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P R O C E E D I N G S

(11:23 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 25-83, Jules versus Andre Balazs.

Mr. Unikowsky.

ORAL ARGUMENT OF ADAM G. UNIKOWSKY

ON BEHALF OF THE PETITIONER

MR. UNIKOWSKY: Mr. Chief Justice, and may it please the Court:

In Badgerow versus Walters, this Court held that federal courts lack jurisdiction over applications under Sections 9 and 10 of the Federal Arbitration Act unless an independent jurisdictional basis appears on the face of the application.

In this case, the Court should hold that Badgerow's rule applies to all Section 9 and 10 applications regardless of whether a preexisting suit is on file. Nothing in the FAA distinguishes between those Section 9 and 10 applications that are associated with a preexisting suit and those that are not.

Moreover, Section 8 of the FAA contains explicit jurisdictional anchor

1 language that Sections 9 and 10 lack. The
2 Court should infer that this textual disparity
3 is intentional, much as the Court relied on a
4 similar inference in *Badgerow*.

5 The Court should resolve this case
6 based on the text of the FAA rather than based
7 on Section 1367's "related to" standard, but if
8 the Court reaches that issue, it should hold
9 that there is no common nucleus of operative
10 fact between the underlying suit and the
11 Section 9 and 10 applications which concern an
12 arbitration award that did not exist at the
13 time of the original federal suit. As *Badgerow*
14 put it, the original -- the underlying dispute
15 is not now at issue.

16 In *Kokkonen*, this Court held that a
17 settlement dispute is insufficiently related to
18 the underlying dispute to warrant the exercise
19 of ancillary jurisdiction. And the Court
20 should rely on similar reasoning here in
21 rejecting the jurisdiction.

22 I welcome the Court's questions.

23 JUSTICE THOMAS: Was there a pending
24 federal case in *Badgerow*?

25 MR. UNIKOWSKY: There was no pending

1 federal case in Badgerow, and we --

2 JUSTICE THOMAS: So don't you think
3 that's a difference?

4 MR. UNIKOWSKY: Well, that is indeed a
5 factual distinction between this case and
6 Badgerow.

7 JUSTICE THOMAS: Okay. So your client
8 brings the federal case, right?

9 MR. UNIKOWSKY: Yes.

10 JUSTICE THOMAS: The court then enters
11 a stay so that the arbitration can take place?

12 MR. UNIKOWSKY: That's correct.

13 JUSTICE THOMAS: The arbitration then
14 is decided, and the parties come back to that
15 very same court to confirm the arbitral award?

16 MR. UNIKOWSKY: That's correct.

17 JUSTICE THOMAS: Or decision. And
18 you're saying now that the jurisdiction of the
19 court that you invoked is inadequate to decide
20 this?

21 MR. UNIKOWSKY: That's correct, Your
22 Honor. There is -- I'm sorry.

23 JUSTICE THOMAS: Don't you think
24 there's something odd about that?

25 MR. UNIKOWSKY: I don't think so. I

1 think our position follows pretty cleanly.

2 JUSTICE THOMAS: You think that that's
3 consistent with Badgerow?

4 MR. UNIKOWSKY: Yes, I think that the
5 Badgerow rule -- admittedly, in the Badgerow
6 case, there was no original lawsuit, and in
7 this case, there is. And that's why this is a
8 separate case from Badgerow. But, ultimately,
9 I think the same rule should apply.

10 JUSTICE THOMAS: So, in Badgerow,
11 there was no jurisdiction, and so the Court
12 said that there's no independent jurisdiction.
13 And, here, you have a pending case in which the
14 district court stayed its suit -- its action
15 pending the arbitration, and you say there's --
16 that's similar to Badgerow, where there was no
17 case?

18 MR. UNIKOWSKY: No, it's a different
19 case, Your Honor, but I think the same rule
20 should still apply whether or not you start
21 with the text of the FAA or whether you start
22 with Section 1367, as Respondents would
23 advocate. So maybe it's helpful if I start
24 with the latter point before turning to the
25 text --

1 JUSTICE KAVANAUGH: What's the purpose
2 of the stay?

3 MR. UNIKOWSKY: The purposes of the
4 stay is for -- if the case comes back and is
5 not resolved in arbitration. So, if you look
6 at the text of Section 3, Section 3 says that
7 if it turns out that the parties are in default
8 of the arbitration, so the arbitration doesn't
9 resolve the dispute, then the parties can come
10 back to the federal court and adjudicate -- and
11 the federal court can adjudicate the dispute.
12 Or, in -- in the Spizzirri case, the Court
13 offered the example of a case where the
14 arbitration breaks down, and so the case is
15 stayed and the case might have to be
16 reactivated in federal court.

17 But, here, there's an arbitration
18 award. The arbitration has wrapped up. And
19 so, under Rule 8 of the Federal Rules of Civil
20 Procedure, the Court should dismiss the federal
21 suit. It's quite similar to the facts --

22 JUSTICE SOTOMAYOR: Counsel, doesn't
23 Rule 8(c)(1) say that an arbitration has to be
24 pled as an affirmative defense?

25 MR. UNIKOWSKY: Right. So I --

1 JUSTICE SOTOMAYOR: So why aren't we
2 thinking of it that way? Meaning Rule 8 says
3 in a litigation where an arbitration is sought.
4 And that's what the federal action here was,
5 an -- it was a federal suit. The defense was
6 arbitration controls.

7 Why isn't this just a motion to
8 confirm that the claim can't go forward?

9 MR. UNIKOWSKY: So I think that
10 dismissal would be appropriate. And because,
11 at the start of the lawsuit, there was --

12 JUSTICE SOTOMAYOR: No, but you're
13 arguing something else. You're arguing that
14 not dismissal is appropriate but confirming the
15 arbitration award so it is final and settles
16 the matter is not.

17 MR. UNIKOWSKY: Right, our --

18 JUSTICE SOTOMAYOR: Because that's
19 what you're arguing.

20 MR. UNIKOWSKY: We're arguing, Your
21 Honor, that the Court doesn't have jurisdiction
22 to confirm the award, as opposed to dismiss the
23 federal case, because confirming the award
24 is --

25 JUSTICE SOTOMAYOR: Then how can you

1 dismiss it if you don't know if the arbitration
2 award will be sustained, confirmed?

3 MR. UNIKOWSKY: Well, the vast
4 majority of arbitration awards are never
5 subject to confirm or vacate proceedings.

6 JUSTICE SOTOMAYOR: Well, but the
7 point still remains, how does a court know that
8 it's a defense to the action until it has
9 decided that it's a valid award?

10 MR. UNIKOWSKY: No, because the award
11 itself is the defense. It functions like a
12 release. So, if a -- if a plaintiff files a
13 lawsuit and the defendant --

14 JUSTICE SOTOMAYOR: Well, you can't
15 claim an arbitration award that has been
16 vacated, correct?

17 MR. UNIKOWSKY: That's correct. So
18 what a court could do -- so a court might not
19 know if the arbitration award is going to be
20 later subject to confirm or vacate proceedings
21 in state court. That could take several years.

22 And so what a court would ordinarily
23 do is dismiss the case. Theoretically, if the
24 award is vacated, they would typically
25 rearbitrate it. They wouldn't necessarily go

1 back to the federal district court. In a --
2 I'm sorry, Your Honor.

3 JUSTICE SOTOMAYOR: No, no. Counsel,
4 I'm having trouble understanding your lawsuit
5 because I thought Spizzirri answered it
6 already. In Spizzirri, what we said was, where
7 a court does have proper jurisdiction over a
8 Section 9 or 10 application in a preexisting
9 lawsuit -- and there was, under Section 3, a
10 preexisting federal claim, so it had proper
11 jurisdiction -- the court that stayed the
12 action can and should, for efficiency's sake,
13 adjudicate those applications as motions in the
14 existing lawsuit.

15 So this is a motion in an existing
16 lawsuit -- that's what Section 9 and 10 are --
17 over a claim that had jurisdiction, age
18 discrimination. Why isn't this just a motion
19 to confirm that?

20 MR. UNIKOWSKY: Well, Your Honor, so,
21 in -- in Badgerow, the Court addressed the
22 language in Section 6 about motions that Your
23 Honor just referred to. The Court said that
24 it's not a motion. It says that the court's
25 going to treat the application as a motion for

1 efficiency's sake. So I don't think that the
2 language in Section 6 carries the day.

