No. 22-1218

IN THE

Supreme Court of the United States

WENDY SMITH, ET AL.,

Petitioners,

v.

KEITH SPIZZIRRI, ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

Counsel for Amicus Curiae

Benjamin G. Robbins
Counsel of Record
Daniel B. Winslow, President
New England Legal Foundation
333 Washington Street, Suite 850
Boston, MA 02108
(617) 695-3660
brobbins@newenglandlegal.org

April 1, 2024

BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT.................................... 2

ARGUMENT 5

I. WHEN THE PARTIES' ARBITRATION AGREEMENT HAS DELEGATED ALL ISSUES IN A SUIT TO ARBITRATION, A COURT SHOULD DISMISS THE SUIT AND COMPEL ARBITRATION. 5

A. Section 3 Of The Federal Arbitration Act Applies Only When An Arbitration Agreement Is Partial In Scope And, Therefore, Bifurcates The Issues In A Suit Between Arbitration And The Court. 5

B. Section 3 Apparently Reflects The Limited Scope Of Arbitration As It Was Practiced At The Time Of The FAA's Enactment, When NonLawyer Merchants Would Resolve Ordinary Business Disputes Between Fellow Merchants. 11

II. A Federal Court's Stay Of A Suit That The Court Has Submitted Entirely To Arbitration Cannot Provide The Necessary "Independent Jurisdictional Basis" That Would Allow The Court To Entertain An "FAA-Created Arbitration Action." 16

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Alexander v. Gardner-Denver Co.,
415 U.S. 36 (1974) 13, 14

Am. Express Co. v. Italian Colors Rest.,
570 U.S. 228 (2013) 14

Badgerow v. Walters,
596 U.S. 1 (2022) 4, 8, 9, 16, 17-18, 19, 20

Barrentine v. Arkansas-Best Freight Sys., Inc.,
450 U.S. 728 (1981) 13

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 14

Corley v. United States,
556 U.S. 303 (2009) 7

Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.,
529 U.S. 193 (2000) 16

EEOC v. Waffle House, Inc.,
534 U.S. 279 (2002) 6

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 14

Hall St. Assocs., L.L.C. v. Mattel, Inc.,
552 U.S. 576 (2008) 13

Henry Schein, Inc. v. Archer & White Sales, Inc.,
586 U.S.__, 139 S. Ct. 524 (2019)........................... 9

Kokkonen v. Guardian Life Ins. Co. of America,
511 U.S. 375 (1994) 16, 20

Lamps Plus, Inc. v. Varela,
587 U.S. 176 (2019) 7, 9

M/S Bremen v. Zapata Off-Shore Co.,
407 U.S. 1 (1972) 10

Marine Transit Corp. v. Dreyfus,
284 U.S. 263 (1932) 16, 20

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley,
756 F.2d 1048 (4th Cir. 1985) 6-7

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 14

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 6, 7-8

New Prime Inc. v. Oliveira,
586 U.S. __, 139 S. Ct. 532 (2019)........................ 11

Perry v. Thomas,
482 U.S. 483 (1987) 14

Quijas v. Shearson/Am. Express, Inc.,
490 U.S. 477 (1989) 14

Sea-Land Serv., Inc. v. Sea-Land of Puerto Rico, Inc.,
636 F. Supp. 750 (D.P.R. 1986)............................ 10

Shearson/Am. Express, Inc. v. McMahon,
482 U.S. 220 (1987) 14

SmartSky Networks, LLC v. DAG Wireless, LTD.,
93 F.4th 175 (4th Cir. 2024)................................ 18

Sturgeon v. Frost,
577 U.S. 424 (2016) 8

The Anaconda v. Am. Sugar Refining Co.,
322 U.S. 42 (1944) 16

Vaden v. Discover Bank,
556 U.S. 49 (2009) 9

Viking River Cruises, Inc. v. Moriana,
596 U.S. 639 (2022) 10

West Virginia v. EPA,
597 U.S. 697 (2022) 10

Wilko v. Swan,
346 U.S. 427 (1953) 13, 14

STATUTES

9 U.S.C. §§ 1-16... 5

9 U.S.C. § 1.. 11

9 U.S.C. § 2.. 10

9 U.S.C. § 3......... 1, 2, 3, 5-6, 7, 8, 9, 11, 15-16, 19, 20

9 U.S.C. § 4...2, 4, 8, 9, 17, 18

9 U.S.C. § 7.. 16

9 U.S.C. § 8...5, 16, 19, 20

9 U.S.C. § 9 .... 16, 18, 19

9 U.S.C. § 10 .... 16, 18, 19

9 U.S.C. § 11 16

9 U.S.C. § 16(a)(3) 9

OTHER AUTHORITIES

Edward Brunet,
Seeking Optimal Dispute Resolution Clauses in High Stakes Employment Contracts,
23 Berkeley J. Emp. & Lab. L. 107 (2002) 11

