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. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

REPLY BRIEF OF PETITIONER

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In its petition, Green Tree Financial Corp. ("Green Tree") demonstrated that review by this Court is necessary to resolve an acknowledged and persistent conflict among both state and federal appellate courts on the question whether the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration. Pet. 3-4, 10-13, 14-23. We further demonstrated that the decision below is an appropriate vehicle for resolving this conflict, because the South Carolina Supreme Court rejected the majority position and adopted the minority view that the FAA does not bar class-action arbitration where the parties' agreement does not provide for class-action arbitration. *Id.* at 23-26. In doing so, the South Carolina Supreme Court contravened numerous decisions of this Court, which provide that the FAA mandates in both federal and state courts that arbitration agreements must be enforced according to the parties' terms and not according to terms imposed by courts implementing their own policy preferences. *Id.* at 5-6, 13, 23-26. Finally, we showed that the question presented is an important and recurring one that would have a profound impact on the proper application of the FAA in both state and federal courts. *Id.* at 13-14, 27-30.

Respondents' Opposition ("Opp.") does not detract from the force of these conclusions. To the contrary, Respondents admit candidly that, at a minimum, the "arbitration agreement" does not "speak[] to the question of class arbitration[]." Opp. 12. Respondents are thus forced to attempt to divert the Court's attention from the imposition of class-action arbitration onto such an agreement by arguing that Green Tree is a bad actor that knowingly violated settled South Carolina law and caused substantial damage to numerous South Carolina residents. *Id.* at 1-9. That argument is baseless.

The purportedly "knowing" violations underlying the arbitral awards in this case occurred years *before* the 1998 decision which resolved whether the insurance and attorney preference notice requirements applied to the circumstances presented here. See Pet. App. 69a, 91a (relying expressly on *Tilley* v. *Pacesetter Corp.*, 508 S.E.2d 16 (S.C. 1998) to conclude that S.C. Code Ann. § 37-10-102(a) had been violated). Further, while Respondents "did not attempt to show actual damages" in the proceedings below, *id.* at 69a, 96a, they now pepper their Opposition with baseless claims that (i) "terms of the credit were not disclosed," Opp. 4, (ii) "consumers did not understand that they were securing the credit transaction with a mortgage on their home," *id.*, and (iii) "[t]he dealer would have the consumer execute the documents without explanation," *id.* at 5. Like much of their Opposition, these accusations are made without record citation and cannot alter the conclusion that this case squarely presents an important and recurring question regarding the proper application of the FAA.

1. First, Respondents' efforts to explain away the deep and mature conflict among the state and federal courts are specious. See Opp. 12, 18-24. According to Respondents, there is no conflict because "the federal court decisions . . . that deny class arbitration or class consolidation do so as a construction of the Federal Rules of Civil Procedure." *Id.* at 12. This is merely wishful thinking. Any fair reading of these opinions reveals that they hold that the FAA prohibits the imposition of class or consolidated arbitration where the arbitration agreement does not provide for such treatment. *E.g.*, *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995); *Dominium Austin Partners, LLC* v. *Emerson*, 248 F.3d 720, 728 (8th Cir. 2001); see also Pet. 15-19 (citing cases).[1]

[1] The *Champ* line of cases is based on decisions of this Court which make clear that the FAA requires that arbitration agreements be enforced according to their terms. *See Volt Info. Scis., Inc.* v. *Board of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 475-79 (1989); *accord*

Similarly, the cases that adopt the conflicting minority approach, including the decision below, are equally clear in holding that the FAA does not preclude imposition of class or consolidated procedures even where the arbitration agreement does not provide for such procedures. See *Blue Cross of Cal.* v. *Superior Ct.*, 67 Cal. App. 4th 42, 63 (1998); Pet. App. 19a (rejecting Green Tree's argument that "this Court is obligated to follow *Champ*, as a matter of federal substantive law"). This case squarely raises that acknowledged conflict.

a. In *Champ*, the Seventh Circuit directly rejected the argument "that since an order compelling class arbitration *does not contradict* the terms of the parties' arbitration agreement, it is *in accordance with* those terms." 55 F.3d at 274. It did so, not based upon an analysis of the Federal Rules of Civil Procedure – which the court properly held were irrelevant to the issue, *id.* at 276-77 – but based upon a determination that the FAA, as interpreted by this Court in decisions such as *Volt* and *Dean Witter*, precluded that result, *id*. at 274-75. In particular, the *Champ* court concluded that the "chief concern under the FAA is to enforce the parties' arbitration as they wrote it, '*despite* possible inefficiencies created by such enforcement.'" *Id.* (quoting *Government of U.K.* v. *Boeing Corp.*, 998 F.2d 68, 72 (2d Cir. 1993)).[2]

E.E.O.C v. *Waffle House, Inc.*, 534 U.S. 279, 293-94 (2002); *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 688 (1996); *Mastrobuono* v. *Shearson Lehamn Hutton, Inc.*, 514 U.S. 52, 54 (1995); *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985); *cf. Howsam* v. *Dean Witter Reynolds, Inc.*, No. 01-800, slip op. at 3 (U.S. Dec. 10, 2002) ("'a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit'"); *id.* slip op. at 1 (Thomas, J., concurring in judgment) (noting *Volt* "held that under the [FAA] courts must enforce private agreements to arbitrate . . . in accordance with their terms").

