No. 21-3570

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LORRAINE ADELL,
individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Ohio, Eastern Division

BRIEF OF PLAINTIFF-APPELLANT LORRAINE ADELL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-3570 Case Name: Lorraine Adell v. Cellco Partnership

Name of counsel: William Robert Weinstein

Pursuant to 6th Cir. R. 26.1, Lorraine Adell
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

n/a

CERTIFICATE OF SERVICE

I certify that on August 23, 2021 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ William Robert Weinstein
Law Offices of Wm. R. Weinstein, 199 Main St. 4th Fl, White Plains NY 10601

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES:

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS & RULES:

LEGISLATIVE HISTORY & OTHER AUTHORITIES:

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff-Appellant Lorraine Adell ("Adell") respectfully requests oral argument in this appeal, which presents two issues of enormous importance under the Constitution and of first impression in this Court. First is whether the adhesion customer agreement of Defendant-Appellee Cellco Partnership d/b/a Verizon Wireless ("Verizon")—which Verizon has conceded does not provide Adell with the right to refuse to arbitrate with Verizon and still receive equipment and services from it, and which unilaterally deprives Adell of the right to specify with whom she chooses to arbitrate—can satisfy the standard for "voluntariness" of consent to the waiver of her Article III rights under Supreme Court precedent including *Wellness Int'l Network, Ltd. v Sharif,* 575 U.S. 665 (2015). Second is whether, under the proper application of *Epic Sys. Corp. v. Lewis,* 138 S. Ct. 1612 (2018), the choice of the people's representatives regarding the use and economic benefits of class action lawsuits for resolving consumer disputes of national importance, and Congress's express findings and purposes in enacting the Class Action Fairness Act of 2005 ("CAFA"), inherently and irreconcilably conflict with and override arbitration under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"). Oral argument will assist the Court in reaching a full understanding of these complex, important issues.

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The District Court has diversity subject-matter jurisdiction under CAFA, 28 U.S.C. § 1332(d), because: (i) the proposed plaintiff classes exceed 100 members as required under § 1332(d)(5)(B); (ii) diversity of citizenship exists under § 1332(d)(2)(A) because Adell is a resident and citizen of Ohio, and Verizon, a partnership, is a citizen of Delaware and New Jersey under § 1332(d)(10); and (iii) the amount in controversy required under §§ 1332(d)(2) & (d)(6) exceeds $5,000,000. *See* June 22, 2018 Declaration of William R. Weinstein, ¶¶ 6-8, RE 19, Page ID # 122-123 ("Weinstein Declaration"); Weinstein Declaration Exhibit 5 (excerpts of Verizon Communications 2017 Form 10-K), RE 19-5, Page ID # 159-160; Weinstein Declaration Exhibit 6 (U.S. States ranked by population), RE 19-6, Page ID # 163; June 15, 2018 Declaration of Lorraine Adell, ¶ 2, RE 20, Page ID # 200. *See also* Adell's March 19, 2018 Class Action Complaint ("Complaint"), ¶¶ 6, 9, RE 1, Page ID # 3-4.

This Court's appellate jurisdiction arises under: (i) FAA § 16(a)(1)(D), because the District Court's May 24, 2021 Opinion and Order from which Adell appeals, denying Adell's motion to vacate the arbitration award and granting Verizon's motion to confirm the award ("May 24, 2021 Opinion") (RE 42, Page ID # 574-580), is an order "confirming or denying confirmation of an award"; and (ii) FAA § 16(a)(3), because the May 24, 2021 Opinion, and the District Court's

March 5, 2019 Opinion and Order from which Adell also appeals, denying Adell's motion for partial summary judgment and granting Verizon's motion to compel arbitration ("March 5, 2019 Opinion") (RE 32, Page ID # 430-437), are "final decision[s] with respect to an arbitration that is subject to" the FAA.

Adell's Notice of Appeal, filed June 22, 2021 (RE 44, Page ID # 582-583), is timely under Fed. R. App. P. 4(a)(1)(A) because it was filed within 30 days after entry of the May 24, 2021 Opinion, and within 30 days of the judgment entered thereon on June 2, 2021 ("Judgment") (RE 43, Page ID # 581).

STATEMENT OF ISSUES ON APPEAL

Whether the District Court's March 5, 2019 Opinion and its May 24, 2021 Opinion holding that the bilateral arbitration agreement between Adell and Verizon is enforceable are erroneous because:

(i) Adell's waiver of her personal constitutional right to the exercise of the Article III judicial power for her state law breach of contract claims against Verizon brought within the diversity jurisdiction of the federal courts under CAFA was not "voluntary" under applicable Supreme Court precedent, including *Wellness*, in light of: (a) the absence in Verizon's adhesion customer agreement of the right by Adell to refuse non-Article III arbitration under the FAA and still receive her equipment and services from Verizon; and (b) Verizon's refusal to deal

with Adell unless she waives her Article III rights and agrees to FAA arbitration with Verizon; and

(ii) The choice of the people's representatives regarding the use and economic benefits of class action lawsuits for resolving consumer disputes of national importance, and Congress's express findings and purposes in enacting CAFA—including: (a) Congress's express finding that "[c]lass action lawsuits are an important and valuable part of the legal system ... by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm"; and (b) Congress's express purposes in enacting CAFA to "assure fair and prompt recoveries for class members with legitimate claims," to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction," and to "benefit society by encouraging innovation and lowering consumer prices"—inherently and irreconcilably conflict with and override the FAA.

STATEMENT OF THE CASE

A. Adell's Complaint

Adell's Complaint asserts claims seeking two different forms of relief on behalf of two different classes under Fed. R. Civ. P. 23.

First, pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, the Complaint seeks declarations—initially on behalf of Adell individually and, after class certification, on behalf of a Fed. R. Civ. P. 23(b)(2) declaratory judgment class comprised of all of Verizon's cell phone customers nationwide—that the bilateral arbitration agreement between Verizon and Adell and Verizon's customers is unenforceable because, generally: (i) the waiver of their personal constitutional right to the exercise of the Article III judicial power under CAFA in connection with their state law breach of contract claims against Verizon is not "voluntary"; and (ii) Congress's express findings and purposes in enacting CAFA inherently and irreconcilably conflict with arbitration under the FAA. Complaint ¶¶ 1(a), 20-34, 46-51, RE 1, Page ID # 1-2, 9-13, 16-18.[1]

Second, the Complaint asserts claims on behalf of a Fed. R. Civ. P. 23(b)(3) class comprised of all Verizon wireless telephone customers with an Ohio area

[1] Several versions of Verizon's standard form customer agreement—substantially identical in relevant part but updated on different dates—were placed in the record by the parties. RE 7-1, Page ID # 41-47/RE 19-2, Page ID # 136-142; RE 19-1, Page ID # 127-134; RE 19-3, Page ID # 144-150; RE 21-2, Page ID # 257-266. Citations herein are to the August 18, 2015 customer agreement, RE 19-1, Page ID

code, seeking damages and other amounts awardable under Ohio law for breach of contract based on Verizon's practices in connection with its imposition of its "Administrative Charge." Adell alleges that the Administrative Charge is required under the terms of Verizon's Customer Agreement to be limited to the recovery of governmental-related costs, but instead has been used as a discretionary pass-

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127-134 (hereinafter "Customer Agreement"), which was current when Adell became a Verizon customer on September 3, 2015. *See* Adell Declaration ¶ 3, RE 20, Page ID # 200.

Verizon's Customer Agreement includes an arbitration agreement requiring Adell and all of Verizon's other customers to waive their Article III rights by agreeing "TO RESOLVE DISPUTES ONLY BY ARBITRATION" "BY ONE OR MORE NEUTRAL ARBITRATORS," and further states that "THE FEDERAL ARBITRATION ACT APPLIES TO THIS AGREEMENT." Complaint ¶ 21, RE 1, Page ID # 9; RE 19-1, Page ID # 132. The arbitration agreement also includes a prohibition on class action arbitration and anything other than individual relief: "THIS AGREEMENT DOESN'T ALLOW CLASS … ARBITRATIONS[,]" and "THE ARBITRATOR MAY AWARD MONEY OR INJUNCTIVE RELIEF ONLY IN FAVOR OF THE INDIVIDUAL PARTY SEEKING RELIEF AND ONLY TO THE EXTENT NECESSARY TO PROVIDE RELIEF WARRANTED BY THAT PARTY'S INDIVIDUAL CLAIM." RE 19-1, Page ID # 133. Further, under its terms, the arbitration agreement is revoked in its entirety if the prohibition on class arbitration cannot be enforced: "IF FOR SOME REASON THE PROHIBITION ON CLASS ARBITRATIONS SET FORTH IN SUBSECTION (3) CANNOT BE ENFORCED…, THEN THE AGREEMENT TO ARBITRATE WILL NOT APPLY[.]" RE 19-1, Page ID # 134.

through of Verizon's general costs. Complaint ¶¶ 1(b), 2-5, 35-45, 52-57, RE 1, Page ID # 2, 2-3, 13-16, 18-19.[2]

B. The March 5, 2019 Opinion Denying Adell's Motion For Partial Summary Judgment On Her Individual Declaratory Judgment Claims And Granting Verizon's Motion To Compel Arbitration

On June 22, 2018 Adell filed her motion under 28 U.S.C. §§ 2201-2202 and Fed. R. Civ. P. 56 and 57 for partial summary judgment on her individual claims for declaratory judgment, seeking declarations that Verizon's bilateral arbitration agreement is not enforceable because Adell's waiver of her personal Article III right was not voluntary, and because of the inherent conflict between arbitration under the FAA and CAFA's express purposes as stated by Congress. Adell Motion, RE 17, Page ID # 90-91. On the same day, Verizon moved under FAA §§

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[2] The Administrative Charge provision of Verizon's Customer Agreement provides as follows:

> [O]ur charges also *include Federal Universal Service, Regulatory and Administrative Charges, and we may also include other charges related to our governmental costs.* We set these charges; they aren't taxes, they aren't required by law, they are not necessarily related to anything the government does, they are kept by us in whole or in part, and the amounts and what they pay for may change.

