No.

In the
Supreme Court of the United States

LORRAINE ADELL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioner,

v.

CELLCO PARTNERSHIP, DOING BUSINESS AS VERIZON WIRELESS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Although the waiver of the personal right to an Article III adjudication and other fundamental constitutional rights must be voluntary, the Sixth Circuit here and other federal courts have rejected the applicability of the heightened constitutional standard for voluntary consent in cases involving arbitration under the Federal Arbitration Act (FAA), and instead employ a substantially less rigorous analysis of unconscionability under state contract law to find the waiver enforceable.

Question 1 is: Whether the voluntariness of the waiver of the personal right to an Article III adjudication under the Class Action Fairness Act of 2005 (CAFA) and consent to non-Article III arbitration under the FAA is governed by the heightened constitutional standard, or by the state law of contract unconscionability?

II. CAFA, 28 U.S.C. § 1332(d), commands the federal courts to exercise jurisdiction over class actions with 100 or more class members whose aggregated claims against a defendant that is a citizen of a different state exceed $5,000,000, as here. CAFA's express purposes include "restor[ing] the intent of the framers … by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction," and "benefit[ting] society by … lowering consumer prices." CAFA § 2(b), 119 Stat. 5. The Sixth Circuit held that it could give effect to both CAFA and the FAA by exercising CAFA jurisdiction to compel one bilateral arbitration under the FAA, thereby rendering CAFA's

command to adjudicate class actions and its express purposes nugatory.

Question 2 is: Whether CAFA and its express purposes inherently and irreconcilably conflict with and override the FAA?

RELATED PROCEEDINGS

Lorraine Adell, individually and on behalf of all others similarly situated, v. Cellco Partnership dba Verizon Wireless, No. 1:18CV623 (N.D. Ohio):

- Opinion and order denying motion for partial summary judgment on claims for declaratory judgment and granting motion to compel arbitration and for stay pending arbitration (Mar. 5, 2019) (App. 31-40)
- Opinion and order denying motion to amend for certification under 28 U.S.C. § 1292(b) (Oct. 18, 2019) (App. 27-30)
- Opinion and order denying motion to vacate arbitration award and granting motion to confirm (May 24, 2021) (App. 17-24)
- Judgment (June 2, 2021) (App. 25-26)

Lorraine Adell, individually and on behalf of all others similarly situated, v. Cellco Partnership dba Verizon Wireless, No. 21-3570 (6th Cir.):

- Opinion affirming judgments of district court (May 11, 2022) (App. 1-14)
- Judgment (May 11, 2022) (App. 15-16)
- Order denying petition for rehearing en banc (June 16, 2022) (App. 41-42)

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PETITION FOR A WRIT OF CERTIORARI

Lorraine Adell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion (App. 1-14) is unreported but available at 2022 WL 1487765. The district court's opinion denying Adell's motion to vacate the arbitration award and granting Verizon's motion to confirm (App. 17-24) is unreported but available at 2021 WL 2075475. The district court's opinion denying Adell's motion for partial summary judgment on her individual claims for declaratory judgment and granting Verizon's motion to compel and for a stay pending arbitration (App. 31-40) is unreported but available at 2019 WL 1040754.

JURISDICTION

The Sixth Circuit's judgment was entered on May 11, 2022 (App. 15-16). The Sixth Circuit's order denying Adell's timely petition for rehearing en banc was entered on June 16, 2022 (App. 41-42), thereby extending the time to file this petition until September 14, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 1, of the U.S. Constitution provides in pertinent part: "The judicial Power of the United States, shall be vested in one Supreme Court, and in

such inferior courts as the Congress may from time to time ordain and establish."

Article III, § 2, of the U.S. Constitution provides in pertinent part: "The judicial Power shall extend … to Controversies … between Citizens of different States."

The Judiciary Act of 1789, § 11, 1 Stat. 78 (Sept. 24, 1789), provides in pertinent part: "[T]he circuit courts shall have original cognizance … of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and … the suit is between a citizen of the State where the suit is brought, and a citizen of another State."

CAFA § 2, Pub. L. No. 109-2, 119 Stat. 4-5 (Feb. 18, 2005), provides in pertinent 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.
>
> * * *
>
> (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.

9 U.S.C. § 2 (FAA § 2) provides: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

CAFA, 28 U.S.C. § 1332(d), is reproduced in the appendix to this petition (App. 43-51).

INTRODUCTION

The two questions presented by Adell's petition involve fundamental, inextricably intertwined rights and obligations under Article III of the Constitution: (1) the personal right to invoke the exercise of the Article III judicial power for cases properly brought within the CAFA diversity jurisdiction of the federal courts; and (2) the unflagging obligation of the federal courts to exercise the judicial power to adjudicate cases properly brought within their CAFA jurisdiction. The Sixth Circuit and other federal courts, applying the "liberal federal policy favoring arbitration agreements," have elevated the FAA above the Constitution and rendered meaningless these most fundamental Article III rights and obligations. The lower courts' holdings wholly conflict with the relevant decisions of this Court, as well as the Article III foundation of our Constitutional form of government. This Court's intervention is essential to put the lower courts back on the right path.

1. Question 1 asks whether the voluntariness of the waiver of the personal right to an Article III adjudication under CAFA and consent to non-Article III arbitration under the FAA is governed by the heightened constitutional standard, or by the state law of contract unconscionability. The Sixth Circuit held that state law controlled.

By enacting diversity jurisdiction in § 11 of the Judiciary Act of 1789, the First Congress simultaneously conferred on the citizens of the United States the "personal right [to] Article III's *guarantee* of an impartial and independent federal adjudication," *Commodity Futures Trading Comm'n v. Schor,* 478

U.S. 833, 848 (1986) (emphasis added), and conferred on the federal courts the "virtually unflagging obligation" to adjudicate a party's case, *Colo. River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976), that is properly "brought within the bounds of [that] federal jurisdiction." *Stern v. Marshall,* 564 U.S. 462, 484 (2011).

The "personal right" to the exercise of the Article III judicial power is so "implicit in the concept of ordered liberty" that "neither liberty nor justice would exist if [it] were sacrificed." *Cf. Palko* v. *Connecticut,* 302 U.S. 319, 325, 326 (1937). "The power of determining causes between … the citizens of different States, is … essential to the peace of the Union." The Federalist No. 80, p. 477 (Hamilton) (C. Rossiter ed. 1961) (The Federalist).

