appeal is pending. Making this point itself, the majority states in a footnote, "[T]he district court may still proceed with matters that are not involved in the appeal, such as the awarding of costs and attorney's fees."[125] But *when* exactly a matter is not involved in the appeal, the majority does not make clear.

The issue of exactly what the district court can and cannot do pending the interlocutory appeal is an important one. For example, can a party depose a very elderly witness while the appeal is pending to preserve their testimony?[126] The rule in this case directs that mandatory stays are granted, but fails to provide any guidance about the limitations of the stay. If courts are to assume the stay is an absolute bar on all trial activities, except for the awarding of costs and attorney's fees as mentioned by the majority, then the power of judges to preserve evidence and make discretionary decisions will be substantially curtailed by this rule. It seems unlikely that Congress intended such a sweeping rule to be read into a statute that did not mention stays at all.

In sum, the majority relies on statutes that prohibit mandatory stays, and background principles to justify its rule, which is not found explicitly within §16 or any other statute. The majority explains away the instances in which a mandatory stay is explicit within similar statutes (section three and §1292), claiming the stay is only explicit due to the specific circumstances of those statutes. From this limited statutory analysis, the majority announces a sweeping new rule: when Congress creates a right to an interlocutory appeal, without including a stay or non-stay provision, the district court proceedings must be stayed pending the appeal if *any* aspect of the case is involved in the appeal.[127] Concerningly, there is no indication in the majority opinion that this rule should not be applied to *every* instance in which a statute creates a right to interlocutory appeals but does not mention stays. The absence of a direct trace to any statutes in the majority's rule raises suspicion that the Court may be creating law, a concern further underscored by the fact that the majority does not cite any precedent in which the Court has imposed a mandatory stay of pre-trial and trial

125. *Coinbase, Inc.*, slip op. at 4 n.2.

126. *Id.* at 11 (Jackson, J., dissenting) ("Say a witness is on her deathbed. Under the majority's rule, if an interlocutory arbitrability appeal under §16(a) is pending, discovery must be stayed and the evidence must be lost. That is apparently so even if the parties *agree* they wish to proceed with discovery.").

127. *Id.* at 6-7.

proceedings pending an interlocutory appeal.[128] Perhaps the other two lines of analysis in the case, the *Griggs* principle and the weighing of the parties' interests will justify this apparent overstep of the role of the judiciary.

C. The Griggs Principle

As the preceding section demonstrates, no statutory rule governs stays when a party files an interlocutory appeal of an order denying a motion to compel arbitration. Instead, the majority relies upon the *Griggs* Principle to intuit its rule. This section of the Note will consider the *per curiam* opinion issued in *Griggs v. Provident Consumer Disc. Co.* and show that the *Griggs* principle does not constitute a strong enough background principle to support the majority's rule.

The majority centers its analysis on two key sentences from *Griggs* which it contends formed the background principle Congress relied on when it passed §16 of the FAA.[129] The relevant reasoning from *Griggs* states that a federal district court and a federal court of appeals should not simultaneously assert jurisdiction over a case, and upon filing a notice of appeal, the district court is divested of control over "those aspects of the case involved in the appeal."[130] The majority asserts that this background principle entitles parties to mandatory stays in interlocutory appeals of motions to compel arbitration.[131] Because of this, the majority reasons that Congress was silent in §16 because the background principle was sufficient to create mandatory stays in these cases.[132]

A key difference between the majority and the dissent's understanding of the *Griggs* principle lies in how to interpret the following phrase: "those aspects of the case involved in the appeal." The majority reasons that because the question of arbitrability affects the authority of the district court to hear the case, the entire case is involved in the appeal.[133] Although questions of arbitrability are generally severable from the merits of a case, the majority contends that the relevant inquiry is "whether the district court's authority to consider a case is 'involved in the appeal' when an appellate court considers the threshold question of arbitrability."[134] The majority is adamant that the answer to this is yes.[135]

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128. *Id.* at 7 (Jackson, J., dissenting).

129. *Id.* at 3-4.

130. Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982).

131. *Coinbase, Inc.*, slip op. at 7.

132. *Id.*

133. *Id.* at 3-5.

134. *Id.* at 10 (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U. S. 1, 21 (1983); Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982)).

135. *Coinbase, Inc.*, slip op. at 10.

