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

REPLY BRIEF OF PLAINTIFF-APPELLANT LORRAINE ADELL

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REPLY TO VERIZON'S STATEMENT OF JURISDICTION[1]

It is indisputable that the District Court's subject-matter jurisdiction here is the diversity jurisdiction invoked in Adell's Complaint under CAFA, 28 U.S.C. § 1332(d). Adell Br. 2 (Statement of Jurisdiction).[2]

Almost 90 years ago, in *Marine Transit Corp. v. Dreyfus,* 284 U.S. 263, 275-76 (1932), the Supreme Court articulated the jurisdictional relationship between FAA § 4 and what is now FAA §§ 9-10: "We do not conceive it to be open to question that, where the court has authority under the [FAA] … to make an order for arbitration, the court also has authority to confirm the award or to set it aside for irregularity, fraud, *ultra vires* or other defect." *Accord, e.g., Dodson Int'l Parts, Inc. v. Williams Int'l Co.,* 12 F.4th 1212, 1227 (10th Cir. 2021) (quoting *Marine Transit* and numerous circuit court decisions).

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[1] References to Adell's August 23, 2021 appeal brief (6th Cir. Dkt. # 18) are denoted "Adell Br. __." Defined terms in Adell's appeal brief are used consistently herein.

References to Verizon's second corrected appeal brief (6th Cir. Dkt. # 27) filed on October 19, 2021 to comply with 6 Cir. R. 28(a)-(b) are denoted "Verizon Br. __." For the record, Verizon's Certificate of Compliance (Verizon Br. 32) still doesn't comply with the applicable federal rules—it references only "Circuit Rule 5-2(b)" (which doesn't exist) and the 20 page limit that applies to handwritten or typewritten petitions for leave to appeal under Fed. R. App. P. 5(c)(2) (which is not mentioned), and the brief doesn't comply with that 20 page limit either.

[2] Verizon agrees with Adell's statement that this Court's appellate jurisdiction arises under FAA §§ 16(a)(1)(D) and 16(a)(3), which also is indisputable. *Compare* Verizon Br. 2 *with* Adell Br. 2-3.

Thus, the District Court's jurisdiction under CAFA was the same for its March 5, 2019 Opinion—which granted Verizon's motion to compel arbitration and stay the action and retain jurisdiction under FAA §§ 3-4 and denied Adell's motion for partial summary judgment on her individual declaratory judgment claim (RE 32, Page ID # 430-437)—as for its May 24, 2021 Opinion granting Verizon's motion to confirm the Award and denying Adell's motion to vacate the Award under FAA §§ 9-10, respectively (RE 42, Page ID # 574-580).

Although Verizon states that it "does not contest that the district court had subject-matter jurisdiction to resolve [Adell]'s claims," it cites two of the Court's decisions in support. Verizon Br. 1. In *Baker v. Iron Workers Local 25 Vacation Pay Fund*, 999 F.3d 394, 397-98, 400 (6th Cir. 2021)—a labor law and not FAA case where the underlying federal question jurisdiction under ERISA was not in dispute but only the scope and applicability of the arbitration agreement—the Court decided that the dispute fell within the scope of the arbitration agreement and should have been dismissed under Rule 12(b)(6) rather than Rule 12(b)(1). The second case, *Hale v. Morgan Stanley Smith Barney LLC*, 982 F.3d 996, 997-98 (6th Cir. 2020), did involve a Rule 12(b)(1) jurisdictional challenge in connection with a district court proceeding initiated to vacate an arbitration award, and the Court essentially "looked through" to the underlying controversy to determine that diversity jurisdiction existed regardless of the fact that the award was for $0,

because the underlying controversy between the parties involved a claim for $14.75 million.

Marine Transit confirms that in this case, CAFA provides the District Court with the same jurisdictional basis to decide Verizon's motion to compel and stay the action under FAA §§ 3-4 (as well as Adell's motion for partial summary judgment) *and* the parties' motions to confirm and vacate the Award under FAA §§ 9-10. Neither *Baker* nor *Hale* changes or is particularly relevant to that fact.

PRELIMINARY STATEMENT

"Arbitrability" challenges to an arbitration agreement under FAA § 4 are generally of three types: validity of formation, enforceability, and scope. The Supreme Court has concisely distilled the essence of the applicable procedural framework under § 4, in *Granite Rock Co. v. Int'l Bhd. of Teamsters,* 561 U.S. 287, 299-300 (2010) (citations omitted) (emphasis in original):

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

See also id. at 303 ("presumption favoring arbitration [is applicable] only where it reflects … a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and … is legally enforceable and best construed to encompass the dispute").

