No. 19-963

In the
Supreme Court of the United States

HENRY SCHEIN, INC.,
Petitioner,
v.

ARCHER AND WHITE SALES, INC.
Respondent.

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

BRIEF OF WILLIAM R. WEINSTEIN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is a private practitioner whose practice over the past twenty-plus years has substantially involved the prosecution of consumer class actions, as well as numerous cases raising issues regarding the validity and enforceability of arbitration agreements under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA").

Issues regarding the authority of the arbitrator to decide arbitrability and merits issues, including the "who decides arbitrability" issue presented in this case, have arisen in a number of *amicus'* cases, the first extending back more than two decades. *See Hackel v. Abramowitz,* 245 A.D.2d 124, 665 N.Y.S.2d 655 (N.Y. App. Div. 1997) ("the language of the relevant AMEX rule renders the issue of arbitrability one to be determined by the arbitrators"). *See also Emilio v. Sprint Spectrum L.P.,* 315 F. App'x 322, 324-25 (2d Cir. 2009) (question whether *res judicata* barred arbitration was for arbitrator rather than court where arbitration agreement incorporated JAMS rules); *Schatz v. Cellco P'ship,* 842 F. Supp. 2d 594, 613 (S.D.N.Y. 2012) (issue whether claim for general injunctive relief under consumer fraud statute was arbitrable where arbitration agreement precluded arbitrator from issuing such relief was for arbitrator to decide in first instance in light of uncertainty whether such relief was

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[1] *Amicus* affirms under Rule 37.6 that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* made a monetary contribution intended to fund the preparation or submission of the brief. The parties' blanket consents to the filing of *amicus* briefs are on file with the Clerk's office.

available under statute); *Emilio v. Sprint Spectrum L.P.,* 508 F. App'x 3, 4-6 (2d Cir. 2013) (enforceability of class action waiver was arbitrability issue for arbitrator where arbitration agreement incorporated JAMS rules).

Amicus has also prosecuted cases specifically challenging the validity and enforceability of consent to non-Article III adjudications in connection with consumer cell phone arbitration agreements governed by the FAA, where such consent is not "knowing and voluntary" under the standard set out in *Wellness Int'l Network, Ltd. v. Sharif,* 135 S. Ct. 1932, 1948 (2015). *See Adell v. Cellco P'ship,* No. 1:18CV623, 2019 WL 1040754, at *2-3 (N.D. Ohio Mar. 5, 2019) (distinguishing bankruptcy context of *Wellness* and declining to extend "knowing and voluntary" standard to consumer cell phone arbitration agreement under FAA); *Katz v. Cellco P'ship,* No. 7:12CV9193, 2018 WL 1891145, at *8 (S.D.N.Y. Apr. 17, 2018) (distinguishing *Wellness* as involving bankruptcy proceedings and declining to apply it to due process claim regarding scope of judicial review of arbitration award under FAA), *aff'd on other grounds,* 756 F. App'x 103 (2d Cir.), *cert. denied*, 140 S. Ct. 448 (2019).

Amicus argues below that the procedures prescribed in 9 U.S.C. § 4 require the court or a jury to decide as an initial matter whether a party to an arbitration agreement has consented to the determination of the arbitrability of the dispute by an arbitrator, and whether that consent is "knowing and voluntary" and thus valid and enforceable under the FAA. In this case, the judgment of the Fifth Circuit should be affirmed,

because it followed the procedures required under 9 U.S.C. § 4 when it decided that any delegation of the determination of arbitrability to the arbitrator did not encompass the dispute at issue and thus it had the authority to decide the arbitrability issue, and because respondent did not "knowingly" consent to the determination of arbitrability of the dispute by the arbitrator.