Indeed, Adell submits, the personal right to the exercise of Article III diversity jurisdiction for the judicial adjudication of common law claims is the most fundamental of personal constitutional rights envisioned by the framers, because it originates within the body of the Constitution, and was first conferred by Congress in the Judiciary Act of 1789 on September 24, 1789—one day before the Bill of Rights were proposed by the First Congress on September 25, 1789, more than two years before those amendments were finally ratified on December 15, 1791, and eighty-five years before Congress conferred federal-question jurisdiction on the federal courts in the Judiciary Act of 1875. *E.g., Romero v. Int'l Terminal Operating Co.,* 358 U.S. 354, 362-63 (1959).

Congress's enactment of CAFA diversity jurisdiction conferring the personal right to an Article

III adjudication is equally fundamental. CAFA was enacted by an overwhelming majority of the people's elected representatives on February 18, 2005—a 279-149 vote in the House and a 72-26 vote in the Senate.[1] However, the scope of CAFA jurisdiction and the reach of the Article III judicial power conferred under it are vast.

Section 11 of the Judiciary Act conferred original diversity jurisdiction on the circuit courts over "all suits of a civil nature at common law or in equity, where the matter in dispute exceed[ed], exclusive of costs, the sum or value of five hundred dollars" between citizens of different states. Two citizens from different states with a $501 breach of contract dispute could invoke the Article III judicial power.

In stark contrast, CAFA confers original diversity jurisdiction on district courts to adjudicate civil class actions, generally involving at least 100 citizens of one state with the same claim or claims against a single defendant that is a citizen of a different state. 28 U.S.C. §§ 1332(d)(2) & 1332(d)(5)(B). Under § 1332(d)(2) & (d)(6), the aggregated claims of class members must "exceed[] the sum or value of $5,000,000, exclusive of interest and costs"—*ten thousand times* the amount of the dispute in § 11 of the Judiciary Act of 1789 (the current § 1332(a) requirement of $75,000 is 150 times the § 11 amount). And instead of two citizens, the civil action

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[1] Actions Overview, S.5—Class Action Fairness Act of 2005, https://www.congress.gov/bill/109th-congress/senate-bill/5/actions

brought under CAFA can involve not just 100 class members, but tens of thousands, or more.

In this case, Adell has properly invoked CAFA jurisdiction regarding the questions presented in her petition on behalf of a proposed class of Verizon's customers with many tens of millions of cellphones, and has also asserted common law claims for breach of contract on behalf of a smaller class comprised of millions of Verizon's Ohio customers that can only be adjudicated if Adell succeeds in the instant proceeding.

It is beyond dispute that the waiver of a constitutional right must be "voluntary," and this includes the waiver of the constitutional right to an Article III adjudication and consent to a non-Article III adjudication for matters properly brought within the jurisdiction of the federal courts. *Wellness Int'l Network, Ltd. v Sharif,* 575 U.S. 665, 685 (2015). In evaluating the voluntariness of consent, courts "do not presume acquiescence in the loss of fundamental rights," and "'indulge every reasonable presumption against waiver' of fundamental constitutional rights." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.,* 527 U.S. 666, 682 (1999), *quoting Aetna Ins. Co. v. Kennedy,* 301 U.S. 389, 393 (1937), *Ohio Bell Tel. Co. v. Public Util. Comm'n of Ohio,* 301 U.S. 292, 307 (1937), and *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). *See also Roell v. Withrow,* 538 U.S. 580, 595 (2003) (Thomas, J., dissenting) (quoting *Aetna Ins. Co.* and *Ohio Bell Tel. Co.*) (waiver of "right to an Article III judge"). *Accord Fuentes v. Shavin,* 407 U.S. 67, 94 n.31 (1972) (quoting *Aetna Ins. Co.*) (waiver in consumer contract); *D.H. Overmyer Co. v. Frick Co.,*

405 U.S. 174, 188-89 (1972) (Douglas, J., concurring) (there is a "heavy burden against the waiver of constitutional rights, which applies even in civil matters") (citing *Ohio Bell Tel. Co.* and *Aetna Ins. Co.*) (waiver in commercial contract).

"[N]otification of the right to refuse" "is a prerequisite to any inference of [voluntary] consent" to the waiver of the personal right to an Article III adjudication, and to adjudication by a non-Article III adjudicator. *Wellness,* 575 U.S. at 685, *quoting Roell,* 538 U.S. at 588 n.5, 590. When this case was commenced in 2018, Verizon's "retail connections" (i.e., lines) exceeded 116 million (D. Ct. Dkt. # 19-5), and it is undisputed that Verizon did not, does not and will not offer Adell and Verizon's millions of other customers the right to refuse the waiver of their personal Article III rights and consent to non-Article III adjudication by arbitration under the FAA (D. Ct. Dkt. # 4, ¶ 12). A condition for cellphone usage by Verizon's millions of customers is their involuntary consent to the waiver of their personal Article III rights.

Citing, *inter alia*, the FAA's "liberal federal policy favoring arbitration agreements," App. 7, the Sixth Circuit rejected Adell's argument to apply the heightened constitutional standard for the voluntary waiver of her personal Article III right. The court concluded that *Wellness* "did not disrupt the firmly established rule that consent is a prerequisite to the enforcement of arbitration agreements" under the FAA, App. 9, and thus transformed the constitutional waiver issue into one of unconscionability under state contract law. App. 10-11. Other federal courts have

similarly rejected the applicability of the heightened "knowing and voluntary" standard to the FAA, and have applied state contract law in connection with the waiver of Article III and other constitutional rights. *See Katz v. Cellco P'ship dba Verizon Wireless,* 2013 WL 6621022, at *13 (S.D.N.Y. Dec. 12, 2013) (personal Article III right) (citing cases), *aff'd,* 794 F.3d 341 (2d Cir. 2015); *Am. Heritage Life Ins. Co. v. Orr,* 294 F.3d 702, 711 (5th Cir. 2002) (Seventh Amendment right to jury trial).