What is relevant here, and the only dispute decided by the District Court under FAA § 4 and raised by Adell on appeal, is the "enforceability" of Verizon's arbitration agreement—or more precisely, whether the arbitration agreement is *unenforceable* because: (i) Adell's consent to non-Article III arbitration and the waiver of her individual Article III right was not "voluntary" under the standard "emphasized" by the Supreme Court in *Wellness*, 575 U.S. at 685; and (ii) arbitration under the FAA inherently and irreconcilably conflicts with the express findings and purposes of Congress in enacting CAFA.

At the outset, Adell emphasizes that, contrary to Verizon's misleading formulation of Adell's *Wellness* argument, Adell is not claiming that "enforcing [the] arbitration agreement violates her constitutional right to a judicial forum" (Verizon Br. 2), or that "all customers' arbitration clauses [are] unconstitutional" (Verizon Br. 7). That formulation depends on the foregone conclusion that the agreement *is* enforceable. But the only disputed issue the Court must decide under FAA § 4 is *whether* the agreement is enforceable. *See Granite Rock, supra.* Adell has not raised the issue whether that enforcement would violate her constitutional right or is unconstitutional if the arbitration agreement is enforceable—that issue, and whether such enforcement would constitute "state action"(Verizon Br. 12-14)—are outside the scope of the FAA § 4 dispute Adell asks the Court to decide.

Although the applicability under the FAA of the *Wellness* "heightened voluntariness" standard is an issue of first impression in this Court, this Court has previously applied a "knowing and voluntary" standard under the FAA, including in connection with the waiver of a constitutional right.[3] However, the applicability of a "heightened knowing and voluntary" standard under the FAA had previously been decided and rejected *pre-Wellness* by other courts—including in the district court decision in *Katz v. Cellco P'ship d/b/a Verizon Wireless,* No. 7:12-CV-9193, 2013 WL 6621022, at *13 (S.D.N.Y. Dec. 12, 2013) (collecting cases) (citing and contrasting *Morrison*), *aff'd in part, vacated & remanded in part*, 794 F.3d 341 (2d Cir. 2015) ("*Katz I*"). Though *Katz I* is not on point under *Wellness*, Verizon's failure to cite *Katz I* in its brief is curious and telling. The *Katz I* district court specifically noted that this Court had gone a different direction than other circuit courts regarding the applicability of a heightened "knowing and voluntary" standard under the FAA.

Instead, Verizon leads with the second decision in the prior *Katz* proceedings, *Katz v. Cellco P'ship d/b/a Verizon Wireless*, 756 F. App'x 103 (2d Cir.), *cert. denied*, 140 S. Ct. 448 (2019) ("*Katz II*"). Verizon Br. 2. Verizon

[3] *See* Adell Br. 10, 26 n.6, *citing Hergenreder v. Bickford Senior Living Grp., LLC,* 656 F.3d 411, 420 (6th Cir. 2011) (constitutional right to jury trial); *Cooper v. MRM Inv. Co.,* 367 F.3d 493 (6th Cir. 2004); *Morrison v. Circuit City Stores, Inc.,* 317 F.3d 646 (6th Cir. 2003).

describes that decision as having "rejected substantially similar claims," but that is incorrect. *Katz II* involved a completely different claim—that the limited scope of judicial review for a motion to vacate in connection with enforcement of the arbitration agreement *already determined to be enforceable* in *Katz I* violated Due Process under the Fifth Amendment. 756 F. App'x at 104. *Wellness* is never mentioned or addressed in the Second Circuit's opinion.

Unlike *Katz II,* the applicability of *Wellness* and its heightened voluntariness standard for the enforceability of consent to a non-Article III adjudication and the waiver of the individual right to an Article III adjudication under the FAA is now squarely presented to this Court. Verizon's arguments against the application of the *Wellness* voluntariness standard, and alternatively its contention that the standard was met here, are meritless.

As for the inherent and irreconcilable conflict and clear repugnancy between CAFA and arbitration under the FAA, Verizon's arguments boil down to a single proposition, purportedly based on *Epic*—that unless Congress has expressly discussed and excluded FAA arbitration from the reach of CAFA, then CAFA cannot override the FAA. But *Epic* never says that, and to the contrary, the application of *Epic's* analysis overwhelmingly confirms that CAFA displaces the FAA in connection with consumer cases falling within CAFA's jurisdiction.

