

# SUPREME COURT OF THE UNITED STATES

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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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Pages: 1 through 91  
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IN THE SUPREME COURT OF THE UNITED STATES

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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 the anti-stay laws. Congress enacted such  
16 a provision one day before 16(a) was enacted,  
17 but 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 is 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  
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 I will get to the  
11 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 1292(d)(4), said for motions to  
23 transfer -- passed the very same day -- for  
24 motions to transfer to the U.S. Court of Federal  
25 Claims, you have to have a mandatory stay.

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

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

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

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

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

25           JUSTICE SOTOMAYOR: You still haven't

1 explained 1292(d)(4).

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

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

9 MR. KATYAL: Well, let --

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

12 MR. KATYAL: Well, let --

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

17 MR. KATYAL: The --

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

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

25 But I'm just saying, first, it's hard

1 to understand anything which Congress is doing  
2 in those 11 statutes besides being mere  
3 surplusage. They had to believe that there was  
4 a background automatic stay rule --

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

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

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

15 MR. KATYAL: Absolutely, Justice  
16 Kagan.

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

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

20 JUSTICE KAGAN: And -- and -- and --

21 MR. KATYAL: -- in the statute.

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

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

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

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

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

23 And this brings me to my promise to  
24 Justice Sotomayor, the two statutes that you  
25 mentioned, they're the two ones that my friend

1 relies on, neither work.

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

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

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

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



1 Claims."

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

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

18           There was no --

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

22           Why is it unreasonable to think that  
23 Congress thought that was enough? I mean, they  
24 didn't say anything about a stay, yet they  
25 focused on whether or not -- the problem before

1 you, whether or not continued litigation would  
2 interfere with your claims of the right to  
3 arbitrate.

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

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

16           And so -- you know, and that's why you  
17 have these 11 statutes which my friend can't  
18 explain what they're about. There is no time in  
19 which Congress does what you're saying, which  
20 they grant an interlocutory appeal and then say,  
21 oh, we're also going to give you this automatic  
22 stay right. That statute doesn't exist. My  
23 friend tries to claim at Section 3 and  
24 1292(d)(4), those arguments, I think, fall apart  
25 under inspection.

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

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

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

21                 JUSTICE KAGAN: I think what I was  
22                 suggesting is that we usually try to keep our  
23                 judge-made rules narrow to -- to deal with only  
24                 situations which really cry out for them.

25                 The situation that cried out for it

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

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

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

20 MR. KATYAL: So I think, if the  
21 question here is what Congress intended in  
22 16(a), then I think the best way of  
23 understanding it, apart from all these policy  
24 concerns you're raising or anything else, is  
25 Congress acted against the backdrop --

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

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

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

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

15 If you were sitting in Congress in  
16 1988 and you've taken the step to authorize  
17 immediate interlocutory one-sided appeals from  
18 arbitration, you've said this right is so  
19 important, we don't want you to wait to go  
20 through the trial in district court proceedings,  
21 you get to vindicate that now.

22 Letting the district court proceed  
23 perhaps for years, as the amici say, this  
24 happens -- it's a real problem that has --

25 JUSTICE JACKSON: But can we focus in

1 on what -- what it is that you're vindicating at  
2 that moment? And here -- here's my conceptual  
3 problem with your argument.

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

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

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

19 Now, presumably, if a party doesn't  
20 ask, the district court can keep going. But  
21 you're now suggesting that in a situation in  
22 which the district court says no, you don't go  
23 to arbitration, somehow Congress intended for  
24 that circumstance, the appeal of arbitrability,  
25 to also give rise to an automatic stay, and I

1 guess I don't understand that.

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

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

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

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

23 MR. KATYAL: Justice -- Justice  
24 Jackson --

25 JUSTICE JACKSON: -- and says you can

1 go interlocutory but no stay.

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

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

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



1 should stop.

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

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

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

21 JUSTICE ALITO: Mr. --

22 JUSTICE BARRETT: Mr. Katyal --

23 JUSTICE ALITO: -- Katyal, if there  
24 isn't an automatic stay, will the party whose  
25 motion to compel arbitration ever be able to

1 obtain -- to satisfy the ordinary stay factors  
2 that are -- that govern whether a discretionary  
3 stay can be issued, namely, the irreparable harm  
4 requirement?

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

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

23 But they summarily denied a stay, and  
24 that's why we're here. And that happens time  
25 and time again. And if you were to ask yourself

1 what was Congress thinking in 1988 when they  
2 authorized these immediate appeals, they said we  
3 don't trust district courts in this unique area,  
4 that they get it wrong.

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

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

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

19 It sounds to me like you're saying  
20 that even if Griggs applies, the issue that's  
21 being litigated here in a different way, not  
22 quite as crisply as qualified immunity or double  
23 jeopardy, but it is the issue, the  
24 arbitrability. And I think you responded to  
25 Justice Sotomayor earlier, you know, it's a

1 little different than the Timbuctoo because of  
2 the different procedures. I think you have to  
3 win that argument if you win.

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

6 MR. KATYAL: I think you're correct in  
7 largely describing our position.

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

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

21 So, here, our point to you is that any  
22 action taken by the district court to resolve  
23 the merits, whether it's deciding a motion or  
24 even ordering discovery, which takes place  
25 against the backdrop of the court's powers to

1     compel, that is precisely the issue on appeal.  
2     That's why Judge Easterbrook started this all  
3     back in 1997. And that is why I think the  
4     overwhelming majority of circuits, as well as  
5     the treatises, all agree that's the way of  
6     thinking about this.

