

**OH, WON'T YOU STAY WITH ME?:
DETERMINING WHETHER § 3 OF THE FAA
REQUIRES A STAY IN LIGHT OF
KATZ V. CELLCO PARTNERSHIP**

*Alessandra Rose Johnson**

The Federal Arbitration Act (FAA) provides the legal framework to render international and interstate arbitration agreements judicially enforceable in the United States. In furtherance of that goal, it provides that, if a party initiates litigation rather than arbitration of an arbitrable dispute, either party may request that the court stay the litigation pending resolution in an arbitration proceeding. The U.S. courts of appeals are currently split as to whether § 3 of the FAA requires a court under these circumstances to stay the action or whether the court has the discretion to dismiss the action altogether.

In Katz v. Cellco Partnership, the U.S. Court of Appeals for the Second Circuit—a leading U.S. court in creating and shaping domestic and international arbitration law—recently sided with the majority of other circuits in holding that § 3 requires a court to stay the litigation pending arbitration. This Note supports the Second Circuit’s decision, argues that the proper interpretation of FAA § 3 requires a stay, and proposes that the Supreme Court adopt the Second Circuit’s reasoning. Further, this Note argues that the Second Circuit’s “mandatory-stay” approach is consistent with the plain meaning of the statute and important policy objectives: (1) providing the pro-arbitration framework Congress intended when passing the FAA, as the Supreme Court has repeatedly underscored; (2) foreclosing interlocutory appeals of dismissals that stall arbitrations; (3) rejecting docket management as a grounds for dismissal; and (4) avoiding the general uncertainty and unpredictability of dismissals.

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* J.D. Candidate, 2017, Fordham University School of Law; B.M. Classical Piano Performance, Manhattan School of Music. I would like to thank my advisor, Professor Thomas H. Lee, whose thoughtful advice, immeasurable expertise, and tremendous guidance have made this work possible. I would also like to thank my mother for her unwavering support, constant encouragement, and undying love throughout this process and always.

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INTRODUCTION

This Note addresses confusion regarding the interpretation of § 3 of the Federal Arbitration Act¹ (FAA or “the Act”). Currently, the U.S. courts of

1. Federal Arbitration Act, 9 U.S.C. § 3 (2012) (“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, providing the

appeals are split as to whether § 3 (1) requires a district court to stay an action when all the issues are subject to arbitration or (2) grants a district court the discretion to dismiss the action altogether. The First, Fifth, and Ninth Circuits have held that courts have the discretion to dismiss the action. However, the Third, Seventh, Tenth, Eleventh, and, most recently, Second Circuits have held that a stay is mandated. This Note explores the contrasting interpretations of § 3 and focuses on the implications of the Second Circuit's recent decision on the matter—*Katz v. Cellco Partnership*.² Further, this Note argues that the proper view of § 3 is to require a stay, based on a number of justifications: the text, structure, historical background, and policy of the statute; the Supreme Court's clear pro-arbitration position; and judicial economy and efficiency. Finally, this Note argues that the significance of the Second Circuit's recent decision changes the legal landscape and warrants review of the issue by the Supreme Court to resolve the split among the circuits.

Part I of this Note explores the nature of arbitration, including public policy reasons for favoring it over litigation, and the history of the FAA—highlighting how it was shaped and influenced by the New York Arbitration Act of 1920, its purpose, and the provision in question.³ Part I also discusses the significance of New York's state and federal courts' position at the forefront of creating and interpreting arbitration law.⁴ Further, Part I discusses how the issue of whether to stay or dismiss a dispute can arise in court, implicating the separability doctrine, and the effects on the parties of a court's decision to stay or dismiss an action, focusing on interlocutory appeals.⁵ Finally, it highlights the Supreme Court's strong deference to the arbitral process in recent case law. Part II discusses the circuit courts' holdings, outlining their contrasting interpretations and analyzing the Second Circuit's opinion.⁶ Part III argues that district courts must grant a stay when the action is pending arbitration because it is required by the text of the statute, furthers well-established pro-arbitration policy, avoids the undue delay and burden associated with interlocutory appeals, and avoids the chaos associated with dismissals.⁷ Part III then argues that dismissals cannot be justified by concerns of docket congestion, that they are a source of chaos in the federal courts, and that the Second Circuit's voice on this issue warrants particular attention and deference.⁸ Finally, this Note concludes that, because this issue has real, tangible consequences for disputing parties and for the autonomy of the arbitral process, it is time for the Supreme Court to resolve the circuit split by adopting the Second

applicant for the stay is not in default in proceeding with such arbitration.”). The FAA spans 9 U.S.C.

2. 794 F.3d 341 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 596 (2015).

3. *See infra* Part I.

4. *See infra* Part I.

5. *See infra* Part I.

6. *See infra* Part II.

7. *See infra* Part III.

8. *See infra* Part III.

Circuit's compelling framework.⁹ This Note ultimately argues that judicial economy and efficiency, the goals and underlying policies of the FAA, and the Supreme Court's pro-arbitration policies require courts to grant a stay without the discretion to dismiss the action.¹⁰

I. THEN AND NOW: ARBITRATION AND THE UNDERPINNINGS OF THE FAA,
THE CLEAR TREND TOWARD PRO-ARBITRATION PRINCIPLES,
AND WHY THIS ISSUE MATTERS

Section 3 of the FAA instructs a court to stay¹¹ an action on application of one of the parties if the court determines that the parties have agreed to arbitrate a claim brought before it and that the issue is in fact arbitrable.¹² The effect of a court's decision to issue a stay is that no court proceedings on matters subject to arbitration may occur until the arbitration is complete.¹³ However, some circuit courts have read the FAA to grant a district court the discretion to dismiss an action if all the issues are found to be arbitrable.¹⁴ As the Supreme Court has yet to rule on this issue, a circuit split remains.¹⁵ Before discussing the circuits' conflicting views, this part explores (1) the importance of arbitration, (2) the history and enactment of the FAA, including its underlying principles and goals, (3) the significant impact of New York law on arbitration law generally, (4) how arbitrable disputes can land in court in the first place, (5) the effect of a court's decision to stay or dismiss the action, and (6) the increasingly pro-arbitration view of the Supreme Court.

A. *Overview of Arbitration*

Arbitration is a common form of alternative dispute resolution¹⁶ (ADR) used to adjudicate or settle matters outside of a traditional court, typically occurring as a result of a contractual agreement or court order.¹⁷ In arbitration, the parties submit their disputes to one or more third-party decision makers.¹⁸ Parties often favor arbitration over litigation because of factors such as the expected speed of dispute resolution; the expertise of the arbitrator; streamlined, cost-effective, and flexible procedures, including limitations on discovery and pre-trial practice; confidentiality; and

9. *See infra* CONCLUSION.

10. *See infra* CONCLUSION.

11. A stay is "[a]n order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding." *Stay*, BLACK'S LAW DICTIONARY (10th ed. 2014).

12. *See Williams v. Imhoff*, 203 F.3d 758, 764 (10th Cir. 2000).

13. *USM Corp. v. GKN Fasteners, Ltd.*, 574 F.2d 17, 20 (1st Cir. 1978).

14. *See, e.g., Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 144 (1st Cir. 1998); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992); *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988); *see also infra* Part II.B.

15. *See infra* Part II.

16. *See Lloyd N. Shields, Arbitration As ADR*, 41 LA. B.J. 222, 225 (1993).

17. *See* 83 AM. JUR. 3d *Proof of Facts* §§ 10, 114 (2005).

18. *See id.* § 11.

location.¹⁹ In accordance with public policy favoring arbitration, courts construe the scope of arbitration agreements liberally.²⁰

B. Overview of the FAA

Congress first enacted the FAA in 1925 and then reenacted and codified it in 1947.²¹ The FAA governs arbitration agreements involving maritime disputes and contracts involving interstate or foreign commerce.²² It was a response to “the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts.”²³ Its purpose was “to make valid and enforceable [sic] agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, or which may be the subject of litigation in the Federal courts.”²⁴ In so doing, it “simply . . . make[s] the contracting party live up to his agreement,” placing arbitration agreements on the “same footing as other contracts.”²⁵ The Supreme Court has articulated the primary purpose behind the FAA—to “enforce agreements into which parties had entered”—and noted that it effectively encourages efficient dispute resolution.²⁶

While the FAA directs courts to place arbitration agreements on equal footing with other contracts, it “does not require parties to arbitrate when they have not agreed to do so.”²⁷ Because the FAA “is at bottom a policy

19. See Shields, *supra* note 16, at 224–25. But see Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System’*, N.Y. TIMES (Nov. 1, 2015), <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> (critiquing the arbitral process) [<https://perma.cc/ALB2-MGD6>]; Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> (same) [<https://perma.cc/YN79-BMU3>].

20. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (“[I]t is the congressional policy manifested in the [FAA] that requires courts liberally to construe the scope of arbitration agreements covered by that Act”); *McMahan Sec. Co. v. Forum Capital Mkts. L.P.*, 35 F.3d 82, 88 (2d Cir. 1994) (“[W]e are mindful that the ‘federal policy favoring arbitration requires us to construe arbitration clauses as broadly as possible’ and that ‘arbitration should be ordered unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.’” (quoting *S.A. Mineracao Da Trindade-Samitri v. Utah Int’l, Inc.*, 745 F.2d 190, 194–95 (2d Cir. 1984))).

21. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

22. See Federal Arbitration Act, 9 U.S.C. § 2 (2012).

23. *Gilmer*, 500 U.S. at 24.

24. See H.R. REP. NO. 68-96, at 1 (1924).

25. *Id.*; see also *Gilmer*, 500 U.S. at 24 (“[The FAA’s] purpose was . . . to place arbitration agreements upon the same footing as other contracts.”); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219–20 (1985).

26. *Dean Witter Reynolds*, 470 U.S. at 220–21 (citing 65 CONG. REC. 1931 (1924)) (“It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts.”).

27. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); see also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (“[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so.”).

guaranteeing the enforcement of private contractual arrangements,”²⁸ courts look first to whether the parties agreed to arbitrate a dispute—not to general policy goals—to determine the scope of that agreement.²⁹ For example, ambiguities in the language of the agreement are resolved in favor of arbitration,³⁰ but not if the parties’ intent is clearly contrary or the result is inconsistent with the plain text of the contract. Succinctly put, arbitration under the FAA is “a matter of consent, not coercion.”³¹ The Supreme Court’s articulation of the FAA’s aim in *Dean Witter Reynolds, Inc. v. Byrd*³² supports that fundamental principle, stating that the statute’s primary purpose “requires that we rigorously enforce agreements to arbitrate, even if the result is ‘piecemeal’ litigation.”³³

The FAA was modeled after the New York Arbitration Act of 1920³⁴ (NYAA), which was the first state or federal statute validating arbitration agreements.³⁵ Several other states later followed New York’s lead by enacting their own arbitration statutes.³⁶ One of the drafters of the FAA, Julius Cohen, stated that “there can be little doubt that the attitude and the decisions of the New York courts will be persuasive in the interpretation of the Federal statute since the provisions of the two are largely identical.”³⁷

In particular, the text of section 5 of the NYAA is strikingly similar to that of § 3 of the FAA.³⁸ Decisions interpreting the New York statute are thus, at a minimum, instructive as to the meaning of its federal counterpart. An early interpretation of the NYAA by the New York Court of Appeals at the time of the FAA’s enactment required New York courts to stay matters pending arbitration under section 5.³⁹

C. *The Significance of New York’s State and Federal Courts in Arbitration Law*

Rooted in the NYAA, modern federal arbitration law has been shaped by New York courts.⁴⁰ This remains true today. With the national trend of growing arbitration, as well as ADR generally, the Second Circuit has been a particularly influential player in this area of the law.⁴¹ The New York

28. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

29. *See id.* at 626.

30. *See Volt Info. Scis.*, 489 U.S. at 475–76.

31. *Id.* at 479.

32. 470 U.S. 213 (1985).

33. *Id.* at 221.

34. 1920 N.Y. Laws ch. 275.

35. *See* KATHERINE V.W. STONE, *ARBITRATION LAW* 6 (2003) (“Modern arbitration law has its origins in the New York Arbitration Act of 1920.”).

36. *See id.* at 10.

37. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 275 (1926).

38. *Compare* 1920 N.Y. Laws ch. 275, § 5, with 9 U.S.C. § 3 (2012).

39. *See generally* Berkovitz v. Arbib & Houlberg, Inc., 130 N.E. 288 (N.Y. 1921).

40. *See supra* Part I.B.

41. For examples of the Second Circuit’s pro-arbitration opinions generally, including in contexts beyond the scope of this Note, see, for example, *U.S. Fire Insurance v. National*

Convention, the foundational treaty for international arbitration, even bears the state's name, paying homage to the location that was so instrumental in forming and enforcing the laws of arbitration.⁴² As a global center of international business, securities trading, commerce, banking, and finance, as well as a venue friendly to organized labor and collective bargaining, New York is home to the lion's share of international and domestic arbitration.⁴³ In fact, it is one of the most popular venues for international arbitration in the world and the most popular city for domestic arbitration in the country.⁴⁴ Consequently, New York law is often chosen as the governing law in business contracts, whether or not the parties or the transactions in the dispute have any other connection to New York or the United States.⁴⁵ Thus, New York courts have developed a sophisticated body of commercial law that supports the autonomy of the arbitral process.⁴⁶ Additionally, there is a wealth of expert ADR professionals in New York, a solid reputation for neutral courts that have extensive experience with complex commercial issues and other business disputes, a strong policy in favor of arbitration, and the necessary infrastructure to facilitate the management of any type of case.⁴⁷

D. Litigation or Arbitration?:

The Separability Doctrine and How This Issue Can Arise in Court

Even where the litigants are parties to an arbitration agreement, their dispute may find its way before a court.⁴⁸ For example, a plaintiff can

Gypsum Co., 101 F.3d 813 (2d Cir. 1996), holding that the preclusive effect of a previous ruling by a court on an arbitration is arbitrable just like any other defense to arbitration, and *Thomas James Association v. Jameson*, 102 F.3d 60, 65 (2d Cir. 1996), holding that an employer was required to arbitrate employment disputes even though the employment application did not specifically require arbitration of such disputes.

42. See Vera Korzun & Thomas H. Lee, *An Empirical Survey of International Commercial Arbitration Cases in the US District Court for the Southern District of New York, 1970–2014*, 39 *FORDHAM INT'L L.J.* 307, 340 (2015); see also Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

43. For a record and analysis of empirical data concerning international commercial arbitrations in the U.S. District Court for the Southern District of New York, see Korzun & Lee, *supra* note 42. The article describes the district court as “the John F. Kennedy (JFK) Airport of the international commercial arbitration community” due to its status as the busiest venue in the world for those types of arbitrations. *Id.* at 313. Between 1970 and 2014, there were 122 actions in the Southern District of New York involving suits to enforce arbitral awards, 111 actions to enforce arbitration agreements, 46 actions to seek interim measures, and 25 suits to set aside or vacate arbitral awards. *Id.* at 346–47.

44. See *Why Arbitrate in New York*, N.Y. INT'L ARB. CTR., <http://nyiac.org/new-york/> (last visited Mar. 27, 2016) [<https://perma.cc/C6NG-5MC6>].

45. See Korzun & Lee, *supra* note 42, at 340.

46. *But see* Committee on International Commercial Disputes of the Association of the Bar of the City of New York, *The “Manifest Disregard of Law” Doctrine and International Arbitration in New York*, 24 *AM. REV. INT'L ARB.* 209, 209 (2013) (discussing the questionable desirability of New York as a seat for international arbitration for reasons outside the scope of this Note).

47. See *Why Arbitrate in New York*, *supra* note 44.

48. See MARTIN DOMKE, *DOMKE ON COMMERCIAL ARBITRATION* § 22.1 (Larry E. Edmonson ed., 3d ed. 2015).

initiate a suit in court, ignoring the arbitration agreement altogether.⁴⁹ In that case, a defendant can request a stay pending arbitration, move to compel arbitration, or both.⁵⁰ A plaintiff may also initiate arbitration, and a defendant may commence a court action to argue that the dispute is not covered by the arbitration agreement.⁵¹ In addition, a party may ignore a demand for arbitration, leading the other to sue to compel arbitration.⁵²

A discussion of how arbitrable disputes can land in federal court warrants a brief overview of the doctrine of separability. The Supreme Court recognized the doctrine in the landmark decision *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,⁵³ a case interpreting and applying the FAA. As the Court articulated in *Prima Paint*, the doctrine of separability dictates that an arbitration agreement is treated as a contractual agreement that is independent from the main or underlying contract of which it is a part.⁵⁴ As a result, an arbitration agreement is not necessarily rendered unenforceable by the invalidity of the underlying contract.⁵⁵ In other words, because arbitration agreements are separate from the contracts of which they are a part, arbitrators retain their jurisdiction even if the validity of the underlying contract is challenged. Consequently, when a party moves to compel arbitration or stay litigation pending arbitration, courts must refer arbitrable issues to arbitration even if the validity of the underlying contract is challenged.⁵⁶ The inverse of this doctrine—that the invalidity of an arbitration agreement does not invalidate the underlying contract—also holds true.⁵⁷ The Court in *Prima Paint* further elaborated that, in determining whether to stay litigation under § 3 or compel arbitration under § 4, the only question appropriate for a court to consider is that of the validity of the arbitration agreement itself.⁵⁸

The separability doctrine distinguishes between challenges to the arbitration agreement and those to the underlying contract as a whole.⁵⁹ Challenges to the arbitration agreement itself are questions of arbitrability, which, unless expressly reserved for the arbitrator, are appropriate for the court to decide.⁶⁰ On the other hand, challenges to the contract as a whole are questions exclusively left to the arbitrator.⁶¹ As a result, a dispute that

49. *See id.*

50. *See id.*

51. *See id.*

52. *See id.*

53. 388 U.S. 395 (1967).

