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

BRIEF OF NEW ENGLAND LEGAL FOUNDATION AND CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS AS *AMICI CURIÆ* IN SUPPORT OF PETITIONER ON THE MERITS

MICHAEL E. MALAMUT
CHRISTINE HUGHES
NEW ENGLAND LEGAL FOUNDATION
150 Lincoln Street
Boston, Massachusetts 02111-2504
(617) 695-3660

CHRISTOPHER M. MASON*
NIXON PEABODY LLP
437 Madison Avenue
New York, New York 10022
(212) 940-3000

J. VANN VOGEL
JEROME KARNICK
VERIZON WIRELESS
180 Washington Valley Road
Bedminster, New Jersey 07921
(908) 306-7300

DAVID H. GIBBS
JOHN R. PAGLIARO
NIXON PEABODY LLP
101 Federal Street
Boston, Massachusetts 02110
(617) 345-1000

Counsel for New England Legal Foundation and Cellco Partnership d/b/a/Verizon Wireless as Amici Curiæ

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*Counsel of Record

QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration.

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New England Legal Foundation ("NELF") and Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") submit this brief *amici curiæ* in support of Petitioner Green Tree Financial Corp. a/k/a Green Tree Acceptance Corp. a/k/a Green Tree Financial Services Corp. a/k/a Conseco Finance Corp. ("Green Tree") and in favor of reversal of the decision of the South Carolina Supreme Court imposing class action procedures in arbitrations by parties who did not agree to any such procedures in their arbitration agreements.[1] The decision below ignores the express language and long-standing federal policy of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000) (the "FAA"), that arbitration agreements shall be enforced according to their terms. It also ignores this Court's settled arbitration jurisprudence and improperly seeks to make access to class action procedures a fundamental right. It does all of this in an attempt to justify a newly-created judicial rule, based on individual state court notions of "equity and efficiency", that would require class-wide arbitrations without the agreement of the parties involved.

STATEMENT OF INTEREST OF *AMICI CURIÆ*

NELF is a non-profit, public interest law firm. Its more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States as well as private law firms, individuals, and others who believe in promoting balanced economic growth, protecting the free enterprise system, and defending economic rights. NELF frequently acts as an *amicus curiae* in cases raising policy and constitutional concerns related to these issues. Most of NELF's members are engaged in interstate commerce. Many of them regularly use contracts containing arbitration clauses.

Verizon Wireless is a joint venture indirectly owned by Verizon Communications, Inc., a domestic telecommunications

[1] Pursuant to Supreme Court Rule 37.6, NELF and Verizon Wireless state that this brief was prepared entirely by them and their counsel. No one other than them and their members made any monetary contribution toward the preparation or submission of this brief.

holding company, and Vodafone Group plc, a British telecommunications company. Verizon Wireless, the largest wireless telecommunications provider in the United States, has over 30,000,000 customers. It uses arbitration clauses extensively in its contracts with its customers and others.

SUMMARY OF ARGUMENT

This Court should reverse the decision below. The FAA, to ensure a uniform national approach to arbitration agreements involving interstate commerce, requires that such agreements be enforced according to their terms. Indeed, this is its "primary purpose." *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989). This federal statutory policy therefore supersedes any state notions of "efficiency and equity" that would supposedly permit a state court to impose modern class action procedures taken from its judicial system (and incorrectly assumed to be somehow a fundamental right) on parties whose private arbitration agreements contain no such terms.

ARGUMENT

The FAA is intended to "create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983); *see also, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) ("the substantive law the Act created" applies in both "state and federal courts.").The decision below would improperly frustrate this goal by using varying, state-by-state interpretations of "efficiency and equity" to allow state courts to replace the FAA's substantive preference for enforcement of arbitration agreements according to their terms with a preference for class-wide arbitration procedures instead.

At the time of the FAA's original enactment (as the United States Arbitration Act, 43 Stat. 883, ch. 213 (1925)), federal substantive law certainly did not contemplate the modern class

action, much less class-wide arbitrations.[2] That law did—and still does—however, require that arbitration agreements, if not revoked on grounds generally applicable to all contracts, be enforced according to their terms. *E.g.*, 9 U.S.C. §§ 2, 3, 4; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54 (1995); *Volt*, 489 U.S. at 479; *Southland*, 465 U.S. at 16. The court below ignored this unwavering federal policy with reasoning openly hostile to the arbitration clauses in millions of existing form contracts subject to the FAA:

> class-wide arbitration may be ordered when the arbitration agreement is silent if it would *serve efficiency and equity*, and would not result in prejudice. 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 in the agreement. 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. Further, hearing such claims (involving identical issues against one defendant) individually, in court or before an arbitrator, does not *serve the interest of judicial economy*.

Bazzle v. Green Tree Fin. Corp., 569 S.E.2d 349, 360-61 (S.C. 2002) (footnotes omitted) (emphasis added), *cert. granted*, 123 S. Ct. 817 (2003).

