No. 22-1218

IN THE

Supreme Court of the United States

WENDY SMITH, ET AL.,

Petitioners,

v.

KEITH SPIZZIRRI, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners filed a lawsuit against respondents even though they concede that every claim is subject to mandatory arbitration under an agreement they signed. Based on that concession, the district court compelled arbitration and dismissed the claims without prejudice. The court of appeals rejected petitioners' assertion that § 3 of the Federal Arbitration Act (FAA) categorically bars any district court from ever exercising its authority to dismiss claims merely because it says that a court "shall … stay the *trial* of the action until" the arbitration is complete. 9 U.S.C. § 3 (emphasis added).

The question presented is whether district courts retain their inherent authority to dismiss claims without prejudice even where it is undisputed that all claims in the case are subject to mandatory arbitration and there should therefore never be any "trial of the action" in court.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

Petitioners signed contracts committing to arbitrate claims against respondents. Yet, they violated the contracts by filing a lawsuit in court. They concede they were required to submit every one of their claims to arbitration—which means that this case was never properly in court. Yet, petitioners insist that the district court lacked the discretion to dismiss the suit based on that concession. Petitioners concede that *if* trial courts have such authority, the district court was perfectly justified in dismissing their lawsuit. Pet. 7 n.2, 28 n.11. But they maintain that Congress categorically prohibited any court from ever exercising its discretion to dismiss claims that have been sent to arbitration until after the arbitration ends, under any circumstance, regardless of how improper the lawsuit, how unlikely it is that judicial intervention will ever be needed, or how easy it would be to sue should the need arise.

The court of appeals held that Congress imposed no such categorical override of trial court discretion in § 3 of the FAA, which merely directs a trial court to "stay the *trial* of the action until" the arbitration is complete. 9 U.S.C. § 3 (emphasis added). That ruling is not worthy of review.

To start, petitioners overstate the scope of the circuit conflict and exaggerate the practical import of the discrepancy between the courts of appeals. The issue arises only where every claim in a case is subject to arbitration. In that limited circumstance, some circuits hold that a district court has discretion to either stay or dismiss the action where the circumstances

warrant, whereas others hold that the court *must* stay (and may not dismiss) the case. The practical distinction between these two positions will often be of limited significance, as the petition in this matter amply illustrates.

The decision below is also correct. Courts have always had inherent authority to dismiss cases that should never have been filed. Nothing in the plain text of the FAA overrides a district court's authority to do so just because an arbitration is under way. It merely prohibits a court from proceeding with a "trial" on some claims while others are being arbitrated.

STATEMENT OF THE CASE

Petitioners are "current and former delivery drivers" for an on-demand delivery service operated by respondents. Pet. App. 3a. Petitioners all signed contracts that were unequivocal in specifying they were "agree[ing] to resolve any justiciable disputes between" with respondents "exclusively through final and binding arbitration instead of filing a lawsuit in court." C.A. Excerpts of Record (ER) 28 (Martinez contract); ER 54 (Smith contract); ER 67 (Turner contract). The arbitration agreements provided that they "shall apply to any and all claims arising out of or relating to this Contract, the Owner/Operator's provision of services to Customers, the payments received by Owner/Operator's provision of services to Customers, the payments received by Owner/Operator for providing services to Customers, the termination of this Contract, and all other aspects of the Owner/Operator's relationship with Broker, past or present,

whether arising under federal, state or local statutory and/or common law." *Id*.

Despite these binding arbitration obligations, petitioners sued respondents in Arizona state court alleging violations of federal and state employment laws. Respondents removed the case to federal court and moved to compel arbitration and dismiss the case without prejudice. Pet. App. 10a. Petitioners expressly admitted that all their claims were subject to mandatory arbitration under the FAA. Pet. App. 2a; *see* Pet. App. 1a, 10a; Dist. Ct. Dkt. 21. They have never suggested that they had any basis for filing a lawsuit instead of proceeding to mandatory arbitration.

The district court granted respondents' motion to compel arbitration and dismissed petitioners' action without prejudice. Pet. App. 9a. In so doing, the court rejected petitioners' position that the FAA required the court to stay the action and maintain the case on its docket pending arbitration proceedings. Citing Ninth Circuit precedent, the court explained that, under the FAA, "a district court may either stay the action or dismiss it outright when, as here, the court determines that all of the claims raised in the action are subject to arbitration." Pet. App. 10a (quoting *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1074 (9th Cir. 2014), and citing *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988)). The court reiterated that it "retains discretion to dismiss the action if all claims raised are subject to arbitration." Pet. App. 10a.

