

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

COINBASE, INC.,)
 Petitioner,)
 v.) No. 22-105
ABRAHAM BIELSKI,)
 Respondent.)

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COINBASE, INC.,)

Petitioner,)

v.) No. 22-105

ABRAHAM BIELSKI,)

Respondent.)

- - - - -

Washington, D.C.

Tuesday, March 21, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:35 a.m.

APPEARANCES:

NEAL K. KATYAL, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

HASSAN A. ZAVAREEI, ESQUIRE, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:35 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 22-105, Coinbase versus Bielski.

Mr. Katyal.

ORAL ARGUMENT OF NEAL K. KATYAL

ON BEHALF OF THE PETITIONER

MR. KATYAL: Thank you, Mr. Chief Justice, and may it please the Court:

When a party appeals the denial of a motion to compel arbitration, it stays litigation. That result follows from the centuries-old divestiture rule, as well as by Congress's choice to adopt an asymmetric interlocutory rule in FAA Section 16(a).

The parties today agree on a lot, notably, that the divestiture rule of Griggs is the law. The filing of a notice of appeal divests the district court of its control over those aspects of the case involved in the appeal.

The only question today is whether district court proceedings are aspects of the case involved in the appeal. For three reasons,

1 the answer is yes.

2 First, Congress amended the FAA to
3 allow immediate appeals when district courts
4 deny motions to compel arbitration but not when
5 they approve them. And Congress did something
6 else unusual. It made those appeals
7 nondiscretionary. Those choices reflect
8 Congress's fear about the interim harm from
9 continued litigation.

10 In 1988, Griggs was ensconced as the
11 law, and Congress knew that authorizing these
12 interlocutory appeals would authorize the usual
13 stays too. Indeed, when Congress wants to
14 prevent a mandatory stay, they say so expressly
15 with anti-stay laws. Congress enacted such a
16 provision one day before 16(a) was enacted, but
17 16(a) has no anti-stay provision.

18 Second, these appeals involve the
19 entirety of the district court case. An
20 arbitration agreement does two things. First,
21 it bans district court proceedings and, second,
22 is an affirmative consent to an alternative
23 process. The whole point of an immediate appeal
24 is to protect those rights before they're lost.

25 And, third, it's undisputed the

1 district court action is stayed in other
2 interlocutory contexts, such as qualified
3 immunity. Arbitration is no different and
4 shouldn't be treated less favorably than other
5 rights, the very thing Congress enacted the FAA
6 to protect against.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Haven't we treated
9 qualified immunity differently from other
10 interlocutory appeals?

11 MR. KATYAL: I don't believe so, Your
12 Honor. I think -- I mean, certainly, with
13 respect to collateral order doctrine, you've
14 said that qualified immunity creates a qualified
15 -- creates a collateral order. And, here,
16 Congress has basically put 16(a) appeals,
17 arbitration appeals on it. But, with respect to
18 qualified immunity in cases like Mitchell versus
19 Forsyth, you've acknowledged that once someone
20 invokes qualified immunity, it basically stops
21 discovery and trial proceeding.

22 JUSTICE THOMAS: And yet -- I think my
23 point is that qualified immunity, I think, would
24 be a bad example of how we would normally treat
25 interlocutory appeals. Can you give me another

1 example where the stay would be automatic?

2 MR. KATYAL: So I think, in general,
3 the stay -- the -- the divestiture rule applies.
4 The question -- Griggs applies. The question in
5 any given case is what that rule means in
6 practice.

7 So, for example, take the criminal
8 interlocutory appeal statute, 18 U.S.C. 3731.
9 It doesn't have -- it doesn't say a word about a
10 stay, but it'll authorize the government to --
11 to have an interlocutory appeal.

12 And what courts have said there is
13 that you -- there is a divestiture rule and it
14 prevents things like the trial from going
15 forward, but things short of the trial are okay
16 because it doesn't conflict with Congress's
17 authorization of the right.

18 JUSTICE THOMAS: Well, let me be
19 clear, and this is my final point. Does it
20 follow automatically that when you have an
21 interlocutory appeal, there's an automatic stay?

22 MR. KATYAL: So, in general, it's not
23 that there's an automatic stay. It follows that
24 the divestiture rule applies, and then it
25 depends on the particular context.

1 JUSTICE THOMAS: What does that mean?

2 MR. KATYAL: So -- so it means like in
3 3731, there's an interlocutory appeal, but it
4 doesn't automatically stay, Justice Thomas,
5 everything. There are still some trial
6 proceedings that can occur.

7 Here, like in qualified immunity, like
8 in sovereign immunity, like in double jeopardy,
9 the very right that Congress has authorized for
10 that immediate appeal is being taken away
11 effectively by the district court if any
12 litigation proceeds, but that --

13 JUSTICE SOTOMAYOR: Why is that
14 different than a forum selection clause, which
15 we say is not subject to an automatic stay?

16 MR. KATYAL: Well, I don't --

17 JUSTICE SOTOMAYOR: Seems to me
18 litigating in New York City versus litigating
19 in -- I'm making up a town -- a tiny town in
20 Timbuctoo -- I'm sure there is a city, I'm not
21 denigrating it -- in Timbuctoo, the costs are
22 going to be substantially less. Attorneys' fees
23 are likely to be less. Travel fees, expert
24 fees, everything's going to be less. But,
25 there, the -- Griggs doesn't work.

1 MR. KATYAL: So -- so, Justice
2 Sotomayor, two things. One is I don't believe
3 you've ever said that if it's just a forum
4 selection clause, Griggs doesn't work. You've
5 certainly said, if it's a forum selections
6 argument, you don't have a right to an
7 interlocutory appeal.

8 But that is the very thing that
9 Congress in 16(a) changed. That's why this is
10 such a rare case, because Congress took the step
11 --

12 JUSTICE SOTOMAYOR: So what do you --
13 I -- I look at Griggs as a very simple rule.
14 Griggs says, if what the district court is going
15 to do moots out the appeal, then you have to
16 have an automatic stay because you can't have a
17 district court mooting out what the court of
18 appeals are doing. And Griggs worked the
19 opposite. You can't have a court of appeals
20 deciding an issue on appeal. We should stay our
21 own appeal -- that's what Griggs said -- until
22 the district court tells us what it's going to
23 do with this final judgment.

24 So Griggs was working both ways. Each
25 court will respect that we will stay only if we

1 threaten to moot out each other's point.

2 MR. KATYAL: So -- so, Justice
3 Sotomayor, two points about this. One is I
4 don't quite think that's what Griggs says. I
5 don't think there's language about mooting out.

6 JUSTICE SOTOMAYOR: Well, that's how
7 Congress has seen it --

8 MR. KATYAL: Well --

9 JUSTICE SOTOMAYOR: -- because
10 Congress seems to go both ways on this issue.

11 MR. KATYAL: So -- so I will get to
12 the Congress point in a moment, but just the
13 language of Griggs is whether the district court
14 has control over those aspects of the case
15 involved in the appeal when it's presiding over
16 district court litigation.

17 And our point to you is that --

18 JUSTICE SOTOMAYOR: It has no access
19 here. Suski, there, there was a motion to
20 reconsider the arbitration motion. That's a
21 pure Griggs case.

22 MR. KATYAL: So --

23 JUSTICE SOTOMAYOR: And the district
24 court said, no, the court of appeals is looking
25 at that arbitration order. I can't now

1 reconsider it.

2 MR. KATYAL: So -- so, Justice
3 Sotomayor, our point here is that when that very
4 question on appeal is does the district court
5 have any authority at all to proceed, then
6 actions taken, whether it's deciding a motion to
7 dismiss or ordering discovery -- and discovery,
8 of course, you know, can be -- can come out and
9 spill out into the open, which is the very thing
10 that arbitration agreements are bargained for to
11 prevent against -- all that toothpaste can't be
12 put back in the tube. And Congress -- and I
13 will now get to your point -- Congress in 16(a)
14 did something unusual by authorizing that
15 immediate appeal. You can't wait for those
16 trial rights to occur later on.

17 And, here, Congress's backdrop --

18 JUSTICE SOTOMAYOR: So what do you do,
19 counsel, with the fact that it had stays in
20 mind? In that same section it -- or a different
21 section, it permitted a stay or ordered a stay
22 when a motion to -- to compel arbitration was
23 granted and then, under 1299(2)(iv)(d)(4), said,
24 for motions to transfer -- passed the very same
25 day -- for motions to transfer to the U.S. Court

1 of Federal Claims, you have to have a mandatory
2 stay.

3 If Griggs was the law, it didn't have
4 to pass that.

5 MR. KATYAL: So, Justice Sotomayor,
6 there's a lot there, so I'm going to ask for a
7 little leeway to -- to answer every part of your
8 question.

9 So, first, the background rule of
10 Congress, 11 separate times going back to 1891,
11 is, when they want to abrogate a stay, an
12 automatic stay, they say so. They said so just
13 the very day before 16(a) was passed. And that
14 --

15 JUSTICE SOTOMAYOR: So why did they --
16 have -- they didn't abrogate it, and yet they
17 said --

18 MR. KATYAL: Right. So they didn't
19 have to say anything here because, if you were
20 to put yourself in Congress's shoes in 1988 and
21 ask, okay, we're doing this unusual thing,
22 authorizing this immediate stay, what does
23 that -- authorize this immediate appeal, what
24 does that mean for stays, they knew they had to
25 affirmatively say something to abrogate it.

1 That was the background rule. It's the only
2 way to understand --

3 JUSTICE SOTOMAYOR: You still haven't
4 explained 1292.

5 MR. KATYAL: I -- I'm -- I promise you
6 I will get there, but I just want to understand
7 the background -- I want you to understand that
8 the background rule is Congress, when it wants
9 to --

10 JUSTICE SOTOMAYOR: I don't know how
11 much of a background rule there is --

12 MR. KATYAL: Well, let --

13 JUSTICE SOTOMAYOR: -- or that
14 Congress follows it.

15 MR. KATYAL: Well, let --

16 JUSTICE SOTOMAYOR: Between your brief
17 and the other side's brief, all I know is that
18 when Congress thinks about a stay, it either
19 says yes, do it, or no, don't do it.

20 MR. KATYAL: The --

21 JUSTICE SOTOMAYOR: When it's not
22 thinking about a stay, it doesn't say anything.

23 MR. KATYAL: Right. So this is so
24 important because this is not a situation in
25 which the statutes can -- cancel each other out,

1 and I'll explain the two statutes we're talking
2 about in a minute.

3 But I'm just saying, first, it's hard
4 to understand anything which Congress is doing
5 in those 11 statutes besides being mere
6 surplusage. They had to believe that there was
7 a background automatic stay rule --

8 JUSTICE SOTOMAYOR: So why isn't it
9 what it says?

10 MR. KATYAL: -- that they were doing.

11 JUSTICE KAGAN: Well, I don't
12 understand why that's true. I mean, you're
13 suggesting that every time Congress wants an
14 immediate appeal, it also wants an automatic
15 stay. But Congress might well say what we want
16 is an immediate appeal and a discretionary stay
17 regime.