3 JUSTICE KAGAN: But what Badgerow also
4 said, it said something like jurisdiction to
5 decide a case includes jurisdiction to decide a
6 motion in a case. And isn't that what we have
7 here?

8 And Badgerow distinguished that from
9 using the look-through method. It's just
10 saying, if you have jurisdiction over a case,
11 you have jurisdiction over the motions in the
12 case. That seems pretty -- you know, just a
13 truism. And isn't that what's involved here?

14 MR. UNIKOWSKY: I don't think so
15 because the court has jurisdiction to decide
16 motions. It's just not necessarily every
17 single motion that would result in the court
18 entering a judgment that exceeds its
19 jurisdiction, because the judgment that
20 Respondents are asking the Court to enter is
21 not merely a judgment of dismissal, which, of
22 course, the Court can do. It's essentially
23 transforming the arbitration award into a
24 judgment which would allow Respondents to
25 enlist the Court to execute the judgment

1 against --

2 JUSTICE KAGAN: Well, so explain that.
3 What category of motions should not be included
4 in this statement of, if you have jurisdiction
5 over a case, you have jurisdiction over the
6 motions in a case? What category of motions is
7 excluded from that?

8 MR. UNIKOWSKY: Motions that would
9 cause the court to enter a judgment that the
10 court doesn't have jurisdiction to enter
11 because, in this case, the court undoubtably
12 had jurisdiction to dismiss Petitioner's suit
13 based on the fact that an arbitration award
14 existed.

15 What the court didn't have
16 jurisdiction to do is enter an award in what
17 was essentially a breach-of-contract suit that
18 was beyond the court's jurisdiction. So,
19 absolutely, the court could have dismissed the
20 claim, but we think there's a difference
21 between dismissal of a claim and transforming
22 what is fundamentally a contract dispute into a
23 judgment when the court lacks jurisdiction over
24 that case.

25 JUSTICE JACKSON: But the question --

1 that's begging the question, I think, because
2 isn't the purpose of Section 9 to give the
3 court the ability to do that, to say that
4 that's exactly what is supposed to happen?

5 I mean, I -- I've been a little
6 confused by some of the things -- the
7 representations that you made. You suggested
8 that the vast number of arbitrations are not
9 subject to "confirm and vacate proceedings."
10 And I guess, to the extent that you're
11 suggesting that there won't be a dispute about
12 whether or not the award is to be confirmed,
13 that's true.

14 But, in most cases, when you have an
15 arbitration, isn't there a circumstance in
16 which some court, whether the federal court or
17 the state court, is asked to convert the award
18 into a judgment so that it can ultimately be
19 enforced?

20 MR. UNIKOWSKY: No, that's actually
21 quite rare, Your Honor. The vast majority of
22 arbitration awards do not result in subsequent
23 judicial proceedings because it's so hard to
24 vacate an arbitration award that in almost
25 every case, the parties adhere to the award.

1 Usually, when the defendant wins the
2 arbitration, you know, usually, the defendant
3 doesn't come to court to confirm because the
4 arbitration award itself generally has res
5 judicata effect.

6 JUSTICE JACKSON: All right. But, in
7 a situation, this goes back to Justice Thomas's
8 initial question in which we already have a
9 preexisting lawsuit related to these parties,
10 related to an underlying dispute that then gets
11 resolved by arbitration, it seems peculiar, I
12 think, that you would suggest that Congress set
13 these rules up to insist that another court be
14 involved in confirming that award so as to
15 close out the initial case.

16 I mean, the -- the -- the
17 circumstances -- you -- you would, I think,
18 have to agree that when we have a existing
19 lawsuit that was stayed for the purpose of
20 arbitration, it can't be one of the situations
21 in which the arbitration can happen and
22 everybody goes off into the sunset and the
23 original court doesn't know what happened. So
24 there has to be some closure to this.

25 And I think, under your rule, the

1 closure you're positing comes from another
2 court confirming the award, and that just seems
3 very odd.

4 MR. UNIKOWSKY: I don't think so, Your
5 Honor. So, first of all, I think that the
6 closure happens when the award occurs and the
7 parties come back to the federal court and say,
8 look, we were able to resolve our dispute in
9 arbitration. There's no more pending claims.
10 There's no partial substantive claims that were
11 stayed. The entire case is over.

12 JUSTICE JACKSON: But you do agree
13 they have to come back to the federal court?
14 They can't just --

15 MR. UNIKOWSKY: Of course, they have
16 to come back to the federal -- of course.

17 JUSTICE JACKSON: All right. And
18 so -- but -- but somehow you're saying that
19 having exercised jurisdiction over this matter
20 from day one at your request, Justice Thomas
21 reminds us, the only way it gets resolved from
22 the purpose -- from the standpoint of wrapping
23 this up is if the parties are just coming back
24 to notify that another court has been engaged
25 to do some sort of confirmation. Or you're

1 saying the confirmation doesn't have to happen
2 at all?

3 MR. UNIKOWSKY: It doesn't have to
4 happen at all. There's, like, a four-year
5 statute of limitations at least in California
6 on the confirmation proceedings. The court's
7 not just going to sit there for four years to
8 wait if -- to -- to see whether someone's going
9 to try --

10 JUSTICE JACKSON: But, if the parties
11 want it to happen --

12 MR. UNIKOWSKY: Yes.

13 JUSTICE JACKSON: -- you're saying
14 they cannot ask the court that took original
15 jurisdiction over it to be the one to confirm.

16 MR. UNIKOWSKY: Right. That's
17 correct. They should go to the state court,
18 and the court is free to stay the dismissal of
19 the case if it knows that there is ongoing
20 confirmation or vacatur proceedings in another
21 court and so -- but all the court cannot do is
22 transform what is fundamentally a breach-of-
23 contract suit into a judgment.

24 JUSTICE BARRETT: Mr. Unikowsky, why
25 wouldn't there be ancillary -- ancillary

1 enforcement jurisdiction to be specific of
2 the -- of the kind that was -- that the Court
3 talked about in Kokkonen? It seems to me that
4 if the parties come back, you know, Kokkonen
5 envisioned a situation in which the district
6 court could, under 41, make it part of the
7 terms of the settlement agreement that the
8 district court could retain authority to
9 enforce the agreement and that that wouldn't
10 have been a problem.

11 There would be no separate basis of
12 jurisdiction there, right? It's a distinct
13 action, it's a contract action in essence
14 that's distinct from the underlying suit,
15 wouldn't be 1331 or 1332, for example. Why
16 couldn't something like that theory apply here?

17 MR. UNIKOWSKY: So, first of all,
18 that's not Respondents' argument, and that's
19 not what the Court did in this case. The
20 Section 3 order did not purport to retain
21 jurisdiction to confirm a follow-up arbitration
22 award. It just said pursuant to Section 3 that
23 the case will be stayed until arbitration has
24 been had.

25 I also don't think a court could do

1 that. I don't think a court could circumvent
2 the limitations under Section 3 by entering an
3 order that's broader than Section 3, especially
4 given that you have Section 8, which explicitly
5 authorizes the retention of jurisdiction in
6 maritime cases, and Section 9 does not have
7 similar language.

8 I also think that a court doesn't have
9 unlimited authority to retain jurisdiction
10 under Rule 41. I think the analysis is
11 somewhat similar to the analysis in cases
12 involving consent decrees like -- so, in
13 certain cases, the court can take a settlement
14 and embody it in a judgment, but the court
15 can't just rubber-stamp it.

16 The court has to make an independent
17 assessment of things like whether or not the
18 settlement advances the objectives underlying
19 the statute, and only then can it really give
20 the settlement the imprimatur of the court's
21 authority.

22 And so we think that, you know, a
23 similar analysis would have to happen here,
24 except it can't because, in an arbitration
25 award, the court really isn't considering on

1 its own the viability of the award. It's just
2 assessing whether the arbitrator exceeded its
3 powers.

4 So, in a nutshell, I don't think the
5 court did that in the Section 3 stay. I don't
6 think the court could have done that either in
7 the Section 3 stay.

8 JUSTICE KAVANAUGH: When it comes
9 back, if the case were a federal question case
10 to begin with and it comes back, there's no
11 federal question, therefore, it goes to state
12 court, correct?

13 MR. UNIKOWSKY: So what happens is the
14 court -- yes. So there was a federal question
15 at the outset.

16 JUSTICE KAVANAUGH: Right.

17 MR. UNIKOWSKY: And so the arbitration
18 award functions like a release or res judicata.
19 It's a defense saying this case has been
20 resolved in a different forum.