I. THE *WELLNESS* STANDARD FOR VOLUNTARY CONSENT GOVERNS FAA ARBITRATION, AND HAS NOT BEEN SATSIFIED

Verizon's arguments to avoid the applicability of *Wellness* to its arbitration agreement can be synthesized as follows: (i) *Wellness* doesn't apply to FAA arbitration or govern the standard under the FAA for voluntary consent to the waiver of Adell's Article III right, state law does (Verizon Br. 14-20); and (ii) even if the *Wellness* voluntariness standard does apply, Adell's consent was voluntary and the arbitration agreement is enforceable (Verizon Br. 20-24). Verizon also makes a "no state action" argument based on the assumption the agreement is enforceable (Verizon Br. 12-14), but that issue is not presented in this appeal, as briefly addressed in the Preliminary Statement, *supra,* and again below. Verizon's arguments should be rejected by the Court.

A. The *Wellness* Standard For Voluntary Consent Applies To Arbitration Under The FAA

Verizon's refusal to concede that the *Wellness* voluntary consent standard under Article III applies to arbitration (Verizon Br. 18-19) is sheer denial. The first two sentences of the opinion's analysis specifically include non-Article III "arbitrators" in connection with "[a]djudication by consent," and the majority

opinion refers repeatedly throughout to "non-Article III adjudicators."[4] *Wellness* "emphasize[s]" that "a litigant's consent—whether express or implied—must still be knowing and voluntary," and this standard is specifically linked to "the non-Article III adjudicator"—not only a bankruptcy judge, or the magistrate judge in *Roell v. Withrow,* 538 U.S. 580, 588 n.5, 590 (2003), the decision quoted by *Wellness* for the "knowing and voluntary" consent standard. 575 U.S. at 685. On its face, this quoted passage from *Wellness* imposes the *same* standard of consent "whether express or implied," not a "lower standard" for implied consent as Verizon wrongly states (Verizon Br. 20).

Justice Alito, in his concurrence. 575 U.S. at 686, expressly equates a bankruptcy court's "judgment" and an arbitrator's "decision," and concludes they would both be acceptable under Article III based on "the Court's previous rejection

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[4] *Wellness* begins its analysis, 575 U.S. at 675 (citation omitted): "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.'"

And in the very next paragraph of *Wellness*, the Court describes *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833 (1986), as "the foundational case of the modern era" involving non-Article III adjudicators. 575 U.S. at 675. Although the CFTC engages in non-Article III adjudication, *see* https://www.cftc.gov/LearnAndProtect/ReparationsProgram/index.htm, it is not a "court" and that is only one of its regulatory powers. And the CFTC has strict regulations requiring that a customer's consent to arbitration be voluntary and not a condition for opening an account. *See* Adell Br. 32.

of 'formalistic and unbending rules'" in *Schor*. Chief Justice Roberts, in his dissent, takes both the majority and Justice Alito to task for including arbitrators, 575 U.S. at 702-03, which would be unnecessary if arbitrators weren't included.

Further, during the January 14, 2015 oral argument in *Wellness,* Justice Kagan crystallized the relationship between non-Article III arbitration and bankruptcy adjudication:

> JUSTICE KAGAN: … [T]he entire question is that the parties are consenting to go to bankruptcy court, and the question is: Will that consent be sufficient in the same way that it is in the arbitration system?

See Transcript, p. 52:8-11 (available at https://www.supremecourt.gov/oral_arguments/argument_transcript/2014). This passage provides persuasive context for the direct linkage by the *Wellness* majority and Justice Alito between the voluntary consent for non-Article III arbitration and bankruptcy adjudication.[5]

[5] In *Coleman v. Labor & Indus. Review Comm'n of Wis.,* 860 F.3d 461, 465 (7th Cir. 2017)—a case analyzing both *Wellness* and the Supreme Court's earlier decision under Article III in *Stern v. Marshall*, 564 U.S. 462 (2011)—the Seventh Circuit held that consent to adjudication by a non-Article III magistrate must be given by both parties. Importantly, Judge Easterbrook, in his dissent from the denial of rehearing en banc, confirmed his understanding that the requirement for consent to non-Article III adjudicators includes consent to private arbitrators: "Article III means that only litigants who consent to decision by an Article I officer (*or for that matter a private arbitrator*) can be denied the benefits of an Article III judge." 860 F.3d at 478 (emphasis added).