Julius Henry Cohen & Kenneth Dayton,
The New Federal Arbitration Law,
12 Va. L. Rev. 265 (1926) 12, 13, 15

Osmond K. Fraenkel,
The New York Arbitration Law,
32 Colum. L. Rev. 623 (1932) 14

Thomas H. Oehmke with Joan M. Brovins,
3 *Commercial Arbitration* § 65:14 (2023) 7

Harlan F. Stone,
The Scope and Limitation of Commercial Arbitration,
10 Proc. Acad. Pol. Sci. N.Y. 195 (1923) 11-12, 14-15

Katherine Van Wezel Stone,
Rustic Justice: Community And Coercion Under The Federal Arbitration Act,
77 N.C. L. Rev. 931 (1999) 12

INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation (NELF) is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston.[1] NELF's membership consists of corporations, law firms, individuals, and others who believe in its mission of promoting inclusive economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include a cross-section of large and small businesses and other organizations from all parts of the Commonwealth, New England, and the United States.

NELF is committed to the use of arbitration as a private contractual alternative to litigation for the resolution of disputes. To that end, NELF seeks to uphold the mandate of the Federal Arbitration Act (FAA) that arbitration agreements should be enforced according to their terms. Therefore, when the parties' agreement has delegated all of the issues in a lawsuit to arbitration, a court should dismiss the suit and compel arbitration.

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding whether Section 3 of the FAA requires a

---

[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored NELF's amicus brief, in whole or in part, and that no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

federal court to stay a suit when all of its claims belong in arbitration.

SUMMARY OF ARGUMENT

When, as here, the parties' arbitration agreement delegates all issues in a suit to arbitration, a court should dismiss the suit and compel arbitration. Section 3 of the Federal Arbitration Act (FAA) applies only when an arbitration agreement is partial in scope and, therefore, bifurcates the issues between arbitration and a "trial of the action" in court.

In particular, when the agreement refers some issues to arbitration but leaves other issues in court, and a party files an application for a stay, Section 3 provides that the court "shall stay the trial of the action until such arbitration has been had." This language clearly indicates that a court will adjudicate the merits of the parties' nonarbitrable claims *after* the parties have resolved their arbitrable claims. Section 3 ensures the orderly resolution of arbitrable and nonarbitrable claims in a bifurcated suit.

When, however, the parties have referred all issues in a lawsuit to arbitration, as in this case, Section 3 does not apply. In such a case, no issues remain in court for a "trial of the action." To conclude otherwise would render this key statutory language superfluous.

Section 3's granular "any issue" language differs from the expansive language of Section 4,

which allows a federal court to compel arbitration when it would have jurisdiction to decide the parties' entire controversy. This pointed textual difference must mean that a Section 3 stay does not apply when the parties' entire dispute is arbitrable.

Since Section 3 does not apply when the whole suit belongs in arbitration, the FAA leaves undisturbed a federal court's power to dismiss the suit and compel arbitration. Dismissal is appropriate because the court has declined to exercise its jurisdiction to decide the underlying arbitrable controversy, in order to enforce the parties' arbitration agreement and the FAA's mandate.

When Congress enacted the FAA in 1925, arbitration was generally limited to the resolution of ordinary contract disputes between merchants, decided by *nonlawyer* fellow merchants who applied industry norms, not legal principles. Accordingly, arbitration was deemed to be unsuitable for resolving complex legal issues. Therefore, it would have made sense at the time for parties to agree to keep those legal issues in court, while agreeing to arbitrate their standard business disputes.

Section 3 of the FAA apparently reflects the limited scope of arbitration as it was then practiced. In Section 3, Congress provided for the orderly resolution of arbitrable and nonarbitrable issues in a suit that was subject to a limited arbitration agreement.