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

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

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

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

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

25           In other words, there are a lot of

1 different ways to manage the problem you  
2 confront rather than a claimed entitlement to  
3 something that isn't granted by the statute,  
4 which does grant you another significant  
5 entitlement.

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

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

22 CHIEF JUSTICE ROBERTS: Thank you.

23 Justice Thomas?

24 Justice Alito?

25 Justice Sotomayor?

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

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

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

23                   And I don't know if this case provides  
24 that opportunity or not, but if you were to  
25 lose, it seems to me this is the perfect example



1 of two cases with different pull with respect to  
2 a stay. The Suski case has a very strong  
3 argument on the merits -- in fact, the  
4 defendants, the Respondents, lost one before --  
5 below -- that this arbitration agreement doesn't  
6 cover this dispute at all.

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

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

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

24           JUSTICE SOTOMAYOR: They are sometimes  
25 and they are not other times. That's my point.

1 But why should you win?

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

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

11 MR. KATYAL: Well --

12 JUSTICE SOTOMAYOR: -- a stay should  
13 have been granted.

14 MR. KATYAL: Well, I think that you  
15 probably --

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

20 MR. KATYAL: Right. I think it's  
21 tough to tweak them because this Court has said  
22 in Morgan versus Sundance you don't want to have  
23 a special rule for arbitrability alone, so  
24 that's why we're saying apply the standard  
25 Griggs rule here which you apply in other

1 contexts, like the immunity cases and double  
2 jeopardy, which would confer an automatic stay.

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

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

23           So we think the better thing to do is  
24 to recognize that if -- if you want to have a  
25 elimination of the automatic stay, do what

1 Congress has done 11 times, and this Court  
2 shouldn't impose it on itself.

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

9 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

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

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

22           So take qualified immunity, take  
23 double jeopardy, take state sovereign immunity,  
24 these are all examples in which the appeals  
25 could be described by exactly what you're

1 saying, which is, well, you might win your  
2 appeal, you might not on immunity, on the  
3 merits, but there's an automatic stay in all of  
4 those.

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

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

21 JUSTICE KAGAN: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Gorsuch?

24 Justice Kavanaugh?

25 JUSTICE KAVANAUGH: Yeah. You make a

1 strong point about the 11 statutes and -- and  
2 then -- so I think that's a strong point in your  
3 favor.

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

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

10 JUSTICE KAVANAUGH: -- and why.

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

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

19 MR. KATYAL: So all sorts of rights in  
20 the interim could be destroyed.

21 So take, for example, just the  
22 simplest thing, discovery. So, if they try and  
23 force discovery in the district court, and then  
24 they get access to discovery, which may have  
25 embarrassing details, it could spill out into

1 the newspapers, we see examples of that all the  
2 time, you know, in any given discovery  
3 litigation.

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

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

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

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

22 JUSTICE KAVANAUGH: And then second,  
23 to pick up on something the Chief Justice said  
24 and also I think Justice Kagan, the rights on  
25 the other side.



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

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

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

24           What you could say about mechanisms to  
25    do stuff, obviously, expediting the court of

1 appeals, but there's also the ability, let's say  
2 that you have a witness that might pass away or  
3 something and you'd be harmed by the automatic  
4 stay, I think there's three things that could be  
5 done there.

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

10 Second, you could get that evidence in  
11 the arbitration process itself.

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

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

23 And it would just make it like --  
24 right now, qualified immunity, double jeopardy,  
25 state sovereign immunity, they all risk the same

1 kind of policy harms of the dying witness,  
2 delay, harms of delay and the like, but this  
3 Court has --

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

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

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

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Barrett?

24 JUSTICE BARRETT: What about the  
25 concern, though, that this can be used as a

1 delay tactic even when it's frivolous?

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

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

11           JUSTICE BARRETT: Of course. Of  
12 course.

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

18           JUSTICE BARRETT: Okay, but what about  
19 the delay?

20           MR. KATYAL: Yeah. And then with  
21 respect to that, I do think the courts have  
22 mechanisms in every circuit, and they are used,  
23 Justice Barrett, as the amici say, in every  
24 circuit for frivolous appeals to be weeded out.  
25 There's one mechanism by which, basically, the

1 district court tells the circuit court, you  
2 know, this appeal is frivolous, give us back  
3 jurisdiction, act right away, motion to expedite  
4 or -- or sua sponte motion to expedite. And it  
5 gets thrown right back to the district court.  
6 So I think that's one mechanism dealing with it.

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

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

20           JUSTICE BARRETT: Thank you.

21           CHIEF JUSTICE ROBERTS: Justice  
22 Jackson?

23           JUSTICE JACKSON: Yes. Thank you.

24           So in response to Justice Kagan, you  
25 suggested that the statute was silent, and I

1 guess I'm not sure about that. I -- I see here  
2 a statute in -- at least in a couple places in  
3 which it appears as though Congress was actually  
4 thinking about the interaction of appeals and  
5 stays in this context. 16(b) tells us that you  
6 have no appeals from orders granting stays.