54. *See id.* at 402; *see also* Robert H. Smit, *Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit?: Or Can Something Indeed Come from Nothing?*, 13 AM. REV. INT'L ARB. 19, 21 (2002).

55. *See* Smit, *supra* note 54, at 21.

56. *See id.*

57. *See id.*

58. *See Prima Paint*, 388 U.S. at 412–16.

59. *See* 31 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 905.02, LexisNexis (database updated 2015).

60. *See id.*; *see also* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995).

61. *See* MOORE ET AL., *supra* note 59, § 905.02.

is arguably subject to arbitration could begin in federal court, where the court is charged with determining arbitrability at the outset.

One justification for the separability doctrine is based on the essential autonomy of arbitration.⁶² Invoking the doctrine prevents parties from delaying arbitration or avoiding it altogether by challenging the underlying contract containing the arbitration clause either in court or in the arbitration proceeding itself.⁶³ Avoiding judicial interference in disputes over arbitrable issues in this way helps to preserve the integrity and efficacy of the arbitral process.⁶⁴

Another justification for separability is that it protects against the danger that arbitrators will improperly uphold their own jurisdiction over a matter in private arbitrations.⁶⁵ Because decisions about the validity of agreements necessarily dictate the limits of arbitrators' power, arbitrators have a strong economic incentive to find that they have jurisdiction so that they can hear a dispute.⁶⁶ Therefore, the authority of courts to decide the threshold issue of whether an arbitration agreement is valid is a necessary safeguard against this potential for overreaching.⁶⁷

In addition, this doctrine preserves one of the bedrock principles of arbitration as articulated by the Supreme Court in *Dean Witter Reynolds, Inc. v. Byrd*—respecting the parties' right to contract by enforcing their agreements.⁶⁸ It is a necessary tool "to effectuate the parties' implied or express intent that any and all disputes between them be arbitrated, including disputes about the validity of their underlying contract."⁶⁹

*E. The Effect of a Court's Order to Stay or Dismiss:
Interlocutory Appeals and Why This Issue Matters*

A federal district court's decision to stay or dismiss an action determines when an appeal is permitted. A stay is considered an interlocutory order and is not appealable under § 16 of the FAA.⁷⁰ While dismissal triggers appellate jurisdiction, which allows an immediate appeal, granting a stay precludes the possibility of an immediate appeal.⁷¹

In 1988, Congress amended the FAA to clarify the right of appeal, with the intent to "promote appeals from orders barring arbitration and limit

62. See Smit, *supra* note 54, at 22.

63. See *id.*

64. See *id.*

65. See Korzun & Lee, *supra* note 42, at 321.

66. See *id.*

67. See *id.*

68. See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985); see also Smit, *supra* note 54, at 22.

69. Smit, *supra* note 54, at 22.

70. See 9 U.S.C. § 16(b) (2012).

71. See Pierre H. Bergeron, *District Courts As Gatekeepers?: A New Vision of Appellate Jurisdiction Over Orders Compelling Arbitration*, 51 EMORY L.J. 1365, 1378 (2002); see also *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 87 n.2 (2000).

appeals from orders directing arbitration.”⁷² That amendment was later codified as § 16 of the FAA.⁷³ Section 16(b) prohibits appeals from an interlocutory order granting a stay of an action pending arbitration under § 3.⁷⁴

Contrast that with § 16(a), which provides that, if the court order is a “final decision,” appellate review is permitted.⁷⁵ Therefore, appellate review is precluded unless the court order is considered a final decision or falls within one of the exceptions in § 16(a)(1) or (2).⁷⁶ Even the distinction between a stay and a final decision is not clear, however. The circuit courts are divided on when a decision is “final” within the meaning of § 16(a)(3),⁷⁷ but the Supreme Court has given some clarification.

In *Green Tree Financial Corp.-Alabama v. Randolph*,⁷⁸ the Supreme Court squarely addressed the question of whether an order compelling arbitration and dismissing an action was a “final decision with respect to an arbitration within the meaning of § 16(a)(3) of the [FAA], and thus is immediately appealable pursuant to that Act.”⁷⁹ Noting that the FAA does not provide its own definition, the Court described a final decision as one that “ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.”⁸⁰ Ultimately, it held that, when a court dismisses all claims before it, nothing is left for the court to do but execute the ruling, so that the decision is “final” within the meaning of § 16(a)(3) and therefore immediately appealable.⁸¹

The Third Circuit has noted that a dismissal, as opposed to a stay, causes undue delay, thereby depriving a party entitled to arbitration of “the right to proceed with arbitration without the substantial delay arising from an

72. *See* *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953, 955 (10th Cir. 1994) (quoting *Filanto, S.P.A. v. Chilewich Int’l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993)).

73. *See id.*

74. *See* 9 U.S.C. § 16(b) (“[A]n appeal may not be taken from an interlocutory order . . . (1) granting a stay of any action under section 3 of this title; (2) directing arbitration to proceed under section 4 of this title; (3) compelling arbitration under section 206 of this title; or (4) refusing to enjoin an arbitration that is subject to this title.”).

75. *See id.* § 16(a)(1)–(3) (“An appeal may be taken from . . . (1) an order . . . (A) refusing a stay of any action under section 3 of this title, (B) denying a petition under section 4 of this title to order arbitration to proceed, (C) denying an application under section 206 of this title to compel arbitration, (D) confirming or denying confirmation of an award or partial award, or (E) modifying, correcting, or vacating an award; (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or (3) a final decision with respect to an arbitration that is subject to this title.”).

76. *Adair Bus Sales*, 25 F.3d at 955.

77. *See id.* (comparing the circuits’ conflict over whether an order can only be final within the meaning of § 16(a)(3) and therefore immediately appealable if the only issue before the court is arbitrability, and stating that a stay pending arbitration under § 3 will “virtually always be characterized as interlocutory, and not as a final decision within § 16(a)(3)”).

78. 531 U.S. 79 (2000).

79. *Id.* at 82.

80. *Id.* at 86 (quoting *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994)).

81. *See id.* at 89.

appeal.”⁸² In the same opinion, the court contrasted the effects of granting a motion to stay litigation: “[I]t relieves the party entitled to arbitrate of the burden of continuing to litigate the issue while the arbitration process is ongoing, and it entitles that party to proceed immediately to arbitration without the delay that would be occasioned by an appeal of the District Court’s order to arbitrate.”⁸³ Under § 16 of the FAA, an interlocutory appeal is available following a court order “refusing a stay of any action under section 3 of [the Act].”⁸⁴

F. *The Supreme Court’s Cases Involving Arbitrable Claims*

In the last several decades, the Supreme Court has been increasingly deferential to the arbitral process.⁸⁵ Though the FAA was intended to overcome a neutral-to-negative view of arbitration, “a number of this Court’s cases decided in the last several decades have pushed the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration.”⁸⁶ This pro-arbitration trend demonstrates increased faith in the arbitral process and should influence other courts’ attitudes.

II. THE CIRCUIT SPLIT: MANDATE A STAY OR PERMIT DISMISSAL?

The divide over whether the FAA mandates a stay or grants a district court discretion to dismiss an action pending arbitration has recently deepened. The Second Circuit has now weighed in on this issue in an exhaustive and detailed opinion and has held that a stay is required under the FAA.⁸⁷ In light of this case, this part discusses the three conclusions the circuit courts have reached when addressing § 3—to mandate a stay, to permit dismissal, or to remain expressly uncommitted.

82. *Lloyd v. Hovensa, LLC*, 369 F.3d 263, 271 (3d Cir. 2004).

83. *Id.* at 270.

84. 9 U.S.C. § 16(a)(1)(A) (2012); *see also* *Forsythe Int’l S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1020 (5th Cir. 1990) (stating that § 16 favors arbitration by “permitting interlocutory appeals of orders favoring litigation over arbitration and precluding review of interlocutory orders that favor arbitration”).

85. *Compare* *Wilko v. Swan*, 346 U.S. 427 (1953) (holding that arbitration in the context of disputes arising under the Securities Act of 1933 would inadequately protect the buyers of securities), *with* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (stating that the strong federal policy favoring arbitration requires courts to construe parties’ intentions generously on issues of arbitrability).

86. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 131–32 (2001). To demonstrate the Court’s pro-arbitration policy, the Court cited *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), *Mitsubishi Motors Corp.*, 473 U.S. 614, *Southland Corp. v. Keating*, 465 U.S. 1 (1984), *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), and *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967). *See Circuit City*, 532 U.S. at 132 n.14.

87. *See Katz v. Cellco P’ship*, 794 F.3d 341 (2d Cir. 2015).

A. Section 3 Mandates a Stay

One of the practical benefits of issuing a stay is that it prevents a court from having to reestablish subject matter jurisdiction at the enforcement stage following an arbitration award.⁸⁸ Five circuits—the Tenth, Eleventh, Seventh, Third, and Second—have held that a stay is mandated and that a district court lacks discretion to dismiss.

