No. 22-1218

In the Supreme Court of the United States

WENDY SMITH, ET AL.

Petitioners,

v.

KEITH SPIZZIRRI, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curia*e briefs in cases, like this one, that raise issues of concern to the Nation's business community.[1]

Many of the Chamber's members and affiliates regularly rely on arbitration agreements in their contractual relationships. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with litigation in court—because arbitration is speedy, fair, inexpensive, and less adversarial than litigation. Based on the policy embodied in the Federal Arbitration Act (FAA), the Chamber's members and affiliates have structured millions of contractual relationships around the use of arbitration to resolve disputes.

The Chamber's members and affiliates, and the business community more broadly, therefore have a strong interest in proper interpretation of the FAA. And, more specifically, they have an interest in ensuring that businesses can enforce arbitration

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[1] Pursuant to Rule 37.6, the Chamber affirms that no counsel for a party authored this brief in whole or in part and that no entity or person other than the Chamber, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

agreements under the FAA as quickly and easily as possible, without the burdens of unnecessary litigation or premature appeals from district court orders that compel arbitration in accordance with the terms of the parties' agreement.

Section 3 of the FAA furthers that important purpose by stating clearly that, upon a party's request, a case must be stayed if the court issues an order compelling arbitration. The Chamber files this brief to urge the Court to interpret Section 3 in accordance with its plain language.

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal courts typically face motions to compel arbitration under the following scenario: A plaintiff files a lawsuit in court, often as a putative class or collective action. The defendant business responds to the complaint by moving to compel arbitration of the plaintiff's dispute on an individual basis and requests a stay under Section 3 of the FAA pending the outcome of the arbitration. The plaintiff then opposes arbitration, and (sometimes) requests in the alternative that the court dismiss rather than stay the case so that the plaintiff can take an immediate appeal from the order compelling arbitration—an appeal that would not be available if the case were stayed.

In this case, however, the ordinary alignment of the parties is reversed. Petitioners—the plaintiffs asserting the underlying claims—have acquiesced to arbitration despite filing a lawsuit. They are the parties requesting a stay rather than a dismissal.

The unusual posture in which the question presented arises here does not change the answer to that question. When a court compels arbitration, the text

and structure of the FAA require the court to stay the judicial action pending the outcome of the arbitration whenever a party requests a stay.

Section 3 of the Act states that when claims in a case are "referable to arbitration" under a written agreement, a court "*shall* on application of one of the parties stay the trial of the action until [the] arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3 (emphasis added). Congress's unambiguous mandate overrides any discretion courts might otherwise have to dismiss cases pending on their dockets.

The structure of the FAA buttresses that conclusion. Most importantly, a mandatory stay gives effect to Congress's decision in Section 16 *not* to authorize an immediate appeal from a district court order that compels arbitration in accordance with the terms of the arbitration agreement and stays the case under Section 3. See 9 U.S.C. § 16(b)(1). If a court compelling arbitration were not required to issue a stay, and could instead dismiss the lawsuit, the plaintiff would be able to appeal immediately. See 9 U.S.C. § 16(a)(3); *Green Tree Fin. Corp.-Ala.* v. *Randolph*, 531 U.S. 79, 86-89 (2000). Overriding a party's stay request and instead entering a dismissal therefore effects an impermissible end-run around Section 16's design.

In addition, when the underlying case is filed in or removed to federal court, a stay preserves the availability of the federal forum for proceedings related to the arbitration. Those proceedings can include FAA-authorized judicial intervention in connection with the arbitration, such as appointing an arbitrator if necessary under 9 U.S.C. § 5 or compelling witnesses to attend the arbitration under 9 U.S.C. § 7. They can also include post-arbitration proceedings to confirm,

vacate, or modify the arbitration award under 9 U.S.C. §§ 9-11.

ARGUMENT

Section 3 Requires The District Court To Grant A Stay Of Proceedings When Requested By One Of The Parties.

When a court grants a motion to compel arbitration and no part of the case remains in court—either because the claims are all arbitrable or the parties have delegated questions of arbitrability to the arbitrator—Section 3 of the FAA requires the court to stay proceedings upon the request of a party. The court may not dismiss the case. Section 3's text and the FAA's structure both compel that result.

