No. 24-564

In the Supreme Court of the United States

QYK BRANDS LLC, DBA GLOWYY, PETITIONER

v.

FEDERAL TRADE COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the judgment reflecting (a) the district court's determination that petitioner had violated the Federal Trade Commission Act, 15 U.S.C. 41 *et. seq.*, and a rule issued thereunder, and (b) the district court's entry of a permanent injunction and award of monetary relief for the benefit of consumers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is available at 2024 WL 1526741. The opinion of the district court (Pet. App. 14a-39a) is available at 2022 WL 1090257.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2024. A petition for rehearing was denied on June 20, 2024 (Pet. App. 74a-75a). On August 21, 2024, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including November 17, 2024, and the petition was filed on November 18, 2024 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.*, prohibits all "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. 45(a)(1). Such acts include the dissemination of any "false advertisement * * * for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce, of food, drugs, devices, services, or cosmetics." 15 U.S.C. 52(a). The FTC Act also authorizes the Federal Trade Commission (FTC or Commission) to prescribe rules that "define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. 57a(a)(1)(B).

Pursuant to that authority, the Commission has issued the Mail, Internet, or Telephone Order Merchandise Rule (MITOR), 16 C.F.R. Pt. 435, which defines practices that are unfair or deceptive for merchants who sell goods through the mail, via the Internet, or by telephone. As relevant here, MITOR prohibits a seller from soliciting orders for the sale of merchandise without "a reasonable basis to expect that [the seller] will be able to ship any ordered merchandise to the buyer * * * [w]ithin that time clearly and conspicuously stated in any such solicitation," or within 30 days if no time is stated. 16 C.F.R. 435.2(a)(1). A seller who is unable to ship within that timeframe must offer the buyer, without prior demand, "an option either to consent to a delay in shipping or to cancel the buyer's order and receive a prompt refund." 16 C.F.R. 435.2(b)(1). If the seller fails to offer this refund-or-consent option and does not timely ship the merchandise, it must "deem [the] order cancelled and * * * make a prompt refund to the buyer." 16 C.F.R. 435.2(c). A seller's failure to comply

with any of these requirements is an unfair or deceptive act or practice under the FTC Act.

2. This case arises out of petitioner QYK Brands LLC's advertisement and sale of protective goods during the early days of the COVID-19 pandemic. When the pandemic hit the United States in March 2020, consumer demand for hand sanitizer skyrocketed, and many retailers quickly ran out of inventory. See Pet. App. 16a. Petitioner, too, lacked the ingredients and packaging to meet demand. *Id.* at 19a. It nevertheless began running ads for hand sanitizer on the Internet, including on platforms like Google, Facebook, Instagram, Reddit, and Bing. *Id.* at 16a-17a. On Google, for instance, petitioner advertised that it had "Hand Sanitizers in Stock," and petitioner promised fast shipping with claims like "Ships Today" and "Ships Fast from CA Today." *Id.* at 17a. Between March and May 2020, petitioner's website also advertised a variety of shipping speeds of between three and ten days. *Id.* at 17a-18a.

These claims led to a boom in petitioner's sales of hand sanitizer. In just two weeks, from March 4 to March 18, 2020, petitioner sold nearly 150,000 bottles; from March to August 2020, petitioner's hand sanitizer sales totaled more than $3.3 million. Pet. App. 17a. Petitioner knew, however, that its inventory of hand sanitizer was "woefully insufficient" to meet demand, and the vast majority of orders were not shipped on time. *Id.* at 18a; see *id.* at 18a-19a, 25a. More than 30,000 of the 43,633 orders that petitioner received from March to August 2020 took more than ten days to ship, and more than 10,000 of those orders took more than 30 days to ship. *Id.* at 18a. Petitioner did not regularly notify customers of shipping delays, and it generally did not provide customers the refund-or-consent option or

provide refunds when products failed to ship on time. *Id.* at 19a, 25a-26a. Petitioner sometimes refused customers' requests for refunds, claiming that refunds were impossible because shipping labels had already been created. *Id.* at 19a-20a, 26a.