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

15 So can you help me to understand why  
16 this is not that scenario?

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

22 JUSTICE JACKSON: No, not stop an  
23 automatic -- grant an automatic stay.

24 MR. KATYAL: Well, so with respect to  
25 grant, we think that is the underlying

1 background rule. That's why --

2 JUSTICE JACKSON: But, it can't --

3 MR. KATYAL: All those --

4 JUSTICE JACKSON: -- be -- here --  
5 here -- why did they put it in 3, then?

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

8 JUSTICE JACKSON: Yeah.

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

14 JUSTICE JACKSON: But, conceptually,  
15 conceptually.

16 MR. KATYAL: Conceptually --

17 JUSTICE JACKSON: Let me just ask you  
18 conceptually. You say, when a court has granted  
19 arbitration, and we know that it's actually  
20 going to go on and we could have the conflict  
21 problem that you talk about, that Congress would  
22 have to say that a stay is required. But, as  
23 Justice Kagan points out, in a world in which we  
24 don't know whether or not arbitration is going  
25 to happen, you say somehow the background rule

1 is that a stay is automatic.

2 MR. KATYAL: That's right.

3 JUSTICE JACKSON: That seems exactly  
4 backward to me as to what it is that we should  
5 think about Congress's intent with respect to  
6 stays.

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

15 By contrast, when Congress takes the  
16 unusual step, which it almost never does, of  
17 saying we're granting you a right to an  
18 interlocutory appeal --

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

21 MR. KATYAL: Right.

22 JUSTICE JACKSON: -- Congress doesn't  
23 have to say in that scenario that -- that the  
24 underlying stay occurs.

25 MR. KATYAL: So --



1 JUSTICE JACKSON: They would have to  
2 say it when you definitely get arbitration but  
3 they don't have to say it when we don't know  
4 whether or not you get arbitration --

5 MR. KATYAL: So --

6 JUSTICE JACKSON: -- but they're just  
7 giving you a right --

8 MR. KATYAL: So --

9 JUSTICE JACKSON: -- to go to the  
10 court of appeals?

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

19 JUSTICE JACKSON: The right to -- to  
20 go to the court of appeals to see whether or not  
21 you can arbitrate is so valuable that we have to  
22 say that there's a stay in that -- I'm sorry --  
23 that we don't have to say there's a stay in that  
24 scenario. But once you actually have the right  
25 to go to arbitration, Congress would have to say

1 it in the statute.

2 MR. KATYAL: They'd have to say it  
3 with respect to staying district court  
4 proceedings vis-à-vis an arbitral court, because  
5 there is no background rule there. But there is  
6 a background rule here, and Congress is acting  
7 against that backdrop rule.

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

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 Mr. Zavareei?

23 ORAL ARGUMENT OF HASSAN A. ZAVAREEI

24 ON BEHALF OF THE RESPONDENT

25 MR. ZAVAREEI: Mr. Chief Justice, and

1 may it please the Court:

2 Congress says what it means and it  
3 means what it says. So let's begin, as we must,  
4 with the text of Section 16 of the FAA.

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

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

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

25 Under basic rules of statutory

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

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

18 Let me just finish by saying there is  
19 no such thing as a Griggs divestiture rule.  
20 That is made up by my friend on the other side.  
21 Griggs is a simple principle that says two  
22 courts should not be deciding the same issue at  
23 the same time. And it has no bearing in this  
24 instance.

25 Thank you. And I welcome your

1 questions.

2 JUSTICE THOMAS: If -- if your whole  
3 argument -- if your argument is that these are  
4 just equitable powers that the court is  
5 exercising, pre-existing equitable powers, what  
6 exactly is accomplished by Section 16?

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

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

21 And this Court also held the same in  
22 the First Options case, when another party tried  
23 to take Section 16 and say: Well, look, they  
24 gave this power through Section 16. Let's add  
25 some more super powers to Section 16. Let's

1 increase the standard of review to make it even  
2 harder to defeat arbitration clauses.

3 JUSTICE THOMAS: And --

4 JUSTICE KAVANAUGH: You said -- I'm  
5 sorry.

6 JUSTICE THOMAS: How would you -- give  
7 me an example, and -- and this will be my final  
8 question, but give me an example of irreparable  
9 harm in -- in your analysis of a -- whether or  
10 not there should be a stay.

11 MR. ZAVAREEI: There are a number of  
12 instances in cases where there have been found  
13 to be irreparable harm in courts below when  
14 courts apply the Nken standard.

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

22 When there's an arbitration clause  
23 that forbids class claims, courts have found  
24 there to be irreparable harm. So there are a  
25 number of -- when you get close to trial,

1 there's irreparable harm.

2           So it's not as though there's --  
3 there's no instance of irreparable harm. Courts  
4 have repeatedly found inappropriate  
5 circumstances applying the Nken standard that  
6 there can be irreparable harm.

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

15           You said the Griggs background rule is  
16 made up, but it is a principle. It seems to me  
17 the question is whether it applies here. I  
18 don't think -- it's not a made-up -- it's a real  
19 case and we got to figure out if the principle  
20 applies here.

21           And then, second, Mr. Katyal, I think  
22 you need to respond, says that, if you look at  
23 the body of the U.S. Code, Congress is explicit  
24 when it doesn't want to have a mandatory stay  
25 accompanying an interlocutory appeal and it's

1 done so in 11 statutes.

