No. 18-1543

IN THE
Supreme Court of the United States

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

Petitioner,

v.

CELLCO PARTNERSHIP D/B/A/ VERIZON WIRELESS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONSE TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

The Petition presents the following questions:

(1) whether Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3, which directs that the court "shall … stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement," requires federal district courts to stay all pending judicial proceedings, rather than giving these courts discretion to dismiss the action and enter final judgment; and

(2) whether requiring an individual to arbitrate a dispute under the terms to which he agreed in a signed, written contract with a private entity violates the U.S. Constitution.

RULE 29.6 STATEMENT

Verizon Wireless is an indirect wholly owned subsidiary of Verizon Communications Inc. No publicly traded company owns 10% or more of Verizon Communications Inc.

RELATED PROCEEDINGS

Katz v. Cellco P'ship, No. 12-cv-9193, United States District Court for the Southern District of New York. Judgment entered December 16, 2013.

Katz v. Cellco P'ship, Nos. 14-138 (lead), 14-291 (XAP), United States Court of Appeals for the Second Circuit. Judgment entered July 28, 2015.

Katz v. Cellco P'ship, No. 15-542, United States Supreme Court. Judgment entered December 7, 2015.

Katz v. Cellco P'ship, No. 12-cv-9193, United States District Court for the Southern District of New York. Judgment entered April 18, 2018.

Katz v. Cellco P'ship, No. 18-1436, United States Court of Appeals for the Second Circuit. Judgment entered March 12, 2019.

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There were four judicial opinions issued below:

Katz v. Cellco P'ship, 756 F. App'x 103 (2d Cir. 2019) ("*Katz IV*");

Katz v. Cellco P'ship, No. 12-cv-9193, 2018 WL 1891145 (S.D.N.Y. Apr. 17, 2018) ("*Katz III*");

Katz v. Cellco P'ship, 794 F.3d 341 (2d Cir. 2015) ("*Katz II*"), *cert. denied* 136 S.Ct. 596 (2015); and

Katz v. Cellco P'ship, No. 12-cv-9193, 2013 WL 6621022 (S.D.N.Y. Dec. 12, 2013) ("*Katz I*").

These opinions are reproduced in Petitioner's appendices A – E.

JURISDICTION

This Court has certiorari jurisdiction pursuant to 28 U.S.C. § 1254(1). However, as set forth below, this Court lacks subject matter jurisdiction to decide the first question presented because it is moot.

INTRODUCTION AND STATEMENT OF THE CASE

The Petition represents Michael A. Katz's second attempt to have this Court upend decades of settled precedent by declaring unconstitutional the enforcement of private arbitration agreements. The end goal is to disfavor arbitration agreements and force private companies like Verizon Wireless to offer to contract their services on terms Katz would prefer,

in direct contravention of the Federal Arbitration Act ("FAA"). In pursuit of that meritless quest, Katz here seeks to focus on an open question of statutory interpretation that this Court has reserved but that is moot, waived, and otherwise inappropriate for resolution in this case.

The underlying dispute stems from a small administrative charge on Verizon Wireless bills. Katz claims that the charge was too high. Rather than arbitrate that dispute as required by the signed, written Customer Agreement that Katz concedes he entered with Verizon Wireless, Katz filed, in 2012, a class action lawsuit in the U.S. District Court for the Southern District of New York asserting state law claims for breach of contract and consumer fraud. Katz also sought, among other things, a declaration that the arbitration requirement violated Article III of the U.S. Constitution.

The district court rejected Katz's constitutional claims, dismissed the lawsuit, and entered an order compelling Katz to arbitrate his state law claims pursuant to the terms of the Customer Agreement. The court based its constitutional ruling, in part, on the commonsense observation that Verizon Wireless, as a private entity, cannot violate anyone's constitutional rights; in other words, Verizon Wireless is not a state actor and the Customer Agreement is not state action. App. 49a (*Katz I*). Katz appealed. Verizon Wireless cross-appealed the district court's decision to dismiss rather than stay the proceedings as required by the FAA.