The majority supports its interpretation of the *Griggs* principle by pointing out that most courts of appeals that have addressed this question in the arbitration context have held in favor of mandatory stays.[136] Circuit courts, however, were split on this issue prior to the ruling in *Coinbase*.[137] The majority also cites treatises that support its position.[138]

Another central point of the majority's claim is that this application of the *Griggs* rule is necessary to make the right to an interlocutory appeal granted by §16(a) impactful and carry out Congress's intent.[139] The majority claims that without a stay, the right to an interlocutory appeal would be largely nullified, like "a lock without a key, a bat without a ball."[140] While it is true that the parties will lose the primary benefits of arbitration when a stay is denied, the interlocutory appeal is not completely useless. If the appeal is successful, the claim will be sent to arbitration regardless of the outcome of the trial.[141]

Conversely, the dissent contends that the phrase "those aspects of the case involved in the appeal" refers to only the specific questions in the case which are assigned to the appellate court; in *Coinbase* this is only the motion to compel arbitration.[142] The dissent concedes that when the interlocutory appeal is filed, the district court is divested of its power to revisit the issue of arbitrability, but this does not mean the district court has been divested of its power to decide the merits.[143] The dissent asserts that the overarching rationale underlying the *Griggs* principle is "one order, one reviewing court," and allowing an appellate court to hear the arbitrability issue while a district court hears the merits of a case does not run afoul of this.[144]

Finally, the dissent claims that a different background principle underlays Congress's decision to enact §16(a) without explicit rules regarding stays. The principle the dissent champions is that courts have "case-by-case discretion regarding whether or not to issue a

136. *Id.* at 1, 5 ("The common practice in §16(a) cases, therefore, is for a district court to stay its proceedings while the interlocutory appeal on arbitrability is ongoing. That common practice reflects common sense.").

137. Blinco v. Green Tree Servicing, LLC, 366 F.3d 1249,1251 (11th Cir. 2004) ("Whether a party is entitled to a stay of all proceedings in the district court until resolution of an appeal from a denial of arbitration is an issue of first impression for this Court. The circuit courts that have considered the issue are split. *Compare Bradford-Scott Data Corp., Inc. v. Physician Computer Network, Inc.*, 128 F.3d 504 (7th Cir. 1997) . . . *with Britton v. Co-op Banking Group*, 916 F.2d 1405 (9th Cir. 1990) . . . *and In re Salomon Inc. Shareholders Derivative Litigation*, 68 F.3d 554 (2d Cir. 1995) . . . .").

138. *Coinbase, Inc.*, slip op. at 4-5.

139. *Id.* at 5.

140. *Id.* at 6.

141. The dissent points out that parties continue to pursue interlocutory appeals when the court denies a stay, like Coinbase did in this case. *Id.* at 12-13 (Jackson, J., dissenting).

142. *Id.* at 8-9 (Jackson, J., dissenting).

143. *Coinbase, Inc.*, slip op. at 9 (Jackson, J., dissenting).

144. *Id.* at 8-9.

stay."[145] The dissent points to *Landis v. North American Co.*, which stated "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket."[146] History further bolsters the dissent's claim: the default rule that the judge closest to a case has the discretion to grant a stay goes back to the Judiciary Act of 1891.[147]

In summation, both the majority and the dissent's interpretation of the *Griggs* principle and the phrase "those aspects of the case involved in the appeal" are reasonable. As there is no clear right way to interpret this phrase, it seems insufficient to be the rationale Congress relied on when it created the right to interlocutory appeals in §16 and was silent regarding stays.

D. Weighing the Parties' Interest

The holding in *Coinbase* mandates a stay of case proceedings when an interlocutory appeal of a motion to compel arbitration is filed. This rule impacts the interests of the parties in the case and the general public. Depending on whether a stay is granted, the parties in a case may be compelled to settle, lose opportunities for discovery, or be unable to receive speedy relief. The public interest in the efficient use of judicial resources and quick cessation of a party's wrongdoing is also implicated by whether or not a stay is granted. The majority opinion focuses on the interests of the party seeking to appeal the motion to compel arbitration (the defendant), and the dissent focuses its concern on the party seeking to avoid arbitration (the plaintiff). At least one party's interests will inevitably be harmed by either a stay or lack thereof. The question presented is which party should bear the consequences? This specific issue may serve as an illustration of the broader conflict often encountered in arbitration cases—a clash between the right to litigation and the right to arbitration.

First, both parties are at risk of being compelled to settle based on a court's decision to stay a case. The majority points out that there is a risk of defendants being coerced into "blackmail settlements" when the district court case continues without a stay.[148] This is relevant in light of class-action cases, like *Coinbase*, in which there is a looming

145. *Id.* at 5, 7 ("*This* was the background against which Congress enacted §16 . . . . Before Congress enacted §16, parties brought interlocutory arbitrability appeals under other sources of appellate jurisdiction, and courts treated stays as discretionary, not mandatory. Yet, according to the majority, Congress sought to displace that common understanding when it enacted §16–without saying anything at all about stays pending appeal.").