21 JUSTICE KAVANAUGH: Got it. So the
22 confirm or vacate, though, goes to state court
23 in those cases?

24 MR. UNIKOWSKY: Yes.

25 JUSTICE KAVANAUGH: If you come back

1 and the original jurisdiction was based on
2 diversity of citizenship, you still have the
3 diversity when you come back? Can you --

4 MR. UNIKOWSKY: Correct. The face of
5 the application --

6 JUSTICE KAVANAUGH: Then you go to
7 federal court?

8 MR. UNIKOWSKY: You can, because
9 there's an independent jurisdictional basis on
10 the face --

11 JUSTICE KAVANAUGH: Which it just
12 strikes me as odd that if the original case to
13 Justice Thomas's question was based on federal
14 question jurisdiction, you'd end up in state
15 court to confirm or vacate whereas, if the
16 original jurisdiction was based on diversity
17 and that still exists at the end, you would end
18 up in federal court. It seems like an odd
19 result.

20 MR. UNIKOWSKY: I don't think it's so
21 odd because the follow-up dispute at its core
22 is a contract dispute. The parties aren't
23 debating anymore the merits of the federal
24 claims. That's been resolved by the
25 arbitrator. All the parties are addressing --

1 JUSTICE KAVANAUGH: There's still a
2 pending federal case based on federal question
3 jurisdiction.

4 MR. UNIKOWSKY: That -- that's true.
5 But, once -- once the arbitration is over and
6 there is an arbitration award and we're at the
7 stage where the court is considering a Section
8 9 or 10 application, the issue is not whether
9 or not the federal claims have merit or not.
10 That's already been resolved by the arbitrator.
11 The issue is whether the arbitrator committed
12 fraud, exceeded its powers, things that have
13 nothing to do with the federal claims. And
14 Badgerow's insight from our perspective is that
15 at core is a contractual dispute.

16 JUSTICE GORSUCH: Mr. Unikowsky --

17 JUSTICE KAVANAUGH: What should --

18 MR. UNIKOWSKY: Yes?

19 JUSTICE GORSUCH: I'm sorry, please.

20 JUSTICE KAVANAUGH: Go ahead. Go
21 ahead.

22 JUSTICE GORSUCH: That was my question
23 too. And I'm struggling to come up with a
24 reason why Congress in the Federal Arbitration
25 Act might have wanted diversity cases to remain

1 in federal court for confirmation proceedings
2 but federal question cases to go to state
3 court.

4 You're -- you're a very clever fellow.
5 What -- what -- what -- what -- what might you
6 imagine Congress's policy judgment would have
7 been in that -- for that?

8 MR. UNIKOWSKY: I think it's a similar
9 policy judgment that underlay Badgerow. And I
10 do recognize that in Badgerow there was no
11 preexisting federal suit, but nonetheless, in
12 Badgerow, the underlying question was federal.
13 Like, the question was whether the arbitrator's
14 resolution of federal claims complied with the
15 Federal Arbitration Act, and the Court said
16 that at core that's a contract dispute.

17 And courts only have jurisdiction over
18 contract disputes when the requirements for
19 diversity of citizenship are satisfied, and so
20 that's ultimately the distinction.

21 JUSTICE GORSUCH: Okay.

22 MR. UNIKOWSKY: And, as a policy
23 matter, I mean, what's happening in this case
24 is, ultimately, the court is entering a
25 judgment. The reason people typically seek to

1 confirm arbitration awards is because they want
2 a judgment they can execute on. That's why
3 most confirm or vacate proceedings are when the
4 plaintiff wins and they have a judgment and
5 they want to use the authority of the court.

6 And so, you know, state courts are
7 very good at entering judgments and enforcing
8 them. That's why Congress made a different
9 decision in Section 8 cases, where the court
10 seizes a ship, because, in that case, it makes
11 perfect sense for the federal court to enter a
12 judgment because it already has possession of
13 the ship. So I think that's a sensible reason
14 Congress would have said that we want the
15 federal court to enter the judgment in the
16 American courts.

17 JUSTICE GORSUCH: Thank -- thank you.
18 I think Justice Kavanaugh had more.

19 JUSTICE KAGAN: So --

20 MR. UNIKOWSKY: I'm sorry.

21 JUSTICE KAVANAUGH: Go ahead.

22 JUSTICE KAGAN: -- am I right,
23 Mr. Unikowsky, that your understanding of where
24 Section 5 and 7 would continue to apply, it's
25 really only in these diversity suits again?

1 MR. UNIKOWSKY: I think so. But I
2 think there's an argument possibly the other
3 way that wouldn't apply in this case. So I
4 think the correct answer, like, my ultimate
5 bottom-line position is that's -- that, yes,
6 there has to be an independent jurisdictional
7 basis in Sections 5 and 7. You know, Section 4
8 has look-through jurisdiction. Section 8 has
9 the anchor. And if such language isn't
10 present, there needs to be an independent
11 jurisdictional basis.

12 Now I think there's a reasonable
13 contrary argument that wouldn't apply here
14 under the second head as Kokkonen puts it of --
15 of ancillary jurisdiction. There is an
16 argument theoretically available that if the
17 court compels arbitration but there's no
18 arbitrator, appointing an arbitrator is a way
19 of enforcing the order compelling arbitration.
20 So I think a court could reach that conclusion,
21 which wouldn't apply here because the
22 arbitration is over. Like, the order
23 compelling arbitration has been carried out.
24 So I think the Court can reserve this question
25 until the next time it has the opportunity to

1 decide whether a particular type of arbitration

2 --

3 JUSTICE SOTOMAYOR: Here, the court
4 didn't order arbitration because it thought it
5 didn't have the power to, so --

6 MR. UNIKOWSKY: That's correct. It
7 stayed -- our argument --

8 JUSTICE SOTOMAYOR: So, under your
9 theory, your answer to Justice Kagan is it
10 doesn't have any power.

11 MR. UNIKOWSKY: No, but I think,
12 arguably, even in a case where the court stays
13 pending arbitration like this one, the premise
14 of the stay order is that the arbitration will
15 happen. Otherwise, the arbitration will last
16 forever. And so a court -- this is not my --
17 this is not my bottom-line answer, but I think
18 a court could say that the court is in a sense
19 enforcing the order staying arbitration by
20 appointing an arbitrator to make sure the
21 arbitration happens. That's just a way a court
22 might avoid that result.

23 But, ultimately, I think that the FAA
24 says what it says. The court -- you know,
25 Congress included jurisdictional language where

1 one --

2 JUSTICE SOTOMAYOR: All right. Thank
3 you, counsel.

4 MR. UNIKOWSKY: Yes.

5 JUSTICE JACKSON: Counsel, no one --
6 oh.

7 JUSTICE KAVANAUGH: Go ahead.

8 JUSTICE JACKSON: No one, I think,
9 disputes the court's jurisdiction to enter a
10 consent decree. So why isn't confirmation of
11 an arbitral -- arbitral award analogous since
12 both involve taking a private resolution and
13 making it a judgment of the court?

14 MR. UNIKOWSKY: Because consent
15 decrees require a degree of judicial
16 involvement that doesn't exist when the court
17 confirms an arbitration award. There's a rich
18 body of law from this Court about when a court
19 can enter a consent decree, and the Court has
20 made clear that the court has to undertake an
21 independent assessment of considerations such
22 as whether or not the terms of the consent
23 decree advance the objectives underlying the
24 law at issue in the complaint and whether
25 there's a sufficient nexus between the terms of

1 the decree and the complaint.

2 Obviously, there's a lot of discretion
3 to the parties, but still, precisely because
4 it's a judgment of the court, the court has to
5 undertake an independent assessment of the
6 terms. That doesn't really happen under the
7 FAA.

8 JUSTICE JACKSON: Is that just because
9 it has been -- those kinds of assessments have
10 been given to the arbitrator and sometimes even
11 at the court's direction?

12 MR. UNIKOWSKY: I don't think so.
13 When the court confirms an arbitration award,
14 the court isn't independently assessing, for
15 example, whether the arbitrator's award
16 furthers the goals of Title VII or the ADA or
17 whatever federal statutory claims are being
18 advanced. The court isn't sort of taking a
19 second look at -- at the merits.