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[2] *See, e.g.*, Hearing on S. 4213 and S. 4214, Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 4th Sess., 2 (1923) (comments of Charles L. Bernheimer that the proposed legislation "follows the line of the New York arbitration law"), *cited in Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 n.13 (1967)). Notably, New York state courts have never adopted any theory of class-wide arbitration for arbitrations in that state. *See, e.g., Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 573 (N.Y. App. Div. 1998); *Harris v. Shearson Hayden Stone, Inc.*, 441 N.Y.S.2d 70, 76 (N.Y. App. Div. 1981), *aff'd on op. below*, 435 N.E.2d 1097 (N.Y. 1982).

The vague and open-ended standards proposed in this reasoning will destroy the desired uniformity of federal law under the FAA while improperly attempting to raise the mere procedural device of the class action to the level of a fundamental right greater than that of trial by jury. They will also—as they did below—produce results inconsistent with the substantive language of the FAA (and, consequently, contrary to the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, § 2) and inconsistent with Court's settled arbitration jurisprudence. As a result, this Court should reverse the decision below.

I. The South Carolina Supreme Court's decision conflicts with the federal policy of the FAA and this Court's settled arbitration jurisprudence.

Class actions are based on court rules developed for judicial fora. *See, e.g.*, Fed. R. Civ. P. 23; S. C. R. Civ. P. 23. Arbitrations are based on private agreements. *See* 9 U.S.C. § 2. While an arbitration agreement may incorporate the rules developed for a particular arbitral forum, the court below identified no arbitral forum that requires class-wide arbitration, much less class-wide arbitration over the objection of a party. Nor did the court below identify any such arbitral forum chosen by the parties here. Instead, to avoid a "risk" that parties may be treated differently in arbitration than in court, and to serve an alleged policy of "efficiency and equity", it sought to impose a presumption of class-wide procedures as part of every arbitration agreement in every arbitral forum. *See Bazzle*, 569 S.E.2d at 361.

As discussed below, the South Carolina Supreme Court improperly ignored the uniform federal policy of the FAA favoring enforcement of arbitration agreements according to their terms. It also improperly attempted to justify this failure by inflating the importance of its own judicial policy. Federal policy on how to decide issues of fact in a federal court will not yield to state procedural rules merely "in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court." *Byrd v. Blue Ridge Rural Elec. Coop., Inc.,*

356 U.S. 525, 538 (1958). Similarly, a uniform federal policy on how to enforce arbitration agreements should not yield to a state court's notions of "efficiency and equity" so as to avoid a "risk" that a matter would be handled one way in that state's courts and another way in arbitration.[3]

A. The South Carolina Supreme Court's decision conflicts with the uniform federal policy of the FAA that arbitration agreements be enforced according their terms.

In reaching its decision, the court below honored neither the precise words nor the general intent of the FAA. The FAA permits a court only to determine whether there is a valid agreement to arbitrate and, if so, to take actions that honor the terms of that agreement. Section 2 provides that a written arbitration clause involving interstate commerce "*shall* be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the *revocation* of any contract." 9 U.S.C. § 2 (emphasis added). Section 3 provides that if a lawsuit involves an issue covered by such an arbitration clause, the court "*shall* upon application of one of the parties stay the trial of the action until such arbitration has been had *in accordance with the terms of the agreement* . . . ." 9 U.S.C. § 3 (emphasis added). Section 4 provides that if a court tries the issue of the existence of an arbitration agreement and finds that one exists, it "*shall* make an order directing the parties to proceed to arbitration *in accordance with the terms of the arbitration agreement*." 9 U.S.C. § 4 (emphasis added).[4]

These sections neither authorize a court to rewrite an arbitration agreement (as opposed to revoke it) an arbitration

[3] As in *Byrd*, 356 U.S. at 539-40, any assumption that actual outcomes would be different because of a particular South Carolina rule (in this case imposing an obligation to make available class-wide procedures in contracts containing arbitration clauses) is not supported by any evidence.

[4] Notably, these Sections use the word "shall", not "may." *Cf. Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198-99 (2000) ("may" can, but does not necessarily, imply some degree of discretion as used in parts of the FAA).

clause nor authorize it to order that an arbitration proceed in accordance with its individual judicial views of "efficiency and equity" (as opposed to the terms of the arbitration clause). Yet these were effectively the steps taken by the court below—even though *this* Court has also long held that "private agreements to arbitrate are enforced *according to their terms*." *Volt*, 489 U.S. at 479 (emphasis added); *accord, e.g., Mastrobuono*, 514 U.S. at 54 (same); *Southland*, 465 U.S. at 13 ("the purpose of the" FAA was to "assure" parties that their "expectations would not be undermined by . . . state courts or legislatures."). [5]

The importance of the policy choice by Congress that arbitration clauses be enforced as written is clear. First, the language of the FAA requiring enforcement of arbitration clauses "in accordance with the terms of the agreement" (except when subject to "revocation") has remained untouched since its enactment in 1925. *Compare* 43 Stat. 883, ch. 213 §§ 2, 3, 4 (1925) *with* H.R. 2084 §§ 2, 3, 4, 80th Cong., 1st Sess. (1947) (recodifying the United States Arbitration Act as the FAA) *with* 9 U.S.C. §§ 2, 3, 4 (current language); *see also Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 201 (1956) (sections 1, 2, and 3 of the FAA "are integral parts of a whole."); *see also, e.g., Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) ("nothing in the [FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement).[6]