2 So you want to answer those two  
3 things?

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

9 What I'm saying is that it is not the  
10 background rule in Congress's silence with  
11 respect to stays. The background rule started  
12 with the All Writs Act. It started with the  
13 Judiciary Act of 1891.

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

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

21 And in the reply brief, my friend says  
22 that when it provides a discretionary standard,  
23 that it displaces Griggs, and then, under those  
24 circumstances, you can have discretion.

25 The problem is that there are a lot of



1 statutes that are also silent, okay, and these  
2 silent statutes also have to be looked at. And  
3 one that's not in any of the briefs and is I  
4 think the most important is Section 1292(b).

5 1292(b) says that whether or not  
6 there's a stay upon an application for an appeal  
7 is discretionary. But it says nothing about  
8 what happens when an appeal is granted, an  
9 appeal is taken.

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

13 JUSTICE GORSUCH: Well --

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

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

21 I mean, how far that rule extends and  
22 whether it goes this far is a really good  
23 question, but do you dispute that principle that  
24 a lower court could essentially undermine  
25 appellate jurisdiction over an issue that the

1 court of appeals has before it?

2 MR. ZAVAREEI: No, absolutely not,  
3 Your Honor. I think that's a foundational  
4 principle. It was enunciated in Griggs, but it  
5 wasn't invented in Griggs.

6 JUSTICE GORSUCH: It's -- it's  
7 hundreds of years old, right?

8 MR. ZAVAREEI: It's been there  
9 forever. And the point is is that you don't  
10 want two courts deciding the same issue at the  
11 same time.

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

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

20 MR. ZAVAREEI: Right.

21 JUSTICE GORSUCH: But we agree that  
22 that's a rule?

23 MR. ZAVAREEI: Absolutely, Your Honor.  
24 Absolutely.

25 JUSTICE JACKSON: Can I ask -- oh,

1 were you going?

2 CHIEF JUSTICE ROBERTS: Go ahead.

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

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

20 And I would think there's like a lot  
21 of pretrial dispositive circumstances that bear  
22 those same hallmarks. So, if the court denies a  
23 motion for a statute of limitations or the court  
24 denies a motion for, you know, a dismissal under  
25 personal jurisdiction problems, all of these

1 scenarios, I think, kind of have that same  
2 inherent problem.

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

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

14 And so, under that articulation, if  
15 you were to go that far, that encompasses a  
16 whole lot of things, including the ones that you  
17 mentioned, Justice Jackson.

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

20 MR. ZAVAREEI: Exactly.

21 JUSTICE JACKSON: -- then would we be  
22 opening up a can of worms with respect to other  
23 people making Griggs-type arguments about the  
24 right to appeal and, therefore, stay the  
25 underlying proceedings?

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

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

16           MR. ZAVAREEI: Under Griggs, perhaps.

17           JUSTICE GORSUCH: Again, we dispute  
18 how far that goes, but we all agree that that's  
19 a thing, right?

20           MR. ZAVAREEI: It is, but what my  
21 friend on the other side is saying is that it's  
22 an automatic stay of everything.

23           JUSTICE GORSUCH: Well, that's the  
24 question, is how far the -- how far the stay  
25 reaches, not whether a stay exists, because

1 you'd agree, again, that under 1292(b), that the  
2 district court couldn't do something that would  
3 undermine or thwart the court of appeals'  
4 jurisdiction over the case.

5 MR. ZAVAREEI: Yes, that's what --  
6 that's what our position is.

7 JUSTICE GORSUCH: All right.

8 MR. ZAVAREEI: And that's what the  
9 statute says.

10 JUSTICE GORSUCH: Okay.

11 JUSTICE JACKSON: But that's happening  
12 --

13 JUSTICE GORSUCH: With -- with --

14 JUSTICE JACKSON: -- on a case-by-case  
15 basis.

16 JUSTICE GORSUCH: -- with -- with  
17 respect to the Nken factors, if I might for a  
18 second, I just want to understand what realm of  
19 agreement we have.

20 If we were to go down that road, I  
21 thought I understood you to say to Justice  
22 Thomas that it would be appropriate to enter a  
23 stay when the appellate process is particularly  
24 long?

25 MR. ZAVAREEI: It could be, yes.

1 JUSTICE GORSUCH: Yeah. Or -- or the  
2 arbitration agreement provides for no -- no  
3 formal discovery?

4 MR. ZAVAREEI: It could be, yes,  
5 Your Honor.

6 JUSTICE GORSUCH: And no class claims?

7 MR. ZAVAREEI: Yes. These were  
8 examples from particular cases that I was  
9 giving.

10 JUSTICE GORSUCH: And -- and -- and  
11 also, when it gets close to trial, then -- then  
12 a stay might be appropriate.

13 MR. ZAVAREEI: Yes, Your Honor.

14 JUSTICE GORSUCH: Okay. Thank you.

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

23 Would that be irreparable harm?

24 MR. ZAVAREEI: Let me answer it this  
25 way: It depends. It might. Obviously, this

1 Court has held that, generally, writ large, that  
2 the discovery costs themselves are not  
3 irreparable harm.

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

14 JUSTICE ALITO: Well, what would be  
15 the irreparable harm if the only harm is very  
16 substantial litigation costs?

