No. _____

In the
Supreme Court of the United States

MICHAEL A. KATZ, individually and on behalf of all others similarly situated,
Petitioner,

v.

CELLCO PARTNERSHIP, DBA VERIZON WIRELESS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Federal Arbitration Act ("FAA") § 3 requires the district court to stay the action after it compels arbitration of all claims and a stay is requested by one of the parties.

2. Whether the standard for voluntary consent prescribed in *Wellness Int'l Network, Ltd. v. Sharif,* 135 S. Ct. 1932, 1948 (2015), applies under the FAA to the waiver of the constitutional rights (i) to the exercise of the Article III judicial power in connection with state law private rights brought within the jurisdiction of the federal courts, and (ii) to judicial review of non-Article III rulings of law required under the Due Process Clause of the Fifth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael A. Katz ("Katz") respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App. 1a-5a) is unpublished but available at 756 F. App'x 103 (2d Cir. Mar. 12, 2019). The opinion of the district court (App. 8a-28a) is unpublished but available at 2018 WL 1891145 (S.D.N.Y. Apr. 17, 2018). These decisions are referred to herein as *Katz II*.[1]

The prior opinion of the court of appeals also the subject of this petition (App. 29a-39a) is available at 794 F.3d 341 (2d Cir. 2015). The prior decision of the district court also the subject of this petition (App. 40a-73a) is unpublished but available at 2013 WL 6621022 (S.D.N.Y. Dec. 12, 2013). These prior decisions are referred to herein as *Katz I*. This Court's denial of Katz's petition for a writ of certiorari to review the prior judgment of the court of appeals in *Katz I* is available at 136 S. Ct. 596 (2015).

JURISDICTION

The court of appeals entered judgment in *Katz II* on March 12, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] References to "App. _a" are to the pages of the appendix to this petition. References to "CA2 Jt. App. A_" are to the Second Circuit joint appendix in *Katz II,* CA2 No. 18-1436, Dkt. # 22.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Art. III, § 2, of the U.S. Constitution provides in pertinent part:

> The judicial Power shall extend … to Controversies … between Citizens of different States.

The Due Process Clause, amend. V, cl. 4, provides in pertinent part:

> [No person shall] be deprived of life, liberty, or property, without due process of law[.]

Excerpts of relevant sections of the FAA, 9 U.S.C. §§ 1, *et seq.*, are reproduced in Appendix F (App. 74a-77a).

STATEMENT OF THE CASE

Katz's petition asks the Court to resolve two important questions under the FAA.

1. Question 1—whether FAA § 3 requires the district court to stay the action after it compels arbitration of all claims and a stay is requested by one of the parties—was reserved by the Court in *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 87 n.2 (2000), and was effectively reserved again this term in *Lamps Plus, Inc. v. Varela,* 139 S. Ct. 1407, 1414 n.1 (2019). There is an essentially even circuit conflict on the question, with the Second Circuit in this case joining those circuits holding that the district court must enter a stay under FAA § 3 rather than dismiss the action after it compels arbitration of all claims and a stay is requested by one of the parties (App. 33a-39a).

The answer to Question 1 lies in the application of the traditional rules of statutory construction to the language of the relevant sections of the FAA, including: (i) FAA § 3 (App. 74a), which commands the district court to "stay the trial of the action" if "any issue" is determined to be arbitrable; (ii) FAA § 4 (App. 75a-76a), which commands the district court to compel the parties to arbitration if so required under an enforceable arbitration agreement; and (iii) FAA § 16 (App. 76a-77a), which under FAA §§ 16(b)(1)-(b)(2) precludes an immediate appeal from the entry of an "interlocutory order" under FAA §§ 3-4 favorable to arbitration, but under FAA § 16(a)(3) allows an immediate appeal of a "final decision with respect to an arbitration" "regardless of whether the decision is favorable or hostile to arbitration." *Randolph,* 531 U.S. at 85-86.

Under the traditional rules of statutory construction, the relevant FAA sections must be read together as a whole giving effect to all provisions and the words used in light of their ordinary meaning at the time Congress enacted the FAA and its amendments, with proper consideration of the provisions' purposes and underlying policies as discerned from the FAA's structure. *See, e.g., New Prime Inc. v. Olivera,* 139 S. Ct. 532, 539 (2019); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, *e.g.*, §§ 24-27 (2012).

The construction of the relevant provisions is also informed by the not previously well-recognized legislative history of FAA § 16 describing Congress's intent regarding how the underlying policies reflected

in that section should be weighed—that "under [§ 16], appealability does not turn solely on the policy favoring arbitration … [and thus] preserve[s] the general policy that appeal should be available where there is nothing left to be done in the district court." *See* 134 Cong. Rec. 31065 (Oct. 14, 1988) (addressing FAA § 15, newly added by Pub. L. No. 100-702, § 1019(a), 102 Stat. 4670-71 (Nov. 19, 1988), renumbered § 16 by Pub. L. No. 101-650, § 325(a), 105 Stat. 5120 (Dec. 1, 1990)). *See also Randolph,* 531 U.S. at 86 (according "final decision" "its well-established meaning").

At its most basic, Question 1 requires the Court to decide whether the command under FAA § 3 that the district court "shall stay the trial of the action" applies when "all claims" are arbitrable and none will be adjudicated by trial. Generally the circuit courts holding that the stay is mandatory, including the Second Circuit below, focus on the words "shall stay" and wholly ignore the words "the trial." And any construction of § 3 must be reconciled with FAA § 16.

Question 1 is important, it has divided the circuit courts, it recurs with great frequency, and it merits the grant of certiorari.

2. Question 2—whether the standard for voluntary consent prescribed in *Wellness* applies under the FAA to the waiver of the personal constitutional right to the exercise of the Article III judicial power regarding state law private rights brought within the jurisdiction of the federal courts, and the related but "independently required" right to judicial review of non-Article III rulings of law required under the Due Process Clause (*see Thomas v. Union Carbide Agr. Prods. Co.,* 473 U.S.

