No. 22-1218

In the Supreme Court of the United States

WENDY SMITH, ET AL., PETITIONERS

v.

KEITH SPIZZIRRI, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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A. There Is A Clear And Intractable Conflict

1. As the petition established, the circuit conflict is deep, acknowledged, and entrenched. Pet. 7-26. While "[s]ome circuits" require "stay[s]" when "all claims are submitted to arbitration," other circuits "allow[] district courts to dismiss such claims outright." *Griggs* v. *S.G.E. Mgmt., LLC*, 905 F.3d 835, 839 & n.14 (5th Cir. 2018). The circuits are "about evenly" divided, and "[t]he question * * * remains unsettled" because this Court has not weighed in. *Katz* v. *Cellco P'ship*, 794 F.3d 341, 344-345 (2d Cir. 2015). In the meantime, courts in "the Ninth, First, Fifth, and Eighth Circuits" are authorized to "dismiss" when all claims are subject to arbitration, while courts in "the Second, Third, Sixth, Seventh, Tenth, and Eleventh Circuits" must "stay" the case "upon application of a party." Pet. App. 5a n.4. The FAA's operation thus varies dramatically based on the happenstance of where a suit is filed.

Because the circuit split is undeniable, not even respondents contest the obvious conflict. Nor could they: "the question has split the circuits." *Anderson* v. *Charter Commc'ns, Inc.*, 860 F. App'x 374, 379 (6th Cir. 2021); accord *Aggarao* v. *MOL Ship Mgmt. Co.*, 675 F.3d 355, 376 n.18 (4th Cir. 2012); *Lloyd* v. *HOVENSA, LLC*, 369 F.3d 263, 268-269 (3d Cir. 2004). Indeed, this is not only the rare case where a respondent admits a conflict exists, but respondents even admit precisely what that conflict is: "some circuits hold that a district court has discretion to either stay or dismiss," "whereas others hold that the court *must* stay (and may not dismiss)." Opp. 1-2. The primary certworthiness factor is therefore indisputably met.

2. Rather than candidly concede and move on, respondents instead resist review on the ground that "the circuit split is not as deep as petitioners claim." Opp. 8. Yet the very best respondents could do was challenge the

result in *three* circuits, while saying nothing about the remaining *seven*. Even if respondents were correct, the full tally would be seven circuits splitting 4-3, instead of ten circuits splitting 6-4. Either conflict is deep, intolerable, and certworthy. And that is especially true in the arbitration context, where this Court often grants review even with only a shallow split. *E.g.*, *American Express Co.* v. *Italian Colors Restaurant*, 570 U.S. 228 (2013); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011).

In any event, respondents are wrong about those three circuits, as even a quick glance confirms.

a. Respondents assert the Eighth Circuit has not squarely resolved this issue, because *Green* v. *SuperShuttle Int'l, Inc.*, 653 F.3d 766 (8th Cir. 2011), ultimately concluded the lower court "abused its discretion in dismissing the case." Opp. 7-8. According to respondents, the Eighth Circuit 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." *Id.* at 8.

This is puzzling. For one, *Green*'s 2-1 majority unequivocally recognized "a judicially-created exception" to Section 3's stay requirement, which authorizes "district courts" to "dismiss an action rather than stay it." 653 F.3d at 769-770. This is why Judge Shepherd wrote separately to *reject* the majority's view: "[S]ection 3 affords the district court no discretion to dismiss a case even 'where it is clear the entire controversy * * * will be resolved by arbitration." *Id.* at 770 (Shepherd, J., concurring). Respondents, of course, never bother mentioning the majority's operative rationale or Judge Shepherd's conflicting views.

But even if respondents read *Green* correctly, they have no answer for the Eighth Circuit's *subsequent* decisions, which do indeed "categorically decide the question presented" (Opp. 8): "While the Federal Arbitration Act

'generally requires a federal district court to stay an action pending an arbitration, rather than to dismiss it[,] * * * district courts may, in their discretion, dismiss an action rather than stay it where it is clear the entire controversy between the parties will be resolved by arbitration.'" *Sommerfeld* v. *Adesta, LLC*, 2 F.4th 758, 762 (8th Cir. 2021). The Eighth Circuit thus adopted the precise holding (in virtually identical language) that respondents insist the circuit did not reach.