Contrary to the petitioners' arguments, a federal court's stay of a suit that the court has sent entirely to arbitration cannot provide the necessary "independent jurisdictional basis" that would allow the court to entertain an "FAA-created arbitration action." In *Badgerow v. Walters,* 596 U.S. 1 (2022), the Court held that a party seeking to confirm or vacate an arbitral award under the FAA must establish a jurisdictional basis on "the face of the application itself." The Court made clear that only the distinctive language of Section 4 (a petition to compel arbitration) allows a court to "look through" the petition to find a jurisdictional basis in the underlying federal suit.

The Court's holding in *Badgerow* should apply regardless of whether the FAA application is a freestanding action or whether the application is filed in a pending suit that a court has stayed, while sending all claims to arbitration. In neither case has Congress authorized resort to "the controversy between the parties" to establish jurisdiction over the FAA application, as Congress has expressly done in Section 4.

Moreover, when a court has stayed a suit but has submitted the entire underlying controversy to arbitration, the court has relinquished its jurisdiction to decide that arbitrable controversy. This differs markedly from the ordinary motion arising out of an ordinary civil suit, in which the court's exercise of jurisdiction to decide the pending suit anchors its jurisdiction to decide the motion.

Nor does the text of Section 3 provide that a federal court may retain jurisdiction over a case that it has sent entirely to arbitration. By contrast, Section 8 of the FAA, which applies to arbitrable admiralty disputes, provides that a federal court "shall retain jurisdiction to enter its decree upon the [arbitral] award," after it has exercised its "jurisdiction to direct the parties to proceed with the arbitration" of their admiralty dispute. The absence of any such jurisdictional language in Section 3 must be a deliberate policy choice of Congress.

ARGUMENT

I. WHEN THE PARTIES' ARBITRATION AGREEMENT HAS DELEGATED ALL ISSUES IN A SUIT TO ARBITRATION, A COURT SHOULD DISMISS THE SUIT AND COMPEL ARBITRATION.

A. Section 3 Of The Federal Arbitration Act Applies Only When An Arbitration Agreement Is Partial In Scope And, Therefore, Bifurcates The Issues In A Suit Between Arbitration And The Court.

At issue is whether Section 3 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (FAA), requires a federal court, upon a party's application, to stay a suit that belongs entirely in arbitration under the parties' agreement, or whether the court may, instead, dismiss the suit and compel arbitration. Section 3 provides, in relevant part:

> 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.

9 U.S.C. § 3 (emphasis added).

This distinctive statutory language tells us that Section 3 applies only when an arbitration agreement is partial in scope and, therefore, bifurcates the "issues" in a federal suit between arbitration and "a trial of the action" in court. "[T]he relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (emphasis supplied by Court). *See also 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).

However, when the agreement delegates *all* issues in a suit to arbitration, as in this case, Section 3 does not apply because no issues remain in court for a "trial of the action," i.e., "the ultimate

resolution of the dispute on the merits." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1052 (4th Cir. 1985) (interpreting Section 3's "trial of the action"). To conclude otherwise would render that key statutory language superfluous. "[O]ne of the most basic interpretive canons [is] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (cleaned up).

In particular, when the parties' arbitration agreement refers some issues in a suit to arbitration but leaves other issues in court, and a party files an application for a stay, Section 3 provides that the court "shall stay the trial of the action until such arbitration has been had." 9 U.S.C. § 3. This language clearly indicates that litigation on the merits of the nonarbitrable claims will take place in court *after* the parties have resolved their arbitrable claims. *See Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 197 (2019) (Breyer, J., dissenting) ("Where a suit contains several claims, and the district court has determined that the parties agreed to arbitrate only a subset of those claims, Section 3 of the FAA provides that the district court must stay the litigation at the request of either party."). *See also* Thomas H. Oehmke with Joan M. Brovins, 3 *Commercial Arbitration* § 65:14 (2023) ("If some issues in a multi-issue dispute are arbitrable, while others are not, then the issues should be segregated with the appropriate issues ordered to arbitration and the remainder subject to resolution by litigation."). *Cf. Moses H. Cone*, 460 U.S. at 20 n.23 (when arbitrable dispute between two parties also

involves non-signatory third party, "it may be advisable to stay litigation among the non-arbitrating parties pending the outcome of the arbitration."). In short, Section 3 ensures the orderly resolution of arbitrable and nonarbitrable claims in a bifurcated suit.

