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 Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF PETITIONER

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February 24, 2003

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.

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings are listed in the caption of the decision of the Supreme Court of South Carolina. Pet. App. 1a.

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner Green Tree Financial Corp. is now known as Conseco Finance Corp. Petitioner is a wholly-owned subsidiary of Conseco, Inc., an Indiana corporation whose stock is publicly traded. No publicly owned company owns ten percent or more of the stock of Conseco, Inc.

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina is published at 569 S.E.2d 349 (S.C. 2002) and appears in the Appendix of the Petition for Certiorari ("Pet. App.") at 1a-26a. The South Carolina Court of Common Pleas' Order confirming the arbitral award and denying Green Tree's motion to vacate in *Bazzle* v. *Green Tree Financial Corp.* is unpublished and appears at Pet. App. 27a-35a. The South Carolina Court of Common Pleas' Order confirming the final award in arbitration and denying Green Tree's motion to vacate in *Lackey* v. *Green Tree Financial Corp.* is

unpublished and appears at Pet. App. 36a-54a. The final order and arbitral award in arbitration in *Bazzle* appears at Pet. App. 55a-81a, and the final order and arbitral award in *Lackey* appears at Pet. App. 82a-109a.

JURISDICTION

The Supreme Court of South Carolina entered its final judgment on August 26, 2002. The petition for a writ of certiorari was filed on October 23, 2002, and was granted on January 10, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT STATUTORY PROVISIONS

The statutes relevant to this case are contained in the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, which mandates enforcement of written agreements to settle by arbitration controversies arising out of contracts evidencing transactions involving commerce. In particular, Section 2 of the FAA, 9 U.S.C. § 2, provides that such "written" arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* The relevant provisions of these statutes are reproduced in the statutory addendum to this brief.

STATEMENT OF THE CASE

The question presented in this case is whether a simple two-party arbitration proceeding can be converted, over one of the parties' objections, into a class-action arbitration, where the parties expressly have agreed that the proceeding will be governed by the FAA and have included no provision to allow for class-wide arbitration. As explained below, the clear answer is no.

In its decision below, the Supreme Court of South Carolina rejected Green Tree's challenge under the FAA to two interrelated class-action arbitration awards, which require Green Tree to pay nearly $27 million in statutory damages, attorney's fees and costs to two classes consisting of a total of more than 3,700 individuals. Green Tree challenged those arbitral awards because the written arbitration agreement underlying them does not provide for class-action arbitration, and the FAA does not permit class-action mechanisms to be superimposed onto private arbitration agreements absent the parties' consent.

There is no dispute that the arbitration agreement underlying the South Carolina Supreme Court's judgment does not provide for class-wide arbitration. Rather, the arbitration agreement provides for resolution of "[a]ll disputes, claims or controversies" arising from "this contract" "by binding arbitration by one arbitrator selected by us with consent of you." Pet. App. 110a. The arbitration agreement thus authorizes an arbitrator, chosen by the parties to the contract, to resolve bilateral disputes between those two contractually defined parties: (1) "you," *i.e.*, the buyer obtaining the loan, and (2) "us," *i.e.*, the seller or its assign Green Tree. *Id.* Respondents, for their part, agree that, at a minimum, the "arbitration agreement" does not "speak[] to the question of class arbitration[]." Brief in Opposition ("Opp.") 12; *id*. at 5 (same). Notwithstanding this contractual language, the South Carolina Supreme Court ruled that class arbitration could be imposed judicially onto the parties' agreement without regard to their contractual intent "if it would serve efficiency and equity, and would not result in prejudice." Pet. App. 22a. That reformation of the contract to promote policy preferences of a court cannot be reconciled with the requirements of the FAA.

As this Court has explained on repeated occasions, the FAA was designed "to 'ensur[e] that private agreements to arbitrate are enforced according to their terms.'" *Doctor's Assocs.,*

Inc. v. *Casarotto*, 517 U.S. 681, 688 (1996) (alteration in original) (quoting *Volt Info. Scis., Inc.* v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). That mandate requires both state and federal courts to enforce written arbitration agreements and thus prevents them from rewriting such private agreements to suit the courts' policy views of efficiency or equity. Indeed, the FAA "requires that [courts] rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation." *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). Where, as here, a private arbitration agreement does not provide for class-wide arbitration, the FAA prohibits class-action arbitration from being imposed onto the parties' agreement, as was done here, based upon a court's own views of "efficiency" or "equity." See *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("we do not . . . reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated"). The notion that courts are free to intrude upon the contractual aspects of an arbitration agreement by imposing their own views of public policy onto a private arbitration agreement simply cannot be squared with the FAA. Accordingly, the decision below must be reversed.