18 MR. KATYAL: Absolutely, Justice
19 Kagan.

20 JUSTICE KAGAN: Well, and that's --

21 MR. KATYAL: And that's what they've
22 done --

23 JUSTICE KAGAN: And -- and -- and --

24 MR. KATYAL: -- in the statute.

25 JUSTICE KAGAN: -- it seems as though,

1 you know, that's what has happened here. And
2 the Griggs you might say exception to that is an
3 exception, it's -- it's a judge-made exception,
4 we should read it narrowly. It's an exception
5 that applies when the appeals court and the
6 district court are doing the exact same thing
7 such that the district court is kind of stepping
8 on the appeals court, everything that the
9 district court does.

10 This district court is not stepping on
11 the appeals court. The appeals court is trying
12 to figure out arbitrability. The district court
13 is trying to figure out the merits.

14 MR. KATYAL: Justice Kagan, that is
15 the very argument on appeal authority, and this
16 is not a circumstance in which Congress did what
17 you're saying.

18 So, if you compare, for example,
19 16(a), which says nothing at all about a stay,
20 to, for example, what it said the day before,
21 which is "neither the application for nor the
22 granting of an appeal under this ... [paragraph]
23 shall stay proceedings," when Congress wants to
24 have a discretionary district court stay
25 determination, they say so.

1 And this brings me to my promise to
2 Justice Sotomayor, the two statutes that you
3 mentioned, they're the two ones that my friend
4 relies on, neither work.

5 Section 3 you point to of the
6 Arbitration Act, and, to be sure, it's an
7 affirmative authorization of a stay pending
8 arbitration. That's not like a stay pending
9 appeal. There's no background divestiture rule
10 about stays pending arbitration.

11 Congress had to say something about it
12 because it had no background rule that it was
13 litigate -- that it was legislating against.
14 It's an entirely different situation. They had
15 to mint a rule.

16 The only other one that I think my
17 friend really relies on is 1292(d)(4)(B), and
18 that (d)(4)(B) provision is very different for
19 reasons our reply brief says. 16(a) was drafted
20 from scratch. There was nothing there before.
21 (d)(4) was written on top of the pre-existing
22 (d)(3), which passed in 1982, and lo and behold,
23 that has an anti-stay provision akin to the one
24 Justice Kagan was suggesting Congress puts in.

25 Here's what it says: "Neither the

1 application for nor the granting of an appeal...
2 shall stay proceedings in the Court of
3 International Trade or the Court of Federal
4 Claims."

5 So they're abrogating the stay rule.
6 It's an anti-stay rule. Then, in 1988, they
7 passed the statute my friend points to and that
8 Justice Sotomayor asks about, (d)(4). It adds a
9 60-day stay and a stay if there's a denial or a
10 motion of a grant to transfer to the Court of
11 Federal Claims.

12 Now Congress had to resurrect the
13 divestiture rule. They had just taken it back
14 in 1982. And so that's why you see Congress
15 doing what they're doing there. And, of course,
16 with the 60-day provision, as our reply brief
17 says, it makes sense that they would
18 affirmatively come in and authorize an automatic
19 stay for something longer than 60 days if they
20 had a 60-day provision in it.

21 JUSTICE GORSUCH: Mr. --

22 MR. KATYAL: There was no --

23 CHIEF JUSTICE ROBERTS: Mr. -- Mr.
24 Katyal, it is a huge benefit to you to be able
25 to take an interlocutory appeal, right?

1 Why is it unreasonable to think that
2 Congress thought that was enough? I mean, they
3 didn't say anything about a stay, yet they
4 focused on whether or not -- the problem before
5 you, whether or not continued litigation would
6 interfere with your claims of the right to
7 arbitrate.

8 They gave you the most valuable right
9 you could have. You don't have to wait until
10 the case is over. You can go up right away. So
11 they were thinking about the problem you face
12 when you lose on your arbitration claim and
13 litigation is going, and this is what they gave
14 you. Why isn't that enough?

15 MR. KATYAL: So, Mr. Chief Justice, I
16 think because the background rule at the time
17 was always that there would be an automatic stay
18 and the divestiture would apply in circumstances
19 like this.

20 And so -- you know, and that's why you
21 have these 11 statutes which my friend can't
22 explain what they're about. There is no time in
23 which Congress does what you're saying, which
24 they grant an interlocutory appeal and then say,
25 oh, we're also going to give you this automatic

1 stay right. That statute doesn't exist. My
2 friend tries to claim at Section 3 and
3 1292(d)(4) those arguments, I think, fall apart
4 under inspection.

5 Rather, the background rule has always
6 been this. You could look to the immunity
7 context, you could look to 3731, what have you,
8 it's all there.

9 Now, Justice Kagan, you also said a
10 separate point about this being a judge-made
11 rule. And maybe it's not jurisdictional.
12 Certainly, Griggs used the word "jurisdictional"
13 back in 1982, but that was a time when the Court
14 used that word more loosely.

15 Our central point to you is, even if
16 you thought of this as a judge-made rule, that
17 gives you no more discretion. It's still a
18 claims processing rule, as my friend on the
19 other side said. It is just as mandatory for
20 this Court to follow. You've said so many
21 times. You said the only times you abrogate
22 judge-made claims processing rules is if it
23 flies in the face of long tradition. That's
24 what you said in the Nutraceutical case.

25 JUSTICE KAGAN: I think what I was

1 suggesting is that we usually try to keep our
2 judge-made rules narrow to -- to deal with only
3 situations which really cry out for them.

4 The situation that cried out for it
5 in -- in Griggs was a situation in which the
6 district court was doing the same thing that the
7 appellate court was doing and so was stepping on
8 the appellate court every move it made. That is
9 not the situation here.

10 I mean, I can understand why you'd
11 prefer everything to stop while the appellate
12 court is dealing with the arbitrability issue,
13 but the district court is not any longer dealing
14 with the arbitrability issue, so the two can go
15 their merry way, coincident with each other.

16 Now, if the district court or the
17 appellate court thinks that, gosh, you guys have
18 a really good claim and you're going to end up
19 winning, I guess that this would be the
20 appellate court, in the -- in the appellate
21 court, you can get a discretionary stay. But,
22 otherwise, you know, you've gotten a pretty
23 valuable thing. You just haven't gotten the
24 whole ball of wax.

25 MR. KATYAL: So I think, if the

1 question here is what Congress intended in
2 16(a), then I think the best way of
3 understanding it, apart from all these policy
4 concerns you're raising or anything else, is
5 Congress acted against the backdrop --

6 JUSTICE KAGAN: I'm -- I'm not raising
7 policy concerns. 16(a) does not say what you
8 want it to say. It just doesn't.

9 MR. KATYAL: I'm not saying that 16(a)
10 by itself does the work. I'm saying 16(a) --

11 JUSTICE KAGAN: You -- you stood up
12 and said it's all about Griggs. I'm -- I'm
13 saying Griggs is about a very much narrower
14 situation than the situation that we're in now.

15 MR. KATYAL: I think -- I think it's
16 about 16(a) plus Griggs together. So what 16(a)
17 does is it brings us into the unique
18 interlocutory context, and then the question is,
19 what does Congress think.

20 If you were sitting in Congress in
21 1988 and you've taken the step to authorize
22 immediate interlocutory one-sided appeals from
23 arbitration, you've said this right is so
24 important, we don't want you to wait to go
25 through the trial in district court proceedings,

1 you get to vindicate that now.

2 The -- letting the district court
3 proceed perhaps for years, as the amici say,
4 this happens -- it's a real problem that --

5 JUSTICE JACKSON: But can we focus in
6 on what -- what it is that you're vindicating at
7 that moment? And here -- here's my conceptual
8 problem with your argument.

9 At the moment in which you're taking
10 the interlocutory appeal that they authorize
11 under Section 16, what you are vindicating is
12 your claim that this is subject to arbitration
13 after a district court has denied you that
14 motion.

15 What I guess I don't understand is it
16 seems to me that your argument is asking for an
17 extension of the stay principle in the following
18 way.

19 So Section 3 tells us that once a
20 district court decides, yes, yes, you can go to
21 arbitration, then, upon application of a party,
22 the district court has to stay the trial
23 proceedings.

24 Now, presumably, if a party doesn't
25 ask, the district court can keep going. But

1 you're now suggesting that in a situation in
2 which the district court says no, you don't go
3 to arbitration, somehow Congress intended for
4 that circumstance, the appeal of arbitrability,
5 to also give rise to an automatic stay, and I
6 guess I don't understand that.

7 MR. KATYAL: But you correctly
8 described our argument. Congress did something
9 very unusual. It's a one-sided interlocutory
10 appeal. So, if the motion to compel arbitration
11 is granted, the other side doesn't get it, but,
12 if it's denied, then you get to run to the court
13 of appeals immediately.

14 The reason for that is because
15 Congress decided that the rights at issue were
16 so important and had the --

17 JUSTICE JACKSON: I understand that.
18 But there are other situations in the law in
19 which Congress grants interlocutory appeal and
20 says, as you admit, you don't have a stay as a
21 result.

22 So just the fact that you get an
23 interlocutory appeal doesn't indicate
24 necessarily that Congress is also saying that a
25 stay follows, because there are many situations

1 in which Congress expressly, right, divorces the
2 two --

3 MR. KATYAL: Justice -- Justice
4 Jackson --

5 JUSTICE JACKSON: -- and says you can
6 go interlocutory but no stay.

7 MR. KATYAL: Yeah, Justice Jackson,
8 that's exactly our point, which is, when
9 Congress authorizes an interlocutory appeal and
10 they're worried about an automatic stay, that
11 they don't think that one's granted, then they
12 say -- or they -- they allot one --

13 JUSTICE JACKSON: No, no, no, I
14 understand, but you're mixing two concepts. I'm
15 not talking about what they're actually saying.
16 I'm just -- I'm pushing back on your suggestion
17 that the reason they've given us an automatic
18 stay and not said anything about -- excuse me --
19 an automatic appeal, an interlocutory appeal,
20 and not said anything about a stay is because
21 they understand it's so important that we go
22 right to appeal and that, as a result, the
23 proceedings should stop.

24 But I look and I see a bunch of other
25 situations in which Congress says this is really

1 important, go right to the court of appeals, but
2 don't stop the underlying proceedings. So every
3 time Congress lets you interlocutory appeal, it
4 does -- it is not necessarily indicative of
5 their view that the underlying proceedings
6 should stop.

7 MR. KATYAL: Justice Jackson, my point
8 is, if Congress doesn't think it follows that an
9 automatic stay comes from an interlocutory
10 appeal, they say precisely that.

11 And this isn't just some made-up
12 position. This is not just the position of the
13 majority of the circuits. It's what the two
14 main federal treatises, which my friend on the
15 other side praises, Wright & Miller and Moore's,
16 both say is the consequence of the Griggs
17 divestiture rule. That's the way it applies.
18 And it applies that way in other contexts,
19 picking up on Justice Thomas's point about
20 sovereign -- state sovereign immunity, about
21 qualified immunity, and about double jeopardy.

22 And so, if you don't read it this way,
23 you might -- you -- you very well risk undoing
24 those -- those -- those automatic stays in all
25 of those other contexts.

