

No. _____

IN THE
Supreme Court of the United States

MELODY BYNUM,

Petitioner,

v.

MAPLEBEAR INC., DBA INTSACART,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The district court ordered Plaintiff to arbitrate her FLSA claims. Because of her belief that her FLSA claims are nonarbitrable – an issue of first impression, as well as the risks and costs of arbitration - financial and otherwise, Plaintiff opposed the order and declined arbitration. The district court dismissed Plaintiff's case as a result. The Second Circuit dismissed the appeal for lack of jurisdiction. First, the Second Circuit reasoned and held, based on Circuit precedent, that the Federal Arbitration Act ("FAA"), required a stay of the case, and that the district court lacked authority under the FAA to dismiss the case. Second, it also reasoned that Plaintiff "voluntarily" dismissed her claims, and as such, it lacked jurisdiction under 28 U.S.C. § 1291. A few weeks later, the "#MeToo" movement began sweeping the nation with an unprecedented public focus on the role of arbitration in silencing victims of workplace abuses – denial of appellate review is a significant and unnecessary form of silencing.

1. Whether the Federal Arbitration Act ("FAA"), requires a district court to issue a stay after compelling arbitration of all claims, as the Second, Third, Seventh and Tenth Circuits have held, or whether the district court can dismiss the case, as the First, Fifth, and Ninth Circuits have held?
2. Whether the Second Circuit lacked appellate jurisdiction under 28 U.S.C. § 1291, in light of FRCP 41, and this Court's decision in *U.S. v. Procter & Gamble Co.*, 356 U.S. 677 (1958), recently reaffirmed in June 2017, which address involuntary dismissals?

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I. OPINIONS BELOW

The order of the Court of Appeals is unreported but can be found at *Bynum v. Maplebear Inc.*, 698 F. App'x 23 (2d Cir. 2017), and is reproduced in the appendix ("App.") at App. 3-6. The Second Circuit's unpublished order denying rehearing is reproduced at App. 44-45. The district court's decision dismissing the action can be found at *Bynum v. Maplebear Inc.*, 209 F. Supp. 3d 528 (E.D.N.Y. 2016), and is reproduced at App. 7-41.

II. JURISDICTION

The Court of Appeals rendered its decision on October 5, 2017 (App. 3-6) and denied the October 19, 2017 petition for rehearing on October 30, 2017. (App. 44). This Court has jurisdiction under 28 U.S.C. § 1254(1). On February 9, 2018, this Court extended the time for Plaintiff to file a petition for writ or certiorari to March 29, 2018. (App. 1-2).

III. STATUTES AND RULES INVOLVED

1. 9 U.S.C. § 3

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for

the stay is not in default in proceeding with such arbitration.

2. 9 U.S.C. § 16

(a) An appeal may be taken from—

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

3. 28 U.S.C. § 1291

The 28 U.S.C. § 1291 provision reads in relevant part as follows:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States...

4. The FRCP Rule 41

Rule 41 of the Federal Rules of Civil Procedures (“FRCP”) defines and distinguishes between voluntary and involuntary dismissals and states in relevant part as follows:

(a) Voluntary Dismissal.

(1) By the Plaintiff.

(A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice.

(2) By Court Order; Effect. Except as provided in Rule 41(a) (1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper... Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal

under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

IV. STATEMENT OF CASE

1. (First) District Court Proceeding

Petitioner Melody Bynum (“Petitioner” or “Plaintiff”), commenced the instant action on October 30, 2015 to recover overtime wages, under the Fair Labor Standards Act (“FLSA”) and New York Labor Law (“NYLL”). Prior to filing an answer, Defendant Maplebear Inc. (“Respondent” or “Defendant”), moved to compel arbitration. In opposition, Plaintiff argued that FLSA claims are nonarbitrable based on this Court’s decision in *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981), which the Second Circuit itself interpreted as “finding Congressional intent that FLSA claims are non-arbitrable because of the inherent conflict between arbitration and the FLSA’s purposes.” See *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 850 (2d Cir. 1987)¹. The conflict is easy to detect – the financial and non-financial costs of arbitration can result in the loss or waiver of FLSA claims, but unlike other