Statutory Background

Section 2 of the FAA provides that written arbitration agreements subject to the FAA "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. As this Court has explained, Congress's goal in enacting Section 2 of the FAA was to overcome deep-seated judicial hostility to arbitration and thereby allow private parties to choose to resolve their disputes through arbitration rather than litigation. See, *e.g.*, *Volt Info. Scis., Inc.* v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); *Dean Witter*, 470 U.S. at 219-20. Specifically, the FAA permits private parties to trade the judicial procedures that otherwise would apply to resolve their disputes in court for the

informality, simplicity and speed of the arbitral process. See *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Moreover, because judicial hostility to arbitration had existed in both federal and state courts, this Court concluded almost 20 years ago, and more recently has reaffirmed, that Section 2 of the FAA, which the Court has ruled to be the "substantive" provision of the FAA, applies both in state and federal courts. *Southland Corp.* v. *Keating*, 465 U.S. 1, 12-15 (1984); see *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995) (reaffirming *Southland*); cf. *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 121-22 (2001).

Essential to Congress's goal of ensuring the enforcement of parties' written agreements to arbitrate is the principle that such agreements may not be rewritten by courts. Rather, state and federal courts must "'rigorously enforce' such agreements according to their terms." *Volt*, 489 U.S. at 479 (quoting *Dean Witter*, 470 U.S. at 221). Indeed, this Court repeatedly has explained that "the central purpose of the Federal Arbitration Act [is] to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt*, 489 U.S. at 479); see also *Doctor's Assocs.*, 517 U.S. at 688 (enforcement of agreement according to terms is "the very purpose of the Act"); *Volt*, 489 U.S. at 476 ("the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate").

Because "'[a]rbitration under the [FAA] is a matter of consent, not coercion,'" *Waffle House*, 534 U.S. at 294 (second alteration in original) (quoting *Volt*, 489 U.S. at 479), courts must "look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement," *id.* In the same way that an arbitration agreement "cannot bind a nonparty," *id*., the FAA

"does not expand the range of claims subject to arbitration beyond what is provided for in the agreement," *id.* at 293 n.9. As a result, courts must "respect the terms of the [arbitration] agreement without regard to the federal policy favoring arbitration." *Id.* at 294 n.9.

As this Court has noted, arbitration "'is usually cheaper and faster than litigation.'" *Allied-Bruce*, 513 U.S. at 280 (quoting H.R. Rep. No. 97-542, at 13 (1982)); see also *Dean Witter*, 470 U.S. at 220; *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995). But the "basic objective" under the FAA "is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties." *Id*. at 947 (citations and internal quotation marks omitted). Indeed, the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement. . . . notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (footnote omitted).

Factual Background

The Bazzle Proceedings. In 1995, Lynn and Burt Bazzle executed a retail installment contract and security agreement ("Bazzles' Contract") to finance home improvements including the installation of windows. A copy of that contract is reproduced in the Joint Appendix ("J.A.") at 33-34. At the top of the first page, the Bazzles' Contract identifies Lynn and Burt Bazzle as the only two "Buyer[s]" and defines the terms "'You' and 'your'" to mean "each Buyer *above* and guarantor, jointly and severally." *Id.* at 33 (emphasis added). Similarly, just below the printed Seller's name, the Bazzles' Contract defines "'We' and 'us'" to mean "the Seller above, its successors and assigns." *Id.* On the bottom of the same

page, the Bazzles' Contract provides that the Seller has assigned its rights to Green Tree Financial Corp. *Id.*

The Bazzles' Contract further explains that the Bazzles would use the $15,136 extension of credit to finance the "installation of . . . windows" and, in turn, that the Bazzles were providing a security interest in those goods and the real property where the improvements were to be made. J.A. 33 (capitalization omitted). The agreement specified that "You," *i.e.*, the Bazzles, "may obtain property insurance from anyone that is acceptable to us." *Id.* Above the signature block, the Bazzles' Contract cautions: "Do not sign this contract before you read it . . . ," *id.*, and "This contract shall become effective only when signed and executed by the buyer and seller, and shall apply to and inure to the benefit of and bind the heirs, executors, administrators, successors and assigns of both parties to this contract." *Id.* Directly above their signatures, the Bazzles' Contract states in large typeface: "BUYER ACKNOWLEDGES RECEIPT OF A COPY OF THIS RETAIL INSTALLMENT CONTRACT." *Id.* Similarly, just below their signatures, the Bazzles' Contract provides: "YOU ALSO AGREE TO THE TERMS ON THE REVERSE SIDE OF THIS CONTRACT." *Id.*

On the reverse side, the Bazzles' Contract includes an arbitration clause. The arbitration clause states, in pertinent part:

> ARBITRATION—All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract, or the validity of this arbitration clause or the entire contract, shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they

> choose arbitration instead of litigation to resolve disputes. The parties agree and understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration, except as provided herein. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO COURT ACTION BY US (AS PROVIDED HEREIN). The parties agree and understand that all disputes arising under case law, statutory law, and all other laws including, but not limited to, all contract, tort, and property disputes, will be subject to binding arbitration in accord with this contract. The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief.

Pet. App. 110a. A copy of the arbitration clause is reproduced in full at Pet. App. 110a-111a.

