No. 02-634

IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED; DANIEL B. LACKE, GEORGE BUGGS AND FLORINE BUGGS, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ of Certiorari
to the Supreme Court of South Carolina

BRIEF OF *AMICUS CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. §§ 1-16, preempts generally applicable state contract law and state procedural rules applied by a state court in determining whether parties can arbitrate class-wide claims under an arbitration clause, when the state court found the clause to be silent on the subject.

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INTEREST OF *AMICUS CURIAE*[1]

Trial Lawyers for Public Justice ("TLPJ") submits this brief as *amicus curiae* in support of Respondents, urging the Court to hold that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, does not preempt the state contract law and procedural rules applied by the court below in determining that the Respondent plaintiffs could arbitrate claims for class-wide relief against Petitioner Green Tree Financial Corp. ("Petitioner" or "Green Tree").

TLPJ is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation. In prosecuting cases throughout the federal and state courts, TLPJ seeks to advance consumers' and victims' rights, environmental protection, civil rights and civil liberties, workers' rights and workplace safety, the protection of the poor and powerless, and the preservation and improvement of the civil justice system. Based on these goals, TLPJ has become concerned over a recent trend wherein many businesses are attempting to deny consumers access to courts and to limit their own liability to consumers by imposing mandatory and binding arbitration clauses as part of routine economic transactions.

Six years ago, TLPJ established a Mandatory Arbitration Abuse Prevention Project to combat these abuses. While TLPJ supports alternative dispute resolution that is truly voluntary between parties and affords consumers a true opportunity to enforce their legal rights, our research and

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37.3(a), letters of consent to file this brief from Petitioners and Respondents have been filed with the Clerk of the Court.

investigation have convinced us that corporate abuses of the opportunity to compel arbitration sometimes serve to deny consumers any opportunity to effectively vindicate their claims. Through its Mandatory Arbitration Abuse Prevention Project, TLPJ has devoted much effort to representing consumers in fighting these abuses.

The question presented is whether the FAA preempts generally applicable state contract law and procedural rules that a state court applied in holding that a sub-prime mortgage lender's mandatory arbitration clause allows consumer plaintiffs to arbitrate claims for class-wide relief. TLPJ has a strong interest in the resolution of this question because Green Tree's preemption arguments would threaten to eliminate what this Court has held to be the primary source of protection for consumers against corporate over-reaching in cases governed by the FAA: namely, the rules and requirements of state contract law. *See Allied-Bruce Terminix Co's, Inc. v. Dobson*, 513 U.S. 265, 281 (1995). The South Carolina Supreme Court found that Green Tree's arbitration clause did not clearly address the subject of class-wide claims, and proceeded to resolve this ambiguity in favor of the plaintiffs by applying the general common law rule for resolving ambiguity against the drafter. Green Tree's argument that the FAA preempts this and any other state law that furthers the goals of "efficiency and equity," Pet. Br. at 34, would give corporations license to strip consumers of important substantive and procedural rights by stealth through the imposition of mandatory arbitration clauses that do not even make mention of these rights.

Green Tree's preemption arguments also run counter to the FAA's plain language, to generally recognized federal preemption principles, and to the Court's decisions addressing the types of state laws that the FAA does preempt. TLPJ

therefore respectfully submits this brief urging the Court to affirm the decision below entering judgment on the class-wide arbitration awards issued in favor of the plaintiffs.

TLPJ has an additional interest in the resolution of this case pertaining to a question that is *not* properly before the Court, but was nevertheless raised by several *amici* filing briefs supporting Green Tree. These *amici* ask the Court to hold that the FAA preempts applications of the state common law doctrine of unconscionability that would result in findings that particular arbitration clauses are unconscionable because they explicitly purport to ban consumer claims for class-wide relief. *See*, *e.g.*, Brief of *Amicus Curiae* Chamber of Commerce at 5 n. 2; Brief of *Amicus Curiae* American Bankers Association, *et al*. at 6. Since the Court granted *certiorari* to resolve disputes over the manner of *enforcement* (not the alleged *illegality*) of Green Tree's arbitration clause; since neither party raises arguments involving South Carolina's law of unconscionability; and since no factual record pertaining to the elements of state law unconscionability is before the Court, TLPJ respectfully urges the Court not to reach out to address this issue.

STATEMENT OF CASE

The plaintiffs are consumers who entered into home equity and mobile home mortgage loans with Green Tree. These loans are covered by South Carolina's Consumer Protection Code, including its provision replacing the State's usury limits with the requirement that a lender ascertain a borrower's choice of legal counsel and insurance agent in matters relating to the transaction prior to the closing. *See* S.C. CODE ANN. § 37-10-102. In 1996 and 1997, plaintiffs filed the two cases that were consolidated in this appeal as putative class

actions, alleging that Green Tree failed to comply with these statutory requirements in all of the transactions at issue.

