

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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Place: Washington, D.C.
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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: I think my point is
23 that qualified immunity, I think, would be a bad
24 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 divestiture rule applies. The
4 question -- Griggs applies. The question in any
5 given case is what that rule means in practice.

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

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

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

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

25 JUSTICE THOMAS: What does that mean?

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

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

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

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

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

25 MR. KATYAL: So -- so, Justice

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

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

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

23 So Griggs was working both ways. Each
24 court will respect that we will stay only if we
25 threaten to moot out each other's point.

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

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

7 MR. KATYAL: Well --

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

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

16 And our point to you is that --

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

21 MR. KATYAL: So --

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

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

16 And, here, Congress's backdrop --

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

1 stay.

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

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

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

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

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

1 JUSTICE SOTOMAYOR: You still haven't
2 explained 1292.

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

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

10 MR. KATYAL: Well, let --

11 JUSTICE SOTOMAYOR: -- or that
12 Congress follows it.

13 MR. KATYAL: Well, let --

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

18 MR. KATYAL: The --

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

21 MR. KATYAL: So this is so important
22 because this is not a situation in which the
23 statutes cancel each other out, and I'll explain
24 the two statutes we're talking about in a
25 minute.

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

6 JUSTICE SOTOMAYOR: So why isn't it
7 what it says?

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

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

16 MR. KATYAL: Absolutely, Justice
17 Kagan.

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

19 MR. KATYAL: And that's what they've
20 done --

21 JUSTICE KAGAN: And -- and -- and --

22 MR. KATYAL: -- in the statute.

23 JUSTICE KAGAN: -- it seems as though,
24 you know, that's what has happened here. And
25 the Griggs you might say exception to that is an

1 exception, it's a judge-made exception, we
2 should read it narrowly. It's an exception that
3 applies when the appeals court and the district
4 court are doing the exact same thing such that
5 the district court is kind of stepping on the
6 appeals court, everything that the district
7 court does.

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

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

16 So, if you compare, for example,
17 16(a), which says nothing at all about a stay,
18 to, for example, what it said the day before,
19 which is "neither the application for nor the
20 granting of an appeal under this paragraph shall
21 stay proceedings," when Congress wants to have a
22 discretionary district court stay determination,
23 they say so.

24 And this brings me to my promise to
25 Justice Sotomayor, the two statutes that you

1 mentioned, they're the two ones that my friend
2 relies on, neither work.

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

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

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

23 Here's what it says: "Neither the
24 application for nor the granting of an appeal
25 shall stay proceedings in the Court of

1 International Trade or the Court of Federal
2 Claims."

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

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

19 JUSTICE GORSUCH: Mr. --

20 MR. KATYAL: There was no --

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

24 Why is it unreasonable to think that
25 Congress thought that was enough? I mean, they

1 didn't say anything about a stay, yet they
2 focused on whether or not -- the problem before
3 you, whether or not continued litigation would
4 interfere with your claims of the right to
5 arbitrate.

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

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

18 And so -- you know, and that's why you
19 have these 11 statutes which my friend can't
20 explain what they're about. There is no time in
21 which Congress does what you're saying, which
22 they grant an interlocutory appeal and then say,
23 oh, we're also going to give you this automatic
24 stay right. That statute doesn't exist. My
25 friend tries to claim at Section 3 and

1 1292(d)(4) those arguments, I think, fall apart
2 under inspection.

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

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

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

23 JUSTICE KAGAN: I think what I was
24 suggesting is that we usually try to keep our
25 judge-made rules narrow to -- to deal with only

1 situations which really cry out for them.

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

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

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

22 MR. KATYAL: So I think, if the
23 question here is what Congress intended in
24 16(a), then I think the best way of
25 understanding it, apart from all these policy

1 concerns you're raising or anything else, is
2 Congress acted against the backdrop --

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

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

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

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

17 If you were sitting in Congress in
18 1988 and you've taken the step to authorize
19 immediate interlocutory one-sided appeals from
20 arbitration, you've said this right is so
21 important, we don't want you to wait to go
22 through the trial in district court proceedings,
23 you get to vindicate that now.

24 Letting the district court proceed
25 perhaps for years, as the amici say, this

1 happens -- it's a real problem that has --

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

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

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

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

21 Now, presumably, if a party doesn't
22 ask, the district court can keep going. But
23 you're now suggesting that in a situation in
24 which the district court says no, you don't go
25 to arbitration, somehow Congress intended for

1 that circumstance, the appeal of arbitrability,
2 to also give rise to an automatic stay, and I
3 guess I don't understand that.

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

11 The reason for that is because
12 Congress decided that the rights at issue were
13 so important and had the issue --

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

19 So just the fact that you get an
20 interlocutory appeal doesn't indicate
21 necessarily that Congress is also saying that a
22 stay follows, because there are many situations
23 in which Congress expressly, right, divorces the
24 two --

25 MR. KATYAL: Justice -- Justice

1 Jackson --

2 JUSTICE JACKSON: -- and says you can
3 go interlocutory but no stay.

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

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

21 But I look and I see a bunch of other
22 situations in which Congress says this is really
23 important, go right to the court of appeals, but
24 don't stop the underlying proceedings. So every
25 time Congress lets you interlocutory appeal, it

1 does -- it is not necessarily indicative of
2 their view that the underlying proceedings
3 should stop.

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

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

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

23 JUSTICE ALITO: Mr. --

24 JUSTICE BARRETT: Mr. Katyal --

25 JUSTICE ALITO: -- Katyal, if there

1 isn't an automatic stay, will the party whose
2 motion to compel arbitration ever be able to
3 obtain -- to satisfy the ordinary stay factors
4 that are -- that govern whether a discretionary
5 stay can be issued, namely, the irreparable harm
6 requirement?

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

19 And the other is this case, Justice
20 Alito, illustrates exactly that. I mean, the
21 district courts here in both cases said these
22 were actually pretty good arguments for
23 arbitration -- arbitrability, and reasonable
24 minds can differ about this.

25 But they summarily denied a stay, and

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

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

10 JUSTICE BARRETT: Mr. Katyal, can I
11 interrupt and just follow up on what your answer
12 to Justice Alito is?

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

21 It sounds to me like you're saying
22 that even if Griggs applies, the issue that's
23 being litigated here in a different way, not
24 quite as crisply as qualified immunity or double
25 jeopardy, but it is the issue, the

1 arbitrability. And I think you responded to
2 Justice Sotomayor earlier, you know, it's a
3 little different than the Timbuctoo because of
4 the different procedures. I think you have to
5 win that argument if you win.