Petitioners have already explained this, flagging *Sommerfeld* and a post-*Sommerfeld* district-court case applying circuit law to authorize "dismiss[al]." Pet. 22 n.9; see also *Brazil* v. *Menard, Inc.*, 601 F. Supp. 3d 503, 513 (D.S.D. 2022) (describing "binding" Eighth Circuit law). Respondents have no obvious basis for simply pretending those later decisions do not exist.

b. Respondents next contend the Sixth Circuit is not squarely part of the split, because the circuit declined to adopt "'an absolute rule,'" and suggested certain "'situations,'" hypothetically, might permit "'dismissal.'" Opp. 6 (quoting *Arabian Motors Grp. W.L.L.* v. *Ford Motor Co.*, 19 F.4th 938, 942 (6th Cir. 2021)). Yet respondents' attempt to distinguish the Sixth Circuit has already been refuted—by the Sixth Circuit itself. The *Arabian* panel declined to adopt a "categorical" rule in the narrowest possible sense: it was expressly leaving the door open for rare "situations" having nothing to do with the "normal" course. 19 F.4th at 942 (flagging theoretical exceptions for "moot[ness]," "some other pleading or procedural defect," or where "both parties request a dismissal" or "neither party asks for a stay"). But as applied to "conventional" settings (*ibid.*), *Arabian*'s holding was unequivocal: "the district court erred in denying [the party's] request for a stay." *Id.* at 942-943.

Nor was the Sixth Circuit unclear concerning the basis for its position. It repudiated the conflicting views of those "circuits" "go[ing] the other way." 19 F.4th at 943 (rejecting contrary decisions from the First, Fifth, and Ninth Circuits). It stressed how Section 3's "command" to "'stay the trial of the action' conveys a mandatory obligation" (*id.* at 941), contrary to the minority view (Pet. App. 5a). It outlined how the FAA's other provisions "reinforce this interpretation," and how the contrary position would "undercut[]" the Act's "provisions" and "upend" the FAA's statutory "approach." 19 F.4th at 941-942 (discussing 9 U.S.C. 5, 7, 9-11, 16). The court even repudiated respondents' primary "textual" argument. *Id.* at 943 (rebuffing the same theory that Section 3 "stay[s] the trial of the action," yet there is "no trial to stay" where all claims are subject to arbitration); contra Opp. 15-17 (asserting this rejected argument).

Under any fair reading, *Arabian* has definitively resolved this question. By suggesting a *possible* exception for a limited category of cases involving special circumstances (contrary to the "conventional" circumstances here), it did nothing to disturb its direct holding for the "normal" course—which it supported with an exhaustive rationale. 19 F.4th at 941-943. Its disposition is irreconcilable with the Ninth Circuit's competing approach.

c. Respondents finally declare it doubtful that the Eleventh Circuit, "contrary to the Ninth Circuit, would compel a stay pending arbitration in the[se] circumstances." Opp. 7. Yet the Eleventh Circuit's decisions are hardly equivocal: "[t]he district court properly found that the state law claims were subject to arbitration, but *erred in dismissing the claims*"; "[u]pon finding that a claim is subject to an arbitration agreement, *the court should order that the action be stayed pending arbitration*." *Bender* v. *A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699

(11th Cir. 1992) (per curiam) (citing 9 U.S.C. 3; emphases added); see also *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union AFL-CIO-CLC* v. *Wise Alloys, LLC*, 807 F.3d 1258, 1268 (11th Cir. 2015) ("a stay was mandatory under section 3"). Respondents conspicuously fail to address those binding authorities when casting doubt on the status of Eleventh Circuit law.

What respondents do assert is this: "[i]n truth, the Eleventh Circuit [has] held only that a dismissal may be appropriate" when no "party has sought a stay." Opp. 6-7 (citing *Caley* v. *Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1379 (11th Cir. 2005)). In other words, according to respondents, the Eleventh Circuit's position is unclear—because a *different* case authorized dismissal "when there was no evidence either party had applied for a stay." Opp. 6. This position, again, is baffling. *Caley* presents a *different* legal question on different facts; neither party sought a stay or invoked Section 3—which means *there was no reason to address stays or Section 3*. *Caley* says nothing about whether a stay is required when a party *does* request a stay. It is mystifying why respondents believe *Caley* (by *not* addressing the relevant question) casts any doubt on pertinent Eleventh Circuit authority.