Although in *Riley v. California,* 573 U.S. 373, 385 (2014), and *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018), this Court has twice effectively taken judicial notice that cellphones and their use are involuntary, the Sixth Circuit rejected the applicability of these decisions because its "precedent has squarely rejected similar arguments." App. 11. In *Riley*, this Court cited a 2013 Pew Research Update establishing that "a significant majority of American adults [own] smartphones," 573 U.S. at 385. In fact, the current numbers show that "[t]he vast majority of [adult] Americans—97%—now own a cellphone of some kind, [and t]he share of Americans that own a smartphone is now 85%[.]"[2] But the Court has already taken judicial notice of this in even starker numbers: "There are 396 million cell phone service accounts in the United States — for a Nation of 326 million people." *Carpenter,* 138 S. Ct. at 2211. Cellphones are no longer only the Wellsian Martian's perception of "an important feature of the human anatomy," or ever-expanding storage for our most valuable "privacies of

[2] Pew Research Center "Mobile Fact Sheet" dated April 7, 2021, https://www.pewresearch.org/internet/fact-sheet/mobile

life," *Riley,* 573 U.S. at 403, *Carpenter,* 138 S. Ct. at 2214, 2217. They are a microchip portal instantly connecting our innermost thoughts and feelings to our personal and public worlds.

Under *Riley* and *Carpenter*, dangerous felons are entitled to the protections of the Fourth Amendment in connection with their cellphones. However, under the Sixth Circuit's holding, the vast majority of the Nation, all law-abiding cellphone customers of Verizon and the other major cellphone service providers, have lost their most fundamental Article III constitutional right to the federal court adjudication of their legitimate common law claims asserted to recover their wrongly-taken property. *Cf. Reiter v. Sonotone Corp.,* 442 U.S. 330, 338 (1979) ("Money, of course, is property.").

Nothing in the FAA can support this constitutional vacuum. The FAA's overriding policy as derived from FAA § 2 is "to place [arbitration] agreements upon the same footing as other contracts" and "to make arbitration agreements as enforceable as other contracts, but not more so." *Morgan v. Sundance Inc.,* 142 S. Ct. 1708, 1713 (2022) (quotations and citations omitted). Whatever the proper application of state contract law principles to issues regarding the validity of formation, legal enforceability and scope of arbitration agreements, these principles cannot displace the Constitution with its heightened requirements of "every reasonable presumption against waiver of fundamental constitutional rights" and "notification of the right to refuse [as] a prerequisite to any inference of [voluntary] consent" to the non-Article III adjudication.

2. Question 2 asks the Court to decide whether CAFA and its express purposes inherently and irreconcilably conflict with and override the FAA. The Sixth Circuit cursorily held that there is nothing in CAFA and its express purposes sufficient to displace the FAA. App. 13-14. Although the NLRA faced a "stout uphill climb" in *Epic Sys. Corp. v. Lewis,* 138 S. Ct. 1612, 1624 (2018), Adell submits that it is the FAA which must climb the constitutional mountain, not the other way around, and that the FAA falls far short of overriding CAFA.

The personal right to invoke the Article III judicial power for matters properly brought within the bounds of CAFA diversity jurisdiction "[is] Article III's *guarantee* of an impartial and independent federal adjudication" of the class action. *Schor,* 478 U.S. at 848; *Wellness,* 575 U.S. at 675 (quoting *Schor*). The absence of a "guarantee" of judicial adjudication of substantive rights under other federal statutes—*not* the Constitution—was a common denominator for upholding individual arbitration in three of the Court's leading cases deciding the issue. *See Epic,* 138 S. Ct. at 1628 ("Nothing in our cases indicates that the NLRA guarantees class and collective action procedures[.]"); *CompuCredit Corp. v. Greenwood,* 565 U.S. 95, 102 (2012) (under Credit Repair Organizations Act (CROA) "this mere 'contemplation' of suit in any competent court does not *guarantee* suit in all competent courts") (emphasis in original); *Am. Express Co. v. Italian Colors Restaurant,* 570 U.S. 228, 233 (2013) ("the antitrust laws do not guarantee an affordable [class action] procedural path to the vindication of every claim"). And the FAA isn't even a jurisdictional statute, it's an "anomaly" that has to

piggy-back onto existing federal jurisdiction before it can be asserted in the federal courts at all. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 25 n.32 (1983).

Inextricably intertwined with the personal Article III guarantee of a federal adjudication for matters properly brought within the bounds of CAFA jurisdiction is the "virtually unflagging obligation" of the federal courts to adjudicate them. Calling the obligation "virtually unflagging" is not emphatic enough. *See Cohens v. Virginia,* 19 U.S. 264, 404 (1821); *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans,* 491 U.S. 350, 358-59 (1989) (collecting cases); *Texas v. California,* 141 S. Ct. 1469, 1469-70 (mem.) (2021) (Alito, J., dissenting from denial of leave to file bill of complaint) (quoting *Cohens*).

"[T]hese emphatic directions would seem to resolve any argument" challenging CAFA's supremacy over the FAA. *Cf. Epic,* 138 S. Ct. at 1621. However, the CAFA statute also is overflowing with "textual and contextual clues" and "[l]inguistic and statutory context" confirming that the right to commence a class action under CAFA displaces the FAA. *Cf. Epic,* 138 S. Ct. 1625, 1626, 1627, 1631.

Under 28 U.S.C. § 1332(d)(2), Congress has commanded that "[t]he district courts *shall* have original jurisdiction of any civil action" satisfying the prescribed class action diversity of citizenship, numerosity and amount in controversy requirements—"shall have" jurisdiction being synonymous with the duty to exercise it. *See, e.g., Morgan,* 142 S. Ct. at 1714 ("shall" is "a command").

Yet the Sixth Circuit reduced CAFA's jurisdictional command to merely "the *ability* to hear … class action cases." App. 14 (emphasis in original).

Compared to the NLRA in *Epic,* the civil action Congress has commanded the federal courts to adjudicate under CAFA *is* a "class action," as CAFA's title and continual "class" references obviously confirm. Further, Congress has provided detailed directions in the CAFA statute on how the class action is to be adjudicated to protect the interests of class members in furtherance of Congress's express purposes. *See* CAFA § 3, 119 Stat. 5-9, entitled "Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions" (codified at 28 U.S.C. §§ 1711-15).