1 JUSTICE ALITO: Mr. --

2 JUSTICE BARRETT: Mr. Katyal --

3 JUSTICE ALITO: -- Katyal, if there
4 isn't an automatic stay, will the party whose
5 motion to compel arbitration ever be able to
6 obtain -- to satisfy the ordinary stay factors
7 that are -- that govern whether a discretionary
8 stay can be issued, namely, the irreparable harm
9 requirement?

10 MR. KATYAL: Right. As our brief says
11 and the amici briefs say, we have a lot of
12 empirical evidence on this that shows that these
13 discretionary stays are not granted under the
14 Nken factors and that huge harm results in the
15 interim because discovery comes out, it spills
16 out into the open, which is the very
17 bargained-for thing that the arbitration
18 agreement was all about. That toothpaste can't
19 later be put back in the tube. That's why these
20 stays and these automatic stays are so
21 important. So that's, I think, one point.

22 And the other is this case, Justice
23 Alito, illustrates exactly that. I mean, the
24 district courts here in both cases said these
25 were actually pretty good arguments for

1 arbitration -- arbitrability, and reasonable
2 minds can differ about this.

3 But they summarily denied a stay, and
4 that's why we're here. And that happens time
5 and time again. And if you were to ask yourself
6 what was Congress thinking in 1988 when they
7 authorized these immediate appeals, they said we
8 don't trust district courts in this unique area,
9 that they get it wrong.

10 Indeed, the amici have given you a lot
11 of empirical evidence to show that there's a 50
12 percent reversal rate in 16(a) appeals --

13 JUSTICE BARRETT: Mr. Katyal, can I
14 interrupt and just follow up on what your answer
15 to Justice Alito is?

16 I think the problem for you is Moses
17 H. Cone -- and Justice Kagan was talking about
18 this -- arbitrability being distinct from the
19 merits. And I guess I want to ask you let's
20 assume that the Griggs principle applies in the
21 background. You're talking about the toothpaste
22 not being able to put in the tube -- be put back
23 in the tube.

24 It sounds to me like you're saying
25 that even if Griggs applies, the issue that's

1 being litigated here in a different way, not
2 quite as crisply as qualified immunity or double
3 jeopardy, but it is the issue, the
4 arbitrability. And I think you responded to
5 Justice Sotomayor earlier, you know, it's a
6 little different than the Timbuctoo because of
7 the different procedures. I think you have to
8 win that argument if you win.

9 So do you want to say something about
10 that, why it's not so distinct?

11 MR. KATYAL: I think you're correct in
12 largely describing our position.

13 So we can spot you the language from
14 Moses Cone, absolutely, that arbitrability is
15 different -- is a different question than the
16 merits of the arbitration, are you liable. The
17 divestiture rule doesn't turn on whether the
18 elements are the same or not. It's not some
19 lesser included offense or not. Rather, the --
20 the language from Griggs is, "the aspects of the
21 case" the district court would address absent a
22 stay are "involved in the appeal."

23 So overlapping elements isn't the way
24 anyone sees it. Wright & Miller, no one else
25 sees it that way.

1 So, here, our point to you is that any
2 action taken by the district court to resolve
3 the merits, whether it's deciding a motion or
4 even ordering discovery, which takes place
5 against the backdrop of the court's powers to
6 compel, that is precisely the issue on appeal.
7 That's why Judge Easterbrook started this all
8 back in 1997, and that is why I think the
9 overwhelming majority of circuits, as well as
10 the treatises, all agree that's the way of
11 thinking about this.

12 And to the extent there's worries
13 about delay or harm, Congress knows exactly what
14 to do. They come in and they pass an anti-stay
15 provision, the thing that Justice Jackson was
16 asking about. And they have no example, zero
17 example, of what a -- of a interlocutory appeal
18 being authorized without an automatic stay by
19 silence. It just never happened.

20 JUSTICE GORSUCH: And Mr. Katyal,
21 where does this background rule come from? Is
22 it a federal common law principle? How old is
23 it? Do you want to talk about that?

24 MR. KATYAL: Sure. I mean, at least
25 -- I think it -- I think it probably traces to,

1 you know, some sort of claims processing rule.
2 In 1883, this Court in Hovey said, "one general
3 rule in all cases was an appeal suspends the
4 power of the court below to proceed further in
5 the cause."

6 And then statutes starting in 1891
7 recognized exactly that. So Congress authorizes
8 an interlocutory appeal in 19 -- in 1891, and at
9 the very same time, they say that there is no
10 automatic stay, that the filing of that
11 interlocutory appeal doesn't have an automatic
12 stay.

13 JUSTICE SOTOMAYOR: So why are --

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel. The -- what you're trying to avoid, of
16 course, is losing your right to arbitrate or
17 going through discovery, but there are a lot of
18 ways you can address that. I mean -- and it may
19 be present in some cases more than others. The
20 district court has, you know, a very busy
21 schedule. You're set for, you know, trial in a
22 year and a half. The court of appeals is going
23 to -- you know, it's got a much quicker
24 schedule. You can ask the court of appeals for
25 expedition. You can explain the situation to

1 the trial -- district court judge. He'd say,
2 you know, a stay is a very big deal, I'm not
3 going to do that, but I'll make sure discovery
4 doesn't start for another whatever.

5 In other words, there are a lot of
6 different ways to manage the problem you
7 confront rather than to -- claimed entitlement
8 to something that isn't granted by the statute,
9 which does grant you another significant
10 entitlement.

11 MR. KATYAL: So -- so, Mr. Chief
12 Justice, I mean, it's certainly the case that
13 people have tried. The amici briefs are all
14 over this and say, look, we've tried every one
15 of these other mechanisms. They don't work.
16 Litigation moves too slow. Confidentiality
17 concerns can't be protected adequately.

18 And, again, I think we're not making a
19 policy argument. We are saying that the
20 bargained-for right -- the -- what the person --
21 what the people saying they've got a motion -- a
22 valid motion to compel are saying, look, this is
23 what we agreed to, we have a right to
24 immediately appeal that, and that right will get
25 undone in the interim because litigation, even

1 under the fastest timetable, takes some time.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 Justice Thomas?

4 Justice Alito?

5 Justice Sotomayor?

6 JUSTICE SOTOMAYOR: Section (c)(6) of
7 the FAA says, "Except as otherwise herein
8 expressly provided" -- and we know that a stay
9 is not mentioned expressly one way or another --
10 "any application to the court hereunder shall be
11 made and heard in the manner provided by law for
12 the making and hearing of motions."

13 And I look at the civil procedures and
14 they basically say that -- civil procedure rules
15 and appellate rules, that automatic stays are
16 not the rule, they're the -- they are the
17 exception, and they require judicial
18 determinations of whether a stay should be
19 granted.

20 To me, this is an easy case because I
21 follow the Federal Rules of Civil Procedure and
22 the statute that tells me to look there.
23 Putting that aside, assuming that that's my
24 view, okay, just assuming, please don't try to
25 reargue the case, really, what I think you're

1 doing is you're fighting about how the Nken
2 factors should be addressed by courts below.

3 And I don't know if this case provides
4 that opportunity or not, but if you were to
5 lose, it seems to me this is the perfect example
6 of two cases with different pulls with respect
7 to a stay. The Suski case has a very strong
8 argument on the merits -- in fact, the
9 defendants, the Respondents, lost one before --
10 below -- that this arbitration agreement doesn't
11 cover this dispute at all.

12 Whereas the Bielski case is a typical
13 case where there's an undisputed arbitration
14 agreement, there -- and the question is whether
15 some state law trumps that. And, there, I could
16 see where we would say, if it's an issue of
17 where there's an undisputed arbitration
18 agreement, that should be very high on the
19 likelihood of con -- confusion standard.

20 Where there's a question about whether
21 an agreement exists at all, then that's more
22 likelihood of success by the person seeking to
23 avoid arbitration.

24 MR. KATYAL: So -- so, Justice
25 Sotomayor, a few things. So, first, I think we

1 agree with you that this case does raise the
2 question of whether the Nken factors alone are
3 adequate. We think an automatic --

4 JUSTICE SOTOMAYOR: They are sometimes
5 and they are not other times. That's my point.
6 But why should you win?

7 MR. KATYAL: And in our point and the
8 amici's point is, as a matter of practice, the
9 Nken factors mean stays are not granted. Both
10 of these cases are perfect illustrations of that
11 point. This Court has said before --

12 JUSTICE SOTOMAYOR: Well, I just said
13 to you in one of them it shouldn't have been
14 granted. In the other one, arguably. And in
15 the other one, arguably --

16 MR. KATYAL: Well --

17 JUSTICE SOTOMAYOR: -- a stay should
18 have been granted.

19 MR. KATYAL: Well, I think that you
20 probably think --

21 JUSTICE SOTOMAYOR: So my bottom line
22 is, how do we tweak them if they need to be
23 tweaked -- tweaked? And you can also answer
24 this is not the case to do it.

25 MR. KATYAL: Right. I think it's

1 tough to tweak them because this Court has said
2 in Morgan versus Sundance you don't want to have
3 a special rule for arbitrability alone, so
4 that's why we're saying apply the standard
5 Griggs rule here which you apply in other
6 contexts, like the immunity cases and double
7 jeopardy, which would confer an automatic stay.

8 If you said you didn't want to have
9 that automatic stay and you didn't trust
10 Congress to impose it, you wanted to -- to
11 abrogate it, you wanted to abrogate it yourself
12 and apply the Nken factors, I think you'd have
13 to look at a couple of things: one, this Court's
14 1974 decision that litigation burdens alone
15 aren't irreparable harm; two, you'd want to look
16 to the harms of confidentiality and whether or
17 not they could be adequately protected; and
18 three, I think it would mean at least a
19 presumption in favor of a stay in 16(a) appeals
20 in which there is a bargained-for allegation
21 that this shouldn't belong in district court at
22 all.

23 You could do all of those things. It
24 would get pretty special. I'd worry about the
25 collateral consequences to Nken in all sorts of

1 other contexts because it's used all over the
2 place, not just, of course, here.

3 So we think the better thing to do is
4 to recognize that if -- if you want to have a
5 elimination of the automatic stay, do what
6 Congress has done 11 times, and this Court
7 shouldn't impose it on itself.

8 And with respect to Section 6, we
9 don't think that quite works because there is a
10 different rule for interlocutory appeals, and
11 when interlocutory appeals are granted, then it
12 carries with it the soil of the divestiture
13 rule.

14 CHIEF JUSTICE ROBERTS: Justice Kagan?

15 JUSTICE KAGAN: So, if I can
16 paraphrase your argument, Mr. Katyal, it seems
17 to me to go something like this. It's that it
18 just has to be the case that when Congress gives
19 you an immediate appeal, it also gives you an
20 automatic stay because, otherwise, you'd lose
21 the very right that Congress thought was so
22 important.

23 But, of course, that, you know, sort
24 of assumes that you have that right, and -- and
25 we shouldn't make that assumption. It might be

1 that this is a case that should go to
2 arbitration, or it might be that this is a case
3 that shouldn't go to arbitration. What Congress
4 did was it gave you a mechanism to decide which
5 one.

6 Now, as to whether you're entitled to
7 a stay while that decision is made, we also have
8 to take into account that you might be entirely
9 wrong about arbitration and that there are
10 people who are not going to get what their
11 rights are, which is the right to have their
12 case actually litigated in a courtroom.