SUMMARY OF ARGUMENT

The language of 9 U.S.C. § 4 as written provides a "simple framework" that requires the court, or a jury if demanded, to resolve any disagreements by the parties regarding an arbitration agreement's validity or enforceability (including in connection with its formation or applicability to the dispute at issue). *See* 9 U.S.C. § 4; *Granite Rock Co. v. Int'l Bhd. of Teamsters,* 561 U.S. 287, 299-300, 303 (2010). This "simple framework" applies equally to an antecedent agreement regarding the delegation of the determination of arbitrability to the arbitrator. *See Schein v. Archer & White Sales, Inc.* 139 S. Ct. 524, 529 (2019) ("*Schein* I"). Here, the Fifth Circuit was required under 9 U.S.C. § 4 to resolve the parties' disagreement regarding the enforceability and applicability of the provision delegating the determination of arbitrability to the arbitrator, and decided the parties' dispute regarding the arbitrability of respondent's "action seeking injunctive relief" only *after* first concluding that this arbitrability issue was not delegated to the arbitrator and was for the court to decide. Petitioner's arguments that this was error are contradicted both by

9 U.S.C § 4 and *Granite Rock,* and should be rejected by the Court.

Additionally, the Fifth Circuit reached the right result because respondent did not "knowingly" consent to the determination of arbitrability by the arbitrator. The "knowing and voluntary" standard of consent set out by the Court in *Wellness* applies to non-Article III adjudication by a private arbitrator, *see* 135 S. Ct. at 1942, 1948. And although the Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), did not couch its analysis in Article III terms, the validity and enforceability of consent to the determination of arbitrability by a non-Article III arbitrator clearly animated its rationale—including both the fact that parties to an arbitration agreement likely do not focus on or appreciate the significance of consent to the arbitrator deciding arbitrability issues, *id.* at 945, and the fact that the arbitrator's decision is not subject to meaningful review by the Article III court, *id.* at 942. Respondent persuasively establishes that the mere incorporation of the rules of the arbitration forum is insufficient to establish respondent's "knowing" consent to the delegation of arbitrability to the arbitrator (Resp. Br. 13-26). The absence of knowing consent renders any purported delegation of arbitrability issues to the arbitrator invalid and unenforceable, and thus arbitrability was properly decided by the court under 9 U.S.C. § 4.

ARGUMENT

I. 9 U.S.C. § 4 REQUIRES THE COURT OR A JURY TO DECIDE THE VALIDITY AND ENFORCEABILITY OF CONSENT TO THE DETERMINATION OF ARBITRABILITY BY AN ARBITRATOR WHEN CONTESTED BY A PARTY

""[T]he first principle that underscores all of [the Court's] arbitration decisions' is that '[a]rbitration is strictly a matter of consent.'" *Lamps Plus, Inc. v. Varela,* 139 S. Ct. 1407, 1415 (2019), *quoting Granite Rock Co. v. Int'l Bhd. of Teamsters,* 561 U.S. 287, 299 (2010) (internal quotation marks omitted). The Court has "emphasized that 'foundational FAA principle' many times." *Lamps Plus,* 139 S. Ct. at 1415-16 (citing cases).

If 9 U.S.C. § 2 is the "primary substantive provision" of the FAA declaring the validity and enforceability of a party's consent to arbitration, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), then 9 U.S.C. § 4 is the "primary procedural provision" to determine the validity and enforceability of that consent.

"[T]he starting point for interpreting a statute is the language of the statute itself," *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980), and "the Court must interpret the [FAA] as written," *Schein* I, 139 S. Ct. at 529. Yet 9 U.S.C. § 4 has been quoted in full only *once* in the entirety of the Court's FAA jurisprudence, eighty-eight years ago in *Marine Transit Corp. v. Dreyfus,* 284 U.S. 263, 270 n.1

(1932), in which the Court upheld the constitutionality of the FAA as originally enacted in 1925 under Article III (U.S. CONST. art. III). Because 9 U.S.C. § 4 (cumbersome as some may find it) controls the outcome here, it is quoted in full for the Court in the annexed appendix.