20 All the court is doing is assessing
21 whether the arbitrator exceeded its authority
22 under the arbitration agreement and engaged in
23 certain specified types of misconduct. So I
24 think that the degree of judicial involvement
25 under the -- on Section 9 and 10 is much less

1 than what this Court has said is necessary to
2 justify the court transforming a -- a pure
3 settlement into a consent decree.

4 So that's why I don't think that
5 analogy carries over.

6 JUSTICE KAVANAUGH: The Second Circuit
7 and the district court both thought that our
8 statement in Cortez Byrd kind of made this
9 simple because, there, we said, "We have,
10 however, previously held that the court with
11 the power to stay the action under Section 3
12 has the further power to confirm any ensuing
13 arbitration award."

14 So I know you're going to say that was
15 out of context and -- but that statement on its
16 own would resolve this, wouldn't it?

17 MR. UNIKOWSKY: On its own, that
18 statement is favorable to Respondents. And I'm
19 going to say what you said I was going to
20 say --

21 (Laughter.)

22 MR. UNIKOWSKY: -- which is that if
23 you read that whole paragraph, it's actually
24 making a very different point which I think
25 ultimately supports our position, which is that

1 Congress wouldn't have intended a court's
2 ability to -- to decide a Section 9 or 10
3 application to turn on whether there was a
4 preexisting suit on file, right?

5 So the question in Cortez Byrd was one
6 of venue, whether venue existed only in the
7 jurisdiction in which the arbitration occurred
8 or was broader than that. And the proponent of
9 narrow venue conceded in that case that if
10 there was a Section 3 stay, that court could
11 exercise jurisdiction over the Section 9 and 10
12 application but argued for a different result
13 if there was no Section 3 stay.

14 JUSTICE KAVANAUGH: Different
15 question. Section 10 in state court.
16 Thoughts?

17 MR. UNIKOWSKY: Yes. So, I mean, we
18 view Sections 9 and 10 as -- as joined at the
19 hip. Like, Section 9 refers to confirming the
20 award unless there's a Section 10 vacatur.

21 JUSTICE KAVANAUGH: The standards set
22 forth in Section 10.

23 MR. UNIKOWSKY: Oh. The Court
24 reserved that question in -- in Badgerow.

25 JUSTICE KAVANAUGH: Yeah. What are

1 your thoughts?

2 MR. UNIKOWSKY: My thoughts are that
3 it doesn't have to be exactly identical to the
4 federal standard, but if the Court --

5 JUSTICE KAVANAUGH: Does it have to be
6 close?

7 MR. UNIKOWSKY: Pretty close. Like,
8 if the court authorized de --

9 JUSTICE KAVANAUGH: Pretty close?

10 MR. UNIKOWSKY: Yeah. Basically,
11 pretty close. I mean, the Court hasn't
12 addressed this. Look, if the state court
13 authorizes de novo review of an arbitration
14 award --

15 JUSTICE KAVANAUGH: Because the state
16 court theoretically could have very different
17 standards. Then the arbitration award's thrown
18 out. But then the new suit, again, back to
19 Justice Thomas's first question -- not the new
20 suit -- the suit comes back to federal court
21 then after the state court's thrown out the
22 arbitration award.

23 MR. UNIKOWSKY: So, typically, that's
24 not ---

25 JUSTICE KAVANAUGH: Isn't that a

1 strange system?

2 MR. UNIKOWSKY: I don't think it would
3 come back to federal court. Typically, what
4 would happen is they would arbitrate the claim
5 again. Like, the effect of, for instance --

6 JUSTICE KAVANAUGH: Well, it depends
7 what the state court said in tossing the
8 arbitration award, right?

9 MR. UNIKOWSKY: Well, not really
10 because, if the federal court -- if the case is
11 arbitrable, then -- and the state court says
12 there's some defect in the arbitration
13 proceeding, but the case is still arbitrable,
14 you'd presumably go back and rearbitrate.

15 Theoretically, the parties, for
16 example, might stipulate that if the award is
17 vacated, they're just going to give up on
18 arbitration, and then they could go back to
19 federal court, either file a Rule 60 motion, or
20 the federal court could opt to wait to dismiss
21 the case until the state court's proceedings
22 are done and it could be reactivated in federal
23 court.

24 JUSTICE KAGAN: Do states have pretty
25 close standards?

1 MR. UNIKOWSKY: They do. I don't
2 think that's -- I'm not aware of any state that
3 diverges significantly. Like, there's, like,
4 minor wording differences sometimes. I think
5 there would be an obvious preemption problem.
6 As -- as I said, if the state authorized de
7 novo review of an arbitration award, that would
8 be contrary to Section 2's substantive standard
9 that arbitration agreements should be enforced.

10 But, if there was, like, very small
11 distinctions or differences in things like the
12 statutes of limitations, I don't think that
13 those types of differences would necessarily --

14 JUSTICE KAGAN: I have another
15 question also just about practice here. Are --
16 are most of these 9 and 10 applications brought
17 as freestanding applications, or are they
18 connected to a -- to a federal suit in -- in
19 the way that this one was?

20 MR. UNIKOWSKY: I mean, I've read a
21 lot of cases. I'm -- I'm not sure of the
22 empirics there. I think they're mostly brought
23 independently because, usually, there's not
24 that much dispute over whether parties have to
25 arbitrate, but I've seen it on both sides.

1 I -- I don't know a specific number.

2 JUSTICE KAGAN: And is there a way in
3 which your theory or Mr. Geysen's theory would
4 push the practice in one direction or another
5 in a way that either made sense or didn't make
6 sense?

7 MR. UNIKOWSKY: So, yes. I appreciate
8 the opportunity to say that. So one of the
9 concerns about Respondents' position is that
10 it'll create an incentive every -- in every
11 case to file a freestanding motion to compel
12 arbitration or do something else to get to
13 federal court if you want to have that anchor.

14 And this Court remarked on this in
15 both Vaden and as well as Justice Breyer's
16 dissent in Badgerow. Vaden said it would be a
17 totally artificial distinction between -- to
18 distinguish between Section 9 and 10
19 applications associated with preexisting suits
20 and not so associated.

21 And Justice Breyer's Badgerow dissent
22 reiterated that language, that the
23 jurisdictional anchor would create that totally
24 artificial distinction.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas, anything further?

3 Justice Alito?

4 JUSTICE ALITO: Well, just out of
5 curiosity, do you think we should ask Claude to
6 decide this case?

7 (Laughter.)

8 MR. UNIKOWSKY: No. I -- I adhere to
9 the wise judgment of -- of this Court.

10 CHIEF JUSTICE ROBERTS: Justice
11 Sotomayor?

12 JUSTICE SOTOMAYOR: You're suggesting
13 to me that people who have stays in place
14 typically don't move that court for motions to
15 confirm the award, that they usually go to --
16 to -- somewhere else for that?

17 MR. UNIKOWSKY: No. I'm suggesting
18 that usually, motions to confirm the award
19 aren't necessary, especially when there was --

20 JUSTICE SOTOMAYOR: No, no, no, I
21 understand that. But, when there is a stay,
22 what's the number of cases that go to another
23 court?

24 MR. UNIKOWSKY: Well, there's a
25 circuit conflict on this issue. And it's true

1 that most of the courts have gone with
2 Respondents' position, but most of those
3 opinions are sort of not -- not very -- there's
4 not a lot of reasoning --

5 JUSTICE SOTOMAYOR: It doesn't matter,
6 but the -- the vast majority -- I'm not aware
7 of a Section 3 stay case where the other side
8 has come to a different court to confirm the
9 award.

10 MR. UNIKOWSKY: Well, I mean, there's
11 a -- there's a circuit conflict on this issue.
12 And --

13 JUSTICE SOTOMAYOR: So the -- where
14 they're not permitted -- that's what drew us to
15 take this case. Where they're not permitted
16 to, they can't.

17 MR. UNIKOWSKY: Right.

18 JUSTICE SOTOMAYOR: But the point is,
19 when they are permitted, they stay in the court
20 where the stay is granted, correct?

21 MR. UNIKOWSKY: Right. It's likely
22 that if the Court rules for Respondents, people
23 don't want to pay a second filing fee --

24 JUSTICE SOTOMAYOR: All right.

25 MR. UNIKOWSKY: -- so they'll probably

1 go --

2 JUSTICE SOTOMAYOR: You -- you talk
3 about your fear of -- of people choosing
4 litigation, choosing a venue, and not
5 arbitrating in order to get a venue.