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

8 MR. KATYAL: I think you're correct in
9 largely describing our position.

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

20 So overlapping elements isn't the way
21 anyone sees it. Wright & Miller, no one else
22 sees it that way.

23 So, here, our point to you is that any
24 action taken by the district court to resolve
25 the merits, whether it's deciding a motion or

1 even ordering discovery, which takes place
2 against the backdrop of the court's powers to
3 compel, that is precisely the issue on appeal.
4 That's why Judge Easterbrook started this all
5 back in 1997, and that is why I think the
6 overwhelming majority of circuits, as well as
7 the treatises, all agree that's the way of
8 thinking about this.

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

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

21 MR. KATYAL: Sure. I mean, at least
22 -- I think it -- I think it probably traces to,
23 you know, some sort of claims processing rule.
24 In 1883, this Court in Hovey said, "one general
25 rule in all cases was an appeal suspends the

1 power of the court below to proceed further in
2 the cause."

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

10 JUSTICE SOTOMAYOR: So why are --

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel. The -- what you're trying to avoid, of
13 course, is losing your right to arbitrate or
14 going through discovery, but there are a lot of
15 ways you can address that. I mean -- and it may
16 be present in some cases more than others. The
17 district court has, you know, a very busy
18 schedule. You're set for, you know, trial in a
19 year and a half. The court of appeals is going
20 to -- you know, it's got a much quicker
21 schedule. You can ask the court of appeals for
22 expedition. You can explain the situation to
23 the trial -- district court judge. He'd say,
24 you know, a stay is a very big deal, I'm not
25 going to do that, but I'll make sure discovery

1 doesn't start for another whatever.

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

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

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

24 CHIEF JUSTICE ROBERTS: Thank you.

25 Justice Thomas?

1 Justice Alito?

2 Justice Sotomayor?

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

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

17 To me, this is an easy case because I
18 follow the Federal Rules of Civil Procedure and
19 the statute that tells me to look there.
20 Putting that aside, assuming that that's my
21 view, okay, just assuming, please don't try to
22 reargue the case, really, what I think you're
23 doing is you're fighting about how the Nken
24 factors should be addressed by courts below.

25 And I don't know if this case provides

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

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

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

21 MR. KATYAL: So -- so, Justice
22 Sotomayor, a few things. So, first, I think we
23 agree with you that this case does raise the
24 question of whether the Nken factors alone are
25 adequate. We think an automatic --

1 JUSTICE SOTOMAYOR: They are sometimes
2 and they are not other times. That's my point.
3 But why should you win?

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

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

13 MR. KATYAL: Well --

14 JUSTICE SOTOMAYOR: -- a stay should
15 have been granted.

16 MR. KATYAL: Well, I think that you
17 probably --

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

22 MR. KATYAL: Right. I think it's
23 tough to tweak them because this Court has said
24 in Morgan versus Sundance you don't want to have
25 a special rule for arbitrability alone, so

1 that's why we're saying apply the standard
2 Griggs rule here which you apply in other
3 contexts, like the immunity cases and double
4 jeopardy, which would confer an automatic stay.

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

20 You could do all of those things. It
21 would get pretty special. I'd worry about the
22 collateral consequences to Nken in all sorts of
23 other contexts because it's used all over the
24 place, not just, of course, here.

25 So we think the better thing to do is

1 to recognize that if -- if you want to have a
2 elimination of the automatic stay, do what
3 Congress has done 11 times, and this Court
4 shouldn't impose it on itself.

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

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

20 But, of course, that, you know, sort
21 of assumes that you have that right, and -- and
22 we shouldn't make that assumption. It might be
23 that this is a case that should go to
24 arbitration, or it might be that this is a case
25 that shouldn't go to arbitration. What Congress

1 did was it gave you a mechanism to decide which
2 one.

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

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

16 MR. KATYAL: So, Justice Kagan, what I
17 think does the work in your question to me is
18 Congress has decided that X, and our point
19 to you is the statute is silent. And you know
20 that when Congress has decided X, when they're
21 worried about the automatic stay, they come in
22 and affirmatively say so. There is no
23 precedent. Congress has never said the reverse.

24 So take qualified immunity, take
25 double jeopardy, take state sovereign immunity,

1 these are all examples in which the appeals
2 could be described by exactly what you're
3 saying, which is, well, you might win your
4 appeal, you might not on immunity, on the
5 merits, but there's an automatic stay in all of
6 those.

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

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

23 JUSTICE KAGAN: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Gorsuch?

1 Justice Kavanaugh?

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

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

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

12 JUSTICE KAVANAUGH: -- and why.

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

18 JUSTICE KAVANAUGH: Yeah, I got -- I
19 got that, but what will happen if -- if you
20 don't win?

21 MR. KATYAL: So all sorts of rights in
22 the interim could be destroyed.

23 So take, for example, just the
24 simplest thing, discovery. So, if they try and
25 force discovery in the district court, and then

1 they get access to discovery, which may have
2 embarrassing details, it could spill out into
3 the newspapers, we see examples of that all the
4 time, you know, in any given discovery
5 litigation.

6 That's exactly the thing that you
7 arbitrate for. The reason the parties agree in
8 the first place is to have that kind of
9 confidentiality. That's just one example of
10 many.

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

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

21 But, here, the very question, as Judge
22 Easterbrook says, is, does the district court
23 have power to do anything.

24 JUSTICE KAVANAUGH: And then second,
25 to pick up on something the Chief Justice said

1 and also I think Justice Kagan, the rights on
2 the other side.

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

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

17 MR. KATYAL: Absolutely, Justice
18 Kavanaugh. So, first, you know, it -- it's
19 telling the majority rule already is the one
20 that we're advocating in the circuits. We don't
21 see, I think, harms of delay or any impact, none
22 of the amici on their side talk about it,
23 whereas there's a lot of harm on the other side
24 of not recognizing the rule in those two
25 circuits that go the other way.

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

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

12 Second, you could get that evidence in
13 the arbitration process itself.

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

19 Finally, if you're worried about it at
20 the end of the day, Congress is the solution for
21 that. That's why you have those 11 statutes.
22 So, if they wanted to abrogate the divestiture
23 rule in some way, they certainly have the power
24 to do it.

25 And it would just make it like --

1 right now, qualified immunity, double jeopardy,
2 state sovereign immunity, they all risk the same
3 kind of policy harms of the dying witness,
4 delay, harms of delay and the like, but this
5 Court has --

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

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

19 Here, there's actually much less to
20 worry about because Congress has an easy ability
21 to abrogate. They don't always with respect to
22 state sovereign immunity and things like that.