¹ On December 12, 2017, the Second Circuit in *Rodriguez-Depena v. Parts Auth., Inc.*, 877 F.3d 122 (2d Cir. 2017), tried to distinguish its description of *Barrentine* in *Genesco*, and held that FLSA claims are arbitrable – though without squarely addressing the argument at the center of *Barrentine*, that FLSA claims cannot be waived but arbitration may result in loss or waiver of such claims. Plaintiff in *Rodriguez* intends to seek review in the U.S. Supreme Court.

statutory claims, FLSA claims cannot be waived in light of this Court's decisions in *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 66 (1946), *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), and *Barrentine*. For example, the arbitrator is bound to carry out the intent of the parties and if the parties agree to pay overtime only after 60 hours a week, the arbitrator is bound or is free to honor that agreement even though the FLSA does not permit such a waiver and requires overtime after 40 hours a week. Relatedly, high arbitration costs can prevent or deter an employee from pursuing FLSA claims in arbitration, therefore resulting in waiver. Such waiver may not be a problem in anti-trust, age discrimination, and other statutory claims, but it would be with regard to FLSA claims, which cannot be waived by agreement or conduct under this Court's precedents. *Barrentine*, *Brooklyn Savings*, and *Gangi*.

Nonetheless, the district court compelled arbitration and stayed the case. *Bynum v. Maplebear Inc.*, 160 F. Supp. 3d 527 (E.D.N.Y. – February 12, 2016). Because of the financial and non-financial costs and risks of arbitration that still remained, and Plaintiff's belief that her FLSA claims are nonarbitrable – an issue of first impression, Plaintiff declined arbitration and appealed.

2. (First) Court of Appeals Proceeding

Citing its precedent in *Katz v. Celco Partnership*, 794 F.3d 341, 344 (2d Cir. 2015), the Second Circuit on July 13, 2016, dismissed the appeal for lack of jurisdiction and remanded with the following instructions (App. 43):

The district court should determine, in the first instance, whether the

appellant's waiver of the right to arbitrate entitles the Appellant to termination of the existing stay and dismissal of the action, and/or whether certification under 28 U.S.C. § 1292(b) is appropriate.

3. (Second) District Court Proceeding

Following remand, the district court took briefing on the issues set forth by the Second Circuit. The district court held a hearing on September 8, 2016, at which Defendant argued that the district court lacked the authority under the FAA to dismiss the case, in the following exchange (App. 46):

THE COURT (Judge Weinstein): Well, if I dismiss it, then it is final.

MR. BERKOWITZ: I think -- well, I guess my comment on that would be under the Katz decision, Your Honor, I don't believe -- I don't believe the Court has the discretion to dismiss the case under Katz.

THE COURT (Judge Weinstein): Maybe that's what we ought to have the Court of Appeals tell us. It seems to me a waste of arbitral resources, court resources, and the plaintiff's resources, to allow the arbitrator to do what the arbitrator has to do, dismiss.

Also, at the September 8, 2016 hearing, Plaintiff confirmed in person, that she wanted to pursue her claims in Court and would decline to arbitrate the case as the district court had ordered – the district court then dismissed as recounted in its

ruling (App. 17):

The court repeatedly inquired about plaintiff's intention to forego arbitration, as well as her understanding that the **refusal to arbitrate would lead to a dismissal** on the merits and a probable loss of her claims:

THE COURT: Madam, is that what you want to do, you want to waive your right to arbitration?

PLAINTIFF BYNUM: That is correct, yes.

THE COURT: On the advice of counsel?

PLAINTIFF BYNUM: That is correct.

THE COURT: Do you know that that will lead to dismissal of your case on the merits, which means you can't bring the case again; do you understand that?

PLAINTIFF BYNUM: I do, yes. It was explained.