3. In August 2020, the FTC brought a civil enforcement action against petitioner in the United States District Court for the Central District of California. See Pet. App. 2a, 21a. In addition to petitioner, the suit named as defendants Rakesh Tammabattula and Jacqueline Thao Nguyen, who together jointly owned and operated petitioner, and several additional corporate entities that Tammabattula and Nguyen owned.[1] *Id.* at 14a, 16a. In its complaint, the FTC alleged that the defendants, including petitioner, had violated the FTC Act and MITOR through their deceptive advertising and late shipment of hand sanitizer. *Id.* at 21a. The FTC also brought a claim arising out of certain representations made by Nguyen, a licensed pharmacist whose license had previously been suspended for unprofessional conduct involving acts of dishonesty, fraud, or deceit. *Id.* at 37a. In particular, Nguyen had represented on a Vietnamese-language broadcast that a protein powder (Basic Immune IGG) sold by the corporate defendants could protect users from COVID-19 and had been approved by the Food and Drug Administration for that purpose. *Id.* at 20a-21a.

a. The district court granted summary judgment in favor of the FTC. Pet. App. 14a-39a. As to the MITOR claim, the court held, based on the undisputed evidence, that petitioner had violated the regulation's three

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[1] Tammabattula and Nguyen were parties in the district court and the court of appeals, but they are not petitioners in this Court. Pet. iii.

relevant requirements. *Id.* at 24a-26a. First, petitioner had violated the rule by soliciting orders for hand sanitizer that petitioner "did not have in stock and had no 'reasonable basis' to believe would be available to ship on [the] advertised timelines." *Id.* at 24a. Second, petitioner had failed to give buyers "the option either to consent to delayed shipping or to cancel their orders and receive a refund." *Id.* at 25a. Third, petitioner "did not always issue refunds—much less 'prompt' refunds —when customers requested one before their order had shipped." *Id.* at 26a. As to the FTC Act claims, the court held that petitioner's claims about shipping speed and inventory were unfair and deceptive, *id.* at 27a, as were Nguyen's statements related to Basic Immune IGG, *id.* at 28a-29a.

Pursuant to Section 19 of the FTC Act, 15 U.S.C. 57b, the district court awarded monetary relief for the benefit of consumers.[2] The court ordered petitioner to pay $3,086,238.99—an amount equal to petitioner's revenues from hand sanitizers sold from March to August 2020—into a fund that the FTC will use to provide a refund to any customer who requests it. Pet. App. 34a-35a, 64a-66a. Any unclaimed funds (less administrative expenses) will be returned to petitioner at the conclusion of the redress process. *Id.* at 66a. Pursuant to Section 13(b) of the FTC Act, 15 U.S.C. 53(b), the district court also entered a permanent injunction. As relevant here, the injunction permanently bars petitioner from advertising or selling protective goods and services, including products designed, intended, or represented to

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[2] Section 19 authorizes a court to "grant such relief," including "the refund of money," "as the court finds necessary to redress injury to consumers" resulting from violation of an FTC consumer protection rule. 15 U.S.C. 57b(b); see 15 U.S.C. 57b(a)(1).

detect, treat, prevent, mitigate, or cure COVID-19 or any other infection or disease. Pet. App. 48a.

b. The court of appeals issued an unpublished, nonprecedential decision that unanimously affirmed the district court's judgment as it pertains to petitioner. Pet. App. 1a-13a.[3]

The court of appeals first held, based on the undisputed evidence, that petitioner had violated the FTC Act and MITOR. Pet. App. 3a-5a. The court explained that the defendants, including petitioner, had advertised that hand sanitizers were available for fast shipping even though the defendants "knew that they could not keep up with demand" and "had no reasonable basis to expect that they could meet the shipping times" advertised. *Id.* at 4a. The court further observed that, to the extent post-order events had prevented shipping on the timeframes promised, MITOR had "built into its structure an accommodation for unforeseen disruptions": The seller must offer the buyer the refund-or-consent option. *Ibid.* The court explained, however, that petitioner had "undisputably failed, in many cases, to offer customers an actual opportunity to cancel the order and receive a refund." *Id.* at 4a-5a.

The court of appeals also held that, under "the specific facts of this case," the district court had not abused its discretion in awarding monetary relief, including by allowing customers to receive a refund without first returning the product. Pet. App. 8a. The court of appeals explained that, at the time of the district court's remedial ruling, much of the hand sanitizer at issue was already expired or about to expire, and the product was therefore of no value. *Ibid.* Under those "unique

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[3] One member of the panel, Judge Rawlinson, concurred in the result without offering separate reasoning. Pet. App. 13a.

circumstances," the court observed, the return of such products would have been "pointless" and was not required by the Act. *Ibid.*

Finally, the court of appeals held that the district court had not abused its discretion by issuing a permanent injunction against petitioner, Nguyen, and the other corporate defendants, based on the district court's finding that there was a "sufficient likelihood of future violations to warrant" injunctive relief. Pet. App. 9a. As to Tammabattula, however, the court of appeals vacated the injunction. *Id.* at 11a-13a. The court found no evidence that Tammabattula had been personally involved in Nguyen's prior misconduct or the representations regarding Basic Immune IGG. *Ibid.* The court of appeals concluded that "Tammabattula's first-time violation did not reasonably support including him, personally, in the sweeping *permanent* ban imposed by the district court." *Id.* at 12a; see *ibid.* (leaving it to the district court's discretion to determine on remand "whether, and to what extent, a more suitably tailored injunction should be imposed with respect to Tammabattula").