RE 19-1, Page ID # 130 (emphasis added). The United States District Court for the Western District of Washington previously held that language in an earlier version of the customer agreement essentially identical to the italicized language "unambiguously states" that the Administrative Charge "must be 'related to [Verizon's] governmental costs.'" *See Smale v. Cellco P'ship d/b/a Verizon Wireless,* 547 F. Supp. 2d 1181, 1186 (W.D. Wash. 2008). *See also* Complaint ¶¶ 3, 40, RE 1, Page ID # 2-3, 15.

3–4 and Fed. R. Civ. P. 12(b)(1) to compel all of Adell's state law claims to arbitration and to stay the action until the completion of the arbitration, or alternatively to dismiss the action for lack of subject-matter jurisdiction. Verizon Motion, RE 21, Page ID # 211-212.

Adell based her motion on a discrete, limited number of undisputed facts (*see generally* Adell Brief, RE 18, Page ID # 99-101):

(i) Adell, who resides in South Euclid, Ohio, has been a Verizon customer since September 3, 2015, and has paid the Administrative Charge at issue in the action. Adell Declaration, ¶¶ 2-4, RE 20, Page ID # 200-201; Declaration Exhibit 1, RE 20-1, Page ID # 204-207; Declaration Exhibit 2, RE 20-2, Page ID # 209-210.

(ii) Verizon's Customer Agreement includes an arbitration agreement governed by the FAA that (i) requires Adell and Verizon's other customers to bilaterally arbitrate all disputes otherwise properly brought in federal court, (ii) precludes class action arbitrations, and (iii) limits the relief the arbitrator can award solely to individual relief. *See* Note 1 and record citations, *supra.* Additionally, the arbitration agreement provides that if the prohibition on class arbitrations is not enforceable regarding Adell's dispute, then the arbitration agreement will not apply. *Id.*

(iii) Verizon has admitted in federal court "that the Customer Agreement contains [the arbitration agreement] and that acceptance of the Customer Service Agreement is necessary to obtain equipment and services from Verizon[.]" Weinstein Declaration Exhibit 4, RE 19-4, Page ID # 156.

(iv) Plaintiff has never been given the right to refuse to consent to the arbitration agreement and still receive equipment and services from Verizon. Adell Declaration, ¶ 5, RE 20, Page ID # 200-201.[3]

(v) The Court has jurisdiction over this matter under CAFA. *See* Statement of Jurisdiction and record citations, *supra*.

With respect to her Article III "voluntariness" challenge, Adell directed the District Court, *inter alia*, to the Supreme Court's decision in *Wellness,* 575 U.S. at 674-75, 685, confirming that the "knowing and voluntary" standard for consent to the waiver of her personal Article III rights applies to non-Article III adjudication by arbitration, and to other Supreme Court decisions also emphasizing voluntariness of the consent to the waiver the personal Article III rights in connection with arbitration and other non-Article III adjudications. Adell Brief, RE

[3] Adell's partial summary judgment motion challenged only the enforceability of Verizon's arbitration agreement, which is severable and subject to a separate, discrete challenge under federal law. *See, e.g., Rent-A-Center West, Inc. v. Jackson,* 561 U.S. 63, 70-71 (2010). Adell is not challenging her agreement to be bound by the other terms of the Customer Agreement that govern her receipt of equipment and services from Verizon. Adell Brief, RE 18, Page ID # 100, n.3.

18, Page ID # 104-106. Adell also directed the District Court to decisions of this Court in *Morrison v. Circuit City Stores, Inc.,* 317 F.3d 646 (6th Cir. 2003), and *Cooper v. MRM Inv. Co.,* 367 F.3d 493 (6th Cir. 2004), which applied a "knowing and voluntary" standard in the arbitration context, but not under Article III or specifically discussing the applicable standard for the waiver of a constitutional right. RE 18, Page ID # 107. In her reply brief, Adell additionally directed the District Court to *Hergenreder v. Bickford Senior Living Grp., LLC,* 656 F.3d 411, 420 (6th Cir. 2011), which did apply a "knowing and voluntary" standard specifically to the waiver of a constitutional right in the context of an arbitration agreement, but not the personal constitutional right under Article III. RE 25, Page ID # 329. Adell also directed the District Court to the numerous references in the FAA legislative history to the understanding of Congress and its primary drafter, Julius Cohen, that FAA arbitration be "voluntary." Adell Brief, RE 18, Page ID # 108-110.

With respect to her CAFA "inherent and irreconcilable conflict with the FAA" challenge, Adell directed the District Court, *inter alia,* to the express findings, purposes and text of CAFA, as well as the incompatibility of the fundamental attributes of FAA arbitration identified in Supreme Court precedent with the class action litigation Congress has specifically vested the federal courts with the jurisdiction to adjudicate under CAFA. Adell Brief, RE 18, Page ID #

110-115. Adell also argued that *Epic* was distinguishable from Adell's CAFA challenge, and that those distinctions supported a holding that CAFA overrides the FAA. RE 18, Page ID # 116-117.

The District Court's March 5, 2019 Opinion denied Adell's motion for declaratory judgments and granted Verizon's motion to compel arbitration. RE 32, Page ID # 430-437. Regarding Adell's Article III challenge, the District Court declined to extend *Wellness* to FAA arbitration, but also held that Adell's consent to the waiver of her Article III right was "voluntary" because she had "the right to refuse to sign the Verizon Customer Agreement and to take her business elsewhere," and had "an alternative source with which [she] could contract," citing as support for its conclusion a non-Article III 1998 unconscionability decision case by this Court under Michigan state law. RE 32, Page ID # 434-435. The District Court also found that under *Wellness,* requiring Verizon to provide services to Adell without her agreement to arbitrate "would necessarily deprive [Verizon] of its rights and force [Verizon] to accept contractual terms without its voluntary consent." RE 32, Page ID # 435. The District Court then rejected Adell's CAFA challenge, citing *Epic* and holding that if "Congress had wanted to override the FAA and ban arbitration class action waivers, it could have done so manifestly and expressly in the CAFA statute." RE 32, Page ID # 435-436.

Thus, the District Court denied Adell's motion and granted Verizon's motion to compel arbitration. March 5, 2019 Opinion, RE 32, Page ID # 430, 436-437. In addition, the District Court granted Verizon's request that the action be stayed until the completion of arbitration. *Id.; see also* Verizon Motion, RE 21, Page ID # 211-212.

Thereafter, on April 2, 2019, based, *inter alia,* on a number of decisions of this Court and the district courts in this Circuit including the District Court in this matter, Adell moved the District Court under 28 U.S.C. § 1292(b) to amend for certification for interlocutory appeal that part of the Court's March 5, 2019 Opinion staying the action under FAA § 3 rather than dismissing the action after determining that all of Adell's claims were arbitrable. Motion to Amend, RE 33, Page ID # 438-439; Supporting Brief, RE 34, Page ID # 441-442. By its October 18, 2019 Opinion and Order, the District Court denied the motion, finding "in this instance that a stay rather than an immediate appeal materially advances the ultimate termination of litigation." RE 37, Page ID # 485-488 at 487.

Lacking an avenue for immediate appeal, Adell then proceeded with the arbitration of her individual state law breach of contract claims.

C. The May 24, 2021 Opinion Denying Adell's Motion To Vacate The Arbitration Award And Granting Verizon's Motion To Confirm The Award

1. The Arbitration Award

The Customer Agreement provides for the filing of an arbitration demand with the American Arbitration Association ("AAA"). RE 19-1, Page ID # 132. On December 12, 2019, Adell filed her Demand for Arbitration with the AAA. RE 38-4, Page ID # 514-542; AAA Demand Filing Confirmation, RE 38-5, Page ID # 544-545. Adell and Verizon filed pre-hearing motions that briefed the issues for summary disposition, and the arbitrator issued the arbitration award ("Award) dated July 22, 2020, construing the Customer Agreement and ruling against Adell on her breach of contract claims and in favor of Verizon. Award, RE 38-2, Page ID 506-508.