17 MR. ZAVAREEI: Well, under those  
18 circumstances, it would be those -- those  
19 substantial --

20 JUSTICE ALITO: But haven't we said  
21 that that's not irreparable harm?

22 MR. ZAVAREEI: As compared to what  
23 would happen in arbitration. So those things  
24 can't be separated. They have to be taken  
25 together.



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

7                   JUSTICE ALITO: Well, I don't  
8                   understand that. It's either -- either money --  
9                   either litigation costs count or they don't  
10                  count.

11                  MR. ZAVAREEI: Well, I --

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

19                  MR. ZAVAREEI: It is indeed,  
20                  Your Honor, but the district courts have looked  
21                  at this and have determined that, under -- under  
22                  certain circumstances, depending on the nature  
23                  of the arbitration, that that can constitute  
24                  irreparable harm.

25                  JUSTICE ALITO: Was that right?

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

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

12           MR. ZAVAREEI: Well, first of all,  
13 we're not aware of that happening ever in -- in  
14 any case, but, if that were to happen, then --  
15 then the circuit court could issue a stay, and  
16 this Court could issue a stay. And, in fact,  
17 that's exactly what this Court did in the Henry  
18 Schein case, where the district court was intent  
19 on moving forward with the trial, and -- while  
20 an arbitrability issue was -- was -- was pending  
21 and kept going back down, and they kept trying  
22 to move forward. And, finally, this Court said  
23 no.

24           And so when I speak about the Nken  
25 standard and the power of the courts to issue

1 stays, it's not just the district court that has  
2 the power. It's the circuit courts that have  
3 the power, and it's this Court that has the  
4 power. In this case alone, my friend on the  
5 other side saw -- side sought a stay in both  
6 cases in the district court, he sought a stay in  
7 the Ninth Circuit, and they sought a stay here.  
8 And all three courts denied the stay applying  
9 the Nken standard.

10 JUSTICE KAVANAUGH: Your -- your  
11 concern is the delay of the appeal, I think,  
12 stated concern, how long it takes. The other  
13 side's concern, I believe, is that they think  
14 they correctly bargained for arbitration and  
15 they have a right that Congress has given them  
16 to have the appellate court determine that and  
17 that they're not going to be able to afford  
18 themselves of that congressionally granted right  
19 because, if the district court discovery goes  
20 forward in a putative class -- in a class action  
21 context, that is going to coerce massive  
22 settlements, and they don't want to be coerced  
23 into massive settlements without having the  
24 opportunity to take advantage of the right that  
25 Congress has given them to have an appeals court

1 decide whether arbitration is the appropriate  
2 forum.

3 How do you respond to that?

4 MR. ZAVAREEI: Well, first, let me --  
5 let me speak to the -- the situation -- the  
6 actual situation on the ground with respect to  
7 once that happens.

8 First, you've already got a district  
9 court that has ruled that the -- there is no  
10 valid arbitration clause.

11 JUSTICE KAVANAUGH: Could be wrong and  
12 the statistics show that they sometimes are  
13 wrong in -- in any event. Just --

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

16 JUSTICE KAVANAUGH: Just assume  
17 they're wrong.

18 MR. ZAVAREEI: -- 29 percent of the  
19 time.

20 JUSTICE KAVANAUGH: Okay. They're not  
21 right every time.

22 MR. ZAVAREEI: They're not right every  
23 time.

24 JUSTICE KAVANAUGH: They -- they have  
25 crowded dockets. They have to move quickly.

1 They're not correct every time.

2 MR. ZAVAREEI: And in 62 percent of  
3 the times that they're wrong, Your Honor, the  
4 courts have issued stays. So that's -- so  
5 that's one piece of it.

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

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

17 MR. ZAVAREEI: And that -- exactly,  
18 Your Honor, and that's exactly the remedy that  
19 Congress came up with.

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

22 JUSTICE KAVANAUGH: Yeah. But on my  
23 question --

24 JUSTICE KAGAN: -- either way, it  
25 doesn't tell us --

1 JUSTICE KAVANAUGH: On my question --

2 JUSTICE KAGAN: It doesn't tell us who  
3 wins as between the two of you. Either --  
4 whoever wins, the appeals should move fast.

5 MR. ZAVAREEI: But can I -- can I  
6 give a --

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

18 MR. ZAVAREEI: Well --

19 JUSTICE KAVANAUGH: So -- just to tell  
20 you where I am.

21 MR. ZAVAREEI: I -- I understand and I  
22 appreciate that. But I will say, Your Honor, is  
23 what you're looking at now are policy concerns,  
24 right, and policy concerns that could have been  
25 addressed by Congress when -- they were

1 concerned about these policy concerns. They  
2 wanted to get these appeals heard quickly, and  
3 they came up with a way to do it. Their --  
4 their way to do it was to enact Section 16 --