23 JUSTICE KAVANAUGH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett?

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

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

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

13 JUSTICE BARRETT: Of course. Of
14 course.

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

20 JUSTICE BARRETT: Okay, but what about
21 the delay?

22 MR. KATYAL: Yeah. And then, with
23 respect to that, I do think the courts have
24 mechanisms in every circuit, and they are used,
25 Justice Barrett, as the amici say, in every

1 circuit for frivolous appeals to be weeded out.
2 There's one mechanism by which, basically, the
3 district court tells the circuit court, you
4 know, this appeal is frivolous, give us back
5 jurisdiction, act right away, motion to expedite
6 or -- or sua sponte motion to expedite, and it
7 gets thrown right back to the district court.
8 So I think that's one mechanism of dealing with
9 it.

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

19 And to the extent Justice Kavanaugh --
20 picking up on his concern, I think this Court,
21 should it rule for us, should say something
22 about all of those mechanisms that are available
23 that you've recognized already in Carlisle.

24 JUSTICE BARRETT: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: Yes. Thank you.

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

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

19 So can you help me to understand why
20 this is not that scenario?

21 MR. KATYAL: Absolutely, Justice
22 Jackson. I think, if we were to ask what
23 language we'd expect if Congress wanted to -- to
24 stop an automatic stay, we've got all sorts
25 of examples --

1 JUSTICE JACKSON: No, not stop an
2 automatic -- grant an automatic stay.

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

6 JUSTICE JACKSON: But it can't --

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

8 JUSTICE JACKSON: -- be -- here --
9 here -- why did they put it in 3 then?

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

12 JUSTICE JACKSON: Yeah.

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

18 JUSTICE JACKSON: But, conceptually,
19 conceptually.

20 MR. KATYAL: Conceptually --

21 JUSTICE JACKSON: Let me just ask you
22 conceptually. You say, when a court has granted
23 arbitration and we know that it's actually going
24 to go on and we could have the conflict problem
25 that you talk about, that Congress would have to

1 say that a stay is required. But, as Justice
2 Kagan points out, in a world in which we don't
3 know whether or not arbitration is going to
4 happen, you say somehow the background rule is
5 that a stay is automatic.

6 MR. KATYAL: That's right.

7 JUSTICE JACKSON: That seems exactly
8 backward to me as to what it is that we should
9 think about Congress's intent with respect to
10 stays.

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

20 By contrast, when Congress takes the
21 unusual step, which it almost never does, of
22 saying we're granting you a right to an
23 interlocutory appeal for a --

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

1 MR. KATYAL: Correct.

2 JUSTICE JACKSON: -- Congress doesn't
3 have to say in that scenario that the underlying
4 stay occurs.

5 MR. KATYAL: So --

6 JUSTICE JACKSON: They would have to
7 say it when you definitely get arbitration, but
8 they don't have to say it when we don't know
9 whether or not you get arbitration --

10 MR. KATYAL: So --

11 JUSTICE JACKSON: -- but they're just
12 giving you a right --

13 MR. KATYAL: So --

14 JUSTICE JACKSON: -- to go to the
15 court of appeals?

16 MR. KATYAL: So, basically, that's
17 right -- if I understand the question, I think
18 that's right. That is, if Congress here is
19 saying it's a one-sided appeal right, only if
20 your arbitration is -- arbitrability is denied,
21 and if it's denied, then your right is so
22 valuable that we don't want you to wait to have
23 to go through the district court process.

24 JUSTICE JACKSON: The right to -- to
25 go to the court of appeals to see whether or not

1 you can arbitrate is so valuable that we have to
2 say that there's a stay in that -- I'm sorry --
3 that we don't have to say there's a stay in that
4 scenario. But, once you actually have the right
5 to go to arbitration, Congress would have to say
6 it in the statute.

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

13 Otherwise, these 11 statutes are total
14 surplusage. They're totally irrelevant if you
15 think that when Congress -- Congress has to
16 affirmatively authorize an automatic stay. In
17 none of those 11 did they authorize an automatic
18 stay. They, in fact, said the reverse. And
19 they said the reverse because the only way of
20 making sense of them is to say they were doing
21 something there. What were they doing? They
22 were ending the automatic stay that would
23 otherwise exist under the background principle
24 of law going back to Hovey in 1883.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Mr. Zavareei?

3 ORAL ARGUMENT OF HASSAN A. ZAVAREEI

4 ON BEHALF OF THE RESPONDENT

5 MR. ZAVAREEI: Mr. Chief Justice, and
6 may it please the Court:

7 Congress says what it means and it
8 means what it says. So let's begin, as we must,
9 with the text of Section 16 of the FAA.

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

16 So what if we look beyond Section 16?
17 Again, this Court has held under very similar
18 circumstances in the Nken case that when
19 Congress includes particular language in one
20 section but excludes it from another section of
21 the same Act, that Congress acts intentionally
22 and purposely with respect to the disparate
23 inclusion and exclusion.

24 And, here, in this case, we have two
25 examples of this inclusion/exclusion dichotomy.

1 First, we have Section 3 of the FAA itself,
2 which includes a mandatory stay, and then we
3 have Section 1292(d)(4)(B), which was part of
4 the same Act as Section 16.

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

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

23 Let me just finish by saying there is
24 no such thing as a Griggs divestiture rule.
25 That is made up by my friend on the other side.

1 Griggs is a simple principle that says two
2 courts should not be deciding the same issue at
3 the same time. And it has no bearing in this
4 instance.

5 Thank you. And I welcome your
6 questions.

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

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

19 But it's also important to note that
20 that's as far as they went. I believe, as
21 Justice Kagan said, if they wanted to do more,
22 they could have. And as Justice Gorsuch held in
23 the Henson versus Santander case, that you can't
24 presume that they would have gone further than
25 they actually did.

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

8 JUSTICE THOMAS: And --

9 JUSTICE KAVANAUGH: You said -- I'm
10 sorry.

11 JUSTICE THOMAS: -- how would you --
12 give me an example -- and -- and this will be my
13 final question, but give me an example of
14 irreparable harm in -- in your analysis of a --
15 whether or not there should be a stay.

16 MR. ZAVAREEI: There are a number of
17 instances in cases where there have been found
18 to be irreparable harm in courts below when --
19 when courts have applied the Nken standard.

20 One of those examples is when there's
21 an especially lengthy appeal. Courts have held
22 that creates irreparable harm. When there is no
23 formal discovery allowed for in the arbitration
24 clause, but, under those circumstances, there
25 could be -- there's been found to be irreparable

1 harm. When there's an arbitration clause that
2 forbids class claims, courts have found there to
3 be irreparable harm. So there are a number
4 of -- when you get close to trial, there's
5 irreparable harm.

6 So it's not as though there's --
7 there's no instance of irreparable harm. Courts
8 have repeatedly found inappropriate
9 circumstances applying the Nken standard that
10 there can be irreparable harm.