Before specifically addressing the District Court's denial of Adell's motion to vacate the Award, Adell emphasizes for the Court that although Adell believes the Award suffers from serious legal error, her District Court motion to vacate under FAA § 10(a)(4) did not assert "manifest disregard of the law" as a ground to vacate the Award—although this Court continues to recognize it as "a viable ground for attacking an arbitrator's decision." *E.g., Gibbens v. OptumRx, Inc.,* 778 F. App'x 390, 393 (6th Cir. 2019) (quoting *Marshall v. SSC Nashville Operating Co.,* 686 F. App'x 348, 353 (6th Cir. 2017)). Adell is well aware that if an

"arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," the fact that "a court is convinced he committed serious error does not suffice to overturn his decision." *E.g., Eastern Associated Coal Corp. v. Mine Workers,* 531 U.S. 57, 62 (2000); *Farley v. Eaton Corp.*, 701 F. App'x 481, 485 (6th Cir. 2017) (quoting *United Paperworkers Int'l Union, AFL CIO v. Misco, Inc.*, 484 U.S. 29, 37–38 (1987)).

Nevertheless, Adell vigorously disagrees with the arbitrator's bottom line conclusion of law that the essentially identical language of the Customer Agreement held by the U.S. District Court in *Smale* to "unambiguously stat[e]" that the Administrative Charge "must be 'related to [Verizon's] governmental costs,'" 547 F. Supp. 2d at 1186—based in part on Verizon's own concessions on brief in that proceeding (Complaint ¶¶ 3, 40, RE 1, Page ID # 3, 15)—could somehow be "clarified" by Verizon's subsequent insertion of the vague phrase "[the charges] are not necessarily related to anything the government does," and thereby be transformed such that it "*does not appear* to require that Administrative Charges be related to government costs *and cannot be said to be ambiguous*." *Cf.* Award, RE 38-2, Page ID # 508, *see also* Note 2, *supra* (quoting Administrative Charge provision) (emphasis added). Particularly in light of all of the relevant rules of contract construction under Ohio law, including, but not limited to, the hornbook rule that "an ambiguity in the writing will be interpreted strictly against

the drafter and in favor of the nondrafting party." *Westfield Ins. Co. v. Galatis*, 797 N.E.2d 1256, 1262 (Ohio 2003).

2. The District Court's Denial of Adell's Motion under FAA § 10(a)(4) to Vacate the Award

Under FAA § 10(a)(4), the District Court "may make an order vacating the award upon the application of any party to the arbitration … where the arbitrators exceeded their powers[.]" "Because the district court's order compelling arbitration was not a final and appealable order, [Adell] had no choice but to arbitrate [her] claims and contest the court's order [by filing a motion to vacate] upon the completion of the arbitration." *PolyOne Corp. v. Westlake Vinyls, Inc.*, 937 F.3d 692, 698 (6th Cir. 2019) (citing *Wiepking v. Prudential-Bache Sec., Inc.*, 940 F.2d 996, 999 (6th Cir 1991)). [4]

Adell filed her FAA § 10(a)(4) motion to vacate the Award on October 16, 2020. RE 38, Page ID # 489-490. The motion asserted that the arbitrator exceeded his authority because of the unenforceability of the arbitration agreement on the grounds under Article III and CAFA addressed throughout this brief that the District Court rejected in its March 5, 2019 Opinion denying Adell's motion for

[4] *See also Solvay Pharm., Inc. v. Duramed Pharm., Inc.*, 442 F.3d 471, 477 (6th Cir. 2006) (citations omitted): "[W]here … a party to an arbitration proceeding challenges the arbitrator's authority to decide a particular issue, [that is a] threshold question of arbitrability[.]" And under § 10(a)(4), "arbitrators may exceed their powers … by engaging in an inquiry that was not properly arbitrable." *Id.*

partial summary judgment. *Id.*; Adell § 10(a)(4) Brief, RE 38-1, Page ID # 500. Verizon's November 6, 2020 response in opposition to the motion included a cross-motion to confirm the Award under FAA § 9. RE 40, Page ID # 556-565.

Adell's brief in support of her FAA § 10(a)(4) motion incorporated by reference her arguments in support of her motion for partial summary judgment, but candidly conceded that "there has been no intervening controlling law [since the March 5, 2019 Opinion had issued] which would support the Court's departure from 'the law of the case.'" RE 38-1, Page ID # 500-501. Adell further explained to the District Court that her § 10(a)(4) motion was being brought so she could pursue her appeal of the Article III and CAFA issues she had been precluded from appealing directly to this Court after the District Court compelled arbitration and stayed the action in its March 5, 2019 Opinion. *Id.*, Page ID # 500. And in her brief in opposition to Verizon's motion to confirm, Adell stated that "[a]lthough [she] does not concede that Verizon's cross-motion should be granted, [her] grounds in opposition are the same grounds in support of her motion to vacate." RE 41, Page ID # 572.

Repeating its holdings from its March 5, 2019 Opinion, and extensively referencing the above from Adell's briefs, the District Court held that Adell had "fail[ed] to meet that substantial burden" "of proving that the arbitrators exceeded their authority," and denied Adell's motion to vacate and granted Verizon's cross-

motion to confirm. May 24, 2021 Opinion, RE 42, Page ID # 575, 578-579 (quoting *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 330 F.3d 843, 846 (6th Cir. 2003)). The District Court's Judgment finally terminating the action issued on June 2, 2021. RE 43, Page ID # 581.

SUMMARY OF THE ARGUMENT

It is beyond peradventure that arbitration under the FAA is *supposed to be* "a matter of consent, not coercion." Prior Supreme Court separation of powers cases under Article III, including several specifically considering arbitration, have consistently turned on the voluntariness of consent (or lack thereof). But not until *Wellness* has there been so compelling a statement by the Supreme Court that a party's "consent" to non-Article III adjudication by arbitration is subject to the "knowing and voluntary" standard—including the right to refuse—in order to be an enforceable waiver of the personal Article III constitutional right to "an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States." This Court has previously applied the "knowing and voluntary" standard in the context of FAA arbitration, but not in connection with Article III, and not under the standard imposed by *Wellness*. This Court can and should extend its already existing "knowing and voluntary" standard to the teachings of *Wellness* and the Supreme Court cases confirming a presumption *against* the waiver of constitutional rights in the civil as well as

criminal context—particularly under circumstances objectively undermining voluntariness. The result will be a holding that Verizon's adhesive denial of the right to refuse non-Article III arbitration by Adell and still receive her equipment and services from Verizon is not "voluntary" under the Constitution, and that the waiver of her Article III rights is unenforceable.

The express findings and purposes of CAFA, and the plain text of the statute, are an unequivocal, forceful command by Congress that the federal courts "shall" adjudicate consumer class actions of national importance that meet CAFA's jurisdictional requirements—in order to protect consumers, to benefit those consumers, the national economy and society, *and* to "restore the intent of the framers"—subject only to the few limited exceptions identified in the statute which do *not* include FAA arbitration. *Epic* makes clear that the courts must respect this choice "of the people's representatives," regardless of whether the courts might prefer FAA arbitration and the federal common law developed by the courts for its application. CAFA, a painstakingly detailed class action statute, abundantly satisfies the deficiencies relied on in *Epic* to support its holding that the National Labor Relations Act ("NLRA") does not impliedly (as opposed to expressly) displace the FAA. Application of the standards set out in other relevant Supreme Court cases also fully confirms that CAFA overcomes the presumption against implied repeals and overrides the FAA. There is a clear repugnancy

between: (i) the class action mechanism chosen by Congress for the resolution of numerous similar small consumer claims with national importance by the exercise of the jurisdictionally vested judicial power under CAFA; and (ii) the mechanism adopted under the FAA—if there is an independent jurisdictional basis—to summarily enforce voluntary agreements by parties of substantially equal bargaining power for the extrajudicial, confidential resolution of their primarily private disputes. Consumers do not fit that mold, and were not intended to be included by Congress when it enacted the FAA in 1925. Unlike CAFA.

The District Court's March 5, 2019 Opinion and its May 24, 2021 Opinion should be reversed by this Court.

ARGUMENT

The Court reviews a denial of a motion for summary judgment or partial summary judgment *de novo,* and "'must assume the truth of the non-moving party's evidence and construe all inferences from that evidence in the light most favorable to the non-moving party.'" *Bassett v. Nat'l Collegiate Athletic Ass'n,* 528 F.3d 426, 430 (6th Cir. 2008) (quoting *Ciminillo v. Streicher,* 434 F.3d 461, 464 (6th Cir. 2006)). The Court also reviews the District Court's decision to confirm or deny a motion to vacate *de novo* as to questions of law, which are the only issues presented by Adell's appeal. *Green v. Ameritech Corp.*, 200 F.3d 967, 974 (6th Cir. 2000).

I. ADELL'S WAIVER OF HER PERSONAL CONSTITUTIONAL RIGHTS UNDER ARTICLE III WAS NOT "VOLUNTARY" AND IS UNENFORCEABLE

"When a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' ... and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." *Stern v. Marshall,* 564 U.S. 462, 484 (2011), *quoting Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in judgment). Adell's claim for damages for breach of contract is "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." *E.g., Northern Pipeline,* 458 U.S. at 90.

"Article III, § 1's guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States … *serves to protect primarily personal, rather than structural, interests*." *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 848 (1986) (emphasis added).

