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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICHAEL A. KATZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

CELLCO PARTNERSHIP, DBA VERIZON WIRELESS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the application of the Federal Arbitration Act ("FAA") to state-law private rights brought within the jurisdiction of the federal courts violates Article III of the United States Constitution. Question 1 includes:

A. Whether, under the FAA, the waiver of the "personal right" to an Article III adjudicator is subject to the "knowing and voluntary" standard of consent;

B. Whether Article III separation of powers concerns are implicated when Congress has neither created nor delegated resolution of the dispute to the non-Article III forum, and when the reference of disputes to arbitration is the result of a private agreement entered into outside the purview of the federal courts; and

C. Whether Congress' mandate under 9 U.S.C. §§ 9, 10 & 13 that the federal courts confirm and enter judgments on state-law private rights arbitration awards without meaningful exercise of the judicial Power violates Article III separation of powers under, *e.g.*, *United States v. Klein*, 80 U.S. 128 (1872).

2. Whether Congress' adoption of the alternative scheme of adjudication under the FAA combined with the federal courts' enforcement of the statute as mandated by Congress constitutes "state action."

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael A. Katz ("Katz") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 794 F.3d 341 (2d Cir. 2015), and is reprinted in the Appendix ("App.") at 1a-11a. The District Court's decision denying Katz's motion seeking a declaratory judgment on the Article III question presented, and granting the motion of Respondent Cellco Partnership, DBA Verizon Wireless ("Verizon) to compel arbitration, is unreported but is available at 2013 WL 6621022 (S.D.N.Y. Dec. 12, 2013), and is reprinted at App. 12a-45a.

JURISDICTION

The Court of Appeals issued its decision that is the subject of the petition on July 28, 2015. App. 1a. Its judgment was entered the same day. Court of Appeals Docket ("CA2 Docket"), *Katz v. Cellco P'shp, DBA Verizon Wireless,* Appeal No. 14-138 (2d Cir.), Entry #123. This Court has jurisdiction under 28 U.S.C. § 1254(1).

28 U.S.C. § 2403(a) applies in this case. The notification required by Supreme Court Rule 29.4(b) has been made to the Solicitor General of the United States. On January 29, 2014, the Court of Appeals, pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question. CA2 Docket, Entry #16.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 1 of the Constitution (U.S. CONST. Art. III, § 1) provides:

> 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. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Article III, § 2 of the Constitution (U.S. CONST. Art. III, § 2), provides in pertinent part:

> The judicial Power shall extend ... to Controversies ... between Citizens of different States.

Relevant sections of the FAA, 9 U.S.C. §§ 1, *et seq.*, are reproduced in pertinent part in the Appendix. App. 46a-49a.

STATEMENT OF THE CASE

Whether Article III is violated by the application of the FAA to state-law private rights brought within the jurisdiction of the federal courts is a question of great importance. The constitutionality of arbitration under the FAA—including the lack of control exercised by federal

courts over the arbitration proceeding, the implications of consent by private agreement, and the impact on the integrity of the federal courts by Congress' mandate to confirm and enter judgments on awards without meaningful exercise of the judicial Power—was explored by the Court during the January 14, 2014 oral argument in *Executive Benefits Ins. Agency v. Arkison,* No. 12-1200 (Tr. of Oral Arg. 53-55), and during the January 14, 2015 oral argument in *Wellness Int'l Network, Ltd. v. Sharif,* No. 13–935 (Tr. of Oral Arg. 50-54). And the relationship between arbitration and Article III—including these same issues and other separation of powers questions presented in this petition—was the subject of notable discussion among all four opinions in *Wellness Int'l Network, Ltd. v. Sharif,* 135 S. Ct. 1932 (2015). *See id.* at 1942 (majority opinion); *id.* at 1949 (Alito, J., concurring in part and concurring in judgment); *id.* at 1958-59 (Roberts, C.J., dissenting); *id.* at 1968 (Thomas, J., dissenting).

This Court has specifically addressed the constitutionality of the FAA under Article III once before, more than 80 years ago, in *Marine Transit Corp. v. Dreyfus,* 284 U.S. 263 (1932). The precise constitutional question presented was "whether [the application of the United States Arbitration Act] is compatible with the maintenance of the judicial power of the United States as extended to cases of admiralty and maritime jurisdiction (Const. Art. III)." *Id.* at 277. Holding the Arbitration Act constitutional under Article III as applied to admiralty and maritime cases, the Court stated in pertinent part, *id.* at 277-78:

> In *Red Cross Line v. Atlantic Fruit Co.,* [264 U.S. 109, 122, 123 (1924)], this Court pointed

> out that in admiralty "agreements to submit controversies to arbitration are valid," and that "reference of maritime controversies to arbitration has long been common practice." "*An executory agreement,*" *said the court,* "*may be made a rule of court*" and the "substantive right created by an agreement to submit disputes to arbitration is recognized as a perfect obligation." ... The general power of Congress to provide remedies [including specific performance] in matters falling within the admiralty jurisdiction of the federal courts, and to regulate their procedure, is indisputable. (emphasis added)

Cf. Wellness, 135 S. Ct. at 1942 (citing early cases of the Court involving reference to arbitrators if made by "rule of court" with consent of parties); *Red Cross Line,* 264 U.S. at 121-22, 122 n.2 (citing "rule of court" cases including those cited in *Wellness*).[1]

Since *Marine Transit,* the Court has developed a substantial body of law examining whether Article III has been violated by Congress' adoption of non-Article III adjudicative schemes. The factors weighed by the Court have included: (1) "the origins and importance of the right to be adjudicated," *i.e.,* whether a "private right" for liability between individuals is asserted, or a "public right" involving the federal government as a party or a claim integrally related to a federal regulatory scheme; (2) the nature of the non-Article III forum, and "the extent to

1. The executory agreement described in *Red Cross Line* was one "voluntarily and legally incurred." 264 U.S. at 124.

which [it] exercises the range of jurisdiction and powers normally vested only in Article III courts"; (3) the extent to which the delegation nonetheless reserves judicial power for exercise by Article III courts, including the extent of the control exercised over the non-Article III forum and the prescribed level of judicial review; (4) the presence or "absence of consent to an initial adjudication before a non-Article III tribunal"; and (5) "the concerns that drove Congress to depart from" adjudication in an Article III court. *See Stern v. Marshall,* 131 S. Ct. 2594, 2625-26 (2011) (Breyer, J., dissenting and quoting *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 849, 851 (1986)).