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

19 You say the Griggs background rule is
20 made up, but it is a principle. It seems to me
21 the question is whether it applies here. I
22 don't think -- it's not a made-up -- it's a real
23 case and we've got to figure out if the
24 principle applies here.

25 And then, second, Mr. Katyal -- I

1 think you need to respond -- says that if you
2 look at the body of the U.S. Code, Congress is
3 explicit when it doesn't want to have a
4 mandatory stay accompanying an interlocutory
5 appeal and it's done so in 11 statutes.

6 So you want to answer those two
7 things?

8 MR. ZAVAREEI: Yes, Your Honor. Let
9 me start with the first one. I -- I'm not
10 saying that Griggs doesn't matter and I'm not
11 saying that Griggs is not an important
12 principle.

13 What I'm saying is is that it is not
14 the background rule in Congress's silence with
15 respect to stays. The background rule started
16 with the All Writs Act. It started with the
17 Judiciary Act of 1891.

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

20 MR. ZAVAREEI: Okay. So, with respect
21 to the 11 statutes, it's just -- it's just
22 wrong. There are a number of statutes that --
23 so what he calls the 11 statutes are the ones
24 that he says displace Griggs.

25 And in the reply brief, my friend says

1 that when it provides a discretionary standard,
2 that it displaces Griggs, and then, under those
3 circumstances, you can have discretion.

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

9 1292(b) says that whether or not
10 there's a stay upon an application for an appeal
11 is discretionary. But it says nothing about
12 what happens when an appeal is granted, an
13 appeal is taken.

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

17 JUSTICE GORSUCH: Well --

18 MR. ZAVAREEI: -- of Griggs. That --

19 JUSTICE GORSUCH: -- but, counsel, did
20 you just -- I mean, I understand we have a
21 question about how far the principle in Griggs
22 goes, but I -- I -- do you dispute that there is
23 a one-court-at-a-time rule that is pretty
24 ancient and goes back to the common law?

25 I mean, how far that rule extends and

1 whether it goes this far is a really good
2 question, but do you dispute that principle that
3 a lower court could essentially undermine
4 appellate jurisdiction over an issue that the
5 court of appeals has before it?

6 MR. ZAVAREEI: No, absolutely not,
7 Your Honor. I think that's a foundational
8 principle. It was enunciated in Griggs, but it
9 wasn't invented in Griggs.

10 JUSTICE GORSUCH: It's -- it's
11 hundreds of years old, right?

12 MR. ZAVAREEI: It's been there
13 forever. And the point is is that you don't
14 want two courts deciding the same issue at the
15 same time.

16 Justice Thomas, in his concurrence in
17 the Price v. Dunn case, articulated that
18 principle very clearly and talked specifically
19 about the exact claim being decided. There, it
20 was a preliminary injunction.

21 JUSTICE GORSUCH: Sure. We can -- we
22 can just -- the whole case really revolves
23 around does this fall in that rule or not.

24 MR. ZAVAREEI: Right.

25 JUSTICE GORSUCH: But we agree that

1 that's a rule?

2 MR. ZAVAREEEI: Absolutely, Your Honor.
3 Absolutely.

4 JUSTICE JACKSON: Can I ask -- oh,
5 were you going?

6 CHIEF JUSTICE ROBERTS: Go ahead.

7 JUSTICE JACKSON: Can I ask about the
8 consequences of your -- your friend on the other
9 side winning this? Justice Kavanaugh asked him,
10 well, what if you lose. I'd like to ask what if
11 he wins.

12 And my concern is a little bit about
13 confusion with respect to our collateral order
14 doctrines and the extent to which people would
15 think that any dispositive motion that is denied
16 and that could be appealed up to the court of
17 appeals would somehow be authorized as a result
18 of this, because he says, for example, this is
19 integral, this is touching upon what's happening
20 with the progress of this litigation because the
21 order is about arbitration and that's another
22 forum, and if we continue to go to trial, we
23 will undermine our right to arbitrate.

24 And I would think there's, like, a lot
25 of pretrial dispositive circumstances that bear

1 those same hallmarks. So, if the court denies a
2 motion for a statute of limitations or the court
3 denies a motion for, you know, a dismissal under
4 personal jurisdiction problems, all of these
5 scenarios, I think, kind of have that same
6 inherent problem.

7 So I'm a little worried about
8 conceiving of a denial of arbitration as being
9 so integral to the merits determination that he
10 wins under that theory. So can -- can you -- am
11 I right about that or not?

12 MR. ZAVAREEI: You are. And let me
13 start with something from Digital Equipment,
14 which -- which said that virtually every right
15 that could be enforced appropriately by pretrial
16 dismissal might loosely be described as
17 conferring a right to not stand trial, right?

18 And so, under that articulation, if
19 you were to go that far, that encompasses a
20 whole lot of things, including the ones that you
21 mentioned, Justice Jackson.

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

24 MR. ZAVAREEI: Exactly.

25 JUSTICE JACKSON: -- then would we be

1 opening up a can of worms with respect to other
2 people making Griggs-type arguments about the
3 right to appeal and, therefore, stay the
4 underlying proceedings?

5 MR. ZAVAREEI: Well, yes, absolutely,
6 particularly because he places so much emphasis
7 on this unfortunately untrue claim that there
8 are no other statutes that are silent with
9 respect to the discretion without mentioning
10 1292(b), which includes most interlocutory
11 appeals and is deadly silent. And that includes
12 forum selection. That includes venue, personal
13 jurisdiction.

14 JUSTICE GORSUCH: Well, you -- you'd
15 agree in 1292(b) cases, again, the district
16 court couldn't do certain things, that its
17 jurisdiction would be divested with respect to
18 some portion of the case that's now pending in
19 the court of appeals.

20 MR. ZAVAREEI: Under Griggs, perhaps.

21 JUSTICE GORSUCH: Again, we dispute
22 how far that goes, but we all agree that that's
23 a thing, right?

24 MR. ZAVAREEI: It is, but what my
25 friend on the other side is saying is that it's

1 an automatic stay of everything.

2 JUSTICE GORSUCH: Well, that's the
3 question, is how far the -- how far the stay
4 reaches, not whether a stay exists, because
5 you'd agree, again, that under 1292(b), that the
6 district court couldn't do something that would
7 undermine or thwart the court of appeals'
8 jurisdiction over the case.