As Chief Justice Marshall recognized 200 years ago in *Cohens v. Virginia,* 19 U.S. 264, 378 (1821), regarding a claim like Adell's properly brought within the diversity jurisdiction of the Article III courts:

> [T]he second class [of cases defined by Article III, § 2] comprehend[s] "controversies between … ["Citizens of different States"]. If these be the parties, … *the[y] have a constitutional right to come into the Courts of the Union*. (emphasis added)

It is undisputed that the District Court has original jurisdiction to adjudicate Adell's common law breach of contract claims under CAFA, 28 U.S.C. § 1332(d)(2). *See* Statement of Jurisdiction, *supra.* Thus, Adell has the "constitutional right to come before the Courts of the Union" to receive "an independent and impartial adjudication by the federal judiciary" of her claims. *Schor, supra; Cohens, supra.*

A. The Supreme Court's Article III Jurisprudence Applies To Arbitration on Consent

Before discussing *Wellness*, which squarely confirms that consent to private arbitration must be analyzed within the context of Article III, Adell directs the Court to two prior Supreme Court decisions specifically addressing arbitration in the context of the Article III structural separation of powers context.

First is *Marine Transit Corp. v. Dreyfus,* 284 U.S. 263 (1932), in which the precise issue was whether arbitration under the FAA (then titled "United States Arbitration Act," *see* 284 U.S. at 270 n.1) violated Article III structural separation of powers requirements in connection with the adjudication of admiralty and maritime cases. *Id.* at 277. The Supreme Court held that an executory agreement to arbitrate maritime disputes "may be made a rule of court" under the Arbitration Act and did not violate Article III. *Id.* at 279, *quoting Red Cross Line v. Atlantic Fruit Co*., 264 U.S. 109, 123 (1924) (decided under N.Y. Arbitration Law enacted

prior to FAA).[5] Importantly, the arbitration award in *Marine Transit* was enforceable by the district court only with the stipulated consent of the parties. *See* 284 U.S. at 277 n.4.

Second is *Thomas v. Union Carbide Agric. Prods. Co.,* 473 U.S. 568 (1985), which specifically addressed the constitutionality of Congress's mandate of arbitration under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq*. *See* 473 U.S. at 571. In *Thomas,* the Supreme Court held that separation of powers principles did not prohibit Congress from "selecting binding arbitration [by "civilian" arbitrators maintained on the roster of the Federal Mediation and Conciliation Service] … as the mechanism for resolving disputes among [FIFRA] participants" with the participants' "explicit consent". *Id.* at 571, 574 n.1, 590, 592. In fact, the "civilian" arbitrators were AAA commercial arbitrators, the fee schedule was the AAA fee schedule, and the applicable rules were the AAA FIFRA arbitration rules. 473 U.S. at 573 n.1; 29 C.F.R., Part 1440, § 1440.1 and appendix (available, *inter alia*, from Hein Online).

Wellness decided "whether Article III allows bankruptcy judges to adjudicate [certain claims for which litigants are constitutionally entitled to an Article III adjudication] with the parties' consent." The Supreme Court held that

[5] The District Court's March 5, 2019 Opinion compelling arbitration under FAA § 4 is comparable to the described reference to arbitration "under a rule of court."

"Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge." 575 U.S. at 669. *Wellness*, however, also includes *substantial* discussion of the long-standing use of arbitrators in the federal courts to decide parties' claims *on consent*. For example, the majority opinion includes the following extensive discussion of arbitration in cases extending back more than two centuries:

> Adjudication by consent is nothing new. Indeed, "[d]uring the early years of the Republic, federal courts, *with the consent of the litigants*, *regularly referred adjudication of entire disputes to non-Article III* referees, masters, or *arbitrators*, for entry of final judgment in accordance with the referee's report." … *[S]ee, e.g.*, *Thornton* v. *Carson*, 11 U.S. 596, 7 Cranch 596, 597, 3 L. Ed. 451 (1813) (affirming damages awards in two actions that "were referred, *by consent under a rule of Court to arbitrators*"); *Heckers* v. *Fowler*, 69 U.S. 123, 2 Wall. 123, 131, 17 L. Ed. 759 (1865) (observing that the "[p]ractice of referring pending actions under a rule of court, by consent of parties, was well known at common law," and "is now universally regarded … as the proper foundation of judgment"); *Newcomb* v. *Wood*, 97 U.S. 581, 583, 24 L. Ed. 1085 (1878) (*recognizing "[t]he power of a court of justice, with the consent of the parties, to appoint arbitrators* and refer a case pending before it").

Id. at 674-75 (emphasis added).

Justice Alito, concurring in the decision including its discussion of arbitrators, but only in the judgment with respect to the Court's holding that consent may be implied as well as express, compared the entry of judgment by a bankruptcy judge to the issuance of a decision by an arbitrator, and agreed that neither violates separation of powers under *Schor*. *Id.* at 686-87. Indeed, Chief

Justice Roberts, in his dissent, takes both the majority and Justice Alito to task for comparing bankruptcy judges and arbitrators. *Id.* at 702-03. Justice Thomas also discusses the relationship between the arbitration of private rights and the judicial power. *Id.* at 718-19.

These cases all confirm that arbitration, including FAA arbitration, is subject to the strictures of Article III.

B. The Waiver Of Adell's Article III Constitutional Rights, And Her Consent To Non-Article III Adjudication, Must Be Voluntary

Regarding the constitutional requirement that valid consent to non-Article III adjudication be voluntary, Adell starts with *Wellness*, in which the Supreme Court includes all "non-Article III adjudicator[s]," not just bankruptcy and magistrate judges:

> 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").

575 U.S. at 685 (emphasis added).

Wellness further observes that "the cases in which this Court has found a violation of a litigant's right to an Article III decisionmaker have involved an

objecting defendant forced to litigate involuntarily before a non-Article III court." *Id.* at 682-83.

In *Stern,* even though Pierce had consented to the adjudication of his defamation claim in the bankruptcy court, he "had nowhere else to go if he wished to recover from Vickie's estate," and thus, he "did not truly consent to resolution of Vickie's claim in the bankruptcy court proceedings." 564 U.S. at 493.

In *Northern Pipeline,* because the 1978 Bankruptcy Act did not require the parties' consent for the referee to adjudicate claims beyond those involving property in the possession of the court, 458 U.S. at 79 n.31, Justice Rehnquist in his concurrence in the judgment described this non-Article III adjudication as "against [Marathon's] will." *Id.* at 91. As *Wellness* notes, "[t]he Court confirmed in two later cases that *Northern Pipeline* turned on the lack of consent." 575 U.S. at 681, *citing Schor* and *Thomas*, *supra*.

Schor further emphasizes the importance of voluntariness in connection with a non-Article III adjudication—in *Schor* in front of the Commodities Futures Trading Commission ("CFTC"), 478 U.S. at 855 (emphasis added): "[T]he decision to invoke [the CFTC] forum is entirely left to the parties and … Congress may make available a quasi-judicial mechanism *through which willing parties may, at their option*, elect to resolve their differences.

And in *Thomas,* discussed Argument I(A), *supra,* a participant "explicitly consent[ed] to have his rights determined by arbitration," with the AAA, 473 U.S. at 592, the arbitration was between "voluntary participants," *id.* at 589, and the binding arbitration program had specifically been negotiated and agreed to among representatives of both the major chemical manufacturers and the arbitration participants, *id.* at 575.

Voluntariness is an essential element for the valid and enforceable waiver of the personal constitutional right to an Article III adjudicator and consent to the non-Article III adjudicator—including an arbitrator.[6]

1. The Voluntariness Standard is Consistent with Congress's Understanding in Enacting the FAA

The legislative history of the FAA includes multiple references to the fact that the enforceability of arbitration agreements was intended to include those entered into *voluntarily.* Several references can be found in the record of the 1923 Senate Hearings, *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a*

[6] As noted in the Statement of the Case, Section B, *supra,* this Court has applied a "knowing and voluntary" standard specifically to the waiver of the constitutional right to a jury trial in the context of an arbitration agreement, *see Hergenreder,* 656 F.3d at 420. However, the application of that standard was under this Circuit's "federal common law" criteria, and not the governing Article III standard prescribed under *Wellness* or based on the strong presumption *against* the waiver of a constitutional right. *See* Argument I(C), *infra. Wellness* defines the constitutional standard under Article III that must be applied here.

Subcomm. of the S. Comm. on the Judiciary, 67th Cong. 9 (1923), RE 19-7, Page ID # 167-170 ("*1923 Hearings*").

During the statement of W.H.H. Piatt, Chairman of the Committee of Commerce, Trade and Commercial Law of the American Bar Association, Senator Thomas Walsh of Montana was concerned whether the legislation would apply to adhesion contracts where, like here, one party like an insurance company or railroad company had much more bargaining power and was able to provide a contract on a "take it or leave it" basis—"[e]ither you can make that contract or you can not make any contract." *1923 Hearing.* at 9-10, RE 19-7, Page ID # 169-170. Piatt initially stated that "it is not the intention of the bill to cover" such cases, *id.* at 9, and further stated: "*I would not favor any kind of legislation that would permit the forcing a man to sign that* [*kind of*] *a contract*[.]" *Id.* at 10 (emphasis added).