In any event, aside from not addressing the relevant question, *Caley* does not support respondents on any level. It affirmed a dismissal but never explained why that outcome was appropriate. 428 F.3d at 1379. It never contemplated a stay, discussed any competing reasons to stay versus dismiss, or confronted any aspect of this issue. Again, as respondents themselves confirm, there was no indication anyone even *requested* a stay in the first place—which is the critical precondition to Section 3's stay requirement. *Caley* thus had no occasion to address this issue, and it does not affect the Eleventh Circuit's

prior (or subsequent) law addressing the split. *United Steel*, 807 F.3d at 1268; *Bender*, 971 F.2d at 699.[1]

Respondents, however, are right about one thing: lower courts in the Eleventh Circuit do remain oddly split over the status of circuit law on this issue. Opp. 7 & n.1; see also Pet. 18 n.8 (flagging the same confusion). But that point hardly helps them: this persistent confusion merely highlights the wasted time and resources devoted to this recurring question. This Court alone can provide definitive guidance, and its review is urgently warranted.

3. This case cleanly presents an important statutory question that has squarely divided the courts of appeals. Respondents have no real answer for the split (because there is none). There is no benefit to delay and further percolation is pointless: the conflict is widespread; ten circuits have split nearly down the middle; courts and parties continue wasting time and energy on the question; and no court has shown any willingness to back down. The debate has been thoroughly exhausted at the circuit level, and the courts remain hopelessly divided. Pet. App. 8a (Graber, J., concurring) (urging this Court's review).

Until this Court intervenes, parties' statutory rights under the FAA will be dictated by geography. It is past time to resolve this significant question.

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[1] This also illustrates respondents' error in suggesting the question is not "binary." Opp. 5-6. Each circuit recognizing the split has readily understood the binary nature of the question: a stay is either mandatory or not. Pet. App. 5a & n.4. The fact that respondents posit situations where the *relevant* question is not presented (*e.g.*, where neither party seeks a stay) is entirely besides the point. See 9 U.S.C. 3 (courts "shall *on application of one of the parties* stay the trial of the action until such arbitration has been had") (emphasis added).

B. The Question Presented Is Important And Warrants Review In This Case

1. a. As the petition established, the question presented has obvious importance. Pet. 26-27. It arises all the time. It generates endless confusion among lower courts. Circuit judges themselves are now crying out for guidance. And the legal and practical consequences are significant: it dictates whether parties can immediately appeal an order compelling arbitration (contrary to the FAA's design); it affects whether federal courts have supervisory authority to enforce the FAA's other critical safeguards; and it serves as a critical backstop to protect litigant rights if a party compels arbitration but abandons the arbitration process. The answer to this question has immediate effects on the FAA's proper administration, where a dismissal disrupts the FAA's considered scheme. And yet the Act now operates differently nationwide based on where a dispute arises. The resulting disparity is untenable.

b. In response, respondents say this "exaggerate[s]" the issue's importance (Opp. 8), but their posturing is transparent. They insist the question only arises in "limited" circumstances (*id.* at 5), but there is nothing limited about it. This arises *every time an entire case is compelled to arbitration*. It does not take five minutes on Westlaw to confirm there is nothing "uncommon" about that scenario (contra *ibid.*). Indeed, it takes only a glance through the petition and opposition (and the conflicting views of ten circuits and countless district courts) to understand the hundreds of cases this question affects.

Respondents argue the issue has "virtually no practical significance" (Opp. 8), but the contention is meritless. As petitioners explained, this issue squarely implicates core appellate rights under the FAA—as dismissals im-

mediately activate (premature) rights to appeal arbitration orders. *Arabian*, 19 F.4th at 942; *Katz*, 794 F.3d at 346; *Lloyd*, 369 F.3d at 270 & n.8. This issue was explicitly flagged by multiple circuits (*ibid.*), and respondents counter with—*nothing*. They cannot explain why parties in four circuits should have an immediate right to appeal orders compelling arbitration, but parties in six circuits have to wait until the arbitration is final. That issue is patently "significan[t]."