A. The text mandates a stay.

When a statute's plain language is unambiguous, the interpretive "inquiry begins with the statutory text, and ends there as well." *Nat'l Ass'n of Mfrs.* v. *Dep't of Defense*, 583 U.S. 109, 127 (2018) (quotation marks omitted).

Section 3 is clear: when the district court determines that parties have agreed to arbitrate, it "*shall* on application of one of the parties *stay* the trial of the action" until the arbitration has been completed. 9 U.S.C. § 3 (emphasis added).

Congress's use of the word "shall" creates a "mandatory * * * obligation impervious to judicial discretion." *Lexecon, Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (citing *Anderson* v. *Yungkau*, 329 U.S. 482, 485 (1947)). "Shall" is "the language of command." *Escoe* v. *Zerbst*, 295 U.S. 490, 493 (1935); see also *United States ex rel. Siegel* v. *Thoman*, 156 U.S. 353, 360 (1890) (contrasting "shall,"

which "indicat[es] command," with "may," which indicates "permission"). "The traditional, commonly repeated rule is that *shall* is mandatory." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 112 (2012). "[W]hen the word *shall* can reasonably be read as mandatory, it ought to be so read." *Id.* at 114.

Dictionaries confirm that conclusion: "The common meaning of 'shall' when used in concert with another verb is * * * 'obliged; must.'" *Arabian Motors Grp. W.L.L.* v. *Ford Motor Co.*, 19 F.4th 938, 941 (6th Cir. 2021) (Sutton, J.) (quoting WEBSTER'S INT'L DICTIONARY 2300 (2d ed. 1942)); see also THE CENTURY DICTIONARY AND CYCLOPEDIA 5546 (1904 ed.) (defining "shall" when paired with a verb as "obliged or compelled to"). As Black's Law Dictionary similarly observes, "drafters typically intend" and "courts typically uphold" the use of "shall" in its "mandatory sense," meaning "[h]as a duty to" or "is required to." BLACK'S LAW DICTIONARY (11th ed. 2019).

Lower courts that have ordered dismissal rather than a stay, including the Ninth Circuit here, have invoked a judicial "discretion to dismiss" when all claims are subject to arbitration. They theorize that this discretion flows from courts' inherent authority to manage their dockets. *E.g.*, Pet. App. 2a, 5a.

But Congress expressly commanded otherwise in Section 3's text. Its "use of a mandatory 'shall' imposes *discretionless* obligations." *Katz* v. *Cellco P'Ship*, 794 F.3d 341, 345 (2d Cir. 2015) (emphasis added; alterations omitted) (quoting *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001)); accord *Lexecon*, 523 U.S. at 35.

To be sure, courts generally possess inherent authority to manage their dockets, but "[i]n many

instances the inherent powers of the courts may be controlled or overridden by statute or rule." *Degen* v. *United States*, 517 U.S. 820, 823 (1996). Section 3 is just such a statute: courts' inherent authority to manage their dockets "cannot trump a statutory mandate, like Section 3 of the FAA, that clearly removes such discretion." *Katz*, 794 F.3d at 346. As the Third Circuit put it, Section 3 contains no "exception" for situations in which a court "finds dismissal to be the preferable approach." *Lloyd* v. *HOVENSA, LLC*, 369 F.3d 263, 269 (3d Cir. 2004). Judge Sutton, speaking for the Sixth Circuit, explained that "the Federal Arbitration Act is not a docket-management statute," and "cleaning out district court dockets" must take a backseat to Section 3's clear instructions. *Arabian Motors*, 19 F.4th at 943.

It is true that Section 3 refers to staying "the trial" of the action. 9 U.S.C. § 3. But that language, which predates by over a decade the advent of the Federal Rules of Civil Procedure, necessarily requires staying everything leading up to a trial as well—in other words, all further litigation of the claim in court. As this Court recently recognized, a request for arbitration involves "the entire case," including "pre-trial" proceedings and "discovery" that the parties "contracted to avoid through arbitration." *Coinbase, Inc.* v. *Bielski*, 599 U.S. 736, 741-743 (2023) (discussing stays pending appeal). For the stay under Section 3 to make any sense, it must preclude all litigation in court with regard to the claim or claims that the court is sending to arbitration.