CAFA is replete with detailed exceptions to the exercise of the minimal diversity jurisdiction bestowed on the federal courts under § 1332(d)(2), none applicable here. There is a discretionary "home state" exception under § 1332(d)(3), a mandatory "home state" exception under § 1332(d)(4), "party" exceptions for government defendants and for insufficiently numerous proposed plaintiff classes under § 1332(d)(5), an exception for insufficiently large aggregated claims under § 1332(d)(6), and three "subject matter" exceptions in §1332(d)(9) for claims related to securities or internal corporate affairs under state law. However there is *no exception* for FAA arbitration, and none can be implied in the face of CAFA's emphatic command to exercise jurisdiction, and its complex, technically and procedurally detailed provisions with its numerous exceptions so painstakingly designed. *Cf. Boechler, P.C. v.*

Commissioner, 142 S. Ct. 1493, 1500-01 (2022) (no implicit exception for equitable tolling in *United States v. Brockamp,* 519 U.S. 347 (1997), where statute was written in "unusually emphatic form" with "detailed technical" language and numerous explicitly listed exceptions).

Congress knows how to make an exception to the exercise of jurisdiction conferred when it wants to. *Ex parte McCardle,* 74 U.S. 506, 513-14 (1869). "Had Congress intended [an exception for FAA arbitration], it easily could have drafted language to that effect." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014) (construing CAFA).

CAFA and its express purposes inherently and irreconcilably conflict with and override arbitration under the FAA. *Cf. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (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."). It is now hornbook law that class actions inherently conflict with the fundamental attributes of arbitration contemplated by the FAA—an "individualized and informal mode of" dispute resolution. *Viking River Cruises, Inc., v. Moriana,* 142. S. Ct. 1906, 1918 (2022), *citing, e.g., Epic,* 138 S. Ct. at 1623, *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (2010), and *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 348 (2011). CAFA is a class action jurisdictional statute expressly enacted, *inter alia,* to "assure fair and prompt recoveries for class members with legitimate claims" and to "benefit society by encouraging innovation and lowering

consumer prices." CAFA § 2(b)(1) & (b)(3). Private bilateral arbitration under the FAA prevents the achievement of these purposes, and is irreconcilably inconsistent with them.

Most important, and confirming its constitutional dimensions, is CAFA's express purpose 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"—an express purpose so singular that Congress has stated it only one other time of which Adell is aware, under the War Powers Resolution of 1973 (i.e., the "War Powers Act"), 50 U.S.C. § 1541(a), enacted "to fulfill the intent of the framers" in response to the Viet Nam war and the secret bombings in Cambodia. An Article III adjudication under diversity jurisdiction is the original, personal, fundamental constitutional right.

As detailed in the Statement of the Case, *infra,* the lower courts here ignored or cursorily brushed aside CAFA's text and express purposes—including restoring the intent of the framers. Instead, those courts essentially adopted a rule of decision that the failure of Congress to expressly exclude FAA arbitration in CAFA means that Congress nevertheless implicitly intended an exception for FAA arbitration that overrides the CAFA jurisdictional command. As a result, the lower courts "reconciled" CAFA and the FAA by exercising their CAFA jurisdiction to destroy it and prevent the achievement of Congress's express purposes.

This Court, and the lower federal courts, are not only "faithful agents" of the people's elected

representatives in Congress and their expressly stated economic choices, and are not only faithful agents to the Constitution. A. Barrett, *Substantive Canons and Faithful Agency*, 90 B. U. L. Rev. 109, 110, 116 (2010) (quoted *West Virginia v. Environmental Protection Agency,* 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring)). The federal courts are faithful agents of the people, *id.* at 113, who placed their faith in our form of government when they ordained and established the Constitution, and who continue to express their faith in its wisdom. This faith of the people and the federal courts is as inextricably intertwined as the personal rights of the people and the obligations of the federal courts conferred by CAFA under Article III.

Adell is asking this Court to ensure that Article III's guarantee of a federal adjudication of her class action case properly brought within the bounds of CAFA jurisdiction is honored.

STATEMENT OF THE CASE

1.a. Adell's class action arises out of Verizon's practices regarding its Administrative Charge surcharge, which was $0.40 per line when first implemented in 2005, has been increased numerous times, and was $1.23 per line when Adell's commenced her action in 2018. App. 2; D. Ct. Dkt. # 1 (Class Action Complaint) ("Complaint"), ¶¶ 35-36. Adell alleges that Verizon is "us[ing] the Administrative Charge as a discretionary pass-through of Verizon's general costs," contrary to the requirement of Verizon's Customer Agreement that it be comprised solely of governmental related costs, and that this "allows Verizon to increase the monthly rate for service …, breaching Verizon's

contracts with Ohio and nationwide customers." App. 3; Complaint ¶¶ 4, 5, 45, 53.

1.b. Verizon's Customer Agreement with Adell and Verizon's other customers includes an arbitration agreement governed by the FAA that (i) requires Adell and Verizon's other customers to bilaterally arbitrate all disputes otherwise properly commenced in federal court, (ii) precludes class action arbitrations, and (iii) limits the relief the arbitrator can award solely to individual relief. *See* D. Ct. Dkt. # 21-2; App. 5-6 (quoting agreement). The Customer Agreement states that it is "governed by federal law and the laws of the state encompassing the area code of [the customer's] wireless phone number." App. 9.

1.c. Verizon has admitted in federal court, and it is undisputed, "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[.]" D. Ct. Dkt. # 19-4, ¶ 12. And it is undisputed that Adell has never been given the right to refuse to consent to the arbitration agreement and still receive equipment and services from Verizon. D. Ct. Dkt. # 20, ¶ 5.

1.d. Adell's Complaint asserts claims for two different forms of relief on behalf of two different classes. First, on behalf of a Fed. R. Civ. P 23(b)(2) "declaratory judgment" class comprised of all Verizon wireless customers, Adell seeks declaratory judgments pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, Complaint ¶ 1(a):

> (i) That the waiver of their personal constitutional right to the exercise of the Article III judicial power in connection with their state law claims against Verizon for breach of contract brought within the diversity jurisdiction of the federal courts under CAFA is not "voluntary," and therefore not enforceable, because of the absence of the right to refuse to consent to non-Article III arbitration under the FAA and still receive their equipment and services from Verizon, and
>
> (ii) That their agreements to bilaterally arbitrate their state law claims brought within the diversity jurisdiction of the federal courts under CAFA are not enforceable because of the "inherent conflict" between arbitration under the FAA and CAFA's express purposes as stated by Congress.