The Second Circuit ruled in Verizon Wireless's favor on both issues. First, the court affirmed on the merits the district court's rejection of Katz's constitutional claims. App. 33a (*Katz II*). Turning to the question of whether the FAA requires a stay or permits discretionary dismissal, the court held that "[t]he FAA's text, structure, and underlying policy command" a stay. App. 35a–36a. Accordingly, in 2015, the Second Circuit remanded for the district court to enter a stay while the dispute proceeded to arbitration.

Katz petitioned this Court for review of the Second Circuit's constitutional rulings. He presented five questions concerning the constitutionality of the FAA and the wisdom of the state-action doctrine. Cert. Pet. i, *Katz v. Cellco P'ship*, 136 S. Ct. 596 (2015) (No. 15-542), 2015 WL 6549668, at *i. Katz made clear, however, that he was "not seeking review" of the Second Circuit's statutory ruling requiring "remand[ ] for entry of a stay." *Id.* at 16 n.7. This Court denied certiorari in late 2015. *Katz*, 136 S. Ct. 596.

On remand, the district court stayed the action as directed by the Second Circuit and the dispute proceeded to arbitration. During arbitration, to resolve the matter and avoid lengthy further proceedings, Verizon Wireless proffered a $1,500 payment to Katz—an amount that constituted not only a full refund of the disputed administrative charge under the most generous possible construction, but also the maximum potential amount of damages. *See* App. 11a–12a, 81a. Katz did not contest that this proffer represented the full amount in dispute, but nevertheless rejected Verizon

Wireless's proffered payment in an attempt to keep litigating the matter. App. 81a.[1]

The arbitrator then issued decisions granting Verizon Wireless judgment on the pleadings, denying Katz's claims for injunctive relief, and ordering Verizon Wireless to pay Katz $1,500, plus $500 in attorneys' fees. App. 82a, 86a–87a. Following those decisions, Katz returned to the district court and moved to vacate the arbitration decisions in substantial part, again claiming that Verizon Wireless's enforcement of the arbitration agreement violated his constitutional rights.

This time around, Katz framed the supposed constitutional violation as a transgression of his Fifth Amendment due process right to an Article III forum, rather than as a direct violation of Article III. Although Katz continued to acknowledge that he had entered the signed, written Customer Agreement with Verizon Wireless that required him to arbitrate, Katz argued that that his consent was "involuntary" insofar as Verizon Wireless conditioned its offer of wireless service on his acceptance of the agreement to arbitrate (along with the rest of the provisions of the Customer Agreement). The district court, correctly recognizing that state action is an essential element

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[1] In the Petition, Katz asserts it is "undisputed" that $1,500 was "incomplete relief." Pet. 16 (citation omitted). To the extent Katz intends to suggest that his claims are worth more than $1,500, or to deny that the arbitration agreement, by its terms, precludes injunctive relief, this position is not only denied by Verizon Wireless but was rejected by the arbitrator and Katz is not seeking review of that decision.

of any constitutional claim no matter which constitutional provision is invoked, rejected Katz's "new" claim on the same basis as before—*i.e.*, that Verizon Wireless is not a state actor and that its enforcement of the arbitration agreement is not state action. App. 23a–26a (*Katz III*). Accordingly, the district court confirmed the arbitration decisions in full.

Katz again appealed to the Second Circuit. The "sole issue" Katz presented in his second appeal was whether Verizon Wireless had violated his Fifth Amendment due process right to an Article III forum. Katz Br. 30–31, *Katz IV* (No. 18-1436), 2018 WL 4076064 *30–31. As he had below, Katz argued that his consent to arbitration was "involuntary" because he supposedly lacked the "right to refuse" the arbitration clause in the Customer Agreement when he accepted Verizon Wireless's offer of wireless service. *See id., e.g.*, 2, 28–29, 46–47. Katz did not argue that he was compelled to accept Verizon Wireless's offer of service. What Katz sought, in effect, was a declaration from the Second Circuit that the Fifth Amendment grants him a *constitutional right* to redline an offer of service and reject an arbitration clause, thereby forcing a private entity to offer services on his preferred terms. Katz did not renew his previous objection to the Second Circuit's holding that the FAA requires a stay pending arbitration.

The Second Circuit rejected Katz's Fifth Amendment argument. The court held, once again, that Verizon Wireless could not have violated Katz's constitutional rights because "Verizon is a private

concern, not a state actor, and its enforcement of an arbitration agreement does not transform it into an arm of the state." App. 5a (*Katz IV*).