The agreement imposes several constraints on the arbitration that it authorizes. First, the written agreement identifies the matters that will be subject to arbitration: "All disputes, claims, or controversies arising from or relating to *this contract* or the relationships which result from *this contract*, or the validity of this arbitration clause or the entire contract." Pet. App. 110a (emphasis added). Second, the arbitration agreement identifies the parties who have agreed to arbitrate ("you" and "us"), and the manner in which those parties would choose an arbitrator to resolve disputes arising out of "this contract" (*i.e.*, "one arbitrator selected by us with consent of you"). *Id.* Further, the arbitration agreement specifies that it "shall be governed by the Federal Arbitration Act." *Id.* Although the arbitrator is given "all powers

provided by the law and the contract," those powers necessarily are limited to resolving and providing relief with respect to "disputes, claims, or controversies arising from or relating to *this* contract or the relationships which result from *this* contract." *Id.* (emphasis added). By limiting the arbitrator's authority to resolving disputes, claims, or controversies "arising from or relating to" the Bazzles' Contract, the agreement withholds authority to resolve disputes arising from or relating to *other* contracts involving *other* individuals who are not parties to the Bazzles' Contract.

Notwithstanding their express agreement to arbitrate, on March 25, 1997, the Bazzles filed an individual action against Green Tree in South Carolina state court alleging violations of the attorney and insurance-agent notice preference provisions of South Carolina law. See S.C. Code Ann. §§ 37-10-102(a), -105. The Bazzles alleged that Defendants did not "advise Plaintiffs of their right to select counsel and/or an insurance agent." Rec. on Appeal at 1369. Plaintiffs sought "actual and punitive damages, statutory damages and penalties, treble damages, attorneys' fees, costs and expenses, and whatever further relief the Court deems just and proper." *Id.* at 1374.

About a month later, on April 21, 1997, the Bazzles decided to expand their case by filing an amended class-action complaint and, at the same time, they filed a motion for class certification. Green Tree moved to stay the court proceedings (including the motion for class certification) and requested an order compelling arbitration. Green Tree explained that an order compelling arbitration, if granted, would preclude class-action treatment. Rec. on Appeal at 1448. On December 5, 1997, the trial court granted the Bazzles' motion for class certification (thereby denying

Green Tree's motion for a stay of all proceedings) and entered an order compelling arbitration. Pet. App. 3a.[1]

After the trial court entered an order appointing an arbitrator, the class-action arbitration proceedings that the trial court had ordered were administered solely by the arbitrator. On July 24, 2000, the arbitrator issued an award against Green Tree on behalf of a class of 1,899 individuals. The merits of the arbitration concerned whether the Bazzles were provided with notice of their right to choose their own attorney or insurance agent in connection with the Bazzles' Contract. Green Tree did not require the Bazzles to use an attorney or insurance agent in connection with the transaction. Although Plaintiffs were authorized to recover "actual damages" if they could show that they had been injured, the arbitrator acknowledged that "Plaintiffs as a class did not attempt to show actual damages." Pet. App. 69a. He nevertheless imposed a class-wide "penalty" upon Green Tree of between $5,000 and $7,500 "per transaction," which resulted in a total award of $10,935,000 in statutory damages. *Id*. at 71a.

The arbitrator also awarded Plaintiffs an additional $3,645,000 in attorney's fees based upon not only their prosecution of the arbitration, but also, among other things, their lobbying efforts during the 1997 South Carolina legislative session. Pet. App. 77a, 79a. The arbitrator rejected Green Tree's showing that "[i]f every hour submitted by the Plaintiffs is allowed, a $3,000,000 attorneys fee award would result in an hourly rate exceeding $900.00 per hour." Rec. on Appeal at 2126. Moreover, the arbitrator ordered that funds awarded to class members that remained unclaimed

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[1] On March 17, 1998, the trial court denied Green Tree's motion to reconsider the order granting class certification. Green Tree filed an appeal challenging the trial court's order certifying a class for arbitration, but the appeal was dismissed by the court of appeals as interlocutory. Pet. App. 28a.

would not be returned to Green Tree, but instead would be tendered to charitable groups chosen by plaintiffs' counsel: "75% of such funds to the South Carolina School of Law, 9% to the South Carolina Habitat for Humanity, 8% to the Shriner's Hospital and 8% to Global Outreach." Pet. App. 79a.

The Bazzles filed a motion to confirm the award in the state trial court, and Green Tree sought to vacate the award. Green Tree showed that the class-action arbitration had been ordered by the trial court even though the arbitration agreement did not provide for class-action arbitration. The Bazzles, for their part, argued that "this Court determined in this matter that the matter could proceed as a class action" and that the "Arbitrator received the case as a class action." J.A. 31. Thus, the Bazzles expressly argued that "Green Tree incorrectly implies that the arbitrator determined the matter could proceed as a class action." *Id.* (capitalization omitted). Indeed, they made clear that, "to the extent that Judge Ervin [the arbitrator] made such a decision, if any, in this case or the *Lackey* case, it was a reaffirmation and/or adoption of this Court's prior determination." *Id.* at 32 n.2. The trial court confirmed the arbitral award and denied Green Tree's motion to vacate, and, in doing so, explained that the court had ordered class arbitration, had "previously ruled on Green Tree's motion for reconsideration of class certification," and saw "no basis to address the issue again." Pet. App. 34a.