The Ninth Circuit unanimously affirmed. Pet. App. 1a-7a. It held that binding Ninth Circuit precedent "establishes that district courts may dismiss suits when, as here, all claims are subject to arbitration." Pet. App. 2a (relying on *Johnmohammadi*, 755 F.3d at 1074; *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1060 (9th Cir. 2004); *Sparling*, 864 F.2d at 638; *Martin Marietta Aluminum, Inc. v. Gen. Elec. Co.*, 586 F.2d 143, 147 (9th Cir. 1978)). While stating that some of the language in FAA § 3 may "appear[] to require courts to stay litigation that is subject to mandatory arbitration," the court noted that the Ninth Circuit "has long carved out an exception if all claims are subject to arbitration." Pet. App. 4a-5a. This "line of cases" clarifies that "notwithstanding the language of § 3, the district court had discretion to dismiss Plaintiffs' suit because the parties agreed that all claims were subject to arbitration." Pet. App. 5a (cleaned up).

Petitioners also made an argument that the district court abused its discretion in granting the motion to dismiss in this particular case. Pet. App. 7a. The court of appeals rejected that argument, noting there was no point in the proceedings below at which the district court "misstate[d] the law, misconstrue[d] the facts, or otherwise act[ed] arbitrarily." Pet. App. 7a. Petitioners have since abandoned any such argument, conceding that the district court's dismissal was a sound exercise of discretion. Pet. 5 n.1, 7 n.2, 28 n.11.

Judge Graber, joined by Judge Desai, concurred in the opinion. Pet. App. 8a. She wrote separately to "encourage the Supreme Court to take up this

question." Pet. App. 8a. Judge Graber also called on the Ninth Circuit to take the case en banc to align its caselaw with what she characterized as the "Congressional requirement embodied in the Federal Arbitration Act" that mandated a stay rather than dismissal of the case. Pet. App. 8a.

REASONS TO DENY CERTIORARI

I. Petitioners Overstate The Split's Scope.

The question presented arises only in the limited circumstance where a plaintiff has filed a lawsuit even though all claims in the case are subject to mandatory arbitration. In that uncommon circumstance, the question petitioners present is whether FAA § 3 categorically prohibits district courts from ever dismissing the action without prejudice. Petitioners assert that the circuits that have resolved the question fall into two neat camps, with six circuits holding that "a stay"—not a dismissal—is always "mandatory once a court compels arbitration," and four "squarely" holding that courts have the discretion to dismiss without prejudice where all claims are arbitrable. Pet. 7 (quoting *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769-70 (8th Cir. 2011)).

Closer examination reveals that the split is not as stark as petitioners assert. Two circuits cited on the mandatory-stay side cannot be classified as such, nor at least one circuit on the may-dismiss side. Ultimately, the state of the law cannot be reduced to petitioners' simple "binary" choice. *See, e.g.*, Pet. 25-26 ("This question is binary: one view of the [Act] is

correct and the other is wrong, and a stay under Section 3 is either mandatory or not.").

For example, petitioners include the Sixth Circuit on their list of circuits that do not permit dismissal and instead require a stay even when a court determines that all claims in a case are subject to mandatory arbitration. Pet. 12-15. But the Sixth Circuit holds that there "may be situations in which a dismissal" in this context "remains permissible." *Arabian Motors Grp. W.L.L. v. Ford Motor Co.*, 19 F.4th 938, 942 (6th Cir. 2021). The court explicitly refused to "adopt an absolute rule," and declined to "decide" whether a district court should "always" stay litigation where all claims are subject to arbitration. *Id.* at 942-43. While stating that "a district court should enter a stay in the normal course in this setting," it did not define what the "normal course" is or how narrowly "this setting" should be construed. *Id.* at 942. Contrary to petitioners' suggestion (at 12-13), the Sixth Circuit thus does not line up tidily against the Ninth Circuit.