568, 592-93 (1985))—is the most important question this Court can answer under the FAA. The proof of its importance is found in the Court's lockers where those attending every session must deposit their cell phones, in the Courtroom where all cell phone-using observers every session have involuntarily waived their personal constitutional rights under Article III and the Due Process Clause, and on the sidewalks surrounding the Court, where every person using or carrying a cell phone has done the same—all as a result of the arbitration agreements they have no right to refuse.

The answer to Question 2 lies at the intersection of the most fundamental principles regarding arbitration under the FAA and consent to non-Article III adjudication, respectively: (i) that arbitration "is a matter of consent, not coercion," *e.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 681 (2010); and (ii) that consent to non-Article III adjudication must be "knowing and voluntary," and that "'notification of the right to refuse' adjudication by a non-Article III [adjudicator] 'is a prerequisite to any inference of consent.'" *Wellness,* 135 S. Ct. at 1948 (quoting *Roell v. Withrow,* 538 U.S. 580, 588 n.5 (2003)).

Respondent Cellco Partnership d/b/a Verizon Wireless ("Verizon") has conceded in the proceedings below, and thus it is undisputed for the purposes of Katz's petition, that Verizon's "Customer Agreement contains an arbitration clause and that acceptance of the Customer Service Agreement is necessary to obtain [cell phone] equipment and services from" Verizon (CA2 Jt. App. A39). Further, just last year, in

Carpenter v. United States, 138 S. Ct. 2206 (2018), this Court rejected under the Fourth Amendment the applicability of "voluntariness" to cell phones, first because "cell phones and the services they provide are 'such a pervasive and insistent part of daily life' that carrying one is indispensable to participation in modern society." *Id.* at 2220 (quoting *Riley v. California,* 134 S. Ct. 2473, 2484 (2014)). With cell phones, there is no "right to refuse" to consent to the waiver of the personal right to the exercise of the Article III judicial power and the independently required due process right to judicial review of the non-Article III arbitrator's rulings of law.

The current state of the law regarding the applicable standard for consent to the waiver of constitutional rights under the FAA is diffuse and conflicting, and in urgent need of guidance from this Court to bring it in line with *Wellness* and restore the constitutional rights involuntarily waived. The district court's rejection of the applicability of the "knowing and voluntary" standard to Katz's personal right to the exercise of the Article III judicial power in *Katz I* (App. 66a-68a), which was affirmed by the circuit court without discussion (App. 33a), was based on other circuit cases also rejecting the applicability of the standard under the FAA. App. 68a, *citing, e.g.*, *Morales v. Sun Constructors, Inc.*, 541 F.3d 218, 224 (3d Cir. 2008) ("applying a heightened 'knowing and voluntary' standard to arbitration agreements would be inconsistent with the FAA"); *Caley v. Gulfstream Aerospace Corp.,* 428 F.3d 1359, 1371-72 (11th Cir. 2005) ("a court can decline to enforce an arbitration agreement under the FAA only if the plaintiffs can

point to a generally applicable principle of *contract* law under which the agreement could be revoked") (emphasis in original). The Sixth Circuit, however, has expressly applied a "knowing and voluntary" standard to arbitration agreements and held that the applicability of that standard is a matter of "federal and not state law." *See Hergenreder v. Bickford Senior Living Grp., LLC,* 656 F.3d 411, 420 (6th Cir. 2011).

Furthermore, in evaluating whether the extremely restricted judicial review of arbitrator decisions imposed under FAA § 10(a)(4) (App. 76a) violates due process, all of the leading circuit court decisions (further discussed *infra*) have rejected the due process violation in whole or substantial part based on the "voluntariness" of the agreement to arbitrate.

The district court in *Katz II* held that the Article III right and the due process right should be evaluated under the same waiver standard, adhered to it prior holding in *Katz I* rejecting the "knowing and voluntary" standard in connection with Katz's personal Article III right, and declined based on the law of the case doctrine to apply the *Wellness* standard of voluntary consent to Katz's post-arbitration due process claim (App. 25a-26a). And again, the Second Circuit affirmed this holding without discussion (App. 5a).

Nothing in FAA § 2 supports the elevation of an arbitration agreement above other private agreements involuntarily waiving fundamental constitutional rights. *Cf., e.g., Rent-A-Center, West, Inc. v. Jackson,* 561 U.S. 63, 67 (2010) (FAA § 2 "places arbitration agreements on an equal footing with other contracts"). The "knowing and voluntary" requirement under

Wellness is consistent with the Court's consideration of voluntariness of consent in much of its modern Article III jurisprudence. *E.g., Stern v. Marshall,* 564 U.S. 462, 493 (2011) ("Pierce did not truly consent [when he] had nowhere else to go"). The application of the *Wellness* voluntariness standard to arbitration under the FAA is also squarely supported by the FAA's legislative history, *see, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1643 (2018) (Ginsburg, J., dissenting) (quoting "voluntariness" legislative history)—because voluntary arbitration as intended by Congress *works*. This case is a prime example of why involuntary consumer arbitration does not.

Wellness includes multiple references to arbitrators as among the "non-Article III adjudicators" for whom consent must be voluntary—including the right to refuse. 135 S. Ct. at 1942, 1948; *cf.* 135 S. Ct. at 1959 (Roberts, C.J., dissenting) ("The discussion of magistrate judges, masters, arbitrators, and the like fits with the majority's focus[.]"). The Second Circuit declined to make the connection, and neither has any other circuit court of which Katz is aware. Simply stated, Katz's consent to bilateral arbitration with Verizon cannot be voluntary and enforceable without the "right to refuse" the non-article III adjudication and still receive his equipment and services from Verizon. *Wellness,* 135 S. Ct. at 1948.