Katz lodged the instant Petition.

REASONS FOR DENYING THE PETITION

I. This Case Is An Inappropriate Vehicle For Deciding Whether The Federal Arbitration Act Requires A District Court To Stay Proceedings Pending Arbitration.

Katz asks the Court to consider whether Section 3 of the FAA requires federal district courts to stay judicial proceedings pending arbitration or gives these courts discretion to dismiss the action and enter final judgment. The Court should deny certiorari because the Court lacks subject matter jurisdiction to reach that moot question. In addition, the Court should deny certiorari because (i) Katz affirmatively waived the issue in 2015 and failed to preserve it in his current appeal, (ii) its resolution would make no difference in this case, and (iii) in any event, further percolation would allow the courts of appeal to continue addressing the issue, including the precise argument Katz intends to make but concedes has never been considered by any court of appeals.

A. The Decision To Stay Or Dismiss Is Moot Because Arbitration Is Complete.

Article III demands that "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013) (citation

omitted). Accordingly, a "case that becomes moot at any point during the proceedings is 'no longer a "Case" or "Controversy" for purposes of Article III,' and is outside the jurisdiction of the federal courts." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)). The same is true for any "particular claims" that become moot during the litigation. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (emphasis and citation omitted).

There is no justiciable controversy regarding the first question Katz presents. The decision whether to stay or dismiss this action pending arbitration became moot when arbitration was completed in 2017. From that point forward, it would have been impossible to direct the district court to keep Katz's lawsuit on its docket while arbitration took place, or to allow the court to dismiss the action until arbitration was complete. The dispute was moot, that is, "no longer embedded in any actual controversy about [Katz's] particular legal rights." *Nike*, 568 U.S. at 91 (citation omitted); *see also, e.g.*, *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 393–94 (1981) ("This, then, is simply another instance in which one issue in a case has become moot, but the case as a whole remains alive because other issues have not become moot.").

This jurisdictional defect dooms the first question presented. It would be a poor use of the Court's scarce resources to grant certiorari on the first question now, only to dispose of the issue later without having

decided the merits. The Court should deny certiorari.[2]

B. Katz Affirmatively Waived And Then Failed To Preserve Any Objection To The Second Circuit's Holding That The FAA Requires A Stay.

Not only does this Court lack jurisdiction to decide whether the FAA requires a stay, Katz affirmatively waived his opportunity to present that question in his 2015 petition for certiorari. Katz then declined to preserve the issue in his second, current appeal, making it doubly forfeit.

In *Katz II*, the Second Circuit affirmed on the merits the district court's rejection of Katz's constitutional challenges to the FAA and remanded for a stay because the "plain language" of the FAA "specifies that the court 'shall' stay proceedings pending arbitration." App. 36a. In his 2015 petition to this Court for review of that decision, Katz asserted

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[2] While the Court often grants certiorari to vacate rulings on issues that become moot while a case awaits this Court's review, that is not what happened in this case. Here, Katz had the opportunity to present the stay question before it was moot and affirmatively waived that opportunity. *See* section I.B., *infra*. Because Katz "voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari" he "thereby surrender[ed] his claim to the extraordinary equitable remedy of vacatur." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) (distinguishing *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)). The correct result is denial of certiorari.

that the Second Circuit's remand for a stay furthered a circuit split. Nevertheless, Katz made it clear that he was "not seeking review of that portion of the Court of Appeal's decision" "remand[ing] for entry of a stay." Cert. Pet. 16 n.7, *Katz*, 136 S. Ct. 596 (No. 15-542), 2015 WL 6549668, at *16 n.7. Katz chose instead to present five other questions about the constitutionality of the FAA and the wisdom of the state-action doctrine. *See id.* i. Katz thus waived the question he now presents to this Court. *See, e.g.*, *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 31–32 (1961) ("We hold that the Communist Party abandoned its claim of error ... by failing to raise that question in its previous petition for certiorari here.").

And that was not the only time Katz declined to raise the issue. When Katz filed the currently-at-issue appeal, following the district court's judgment confirming the results of the arbitration, he specifically represented that he was raising "only one issue in his [second] appeal to the Second Circuit"—whether the constitution prohibited enforcement of his agreement to arbitrate. Pet. 19. Katz thus failed to preserve the question he now presents to this Court. *See, e.g.*, *Zafiro v. United States*, 506 U.S. 534, 537 (1993) ("Zafiro did not appeal the denial of her severance motion, and thus, her claim is not properly before this Court.").