This issue also controls whether federal courts retain jurisdiction to enforce the FAA's other procedural safeguards. *E.g.*, *Lloyd*, 369 F.3d at 370 (describing role as "significant"); *Green*, 653 F.3d at 771 (Shepherd, J., concurring). In response, respondents argue this concern is insubstantial since parties can always refile a new federal action. Opp. 9. Respondents may have been correct (at least in some circuits) before *Badgerow* v. *Walters*, 596 U.S. 1 (2022), but they are undoubtedly wrong now. After *Badgerow*, it is the rare dispute that can return to federal court merely to invoke the FAA's rights and protections (596 U.S. at 5, 16-18)—which means that a stay is effectively the only game in town. Yet in circuits dismissing an action, parties forfeit the ability to re-access federal court—despite Section 3's explicit reservation of a federal forum until the arbitration has concluded.[2]

Finally, respondents suggest the issue must not matter because this Court has not resolved it before now.

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[2] Respondents also understate the danger to parties' rights from eliminating the backstop of a stayed case. Opp. 9-10. The Eighth Circuit itself flagged potential limitations problems (*Green*, 653 F.3d at 770), and this issue can arise when an arbitration fails for any reason—including a failure to pay arbitral fees. The stay, by design, provides a safeguard if the "arbitration has [not] been had in accordance with the terms of the agreement." 9 U.S.C. 3; see also *Tice* v. *American Airlines, Inc.*, 288 F.3d 313, 318-319 (7th Cir. 2002).

Opp. 11. Yet this Court recognized the issue twice, and neither time brushed it aside as insignificant. Nor have the circuits discounted the question as insubstantial; on the contrary, the circuits have detailed precisely why it matters. And the issue now has outsized significance in light of *Badgerow*: whereas parties in the past could indeed refile a federal case to invoke the FAA's other protections (Opp. 9-10), that is no longer true—*Badgerow* heavily restricted the ability to re-invoke federal jurisdiction, so a stay alone is likely the only vehicle for retaining a federal forum. Properly construed, Section 3 accomplishes that objective.[3]

In sum, respondents cannot explain why the FAA should operate differently in different circuits—or why litigants in New York and Florida are entitled to a stay, while their counterparts in California and Texas might face dismissal. This question has substantial implications for parties' federal rights, and this national scheme should not turn on geography alone.

2. This is an ideal vehicle. The question presented is a pure question of law. It was squarely raised and resolved at each level below. There is no conceivable obstacle to deciding it here—nor do respondents even try to manufacture a reason it cannot be resolved. This vehicle is as clean as it gets. Pet. 28.

Respondents instead say the vehicle is "unsuitable" because petitioners would not suffer significant prejudice from refiling a new suit. Opp. 11-12. Yet the prejudice is obvious. Respondents have resisted paying arbitration fees—a concern petitioners flagged long ago. D. Ct. Doc. 21 at 7 (requesting a stay due to "well-founded belief that

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[3] Respondents never once mention *Badgerow* in their brief—they have no answer for its obvious effect on the serious consequences of deciding this question incorrectly.

Defendants will be unable or unwilling to pay the ongoing arbitration fees" and "th[e] action will ultimately be kicked back to the Court"). Petitioners anticipate seeking confirmation in federal court (assuming the arbitrations are ever completed). *Id.* at 6 (so stating). And time will tell if the FAA's other procedural mechanisms will be necessary—a legitimate concern given respondents' past litigation conduct. Yet there is no obvious jurisdictional hook to refile after *Badgerow*—so the dismissal likely eliminates petitioners' access to a federal forum.

Respondents also attack petitioners for filing a lawsuit despite the claims being subject to arbitration. This is irrelevant and wrong. It is irrelevant because it has nothing to do with the question presented; nothing in Section 3 turns on whether a party surrendered or resisted an arbitration demand. And it is wrong because petitioners had a basis for resisting arbitration (certain defendants were non-signatories), but strategically acquiesced. And there was nothing blameworthy about filing a lawsuit. Arbitration is an affirmative defense and a contractual right; it can be waived or abandoned. Fed. R. Civ. P. 8(c)(1). Anyhow, this describes *every* instance where an entire case is compelled to arbitration—which makes this a prototypical vehicle for resolving the question presented.

3. Respondents finally jump the gun with an extended merits discussion. Their arguments only confirm the fundamental disagreement over this important question, underscoring this case's certworthiness. While the proper time for a merits debate is plenary review, for now: respondents' atextual theories are wrong; they have been properly rejected by multiple courts; and their arguments ultimately prove one thing: if respondents are correct, courts in six circuits are wrongly requiring stays when dismissals are warranted. That is a reason to *grant* review, not deny it.

Respectfully submitted.

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