These factors form a matrix used by the Court to determine whether a particular non-Article III adjudication scheme breaches the boundaries protecting the Article III judicial Power from unconstitutional separation of powers incursions. As emphasized by the majority in *Wellness,* whether the boundaries have been unconstitutionally violated "must be decided not by 'formalistic and unbending rules,' but 'with an eye to the practical effect that the' practice 'will have on the constitutionally assigned role of the federal judiciary.'" 135 S. Ct. at 1944 (quoting *Schor,* 478 U.S. at 851).

Analyzing and integrating these factors when the FAA is applied to state-law private rights brought within the jurisdiction of the federal courts under the facts in this case establishes the following:

(1) The "personal right" of Verizon's 92 million customers and more than 320 million wireless communications customers nationwide to the exercise of

the essential attributes of the Article III judicial Power in connection with their state-law private rights claims has been taken away involuntarily, and the judicial Power vested in the federal courts by Congress under the Class Action Fairness Act of 2005 ("CAFA") to adjudicate the claims of these customers on a class-wide basis has been eliminated entirely;

(2) The adjudication of these customers' state-law private rights claims has been referred to arbitrators authorized to decide "any dispute"—including constitutional issues—without limitation, and the arbitrators adjudicate these disputes in an arbitration forum over which the federal courts exercise no meaningful control and which is incompatible with the class-wide scope of the judicial Power vested in the federal courts under CAFA; and

(3) The federal courts are required by Congress under 9 U.S.C. §§ 9 & 10 to confirm arbitration awards under the limitations imposed by Congress on the exercise the judicial Power, and under 9 U.S.C. § 13 to enter judgments on those awards "even if convinced that 'serious error' infect[s] the ... award[s]," *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 696 (2010) (Ginsburg, J., dissenting), *quoting Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987)—in conflict with Article III separation of powers principles under, *e.g., United States v. Klein.*

"Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). The questions squarely presented in Katz's petition fully implicate the liberty of

the People the Framers intended to secure by designing an independent Article III judiciary to exercise its vested judicial Power. *Stern*, *Wellness* and the entire body of the Court's Article III separation of powers cases confirm that the questions presented are most important, and that Katz's petition should be granted.

A. Verizon's customer agreement, including the arbitration agreement imposed on Katz and Verizon's more than 92 million customers.

Verizon's more than 92 million wireless telephone customers all have had arbitration under the FAA imposed on them. CA2 App., at A159-A160 (Verizon arbitration agreement); *id.* at A88 (92.2 million Verizon customers per Verizon Communications, Inc. Form 10-K for fiscal year ending December 31, 2011). Verizon concedes that these customers have no choice, but are required to accept Verizon's customer agreement, including its arbitration agreement, in order "to obtain equipment or services from Verizon." *Id.* at A178 (Verizon Rule 56.1 Response ¶12).

The terms of Verizon's arbitration agreement provide in relevant part (CA2 App., at A159-A160):

> YOU AND VERIZON WIRELESS BOTH AGREE TO RESOLVE DISPUTES ONLY BY ARBITRATION OR IN SMALL CLAIMS COURT.
>
> ***
>
> (1) THE FEDERAL ARBITRATION ACT APPLIES TO THIS AGREEMENT. ...

ANY DISPUTE THAT RESULTS FROM THIS AGREEMENT OR FROM THE SERVICES YOU RECEIVE FROM US (OR FROM ANY ADVERTISING FOR ANY PRODUCTS OR SERVICES) WILL BE RESOLVED BY ONE OR MORE NEUTRAL ARBITRATORS BEFORE THE AMERICAN ARBITRATION ASSOCIATION ("AAA") OR BETTER BUSINESS BUREAU ("BBB").

***

(3) THIS AGREEMENT DOESN'T ALLOW CLASS ARBITRATIONS EVEN IF THE AAA OR BBB PROCEDURES OR RULES WOULD. THE ARBITRATOR MAY AWARD MONEY OR INJUNCTIVE RELIEF ONLY IN FAVOR OF THE INDIVIDUAL PARTY SEEKING RELIEF AND ONLY TO THE EXTENT NECESSARY TO PROVIDE RELIEF WARRANTED BY THAT PARTY'S INDIVIDUAL CLAIM. (bold in original)

***

(7) AN ARBITRATION AWARD AND ANY JUDGMENT CONFIRMING IT APPLY ONLY TO THAT SPECIFIC CASE; IT CAN'T BE USED IN ANY OTHER CASE EXCEPT TO ENFORCE THE AWARD ITSELF.

Verizon has the right to change the terms of the customer agreement at any time (CA2 App., at A155-A156): "We may change prices or any other term

of your Service or this agreement at any time[.] ... If you use your Service after the change takes effect, that means you are accepting the change." The customer agreement also includes an integration clause that contractually precludes modification by anyone other than Verizon, and prohibits a customer from "rely[ing] on any other documents, or on what's said by any sales or customer service representatives" (*id.* at A161).

On February 28, 2011, Katz purchased a new cell phone and agreed to a new 24-month contract term with Verizon as a condition of the purchase (CA2 App., at A148, ¶8). At the conclusion of his transaction, Katz was presented with and required to sign a statement stating in relevant part (*id.*, A150-A153 at A152):

> I AGREE TO THE CURRENT VERIZON WIRELESS CUSTOMER AGREEMENT (CA), INCLUDING THE CALLING PLAN ... AND OTHER TERMS AND CONDITIONS FOR SERVICES AND SELECTED FEATURES I HAVE AGREED TO PURCHASE AS REFLECTED ON THE RECEIPT, AND WHICH HAVE BEEN PRESENTED TO ME BY THE SALES REP, AND WHICH I HAD THE OPPORTUNITY TO REVIEW. I UNDERSTAND THAT I AM AGREEING TO ... SETTLEMENT OF DISPUTES BY ARBITRATION AND OTHER MEANS INSTEAD OF JURY TRIALS AND OTHER IMPORTANT TERMS IN THE CA.