Having affirmatively waived his right to challenge the Second Circuit's construction of the FAA as requiring a stay in this case, and having subsequently failed to preserve it, Katz cannot now credibly claim that the question "merits the grant of certiorari." Pet.

4. The Court should not reward Katz's attempt to game its certiorari jurisdiction by presenting a question he twice disclaimed.

C. There Would Have Been No Practical Difference In This Case If The Second Circuit Had Held That The FAA Permits Dismissal.

This case is also a poor vehicle for resolving the first question presented because, even if the question were not moot, a result contrary to that reached by the Second Circuit would not have made any practical difference below.

To begin, the policy interest Katz claims to vindicate is not relevant in this case. Some plaintiffs prefer dismissal rather than a stay when a court orders arbitration because "an appeal may be taken" prior to arbitration. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 86–87 (2000) (citing 9 U.S.C. § 16(a)(3)). That is precisely what happened in this case after the district court ordered dismissal in *Katz I*. Although the Second Circuit later determined that the dismissal was in error and remanded for a stay, that determination was made only *after* Katz had fully aired his claims at the appellate level and the Second Circuit had rejected every claim on the merits. App. 31a ("we hold … Katz's various constitutional challenges to the FAA are meritless"); *see also id.* at 33a ("we agree with the [district] court's decision that the FAA neither violates Article III of the Constitution nor imposes an unconstitutional rule of decision"). Thus, no matter how the Second Circuit resolved the stay issue, Katz had already obtained his

first full appellate hearing. This case thus presents a poor set of facts on which to vindicate the supposed "policy favoring an immediate appeal" from a district court's decision. Pet. 23.

Nor does this case provide an opportunity to correct the effects of any error by the Second Circuit. Unlike in 2015, when this Court's reversal might have made at least some theoretical difference by allowing the district court to dismiss the case pending arbitration, that remedy is no longer available. If the Court were to reverse the Second Circuit's construction of the FAA today, it could not order dismissal pending an arbitration that has already occurred (and which was subsequently confirmed by the district court in *Katz III* and not challenged on appeal in *Katz IV*). *See* section I.A., *supra*. And there would likewise be no reason to disturb the results of the arbitration (or its subsequent judicial confirmation) because the arbitrator's decision did not depend in any way on the fact that the case was stayed rather than dismissed. Indeed, Katz acknowledges that "the district court had no involvement" with the arbitration as a result of the stay. Pet. 24.

In an effort to find some reason that the order of stay mattered, Katz complains that the parties were required to provide the district court with occasional joint status reports. Pet. 24. At this point, of course, no status reports would be required since, having confirmed the arbitration award, there is nothing further for the district court to do. But even in 2015, a decision to stay rather than dismiss had no necessary impact on the need to file reports because,

as Katz acknowledges, a district court may also require status reports following dismissal. Pet. 25 ("district courts dismiss cases regularly … while retaining jurisdiction").

Because the Second Circuit's holding made no practical difference in this case, it is a poor vehicle for reviewing the first question presented.

D. The Court Should Allow Percolation Of The Precise Issue Raised By Katz.

For twenty years, the Court has "expressly refrained" from deciding whether the FAA requires a stay. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1414 n.1 (2019) (citing *Randolph*, 531 U.S. at 87 n.2). Continued activity in the lower courts confirms that there is no need to take up that issue now.

This case illustrates the point. Prior to *Katz II*, the Second Circuit had "suggested different conclusions" as to whether the FAA required a stay. App. 34a. Nevertheless, because the panel recognized that "[t]he FAA's text, structure, and underlying policy command" a stay, it easily resolved the disagreement in its case law. *Id.* at 35a–36a. District courts in the Second Circuit now have clear direction, as the Petition acknowledges. Pet. 20.

A similar shift appears to be underway in the Fourth Circuit. That court recently observed that there is "tension" in its cases regarding a stay or dismissal under the FAA. *See Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 376 n.18 (4th Cir. 2012). Although an appropriate case for resolving that tension has not yet arisen, *see id.*; *see also* App. 35a,

the bar of the Fourth Circuit is now on notice that it should present the issue in an appropriate case.