Recognizing that "the Court must interpret the [FAA] as written," *Schein* I, 139 S. Ct. at 529, the procedures set out in 9 U.S.C. § 4 can nevertheless be reduced to the following: (1) a party may file a motion to compel[2] with the federal court (so long as there is an independent basis for federal jurisdiction) when the party believes another party is obligated to but is not complying with an arbitration agreement; (2) the court determines whether the party allegedly obligated to but not complying with the arbitration agreement contests the agreement's validity or enforceability (including in connection with its formation or applicability to the dispute at issue), and if not, must order the parties to proceed with the arbitration in accordance with the agreement's terms; (3) if the party allegedly obligated to but not complying with the arbitration agreement contests the agreement's validity or enforceability (including in connection with its formation or applicability to the dispute at issue), then the court, or a jury if demanded by the party contesting the alleged obligation, must determine the dispute at trial; (4) if the court or jury resolves the dispute in

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[2] Although 9 U.S.C. § 4 speaks of a "petition," under 9 U.S.C. § 6, "[a]ny application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions[.]"

favor of the non-complying party, the proceeding to compel must be dismissed; and (5) if the court or jury resolves the dispute in favor of the moving party, the court must order the parties to proceed with the arbitration in accordance with the agreement's terms.

In fact, without detailing every step of the procedures prescribed under 9 U.S.C. § 4, the Court has already substantially distilled its essence, in *Granite Rock*, 561 U.S. at 299-300 and n.7 (citations omitted) (emphasis in original):

> [O]ur precedents hold that courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue. … Where a party contests either or both matters, "the court" must resolve the disagreement.

Petitioner twice observes that an agreement delegating arbitrability to an arbitrator "'is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce,' and the Arbitration Act 'operates on this additional arbitration agreement just as it does on any other.'" Pet. Br. 2, 7-8, *quoting Schein* I, 139 S. Ct. at 529 (internal quotation marks and citation omitted). Under 9 U.S.C. § 4, the court (or a jury if demanded) is delegated the authority by Congress to initially resolve any disagreement about the arbitration agreement's validity or enforceability—including in connection with its formation or applicability to the dispute at issue. And this includes

"antecedent" disagreements regarding "who decides" arbitrability under the terms of the arbitration agreement. Section 4 "contemplate[s] a distinct gatekeeping role for the court." Resp. Br. 28.

The procedure employed by the Fifth Circuit is totally consistent with 9 U.S.C. § 4. The court first decided the parties' dispute whether the court or the arbitrator should decide arbitrability, and concluded that, under its precedent, the incorporation of the American Arbitration Association ("AAA") rules for matters not carved out was sufficient to delegate authority for arbitrability determinations to the arbitrator regarding those matters, but that arbitrability should be determined by the court for the carved out matters not subject to the AAA rules. Pet. App. 6a-11a. Having resolved the parties' dispute regarding the authority to determine arbitrability for the matters carved out, as it was required to do under 9 U.S.C. § 4, the Fifth Circuit then exercised its authority under 9 U.S.C. § 4 to determine that respondent's action was, in fact, an "action seeking injunctive relief" and thus subject to the carve out and not arbitrable. Pet. App. 12a-16a.

One response to petitioner's characterization of the procedural chronology followed by the Fifth Circuit as "bizarre," "circular" or "incoherent[t]" (Pet. Br. 33, 36, 37) is "read 9 U.S.C. § 4"—the applicable procedural statute that petitioner addresses only in the most cursory fashion (Pet. Br. 9, 20)—because Congress says the court (or a jury if demanded) "shall" (i.e., *must*) decide the delegation issue when disputed by the parties. And the only delegation issue decided by the

Fifth Circuit was whether the AAA rules applied to the carve-out. Pet. App. 11a ("[T]he placement of the carve-out here is dispositive. … The plain language incorporates the AAA rules—and therefore delegates arbitrability—for all disputes *except* those under the carve-out.") (emphasis in original).