1. The Tenth Circuit

Upon review of a case involving a breach of a distributorship agreement in which the district court issued an order compelling arbitration, the Tenth Circuit clarified that the “closing” of the case was not effectively a dismissal; rather, the “order clearly contemplates the possibility of continued federal litigation.”⁸⁹ The appellate court continued: “[A stay] is the relief statutorily authorized Were the order construed to be a dismissal, the appropriate course for this court would be to vacate the order and remand for issuance of a stay.”⁹⁰

In a later decision, the Tenth Circuit again articulated that rule. In *Adair Bus Sales, Inc. v. Blue Bird Corp.*,⁹¹ a case in which the defendant sought a stay pending arbitration, the district court found that the dispute was squarely within the scope of the arbitration agreement.⁹² The court then proceeded to dismiss the action.⁹³ On appeal, the Tenth Circuit stated that the district court should have granted the motion to stay pending arbitration instead of dismissing the action.⁹⁴

Notably, the later opinion focused on the question of appealability. The court identified that “[a] majority of the circuits have adopted the view that an order can only be final within the meaning of § 16(a)(3) and therefore immediately appealable if arbitrability is the sole issue before the district court.”⁹⁵ However, “if issues other than the propriety of arbitration are raised or relief other than a determination as to the arbitrability of the dispute is sought,” an order is not final and therefore not immediately appealable.⁹⁶ Adopting that majority approach, the court determined that a stay under § 3 effectively always will be interlocutory and not final within the meaning of § 16(a)(3).⁹⁷ The Tenth Circuit reasoned in part that there is an inherent likelihood in § 3 suits of the presence of issues other than

88. See IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT § 9.2.3 (1995) (stating that issuing a stay under FAA § 3 following an arbitration award allows parties seeking to confirm, vacate, or modify the award to return to the federal court where the stayed action is pending).

89. *Quinn v. CGR*, 828 F.2d 1463, 1465 (10th Cir. 1987).

90. *Id.* at 1465 n.2 (quoting 9 U.S.C. § 3 (1982)).

91. 25 F.3d 953 (10th Cir. 1994).

92. *See id.* at 954.

93. *See id.* at 954–55.

94. *See id.* at 955 (citing *Quinn*, 828 F.2d at 1465 n.2).

95. *Id.*

96. *Id.*

97. *See id.*

arbitrability.⁹⁸ Ultimately, the court noted that, if the district court had properly granted the defendant's motion for a stay, that order would have been interlocutory because the plaintiff sought arbitrability of the dispute, and the court would not have had appellate jurisdiction.⁹⁹ The court based its appellate jurisdiction on the fact that the appeal was presented following the district court's order of dismissal.¹⁰⁰

2. The Eleventh Circuit

In a case involving a sexual harassment claim by an employee against a stock brokerage firm, the District Court for the Middle District of Florida found that the pendent state law claims were covered by the arbitration agreement and dismissed those claims.¹⁰¹ On appeal, the Eleventh Circuit agreed that the claims were subject to arbitration but held that the district court should have stayed them instead of ordering dismissal.¹⁰² The court explicitly held that “[u]pon finding that a claim is subject to an arbitration agreement, the court should order that the action be stayed pending arbitration.”¹⁰³ Accordingly, it vacated the dismissal of the state law claims and remanded the action with instructions that the claims be stayed pending arbitration.¹⁰⁴

Consistent with the Tenth Circuit,¹⁰⁵ the Eleventh Circuit also noted the appealability issue.¹⁰⁶ The court observed that dismissal was appealable as a final decision; however, if the district court had stayed the state law claims, the order would not have been appealable pursuant to 9 U.S.C. § 16(b)(1)–(2).¹⁰⁷

3. The Seventh Circuit

In a case involving claims of age discrimination brought under the Age Discrimination in Employment Act, the District Court for the Northern District of Illinois dismissed the claims for lack of jurisdiction because the claims were pending arbitration.¹⁰⁸ However, on appeal, the Seventh Circuit held that, whenever a suit must be interrupted to refer to another forum, the district court should retain jurisdiction by staying the claims rather than dismissing the action.¹⁰⁹ Underlying the Seventh Circuit's reasoning is an efficiency argument—if there may later be grounds for reinstating jurisdiction, the suit can easily and efficiently resume in court if

98. *See id.*

99. *See id.*

100. *See id.*

101. *See Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir. 1992).

102. *See id.*

103. *Id.* (citing 9 U.S.C. § 3 (1992)).

104. *See id.*

105. *See Adair Bus Sales*, 25 F.3d at 955.

106. *See Bender*, 971 F.2d at 699.

107. *See id.*

108. *See Tice v. Am. Airlines, Inc.*, No. 95 C 6890, 2001 WL 1002466, at *4 (N.D. Ill. Aug. 30, 2001).

109. *See Tice v. Am. Airlines, Inc.*, 288 F.3d 313, 318 (7th Cir. 2002).

the action were stayed rather than dismissed.¹¹⁰ In constructing this reasoning, the court analogized the issue to the doctrine of primary jurisdiction.¹¹¹

The court had previously addressed this doctrine in an earlier case:

[I]n its central and original form, in which it is more illuminatingly described, however, as “exclusive agency jurisdiction,” . . . applies only when, in a suit involving a regulated firm but not brought under the regulatory statute itself, an issue arises that is within the exclusive original jurisdiction of the regulatory agency to resolve, although the agency’s resolution of it will usually be subject to judicial review. When such an issue arises, the suit must stop and the issue must be referred to the agency for resolution. If the agency’s resolution of the issue does not dispose of the entire case, the case can resume subject to judicial review of that resolution along whatever path governs review of the agency’s decisions, whether back to the court in which the original case is pending or, if the statute governing review of the agency’s decisions designates another court, to that court.¹¹²

In *Tice v. American Airlines, Inc.*,¹¹³ the court applied this reasoning to the question of whether to stay or dismiss cases pending arbitration and concluded that that context should be treated similarly.¹¹⁴ Accordingly, it modified the judgment of the district court to convert the dismissal to a stay pending arbitration.¹¹⁵

A few years later, the Seventh Circuit reiterated its position that the proper course of action is to stay the proceedings pending arbitration rather than dismiss altogether.¹¹⁶ Furthermore, the court clarified the proper source of a district court’s authority in that context, stating that it does not derive from Rule 12(b) of the Federal Rules of Civil Procedure, but rather directly from the FAA itself in § 3.¹¹⁷

4. The Third Circuit

The Third Circuit reviewed a decision by the District Court of the Virgin Islands, which denied a motion to stay proceedings pending arbitration and instead dismissed them with prejudice.¹¹⁸ In that case, the appellate court determined that it had jurisdiction to hear the appeal because the district court’s order constituted a “final decision with respect to an arbitration”

110. *See id.*

111. *See id.* at 317–18.

112. *Id.* (quoting *Arsberry v. Illinois*, 244 F.3d 558, 563 (7th Cir. 2001) (citations omitted)).

113. 288 F.3d 313 (7th Cir. 2002).

114. *See id.* at 318.

115. *See id.* at 318–19.

116. *See Cont’l Cas. Co. v. Am. Nat’l Ins.*, 417 F.3d 727, 732 n.7 (7th Cir. 2005).

117. *See id.* (citing *Tice*, 288 F.3d at 318); *see also* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1360, Westlaw (database updated Apr. 2015) (characterizing a motion to stay pending arbitration as “Not Enumerated in Rule 12(b)”).

118. *See Lloyd v. Hovensa, LLC*, 369 F.3d 263 (3d Cir. 2004); *see also Lloyd v. Hovensa LLC*, 243 F. Supp. 2d 346 (V.I. 2003).

pursuant to 9 U.S.C. § 16(a)(3).¹¹⁹ Upon consideration of whether the district court erred in dismissing the action rather than granting the motion for stay, the appellate court noted that this was an issue of first impression and recognized the discord among the circuits.¹²⁰ The Third Circuit emphasized in detail its reliance on a Supreme Court decision—*Green Tree Financial Corp.-Alabama v. Randolph*—in forming its own interpretation of the statute.¹²¹

In *Green Tree Financial*, the Court held that the plain meaning of the term “final decision” must be applied to § 16(c)(3).¹²² Applying that plain language reading to § 3, the Third Circuit held that a stay was mandated¹²³:

The directive that the Court “shall” enter a stay simply cannot be read to say that the Court shall enter a stay in all cases except those in which all claims are arbitrable and the Court finds dismissal to be the preferable approach. On the contrary, the statute clearly states, without exception, that whenever suit is brought on an arbitrable claim, the Court “shall” upon application stay the litigation until arbitration has been concluded Accordingly, we hold that the District Court was obligated under 9 U.S.C. § 3 to grant the stay once it decided to order arbitration.¹²⁴

In support of its plain language approach to interpretation, the Third Circuit emphasized the maxim that only in the face of an absurd result that could not have been intended by Congress would a court be at liberty to “disregard an unambiguous directive.”¹²⁵ In addition, the court noted that it is burdensome for a litigant to have to file a new action each time the court’s assistance is required and bear the risk that the case would be assigned to a new judge.¹²⁶ In comparison, the court articulated the benefits of allowing the court to retain jurisdiction by issuing a stay, thereby expediting the process and allowing the parties to return easily to the same judge.¹²⁷

Further, the Third Circuit identified additional practical benefits to mandating a stay. Issuing a stay relieves the parties of having to continue to litigate while the arbitration is ongoing and allows the parties to proceed immediately with arbitration without having to wait for an appeal of the district court’s order to arbitrate.¹²⁸ Therefore, the court reasoned that the

119. *See Lloyd*, 369 F.3d at 268 (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 86 (2000)).