Verizon claims that *Wellness* and *Roell* are distinguishable as involving Article I "tribunals" purportedly raising separation of powers issues "that simply are not present when private parties consent to private arbitration" (Verizon Br. 19).The substantial reliance in *Wellness* on *Schor,* which addresses non-Article III adjudication by the CFTC (*see* n.4, *supra*), lays Verizon's *ipse dixit* to rest. And Verizon's "tribunal" argument is directly rebutted by *Marine Transit, supra,* which specifically considered Article III separation of powers and upheld the constitutionality of FAA arbitration. *See* Adell Br. 21-22. Verizon says *Marine Transit* does not support Adell's claim, but never says why or mentions the case again. Verizon Br. 17. Verizon also ignores the fact that the arbitration in *Marine Transit* involved voluntary, stipulated consent.[6]

Verizon's Article I argument is also contradicted by *Thomas v. Union Carbide Agric. Prods. Co.,* 473 U.S. 568 (1985), which considered FIFRA

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[6] Verizon also makes the following inferential argument (Verizon Br. 16):

> [I]f enforcing arbitration clauses as a matter of contract violated the "judicial power" of the federal courts, U.S. Const., art III, § 1, one would have expected the Supreme Court—or at least an individual Justice, to at least acknowledge as much in any of the dozen FAA cases it has decided in as many years.

Verizon's argument has it backwards. Adell has not and does not claim FAA arbitration violates Article III, because it doesn't—*Wellness* and *Marine Transit,* on which Adell prominently relies, confirm that. But *Marine Transit* supports and *Wellness* confirms that consent to FAA arbitration must be "voluntary."

arbitration by the American Arbitration Association under Article III separation of powers. *See* Adell Br. 22. In response to Verizon's accusation that Adell "misleadingly argues … [and] suggest[s] that the program was voluntary" (Verizon Br. 18 n.4), Adell directs the Court to the following description of the program in *Thomas* as a basis for its holding that Article III was not violated: "Congress has the power, under Article I, to authorize an agency administering a complex regulatory scheme to allocate costs and benefits *among voluntary participants in the program* without providing an Article III adjudication." 473 U.S. at 589 (emphasis added).

The *Wellness* voluntary consent standard applies to non-Article III FAA arbitration by "non-Article III arbitrators."

B. Adell's Arbitration Agreement With Verizon Is Not Voluntary, And Is The Result Of "Overwhelming Economic Power"

Any suggestion by Verizon that its adhesive arbitration agreement is "voluntary" under *Wellness*—or under any semblance of reality—is pure fiction. The undisputed facts are that Verizon does not give Adell (and the rest of its customers) any "choice" in deciding to arbitrate with it: (i) "acceptance of the [arbitration agreement] is necessary to obtain equipment and services from Verizon," and thus Verizon refuses to deal with Adell and its other customers unless they waive their Article III rights under CAFA and consent to non-Article III FAA arbitration; and (ii) Adell has never been given the right by Verizon to

refuse to consent to the arbitration agreement and still receive equipment and services from Verizon." Adell Br. 3-4, 8.

In her brief, Adell directed the Court to *Riley v. California,* 573 U.S. 373, 385 (2014), and *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018), in which the Supreme Court twice rejected the applicability of voluntariness to cellphones, and took judicial notice of the fact that cellphones are not voluntary. Adell Br. 35-36. In *Riley,* to support this lack of voluntariness, the Supreme Court observed that "a significant majority of American adults now own [smart] phones," citing to A. Smith, Pew Research Center, Smartphone Ownership—2013 Update (June 5, 2013). 573 U.S. at 385. But that was then, and this is now. And here is amazing fact: according to the most recent Pew Research Center "Mobile Fact Sheet" dated April 7, 2021 (*see* https://www.pewresearch.org/internet/fact-sheet/mobile/):

> The vast majority of Americans -- 97% -- now own a cellphone of some kind. The share of Americans that own a smartphone is now 85%, up from just 35% in Pew Research Center's first survey of smartphone ownership conducted in 2011.

Verizon cursorily sweeps away the significance of *Riley* and *Carpenter* as "inapposite" without explanation (and without even identifying *Riley*). Verizon Br. 24. But there is no reason the cellphone involuntariness recognized in these decisions as a basis for protection from unreasonable searches in connection with criminal conduct under the subsequently ratified Fourth Amendment is not *more applicable* to the forced involuntary waiver of one of the most fundamental rights

accorded to the People *within the body* of the Constitution under Article III—the right to invoke the "judicial power" and receive an Article III adjudication.

Verizon also criticizes Adell for purportedly "cherry-picking" from the oral argument transcript in *Carpenter,* where Chief Justice Roberts confirmed that the decision he wrote for an essentially unanimous court in *Riley* "emphasized that you really don't have a choice these days if you want to have a cell phone." *Compare* Verizon Br. 24 *with* Adell Brief 35 (quoting transcript). If Adell is "cherry-picking," then Verizon should have been able to find other portions of the transcript supporting it or undermining Adell's citation—but it doesn't. Nor does Verizon cite any public information that might support an argument that cellphones are "voluntary." It would be extremely hard pressed to do so, when its 2017 Form 10-K states that its customers alone comprise in excess of 116,000,000 "retail connections"—i.e., lines of service (RE 19-5, Page ID # 160).