Green Tree responded to both suits by moving to compel arbitration of all claims pursuant to the arbitration clauses that it put into its standard-form loan contracts. These clauses stated in relevant part that: "All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . shall be resolved by binding arbitration by one arbitrator selected by us with consent of you." Pet. App. 110a. In the case filed by plaintiffs Lynn and Burt Bazzle, the state trial court granted the plaintiffs' motion for class certification and Green Tree's motion to compel arbitration. *Id*. at 3a. In the case filed by plaintiff Daniel Lackey, the state appellate court ordered enforcement of Green Tree's arbitration clause, and the parties stipulated to arbitrate before the arbitrator who was presiding over the *Bazzle* case. *Id*. at 6a. After finding the requirements for class certification to be satisfied, the arbitrator certified a class of approximately 1,840 plaintiffs in the *Lackey* case. *Id*.

After hearing evidence showing that Green Tree had notice of the statutory requirements in many of the transactions at issue but continued to refuse to comply, the arbitrator issued awards for the plaintiffs in both cases. In the *Bazzle* case, the arbitrator awarded between $5,000 and $7,500 in damages to each of the 1,899 plaintiffs for a total award of $10,395,000. *Id*. at 4a. In the *Lackey* case, the arbitrator awarded $5,000 in damages to each plaintiff for a total award of $9,200,000. *Id*. at 7a. State trial courts entered judgment on the plaintiffs' motions to confirm both class-wide arbitration awards. The South Carolina Supreme Court assumed jurisdiction and consolidated Green Tree's appeals from these orders on the question of whether the trial court in *Bazzle* and the arbitrator

in *Lackey* exceeded their legal or contractual authority by allowing the plaintiffs to arbitrate class-wide claims. *Id*. at 8a.

The South Carolina Supreme Court applied established state contract law principles in affirming the decisions below permitting arbitration of class claims. First, the court found that, "if the terms of a contract are clear and unambiguous, the Court must enforce the contract according to its terms regardless of its wisdom or folly." *Id*. at 17a (citing *Ellis v. Taylor*, 449 S.E.2d 487 (S.C. 1994)). Next, the court cited the maxim that "[a]mbiguous language in a contract . . . should be construed liberally and interpreted strongly in favor of the non-drafting party." *Id*. (citing *Myrtle Beach Lumber Co., Inc. v. Wiloughby*, 274 S.E.2d 423 (S.C. 1981) (case involving non-arbitration contract)). The court also cited this Court's precedent applying the same state law rule to arbitration clauses covered by the FAA. *Id*. at 18a (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)).

The state court below then made a factual finding that Green Tree's arbitration clause was "*silent* regarding class-wide arbitration" because the clause nowhere mentions the issue. *Id*. at 19a (emphasis in original). The court considered Green Tree's arguments against class-wide arbitration based on the clause's language pertaining to "disputes . . . arising from or relating to *this contract*" and "relationships which result from *this contract*," *id*. (emphasis in original), but concluded that "[a]t best, it creates an ambiguity, and should, therefore, be construed against the drafting party, Green Tree." *Id*.

The South Carolina Supreme Court thus held that the plaintiffs could arbitrate their class claims based on the "general principles of contract interpretation" that apply to Green Tree's arbitration clause, *id*. at 20a-21a, and based on

established state law allowing consolidation of claims subject to arbitration. *Id*. at 18a-19a (citing *Episcopal Housing Corp. v. Federal Ins. Co.*, 255 S.E.2d 451 (S.C. 1979); *Plaza Devel. Serv's v. Joe Harden Builder, Inc.*, 365 S.E.2d 231 (S.C. App. 1988)). The court noted a split of authority among federal and state courts on whether class-wide arbitration was allowed under the FAA absent express contractual authorization, but noted that federal court decisions barring such proceedings were based largely on Section Four of the Act, 9 U.S.C. § 4, which by its terms does not apply to state courts. *Id*. at 20a. Finally, the court found that it would be fundamentally unfair to strip consumers of the right to seek class-wide relief through non-negotiable, adhesive contracts that nowhere even make mention of this right:

> If we enforced a mandatory adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so. Following the federal approach risks such a result where arbitration is mandated through an un-negotiated adhesion contract. Under those circumstances, parties with nominal individual claims, but significant collective claims, would be left with no avenue for relief and the drafting party with no check on its abuses of the law.

Id. at 22a.