120. *See id.* at 268–69 (citing the First, Fourth, Fifth, Sixth, Ninth, and Tenth Circuits addressing this issue).

121. *Id.* at 269–70.

122. *Green Tree Financial*, 531 U.S. at 88.

123. *See Lloyd*, 369 F.3d at 269–71.

124. *Id.* at 269.

125. *Id.* at 269–70 (citing *Mitchell v. Horn*, 318 F.3d 523, 535 (3d Cir. 2003)).

126. *See id.*

127. *See id.*

128. *Id.* An appeal may not be taken from an interlocutory order granting a stay under § 3 or compelling arbitration under § 4. 9 U.S.C. § 16(b)(1)–(2) (2012). However, an immediate appeal is available if the court issued an order refusing to grant a stay or denying a petition to compel arbitration. *Id.* § 16(a)(1)(A)–(B).

overall statutory scheme of the FAA shows a policy decision to eliminate judicial interference with the arbitral process unless and until there is a final award.¹²⁹ Accordingly, interpreting the statute according to its plain meaning was the only reading consistent with the text, the overall structure of the statute, and the strong policy favoring arbitration.¹³⁰

5. The Second Circuit

Most recently, the Second Circuit joined the circuits holding that a stay is required.¹³¹ The case, a class action brought by consumers against a wireless phone service provider seeking a declaratory judgment that compelling arbitration under the FAA pursuant to a contractual arbitration clause was unconstitutional, was on appeal from the District Court for the Southern District of New York.¹³² The district court denied declaratory relief and compelled arbitration of all claims.¹³³ In addition, it denied the defendant's motion to stay the proceedings, instead dismissing the action and noting that whether dismissal was permitted was still an open question within the circuit.¹³⁴

Acknowledging the divide among the circuit courts, the Second Circuit also noted that the Supreme Court had not yet decided the issue¹³⁵ and that the Second Circuit itself had suggested competing conclusions. For example, in *McMahan Securities Co. v. Forum Capital Markets, L.P.*,¹³⁶ the court stated that “[u]nder the [FAA], a district court must stay proceedings if satisfied that the parties have agreed in writing to arbitrate an issue or issues underlying the district court proceeding. The FAA leaves no discretion with the district court in the matter.”¹³⁷ Contrary to this position, however, the court also stated in a subsequent case that “if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then decide whether to stay the balance of the proceedings pending

129. *Lloyd*, 369 F.3d at 270.

130. *Id.* at 271.

131. *See Katz v. Cellco P'ship*, 794 F.3d 341 (2d Cir. 2015).

132. *See id.* at 343; *see also Katz v. Cellco P'ship*, No. 12 CV 9193(VB), 2013 WL 6621022 (S.D.N.Y. Dec. 12, 2013). On appeal, the Second Circuit also analyzed state law claims that are not of importance to this Note. *See Katz*, 794 F.3d at 343–44. Additionally, the plaintiff brought challenges to the constitutionality of the FAA, arguing that compelling arbitration violates Article III's separation of powers principles and deprives a plaintiff of his personal right to adjudication before an independent Article III judge. *Katz*, 2013 WL 6621022, at *4. The district court discussed and dismissed those challenges. *Id.* at *8–15. On appeal, the Second Circuit called the challenges “meritless” and deferred to the “well-reasoned opinion of the District Court” on that issue. *Katz*, 794 F.3d at 343.

133. *See Katz*, 2013 WL 6621022, at *15.

134. *See Katz*, 794 F.3d at 344.

135. *See id.* (“The question whether the District Court should have taken that course [that is, to dismiss rather than to stay the case after all claims were compelled to arbitration] is not before us, and we do not address it.” (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 87 n.2 (2000))).

136. 35 F.3d 82 (2d Cir. 1994).

137. *Id.* at 85–86 (citing 9 U.S.C. § 3 (1992); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985)).

arbitration.”¹³⁸ But in neither of those cases did the court address the specific question posed in *Katz*; rather, both cases addressed whether a stay was necessary or ancillary to the arbitrability issue.¹³⁹

In another relevant case, the court “urge[d] district courts in these circumstances to be as clear as possible about whether they truly intend to dismiss an action or mean to grant a stay pursuant to [FAA § 3], which supplies that power.”¹⁴⁰ The facts of that case are, however, also distinguishable. There, the court addressed whether dismissal under § 16 of the FAA was a “final decision,” assuming for the purposes of the decision that dismissal was permissible.¹⁴¹

Following these decisions, in *Katz*, the Second Circuit then held that a stay is required pending arbitration.¹⁴² In support of this holding, the court analyzed the text, structure, and underlying policy of the FAA.¹⁴³ First looking to the text of the statute, the court focused on the word “shall,” concluding that it stripped the directive of any discretionary nature.¹⁴⁴ The court also stated that the plain language must be followed unless it produces an absurd result, which it found was not the case there.¹⁴⁵ In fact, the court held that, contrary to an absurd result, a mandatory stay compels a result firmly congruent with the FAA’s overall statutory scheme and underlying policy.¹⁴⁶

Next, considering the FAA’s statutory scheme as a whole, the Second Circuit emphasized the appellate implications.¹⁴⁷ If a court has discretion to dismiss an arbitrable matter, the court “effectively converts an otherwise-unappealable interlocutory stay order into an appealable final dismissal order.”¹⁴⁸ As a result, rather than allocating appellate rights to Congress as the statute expressly intends, courts would have granted themselves the power to create such rights.¹⁴⁹ The court ruled that this is explicitly contrary to the statute, which denies immediate appeals from interlocutory orders to compel arbitration or stay proceedings.¹⁵⁰

The court found that, in addition to being discordant with the statutory structure, the disruption in appellate procedure is also incongruent with the pro-arbitration policy underlying the statute.¹⁵¹ The Supreme Court has articulated that the FAA’s policy is “to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as

138. *Oldroyd v. Elmira Sav. Bank*, 134 F.3d 72, 76 (2d Cir. 1998).

139. *See id.* at 76–77; *McMahan Sec. Co.*, 35 F.3d at 85–86.

140. *Salim Oleochemicals v. M/V Shropshire*, 278 F.3d 90, 93 (2d Cir. 2002).

141. *See id.* at 92–93.

142. *Katz v. Cellco P’ship*, 794 F.3d 341, 345–47 (2015).

143. *See id.*

144. *See id.* at 345.

145. *See id.* at 345–46.

146. *See id.* at 346.

147. *See id.*

148. *Id.*

149. *See id.*

150. *See id.*

151. *See id.*

possible.”¹⁵² In fact, the statute itself provides that judicial participation in the arbitral process is only permitted in certain capacities, including, *inter alia*, to designate or appoint an arbitrator or fill an arbitrator vacancy,¹⁵³ subpoena witnesses or punish witnesses for contempt,¹⁵⁴ and modify or correct an arbitral award made in error.¹⁵⁵ The Second Circuit relied in part on this reasoning when it emphasized that a stay furthers the policy of limited judicial participation by enabling parties to proceed directly to arbitration without the burden of additional litigation and without judicial interference until the final award.¹⁵⁶

The Second Circuit was unpersuaded by the argument favored by other circuit courts that efficient docket management is a reason to permit dismissal of an action pending arbitration.¹⁵⁷ It found that such efficiency, while within the inherent authority of district courts, is not a sufficient basis to trump a statutory mandate such as that in § 3 of the FAA.¹⁵⁸ In support of this conclusion, the court cited several cases from other circuits that held that there are certain statutory constraints on a district court’s inherent power to manage its docket efficiently.¹⁵⁹

In conclusion, the court, affirming the district court’s ruling compelling arbitration but reversing the dismissal of the action, held that the justification for permitting dismissal was outweighed by support from the text, structure, and underlying policy of the statute that a stay is mandated upon request by one of the parties once all of the claims in an action have been referred to arbitration.¹⁶⁰ Under the Second Circuit’s holding, a party resisting a motion to stay under § 3 of the FAA no longer will be able to appeal an adverse ruling until the arbitration proceedings are complete.¹⁶¹

152. *See id.* (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)).

153. 9 U.S.C. § 5 (2012).

154. *Id.* § 7.

155. *Id.* § 11.