While petitioner argued that the duration of the violation and changes to petitioner's business model weighed against entry of injunctive relief, the court of appeals accepted the district court's contrary finding that the defendants had exhibited a "potential willingness and [had a] continued opportunity to engage in violations of the FTC Act." Pet. App. 10a. Except with respect to Tammabattula, the court of appeals also rejected petitioner's argument that the injunction was overbroad. The court held that the district court could properly base the injunction against all of the other defendants on Nguyen's history of serious misconduct and her misrepresentations during the pandemic. *Id.* at 11a. The

court of appeals observed that Nguyen had acted through the corporate defendants, and the parties had agreed that the corporate defendants, including petitioner, had "operated as a common enterprise" such that each one was "liable for the acts and practices alleged." *Id.* at 11a n.1.

4. The court of appeals denied a petition for rehearing and rehearing en banc with no noted dissent or request for a vote. Pet. App. 74a-75a.

ARGUMENT

Petitioner contends (Pet. 20-21) that the court of appeals erred in holding that petitioner had violated the FTC Act and MITOR through its advertisement and sale of hand sanitizer during the COVID-19 pandemic. Petitioner further contends (Pet. 12-20) that the district court abused its discretion in awarding monetary relief and entering a permanent injunction to remedy those violations. Those contentions lack merit. The court of appeals correctly affirmed the district court's judgment with respect to petitioner, and its factbound and nonprecedential decision does not conflict with any decision of this Court or another court of appeals.

Petitioner principally requests (Pet. i-ii, 7-12, 22) that this Court grant the petition, vacate the judgment below, and remand the case (GVR) in light of *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024), which overruled this Court's earlier decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But *Loper Bright* does not cast doubt on the correctness of the disposition below. Neither the court of appeals nor the district court relied on, or even cited, *Chevron*. For similar reasons, there is no basis to grant plenary review, as petitioner alternatively requests (Pet. 22), to provide guidance to lower

courts on the proper application of *Loper Bright*. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that petitioner had violated the FTC Act and MITOR.

MITOR prohibits a seller from soliciting orders for the sale of merchandise without "a reasonable basis to expect that [the seller] will be able to ship any ordered merchandise to the buyer" within the time promised. 16 C.F.R. 435.2(a)(1). The court of appeals correctly held that petitioner had violated that rule. Undisputed evidence reflected that petitioner had advertised that its hand sanitizers were in stock and would ship quickly, even though petitioner lacked "a reasonable basis to expect that [it] would be able to satisfy [its] advertised shipping-time claims." Pet. App. 3a. For similar reasons, the court correctly held that petitioner had made deceptive shipping claims in violation of Section 5 of the FTC Act. *Id.* at 4a.

Petitioner contends (Pet. 20-21) that the court of appeals misapplied the law to the "specific facts of this case" by failing to consider the impact of the COVID-19 pandemic on its ability to obtain and ship goods. Pet. App. 8a (emphasis omitted). The court explained, however, that petitioner was well aware of the pandemic's effects on its inventory and supply chain "at the time" that it ran advertisements promising that its products were in stock and would ship quickly—estimates that petitioner "had no reasonable basis to believe would be met." *Id.* at 4a. In addition, to the extent any "post-order events make it impossible to fulfill an order within the time stated," MITOR requires the seller to offer buyers the option either to consent to a delay in shipping or to cancel the order and receive a prompt refund. *Ibid.*; 16 C.F.R. 435.2(b)(1). Petitioner did not satisfy

that requirement because it did not "offer customers an actual opportunity to cancel the order and receive a refund." Pet. App. 4a-5a.

Petitioner does not assert that this factbound holding conflicts with any decision of this Court or of another court of appeals. Petitioner's contention (Pet. 21) that the court of appeals did not properly account for the "unique circumstances" of this case ignores the court's conclusions that petitioner (a) had no reasonable basis for expecting that it could fill customer orders within the promised timeframes and (b) failed to offer the refund-or-consent option that MITOR provides as a backstop when unforeseeable delays arise. See Pet. App. 3a-5a. Petitioner's challenge does not warrant this Court's review.