The current lack of voluntary consent under the FAA to the waiver of the most fundamental constitutional rights ensuring the proper adjudication of Katz's state law private right claims need not await an act of Congress for correction. *Cf. Lamps Plus,* 139

S. Ct. at 1422 (Ginsburg, J., dissenting) (suggesting congressional correction to "counter the Court's current [FAA] jurisprudence"). The answer lies in the Constitution, and the application of the existing Article III jurisprudence of this Court, most importantly including *Wellness*. This case is an ideal vehicle for the Court to grapple with and squarely address for the first time a question of such great importance. The Court, in its singular role as the ultimate protector of constitutional rights, should grant certiorari on Question 2.

A. Background Facts

Katz's claims against Verizon for breach of contract, and deceptive consumer practices under New York General Business Law ("GBL") § 349, relate to an "administrative charge" imposed by Verizon on its cell phone customers (*Katz I,* CA2 Opinion, App. 31a). The administrative charge is supposed to be related to Verizon's governmental costs, but Verizon has admitted in prior federal court proceedings that it was using the administrative charge to "recove[r] general costs it incurred to provide service" (*id.*). Katz alleges that the administrative charge constitutes a wrongful and deceptive concealed price increase (*id.*).

Verizon has conceded in the proceedings below, and it is undisputed, that Verizon's "Customer Agreement contains an arbitration clause and that acceptance of the Customer Service Agreement is necessary to obtain equipment and services from" Verizon (CA2 Jt. App. A39, ¶ 12). Katz has vigorously maintained during the proceedings below that his consent to the arbitration agreement was not voluntary, that he "had no choice if

he wanted to continue his service with Verizon but to be bound by its unilaterally imposed arbitration agreement [and that there] was nothing … 'voluntary' about it" (CA2 Jt. App. A33, ¶ 7). And, as the district court noted in its decision in *Katz I,* Verizon did "not dispute [that] the thirteen major wireless telephone service providers require arbitration agreements in their customer contracts." App. 66a, n.6.

Verizon's arbitration agreement states that all claims between Verizon and Katz and its cell phone customers are subject to arbitration, and expressly disclaims any right to a "judge or jury" (CA2 Jt. App. A29). The agreement "unconditionally waive[s] any right to trial by jury," and only contemplates and allows for a trial in court in the event the agreement is not enforceable—i.e., in the event no claims are arbitrable (*id.* at A30, § 9). In other words, under the terms of Verizon's arbitration agreement, if all claims are arbitrable there will be no "trial of the action."

B. Proceedings Below: *Katz I*

1. Katz's amended class action complaint was filed in January 2013 (*Katz I,* S.D.N.Y. No. 12-cv-9193, Dkt. # 6). Jurisdiction was invoked under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d) (*id.* at ¶ 8). In addition to his substantive claims for breach of contract and deceptive consumer practices, Katz also sought as a preliminary matter a declaratory judgment that the arbitration agreement was not enforceable because the application of the FAA to his state law private right claims violated separation of powers under Article III (*id.* at ¶ 56). Katz's allegations supporting the Article III violation tracked the factors codified by the Court in

Stern, supra (*id.* at ¶¶ 14-15), and additionally asserted that the FAA's limitations on judicial review prescribed a rule of decision in violation of *United States v. Klein,* 80 U.S. 128 (1871) (*id.* at ¶ 15(c)(iii)). Katz also alleged that he did not voluntarily enter into the arbitration agreement, that he would not voluntarily arbitrate, and if compelled to do so that the arbitration would be involuntary and a violation of his rights under Article III (*id.* at ¶¶ 15(d)(i) and 16)).

Katz moved for summary judgment on his declaratory judgment claim under Article III, and Verizon cross-moved to compel arbitration and to stay the action under FAA § 3 (*Katz I,* S.D.N.Y. Decision, App. 41a.). The district court rejected Katz's Article III separation of powers claim (App. 62a-66a) and his claim that the FAA prescribed a rule of decision in violation of *Klein* (App. 69a-71a). The district court also rejected the applicability under the FAA of the "heightened knowing and voluntary" standard to Katz's waiver of his personal right to the Article III judicial power (App. 66a-68a), and left the enforceability of the arbitration agreement up to state contract law (App. 62a-66a). Thus, the district court granted Verizon's cross-motion to compel all claims to arbitration (App. 73a).

The district court then addressed the issue whether to stay the action under FAA § 3 or dismiss when all claims were determined to be arbitrable. Noting the existence of a division among the circuit courts and also among the district courts within the Second Circuit, the district court agreed with Katz and the substantial number of circuit courts that "dismissal is a proper

remedy when all of the issues presented in a lawsuit are arbitrable." App. 72a (quoting *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.,* 252 F.3d 707, 709–10 (4th Cir. 2001)).

2. On appeal the Second Circuit expressly affirmed the district court's holdings that the FAA did not violate Article III separation of powers or *Klein* (App. 33a). However, it affirmed the district court's rejection of the "heightened knowing and voluntary" standard without discussion (*id.*). Separately, the Second Circuit rejected the district court's dismissal of Katz's complaint, and spent the majority of its decision supporting its holding that "the text, structure, and underlying policy of the FAA mandate a stay of proceedings when all of the claims in an action have been referred to arbitration and a stay requested" under FAA § 3 (App. 33a-39a).

After recognizing that the circuit courts are "about evenly divided" on the issue (App. 35a), the Second Circuit first opined that "[t]he plain language [of FAA § 3] specifies that the court 'shall' stay proceedings pending arbitration, provided an application is made and certain conditions are met. It is axiomatic that the mandatory term 'shall' typically 'creates an obligation impervious to judicial discretion.'" App. 36a (quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)). Second, the circuit court then explained how "[a] mandatory stay comports with the FAA's statutory scheme and pro-arbitration policy." Quoting *Randolph,* 531 U.S. at 86, and reviewing the allowability and restrictions on appeals under FAA §§ 16(a)(1)(A)-(B) and §§ 16(b)(1)-(b)(2) (*see* App. 76a-

77a), the court found that "[t]he statute's appellate structure … 'permits immediate appeal of orders hostile to arbitration ... but bars appeal of interlocutory orders favorable to arbitration.'" App. 37a. Third, the Second Circuit found support for its holding in the fact that "a mandatory stay is consistent with the FAA's underlying policy 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.'" App. 38a (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)). These reasons, the court concluded, precluded the exercise of discretion by the district court to dismiss rather than stay the action when all claims are referred to arbitration and a stay is requested by one of the parties under FAA § 3 (App. 38a-39a).