156. *See Katz v. Cellco P’ship*, 794 F.3d 341, 346 (2d Cir. 2015). Notably, the court explicitly addressed only actions in which all claims are pending arbitration and not those in which fewer than all of the claims have been referred to arbitration. *Id.* at 345 n.6.

157. *Id.* at 346–47.

158. *See id.* at 346.

159. *See id.* at 346–47 (citing *Link v. Wabash R.R.*, 370 U.S. 626, 630–31 (1962)) (holding that efficient docket management is within the inherent authority of district courts); *Marion S. Mishkin Law Office v. Lopalo*, 767 F.3d 144, 148 (2d Cir. 2014); *Perez v. Wis. Dep’t of Corr.*, 182 F.3d 532, 536 (7th Cir. 1999) (“[J]udges must place enforcement of the [Prison Litigation Reform Act’s administrative-exhaustion requirement] over a concern for efficient docket management . . .”); *In re Prevot*, 59 F.3d 556, 566 (6th Cir. 1995) (“A court has the inherent power to manage its docket, subject of course to statutes requiring special treatment for specified types of cases . . .”); *Marquis v. FDIC*, 965 F.2d 1148, 1154 (1st Cir. 1992) (“It is beyond cavil that, absent a statute or rule to the contrary, federal district courts possess the inherent power to stay pending litigation when the efficacious management of court dockets reasonably requires such intervention . . .”).

160. *Katz*, 794 F.3d at 347.

161. *See Jeffrey M. Prokop & Jamie Shookman, Second Circuit Clarifies that a District Court Must Stay, and May Not Dismiss, Arbitrable Claims Pending Arbitration*, ORRICK (Aug. 6, 2015), <https://www.orrick.com/Events-and-Publications/Pages/Second-Circuit-Clarifies-That-A-District-Court-Must-Stay-And-May-Not-Dismiss-Arbitrable-Claims-Pending-Arbitration.aspx> [<https://perma.cc/4C5X-RBF5>].

B. Section 3 Permits Dismissals

The benefit of permitting a district court to dismiss an action altogether, as long as all the issues are subject to arbitration, is efficient docket management. This is an increasingly important consideration in an already-burdened court system.¹⁶² However, it is worth noting an undesirable consequence of such discretionary docket management: when a district court exercises its discretion to manage its docket by dismissing a case, the case-management responsibility then shifts to the appellate court which encompasses the district court.¹⁶³

The Ninth, Fifth, and First Circuits have held that a district court has discretion to dismiss cases under these circumstances. Even among the district courts in those circuits, there is disagreement regarding the authority under which the court may dismiss the action. Some circuits have dismissed an action where all the claims were found to be subject to arbitration under Rule 12(b)(1); others have done so under Rules 12(b)(3) or 12(b)(6).¹⁶⁴

1. The Ninth Circuit

In *Sparling v. Hoffman Construction Co.*,¹⁶⁵ a subcontractor and its shareholders alleged fraudulent inducement and other claims against the general contractor.¹⁶⁶ The trial judge dismissed the complaint sua sponte,¹⁶⁷ which led to the issue on appeal of whether such dismissal of the arbitrable claims was proper.¹⁶⁸ The plaintiff argued that the district court lacked discretion to dismiss the action under § 3 per the arbitration clause.¹⁶⁹ In its decision, the Ninth Circuit relied upon an earlier case in which it affirmed a district court's grant of summary judgment.¹⁷⁰ In *Sparling*, the court held that a court has authority under § 3 of the FAA to grant a stay pending arbitration "but [that authority] does not preclude

162. See, e.g., *Reynolds v. De Silva*, No. 09 Civ. 9218(CM), 2010 WL 743510, at *9 (S.D.N.Y. Feb. 24, 2010) ("It would be an inefficient use of the Court's docket to stay the action.").

163. See KIMM LAW FIRM, *Second Circuit Joins the Circuit-Split, Holding an Arbitration Clause Requires Courts to Stay, Not Dismiss, Actions*, KIMM NOTES, COMMENT. & ANALYSIS ON LEGAL DEV. (July 28, 2015), <http://www.kimmlaw.com/wp-content/uploads/2015/08/Kimm-Notes-2015-7-28-Arbitration-Stay.pdf> [https://perma.cc/P5U3-R7VC].

164. See, e.g., *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1060 (9th Cir. 2004) (dismissing on 12(b)(6) grounds); *Atkins v. Louisville & Nashville R.R.*, 819 F.2d 644, 647 (6th Cir. 1987) (dismissing on 12(b)(1) grounds); *Cedars-Sinai Med. Ctr. v. Glob. Excel Mgmt., Inc.*, No. CV 09-3627 PSG (AJWx), 2010 WL 5572079, at *9 (C.D. Cal. Mar. 19, 2010) (dismissing on 12(b)(3) grounds).

165. 864 F.2d 635 (9th Cir. 1988).

166. See *id.* at 636.

167. See *id.* at 637.

168. See *id.* at 638.

169. See *id.*

170. See *Martin Marietta Aluminum, Inc. v. Gen. Elec. Co.*, 586 F.2d 143 (9th Cir. 1978). However, in that case, the defendant did not request a stay of the proceedings. *Id.* at 146.

summary judgment when all claims are barred by an arbitration clause.”¹⁷¹ The Ninth Circuit determined that “the [statutory] provision did not limit the court’s authority to grant a dismissal in this case.”¹⁷² Further, it held that, because the arbitration clause was broad enough to encompass all of the plaintiff’s claims, thereby requiring all claims to be referred to arbitration, the district court acted within its discretion in dismissing the claims.¹⁷³

2. The Fifth Circuit

The Fifth Circuit likewise interpreted § 3 to permit dismissal in *Alford v. Dean Witter Reynolds, Inc.*,¹⁷⁴ distinguishing cases in which a party commences suit upon any issue referable to arbitration from those in which all of the issues raised must be submitted to arbitration.¹⁷⁵

In *Alford*, the District Court for the Southern District of Texas denied a motion to compel arbitration,¹⁷⁶ and the defendant appealed. The Fifth Circuit affirmed the decision to refuse the defendant’s demand to arbitrate,¹⁷⁷ and the defendant again appealed to the Supreme Court, which vacated and remanded that decision.¹⁷⁸ On remand, the district court dismissed the case with prejudice and ordered the parties to arbitration within thirty days,¹⁷⁹ and the plaintiff appealed the order.¹⁸⁰ Before the Fifth Circuit decided the case again, one of the issues presented was whether the lower court erred in dismissing rather than staying the case given that all the issues were required to be submitted to arbitration.¹⁸¹

In response to the plaintiff’s argument that the district court erred according to § 3 of the FAA, the Fifth Circuit agreed that “a stay is mandatory upon a showing that the opposing party has commenced suit ‘upon any issue referable to arbitration under an agreement in writing for such arbitration.’”¹⁸² However, the court distinguished that situation, stating that the rule was not intended to preclude dismissal in “the proper circumstances.”¹⁸³ The court explained that, as long as all the issues raised

171. *Sparling*, 864 F.2d at 638 (discussing the holding of *Martin Marietta Aluminum, Inc.*).

172. *Id.*

173. *See id.*

174. 975 F.2d 1161 (5th Cir. 1992).

175. *See id.* at 1164 (analyzing a discrimination action brought by a former employee of a brokerage firm against the broker).

176. *Alford v. Dean Witter Reynolds, Inc.*, 712 F. Supp. 547, 548 (S.D. Tex. 1989).

177. *See Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104, 107–08 (5th Cir. 1990).

178. *See Dean Witter Reynolds, Inc. v. Alford*, 500 U.S. 930, 930 (1991).

179. *See Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991).

180. *See Alford*, 975 F.2d at 1163.

181. *See id.* at 1162–63.

182. *Id.* at 1164 (quoting *Campeau Corp. v. May Dep’t Stores Co.*, 723 F. Supp. 224, 226–27 (S.D.N.Y. 1989)).

183. *Id.*

are subject to arbitration, dismissal is not precluded.¹⁸⁴ It did so citing district court cases and the Ninth Circuit's decision in *Sparling*.¹⁸⁵

Further, the court noted the practical implications of granting a stay.¹⁸⁶ It found that the proper course of action in a case where all claims are subject to arbitration is not to stay the action because that would serve no purpose: "Any post-arbitration remedies sought by the parties will not entail renewed consideration and adjudication of the merits of the controversy but would be circumscribed to a judicial review of the arbitrator's award in the limited manner prescribed by law."¹⁸⁷

3. The First Circuit

In *Bercovitch v. Baldwin School, Inc.*,¹⁸⁸ a suspended student alleged claims against his private school under the Americans with Disabilities Act (ADA), the Rehabilitation Act, and local law.¹⁸⁹ The District Court for the District of Puerto Rico denied the school's request for arbitration and issued a preliminary injunction requiring the school to reenroll the student,¹⁹⁰ which the school appealed.¹⁹¹

The First Circuit devoted a relatively large portion of its opinion to arbitration, explaining the strong federal policy favoring arbitration under the FAA and the arbitrability of the ADA claims.¹⁹² The court specifically addressed the question of whether a district court must stay the claims subject to arbitration or has discretion to dismiss.¹⁹³ The court concluded that "the district court shall consider whether the case should be dismissed or stayed."¹⁹⁴ In an important footnote, the court squarely found that "a court may dismiss, rather than stay, a case when all of the issues before the court are arbitrable."¹⁹⁵ In support, the court cited cases from the Fifth and Ninth Circuits and from the District Court of Puerto Rico.¹⁹⁶

In *Bercovitch*, because jurisdiction was based on a federal question and the two federal claims in that case were arbitrable, the only remaining state law claim was before the court solely based on pendent jurisdiction.¹⁹⁷

184. *See id.*

185. *See id.*

186. *See id.*

187. *Id.* (quoting *Sea-Land Serv., Inc. v. Sea-Land of P.R., Inc.*, 636 F. Supp. 750, 757 (D.P.R. 1986)).