The same goes for the Eleventh Circuit. Petitioners claim that the Eleventh Circuit has "rejected" the Ninth Circuit's position that dismissal without prejudice may be warranted where all claims are subject to mandatory arbitration. Pet. 18. In truth, the Eleventh Circuit held only that a dismissal may be appropriate when there is no indication a party has sought a stay. *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1379 (11th Cir. 2005) (affirming district court's grant of motion to compel arbitration and dismissal of case where there was no evidence either party had applied for a stay). The Eleventh Circuit has not definitively

weighed in on the proper course when a party has sought a stay. *See, e.g.*, *In re Wiand*, No. 10-cv-71, 2011 WL 4532070, at *13 & n.26 (M.D. Fla. June 8, 2011) (stating that "the Eleventh Circuit has not specifically addressed the issue" whether a stay is mandatory when requested by a party); *Clayborne v. Golden Krust Franchising, Inc.*, No. 22-CV-62018, 2023 WL 2244868, at *6 (S.D. Fla. Feb. 10, 2023) (noting that "courts have been inconsistent on whether to dismiss or stay a case pending arbitration" within the Eleventh Circuit). And multiple district courts in that Circuit have continued to apply the rule articulated by the Ninth Circuit below.[1] Petitioners are wrong to count the Eleventh Circuit in their tally of circuits that, contrary to the Ninth Circuit, would compel a stay pending arbitration in the circumstances of this case.

Petitioners also incorrectly list the Eighth Circuit on the other side of the split. They claim that the Eighth Circuit "reached" the "conclusion" that FAA § 3 grants courts discretion to dismiss (rather than mandating a stay) where all claims in a particular

[1] *See, e.g.*, *Olsher Metals Corp. v. Olsher*, No. 01-3212-CIV, 2003 WL 25600635, at *9 (S.D. Fla. Mar. 26, 2003) ("A case in which arbitration has been compelled may be dismissed in the proper circumstances, such as when all the issues raised in … court must be submitted to arbitration." (emphasis and quotation marks omitted)), *aff'd*, No. 03-12184, 2004 WL 5394012 (11th Cir. Jan. 26, 2004); *Perera v. H & R Block E. Enters., Inc.*, 914 F. Supp. 2d 1284, 1290 (S.D. Fla. 2012) (when all of a plaintiff's claims are subject to arbitration, the proper course of action is to dismiss the case instead of entering a stay); *Hodgson v. NCL (Bahamas), Ltd.*, 151 F. Supp. 3d 1315, 1316 (S.D. Fla. 2015) (same).

case are subject to mandatory arbitration. Pet. 21-22 (discussing *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766 (8th Cir. 2011)). But *Green* merely concluded that the district court abused its discretion in dismissing the case under the particular circumstances presented, when "it [was] not clear all of the contested issues between the parties w[ould] be resolved by arbitration." *Green*, 653 F.3d at 770. The court thus did not categorically decide the question presented here: whether a district court may not dismiss a case pending arbitration, even when it is clear that all claims are subject to mandatory arbitration. Accordingly, since *Green*, not all district courts within the Eighth Circuit have read § 3 along the Ninth Circuit's lines. *See, e.g.*, *Industrial Steel Constr., Inc. v. Lunda Constr. Co.*, No. 20-cv-00070, 2020 WL 8225436, at *4 (S.D. Iowa Nov. 5, 2020) (citing *Green* and observing "[i]n this court's view, in light of its plain language, § 3 … explicitly requires a stay").

In short, the circuit split is not as deep as petitioners claim. Nor does the Ninth Circuit's decision below deepen any preexisting disagreement among the circuits, given the Ninth Circuit's prior rulings on the question presented.

II. The Question Presented Has Virtually No Practical Significance.

Petitioners also exaggerate the practical significance of the question presented. To start, it is simply not true that "the issue arises potentially any time a court compels arbitration." Pet. 26. Every circuit agrees that trials should be stayed where part of a case is subject to arbitration and other parts remain

in court. The question presented arises only where a court concludes that all claims are arbitrable. And this case implicates only a subset of that universe, where the parties *agree* that all claims are subject to mandatory arbitration.