THE COURT: And you advised her of that?

MR. HASSAN: Yes, Your Honor. We went through this in great detail.

THE COURT: So when you say you're waiving arbitration, I take it you mean you refuse to go to

arbitration; is that right?
PLAINTIFF BYNUM: That is
correct, yes.

In other words, the dismissal was not voluntary because it resulted from a refusal (for good reason), to arbitrate as directed by the district court. This is not a situation where the Plaintiff settled her case and then sought dismissal as a result. In fact, the district court dismissed Plaintiff's case precisely because she wanted to continue her case – in court as opposed to arbitration.

4. (Second) Court of Appeals Proceeding

In dismissing the appeal for lack of jurisdiction, the Second Circuit on October 5, 2016, stated in relevant part as follows (App. 5):

The Federal Arbitration Act bars interlocutory appeals from the grant of a motion to compel arbitration. 9 U.S.C. § 16(b)(1)-(2) (“[A]n appeal may not be taken from an interlocutory order ... granting a stay of any action under § 3 ... [or] directing arbitration to proceed under § 4.”). Plaintiffs cannot circumvent that prohibition by agreeing to dismiss their claims rather than proceed to arbitration. See *Katz v. Cellco P'ship*, 794 F.3d 341, 346 (2d Cir. 2015) (noting that dismissing a complaint after granting a motion to compel, rather than staying the action, “effectively converts an otherwise-unappealable interlocutory stay order into an appealable final dismissal order. Affording judges such discretion would

empower them to confer appellate rights expressly proscribed by Congress.”).

In so holding, the Second Circuit’s ruling based on its precedent in *Katz*, puts the Second Circuit in conflict with at least three other Circuits as it recognized in *Katz v. Celco P’ship*, 794 F.3d 341, 345 (2d Cir. 2015), when it stated in relevant part as follows:

The Courts of Appeals are about evenly divided. Several Circuits have held or implied that a stay must be entered.

If this Court finds that a district court has authority/discretion to dismiss under the FAA, it would eliminate the primary basis for the Second Circuit’s dismissal of the appeal for lack of subject matter jurisdiction.

The Second Circuit also dismissed for lack of jurisdiction under 28 U.S.C. § 1291 when it stated in relevant part as follows:

We lack jurisdiction over this appeal. See *Empire Volkswagen Inc. v. World-Wide Volkswagen Corp.*, 814 F.2d 90, 94 (2d Cir. 1987) (holding that “an appeal from a judgment entered upon a voluntary dismissal with prejudice does not bring up for review any matters that were voluntarily dismissed”).

The Second Circuit’s conclusion that the dismissal was voluntary is in conflict with *Procter & Gamble* in which this Court rejected a similar and even more compelling argument that appellate jurisdiction was lacking in that case because the dismissal was voluntary. Both this case and *Procter*

& *Gamble*, involve decisions by aggrieved parties to decline certain actions ordered by the court. Notably, this Court in *Microsoft Corp. v. Baker*, 137 S. Ct. at 1715, fn 11, recently reaffirmed its decision in *Procter & Gamble*.

On October 30, 2017, the Second Circuit denied a petition for rehearing. (App. 44-45).

On February 9, 2018, this Court extended Plaintiff's time to file a petition for certiorari to March 29, 2018. (App. 1-2). This constitutes the Petition for Writ of Certiorari of Ms. Melody Bynum.

The national importance of the arbitration issue can hardly be overstated. In this regard, arbitration agreements are now common place across the nation and almost every district judge is confronted on a regular basis with motions to compel arbitration – and the issue of whether to stay or dismiss. This Court has also repeatedly granted certiorari in arbitration cases in the last decade or two, and three arbitration cases are currently pending before this Court. *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), cert. granted, No. 16-300, 2017 WL 125665 (Jan. 13, 2017), *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015), cert. granted, No. 16- 307, 2017 WL 125666 (Jan. 13, 2017) and *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), cert. granted, No. 16-285, 2017 WL 125664 (Jan. 13, 2017). In deciding these pending cases, the Court should be alerted not to decide the issue of the arbitrability of FLSA claims by accident or without full briefing – the parties in those cases may have assumed or did not care whether FLSA claims were arbitrable and instead, were only interested in the class action aspect of the issue.