SUMMARY OF ARGUMENT

The South Carolina Supreme Court correctly applied ordinary state contract law and state procedural rules in holding

that Green Tree's arbitration clause allows arbitration of the plaintiffs' claims for class-wide relief. Green Tree argues that the FAA preempts these state laws because the Act prohibits any result that is not explicitly spelled out in the arbitration clause itself. These arguments fail on several counts.

First, Green Tree's preemption arguments are contrary to the text of the FAA , which expressly preserves state contract law and allows state courts to apply their own procedural rules when they are asked to enforce arbitration clauses. The FAA's savings clause makes arbitration clauses revocable on the same legal and equitable grounds as apply to any other contract. *See* 9 U.S.C. § 2. Based on this savings clause, this Court has held repeatedly that the Act preserves generally applicable state contract law. *See*, *e.g.*, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). Similarly, the FAA's procedural rules for enforcing arbitration clauses apply only in "the courts of the United States" or "any United States District Court." 9 U.S.C. §§ 3 and 4. Based on this statutory language, the Court has rejected any attempt to make these rules apply in state court cases. *See Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6 (1989); *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10 (1984).

Second, Green Tree's call for a radical expansion of FAA preemption here does not comport with general principles of implied conflict preemption. When addressing alleged conflicts under other federal statutes, this Court has held that there can be no implied conflict preemption based on frustration of federal purposes where no federal law addresses the subject that state law is regulating. *See*, *e.g.*, *Sprietsma v. Mercury Marine*, 123 S. Ct. 518, 527-28 (2002); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289-90 (1995). The FAA

contains no provisions setting out federal contract interpretation rules or addressing multiple-party disputes. *Volt Info. Sciences*, 489 U.S. at 474 and 476 n.5 (1989) (noting absence of federal law for interpreting contracts and FAA's silence on multiple-party issues). Since neither the FAA nor any other federal law speaks to the parties' disputes over contract interpretation and the permissibility of aggregating claims, the court below properly applied state law to these issues.

Finally, the state laws at issue here do not conflict with the FAA or the Act's underlying purposes. The Court has only found the FAA to preempt state laws that show hostility towards arbitration by specifically interfering with the parties' *contractual selection of forum*, either by imposing unique burdens that limit the enforcement of arbitration clauses or by barring all arbitration of claims. *See*, *e.g.*, *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *Allied-Bruce Terminix Co.'s, Inc. v. Dobson*, 513 U.S. 265 (1995). The state laws applied by the court below did not target or even address questions of forum selection, since all parties agreed that their claims were subject to arbitration. Instead, the court properly applied state law to resolve the separate issue of whether the plaintiffs could obtain class-wide relief, an issue that does not touch upon the FAA's preemptive policy goals for protecting contractual forum selection.

On a completely separate matter, the Court should not use this case to decide issues raised by Green Tree's *amici* regarding the state common law doctrine of unconscionability that are not raised in the question on which *certiorari* was granted. As the Court has recognized, unconscionability is a state law ground for *revoking* contracts, including arbitration agreements. *See Casarotto*, 517 U.S. at 687. Since all of the parties here agree that the arbitration clause is *enforceable*,

albeit based on conflicting understandings of its terms, the separate issues of whether this or a differently-worded arbitration clause would be unconscionable (and therefore *unenforceable*) under generally applicable state contract law, or whether the FAA would preempt such state law, were not briefed by the parties, and therefore are not properly before the Court. *See* S. Ct. Rule 14.1(a). The Court should decline the invitation by several of Petitioner's *amici* to reach out and address these separate issues.

ARGUMENT

I. THE FAA DOES NOT PREEMPT THE STATE LAWS APPLIED BY THE COURT BELOW IN HOLDING THAT THE PARTIES CAN ARBITRATE CLASS CLAIMS.

Because preemption constitutes a radical intrusion on a state's power, this Court has long recognized a strong presumption against preemption of state laws. Particularly where "'federal law is said to bar state action in fields of traditional state regulation, we have worked on the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *California Div. of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 325 (1997) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The state laws applied by the court below were a common law rule of contract interpretation and a procedural rule for administering cases filed in state court, both areas of traditional and almost exclusive state regulation. *See*, *e.g.*, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Congress has no power to declare substantive rules of common law applicable in a state.

. ."); *Howlett v. Rose*, 496 U.S. 356, 372 (1990) ("The States thus have great latitude to establish the structure and jurisdiction of their own courts."). Therefore, Green Tree bears the considerable burden of demonstrating that it was the clear and manifest purpose of Congress in enacting the FAA to displace these state laws. In light of the FAA's plain language and this Court's decisions regarding implied conflict preemption generally and preemption under the FAA specifically, Green Tree cannot bear this burden.