B. Katz's complaint and the state-law private rights claims asserted.

Katz has invoked CAFA, Pub. L. No. 109-02 (enacted Feb. 18, 2005), as the basis for the District Court's jurisdiction (CA2 App., at A10-A11, Complaint ¶8). "Verizon does not challenge the Court's subject-matter jurisdiction over [Katz's] claims under CAFA" (CA2 App., at 176, Verizon Rule 56.1 Response ¶6). Under CAFA, Congress has vested the federal courts with jurisdiction to adjudicate the state-law private rights of Verizon's customers on a class-wide basis.[2] One of Congress' express purposes in enacting CAFA, stated in § 2(b), 119 Stat. 5, was "[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." As *Stern* emphasizes, "[w]hen a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' ... and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." 131 S. Ct. at 2609 (quoting *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86-87 n.39, 90 (1982)).

Katz's Complaint is brought on behalf of two classes (CA2 App., at A7-A8, Complaint ¶1; A28-A29, Complaint ¶45):

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2. "CAFA gives federal courts jurisdiction over certain class actions, defined in [28 U.S.C.] § 1332(d)(1), if the class has more than 100 members, the parties are minimally diverse, and the amount in controversy exceeds $5 million. § 1332(d)(2), (5)(B)[.]" *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 552 (2014).

(i) A Fed. R. Civ. P. 23(b)(2) "Declaratory Judgment Class," comprised of all of Verizon's more than 92 million wireless telephone customers, seeking a declaration that the application of the FAA to their claims for liability under state law for breach of contract and consumer fraud violates Article III;[3] and

(ii) A Fed. R. Civ. P. 23(b)(3) "New York Class," comprised of all Verizon wireless telephone customers with a New York State area code, seeking damages and other amounts awardable under New York law for breach of contract and consumer fraud.

The state-law claims are based on Verizon's practices in connection with its so-called Administrative Charge, a monthly per-line charge of $0.99 when the action was commenced in 2012 (CA2 App., at A17, Complaint ¶19). Katz alleges that Verizon has consistently stated and implied in its customer agreement, monthly bills and other customer information that the Administrative Charge was and is being imposed for the recovery of "government mandated" or "government related" costs (CA2 App., at A8, Complaint ¶3; A18-A22, Complaint ¶¶22-32). Katz further alleges that the Administrative Charge is really a discretionary pass-through of Verizon's general costs utilized by Verizon to effectuate a concealed increase in the agreed-upon monthly rate for service (CA2 App., at A8, A10, A28, A33, A34, Complaint ¶¶3, 7, 44, 59, 64, respectively).

3. The number is "staggering," *see Stern*, 131 S. Ct. at 2630 (Breyer, J., dissenting), but the relevant compressed digital data for all these customers can be carried in one's pocket on a USB "thumb drive."

Verizon *admitted* in prior federal court proceedings in the District of New Jersey that it was using the Administrative Charge to "recove[r] general costs it incurred to provide service," including "the costs of building new cell sites" (CA2 App., at A9, A21, A24-A25, Complaint ¶¶5, 27(c), 38, respectively; A45-A48, Complaint Ex. B).[4] However, in a different federal court action against Verizon pending in the Western District of Washington at the same time as the New Jersey action, the District Court judge—analyzing the same customer documents at issue in the New Jersey action and in this action—concluded that the Administrative Charge "unambiguously" was supposed to be a recovery of "governmental-surcharge-related costs." *Smale v. Cellco P'shp d/b/a Verizon Wireless*, 547 F. Supp. 2d 1181, 1185-86 (W.D. Wash. 2008). *See also* CA2 App., at A9-A10, Complaint ¶6; A25-A28, Complaint ¶¶39-43.

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4. Exhibit B to Katz's Complaint (CA2 App., at A45-A48) is an excerpt of a December 10, 2007 brief filed by Verizon in support of its motion to dismiss in *Litman v. Cellco P'shp d/b/a Verizon Wireless*, No. 07-CV-4886 (D.N.J.), Docket Entry #9-2. In *Litman*, the District Court granted Verizon's motion to compel arbitration, 2008 WL 4507573 (D.N.J. Sept. 29, 2008), but that decision was reversed by the Third Circuit under then-controlling New Jersey unconscionability law regarding class-action waivers, 381 F. App'x 140 (3d Cir. 2010). Verizon then filed a petition for certiorari that was granted by this Court, vacating the Third Circuit's decision and remanding for further consideration in light of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). *Cellco P'shp d/b/a Verizon Wireless v. Litman*, No. 10-398, 131 S. Ct. 2872 (2011). On remand, the Third Circuit followed *Concepcion* and affirmed the District Court's decision granting the motion to compel, 655 F.3d 225 (3d Cir. 2011). Litman's subsequent petition for certiorari from the Third Circuit's decision was denied by this Court. *Litman v. Cellco P'shp d/b/a Verizon Wireless*, No. 11-644, 132 S. Ct. 1046 (2012).

Thus, the individual and class claims asserted by Katz are not just "an allegation" of wrongful and deceptive conduct (*cf. Concepcion,* at 1750), but are supported by "smoking gun" evidence annexed to Katz's Complaint and corroborated by a published federal District Court decision.

C. Arbitration under the FAA is imposed on more than 320 million wireless telephone customers nationwide.

The record in this case establishes that each and every of the thirteen major United States cell phone carriers reviewed in the most recent ConsumerReports.org annual survey and ratings when Katz's Complaint was filed in 2012 (CA2 App., at A89)—Verizon, AT&T, Sprint, T-Mobile, Consumer Cellular, U.S. Cellular, Credo Mobile, TracFone, Straight Talk, Net10, Virgin Mobile, MetroPCS and AT&T GoPhone—has imposed arbitration under the FAA on its customers as part of its standard form customer agreement (CA2 App., at A90-A143, collecting relevant portions of arbitration agreements).

The record also establishes, based on documents filed with the Securities and Exchange Commission, that the seven largest of these carriers combined (including Verizon) have more than 320 million customers on whom arbitration under the FAA has been imposed.[5] *Cf. Riley*

5. *See* CA2 App., at: (i) A88 (Verizon, 92.2 million customers); (ii) A197 (AT&T, 107 million subscribers); (iii) A199 (Sprint-Nextel, 55.6 million subscribers); (iv) A201 (Deutsche Telekom/T-Mobile, 33.3 million U.S. subscribers); (v) A203 (América Móvil/TracFone, 21.6 million TracFone U.S. subscribers); (vi) A205 (U.S. Cellular, 5.8 million customers); and (vii) A207 (MetroPCS, 8.9 million customers).

v. California, 134 S. Ct. 2473, 2490 (2014) ("Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception."). Thus, more than 320 million wireless customers—a number equivalent to the entirety of the People of the United States, *see Obergefell v. Hodges,* 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting) ("320 million Americans coast-to-coast")—"ha[ve] nowhere else to go," *Stern,* 131 S. Ct. at 2614, to obtain the essential method of communication in modern society.