Moreover, the #MeToo movement sweeping the nation has highlighted the arbitration issue like never before, and specifically, the use of arbitration agreements to silence victims of workplace abuses and deny them an adequate chance to be heard – in this case, the chance to be heard on appeal in the arbitration context – the abuser can appeal but the victim cannot. This Court should grant this petition and decide the issues of national importance presented herein.

V. REASONS FOR GRANTING PETITION

There are two main reasons why this petition should be granted. First, the precedent in *Katz*, which the Second Circuit relied upon to dismiss the appeal, is in conflict with precedents of other Circuits which allow for dismissal. U.S. Sup. Ct. R. 10(a). Second, the Second Circuit has decided an important question of federal law that conflicts with this Court’s decision in *Procter & Gamble* as recently reaffirmed in *Microsoft*. U.S. Sup. Ct. R. 10(c).

1. Petition Presents An Important Question Of Federal Law As To Which The Courts Of Appeals Are In Conflict – Circuits Are Split As To Whether To Stay Or Dismiss Under The FAA

In dismissing the appeal for lack of jurisdiction, the Second Circuit stated in relevant part as follows (App. 5):

The Federal Arbitration Act bars interlocutory appeals from the grant of a motion to compel arbitration. 9 U.S.C. § 16(b)(1)-(2) (“[A]n appeal may not be taken from an interlocutory order ... granting a stay of any action under § 3

... [or] directing arbitration to proceed under § 4.”). Plaintiffs cannot circumvent that prohibition by agreeing to dismiss their claims rather than proceed to arbitration. See *Katz v. Cellco P'ship*, 794 F.3d 341, 346 (2d Cir. 2015) (noting that dismissing a complaint after granting a motion to compel, rather than staying the action, “effectively converts an otherwise-unappealable interlocutory stay order into an appealable final dismissal order. Affording judges such discretion would empower them to confer appellate rights expressly proscribed by Congress.”).

In so holding, the Second Circuit’s ruling based on its precedent in *Katz*, puts the Second Circuit in conflict with at least three other Circuits. In fact, the Second Circuit in *Katz v. Cellco P'ship*, 794 F.3d 341, 345 (2d Cir. 2015), recognized the circuit split when it stated in relevant part as follows:

The Courts of Appeals are about evenly divided. Several Circuits have held or implied that a stay must be entered, *see, e.g., Cont'l Cas. Co. v. Am. Nat'l Ins.*, 417 F.3d 727, 732 n. 7 (7th Cir. 2005); *Lloyd v. HOVENSA, LLC*, 369 F.3d 263, 269–71 (3d Cir. 2004); *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953, 955–56 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir. 1992) (*per curiam*); while others have suggested that district

courts enjoy the discretion to dismiss the action, *see, e.g., Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 156 & n. 21 (1st Cir. 1998); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992); *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 637–38 (9th Cir. 1988).

The district judge – the legendary Jack B. Weinstein, also highlighted the need for guidance on this issue from the higher courts when he stated in relevant part as follows (App. 46):

THE COURT (Judge Weinstein): I understand.

I am going to dismiss. Either one of you can take it up on appeal, and we will get a ruling on whether you can do this and what the district court should do under these circumstances. My view is that the easiest and best thing to do is to cut the knot, dismiss on the merits, and end the dispute, without involving a major arbitral association, JAMS or AAA or any others, without involving courts in a further litigation after the arbitration, whatever it may be, with or without the plaintiff.

If this Court finds that a district court has authority/discretion to dismiss under the FAA, it would eliminate the primary basis for the Second Circuit’s dismissal of the appeal for lack of subject matter jurisdiction.