Although the Second Circuit quoted the "shall stay the trial of the action" language of FAA § 3, it never considered or further discussed the significance of the phrase "the trial"—instead truncating the relevant language to "stay the action" or more frequently "stay of proceedings" (App. 31a, 35a, 37a). Its opinion never referred to FAA § 16(a)(3) or the immediately appealable "final decision" identified in that section (App. 77a). And the circuit court placed the following limit on the scope of its opinion: "Although the statutory text refers to an action brought upon ***any*** issue referable to arbitration," 9 U.S.C. § 3 (emphasis added [by the court]), we address here only the disposition of actions in which ***all*** claims have been referred to arbitration" (emphasis in original). App. 36a n.6.

Having affirmed the Article III holdings of the district court, the Second Circuit vacated the district court's dismissal of the action, and remanded "with instructions to stay the action pending arbitration." App. 30a, 39a.[2]

C. Proceedings Below: *Katz II*

1. Consistent with the Second Circuit's instruction, the district court on remand entered an August 26, 2015 order staying the case pending arbitration, and directing "the parties [to] inform the Court of the status of the arbitration by November 24, 2015, and every 90 days thereafter[;] within 10 days of completion of the arbitration, the parties shall provide a joint status report to the Court." S.D.N.Y. No. 12-cv-9193, Dkt. # 46. During the course of the arbitration, Katz filed six joint updates on behalf of the parties (*id.,* Dkt. ## 47, 48, 49, 54, 65, 66), faxed one more to the court with confidential information, and then filed the final

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[2] *Wellness* was not issued by this Court until May 26, 2015, eighteen months after the district court issued it December 2013 decision in *Katz I*, and more than six months after appeal briefing was completed in the circuit court in December, 2014 (CA2 No. 14-138, Dkt. # 78). Katz submitted a Fed. R. App. P. 28(j) letter advising the circuit court of the decision on June 15, 2015 (*id.,* Dkt. # 112). Verizon submitted its Rule 28(j) response on June 24, 2015 (*id.,* Dkt. # 114). In its response Verizon quoted *Wellness* and correctly observed that "the Court's finding of no Article III violation was based on the condition that 'a litigant's consent … *must … be knowing and voluntary*." *Id.* (emphasis added by Verizon). The Second Circuit did not address *Wellness,* and as noted above, affirmed the district court's rejection of the "heightened knowing and voluntary" standard without discussion.

joint report at the completion of the arbitration in June 2017 (*id.,* Dkt. # 67).

2. The arbitrator issued two decisions during the arbitration: (i) his October 28, 2016 Decision on Motion for Summary Disposition ("October 2016 Decision") (App. 84a-88a); and (ii) his June 29, 2017 Decision on Motion for Judgment on the Pleadings ("June 2017 Decision") (App. 78a-83a). As relevant to Katz's petition, the arbitrator's decisions included three rulings of law.

First, in the arbitrator's October 2016 Decision, he ruled as a matter of law that Katz was precluded from seeking "general injunctive relief" under GBL § 349(h) on behalf of other Verizon customers to enjoin Verizon's deceptive administrative charge practices, because "[w]hile Section 349 of the GBL grants authority to the Attorney General of New York State to seek relief on behalf of all Verizon customers, there is no language in the statute granting the same power to individuals" (App. 86a).[3] The arbitrator's construction of the statute was reached despite being directed by Katz to numerous authorities, including a federal decision directly on point supporting his right to general injunctive relief, a state case reaching the same

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[3] GBL § 349(h) provides in relevant part:

> In addition to the right of action granted to the attorney general pursuant to this section, *any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice*, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. (emphasis added)

conclusion under the companion statute to GBL § 349, and cases and statutes confirming that § 349 is to be liberally construed to promote its policy of protecting consumers (CA2 Jt. App. A96-A106).

Second, in his June 2017 Decision, the arbitrator ruled as a matter of law that Verizon "shall pay [Katz] the sum of $1,500.00, without interest," based on a December 13, 2016 tender by Verizon to Katz ("Tender") of a check for $1500 "without prejudice" and without "admit[ting] liability with regard to any of the claims asserted" by Katz in the arbitration (App. 81a; *see also* Tender, CA2 Jt. App. A86-A88). The arbitrator's ruling was made even though it was undisputed that Katz had "rejected and refused" the Tender, and that the Tender was "incomplete relief since it does not contain individual injunctive relief and an award of attorney fees to [Katz]" (App. 81a). Further, the arbitrator ignored two directly relevant (if not controlling) decisions Katz cited (CA2 Jt. App. A91-A92): (i) *Geismann v. ZocDoc, Inc.,* 850 F.3d 507 (2d Cir. 2017), which held that a plaintiff cannot be bound by an offer of judgment that had been rejected and did "nothing to satisfy the demand for injunctive relief," *id.* at 514 (citing *Campbell-Ewald Co. v. Gomez,* 136 S. Ct. 663 (2016)); and (ii) *Horn Waterproofing Corp. v. Bushwick Iron & Steel Co.*, 66 N.Y.2d 321, 331-32 (1985), in which the New York Court of Appeals held that even the acceptance of a tender under protest "preclude[s] an accord and satisfaction or any other prejudice to the rights thus reserved."