The statement of Congressman Graham of Pennsylvania in connection with the House floor debate on H.R. 646, *Enforcement of Arbitration Agreements*, 65 Cong. Rec. 1931 (1924), RE 19-8, Page ID # 172, also emphasizes that arbitration under the FAA should be voluntary (here in relevant part):

> This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts—*an agreement to arbitrate, when voluntarily placed in the document by the parties to it.* (emphasis added)

The Joint Congressional Hearings include other statements supporting the intended "voluntary" nature of arbitration under the FAA. *See Arbitration of Interstate Commercial Disputes, Joint Hearings on H.R. 646 and S. 1005 before the Subcommittees of the Committees on the Judiciary*, 68th Cong., 1st Sess. 40 (1924), RE 19-9, Page ID # 174-176 ("*Joint Hearings*").

For example, Alexander Rose, speaking on behalf of the Arbitration Society of America, also confirmed during his statement that arbitration under the legislation was supposed to be voluntary, *Joint Hearings* at 26, RE 19-9, Page ID # 176:

> *Arbitration*, I may say to you gentlemen, does not by any means seek to supplant the courts or work in opposition to the courts, because after all it *is a purely voluntary thing*. It is only the idea that arbitration may now have the aid of the court to enforce these provisions *which men voluntarily enter into.* (emphasis added)

Finally, shortly after the FAA was signed into law in 1925, Julius Cohen, one of principal proponents of the FAA and one of its architects and primary drafters (*see Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 274 (1995)), further confirmed and emphasized that arbitration under the FAA was supposed to be voluntary:

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

See Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law,* 12 Va. L. Rev. 265, 279 (1926), RE 19-10, Page ID # 179.

Consistent with this substantial legislative history, the Supreme Court has confirmed that "the FAA imposes certain *rules of fundamental importance, including the basic precept* that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (emphasis added), *quoting Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 479 (1989). This Court has stated the same numerous times. *E.g., Richmond Health Facilities v. Nichols,* 811 F.3d 192, 201 (6th Cir. 2016) (quoting *Volt*).

C. The District Court's Holding That Adell Voluntarily Consented To The Waiver Of Her Personal Article III Rights Is Legally Erroneous

The District Court provided no reason in its May 24, 2021 Opinion for its declining to apply the *Wellness* standard of voluntary consent under Article III to FAA arbitration—aside from the issue's status as one of first impression in the federal courts. RE 32, Page ID # 434. As *Wellness* and other Supreme Court decisions make clear, however, Article III applies to the FAA and other non-Article III adjudication, and requires that consent be voluntary—consistent with Congress's repeatedly stated intent in the FAA legislative history. Every justice in *Wellness*—the five-Justice majority, Justice Alito in his concurrence, Chief Justice

Roberts in his dissent joined by Justice Scalia, and Justice Thomas in his dissent—all understood the decision's reach to non-Article III arbitration as well.

The District Court's first alternative justification for rejecting Adell's voluntariness challenge—that Adell had the right to refuse because she could have gone elsewhere, and thus "the right to refuse was part and parcel of her consent" (citing only to an unconscionability decision of this Court under Michigan state law)—cannot satisfy the standard for voluntariness under the Constitution, and is erroneous. RE 32, Page ID # 435. The District Court's additional finding based on its reading of *Wellness*—that forcing Verizon to provide services to Adell without being able to insist on arbitration violates its right to voluntary consent, *id.*—misconstrues both *Wellness* and fundamental principles of arbitration under the FAA.

1. Consent to the Waiver of Adell's Article III Rights Cannot Be Voluntary and Overcome the Presumption Against the Waiver of Those Rights Without The Right To Refuse Non-Article III Arbitration And Still Receive Her Equipment and Services from Verizon

It is undisputed, and Verizon has conceded, that Adell had no choice but to consent to the waiver of her personal right to an Article III adjudicator to receive equipment and services from Verizon, and concomitantly that Verizon would not provide equipment and services without Adell's agreement to the waiver of her Article III rights. Weinstein Declaration Exhibit 4, RE 19-4, Page ID # 156.

Contrary to the analysis of the District Court, the sufficiency of her consent in these circumstances is subject to standards under the Constitution, not state contract unconscionability law.

As an initial matter, the sufficiency of Adell's Article III waiver under the Constitution has to be evaluated under the guiding principle that 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). *Accord Fuentes v. Shavin,* 407 U.S. 67, 94 n.31 (1972) ("Indeed, in the civil no less than the criminal area, 'courts indulge every reasonable presumption against waiver.'") (quoting *Aetna Ins. Co.* v. *Kennedy,* 301 U.S. 389, 393 (1937)). This Court has recognized this guiding principle: "[I]t is well established that courts closely scrutinize waivers of constitutional rights, and 'indulge every reasonable presumption against a waiver.'" *Sambo's Rests., Inc. v. City of Ann Arbor*, 663 F.2d 686, 691 (6th Cir. 1981) (quoting *Aetna*).

Fuentes and *Overmyer* demonstrate the criteria that preclude voluntariness in connection with a contractual waiver of constitutional rights. In *Fuentes,* the Supreme Court found that the contractual waiver was not "voluntary, knowing and intelligently made": "There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power. *The purported waiver provision was* a printed part of a form sales contract and *a necessary*

condition of the sale." 407 U.S. at 95 (emphasis added). In *Overmyer,* the contractual waiver was voluntary for essentially the same reason that it was not in *Fuentes*: "This is not a case of unequal bargaining power or overreaching. The Overmyer-Frick agreement, from the start, was not a contract of adhesion. *There was no refusal on Frick's part to deal with Overmyer unless Overmyer agreed* to a cognovit." 405 U.S. at 186 (emphasis added). Verizon's arbitration agreement precisely fits all of these criteria for involuntariness and unenforceability.

By comparison, it is instructive to see when an agreement to arbitrate *is* "voluntary." CFTC Regulations 17 C.F.R. §§ 166.5(b) & (c) govern the use of arbitral dispute resolution with customers. Section 166.5(b) requires that "the use by customers of dispute settlement procedures shall be voluntary." Under § 166.5(c)(1), "[s]igning the [arbitration] agreement must not be made a condition for the customer to utilize the services offered by the Commission registrant." And § 166.5(c)(7) requires extensive cautionary language in large boldface type making it clear that consent to arbitration must "be voluntary," and *not* a condition of opening an account.

Fuentes and *Overmyer* confirm that adhesion contracts like Verizon's, with no right to refuse the waiver of her Article III rights by Adell, and with Verizon's refusal to provide equipment and services unless Adell agrees to the waiver, cannot satisfy the voluntariness standard required to overcome the presumption *against*

the waiver of Adell's Article III constitutional right. This lack of the right to refuse (*Wellness,* 575 U.S. at 685), this lack of choice (*Stern*, 564 U.S. at 493), this waiver against Adell's will (*Northern Pipeline*, 458 U.S. at 91) and the fact that Adell is *not* a willing party (*cf. Schor,* 478 U.S. at 855), are precisely what the Supreme Court has repeatedly held violates Article III.

The District Court's reliance on the fact that Adell could go elsewhere has no basis under the applicable constitutional standards.

2. The FAA Protects Adell's Right to Specify with Whom She Chooses to Arbitrate

The District Court also supported its voluntariness conclusion with this holding: "[T]o allow [Adell] to refuse to arbitrate disputes on an individual basis but still retain the Verizon equipment and services would necessarily deprive [Verizon] of its rights and force [Verizon] to accept contractual terms without its voluntary consent." March 5, 2019 Opinion, RE 32, Page ID # 435; *see also* May 24, 2021 Opinion, RE 42, Page ID # 575.

This holding ignores the essential principle that an agreement to arbitrate is bilateral and mutual. *See Stolt-Nielsen,*559 U.S. at 684 ("[A]rbitration is simply a matter of contract *between the parties*[.]") (emphasis added in *Stolt-Nielsen*). Additionally, the District Court's holding ignores the essential principle that it is "the contractual nature of arbitration that the parties may specify *with whom they*

choose to arbitrate their disputes." *Id.* (emphasis added). *See also, e.g., Hergenreder,*656 F.3d at 416 (quoting *Stolt-Nielsen*).

The agreement to arbitrate is an agreement "between the parties," and Adell has just as much right to choose with whom to arbitrate as Verizon. Although the District Court cited no authority actually supporting its holding that Verizon has some sort of "freedom of contract" right not to do business with Adell if she (and Verizon's millions of customers) decline to arbitrate, Verizon's purported right cannot be exercised until after Adell and these customers are given the choice not to arbitrate with Verizon and so choose. But it is undisputed that Verizon will not provide Adell and its other customers with the choice to decline arbitration. And because of that, their agreement to waive their Article III rights is unenforceable *under the Constitution.*[7]

3. The FAA Legislative History and the Supreme Court's Recognition That Cell Phones Are Not Voluntary Contradict the District Court's Finding of Voluntariness

The District Court's bottom line conclusion that Adell's consent to the waiver of her Article III rights was "voluntary" cannot be reconciled, in the first

[7] The District Court's holding regarding Verizon's right "not to do business" is also contrary to the terms of the arbitration agreement, which states that Verizon *will* do business with Adell and its other customers if the arbitration agreement and its class prohibition are not enforceable: "(8) IF FOR SOME REASON THE PROHIBITION ON CLASS ARBITRATIONS SET FORTH IN SUBSECTION (3) CANNOT BE ENFORCED, THEN THE AGREEMENT TO ARBITRATE WILL NOT APPLY." RE 19-1, Page ID # 134.

instance, with the FAA legislative history, quoted extensively above, which makes clear that "take it or leave it" contracts are not voluntary and were not intended to be subject to the FAA. *E.g., 1923 Hearing* at 9-10, RE 19-7, Page ID # 169-170.