13 So that's why Congress in Section 16
14 gives you something very important but denies
15 you something -- something else that you want
16 and says that's up to the courts to decide
17 whether this is one that's appropriately stayed
18 or not, depending, in large part, on the merits.

19 MR. KATYAL: So, Justice Kagan, what I
20 think does the work in your question to me is
21 Congress has decided that X, and our point
22 to you is the statute is silent. And you know
23 that when Congress has decided X, when they're
24 worried about the automatic stay, they come in
25 and affirmatively say so. There is no

1 precedent. Congress has never said the reverse.

2 So take qualified immunity, take
3 double jeopardy, take state sovereign immunity,
4 these are all examples in which the appeals
5 could be described by exactly what you're
6 saying, which is, well, you might win your
7 appeal, you might not on immunity, on the
8 merits, but there's an automatic stay in all of
9 those.

10 Here, it's even better. Congress has
11 affirmatively authorized that interlocutory
12 appeal in 16(a), and this Court in Digital
13 Equipment Corporation, I think, you know, we
14 agree with my friend on the other side at pages
15 36 and 37 of his brief when he says Digital
16 Equipment Corporation points the way.

17 He reads to -- he says, you know, the
18 private rights are generally not important
19 enough to get an interlocutory appeal and the
20 like, but you have Footnote 7 in there, which he
21 doesn't cite in his brief, which is about this
22 statute, 16(a), and 16(a), the Court says,
23 created a sweetening impact -- a sweeping impact
24 and puts the right of 16(a) arbitration appeals
25 akin to things like the immunity cases.

1 JUSTICE KAGAN: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Gorsuch?

4 Justice Kavanaugh?

5 JUSTICE KAVANAUGH: Yeah. You make a
6 strong point about the 11 statutes and -- and
7 then -- so I think that's a strong point in your
8 favor.

9 You were also asked, though, about the
10 standard Griggs rule, and I think you were asked
11 is this the kind of situation that really cries
12 out for application of the Griggs rule, and I
13 guess I want you to answer that --

14 MR. KATYAL: Yeah. My answer is --

15 JUSTICE KAVANAUGH: -- and why.

16 MR. KATYAL: -- the same answer that
17 Wright & Miller give, that Judge Easterbrook
18 gave, which is the whole question on appeal is
19 does the district court have authority to act.
20 And if there is action at the district court --

21 JUSTICE KAVANAUGH: Yeah, I got -- I
22 got that, but what will happen if it -- if you
23 don't win?

24 MR. KATYAL: So all sorts of rights in
25 the interim could be destroyed.

1 So take, for example, just the
2 simplest thing, discovery. So, if they try and
3 force discovery in the district court, and then
4 they get access to discovery, which may have
5 embarrassing details, it could spill out into
6 the newspapers, we see examples of that all the
7 time, you know, in any given discovery
8 litigation.

9 That's exactly the thing that you
10 arbitrate for. You -- the reason the parties
11 agree in the first place is to have that kind of
12 confidentiality. That's just one example of
13 many.

14 The district courts suppose -- I
15 suppose could decide a motion to dismiss or go
16 even further and perhaps even have a trial. The
17 divestiture rule is about stopping all of that
18 in this case.

19 Now the divestiture rule in other
20 cases won't be an automatic stay on everything.
21 As I said to Justice Thomas, it depends on the
22 nature of the underlying right, and sometimes
23 certain things can go forward.

24 But, here, the very question, as Judge
25 Easterbrook says, is, does the district court

1 have power to do anything.

2 JUSTICE KAVANAUGH: And then second,
3 to pick up on something the Chief Justice said
4 and also I think Justice Kagan, the rights on
5 the other side.

6 It seems to me that the problem here
7 at the core of this maybe for both sides is how
8 long it takes to decide the appeal, right? If
9 it were really fast, then the district court --
10 from your perspective, then the district court
11 wouldn't be able to do much. If it were really
12 fast, then the delay wouldn't affect what
13 Justice Kagan describes the rights.

14 So, if you prevail in this case, is
15 there a way to ensure that courts of appeals
16 move quickly? Any appropriate thing we can say
17 to ensure that courts of appeals move quickly so
18 that we mitigate the harm to the rights that
19 were raised appropriately about the other side?

20 MR. KATYAL: Absolutely, Justice
21 Kavanaugh. So, first, you know, it -- it's
22 telling the majority rule already is the one
23 that we're advocating in the circuits. We don't
24 see, I think, harms of delay or any impact, none
25 of the amici on their side talk about it,

1 whereas there's a lot of harm on the other side
2 of not recognizing the rule in those two
3 circuits that go the other way.

4 What you could say about mechanisms to
5 do stuff, obviously, expediting the court of
6 appeals, but there's also the ability, let's say
7 that you have a witness that might pass away or
8 something and you'd be harmed by the automatic
9 stay, I think there's three things that could be
10 done there.

11 One is you could seek a limited remand
12 from the court of appeals to allow the district
13 court to take that evidence or something like
14 that.

15 Second, you could get that evidence in
16 the arbitration process itself.

17 And, third, district courts often have
18 inherent powers to preserve the status quo and
19 protect jurisdiction, and so that might also
20 provide a mechanism to get that kind of
21 testimony.

22 Finally, if you're worried about it at
23 the end of the day, Congress is the solution for
24 that. That's why you have those 11 statutes.
25 So, if they wanted to abrogate the divestiture

1 rule in some way, they certainly have the power
2 to do it.

3 And it would just make it like --
4 right now, qualified immunity, double jeopardy,
5 state sovereign immunity, they all risk the same
6 kind of policy harms of the dying witness,
7 delay, harms of delay and the like, but this
8 Court has --

9 JUSTICE KAVANAUGH: You understand the
10 concern on the other side is, you automatically
11 do this, it kicks the case down, delays your
12 friend when you're on your side of the district
13 court litigation, and that's what they're
14 worried about. And if we can kind of mitigate
15 that, that would -- that would solve a lot of
16 the stated problems.

17 MR. KATYAL: Absolutely, Justice
18 Kavanaugh. And that is, of course, the same
19 problem in all the immunity contexts, double
20 jeopardy contexts and the like, and yet there's
21 an absolute rule.

22 Here, there's actually -- it's much
23 less to worry about because Congress has an easy
24 ability to abrogate. They don't always with
25 respect to state sovereign immunity and things

1 like that.

2 JUSTICE KAVANAUGH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett?

5 JUSTICE BARRETT: What about the
6 concern, though, that this can be used as a
7 delay tactic even when it's frivolous?

8 And I understand that you say and some
9 of the courts in the majority have said, well,
10 you know, courts of appeals can say this is
11 frivolous. But it's also my understanding that
12 that doesn't really happen in the -- in the
13 majority. So how much protection is that?

14 MR. KATYAL: So, first of all,
15 obviously, this case we don't think is
16 gamesmanship and the like and so on.

17 JUSTICE BARRETT: Of course. Of
18 course.

19 MR. KATYAL: But I think the greater
20 risk statistically is what happens in the other
21 direction, that you have district courts that
22 are being reversed 50 percent of the times and
23 going --

24 JUSTICE BARRETT: Okay, but what about
25 the delay?

1 MR. KATYAL: Yeah. And then, with
2 respect to that, I do think the courts have
3 mechanisms in every circuit, and they are used,
4 Justice Barrett, as the amici say, in every
5 circuit for frivolous appeals to be weeded out.
6 There's one mechanism by which, basically, the
7 district court tells the circuit court, you
8 know, this appeal is frivolous, give us back
9 jurisdiction, act right away, motion to expedite
10 or -- or sua sponte motion to expedite, and it
11 gets thrown right back to the district court.
12 So I think that's one mechanism of dealing with
13 it.

14 The other is what you said in Arthur
15 Andersen versus Carlisle. You said there's all
16 sorts of ways to -- you know, to go after
17 attorneys for frivolous -- for -- for frivolous
18 lawsuits, award costs and damages and things
19 like that. And so that was actually about
20 16(a), and you said there's all sorts of
21 mechanisms that the court uses to deal with
22 that.

23 And to the extent Justice Kavanaugh --
24 picking up on his concern, I think this Court,
25 should it rule for us, should say something

1 about all of those mechanisms that are available
2 that you've recognized already in Carlisle.

3 JUSTICE BARRETT: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 JUSTICE JACKSON: Yes. Thank you.

7 So, in response to Justice Kagan, you
8 suggested that the statute was silent, and I
9 guess I'm not sure about that. I -- I see here
10 a statute in at least in a couple places in
11 which it appears as though Congress was actually
12 thinking about the interaction of appeals and
13 stays in this context. 16(b) tells us that you
14 have no appeals from orders granting stays.

15 And I think really problematic for
16 your argument is -- is Section 3 because the
17 fact that Congress expressly speaks to a stay
18 upon request if arbitration is authorized seems
19 problematic because I would think we would
20 expect to see that same kind of language with
21 respect to this interlocutory appeal if that's
22 what Congress intended.

23 So can you help me to understand why
24 this is not that scenario?

25 MR. KATYAL: Absolutely, Justice

1 Jackson. I think, if we were to ask what
2 language we'd expect if Congress wanted to -- to
3 stop an automatic stay, we've got all sorts
4 of examples --

5 JUSTICE JACKSON: No, not stop an
6 automatic -- grant an automatic stay.

7 MR. KATYAL: Well, so with respect to
8 grant, we think that is the underlying
9 background rule. That's why --

10 JUSTICE JACKSON: But it can't --

11 MR. KATYAL: -- all those 11 --

12 JUSTICE JACKSON: -- be -- here --
13 here -- why did they put it in 3 then?

14 MR. KATYAL: Oh, because 3 -- and I
15 said this to Justice Sotomayor --

16 JUSTICE JACKSON: Yeah.

17 MR. KATYAL: -- is about a totally
18 different problem. It's about stays pending
19 arbitration. There is no background Griggs
20 divestiture rule. There are no 11 statutes to
21 look at for Congress --

22 JUSTICE JACKSON: But, conceptually,
23 conceptually.

24 MR. KATYAL: Conceptually --

25 JUSTICE JACKSON: Let me just ask you

1 conceptually. You say, when a court has granted
2 arbitration and we know that it's actually going
3 to go on and we could have the conflict problem
4 that you talk about, that Congress would have to
5 say that a stay is required. But, as Justice
6 Kagan points out, in a world in which we don't
7 know whether or not arbitration is going to
8 happen, you say somehow the background rule is
9 that a stay is automatic.

10 MR. KATYAL: That's right.

11 JUSTICE JACKSON: That seems exactly
12 backward to me as to what it is that we should
13 think about Congress's intent with respect to
14 stays.

15 MR. KATYAL: No, Justice Jackson,
16 Section 3 is about an entirely different
17 problem, which is, if the court says
18 arbitration's going to happen, then you can't
19 have further district court proceedings.
20 There's no, like, clash between two different
21 courts like Griggs in that circumstance. So
22 Congress had to affirmatively come in and say
23 something.