Petitioners' main argument for why it is important to reject the Ninth Circuit's discretionary rule is that there may be circumstances where "[d]ismissals can also cause serious prejudice to litigants." Pet. 27. They suggest, for example, that it may be important for a district court to maintain a case on its docket pending arbitration, to make it easier for the plaintiff to call upon the court to exercise certain judicial powers to enforce arbitral rights. Petitioners point to the power of district courts to entertain requests (under certain limited circumstances) to appoint an arbitrator, 9 U.S.C. § 5; to compel the attendance of witnesses, *id.* § 7; or to force a defendant who compelled arbitration to actually proceed to arbitration, *id.* § 4. Petitioners also note that courts may entertain lawsuits to confirm, *id.* § 9, or vacate an arbitrator's decision, *id.* §§ 10-11.

But all those options are available to the plaintiff in a new lawsuit. So the difference between a stay and a dismissal without prejudice has little practical effect. And any practical effect is diminished even further, because, where those scenarios appear especially likely, a plaintiff can persuade the court to exercise its discretion not to dismiss the case.

Petitioners identify only one circumstance in which a party may suffer prejudice from a dismissal that cannot be cured by refiling the case. Pet. 27. It is

the exceedingly uncommon circumstance in which: (1) the plaintiff files multiple claims right before a statute of limitations is about to expire; (2) the plaintiff argues that some of the claims are not subject to arbitration; (3) the court disagrees and sends them all to arbitration; (4) the arbitrator disagrees with the court and concludes that some claim is not subject to arbitration; but (5) in the brief time between the filing of the original action and the arbitrator's decision on arbitrability, the statute of limitations has expired; and (6) this happens in one of the jurisdictions that does not recognize that the filing of an arbitration proceeding tolls the statute of limitations. *Compare Zarecor v. Morgan Keegan & Co.*, 801 F.3d 882, 889 (8th Cir. 2015) (holding that "pursuit of arbitration did not toll the federal statute of limitations"), *with Stewart v. Acer Inc.*, No. 22-cv-04684, 2023 WL 1463413, at *1 (N.D. Cal. Feb. 1, 2023) ("[I]t is not clear why a statute of limitations period wouldn't remain tolled while a dispute is with an arbitrator.").[2]

If that scenario ever presents itself in any case, the plaintiff would have a persuasive argument as to why the district court should stay the litigation rather than dismissing. A court would be able to protect the plaintiff's interests by either staying the case or conditioning dismissal on the defendant's willingness to toll the statute of limitations pending the arbitration.

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[2] Petitioners offer a similar scenario in which the defendant compels arbitration, but then refuses to participate in the arbitration, and meanwhile the statute of limitations has run. Pet. 27. But refusing to participate in an arbitration is a fresh breach of the arbitration agreement, which can be the basis of a new lawsuit to compel arbitration.

So even here, the difference between the two rules is unlikely to have any practical effect.

Against this backdrop, it is significant that some of the cases asserted on both sides of the split are far from recent: Two of the cases petitioners cite were decided in 1992, and two others were decided in 1994 and 1998. *See Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992) (per curiam); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161 (5th Cir. 1992); *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953 (10th Cir. 1994); *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141 (1st Cir. 1998). And yet, this Court has found no occasion to address the issue in the past three decades.

III. This Case Is An Unsuitable Vehicle For Resolving The Question Presented.

The latter point about the practical impact of the issue underscores just how unsuitable this case is as a vehicle for resolving the question presented. Tellingly, petitioners' arguments about the possible impact of the question presented involve hypothetical consequences in other cases. Petitioners do not even have an argument for how they are prejudiced by having to bring a new lawsuit should the need ever arise. For example, because petitioners have no argument that any of their claims is not amenable to arbitration, there is virtually no chance that the arbitrators would decline to hear the arbitration.

If this Court is inclined to review the question presented, it should await a case where the answer makes a difference—*e.g.*, where a plaintiff resists a

motion to compel arbitration and intends to argue to the arbitrators that some or all of the claims should return to court. At least in that context, there may be a plausible claim to prejudice in some jurisdictions (where the statute of limitations is not tolled by the filing of an arbitration).

IV. The Decision Below Is Correct.

This Court's review is also unwarranted because the decision below is correct. FAA § 3 is not a prohibition against dismissing a case that all parties agree does not belong in court, but a direction on the order of *trials* when related claims are appropriately divided between a court and an arbitration. It provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, provided the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3.