The Lackey Proceedings. Daniel Lackey (and George and Florine Buggs) also entered into consumer installment contracts and security agreements with Green Tree for the purchase of manufactured homes. J.A. 35-36 (Lackey Contract). These agreements contained an arbitration clause that is in all relevant respects identical to the arbitration agreement in the *Bazzle* proceeding. Pet. App. 19a n.18. Indeed, according to the South Carolina Supreme Court, the arbitration agreements in the Bazzles' Contract and the Lackey Contract "are identical except for one word. The

Bazzle clause says the arbitrator will be selected by Green Tree 'with the consent of *you*,' and the *Lackey* clause says 'with the consent of *Buyer[s]*.'" *Id*.

Notwithstanding their agreements to arbitrate, on May 28, 1996, Lackey and the Buggses commenced a class action lawsuit against Green Tree in state court, also alleging violations of the attorney and insurance-agent notice preference provisions of South Carolina law. Green Tree filed a motion to compel arbitration, but the trial court ruled that Green Tree's arbitration agreement was unenforceable. Pet. App. 5a-6a. Green Tree appealed, and the court of appeals reversed, holding that the arbitration agreement should be enforced. See *Lackey* v. *Green Tree Fin. Corp.*, 498 S.E.2d 898, 905 (S.C. Ct. App. 1998). Thereafter, Thomas Ervin, the same arbitrator who was presiding over the *Bazzle* proceeding, was appointed as arbitrator in the *Lackey* proceeding.

The *Lackey* plaintiffs expressly argued, based upon the decision of the trial court in the *Bazzle* proceeding, that the arbitration should proceed as a class action. Specifically, the *Lackey* plaintiffs contended that class-action arbitration should proceed because

> [i]n a similar action pending against the Defendant in Dorchester County, *Bazzle* v. *Green Tree Financial Corporation et al.*, Civil Action Number 97-CP-18-258, the issue of a class action proceeding in arbitration was thoroughly presented in hearings before The Honorable Patrick R. Watts, Special Circuit Judge. The court found that a class action could proceed in arbitration.

Rec. on Appeal at 516. Green Tree explained that the arbitrator had no authority to order class arbitration. J.A. 15-16. The *Lackey* parties' arguments were accepted, and, as a result, the arbitrator followed the approach that had been imposed upon him by the trial court in *Bazzle*, certified a

class-wide arbitration, and approved a class notice that was sent to class members. *Id*. at 17-23.

On the merits, the arbitrator concluded that Green Tree had violated the attorney and insurance-agent notice preference requirements of South Carolina law. Pet. App. 91a. As in *Bazzle*, the arbitrator acknowledged that "plaintiffs as a class did not attempt to show actual damages," *id*. at 96a, but he nevertheless imposed a "penalty" of "$5,000 per transaction," for a total of $9,200,000 in statutory damages to the 1,840 class members, *id*. at 98a. The arbitrator also required Green Tree to pay $3,066,666 in attorney's fees (and $18,252 in costs), and, as in *Bazzle*, relied upon plaintiffs' counsel's lobbying efforts to justify a fee award that would compensate plaintiffs' counsel at a rate in excess of $900.00 per hour. *Id*. at 106a-107a. Finally, as in *Bazzle*, the arbitrator concluded that any unclaimed funds would not be returned to Green Tree, but instead would be distributed to charitable organizations chosen by plaintiffs' counsel. *Id*. at 107a.

Green Tree moved in state trial court to vacate the arbitral award, explaining that the award should be set aside because "the power of an arbitrator . . . is limited by the parties' arbitration agreement" and the arbitrator lacked authority to impose class arbitration on the parties. Rec. on Appeal at 408 (citing, *inter alia*, *Mastrobuono*, 514 U.S. at 57). The trial court, however, denied Green Tree's motion and confirmed the arbitral award, ruling, among other things, that Green Tree "was afforded exactly the proceeding in binding arbitration that it sought." Pet. App. 45a. Green Tree appealed.

Decision of the Supreme Court of South Carolina

The Supreme Court of South Carolina assumed jurisdiction over the *Bazzle* and *Lackey* appeals and consolidated the proceedings. Pet. App. 2a. The court below first ruled that both arbitration agreements were "governed by the FAA." *Id*. at 11a & n.9. The South Carolina Supreme Court recognized, however, that "[s]everal federal circuits have precluded class-

wide arbitration when the arbitration agreement is silent," whereas "the California courts have permitted class-wide arbitration on a case by case basis when the arbitration agreement is silent." *Id.* at 11a, 12a. The court further explained that "[t]he United States Supreme Court has not addressed the FAA's impact on class-wide arbitration" and therefore "there is no binding precedent that [the South Carolina Supreme Court] is obligated [to] follow." *Id*. at 11a.