Second, Adell asserts claims on behalf of a Rule 23(b)(3) class comprised of all Verizon wireless customers whose cellphones have an Ohio area code, seeking damages and other amounts awardable under Ohio law for breach of contract based on Verizon's Administrative Charge practices described above. Complaint ¶ 1(b).

2.a. In the district court, Adell moved for partial summary judgment on her individual declaratory judgment claims, and Verizon moved under FAA §§ 3-4 to compel bilateral arbitration of Adell's individual breach of contract claims and to stay

the action pending completion of the arbitration. App. 31-40. In its March 5, 2019 opinion and order, the district court denied Adell's motion and granted Verizon's motion compelling arbitration and staying the action. *Id.*

2.b. With respect to first issue, that Adell's waiver of her personal Article III right to a federal court adjudication under CAFA was involuntary and not enforceable, the district court began its analysis stating that "[t]he FAA establishes a liberal policy favoring arbitration agreements and any doubts regarding arbitrability should be resolved in favor of arbitration over litigation," and that "[t]he FAA requires courts to 'rigorously enforce' arbitration agreements." App. 34, 35.

Regarding Adell's argument that the standard for voluntary consent to the waiver of the personal right to the Article III adjudication is a matter of constitutional law as set out in *Wellness* and *Roell,* the district court observed that "the applicability of the *Wellness* consent standard in the bankruptcy context to an arbitration procedure under the FAA is an issue of first impression in the Sixth Circuit and nationwide," and then "decline[d] to accept [Adell's] invitation to extend the *Wellness* analysis in this fashion." App. 36.

Specifically, the district court rejected Adell's contention that the waiver of her Article III right was not voluntary, finding that "it is evidently clear that Adell possessed the right to refuse to sign the Verizon Customer Agreement and to take her business elsewhere[, and t]hus, the right to refuse was part and parcel of her consent." App. 37. Additionally, citing to

a Sixth Circuit non-Article III case under Michigan unconscionability law, the district court stated that "[w]hen a party has 'an alternative source with which it could contract,' the agreement cannot be unreasonable or unenforceable." *Id.*

2.c. With respect to the second issue, whether CAFA inherently and irreconcilably conflicts with and overrides the FAA, the district court first referenced *Epic*'s emphasis on the losing record of cases arguing conflicts between the FAA and other statutes. App. 38 (quoting 138 S. Ct. at 1627). Next, the district court quoted *Epic's* textual analysis that "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." App. 38 (quoting *id.*). The district court then quoted the following passage from *Epic*:

> 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.

App. 38-39 (quoting 138 S. Ct. at 1632).

Based on these quoted portions of *Epic,* the district court rejected the existence of any conflict between CAFA and the FAA, and held: "This Court agrees with [Verizon] 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." App. 39.

2.d. Because FAA § 16(b) precludes immediate appeals of interlocutory orders staying proceedings and compelling arbitration under FAA §§ 3-4, Adell moved for certification under 28 U.S.C. § 1292(b), but her motion was denied by the district court. App. 27-30. Thus, before appealing the denial of her motion for partial summary judgment on her individual declaratory judgment claims, Adell had to proceed with the arbitration, which resulted in an arbitrator's award dated July 22, 2020 rejecting her breach of contract claims. D. Ct. Dkt. # 38-2.

2.e. Adell then moved to vacate the arbitrator's award under FAA § 10(a)(4), asserting that the arbitrator exceeded his authority in arbitrating Adell's claims and issuing his award, based on the same two grounds for the unenforceability of the arbitration agreement raised in her motion for partial summary judgment that were rejected in the district court's March 5, 2019 opinion. D. Ct. Dkt. # 38.[3] In its

[3] Adell did not assert "manifest disregard of the law" as a ground to vacate an arbitration award under FAA § 10(a)(4), although the Sixth Circuit (rightly or wrongly) continues to recognize it as "a viable ground for attacking an arbitrator's decision." *Gibbens v. OptumRx, Inc.,* 778 F. App'x 390, 393 (6th Cir. 2019). Nevertheless, Adell vigorously disagrees with the arbitrator's bottom line holding that Verizon's arbitration agreement "cannot be said to be ambiguous" and allows the Administrative Charge to include non-governmental related costs (D. Ct. Dkt. # 38-2 at 4). The holding is clearly erroneous because, *inter alia*: (i) the same provision with the substantially identical language was held by the district court in *Smale v. Cellco P'ship,* 547 F. Supp.

May 24, 2021 opinion, the district court denied Adell's motion to vacate and granted Verizon's motion to confirm the award under FAA § 9. App. 17-24.

As noted by the district court, the basis for Adell's motion to vacate was "for the reasons asserted in [her] motion for partial summary judgment denied by the [district court's March 5, 2019 opinion]." App. 22. The district court further observed that Adell acknowledged that "there ha[d] been no intervening controlling law which would support the [district court's] departure from 'the law of the case' set out in its [March 5, 2019 opinion]." App. 22. Finally the district court noted that Adell's grounds in opposition to Verizon's motion to confirm "[were] the same grounds in support of her motion to vacate." App. 23.

Thus, the district court denied Adell's motion to vacate and granted Verizon's motion to confirm. App. 17, 24. It entered its judgment on June 2, 2021, finally enabling Adell to appeal the district court's denial of her motion for partial summary judgment, and its denial of her motion to vacate the award, pursuant to FAA §§ 16(a)(1)(D) and (a)(3). App. 15-16.

3.a. Adell timely appealed the district court's opinions denying her motion for partial summary and her motion to vacate and its judgment on June 22,

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2d 1181, 1186 (W.D. Wash. 2008), to "unambiguously state[]" that the Administrative Charge "must be 'related to [Verizon's] governmental costs"; and (ii) Verizon admitted to the *Smale* court in evidence Adell submitted to the arbitrator that essentially the same provision requires the Administrative Charge to be "related to [Verizon's] governmental costs." Adell is confident that all of the evidence and legal authority supporting her construction would receive appropriate consideration in the federal courts.

2021. D. Ct. Dkt. # 44. The Sixth Circuit affirmed in its opinion and judgment entered May 11, 2022 that are the subject of Adell's petition. App. 1-14, 15-16.