9 MR. ZAVAREEI: Yes, that's what --
10 that's what our position is.

11 JUSTICE GORSUCH: All right.

12 MR. ZAVAREEI: And that's what the
13 statute says.

14 JUSTICE GORSUCH: Okay.

15 JUSTICE JACKSON: But that's happening
16 --

17 JUSTICE GORSUCH: With -- with --

18 JUSTICE JACKSON: -- on a case-by-case
19 basis.

20 JUSTICE GORSUCH: -- with -- with
21 respect to the Nken factors, if I might for a
22 second, I just want to understand what realm of
23 agreement we have.

24 If we were to go down that road, I
25 thought I understood you to say to -- to Justice

1 Thomas that it would be appropriate to enter a
2 stay when the appellate process is particularly
3 long?

4 MR. ZAVAREEEI: It could be, yes.

5 JUSTICE GORSUCH: Yeah. Or -- or the
6 arbitration agreement provides for no -- no
7 formal discovery?

8 MR. ZAVAREEEI: It could be, yes,
9 Your Honor.

10 JUSTICE GORSUCH: And no class claims?

11 MR. ZAVAREEEI: Yes. These were
12 examples from particular cases that I was
13 giving.

14 JUSTICE GORSUCH: And -- and -- and
15 also, when it gets close to trial, then -- then
16 a stay might be appropriate?

17 MR. ZAVAREEEI: Yes, Your Honor.

18 JUSTICE GORSUCH: Okay. Thank you.

19 JUSTICE ALITO: Well, in all of those
20 situations, how would the requirement of
21 irreparable harm be met when the party denied --
22 whose motion to compel arbitration was denied
23 says we're going to -- what we're going to
24 suffer is \$5 million in discovery costs, or if
25 it's going to go to trial, the trial is going to

1 cost \$5 million?

2 Would that be irreparable harm?

3 MR. ZAVAREEI: Let me answer it this
4 way: It depends. It might. Obviously, this
5 Court has held that, generally, writ large, that
6 discovery costs themselves are not irreparable
7 harm.

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

18 JUSTICE ALITO: Well, what would be
19 the irreparable harm if the only harm is very
20 substantial litigation costs?

21 MR. ZAVAREEI: Well, under those
22 circumstances, it would be those -- those
23 substantial --

24 JUSTICE ALITO: But haven't we said
25 that that's not irreparable harm?

1 MR. ZAVAREEEI: As compared to what
2 would happen in arbitration. So those things
3 can't be separated. They have to be taken
4 together.

5 If it's just a lot of money, then that
6 is not irreparable harm. But, if the
7 alternative is that you could be in a situation
8 where you do not have to spend any money, there
9 is no discovery at all, then, under those
10 circumstances, it might be irreparable harm.

11 JUSTICE ALITO: Well, I don't
12 understand that. It's either -- either money --
13 either litigation costs count or they don't
14 count.

15 MR. ZAVAREEEI: Well, I --

16 JUSTICE ALITO: Why does it matter
17 whether you have zero litigation costs in -- in
18 arbitration, which, of course, will never be
19 exactly the case, and you have very heavy
20 arbitration costs if you have to go ahead with
21 the district court proceeding? It's still
22 litigation costs.

23 MR. ZAVAREEEI: It is indeed, Your
24 Honor, but the district courts have looked at
25 this and have determined that under the -- under

1 certain circumstances, depending on the nature
2 of the arbitration, that that can constitute
3 irreparable harm.

4 JUSTICE ALITO: Was that right?

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

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

16 MR. ZAVAREEI: Well, first of all,
17 we're not aware of that happening ever in -- in
18 any case, but, if that were to happen, then --
19 then the circuit court could issue a stay, and
20 this Court could issue a stay. And, in fact,
21 that's exactly what this Court did in the Henry
22 Schein case, where the district court was intent
23 on moving forward with the trial, and -- while
24 an arbitrability issue was -- was -- was pending
25 and kept going back down, and they kept trying

1 to move forward. And, finally, this Court said
2 no.

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

14 JUSTICE KAVANAUGH: Your -- your
15 concern is the delay of the appeal, I think,
16 stated concern, how long it takes. The other
17 side's concern, I believe, is that they think
18 they correctly bargained for arbitration and
19 they have a right that Congress has given them
20 to have the appellate court determine that and
21 that they're not going to be able to afford
22 themselves of that congressionally granted right
23 because, if the district court discovery goes
24 forward in a putative class -- in a class action
25 context, that is going to coerce massive

1 settlements, and they don't want to be coerced
2 into massive settlements without having the
3 opportunity to take advantage of the right that
4 Congress has given them to have an appeals court
5 decide whether arbitration is the appropriate
6 forum.

7 How do you respond to that?

8 MR. ZAVAREEI: Well, first, let me --
9 let me speak to the -- the situation -- the
10 actual situation on the ground with respect to
11 once that happens.

12 First, you've already got a district
13 court that has ruled that the -- there is no
14 valid arbitration clause.

15 JUSTICE KAVANAUGH: Could be wrong and
16 the statistics show that they sometimes are
17 wrong in -- in any event. Just --

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

20 JUSTICE KAVANAUGH: Just assume
21 they're wrong.

22 MR. ZAVAREEI: -- 29 percent of the
23 time.

24 JUSTICE KAVANAUGH: Okay. They're not
25 right every time.

1 MR. ZAVAREEEI: They're not right every
2 time.

3 JUSTICE KAVANAUGH: They -- they have
4 crowded dockets. They have to move quickly.
5 They're not correct every time.

6 MR. ZAVAREEEI: And in 62 percent of
7 the times that they're wrong, Your Honor, the
8 courts have issued stays. So that's -- so
9 that's one piece of it.

10 The second piece of it is I think what
11 Justice Kagan was talking about, is that the
12 other side also has a right. The other side
13 also has a right to move forward with their
14 litigation. And there are risks associated with
15 slowing down the litigation. Look at --

16 JUSTICE KAVANAUGH: I agree with that.
17 Isn't -- isn't the solution to this to make sure
18 that the appeals move fast? And then your
19 stated concern at least is solved so long as
20 they really do move quickly.

21 MR. ZAVAREEEI: And that -- exactly,
22 Your Honor, and that's exactly the remedy that
23 Congress came up with.

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

1 JUSTICE KAVANAUGH: Yeah. But, on my
2 question --

3 JUSTICE KAGAN: -- either way, it
4 doesn't tell us --

5 JUSTICE KAVANAUGH: -- on my --

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

9 MR. ZAVAREEI: But can I -- can I
10 give an --

11 JUSTICE KAVANAUGH: Right, but the
12 problem, just to answer Justice Kagan's
13 question, is that the coerced settlement problem
14 exists still, which they say they have a
15 congressionally afforded right to an appellate
16 determination of whether arbitration is the
17 appropriate forum, and they're not really going
18 to be able to get that if they're coerced into a
19 massive settlement because of the discovery.
20 I'm just telling you what the concern is, and I
21 think that's realistic.