A. The Text of the FAA Permits Application of State Contract Law and Procedural Rules.

The lower court's application of state contract law principles and state procedural rules is consistent with, and indeed is invited by, the express provisions of the FAA. The Act proclaims that written arbitration agreements "shall be valid, irrevocable, and unenforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Court has construed this savings clause to preserve the application of generally applicable state contract law, whether of legislative or judicial origin, to arbitration clauses. *Perry*, 482 U.S. at 492 n.9. This includes state laws governing contract formation and interpretation, as well as revocation. *See*, *e.g.*, *First Options*, 514 U.S. at 944 ("When deciding whether the parties agreed to arbitrate a certain matter. . .courts generally apply ordinary state-law principles that govern the formation of contracts."); *Volt Info. Sciences*, 489 U.S. at 474 ("the interpretation of private contracts is ordinarily a question of state law").

By applying the established rule of South Carolina contract law that ambiguity shall be construed most strongly against the drafter to the question of whether plaintiffs could

arbitrate class claims, the court below followed the directives of the FAA and of this Court. In *Mastrobuono*, this Court was asked to decide whether two investors could recover punitive damages in arbitration where their broker's standard-form contract did not explicitly address the subject, but contained a choice-of-law clause that arguably prohibited the claims and an arbitration clause covered by the FAA that arguably allowed them. *Mastrobuono*, 514 U.S. at 58-61. After finding that, "[a]t most, the choice-of-law clause introduces an ambiguity" into the agreement, the Court allowed arbitration of the claims because "respondents cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Id*. at 62 (citing Restatement (Second) of Contracts § 206, and relevant state and federal court opinions). Thus, the South Carolina Supreme Court's reliance on state contract law to resolve the ambiguity it found in Green Tree's arbitration clause over arbitration of class claims is perfectly consistent with this Court's teachings regarding the FAA's savings clause.[2]

Similarly, it was appropriate for the state court below to rely on state procedural rules in deciding whether the parties

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[2] While *Mastrobuono* applied the New York and Illinois common law rule for construing contractual ambiguity against the drafter, the Court also observed the court-made rule under the FAA that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . ." *Id*. at 62 n.8 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983)). In *Mastrobuono*, the *Moses H. Cone* rule and the state common law rule both yielded the same result favoring arbitration of the plaintiffs' punitive damages claims. If the *Moses H. Cone* rule were found to apply here, it should likewise yield the same result brought about by the state common law rule, namely that ambiguities in Green Tree's arbitration clause be resolved in favor of arbitrating the plaintiffs' class claims.

could arbitrate class claims in light of the limited scope of the FAA's own procedural rules. Although the FAA establishes procedures for judicial enforcement of arbitration clauses, these rules only apply to cases filed in the "courts of the United States," 9 U.S.C. § 3, or in "any United States district court" having jurisdiction based on the parties' underlying claims, 9 U.S.C. § 4. Thus, even when finding that state laws were preempted by Section Two of the Act, this Court has gone out of its way to emphasize that "we do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts." *Southland*, 465 U.S. at 16 n.10; *see also Volt Info. Sciences*, 489 U.S. at 477 n.6 ("we have never held that §§ 3 and 4, *which by their terms appear to apply only to proceedings in federal court*, . . . are nonetheless applicable in state court.") (emphasis added). Since the FAA's procedural rules do not bind state courts, the Act should not be held to preempt South Carolina decisional law allowing consolidation of arbitrable claims.

In short, contrary to Green Tree's contentions here, the FAA was written to *accommodate*, not to preclude, a state court's application of ordinary state contract law principles and state procedural rules in construing and enforcing an arbitration clause. The court below was therefore correct to apply these types of state laws in holding that Green Tree's arbitration clause allows arbitration of class claims.

B. There Is No Implied Conflict Preemption Where No Federal Law Standards Address the Subject of State Law Regulation.

As the Court has recognized, "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sciences*, 489 U.S. at 477. Therefore, the FAA can

only displace state law through the doctrine of implied conflict preemption. *Id*. at 477-78. In order to establish that the FAA impliedly preempts the state contract interpretation and procedural rules applied by the court below, Green Tree must demonstrate that there is an "actual conflict" between federal and state law, either because it is "impossible for a private party to comply with both . . . requirements" or because the state laws "stand[] as an obstacle to the accomplishment and execution of the full purposes of Congress." *Freightliner Corp.*, 514 U.S. at 287 (citations omitted). Implied conflict preemption cannot lie here because the FAA contains no independent rules of federal law for interpreting contracts or for addressing issues relating to multiple-party disputes.