6 MR. UNIKOWSKY: Yes.

7 JUSTICE SOTOMAYOR: You have to be
8 Houdini and -- or not Houdini. You have to
9 have magical powers to know whether you're
10 going to win or lose, right?

11 MR. UNIKOWSKY: No. You can just
12 bring a freestanding Section 4 motion to compel
13 arbitration, which this Court held you could do
14 in Vaden.

15 JUSTICE SOTOMAYOR: Well, you didn't
16 bring it.

17 MR. UNIKOWSKY: No.

18 JUSTICE SOTOMAYOR: You had to have
19 the foresight -- you went to New York, a
20 jurisdiction that had no connection to the
21 dispute where -- where the dispute happened,
22 and only because you lost in New York are you
23 wanting to get out of New York.

24 MR. UNIKOWSKY: Your Honor, the facts
25 of this specific case don't present the

1 practical concern you've elaborated --

2 JUSTICE SOTOMAYOR: Well, but they
3 present the practical concern that your fear
4 requires a lot of predictions that parties are
5 unlikely to engage in because, right now, most
6 of them don't fight where they're going. They
7 just do arbitration.

8 MR. UNIKOWSKY: I --

9 JUSTICE SOTOMAYOR: And most of them
10 don't fight awards. They accept them.

11 MR. UNIKOWSKY: Right, but the point
12 is, look, if I'm -- if I am advising a client
13 and the client says we're about to arbitrate
14 and we might need down the road to file an
15 application to confirm or vacate the award, and
16 the client says, I'd rather be in federal
17 court, in every case, I would say let's go to
18 federal court.

19 JUSTICE SOTOMAYOR: You know, I've
20 practiced a lot of arbitration law. I don't
21 know a client who ever said that to me. I want
22 to file it in this court in case my -- I win
23 the award, I want to be in federal court.

24 Thank you, counsel.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 Justice Gorsuch?

2 Justice Kavanaugh?

3 Justice Barrett?

4 JUSTICE BARRETT: Just as a practical
5 matter, under your theory, the stay is in
6 place. You have the award. You want to
7 confirm it.

8 Do you have to go get a -- do you file
9 a motion to dismiss first in the district court
10 before you go to the state court to try --
11 state court to try to get the arbitral award
12 confirmed or vacated?

13 MR. UNIKOWSKY: No, I don't think you
14 necessarily have to do that. I don't think
15 there's a specific order of operations because
16 we view this as a non- -- like, the arbitration
17 award as a non-jurisdictional defense, akin to
18 res judicata or release.

19 I think the federal court could opt,
20 if it knows, that there's an ongoing vacate or
21 confirm proceeding, it could opt to just wait
22 to dismiss the federal suit until those
23 proceedings wrap up. I don't think there's
24 necessarily an order of operations that's
25 required.

1 JUSTICE BARRETT: Okay. Thanks.

2 CHIEF JUSTICE ROBERTS: Justice
3 Jackson?

4 JUSTICE JACKSON: Can I just take you
5 back to the original questions that I think
6 Justice Sotomayor and Justice Kagan asked
7 about, treatment of this as a motion --

8 MR. UNIKOWSKY: Yes.

9 JUSTICE JACKSON: -- and Section 6.
10 And I know that you referenced Badgerow's
11 statement that the applications will get
12 streamlined treatment as a motion, but Badgerow
13 cited a case called Hall Street Associates for
14 that proposition. It quoted from Hall Street.

15 And that entire quote says, we'll get
16 streamlined treatment as a motion obviating the
17 separate contract action that would usually be
18 necessary to enforce or tinker with an arbitral
19 award in court.

20 So it appears at least as of Hall
21 Street, the -- the Court understood the way
22 that this worked, that the reason why you're
23 treating this as a motion is that it would mean
24 that you wouldn't need another contract action
25 in another court in order to enforce the award.

1 Why -- why doesn't this undermine the argument
2 that you're making now?

3 MR. UNIKOWSKY: Because I -- I
4 interpret that language in Hall and Badgerow
5 differently. Section 6 does not distinguish
6 between applications in a freestanding case and
7 applications that are associated with the
8 preexisting case, just a single rule that
9 covers all FAA applications that says that they
10 will be treated like a motion.

11 And what the Court said in Badgerow
12 was what that means is not that it is a motion
13 in a case in which there is jurisdiction. It
14 will just be treated like one.

15 JUSTICE JACKSON: I understand, but in
16 Hall, it says the reason why it's treated as a
17 motion is because it will obviate the separate
18 contract action. And what I'm confused about
19 is how that could be consistent with your
20 vision, which would require a separate
21 contract.

22 MR. UNIKOWSKY: Well, I think there
23 has to be jurisdiction over the contract
24 action. If there isn't jurisdiction, the court
25 couldn't hear it. And if there is

1 jurisdiction, then yes, the court could hear it
2 as a motion and it would save a lot of time and
3 effort.

4 And Section 9 and 10 has these very
5 specific service-of-process provisions. And if
6 the defendant is within the district, it's sort
7 of easier to serve process than it is normally.
8 And I think Section 6 is similar with that
9 streamlined procedure, but that doesn't mean
10 there is jurisdiction. It simply talks about
11 what happens if there is jurisdiction.

12 JUSTICE JACKSON: Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Geysler.

16 ORAL ARGUMENT OF DANIEL L. GEYSER

17 ON BEHALF OF THE RESPONDENTS

18 MR. GEYSER: Thank you, Mr. Chief
19 Justice and may it please the Court:

20 Consistent with decades of established
21 doctrine, federal courts of preexisting
22 jurisdiction may resolve related claims in the
23 same pending case and nothing in the FAA or
24 Badgerow overrides the ordinary jurisdictional
25 rules in this setting.

1 A federal court already vested with
2 original jurisdiction has obvious power to hear
3 FAA motions in that pending action. There's no
4 need to ask if there is a redundant basis for
5 original jurisdiction because jurisdiction
6 already exists and any FAA motion falls
7 squarely within the Court's supplemental
8 jurisdiction.

9 This follows under the plain text of
10 Title 28. It adheres to ordinary
11 jurisdictional principles, and it promotes the
12 FAA's purpose and objectives, including
13 facilitating the judiciary supervisory role in
14 enforcing awards.

15 Petitioner's contrary approach
16 contravenes Section 1367. It is at odds with
17 *Badgerow*, and it invites unworkable and
18 untenable results. Respondents are simply
19 asking to go back to the same court to enter
20 judgment and dismiss Petitioner's case, without
21 having to bifurcate these proceedings, file new
22 state law litigation, and endure a parallel
23 federal appeal, and chase down Petitioner to
24 finally bring this case to a close.

25 I welcome the Court's questions.

1 JUSTICE THOMAS: How exactly does 1367
2 apply to a Section 9 application, where there
3 are no apparent claims?

4 MR. GEYSER: Well --

5 JUSTICE THOMAS: Where the claims in
6 the section -- in an application under Section
7 9?

8 MR. GEYSER: Well, I think it applies
9 exactly under Section 1367. You have an
10 existing federal case which vests original
11 jurisdiction. The Section 9 claim, if you look
12 at it as a state law analog, as a contractual
13 resolution of the claim, as Badgerow did, then
14 they -- there would be supplemental
15 jurisdiction over that -- that state law claim.

16 Now --

17 JUSTICE THOMAS: But it's not a state
18 claim.

19 MR. GEYSER: It -- it isn't, which I
20 think is all the more reason that there clearly
21 is jurisdiction under 1367. 1367 isn't limited
22 to state law actions. It's any claim that's so
23 related to the original claim that it forms
24 part of the same case or controversy.

25 JUSTICE KAGAN: Well, but it's the

1 same nucleus of operative fact. That's the --
2 that's the test. How is this the same nucleus
3 of operative fact? It seems to me completely
4 two different sets of facts.

5 MR. GEYSER: Well, I don't think so,
6 Your Honor. It's the -- it's the contractual
7 resolution of the pending claim in the same
8 case.

9 JUSTICE KAGAN: Well but, Mr. Geyser,
10 I mean, what -- what the -- I think
11 Mr. Unikowsky said this, what the -- the -- the
12 second case is going to be about is something
13 like did the arbitrator commit fraud. It's
14 going to have nothing to do with the actual
15 claims in the case. You're not allowed to
16 relitigate those.