Furthermore, petitioner's argument that the Fifth Circuit had to decide whether respondent's action seeking injunctive relief was arbitrable in order to decide the delegation issue (Pet. Br. 4, 33-34) is itself circular, and wrong. Once the Fifth Circuit decided that it had the authority to decide the arbitrability question based on the inapplicability of the AAA rules to the carve-out, it still could have decided that the matter *was arbitrable* by concluding that respondent's action was not the type of "action seeking injunctive relief" contemplated by the carve-out (although in *amicus'* view the chances of the Fifth Circuit doing so given the language of the carve-out provision would have been extremely remote). Equally circular and wrong is petitioner's concomitant argument that if the Fifth Circuit decided the arbitrator was empowered to decide arbitrability because the AAA rules applied to the carved out matters as well, then that holding could have "bound" the arbitrator to find the matter arbitrable (Pet. Br. 34)—the arbitrator still had the authority to construe the agreement to find that respondent's action seeking injunctive relief *was not arbitrable* for the same reasons as the Fifth Circuit, based on the language of the contract. And it is worth noting that nothing in the Fifth Circuit's decision regarding who decides arbitrability precluded petitioner from vigorously arguing that the matter was

arbitrable when the Fifth Circuit determined the arbitrability issue. Petitioner's arguments were fully considered and addressed though ultimately rejected based on the court's construction of the arbitration agreement. Pet. App. 12a-16a.

Finally, petitioner argues that the Court should apply the "presumption of arbitrability" as a default in the absence of an express carve-out of the delegation of arbitrability to the arbitrator in the carve-out provision itself (Pet. Br. 31-33). But the Court has already rejected the argument that the "presumption of arbitrability" can override the "foundational FAA principle" that "'[a]rbitration is strictly a matter of consent'" (*Lamps Plus,* 139 S. Ct. at 1415)—in *Granite Rock,* the very decision quoted by *Lamps Plus*:

> *We have applied the presumption favoring arbitration*, in FAA and in labor cases, *only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended* because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and best construed to encompass the dispute.

Granite Rock, 561 U.S. at 303 (emphasis added).

The words of 9 U.S.C. § 4 may be somewhat cumbersome, but they provide a "simple framework" (*Granite Rock,* 561 U.S. at 303) for the resolution of disagreements about an arbitration agreement's validity and enforceability (including in connection

with its formation or applicability to the dispute at issue). And this "simple framework" applies with equal force to the dispute between petitioner and respondent regarding the delegation of arbitrability determinations to the arbitrator.

II. CONSENT TO THE DETERMINATION OF ARBITRABILITY BY AN ARBITRATOR MUST BE "KNOWING AND VOLUNTARY" TO BE VALID AND ENFORCEABLE

To be valid and enforceable, consent to non-Article III adjudication by a private arbitrator, the "foundational FAA principle" (*Lamps Plus*, 139 S. Ct. at 1415), must be "knowing and voluntary." In *Wellness,* regarding non-Article III adjudication by consent*,* including by arbitrators, *see* 135 S. Ct. at 1942, the Court stated, *id.* at 1948:

> It bears emphasizing, however, that a litigant's consent—whether express or implied—must still be knowing and voluntary. *Roell* [*v. Withrow*] makes clear *that the key inquiry is whether "the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case" before the non-Article III adjudicator*. [538 U.S. at 590]; see also *id.,* at 588, n.5, 123 S. Ct. 1696 ("notification of the right to refuse" adjudication by a non-Article III court "is a prerequisite to any inference of consent") (emphasis added).

See also Coleman v. Labor & Indus. Review Comm'n of Wis., 860 F.3d 461, 478 (7th Cir. 2017) (Easterbrook, J., dissenting from denial of rehearing en banc) ("Article

III means that only litigants who consent to decision by an Article I officer (*or for that matter a private arbitrator*) can be denied the benefits of an Article III judge." (emphasis added)

Consistent with *Wellness,* Julius Cohen, the principal drafter of the FAA as originally enacted in 1925, stated shortly after its passage: "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) (emphasis added). *See also Thomas v. Union Carbide Agric. Prods. Co.,* 473 U.S. 568, 577 n.1, 589, 590, 592 (1985) (no Article III violation in connection with private "civilian" arbitration program "explicitly consent[ed] to" between "voluntary participants" and conducted by AAA under applicable federal statutory scheme). *Cf. Epic Sys. Corp. v. Lewis,* 138 S. Ct 1612, 1643 (2018) (Ginsburg, J., dissenting) ("Congress, it bears repetition, envisioned application of the Arbitration Act to voluntary, negotiated agreements."). *See also id.* ("the FAA provides an 'opportunity to enforce ... an agreement to arbitrate, when voluntarily placed in the document by the parties to it'") (quoting 65 Cong. Rec. 1931 (1924) (remarks of Rep. Graham)).