The District Court's holding in its March 5, 2019 Opinion (RE 32, Page ID # 434-435) defended by Verizon (Verizon Br. 21)—that Adell's consent was "voluntary" because she could "refuse [and] take her business elsewhere"—ignores both *Wellness* and the reality of cellphones. Adell could visit each of the three other largest cellphone carriers after leaving Verizon, and that would not change the result—all impose the forced, adhesive waiver of Article III rights and

involuntary consent to non-Article III FAA arbitration on their hundred millions of customers.[7]

The standard for "voluntariness" under *Wellness* is not "take it or leave it," and Verizon's "refusal to deal" is directly relevant to the involuntariness of Adell's consent to the waiver of a constitutional right. *See Fuentes v. Shavin,* 407 U.S. 67, 95 (1972) (contractual waiver in adhesion contract unenforceable where parties "were far from equal in bargaining power" and waiver was "condition of sale"); *cf. D.H. Overmyer Co. v. Frick Co.,* 405 U.S. 174, 186 (1972) (contractual waiver enforceable where equal bargaining power regarding non-adhesion contract and no refusal to deal unless waiver). *See* Adell Br. 31-32. Although Verizon tries to distinguish these cases on their facts, Verizon is silent regarding the overriding principle on which they are based: that there is a "heavy burden against the waiver of constitutional rights," *D.H. Overmyer,* 405 U.S. at 188, and that "courts indulge every reasonable presumption against waiver," *Fuentes,* 407 U.S. at 94 n.31. *Accord Sambo's Rests., Inc. v. City of Ann Arbor,* 663 F.2d 686, 691 (6th Cir. 1981). The presumption against waiver of constitutional rights is the law that

[7] *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).

governs, including in the Sixth Circuit. Along with the applicability of the "knowing and voluntary" standard for consent under the FAA.[8]

With respect to the numerous statements quoted by Adell (Adell Br. 26-29) from the FAA legislative history and by Julius Cohen (the FAA's principal author) that arbitration under the FAA is supposed to be "voluntary" and *not* the result of a "take it or leave it" agreement, Verizon says they are "beside the point" because "hearings from 1923 have no bearing on the meaning of Article III which was ratified in 1788" (Verizon Br, 19). The argument is sheer sophistry. The FAA legislative history is obviously highly relevant to whether the *Wellness* "voluntary"

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[8] Based on the District Court's reading of *Wellness* in its March 5, 2019 Opinion (RE 32, Page ID # 435)—that "to 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 [it] to accept contractual terms without its voluntary consent"—Verizon claims there is a "reciprocal constitutional issue" and "[serious] constitutional concern" regarding its rights. Verizon Br. 21. What is the right Verizon is asserting and its source? Adell and Verizon each have an individual constitutional right to an Article III adjudication—though it can be voluntarily waived, as *Wellness* confirms. But there is no constitutional right to a non-Article III adjudication that Verizon seems to be arguing for. If the "source" is "freedom of contract," then *Lochner v New York,* 195 U.S. 45 (1905), and its ilk have been discredited for more than 80 years. *See, e.g., West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 392-93 (1937) ("inequality in the footing of the parties" provides basis "for power under the Constitution to restrict freedom of contract") (rejecting *Lochner*).

What is reciprocal but missing from Verizon's arbitration agreement is Adell's right to choose "with whom … to arbitrate her disputes"—which is not satisfied by the obligation Verizon and the District Court want to impose to walk away and not enter into any contract at all. Adell Br. 33-34. Under the FAA, if one party wants to arbitrate and the other doesn't, then there is no arbitration.

standard is consistent with and applicable to the FAA (which Verizon denies). As for the "legislative history" of Article III, without going back to The Federalist Papers, the Supreme Court in the "modern era" has consistently found Article III violated when consent to the non-Article III adjudication was involuntary and the result of a lack of choice, and not violated when it was voluntary—including in *Wellness. See* Adell Br. 24-26, 33, and cases cited therein.[9]

The Supreme Court has 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 v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991), *quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 627 (1985). *See also Seawright v. Am. Gen. Fin. Servs., Inc.,* 507 F.3d 967, 975 (6th Cir. 2007) (quoting *Gilmer*) (*Seawright* cited Verizon Br. 9, 15, 16). Verizon's "overwhelming economic power," which it wields to force Adell and all of its

[9] Verizon (Verizon Br. 3, 15, 19) cites several times to *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 346 (2011), for its rejection of "adhesion contracts" as a proper limitation for the California rule it was addressing. But that was *solely* in the context of its preemption analysis and holding under the Supremacy Clause, Article VI, § 2. *Concepcion* never addresses or mentions "Article III" or the term "voluntary," and "consent" is mentioned only in Justice Thomas' concurrence, when he notes that "we have emphasized that '[a]rbitration under the Act is a matter of consent.'" 563 U.S. at 355. n.*(citation omitted).

customers to consent to non-Article III arbitration and the waiver of their Article III rights, is indisputable, and cannot satisfy *Wellness*.