5 JUSTICE KAVANAUGH: That goes back to  
6 whether there's a background rule.

7 MR. ZAVAREEI: It -- precisely.

8 JUSTICE KAVANAUGH: Yeah. On the --

9 JUSTICE JACKSON: Wasn't there also --

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

16 MR. ZAVAREEI: There -- there could  
17 be, yes.

18 JUSTICE KAGAN: Is there also a  
19 solution to Mr. Katyal's problem if appeals  
20 courts move quickly?

21 MR. ZAVAREEI: Well, with all due  
22 respect --

23 JUSTICE KAVANAUGH: No.

24 MR. ZAVAREEI: -- I don't think so  
25 because I think his problem is that he wants

1 delay, that his clients want to hold these cases  
2 up --

3 JUSTICE KAVANAUGH: He doesn't know --  
4 he --

5 JUSTICE KAGAN: Right, but if what he  
6 wants -- but if what he wants is what --

7 JUSTICE KAVANAUGH: That's not right.

8 JUSTICE KAGAN: -- Justice Kavanaugh  
9 suggests, which is not to be subject to a lot  
10 of, you know -- you know, settlement pressure,  
11 then if the appeals court moves quickly, he's  
12 not going to be subject to a lot of settlement  
13 pressure.

14 MR. ZAVAREEI: Let -- let me give an  
15 example, if I could. Bradford-Scott --

16 JUSTICE KAVANAUGH: Well, then should  
17 we have an automatic stay on the discretionary  
18 factors, to answer Justice Kagan's question, if  
19 discovery is about to be ordered?

20 MR. ZAVAREEI: Where would that come  
21 from?

22 JUSTICE KAVANAUGH: You --

23 MR. ZAVAREEI: That would be made up  
24 out of whole cloth.

25 JUSTICE KAVANAUGH: Well, you said



1 that a lot of district courts are granting it.

2 MR. ZAVAREEI: Well, they're not --  
3 they're not -- it's not automatic.

4 JUSTICE KAVANAUGH: Are they correct?  
5 I thought you said they're --

6 MR. ZAVAREEI: They're applying --

7 JUSTICE KAVANAUGH: I thought you said  
8 they were correct to Justice Alito. Is that  
9 wrong?

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

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

21 MR. ZAVAREEI: That's absolutely the  
22 question. And I -- and I still struggle to  
23 understand how my friend on the other side  
24 continues to say that there is a divestiture  
25 rule or a Griggs rule of divestiture.

1 JUSTICE JACKSON: Right. So --

2 MR. ZAVAREEI: There is no such thing.

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

17 MR. ZAVAREEI: Absolutely. And -- and  
18 I'd like to go back to your question -- it  
19 answers both of your questions, Your Honors,  
20 which -- the Bradford-Scott case, which is the  
21 -- Judge Easterbrook's case that established the  
22 majority rule, right? In that case he said,  
23 well, Griggs requires a mandatory stay. Four  
24 months later, a separate panel looked at that  
25 arbitrability clause and said there's no valid

1 arbitration clause here. Four months later.  
2 And it was sent back down. And the parties were  
3 able to litigate again. There is no need under  
4 circumstances like that for a mandatory stay.

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

13 JUSTICE ALITO: I wanted --

14 MR. ZAVAREEI: They've --

15 JUSTICE ALITO: I'm sorry. Finish  
16 your sentence.

17 MR. ZAVAREEI: Just one last point.  
18 The only discovery so far is they've produced  
19 eight documents. That's not causing irreparable  
20 harm.

21 JUSTICE ALITO: I wanted to give you a  
22 chance to respond to an argument made in the  
23 reply brief, and that is the reference to the  
24 criminal interlocutory appeal statute, 18 U.S.C.  
25 3731, which doesn't make any mention of stays

1 and yet it's widely understood that that does  
2 result in a stay of district court proceedings  
3 while the case is on appeal, while the issue is  
4 on appeal.

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

16 That, I submit to you, is what Griggs  
17 is about. It's making sure that, when the court  
18 of appeals is deciding an important issue that  
19 has something to do with the case below, that --  
20 that that is not in real time moving below, that  
21 the court of appeals is not shooting at a moving  
22 target, that -- that that is frozen in time so  
23 that the court of appeals can make that decision  
24 based on a fixed record and not have it  
25 change -- not have the ground move underneath

1 its feet.

2 And so I don't think that the  
3 Centriacci case is -- holds anything otherwise. I  
4 think that court actually was very consistent with our  
5 argument here.

6 And -- and, again, to be clear, this is  
7 another one of those cases -- this is another one of  
8 those statutes that is silent, and under my friend's  
9 interpretation, that means that there should be an  
10 automatic stay because it's silent, but that is not  
11 what Justice Posner -- what Judge Posner said.

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

18 JUSTICE SOTOMAYOR: Counsel, give me  
19 your best answer to Judge Easterbrook's  
20 position, which was articulated by Justice  
21 Barrett earlier, which is, in essence, this is  
22 like sovereign immunity, qualified immunity,  
23 because it's a question of being tried at all --  
24 not tried, but litigated at all.

25 What's your best response to that?

1 MR. ZAVAREEI: Well, let me answer the  
2 question directly by saying that it is --  
3 immunity is -- is the right not to be haled into  
4 any court, any -- any forum, anywhere, any time.

5 JUSTICE SOTOMAYOR: Right. It's not  
6 an issue of being hauled into court, it's an  
7 issue of being litigated and being --

8 MR. ZAVAREEI: Litigated anywhere,  
9 whether it's in court, whether it's an arbitral  
10 tribunal.

11 JUSTICE SOTOMAYOR: It's a finding of  
12 liability.

13 MR. ZAVAREEI: Anywhere.

14 JUSTICE SOTOMAYOR: You're free from  
15 liability, I agree.

16 MR. ZAVAREEI: Well, not only are you  
17 free from liability, you're free from the  
18 indignity of having to take the stand, you're  
19 free from the indignity of having someone taking  
20 discovery against you.

