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, DBA VERIZON WIRELESS,
*Respondent*.

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

## REPLY BRIEF FOR PETITIONER

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**CONSTITUTION**

**STATUTES**



**OTHER AUTHORITIES**

## REPLY BRIEF FOR PETITIONER

Verizon does not dispute the importance of the two questions presented in Katz's petition under the FAA and the Constitution.

Verizon cannot dispute that Question 1—whether FAA § 3 (quoted Pet. App. 74a) requires a court "to stay the trial of the action" when all claims are arbitrable (and there will be no "trial")—is the subject of an entrenched circuit split that can only be resolved by this Court (Pet. 20-26).

Verizon cannot dispute that Question 2—whether the *Wellness* standard for voluntary consent (including the right to refuse to consent, *see* 135 S. Ct. at 1948) applies under the FAA to Katz's waiver of the Article III judicial power and due process in connection with his state law private rights—has not been but should be settled by this Court to resolve the inconsistency between *Wellness* and the rejection of the "knowing and voluntary" standard of consent under the FAA in this case and the decisions of many but not all other circuit courts (Pet. 26-33).

Nor does Verizon dispute the essential fact conceded by Verizon and underlying Katz's petition—that Verizon denies to Katz and Verizon's other customers the right to refuse to consent to the waiver of their constitutional rights when "making" their arbitration agreements governed by the FAA (Pet. 9-10).

Katz's petition fully satisfies the Rule 10 standards for the grant of certiorari, and is an ideal vehicle for the Court to decide the important questions presented.

## I. THIS CASE IS AN IDEAL VEHICLE FOR QUESTION 1 REGARDING THE ENTRY OF A STAY UNDER FAA § 3

This case is the most recent addition to the evenly divided ten circuit split, and the Second Circuit's analysis is representative of the circuit courts mandating that district courts "stay the action" or "proceedings" when all claims are arbitrable (Pet. 2, 12-13, 20-21). Verizon's opposition (Opp. 6-13) does not detract from the case's status as an ideal vehicle for the Court to decide Question 1.

### A. Mootness Is No Barrier To The Court Deciding Question 1

Verizon argues that Question 1 is moot because the arbitration conducted while the case was stayed is now complete (Opp. 6-8), and because Katz was able to pursue his Article III claim in *Katz I* as part of the same appeal that reversed the district court's dismissal and remanded for entry of the FAA § 3 stay (Opp. 10-12).

1. First, Question 1 is not moot. Standing alone, the attorney's fees incurred by Katz as a result of the entry of the stay and the preparation of numerous status reports required by the district court during the pendency and at the conclusion of the arbitration (Pet. 14-15, 24) are recoverable in connection with Katz's claim under New York General Business Law ("GBL") § 349(h) if Katz succeeds on Question 1 and the

case makes its way back down to the district court.[1] "That claim [for the stay-related fees] remains in the case. … [A]s long as [Katz has] a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Ellis v. Railway Clerks,* 466 U.S. 435, 442 (1984).

2. Alternatively, the procedural issue under the FAA raised by Question 1 is "capable of repetition, yet evading review." *E.g., Moore v. Ogilvie*, 394 U.S. 814, 816 (1969). Contrary to Verizon, the procedural gravamen of Question 1 subject to the circuit split is not merely the continuing existence of the FAA § 3 stay during the pendency of the arbitration, or whether the case has been dismissed (Opp. 6-8, 10-12). Rather, the principal issue splitting the circuit courts is whether a party compelled to arbitrate all claims should be entitled to an immediate appeal of a "final decision" under FAA § 16(a)(3), or should be prohibited under FAA § 16(b)(1) from an immediate appeal of an "interlocutory" § 3 stay (FAA § 16 quoted Pet. App. 76a-77a).[2] This issue can result in three procedural scenarios for the parties, frequently repeated, yet evading review by the Court.

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[1] GBL § 349(h), which was quoted in part in Katz's petition (Pet. 15 n.3), also provides that "[t]he court may award reasonable attorney's fees to a prevailing plaintiff." Katz has specifically claimed those fees in his Complaint (S.D.N.Y. No. 12-cv-9193, Dkt. # 6, ¶ 66).