This Court has recognized that the FAA does not set out independent federal standards for interpreting contracts or for addressing multiple party disputes. In the case of the former, the Court explained that "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt Info. Sciences*, 489 U.S. at 474. In the case of the latter, the Court observed that "the FAA itself contains no provision designed to deal with the special practical problems that arise in multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate." *Id*. at 476 n.5. Based on this recognition, the Court found that state laws authorizing courts to consolidate arbitration proceedings would "foster the federal policy favoring arbitration" under the FAA. *Id*. The Court has endorsed the application of state contract law and procedural rules like those applied by the court below on the ground that these state laws help to resolve issues that the express provisions of the FAA do not address.

When addressing preemption arguments under other federal statutory schemes, the Court similarly has held that there cannot be implied conflict preemption where there is no federal law standard addressing the subject of state law regulation. In *Freightliner Corp.*, for example, the Court held that a state tort law standard of care calling for antilock brakes in 18-wheel tractor-trailers was not preempted by federal law because the only federal regulation that ever addressed the subject of antilock brakes on these vehicles had been repealed. *Freightliner Corp.*, 514 U.S. at 284-85. The Court held that "it is not impossible . . . to comply with both federal and state law because there is simply no federal standard for a private party to comply with." *Id*. at 289. Likewise, the Court held that there could be no frustration of federal purposes because "[a] finding of liability against petitioners would undermine no objectives or purposes with respect to ABS devices, since none exist." *Id*. at 289-90; *see also Sprietsma*, 123 S. Ct. at 527-28 (finding no implied conflict preemption of common law tort claims in the absence of governing federal regulation).

The same rule should apply here against Green Tree's arguments for a radical expansion of FAA preemption to displace state laws governing contract interpretation and multi-party disputes, issues that Congress itself has never addressed. While Congress has not spoken to these matters, state lawmaking authorities have given these issues their considered judgment. The court below applied South Carolina's rule for construing contractual ambiguity against its drafter, a default rule that also furthers basic fairness concerns by ensuring that the party who has the "greater opportunity to prevent mistakes in meaning . . . is responsible for any ambiguity and should be the one to suffer from its shortcomings." Pet. App. at 17a; *see also* Restatement (Second) of Contracts § 206, Comment (a) (1979) (principle of "*contra preferentem*" guards against

situation where party guarding its own interests will "leave meaning deliberately obscure, intending to decide at a later date what meaning to assert."). The court below also applied state decisional law allowing aggregation of claims subject to arbitration, recognizing that, in cases like this one involving "identical issues against one defendant," the rule serves the "interest of judicial economy." Pet. App. at 22a. These important state policy goals should not be subverted in the complete absence of evidence that Congress ever gave any consideration to these issues. Since the FAA is silent on the subjects to which the court below applied state law, there is no basis for a finding that these state laws are preempted based on any alleged conflict with federal law.[3]

C. The State Laws Applied by the Court Below Do Not Frustrate the Purposes of the FAA.

Even without the FAA's savings clause preserving state contract law, there would be no basis for finding that the Act preempts the state laws that the court below applied in construing *and enforcing* Green Tree's arbitration clause. Since neither express nor field preemption is at issue, the FAA only preempts those state laws whose application would conflict with the Act's underlying purposes and objectives. *Volt Info. Sciences*, 489 U.S. at 477-78. The Court has often stated that Congress enacted Section Two of the FAA with the primary goals of "revers[ing] the longstanding judicial hostility to arbitration agreements that had existed at English common

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[3] Since neither the FAA nor any applicable federal regulations address these issues, Green Tree's preemption arguments would require this Court to devise federal common law rules of contract interpretation from the ground up and would make every dispute over any term in an arbitration clause a federal question giving rise to the Court's jurisdiction.

law and had been adopted by American courts" and of "plac[ing] arbitration agreements upon the same footing as other contracts." *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991)).

Based on these goals, the Court has found that the FAA preempts two types of state laws that show hostility towards arbitration by aiming to restrict enforcement of the parties' contractual selection of the private forum. The first are state laws that single out arbitration clauses for disfavored treatment by imposing unique obstacles to their enforcement, thereby placing them on a "different footing" from other contracts. *See Casarotto*, 517 U.S. at 687 (FAA preempts state statute that "conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally"); *Allied-Bruce Terminix*, 513 U.S. at 269-70 (FAA preempts state statute that makes all pre-dispute arbitration agreements invalid and unenforceable). The second are state laws that "take[] [their] meaning precisely from the fact that a contract to arbitrate is at issue," *Perry*, 482 U.S. at 492 n.9, such as statutory anti-waiver rules that are construed to bar enforcement of *all* arbitration clauses in cases involving specific types of claims. *Southland*, 465 U.S. at 10.[4]

In light of these decisions, the FAA should not be found to preempt the state laws applied by the court below for the simple reason that *they did not address disputes over forum*

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[4] To the extent that the *Southland* preemption scenario is relevant here, it is worth emphasizing that the only party seeking to bar arbitration of an entire category of claims, namely all claims for class-wide relief, is Green Tree itself. Given the parallels between Green Tree's arguments and the statute that was preempted in *Southland*, Green Tree is in a curious position to be putting all of its eggs in the FAA preemption basket.

selection. All parties have agreed that the plaintiffs' claims are subject to arbitration under Green Tree's arbitration clause. Given this agreement regarding forum, the parties' *separate* dispute over whether the clause allows individual and/or class claims does not implicate the FAA's policy goals, and therefore was properly decided through the application of state law.