[2] The cases regarding consolidated arbitration, on which *Champ* relied, employ the same analysis. Pet. 16-17 & n.3 (citing cases). For example, in *United Kingdom*, 998 F.2d at 71, the Second Circuit "h[e]ld that the FAA does not authorize consolidation of arbitration proceedings unless doing so would be 'in accordance with the terms of the agreement.'"

Thus, Respondents are wrong in suggesting that *Champ* does not conflict with the decision below because the Federal Rules of Civil Procedure do not authorize consolidation, whereas "South Carolina law is precisely the opposite of the federal rules: to *allow* consolidation." Opp. 19. The Federal Rules of Civil Procedure authorize both "consolidation," Fed. R. Civ. P. 42, and class actions, *id.* 23, but the *Champ* court squarely held that they could not be used to impose class-action arbitration on a "silent" agreement because the FAA "requires that we enforce an arbitration agreement according to its terms." 55 F.3d at 276. Indeed, Respondents nowhere mention, let alone dispute, Green Tree's showing that "the obligation to enforce arbitration agreements in accordance with their terms is a core aspect of the FAA that applies in cases filed in both federal and state court." Pet. 29 & n.11 (citing cases); *id.* at 5 & n.1.

In stark contrast, the decision below held that class arbitration could be imposed "without any contractual . . . directive to do so" "if it would serve efficiency and equity, and would not result in prejudice." Pet. App. 21a, 22a. The conflict between that holding and the majority position reflected in *Champ* is plain, direct and unassailable.[3] Indeed, the court below, when it rejected the *Champ* line of cases, properly understood that *Champ* turned on the requirements of the FAA, *id.* at 12a-13a, 19a-21a, and not, as Respondents suggest, upon "a construction of the Federal Rules of Civil Procedure." Opp. at 12.

Respondents' effort to reconcile the decision below and the Eighth Circuit's decision in *Dominium Austin Partners* is equally meritless. Opp. 19-20. First, contrary to

[3] The Seventh Circuit has since reiterated that the parties' intent is the determinative question under the FAA. *Connecticut Gen. Life Ins. Co.* v. *Sun Life Assur. Co. of Can.*, 210 F.3d 771, 774 (2000) (court "cannot consolidate, transfer, etc. arbitration proceedings in defiance of the parties' wishes or contractual undertakings"; "the court has no power to order such consolidation if the parties' contract does not authorize it").

Respondents' overarching argument, the *Dominium Austin Partners*' decision nowhere mentions, let alone relies upon, the Federal Rules of Civil Procedure. Instead, the Eighth Circuit held that "the goal of the FAA is to enforce the agreement of the parties, not to effect the most expeditious resolution of claims." 248 F.3d at 728. Respondents acknowledge that the Eighth Circuit relied upon "circuit precedent," Opp. 19, but ignore that this "circuit precedent" held that the FAA precludes imposition of consolidated arbitration unless the arbitration agreement provides for it. See *Baesler* v. *Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); see also *Gammaro* v. *Thorp Consumer Discount Co.*, 828 F. Supp. 673, 674 (D. Minn. 1993) (applying *Baesler* to deny request for class arbitration), *appeal dismissed*, 15 F.3d 93 (8th Cir. 1994). These holdings directly conflict with the decision below that the FAA permits "'intrusion upon the contractual aspects of the relationship'" "if it would serve efficiency and equity, and would not result in prejudice." Pet. App. 21a, 22a.

Nor can *Dominium Austin Partners* be distinguished, as Respondents argue, based on the Eighth Circuit's statement that "'[t]he construction of an agreement to arbitrate is governed by the FAA *unless the agreement expressly provides that state law should govern*.'" Opp. 20 (quoting *Dominium*, 248 F.3d at 729 n.9). The arbitration agreement in this case provides that it "shall be governed by the Federal Arbitration Act," Pet. App. 110a, and the court below squarely held that the arbitration agreement is "governed by the FAA," *id.* at 11a. Although Respondents note that the court below "earlier construed the very same arbitration agreement," Opp. 20, they omit that the South Carolina Supreme Court's prior decision held that (i) "Green Tree's arbitration clause was governed by the FAA," Pet. App. 11a n.9, and (ii) as a result, application of the state's Arbitration Act and provisions of its Consumer Protection Code to the

parties' agreement was preempted by the FAA. See *Munoz* v. *Green Tree Fin. Corp.*, 542 S.E.2d 360, 364 (S.C. 2001).