A closer examination of Section 3's language confirms this interpretation. Right away, in the first sentence, Congress has singled out an arbitrable "issue" that is part of a "suit" or "proceeding." Congress has not provided that the "suit" or "proceeding" is itself arbitrable. Also, if Congress had wanted a Section 3 stay to apply even when all of the "issues" in a suit were arbitrable, it would have said so, such as by providing: "If any suit or proceeding be brought in any of the courts of the United States [*which is*] referable to arbitration[, *in whole or in part*]." But Congress chose not to do so. Instead, Congress decided to focus on the particular "issues" that comprise a federal suit. "And its decision governs." *Badgerow v. Walters,* 596 U.S. 1, 11 (2022).

On that note, contrast Section 3's granular "any issue" language with the expansive language of Section 4, which allows a federal court to compel arbitration when it "would have jurisdiction . . . of the *subject matter* of a *suit* arising out of the *controversy* between the parties." 9 U.S.C. § 4 (emphasis added). "[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016) (cleaned up).

Unlike Section 3's specific "any issue" language, Section 4 refers sweepingly to the parties' "full-bodied controversy." *Vaden v. Discover Bank*, 556 U.S. 49, 68 n.16 (2009). This pointed textual difference must mean that a Section 3 stay does not apply when the parties' "full-bodied controversy" is arbitrable. "We have no warrant to redline the FAA, importing Section 4's consequential language into provisions containing nothing like it." *Badgerow*, 596 U.S. at 11.

Since Section 3 does not apply when all of the issues in a suit belong in arbitration, the FAA leaves undisturbed a federal court's power to dismiss the case and compel arbitration.[2] Dismissal is appropriate because the court has declined to exercise its jurisdiction to decide the underlying arbitrable controversy, in order to enforce the parties' arbitration agreement and the FAA's

---

[2] The parties in this case agree that all claims in the petitioners' suit belong in arbitration. Petitioners' Brief at 2. Therefore, the dismissal of this suit does not implicate the procedural consequence that the issue of arbitrability can become an appealable "final decision with respect to an arbitration," under 9 U.S.C. § 16(a)(3). *See Lamps Plus*, 587 U.S. at 181 ("[A]n order directing the parties to proceed to arbitration, and dismissing all the claims before the court, is 'final' within the meaning of § 16(a)(3), and therefore appealable.") (cleaned up). However, parties generally could avoid an appealable "final decision" on the issue of arbitrability simply by delegating that threshold issue to the arbitrator in their agreement. "When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S.__, 139 S. Ct. 524, 528 (2019).

mandate.[3] "Article III demands that an actual controversy persist throughout all stages of litigation." *West Virginia v. EPA*, 597 U.S. 697, 718 (2022) (cleaned up).[4] *See also Sea-Land Serv., Inc. v. Sea-Land of Puerto Rico, Inc.*, 636 F. Supp. 750, 757-58 (D.P.R. 1986) ("Given . . . that all issues raised in th[e] action are arbitrable and must be submitted to arbitration, . . . there are *no live controversies* before th[e] court, [and] the appropriate procedure is dismissal of the action.") (emphasis added).

---

[3] See 9 U.S.C. § 2 ("A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and *enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract.") (emphasis added).

[4] After all, an arbitration agreement is "a specialized kind of forum-selection clause," *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 653 (2022) (cleaned up). And the FAA answers "[t]he threshold question . . . whether [a] court should have *exercised its jurisdiction to* do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by *specifically enforcing* th[at] forum clause." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) (emphasis added).

B. Section 3 Apparently Reflects The Limited Scope Of Arbitration As It Was Practiced At The Time Of The FAA's Enactment, When Nonlawyer Merchants Would Resolve Ordinary Business Disputes Between Fellow Merchants.

The notion of bifurcated claims under an arbitration agreement that is partial in scope may seem quaint and foreign, let alone deserving of special statutory treatment under Section 3. "But this modern intuition isn't easily squared with evidence of the [section's] meaning at the time of the Act's adoption in 1925." *New Prime Inc. v. Oliveira*, 586 U.S. __, 139 S. Ct. 532, 539 (2019) (discussing Section 1's "transportation worker" exemption).