The Supreme Court, and this Court and the courts within this Circuit, and the federal courts nationwide, have reiterated hundreds of times "the basic precept that arbitration 'is a matter of consent, not coercion.'" *See* Adell Br. at 29. The issue is now squarely presented: is this a living precept or a dead letter? Article III and *Wellness* provide the avenue for the proper extension of the "knowing and voluntary" standard this Court already applies under the FAA.

C. Federal Law Under Article III As Interpreted By *Wellness* Governs The Enforceability Adell's Consent, Not "Ordinary State Contract Law"

Verizon argues that the voluntariness of Adell's consent must be measured under "ordinary state contract law," not federal law (Verizon Br. 14-20). Verizon spends much of its argument trying to distinguish *Wellness* and the other Supreme Court Article III decisions discussing consent in connection with arbitration. However, this Court has also applied the "knowing and voluntary" standard to consent under the FAA as a matter of federal law. *See* Preliminary Statement, n.3, *supra;* Adell Br. 10, 26 n.6. *Cf. In re County of Orange,* 784 F.3d 520, 531 (9th Cir. 2015) ("the federal 'knowing and voluntary' standard … is not a generally applicable federal rule, but rather a federal constitutional minimum").

Verizon (Verizon Br. 4, 16 n.2) cites this Court's decision in *Stutler v. T.K. Constructors Inc.*, 448 F.3d 343 (6th Cir. 2006), but *Stutler* neither addresses nor controls the issue here—whether the *Wellness* standard for voluntary consent under Article III governs FAA arbitration. As a chronological matter, *Stutler* was issued nine years before *Wellness*. Further, in *Stutler,* "no federally protected interest [was] at stake," 448 F.3d at 346. Thus, *Stutler* distinguished the "knowing and voluntary" standard applied in *Morrison* and *Cooper* as involving "federal statutory rights." *Id.* at 346-47.

Although it is true that Adell's underlying claims arise under state contract law, her challenge to the enforceability of the arbitration agreement is a matter of federal law, based on *Wellness* (along with the inherent irreconcilable conflict with CAFA). Under the FAA, Verizon's arbitration agreement is severable from the underlying Customer Agreement, and subject to a separate discrete federal law challenge. *See, e.g., Rent-A-Center West, Inc. v. Jackson,* 561 U.S. 63, 70-71 (2010); Adell Br. 9 n.3.[10]

[10] Verizon's wrongly argues (Verizon Br. 16) that Adell "concedes" "that the arbitration clause in Adell's Customer Agreement is enforceable as a matter of state law." Adell is not asserting an individual state law "enforceability" challenge, which would be highly fact dependent. But Adell is confident that the facts establishing the procedure employed by Verizon to obtain "consent" from Adell and its other customers would dispel any semblance of "knowing and voluntary" consent. And other individualized facts do not change the undisputed facts here establishing the lack of "voluntary consent" under *Wellness* as a matter of law.

Stutler also provides the controlling rule in this case, "[e]ven if *Morrison* and *Cooper* were not explicitly limited to the arbitration of federal statutory rights," 448 F.3d at 347. It quotes the following passage from *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938): "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."

The enforceability of Verizon's arbitration agreement and Adell's consent to non-Article III adjudication and the waiver of her Article III right, and the applicability of *Wellness* to the FAA, are "matters governed by the Federal Constitution or by acts of Congress," not state law. Using state law to govern these "matters" would violate the Supremacy Clause, Article VI, § 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof … shall be the supreme law of the land[.]"). *Stutler* does not control here.