3.b. Like the district court, the Sixth Circuit also began its analysis by observing that "[t]he FAA evinces 'a liberal federal policy favoring arbitration agreements,'" App. 7 (quoting *Moses H. Cone*), and that "courts must 'rigorously enforce' arbitration agreements according to their terms," *id*. (quoting *Am. Express Co.*).

3.c. The Sixth Circuit addressed the issue of the voluntariness of Adell's waiver of her personal Article III right under a section entitled "Voluntariness under the Federal Arbitration Act." App. 8-11. According to the court, *Wellness* "did not disrupt the firmly established rule that consent is a prerequisite to the enforcement of arbitration agreements" under the FAA, App. 9—thereby transforming the constitutional waiver issue into one of unconscionability under Ohio contract law, App. 9-10. The court concluded that "[n]othing in the record … supports Adell's claim that her consent to the Customer Agreement was not knowing and voluntary," App. 9, citing its holding in a prior case finding no procedural unconscionability because a party is "not entitled to use a particular wireless provider," and because there was no "evidence that Verizon was [Adell's] only option for cell-phone service." App. 11. In so concluding, the Sixth Circuit also rejected the relevance of Verizon's "undoubtedly … greater economic power," and the fact

that the three other major cellphone providers also mandate non-Article III FAA arbitration.[4] App. 11.

3.d. The Sixth Circuit's analysis of whether CAFA and its express purposes inherently and irreconcilably conflict with and override the FAA relied exclusively on *Epic* and its analysis of whether the NLRA overrides the enforceability of arbitration agreements. The court first emphasized *Epic*'s discussion of the presumption against "repeals by implication," and that "[t]he goal when construing two statutes … is to interpret the acts 'to give effect to both.'" App. 12, *quoting Epic,* 138 S. Ct. at 1624 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

The Sixth Circuit then referenced *Epic's* discussion of "textual and contextual clues," including: (i) "when Congress wants to mandate particular dispute resolution procedures[,] it knows exactly how to do so" (quoting *Epic,* 138 S. Ct. at 1626); (ii) the absence of the proper "procedures for resolving 'actions,' 'claims,' 'charges,' and 'cases'" as evidence pointing against displacement of the FAA (quoting *Epic, id.*); and (iii) that "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" (quoting *Epic,* 138 S. Ct. at 1627). App. 13.

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[4] *See* https://www.sprint.com/en/legal/terms-and-conditions.html (Sprint Customer/Arbitration Agreement); https://www.att.com/legal/terms.consumerServiceAgreement.html (AT&T Customer/Arbitration Agreement); https://www.t-mobile.com/responsibility/legal/terms-and-conditions (T-Mobile Customer/Arbitration Agreement).

Without acknowledging that CAFA satisfies every quoted "textual and contextual clue" that *Epic* identified as missing from the NLRA, the Sixth Circuit held that "Adell has not pointed to evidence that could overcome the high barrier for displacement of the FAA." App. 13. It cursorily dismissed, *inter alia*, the fact that "CAFA undoubtedly discusses class actions," the significance of CAFA's grant of original jurisdiction, and the express findings and purposes of CAFA (including to restore the intent of the framers). App. 13-14. The court then held that "the jurisdictional changes wrought through CAFA do not show an obvious conflict with the FAA that would make Adell's arbitration agreement with Verizon unenforceable." App. 14. Finally, the Sixth Circuit held that "[w]e can, and the district court did, give effect to both [CAFA and the FAA]. The district court here had jurisdiction over Adell's case through CAFA and exercised that jurisdiction when compelling arbitration and enforcing the arbitration award." *Id.*

3.e. The Sixth Circuit judgment was entered May 11, 2022. App. 15-16. Adell timely moved for rehearing en banc, which was denied by the court's order entered June 16, 2022. App. 41-42.

4. Neither the district court or the Sixth Circuit discussed or mentioned this Court's extensive body of decisions regarding the heightened voluntariness standard for the waiver of Article III and other constitutional rights and the requirement to "indulge every reasonable presumption against waiver," the Court's Article III decisions turning on the lack of voluntary consent, or the Court's decisions regarding the "unflagging obligation" of the federal courts to

adjudicate cases properly brought within their jurisdiction.

REASONS FOR GRANTING THE PETITION

This past term, in *Morgan, supra,* the Court unanimously took the lower federal courts to task for relying on the FAA's "liberal national policy favoring arbitration" to create an arbitration-specific rule that a waiver of the right to arbitrate by litigating in court is only enforceable if the other party is "prejudiced" by the litigation conduct—a rule tracing its origins to a 1968 Second Circuit case holding that "waiver of the right to arbitrate 'is not to be lightly inferred.'" 142 S. Ct. at 1712-13. Finding no basis for this "bespoke rule of waiver" in the FAA or federal procedure outside the arbitration context, the Court emphasized that the FAA policy is "to make 'arbitration agreements as enforceable as other contracts, but not more so,'" and "about treating arbitration contracts like all others, not about fostering arbitration." *Id.* at 1713. *But see Moses H. Cone,* 460 U.S. at 24 ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements[.]"). *Cf. Reiter,* 442 U.S. at 341 ("[T]he language of an opinion is not always to be parsed as though we were dealing with language of a statute.").

The "liberal policy favoring arbitration" and its requirement for "rigorous enforcement" of arbitration agreements have become a brooding omnipresence, and this case squarely presents how they have been stretched to the constitutional breaking point. Although the questions presented are of first impression with no circuit split, their constitutional implications under Article III and the enormity of

their scope overwhelm an issue like the procedural waiver rule addressed in *Morgan*. Stated plainly, the courts below have written off the personal Article III rights conferred on cellphone users comprising the vast majority of the people of the Nation, and have condoned the destruction of their own jurisdiction, by elevating the FAA over CAFA—thereby rendering Congress's jurisdictional command and purposes in enacting CAFA nugatory.

The importance of the questions presented and the need for this Court to decide them cannot be gainsaid.

I. The Involuntary Waiver By Hundreds Of Millions Of Verizon And Other Cellphone Customers Of The Personal Right To An Article III Adjudication Conferred By CAFA Is A Question Of Paramount Importance Under The Constitution

There is no exaggeration in the formulation of this reason for granting the petition, and the importance of the question is self-evident. The indisputable numbers are part of the same 300 million-plus cellphone customers of which the Court took judicial notice—without citation—in *Carpenter*, *supra*. The "price" of using cellphones is the waiver of the personal Article III right by the vast majority of the Nation.