D. The decisions of the courts below.

The District Court denied Katz's motion seeking a declaratory judgment under Article III, and ruled against Katz on all of the questions presented. Regarding Question 1, the District Court held:

(i) The "heightened" "knowing and voluntary" standard of consent is inapplicable to and inconsistent with arbitration under the FAA, as held by a number of circuit and district court decisions (App. 38a-40a, *see also* App. 35a-38a).[6] The District Court rejected Katz's arguments based on this Court's decisions incorporating a "voluntary, knowing and intelligent" standard for the waiver of constitutional rights, including *D.H. Overmyer Co. v. Frick Co.,* 405 U.S. 174, 185-86 (1972) (App. 40a), and—"even assuming an absence of meaningful choice" (App. 37a-38a)—nevertheless applied an unconscionability analysis under 9 U.S.C. § 2 that Katz maintained was inapplicable to the standard for an Article III waiver under the Constitution (App. 35a-36a).

6. The District Court did note (App. 40a) that the Sixth Circuit, in *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 668 (6th Cir. 2003) (en banc), had applied a "knowing and voluntary waiver" standard to an arbitration agreement in evaluating the sufficiency of a waiver of the right to proceed in federal court.

(ii) Article III separation of powers concerns are not implicated by private arbitration because Congress has neither created nor delegated resolution of the dispute to the non-Article III forum (App. 30a-35a). The District Court relied heavily *Schor*'s statement, 478 U.S. at 855, that "it seems self-evident that ... Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers" (App. 33a-34a), and again relying on *Schor*, found that Article III was not implicated because "the decision to invoke [the arbitration] forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction of these matters is unaffected" (*id.*). The District Court did not consider that in *Schor* the parties had the choice to proceed either in front of the CFTC or in federal court. *See Schor*, 478 U.S. at 850. Nor did the District Court address *Marine Transit* and its examination of the FAA's implications on the Article III judicial Power.

(iii) Congress' mandate under the FAA that the federal courts confirm and enter judgments on state-law private rights arbitration awards without meaningful exercise of the judicial Power does not violate Article III separation of powers or prescribe a "rule of decision" under the Court's decisions including, *e.g.*, *Klein* (App. 40a-42a). The District Court rejected the applicability of *Klein* because Congress had not "decide[d] the outcome of cases by declaring the effect of specific evidence in specific cases" (App. 41a-42a). Similarly, the District Court rejected the significance of the Congressional limitations on the exercise of the judicial Power, concluding they were not "a rule of decision 'of a cause in a particular way,'" because "the law is neutral on the outcome of any particular decision" (App. 42a).

Regarding Question 2, the District Court held that there was insufficient state action to support Katz's Article III challenge—focusing primarily on the District Court's involvement "in issuing one order enforcing a private agreement to arbitrate" in the non-Article III forum—and relying principally on the non-separation of powers decisions of the Second Circuit and other circuit and district courts holding that the imposition of arbitration agreements by private actors and enforcement of the agreements by the federal courts does not constitute "state action" (App. 22a-29a at 24a-25a). The District Court rejected the applicability of the "joint action" state action test based on Congress' adoption of the FAA alternative adjudication scheme in its entirety, combined with mandated enforcement of the statute by the federal courts under the limitations on the exercise of the judicial Power imposed by Congress (App. at 22a-29a), and rejected Katz's reliance on and distinguished decisions including *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982), which held that the private use of the challenged government procedures with the help of government officials constitutes "joint action" state action (App. 23a, 25a, 28a, 29a).

Katz directed the Court of Appeals to *Wellness* in a Fed. R. App. P. 28(j) letter shortly after the decision was issued (CA2 Docket, Entry #112). Nevertheless, the Court of Appeals affirmed the decision and reasoning of the District Court on the Article III questions without separate analysis, App. 3a, 5a.[7]

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7. In connection with a cross-appeal by Verizon, the Court of Appeals held that when the District Court granted Verizon's motion under 9 U.S.C § 3 to stay the federal court action and

REASONS FOR GRANTING THE PETITION

I. The constitutionality of the application of the FAA to state-law private rights brought within the jurisdiction of the federal courts is an important issue that should be decided by the Court.

Stern "emphatically" confirms the importance of this Court deciding the Article III separation of powers questions presented by Katz's petition: "A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely." 131 S. Ct. at 2620. In this case, the impact of the FAA on the federal courts' exercise of the essential attributes of judicial Power—including the entire elimination of the exercise of the judicial Power vested under CAFA to adjudicate the class-wide state-law private rights of more than 320 million wireless customers—presents a potentially far greater unconstitutional invasion of the Article III

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compel arbitration, the District Court did not have the inherent authority to dismiss the case where all claims were arbitrable—joining a number of circuit courts reaching the same conclusion and departing from a number of other circuit courts allowing dismissal (App. 5a-11a). Thus, the Court of Appeals vacated the dismissal by the District Court and remanded for entry of a stay (App. 11a).

Katz is not seeking review of that portion of the Court of Appeal's decision and judgment. He has conceded in both lower courts that the arbitration agreement is enforceable if the application of the FAA in this case does not violate Article III separation of powers. *See* Court of Appeals Decision (App. 4a & n.3). If Katz is successful in his Article III challenge, then the order compelling arbitration and the stay must necessarily be vacated as a result.

boundaries than *Stern* and *Wellness,* among many Article III cases.

Glidden Co. v. Zdanok, 370 U.S. 530 (1962), further confirms that importance of the Article III question presented. *Glidden* decided in the affirmative the question whether the United States Court of Customs and Patent Appeals and the United States Court of Claims were Article III courts and their judges Article III judges. The question was decided despite the fact that "[n]o challenge to the authority of the judges was filed in the course of the proceedings before them in either case." *Id.* at 535. As the plurality stated, "the disruption to sound appellate process entailed by entertaining objections not raised below ... is plainly insufficient to overcome the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." *Id.* at 537.[8] "Preserving the separation of powers is one of th[e] Court's most weighty responsibilities." *Wellness,* 135 S. Ct. at 1954 (Thomas, J., dissenting).