24 By contrast, when Congress takes the
25 unusual step, which it almost never does, of

1 saying we're granting you a right to an
2 interlocutory appeal for a --

3 JUSTICE JACKSON: On the question of
4 whether or not you get to go to arbitration --

5 MR. KATYAL: Correct.

6 JUSTICE JACKSON: -- Congress doesn't
7 have to say in that scenario that the underlying
8 stay occurs.

9 MR. KATYAL: So --

10 JUSTICE JACKSON: They would have to
11 say it when you definitely get arbitration, but
12 they don't have to say it when we don't know
13 whether or not you get arbitration --

14 MR. KATYAL: So --

15 JUSTICE JACKSON: -- but they're just
16 giving you a right --

17 MR. KATYAL: So --

18 JUSTICE JACKSON: -- to go to the
19 court of appeals?

20 MR. KATYAL: So, basically, that's
21 right -- if I understand the question, I think
22 that's right. That is, if Congress here is
23 saying it's a one-sided appeal right, only if
24 your arbitration is deny -- arbitrability is
25 denied, and if it's denied, then your right is

1 so valuable that we don't want you to wait to
2 have to go through the district court process.

3 JUSTICE JACKSON: The right to -- to
4 go to the court of appeals to see whether or not
5 you can arbitrate is so valuable that we have to
6 say that there's a stay in that -- I'm sorry --
7 that we don't have to say there's a stay in that
8 scenario. But, once you actually have the right
9 to go to arbitration, Congress would have to say
10 it in the statute.

11 MR. KATYAL: They'd have to say it
12 with respect to staying district court
13 proceedings vis-à-vis an arbitral court because
14 there is no background rule there. But there is
15 a background rule here, and Congress is acting
16 against that backdrop rule.

17 Otherwise, these 11 statutes are total
18 surplusage. They're totally irrelevant if you
19 think that when Congress -- Congress has to
20 affirmatively authorize an automatic stay. In
21 none of those 11 did they authorize an automatic
22 stay. They, in fact, said the reverse. And
23 they said the reverse because the only way of
24 making sense of them is to say they were doing
25 something there. What were they doing? They

1 were ending the automatic stay that would
2 otherwise exist under the background principle
3 of law going back to Hovey in 1883.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Zavareei?

7 ORAL ARGUMENT OF HASSAN A. ZAVAREEI
8 ON BEHALF OF THE RESPONDENT

9 MR. ZAVAREEI: Mr. Chief Justice, and
10 may it please the Court:

11 Congress says what it means and it
12 means what it says. So let's begin, as we must,
13 with the text of Section 16 of the FAA.

14 Congress says nothing in Section 16
15 about mandatory stays. And this Court has held
16 in the Scripps-Howard case that Congress would
17 not, without clearly expressing such a purpose,
18 deprive the courts of their customary power to
19 order stays under review.

20 So what if we look beyond Section 16?
21 Again, this Court has held under very similar
22 circumstances in the Nken case that when
23 Congress includes particular language in one
24 section but excludes it from another section of
25 the same Act, that Congress acts intentionally

1 and purposely with respect to the disparate
2 inclusion and exclusion.

3 And, here, in this case, we have two
4 examples of this inclusion/exclusion dichotomy.
5 First, we have Section 3 of the FAA itself,
6 which includes a mandatory stay, and then we
7 have Section 1292(d)(4)(B), which was part of
8 the same Act as Section 16.

9 Under basic rules of statutory
10 construction then, Section 16 cannot be said to
11 harbor a hidden automatic stay provision. And,
12 as a practical matter, this means that the
13 courts retain their equitable power to use their
14 discretion to issue stays when appropriate, a
15 power that has been vested in this Court since
16 the founding of the republic. And that is as it
17 should be because stays are an important power
18 and are important when appropriate.

19 But whether they are appropriate
20 depends. With respect to Section 16 appeals, it
21 depends on the type of discovery allowed for
22 under the arbitration clause. It depends on the
23 strength of the arbitrability appeal. It
24 depends on the weighing of the equities. And it
25 depends on the -- on the public interest at

1 stake in the underlying litigation.

2 Let me just finish by saying there is
3 no such thing as a Griggs divestiture rule.
4 That is made up by my friend on the other side.
5 Griggs is a simple principle that says two
6 courts should not be deciding the same issue at
7 the same time. And it has no bearing in this
8 instance.

9 Thank you. And I welcome your
10 questions.

11 JUSTICE THOMAS: If -- if your whole
12 argument -- if your argument is that these are
13 just equitable powers that the court's
14 exercising, pre-existing equitable powers, what
15 exactly is accomplished by Section 16?

16 MR. ZAVAREEI: Section 16 is designed
17 to expedite the appeal. It's -- it's --
18 Congress was putting its thumb on the scale in
19 order to -- to favor arbitration in a very
20 particular way, to get that decision to the
21 court of appeals quickly and to be decided as
22 quickly as possible.

23 But it's also important to note that
24 that's as far as they went. I believe, as
25 Justice Kagan said, if they wanted to do more,

1 they could have. And as Justice Gorsuch held in
2 the Henson versus Santander case, that you can't
3 presume that they would have gone further than
4 they actually did.

5 And this Court also held the same in
6 the First Options case when another party tried
7 to take Section 16 and say: Well, look, they
8 gave this power through Section 16. Let's add
9 some more super-powers to Section 16. Let's
10 increase the standard of review to make it even
11 harder to defeat arbitration clauses.

12 JUSTICE THOMAS: And --

13 JUSTICE KAVANAUGH: You said -- I'm
14 sorry.

15 JUSTICE THOMAS: -- how would you --
16 if -- give me an example -- and -- and this will
17 be my final question, but give me an example of
18 irreparable harm in -- in your analysis of a --
19 whether or not there should be a stay.

20 MR. ZAVAREEI: There are a number of
21 instances in cases where there have been found
22 to be irreparable harm in courts below when --
23 when courts have applied the Nken standard.

24 One of those examples is when there's
25 an especially lengthy appeal. Courts have held

1 that creates irreparable harm. When there is no
2 formal discovery allowed for in the arbitration
3 clause, but, under those circumstances, there
4 could be -- there's been found to be irreparable
5 harm. When there's a arbitration clause that
6 forbids class claims, courts have found there to
7 be irreparable harm. So there are a number
8 of -- when you get close to trial, there's
9 irreparable harm.

10 So it's not as though there's --
11 there's no instance of irreparable harm. Courts
12 have repeatedly found inappropriate
13 circumstances applying the Nken standard that
14 there can be irreparable harm.

15 JUSTICE KAVANAUGH: You started by
16 saying Congress means what it says and says what
17 it means. I agree completely with that, but
18 this problem here is the statute's silent on the
19 question. So it seems like we have to look to
20 whether there's a background principle and look
21 to the existing body of the U.S. Code to figure
22 out what Congress usually does.

23 You say the Griggs background rule is
24 made up, but it is a principle. It seems to me
25 the question is whether it applies here. I

1 don't think -- it's -- it's not a made-up --
2 it's a real case and we've got to figure out if
3 the principle applies here.

4 And then, second, Mr. Katyal -- I
5 think you need to respond -- says that if you
6 look at the body of the U.S. Code, Congress is
7 explicit when it doesn't want to have a
8 mandatory stay accompanying an interlocutory
9 appeal and it's done so in 11 statutes.

10 So you want to answer those two
11 things?

12 MR. ZAVAREEI: Yes -- yes, Your Honor.
13 Let me start with the first one. I -- I'm not
14 saying that Griggs doesn't matter and I'm not
15 saying that Griggs is not an important
16 principle.

17 What I'm saying is is that it is not
18 the background rule in Congress's silence with
19 respect to stays. The background rule started
20 with the All Writs Act. It started with the
21 Judiciary Act of 1891.

22 JUSTICE KAVANAUGH: If you are correct
23 about that, why the 11 statutes then?

24 MR. ZAVAREEI: Okay. So, with respect
25 to the 11 statutes, it's just -- it's just

1 wrong. There are a number of statutes that --
2 so what he calls the 11 statutes are the ones
3 that he says displace Griggs.

4 They -- and in the reply brief, my
5 friend says that when it provides a
6 discretionary standard, that it displaces
7 Griggs, and then, under those circumstances, you
8 can have discretion.

9 The problem is that there are a lot of
10 statutes that are also silent, okay, and these
11 silent statutes also have to be looked at. And
12 one that's not in any of the briefs and is I
13 think the most important is Section 1292(b).

14 1292(b) says that whether or not
15 there's a stay upon an application for an appeal
16 is discretionary. But it says nothing about
17 what happens when an appeal is granted, an
18 appeal is taken.

19 Under my friend's analysis, that means
20 that under every 1292(b) appeal, a stay would be
21 mandatory under the background rule --

22 JUSTICE GORSUCH: Well --

23 MR. ZAVAREEEI: -- of Griggs. That --

24 JUSTICE GORSUCH: -- but, counsel, did
25 you just -- I mean, I understand we have a

1 question about how far the principle in Griggs
2 goes, but I -- I -- do you dispute that there is
3 a one-court-at-a-time rule that is pretty
4 ancient and goes back to the common law?

5 I mean, how far that rule extends and
6 whether it goes this far is a really good
7 question, but do you dispute that principle that
8 a lower court could essentially undermine
9 appellate jurisdiction over an issue that the
10 court of appeals has before it?

11 MR. ZAVAREEI: No, absolutely not,
12 Your Honor. I think that's a foundational
13 principle. It was enunciated in Griggs, but it
14 wasn't invented in Griggs.

15 JUSTICE GORSUCH: It's -- it's
16 hundreds of years old, right?

17 MR. ZAVAREEI: It's -- it's been there
18 forever. And the point is is that you don't
19 want two courts deciding the same issue at the
20 same time.

21 Justice Thomas, in his concurrence in
22 the Price v. Dunn case, articulated that
23 principle very clearly and talked specifically
24 about the exact claim being decided. There, it
25 was a preliminary injunction.

1 JUSTICE GORSUCH: Sure. We can -- we
2 can -- we -- the whole case really revolves
3 around does this fall in that rule or not.

4 MR. ZAVAREEI: Right.

5 JUSTICE GORSUCH: But we agree that
6 that's a rule?

7 MR. ZAVAREEI: Absolutely, Your Honor.
8 Absolutely.

9 JUSTICE GORSUCH: Okay.

10 JUSTICE JACKSON: Can I ask -- oh,
11 were you going?

12 JUSTICE KAVANAUGH: Go ahead.

13 JUSTICE JACKSON: Can I ask about the
14 consequences of your -- your friend on the other
15 side winning this? Justice Kavanaugh asked him,
16 well, what if you lose. I'd like to ask what if
17 he wins.

18 And my concern is a little bit about
19 confusion with respect to our collateral order
20 doctrines and the extent to which people would
21 think that any dispositive motion that is denied
22 and that could be appealed up to the court of
23 appeals would somehow be authorized as a result
24 of this, because he says, for example, this is
25 integral, this is touching upon what's happening

1 with the progress of this litigation because the
2 order is about arbitration and that's another
3 forum, and if we continue to go to trial, we
4 will undermine our right to arbitrate.

5 And I would think there's, like, a lot
6 of pretrial dispositive circumstances that bear
7 those same hallmarks. So, if the court denies a
8 motion for a statute of limitations or the court
9 denies a motion for, you know, a dismissal under
10 personal jurisdiction problems, all of these
11 scenarios, I think, kind of have that same
12 inherent problem.