[5] As others will undoubtedly point out, federal courts following this Court's jurisprudence have generally refused as a matter of federal law to impose class action procedures on private arbitrations that do not provide for them. *See, e.g., Champ v. Siegel Trading Co.*, 55 F. 3d 269, 276 (7th Cir. 1995). The court below did not deny that it was refusing to follow federal law and these decisions. Its purported justification for this refusal (without any mention of the Supremacy Clause, U.S. Const. art. VI, § 2), and for its preference instead for California state law, was simply that "[f]ollowing the federal approach risks" results it considered unpalatable as a matter of "equity." *Bazzle*, 569 S.E.2d at 361.

[6] This Court need not address whether Sections 3 and 4 (or 3 *or* 4) of the FAA apply in state courts in order to divine that Congress intended arbitration clauses to be enforced only according to their terms. *Cf., e.g., Southland*, 465

Second, the language of the FAA is part of a policy to maintain a consistent *national* policy on arbitration—to "create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone*, 460 U.S. at 24. The one exception, not applicable here, is "*if* [a state] . . . law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally", then that law may apply to invalidate an arbitration agreement. *Doctors Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996) (quoting *Perry v. Thomas,* 482 U.S. 483, 493 n.9 (1987) (emphasis in original)).[7] Otherwise, Congress wishes the FAA to have the broadest possible effect. *See, e.g.*, H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924) (emphasizing that "control over interstate commerce", the trigger for application of the FAA, "reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce.").

Third, the language of the FAA also reflects a "statutory policy of *rapid and unobstructed* enforcement of arbitration agreements." *Moses H. Cone*, 460 U.S. at 23 (emphasis added). The decision whether to impose class-wide arbitration on parties who had not clearly planned for or agreed to it will undoubtedly involve courts in the details of more arbitration clauses. That involvement will make dispute resolution slower, more burdensome, and more complex. *See, e.g., Keating v. Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982), *rev'd in part on other*

U.S. at 12, 16 n.10 (reserving issues); *accord Volt*, 489 U.S. at 477 n.6. It is hard to discern how Section 3 could *not* apply to the states, however, at least to the extent of requiring that any state procedure for enforcing an arbitration clause provide for a stay and not diminish the protections of Section 2 precluding a court from rewriting such clauses. *See Moses H. Cone*, 460 U.S. at 26 ("state courts, as much as federal courts, are *obliged* to grant stays of litigation under § 3 of the Arbitration Act.") (emphasis added); *see also id.* at 26, nn. 34-35.

[7] The South Carolina Supreme Court did not even purport to require *all* contracts in South Carolina to contain by implication a consent to class-wide procedures. It focused only on arbitration agreements. Thus, contrary to *Doctors Associates*, its rule "arose" only to govern such agreements, not contracts generally.

grounds sub. nom. Southland Corp. v. Keating, 465 U.S. 1 (1984).[8] Courts will cease to be gatekeepers simply opening the way to the path of arbitration and involving themselves as little as possible in its issues, *see Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 592 (2002) (timeliness of claim under arbitration rules a matter for arbitrator to decide). They will instead have to become travel agents trying to book, on a case by case basis, a detailed itinerary of stops along that journey—for there are no settled guidebooks for class-wide arbitrations, no approved procedures, no clear limitations on what may or may not be done.[9]

Fourth, the language of the FAA is not merely precatory. As this Court held in *Southland* and *Perry*, "in enacting § 2 of the federal Act, Congress . . . withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Perry*, 482 U.S. at 489 (quoting *Southland*, 465 U.S. at 10); *accord, e.g., Volt*, 489 U.S. at 478-79. It is well-settled that "what cannot be done directly cannot be done indirectly."[10] Thus, no state should be permitted to circumvent the direct withdrawal of its power to require private parties to use a judicial forum (and the procedures

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[8] The long history of arbitration from medieval times to the present has been a constant illustration of the tension between the desire of private persons for "less formality and expense than is involved in recourse to the courts" and the persistence of courts in adding to the complexity of arbitration because they "did not look very favourably on a practice which tended to diminish their jurisdiction." 14 William Holdsworth, *A History of English Law* at 187 (1964). This case indicates that, despite the FAA, courts still continue to give arbitration and the choices of private parties less than their due.

[9] For example, it is hard to predict the mechanisms that might be invented by various state courts for the "protection" of absent class members in arbitration, but it is easy to predict that such mechanisms will make the arbitral process more like litigation and more likely to require on-going judicial monitoring.