Section 3's mandatory language is not triggered until the statute's conditions are satisfied. Most notably, a stay is not mandatory unless "one of the parties" has made an "application" requesting one. 9 U.S.C.

§ 3. Thus, for example, when all parties request the dismissal of a lawsuit—or at minimum do not request a stay—Section 3 does not preclude dismissal. Cf. *Lamps Plus, Inc.* v. *Varela*, 139 S. Ct. 1407, 1414 n.1 (2019) (noting that "no party sought a stay"); *Arabian Motors*, 19 F.4th at 942 (acknowledging, without deciding, that dismissal may remain an option in situations in which "both parties request a dismissal" or "neither party asks for a stay"). Indeed, a dismissal under such circumstances may effectuate parties' early settlement of the matter or a voluntary decision by the plaintiff not to prosecute the claims in either court or arbitration.[2]

B. The FAA's structure confirms that a stay is mandatory.

While the meaning of Section 3's text is clear, the stay requirement is confirmed by Section 3's "'place in the overall statutory scheme.'" *Parker Drilling Mgmt. Servs., Ltd.* v. *Newton*, 139 S. Ct. 1881, 1888 (2019) (quoting *Roberts* v. *Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012)).

1. Allowing district courts to freely dismiss cases subject to arbitration would "undercut[] the pro-arbitration appellate-review provisions" found in Section 16 of the FAA. *Arabian Motors*, 19 F.4th at 942.

When a court *denies* a request for arbitration, Section 16 authorizes an immediate appeal. See 9 U.S.C. § 16(a)(1). By contrast, Congress made clear that there should *not* be an automatic immediate appeal from an interlocutory order that *grants* arbitration in

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[2] Of course, a plaintiff cannot use a voluntary dismissal to manufacture an immediate appeal from an order compelling arbitration. See *Microsoft Corp.* v. *Baker*, 582 U.S. 23, 36-42 (2017); page 9, *infra*.

accordance with the terms of the parties' agreement. Congress permitted such appeals only when certified under the standards of 28 U.S.C. § 1292(b). See 9 U.S.C. § 16(b).

That asymmetry is no accident. This Court has long recognized "Congress' clear intent, in the [Federal] Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). That is why, when Congress enacted Section 16 in 1988, it created "a rare statutory exception to the usual rule that parties may not appeal before final judgment" but limited that exception to "orders *denying*" arbitration. *Coinbase*, 599 U.S. at 740.

Section 3's requirement of a stay facilitates Congress's plan. When a court compels arbitration and enters a stay, the party opposing arbitration ordinarily cannot take an appeal. A stay therefore "enables parties to proceed to arbitration directly, unencumbered by the uncertainty and expense of additional litigation" in the form of an interlocutory appeal. *Katz*, 794 F.3d at 346. Put another way, a stay protects "the right to proceed with arbitration without the substantial delay arising from an appeal." *Lloyd*, 369 F.3d at 271.

If, despite Section 3's plain language, a court could dismiss the underlying claims, the party opposing arbitration would be able to take an immediate appeal. See 9 U.S.C. § 16(a)(3); *Randolph*, 531 U.S. at 86-89. Courts lack the power to nullify the distinction drawn by Section 16 and "confer appellate rights expressly proscribed by Congress." *Katz*, 794 F.3d at 346; see *Lloyd*, 369 F.3d at 271 (similar).

Indeed, whether requested by the party resisting arbitration or entered *sua sponte* by a district court, a dismissal aimed at allowing an immediate appeal from an order compelling arbitration is just the sort of circumvention that this Court rejected in *Microsoft Corp.* v. *Baker*, 582 U.S. 23 (2017). As the Court emphasized, litigants and courts may not use dismissal tactics to undermine "the process Congress has established * * * for determining when nonfinal orders may be immediately appealed"—in that case, the "careful calibration" governing interlocutory appeals of orders granting or denying class certification under Federal Rule of Civil Procedure 23(f). *Id.* at 37, 40.