[2] Whether a decision compelling all claims to arbitration is "interlocutory" is fairly included in Question 1 (Pet. 24-25).

In *Katz I*, Katz lost on the stay issue, but nevertheless had the merits of his first appeal under Article III decided as part of the same appeal (Pet. 12-14). More typically, for those circuits allowing dismissal, a defendant like Verizon must endure the immediate appeal, but even where the circuits mandate a stay under FAA § 3 precluding immediate appeal, the party requesting the stay would still have to endure the same appeal after the completion of arbitration before the case can reach this Court. Third, for those circuits mandating the stay, FAA § 16(b) allows the stayed party to seek certification for interlocutory appeal under § 1292(b), but whether an immediate appeal is granted, or is denied and arbitration comes first, the appeal will be completed before the case can reach this Court. Thus, the appeal will always have been heard before the FAA § 3 question reaches this Court regardless of the petitioning party. And the issue continues in great numbers. *See* Pet. 20 (*Katz I* followed more than 25 times by Second Circuit district courts during year prior to petition). Indeed, just last month, the *Katz* district court applied *Katz I* in a different case and entered the same FAA § 3 stay order requiring the same periodic status reports from the parties. *See Trustees of Laundry, Dry Cleaning Workers & Allied Indus. Health Fund v. FDR Servs. Corp. of N.Y.,* No. 17-cv-7145 (VB), 2019 WL 4081899, at *3 (S.D.N.Y. Aug. 28, 2019).

3. Also alternatively, this case is "capable of repetition, yet evading review" because Katz has brought it under CAFA, on behalf of a "Declaratory Judgment Class" comprised of all Verizon customers, seeking relief under Article III based in part on

involuntariness (S.D.N.Y. No. 12-cv-9193, Dkt. # 6, ¶¶ 1(a), 15(d)), and also on behalf of a class of New York customers seeking damages (*id.* at ¶ 1(b)). As the Court suggested in *Sosna v. Iowa,* 419 U.S. 393, 402 n.11 (1975), where an individual plaintiff's claim that would otherwise evade review because it is "inherently transitory" becomes moot before class certification, certification can "relate back" to the filing of the complaint. *Cf. Genesis Healthcare Corp. v. Symczyk,* 569 U.S. 66, 75-77 (2013) (distinguishing *Sosna* because no ongoing conduct). All putative Declaratory Judgment Class members will be subject to the same FAA § 3 requirement under *Katz I,* and even if not, their appeal on the merits of the Article III issue will be heard before the FAA § 3 issue reaches this Court—the essence of "inherent transitoriness." And Katz's commitment to resolving Question 1 is strengthened as a fiduciary to the putative class even *before* certification. *See Standard Fire Ins. Co. v. Knowles,* 568 U.S. 588, 590, 594 (2013).

Mootness does not prevent the Court from deciding Question 1.

### B. Question 1 Is Properly Presented In Katz's Petition, And Is Not Waived

Verizon also argues Katz has waived Question 1 by not presenting it in his earlier petition in *Katz I* that was denied by the Court in 2015, 136 S. Ct. 596, and because Katz didn't reassert the question in his second petition (Opp. 8-10). Verizon has cited no case, and Katz is aware of none, where the Court found a waiver of an issue actively litigated below where the first certiorari petition not raising the issue was denied

without briefing on the merits, or where a futile challenge to "the law of the case" was not raised in the subsequent appeal.[3] Furthermore, Verizon's assertion of waiver is contrary to Supreme Court procedural practice.

So long as Katz's second petition was timely filed—and it undisputedly was—"there is no question that … [the Court has the] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." *Major League Players Ass'n v. Garvey,* 532 U.S. 504, 508 n.1 (2001) (per curiam). Including where a prior petition was denied. *See Mercer v. Theriot,* 377 U.S. 152, 153-54 (1964) (per curiam). "And except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916). *See also* S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice ("Supreme Court Practice"), § 4.18, at 282-83 (10th ed. 2013) (citing cases).