[10] *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867); *id.* ("The Constitution deals with substance, not shadows"); *accord, e.g., Doctors' Assocs.*, 517 U.S. at 687 n.3 (court cannot do what legislature could not do) (quoting *Perry*, 482 U.S. at 493 n.9); *Fairbank v. United States*, 181 U.S. 283, 294, 300 (1901) ("what cannot be done directly . . . cannot be accomplished indirectly by legislation which accomplishes the same result.").

such as class actions that are part of that forum) by instead requiring those parties to use a judicially-created arbitration forum (and class-wide arbitration procedures that will undoubtedly involve judicial monitoring) different than what the parties had provided in their arbitration agreement.[11]

Finally, the FAA clearly applies to the arbitration agreements in question here. This is not a case where the parties chose "to abide by the state rules of arbitration", *Volt*, 489 U.S. at 472. Instead, they specified that the FAA (not South Carolina law), would govern arbitration issues. *See Bazzle*, 569 S.E.2d at 356.[12] Unlike *Volt*, where it would have been "inimical to the policies underlying *state* and federal arbitration law" to ignore an explicit California statute that permitted a stay of arbitration, given that the parties had chosen California law and not the FAA to govern arbitration issues, 489 U.S. at 472 (emphasis added), here it would be inimical to federal law to impose a state policy on parties who did not choose state law.[13]

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[11] While there may be some situations where arbitration protected by the FAA is preempted by other substantive federal law, *see, e.g.*, *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 397-98, 402 n.17 (2002) (ERISA may preempt arbitration); *id.* at 403-04 (Thomas, J., dissenting) (same), no such federal law exists or was relied upon by the court below to justify its position.

[12] *Cf. Volt*, 489 U.S. at 484, 491-92 (concern whether FAA could be circumvented by a state court choosing to construe an arbitration clause "as having intended to exclude the applicability of federal law") (Brennan, J., dissenting).

[13] In addition, unlike the California statute chosen by the parties in *Volt*, the South Carolina "law" announced below had never before existed. *Cf. id.* at 476 n.5 (emphasizing the *legislative* nature of the California law in question); *Champ*, 55 F. 3d at 278 (even if silence in arbitration agreement would permit class-wide arbitration, no such process permissible "absent some *statutory* authority to do so") (emphasis added) (Rovner, J., concurring). In short, this is not a case in which this Court must defer to a state court's construction of an existing state law chosen by the parties. *See, e.g.*, *Mastrobuono*, 514 U.S. at 60 n.4. Nor is it a case where the court below could properly claim that it had "independent state grounds" for its decision, *see Bazzle*, 569 S.E. 2d at 360, simply by choosing to construe contract language so as to ignore the FAA's requirements.

B. *The South Carolina Supreme Court's decision conflicts with this Court's settled arbitration jurisprudence.*

The standards of "efficiency and equity" and "judicial economy" imposed by the court below to attempt to justify its decision also conflict with settled arbitration jurisprudence from this Court that has guided and encouraged drafters of agreements for many years. Although the FAA "favors arbitration as a speedy, economical method of dispute resolution", *Frank Fiore Enters., Inc. v. Francis*, No. 86 Civ. 7241 (WCC), 1987 U.S. Dist. LEXIS 2711, at *11 (S.D.N.Y. Apr. 8, 1987), this Court has bluntly held that "[w]e . . . reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims", *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985).[14] As a result, the FAA requires arbitrations "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Id.* at 217.[15] Because nothing in the FAA or this Court's jurisprudence requires that any particular arbitration result in fewer judicial proceedings generally, there is no proper basis for creating a requirement (such as class-wide arbitration) so that any particular arbitration will result in fewer arbitrations (or any other supposed efficiency) generally, either. Put another way, Congress

[14] As noted earlier, the "primary purpose" of the FAA is to "ensure that private agreements to arbitrate are enforced *according to their terms*." *Volt*, 489 U.S. at 479 (emphasis added).

[15] *Accord, e.g., Moses H. Cone*, 460 U.S. at 20 (FAA may "*require[]* piecemeal resolution when necessary to give effect to an arbitration agreement") (emphasis added); *Government of the United Kingdom v. Boeing Co.*, 998 F.2d 68, 72 (2d Cir. 1993) (improper to consolidate arbitrations "despite possible inefficiencies created by such enforcement"); *Superior Oil Co. v. Transco Energy Co.*, 616 F. Supp. 98, 103 (W.D. La. 1985) (national policy in favor of arbitration is so strong that it requires "piecemeal resolution or duplication of effort when necessary to give effect to an arbitration agreement."); *Brower*, 676 N.Y.S.2d at 573 (despite finding by trial court that a class action "may" be less costly than arbitration, "which is generally less costly than litigation", arbitration still required); *Harris*, 441 N.Y.S.2d at 76.

has already balanced the policies of efficiency, equity, and judicial economy against the benefits of enforcing arbitration clauses according to their terms, and has decided to favor the latter choice. The Supreme Court of South Carolina had no right to tilt that balance the other way.[16]

Similarly, nothing in this Court's opinions considering the application of the FAA to smaller cases (such as may arise in the consumer and employment arenas), indicates that the FAA must be reinterpreted depending on the size of a putative claim. In the 1995 *Allied-Bruce Terminix* case, for example, this Court held that "Congress, when enacting this law [FAA], had the needs of consumers . . . in mind. . . . Indeed, arbitration's advantages often would seem helpful to *individuals*, say, complaining about a product . . . ." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (citation omitted) (emphasis added). In the 2001 *Circuit City* case, this Court held that "it is true here, just as it was for the parties to the contract at issue in *Allied-Bruce*, that there are real benefits to the enforcement of arbitration provisions. . . . Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc. v. Adams*, 532 U. S. 105, 122-123 (2001).[17]