Although the arbitration agreements in these cases, by their terms, limit arbitration to "'disputes, claims, or controversies arising from or relating to *this contract*, or the relationships which result from *this contract*,'" the court below concluded, without any elaboration, that "this language does not limit the arbitration to non-class arbitration." Pet. App. 19a. The court ruled, without any explanation, that this language "creates an ambiguity" that the court would construe against Green Tree to conclude that "Green Tree's arbitration clause was *silent* regarding class-wide arbitration." *Id.*

Given its determination that the agreement was "silent" as to the availability of class-action arbitration, the court below explained that it previously had "held that a state court may order *consolidation* of claims subject to mandatory arbitration without any contractual or statutory directive to do so." Pet. App. 21a (relying upon *Episcopal Hous. Corp.* v. *Federal Ins. Co.*, 255 S.E.2d 451, 452 (S.C. 1979)); see *id*. at 18a-19a. The court reasoned that because it "permits consolidation of appropriate claims where the arbitration agreement is silent"—*i.e.*, where there is no "contractual . . . directive to do so"—"it follows that [it] would permit class-wide arbitration, as ordering class-wide arbitration calls for considerably less intrusion upon the contractual aspects of the relationship." *Id.* at 21a (internal quotation marks omitted).

Based upon this reasoning, the court below "adopt[ed] the approach taken by the California courts" and held "that 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." Pet. App. 22a. Although the Bazzles initially had filed suit individually and although the arbitral awards in these cases gave each class member a minimum recovery of $5,000 to $7,500, plus attorney's fees and costs, the court suggested that, absent class-wide arbitration, "parties with nominal individual claims . . . would be left with no avenue for relief." *Id*. The court further reasoned that class arbitration was appropriate because "hearing such claims (involving identical issues against one defendant) individually, in court or before an arbitrator, does not serve the interest of judicial economy." *Id*. Because the court concluded that the imposition of class-action procedures onto a "silent" arbitration agreement was a permissible, albeit discretionary, option, it upheld the arbitral awards in both *Bazzle* and *Lackey*. *Id*. at 23a.

SUMMARY OF ARGUMENT

The decision and judgment of the South Carolina Supreme Court should be reversed because it violates the FAA's core principle that arbitration agreements must be enforced as written and may not be rewritten by courts to further their own notions of public policy. See 9 U.S.C. § 2. The court below violated the FAA by ruling that class-wide arbitration could be imposed without regard to the written terms of the parties' arbitration agreements.

This Court's decisions make clear that the FAA was designed to overcome judicial hostility to arbitration by mandating that arbitration agreements be enforced rigorously in accordance with their terms. See, *e.g.*, *Volt*, 489 U.S. at 478. Arbitration must be based upon "'consent, not coercion.'" *Waffle House*, 534 U.S. at 294 (quoting *Volt*, 489 U.S. at 479). Moreover, the requirement that courts enforce written arbitration agreements is reflected in Section 2 of the FAA, which applies both in state and federal court. *Southland*, 465 U.S. at 10 (holding that Section 2 of FAA applies in state court); *Allied-Bruce*, 513 U.S. at 272 ("we

find it inappropriate to reconsider what is by now well-established law").

This core requirement reflected in Section 2 does not depend, as Respondents suggest, Opp. 14, on whether Sections 3 and 4 of the FAA also apply by force of law to state court proceedings. Indeed, at the same time that this Court has declined to resolve whether Sections 3 and 4 of the FAA apply in state courts, it consistently has made clear that the FAA requires rigorous enforcement of the written terms of arbitration agreements in all cases whether arising in state or federal court. In all events, even if Sections 3 and 4 of the FAA did not apply to state court proceedings by force of law, they would apply in this case by contract because the parties agreed expressly that their arbitration agreement "shall be governed by the [FAA]." Pet. App. 110a; see *Volt*, 489 U.S. at 478-79 (explaining that parties can choose the procedures governing their arbitration). Accordingly, there can be no question that the courts below were not authorized to modify or rewrite the parties' arbitration agreements to conform to their own notions of efficient dispute resolution. Instead, those courts were obligated to enforce those agreements in accordance with their written terms. See 9 U.S.C. § 2.

The decision below cannot be reconciled with the requirements of the FAA. The approach adopted by the court below permits courts to impose their own views regarding arbitration without regard to the parties' expressed intent. The South Carolina Supreme Court ruled that class arbitration could be imposed upon the parties without any contractual directive to do so if, in the *court*'s view, class arbitration would "serve efficiency and equity, and would not result in prejudice." Pet. App. 22a. Under the FAA, courts have no authority or discretion to supplement the parties' arbitration agreement without the "consent" of the parties as expressed in their private agreement. Under the FAA, "parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479. As a result, efforts to rewrite

or modify arbitration agreements are nothing more than another variation of the old judicial hostility to arbitration that the FAA was designed to eliminate. See, *e.g.*, *id.* at 478; *Waffle House*, 534 U.S. at 293.