13 So I'm a little worried about
14 conceiving of a denial of arbitration as being
15 so integral to the merits determination that he
16 wins under that theory. So can -- can you -- am
17 I right about that or not?

18 MR. ZAVAREEI: You are. And let me
19 start with something from Digital Equipment,
20 which -- which said that virtually every right
21 that could be enforced appropriately by pretrial
22 dismissal might loosely be described as
23 conferring a right to not stand trial, right?

24 And so, under that articulation, if
25 you were to go that far, that encompasses a

1 whole lot of things, including the ones that you
2 mentioned, Justice Jackson.

3 JUSTICE JACKSON: So, if he's relying
4 on the Griggs rule on that basis --

5 MR. ZAVAREEI: Exactly.

6 JUSTICE JACKSON: -- then would we be
7 opening up a can of worms with respect to other
8 people making Griggs-type arguments about the
9 right to appeal and, therefore, stay the
10 underlying proceedings?

11 MR. ZAVAREEI: Well, yes, absolutely,
12 particularly because he places so much emphasis
13 on this unfortunately untrue claim that there
14 are no other statutes that are silent with
15 respect to the discretion without mentioning
16 1292(b), which includes most interlocutory
17 appeals and is deadly silent. And that includes
18 forum selection. That includes venue, personal
19 jurisdiction.

20 JUSTICE GORSUCH: Well, you -- you'd
21 agree in 1292(b) cases, again, the district
22 court couldn't do certain things, that its
23 jurisdiction would be divested with respect to
24 some portion of the case that's now pending in
25 the court of appeals.

1 MR. ZAVAREEEI: Under Griggs, perhaps.

2 JUSTICE GORSUCH: Again, we dispute
3 how far that goes, but we all agree that that's
4 a thing, right?

5 MR. ZAVAREEEI: It -- it is, but what
6 my friend on the other side is saying is that
7 it's an automatic stay of everything.

8 JUSTICE GORSUCH: Well, that's the
9 question, is how far the -- how far the stay
10 reaches, not whether a stay exists, because
11 you'd agree, again, that under 1292(b), that the
12 district court couldn't do something that would
13 undermine or thwart the court of appeals'
14 jurisdiction over the case.

15 MR. ZAVAREEEI: Yes -- yes, that's
16 what -- that's what our position is.

17 JUSTICE GORSUCH: All right.

18 MR. ZAVAREEEI: And that's what the
19 statute says.

20 JUSTICE GORSUCH: Okay.

21 JUSTICE JACKSON: But that's happening
22 --

23 JUSTICE GORSUCH: With -- with --

24 JUSTICE JACKSON: -- on a case-by-case
25 basis.

1 JUSTICE GORSUCH: -- with -- with
2 respect to the Nken factors, if I might for a
3 second, I just want to understand what realm of
4 agreement we have.

5 If we were to go down that road, I
6 thought I understood you to say to -- to Justice
7 Thomas that it would be appropriate to enter a
8 stay when the appellate process is particularly
9 long?

10 MR. ZAVAREEI: It could be, yes.

11 JUSTICE GORSUCH: Yeah. Or -- or the
12 arbitration agreement provides for no -- no
13 formal discovery?

14 MR. ZAVAREEI: It could be, yes,
15 Your Honor.

16 JUSTICE GORSUCH: And no class claims?

17 MR. ZAVAREEI: Yes. These were
18 examples from particular cases that I was
19 giving.

20 JUSTICE GORSUCH: And -- and -- and
21 also, when it gets close to trial, then -- then
22 a stay might be appropriate?

23 MR. ZAVAREEI: Yes, Your Honor.

24 JUSTICE GORSUCH: Okay. Thank you.

25 JUSTICE ALITO: Well, in all of those

1 situations, how would the requirement of
2 irreparable harm be met when the party denied --
3 whose motion to compel arbitration was denied
4 says we're going to -- what we're going to
5 suffer is \$5 million in discovery costs, or if
6 it's going to go to trial, the trial is going to
7 cost \$5 million?

8 Would that be irreparable harm?

9 MR. ZAVAREEI: Let me answer it this
10 way: It depends. It might. Obviously, this
11 Court has held that, generally, writ large, that
12 the discovery costs themselves are not
13 irreparable harm.

14 But, if you had a situation like some
15 of the courts below have decided where, in the
16 arbitration rules themselves, there's no
17 discovery, and the judges are looking at that
18 and saying, huh, well, this is a pretty -- this
19 is a pretty strong appeal, and a lot of
20 discovery would happen here, let me -- and look
21 at the arbitration clause itself, it says
22 there's no discovery, under those circumstances,
23 they have held that that is irreparable harm.

24 JUSTICE ALITO: Well, what would be
25 the irreparable harm if the only harm is very

1 substantial litigation costs?

2 MR. ZAVAREEEI: Well, under those
3 circumstances, it would be those -- those
4 substantial --

5 JUSTICE ALITO: But haven't we said
6 that that's not irreparable harm?

7 MR. ZAVAREEEI: But -- but, as -- as
8 compared to what would happen in arbitration.
9 So those things can't be separated. They have
10 to be taken together.

11 If it's just a lot of money, then that
12 is not irreparable harm. But, if the
13 alternative is that you could be in a situation
14 where you do not have to spend any money, you --
15 there is no discovery at all, then, under those
16 circumstances, it might be irreparable harm.

17 JUSTICE ALITO: Well, I -- I don't
18 understand that. It's either -- either money --
19 either litigation costs count or they don't
20 count.

21 MR. ZAVAREEEI: Well, I --

22 JUSTICE ALITO: Why does it matter
23 whether you have zero litigation costs in -- in
24 arbitration, which, of course, will never be
25 exactly the case, and you have very heavy

1 arbitration costs if you have to go ahead with
2 the district court proceeding? It's still
3 litigation costs.

4 MR. ZAVAREEI: It is indeed, Your
5 Honor, but the district courts have looked at
6 this and have determined that under the -- under
7 certain circumstances, depending on the nature
8 of the arbitration, that that can constitute
9 irreparable harm.

10 JUSTICE ALITO: Was that right?

11 MR. ZAVAREEI: I think that it is
12 because I think it's important that the -- that
13 the -- the standards in Nken remain flexible,
14 and I think that it's important that, yes, this
15 Court has held that -- that monetary expense
16 alone is not irreparable harm in most
17 circumstances, but that doesn't mean that you
18 can't look at what would happen in arbitration
19 as you make that determination.

20 JUSTICE ALITO: What if the district
21 court says I'm going ahead with trial?

22 MR. ZAVAREEI: Well, first of all,
23 we're not aware of that happening ever under --
24 in -- in any case, but, if that were to happen,
25 then -- then the circuit court could issue a

1 stay, and this Court could issue a stay. And,
2 in fact, that's exactly what this Court did in
3 the Henry Schein case, where the district court
4 was intent on moving forward with the trial, and
5 -- while an arbitrability issue was -- was --
6 was pending and kept going back down, and they
7 kept trying to move forward. And, finally, this
8 Court said no.

9 And -- and so, when I speak about the
10 Nken standard and the power of the courts to
11 issue stays, it's not just the district court
12 that has the power. It's the circuit courts
13 that have the power, and it's this Court that
14 has the power. In this case alone, my friend on
15 the other side saw -- side sought a stay in both
16 cases in the district court, they sought a stay
17 in the Ninth Circuit, and they sought a stay
18 here, and all three courts denied the stay
19 applying the Nken standard.

20 JUSTICE KAVANAUGH: Your -- your
21 concern is the delay of the appeal, I think,
22 stated concern, how long it takes. The other
23 side's concern, I believe, is that they think
24 they correctly bargained for arbitration and
25 they have a right that Congress has given them

1 to have the appellate court determine that and
2 that they're not going to be able to afford
3 themselves of that congressionally granted right
4 because, if the district court discovery goes
5 forward in a putative class -- in a class action
6 context, that is going to coerce massive
7 settlements, and they don't want to be coerced
8 into massive settlements without having the
9 opportunity to take advantage of the right that
10 Congress has given them to have an appeals court
11 decide whether arbitration is the appropriate
12 forum.

13 How do you respond to that?

14 MR. ZAVAREEI: Well, first, let me --
15 let me speak to the -- the situation -- the --
16 the actual situation on the ground with respect
17 to once that happens.

18 First, you've already got a district
19 court that has ruled that the -- there is no
20 valid arbitration clause.

21 JUSTICE KAVANAUGH: Could be wrong and
22 the statistics show that they sometimes are
23 wrong in -- in any event. Just --

24 MR. ZAVAREEI: Under one of the amicus
25 briefs in the Ninth Circuit, they're wrong --

1 JUSTICE KAVANAUGH: Just assume
2 they're wrong.

3 MR. ZAVAREEI: -- 29 percent of the
4 time.

5 JUSTICE KAVANAUGH: Okay. They're not
6 right every time.

7 MR. ZAVAREEI: They're not right every
8 time.

9 JUSTICE KAVANAUGH: They -- they have
10 crowded dockets. They have to move quickly.
11 They're not correct every time.

12 MR. ZAVAREEI: And in 62 percent of
13 the times that they're wrong, Your Honor, the
14 courts have issued stays. So that's -- so
15 that's one piece of it.

16 The second piece of it is I think what
17 Justice Kagan was talking about, is that the
18 other side also has a right. The other side
19 also has a right to move forward with their
20 litigation. And there are risks associated with
21 slowing down the litigation. Look at --

22 JUSTICE KAVANAUGH: I agree with that.
23 Isn't -- isn't the solution to this to make sure
24 that the appeals move fast? And then your
25 stated concern at least is solved so long as

1 they really do move quickly.

2 MR. ZAVAREEI: And that -- exactly,
3 Your Honor, and that's exactly the remedy that
4 Congress came up with.

5 JUSTICE KAGAN: And wouldn't that be
6 the remedy either way who wins? I mean --

7 JUSTICE KAVANAUGH: Yeah. But, on my
8 question --

9 JUSTICE KAGAN: -- either way, it
10 doesn't tell us --

11 JUSTICE KAVANAUGH: -- on my --

12 JUSTICE KAGAN: -- it doesn't tell us
13 who wins as between the two of you. Either --
14 whoever wins, the appeals should move fast.

15 MR. ZAVAREEI: But can I -- can I
16 give an --

17 JUSTICE KAVANAUGH: Right, but the
18 problem, just to answer Justice Kagan's
19 question, is that the coerced settlement problem
20 exists still, which they say they have a
21 congressionally afforded right to an appellate
22 determination of whether arbitration is the
23 appropriate forum, and they're not really going
24 to be able to get that if they're coerced into a
25 massive settlement because of the discovery.

1 I'm just telling you what the concern is, and I
2 think that's realistic.

3 MR. ZAVAREEI: Well --

4 JUSTICE KAVANAUGH: So -- just to tell
5 you where I am.

6 MR. ZAVAREEI: -- I -- I understand
7 and I appreciate that. But I will say, Your
8 Honor, is what you're looking at now are policy
9 concerns, right, and policy concerns that could
10 have been addressed by Congress when -- they
11 were concerned about these policy concerns.
12 They wanted to get these appeals heard quickly,
13 and they came up with a way to do it. Their --
14 their way to do it was to enact Section 16 --

15 JUSTICE KAVANAUGH: That goes back to
16 whether there's a background rule.

17 MR. ZAVAREEI: It -- precisely.

18 JUSTICE KAVANAUGH: Yeah.

19 JUSTICE JACKSON: Wasn't there also
20 the --

21 JUSTICE KAVANAUGH: On -- on the -- on
22 the delay question -- let's just go back to that
23 if we can -- isn't there a solution in this case
24 if -- if appeals courts move quickly, a solution
25 to your problem, if appeals courts move quickly?

