

# MANDATORY STAY OR DISCRETION TO DISMISS? INTERPRETING SECTION 3 OF THE FEDERAL ARBITRATION ACT

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## Abstract

*Courts and commentators have identified a split among the circuits over whether a district court must stay cases pending arbitration under FAA § 3 or whether the court has discretion to dismiss the case instead if all claims are subject to arbitration. Sources variously classify up to six circuits as having decided that a stay is mandatory and up to five circuits as having decided that district courts have discretion to dismiss. The Supreme Court has twice expressly left the question open, and the majority of a Ninth Circuit panel recently called on the Court to resolve the split.*

*This Article examines in detail whether and, if so, when a stay is mandatory under FAA § 3. In Part I, it explains that a number of the cases giving rise to the asserted circuit split can, in fact, be reconciled, based on whether a party in the case sought a stay rather than dismissal. Even so, two narrower circuit splits persist, rather than just one—one on whether a stay is mandatory under FAA § 3 when a party requests a stay; and another on whether a district court has discretion to dismiss despite FAA § 3 when a party does not request a stay.*

*In Part II, the Article argues that the text of FAA § 3 supports finding a stay mandatory when a party requests a stay, a conclusion that is consistent with the limited legislative history of the FAA as well. The text of FAA § 3 also is consistent with requiring a party to seek a stay before the section applies. But there is no indication in the FAA's drafting history or in its historical context that Congress intended to allow parties to determine by their pleadings whether a stay is mandatory or the court has discretion to dismiss.*

*Finally, in Part III, the Article concludes that the most significant consequence of an order granting a stay pending arbitration (as opposed to dismissing the case) is that the stay order is not immediately appealable, as is well known. Other possible consequences of a stay rather than dismissal either are not likely to arise routinely (and thus could be dealt with by the district court's exercise of discretion, assuming the court has such discretion) or can be addressed in other ways.*

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### INTRODUCTION

Under the common law, a court case could proceed to trial even if the parties had agreed to arbitrate the dispute. A party that filed suit in breach of an arbitration agreement might be liable for nominal damages, “[b]ut [its] own suit will not be stayed or impeded by the agreement.”<sup>1</sup> The enactment of modern arbitration laws changed that common law rule by directing courts to stay cases pending arbitration. Thus, § 3 of the Federal Arbitration Act (FAA) provides that a federal district court “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.”<sup>2</sup> But while a stay pending arbitration halts court action on the claims subject to arbitration, the case remains on the court’s docket. No provision of the FAA addresses whether a court can dismiss a case altogether when the parties have agreed to arbitrate.

Courts and commentators have identified a split among the circuits over whether a district court must stay cases pending arbitration under FAA § 3 or whether the court has discretion to dismiss the case instead if all claims are subject to arbitration. Sources variously classify up to six circuits as having decided that a stay is mandatory under FAA § 3 and up to five circuits as having decided that district courts have discretion to dismiss instead.<sup>3</sup> The Supreme Court expressly left the question open in *Green Tree Financial Corp.-Alabama v. Randolph*<sup>4</sup> and *Lamps Plus, Inc. v. Varela*,<sup>5</sup> and the majority of a Ninth Circuit panel recently called on the Court to resolve the split.<sup>6</sup> The question arises, either explicitly or implicitly, whenever a party to a federal

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<sup>1</sup> E.g., JOHN T. MORSE, JR., THE LAW OF ARBITRATION AND AWARD 91 (1872); see also S. Rep. No. 536, at 2 (1924) (“[I]f an action at law were brought on the contract containing the agreement to arbitrate, such agreement could not be pleaded in bar of the action; nor would such agreement be ground for a stay of proceedings until arbitration was had.”).

<sup>2</sup> 9 U.S.C. § 3.

<sup>3</sup> See *infra* text accompanying notes 11–13.

<sup>4</sup> *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 87 n.2 (2000) (“Had the District Court entered a stay instead of a dismissal in this case, that order would not be appealable. 9 U.S.C. § 16(b)(1). The question whether the District Court should have taken that course is not before us, and we do not address it.”).

<sup>5</sup> *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1414 n.1 (2019) (“Justice BREYER would have us take up that question [left open in *Randolph*] today, but there is no basis for doing so.... Here, no party sought a stay.”).

<sup>6</sup> *Forrest v. Spizzirri*, 62 F.4th 1201, 1206 (9th Cir. 2023) (Graber, J., concurring) (“I encourage the Supreme Court to take up this question, which it has sidestepped previously, ... and on which the courts of appeals are divided ....”). A petition for certiorari in the case was filed on June 14, 2023. See Petition for a Writ of Certiorari, *Smith v. Spizzirri*, 62 F.4th 1206 (9th Cir. 2023) (No. 22-1218).

court lawsuit seeks to have the suit resolved instead in arbitration, hundreds of times a year.<sup>7</sup> Yet despite how frequently the issue arises, academic commentary on the subject is limited.<sup>8</sup>

This Article addresses whether and, if so, when a stay is mandatory under FAA § 3. Its main conclusions are threefold:

- (1) A number of the cases giving rise to the asserted circuit split can, in fact, be reconciled, based on whether a party in the case sought a stay rather than dismissal. Even so, two narrower circuit splits persist on the following questions: (1) whether a stay is mandatory under FAA § 3 when a party requests a stay; and (2) whether a district court has discretion to dismiss despite FAA § 3 when no party requests a stay.
- (2) The text of FAA § 3 supports finding a stay mandatory when a party requests a stay. The limited legislative history of the FAA is consistent with that conclusion and does not support interpreting FAA § 3 as limited to cases in which only some claims are subject to arbitration. The text of FAA § 3 also is consistent with requiring a party to seek a stay before the section applies. But there is no indication in the FAA's drafting history, or in the historical context of the FAA, that Congress intended to

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<sup>7</sup> Tamar Meshel v. Moin A. Yahya, *The Gatekeepers of the Federal Arbitration Act: An Empirical Analysis of the FAA in the Lower Courts* (Sept. 27, 2023) (manuscript at 57 Table 1B), [www.ssrn.com/sol3/papers.cfm?abstract\\_id=4585828](https://www.ssrn.com/sol3/papers.cfm?abstract_id=4585828) [<https://perma.cc/T66J-G958>] (finding 818 contested petitions to compel arbitration decided in federal district courts between June 1, 2021, and May 31, 2022).

<sup>8</sup> See Richard A. Bales & Melanie A. Goff, *An Analysis of an Order to Compel Arbitration: To Dismiss or Stay?*, 115 PENN ST. L. REV. 539 (2011); see also Haley Jones, Note, *Should It Stay or Should It Go?: The Fourth Circuit and § 3 of the Federal Arbitration Act*, 11 LIBERTY U. L. REV. 797 (2017); Alessandra Rose Johnson, Note, *Oh, Won't You Stay with Me?: Determining Whether § 3 of the FAA Requires a Stay in Light of Katz v. Cellco Partnership*, 84 FORDHAM L. REV. 2261 (2016); Jesse Ransom, *United States Federal Circuit Court Practice: Stay Versus Dismissal on Motions to Dismiss and Compel Arbitration*, 2 ARB. BRIEF 76 (2012); Angelina M. Petti, Note, *Judicial Enforcement of Arbitration Agreements: The Stay-Dismissal Dichotomy of FAA Section 3*, 34 HOFSTRA L. REV. 565 (2005). For other views on the issue, see, e.g., RESTATEMENT OF THE U.S. L. ON INT'L COM. & INVESTOR-STATE ARB. § 2.1(b)(1) (AM. L. INST. 2023); IAN R. MACNEIL ET AL., II FEDERAL ARBITRATION LAW § 23.3.1.2 (Supp. 1999) ("Such dismissals [where the matter is clearly arbitrable] are highly questionable. Not only does the language of FAA § 3 fail to justify dismissal, but a dismissal can have unfortunate circumstances.").

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allow parties to determine by their pleadings whether a stay is mandatory or the district court has discretion to dismiss.

- (3) The most significant consequence of a stay pending arbitration rather than dismissal is on appealability, as is well known. A stay also facilitates future court involvement with the arbitration and reduces the risk that the statute of limitations will run while the case is in arbitration, albeit only in some cases. Judicial economy, the main justification given for dismissal, likely could be achieved equally well by a stay coupled with administrative closure of the case; dismissal is not necessary.

The Article proceeds as follows. In Part I, it reconciles (to the extent possible) the cases and reconceptualizes the asserted circuit split. Part II sets out and evaluates the textual and historical arguments in favor of the various approaches. Part III considers the legal and practical consequences of staying rather than dismissing a case pending arbitration.

### I. MANDATORY STAY OR DISCRETION TO DISMISS? REEXAMINING THE SPLIT AMONG THE CIRCUITS

Courts and commentators commonly characterize court interpretations of FAA § 3 as reflecting a widespread but dichotomous split among the circuits.<sup>9</sup> On this view, some circuits have held that FAA § 3 mandates that a district court stay rather than dismiss a case, even when all issues in the case are subject to arbitration—the “mandatory-stay” approach. Other circuits have concluded that a district court has discretion to dismiss such a case instead of issuing a stay—the “discretion-to-dismiss” approach.<sup>10</sup> As courts have begun to acknowledge, however, the issue is not quite so simple.

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<sup>9</sup> See, e.g., the cases cited *infra* Table 1; see also *Spizzirri*, 62 F.4th at 1206 (Graber, J., concurring) (identifying issue as one “on which the courts of appeals are divided”); Johnson, *supra* note 8, at 2271 (describing “divide over whether the FAA mandates a stay or grants a district court discretion to dismiss an action pending arbitration”); Bales & Goff, *supra* note 8, at 560 (“Federal circuit courts have split regarding whether a judge may dismiss a case when all issues brought before it by the parties fall within a valid and binding arbitration agreement.”).

<sup>10</sup> E.g., Bales & Goff, *supra* note 8, at 548–50 (distinguishing between the “must stay approach” and the “may dismiss approach”).