Although the Court's decision in *First Options* did not couch its analysis in Article III terms, the validity and enforceability of consent to the determination of arbitrability by a non-Article III arbitrator clearly animated its rationale. First, the Court applied the

"clear and unmistakable" interpretive rule regarding the delegation of arbitrability to an arbitrator based on the presumption that consent to the delegation generally is not made "knowingly":

> On the other hand, the former question—the "who (primarily) should decide arbitrability" question—is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. … And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

514 U.S. at 945 (citations and internal quotations omitted). Second, the Court justified its application of the "clear and unmistakable" interpretive rule based on the consequences of delegation of the determination of arbitrability to the arbitrator—the loss of the right to meaningful Article III judicial review:

> Although the question is a narrow one, it has a certain practical importance. That is because a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the

> party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances

514 U.S. at 942 (citing, *e.g.*, 9 U.S.C. § 10). *Cf. AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 350-51 (2011) ("The AAA rules do authorize judicial review of certification decisions, but this review is unlikely to have much effect given these limitations; review under § 10 focuses on misconduct rather than mistake.").

In arguing that the incorporation of the AAA rules should not constitute "clear and unmistakable" evidence of the delegation of arbitrability to the arbitrator (Resp. Br. 13-26), respondent several times references the fact that persons like respondent do not "knowingly" agree to delegate arbitrability to the arbitrator based on the mere incorporation of the rules of the arbitral forum. *See, e.g.,* Resp. Br. 18 n.6 ("There is no hint the parties knew or understood an important, distinct, 'antecedent agreement' (*Schein I*, 139 S. Ct. at 529) would be hidden in those dozens of pages without the slightest indication in the contract itself."); *id.* at 19 n.7 ("parties cannot agree over an 'arcane' issue without actual knowledge that it exists"); *id.* at 25 ("The entire point of this Court's 'clear-and-unmistakable' standard is that *most parties never contemplate gateway questions of arbitrability*.") (emphasis in original) (quoting *First Options*, 514 U.S. at 944); *id.* (respondent "had no deep knowledge of the intricacies of federal arbitration law, much less any

reason to even *think* about asking who decides arbitrability") (emphasis in original). This lack of knowledge precludes valid and enforceable consent to the delegation of arbitrability to the non-Article III arbitrator.

The lion's share of the parties' arguments address the *First Options* "clear and unmistakable" interpretive rule for the delegation of arbitrability to the arbitrator—which requires "knowing" consent to an essentially unreviewable non-Article III adjudication of the arbitrability issue. But valid consent to non-Article III adjudication by a private arbitrator also requires that it be "voluntary." And nowhere is the absence of voluntary consent more "pervasive" than with cell phones.

This Court has now twice recognized in its decisions that consumers have "no choice" when it comes to cell phones and cell phone services. As stated in *Carpenter v. United States,* 138 S. Ct. 2206, 2220 (2018) (quoting *Riley v. California,* 573 U.S. 373, 134 S. Ct. 2473, 2484 (2014)): "In the first place, 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." *See also* Transcript of Nov. 29, 2017 Oral Argument at 80-81, *Carpenter,* (No. 16-402) (Roberts, C.J.) (responding to government's assertion that "there is an element … of voluntariness in deciding to contract with a cell company" by stating "that sounds inconsistent with our decision in Riley … which emphasized that you really don't have a choice these days if you want to have a cell phone").