The circuit split highlights the great importance of this particular issue – whether the FAA requires a stay or if the district court can dismiss. The importance is even greater given the increasing use of arbitration agreements in all segments of society and the prevalence of motions to compel arbitration in the federal courts.

2. Petition Presents An Important Question Of Federal Law – Whether Jurisdiction Exists Under 28 USC § 1291, That Conflicts With This Court’s Decision in *Procter & Gamble*, Recently Reaffirmed

The Second Circuit’s decision and the Second Circuit law upon which it is based, are in conflict with the Supreme Court’s decision in *Procter & Gamble* which was recently reaffirmed by in *Microsoft Corp. v. Baker*, 137 S. Ct. at 1715, fn 11.

In dismissing the appeal for lack of jurisdiction, the Second Circuit also stated in relevant part as follows (App. 5):

We lack jurisdiction over this appeal. See *Empire Volkswagen Inc. v. World-Wide Volkswagen Corp.*, 814 F.2d 90, 94 (2d Cir. 1987) (holding that “an appeal from a judgment entered upon a voluntary dismissal with prejudice does not bring up for review any matters that were voluntarily dismissed”).

The dismissal was not voluntary – because it resulted from opposition to the district court’s arbitration order, as further confirmed by the following exchange which the district court itself excerpted in its order (App 17):

The court repeatedly inquired about plaintiff's intention to forego arbitration, as well as her understanding that the **refusal to arbitrate would lead to a dismissal on the merits** and a probable loss of her claims:

THE COURT: Madam, is that what you want to do, you want to waive your right to arbitration?

PLAINTIFF BYNUM: That is correct, yes.

THE COURT: On the advice of counsel?

PLAINTIFF BYNUM: That is correct.

THE COURT: Do you know that that will lead to dismissal of your case on the merits, which means you can't bring the case again; do you understand that?

PLAINTIFF BYNUM: I do, yes. It was explained.

THE COURT: And you advised her of that?

MR. HASSAN: Yes, Your Honor. We went through this in great detail.

THE COURT: So when you say you're waiving arbitration, I take it you mean you refuse to go to arbitration; is that right?

PLAINTIFF BYNUM: That is correct, yes.

This is not a situation where the Plaintiff settled her case or lost interest, and was seeking to dismiss the case as a result. This is also not a case where the Plaintiff did not want to pursue her case in court – her case was dismissed precisely because she wanted to pursue her case in court and did not want to go to arbitration. Once again, the fact that refusal to arbitrate and opposition to the district court's order compelling arbitration may lead to dismissal, does not mean the Plaintiff was seeking to dismiss her case – she was simply trying to avoid the costs/risks of arbitration, and to protect her right to proceed in court. The Supreme Court has recognized this distinction in the context of appellate jurisdiction, when it stated in *United States v. Procter & Gamble Co.*, 356 U.S. 677, 679-80 (1958), in relevant part as follows:

The District Court entered orders directing the Government to produce the transcript in 30 days and to permit appellees to inspect and copy it. The Government, adamant in its refusal to obey, filed a motion in the District Court requesting that those orders be amended to provide that, if production were not made, the court would dismiss the complaint. Alternatively, the Government moved the District Court to stay the order pending the filing of an appeal and an application for extraordinary writ. Appellees did not oppose the motion; and the District

Court entered an amended order providing that, unless the Government released the transcript by August 24, 1956, 'the Court will enter an order dismissing the complaint.'³ As the Government persisted in its refusal, the District Court entered judgment of dismissal. The case is here by way of appeal, 32 Stat. 823, as amended, 62 Stat. 869, 989, 15 U.S.C. s 29, 15 U.S.C.A. s 29. We postponed the question of jurisdiction to argument on the merits. 352 U.S. 997, 77 S. Ct. 556.