Third, in the June 2017 Decision, the arbitrator rejected Katz's claim for individual injunctive relief under GBL § 349(h) (quoted Note 3, *supra*) regarding the continued imposition of the administrative charges on the household account which was formerly in his name but now in the name of his non-marital partner, and for which he paid all charges under his agreement with his non-marital partner including for his own wireless phone (App. 80a-81a). The arbitrator ruled as a matter of law that Katz was not entitled to individual injunctive relief under GBL § 349 because Katz "no longer is the owner of the account and … is not billed by Verizon," and Katz "is not a customer of Verizon and … has no obligation to pay the Verizon bill of his non-marital partner and therefore lacks standing to seek individual injunctive relief under GBL Sec. 349" (*id.*). Although Katz's claim was supported by the policy underlying GBL § 349 and the cases and statutes providing that it should be liberally construed, there was no clear law supporting Katz's right to the individual injunctive relief he sought under those facts.

3. Katz moved on September 27, 2017 under FAA § 10 to vacate substantially all of the arbitrator's October 2016 and June 2017 Decisions on various grounds (CA2 Jt. App. A44). The only ground relevant to Katz's petition is his request to vacate

> those parts of the [October 2016] and [June 2017] Decisions that constitute rulings of law, on the ground that Katz's involuntary consent to the standard of review imposed by Congress under FAA § 10(a)(4) violates Katz's constitutional right to judicial review with

> respect to questions of law required under the Due Process Clause of the Fifth Amendment to the United States Constitution.

Katz's principal authority in support of his motion to vacate on due process "voluntariness" grounds was *Wellness*. He also relied on a number of circuit court decisions (discussed *infra*) denying claims that the extremely limited standard of judicial review under FAA § 10(a)(4) violated due process—with the denials based in whole or substantial part on the "voluntariness" of the agreement to arbitrate. S.D.N.Y. No. 12-9193, Dkt. # 73, at 22-25.

Katz's due process claim based on involuntary consent was rejected by the district court. As relevant here, the district court determined, based on Second Circuit authority, that Katz's due process claim was subject to the same standard of consent as his personal Article III claim in *Katz I* (App. 25a). Therefore, under the "law of the case," Katz's due process claim was governed by the district court's holding in *Katz I*—that for the purposes of waiving the individual right to an Article III adjudication, the voluntariness of the waiver is not governed by "a heightened 'knowing and voluntary' standard" but by general contract principles. *Katz II,* App. 25a-26a; *Katz I,* App. 66a-68a. The district court distinguished *Wellness*—reading it as narrowly as possible as only a bankruptcy case involving a "*Stern* claim"—and declined to extend it to FAA arbitration (App. 25a-26a). Thus, the district court held that *Wellness* was not an "intervening authority" sufficient to depart from the law of the case (*id.*).

4. Katz raised only one issue in his appeal to the Second Circuit (*see* Katz's appeal brief, CA2 No. 18-1436, Dkt. # 21, at 2):

> Whether Katz's involuntary consent—i.e., consent without the right to refuse—to the standard of review imposed by Congress under § 10(a)(4) of the FAA regarding the arbitrator's rulings of law violates Katz's constitutional right to judicial review of those rulings required under the Due Process Clause of the Fifth Amendment of the United States Constitution.

The Second Circuit affirmed the district court without addressing the sole issue Katz raised (App. 1a-5a). Stating that Katz had "renew[ed] his claims" in *Katz I,* the circuit court characterized Katz's appeal as follows: "As relevant here, Katz argued that the standard of review imposed by the Federal Arbitration Act violates his Fifth Amendment due process right to judicial review." Neither "consent," "voluntary," "involuntary" nor *Wellness* appear anywhere in its order (*id.*).[4]

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[4] The district court in *Katz II* also rejected Katz's due process claim based, in part, on the law of the case and its holding in *Katz I* that there was insufficient state action to support an Article III violation in connection with the enforcement of a private arbitration agreement under the FAA (App. 24a-25a). The Second Circuit's order in *Katz II* relied exclusively on the absence of state action, without regard to the issue of voluntariness (App. 4a-5a). Katz maintained in the lower courts, and does so in his petition, that if his consent to arbitration is not voluntary as required under the standard prescribed in *Wellness,* then state action is irrelevant because the arbitration agreement and its waiver of his Article III and due process rights are unenforceable.

QUESTION 1 INVOLVES A CIRCUIT CONFLICT AND AN IMPORTANT QUESTION UNDER THE FAA

As noted in Katz's Statement of the Case, *supra,* the circuit courts are evenly divided on Question 1—whether FAA § 3 (App. 74a) requires the District Court to stay the action after it compels arbitration of all claims and a stay is requested by one of the parties. The Second Circuit's opinion in *Katz I* identifies four circuit courts answering the question "yes," and four circuit courts holding that "district courts enjoy the discretion to dismiss the action." App. 35a. *Katz I* makes five "yes" votes for the mandatory stay, but it did not identify the unpublished Sixth Circuit opinion in *Ozormoor v. T-Mobile USA, Inc.,* 354 F. App'x 972, 975 (6th Cir. 2009), which supported dismissal and itself cited to another unpublished Sixth Circuit opinion to the same effect, *Hensel v. Cargill, Inc.,* 198 F.3d 245, at *4 (6th Cir. 1999) (table). So the divide is still even, at five circuit courts on each side of the conflict. This nationwide conflict, and the fact that the Court reserved the issue in *Randolph,* 531 U.S. at 87 n.2, and effectively reserved it again this term in *Lamps Plus,* 139 S. Ct. at 1414 n.1, confirms that it is important and recurring. Indeed, the circuit court's decision in *Katz I* has been cited and followed more than 25 times in the past year in the district courts of the Second Circuit in support of entry of the stay under § 3.

Katz makes several observations about these conflicting circuit court decisions. First, none on either side of the conflict actually construes the "stay the trial

of the action" language of FAA § 3 to determine the significance of the phrase "the trial"—although the cases allowing dismissal seem to tacitly distinguish between "any issue" and "all issues" or "all claims" when concluding dismissal is appropriate. *E.g., Alford v. Dean Witter Reynolds, Inc.,* 975 F.2d 1161, 1164 (5th Cir. 1992). Second, the cases allowing dismissal generally characterize it as the exercise of discretion by the district court, which necessarily means not only that these circuit courts believe FAA § 3 does not preclude dismissal, but that a stay might be proper even where "all claims" are arbitrable and there will never be a trial of any of them. *E.g., Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988).