21 JUSTICE SOTOMAYOR: Well, you're  
22 pushing too far, counsel, because that's what  
23 they say they bargained for, not to take the  
24 stand, not to be public --

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

1 JUSTICE SOTOMAYOR: I -- I -- I -- I  
2 think arbitration is not necessarily public. It  
3 generally isn't.

4 MR. ZAVAREEI: I've arbitrated many  
5 cases. There is no presumption of  
6 confidentiality under AAA or JAMS rules. All of  
7 my arbitrations are public.

8 JUSTICE SOTOMAYOR: I -- I do agree  
9 with you, counsel, that -- that there's no  
10 confidentiality requirement outside of the terms  
11 of the agreement.

12 MR. ZAVAREEI: And -- and -- and I  
13 will also say that Laura Lines is probably the  
14 best case with respect to that, which -- which  
15 holds that entitlement to avoid suit is  
16 different from an entitlement to be sued in a  
17 particular forum.

18 JUSTICE GORSUCH: Well, what do we do  
19 about sovereign immunity then, which is about  
20 which forum cases will proceed very frequently?  
21 It may mean that you can't be haled into a  
22 different sovereign's court, you have the right  
23 to be haled only into your court and only to the  
24 extent you have consented to it.

25 MR. ZAVAREEI: Yes. Again, I think

1 that if you're talking about state sovereign  
2 immunity, for example?

3 JUSTICE GORSUCH: For example, sure.

4 MR. ZAVAREEI: Yeah. I -- I think  
5 that is -- that's the -- the best example that I  
6 think that my friend from the other side came up  
7 with. I think all the other immunities are  
8 easily answered, which is --

9 JUSTICE GORSUCH: Well, qualified  
10 immunity is qualified immunity from suit under  
11 federal law. You may still be liable for state  
12 tort actions.

13 MR. ZAVAREEI: You could be, right.  
14 But the point is that an immunity has been  
15 established that has to be respected by the  
16 courts.

17 JUSTICE GORSUCH: Sure.

18 MR. ZAVAREEI: But arbitration is not  
19 an immunity. Arbitration is not saying --

20 JUSTICE GORSUCH: It is what it is,  
21 but it -- it's a -- it's a choice of forum, and  
22 qualified immunity is a federal doctrine for  
23 federal lawsuits, and it doesn't control in  
24 state court for state lawsuits.

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



1 JUSTICE GORSUCH: And very frequently  
2 police officers are haled into court for torts.

3 MR. ZAVAREEI: But, as soon as you're  
4 haled into federal court or as soon as a state  
5 is brought into federal court --

6 JUSTICE GORSUCH: Sure.

7 MR. ZAVAREEI: -- their right under  
8 the Eleventh Amendment or under qualified  
9 immunity, that right is destroyed.

10 JUSTICE GORSUCH: Sure.

11 MR. ZAVAREEI: As opposed to  
12 arbitration.

13 JUSTICE GORSUCH: Right. They say,  
14 you're right, we -- we -- we just didn't bargain  
15 for this court, we didn't bargain for this  
16 forum, and what is the difference?

17 MR. ZAVAREEI: Well, first of all,  
18 they're -- the Court hasn't held yet that --

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

21 MR. ZAVAREEI: Well -- but my -- my  
22 point is that with respect to sovereign  
23 immunity, all the immunity questions, right,  
24 there's never been any holding other than these  
25 lower court holdings that there should be an

1 automatic stay. There's some holdings relating  
2 to the collateral order doctrine.

3 JUSTICE GORSUCH: So you'd have us  
4 overrule those decisions along the way  
5 implicitly too.

6 MR. ZAVAREEI: Yes.

7 JUSTICE GORSUCH: Okay.

8 MR. ZAVAREEI: Yes.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Thomas?

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

17 MR. ZAVAREEI: In terms of the type of  
18 discovery allowed for?

19 JUSTICE THOMAS: Yes.

20 MR. ZAVAREEI: Usually a lot more  
21 discovery in state court than you have in  
22 federal court.

23 JUSTICE THOMAS: In this particular  
24 issue that we're confronting here.

25 MR. ZAVAREEI: Oh, I'm sorry. With --

1 I -- I'm -- I don't know the answer to that  
2 question, Your Honor.

3 CHIEF JUSTICE ROBERTS: Justice Alito?  
4 Justice Sotomayor?

5 JUSTICE SOTOMAYOR: There is a  
6 possibility if we say that a stay is mandatory  
7 that we could have a situation, isn't there,  
8 where state courts could say no?

9 MR. ZAVAREEI: Yes, absolutely.

10 JUSTICE SOTOMAYOR: In a state  
11 proceeding.

12 MR. ZAVAREEI: Yes, the states are  
13 free to do as they wish.

14 JUSTICE SOTOMAYOR: Because this  
15 section is only -- only involves federal courts.

16 MR. ZAVAREEI: Absolutely.

17 JUSTICE SOTOMAYOR: So we would be  
18 creating an incentive for petitioners to file  
19 their suits in state court if they can.