Moreover, Katz acknowledges that the statutory argument he proposes presenting to this Court—whether "[t]he phrase 'shall stay the trial of the action' means that 'the trial' is not the same as 'the action,'" Pet. 21 (quoting 9 U.S.C. § 3) (emphasis and parenthetical deleted)—is not actually the same one that has troubled some courts of appeals. To the contrary, Katz concedes that "no[ ] [circuit court] on either side of the conflict actually construes the 'stay the trial of the action' language of FAA § 3." Pet. 20–21. That concession reveals that, at a minimum, further percolation is necessary so that the lower courts have an opportunity to consider the argument that Katz intends to raise and which he says has never been addressed.

In sum, even if this case were an appropriate vehicle for resolving whether the FAA permits a stay (it is not), the Court should decline certiorari in order to allow the courts of appeals to continue conforming their precedents to the statute, and to give them an opportunity to address in the first instance the precise statutory argument that Katz intends to make.

II. There Is No Confusion In The Lower Courts About The Application Of The State-Action Doctrine To The Federal Arbitration Act.

Katz further asks the Court to consider whether requiring an individual to arbitrate a dispute under the terms to which he agreed in a signed, written contract with a private entity violates the U.S.

Constitution. That question is unworthy of the Court's attention because Katz's position is fundamentally inconsistent with at least two basic and longstanding principles of this Court's jurisprudence that there is no reason to reconsider, and because there is no circuit split regarding this issue.

1. Katz's contention that enforcement of a private arbitration agreement violates due process is inconsistent with the principle that the United States Constitution regulates only the government, not private parties. *See, e.g.*, *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019). The decision below correctly held, for the fourth time in this litigation, that Verizon Wireless cannot have violated Katz's constitutional rights when it enforced the arbitration agreement because "Verizon is a private concern, not a state actor, and its enforcement of an arbitration agreement does not transform it into an arm of the state." App. 5a (*Katz IV*); *see id.* at 26a (*Katz III*), 33a (*Katz II*), 49a (*Katz I*).

Katz refuses to acknowledge that state action is a fundamental element of all constitutional violations, arguing instead that "state action is irrelevant" under the FAA. Pet. 19 n.4. He insists that although wireless providers admittedly are not state actors, they must, when entering contracts with their customers, act like a government by ensuring that their contracting language conforms with "Article III and due process rights." Pet. 19 n.4.

There is no support for Katz's position. The state-action requirement "is a fundamental fact of our

political order." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). This Court has enforced it without question many times, *see, e.g.*, *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 197–98 (2003); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 58 (1999); *Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 358–59 (1974), including last term, *Halleck*, 139 S. Ct. at 1926. There is no need for this Court to reconsider the propriety of the state-action doctrine.

Nor is there any confusion among the lower courts about the application of the state-action doctrine to the FAA. Contrary to Katz's vague and unfulfilled promise of a "circuit conflict," Pet. 26 (capitalization altered), no court has *ever* found that the FAA converts private contracts into state action. *See, e.g.*, *Smith v. Am. Arbitration Ass'n*, 233 F.3d 502, 507 (7th Cir. 2000) ("The fact that the courts enforce these [arbitration] contracts … does not convert the contracts into state or federal action[.]"); *Desiderio v. Nat'l Ass'n of Secs. Dealers, Inc.*, 191 F.3d 198, 207 (2d Cir. 1999) (finding "no state action in the application or enforcement of the arbitration clause"); *Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1192 (11th Cir. 1995) (holding "confirmation of a private arbitration award by a district court is insufficient state action"). There is no uncertainty in any of these decisions, let alone evidence of a "circuit conflict."

Indeed, the lack of confusion was reflected in the Court's decision last year to deny certiorari in a case similar to this one. In *Roberts v. AT&T Mobility LLC*, 877 F.3d 833 (9th Cir. 2017), the Ninth Circuit held

that the FAA did not "convert AT&T into a state actor" when AT&T, like Verizon Wireless here, sought to enforce an arbitration clause in its customer agreement. *See id.* at 839, 845. The Ninth Circuit flatly rejected the plaintiff's argument that "proving private arbitration clause drafters to be state actors [is] unnecessary." *Id.* at 839. This Court rightly declined to review that unremarkable decision. *Roberts v. AT&T Mobility LLC*, 138 S. Ct. 2653 (2018) (Mem.). And it should do the same here because there is no basis for revisiting the well-settled state-action doctrine.