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[16] This Court should, however, consider one efficiency issue: there are tens, if not hundreds, of millions of existing arbitration agreements in all fifty states that would be subject to interpretation for "efficiency and equity" in a decision to apply or not apply particular class action procedures to their terms. To use this Court's reasoning from the *Circuit City* decision, "[t]he considerable complexity and uncertainty that the construction of" the FAA "urged by respondent would introduce into the enforceability of arbitration agreements" on class-wide bases "would call into doubt the efficacy of alternative dispute resolution procedures adopted by many" parties already "in the process undermining the FAA's proarbitration purposes and 'breeding litigation from a statute that seeks to avoid it.'" *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (quoting *Allied-Bruce*, 513 U.S. at 275).

[17] In Stewart Kyd's late Eighteenth Century treatise on arbitration ("the best book on this subject"), among the categories of cases most suited to arbitration were "disputes of a trifling nature." 12 William Holdsworth, *supra* n.

These principles flow naturally from a core value of our legal system often expressed by this Court: the value of upholding private contracts. *See, e.g., Volt,* 489 U.S. at 472; *see also* U.S. Const. art I § 10.[18] There is a lack of any "federal policy favoring arbitration under a certain set of procedural rules" only because federal policy is clearly to "enforce[], according to their terms, . . . private agreements to arbitrate"—including whatever procedures are actually chosen in those agreements. *Volt*, 489 U.S. at 476; *accord, e.g., id.* at 479 ("By permitting the courts to 'rigorously enforce' . . . [arbitration] agreements according to their terms, *see Byrd, supra,* at 221, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind . . . the FAA."). To the extent that the court below ceased

8, at 393 (citing Stewart Kyd, *A Treatise on the Law of Awards* at 392-93 (1791)). (Kyd's treatise was one upon which our own early courts placed substantial reliance. *See, e.g., Eastman v. Burleigh*, 2 N.H. 484, 486-88 (1822).)

[18] The few courts that have in recent years sought to impose class action procedures on arbitration clauses that do not provide for it, or to reject such clauses because they would preclude class actions, typically ignore this core value. For example, it is well-settled in California that "'if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contract, and that their contracts when entered into freely and voluntarily shall be held sacred, and shall be enforced by courts of justice.' (*In re Garcelon* (1894) 104 Cal. 570, 591 [38 P. 414], quoting from the opinion of Sir G. Jessell, M.R., in *Printing Numerical Registering Co. v. Sampson,* L.R. 19 Eq. 465)." *Carma Developers (Cal.), Inc. v. Marathon Development Cal., Inc.*, 826 P.2d 710, 720-21 (Cal. 1992); *accord, e.g., Vernon v. Drexel Burnham & Co.*, 125 Cal. Rptr. 147, 153 (Ct. App. 1975) ("there is perhaps no higher public policy than to uphold and give effect to contracts validly entered into and legally permissible in subject matter. . . . The sanctity of valid contractual agreements in a free society, such as ours, is of paramount importance and is rooted in both the United States and California Constitutions, which predate and outweigh the body of law on class actions as presently evolving."). Yet the recent decision in *Ting v. AT&T,* No. 02-15416, 2003 U.S. App. LEXIS 2395, at *58 (9th Cir. Feb. 11, 2003), purportedly relying on California law to reject an arbitration clause because it would preclude class actions, not only effectively ignored the most recent statement by a California court on that subject, *see Discover Bank v. Superior Court*, 129 Cal. Rptr. 2d 393 (Ct. App. 2003), but gave no weight to the sanctity of private contracts.

to give proper respect to this core value, its decision conflicts significantly with this Court's jurisprudence.[19]

While "as with any other contract, the parties' intentions control" an arbitration agreement, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985), the FAA emphasizes that the written terms of such agreements are paramount. There was certainly no evidence here that the parties actually contemplated that their contract included a provision for class-wide arbitration despite the absence of any reference to such procedures in the written arbitration clause itself. Nor could the South Carolina Supreme Court—or any other court—simply presume so on the theory that because such procedures are available in many courts, they must be so important to the enforcement of the parties' substantive rights that the parties must have intended to include them. This would be precisely the kind of "generalized attack[] on arbitration" that this Court has consistently rejected as "'rest[ing] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants . . . .'" *Gilmer v. Interstate/Johnson*

[19] As another example of the extent of this conflict, an individual arbitration award simply does not have the same automatic *res judicata* and collateral estoppel effects as a litigated judgment. *See, e.g., McDonald v. City of West Branch*, 466 U.S. 284, 289-92 (1984); *see also, e.g., Universal Am. Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1137 (5th Cir. 1991); *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 385 (2d Cir. 1989); *Giles v. City of New York*, 41 F. Supp. 2d 308, 313 (S.D.N.Y. 1999); *see generally Dean Witter*, 470 U.S. at 222-23; *cf., e.g., Vandenberg v. Superior Court*, 982 P.2d 229, 234 n.2 (Cal. 1999) (no collateral estoppel effect at all to private arbitration awards in California). Thus, a party can engage in individual arbitration more freely, and with less concern about collateral consequences, than in court. By requiring class-wide arbitration by a party who had not agreed to it, however, the court below clearly sought to impose those otherwise collateral consequences. In effect, Green Tree is being forced to resolve more than "only those issues it specifically ha[d] agreed to submit to arbitration", an outcome forbidden by this Court in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995), and *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).