Although it should be clear that the parties' disputes are over matters decided by state law, it should also be clear that Green Tree is the only party whose arguments in this case show an overt "hostility towards arbitration" that could even arguably be found to threaten the FAA's underlying goals. In support of its position that the FAA enacts a presumptive ban on arbitration of class claims, Green Tree argues that "forced class arbitration creates a *bizarre and dangerous* hybrid that imposes the *expense and delay* of court litigation without the necessary due-process safeguards of court involvement and review," that "class arbitrations *lack the essential protections* mandated in the courts," and that class arbitration "raises difficult legal and practical questions. . ." Brief at 41, 42 (emphases added); *see also* Brief of Appellant Conseco Finance Serv. Corp., f/k/a Green Tree Finance Serv Corp. in *Eastman v. Conseco Finance Serv. Corp.*, Wis. Sup. Ct. No. 01-1743, *bankruptcy stay entered* (2003) at 8 ("Imposition of class arbitration would likely cause a party to abandon arbitration altogether . . .") A court that recently agreed with Green Tree's position voiced a similarly generalized hostility towards arbitration by basing its holding on a completely hypothesized "multi-million dollar class arbitration award entered on *nothing more than a whim* [that] cannot be corrected. . ." See *Discover Bank v. Superior Court*, 129 Cal. Rptr. 2d 393, 410 (Cal. Ct. App. 2003) (emphasis added).

Regardless of the merit of Green Tree's attitude towards arbitration, the parties' dispute here does not implicate the FAA's goals for protecting contractual forum selection. All parties agree that their claims are subject to arbitration under Green Tree's arbitration clause. The FAA does not answer or even address the parties' separate disagreement over how to resolve ambiguity in the terms of that clause regarding the aggregation of arbitrable claims. The FAA therefore does not preempt the state contract law and procedural rules applied by the court below to resolve this disagreement in favor of allowing the parties to arbitrate class claims.

II. THE COURT SHOULD NOT REACH ISSUES RAISED BY PETITIONER'S *AMICI* REGARDING STATE UNCONSCIONABILITY LAW.

Green Tree argues that this is a case where the Court must interpret contract terms. Br. at 18-45. Several *amici* supporting Green Tree ask the Court to go beyond questions of contract interpretation, however, and to opine upon the FAA's impact on state law relating to a contract *defense* not raised by either party. These *amici* ask the Court to declare that the FAA preempts application of state laws regarding unconscionability to contractual bans on class actions that are included in some arbitration clauses.[5] The Court should refuse to decide this question, which is not presented here and was not addressed by

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[5] *See, e.g.*, Brief of the Chamber of Commerce at 5, n. 2 (this case is an opportunity to "dispatch [the] shibboleth" that contract bans on class actions are unconscionable); Brief of Directv, Inc. at 4-5 (attacking unconscionability cases); Brief for American Bankers Association, *et al.*, at 6 (case holding that a contractual ban on class actions was unconscionable failed to recognize that the FAA requires enforcement of all arbitration clauses according to their terms).

the state court below, on the basis of the highly selective and often erroneous arguments offered by Green Tree's *amici*.

First, the issue of unconscionability law is not presented in the Petition, which poses the question of whether the FAA "prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class action arbitration." Pet. at i. This is a question of contract enforcement and interpretation as to what meaning should be given to a contract's terms. The *amici's* question regarding the intersection of the FAA and state laws of unconscionability, however, does not focus on the contract's language or how it should be enforced. The unconscionability question involves application of an entirely different set of state laws relating to defenses seeking the *revocation* of a contract.

The Court should refuse to address this new question. This Court does not, in all but the most "exceptional cases," address questions raised after *certiorari* is granted. *Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987). That rule applies with "peculiar force" in "cases coming here from state courts." *McGoldrick v. Companie Generale Transatlantique*, 309 U.S. 430, 434 (1940). Here, there is nothing "exceptional" about the issues raised by *amici*. *Cf. TRW Inc. v. Alexander*, 534 U.S. 19, 34 (2001) (refusing to decide new issue first raised by respondent in its brief on the merits); *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 171 (1999) ("We would normally expect notice of an intent to make so far-reaching an argument in the respondent's opposition to a petition for certiorari, cf. this Court's Rule 15.2, thereby assuring adequate preparation time for those likely affected and wishing to participate.").