22 MR. ZAVAREEI: Well --

23 JUSTICE KAVANAUGH: So -- just to tell
24 you where I am.

25 MR. ZAVAREEI: -- I -- I understand

1 and I appreciate that. But I will say, Your
2 Honor, is what you're looking at now are policy
3 concerns, right, and policy concerns that could
4 have been addressed by Congress when -- they
5 were concerned about these policy concerns.
6 They wanted to get these appeals heard quickly,
7 and they came up with a way to do it. Their --
8 their way to do it was to enact Section 16 --

9 JUSTICE KAVANAUGH: That goes back to
10 whether there's a background rule.

11 MR. ZAVAREEI: It -- precisely.

12 JUSTICE KAVANAUGH: Yeah.

13 JUSTICE JACKSON: Wasn't there also
14 the --

15 JUSTICE KAVANAUGH: On -- on the -- on
16 the delay question -- let's just go back to that
17 if we can -- isn't there a solution in this case
18 if -- if appeals courts move quickly, a solution
19 to your problem, if appeals courts move quickly?
20 Just yes or no?

21 MR. ZAVAREEI: There -- there could
22 be, yes.

23 JUSTICE KAGAN: Is there also a
24 solution to Mr. Katyal's problem if appeals
25 courts move quickly?

1 MR. ZAVAREEEI: Well, with all due
2 respect --

3 JUSTICE KAVANAUGH: No.

4 MR. ZAVAREEEI: -- I don't think so
5 because I think his problem is that he wants
6 delay, that his clients want to hold these cases
7 up --

8 JUSTICE KAVANAUGH: He doesn't know --
9 he --

10 JUSTICE KAGAN: Right, but if what he
11 wants -- but if what he wants is what --

12 JUSTICE KAVANAUGH: That's not right.

13 JUSTICE KAGAN: -- Justice Kavanaugh
14 suggests, which is not to be subject to a lot
15 of, you know -- you know, settlement pressure,
16 then, if the appeals court moves quickly, he's
17 not going to be subject to a lot of settlement
18 pressure.

19 MR. ZAVAREEEI: Let -- let me give an
20 example if I could. Bradford-Scott --

21 JUSTICE KAVANAUGH: Well, then should
22 we have an automatic stay on the discretionary
23 factors, to answer Justice Kagan's question, if
24 discovery is about to be ordered?

25 MR. ZAVAREEEI: Where would that come

1 from? That would be made up --

2 JUSTICE KAVANAUGH: You --

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

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

6 MR. ZAVAREEI: Well, they're not --
7 they're not -- it's not automatic.

8 JUSTICE KAVANAUGH: Are they correct?
9 I thought you said they're --

10 MR. ZAVAREEI: They're applying --

11 JUSTICE KAVANAUGH: I thought you said
12 they were correct to Justice Alito. Is that
13 wrong?

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

16 JUSTICE JACKSON: I mean, isn't the
17 whole -- isn't the whole dispute between the two
18 of you whether or not these are mandatory,
19 meaning taken out of the district court's
20 discretion, versus having the district court
21 look in every case and make a decision? I
22 thought that's really what was at the heart of
23 this. Is that the daylight between the two of
24 you on this issue?

25 MR. ZAVAREEI: That's absolutely the

1 question. And I -- and I still struggle to
2 understand how my friend on the other side
3 continues to say that there is a divestiture
4 rule or a Griggs rule of divestiture.

5 JUSTICE JACKSON: Right. So --

6 MR. ZAVAREEI: There is no such thing.

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

21 MR. ZAVAREEI: Absolutely. And -- and
22 I'd like to go back to your question -- it
23 answers both of your questions, Your Honors,
24 which -- the -- the Bradford-Scott case, which
25 is the -- Judge Easterbrook's case that -- that

1 established the majority rule, right? In that
2 case, he said, well, Griggs requires a mandatory
3 stay. Four months later, a separate panel
4 looked at that arbitrability clause and said
5 there's no valid arbitration clause here, four
6 months later, and it was sent back down and the
7 parties were able to litigate again. There is
8 no need under circumstances like that for a
9 mandatory stay.

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

18 JUSTICE ALITO: I wanted to --

19 MR. ZAVAREEEI: They've --

20 JUSTICE ALITO: I'm sorry. Finish
21 your sentence.

22 MR. ZAVAREEEI: Just one last point.
23 The only discovery so far is they've produced
24 eight documents. That's not causing irreparable
25 harm.

1 JUSTICE ALITO: I wanted to give you a
2 chance to respond to an argument made in the
3 reply brief, and that is the reference to the
4 criminal interlocutory appeal statute, 18 U.S.C.
5 3731, which doesn't make any mention of stays,
6 and yet it's widely understood that that does
7 result in a stay of district court proceedings
8 while the case is on appeal, while the issue is
9 on appeal.

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

21 That, I submit to you, is what Griggs
22 is about. It's making sure that when the court
23 of appeals is deciding an important issue that
24 has something to do with the case below, that --
25 that that is not in real time moving below, that

1 the court of appeals is not shooting at a moving
2 target, that -- that that is frozen in time so
3 that the court of appeals can make that decision
4 based on a fixed record and not have it change
5 -- not have the ground move underneath its feet.

6 And so I don't think that the
7 Centriacci case is -- holds anything otherwise.
8 I think that court actually was very consistent
9 with our argument here.

10 And -- and, again, to be clear, this
11 is another one of those cases -- this is another
12 one of those statutes that is silent, and under
13 my friend's interpretation, that means that
14 there should be an automatic stay because it's
15 silent. But that is not what Justice Posner --
16 what Judge Posner said.

17 Judge Posner said, no, that -- that
18 their interpretation is overbroad. Now he
19 didn't let them impanel a jury. He said we need
20 to slow down, slow your horses on that one, but
21 he said you could go forward with some other --
22 with discovery, with other criminal proceedings.

23 JUSTICE SOTOMAYOR: Counsel, give me
24 your best answer to Judge Easterbrook's
25 position, which was articulated by Justice

1 Barrett earlier, which is, in essence, this is
2 like sovereign immunity, qualified immunity,
3 because it's a question of being tried at all --
4 not tried, but litigated at all.

5 What's your best response to that?

6 MR. ZAVAREEI: Well, let me answer the
7 question directly by saying that it is --
8 immunity is -- is the right not to be haled into
9 any court, any -- any forum, anywhere, any time.

10 JUSTICE SOTOMAYOR: Right. It's not
11 an issue of being hauled into court. It's an
12 issue of being litigated and being found liable.