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8. One of the petitioners in *Glidden* had been granted leave by the Court the prior term to proceed with an appeal of the Article III issue to the Court of Appeals *in forma pauperis.* 370 U.S. at 532-33; *leave granted sub nom. Lurk v. United States,* 366 U.S. 712 (1961). In *Lurk, id.* at 713, Justice Frankfurter, joined by Justices Harlan and Stewart, dissented from the remand to the Court of Appeals because

> [t]hese [Article III questions] are not questions on which, with all due respect, a lower court can be of effective assistance to this Court. ... [T]he constitutional history and the cases upon which the decision ultimately must turn are the special concern of this Court.

The application of each of the factors synthesized by Justice Breyer in *Stern* "with an eye to the practical effect that the [FAA has] on the constitutionally assigned role of the federal judiciary," *Schor*, 478 U.S. at 851, supports a finding of unconstitutionality under Article III, and confirms the importance of the Court deciding the Article III questions.

A. The assertion of state-law private rights supports a finding of unconstitutionality under Article III.

"Disposition of private rights to life, liberty, and property falls within the core of the judicial power[.]" *Wellness*, 135 S. Ct. at 1963 (Thomas, J., dissenting). *Cf. Stern*, 131 S. Ct. at 2626 (Breyer, J., dissenting) (conceding that private rights nature of claim to be adjudicated argues against constitutionality under Article III).

In *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985), the Court held that Article III separation of powers did not prohibit Congress, in connection with a federal statutory pesticide registration scheme enacted under its Article I powers, from "selecting binding arbitration [by "civilian" arbitrators] with only limited judicial review" as the mechanism for resolving claims for compensation owed for the use by one manufacturer of the data of another. 473 U.S. at 571, 574 n.1, 590. *Thomas*' "limited" holding, however, hinged upon the fact that the claim involved was "a seemingly 'private' right ... so closely integrated into a public regulatory scheme," *id.* at 593-94. Furthermore, under the regulation governing the conduct of the arbitration, 29 C.F.R § 1440.1(b) (*see* 473 U.S. at 590, 591), the "civilian" arbitrators were to be

selected from "the roster of commerical [sic] arbitrators maintained by the American Arbitration Association ["AAA"]," and the arbitration was to be conducted under the fee schedule and rules of the AAA.

Like the non-Article III arbitration scheme prescribed in *Thomas*, Verizon's arbitration agreement also provides for arbitration in the AAA forum with its roster of AAA arbitrators, AAA fee schedules and AAA rules (CA2 App., at A159, §§1-2). However, unlike the "seemingly 'private' right ... so closely integrated into a public regulatory scheme" created by Congress under Article I in *Thomas*, the private rights asserted in this case are solely "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," *Stern*, 131 S. Ct. at 2609.[9]

The "[a]uthority for the Federal Government to decide questions of state law exists only by virtue of the Diversity Clause in Article III." *Glidden*, 370 U.S. at 537-38 (citing *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938)). Thus, it also is important for the Court to consider the significance of the distinction between state-law private rights and Congress' power to regulate admiralty jurisdiction upheld under Article III in *Marine Transit, supra.* Admiralty claims are not "common law" claims, at least for purposes of the right to jury trial under the Seventh Amendment. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42, 55 n.10 (1989).

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9. The District Court distinguished *Thomas* because there Congress "select[ed] binding arbitration" for dispute resolution, whereas "Congress through the FAA is not 'selecting binding arbitration' for the resolution of disputes; Congress is enforcing a private agreement that selects binding arbitration for the resolution of disputes." App. 34a n.4.

B. The nature of and the powers and range of jurisdiction exercised by the arbitration forum supports a finding of unconstitutionality under Article III.

1. Arbitrators exercise the judicial Power under the unlimited "any dispute" arbitration agreements utilized by Verizon and other wireless providers.

In his concurrence in *Wellness,* Justice Alito stated, 135 S. Ct. at 1949: "No one believes that an arbitrator exercises '[t]he judicial Power of the United States,' Art. III, § 1, in an ordinary, run-of-the mill arbitration." Justice Alito, however, did not define "an ordinary, run-of-the-mill arbitration."

In 1926, one year after the passage of the FAA, Julius H. Cohen, the "drafter for the American Bar Association of much of the proposed bill's language," *Allied-Bruce Terminix Cos., Inc. v. Dobson,* 513 U.S. 265, 274 (1995), co-authored his well-cited law review article regarding the act. *See* Julius H. Cohen & Kenneth Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265 (1926) ("Cohen & Dayton"). Cohen & Dayton, *id.* at 285-86, discusses a report by "[a] special committee appointed by the Association of the Bar of the City of New York in February, 1924 rendered ... to the Association dated April 1st, 1925" that "considered the operation of the New York [arbitration] law and the principles of arbitration in detail" ("City Bar Report").[10] As Cohen & Dayton notes, *id.,* the City Bar Report

10. For the convenience of the Court and the parties, a copy of the City Bar Report has been posted to the website of New York City Bar Association. *See* http://bit.ly/1NnHQmv.

> declared the advisability of restricting agreements to arbitrate future disputes [i.e. executory agreements] to those cases in which there is a body of 'established customs, practices, and standards' with which the arbitrators and the parties will be familiar ... and of excluding such agreements from contracts in which this element of common practice is absent.

See City Bar Report, at 275-76. Thus, the City Bar Report seems to describe, at least in part, the nature of an "ordinary, run-of-the mill arbitration"—a "core" arbitration. *Cf. Crowell v. Benson,* 285 U.S. 22, 38, 44-45, 54 (1932) (administrative adjudicator had limited authority to make specialized, narrowly confined factual determinations regarding particularized area of law); *Schor,* 478 U.S. at 852-56 (CFTC authorized to adjudicate only "a narrow class of common law claims" in a "particularized area of law" governed by "a specific and limited federal regulatory scheme" for which the agency had "obvious expertise").