This Court has never diminished the force of its many decisions, including those cited in Introduction(1), *supra*, requiring the waiver of the personal Article III right and other fundamental constitutional rights to be voluntary, *e.g., Wellness,*

575 U.S. at 685, and requiring the federal courts to "indulge every reasonable presumption against waiver," *Coll. Sav. Bank,* 527 U.S. at 682.

The standards for evaluating the voluntariness of the waiver in a private contract while applying "every reasonable presumption against waiver" are set out in *Fuentes* and *Overmyer, supra.* In *Fuentes,* the Court found that the contractual waiver in the consumer contract 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 in a commercial contract was held to be voluntary for essentially the same reasons 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). Justice Douglas stated succinctly in his *Overmyer* concurrence "that the heavy burden against the waiver of constitutional rights … had been effectively rebutted [because w]hatever procedural hardship the Ohio confession-of-judgment scheme worked upon the petitioners was voluntarily and understandingly self-inflicted through the arm's-length bargaining of these corporate parties." *Id.* at 188-89.

Verizon's arbitration agreement precisely fits all of these criteria for involuntariness and

unenforceability, and is constitutionally indistinguishable from the unenforceable *Fuentes* consumer contract. The agreement is an adhesion contract with no bargaining and grossly disparate bargaining power, the waiver is a necessary condition of the sale, and Verizon admits that it refuses to deal with Adell and all of its other customers unless they agree. The district and circuit courts below simply ignored *Fuentes* and *Overmyer*. In *Katz,* the district said only this, without explanation: "The Court rejects plaintiff's argument that more is required under [*Overmyer*], 405 U.S. 174 (1972), to find waiver of his Article III rights." 2013 WL 6621022, at *13 (citing cases rejecting applicability of "knowing and voluntary" standard under FAA).

Because FAA § 2 and the federal policy under the FAA is, at bottom, an "equal treatment" rule, *e.g., Epic,* 138 S. Ct. at 1622, then Verizon's arbitration agreement waiving the Article III constitutional right should fare no better than the consumer contract waiving due process in *Fuentes,* or any other agreement waiving a fundamental constitutional right—the waiver must be subject to the heightened voluntariness standard.

The Court previously left open the possibility under the FAA for striking down arbitration agreements like Verizon's and the other cellphone providers in a context like this, when it cautioned the federal courts to "remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of … overwhelming economic power that would provide grounds 'for the revocation of any contract.'" *Gilmer*, 500 U.S. at 33, *quoting Mitsubishi*

Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985). If "overwhelming economic power" can be a ground for revoking any contract, then the economic power of Verizon to involuntarily force more than 100 million waivers of the personal Article III right is it.

By applying an unconscionability analysis under state law, the courts below elevated the FAA above the Constitution, and placed the burden on Adell to walk away from Verizon, saying that walking away is the "right to refuse" envisioned by *Wellness.* But because of the necessity for cellphones in modern society, Adell would have had "no choice" and "nowhere else to go," *Stern,* 564 U.S. at 493, 493 n.8, and neither do hundreds of millions of other cellphone users, as the Court has acknowledged and confirmed in *Riley* and *Carpenter*.

FAA arbitration cannot be divorced from its relationship to the personal right to an Article III adjudication. [5] The Court has stated numerous times that "the basic precept that arbitration is a matter of consent, not coercion" is a "fundamental" rule under

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[5] *Wellness* confirms that private arbitration on consent constitutes non-Article III adjudication subject to Article III constitutional constraints. *See* 575 U.S. at 674-75. *See also Marine Transit Corp. v. Dreyfus,* 284 U.S. 263, 277 n.4, 279 (1932) (executory agreement to arbitrate maritime disputes "may be made a rule of court" under Arbitration Act and did not violate Article III) (arbitration award enforceable by district court only with stipulated consent of parties). *Cf. Thomas v. Union Carbide Agric. Prods. Co.,* 473 U.S. 568, 571, 573 n.1, 574 n.1, 589, 590-91 (1985), (binding arbitration program "among voluntary participants" before American Arbitration Association commercial arbitrators does not violate Article III).

the FAA. *E.g., Stolt-Nielsen*, 559 U.S. at 681 (quotations omitted). But the parameters of this "coercion" have never been clearly defined in the context of the arbitration agreement's Article III constitutional implications. And cellphones require a different paradigm than the mechanical application of unconscionability under state contract law. *Cf. Riley, Carpenter*. If the involuntary waiver by hundreds of millions of cellphone users of their Article III rights is not per se coercive, then the fundamental FAA rule is meaningless dicta.

The "guarantee" of an Article III adjudication under CAFA cannot be satisfied without requiring Verizon and the other major cellphone providers to offer their customers the right to refuse arbitration and still receive their equipment and services from them.

II. The Destruction Of The Federal Courts' Jurisdiction And Thwarting Of Congress's Jurisdictional Command And Express Purposes Under CAFA Is A Question Of Paramount Importance Under The Constitution

While in some cases the federal courts' obligation to adjudicate claims within their jurisdiction can be described as "virtually unflagging," in this case it is "unflagging" without qualification, as the cases collected in *New Orleans Pub. Serv.,* 491 U.S. at 358-59, confirm:

> Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of

> jurisdiction that has been conferred. For example: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *Cohens* v. *Virginia,* 6 Wheat. 264, 404 (1821). "'[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.'" *Chicot County* v. *Sherwood,* 148 U.S. 529, 534 (1893) (citations omitted). "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction.... The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Willcox* v. *Consolidated Gas Co.,* 212 U.S. 19, 40 (1909) (citations omitted).

In *Texas v. California,* Justice Alito, dissenting from the denial of leave to file a bill of complaint, posited a hypothetical in which a circuit court affirms the order of a district court arbitrarily ordering that the complaint of a Texan trying to sue a Californian under § 1332(a) diversity jurisdiction for a traffic accident "not be accepted for filing." 141 S. Ct. at 1469. Quoting Chief Justice Marshall's "famous procla[mation]" from *Cohens* quoted above, Justice Alito stated that "this Court would reverse in the blink

of an eye." *Id.* at 1469-70. The Sixth Circuit's description of the CAFA jurisdictional command as merely "the *ability* to hear … class action cases" (emphasis in original), and its conclusion that it could "give effect to both" CAFA and the FAA by exercising its CAFA jurisdiction to reduce the federal adjudication of the claims of millions to the essentially non-reviewable claim of one, App. 14, should be rejected by the Court even more reflexively. CAFA "cannot be held to destroy itself." *Concepcion*, 563 U.S. at 343.