A. District courts have always had the inherent power to dismiss a case when dismissal is appropriate

under the circumstances. "It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution.'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). Among these is the "inherent power" of district courts to dismiss cases for failure to prosecute, as incident to "the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 & n.4 (1962) (citing cases). Likewise, this Court has long acknowledged "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). That power has "long gone unquestioned," as "is apparent" from this Court's cases stretching back to the nineteenth century. *Link*, 370 U.S. at 631 (citing *Redfield v. Ystalyfera Iron Co.*, 110 U.S. 174, 176 (1884)).

The decision below reflects these principles. In conceding "that, under the [Act], all claims were subject to mandatory arbitration," Pet. App. 3a, petitioners conceded that there were no pending claims for the district court to resolve. *See also* Pet. App. 2a ("The parties agreed that all claims are subject to mandatory arbitration."); Pet. App. 10a ("[A]ll claims are subject to arbitration, as Plaintiffs acknowledge."). Plaintiffs admitted that the claims simply did not belong in court. The case was no more worthy of taking a place on the district court's crowded docket than if petitioners had filed the same claims in arbitration first, and then filed a lawsuit claiming a right

to have a district court superintend the arbitration should the need ever arise. In fact, filing a lawsuit knowing that all the claims are subject to arbitration might well be sanctionable.

If a plaintiff filed a lawsuit after executing a covenant not to sue or filed a lawsuit in federal court after signing a contract promising to bring any suit in state court, there would be no doubt that the district court would have the "inherent power" to dismiss—without prejudice—"so as to achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 630-31. The plaintiff would not have a right to occupy a place on the court's docket on the ground that the defendant might breach the settlement agreement or that the chosen forum might turn down jurisdiction.

Because these common-law principles were established long before Congress enacted § 3, "Congress 'is understood to legislate against a background of [those] common-law … principles'" and courts must interpret § 3 "with the presumption that Congress intended to retain the substance of the common law." *Samantar v. Yousuf*, 560 U.S. 305, 320 n.13 (2010) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)). So only a clear statutory command could override the courts' inherent discretionary authority to manage their own dockets and dismiss a case without prejudice when dismissal would otherwise be appropriate.

Nothing in FAA § 3 abrogates—much less clearly overrides—a court's discretionary authority to dismiss a case where everyone agrees that all the claims belong in a different forum. Section 3 does not say

that a district court may not dismiss a lawsuit under those circumstances. It does not say anything at all about dismissal. Rather, § 3 contemplates a case with claims that are properly before the court alongside claims that are subject to arbitration, and, in that context, it directs the order of trials. That is evident from two elements of the plain language.

First, § 3 is directed to the situation where "*any issue*" in a "suit or proceeding" is "referable to arbitration under an [arbitration] agreement" and a court finds "that *the issue* involved in such suit or proceeding is referable to arbitration under such an agreement." *Id.* (emphasis added). It is not directed to a situation where everyone agrees that *all issues* in the suit are referrable to arbitration and there is therefore no claim left for the court to decide. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (§ 3 "provides for stays of proceedings in federal district courts when *an issue* in the proceeding is referable to arbitration" (emphasis added)); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009) (§ 3 instructs courts to issue a stay where the action "involves *an* '*issue* referable to arbitration'" (emphasis added) (quoting 9 U.S.C. § 3)); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) ("The FAA provides for stays of proceedings in federal district courts when *an issue* in the proceeding is referable to arbitration." (emphasis added)).

Second, § 3 says that the consequence of the trial court's finding is to "stay the *trial* of the action." 9 U.S.C. § 3 (emphasis added). It does not suspend other proceedings, such as motions to dismiss. Nor does it override other powers of the court, including

addressing pretrial motions or deciding that the case does not belong on its docket. And § 3 imposes no constraint on the court once a plaintiff concedes that there should never be a trial in the court. If, by agreement of the parties, no trial will ever occur, then the direction to "stay the trial of the action" is inapplicable.

This reference to "stay[ing] the trial" was intentional. Congress chose different language in the FAA when it intended to refer to the case as a whole. For instance, § 12 of the FAA addresses a situation where a court may "stay the *proceedings* in an action." 9 U.S.C. § 12 (emphasis added). Specifically, that provision explains that when a motion is filed to vacate, modify, or correct an arbitration award, "any judge who might make an order to stay the *proceedings* in an action brought in the same court may make an order … staying the *proceedings* of the adverse party to enforce the award." *Id.* (emphasis added). Congress thus knew how to provide for "staying the proceedings" when it wanted to do so.