2. Even if Verizon Wireless were a state actor and the arbitration agreement were state action (they are not), the Petition should be denied because Katz waived his right to an Article III court when he signed the arbitration agreement. *See Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427 (2017) ("the primary characteristic of an arbitration agreement [is] a waiver of the right to go to court and receive a jury trial").

Katz acknowledges that he entered a valid, binding contract with Verizon Wireless under New York contract law that committed him to arbitrate any dispute arising from his Verizon Wireless service. App. 65a. To avoid the import of that concession, Katz attempts to manufacture a conflict between the decision below and *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), a case he claims imposed a "heightened" constitutional standard of consent on arbitration contracts. It did not.

In reality, *Wellness* addressed Congress's assignment of common-law "*Stern* claims" to bankruptcy courts.[3] The Court approved that assignment for litigants who consent to adjudication of their Article III claims in an Article I forum. *Id.* at 1944–45, 1948. But, contrary to Katz's contention, the Court did not purport to address a standard of consent for arbitration contracts. Nor would that have made any sense. Unlike the statute at issue in *Wellness*, which compelled parties to litigate in a non-Article III forum, "the FAA does not require parties to arbitrate when they have not agreed to do so." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). Thus, the issue of compulsion addressed in *Wellness* is not relevant under the FAA.

Moreover, even if *Wellness* had somehow been addressed to a standard of consent for private arbitration contracts, the decision would have made no difference in this case because Katz gave his express, written consent to arbitration. Under *Wellness*, an "express statement[ ] of consent … ensure[s] irrefutably that any waiver of the right to Article III adjudication [was] knowing and voluntary." 135 S. Ct. at 1948 n.13. Thus, even if Katz were right that *Wellness* had something to say about private arbitration agreements, there would be

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[3] A "*Stern* claim" is "a claim designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a constitutional matter." *Wellness*, 135 S. Ct. at 1941–42 (quoting *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 30–31 (2014)).

no conflict between *Wellness* and the decisions by the Second Circuit below.

What Katz is really seeking is a declaration from this Court that he has a *constitutional right* to force a private entity to offer him services on terms he prefers. Katz repeatedly argues that his express, written consent to arbitration was "involuntary" because he was denied the "right to refuse" the arbitration provision in the Customer Agreement *and still obtain wireless service from Verizon Wireless*. Pet. 5, 6, 8, 19. The clear import of his argument is that Katz believes that due process requires private entities to offer to contract their services without conditioning their offer on the acceptance of an agreement to arbitrate. That argument is directly contrary to the FAA, *see* 9 U.S.C. § 2, fundamental precepts of contract law, *see, e.g.*, Restatement (Second) of Contracts § 58 cmt. a (1981) (restating "the basic principle that the offeror is the master of his offer"), and numerous decisions of this Court in the last decade alone enforcing arbitration clauses without so much as a hint of a concern about any lurking due process problem.[4] This Court should

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[4] *See, e.g., Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *Compucredit Corp. v. Greenwood*, 565 U.S. 95 (2012); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012) (per curiam); *Nitro-Lift Techs., LLC*

reject Katz's invitation to create out of whole cloth a due process right never before thought to exist.

Finally, as with state action, *supra*, there is no confusion among the lower courts about the issue of waiver. Katz asserts that the Second Circuit's denial of his constitutional claims for lack of state action somehow creates a conflict with decisions of other courts that denied similar claims based on waiver. Pet. 31–32. But Katz overlooks the fact that a court may deny a claim on any sufficient grounds without discussing every possible ground on which the claim could have been denied. The decision to deny a claim for one sufficient reason creates no conflict with a decision that denies a similar claim for a different, independently sufficient reason. The Second Circuit's decision does not conflict with any actual decision of any other circuit to address the issue.

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v. Howard, 568 U.S. 17 (2012) (per curiam); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *KPMG LLP v. Cocchi*, 565 U.S. 18 (2011) (per curiam); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009).

CONCLUSION

For the foregoing reasons the Court should deny the Petition.

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