When Congress enacted the FAA in 1925, arbitration was generally limited to the resolution of ordinary contract disputes between merchants, decided by *nonlaywer* fellow merchants who applied industry norms, not legal principles. "[A]rbitrators were seldom lawyers but were fellow merchants in the same business as the disputants and were selected because of the expectation that they would decide using industry custom and usage norms." Edward Brunet, *Seeking Optimal Dispute Resolution Clauses in High Stakes Employment Contracts*, 23 Berkeley J. Emp. & Lab. L. 107, 111 (2002). *See also* Harlan F. Stone,[5] *The Scope and Limitation of*

[5] At the time, the future Chief Justice of the Court was the Dean of Columbia Law School. *See* Stone, *The Scope and Limitation of Commercial Arbitration*, 10 Proc. Acad. Pol. Sci. N.Y. at 195.

Commercial Arbitration, 10 Proc. Acad. Pol. Sci. N.Y. 195, 195 (1923) (before passage of FAA, decrying fact "[t]hat *two merchants* of full age and mental competency should not be permitted by the laws of their country to stipulate for the adjustment and settlement of controversies between them exclusively by the *arbitration of a fellow merchant*.") (emphasis added).[6] This limited use of arbitration already had deep historical roots in the country.[7]

Since arbitrators were typically experienced merchants applying industry standards, not lawyers or retired judges applying the law, arbitration was deemed to be unsuitable for resolving complex legal issues that might arise in the course of parties' business dealings. Indeed, one of the primary drafters of both the FAA and its State precursor, the New York Arbitration Law of 1920, acknowledged

---

[6] *See also* Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 266 (1926) ("Systems of arbitration depending for their effectiveness wholly upon the moral suasion of *the business community* have grown up in the past decades in many lines of American business. Usually the most successful are to be found in the ranks of *thoroughly organized trade associations* which can exercise an effective discipline, whether it be moral or actual.") (emphasis added).

[7] "For example, the New York Chamber of Commerce set up an arbitration system in 1768 in order to settle business disputes according to trade practice *rather than legal principles*[.]" Katherine Van Wezel Stone, *Rustic Justice: Community And Coercion Under The Federal Arbitration Act*, 77 N.C. L. Rev. 931, 971 (1999) (cleaned up) (emphasis added).

this traditional shortcoming of arbitration when the FAA took effect, in 1926:

> Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact . . . . It has a place also in the determination of the simpler questions of law . . . . It is *not the proper method* for deciding points of law of major importance involving constitutional questions or policy in the application of statutes.

Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 281 (1926) (emphasis added).[8] In a similar vein, the Court itself appears to have initially adopted the view that arbitration was inappropriate for deciding various statutory claims.[9]

---

[8] *See also Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 589 n.7 (2008) ("The text of the FAA was based upon that of New York's arbitration statute [of 1920]. . . . Julius Henry Cohen [was] one of the primary drafters of both the 1920 New York Act and the proposed FAA.").

[9] *See, e.g.*, *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (union workers could bring FLSA claims *de novo* in federal court, after having unsuccessfully pursued same wage claims under arbitration clause in collective bargaining agreement); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (same with respect to union worker's Title VII claims); *Wilko v. Swan*, 346 U.S. 427 (1953) (claims under Securities Act of 1933 are not arbitrable).

In sum, arbitration as it was practiced at the time of the FAA's enactment was generally unsuited for deciding complex legal issues. Therefore, it would have made sense for parties to agree to keep those legal issues in court, while agreeing to arbitrate their standard contract disputes first. "Since many arbitration clauses, especially those in building contracts, are partial in scope, *litigation after the determination of the arbitrators* is frequently necessary in order to settle the remaining disputes." Osmond K. Fraenkel, *The New York Arbitration Law*, 32 Colum. L. Rev. 623, 632 (1932). *See also* Stone, *The Scope and Limitation of Commercial Arbitration*, 10 Proc. Acad. Pol. Sci. N.Y.

It was only relatively recently that the Court interpreted the FAA to apply to virtually all state and federal claims, "unless the FAA's mandate has been overridden by a contrary congressional command" in a federal statute. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (cleaned up). *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (FAA exempts only employment contracts of transportation workers engaged in interstate or international commerce); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (distinguishing *Alexander v. Gardner-Denver* and holding that arbitration clause in security broker's securities registration application applied to broker's ADEA claims); *Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (overruling *Wilko v. Swan* and holding that securities claims under Securities Act of 1933 are arbitrable); *Perry v. Thomas*, 482 U.S. 483 (1987) (FAA preempted provision of California Labor Law stating that workers could maintain wage collection actions without regard to any arbitration agreement); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (FAA applies to claims under Securities Act of 1934 and RICO statute); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (FAA applies to federal antitrust claims, even in international arbitration).

at 199 ("[I]t may be found useful in particular trades or businesses to adopt a [pre-dispute] clause calling for *arbitration only on specified enumerated types of controversy*, which experience has shown can best be settled or adjusted by those having expert knowledge of the business, leaving other controversies to be *litigated in the court* or by arbitration as may be deemed advisable when the controversy actually arises.") (emphasis added).