Properly understood, this reading of the statute does not entail an "exception" to the text of § 3. Pet. App. 5a. Rather, the limitation is inherent in the text of the statute itself.

Petitioners' contrary reading of § 3 yields absurd results. By their reading, a party with a pending arbitration could file a lawsuit merely because it wants a court to "supervise the arbitration," Pet. 27, and the court would be stripped of all power to dismiss the suit.

Petitioners' reading also puts an undue burden on district courts by bloating their dockets with cases that simply do not belong there. Staying a case does not make the case disappear. Many district courts require parties to report periodically on the progress of the arbitration even while the case is stayed, sometimes in live status conferences. *See, e.g.*, *Spates v. Uber Techs., Inc.*, No. 21-CV-10155, 2023 WL 3506138, at *3 (S.D.N.Y. Mar. 31, 2023); *see also GunVault, Inc. v. Wintrode Enters., Inc.*, No. ED-CV-1201459-JAK-RZX, 2014 WL 12589336, at *8 (C.D. Cal. Feb. 24, 2014) (placing patent matter on inactive calendar and ordering parties to submit joint status reports). And parties are more likely to bring issues before a court that already has jurisdiction, even though judicial intervention is unnecessary. All this adds unnecessary expense to an arbitration, by forcing the defendant to appear in multiple forums, even though, as petitioners acknowledge, arbitration is supposed to be less expensive. Pet. 26.

B. Petitioners' contrary reading relies heavily on § 3's direction that courts "shall … stay the trial" under the circumstances described. But "shall" does not change the circumstances described. It does not expand coverage to a situation where no trial in court will ever happen. Nor does it nullify a court's inherent power to entertain pretrial motions or to dismiss cases as warranted. In any event, § 3's language would not oblige courts to stay rather than dismiss. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n.9 (1995) ("[L]egal writers sometimes use … 'shall' to mean 'should,' 'will,' or even 'may.'"). That is particularly true here, where interpreting "shall" to imply a rigid mandate "would lead to an absurd or

futile result, or to an unreasonable result at variance with the policy of the legislation as a whole." *Watt v. Alaska*, 451 U.S. 259, 284 n.8 (1981) (citations omitted).

Petitioners are also wrong to assert that the Ninth Circuit's reading of § 3 affects "whether federal jurisdiction exists to supervise the arbitration and enforce the FAA's procedural protections." Pet. 27. It is not the job of federal courts to "supervise" arbitrations. As petitioners' statutory citations indicate, federal courts have discrete powers with regard to arbitrations. *See id.* (citing 9 U.S.C. §§ 5, 7, 9-11). None of those powers is lost when a court dismisses a case without prejudice.

Similarly, for reasons already discussed (at 8-12), this reading of § 3 will not prejudice parties. *See* Pet. 26-27. On the one hand, it is exceedingly rare that a court's decision to dismiss the case will bar the plaintiff from filing a new suit if and when the need arises. On the other hand, when that outcome is even within the realm of possibility, the plaintiff can explain that possibility to the court, which, in turn, can decline to dismiss on that basis, or otherwise condition its dismissal to address the concern. *See, e.g.*, *Alford*, 975 F.2d at 1164 (considering whether discretionary dismissal would affect parties' ability to bring "post-arbitration remedies"). Recognizing this discretionary authority respects rather than impinges on the court's role.

Petitioners are also mistaken in suggesting that their position is consistent with the FAA's pro-arbitration policies. The arbitration-frustrating effect of

petitioners' position is on display here. Again, petitioners and respondents alike agreed from the start that all claims in this matter were subject to mandatory arbitration. *Supra* 2-3, 13. And yet, petitioners dragged respondents into a judicial forum. For more than two years now, petitioners have forced respondents to litigate at all levels of the judicial system regarding a case that at the outset was properly referred to mandatory arbitration under the plain terms of the parties' agreements. Petitioners' reading of the statute in the face of that background does not promote arbitration; it thwarts the parties' contractual arrangements and works an improper imposition on the judicial system.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 4, 2023