The Supreme Court in *Procter & Gamble*, 356 U.S. at 680–81, then reasoned as follows in concluding that the dismissal in that case was not voluntary, and that it had appellate jurisdiction:

Appellees urge that this appeal may not be maintained because dismissal of the complaint was solicited by the Government. They invoke the familiar rule that a plaintiff who has voluntarily dismissed his complaint may not sue out a writ of error. See *Evans v. Phillips*, 4 Wheat. 73, 4 L.Ed. 516; *United States v. Babbitt*, 104 U.S. 767, 26 L.Ed. 921. The rule has no application here. The Government at all times opposed the production orders. It might of course have tested their validity in other ways, for example, by the route of civil contempt. Yet it is understandable why a more conventional way of getting review of

the adverse ruling might be sought and any unseemly conflict with the District Court avoided. When the Government proposed dismissal for failure to obey, it had lost on the merits and was only seeking an expeditious review. This case is therefore like *Thomsen v. Cayser*, 243 U.S. 66, 37 S.Ct. 353, 61 L.Ed. 597, where the losing party got the lower court to dismiss the complaint rather than remand for a new trial, so that it could get review in this Court.

As in *Procter & Gamble*, “[Ms. Bynum] at all times opposed the [arbitration] orders,” so the dismissal here could not have been voluntary within the meaning of the law and in the context of appellate jurisdiction. Once again, the fact that opposing the arbitration orders may or will “lead” to dismissal or have the “effect” of dismissal, does not mean the Plaintiff was seeking dismissal – the Plaintiff would have been perfectly happy to continue her case in Court as she sought to do all along, and made clear.

Notably, the Government in *Procter & Gamble* had no greater right to appeal than Plaintiff in this case. In fact, one can reasonably argue that a low wage worker like Plaintiff has a greater need for the protections of the appellate courts than the powerful federal government. This is especially true when dealing with a remedial statute like the FLSA in which the public has a strong interest, and the protections of which cannot be waived by private agreement.

We rely on *Procter & Gamble*, not only because its relevant facts are very similar to those in this case, and because a similar jurisdiction ruling is warranted here, but also because the Supreme Court in *Microsoft*, 137 S. Ct. at 1715, fn 11, distinguished, reaffirmed and did not overrule *Procter & Gamble* when it stated in relevant part as follows:

Respondents also invoke our decision in *United States v. Procter & Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958), but that case—a civil antitrust enforcement action—involved neither class-action certification nor the sort of dismissal tactic at issue here. See *id.*, at 681, 78 S.Ct. 983 (the Government “did not consent to a judgment against [it]” (internal quotation marks omitted)).

As in *Procter & Gamble*, this case involves “neither class action certification nor the sort of dismissal tactic at issue [in *Microsoft*],” where the parties stipulated to dismissal. Simply put, if as the Supreme Court in *Microsoft* found, “the Government “did not consent to a judgment against [it]” in *Procter & Gamble*, Plaintiff here also did not consent to a judgment against her in this case given the facts in both cases. The facts here are even more compelling in favor of finding that the dismissal was not voluntary - the plaintiff in *United States v. Procter & Gamble Co.*, 356 U.S. at 679, “adamant in its refusal to obey, filed a motion in the District Court requesting that those orders be amended to provide that, if production were not made, the court would dismiss the complaint.” Here, we clearly

stated to the district court, “Your Honor, let us proceed in court. We don't want any appeals. We would like to proceed in court.” (2d Cir. Case No. 16-3348, ECF No. 25, pg. 161:1-3 of 223).

A few additional points about *Microsoft* are in order. First, as further explained below, the stipulated dismissal in *Microsoft* qualifies as a voluntary dismissal under FRCP 41(a), whereas the dismissal in this action resulting from opposition to the Court’s arbitration order, qualifies as an involuntary dismissal under FRCP 41(b). Because no answer or motion for summary judgement was filed, Plaintiff did not need a court order for dismissal – and hence, did not seek voluntary dismissal by court order. Second, the holding in *Microsoft* was a narrow exception to the finality rule that does not apply to the facts in this case – stipulated dismissals in class actions which implicate FRCP 23(f) – see *Microsoft*, 137 S. Ct. at 1715, fn 11.