Lane Corp., 500 U.S. 20, 30 (1991) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)).[20]

II. The South Carolina Supreme Court incorrectly treated access to class action procedures as a fundamental right.

In its decision, the court below favored class action procedures taken from its own judicial system and assumed that if such procedures are not available, society suffers an irremediable harm. Yet not only has Congress rejected, by enacting the FAA, the idea that society is harmed by using arbitration rather than judicial process to resolve civil disputes; it has actually imposed arbitration in *preference* to judicial proceedings in some instances. *See generally, e.g., Concrete Pipe and Prods. of Cal., Inc. v. Construction Laborers Pension Trust for So. Cal.*, 508 U.S. 602 (1993) (upholding mandatory arbitration provisions of the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1208, *codified at* 29 U.S.C. § 1401(a)(1) (2000)). Similarly, where Congress has decided in very specific instances that states—rather than private parties—have special competence to control arbitration mechanisms, it has specifically remitted such responsibility to the states. *See* 47 U.S.C. § 252(b)(1) (2000) (arbitration provisions of Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56); *see generally AT&T Corp. v. Iowa*

[20] A limited analogy to concepts of personal jurisdiction may be helpful. If an arbitration clause selects a particular set of arbitration rules, the parties may be deemed to have consented to the "jurisdiction" of that provider or set of rules. *Cf. Hanson v. Denkla,* 357 U.S. 235, 253 (1958) (there must " be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."). The benefits and protections of that "jurisdiction" should be respected, and the drafter cannot be deemed to have consented to some other "jurisdiction." Accordingly, if a court or arbitrator orders class-wide arbitration that is not required by the selected rules, any party should be entitled to avoid any award resulting from such arbitration. *See generally* 9.U.S.C. § 10; *cf. Transaero, Inc. v. Feurza Aearea Boliviana*, 162 F.3d 724, 728 (2d Cir. 1998) (judgment obtained without personal jurisdiction unenforceable), *cert. denied*, 526 U. S. 1146 (1999); *Precision Etchings & Findings, Inc. v. LGP Gem, Ltd.*, 953 F.2d 21, 23 (1st Cir. 1992) (same).

Utils. Bd., 525 U.S. 366 (1999); *id.* at 402 (Thomas, J., concurring in part and dissenting in part).

The court below did not identify any such special delegation of procedural competence to it by Congress. Nor does anything in the FAA itself demonstrate any preference for procedures taken from state court systems over those defined by private parties. The court therefore tried to justify its imposition of class-wide arbitration procedures on parties who had not expressly chosen such procedures by inventing a special right to class-based relief: if it did not affirmatively uphold class-wide arbitrations, then "the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement." *Bazzle*, 569 S.E.2d at 360.

This argument necessarily assumes that private parties have a fundamental, substantive right to class actions that may not be waived (if they may be waived at all) unless done so expressly. Yet there is no such fundamental right. Class actions are only, in this Court's words, a "procedural device." *Deposit Guaranty Nat'l Bank v. Roper***,** 445 U.S. 326, 331 (1980); *see also, e.g., Frazar v. Gilbert*, 300 F.3d 530, 545 (5th Cir. 2002) ("A class action is merely a procedural device . . . .") (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997)).[21] As a result, and contrary to the assumption below, a party may "effectively prevent class actions against it without having to say it [is] doing so in [an] agreement." *Bazzle*, 569 S.E.2d at 360. Indeed, a party may effectively and legally do so even when the method used does not embody the same strong Congressional policy as does arbitration.

[21] This does not mean that all state activity is precluded by the existence of a private contract containing an arbitration clause. Such clauses govern relations between those covered, not between those covered and a state. *Cf. Livadas v. Bradshaw*, 512 U.S. 107 (1994) (arbitration policy and National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* do not preclude enforcement of wage claim by State Labor Commissioner on behalf of employee covered by collective bargaining agreement containing arbitration clause).

For example, forum selection clauses that effectively preclude class actions have been upheld even though they contain no explicit waiver of class action procedures.[22] This is consistent with this Court's general view that businesses may include forum selection clauses in adhesion contracts because "it stands to reason that" customers bound by such contracts "benefit in the form of reduced [prices] . . . reflecting the savings that the [business] . . . enjoys by limiting the fora in which it may be sued." *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 594 (1991).[23] Using a forum selection clause to preclude class actions would certainly result in savings. There is no good reason to preclude such savings when they are the result of an arbitration clause instead, particularly since "[a]n agreement to arbitrate . . . is, in effect, a specialized