1 Just yes or no?

2 MR. ZAVAREEEI: There -- there could
3 be, yes.

4 JUSTICE KAGAN: Is there also a
5 solution to Mr. Katyal's problem if appeals
6 courts move quickly?

7 MR. ZAVAREEEI: Well, with all due
8 respect --

9 JUSTICE KAVANAUGH: No.

10 MR. ZAVAREEEI: -- I don't think so
11 because I think his problem is that he wants
12 delay, that his clients want to hold these cases
13 up --

14 JUSTICE KAVANAUGH: He doesn't know --
15 he -- no, no, no --

16 JUSTICE KAGAN: Right, but if what he
17 wants -- but if what he wants is what --

18 JUSTICE KAVANAUGH: That's not right.

19 JUSTICE KAGAN: -- Justice Kavanaugh
20 suggests, which is not to be subject to a lot
21 of, you know -- you know, settlement pressure,
22 then, if the appeals court moves quickly, he's
23 not going to be subject to a lot of settlement
24 pressure.

25 MR. ZAVAREEEI: Let -- let me give an

1 example if I could. Bradford-Scott --

2 JUSTICE KAVANAUGH: Well, then should
3 we have an automatic stay on the discretionary
4 factors, to answer Justice Kagan's question, if
5 discovery is about to be ordered?

6 MR. ZAVAREEI: Where would that come
7 from? That would be made up --

8 JUSTICE KAVANAUGH: You --

9 MR. ZAVAREEI: -- out of whole cloth.

10 JUSTICE KAVANAUGH: Well, you said
11 that a lot of district courts are granting it.

12 MR. ZAVAREEI: Well, they're not --
13 they're not -- it's not automatic.

14 JUSTICE KAVANAUGH: Are they correct?
15 I thought you said they're --

16 MR. ZAVAREEI: They're applying --

17 JUSTICE KAVANAUGH: I thought you said
18 they were correct to Justice Alito. Is that
19 wrong?

20 MR. ZAVAREEI: They're applying the
21 Nken standard. It's not automatic. They're --

22 JUSTICE JACKSON: I mean, isn't the
23 whole -- isn't the whole dispute between the two
24 of you whether or not these are mandatory,
25 meaning taken out of the district court's

1 discretion, versus having the district court
2 look in every case and make a decision? I
3 thought that's really what was at the heart of
4 this. Is that the daylight between the two of
5 you on this issue?

6 MR. ZAVAREEI: That's absolutely the
7 question. And I -- and I still struggle to
8 understand how my friend on the other side
9 continues to say that there is a divestiture
10 rule or a Griggs rule of divestiture.

11 JUSTICE JACKSON: Right. So --

12 MR. ZAVAREEI: There is no such thing.

13 JUSTICE JACKSON: -- so, given that
14 that's the scenario, I guess I'm just wondering
15 whether the concern that Justice Kavanaugh has
16 put on the table is actually ever going to
17 materialize because, in a situation now where
18 Congress has given Coinbase and other defendants
19 in this situation the ability to go to the
20 appeals court, I'm wondering if they're ever
21 really coerced into settlement. I mean, that
22 seems like a pretty significant, you know, arrow
23 in their quiver to not settle because they're
24 about to go to the appeals court and, hopefully,
25 the appeals court will move quickly and -- and

1 resolve this in their favor.

2 MR. ZAVAREEEI: Absolutely. And -- and
3 I'd like to go back to your question -- it
4 answers both of your questions, Your Honors,
5 which -- the -- the Bradford-Scott case, which
6 is the -- Judge Easterbrook's case that -- that
7 established the majority rule, right? In that
8 case, he said, well, Griggs requires a mandatory
9 stay. Four months later, a separate panel
10 looked at that arbitrability clause and said
11 there's no valid arbitration clause here, four
12 months later, and it was sent back down and the
13 parties were able to litigate again. There is
14 no need under circumstances like that for a
15 mandatory stay.

16 And -- and another point to -- to --
17 to keep under consideration, Your Honor, with
18 respect to irreparable harm and all of these
19 other concerns, the courts also fashion partial
20 stays. In our case, in the Bielski case,
21 there's no class-wide discovery. We can't force
22 an in terrorem class settlement when the judge
23 isn't allowing us to do class discovery.

24 JUSTICE ALITO: I wanted to --

25 MR. ZAVAREEEI: They've --

1 JUSTICE ALITO: I'm sorry. Finish
2 your sentence.

3 MR. ZAVAREEEI: Just one last point.
4 The only discovery so far is they've produced
5 eight documents. That's not causing irreparable
6 harm.

7 JUSTICE ALITO: I wanted to give you a
8 chance to respond to an argument made in the
9 reply brief, and that is the reference to the
10 criminal interlocutory appeal statute, 18 U.S.C.
11 3731, which doesn't make any mention of stays,
12 and yet it's widely understood that that does
13 result in a stay of district court proceedings
14 while the case is on appeal, while the issue is
15 on appeal.

16 MR. ZAVAREEEI: I don't think that's
17 what -- what Judge Posner held there actually,
18 Your Honor. I think what Judge Posner held
19 there was that the divest -- to the extent that
20 there's divestiture, that it is narrow, and he
21 actually said that the government's argument
22 that a notice of appeal automatically divests
23 the trial court of jurisdiction over the case is
24 overbroad and that the -- and that the issue is
25 making sure the two courts do not step on each

1 other's toes.

2 That, I submit to you, is what Griggs
3 is about. It's making sure that when the court
4 of appeals is deciding an important issue that
5 has something to do with the case below, that --
6 that that is not in real time moving below, that
7 the court of appeals is not shooting at a moving
8 target, that -- that that is frozen in time so
9 that the court of appeals can make that decision
10 based on a fixed record and not have it change
11 -- not have the ground move underneath its feet.

12 And so I don't think that the
13 Centriacci case is -- holds anything otherwise.
14 I think that court actually was very consistent
15 with our argument here.

16 And -- and, again, to be clear, this
17 is another one of those cases -- this is another
18 one of those statutes that is silent, and under
19 my friend's interpretation, that means that
20 there should be an automatic stay because it's
21 silent. But that is not what Justice Posner --
22 what Judge Posner said.

23 Judge Posner said, no, that -- that
24 their interpretation is overbroad. Now he
25 didn't let them impanel a jury. He said we need

1 to slow down, slow your horses on that one, but
2 he said you could go forward with some other --
3 with discovery, with other criminal proceedings.

4 JUSTICE SOTOMAYOR: Counsel, give me
5 your best answer to Judge Easterbrook's
6 position, which was articulated by Justice
7 Barrett earlier, which is, in essence, this is
8 like sovereign immunity, qualified immunity,
9 because it's a question of being tried at all --
10 not tried, but litigated at all.

11 What's your best response to that?

12 MR. ZAVAREEI: Well, let me answer the
13 question directly by saying that it is --
14 immunity is -- is the right not to be haled into
15 any court, any -- any forum, anywhere, any time.

16 JUSTICE SOTOMAYOR: Right. It's not
17 an issue of being hauled into court. It's an
18 issue of being litigated and being found liable.

19 MR. ZAVAREEI: Litigated anywhere,
20 whether it's in court, whether it's an arbitral
21 tribunal.

22 JUSTICE SOTOMAYOR: It's a finding of
23 liability.

24 MR. ZAVAREEI: Anywhere.

25 JUSTICE SOTOMAYOR: You're free from

1 liability, I agree.

2 MR. ZAVAREEI: Well, not only are you
3 free from liability, you're free from the
4 indignity of having to take the stand, you're
5 free from the indignity of having someone taking
6 discovery against you.

7 JUSTICE SOTOMAYOR: Well, you're --
8 you're pushing too far, counsel, because that's
9 what they say they bargained for, not to take
10 the stand, not to be public.

11 MR. ZAVAREEI: I -- I beg to differ.

12 JUSTICE SOTOMAYOR: I -- I -- I -- I
13 think arbitration is not necessarily public. It
14 generally isn't.

15 MR. ZAVAREEI: I've arbitrated many
16 cases. There is no presumption of
17 confidentiality under AAA or JAMS rules. All of
18 my arbitrations are public.

19 JUSTICE SOTOMAYOR: I -- I do agree
20 with you, counsel, that -- that there's no
21 confidentiality requirement outside of the terms
22 of the agreement.

23 MR. ZAVAREEI: And -- and -- and I
24 will also say that Laura Lines is probably the
25 best case with respect to that, which -- which

1 holds that entitlement to avoid suit is
2 different from an entitlement to be sued in a
3 particular forum.

4 JUSTICE GORSUCH: Well, what do we do
5 about sovereign immunity then, which is about
6 which forum cases will proceed very frequently?
7 It may mean that you can't be haled into a
8 different sovereign's court, you have the right
9 to be haled only into your court and only to the
10 extent you have consented to it.

11 MR. ZAVAREEI: Yes. Again, I think
12 that if you're talking about state sovereign
13 immunity, for example?

14 JUSTICE GORSUCH: For example, sure.

15 MR. ZAVAREEI: Yeah. I -- I think
16 that is -- that's the -- the best example that I
17 think that my friend from the other side came up
18 with. I think all the other immunities are
19 easily answered, which is --

20 JUSTICE GORSUCH: Well, qualified
21 immunity is qualified immunity from suit under
22 federal law. You may still be liable for state
23 tort actions.

24 MR. ZAVAREEI: You could be, right.
25 But the point is that an immunity has been

1 established that has to be respected by the
2 courts.

3 JUSTICE GORSUCH: Sure.

4 MR. ZAVAREEI: But -- but arbitration
5 is not an immunity. Arbitration is not saying
6 --

7 JUSTICE GORSUCH: It is what it is,
8 but it -- it's a -- it's a choice of forum, and
9 qualified immunity is a federal doctrine for
10 federal lawsuits, and it doesn't control in
11 state court for state lawsuits.

12 MR. ZAVAREEI: But, as soon as you --

13 JUSTICE GORSUCH: And very frequently
14 police officers are haled into court for torts.

15 MR. ZAVAREEI: But, as soon as you're
16 haled into federal court or as soon as a state
17 is brought into federal court --

18 JUSTICE GORSUCH: Sure.

19 MR. ZAVAREEI: -- their right under
20 the Eleventh Amendment or under qualified
21 immunity, that right is destroyed.

22 JUSTICE GORSUCH: Sure.

23 MR. ZAVAREEI: As opposed to
24 arbitration.

25 JUSTICE GORSUCH: Right. But they

1 say, you -- you -- you're right, we -- we --
2 we just didn't bargain for this court, we didn't
3 bargain for this forum, and what is the
4 difference?