Question 1 presents challenging issues of statutory construction. Starting with the words of the statute, "any issue" is not the same as "all issues," but since "any" can mean "all," the context of the relevant FAA sections read together is important. *See* Scalia & Garner, § 14 at 130 (under 1 U.S.C. § 1, singular includes plural and plural includes singular "unless the context indicates otherwise").

The phrase "shall stay *the trial* of the action" (emphasis added) means that "the trial" is not the same as "the action," but an included part. To ignore "the trial" violates the "surplusage canon." Scalia & Garner, § 26 at 174. And the established meaning of "trial" adds significant context: "A judicial examination, in accordance with the law of the land, of a cause, either civil or criminal, of the issues between the parties, whether of law or fact, before a court that has jurisdiction over it." *Black's Law Dictionary* 1675 (rev.

4th ed. 1968).[5] In other words, a "trial" involves an actual substantive judicial review of the facts and legal issues "of a cause" under controlling law.[6] Read together, these words of § 3 strongly suggest the following construction: "Where a suit contains several claims, and the district court has determined that the parties agreed to arbitrate only a subset of those claims, § 3 of the FAA provides that the district court must stay the litigation at the request of either party." *Lamps Plus,* 139 S. Ct. at 1423 (quoting Breyer, J., dissenting). Consistent with this straightforward construction, a number of courts have long prescribed standards for determining under FAA § 3 whether to stay the trial of an action involving both arbitrable and non-arbitrable claims. *E.g., Oldroyd v. Elmira Sav. Bank,* 134 F.3d 72, 76 (2d Cir. 1998) ("[I]f the court

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[5] FAA § 4 (App. 75a-76a) includes multiple references to a "trial" and commands the court to "proceed summarily to the trial" "[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue"—clearly directing a "judicial examination … of the issues between the parties," *i.e.,* an examination of the prescribed substantive merits by the court. "Trial" should be presumed to have the same meaning consistent with or comparable to the *Black's Law Dictionary* meaning in both §§ 3 and 4. Scalia & Garner, § 26 at 170 (presumption of consistent usage canon).

[6] Verizon's arbitration agreement expressly precludes "a judge or jury" from adjudicating claims (which are all arbitrable under its terms), expressly waives a "trial" by jury, and only allows for a non-jury trial in the event the arbitration agreement is not enforceable and none of the claims arbitrable (CA2 Jt. App. A29, A30, § 9). Thus any request by Verizon to "stay the trial of the action" under § 3 is seeking a remedy it has contractually precluded.

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 arbitration.") (cited CA2 Opinion, *Katz I,* App. 34a).

FAA § 3 and § 16 implicate several competing federal policies evidenced by their structure. On the "mandatory stay" side are "the FAA's underlying policy 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible'" relied on by the Second Circuit (App. 38a, citing *Moses H. Cone*), and the policy against piecemeal appeals of interlocutory decisions, s*ee, e.g., Lamps Plus,* 139 S. Ct. at 1425-26 (Breyer, J., dissenting). On the "dismissal side" is the policy favoring an immediate appeal of a "final decision"—that is "a decision that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment." *Randolph*, 531 U.S. at 86 (quotations and citations omitted).

The circuit court's structural analysis supporting its holding under FAA § 3 compared FAA §§ 16 (a)(1)(A)-(B), which allow an immediate appeal of an "order" under FAA §§ 3-4 hostile to arbitration, with FAA §§ 16(b)(1)-(b)(2), which preclude an immediate appeal from an "interlocutory order" under FAA §§ 3-4 favorable to arbitration (App. 37a, *see also* FAA § 16, App. 76a-77a). The Second Circuit wholly ignored FAA § 16(a)(3), which allows an immediate appeal of a "final decision with respect to an arbitration" "regardless of whether the decision is favorable or hostile to arbitration." *Randolph,* 531 U.S. at 85-86. The legislative history of FAA § 16, however, after making a comparable structural analysis, specifically addresses

the relationship between these sections and the competing policies they embody, *see* 134 Cong. Rec. 31065, *supra*:

> [U]nder the proposed statute, appealability does not turn solely on the policy favoring arbitration. Appeal can be taken from final judgments, including a final judgment in an action to compel arbitration, a final judgment that refuses to enjoin arbitration, or a final judgment dismissing an action in deference to arbitration. These appeals preserve the general policy that appeal should be available where there is nothing left to be done in the district court. …

There is no issue that an order staying some but not all claims under FAA § 3 and the accompanying order under FAA § 4 compelling those claims to arbitration are "interlocutory orders" for which immediate appeal is prohibited under FAA § 16(b)(1)-(b)(2). But compelling arbitration of all claims and staying "the trial of the action" that will never occur are, at a minimum, "far less interlocutory"—because there is nothing left for the district court to do with respect to the adjudication of the substantive merits of the claims. The subsequent history of this case after remand illustrates the point: the parties were required to file or provide the district court with eight joint status reports about an arbitration that is supposed to operate entirely outside the courts and for which the district court had no involvement (S.D.N.Y. No 12-cv-9193, Dkt. ## 47, 48, 49, 54, 65, 66, 67, plus one faxed report). In the absence of Katz's motion to vacate, the parties would have had to come back to tell the court to

dismiss the case because there was nothing else for it to do.