Not only are cell phones an "insistent" and "indispensible" part of daily life, but research shows that cell phone use is psychologically addictive. *See, e.g.,* D. Dreher, *Help for a Smartphone-Addicted Generation*, Psychology Today (posted July 8, 2019) (available at https://www.psychologytoday.com/us/blog/your-personal-renaissance/201907/help-smartphone-addicted-generation/) (last visited Oct. 19, 2020); S. Shoukat, *Cell phone addiction and psychological and physiological health in adolescents,* 18 EXCLI Journal at 47-50 (Feb. 4, 2019) (available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6449671/) (last visited Oct. 19, 2020). *See also Riley,* 573 U.S. at 395 ("nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower").

The "clear and unmistakable" evidentiary requirement ensuring "knowing consent" for the delegation of arbitrability to the arbitrator became engrained in the FAA lexicon in connection with commercial arbitration when *First Options* was issued in 1995.[3] But 1995 was a number of years before the explosion of forced arbitration in consumer contracts, and the even greater explosion of the cell phone

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[3] Its origins in the Court's labor arbitration decisions go back well before that. *See AT&T Tech., Inc. v. Commc'n Workers of Am.,* 475 U.S. 643, 649 (1986) (arbitrability should be decided by court rather than arbitrator "[u]nless the parties clearly and unmistakably provide otherwise"); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 583 n.7 (1960) (placing burden of "clear demonstration" of delegation of arbitrability to arbitrator on party asserting delegation).

industry and its inexorable evolution into the most "indispensible" technology in modern society. It is doubtful the Court contemplated in *First Options* such a sea change in society and in the arbitration context in which the rule would continue to be applied.

The "presumption of arbitrability" and "clear and unmistakable" evidence requirement are interpretive rules developed in connection with the FAA statutory scheme. However, there is a "heavy burden against the waiver of constitutional rights, which applies even in civil matters." *D.H. Overmyer Co. v. Frick Co.,* 405 U.S. 174, 188 (1972) (Douglas, J., concurring). "[A]s the Court has said in the civil area, '[w]e do not presume acquiescence in the loss of fundamental rights.'" 405 U.S. at 186 (quoting *Ohio Bell Tel. Co. v. Pub. Util. Comm'n of Ohio*, 301 U.S. 292, 307 (1937)). The constitutional presumption against consent to the waiver of the fundamental individual right to the Article III judicial power overrides any "interpretive rules" under the FAA. Thus, the burden should properly be placed on the cell phone companies to establish the existence of valid and enforceable "knowing and voluntary" consent to non-Article III FAA adjudication by private arbitrators under *Wellness*—including the right to refuse to consent to arbitration and still have the right to receive cell phone services from the cell phone provider. *See Overmyer*, 405 U.S. at 185-86 (Overmyer's waiver of due process right to notice and hearing was "voluntary, knowing and intelligently made" where "agreement … was not a contract of adhesion" and "[t]here was no refusal on Frick's part to deal with Overmyer unless Overmyer agreed to a cognovit[.]"). *But see Adell v. Cellco P'ship,*

2019 WL 1040754, at *3 ("the Court finds it is evidently clear that Plaintiff possessed the right to refuse to sign the Verizon Customer Agreement and to take her business elsewhere") ("to allow Plaintiff to refuse to arbitrate disputes on an individual basis but still retain the Verizon equipment and services would necessarily deprive Defendant of its rights and force Defendant to accept contractual terms without its voluntary consent.").

There is nothing "voluntary" about "hav[ing no] choice" but to enter into an arbitration agreement waiving the right to the Article III judicial power for a piece of technology that is "indispensable to participation in modern society"—and psychologically addictive for the customer or a member or members of the customer's family. Although the Court's FAA jurisprudence has been criticized for the massive scope of its extension to consumer contracts, *see Lamps Plus,* 139 S. Ct. at 1420-21 (Ginsburg, J., dissenting), *amicus* submits that cell phones and cell phone services are *sui generis* in lacking even a scintilla of "voluntariness" regarding customers' consent to non-Article III adjudication by a private arbitrator. Any recognition of the applicability to FAA arbitration of the *Wellness* standard for "valid and enforceable" "knowing and voluntary" consent would be an important first step in reversing this untenable loss of liberty.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

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APPENDIX

9 U.S.C. § 4

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform

the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made iA writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.