Furthermore, the District Court's conclusion is inconsistent with the Supreme Court's now twice confirmation that cell phones are not voluntary.

As first observed by Chief Justice Roberts for the Court in *Riley v. California,* 573 U.S. 373, 385 (2014), "modern cell phones … are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."

Based on and quoting the above passage from *Riley,* the Supreme Court further rejected the applicability of "voluntariness" in connection with cell phones in *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018) (rejecting "voluntary exposure" of cell phone location services, in part quoting *Riley*). And this lack of voluntariness in connection with cell phones was clarified by Chief Justice Roberts during the November 29, 2017 oral argument in *Carpenter,* No. 16-402. In response to the government's assertion that "there is an element … of voluntariness in deciding to contract with a cell company," Chief Justice Roberts squarely contradicted the argument, as follows: "*[T]hat sounds inconsistent with our decision in Riley, though, which emphasized that you really don't have a choice these days if you want to have a cell phone.*" *See* Transcript at 80-81

(emphasis added) (available at https://www.supremecourt.gov/oral_arguments/argument_transcript/2017#list).

Especially regarding the waiver of constitutional rights, the District Court could and should have followed the Supreme Court's lead in concluding what the Supreme Court has no problem essentially taking judicial notice of—that there is nothing voluntary regarding cell phones in modern society.

II. CAFA INHERENTLY AND IRRECONCILABLY CONFLICTS WITH AND OVERRIDES THE FAA

Adell's challenge to the enforceability of the arbitration agreement based on the inherent and irreconcilable conflict between CAFA and arbitration under the FAA was rejected by the District Court's in its March 5, 2019 Opinion, as follows: "[I]f Congress had wanted to override the FAA and ban arbitration class action waivers, it could have done so manifestly and expressly in the CAFA statute." RE 32, Page ID # 436. *See also* May 24, 2019 Opinion, RE 42, Page ID # 575. Thus, the District Court seemingly adopted a holding that only an express exclusion of the applicability of the FAA can suffice for CAFA to override it.

To support its holding, the District Court quoted the following sentence from *Epic*, 138 S. Ct. at 1627: "[T]he absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act." *Id.,* RE 32, Page ID # 436.

The District Court's holding is erroneous.

A. Congress's Express Findings And Purpose In Enacting CAFA, As Reflected In Its Text And Confirmed In Its Legislative History, Inherently And Irreconcilably Conflict With Arbitration Under The FAA

The Supreme Court has held on numerous occasions that Congress's intent to preclude arbitration "will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). *Accord Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987) ("If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history,' or from an inherent conflict between arbitration and the statute's underlying purposes") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

1. Congress's Purposes in Enacting CAFA Are Explicit, Unambiguous, and Substantially Unique in the History of Federal Legislation

Although not addressed or analyzed in the District Court's opinions from which Adell appeals, the findings and purposes of Congress in enacting CAFA, Pub. L. No. 109-02, 119 Stat. 4 (enacted Feb. 18, 2005), are explicitly and unequivocally stated in the statute. RE 19-11, Page ID # 181-191. *See also* Notes to 28 U.S.C. § 1711.

CAFA § 2(a), 119 Stat. 4, RE 19-11, Page ID # 181, sets out the findings of Congress, here in relevant part:

> (a) FINDINGS.—Congress finds the following:
> (1) *Class action lawsuits are an important and valuable part of the legal system* when they permit the fair and efficient resolution of legitimate claims of numerous parties *by allowing the claims to be aggregated into a single action against a defendant* that has allegedly caused harm. (emphasis added)

And CAFA § 2(b), 119 Stat. 5, RE 19-11, Page ID # 182, sets out the purposes of CAFA, here in their entirety (emphasis added):

> (b) PURPOSES.—The purposes of this Act are to—
> (1) assure fair and prompt recoveries for class members with legitimate claims;
> (2) *restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction*; and
> (3) *benefit society by* encouraging innovation and lowering consumer prices.

Aside from what these purposes say, which could not be clearer or less ambiguous in their affirmative approval of class actions, Adell makes two additional observations about Congress's purposes in enacting CAFA.

First, to the best of the knowledge of Adell's counsel, *Congress has only relied on the "intent of the framers" of the Constitution as an express purpose for enacting legislation one other time*: for the War Powers Resolution of 1973 (also known as the "War Powers Act"), which was enacted "to fulfill the intent of the framers" in response to the Viet Nam war and the secret bombings in Cambodia.

See 50 U.S.C. § 1541(a). Based on its restoration of the intent of the framers, CAFA's unique and exceptional importance to the nation and its people is manifest.

Second, aside from the direct benefits to consumers in class actions, Congress's express intent to "benefit society by encouraging innovation and lowering consumer prices" is a choice made by Congress that consumer class actions will benefit not just the economy but society as a whole. [8]

2. CAFA's Legislative History Provides Further Compelling Evidence of Congress's Purposes in Enacting CAFA

One of the principal sources of CAFA's legislative history is Senate Report 109-14 (2005) ("S. Rep. 109-14"). This legislative history confirms the "strong" and "expansive" and "liberal" policy behind Congress's enactment of CAFA:

> Because interstate class actions typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit, the Committee firmly believes that such cases properly belong in federal court. S. Rep. 109-14, at 5, RE 19-12, Page ID # 194.
>
> [T]estimony before this Committee [noted that] class action legislation expanding federal jurisdiction over class actions would fulfill the intentions of the Framers because the rationales that underlie the diversity jurisdiction concept apply with equal—if not greater—force to interstate class actions. *Id.* at 9, RE 19-12, Page ID # 195 (quotations omitted).

[8] CAFA, in § 3, also creates a "Consumer Class Action Bill Of Rights" for the protection of consumers. *See* 119 Stat. 5-8, § 3, RE-19-11, Page ID # 182-186.

> [T]he overall intent of these [§ 1332(d)(1) definitional] provisions is to strongly favor the exercise of diversity jurisdiction over class actions with interstate ramifications. In that regard, the Committee further notes that the definition of "class action" is to be liberally construed. *Id.* at 35, RE 19-12, Page ID # 198.
>
> Overall, new section 1332(d) is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions be heard in federal court[.] *Id.* at 43, RE 19-12, Page ID # 199. *See also Dart Cherokee Basin Operating Co. v. Owens,* 574 U.S. 81, 89 (2014) (quoting this passage in part).

3. CAFA's Text Mandates That the Federal Courts Adjudicate Class Actions Like This One That Satisfy Its Jurisdictional Requirements, Subject to Only a Few Limited Exceptions Prescribed By Congress in the Statute

Congress amended 28 U.S.C. § 1332 in CAFA § 4, 119 Stat. 9-12, RE 19-11, Page ID # 186-189, to vest the federal courts with jurisdiction to adjudicate minimally diverse class actions meeting the requirements of the statute. *E.g., Mason v. Lockwood, Andrews & Newnam, P.C.,* 842 F.3d 383, 386 (6th Cir. 2016) ("minimally diverse" parties).

Specifically, under 28 U.S.C. § 1332(d)(2), "[t]he district courts *shall* [emphasis added] have original jurisdiction of any civil action in which the matter in controversy" satisfies (i) the prescribed numerosity and diversity of citizenship among the putative class members and the defendants, and (ii) the $5,000,000 amount in controversy requirement.

By using the term "shall," Congress has imposed "an obligation [that is] impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) ("The word 'shall' is ordinarily '[t]he language of command.'") (citation omitted).

Congress, in fact, has created two "exceptions" to the mandatory exercise of jurisdiction by the district courts under § 1332(d)(2). One exception under § 1332(d)(3)—the "'Home State' exception"—grants "discretion" to the district courts based on the consideration of six factors by which they "*may* … decline to exercise jurisdiction" over cases "in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed." *See* S. Rep. 109-14 at 28, RE 19-12, Page ID # 196 (emphasis added) (specifically called "exception").

The second exception under § 1332(d)(4)—the "Local Controversy Exception"—*mandates* that the district courts "*shall decline* to exercise jurisdiction" where "greater than two-thirds of the members of all proposed plaintiff classes in the aggregate" and at least one "significant" defendant or the "primary defendants" "are citizens of the State in which the action was originally filed." *See* S. Rep. 109-14 at 28-29 RE 19-12, Page ID # 196-197 (emphasis added) (specifically called exception).