So too here. Courts may not subvert Congress's "careful calibration" of the appellate rights specified in—and precluded by—Section 16. Granting a dismissal that converts an otherwise unappealable interlocutory order in favor of arbitration into a final dismissal order appealable by the party opposing arbitration would do just that.

Such a result "breed[s] litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 275 (1995). Businesses that have entered into numerous contracts premised on "the relative informality of arbitration" and procedures "more streamlined than federal litigation" (*14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 269 (2009)) would be unable to avoid the delay and expense of an appeal either before, or at the same time as, the arbitration.

2. Other provisions of the FAA contemplate the possibility of continued judicial involvement while the arbitration is underway. But that involvement would be more difficult if the district court has dismissed the case notwithstanding a party's request for a stay.

Section 5 authorizes a court to appoint an arbitrator or fill an arbitrator vacancy if the parties' chosen arbitrator or arbitration provider is unavailable. 9 U.S.C. § 5. And Section 7 allows parties to petition a court to buttress arbitrators' subpoena power, authorizing the court to compel the attendance of witnesses at the arbitration and to punish non-compliance with the same contempt powers available for failing to attend court proceedings. 9 U.S.C. § 7.

As long as the federal court in which the lawsuit was filed (or to which it was properly removed) has jurisdiction over the underlying claims and parties, a stay allows that same court to exercise these supervisory functions, as well as to hear any post-arbitration proceedings to confirm, vacate, or modify the arbitration award under 9 U.S.C. §§ 9-11. "When a district court stays a case and retains jurisdiction over it, that permits the parties to use these mechanisms promptly and efficiently." *Arabian Motors*, 19 F.4th at 941; see *Lloyd*, 369 F.3d at 270.

3. Finally, this case does not present any question regarding the application of Sections 16(a)(1)(B) and 16(b) to a district court order that nominally compels arbitration, but orders a form of arbitration that is fundamentally different from what the arbitration agreement authorizes and the party requesting relief sought to enforce. This Court saw one such example in *Lamps Plus*, where the district court issued an order requiring *class* arbitration even though the parties' agreement provided only for individualized arbitration and that is what the party seeking arbitration had sought.

Though the Court ultimately did not resolve the question whether Lamps Plus could appeal from that order under Section 16(a)(1)(B), the provision's text

suggests that it could. Section 16(a)(1)(B) provides for immediate appeal of an order "denying a petition under section 4 of this title to order arbitration to proceed," 9 U.S.C. § 16(a)(1)(B), and Section 4 provides that a party may invoke "a written agreement for arbitration" and petition a court for "an order directing that such arbitration proceed *in the manner provided for in such agreement*," *id.* § 4 (emphasis added). This Court has interpreted the latter provision to "specifically direct [courts] to respect and enforce the parties' chosen arbitration procedures." *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497, 506 (2018).

When a court orders a form of arbitration fundamentally different from that agreed to—as in the case of class arbitration—its decision, even if nominally characterized as compelling arbitration, amounts to the denial of the relief sought in the motion to compel arbitration. As this Court has recognized, class arbitration "is not arbitration as envisioned by the FAA." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011). Class procedures represent a "'fundamental' change to the traditional arbitration process" that is incompatible with "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness." *Epic*, 584 U.S. at 508-509 (quoting *Concepcion*, 563 U.S. at 347); cf. *Lamps Plus*, 139 S. Ct. at 1413, 1414 & n.2 (explaining that "Lamps Plus did not secure the relief it requested. It sought an order compelling *individual* arbitration. What it got was an order rejecting that relief and instead compelling arbitration on a classwide basis"—"over the company's vigorous opposition"). Such a fundamental change may well have implications for appellate jurisdiction under Section 16(a)(1)(B).

Thus, in resolving this case, the Court should avoid passing upon those important questions, which are neither presented nor fully briefed here.

* * *

In sum, the FAA's text and context leave no doubt that a party's request for a stay must be granted when the district court sends the claims to arbitration.

CONCLUSION

The Court should hold that a Section 3 stay is mandatory, and dismissal impermissible, when the district court compels arbitration and a party requests a stay.

Respectfully submitted.

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