However, the unlimited "any dispute" arbitration agreements used by Verizon and the wireless industry reach issues far beyond "run-of-the-mill." For example, in *Emilio v. Sprint Spectrum L.P., d/b/a Sprint PCS,* 2008 WL 4865050, at *1 (S.D.N.Y. Nov. 6, 2008), the District Court upheld the authority of the arbitrator to decide that a Sprint state court settlement did not preclude the continuing arbitration of the individual and class claims asserted in the arbitration, and the Second Circuit (with Justice Sotomayor then sitting on the panel as circuit judge) affirmed. 315 F. App'x 322, 324 (2d Cir. 2009). While the primary issue presented was the arbitrator's authority

under the arbitration agreement, the courts did not expressly examine the basis for the arbitrator's decision: that the settlement "did not satisfy the constitutional requirement of 'adequacy of representation.'" *Emilio*, 2008 WL 4865050, at *1. *See also Hesse v. Sprint Corp.*, 598 F.3d 581, 588-89 (9th Cir. 2010) (reaching same conclusion regarding application of same Sprint settlement to similar claims). *See generally Taylor v. Sturgell*, 553 U.S. 880, 884, 894 (2008) (discussing class action due process "adequacy of representation" requirement).

If this case goes to arbitration, it also is likely the arbitrator will have to decide constitutional issues. In the prior District of New Jersey litigation involving Verizon's Administrative Charge (*see* Note 4, *supra*), Verizon asserted multiple defenses in its merits-related brief based on federal preemption under 47 U.S.C. § 332 of the Federal Communications Act—defenses arising under the Supremacy Clause (U.S. Const. Art. VI, cl. 2). *Litman v. Cellco P'shp d/b/a Verizon Wireless*, No. 07-CV-4886 (D.N.J.), Docket Entry #9-2, Table of Contents. *Cf. Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1039-41 (9th Cir. 2010) (breach of contract and consumer fraud claims not preempted by § 332).

"[T]he essence of the 'judicial Power' created under Article III of the Constitution" is "interpreting and applying substantive law." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 38 (1988) (Scalia, J., dissenting). Furthermore, "[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." *Crowell*, 285 U.S. at 60. Under the

open-ended "any dispute" arbitration agreements utilized by Verizon and the entire wireless communications industry, arbitrators can and do exercise the *fullest* range of the judicial Power.

2. The nature of the arbitration forum is incompatible with the range of jurisdiction and powers vested in the Article III courts under CAFA.

In *Concepcion,* the Court held that "the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures," because such a requirement by the State "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," 131 S. Ct. at 1744, 1753. Among other reasons, the Court stated that "[c]onfidentiality becomes more difficult," and that "arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties," *id.* at 1750—and thus "[w]e find it unlikely that in passing the FAA Congress meant to leave the disposition of these [formal class action] procedural requirements to an arbitrator," *id.* at 1751.

Congress vested the federal courts with class-wide judicial Power under CAFA "[to] restore the intent of the framers ... by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." CAFA § 2(b), 119 Stat. 5. *Concepcion,* however, establishes that the FAA arbitration forum is incompatible with the exercise of this vested judicial Power. How to resolve this conflict between the FAA and the intent of Congress and the Framers under Article

III is an important question for the Court. *Cf. Northern Pipeline,* 458 U.S. at 73: "[It is] clear that where Art. III does apply, all of the legislative powers specified in Art. I and elsewhere are subject to it."

C. The extremely limited reservation of judicial Power to be exercised by the federal courts supports a finding of unconstitutionality under Article III.

1. The federal courts exercise no meaningful control over the arbitrator and the arbitration.

In reaching its finding of constitutionality in *Wellness,* the Court placed substantial weight on the extent of control exercised by the Article III courts over bankruptcy judges and courts, finding that, like the assignment to magistrates of the supervision of voir dire and jury selection in a criminal trial, "the entire process takes place under the district court's total control and jurisdiction." 135 S. Ct. at 1944, quoting *Peretz v. United States,* 501 U.S. 923, 937 (1991). Among other things, "[b]ankruptcy judges, like magistrate judges, 'are appointed and subject to removal by Article III judges.'" *Id.* at 1945 (quoting *Peretz,* 501 U.S. at 937, and citing 28 U.S.C. §§ 152(a)(1), (e)). Furthermore, "bankruptcy courts hear matters solely on a district court's reference, § 157(a), which the district court may withdraw *sua sponte* or at the request of a party, § 157(d)." *Id. Cf. Stern,* 130 S. Ct. at 2613 n.6 ("the agency in *Crowell* functioned as a true 'adjunct' of the District Court").

The federal courts exercise no meaningful control over arbitrators and the arbitration forum under the FAA. Other than making the parties' arbitration agreement a "rule of court" when petitioned for enforcement by a party under 9 U.S.C. §§ 3 & 4, *see Marine Transit,* 284 U.S. at 277, the potential involvement of the federal courts during an arbitration is limited to the designation and appointment of arbitrators under 9 U.S.C. § 5, and the enforcement of witness summons issued by the arbitrators under 9 U.S.C. § 7.

The significance of this lack of control was raised by Justice Kagan during the January 14, 2014 oral argument in *Executive Benefits Ins. Agency v. Arkison,* No. 12-1200. In response to the distinction drawn by Assistant Solicitor General Curtis Gannon between the "more purely private" nature of arbitration and the "lots of procedural protections and statutory protections" governing bankruptcy and magistrate judges, Justice Kagan responded (Tr. of Oral Arg. 53-54 at 54, lines 14-18): "Yes, but that would suggest that arbitration is more constitutionally problematic because ... it's farther away from the supervisory authority of the district court."

The implications of the lack of control was again raised by Justice Kagan during the January 14, 2015 oral argument in *Wellness,* No. 13–935, when she noted that "there's much less supervision over the arbitration system than there is over a typical bankruptcy court" (Tr. of Oral Arg. 51, lines 2-4), and that "bankruptcy courts [are] from the very beginning all the way through, supervised [by] district courts" (Tr. of Oral Arg. 53, lines 14-16).

As analyzed by Justice Breyer in *Stern*, 131 S. Ct. at 2627, the control exercised is closely related to the extent of the judicial Power reserved to the Article III courts.

2. The extremely limited judicial review of private rights arbitration awards prescribed by Congress, and the mandated entry of judgment on those awards, supports a finding of unconstitutionality under Article III, including under *United States v. Klein*.