CAFA § 1332(d)(9) also expressly excludes certain securities-related class actions under the Securities Act of 1933 and the Securities Exchange Act of 1934 and corporate governance-related class actions from the grant of original jurisdiction under § 1332(d)(2). And CAFA § 1332(d)(5) potentially excludes certain class actions with government defendants. There is, however, *no other exception* from the mandatory exercise of CAFA jurisdiction—for the FAA or any other act of Congress.

a. Congress Can Be Presumed to Have Been "Thoroughly Familiar" with the "Unflagging Obligation" of the Federal Courts to Comply with Its Mandate That They Exercise Their Vested CAFA Jurisdiction

The "unflagging obligation" of the federal courts to exercise the jurisdiction vested in them by Congress was well-established when the CAFA jurisdictional statute was enacted in 2005. As stated by the Supreme Court in *Sprint Comm., Inc. v. Jacobs,* 571 U.S. 69, 77 (2013):

> Federal courts, it was early and famously said, have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia,* [19 U.S. 264, 404] (1821). Jurisdiction existing, this Court has cautioned, a federal court's "obligation" to hear and decide a case is "virtually unflagging." *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817[] (1976).

"[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from [the Supreme

Court] and that it expected its enactment to be interpreted in conformity with them." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979). Particularly when Congress has enacted a complex, detailed jurisdictional statute like CAFA.

b. "[I]f the Congress [had] intended to provide additional exceptions [to CAFA], it would have done so in clear language."

In CAFA, as established above, Congress has set out several precisely defined exceptions to the exercise of jurisdiction—but not an exception for the FAA. As stated in Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts,* Canon 8, Omitted-Case Canon, at 93 (2012):

> [T]he judge [should not] elaborate unprovided for exceptions to a text, as Justice Blackman noted while a circuit judge: "[I]f the Congress [had] intended to provide additional exceptions, it would have done so in clear language." (quoting *Petteys v. Butler,* 367 F.2d 528, 538 (8th Cir. 1966) (Blackmun, J., dissenting)).

Cf. Colorado River Water Conservation Dist., 424 U.S. at 807 (28 U.S.C. § 1345 provides that the district courts shall have original jurisdiction over all civil actions brought by the Federal Government "[e]xcept as otherwise provided by Act of Congress.").

In this case, it is the duty of the federal courts to adhere to the limited express exceptions Congress included in CAFA, not to require Congress to include another one for FAA arbitration.

B. *Epic* Prescribes The Rule Of Decision For This Case—That The Choice Of The People's Representatives Overrides The FAA And Its Federal Common Law

The various criteria applied in connection with repeals by implication are not easily synthesized in application, although Adell establishes in Argument II(B)(2) & (B)(3) below why the governing principles and analysis employed in *Epic* establish that, in this case, CAFA overrides the FAA.

However, the following passage from *Epic,* quoted by the District Court in its March 5, 2019 Opinion (RE 32, Page ID # 436), read in light of the express purposes of Congress set out in CAFA, can support no other conclusion but that CAFA overrides the FAA:

> The respective merits of class actions and private arbitration as means of enforcing the law are questions constitutionally entrusted not to the courts to decide but to the policymakers in the political branches where those questions remain hotly contested. ... This Court is not free to substitute its preferred economic policies for those chosen by the people's representatives. *Epic*, 138 S. Ct. at 1632.

Epic further observes that the required deference by the courts to the economic policies "chosen by the people's representatives" is consistent with "respect for Congress as drafter" and "respect for separation of powers." *Id.* at 1624.

Adell believes that respect for "the intention of the framers" takes priority in the ranking of Congress's express purposes in enacting CAFA. But *Epic* provides a clear, readily applicable rule why CAFA must prevail over the FAA here.

1. Unlike Congress's Clear, Expressly Stated Purposes under CAFA, the "Federal Common Law" Under the FAA Exceeds the "Indicated" Purpose of FAA § 2—"To Make Arbitration Agreements as Enforceable as Other Contracts, But Not More So"

The modern law of FAA arbitration is substantially court-made "federal common law." *See Southland Corp. v. Keating,* 465 U.S. 1, 19 (1984) (because FAA § 2 does not define permissible grounds for revocation, "the judiciary must fashion the limitations as a matter of federal common law"); *Cooper*, 367 F.3d at 512 (approving district court application of "federal common law" in arbitration case). And, unlike CAFA, there is nothing in the FAA statute that expresses any congressional statement of findings or purposes—clearly or otherwise. The closest statement of purpose is based on § 2 and its "saving clause"—"save upon such grounds as exist at law or in equity for the revocation of any contract"—which has been described by the Supreme Court a number of times as the purpose "indicated" by Congress "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 404 n.12 (1967); *Volt,* 489 U.S. at 478 (quoting *Prima Paint*).

That the FAA is a body of court-made "federal common law" is a point made clear during the December 8, 2020 oral argument in *Schein v. Archer &*

White Sales, Inc., No. 19-963 ("*Schein II*").[9] First, Justice Alito asked Schein's counsel about the "basis for the presumption of arbitrability" under FAA § 2 first recognized in *Moses H. Cone, infra,* when the Supreme Court has also said § 2 "requires equal treatment of arbitration contracts and other contracts." Tr. 15. Schein's counsel candidly responds: "[I]f I were pressed, I would say it's probably ultimately a matter of federal common law, but it also appears to flow from the terms … and the structure of the statutes themselves." Tr. 16.

Justice Gorsuch followed up on Justice Alito's line of questioning, asking Schein's counsel whether there was "any statutory basis for" "the presumption in favor of arbitration and the exception for clear and unmistakable delegations of arbitrability" when "Section 2 seems to suggest we follow normal contract rules in trying to discern the parties' intentions." Tr. 24-25. Pressed again for a "statutory basis" by Justice Gorsuch, the response of Schein's counsel was "… I can't do really much better than Section 2." Tr. 26.

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[9] Transcript available at:
https://www.supremecourt.gov/oral_arguments/argument_transcript/2020#list

This was the second trip for *Schein* up to the Supreme Court. In *Schein I,* the Supreme Court rejected the determination of arbitrability by the court when the contract delegates arbitrability to the arbitrator, even if the court decides that an argument that the arbitration agreement applies to a particular dispute is "wholly groundless." *Schein v. Archer & White Sales, Inc.,* 139 S. Ct. 524, 528 (2019). The Supreme Court subsequently dismissed the petition for certiorari in *Schein II* "as improvidently granted." 141 S. Ct. 656 (Jan. 25, 2021).

Under *Epic,* the federal courts are not free to "to substitute [their own] preferred economic policies for those chosen by the people's representatives." 138 S. Ct. at 1632. This fundamental principle, flowing not only from principles of statutory construction but separation of powers, requires that the "federal common law" of FAA arbitration, which vastly exceeds the language of § 2 in its reach, take a back seat to the express, overriding purposes of Congress under CAFA.

2. CAFA Is Precisely the Kind of Statute That Satisfies the Factors Absent from the NLRA in *Epic*

It is beyond peradventure that the fundamental attributes of arbitration under the FAA irreconcilably conflict with class actions under CAFA. Arbitration is designed to resolve a single dispute between parties to a single agreement in a proceeding, with a "presumption of privacy and confidentiality," resulting in a single award with limited judicial review. *Stolt-Nielsen,* 559 U.S. at 686. A principal advantage of arbitration is "informality." *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 348 (2011). Additionally, as noted in *Epic,* arbitrators are likely not sufficiently qualified to oversee the complex procedural issues presented by class actions, such as adequacy of class representatives and typicality of the claims, what type of notice is required and whether there is a right to opt out of the action, and how to handle complex discovery. 138 S. Ct. at 1623 (citing *Concepcion*). With CAFA, Congress in 2005 expressly intended precisely the opposite of arbitration under the FAA.

As an initial matter, with CAFA, Congress intended to and did vest the federal courts with Article III diversity jurisdiction, and "commanded" them to adjudicate class actions of national importance to benefit society, improve the economy and protect consumers while enabling the consumers to "receive prompt recoveries for … legitimate claims"—subject only to a few limited exceptions. *See* Argument II(A), *supra.*

In constitutionally stark contrast, it is well-established that Congress did not intend to and did not create independent federal district court subject-matter jurisdiction under the FAA. "Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute [such as] diversity of citizenship." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 25 n.32 (1983); *see also Ford v. Hamilton Inv., Inc.*, 29 F.3d 255, 257-58 (6th Cir. 1994) (quoting *Moses H. Cone*). Thus, the only reason Verizon was able to move to compel arbitration was because Adell had properly invoked CAFA jurisdiction for her Complaint.