As Justices Roberts, Thomas and Alito pointed out in *Microsoft*, under the Supreme Court’s precedents, there was a final order for purposes of appellate jurisdiction because there was nothing left to do in the district court. However, the majority in *Microsoft* created a narrow exception to the finality rule based on policy considerations which actually weigh in favor of jurisdiction in this case. For example, one of the major policy considerations upon which *Microsoft* is based is fairness – that the approach was “one-sided” (*Microsoft*, 137 S. Ct. at 1708) – that the plaintiff in the case could dismiss and appeal but the defendants could not. Such a concern is not present here because the FAA allows an appeal from an order denying a motion to compel.

See 9 U.S.C. § 16(b). As such, the fairness argument would weigh heavily in favor of allowing Plaintiff to appeal the order in this case compelling arbitration.

In distinguishing *Procter & Gamble* from *Microsoft*, the Supreme Court noted that the type of dismissal in *Microsoft* was materially different from the type of dismissal in *Procter & Gamble*. *Microsoft* involved a *stipulation* of dismissal which qualifies as a voluntary dismissal under FRCP 41(a). However, *Procter & Gamble* and this case involve dismissals resulting from opposition to court orders which qualifies as involuntary dismissals under FRCP 41(b). As such, the Supreme Court's decision in *Microsoft* is consistent with FRCP 41 but the Second Circuit's ruling is not.

3. The Great National Importance Of The Arbitration Issues Presented And The Need For Review Are Powerfully Highlighted By The #MeToo Movement Sweeping The Country

The use and abuse of arbitration agreements has increased with great frequency across the country in all sectors of the economy. In a delivery business for example, it is not uncommon for the delivery person as well as the customer to be subject to arbitration agreements. As a result, the impact on the judiciary – both state and federal, have been great. With increasing frequency, a federal judge is called upon to decide a motion to compel arbitration at the outset of cases, as this case demonstrates. Not surprisingly, therefore, the Supreme Court has recognized the great importance of arbitration issues and has granted certiorari and decided numerous arbitration cases/issues in just the last two decades

alone. In fact, the Supreme Court has three arbitration cases currently pending. See *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), cert. granted, No. 16-300, 2017 WL 125665 (Jan. 13, 2017), *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015), cert. granted, No. 16-307, 2017 WL 125666 (Jan. 13, 2017) and *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), cert. granted, No. 16-285, 2017 WL 125664 (Jan. 13, 2017).

The already great importance of arbitration issues like those presented herein, have been elevated to even greater importance by the #MeToo movements that began sweeping the nation in October 2017 – following the Second Circuit’s ruling in this case and the Supreme Court’s June 2017 ruling in *Microsoft*. After the #MeToo movement took off in October 2017, the public was outraged to learn that arbitration and related confidentiality agreements were used to perpetuate sexual harassment and other workplace abuses and to silence victims. As this case demonstrates, arbitration agreements and workplace abuses are not limited to sexual harassment – they extend to wage theft and other wage violations that deprive poor women like Plaintiff from affording the basic necessities of life such as food, clothing and shelter. Moreover, any arbitration ruling here, will apply across the board to all cases including those involving sexual harassment and discrimination.

The silence by arbitration and similar procedures that outraged the public takes two main forms. First, they force victims out of the courthouse and into the secret, expensive and inadequate arbitral forums – or deter victims from ever speaking

up and taking action. Second, rulings like the one under appeal, enforce the silence by kicking victims out of the appellate courts and depriving them of the opportunity for appellate review, even of erroneous orders compelling arbitration. This is so even where, as here, there is a final judgment dismissing the claims, the issues are ones of first impression, and where the only Supreme Court case on the issue (*Barrentine*), rejected arbitration. Fortunately, this Court's precedent in *Procter & Gamble* and the nationwide outrage, conflict with such a harsh and unjust outcome. The issue here is even more powerful, because the Plaintiff is not necessarily asking this Court to opine on the arbitration issue itself – she is only asking for the opportunity to be heard on the issue after a final dismissal of her case.