Respondents' attempt to reconcile the decision below with *Med Center Cars, Inc.* v. *Smith*, 727 So. 2d 9 (Ala. 1998), suffers from the same analytical flaws. In *Med Center*, the Alabama Supreme Court acknowledged the applicability and preemptive force of the FAA, *id.* at 12-13, quoted *Champ*'s analysis of the FAA, *id*. at 20, and expressly adopted *Champ* and the cases on which that court relied, *id*. at 20 & n.4. Respondents argue, however, that Alabama adopted the *Champ* line of decisions as a matter of state policy, not as a matter of federal command. But the Alabama Supreme Court has made clear both before *Med Center* and after that, "[u]nder Alabama law, the specific enforcement of a predispute arbitration agreement violates both our statutory law and public policy, *unless federal law preempts state law*." *Lopez* v. *Home Buyers Warranty Corp.*, 670 So. 2d 35, 37 (Ala. 1995) (emphasis added); *accord Woodman of the World Life Ins. Soc'y* v. *Harris*, 740 So. 2d 362, 366 (Ala. 1999). Thus, Respondents are wrong when they contend that the decision in *Med Center* to enforce an arbitration agreement according to its terms was based on that court's "own State's law," and not on the requirements of the FAA. Opp. 21.[4]

Similarly, Respondents cannot avoid the direct conflict with the holding in *Stein* v. *Geonerco, Inc.*, 17 P.3d 1266, 1270 (Wash. Ct. App. 2001) – which refused to "compel class arbitration" where "the arbitration clause is silent" – by arguing that "the party seeking class arbitration[] had 'fail[ed] to cite relevant statutory provisions that conflict with arbitration of his claims.'" Opp. 20 (quoting *Stein*, 17 P.3d at

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[4] *Leonard* v. *Terminix Int'l Co.*, No. 1010555, 2002 WL 31341084 (Ala. Oct. 18, 2002) (per curiam), does not alter this conclusion. Opp. 21. Indeed, *Leonard* reaffirmed *Med Center*'s holding, 2002 WL 31341084 at *12 n.2, and dealt with unconscionability, *id.* at *3-*4, an issue that the court below did not address, Pet. App. 22a n.21.

1270). The quotation relied upon by Respondents is irrelevant because it is plucked from the section of the decision dealing with whether the arbitration clause should be enforced, and not with the separate question whether "the arbitration should proceed on a classwide basis." *Stein*, 17 P.3d at 1271. As to the latter issue – the one that is relevant here – the *Stein* court expressly acknowledged the conflict among the courts and adopted the *Champ* line of cases. *Id.*

b. Moreover, contrary to Respondents' arguments, Opp. 22-24, the decisions adopting the minority position also confirm the deep and mature conflict implicated by this case. Respondents argue that this conflict is "illusory," *id.* at 18, because the decisions authorizing class-action arbitration in the absence of an arbitration agreement providing for that result "have done so based on state law," *id.* at 22. But that characterization merely begs the question because the issue in this case is whether the federal law, *i.e.*, the FAA, precludes that result. In concluding that the FAA does not dictate that result, the California courts in cases such as *Blue Cross of California* v. *Superior Court*, 67 Cal. App. 4th 42 (1998), have rejected the *Champ* line of cases and held expressly, as a matter of federal law, that "application of the California classwide arbitration rule is not preempted by the [FAA]." *Id.* at 46. Here too, the South Carolina Supreme Court acknowledged the conflicting approaches adopted by the *Champ* line of cases and the minority approach adopted by the *Blue Cross* line of cases, Pet. App. 12a-16a, and rejected the argument that it was required "to follow *Champ*, as a matter of federal substantive law." *Id.* at 19a.

In sum, this case implicates an important and recurring issue of federal law that warrants this Court's review. See *Southland Corp.* v. *Keating*, 465 U.S. 1, 8-9 (1984) (accepting for review but dismissing, for lack of federal jurisdiction, judgment that state law authorized class-action arbitration where agreement "silent" because petitioner failed to argue before court below that FAA precluded that result).