Here, the imposition of class arbitration onto the parties' agreement violated the FAA and infected the arbitration proceedings. The court below substituted its own coercion for the parties' consent, by fundamentally rewriting and transforming the arbitration agreements to which the parties had agreed. Instead of an informal, bilateral arbitration limited to resolving disputes between the two contractually defined parties, "you" and "us," and a contractually defined method for choosing the arbitrator for each such dispute, the class arbitrations imposed here required Green Tree to defend against the claims of thousands of *other* individuals who were not parties to the Bazzle and Lackey Contracts and who never even requested arbitration. Cf. *Waffle House*, 534 U.S. at 294 ("It goes without saying that a contract cannot bind a nonparty."). Similarly, imposition of class arbitration expanded the scope of the arbitration to include not only claims arising from or relating to "this Contract," but also disputes arising from or relating to thousands of *other* contracts.

Finally, the practical problems associated with class arbitration warrant careful scrutiny of any private dispute-resolution agreement before class arbitration is imposed onto it. A class arbitration implicates the due-process rights of non-representative members and therefore should not be lightly inferred absent an express indication that the parties to the arbitration agreement (and all class members) were aware that their disputes could be resolved through class arbitration. Here, the parties' intent is expressly to the contrary, because the imposition of class arbitration expanded the parties' agreement beyond recognition by sweeping thousands of additional parties into the *Bazzle* and *Lackey* arbitrations even

though they were not parties to the specific contracts that authorized the arbitrations in the first instance.

In short, the decision below, which authorizes that revision of the parties' agreement to arbitrate, should be reversed because it violates the FAA's core requirement "'that private agreements to arbitrate [must be] enforced according to their terms.'" *Doctor's Assocs.*, 517 U.S. at 688 (quoting *Volt*, 489 U.S. at 479).

ARGUMENT

I. THE DECISION BELOW SHOULD BE REVERSED BECAUSE IT VIOLATED THE FEDERAL ARBITRATION ACT'S CORE REQUIREMENT THAT ARBITRATION AGREEMENTS BE "RIGOROUSLY" ENFORCED ACCORDING TO THEIR WRITTEN TERMS.

The South Carolina Supreme Court, in this case, held that under the Federal Arbitration Act ("FAA") class-arbitration could be imposed "without any contractual . . . directive to do so." Pet. App. 21a. The Court's rationale was that this result promoted the court's view of "efficiency and equity" and "judicial economy." *Id*. at 22a. This holding is in direct conflict with the FAA's primary mandate that courts must enforce the written terms of arbitration agreements and may not rewrite or modify those agreements to suit the court's views of public policy. That mandate, which is rooted in Section 2 of the FAA, 9 U.S.C. § 2, applies in both state and federal courts and unquestionably applies here to arbitration agreements whose terms expressly provide that the arbitration clause "shall be governed by the Federal Arbitration Act." Pet. App. 110a. Measured against these standards, the decision below must be reversed because the South Carolina Supreme Court concluded that the FAA does not, in fact, prohibit courts from rewriting or modifying arbitration agreements instead of enforcing their written terms.

A. Section 2 Of The FAA Requires That Written Arbitration Agreements Be Enforced According To Their Terms.

1. "'[T]he starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 685 (1985) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). Here, Section 2 of the FAA provides, in relevant part, that a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . 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. Through Section 2, Congress mandated that written arbitration agreements must be "enforce[d]," just like any other contract would be.

Section 2 "is the primary substantive provision of the Act." *Moses H. Cone*, 460 U.S. at 24; see also *Gilmer*, 500 U.S. at 24-25. It "create[s] 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. Moreover, "[i]n enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and 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." *Southland*, 465 U.S. at 10.

Congress, by "mandat[ing] the enforcement of arbitration agreements," *id*., implemented a national policy to address long-standing judicial hostility to such agreements and to permit private parties to choose how they would resolve their disputes. See, *e.g.*, *Scherk* v. *Alberto Culver Co.*, 417 U.S. 506, 510-11 & n.4 (1974). Congress recognized the "desirability of arbitration as an alternative to the complications of litigation," *id*. at 511 (internal quotation

marks omitted), and thus, through Section 2, permitted private parties to "'trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration,'" *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi Motors*, 473 U.S. at 628).