Building on the #MeToo movement, more than six-hundred current and former federal law clerks sent a petition on December 7, 2017, asking Chief Justice Roberts to reexamine procedures for handling employment complaints and disputes. In his year end report, Justice Roberts addressed the issue and stated in relevant part as follows²:

I have great confidence in the men and women who comprise our judiciary," Roberts wrote. "I am sure that the overwhelming number have no tolerance for harassment and share the view that victims must have clear and immediate recourse to effective remedies.

² <http://www.cnn.com/2017/12/31/politics/roberts-year-end-report-sexual-harassment-natural-disaster-response/index.html>

As a low wage woman working hard and fighting for her wages to raise her family, Plaintiff agrees with Chief Justice Roberts that “victims must have clear and immediate recourse to effective remedies.” However, prohibiting Plaintiff from appealing the arbitration ruling even after a final judgment, deprives her of “clear and immediate recourse to effective remedies.” The Second Circuit’s ruling that kicked the Plaintiff out of that court, should be rejected especially in light of *Procter & Gamble* and *Microsoft*. After what the #MeToo movement has taught us about workplace and arbitration abuses, and silencing of victims, how can we tell victims of harassment and other abuses that they cannot even appeal an erroneous arbitration ruling, even if they are willing to risk losing their claims by resisting the arbitration. The statutes and rules do not require such a harsh, and unnecessary result, and it is bad public policy to require otherwise as the public outrage has confirmed.

Congress has also taken unprecedented action as covered in the following excerpt from a Wall Street Journal article printed on December 11, 2017³:

Lawmakers are moving to change procedures for reporting sexual harassment on Capitol Hill and how settlements are funded, after Congress was shaken last week by more allegations of improper behavior and three resignations.

³ <https://www.wsj.com/articles/sexual-harassment-overhaul-on-capitol-hill-likely-put-off-until-next-year-1513032720>

Lawmakers are looking inward at their own policies in the wake of the “Me Too” movement, which has created a national outpouring of personal stories involving sexual harassment and assault in the workplace.

Also, similar unprecedented and rapid change has occurred in the private sector. For example, Microsoft corporation has announced that it will no longer enforce mandatory arbitration agreements in certain employment cases - “The move comes amid a growing outcry to eliminate forced arbitration agreements, which waive the right to sue or take part in class action lawsuits.”⁴ Also, USA TODAY noted that, “The role that forced arbitration plays in silencing women has become a hotly debated topic with the national #MeToo outcry over sexual harassment.”⁵

‘In his year-end report on the state of the judiciary, Roberts said recent events “have illuminated the depth of the problem of sexual harassment in the workplace” and made clear that the “judicial branch is not immune.”’⁶ Justice Roberts was pointing out that the courts are learning things that they did not know or did not fully grasp before. Such new discoveries and enhanced knowledge requires reexamination of current jurisprudence which is decades old and based on understandings,

⁴ <http://money.cnn.com/2017/12/19/technology/microsoft-ends-forced-arbitration/index.html>

⁵ <https://www.usatoday.com/story/money/2017/12/06/bipartisan-bill-would-eliminate-forced-arbitration-break-silence-sexual-harassment-cases/925226001/>

⁶ <https://www.cnn.com/2017/12/31/politics/roberts-year-end-report-sexual-harassment-natural-disaster-response/index.html>

assumptions, and the state of society from many years ago. The premise that an arbitral forum is adequate to protect statutory rights requires reexamination – this Court in *Barrentine* wisely and correctly held it did not.

A much easier question is the one presented here – whether employees in these cases should be denied the chance to appeal, especially in the circumstances presented here. This Court should tackle this important issue especially in light of the dramatic national discourse currently ongoing across the Country that directly implicates arbitration and access to the Courts, including the appellate courts.

VI. CONCLUSION

Based on the foregoing, this Honorable Court should grant this petition for writ of certiorari.

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 March 23, 2018

Respectfully submitted,

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