Thus, the presentation of Question 1 in Katz's current petition is entirely proper, as is its consideration by the Court. The subsequent history after the Second Circuit's remand for entry of the stay in *Katz I* supports this conclusion. The FAA § 3 holding has now been able to "percolate" among the Second

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[3] Verizon cites *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961) (Opp. 9), but the Court found the waiver of the alleged error because the Court could have decided and cured it in the prior proceedings if the Communist Party had raised it in its prior granted petition. 367 U.S. at 30-32.

Circuit district courts, confirming the extent of its repetition. And the facts regarding the implementation of the stay by the district court in *Katz II*, including its required status reports, provides the Court with real world context for the application of the circuit court's holding, and is useful to see how the failure to consider the meaning of all of the words of the command to "stay the trial of the action" in FAA § 3 creates a procedurally confused and inefficient result. The Court has benefited by being able to decide Question 1 now instead of before, which further supports granting the petition.

### C. Question 1 Is Fully Percolated

The first decision of the circuit split identified by the Second Circuit in *Katz I* (Pet. App. 35a) was issued more than three decades ago, *see Sparling v. Hoffman Constr. Co.,* 864 F.2d 635, 637–38 (9th Cir. 1988), and the circuit conflict is entrenched nationwide. Verizon speculates (Opp. 12-13) that "a shift is underway" based on a "tension" in the Fourth Circuit identified seven years ago in *Aggarao v. MOL Ship Mgmt. Co.,* 675 F.3d 355, 376 n.18 (4th Cir 2012), but cites no Fourth Circuit case deviating from its prior decision allowing dismissal in *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709–10 (4th Cir. 2001). The Fourth Circuit district courts continue to follow *Choice Hotels* and dismiss even while recognizing the "tension." *See Marketti v. Cordish Cos., Inc.,* No. 19-cv-1904, 2009 WL 2568839, at *4 (D. Md. June 21, 2019).

Verizon also suggests (Opp. 13) that Question 1 should continue percolating because none of the circuits have considered the full import of the "stay the trial of the action" language addressed in Katz's petition (Pet. 20-22). But a new argument alone is insufficient for a circuit court to depart from its established precedent in the absence of clear contrary authority—from this Court. And Katz did raise the argument in *Katz I*, both in the district court (S.D.N.Y. No. 12-cv-9193, Dkt. # 27, at 17-19), and in the Second Circuit (CA2 No. 14-138-cv, Dkt. # 74, at 50). Question 1 is ripe for decision.

## II. THIS CASE IS AN IDEAL VEHICLE FOR QUESTION 2 REGARDING THE APPLICABILITY UNDER THE FAA OF THE *WELLNESS* STANDARD FOR VOLUNTARY CONSENT

Verizon's response to Question 2 is to ignore it, ignore the importance of voluntary consent to non-Article III adjudication and the waiver of the right to Article III adjudication emphasized in *Wellness,* and to assert a straw man issue based on the absence of state action in connection with enforceable arbitration agreements.

### A. The *Wellness* Standard For Voluntary Consent Applies To Non-Article III Adjudication By Arbitration

Although Verizon tries to limit *Wellness* to common law *Stern* claims decided in the bankruptcy court (Opp. 17), all four opinions in *Wellness* acknowledge its implications for private arbitration. *See* 135 S. Ct. at

1942 (majority opinion) ("[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") (citing 19th century cases approving referral to arbitrators with consent of parties); 135 S. Ct. at 1949 (Alito, J., concurring in part and in judgment) (comparing arbitrator's "decision" and bankruptcy judge's "judgment"); 135 S. Ct. at 158-59 (Roberts, C.J., dissenting) (taking both majority and Justice Alito to task for comparing arbitrators and bankruptcy judges); 135 S. Ct. at 1968 (Thomas, J., dissenting) (analogizing party consent to non-Article III adjudication by arbitrator which lifts "private rights" bar to waiver of bar imposed by right to trial by jury) ("decisions discussing the relationship between private rights and the judicial power have emphasized the "*involuntary* divestiture" … of a private right" (emphasis added by Justice Thomas)). *See also* Pet. 8, 29.