[22] *E.g.*, *Koch v. America OnLine*, 139 F. Supp. 2d. 690, 694-96 (D. Md. 2000) (upholding choice of forum clause requiring all claims to be decided in Virginia over objection that Virginia does not permit class actions because dismissal in Maryland would not prevent the plaintiff from bringing an *individual* claim in Virginia)*; Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007, 1012 (D.C. 2002) (similar); *America Online, Inc. v. Booker*, 781 So. 2d 423, 425 (Fla. Dist. Ct. App. 2001) (similar); *see Celmins v. America OnLine*, 748 So. 2d 1041, 1041-42 (Fla. Dist. Ct. App. 1999) (upholding same forum selection clause); *Groff v. America OnLine, Inc.*, No. PC 97-0331, 1998 R.I. Super. LEXIS 46, at *16 (Super. Ct. R.I. May 27, 1998) (same); *but see America OnLine, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 710 (Ct. App. 2001) (refusing to uphold America OnLine choice of forum clause); *cf. Discover Bank*, 129 Cal. Rptr. 2d at 403-04 (rejecting analysis of *America OnLine* in the presence of FAA).

[23] The *Carnival Cruise Lines* forum selection clause prescribed Florida as the forum for all disputes for Washington residents who took a passenger cruise from California. In the absence of any "evidence that petitioner obtained respondents' accession to the forum clause by fraud or overreaching", and given that "respondents . . . were given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity", this Court saw no reason not to uphold the forum selection clause on the passengers' tickets. 499 U.S. at 595. Congress later prohibited similar forum selection clauses on passenger cruise line tickets in cases of personal injury arising from negligence or fault. *See* 46 U.S.C. App. 183c (2002). Congress could presumably change the FAA with respect to the specific issue in this case, too.

kind of forum-selection clause." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).[24]

Courts have long recognized other reasons that parties may properly seek to avoid class actions, too. As the California Supreme Court noted in *Washington Mut. Bank v. Superior Court* (by rejecting the argument to the contrary), "businesses dealing with mass groups of consumers should . . . be permitted to rely on choice-of-law clauses as a means of avoiding involvement in a nationwide class action. . . . 'Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going.'" 15 P.3d 1071, 1079-80 (Cal. 2001) (quoting *City of San Jose v. Superior Court*, 525 P.2d 701, 711 (Cal. 1974)).[25]

The court below, however, not only asserted in its decision that the drafter of an arbitration clause cannot avoid class action procedures "without having to say it was doing so in the agreement", but also that such a waiver of "class-wide or consolidated arbitration in an adhesion contract, even if explicit, undermines principles favoring expeditious and equitable case

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[24] *Accord, e.g., Shearson/American Express v. McMahon*, 482 U.S. 220, 256 (1987); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995); *Weyerhauser Co. v. Western Seas Shipping Co*., 743 F.2d 635, 637 (9th Cir.), *cert. denied*, 469 U. S. 1061 (1984); *see also Cortez*, 529 U.S. at 201 (the FAA provides a "desired flexibility of parties in choosing a site for arbitration.").

[25] *Accord Harris*, 441 N.Y.S.2d at 76 ("the substantive law of contractual agreement takes precedence over the class action, which is merely a procedural device for consolidating matters properly before the Court.") (citation omitted); *Vernon*, 125 Cal. Rptr. at 153. In effect, the court below has applied a kind of local *forum non conveniens* analysis to determine that an individual arbitration forum is an inconvenient one. This emphasizes the weakness of its decision, because the doctrine of *forum non conveniens* is merely a procedural venue theory. *E.g., American Dredging Co. v. Miller*, 510 U.S. 443, 453-45 (1994). Courts that have focused on the availability or denial of class action procedures to defeat the substantive law of arbitration clauses, *see, e.g., Ting*, No. 02-15416, 2003 U.S. App. LEXIS 2395 at *65-6, have generally fallen prey to this same confusion of means and ends, procedure and substance.

disposition absent demonstrated prejudice to the drafter of the adhesive contract." *Bazzle*, 569 S.E.2d at 360 & n. 21. Without any basis, this makes the "right" to class action procedures even more fundamental than, for example, the right to a jury trial.[26]

The right to a jury trial is both an ancient part of our nation's legal system and a right explicitly preserved in the Constitution. *E.g.*, U.S. Const. amend. VII; 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2301 (2d ed. 1995). As this Court once observed, "[a] right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob v. New York*, 315 U.S. 752, 752-53 (1942). Yet "[i]t is clear that the parties to a contract may by prior written agreement waive the right to jury trial." *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 755 (5th Cir. 1985).[27] Furthermore, this waiver need *not* be explicit when it is the result of the enforcement of an arbitration clause protected by the FAA. *E.g.*, *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1155 n.12 (5th Cir. 1992) ("the Seventh Amendment does not preclude 'waiver' of the right to jury trial through the signing of a valid arbitration

[26] No "right" to class action procedures appears in any federal statute applicable to this case. Even if a federal statute expressly permits class actions, that right will not supersede the right to an individual arbitration pursuant to an arbitration clause that does not mention class procedures. *See Gilmer*, 500 U.S. at 32. Nor can there be any "right" to class action procedures in arbitration by operation of the due process clause of the United States Constitution, U.S. Const. amend. XIV, cl. 1. As one court recently noted, "there is ample authority for the proposition that a private arbitration does not implicate due process concerns since . . . there is no state action involved . . . ." *Sawtelle v. Waddell & Reed, Inc.*, No. 2330, 2003 N.Y. App. Div. LEXIS 1243, at *14 (Feb. 11, 2003) (overturning arbitration award not as violative of due process, but as "irrational", by analogy to *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996)), *citing, e.g., Davis v. Prudential Secs., Inc.*, 59 F.3d 1186, 1191 (11th Cir. 1995); *Sanders v. Gardner*, 7 F. Supp. 2d 151, 174-75 (E.D.N.Y. 1998).