Amici argue that the issues of contract interpretation and contract defenses are inextricably linked, suggesting that their proposition that the FAA creates a presumptive prohibition against class arbitration when a contract is silent on the subject necessarily implies that arbitration clauses are exempt from generally applicable contract defenses. This is a non sequitur – these are separate sets of laws that serve different purposes. Whether or not the FAA requires particular contract language to allow arbitration of class claims does not answer the question of whether generally applicable state contract law can be used to strike down clauses that expressly ban these procedures.

Another reason for the Court not to address the issue raised by Green Tree's *amici* is that the issue was not raised before or actually decided by the South Carolina Supreme Court.[6] The failure of the state court to decide this issue is crucial here because it is unclear on this record how that issue might have been decided, and therefore it is unclear exactly what type of state law *amici* are trying to preempt. First, there is no indication as to the South Carolina law requirements for a finding of procedural unconscionability in contract formation. While the court below noted that the arbitration clause was promulgated as a contract of adhesion, that does not always equate to a finding of procedural unconscionability. In many states, procedural unconscionability requires a showing of some additional element, such as "surprise." There are no facts in the record on whether the contract at issue was promulgated in such a manner as to constitute a "surprise" for the consumer

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[6] The only time that the state court below mentioned issues regarding the legality and equity of explicit class action bans in adhesion contracts, the court concluded that "this present case dose not raise this question . . . ." Pet App. at 22a n.21.

plaintiffs, as that concept might be interpreted by the South Carolina Supreme Court.[7]

The law of South Carolina is also unclear on some of the central legal questions underlying any claim that a contractual ban on class actions is substantively unconscionable. In the states that have held these bans to be unconscionable in some circumstances, those holdings have often been based on general state laws relating to exculpatory clauses. Typical of these cases is *State ex rel. Dunlap v.Berger*, 567 S.E.2d 265 (W.Va.), *cert. denied*, 123 S. Ct. 695 (2002), where the court reviewed a number of longstanding state cases relating to exculpatory clauses (none of which involved arbitration clauses) and concluded that:

> Based on all of the foregoing and in fidelity to the approach that we have long taken in this area, we recognize and hold that exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a

person from enforcing and vindicating rights and protections or

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[7] Several of Green Tree's *amici* excoriate the case of *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003), and ask this Court to say something that would reverse the decision in *Ting* and various other cases like it. Among the many facts developed in that case not mentioned by these *amici* is an enormous body of evidence establishing that AT&T communicated to its customers about its arbitration clause in a manner that company officials knew would ensure that very few customers would learn of the clause. After a full trial on the merits, the district court there held that the terms of the arbitration clause (including its ban on class actions) would be a surprise to the class there, citing to a wealth of documents and testimony. *Ting v. AT&T*, 182 F. Supp. 2d 902, 911-13, 929-30 (N.D. Cal. 2002). Conseco's *amici* would like this Court to pass on the unconscionability of contractual bans on class actions without actually hearing a case containing such a factual record on questions like surprise.

from seeking and obtaining statutory or common law relief and remedies that are afforded by or arise under state law that exists for the benefit of the public are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable.

Id. at 275-76. After reviewing the facts before it, the *Dunlap* court found that a contract provision barring class actions would effectively act as an exculpatory clause in that case, and thus held it to be unconscionable. Here, however, there is no statement of South Carolina law on exculpatory clauses, much less on how such law would apply to this setting.

The Court should also refuse to decide or comment on the issue of whether contractual bans on class actions included in arbitration clauses may ever be found unconscionable because the issue has not been fully or fairly briefed. The importance of such briefing is clear from the fact that *amici* make a number of dubious or incorrect statements of law in support of their effort to have the Court decide this issue. The New England Legal Foundation asserts, for example, that any state law striking down a contractual ban on class actions would violate the FAA because it fails to recognize the "sanctity of contract." Brief at 15, n.18. The American Bankers Association, similarly, insists that cases holding that contractual bans on arbitration are unconscionable ignores a requirement in the FAA that all contracts be enforced "according to their terms." Brief at 6. These arguments ignore the fact, discussed above, that the FAA contains a savings clause providing that particular arbitration clauses will not be enforced if there are grounds under state contract law for their invalidation. The Court has thus recognized that the defense of unconscionability is available to parties challenging arbitration agreements. *Casarotto*, 517 U.S. at 687. Accordingly, to the

extent that state contract law recognizes a defense of unconscionability, there is an important and well-recognized exception to the *amici's* blanket assertion that any conceivable contract term imposed by a drafter is sacred and must always be enforced.