5 MR. ZAVAREEEI: Well, first of all,
6 they're -- the Court hasn't held yet that --

7 JUSTICE GORSUCH: No, of course, we
8 haven't. That's why I'm asking you.

9 MR. ZAVAREEEI: Well, so -- but my --
10 my point is that with respect to sovereign
11 immunity, all the immunity questions, right,
12 there's never been any holding other than these
13 lower court holdings that there should be an
14 automatic stay. There's some holdings relating
15 to the collateral order doctrine.

16 JUSTICE GORSUCH: So you'd have us
17 overrule those decisions along the way
18 implicitly too?

19 MR. ZAVAREEEI: Yes.

20 JUSTICE GORSUCH: Okay.

21 MR. ZAVAREEEI: Yes.

22 CHIEF JUSTICE ROBERTS: Justice
23 Thomas?

24 JUSTICE THOMAS: I'm just curious.
25 You said you've arbitrated quite a few of these.

1 How does this play out in -- of course, I've
2 been on the other side of those cases, like
3 Terminix, but how does it play out in state
4 court?

5 MR. ZAVAREEI: In -- in terms of the
6 type of discovery allowed for?

7 JUSTICE THOMAS: Yes.

8 MR. ZAVAREEI: Usually a lot more
9 discovery in state court than you have in
10 federal court.

11 JUSTICE THOMAS: In this particular
12 issue of -- that we're confronting here.

13 MR. ZAVAREEI: Oh, I'm sorry. With --
14 I -- I -- I don't know the answer to that
15 question, Your Honor.

16 CHIEF JUSTICE ROBERTS: Justice Alito?
17 Justice Sotomayor?

18 JUSTICE SOTOMAYOR: There is a
19 possibility if we say that a stay is mandatory
20 that we could have a situation, isn't there,
21 where state courts could say no?

22 MR. ZAVAREEI: Yes, absolutely.

23 JUSTICE SOTOMAYOR: In a -- in a state
24 proceeding?

25 MR. ZAVAREEI: Yes, the states are

1 free to do as they wish.

2 JUSTICE SOTOMAYOR: Because this
3 section is only -- only involves federal courts.

4 MR. ZAVAREEEI: Absolutely.

5 JUSTICE SOTOMAYOR: So we would be
6 creating an incentive for petitioners to file
7 their suits in state court if they can.

8 MR. ZAVAREEEI: Yes, Your Honor. And
9 CAFA is another one of those statutes that is
10 silent with respect to whether a stay is
11 mandatory or not.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 JUSTICE KAGAN: I might not have
14 understood the colloquy between you and Justice
15 Gorsuch, but I wanted to make sure that it was
16 clarified at least for me.

17 I think what Justice Gorsuch was
18 saying is that there are opinions that do give
19 automatic stays with respect to established
20 immunity doctrines.

21 MR. ZAVAREEEI: Lower court. They're
22 lower court decisions.

23 JUSTICE KAGAN: Lower court. Now --
24 and -- and then he said, well, do we have to say
25 that those are wrong in order to rule for you.

1 MR. ZAVAREEEI: Oh.

2 JUSTICE KAGAN: And I think you said,
3 yes, you do, and I don't think that that's what
4 you want to say, is it?

5 MR. ZAVAREEEI: No. I --

6 (Laughter.)

7 MR. ZAVAREEEI: -- I don't. Thank you.

8 JUSTICE GORSUCH: Maybe I should have
9 directed my question to Justice Kagan.

10 MR. ZAVAREEEI: I know. Thank you.

11 JUSTICE KAGAN: Well, I think you
12 misunderstood his question just to be fair.

13 MR. ZAVAREEEI: I did, I did. I
14 appreciate -- well, what I would say is they
15 were wrong to the extent that they applied
16 Griggs to come up with their analysis, right? I
17 mean, Griggs doesn't provide the basis for
18 saying that a sovereign immunity case should be
19 stayed pending the appeal.

20 JUSTICE KAGAN: But you're not
21 contesting that there are distinctions that can
22 be made between those immunity doctrines and
23 this?

24 MR. ZAVAREEEI: Those -- those -- those
25 immunity cases should be stayed but not under

1 Griggs.

2 JUSTICE KAGAN: Okay. I thought that
3 that's what you meant.

4 MR. ZAVAREEEI: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 Oh, I'm sorry. Justice Gorsuch?

8 Justice Kavanaugh?

9 Now Justice Barrett?

10 JUSTICE BARRETT: No.

11 CHIEF JUSTICE ROBERTS: Justice
12 Jackson?

13 JUSTICE JACKSON: Finally, if we say
14 that a stay is mandatory, I guess I'm still
15 fixating on Justice Kavanaugh's questions about
16 settlement pressure and the equities, and I'm
17 wondering whether the settlement dynamic doesn't
18 shift dramatically in a defendant's favor if we
19 say that because, to the extent that the
20 defendant doesn't want trial, they don't want
21 arbitration either really, they're the
22 defendant, so wouldn't we have a dynamic in
23 which the exact opposite of the appellate court
24 going fast would happen if they get an automatic
25 stay? They get it and then they -- it takes,

1 like, months for the -- the appellate court to
2 rule, and that's just fine with the defendant.

3 MR. ZAVAREEI: That -- that's very
4 real pressure. Look -- look at this case, where
5 Coinbase, the entire cryptocurrency market is
6 collapsing under our feet, and other
7 interchanges, competitors with Coinbase are
8 going bankrupt left and right, and we've got a
9 client who lost \$30,000 and we're getting calls
10 from other clients who have lost hundreds of
11 thousands of dollars, in the meantime, you know,
12 wondering whether Coinbase is going to be around
13 by the time these appellate court decisions
14 are -- are decided. So, absolutely, there's an
15 interest on the other side that could push
16 people to try and settle early to -- to try and
17 escape harms like bankruptcy.

18 Changes in arbitration agreements.
19 Sometimes the parties -- the defendants will
20 actually -- this case again -- issued a new
21 arbitration clause during the pendency of this
22 very appeal. So there are pressures on the
23 other side that can force plaintiffs with valid
24 claims to undervalue their cases and settle
25 them.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Rebuttal, Mr. Katyal?

4 REBUTTAL ARGUMENT OF NEAL K. KATYAL
5 ON BEHALF OF THE PETITIONER

6 MR. KATYAL: Thank you.

7 As Justice Kavanaugh said, the
8 question is how to read congressional silence,
9 and you look to background principles. Here,
10 the question of Congress's silence we think is
11 far more appropriately directed at my friend on
12 the -- on the other side.

13 Eleven times Congress affirmatively
14 said no automatic stay during interlocutory
15 appeals they authorized, including the very day
16 before 16(a).

17 What were they doing if the
18 divestiture rule didn't apply? All 11 statutes
19 would be surplusage and irrelevant. And, here,
20 the statute in 16(a) is silent. We've offered a
21 very good reason for it, because the divestiture
22 rule applies, that's the background principle,
23 and that is the principle for qualified
24 immunity, for state sovereign immunity, as
25 Justice Gorsuch was saying, for double jeopardy.

1 Here, it's even stronger because this
2 isn't just a judge-made principle, it's one that
3 follows from Congress's authorization, just like
4 those 11 statutes. It's just they didn't trim
5 back the rule.

6 Second, Griggs is not just about the
7 same issue being decided. The language of
8 Griggs, which I read to you before, is that the
9 aspect has to be involved in the appeal. That's
10 how Wright and Miller see it. That's how the
11 immunity cases see it. That's double jeopardy
12 cases and the like.

13 And there's a massive harm in the
14 interim. Take class discovery, for example.
15 The reason you have an arbitration agreement in
16 part is to avoid this extensive class discovery
17 which would otherwise happen in the interim.

18 The amici briefs detail this in a lot
19 of detail. My friend says, oh, there's not much
20 discovery in these cases. Take this very case.
21 He just filed an eight-page letter on us with,
22 you know, massive amounts of discovery requests
23 in that. And that happens all the time in these
24 cases, and you can't remedy that after the fact.
25 My friend even admitted litigation costs can't

1 be recouped.

2 And so, like, take the thousand hours
3 we've spent in the interim in this case. If you
4 don't get an automatic stay, attorneys will have
5 to spend that kind of money, clients will have
6 to spend that kind of money. There is no way to
7 put that toothpaste back in the tube. That's
8 also true of the discovery problems and the
9 spilling out into the public domain and Judge
10 Friendly's concern about coercive settlements.

11 Third, Justice Jackson, you asked
12 about personal jurisdiction, opening a can of
13 worms of forum nonconveniens and things like
14 that. Very simple answer. You don't have a
15 stay in any of those cases because you don't
16 have a right to an interlocutory appeal in the
17 first place. So those cases don't arise. And
18 those are the forum selection cases he's citing.
19 They just say sorry to interlocutory appeal.
20 Doesn't matter. Here, in 16(b), there's a
21 unique right to an interlocutory appeal, which
22 makes this different.

23 Fourth, he talks about 1292(b), which
24 he admits isn't in his brief. I think it's not
25 in his brief for a good reason, because 1292(b)

1 has an anti-stay provision in it precisely which
2 isn't here. It doesn't cover every case, but it
3 covers a lot of cases.

4 And then, with respect to the cases it
5 doesn't cover, the courts hold that Griggs does
6 apply in those cases in which there's a
7 discretionary certified appeal. Dayton is a
8 case from the Fifth Circuit in 1995. Green Leaf
9 is a case in the Eleventh Circuit. L.A. versus
10 Santa Monica in the Ninth Circuit. Many cases
11 say that.

12 And, of course, it's a very different
13 posture in 1292(b) because that is a
14 discretionary right for an interlocutory appeal.
15 And it would follow, if you have a discretionary
16 right, you can imagine having a discretionary
17 stay.

18 This is not a discretionary stay.
19 This is an unusual circumstance. Congress has
20 said you have an automatic nondiscretionary
21 right. What were they doing if -- to give you
22 that right, if not to protect also litigation in
23 the interim. That -- to -- whenever Congress is
24 worried about the kind of policy consequences of
25 delay and, you know, a company going bankrupt,

1 as my friend speculates -- obviously, that's not
2 Coinbase, but it may happen in the future with
3 other cases and other clients -- Congress knows
4 exactly what to do. They write, as they've done
5 11 times, no automatic stay. That is precisely
6 what is missing here.

7 And, finally, that brings me to my
8 friend's point about the trials. I can't
9 understand, frankly, his position on trials. I
10 think he said that a trial could take place.
11 There's no automatic stay. It's up to the trial
12 court's discretion.

13 That can't possibly be the law. That
14 can't possibly be the understanding of Griggs.
15 Rather, we think, in every context, whether it's
16 state sovereign immunity, qualified immunity, or
17 double jeopardy, the rule is always the same,
18 which is the divestiture rule applies, and the
19 only question is the scope of that rule.

20 And if a party is saying, for example,
21 that they want discovery or they want to, you
22 know, the court to decide a motion, that is
23 something that undoes the appeal right. It
24 moots it out because there isn't a way to
25 recover that discovery after the fact. There

1 isn't a way to recoup those litigation costs
2 after the fact. There's no mechanism for that,
3 and that is the very right Congress protected in
4 the FAA.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel. The case is submitted.

7 (Whereupon, at 12:58 p.m., the case
8 was submitted.)

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