Verizon's attempt to cabin *Wellness* to *Stern* claims also ignores the origin of the standard for voluntary consent emphasized by the majority—including the right to refuse to consent: the Court's decision in *Roell v. Withrow,* 538 U.S. 580, 588 n.5, 590 (2003), which addressed the propriety of implied consent to non-Article III adjudication and entry of judgment by a magistrate. 135 S. Ct. at 1948.

Question 2 does not challenge the enforceability of arbitration agreements under the Constitution writ large, as Verizon incorrectly recasts it (Opp. 1). From the outset, Katz has conceded that "voluntary"

arbitration does not implicate an Article III violation.[4] But whether *Wellness*—and its standard for voluntary consent, including the right to refuse to consent—applies to private arbitration, and the concomitant waiver of the Article III and due process constitutional rights, is the most important question under the FAA the Court can answer.

### B. If Verizon's Arbitration Agreement Is Involuntary And Unenforceable Under *Wellness* And The FAA, Then The Issue Whether Its Enforcement Constitutes State Action Cannot Be An Independently Sufficient Ground For Denial Of Katz's Petition

The reliance by Verizon on the purported absence of state action in connection with arbitration agreements (Opp. 13-19), and by the Second Circuit as the sole ground for denying Katz's due process claim in *Katz II* (Pet. App. 1a-5a), suffers from the same type of error that the Court recently had to correct in *New Prime Inc. v. Oliveira,* 139 S. Ct. 532 (2019). Just as a court must sequentially first "determine[] that the contract in question is within the coverage of the Arbitration Act" before ordering arbitration, *id.* at 538 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 402 (1967)), so in this case a court must determine whether Katz's consent to the waiver of his

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[4] The district court in *Katz I* (Pet. App. 62a-63a) noted the limits of Katz's claim under Article III: "[P]laintiff concedes that arbitration need not be an 'impermissible incursion on the separation of powers' where the parties have a choice and have willingly made it[.]" *Accord Wellness.*

Article III and due process rights under Verizon's arbitration agreement is enforceable under *Wellness* and the FAA *before* it can determine whether the enforcement of the agreement constitutes sufficient state action for a constitutional violation.[5]

Simply stated, if Verizon's arbitration agreement is not enforceable because it fails to satisfy the standard for voluntary consent applicable under *Wellness*, then the issue of state action in connection with enforceable agreements is irrelevant. The voluntariness of consent under *Wellness*, and thus the enforceability of any waiver of Katz's Article III and due process rights, is an "antecedent, gateway" issue that must be decided before the state action issue that Verizon solely focuses on in its opposition to Question 2 has any potential legal significance. The purported absence of state action, therefore, cannot constitute an independently sufficient ground to preclude the grant of certiorari. *Cf.* Supreme Court Practice, § 4.4(e), at 248-49 (discussing grant of certiorari where alternate grounds for decision exist).

Not one of the cases on which the district court relied in *Katz I* when rejecting the applicability of the "knowing and voluntary" standard under the FAA and finding that Katz waived his individual Article III right (Pet. App. 68a) addresses "state action"—supporting the applicability of the FAA §§ 1-2 sequence described

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[5] In preliminary proceedings in *Katz I,* the parties stipulated that "the enforceability of the Arbitration Agreement … is an antecedent, gateway issue of law that should be decided by the Court[.]" S.D.N.Y. No. 12-cv-9193, Dkt. # 9, at 1.

in *New Prime*. Nor, for that matter, do any of the Court's leading decisions addressing the enforceability of arbitration agreements discuss "state action."

Whether or not there is "confusion" in the lower courts about the application of state action under the FAA (Opp. 13-16), Verizon does not dispute that there is a conflict among the circuits regarding the applicability of the "knowing and voluntary" standard under the FAA and whether the enforceability of an arbitration agreement should be governed by federal or solely state law—the issues raised in Question 2 (Pet. 6-7, 27-28). And all of the decisions rejecting the applicability of the standard are inconsistent with *Wellness*—if it applies under the FAA. Only this Court can eliminate the conflict and provide the necessary guidance to the lower courts, while preserving and protecting Katz's constitutional rights.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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