17 MR. GEYSER: You -- you -- you're not,
18 but I don't think that matters. I don't think
19 the test is are the elements coterminous. It's
20 -- are the claims so related they form part of
21 the same case or controversy?

22 The arbitration award is an
23 affirmative defense in the case. It's hard to
24 see how something can be an affirmative defense
25 to claim in the case without being related to

1 that case.

2 JUSTICE KAGAN: Yeah. I think that
3 that's just not 1367's focus. 1367 says we're
4 -- we're not going to look sort of as an
5 abstract matter as to whether two claims were
6 brought by the same parties or have certain
7 features or are connected with each other in a
8 certain way, other than one particular way,
9 which is are the facts the same in these two
10 claims?

11 And the facts are not going to be the
12 same in these two claims.

13 MR. GEYSER: Well -- well, not all the
14 facts, but you're still asking -- this is a
15 contractual resolution of the claim that is
16 pending. It's like saying that the judgment in
17 a case is somehow unrelated to the original
18 claim that produced the judgment.

19 I -- I think it doesn't have to be the
20 same. We -- we absolutely -- I agree with my
21 friend that these claims will not overlap.
22 Often the they have nothing to do with each
23 other, except --

24 JUSTICE KAGAN: Yeah, common nucleus
25 of operative fact. And often they have nothing

1 to do with each other. I would say almost
2 always they have nothing to do with each other.

3 MR. GEYSER: Well --

4 JUSTICE KAGAN: How could that
5 possibly be a common nucleus of operative fact?

6 MR. GEYSER: Well, it's not that every
7 fact has to share the same, you know, original
8 atom. It's the, is there a common nucleus of
9 operative fact?

10 JUSTICE BARRETT: It's the great-great
11 grandchild of the original claim kind of
12 tenuated on? I mean, is it a claim? You
13 characterize it as an affirmative defense. Not
14 a counterclaim. Not a subsidiary claim. It
15 doesn't seem like it's a claim.

16 MR. GEYSER: Well, it's -- it's
17 resolving -- I think it is resolving the claim
18 in the sense that it is -- it is contractually,
19 you know, disposing of the claim that has been
20 brought.

21 Now, I will say that there's an
22 entirely different way to look at this. And
23 part of the problem is that the FAA, as this
24 Court has acknowledged, is -- is unique.

25 We have an unusual situation where we

1 have a federal right under a federal statute
2 that doesn't give rise to federal jurisdiction.
3 And one analog is to say that the arbitration
4 award is like a contractual settlement.

5 So then confirming the award under the
6 FAA, even though it's a federal statute, is
7 like resolving a state law contract dispute,
8 sort of like Kokkonen.

9 Another analog, though, is just to say
10 this is the federal directive on how a court
11 decides what to do when the claim that's
12 pending before it is now settled. So in the
13 same way that Congress can provide rules of
14 decision and Rule 23, to say if you're going to
15 settle a class action, do you accept the
16 settlement or not, or attach conditions to Rule
17 41, or do exactly what the Court contemplated
18 could have happened in Kokkonen.

19 JUSTICE JACKSON: And if that's the
20 way you're looking at it, are you drawing on
21 original jurisdiction then?

22 MR. GEYSER: Yes. It's --

23 JUSTICE JACKSON: I mean, that's not
24 -- that's not a supplemental jurisdiction idea.

25 MR. GEYSER: The -- then we don't need

1 supplemental jurisdiction --

2 JUSTICE JACKSON: Right.

3 MR. GEYSER: -- which is why we
4 offered two competing paths in our brief that
5 lead to effectively the same result.

6 JUSTICE BARRETT: And it's not
7 ancillary jurisdiction, just to clarify.
8 You're saying that the original jurisdiction,
9 the 1331 hook is carrying you all the way
10 through?

11 MR. GEYSER: I think that is one way,
12 I think in a sensible way to look at it. I
13 think it's actually the way that Cortez Byrd
14 was contemplating saying, of course, once you
15 have an original case and you've stayed it
16 under Section 3, then of course you have
17 jurisdiction to resolve what's a motion in the
18 pending case, just as Justice Kagan and Justice
19 Jackson pointed out, to decide what to do with
20 that contractual resolution of the single
21 pending claim.

22 JUSTICE KAVANAUGH: You heard his
23 response on Cortez Byrd. Do you want to --
24 your friend. Do you want to react to that?

25 MR. GEYSER: Sure. So I think -- I --

1 I think my friend is correct that Cortez Byrd
2 was citing Marine Transit, which is a Section 8
3 case, but Cortez Byrd was not a Section 8 case.

4 So the way I read Cortez Byrd, and I
5 think the way the courts have read Cortez Byrd
6 is the court was importing this common sense
7 intuitive proposition that happened to arise in
8 the Section 8 context and putting it into the
9 Section 9 through 11 context.

10 And Cortez Byrd, by the way, was a
11 2002 decision. It's been decades on the books.
12 Courts have construed it exactly the same way.
13 It was only until the Fourth Circuit --

14 JUSTICE KAVANAUGH: Most of the courts
15 have gone that way, right --

16 MR. GEYSER: Well, I think --

17 JUSTICE KAVANAUGH: -- most of the
18 courts of appeals?

19 MR. GEYSER: I -- I think every court
20 has gone that way. The only one that hasn't
21 was the Fourth Circuit, which, with -- with all
22 due respect to the Fourth Circuit, I think just
23 profoundly misread Badgerow.

24 JUSTICE KAVANAUGH: That's why I said
25 "most."

1 MR. GEYSER: Yeah. And -- and that --
2 that is -- and, in fact, when we say "most,"
3 that -- that is effectively as far as we're
4 aware the only court that has gone the other
5 way. I'm not aware of a single court before
6 Badgerow that's gone the other way.

7 JUSTICE GORSUCH: Mr. Geysler, you've
8 laid out two paths for us, one, the
9 supplemental jurisdiction path, reliant on a
10 statute that could never be accused of being
11 overly precise. The other would be the
12 original jurisdiction path.

13 I know what your answer's going to be,
14 and it's going to be they're both great, Your
15 Honor. But which one do you think, if forced
16 to choose, is -- is the safer route and why?

17 MR. GEYSER: I mean, I -- I really do
18 think that they're both great and I think that
19 they both work.

20 JUSTICE GORSUCH: I knew -- I --
21 (Laughter.)

22 MR. GEYSER: So the --

23 JUSTICE GORSUCH: Any -- any -- any
24 lawyer who -- who -- who doesn't say that isn't
25 worth his salt where you wish to win, and I

1 understand that. But --

2 MR. GEYSER: I -- I think that -- and
3 it really is that it's -- it's half -- you
4 know, half in one hand, half in the other.
5 It's -- I would say that you could say it's
6 part of the original jurisdiction. That's just
7 a very easy way to resolve it. We're in the
8 same pending case. We're trying to dispose of
9 the original claims.

10 JUSTICE KAGAN: Your brief -- if I
11 read your brief, your brief is a supplemental
12 jurisdiction brief.

13 MR. GEYSER: Well, we -- we did make
14 both arguments, and we did supplemental
15 jurisdiction --

16 JUSTICE KAGAN: I mean, you made one
17 in a couple of paragraphs, and you made the
18 other in 50 pages.

19 MR. GEYSER: Well, we thought one --

20 JUSTICE KAGAN: That might be a slight
21 exaggeration.

22 MR. GEYSER: Well, no. We thought one
23 was so obvious that we were trying to help the
24 Court if it decided to go the other way.

25 But I -- I do think, though, that the

1 reason that we were fronting 1367 is -- is
2 because of the analogy that the Court drew in
3 Badgerow, is that if you do think of this as a
4 contractual resolution of the claim and then
5 you think of it as a dispute over the -- that
6 contractual settlement, then it -- it does look
7 like it's a little bit different.

8 And I do think that they clearly arise
9 out of the same ultimate, you know, common
10 nucleus of operative fact. It's clearly the
11 same case or controversy because, again, it
12 is -- it is literally resolving the single
13 controversy before the case, which is why if
14 you looked at how courts typically dispose of
15 these actions if they do retain jurisdiction,
16 as every court outside the Fourth Circuit does,
17 is that they say we're going to -- if we
18 confirm the arbitration award, you enter
19 judgment on the arbitration award and judgment
20 on the underlying claim. You do it in one fell
21 swoop because it is effectively the same
22 action.