146. Landis v. North Am. Co., 299 U. S. 248, 254 (1936); *Coinbase, Inc.*, slip op. at 5 (Jackson, J., dissenting).

147. *Coinbase, Inc.*, slip op. at 6 (Jackson, J., dissenting).

148. The conception of blackmail settlements referenced by the majority comes from Judge Friendly in 1973. In light of the concern raised by judge Friendly, judges have been enabled to deny certifying a class when it finds this would create undue pressure to settle. *Id.* at 6. *See also* Newton v. Merrill Lynch, 259 F.3d 154, 164 (3d Cir. 2001).

risk of a large award if the cases proceed to trial.[149] The dissent counters that the risk of coerced settlements also applies to plaintiffs.[150] If a stay is granted, the plaintiffs might be forced to settle because of the expense of the appellate proceedings or their need for immediate relief.[151] The dissent makes a compelling point that the burdens should not be placed on the party that initially "won" the motion to compel arbitration.[152]

Next, parties may lose access to crucial evidence or witnesses under the majority's rule. The rule mandates a stay of all pre-trial and trial proceedings, meaning even discovery must be postponed until the appellate case is decided.[153] This delay might result in evidence and witnesses becoming unavailable when, and if, the case resumes.[154] The majority's rule is stringent and disables judges from creating case-specific solutions, such as permitting the discovery of time-sensitive information or allowing discovery consistent with arbitration proceedings.[155]

Furthermore, the mandatory stay rule prevents plaintiffs from getting injunctive or speedy relief. Pausing the quest for relief pending the appeal may cause parties financial stress and potentially discourage them from challenging arbitration agreements. A more effective mandatory stay rule might grant judges some discretion to allow certain pre-trial proceedings in exigent circumstances.[156]

Finally, both the majority and dissent argue that their interpretation of the law best serves the public interest in an efficient and proper use of judicial resources. The majority points out that without the mandatory stay rule, there is a possibility that an entire trial would take place, only for the appellate court to later reverse the order denying the motion to compel arbitration.[157] This would send the case to arbitration, rendering the trial court's verdict meaningless.[158] In such a situation, the party who wanted the case heard in arbitration would have endured two complete court proceedings and lost the primary benefits of arbitration: savings and efficiency.

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149. Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1358-59 (2003).

150. *Coinbase, Inc.*, slip op. at 12 (Jackson, J., dissenting).

151. *Id.* (Jackson, J., dissenting).

152. *Id.* (Jackson, J., dissenting).

153. *Id.* at 11 (Jackson, J., dissenting).

154. Under the majority's rule, judges' hands are tied. In a hypothetical situation in which a key witness is in poor health, it would be logical to allow that witness to be deposed while the appellate case is proceeding just in case the trial resumes, but the majority rule does not allow this. *See id.* at 11-12 (Jackson, J., dissenting).

155. *Id.* (Jackson, J., dissenting).

156. *Coinbase, Inc.*, slip op. at 1 (Jackson, J., dissenting).

157. *Id.* at 6.

158. *Id.*

In the absence of a mandatory stay rule, a judge may use a four-factor test and their discretion to decide whether to grant a stay.[159] One of those factors is the likelihood of success on appeal, which should prompt a judge to grant a discretionary stay when the appeal is likely to succeed and prevent the wasted trial that the majority seeks to avoid.[160] The majority counters this by claiming that the discretionary test is insufficient because courts applying that test in this context often deny stays.[161]

Conversely, the public interest in the quick cessation of a party's wrongdoing goes against the majority's rule. In a case where the defendant is actively committing harm to a class of individuals, they can continue doing so during the time it takes the case to be heard by the appellate court.[162] Moreover, a defendant could exploit this delay to conceal evidence of wrongdoing related to the case.

The interests of the parties and the public affected by the majority's mandatory stay rule highlight the complexity and significance of the rule. Prior to this case, several circuits allowed the judge closest to the case to decide the issue of a stay based on their discretion and the circumstances of each case.[163] This new rule takes that discretion away from judges and grants no exceptions, even in compelling circumstances.[164] Both the majority and the dissent's arguments demonstrate situations in which a stay, or lack thereof, might be detrimental to a case.[165] This points to the larger concern with this case—a new rule such as this one, which affects party's substantive rights, should be established by the legislature and not the courts. The legislative process is the proper forum for addressing policy questions that balance parties' interests and the public interest.

III. THE EFFECTS OF COINBASE, INC. V. BIELSKI ON FUTURE DISPUTE RESOLUTION AND WHY CONGRESS SHOULD AMEND THE FAA

The new rule generated in *Coinbase* is poised to negatively impact plaintiffs attempting to bypass arbitration. The rule plainly favors defendants and may cause plaintiffs to settle, wait longer for relief, and lose evidence and witness testimony due to delay. Additionally, there

159. Va. Petrol. Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (1958).

160. *Id.*

161. *Coinbase, Inc.*, slip op. at 9.