2. The court of appeals' affirmance of the district court's remedial order against petitioner was also correct.

a. Petitioner contends (Pet. 17-20) that, in awarding monetary relief under Section 19(b) of the FTC Act, the district court abused its discretion by allowing consumers to request refunds for the hand sanitizer without returning the products. That contention lacks merit. As the court of appeals explained, the listed expiration for the hand sanitizer was two years, and at the time of the district court's order (on April 22, 2022), much of the product at issue (sold from March to May 2020) had expired, and all of it would have expired by the end of the 120-day period for requesting refunds. Pet. App. 8a. Under those "unique circumstances," the district court did not abuse its discretion by declining to require that customers "return expired or about-to-expire products," a step that "could reasonably be viewed as pointless and of no value." *Ibid.*

b. Petitioner further contends (Pet. 12-17) that the district court abused its discretion by permanently enjoining petitioner from selling protective goods and services. Petitioner views the injunction here as inconsistent with the principle that past misconduct alone is an insufficient basis for awarding injunctive relief. See Pet. 14-15. The court of appeals recognized, however, that "injunctive relief [under the statute] is available 'only if the wrongs are ongoing or likely to recur.'" Pet. App. 9a (quoting *FTC* v. *Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985)). The court simply found that the district court had not abused its discretion in determining that this requirement was satisfied here. See *ibid.* In so holding, the court of appeals acknowledged that the defendants had changed their business model to avoid direct retail sales. See *id.* at 10a. It nevertheless held that the district court could properly credit countervailing indications that defendants were still willing and able to engage in violations of the FTC Act. See *ibid.*

Petitioner acknowledges (Pet. 15-16) that the court of appeals correctly articulated the legal standard that governs issuance of a permanent injunction. Petitioner suggests (*ibid.*), however, that the court misapplied that standard by declining to vacate the injunction against it, even as it vacated a permanent injunction against one of its owners, Tammabattula. That argument lacks merit.

The court of appeals correctly explained that the injunction against the corporate defendants, including petitioner, was based on the undisputed actions of another owner, Nguyen, including her past suspension for serious misconduct and her misrepresentations during the pandemic. Pet. App. 10a-11a. Because the parties agreed

that the corporate defendants were liable for Nguyen's actions, "any injunctive relief that is appropriate to Nguyen would properly also extend" to petitioner. *Id.* at 11a n.1. The court found, however, that "in contrast to the corporate Defendants, there was no agreement below that Nguyen and Tammabattula were fully liable for each other's conduct, such that any injunction against Nguyen could automatically be extended, in every respect, to Tammabattula." *Id.* at 12a. The court thus adequately explained its decision to treat Tammabattula differently from the other defendants.

c. The decision below does not conflict with any decision of another court of appeals. As petitioner acknowledges (Pet. 14), the Eighth Circuit has upheld the imposition of similar remedies against persons who violated the FTC Act and MITOR by making false shipping promises in the early days of the COVID-19 pandemic. See *FTC* v. *American Screening, LLC*, 105 F.4th 1098, 1102-1107 (2024). Petitioner cites (Pet. 14-15) the separate opinion of Judge Stras in *American Screening*, who would have required the district court in that case to make additional findings to support the relief it imposed, including as to whether customers had received a "windfall" because they could "keep the personal protective equipment they received *and* get a full refund." *American Screening*, 105 F.4th at 1108 (Stras, J., concurring in part and dissenting in part); see *id.* at 1107-1110. But as explained, that concern is inapplicable here because most of the products at issue were expired and therefore "of no value." Pet. App. 8a. In any event, the Eighth Circuit majority in that case did not adopt Judge Stras's position. See *American Screening*, 105 F.4th at 1102-1107.

Petitioner also relies (Pet. 20) on other authority within the Ninth Circuit, including that court's previous decision in *FTC* v. *Figgie Int'l, Inc.*, 994 F.2d 595, 606 (1993) (per curiam), cert. denied, 510 U.S. 1110 (1994). The Ninth Circuit panel in this case, however, expressly relied on *Figgie* in reaching its decision. See Pet. App. 6a. In any event, this Court does not ordinarily grant review to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Petitioner's reliance (Pet. 7-8) on purportedly conflicting district-court authority within the Ninth Circuit likewise provides no basis for review. Sup. Ct. R. 10(a); cf. *Camreta* v. *Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") (citation omitted).

3. a. Rather than emphasizing its request for plenary review, petitioner principally asks (Pet. i-ii, 7-12, 22) this Court to GVR in light of *Loper Bright*. In general, a GVR is "potentially appropriate" only if "intervening developments * * * reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). This case does not satisfy that standard.