23 JUSTICE KAVANAUGH: Can you respond to
24 your friend's comments, picking up on Justice
25 Breyer's dissent in Badgerow about incentives?

1 MR. GEYSER: The -- I think that it's
2 really hard to see how there's an incentive to
3 file an anchor suit for any number of reasons,
4 including that courts -- just parties aren't
5 doing that.

6 Again, Cortez Byrd's language, you
7 know, my friend can quibble whether it was
8 overstated or improper, but Cortez Byrd's
9 language was unequivocal. If you imported
10 that -- that sentence into this decision, you
11 could write a one-page opinion with a holding
12 that says we resolved this in Cortez Byrd.

13 That was in 2002, and there hasn't
14 been a single identified case of someone filing
15 an anchor suit, and I think it's for similar
16 reasons that Justice Sotomayor pointed out.
17 It's a very odd litigant who's choosing an
18 original venue not to litigate the case and not
19 to compel -- not to compel arbitration, which
20 is sometimes heavily contested, and that's what
21 you'd be worried about, but thinking months or
22 years down the road, what is this going to look
23 like once we get that award? Do I want to
24 confirm it or vacate it? And I'd rather be in
25 federal court, so I'm going to file this

1 preemptive federal action.

2 And for some parties, it's not even an
3 option. If you're a plaintiff and you file the
4 original lawsuit to litigate, then the -- it's
5 not even clear. You might have -- first, under
6 Morgan versus Sundance, you might have
7 forfeited your arbitration rights because
8 you're trying to litigate. And if the
9 defendant doesn't move to compel arbitration,
10 you're then out of luck. I mean, you -- you
11 showed up there. It's -- it's your lawsuit.
12 So I -- I don't think that those incentives
13 actually play out.

14 And if you're concerned about the
15 practical consequences, I would look at the
16 practical consequence of where my friend's
17 position would lead courts and litigants. It
18 would create this -- this odd situation where a
19 party finishes in federal court after the stay.
20 Now -- now, apparently, they have to -- the
21 federal court will either dismiss the case
22 without knowing whether those claims are
23 actually resolved or not, or they stay the case
24 to wait, as my friend said, potentially several
25 years for the post-arbitration motions to play

1 out in state court.

2 Now, if the court -- if the federal
3 court does dismiss the case, now we have an
4 even worse situation. Now we have parallel
5 proceedings, you have a federal appeal
6 potentially contesting the pre-arbitration
7 motion to compel arbitration because you can't
8 take that until you have a final judgment in
9 federal court. And then you have the same
10 litigants going to state court to challenge
11 what happened in the arbitration itself.

12 So, instead of having one proceeding
13 up and running where parties have already paid
14 a filing fee, they've found the defendant,
15 they've effectuated service, they've maybe
16 thought about venue, they thought about
17 personal jurisdiction, everything is up and
18 running where you can resolve it in one
19 proceeding, take one appeal -- it's nice, neat,
20 and tidy -- instead, you have now competing
21 litigation in separate tracks in different
22 court systems.

23 I -- I think -- I don't think that's
24 what Congress intended. I think that would
25 create what Cortez Byrd described as, you know,

1 attributing to Congress a taste for the
2 bizarre, and I do think that would be a bizarre
3 situation.

4 JUSTICE BARRETT: I agree with you
5 that it seems more practical and tidy to do it
6 the way that you just described. I'm wondering
7 if you fronted the 1367 argument because, in
8 some ways, it provides -- I mean, I still
9 struggle with the common nucleus of operative
10 fact and exactly where is the claim issues, but
11 it provides a theoretical grounding.

12 When I'm trying to think about 1331
13 just by itself, I'm trying to figure out what
14 in 1331, if I'm blinded, I'm taking 1367 out of
15 it, justifies the adjudication of a separate
16 contract dispute.

17 MR. GEYSER: I think it would be
18 exactly the same way that when a court invokes,
19 say, Rule 23(e), it doesn't say do I have
20 separate jurisdiction to decide whether to
21 accept this settlement or not, or whether, in
22 the Rule 41 context, do I have jurisdiction to
23 decide whether to retain, you know,
24 jurisdiction over the settlement to police it
25 or to put it in the decree.

1 I think -- I think it is part of
2 the -- the original power to dispose of the
3 claim.

4 JUSTICE BARRETT: And so, under that
5 formulation, we're thinking of it more as a
6 motion than a claim, which would be
7 inconsistent with the 1367 theory, right?

8 MR. GEYSER: Debatably. I think --
9 1367, I think, has -- has been described as --
10 as quite broad. I think it's pretty capacious.
11 I think it can cover lots of things. But,
12 luckily for us, Section 6 under the FAA says
13 treat these as motions.

14 So, if -- if you want to treat the --
15 the -- this as a motion covered by original
16 jurisdiction, you have a very easy path to do
17 it. It's consistent with Cortez Byrd. It's
18 consistent with the fact that Section 6 says
19 treat this as a motion. I think it's even
20 consistent with Kokkonen.

21 And, again -- and, again --

22 JUSTICE BARRETT: Well --

23 MR. GEYSER: -- just to be clear,
24 Kokkonen was dealing with a far more aggressive
25 assertion of ancillary jurisdiction. That was

1 a dismissed case, and the parties were trying
2 to get the court to reinvoke jurisdiction to
3 decide something.

4 JUSTICE BARRETT: Okay. Let's talk
5 about Kokkonen. What about Kokkonen's kind of
6 Bucket 2, where Kokkonen says, well, it would
7 be different if the court had reserved in the
8 dismissal the authority to enforce the terms of
9 the settlement? You didn't push that
10 particularly hard. Why?

11 MR. GEYSER: Well, I -- we did, and
12 I'm sorry if it wasn't clear that we did.
13 Here, it's even better. You don't -- you don't
14 have a dismissal. You have existing pending
15 claims in a pending case.

16 So Kokkonen, again, is a much harder
17 case. There, the Court's saying, I'm going to
18 dismiss this action and I'm going to retain
19 jurisdiction just in case something happens
20 down the road. Here, we have pending federal
21 claims.

22 And if you -- and you don't even know
23 what to do with these claims. So I think, with
24 all due respect to my friend, I think he's
25 incorrect. To dismiss the case without knowing

1 whether the arbitration award will ultimately
2 stand doesn't make any sense. If the award is
3 ultimately vacated, the parties could very well
4 say, you know what, that was a waste of time,
5 let's just litigate in court.

6 JUSTICE BARRETT: So is ancillary
7 jurisdiction of the sort -- ancillary
8 enforcement jurisdiction of the sort that
9 Kokkonen talks about applicable here? Is that
10 a coherent way to think about this?

11 MR. GEYSER: I -- I think you could.
12 Now I -- I do think that this raises a slight
13 complexity about -- to the extent 1367 has
14 displaced or captured ancillary jurisdiction,
15 but I think the very fact that Kokkonen
16 contemplated that a court could retain
17 jurisdiction to decide those subsequent
18 settlement disputes suggests that this would be
19 covered then by 1367.

20 JUSTICE BARRETT: Well, that's why I
21 said enforcement jurisdiction. I think that's
22 different because nobody really disputes that a
23 court could exercise enforcement -- ancillary
24 enforcement jurisdiction over, say, a contempt
25 proceeding. So that would be different. It

1 wouldn't be subsumed by 1367 the same way.

2 MR. GEYSER: We -- we think that works
3 perfectly well, and I think it's -- it's a
4 sensible way to look at this.

5 I do want to address just very quickly
6 the Section 8 argument about does the text of
7 Section 8 somehow preclude jurisdiction under
8 1331 or 1332 or 1367. And I think it quite
9 clearly does.

10 Section 8 is a maritime provision, and
11 it starts off by saying, notwithstanding
12 anything else going on, so this is Congress's
13 attempt to say we're creating a self-contained
14 unit to deal specifically with admiralty and
15 we're going to provide specific rules for that
16 context.

17 In order for that to preclude the
18 assertion of jurisdiction elsewhere -- because,
19 again, we're not relying on the FAA for
20 jurisdiction; we're relying on Title 28 -- it
21 would have to show that Congress in Section 8
22 was thinking, I'm going to foreclose
23 jurisdiction for every non-maritime case, the
24 overwhelming swath of cases that arise under
25 the FAA, simply by creating a specific rule of

1 decision for that narrow context.