Further, CAFA satisfies the most important factors analyzed in *Epic* as a basis for its holding that the NLRA does not override the FAA. As noted in *Epic,* the NLRA's purpose is to "secur[e] to employees rights to organize unions and bargain collectively," and "it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral

forum." 138 S. Ct. at 1618. NLRA § 7 includes no "procedures for resolving 'actions,' 'claims,' 'charges,' and 'cases.'" *Id.* at 1626. Furthermore, "the notion that Section 7 confers a right to class or collective actions seems pretty unlikely when you recall that procedures like that were hardly known when the NLRA was adopted in 1935," and Fed. R. Civ. P. 23 "didn't create the modern class action until 1966." *Id.* at 1624. And "the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act." *Id.* at 1627.[10]

CAFA's express purposes—in addition to restoring the intent of the framers "by providing for Federal court consideration of interstate cases of national importance under [Article III, § 2] diversity jurisdiction"—are precisely about class actions. *See* CAFA § 2, 119 Stat. 4-5, RE 19-11, Page ID # 181-182. CAFA uses the term "class actions" twelve times in the first two sections alone. *Id.* It precisely defines the scope of the jurisdiction it vests in the federal courts (as it must), as well as the limited exceptions to the exercise of that jurisdiction. *See* CAFA § 4, 119 Stat. 9-12, RE 19-11, Page ID # 186-189. It provides detailed procedures for the removal to federal court of class actions that satisfy the

[10] It is puzzling that the District Court quoted this sentence from *Epic* in its March 5, 2019 Opinion (RE 32, Page ID # 436)—for starters given CAFA's name: the "Class Action Fairness Act of 2005." *See* CAFA § 1(a), 119 Stat. 4, RE 19-11, Page ID # 181.

jurisdictional requirements. *See* CAFA § 5, 119 Stat. 12-13, RE 19-11, Page ID # 189-190. And it creates, in § 3, a "Consumer Class Action Bill Of Rights" prescribing procedures regarding such things as notice and the approval of class action settlements for the protection of consumers. *See* CAFA § 3, 119 Stat. 5-8, RE-19-11, Page ID # 182-186.

CAFA is precisely what the NLRA and the statutes in the other cases identified in *Epic* are not. *Cf.* 138 S. Ct. at 1627-28. CAFA is an expression of the choice of the peoples' representatives to provide the people with protections from and remedies for consumer fraud through the class action mechanism, because "[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims … [in] a single action against a defendant that has allegedly caused harm."

Epic fully supports a holding by this Court that CAFA overrides the FAA.

3. CAFA Satisfies the Criteria for Implied Repeal Identified in Other Supreme Court Cases

While it is true that "repeals by implication are strongly disfavored," it is also true that a later statute can "implicitly repeal[] an earlier one [where] there is a clear repugnancy between the two." *United States v. Fausto*, 484 U.S. 439, 452-53 (1988). Additionally, "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari,* 417 U.S. 535, 550-51 (1974). And "where the

scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand … a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000).

In terms of whether CAFA and the FAA speak on the same topic, the most that can be said is that CAFA and the FAA both deal with dispute resolution mechanisms. Beyond that, the nature of the disputes bear nothing in common. Although the federal common law struggles with recognizing the unexpressed intentions of Congress when it enacted the FAA—intentions reflected in the above-quoted FAA legislative history serving as the principal source used in the federal common law to discern the reasons for the FAA's enactment—the bottom line is that the FAA was intended to provide a judicial mechanism to summarily enforce agreements voluntarily entered into by parties of substantially equal bargaining power to extrajudicially, confidentially resolve their primarily private disputes of no national importance. And it is indisputable that CAFA is intended to protect the rights of consumers across the nation, all sharing the same claims, who in no way fit that FAA mold.

The fundamental attributes of arbitration under the FAA thwart the express purposes of Congress in enacting CAFA. Arbitration under the FAA (i) prevents

"the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm"; (ii) prevents "fair and prompt recoveries for class members with legitimate claims"; (iii) "[frustrates] the intent of the framers of the United States Constitution by [preventing] Federal court consideration of interstate cases of national importance under diversity jurisdiction"; and (iv) precludes and eliminates the Congressionally intended "benefit [to] society [of] encouraging innovation and lowering consumer prices." And the FAA also thwarts Congress's "strong preference that interstate class actions be heard in federal court" expressed in CAFA's legislative history quoted above.

It would be absurd for Congress to have intended to create CAFA jurisdiction so the FAA can piggyback onto that jurisdiction to eviscerate CAFA and preclude federal courts from adjudicating class actions satisfying CAFA's jurisdictional requirements. That is a "positive repugnancy." *E.g., Arthur v. Homer*, 96 U.S. 137, 138, 140 (1877).

There is only way that Adell can think of to "reconcile" CAFA and the FAA. Because the FAA does not create an independent basis for federal court jurisdiction, then the FAA must be limited to do what the federal courts under the federal common law have said Congress has "indicated" is the FAA's purpose

under § 2: "[T]o make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint, supra.*

In the case of a dispute over a consumer contract among diverse parties requiring adjudication that satisfies the CAFA jurisdictional requirements and squarely falls within its express purposes, that matter should be adjudicated as a class action in federal court—*whether or not the consumer contract includes an arbitration agreement.* Both contracts should be treated equally.

CONCLUSION

For all the reasons stated herein, the District Court's March 5, 2019 Opinion and its May 24, 2021 Opinion should be reversed by this Court.

Dated: August 23, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, AND WITH TYPEFACE AND TYPE STYLE REQUIREMENTS

This appeal brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(b)(i) because it contains 12,405 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Sixth Circuit R. 32(b)(1).

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2021, this Brief of Plaintiff-Appellant Lorraine Adell was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system, and that all parties or their counsel are registered CM/ECF users and have been served through the CM/ECF system.

Dated: August 23, 2021

s/ William Robert Weinstein
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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rules 28(a)(1) and 30(g), Plaintiff-Appellant Adell hereby designates relevant documents from the District Court record:

Record Entry #	**Description**	**Page ID Range**
1	Class Action Complaint	1-21
7-1	Class Action Complaint Exhibit 1—Verizon Customer Agreement	40-47
17	Plaintiff's Motion for Partial Summary Judgment on Her Individual Claims for Declaratory Judgment	90-92
18	Plaintiff's Memorandum of Law in Support of Motion for Partial Summary Judgment on Her Individual Claims for Declaratory Judgment	93-119
19	Declaration of William R. Weinstein in Support of Plaintiff's Motion for Partial Summary Judgment on Her Individual Declaratory Judgment Claims	120-125
19-1	Weinstein Declaration Exhibit 1—Verizon Customer Agreement	126-134
19-2	Weinstein Declaration Exhibit 2—Verizon Customer Agreement	135-142
19-3	Weinstein Declaration Exhibit 3—Verizon Customer Agreement	143-150
19-4	Weinstein Declaration Exhibit 4—Excerpt from Defendant's Response to Plaintiff's Statement of Uncontested Facts and Statement of Additional Material Facts	151-157
19-5	Weinstein Declaration Exhibit 5—Excerpt from Verizon Communications Inc. 2017 Form 10-K	158-160

19-6	Weinstein Declaration Exhibit 6—Wikipedia entry for List of U.S. States by Population	161-165
19-7	Weinstein Declaration Exhibit 7—Excerpt of 1923 FAA Senate Subcommittee Hearings	166-170
19-8	Weinstein Declaration Exhibit 8—1924 FAA House Hearing	171-172
19-9	Weinstein Declaration Exhibit 9—Excerpt of 1924 FAA Joint Hearings	173-176
19-10	Weinstein Declaration Exhibit 10—Excerpt of Cohen, Dayton, The New Federal Arbitration Law	177-179
19-11	Weinstein Declaration Exhibit 11—Class Action Fairness Act of 2005 - Pub. L. No. 109-2	180-191
19-12	Weinstein Declaration Exhibit 12—Excerpt of CAFA Legislative History	192-199
20	Declaration of Plaintiff Lorraine Adell in Support of Her Motion for Partial Summary Judgment on Her Individual Declaratory Judgment Claims	200-202
20-1	Adell Declaration Exhibit 1—Retail Installment Contract	203-207
20-2	Adell Declaration Exhibit 2—Excerpt from July 3, 2017 Verizon Bill	208-210
21	Defendant's Motion to Compel Arbitration and Stay Proceeding under the Federal Arbitration Act or, Alternatively, to Dismiss for Lack of Subject-Matter Jurisdiction	211-213
21-2	Declaration of Melissa Sandoval	242-266

23	Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Compel Arbitration and Stay Proceeding	272-293
32	March 5, 2019 Opinion and Order	430-437
33	Plaintiff's Motion to Amend for Certification Under 28 U.S.C. § 1292(b) the District Court's March 5, 2019 Order Staying the Action	438-439
34	Plaintiff's Memorandum of Law in Support of 28 U.S.C. § 1292(b) Motion	440-451
37	October 18, 2019 Opinion and Order	485-488
38	Plaintiff's Motion Under 9 U.S.C. § 10(a)(4) to Vacate July 22, 2020 Arbitration Award ("Motion to Vacate")	489-490
38-1	Plaintiff's Memorandum of Law in Support of Motion to Vacate	491-504
38-2	Motion to Vacate Exhibit 1--July 22, 2020 AAA Arbitrator Award	505-508
38-3	Motion to Vacate Exhibit 2--July 23, 2020 AAA Delivery of July 22, 2020 Arbitrator Award	509-512
38-4	Motion to Vacate Exhibit 3—Adell's December 12, 2019 AAA Demand for Arbitration	513-542
38-5	Motion to Vacate Exhibit 4—AAA Confirmation of December 12, 2019 Filing of Adell's Demand for Arbitration	543-545
40	Defendant's Response in Opposition to Plaintiff's Motion to Vacate and Cross-Motion to Confirm Arbitration Award	556-566

41	Plaintiff's Reply Memorandum in Support of Motion to Vacate and Response in Opposition to Defendant's Cross-Motion to Confirm Arbitration Award	567-573
42	May 24, 2021 Opinion and Order	574-580
43	Judgment	581
44	Notice of Appeal	582-583