Because the long-standing judicial hostility to arbitration agreements had existed in both state and federal courts, and because the text of Section 2 does not limit the section's scope to federal courts, this Court concluded almost 20 years ago, in *Southland*, that Section 2 applies in both state and federal courts. *Southland*, 465 U.S. at 12-15; *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987). The Court recently has reaffirmed that Section 2 of the FAA applies in state courts. *Allied-Bruce*, 513 U.S. at 272; see *Circuit City Stores*, 532 U.S. at 121-22. Respondents do not challenge *Southland*, and instead agree, as they must, that Section 2 of the FAA preempts conflicting state law. Opp. 14 (citing *Volt*, 489 U.S. at 477). Indeed, this Court has held in numerous cases that Section 2 of the FAA preempts contrary state law in state-court cases.[2]

2. Section 2 of the FAA prohibits state and federal courts from rewriting private arbitration agreements to suit their own subjective notions of efficiency or judicial economy. This Court has made clear that Section 2 of the FAA requires courts to "rigorously enforce agreements to arbitrate," *Dean Witter*, 470 U.S. at 221, and that this requirement includes the mandate to enforce "such agreements according to their terms," *Volt*, 489 U.S. at 479; see also *Perry*, 482 U.S. at 490-91 (citing cases). This Court's decisions in *Dean Witter* and *Volt* are instructive. In *Dean Witter*, the Court explained that "agreements to arbitrate must be enforced, absent a ground

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[2] *See Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 683 (1996); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272, 281 (1995); *Perry* v. *Thomas*, 482 U.S. 483, 491 (1987); *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984).

for revocation of the contractual agreement." 470 U.S. at 218. In doing so, the Court rejected the suggestion that "the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims," *id.* at 219, instead making clear that the FAA "was motivated, first and foremost, by a congressional desire to enforce agreements into which the parties had entered," *id.* at 220. Thus, the *Dean Witter* Court concluded that "[t]he pre-eminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that [courts] rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation." *Id.* at 221.

Similarly, in *Volt*, the Court explained that the FAA, as applied in a case arising in California state court, ensures that "private arbitration agreements are enforced according to their terms" and "pre-empts state laws which 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'" 489 U.S. at 478 (quoting *Southland*, 465 U.S. at 10). Thus, although Congress was aware that the FAA "would encourage the expeditious resolution of disputes," the Court explained that Congress was motivated first and foremost by a "desire to 'enforce agreements into which parties had entered.'" *Id.* at 478 (quoting *Dean Witter*, 470 U.S. at 220). As a result, the *Volt* Court concluded that the FAA "does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement." *Id.* (citation omitted). Rather, what the FAA requires is that courts "'rigorously enforce'" arbitration "agreements according to their terms" and thereby "give effect to the contractual rights and expectations of the parties." *Id.* at 479 (quoting *Dean Witter*, 470 U.S. at 221).

Since *Volt*, the Court has made clear, repeatedly, that under the FAA, federal and state courts must ensure that written arbitration agreements are enforced in accordance with their

language. Thus, in *Allied-Bruce*, the Court explained that the FAA was designed to require "courts to enforce [arbitration] agreements into which parties had entered, and to place such agreements upon the same footing as other contracts." 513 U.S. at 271 (internal quotation marks and citation omitted) (alteration in original). In *Mastrobuono*, the Court reiterated that "the central purpose of the [FAA]" is "to ensure "that private agreements to arbitrate are enforced according to their terms.'" 514 U.S. at 53-54 (quoting *Volt*, 489 U.S. at 479). In *First Options*, the Court confirmed that "the basic objective" of the FAA "is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties." 514 U.S. at 947 (internal quotation marks and citations omitted). In *Doctor's Associates*, the Court reaffirmed that the "very purpose of the Act was to 'ensur[e] that private agreements to arbitrate are enforced according to their terms.'" 517 U.S. at 688 (alteration in original). And, most recently, in *Waffle House,* the Court explained that the "FAA directs courts to place arbitration agreements on equal footing with other contracts" and ensures "the enforcement of private contractual arrangements." 534 U.S. at 293, 294.[3]

This unbroken line of authority makes clear that courts may not, in furtherance of goals of efficiency or judicial economy, rewrite, modify or attempt to improve upon the terms of a written arbitration agreement governed by the FAA. A contrary rule would render Section 2 largely meaningless, because, if courts were permitted to modify or rewrite private arbitration agreements to suit their views of "efficiency" or "judicial economy," then they could, in the guise of

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[3] *See also Howsam* v. *Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 593 (2003) (Thomas, J., concurring in judgment) ("[U]nder the [FAA] courts must enforce private agreements to arbitrate just as they would ordinary contracts: in accordance with their terms.").

"enforcing" an arbitration agreement, impose obligations and requirements that the private parties to the agreement had not imposed upon themselves. That result runs headlong against the core principle that "'[a]rbitration under the [FAA] is a matter of consent, not coercion.'" *Id*. at 294 (second alteration in original) (quoting *Volt*, 489 U.S. at 479).

The requirement that written arbitration agreements should be enforced according to their terms also follows from Section 2's last clause, which requires that such agreements be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has explained, this provision places "arbitration agreements 'upon the same footing as other contracts.'" *Scherk*, 417 U.S. at 511 (quoting H.R. Rep. No. 68-96, at 2 (1924)); see *Volt*, 489 U.S. at 474 (same). That is, under Section 2, a State "may regulate . . . arbitration clauses[] under general contract law principles," but it "may not . . . decide that a contract is fair enough to enforce all its basic terms . . . but not fair enough to enforce its arbitration clause." *Allied-Bruce*, 513 U.S. at 281; see *Doctor's Assocs.*, 517 U.S. at 686-87. Thus, the "basic objective" of Section 2 of the FAA is "to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties." *First Options*, 514 U.S. at 947 (citations and internal quotation marks omitted). See *Volt*, 468 U.S. at 478 (FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms"). Because the FAA guarantees that arbitration under the FAA—including the terms under which the arbitration occurs—"'is a matter of consent, not coercion,'" *Waffle House*, 534 U.S. at 294, it is the parties who determine whether—and how—to arbitrate. See *Mastrobuono*, 514 U.S. at 57-58; *Volt*, 489 U.S. at 476, 478-49.