D. State Action Is Irrelevant To The Threshold Issue Whether Verizon's Involuntary Arbitration Agreement Is Enforceable Under Article III And *Wellness*

Finally, Verizon leads with and places great weight on its argument, relying primarily on *Katz II, supra,* that "Verizon's enforcement of the arbitration agreement does not involve state action subject to constitutional challenge" (Verizon Br. 12-14). Adell briefly addresses the argument in her Preliminary Statement, *supra,* and as noted there, there is no "enforcement [by Verizon] of the

arbitration agreement" if it's not enforceable, and *whether* it's enforceable is the threshold issue and the only issue presented by Adell in her appeal for the Court to decide under FAA § 4. *E.g.*, *Granite Rock, supra,* 561 U.S. at 299-300, 303

Verizon's "state action" argument, at bottom, is that its arbitration agreement is enforceable because "there is no state action in its enforcement"—a defective tautology. Whatever the applicability of state action to the due process claim in *Katz II* based on the enforcement of an arbitration agreement already determined to be enforceable, state action is not applicable or relevant in this appeal.

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

Verizon cursorily dismisses every factor Adell identifies establishing the inherent and irreconcilable conflict between CAFA and the FAA (Adell Br. 36-53) based on one fact—FAA arbitration is not an express exception to or addressed by CAFA, and thus *Epic* purportedly requires that CAFA cannot override the FAA. Verizon Br. 25-31. To the contrary, application of *Epic's* analysis requires the contrary conclusion—that the inherent and irreconcilable conflict between class actions under CAFA and arbitration under the FAA, and the *undeniable* "clear repugnancy" between the two statutes, can only be resolved by CAFA displacing and overriding the FAA.

A. *Epic* Did Not Overrule The Inherent Conflict Test, It Applied It

It is well-established 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*, 500 U.S. at 26; *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987); *see also* Adell Br. 37. Verizon, in essence, reads the "inherent conflict" test out of existence, incorrectly arguing, purportedly based on *Epic,* that to override the FAA Congress must do so expressly. That is Verizon's only argument, because the inherent conflict test renders CAFA controlling.

Two circuit courts have addressed the question whether *Epic* limited or overruled the "inherent conflict" test under *McMahon* and *Gilmer,* and both have held that the inherent conflict test is still good law. *See In re Belton v. GE Capital Retail Bank,* 961 F.3d 612, 615-16 (2d Cir. 2020)*; Matter of Henry v. Educ. Fin. Servs.,* 944 F.3d 587, 591-92 (5th Cir. 2019). As each court observed, "the test [*Epic*] applies is substantially the same as *McMahon's.*" *In re Belton,* 961 F.3d at 615-16, *quoting Matter of Henry,* 944 F.3d at 592. And that is correct.

First, *Epic* places great weight on the underlying *purpose* of the NLRA as set out in § 7, 29 U.S.C. § 157—"the right to organize unions and bargain collectively." 138 S. Ct. at 1619, 1624; *see also id.* at 1625. *Epic* also analyzes a

number of "textual and contextual clues," *id.* at 1625, 1626, 1627, and "[l]inguistic and statutory context," *id.* at 1631.

Most important here is *Epic*'s *repeated* discussion of the significance of "dispute resolution procedures" and "class actions"—which Verizon ignores or omits—all of which supports CAFA overriding FAA arbitration:

> 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. Federal Rule of Civil Procedure 23 didn't create the modern class action until 1966. *Id.* at 1624.
>
> [M]issing entirely from this careful regime is any hint about what rules should govern the adjudication of class or collective actions in court or arbitration. *Id. at* 1625.
>
> Telling, too, is the fact that *when Congress wants to mandate particular dispute resolution procedures* it knows exactly how to do so. Congress has spoken often and clearly to the procedures for resolving "actions," "claims," "charges," and "cases" in statute after statute. … The fact that we have nothing like that here is further evidence that Section 7 does nothing to address the question of class or collective actions. *Id.* at 1626 (emphasis added).
>
> And we've stressed 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. *Id.* at 1627.
>
> [W]hen it comes to the legislative history here, it seems Congress "did not discuss the right to file class or consolidated claims against employers." *Id.* at 1631.

Where does this lead—just go down the list. As with the NLRA, when the FAA was adopted in 1925 procedures like class actions "were hardly known" and

the "modern class action" wasn't created until 40 years later. Unlike the NLRA, CAFA provides a "careful regime … about what rules should govern the adjudication of class … actions in court." Congress has obviously "mandate[d] particular dispute resolution procedures" for disputes coming within CAFA diversity jurisdiction—emphasis on *mandate*, as confirmed by Adell's textual and statutory analysis (Adell Br. 40-44) that Verizon glibly dismisses as "beside the point" and "irrelevant" (Verizon Br. 28, 29 n.6), and wrongly describes as "permissive" (Verizon Br. 4). CAFA's legislative history obviously discusses "class actions." Adell Br. 39-40. As does CAFA itself, from the first word of its name.

Which leaves the most compelling for last:

> 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. *Id.* at 1632.