[27] *Accord, e.g., Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988) ("Agreements waiving the right to trial by jury are neither illegal nor contrary to public policy."), *cert. denied*, 490 U. S. 1021 (1989); *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir. 1986) (right to jury trial, although fundamental, may be waived by contract).

agreement."), *cert. denied sub nom. Dillard v. Security Pac. Corp.*, 506 U. S. 1079 (1993).[28]

Class actions, particularly the modern class action with procedures of the kind imposed by the court below, lack the historical importance of the right to a jury trial. *See generally, e.g.*, Geoffrey C. Hazard, Jr., *et al.*, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. Pa. L. Rev. 1849 (1998); 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1751 (2d ed. 1986). Class actions (derived primarily from modern court rules) are not enshrined in our Constitution, either. In short, access to class action procedures must be far less a fundamental right than access to jury trials—and jury trials can be waived both explicitly and (at least through the operation of an arbitration clause) implicitly. The assumption of the court below that access to class action procedures is such a fundamental right that it either must be expressly waived in an arbitration clause—or perhaps cannot be waived at all[29]—is simply unsupportable.

As noted earlier, this Court has consistently rejected efforts to modify the effects of the FAA because of "suspicion of arbitration as a method of weakening the protections afforded in the

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[28] *Accord, e.g., Great Western Mortg. Corp. v. Peacock*, 110 F.3d 222 (3rd Cir.) (upholding plaintiff's implied waiver of right to jury trial through arbitration agreement), *cert denied sub nom. Peacock v. Great Western Mortg. Corp*., 522 U. S. 915 (1997); *see also, e.g., Arkoosh v. Dean Witter & Co.*, 415 F. Supp. 535, 544 (D. Neb. 1976). In addition, the FAA "does [not] . . . prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement", *Volt*, 489 U.S. at 478, so it is clear that, at worst, parties could agree to exclude any class-wide claims from an arbitration agreement, yet require the arbitration of an individual's claim to proceed first. If the individual lost, he or she would probably not be an adequate class representative for others. *See generally Sosna v. Iowa*, 419 U.S. 393, 402 (1975). Furthermore, he or she could, if he or she won an arbitration, act as a class representative only for others without an arbitration clause or who had also won individual arbitrations. There is little practical difference, therefore, between what is already expressly permitted by *Volt* under the FAA and what Petitioner seeks from this Court.

[29] *See Bazzle*, 569 S.E.2d at 360 n. 21; *but see Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000) (explicit class-action exemption in arbitration clause enforceable), *cert. denied*, 531 U.S. 1145 (2001).

substantive law . . . ." *Rodriguez*, 490 U.S. at 481; *accord, e.g., Gilmer*, 500 U.S. at 30. The decision below simply represents another such effort, albeit one not even based on a direct concern about substantive law, but on the absence from most arbitrations of a procedural device of recent vintage and less than Constitutional importance. *See also, e.g., Moses H. Cone*, 460 U.S. at 24 ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding *any* state substantive *or procedural* policies to the contrary.") (emphasis added). If allowed to stand, the decision below would encourage the courts of fifty different states to reach innumerable different conclusions, based on a vague standard of "equity and efficiency", as to whether to impose unexpected and unknown class action procedures on existing arbitration agreements otherwise free of such complications. This would not only be a rejection of the FAA policy of enforcing arbitration agreements according to their terms; it would destroy the uniform application of federal arbitration law contemplated in the FAA and necessary to the continued widespread use of arbitration in our national economy. This Court should not permit such a result.

CONCLUSION

For the reasons stated above, the decision below should be reversed.

Respectfully submitted,

MICHAEL E. MALAMUT
CHRISTINE HUGHES
NEW ENGLAND LEGAL FOUNDATION
150 Lincoln Street
Boston, Massachusetts 02111-2504
(617) 695-3660

J. VANN VOGEL
JEROME KARNICK
VERIZON WIRELESS
180 Washington Valley Road
Bedminster, New Jersey 07921
(908) 306-7300

CHRISTOPHER M. MASON*
NIXON PEABODY LLP
437 Madison Avenue
New York, New York 10022
(212) 940-3000

DAVID H. GIBBS
JOHN R. PAGLIARO
NIXON PEABODY LLP
101 Federal Street
Boston, Massachusetts
02110
(617) 345-1000

Counsel for New England Legal Foundation and Cellco Partnership d/b/a Verizon Wireless as Amici Curiæ

*Counsel of Record

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