Section 3 of the FAA reflects the limited scope of arbitration as it was then practiced. "[The FAA] must be read in the light of the situation which it was devised to correct and of the history of arbitration." Cohen & Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. at 266. In Section 3, Congress provided for the orderly resolution of arbitrable and nonarbitrable issues in a suit that was subject to a limited arbitration agreement.

Accordingly, Section 3 ensured the specific enforcement of an arbitration agreement that was only partial in scope, while it also ensured a "trial of the action" for those legal issues that the parties left in court. Section 3 also provided the procedure by which a court adjudicating a bifurcated suit would proceed, i.e., staying litigation of the nonarbitrable issues until the parties resolved their arbitrable issues. In sum, Section 3 was a product of its time and embodied the traditional use of arbitration to resolve ordinary business disputes, while preserving complex legal issues for a "trial of the action" in court.

II. A Federal Court's Stay Of A Suit That The Court Has Submitted Entirely To Arbitration Cannot Provide The Necessary "Independent Jurisdictional Basis" That Would Allow The Court To Entertain An "FAA-Created Arbitration Action."

Contrary to the petitioners' arguments, a federal court's stay of a suit that the court has submitted entirely to arbitration *cannot* provide the necessary "independent jurisdictional basis" that would allow the court to entertain an "FAA-created arbitration action." *Badgerow*, 596 U.S. at 8.[10] An FAA-created action would include an application to compel the appearance of witnesses (Section 7), or an application to confirm or vacate the arbitral award (Sections 9 and 10, respectively). "[T]hose provisions, this Court has held, do not themselves support federal jurisdiction." *Badgerow*, 596 U.S. at 8. *See also id.* at 7 ("The district courts of the United States are courts of limited jurisdiction, defined (within constitutional bounds) by federal statute.").

---

[10] To the extent that the Court has presented a different interpretation of Section 3 in certain earlier opinions, that interpretation was dicta to the Court's holding in each of those cases. "It is to the holdings of our cases, rather than their dicta, that we must attend[.]" *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 379 (1994). *See, e.g.*, *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 195, 202 (2000) (discussing Section 3 but deciding case under venue provisions of Sections 9 through 11); *The Anaconda v. Am. Sugar Refining Co.*, 322 U.S. 42, 44-46 (1944) (discussing Section 3 but deciding case under Section 8, applicable to arbitrable admiralty disputes); *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 274-76 (1932) (same).

Instead, those FAA actions are merely procedural vehicles for the specific enforcement of an arbitration agreement in federal court, addressing various stages of the parties' private arbitration process. "[Q]uarrels about legal settlements--even settlements of federal claims--typically involve only state law, like disagreements about other contracts." *Id.* at 9.

Accordingly, the Court in *Badgerow* held that a party seeking to confirm or vacate an arbitral award must establish a jurisdictional basis on "the face of the application itself." *Badgerow*, 596 U.S. at 9. The Court made clear that only the "distinctive language" of Section 4 (authorizing a petition to compel arbitration) allows a court to "look through" the petition to find a jurisdictional basis in the parties' underlying dispute. *See id.* at 5.[11] "Without that statutory instruction," the *Badgerow* Court concluded, "a court may look *only* to the application actually submitted to it in assessing its jurisdiction." *Id.* (emphasis added).

The Court's holding in *Badgerow* should apply regardless of whether the FAA application is a freestanding action, as it was in that case, or whether the application is filed in a pending suit that a court has stayed, while sending the entire controversy to arbitration. In neither case has Congress authorized resort to "the controversy

---

[11] *See also* 9 U.S.C. § 4 ("A party . . . may petition any United States district court which, *save for such [arbitration] agreement*, would have jurisdiction . . . in a civil action or in admiralty of the subject matter of a suit arising out of *the controversy between the parties*.") (emphasis added).

between the parties" to establish jurisdiction over the FAA application, as Congress has expressly done in Section 4. "Congress has not authorized a federal court to adjudicate a Section 9 or 10 application just because the contractual dispute it presents grew out of arbitrating different claims, turning on different law, that (save for the parties' agreement) could have been brought [and decided] in federal court." *Badgerow*, 596 U.S. at 12.