20 MR. ZAVAREEI: Yes, Your Honor. And  
21 CAFA is another one of those statutes that is  
22 silent with respect to whether a stay is  
23 mandatory or not.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: I might not have

1 understood the colloquy between you and Justice  
2 Gorsuch, but I wanted to make sure that it was  
3 clarified at least for me.

4 I think what Justice Gorsuch was  
5 saying is that there are opinions that do give  
6 automatic stays with respect to established  
7 immunity doctrines.

8 MR. ZAVAREEI: Lower court. They're  
9 lower court decisions.

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

13 MR. ZAVAREEI: Oh.

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

17 MR. ZAVAREEI: No. I --

18 (Laughter.)

19 MR. ZAVAREEI: -- I don't. Thank you.

20 JUSTICE GORSUCH: Maybe I should have  
21 addressed my question to Justice Kagan.

22 MR. ZAVAREEI: I know. Thank you.

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

25 MR. ZAVAREEI: I did, I did. I

1 appreciate -- well, what I would say is they  
2 were wrong to the extent that they applied  
3 Griggs to come up with their analysis, right? I  
4 mean, Griggs doesn't provide the basis for  
5 saying that a sovereign immunity case should be  
6 stayed pending the appeal.

7 JUSTICE KAGAN: But you're not  
8 contesting that there are distinctions that can  
9 be made between those immunity doctrines and  
10 this?

11 MR. ZAVAREEI: Those -- those -- those  
12 immunity cases should be stayed but not under  
13 Griggs.

14 JUSTICE KAGAN: Okay. I thought that  
15 that's what you meant.

16 MR. ZAVAREEI: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Barrett?

19 Oh, I'm sorry. Justice Gorsuch?

20 Justice Kavanaugh?

21 Now Justice Barrett?

22 JUSTICE BARRETT: No.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Jackson?

25 JUSTICE JACKSON: Finally, if we say

1 that a stay is mandatory, I guess I'm still  
2 fixating on Justice Kavanaugh's questions about  
3 settlement pressure and the equities. And I'm  
4 wondering whether the settlement dynamic doesn't  
5 shift dramatically in a defendant's favor if we  
6 say that because, to the extent that the  
7 defendant doesn't want trial, they don't want  
8 arbitration either really, they're the  
9 defendant, so wouldn't we have a dynamic in  
10 which the exact opposite of the appellate court  
11 going fast would happen if they get an automatic  
12 stay?

13           They get it and then they -- it takes  
14 like months for the -- the appellate court to  
15 rule, and that's just fine with the defendant.

16           MR. ZAVAREEI: That's very real  
17 pressure. Look -- look at this case, where  
18 Coinbase, the entire cryptocurrency market is  
19 collapsing under our feet, and other  
20 interchanges, competitors with Coinbase are  
21 going bankrupt left and right, and we've got a  
22 client who lost \$30,000 and we're getting calls  
23 from other clients who have lost hundreds of  
24 thousands of dollars, in the meantime, you know,  
25 wondering whether Coinbase is going to be around

1 by the time these appellate court decisions  
2 are -- are decided.

3 So, absolutely, there's an interest on  
4 the other side that could push people to try and  
5 settle early to -- to try and escape harms like  
6 bankruptcy.

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

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Rebuttal, Mr. Katyal?

18 REBUTTAL ARGUMENT OF NEAL K. KATYAL  
19 ON BEHALF OF THE PETITIONER

20 MR. KATYAL: Thank you.

21 As Justice Kavanaugh said, the  
22 question is how to read congressional silence,  
23 and you look to background principles. Here,  
24 the question of Congress's silence we think is  
25 far more appropriately directed at my friend on

1 the -- on the other side.

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

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

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

20 Second, Griggs is not just about the  
21 same issue being decided. The language of  
22 Griggs, which I read to you before, is that the  
23 aspect has to be involved in the appeal. That's  
24 how Wright and Miller see it. That's how the  
25 immunity cases see it. That's double jeopardy



1 cases and the like.

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

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

16 And so, like, take the thousand hours  
17 we've spent in the interim in this case. If you  
18 don't get an automatic stay, attorneys will have  
19 to spend that kind of money, clients will have  
20 to spend that kind of money. There is no way to  
21 put that toothpaste back in the tube. That's  
22 also true of the discovery problems and the  
23 spilling out into the public domain and Judge  
24 Friendly's concern about coercive settlements.

25 Third, Justice Jackson, you asked

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

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

18 And then, with respect to the cases it  
19 doesn't cover, the courts hold that Griggs does  
20 apply in those cases in which there's a  
21 discretionary certified appeal. Dayton is a  
22 case from the Fifth Circuit in 1995. Green Leaf  
23 is a case in the Eleventh Circuit. L.A. versus  
24 Santa Monica in the Ninth Circuit. Many cases  
25 say that.

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

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

21           And, finally, that brings me to my  
22 friend's point about the trials. I can't  
23 understand, frankly, his position on trials. I  
24 think he said that a trial could take place.  
25 There's no automatic stay. It's up to the trial

1 court's discretion.

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

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

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel. The case is submitted.

20 (Whereupon, at 12:58 p.m., the case  
21 was submitted.)

22

23

24

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## Official - Subject to Final Review

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