The Second Circuit in *Katz I* did mention in a footnote (App. 38a n.7) possible subsequent involvement of the district court after ordering arbitration in connection with arbitrator appointment under FAA § 5, witness attendance under FAA § 7, and proceedings to confirm, vacate or modify an award under FAA §§ 9-11. One of the Third Circuit's justifications for the mandatory stay in *Lloyd v. HOVENSA, LLC*, 369 F.3d 263, 270 (3d Cir. 2004), was that if a district court dismisses the action, "the parties will have to file a new action each time the Court's assistance is required, with the attendant risk of having … a new judge." But that rationale conflicts with *Marine Transit Corp. v. Dreyfus,* 284 U.S. 263, 275-76 (1932), in which this Court confirmed that "where the court has the authority … to make an order for arbitration, the court also has the authority to confirm the award or set it aside." *Accord Smiga v. Dean Witter Reynolds, Inc.,* 766 F.2d 698, 705 (2d Cir. 1985) ([A] court which orders arbitration retains jurisdiction to determine any subsequent application involving the same agreement to arbitrate, including a motion to confirm the arbitration award."). As a practical matter, district courts dismiss cases regularly pursuant to stipulations of settlement while retaining jurisdiction to enforce the agreement if necessary.

The Second Circuit and the other circuit courts mandating the stay have failed to place the competing policy favoring arbitration and the policy favoring immediate appealability on equal footing—contrary to

Congress's intent, and more important, contrary the words of the statute read as a whole in context. "If courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we would risk failing to tak[e] ... account of legislative compromises essential to a law's passage and, in that way, thwart rather than honor the effectuation of congressional intent." *New Prime,* 139 S. Ct. at 543 (internal quotations and citation omitted). *Cf.* G*ranite Rock Co. v. Int'l. Bhd. of Teamsters,* 561 U.S. 287, 299 (2010) (federal policy favoring arbitration under FAA cannot override "the first principle that underscores all of [the Court's] arbitration decisions"—that "[a]rbitration is strictly a matter of consent") (internal quotations and citation omitted).

Question 1 encompasses not only the issue whether the stay under § 3 is mandatory when all claims are referred to arbitration, but also whether the stay is even proper when there never will be "the trial" to stay. Question 1 is compelling, it satisfies Rule 10(a), and it merits the grant of certiorari.

QUESTION 2 INVOLVES A CIRCUIT CONFLICT AND A QUESTION OF UTMOST IMPORTANCE UNDER THE FAA AND ARTICLE III THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

At the outset, Katz emphasizes important limits on the reach of Question 2—whether the *Wellness* standard for voluntary consent applies under the FAA to Katz's waiver of his Article III and due process constitutional rights. First, consistent with the Court's Article III jurisprudence, Question 2 reaches only state

law private right claims, and not federal claims addressed by other of the Court's FAA decisions where Congress's intent evidenced by the words and structure of the statute creating the right are relevant. Second, Question 2 factually seeks an answer only in connection with cell phones, which this Court has realistically recognized are incompatible with a constitutional standard of voluntariness – at least under the Fourth Amendment. *See Carpenter*, 138 S. Ct. at 2220. With those limitations, Question 2 satisfies Rule 10 on two different grounds.

First, the Second Circuit's affirmance of the district court's rejection of the applicability of the "knowing and voluntary" standard of consent in connection with Katz's right to an Article III adjudicator in *Katz I,* and the Second Circuit's affirmance of the district court's adherence in *Katz II* to that holding and its rejection of the applicability of *Wellness* to Katz's due process claim, are decisions on an important question of federal law that has not been, but should be, settled by this Court, *and* have been decided in a way that conflicts with the relevant Article III decisions of this Court—thereby satisfying Rule 10(c).

Second, the rejection of the "knowing and voluntary" standard of consent in connection with arbitration agreements and the relegation of the enforceability of consent to state contract law under FAA § 2 (App. 74a) by the district and circuit court in this case and by other circuit courts on whom the district court relied conflict with the Sixth Circuit's decision in *Hergenreder,* 656 F.3d at 420, which both expressly applied a "knowing and voluntary" standard to

arbitration agreements, and held that the applicability of that standard is a matter of "federal and not state law." Thus, the circuit courts conflict not only about the applicable standard of consent, but also whether the "grounds as exist at law or in equity for the revocation of any contract" under FAA § 2 (App. 74a) allows for the application of the federal constitutional standard. *See Caley,* 428 F.3d at 1371 ("a court can decline to enforce an arbitration agreement under the FAA only if the plaintiffs can point to a generally applicable principle of *contract* law under which the agreement could be revoked") (emphasis in original). *Cf. In re County of Orange,* 784 F.3d 520, 528, 531 (9th Cir. 2015) ("the federal knowing and voluntary standard is not a generally applicable federal rule, but rather a federal constitutional minimum"). This circuit conflict satisfies Rule 10(a) as well.

The Court's extensive body of FAA jurisprudence has never squarely addressed the applicability of the "knowing and voluntary" standard of consent under the FAA for the waiver of the three personal constitutional rights relinquished by every arbitration agreement: (i) the right to the exercise of the Article III judicial power in connection with state law private rights brought within the jurisdiction of the federal courts; (ii) the related but independently required due process right to judicial review of non-Article III rulings of law; and (iii) the right to trial by jury. The Court has repeatedly emphasized the fundamental principle that arbitration "is a matter of consent, not coercion." *Stolt-Nielsen,* 559 U.S. at 681. But to the great dismay of some members of the Court, the consequences of the Court's decisions result in forced arbitration no matter

what. *See, e..g., Lamps Plus,* 139 S. Ct. at 1420-22 (Ginsburg, J., dissenting).