The merits of class actions to achieve economic policies benefiting the people have been chosen by the people's representatives and are embodied in CAFA. Adell Br. 44. *Epic* mandates that CAFA displace the FAA.

B. Congress's Express Findings And Purposes In Enacting CAFA Control

Here is how Verizon "quotes" and characterizes the detailed express findings and purposes of CAFA (Adell Br. 37-39, *quoting* RE 19-11, Page ID # 181-182):

> [Adell] points to vague aphorisms, such as "class action lawsuits are an important and valuable part of the legal system" and "the purposes of this Act are to ... benefit society." *Id.* at 38 (cleaned up).

Verizon Br. 27. Verizon hasn't "cleaned up" the express findings and purposes of CAFA, it has butchered them. To call Congress's findings and purposes "vague aphorisms" exceeds the boundaries of zealous advocacy, and lacks *any* colorable basis in the law.

CAFA *expressly* validates class actions to resolve aggregated claims "against *a* defendant" (in the singular) to accomplish its express purposes: (i) to "assure fair recoveries" for consumer losses; (ii) to "benefit society by … lowering consumer prices"; and (iii) to "restore the intent of the framers … by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction."

Verizon (Verizon Br. 29) questions Adell's elevation of CAFA's express findings and purposes over the "federal common law" of arbitration (Adell Br. 44-47). But there is an important reason: because determining the existence of an "irreconcilable conflict" can "involve so much speculation about congressional

intent." *Ray v. Spirit Airlines, Inc.* 767 F.3d 1220, 1225 (11th Cir. 2014). The FAA includes no express purposes at all—its purposes have been divined by the federal courts strictly from the legislative history and historical context. But there is no speculation about CAFA's purposes, they are expressly and precisely stated. And Adell respectfully submits that the Court owes primary deference to the unique Congressional purpose of CAFA—restoring the intent of the framers.

C. Because The FAA Neither Expands Nor Contracts Federal Jurisdiction, It Cannot Eliminate Class Actions Against Verizon Satisfying CAFA Diversity Jurisdiction

FAA § 4 does not create an "independent basis for federal jurisdiction." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 25 n.32 (1983); *see also* Adell Br. 48. Stated differently, "§ 4 of the FAA does not enlarge federal-court jurisdiction; rather, it confines federal courts to the jurisdiction they would have 'save for [the arbitration] agreement.'" *Vaden v. Discover Bank*, 556 U.S. 49, 66 (2009).

At the same time, the FAA is not intended to contract federal jurisdiction. As a leading treatise concludes: "It is plain that Congress intended the FAA to have no effect on federal jurisdiction. This means, as illustrated by the language of both FAA § 4 and FAA § 8, not only that Congress was not creating federal jurisdiction, but also that it was not reducing federal jurisdiction." Ian R. MacNeil, *et al.*, *Federal Arbitration Law*, § 9.2.3.3 (1996) (treatise cited throughout *Vaden*).

Here is the difference between CAFA and all the other statutes analyzed by the Supreme Court that do not override the FAA: all of them continued to operate to achieve their underlying purposes even in the absence of a class action. In the case of CAFA, however, the FAA's "use" of CAFA jurisdiction to piggy-back into federal court absolutely precludes the accomplishment of *any* of the express purposes of CAFA. Verizon (and the other cellphone companies) will *never* be subject to federal court adjudication of the class action that the people's representatives in Congress have determined is a "valuable part of the legal system" for the people's own protection. This "clear repugnancy" must be resolved by CAFA overriding the FAA. "In other words, the act cannot be held to destroy itself." *Concepcion*, 563 U.S. at 343.[11]

[11] Verizon's suggestion that *Baker* somehow supports a different result (Verizon Br. 10, 28, 29) is meritless. This case doesn't involve a CAFA jurisdictional dispute, it involves a § 4 enforceability dispute based on CAFA's irreconcilable conflict with the FAA regarding class action adjudication. That CAFA is a jurisdictional statute doesn't resolve that dispute or eliminate the requirement that the Court resolve it. That the FAA can piggy-back CAFA to prevent CAFA's "careful regime" of "dispute resolution procedures" "against a defendant" is precisely the point, and why CAFA overrides the FAA. *See also* Reply to Verizon's Statement of Jurisdiction, *supra.*

CONCLUSION

For the reasons stated herein and in Adell's August 23, 2021 appeal brief, the District Court's March 5, 2019 Opinion and its May 24, 2021 Opinion should be reversed by this Court.

Dated: November 19, 2021

Respectfully submitted,

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

This reply brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(b)(ii) because it contains 6,471 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 November 19, 2021, this Reply 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: November 19, 2021

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