In *Loper Bright*, this Court concluded that the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, 701 *et seq.*, requires federal courts to exercise "independent judgment in deciding whether an agency has acted within its statutory authority." 603 U.S. at 412. The Court overruled its earlier decision in *Chevron*, in which it had held that a court owes deference to an agency's

reasonable interpretation of an ambiguous statute that the agency administers. See *id.* at 412-413.

Loper Bright has no bearing on the decision below. As petitioner acknowledges (Pet. 9), the courts below neither cited nor relied on *Chevron*. That is because this case does not involve a disputed question of statutory interpretation, let alone a request for judicial deference to the agency's interpretation of an ambiguous statutory provision. The FTC accordingly did not invoke *Chevron* in litigating the case below, and petitioner did not raise any argument related to *Chevron*, even in its petition for rehearing filed on May 24, 2024—months after *Loper Bright* had been fully briefed and argued. See C.A. Petition for Reh'g 12-17.

Petitioner nevertheless contends (Pet. 9-10) that *Chevron*'s influence "permeates the entire record of the case," suggesting that the courts below "accepted the FTC's arguments and interpretations without the same scrutiny given to the defendants' assertions." That characterization of the proceedings below is incorrect. Consistent with the ordinary standard at summary judgment, the district court reviewed legal arguments de novo and construed the factual record in favor of the non-moving party, drawing "all reasonable inferences in the light most favorable to" petitioner, Pet. App. 23a; see Fed. R. Civ. P. 56, and declining to adopt the FTC's factual assertions where they were not "supported by the record," Pet. App. 18a.

Contrary to petitioner's suggestion (Pet. 9-12), the fact that the courts below ultimately accepted the FTC's arguments for liability does not mean that those courts applied *Chevron* (or any other form of) deference. Rather, the courts below simply applied the law to the particular facts of this case and concluded that

the undisputed record evidence supported the FTC's position. Pet. App. 6a-11a, 30a-38a. The court of appeals likewise did not afford *Chevron* deference by "defer[ring] to the district court's decision" as to the propriety of injunctive relief (Pet. 11), but rather applied the familiar abuse-of-discretion standard on appellate review. Pet. App. 9a; see, *e.g.*, *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) ("The decision to grant or deny [an injunction] is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion.").

Petitioner also contends (Pet. ii, 2, 7, 11) that a GVR is warranted because the court of appeals deferred to the FTC's interpretation of MITOR, a regulation. That contention is doubly mistaken. As an initial matter, neither the court of appeals nor the district court purported to afford any deference to the FTC's interpretation of MITOR; both courts applied the plain language of the rule to the facts of this case. Pet. App. 3a-5a, 24a-26a.[4] In any event, judicial deference to an agency's

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[4] Petitioner cites (Pet. 10) a statement in the FTC's summary-judgment brief, which argued that the defendants' failure to maintain records as to which customers had received notice of delayed shipments triggered a presumption that the defendants had not complied with MITOR. That argument did not constitute a request for judicial deference; the presumption that the FTC invoked is unambiguously set forth in the rule. See 16 C.F.R. 435.2(d) ("[T]he failure of a respondent-seller to have records or other documentary proof establishing its use of systems and procedures which assure compliance, in the ordinary course of business, with any requirement of paragraph (b) or (c) of this section will create a rebuttable presumption that the seller failed to comply with said requirement."). In any event, the district court did not rely on this presumption in holding that petitioner had violated MITOR. Cf. Pet. App. 24a-26a.

interpretation of its own regulations is governed not by *Chevron* but by a separate line of authority, which *Loper Bright* did not disturb. See *Kisor* v. *Wilkie*, 588 U.S. 558, 574-580 (2019) (reaffirming judicial deference to agency interpretation of a regulation that is "genuinely ambiguous"); cf. *id.* at 591 (Roberts, C.J., concurring in part) ("Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress."). In these circumstances, "this Court has no appropriate legal basis to vacate the [court of appeals'] judgment." *Grzegorczyk* v. *United States*, 142 S. Ct. 2580, 2580 (2022) (statement of Kavanaugh, J., respecting the denial of certiorari).

b. For similar reasons, plenary review is not warranted, as petitioner "alternative[ly]" requests (Pet. 22), to give lower courts additional guidance as to the proper application of *Loper Bright*. That decision, as explained, involved deference to agency interpretations of statutory text. No such interpretation is at issue here. See pp. 14-15, *supra*. At bottom, petitioner contests the way in which the court of appeals applied settled law to the "unique" and "specific facts of this case." Pet. 21 (quoting Pet. App. 8a) (emphasis omitted). This Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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