Within the Court's extensive body of Article III jurisprudence, however, *Wellness* now provides the most direct link between private arbitrators and the personal right to the exercise of the Article III judicial power. Each of the four separate opinions addresses private arbitration in one form or another.[7] *Wellness* recognizes that bankruptcy judges, magistrate judges, and arbitrators all are non-Article III adjudicators who can engage in non-Article III "adjudication by consent." 135 S. Ct. 1942, 1948. And when it comes to non-Article III adjudication, the Court has never wavered from the "fundamental principle" that consent to the non-Article III adjudicator must be "voluntary." *See Wellness,* 135 S. Ct. at 1948; *Stern,* 564 U.S. at 493 (Pierce "had nowhere else to go" and "did not truly consent to resolution of [his] claim in the bankruptcy court proceedings"); *Thomas,* 473 U.S. at 589, 592 (arbitration between "voluntary participants") (follow-on registrant "explicitly consent[ed] to have his rights determined by arbitration"); *Northern Pipeline Constr.*

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[7] In his concurrence in *Wellness*, Justice Alito states that "[n]o one believes that an arbitrator exercises '[t]he judicial Power of the United States, Art. III, § 1,' in an ordinary, run-of-the mill arbitration." 135 S. Ct. at 1949. Katz agrees. But Katz's arbitration here could not be considered "run-of-the-mill" where the arbitrator issued rulings of law on issues addressed and even controlled by substantial federal and state decisional authority, including the "Tender" issue decided contrary to the recent opinion of the Court in *Campbell-Ewald*. The arbitrator may not have been "vested" with the Article III judicial power, but he was exercising it, or its identical twin from another universe.

Co. v. Marathon Pipe Line Co., 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring) (non-Article III adjudication under 1978 Bankruptcy Act was "against [Marathon's] will"). *Cf. Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-49 (1986) ("Schor indisputably waived any right he may have possessed" to Article III adjudication where he expressly agreed to proceed in front of CFTC after his adversary initially filed suit in federal court).

Consistent with the Article III requirement of voluntary consent, the FAA legislative history includes multiple references to the fact that arbitration under the FAA is supposed to be "voluntary." *See, e.g., Arbitration of Interstate Commercial Disputes, Joint Hearings on H.R. 646 and S. 1005 before the Subcommittees of the Committees on the Judiciary,* 68th Cong., 1st Sess. 26 (1924) ("Hearing") (statement of Alexander Rose: "Arbitration … is a purely voluntary thing … which men voluntarily enter into."). And shortly after the FAA was signed into law in 1925, Julius Cohen, a principal proponent of the FAA and one of its architects and drafters, emphasized that arbitration under the FAA is supposed to be voluntary:

> No one is required to make an agreement to arbitrate. Such action by a party is entirely voluntary. ... [The new arbitration law] is merely a new method for enforcing a contract freely made by the parties thereto.

Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law,* 12 VA. L. REV. 265, 279 (1926). *See also Epic Sys. Corp.,* 138 S. Ct. at 1643 (Ginsburg, J.,

dissenting) (quoting additional portions of legislative history emphasizing voluntariness).[8]

"[T]he constitutional requirement of due process is a requirement of judicial process." *Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting). In *Thomas*—citing to Justice Brandeis in *Crowell*—the Court identified an issue very similar to Katz's due process claim involving the congressionally prescribed level of judicial review of arbitrator awards under the relevant voluntary federal arbitration scheme, but determined that it did not have to "identify the extent to which due process may require review of determinations by the arbitrator because the parties stipulated below to abandon any due process claims." 473 U.S. at 592-93.[9]

In the courts below, Katz supported his "involuntary consent" due process claim with a number of circuit court decisions confirming that the extremely restricted judicial review of arbitrator decisions imposed under FAA §10(a)(4) (App. 76a) implicates due process protections. Those courts rejected the violation in whole

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[8] Ironically, during the Hearing (at 17), Cohen identified only one constitutional right implicated by the arbitration act: "The one constitutional provision we have got is that you have a right of trial by jury. But you can waive that." The fact is that the constitutional right to the exercise of the Article III judicial power was not very well known at that time—and still isn't.

[9] The Court in *Thomas* did, however, decide that due process in connection with the federal arbitration scheme was satisfied, *inter alia*, where judicial review included the right to pursue Tucker Act claims in the federal district or claims courts with review in the Federal Circuit. 473 U.S. at 589, 593, 593 n.4.

or substantial part based on the "voluntariness" of the agreement to arbitrate. *Bowen v. Amoco Pipeline Co.,* 254 F.3d 925, 940 (10th Cir. 2001); *Davis v. Prudential Sec., Inc.,* 59 F.3d 1186, 1193 (11th Cir. 1995); *Todd Shipyards Corp. v. Cunard Line, Ltd.,* 943 F.2d 1056, 1063-64 (9th Cir. 1991); *Moseley, Hallgarten, Estabrook, & Weeden, Inc. v. Ellis,* 849 F.2d 264, 268 (7th Cir. 1988). *Cf. D.H. Overmyer Co. v. Frick Co.,* 405 U.S. 174, 186 (1972) (private contractual waiver of due process rights was "voluntarily, intelligently and knowingly" made where "[t]here was no refusal on Frick's part to deal with Overmyer unless Overmyer agreed to a cognovit").[10] These cases applying a voluntariness standard also conflict with the decisions of the district and circuit court in *Katz I* and *Katz II.*

Finally, although Katz's petition and Question 2 focus only on his personal constitutional rights, the Court must not overlook the concomitant, vast erosion of the Article III jurisdiction vested in the federal courts to adjudicate state law private right consumer claims under the Class Action Fairness Act of 2005—the jurisdictional basis for Katz's invocation of the Article III judicial power in this case. Recognition of the applicability of the *Wellness* standard of consent to non-Article III adjudication of state law private rights will simultaneously restore the fundamental constitutional rights of Katz and Verizon's other customers to the Article III judicial power and due process *and* the judicial power of the Article III courts

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[10] When the district court rejected the applicability of the "knowing and voluntary" standard in *Katz I,* it also rejected the applicability of *Overmyer* (App. 68a).

to adjudicate their claims—all essential to the protection of liberty.

This is how important Question 2 is. At the time the action was commenced, Verizon disclosed in its 2011 Form 10-K that it had approximately 92 million cell phone customers. S.D.N.Y. No. 12-cv-9193, Dkt. # 20-3 at 3. Verizon's arbitration agreement involuntarily waives three constitutional rights for Katz and each customer. Adopting the *Wellness* standard for voluntary consent could restore 270,000,000 individual constitutional rights of cell phone users in this case alone.

Question 2 satisfies Rule 10 and merits the grant of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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