188. 133 F.3d 141 (1st Cir. 1998).

189. *See id.* at 143.

190. *See Bercovitch v. Baldwin Sch.*, 964 F. Supp. 597, 605–07 (D.P.R. 1997).

191. *See Bercovitch*, 133 F.3d at 147.

192. *See id.* at 147–51.

193. *See id.* at 156.

194. *Id.*

195. *Id.* at 156 n.21.

196. *See id.* (citing *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992); *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 637–38 (9th Cir. 1988); *Sea-Land Serv., Inc. v. Sea-Land of P.R., Inc.*, 636 F. Supp. 750, 757 (D.P.R. 1986)).

197. *See id.*

Therefore, the First Circuit held that the district court acted within its discretion in dismissing the action altogether.¹⁹⁸

C. The Fourth Circuit Explicitly Remains Uncommitted

Disagreement on this issue exists not only among, but within, the circuit courts. The Fourth Circuit provides an illustration of that tension. Although the Fourth Circuit has not yet addressed the issue of whether to stay or dismiss an action when all the claims are subject to arbitration, it has not remained silent.¹⁹⁹

In *Aggarao v. MOL Ship Management Co.*,²⁰⁰ a seaman sued his employer, a ship owner, and others for damages arising from severe injuries he suffered while on a vessel near Baltimore.²⁰¹ He alleged claims of “unseaworthiness, maintenance and cure, breach of contract, violation of the Seaman’s Wage Act, and negligence under general maritime law and the Jones Act.”²⁰² The District Court for the District of Maryland dismissed the complaint for improper venue after it determined that, pursuant to the contract, all the claims were subject to arbitration in the Philippines.²⁰³

In reviewing the district court’s decision to dismiss the complaint with prejudice, the Fourth Circuit noted tension between two of its own prior holdings.²⁰⁴ In *Hooters of America, Inc. v. Phillips*,²⁰⁵ the court stated that “[w]hen a valid agreement to arbitrate exists between the parties and covers the matter in dispute, the FAA commands the federal courts to stay any ongoing judicial proceedings and to compel arbitration.”²⁰⁶ In *Choice Hotels International, Inc. v. BSR Tropicana Resort, Inc.*,²⁰⁷ however, the same court had previously recognized that “dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable.”²⁰⁸ *Hooters of America* did not expressly overrule *Choice Hotels International*—notably, the latter case was distinguishable because all of the issues presented were arbitrable.²⁰⁹ In *Aggarao*, on the other hand, one claim was not subject to arbitration.²¹⁰

After recognizing the tension between those two prior holdings, as well as the unsettled disagreement among the circuit courts on whether a court

198. *See id.*

199. *See id.*

200. 675 F.3d 355 (4th Cir. 2012).

201. *See id.* at 360.

202. *See id.*

203. *See Aggarao v. Mitsui O.S.K. Lines, Ltd.*, 741 F. Supp. 2d 733, 743 (D. Md. 2010).

204. *See Aggarao*, 675 F.3d at 375–76.

205. 173 F.3d 933 (4th Cir. 1999).

206. *Id.* at 937 (citation omitted).

207. 252 F.3d 707 (4th Cir. 2001).

208. *Id.* at 709–10.

209. *See id.*

210. *See Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 376 n.18 (4th Cir. 2012) (noting that, even under *Choice Hotels International*, dismissal is not proper when the issues are not all subject to arbitration).

must stay or has discretion to dismiss an action subject to arbitration,²¹¹ the court also noted explicitly that it need not resolve the issue because it was not squarely presented.²¹² In so doing, the Fourth Circuit is the only circuit that has remained expressly uncommitted on this issue.

III. NO IFS, ANDS, OR BUTS: A DISTRICT COURT IS REQUIRED TO GRANT A STAY UNDER § 3

Part III of this Note argues that the correct interpretation of § 3 is that a district court must stay an action while issues are pending arbitration; it lacks discretion to dismiss. This argument is supported by a plain language reading of the provision and a myriad of sound policy concerns. This part also adopts the reasoning of the Second Circuit in *Katz* as a compelling and persuasive justification and framework for this interpretation of § 3.

A. A Textual Reading of § 3 Requires a Stay

It is undeniable that, on its face, the text of § 3 requires a stay upon request by one of the parties. The provision uses the obligatory language “must stay”—a clear mandate that “leaves no discretion with the district court in the matter.”²¹³ Conspicuously, the statute does not explicitly allow any discretionary ability on the part of courts to act contrary to that instruction. Any potential authority of a district court to dismiss is purely based on concerns and reasoning outside the scope of the provision itself. However, as the Second Circuit clearly stated, “[C]ourts may disregard a statute’s plain meaning [only] where it begets absurdity.”²¹⁴ Section 3 is an unambiguous directive, and reading it to require a stay certainly does not beget absurdity.

The courts that have held that dismissal is permissible even when all issues are subject to arbitration²¹⁵ misinterpret the language of the statute. The statute clearly anticipates circumstances in which “any issue [is] referable to arbitration.”²¹⁶ The word “any” does not logically exclude circumstances in which more than one, or even all, of the issues are referable to arbitration. It merely contemplates disputes in which at least one issue is subject to arbitration. Interpreting the statute to exempt such circumstances is plainly contrary to the precise language of the statute.

211. *See id.* (comparing *Cont’l Cas. Co. v. Am. Nat’l Ins.*, 417 F.3d 727, 732 n.7 (7th Cir. 2005), with *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992)).

212. *See id.*

213. *McMahan Sec. Co. v. Forum Capital Mkts.*, 35 F.3d 82, 85–86 (2d Cir. 1994) (citing 9 U.S.C. § 3 (1992); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985)).

214. *Katz v. Cellco P’ship*, 794 F.3d 341, 345–46 (2d Cir. 2015).

215. *See, e.g., Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141 (1st Cir. 1998); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161 (5th Cir. 1992); *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635 (9th Cir. 1988).

216. 9 U.S.C. § 3 (2012) (emphasis added).

B. Policy Concerns Support Requiring a Stay

There are many policy arguments supporting a mandated stay. First, mandating a stay is the more pro-arbitration position. Second, mandating a stay eliminates the possibility of interlocutory appeals, which ultimately stall the arbitration proceeding and undermine the autonomy of the arbitral process as a whole. Third, a mandated stay is preferable because docket management is an unpersuasive justification for dismissal. Finally, in the interests of judicial economy and efficiency, mandating a stay avoids the jurisprudential chaos that currently surrounds dismissals.

1. Requiring a Stay Is More Consistent with Pro-Arbitration Policy

Although at first glance it may seem counterintuitive for a court to retain its jurisdiction over a matter and the parties as a means of promoting well-established pro-arbitration policy, doing so ultimately advances that goal. Granting a stay and retaining jurisdiction allows quick and efficient resolution following the issuance of the arbitrator's final award should any issues remain.

This benefit is well-illustrated by a case from the Seventh Circuit. In *IDS Life Insurance v. Royal Alliance Associates, Inc.*,²¹⁷ the Seventh Circuit reversed the district court's refusal to sanction the defendant, who prevailed in arbitration.²¹⁸ The plaintiff originally sued in the U.S. District Court for the Northern District of Illinois.²¹⁹ Upon the defendant's motion, the court stayed the suit and compelled arbitration,²²⁰ where the defendant ultimately prevailed.²²¹ Writing for the Seventh Circuit, Judge Richard Posner noted that the defendant then "scampered off to a New York state court and asked it to confirm the arbitrator's award."²²² The court's frustration was based on the notion that issuing a stay effectively holds the case open for efficient post-arbitration proceedings. The defendant in that case failed to appreciate that benefit.

That Seventh Circuit case demonstrates the importance of a continued oversight role for federal courts in post-arbitration proceedings and the benefits to all parties of obtaining a stay. From a policy perspective, a mandated stay furthers one of the purposes of the FAA—encouraging efficient and speedy dispute resolution.²²³

217. 266 F.3d 645 (7th Cir. 2001).