2 JUSTICE KAGAN: Mr. Geysler, just going
3 back to this, oh, it's just a motion in a case,
4 if you have jurisdiction in a case, of course,
5 you have jurisdiction over this too, I mean,
6 this is a very unusual kind of motion, right?
7 It's a motion which could have been brought as
8 a freestanding suit, which is -- which is
9 essentially a freestanding suit.

10 And a freestanding suit in which there
11 would have been no jurisdiction. So
12 notwithstanding that there's this sort of like
13 unusual posture in which it appears as, like, a
14 motion in another suit, we all know that it's a
15 different suit and a different suit in which
16 there is no jurisdiction.

17 So why do you -- why does that carry
18 you home?

19 MR. GEYSER: Well, I -- I think
20 it's -- it's not quite just an entirely
21 different suit because, again, it's -- it's a
22 motion with a different nature of claim to
23 resolve the original pending claim.

24 So I -- I do think, again, just like
25 Rule 23(e) is not a different suit, the -- the

1 parties settle class wide --

2 JUSTICE KAGAN: I think what I mean of
3 it as a different suit is it's a bunch of
4 contract claims. Let's say it's about, like,
5 the arbitrator committed fraud and so my -- the
6 contract is invalid, that's what this suit is.
7 That's what this motion is. Call it whatever
8 you want. That's what this thing is.

9 And that has nothing to do with the
10 employment action that's kicked off this whole
11 thing.

12 MR. GEYSER: Except for the fact that
13 it is resolving the employment action that
14 kicked off this whole thing. So again, that's
15 why I think you'd be -- it's really hard to say
16 that resolving a claim is unrelated to the
17 claim, even if the reason you resolved it,
18 maybe you settled because it they you -- they
19 offered you a lot of money or they -- they gave
20 you something that you wanted that has nothing
21 to do with the underlying factual allegations.
22 It's still resolving the claim.

23 And that -- I think that shows why
24 it's part of the same case or controversy. I
25 mean, it is literally resolving the case or

1 controversy. And -- and again, I think a
2 contrary view on that would say that an
3 affirmative defense to a claim in a case
4 doesn't arise or relate to that same case,
5 which -- which, it's -- it's hard to even
6 articulate the concept because it just doesn't
7 make much sense.

8 But, again, I think that's why they're
9 -- we tried to offer two different paths in the
10 brief because depending on which way you look
11 at it, we're dealing with this odd hybrid that
12 the FAA set up. I mean, again, no -- no one
13 has ever applauded Congress for creating, you
14 know, the world's cleanest statute. It's five
15 pages of the U.S. code. I think this Court is
16 burdened with two or three cases a year, it
17 seems, under this statute going back, I don't
18 know how many years.

19 But looking at it here, I think what
20 Cortez Byrd acknowledged, you know, two decades
21 ago still holds. Of course if you have
22 jurisdiction to stay the case under Section 3,
23 you have jurisdiction to process it at the end
24 of the day.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas, anything further?

3 Justice Alito?

4 Justice Kagan?

5 Justice Gorsuch?

6 Justice Barrett, anything further?

7 Justice Jackson?

8 Thank you, counsel.

9 MR. GEYSER: Thank you.

10 CHIEF JUSTICE ROBERTS: Rebuttal,
11 Mr. Unikowsky?

12 REBUTTAL ARGUMENT OF ADAM G. UNIKOWSKY

13 ON BEHALF OF THE PETITIONER

14 MR. UNIKOWSKY: Thank you, Your Honor.

15 I'd like to first begin with the
16 discussion of Section 1331 which didn't occupy
17 much of the briefing but did occupy much of the
18 discussion this morning.

19 I don't think that confirming the
20 arbitration award can be justified under
21 Section 1331 because that judgment is not the
22 resolution of the original claim. The original
23 claim was a federal employment claim and the
24 resolution of that claim is that the claim
25 cannot proceed in federal court because the

1 parties agreed to arbitrate that claim.

2 So just as the court dismisses a claim
3 based on res judicata or release when it turns
4 out that the parties have adjudicated the case
5 in a different forum, the appropriate
6 resolution of the federal claim is to dismiss
7 it because the federal court can't hear it when
8 it's being decided elsewhere.

9 But confirming the arbitration award
10 is different. It's transforming the
11 arbitration award into a judgment and the
12 practical difference there is that it allows
13 Respondents to execute a money judgment against
14 Petitioner. So what happened here is that the
15 parties agreed to arbitrate and then this
16 arbitrator entered the sanctions award which is
17 a money judgment against Petitioner and then
18 confirming the award transforms that
19 contractual resolution of the claim into a
20 federal judgment. And that's not a federal
21 judgment.

22 The money judgment against Petitioner,
23 which is the real practical effect of
24 confirming this award, is not resolution of the
25 original claim. It's transforming the parties'

1 agreement to adjudicate this in a contractual
2 method into a federal judgment. That's why I
3 think extra jurisdiction is needed. Section
4 1331 doesn't do the trick.

5 And so then you get to Section 1367.
6 And as some of the questions from the bench
7 today made clear, there is no common nucleus
8 effect. I think Kokkonen is directly on point
9 on this issue. I understand in Kokkonen
10 there's a dismissal rather than a stay but as
11 to the first head as Kokkonen called it of
12 ancillary jurisdiction, the Court said it,
13 "permits 'disposition by a single Court of
14 Claims that are in varying respects and degrees
15 factually interdependent,'" which was very
16 similar to the 1367 analysis.

17 And then the court held that the facts
18 underlying Respondent's dismissed claim for
19 breach of agency agreement and those underlying
20 its claim for breach of settlement agreement
21 have nothing to do with each other. It would
22 neither be necessary nor even particularly
23 efficient that they'd be adjudicated together.

24 And that reasoning is right on point
25 here because at core the arbitration award is

1 similar to a breach of settlement agreement
2 claim. It's a -- it's a contractual way of
3 resolving the dispute.

4 And the Court insight from Kokkonen is
5 parties that agree to resolve a dispute via
6 contract who later dispute that contractual
7 resolution are adjudicating a different dispute
8 from the underlying federal dispute.

9 I'd like to say a few words about
10 Cortez Byrd. You know, the Court has said that
11 -- the Court has cautioned against, you know,
12 giving too much credit to drive-by
13 jurisdictional rulings. And I think this is
14 just the canonical case of a drive-by
15 jurisdictional ruling.

16 So first of all, jurisdiction was
17 conceded in that case under diversity
18 jurisdiction. Also there was no Section 3 stay
19 at all. So the jurisdictional anchor issue was
20 doubly not presented.

21 Meanwhile, the court was talking about
22 what it had previously held in this case,
23 Marine Transit, that everyone agrees is
24 irrelevant. The court was also talking about a
25 venue issue which was also conceded by one side

1 in that discussion.

2 And all of this in service of making
3 an argument that's ultimately the argument
4 we're making in this very case, which is that
5 Congress would not have intended for a court's
6 authority to hear a Section 9 or 10 stay
7 application to depend on whether or not there
8 was a preexisting suit on file.

9 So I do understand that lots of lower
10 courts have followed that statement from Cortez
11 Byrd, which makes sense. I think when a lower
12 court sees a sentence like that in the U.S.
13 reports much like in the Royal Canin case which
14 presented a very similar scenario, the courts
15 will often go along with it. That's
16 essentially what happened here.

17 But I think that, you know, this Court
18 has, you know, the authority to check as it did
19 in Royal Canin whether that one sentence really
20 establishes a holding. And I think it just
21 doesn't when you look at the posture of that
22 case as compared to this one.

23 Finally, in terms of the practical
24 effects that Respondents identify, I don't
25 think that they're that -- that significant. I

1 mean, what happens is after there's an
2 arbitration award, you go to the federal court
3 and if a party says look, we're planning to go
4 to state court to confirm the award or vacate
5 it, the federal court can say look, okay, I'll
6 wait to see whether or not they have a case
7 that ever comes back and I'll just delay the
8 dismissal a little bit longer, and we'll go to
9 state court and -- and litigate there.

10 I mean, you know, parallel federal and
11 state litigation happens every day in our
12 system of -- of -- in our -- in our federal
13 system and I don't think that the practical
14 concerns here are any greater than they would
15 be in any other case when you have parallel
16 litigation across the federal and state
17 systems.

18 If there's no further questions, we'd
19 ask the Court to reverse the judgment below.

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

22 (Whereupon, at 12:19 p.m., the case
23 was submitted.)

24

25

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