13 MR. ZAVAREEI: Litigated anywhere,
14 whether it's in court, whether it's an arbitral
15 tribunal.

16 JUSTICE SOTOMAYOR: It's a finding of
17 liability.

18 MR. ZAVAREEI: Anywhere.

19 JUSTICE SOTOMAYOR: You're free from
20 liability, I agree.

21 MR. ZAVAREEI: Well, not only are you
22 free from liability, you're free from the
23 indignity of having to take the stand, you're
24 free from the indignity of having someone taking
25 discovery against you.

1 JUSTICE SOTOMAYOR: Well, you're
2 pushing too far, counsel, because that's what
3 they say they bargained for, not to take the
4 stand, not to be public.

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

6 JUSTICE SOTOMAYOR: I -- I -- I -- I
7 think arbitration is not necessarily public. It
8 generally isn't.

9 MR. ZAVAREEI: I've arbitrated many
10 cases. There is no presumption of
11 confidentiality under AAA or JAMS rules. All of
12 my arbitrations are public.

13 JUSTICE SOTOMAYOR: I -- I do agree
14 with you, counsel, that -- that there's no
15 confidentiality requirement outside of the terms
16 of the agreement.

17 MR. ZAVAREEI: And -- and -- and I
18 will also say that Laura Lines is probably the
19 best case with respect to that, which -- which
20 holds that entitlement to avoid suit is
21 different from an entitlement to be sued in a
22 particular forum.

23 JUSTICE GORSUCH: Well, what do we do
24 about sovereign immunity then, which is about
25 which forum cases will proceed very frequently?

1 It may mean that you can't be haled into a
2 different sovereign's court, you have the right
3 to be haled only into your court and only to the
4 extent you have consented to it.

5 MR. ZAVAREEI: Yes. Again, I think
6 that if you're talking about state sovereign
7 immunity, for example?

8 JUSTICE GORSUCH: For example, sure.

9 MR. ZAVAREEI: Yeah. I -- I think
10 that is -- that's the -- the best example that I
11 think that my friend from the other side came up
12 with. I think all the other immunities are
13 easily answered, which is --

14 JUSTICE GORSUCH: Well, qualified
15 immunity is qualified immunity from suit under
16 federal law. You may still be liable for state
17 tort actions.

18 MR. ZAVAREEI: You could be, right.
19 But the point is that an immunity has been
20 established that has to be respected by the
21 courts.

22 JUSTICE GORSUCH: Sure.

23 MR. ZAVAREEI: But arbitration is not
24 an immunity. Arbitration is not saying --

25 JUSTICE GORSUCH: It is what it is,

1 but it -- it's a -- it's a choice of forum, and
2 qualified immunity is a federal doctrine for
3 federal lawsuits, and it doesn't control in
4 state court for state lawsuits.

5 MR. ZAVAREEEI: But, as soon as you --

6 JUSTICE GORSUCH: And very frequently
7 police officers are haled into court for torts.

8 MR. ZAVAREEEI: But, as soon as you're
9 haled into federal court or as soon as a state
10 is brought into federal court --

11 JUSTICE GORSUCH: Sure.

12 MR. ZAVAREEEI: -- their right under
13 the Eleventh Amendment or under qualified
14 immunity, that right is destroyed.

15 JUSTICE GORSUCH: Sure.

16 MR. ZAVAREEEI: As opposed to
17 arbitration.

18 JUSTICE GORSUCH: Right. They say,
19 you're right, we -- we -- we just didn't bargain
20 for this court, we didn't bargain for this
21 forum, and what is the difference?

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

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

1 MR. ZAVAREEEI: Well, but my -- my
2 point is that with respect to sovereign
3 immunity, all the immunity questions, right,
4 there's never been any holding other than these
5 lower court holdings that there should be an
6 automatic stay. There's some holdings relating
7 to the collateral order doctrine.

8 JUSTICE GORSUCH: So you'd have us
9 overrule those decisions along the way
10 implicitly too?

11 MR. ZAVAREEEI: Yes.

12 JUSTICE GORSUCH: Okay.

13 MR. ZAVAREEEI: Yes.

14 CHIEF JUSTICE ROBERTS: Justice
15 Thomas?

16 JUSTICE THOMAS: I'm just curious.
17 You said you've arbitrated quite a few of these.
18 How does this play out in -- of course, I've
19 been on the other side of those cases, like
20 Terminix, but how does it play out in state
21 court?

22 MR. ZAVAREEEI: In terms of the type of
23 discovery allowed for?

24 JUSTICE THOMAS: Yes.

25 MR. ZAVAREEEI: Usually a lot more

1 discovery in state court than you have in
2 federal court.

3 JUSTICE THOMAS: In this particular
4 issue that we're confronting here.

5 MR. ZAVAREEI: Oh, I'm sorry. With --
6 I -- I -- I don't know the answer to that
7 question, Your Honor.

8 CHIEF JUSTICE ROBERTS: Justice Alito?
9 Justice Sotomayor?

10 JUSTICE SOTOMAYOR: There is a
11 possibility if we say that a stay is mandatory
12 that we could have a situation, isn't there,
13 where state courts could say no?

14 MR. ZAVAREEI: Yes, absolutely.

15 JUSTICE SOTOMAYOR: In a state
16 proceeding?

17 MR. ZAVAREEI: Yes, the states are
18 free to do as they wish.

19 JUSTICE SOTOMAYOR: Because this
20 section is only -- only involves federal courts.

21 MR. ZAVAREEI: Absolutely.

22 JUSTICE SOTOMAYOR: So we would be
23 creating an incentive for petitioners to file
24 their suits in state court if they can.

25 MR. ZAVAREEI: Yes, Your Honor. And

1 CAFA is another one of those statutes that is
2 silent with respect to whether a stay is
3 mandatory or not.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?

5 JUSTICE KAGAN: I might not have
6 understood the colloquy between you and Justice
7 Gorsuch, but I wanted to make sure that it was
8 clarified at least for me.

9 I think what Justice Gorsuch was
10 saying is that there are opinions that do give
11 automatic stays with respect to established
12 immunity doctrines.

13 MR. ZAVAREEEI: Lower court. They're
14 lower court decisions.

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

18 MR. ZAVAREEEI: Oh.

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

22 MR. ZAVAREEEI: No. I --

23 (Laughter.)

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

25 JUSTICE GORSUCH: Maybe I should have

1 addressed my question to Justice Kagan.

2 MR. ZAVAREEEI: I know. Thank you.

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

5 MR. ZAVAREEEI: I did, I did. I
6 appreciate -- well, what I would say is they
7 were wrong to the extent that they applied
8 Griggs to come up with their analysis, right? I
9 mean, Griggs doesn't provide the basis for
10 saying that a sovereign immunity case should be
11 stayed pending the appeal.