218. *Id.* at 654.

219. *See* *IDS Life Ins. v. SunAmerica, Inc.*, Nos. 95 C 1204, 95 C 1212, 97 C 7857, 2000 WL 283939 (N.D. Ill. Mar. 14, 2000).

220. *See id.* at *1.

221. *See id.* at *3.

222. *IDS Life Ins.*, 266 F.3d at 653. Judge Posner went on to state, "The choice of forum was curious, since it was the federal district court in Chicago that at the defendants' urging had stayed the suit filed by the plaintiffs so that the matter could be referred to arbitration. But stranger than the choice of forum was the reason given for the choice, that the district court in Chicago did not have jurisdiction to confirm the award—which is ridiculous." *Id.*

223. *See supra* note 26 and accompanying text.

2. Requiring a Stay Avoids the Possibility of Interlocutory Appeals

A dismissal is characterized as a “final order” under the FAA.²²⁴ Therefore, along with orders refusing to compel arbitration, denial of a request to stay is immediately appealable and subject to interlocutory review.²²⁵ Section 16 as a whole creates a right of interlocutory appeal for any order that is unfavorable to arbitration, whether by dismissal (that is, a final order), a denial of a motion to compel arbitration under § 4, or a refusal to stay an action pending arbitration.²²⁶ While on such a procedural appeal, the resolution of the merits is necessarily stalled, possibly for an extended period of time, which is contrary to the purposes of arbitration—speed and efficiency in dispute resolution. In contrast, when a stay is granted, an immediate appeal is unavailable.²²⁷ In *Katz*, the Second Circuit appropriately recognized that allowing dismissal gives judges discretion that “would empower them to confer appellate rights expressly proscribed by Congress.”²²⁸

The proper role of the court in the context of arbitrable matters is enumerated in the FAA.²²⁹ Sections 5, 7, 9, 10, and 11 contemplate specific circumstances under which a court is permitted to insert itself into the arbitral process.²³⁰ In enumerating those circumstances, it is clear that one of the intentions of the Act is to avoid excessive judicial interference by excluding all other bases for such interference under the doctrine of *expressio unius est exclusio alterius*.²³¹ Limiting instances of permissible judicial interference to those enumerated in the statute supports the pro-arbitration policy of the statute by keeping the judiciary out of the arbitral process to a great extent. This is unsurprising when one considers that such interference inhibits the arbitral process generally by creating barriers to efficient resolution of the merits both in court and through arbitration. This is inherently anti-arbitration—or, at the very least, it is anti-arbitral autonomy. Instead, requiring courts to grant a stay eliminates the concern that the parties will be subject to additional litigation before the arbitral resolution.

224. *See supra* Part I.E.

225. *See supra* note 75 and accompanying text.

226. *See, e.g.,* *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009) (stating that a party may, at any time, appeal an order refusing to stay an action, even if the claim to stay is unmeritorious or frivolous); *see also* 9 U.S.C. § 16 (2012).

227. *See supra* note 128 and accompanying text.

228. *Katz v. Celco P’ship*, 794 F.3d 341, 346 (2d Cir. 2015).

229. *See supra* notes 153–55 and accompanying text.

230. *See supra* notes 153–55 and accompanying text.

231. *See Expressio Unius Est Exclusio Alterius*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative. For example, the rule that ‘each citizen is entitled to vote’ implies that noncitizens are not entitled to vote.”).

3. Docket Management Is an Unpersuasive Justification for Permitting Dismissals

The Second Circuit in *Katz* stated that district courts' inherent authority to manage their dockets cannot override a clear statutory directive.²³² Even where docket congestion is recognized as an appropriate consideration, such as on a § 1404 motion to transfer venue, it is not a dispositive factor.²³³ In such cases, docket management alone is insufficient to satisfy the interests-of-justice standard.²³⁴ If the location of litigation cannot be determined in this way, certainly docket management cannot be a persuasive justification in the context of a federal court's decision on whether to stay an action pending arbitration. The stakes in those circumstances are undeniably high, as the decision dictates not merely where litigation will take place, but whether it will take place at all. In this context, docket management must not justify a court's dismissal of an action contrary to the plain meaning of an unambiguous statute.

4. Requiring a Stay Avoids the Chaos Currently Surrounding Dismissals

Beyond the principle that docket management should be a relatively small factor in determining whether to dismiss a case in federal court is the fact that uncertainty as to the source of the power to dismiss can create chaos that threatens the statutory scheme and the policy it serves. This approach is antithetical to its stated justification: promoting judicial economy via effective docket management.²³⁵ Given this confusion, the economy argument does not stand.

Furthermore, although dismissal is often justified as a tool to effectuate judicial economy, a mandated stay better accomplishes this goal. A major flaw in the "permit dismissal" approach is that there is no clear standard or agreement as to the bases for when dismissal is appropriate. Some courts base dismissal on a 12(b)(1) approach, while others rely on 12(b)(3) or 12(b)(6).²³⁶ The inconsistencies in the sources of authority and bases for dismissal create chaos far more disruptive than the evil of an overburdened docket that dismissal purports to redress. The basis for each dismissal is important because it has consequences in terms of the litigation process.

232. See *Katz*, 794 F.3d at 346–47 (citing cases).

233. See, e.g., *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 484 F.3d 951, 958–59 (7th Cir. 2007) (“[T]he forum non conveniens doctrine should not be used as a solution to court congestion”); *P&S Bus. Machs., Inc. v. Canon USA, Inc.* 331 F.3d 804, 808 (11th Cir. 2003); *JTH Tax, Inc. v. Lee*, 482 F. Supp. 2d 731, 739 (E.D. Va. 2007) (“[A]lthough somewhat relevant, docket conditions generally receive minor consideration and, as this court has held, cannot be the primary reason for retaining venue.”); see also WRIGHT ET AL., *supra* note 117, § 3854.

234. See 28 U.S.C. § 1404(a) (2012).

235. See, e.g., *Reynolds v. De Silva*, No. 09 Civ. 9218(CM), 2010 WL 743510, at *9 (S.D.N.Y. Feb. 24, 2010) (“It would be an inefficient use of the Court’s docket to stay the action.”).

236. Compare *supra* note 164, with *supra* note 117 and accompanying text.

For example, a 12(b)(1) motion may be made at any time.²³⁷ By contrast, a 12(b)(3) motion may only be made at the start of litigation.²³⁸ Meanwhile, a 12(b)(6) motion is a more flexible remedy.²³⁹ Effectively, parties and the course of the litigation are affected by an essentially arbitrary decision to use one Rule as authority for dismissal over another. Worse still, a litigant's tactical decision in selecting one of these procedures to seek dismissal could control how the other parties and the court itself would be required to respond, which the statute never contemplated. Although the stated benefits of dismissal are judicial economy and efficiency in docket management, its practical effects undermine those benefits.

Mandating a stay removes this confusion. From a practical, jurisprudential perspective, and in the interests of judicial economy and efficiency, courts should be required to grant a request to stay and should not be found to have the discretion to dismiss.

CONCLUSION

Whether a district court is required to grant a stay or may, in its discretion, order a dismissal is a significant issue that has real, tangible consequences for the parties to a dispute and for the autonomy of the arbitral process.²⁴⁰ The split among the circuit courts continues to deepen as the issue remains unresolved.²⁴¹ The Second Circuit, as a leader in setting arbitration law and policy,²⁴² stood staunchly on the side of a mandated stay in its recent decision in *Katz*,²⁴³ warranting another look at the issue and providing a persuasive framework ripe for consideration and adoption by the Supreme Court of the United States.²⁴⁴ For the above reasons, the Court should adopt the Second Circuit's reasoning and hold that, under § 3, courts may not use their discretion to dismiss an action pending arbitration but must grant a stay.

237. See WRIGHT ET AL., *supra* note 117, § 1350 (“[I]t has long been well-established that the court’s lack of subject matter jurisdiction may be asserted at any time by any interested party, either in the answer or in the form of a suggestion to the court prior to final judgment.” (citing the policy of Rule 12(h)(3), which is to preserve the defense throughout the action, and cases including, for example, *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004), and *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 186 (1936))).

238. See *id.* § 1352 (“Federal Rule 12(b)(3) requires the defense of improper venue to be raised either by a pre-answer motion to dismiss, or in a responsive pleading.” (citing cases)).

239. See *id.* § 1357 (stating that a Rule 12(b)(6) motion of failure to state a claim upon which relief may be granted must be made before service of a responsive pleading but Rule 12(h)(2) preserves the defense such that it may be raised as late as trial, noting that a judge may dismiss a claim under Rule 12(b)(6) even if no party makes a formal motion, and citing cases).

240. See *supra* Part I.E.

241. See *supra* Part II.

242. See *supra* Part I.C.

243. See *supra* Part II.A.5.

244. On December 7, 2015, the Supreme Court denied a petition for certiorari by the parties in *Katz*. *Katz v. Cellco P’ship*, 136 S. Ct. 596 (2015) (mem.).