Just as CAFA cannot be held to destroy itself, nor can a party improperly create or destroy jurisdiction. Thus, the Court has "interpreted the diversity jurisdiction statute to require courts in certain contexts to look behind the pleadings to ensure that parties are not improperly creating or destroying diversity jurisdiction," as where a plaintiff "fraudulently nam[es] a nondiverse defendant" to destroy diversity, or where a plaintiff creates diversity "by collusively assigning his interest in an action." *See AU Optronics,* 571 U.S. at 174. Verizon's arbitration agreement is being used to destroy CAFA jurisdiction, and should be treated *equally to* and no differently than a collusive contractual assignment being used to create jurisdiction, or any other collusive scheme to destroy it. *Cf. Standard Fire Ins. Co. v. Knowles,* 568 U.S. 588, 590 (2013) (putative class representative cannot stipulate to less than $5,000,000 of damage claims to defeat CAFA jurisdiction).

Adell's Introduction(2), *supra,* provides substantial detail why CAFA's "guarantee" of an Article III adjudication and its text and express

purposes override the FAA and are distinguishable from federal statutes creating substantive rights that are compatible with arbitration—including the NLRA in *Epic*. Put aside CAFA's express purposes—all to ensure the federal court adjudication of class actions of national importance to lower consumer prices—none of which can be achieved through private bilateral arbitration. *Cf. Epic,* 138 S. Ct. at 1619, 1624 (NLRA's underlying purpose is "the right to organize unions and bargain collectively"). In CAFA, the people's representatives have chosen "class actions … as means of enforcing the law" and their "preferred economic policies" when there are numerous class members with very large ($5 million large) aggregated claims—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 of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm." CAFA § 2(a)(1), 109 Stat. 4. *Epic* mandates the choice of the people's representatives as the rule of decision in this case. *Id.* at 1632.

As a matter of statutory construction, *Epic*'s repeated discussion of the significance of "dispute resolution procedures" and "class actions" fully supports CAFA overriding FAA bilateral arbitration. 138 S. Ct. at 1625, 1626, 1627, 1631. Further, Adell reiterates that there is no exception from the CAFA jurisdictional command for bilateral disputes under the FAA, and none can properly be implied. "[I]f the Congress [had] intended to provide additional exceptions, it would have done so in clear language." Antonin Scalia & Bryan A. Garner, *Reading Law: The*

Interpretation of Legal Texts, Canon 8, Omitted-Case Canon, at 93 (2012) (quoting *Petteys v. Butler,* 367 F.2d 528, 538 (8th Cir. 1966) (Blackmun, J., dissenting)). *See also Boechler,* 142 S. Ct. at 1500-01 (no implicit exception for equitable tolling in *Brockamp, supra,* where statute was written in "unusually emphatic form" with "detailed technical" language and numerous explicitly listed exceptions). *See also Alabama v. Bozeman,* 533 U.S. 146, 153 (2001) ("shall" can be an "absolute command" and "militates against an implicit exception").

Which leaves the issue of implied repeal that the Sixth Circuit led with in its discussion of the applicable law, quoting *Epic*. App. 12-13. 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,* 417 U.S.at 550-51 (emphasis added). 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).

The only thing that CAFA and the FAA have in common is that they both address methods of dispute resolution. But as a matter of law, class actions

inherently conflict with the fundamental attributes of arbitration contemplated by the FAA—an "individualized and informal mode of" dispute resolution. *E.g., Viking River Cruises,* 142. S. Ct. at 1918. Unlike CAFA, Congress had no intention of utilizing arbitration for the procedural resolution of aggregate class-type claims when the FAA was enacted in 1925—indeed, "procedures like that were hardly known when the NLRA was adopted in 1935 [and] Federal Rule of Civil Procedure 23 didn't create the modern class action until 1966." *Epic,* 138 S. Ct. at 1624. Most importantly, CAFA is an Article III jurisdictional statute with all of its constitutional implications, and in the FAA Congress was *expressly not* conferring or intending to affect federal jurisdiction. *E.g., Badgerow v. Walters,* 142 S. Ct. 1310, 1315-16 (2022).

Applying the standards for implied repeal set out above, the specific CAFA class action jurisdictional statute with its specific jurisdictional command, specific parameters for matters to be adjudicated and formal class action procedures "will not be controlled or nullified by a" non-jurisdictional private informal dispute resolution statute like the FAA. *Morton,* 417 U.S. at 550-51. And the "specific policy embodied in a later federal statute [CAFA] should control [the Court's] construction of the [FAA]." *Brown & Williamson,* 529 U.S. at 143. The same as at the time of the Constitution's adoption:

> [Where] there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or

> expression … the rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first … as consonant to truth and propriety.

The Federalist No. 78, p. 468.

If, as the Sixth Circuit stated, "repeals by implication" are avoided by satisfying "[t]he goal when construing two statutes … to interpret the acts 'to give effect to both,'" App. 12, *quoting Epic,* 138 S. Ct. at 1624 (quoting *Morton*, 417 U.S. at 551)), then the Sixth Circuit's purported "giving effect to both"—by exercising CAFA jurisdiction to reduce the federal adjudication of the claims of millions to one single private bilateral adjudication—confirms that CAFA and the FAA cannot be reconciled—a "positive repugnancy." *E.g., Arthur v. Homer*, 96 U.S. 137, 138, 140 (1877). In the case of a positive repugnancy, CAFA is the overriding statute and the FAA is the overridden statute.

If the members of the Court were to take their cellphones and "google" the phrase "treason defined," they would see as the first bulleted definition "the action of betraying someone or something," with the following usage example: "doubt is the ultimate treason against faith." Which brings us back to "faithful agency." "[T]he Constitution ought to be the standard of construction for the laws, and … wherever there is an evident opposition, the laws ought to give place to the Constitution." The Federalist No. 81, p. 482. Adell is invoking the Court's faithful agency to Congress, the Constitution and the people of the

Nation to apply the Constitution to fix the enormous problems her petition has identified.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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