2. Given this clear conflict, Respondents are reduced to arguing that review in this case should be denied because the decision below was correct. Opp. 12 (arguing that decision below "is consistent with this Court's decisions holding that the FAA does not preempt state law that is not in conflict with a federal standard"); *id*. at 13-18 (same). Furthermore, Respondents argue that review should be denied because, on the merits, an arbitrator's decision to permit class arbitration "is entitled to special deference." *Id.* at 25; *id.* at 25-28. Although a full response to these merits arguments is not warranted at this stage, it is nevertheless the case that Respondents misconstrue both this Court's decisions and the factual and legal bases of the decision below.

a. According to Respondents, the decision below was correctly decided unless there is "an intent by Congress for the FAA to occupy the entire field of arbitration procedures." Opp. 12. Our case does not depend on such a sweeping view of preemption. We recognize that the FAA does not "'reflect a congressional intent to occupy the entire field of arbitration.'" *Id*. at 14 (quoting *Volt*, 489 U.S. at 477). But that is beside the point. This Court's decisions make clear that the FAA can, and does, preempt state law that conflicts with the purposes of the FAA. *E.g.*, *Southland Corp.*, 465 U.S. at 12-15; *Doctor's Assocs.*, 517 U.S. at 685. Although respondents accurately quote *Volt* for the proposition that "'[t]here is no federal policy favoring arbitration under a certain set of procedural rules,'" Opp. 14 (quoting *Volt*, 489 U.S. at 476), they omit the very next sentence, which provides that "the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate," *Volt*, 489 U.S. at 476.

That policy, which is designed to combat long-standing judicial hostility to arbitration by ensuring enforcement of the actual agreements entered into by the parties, has been confirmed repeatedly by this Court in cases reviewing state court and federal court arbitration decisions. See, *e.g.*,

Doctor's Assocs., 517 U.S. at 688; *Mastroubono*, 514 U.S. at 53-54. To be sure, the FAA leaves parties free to choose to be bound by state law arbitration principles if they so decide. *Volt*, 489 U.S. at 476. But, here, the parties did not adopt South Carolina's arbitration rules because, as the court below correctly held, Pet. App. 11a & n.9, the agreement provides that it "shall be governed by the Federal Arbitration Act," *id.* at 110a.

b. Second, contrary to Respondents' assertion, Opp. 15-16, there is no serious basis for the suggestion that the decision below actually reflected the parties' contractual intent. The South Carolina Supreme Court ruled that class arbitration could be imposed without regard to the parties' contractual intent based upon prior South Carolina precedent which had imposed consolidated arbitration on objecting parties without "any contractual or statutory directive to do so." Pet. App. 21a. The South Carolina Supreme Court's application of that same standard to authorize the imposition of class action arbitration "without any *contractual* . . . directive to do so," *id.*, unquestionably constitutes an "'intrusion upon the contractual aspects of the relationship,'" *id.*, and therefore violates the "FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." *Volt*, 489 U.S. at 479.

Indeed, the court below ruled that class-action arbitration was authorized without regard to the parties' intent "if," in the court's discretion, "it would serve efficiency and equity, and would not result in prejudice," Pet. App. 22a. But, the law is clear that the FAA "leaves no place" for such "discretion," *Dean Witter*, 470 U.S. at 218; instead the FAA commands "'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono*, 514 U.S. at 54 (quoting *Volt*, 489 U.S. at 479). Imposing class arbitration without "any contractual . . . directive to do so," Pet. App. 21a, simply "reflects the old judicial hostility to arbitration in modern and more sophisticated dress." See Br. of Am. Bankers Ass'n, et

al. as *Amici Curiae* in Support of Petition at 4, 12-17 ("forced" class arbitration is an attack on arbitration itself).

c. Finally, Respondents argue that review should be denied because "the *Arbitrator* decided that this case should proceed as a class arbitration." Opp. at 25. But the decision below makes clear that in the *Bazzle* proceeding, the trial court, not the arbitrator, ordered arbitration and "grant[ed] class certification" as to "the Bazzles and all members of their class." Pet App. 3a-4a. Nor do Respondents dispute that the arbitrator in *Lackey* accepted their arguments that class arbitration should be ordered based upon the trial court's order compelling class arbitration in the *Bazzle* proceeding. *Id.* at 5a-6a; R. on Appeal at 516.

In any event, this Court has not hesitated to grant review of important federal questions that arise out of an arbitrator's decision. *Mastrobuono*, 514 U.S. at 55; see also *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938 (1995). Indeed, in *First Options*, this Court reversed an arbitrator's decision, explaining that "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration." *Id.* at 945. More generally, this Court has made clear that judicial review under sections 10 and 11 of the FAA "'ensure[s] that arbitrators comply with the requirements of the [federal statute].'" *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 n.4 (1991) (quoting *Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220, 232 (1987)). Here, imposition of class arbitration without "any contractual . . . directive to do so" Pet. App. 21a, manifestly violates the core principles underlying the FAA and therefore warrants this Court's review.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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