Under 9 U.S.C. § 9 (App. 47a), "a court 'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected 'as prescribed' in §§ 10 and 11." *Hall Street Assocs. LLC v. Mattel, Inc.*, 552 U.S. 576, 582 (2008). As the Court observed in *Concepcion*, 135 S. Ct. at 1752, § 10 (App. 48a) allows a court to vacate an arbitration award in very limited circumstances, but "judicial review of [arbitrators'] decisions ... is unlikely to have much effect given these limitations; review under § 10 focuses on misconduct rather than mistake." Furthermore, under *Hall Street*, 552 U.S. at 590, parties to an arbitration agreement are precluded from agreeing to expand the standards for vacatur or the scope of judicial review mandated by Congress.[11]

The scope of judicial review is an important factor in the Court's consideration of the constitutionality of non-Article III adjudication schemes. *See Executive Benefits*

11. Section 11 of the FAA (App. 48a-49a) does allow the federal courts to make essentially ministerial corrections to awards.

Ins. Agency v. Arkison, 134 S. Ct. 2165, 2172 (2014) (final judgment entered by bankruptcy court on "core" matters and "non-core" matters on consent is subject to "appellate review" by district court; non-core-matters without consent to final judgment require proposed findings of fact and conclusions of law subject to *de novo* review by district court). *See also, e.g., Crowell*, 285 U.S. at 49-50, 77 (constitutionality supported where factual findings of commission are reviewed by district court under "weight of the evidence" standard and questions of law *de novo*); *Schor*, 478 U.S. at 853 (constitutionality supported where decisions of CFTC are subject to same standard of review as *Crowell*). *Cf. Northern Pipeline*, 458 U.S. at 86 (unconstitutionality supported where "judgments of bankruptcy courts are apparently subject to review only under the more deferential [than *Crowell*] 'clearly erroneous' standard").

The entry of judgments on confirmed awards is governed by 9 U.S.C. § 13 (App. 49a). Section 13 states that "[t]he judgment shall be docketed as if it was rendered in an action," and, further, that

> [t]he judgment so entered shall have the same force and effect, in all respects, as ... a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

Thus, under the FAA, Congress requires federal courts to enter judgments on a confirmed award "even if convinced that 'serious error' infect[s] the ... award." *Stolt-Nielsen*, 559 U.S. at 696 (Ginsburg, J., dissenting).

The lower courts held that *Klein* was not implicated by this three-part regime (App. 5a, 40a-42a). But in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 430 (1995), the Court indicated that *Klein* could be implicated where Congress "instruct[s] a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate."

The implications of the Congressional mandate under §§ 9, 10 & 13 were explored by the Court during the January 14, 2015 oral argument in *Wellness*. Justice Sotomayor addressed Congress' mandate to enter judgments (Tr. of Oral Arg. 52, lines 16-20): "[In arbitration] Congress is saying, [the federal courts] are going to [enter judgment on an award] anyway," "even [when] you don't even put that into the contract." And directly addressing the limitations on judicial review, Justice Kagan observed (Tr. of Oral Arg. 51, lines 16-20): "[Arbitration is] totally divorced from any kind of control from anybody, and yet Federal courts, under the Arbitration Act, simply have to rubber-stamp it and say it's valid except in extremely unusual circumstances." According to Justice Kagan (*id.* at 53, lines 12-16), "[T]he arbitrator case seems to me much more threatening to the integrity of the Federal judicial system than ... the bankruptcy courts." *Cf. Wellness,* 135 S. Ct. at 1968 (Thomas, J., discussing relationship of entry of judgment to judicial power, and referencing, *e.g.*, more limited review of bankruptcy court judgments relied on in *Northern Pipeline*).

During the discussion of arbitration in the January 14, 2014 *Executive Benefits* oral argument, Chief Justice Roberts stated (Tr. of Oral Arg. 55, lines 10-13): "Courts enforce contracts all the time. They don't enter judgments

beyond their Article III authority simply because the two parties before them agree that they should." Parties may agree to arbitration governed by the FAA, but it is Congress who has prescribed the limits on judicial review and mandated the entry of judgment on an award "infected with serious error." Congressionally delegated "rubber-stamp work" implicates *Klein*. *See Gutierrez de Martinez*, 515 U.S. at 429.

3. The elimination of the exercise of the judicial Power vested under CAFA over the private rights of more than 92 million Verizon customers and 320 million wireless customers nationwide supports a finding of unconstitutionality under Article III.

The District Court concluded that Article III separation of powers concerns are not implicated by private arbitration when Congress neither creates nor delegates resolution of the dispute to the non-Article III forum (App. 30a-35a). Similarly, in *Wellness*, 135 S. Ct. at 1958-59, Chief Justice Roberts, in dissent, expressed the view that the parties' agreement to resolve disputes by arbitration in a private forum

> does not implicate Article III any more than does an agreement between two business partners to submit a difference of opinion to a mutually trusted friend. Arbitration agreements, like most private contracts, can be enforced in court.

More than 92 million Verizon customers and 320 million wireless customers nationwide are subject to

arbitration of their state-law private rights under the FAA. *See* Note 5, *supra*. The effect of the application of the FAA is the elimination of "the constitutionally assigned role of the federal judiciary" to adjudicate these claims brought within its vested jurisdiction under CAFA. *Cf. Wellness*, 135 S. Ct. at 1944 (quoted *supra*); *Stern*, 131 S. Ct. at 2609, 2620 (quoted *supra*).

D. The absence of "knowing and voluntary" consent to arbitration under the FAA supports a finding of unconstitutionality under Article III.

1. Consent to arbitration of "any dispute" under a contract for which the terms can be changed unilaterally at any time cannot be "knowing."

"[A]greements to arbitrate future disputes [in] those cases in which there is a body of 'established customs, practices, and standards' with which the arbitrators and the parties will be familiar," *see* Cohen & Dayton, at 285-86, are "knowing" agreements. Putting aside the important question whether there is any true, meaningful understanding by wireless customers of the nature and consequences of FAA arbitration, it also is necessarily true that they cannot "know" what they are agreeing to arbitrate—except "everything now and in the future."