12 JUSTICE KAGAN: But you're not
13 contesting that there are distinctions that can
14 be made between those immunity doctrines and
15 this?

16 MR. ZAVAREEEI: Those -- those -- those
17 immunity cases should be stayed but not under
18 Griggs.

19 JUSTICE KAGAN: Okay. I thought that
20 that's what you meant.

21 MR. ZAVAREEEI: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 Oh, I'm sorry. Justice Gorsuch?

25 Justice Kavanaugh?

1 Now Justice Barrett?

2 JUSTICE BARRETT: No.

3 CHIEF JUSTICE ROBERTS: Justice
4 Jackson?

5 JUSTICE JACKSON: Finally, if we say
6 that a stay is mandatory, I guess I'm still
7 fixating on Justice Kavanaugh's questions about
8 settlement pressure and the equities, and I'm
9 wondering whether the settlement dynamic doesn't
10 shift dramatically in a defendant's favor if we
11 say that because, to the extent that the
12 defendant doesn't want trial, they don't want
13 arbitration either really, they're the
14 defendant, so wouldn't we have a dynamic in
15 which the exact opposite of the appellate court
16 going fast would happen if they get an automatic
17 stay? They get it and then they -- it takes,
18 like, months for the -- the appellate court to
19 rule, and that's just fine with the defendant.

20 MR. ZAVAREEI: That's very real
21 pressure. Look -- look at this case, where
22 Coinbase, the entire cryptocurrency market is
23 collapsing under our feet, and other
24 interchanges, competitors with Coinbase are
25 going bankrupt left and right, and we've got a

1 client who lost \$30,000 and we're getting calls
2 from other clients who have lost hundreds of
3 thousands of dollars, in the meantime, you know,
4 wondering whether Coinbase is going to be around
5 by the time these appellate court decisions
6 are -- are decided. So, absolutely, there's an
7 interest on the other side that could push
8 people to try and settle early to -- to try and
9 escape harms like bankruptcy.

10 Changes in arbitration agreements.
11 Sometimes the parties -- the defendants will
12 actually -- this case again -- issue a new
13 arbitration clause during the pendency of this
14 very appeal. So there are pressures on the
15 other side that can force plaintiffs with valid
16 claims to undervalue their cases and settle
17 them.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Rebuttal, Mr. Katyal?

21 REBUTTAL ARGUMENT OF NEAL K. KATYAL
22 ON BEHALF OF THE PETITIONER

23 MR. KATYAL: Thank you.

24 As Justice Kavanaugh said, the
25 question is how to read congressional silence,

1 and you look to background principles. Here,
2 the question of Congress's silence we think is
3 far more appropriately directed at my friend on
4 the -- on the other side.

5 Eleven times Congress affirmatively
6 said no automatic stay during interlocutory
7 appeals they authorized, including the very day
8 before 16(a).

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

18 Here, it's even stronger because this
19 isn't just a judge-made principle, it's one that
20 follows from Congress's authorization, just like
21 those 11 statutes. It's just they didn't trim
22 back the rule.

23 Second, Griggs is not just about the
24 same issue being decided. The language of
25 Griggs, which I read to you before, is that the

1 aspect has to be involved in the appeal. That's
2 how Wright and Miller see it. That's how the
3 immunity cases see it. That's double jeopardy
4 cases and the like.

5 And there's a massive harm in the
6 interim. Take class discovery, for example.
7 The reason you have an arbitration agreement in
8 part is to avoid this extensive class discovery
9 which would otherwise happen in the interim.

10 The amici briefs detail this in a lot
11 of detail. My friend says, oh, there's not much
12 discovery in these cases. Take this very case.
13 He just filed an eight-page letter on us with,
14 you know, massive amounts of discovery requests
15 in that. And that happens all the time in these
16 cases, and you can't remedy that after the fact.
17 My friend even admitted litigation costs can't
18 be recouped.

19 And so, like, take the thousand hours
20 we've spent in the interim in this case. If you
21 don't get an automatic stay, attorneys will have
22 to spend that kind of money, clients will have
23 to spend that kind of money. There is no way to
24 put that toothpaste back in the tube. That's
25 also true of the discovery problems and the

1 spilling out into the public domain and Judge
2 Friendly's concern about coercive settlements.

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

15 Fourth, he talks about 1292(b), which
16 he admits isn't in his brief. I think it's not
17 in his brief for a good reason, because 1292(b)
18 has an anti-stay provision in it precisely which
19 isn't here. It doesn't cover every case, but it
20 covers a lot of cases.

21 And then, with respect to the cases it
22 doesn't cover, the courts hold that Griggs does
23 apply in those cases in which there's a
24 discretionary certified appeal. Dayton is a
25 case from the Fifth Circuit in 1995. Green Leaf

1 is a case in the Eleventh Circuit. L.A. versus
2 Santa Monica in the Ninth Circuit. Many cases
3 say that.

4 And, of course, it's a very different
5 posture in 1292(b) because that is a
6 discretionary right for an interlocutory appeal.
7 And it would follow, if you have a discretionary
8 right, you can imagine having a discretionary
9 stay.

10 This is not a discretionary stay.
11 This is an unusual circumstance. Congress has
12 said you have an automatic nondiscretionary
13 right. What were they doing if -- to give you
14 that right, if not to protect also litigation in
15 the interim. That -- whenever Congress is
16 worried about the kind of policy consequences of
17 delay and, you know, a company going bankrupt,
18 as my friend speculates -- obviously, that's not
19 Coinbase, but it may happen in the future with
20 other cases and other clients -- Congress knows
21 exactly what to do. They write, as they've done
22 11 times, no automatic stay. That is precisely
23 what is missing here.

24 And, finally, that brings me to my
25 friend's point about the trials. I can't

1 understand, frankly, his position on trials. I
2 think he said that a trial could take place.
3 There's no automatic stay. It's up to the trial
4 court's discretion.

5 That can't possibly be the law. That
6 can't possibly be the understanding of Griggs.
7 Rather, we think, in every context, whether it's
8 state sovereign immunity, qualified immunity, or
9 double jeopardy, the rule is always the same,
10 which is the divestiture rule applies, and the
11 only question is the scope of that rule.

12 And if a party is saying, for example,
13 that they want discovery or they want, you know,
14 the court to decide a motion, that is something
15 that undoes the appeal right. It moots it out
16 because there isn't a way to recover that
17 discovery after the fact. There isn't a way to
18 recoup those litigation costs after the fact.
19 There's no mechanism for that, and that is the
20 very right Congress protected in the FAA.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel. The case is submitted.

23 (Whereupon, at 12:58 p.m., the case
24 was submitted.)

25

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