Similarly, Green Tree's *amici* incorrectly assert that state laws applying the doctrine of unconscionability to bans on class actions in arbitration are necessarily rooted in a hostility to arbitration. *See*, *e.g.*, American Bankers Association Brief at 7. This argument overlooks the fact that many states sharply limit the use of exculpatory clauses in *all* contracts, whether or not they contain arbitration clauses. *See*, *e.g., Dunlap*, 567 S.E.2d at 275-76. For example, before any of the California cases cited by *amici* were decided, the rule that contractual class action bans can be unconscionable based on their exculpatory effects was applied in a case that had nothing to do with arbitration. *See American Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001) (striking down retailer's out-of-state forum selection clause based in part on prohibition of consumer class actions).

Although *amici* claim that various cases not before the Court improperly single out arbitration clauses for suspect treatment, these *amici* advocate an approach that *itself* singles out arbitration clauses for different treatment from that given to any other contract. The *amici's* analysis is as follows: even if a state's general law of unconscionability would strike down class action bans as illegal exculpatory clauses in contracts that do *not* require arbitration, that state law is overridden by the FAA any time these provisions are included in a section of a contract that *does* require arbitration. This notion contradicts the Court's instruction that the FAA's main purpose is to "'place arbitration agreements *upon the same footing as other*

contracts.'" *Waffle House*, 534 U.S. at 289 (emphasis added) (citation omitted). Nothing in the Act permits parties to launder otherwise illegal contract terms and make them legal merely by inserting them under the heading "arbitration." As one state court recognized, the FAA does not allow for this kind of escape from liability "merely because the prohibiting or limiting provisions are part of or tied to provisions in the contract relating to arbitration." *Dunlap*, 567 S.E.2d at 280.[8]

Similarly, *amici* suggest that the Court can hold that class action bans are never unconscionable because the class action is merely a procedural device, and arbitration clauses may enact any procedures imaginable without being unconscionable.[9] This theory is plainly incorrect, however, under this Court's own teachings. Rules regarding filing fees and other forum costs of arbitration are clearly procedural, not substantive, in nature. Under these *amici's* theory, therefore, an arbitration clause could impose enormous fees against a consumer and be immune from any state laws relating to unconscionability. This Court has recognized, however, that "the existence of large arbitration costs may well preclude a litigant . . . from effectively vindicating [its] rights." *Green Tree Financial Corp. v. Randolph,* 531 U.S. 79, 81 (2000). Notwithstanding the false dichotomy suggested by Green Tree's *amici*, if a procedural device (such as a contractual class action ban) would in some cases "effectively" bar individuals

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[8] These decisions involving state law anti-exculpatory principles also comply with this Court's instruction that arbitration clauses are only enforceable under the FAA if they allow parties to effectively enforce their statutory rights. *See, e.g., Waffle House*, 534 U.S. at 295 n.10.

[9] *See*, *e.g.,* Brief of New England Foundation at 21 n. 25; Brief of Equal Employment Advisory Council at 12.

from vindicating their substantive rights, and thus would have the same impact as a more direct exculpatory clause, the procedural quality of this contract provision does not save it from violating state laws relating to unconscionable contracts. If every contract term labeled "procedural" were beyond the reach of state law, the drafters of adhesive contracts could easily evade limits on exculpatory clauses by requiring persons with small claims to travel to a completely inaccessible forum (perhaps the outback of New Zealand) to arbitrate claims.

As further proof of the dangers of resolving *amici's* new issue, the American Bankers Association suggests that contractual class action bans would never bar persons from vindicating their rights, citing several law review articles, as well as snippets of legislative history and a few cases that do not even involve class actions. Brief at 8. The practical effect of a class action ban is a factual issue, one that the Court should not address in the vacuum presented by the *amici*. In a case where there *was* a significant record developed at trial, that record demonstrated that a number of successful cases brought on a class action basis against a corporate defendant could never have been brought on an individual basis, whether in court or in arbitration. *Ting*, 182 F. Supp. 2d at 918. At the conclusion of that trial, the federal district court held that "the prohibition on class actions will prevent class members from effectively vindicating their rights in certain categories of claims . . . ." *Id.* at 931. This Court should therefore reject the suggestion, based largely on a few law review articles, that this case presents a vehicle for resolving fact-intensive questions that neither the court below nor the parties have addressed.

The state court below was correct to apply state law in holding that the ambiguous terms of Green Tree's arbitration clause allowed the plaintiffs to arbitrate their class claims. In

light of the state court's decision enforcing the arbitration clause, this Court should not address questions about whether or not *different* arbitration clause terms would be unenforceable as a matter of state or federal law.

CONCLUSION

The judgment of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,

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