In *Home Ins. Co. v. Morse*, 87 U.S. 445, 451 (1874), the Court equated arbitration with the constitutional right of removal in diversity cases:

> In a civil case [a man] may submit his particular suit by his own consent to an arbitration, or ... may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit[.] In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.

This passage by the Court is consistent with the conclusion that an arbitration agreement waiving the constitutional right to an Article III forum cannot be "knowing and intelligent" if one cannot know "in advance" the types of claims and cases to which the waiver applies. *See also Wellness,* 135 S. Ct. at 1948 (consent to non-Article III adjudicator must be "knowing and voluntary").

2. Verizon's 92 million customers and 320 million wireless customers nationwide have "no choice" "to refuse" arbitration under the FAA.

The lower federal courts, both in this case and the others cited by the District Court, have rejected the applicability of the constitutional "knowing and voluntary" standard to arbitration under the FAA, and instead have substituted the standards for enforceability of arbitration agreements under § 2, primarily unconscionability (App. 40a). In *Wellness,* however, the Court has made clear that the waiver of the right to an Article III adjudicator must be "voluntary"—there must be "the right to refuse it." 135 S. Ct. at 1948. *See also Stern,* 131. S. Ct. at 2614-15

(Stern "had nowhere else to go if he wished to recover from [Marshall's] estate," and thus, "did not truly consent" to non-Article III adjudicator). *Cf. Wellness,* 135 S. Ct. at 1968 (Thomas, J.) (discussing implications under Article III of "'involuntary divesture' of a private right") (citation omitted).

The legislative history also includes references to the fact that arbitration under the FAA is supposed to be "voluntary." *See, e.g., Arbitration of Interstate Commercial Disputes, Joint Hearings on H.R. 646 and S. 1005 before the Subcommittees of the Committees on the Judiciary,* 68th Cong., 1st Sess. (1924) ("*Joint Hearings*"), at 26 (Alexander Rose, Arbitration Society of America: "Arbitration ... is a purely voluntary thing ... which men voluntarily enter into."). *See also* Cohen & Dayton, at 279 ("an agreement to arbitrate ... is entirely voluntary ... a contract freely made by the parties thereto").

It is a "basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen,* 130 S. Ct. at 1773 (citation omitted). While it is true that "Congress may "encourage parties to ... resort to arbitration without impermissible incursions on the separation of powers," *Schor,* 478 U.S. at 855, here we have more than 320 million wireless customers with no choice to refuse arbitration from thirteen wireless carriers, including the seven largest standing alone, if they want to communicate in modern society. Both as a matter of "personal right," and in light of its destructive impact "on the constitutionally assigned role of the federal judiciary," *e.g., Wellness,* 135 S. Ct. at 1944, anything other than "truly" "voluntary consent" to arbitration cannot be squared with Article III.

E. A "concern" in enacting the FAA in the legislative history supports a finding of unconstitutionality under Article III.

The *Joint Hearings,* at 33-41, incorporates into the record a "brief" on the proposed statute submitted by Julius Cohen. In a section entitled "THE EVIL TO BE CORRECTED," Cohen identifies three "evils" to be remedied by the act. *Id.* at 34-35. The third evil, in relevant part, is "the failure through litigation, to reach a decision regarded as just ... because the courts necessarily apply general rules which do not always fit a specific case." *Id.* at 35. *See also* Cohen & Dayton, at 269 (same). The City Bar Report, at 272 (*see* http://bit.ly/1NnHQmv), considered "talk of [this] kind [to be] ill-considered and unsound," and "positively harmful to the community."

History, including legislative history, cannot be rewritten. Whether the FAA legislative history evidences "an effort [by Congress] to ... humble the Judiciary"—one of the indicia of unconstitutionality identified in *Wellness,* 135 S. Ct. at 1945—is a question that should be addressed by the Court.

II. The lower courts' holding of insufficient state action to support Katz's Article III challenge conflicts with the decisions of the Court.

Under the Court's decision in *Bond v. United States,* 131 S. Ct. 2355, 2365 (2011), "[t]he structural principles secured by the separation of powers protect the individual as well." *Bond* further confirms that Katz has Article III standing to raise his constitutional separation of powers challenge extending beyond his own individual

interests. *Id.* at 2364. As noted by the Court, "the claims of individuals ... have been the principal source of judicial decisions concerning separation of powers and checks and balances. *Id.* at 2365, *citing, e.g., Northern Pipeline.*

The District Court's holding that there is insufficient state action to support Katz's Article III challenge, affirmed by the Court of Appeals, focused primarily on the District Court's involvement "in issuing one order enforcing a private agreement to arbitrate" in the non-Article III forum—and relying principally on the non-separation of powers decisions of the Second Circuit and other circuit and district courts holding that the imposition of arbitration agreements by private actors and enforcement of the agreements by the federal courts does not constitute "state action" (App. 22a-29a at 24a-25a). Katz submits that *Bond* provides the proper framework for evaluating his right to assert his Article III separation of powers challenge, and that the lower courts' reliance on "state action" principles conflicts with *Bond* and is misplaced.

Assuming that the "state action" test should apply, then Congress' adoption of the alternative scheme of adjudication under the FAA combined with the federal courts' enforcement of the statute as mandated by Congress when petitioned by Verizon constitutes "joint action" state action. Under *Lugar,* which the District Court distinguished, the private use of the challenged government procedures with the help of government officials constitutes "joint action" state action. 457 U.S. at 941. *Cf. American Mfrs, Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 54 (1999) (legislative decision not to intervene in dispute between private parties "can just as easily be seen as state inaction").

Furthermore, the District Court did not consider that, in order to "issu[e] one order enforcing a private agreement to arbitrate," it decided three different Article III separation of power issues, including its rejection of the applicability of a "knowing and voluntary" standard for the waiver of the Article III "personal right." Nor did the District Court consider in this context the consequences on Katz and Verizon's other customers of the Congressionally imposed limitations on the exercise of the judicial Power by federal courts in connection with the confirmation and entry of judgment on private rights awards.

At bottom, Katz's "individual liberty is compromised" when separation of powers under "the constitutional structure of our Government" is violated. *Bond,* 131 S. Ct. at 2365. *Accord Clinton,* 524 U.S. at 450 (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."). Whether stated in terms of Article III standing, or "state action," the constitutional requirements for Katz to pursue his Article III challenge are satisfied.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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