162. *Id.* at 13 (Jackson, J., dissenting) (explaining that the majority's rule presumably disables the parties to the case from seeking injunctive relief while the appeal is pending).

163. *Id.* at 13 n.4 (Jackson, J., dissenting).

164. *Id.* at 1-2 (Jackson, J., dissenting) ("[D]efendants [seeking arbitration] will now receive a stay even when, according to the usual equitable analysis, there is no good reason for one. . . . That logic has such significant implications for federal litigation that the majority itself shies away from the Pandora's box it may have opened.").

165. *Id.* at 11-12 (Jackson, J., dissenting); *see id.* at 6.

may also be more frivolous appeals filed by defendants trying to buy time to build their case.[166] While these consequences may be considered relatively minor, they signify a broader issue–the gradual erosion of the right to engage in traditional litigation.

Coinbase, Inc. v. Bielski is just one in a long line of modern Supreme Court cases promoting arbitration over litigation and creating obstacles for plaintiffs. There is an unasked question lingering behind this jurisprudence: is debating narrow arbitration issues something the Court should spend its time on? The role of the Court is to interpret the Constitution and protect the rights of individuals from intrusion by the state. Debating mandatory stays of interlocutory appeals of motions to compel arbitration seems a far cry from this. However, given the vigor in which Justice Kavanaugh and Justice Jackson, two of the newest justices on the court, argued in their opinions, it seems this is not the end of Supreme Court decisions on arbitration.[167]

In light of this, Congress should act to clarify the FAA and take the policy debate about a right to litigation versus a right to arbitration out of the Court's hands. For instance, regarding stays pending interlocutory appeals, Congress should declare a default rule that governs when a statute that grants a right to an interlocutory appeal is silent regarding stays. Unfortunately, congressional action in this area seems unlikely. Arbitration has become a partisan issue and gridlock makes progress unlikely.[168] The Forced Arbitration Injustice Repeal Act has been introduced in Congress each year since 2019 and has never received bipartisan support.[169] A glimmer of hope can be found in the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, which President Biden signed in March 2022.[170] The Act was placed within the FAA, and demonstrates Congress's capability to make amendments and updates.[171] Aside from federal legislation,

166. The concern regarding frivolous appeals was discussed in both opinions in the case. The majority pointed out that the circuits that have stayed all §16(a) appeals have not seen an increase in frivolous appeals. *Coinbase, Inc.*, slip op. at 7-8. The dissent is concerned that this might change now that the Court has declared stays as the rule and not a matter of judicial discretion. *Id.* at 13 (Jackson, J., dissenting).

167. *About the Court*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/about.aspx (last visited Jun. 15, 2024).

168. *See* Mark J. Levin & Alan S. Kaplinsky, *Arbitration "Fair Act" Reintroduced in Congress,* CONSUMER FIN. MONITOR (May 11, 2023), https://www.consumerfinancemonitor.com/2023/05/11/arbitration-fair-act-reintroduced-in-congress/ [https://perma.cc/KGF4-XAWT].

169. *Id.*

170. David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L. J. F., 1, 1 (2022).

171. Deborah A. Widiss, *New Law Limits Mandatory Arbitration in Cases Involving Sexual Assault or Sexual Harassment*, AM. BAR ASS'N (Nov. 22, 2022), https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/fall-2022/new-law-limits-mandatory-arbitration-in-cases-involving-sexual-assault-or-harassment/?login [https://perma.cc/5SJX-R6BT].

states can pass statutes governing arbitration in the few instances not covered by the FAA.[172]

CONCLUSION

To borrow a word used in the *Prima Paint* and *Rent-A-Center* dissents, the Court's reasoning in Coinbase is "fantastic."[173] Relying on little more than the ambiguous *Griggs* background principle, the majority created a sweeping rule that governs not only in arbitration cases but also in all cases involving interlocutory appeals. The new rule is unsupported by statute, unsupported by precedent, and places an unjustified burden on plaintiffs.

Is this case the final nail in the coffin for the right to litigation? Probably not, but over the last fifty years, the Court has facilitated the gradual erosion of rights relating to arbitration—which should not go unnoticed. The legislature should act to clarify the many procedural questions arbitration raises and take these partisan questions out of the Court's hands. How courts will respond to this new rule and what it will mean for plaintiffs is concerning, but even more concerning is imagining what ruling the Supreme Court will issue next in favor of arbitration.

172. *See* Salvatore U. Bonaccorso, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145, 1147-48 (2015).

173. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 407 (1967) (Black, J., dissenting); Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 83 (2010) (Stevens, J., dissenting).