Moreover, when a court has stayed a suit that it has submitted entirely to arbitration, the court has *relinquished* its jurisdiction to decide the parties' underlying arbitrable controversy.[12] That situation differs markedly from the ordinary motion arising out of an ordinary pending suit, in which a court's exercise of "[j]urisdiction to decide the case includes jurisdiction to decide the motion." *Badgerow*, 596 at 15.

Therefore, the mere pendency of a suit that a court has stayed but sent entirely to arbitration cannot provide the necessary jurisdictional foundation for a subsequent FAA application concerning the specific enforcement of the parties' contractual arbitral process. *See SmartSky Networks, LLC v. DAG Wireless, LTD.*, 93 F.4th 175, 181 (4th Cir. 2024) ("SmartSky argues that the district court had subject matter jurisdiction to confirm the [arbitral] award because a complaint that asserts federal claims acts as a 'jurisdictional anchor' for subsequent FAA Section 9 and 10 applications when the [arbitrable] case was

[12] *See* discussion at pp. 9-10 & n.4, above.

previously stayed pursuant to Section 3 . . . . *Badgerow* does not permit such a result.").

Nor does the text of Section 3 provide that a federal court may retain jurisdiction over a case that it has submitted entirely to arbitration. In fact, Section 3 makes no mention of a court's subject matter jurisdiction whatsoever. *See Badgerow*, 596 at 11 (observing the same with respect to Sections 9 and 10). Instead, Section 3 merely requires a court to stay "the trial of the action" of the nonarbitrable issues in a bifurcated federal suit, to allow the parties to resolve their arbitrable issues first.

In sharp contrast, Section 8 of the FAA, which applies to arbitrable admiralty disputes, provides that a federal court "*shall retain jurisdiction* to enter its decree upon the [arbitral] award," after it has exercised its "jurisdiction to direct the parties to proceed with the arbitration" of their admiralty dispute. 9 U.S.C. § 8 (emphasis added).[13] In particular, Section 8 enforces the parties' agreement

---

[13] Section 8 of the FAA provides, in full:

> If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, *and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award*.

9 U.S.C. § 8 (emphasis added).

to arbitrate their admiralty dispute while, at the same time, allowing the aggrieved party to proceed in court with the traditional in rem "seizure of the [disputed] vessel or other property," as prejudgment security.[14] The court then "retains jurisdiction" over the suit after it compels arbitration under the parties' agreement, so that it may "enter its decree upon the award" after the arbitration concludes. *Id*. *Cf. Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 381-82 (1994) (federal court may exercise ancillary jurisdiction over specific enforcement of parties' (non-arbitration) settlement agreement of federal suit when court expressly "retains jurisdiction" over agreement in its order of dismissal).

Nowhere does Section 3 contain Section 8's "distinctive language," *Badgerow*, 596 U.S. at 5, which allows a federal court to "retain jurisdiction to enter its decree upon the award" after arbitration concludes, let alone exercise federal jurisdiction to order pre-judgment security. "When Congress includes particular language in one section of a statute but omits it in another section of the same Act, we generally take the choice to be deliberate." *Id*. at 11 (cleaned up). Section 3 simply provides no textual support for the assertion that a federal court has the jurisdiction to entertain an FAA application when it has stayed a suit but has submitted all of its

[14] *See Marine Transit Corp.*, n.10 above, 284 U.S. at 275 ("The intent of section 8 is to provide for the enforcement of the agreement for arbitration, without depriving the aggrieved party of his right, under the admiralty practice, to proceed against 'the vessel or other property' belonging to the other party to the agreement.").

issues to arbitration, according to the terms of the parties' agreement.

CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court affirm the judgment of the Ninth Circuit.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION

By its attorneys,

Benjamin G. Robbins
Counsel of Record
Daniel B. Winslow, President
New England Legal Foundation
333 Washington Street
Suite 850
Boston, MA 02108
(617) 695-3660
brobbins@newenglandlegal.org

April 1, 2024