3. It follows that the FAA prohibits courts from rewriting an arbitration agreement, without regard to the intent of the

parties, in an effort to promote the court's own notions of appropriate public policy. Indeed, one of the problems Congress sought to resolve through the FAA was that States often would permit arbitration only under statutory terms dictated by state law, an approach that Congress considered to be "inadequate[]." *Southland*, 465 U.S. at 14. Thus, a court's expressed desire to further efficiency or economy cannot, consistent with Section 2 of the FAA, justify rewriting the parties' arbitration agreement. See *Moses H. Cone*, 460 U.S. at 20 (FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement"); see also *Dean Witter*, 470 U.S. at 221 (FAA requires that courts "rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation"); *First Options*, 514 U.S. at 947 (FAA's "basic objective . . . is not to resolve disputes in the quickest manner possible . . . but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties") (internal quotation marks and citations omitted).

Just as the FAA prohibits rewriting the terms of an enforceable contract in the name of efficiency, so also it prohibits doing so in the name of equity or the protection of special categories of individuals. For example, in *Mitsubishi Motors*, the Court rejected an argument that courts should not interpret arbitration agreements "to encompass claims arising out of statutes designed to protect" a category of individuals unless the agreements expressly "mention the statute giving rise to the claims." 473 U.S. at 625. The Court explained that "as with any other contract, the parties' intentions control," *id*. at 626, and the FAA does not permit "distort[ing] the process of contract interpretation" when claims "implicating statutory rights" are involved, *id*. at 627. A

court may not, consistent with the FAA, "color the lens through which the arbitration clause is read." *Id*. at 628.[4]

Allowing courts to rewrite arbitration agreements without regard for the intent of the parties further ignores that the FAA was enacted to "'reverse the longstanding judicial hostility to arbitration agreements.'" *Waffle House*, 534 U.S. at 289 (quoting *Gilmer*, 500 U.S. at 24); see also H.R. Rep. No. 68-96, at 1 (1924) (FAA designed to "make the [other] contracting party live up to his agreement"). Indeed, to allow a court to inject its own public policy views into an arbitration agreement rather than enforcing the agreement in accordance with its terms would open the door to "the old judicial hostility" to arbitration agreements "in modern and more sophisticated dress." Brief for Am. Bankers Ass'n et al. as *Amici Curiae* in Support of Petition, at 4. Section 2 prohibits such attacks, which seek to "'undercut the enforceability of arbitration agreements.'" *Perry*, 482 U.S. at 489 (quoting *Southland*, 465 U.S. at 16). Allowing state courts to distort the enforcement of the terms of arbitration agreements would undermine "congressional intent to place arbitration agreements" on an equal footing with other contracts just as do state laws invalidating arbitration contracts. *Southland*, 465 U.S. at 16 n.11.

B. Sections 3 And 4 Of The FAA Do Not Permit State Courts To Rewrite Or Modify The Terms Of Parties' Private Arbitration Agreements.

Contrary to the suggestion of Respondents and the court below, the applicability of these settled legal principles does not depend on whether Sections 3 or 4 of the FAA apply to

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[4] *See also Allied-Bruce*, 513 U.S. at 280-81 (declining to adopt separate FAA standard with respect to consumer arbitration agreements); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27-28 (1991) (explaining that FAA permits arbitration of "age-discrimination claims").

state courts.[5] That argument wholly ignores that Section 2 of the FAA, which unquestionably applies to state courts, mandates that agreements to arbitrate be enforced as written. See 9 U.S.C. § 2; *Southland*, 465 U.S. at 10; *Allied-Bruce*, 513 U.S. at 272. Moreover, that argument is not relevant to the substantive issue here: whether state courts are permitted to rewrite or modify arbitration agreements and thereby avoid their substantive obligation to enforce the parties' written arbitration agreement as required by Section 2 of the FAA. As shown below, the FAA precludes the analysis employed by the South Carolina Supreme Court.

1. Nothing in Sections 3 or 4 of the FAA supports the decision below to rewrite the parties' agreement. Sections 3 and 4 of the FAA are provisions which require, respectively, that a court grant a party's motion for a stay of litigation "until . . . arbitration has been had in accordance with the terms of the agreement," 9 U.S.C. § 3, and grant a party's motion for "an order directing the parties to proceed to arbitration in accordance with the terms of the agreement," *id.* § 4. Further, Section 4 also sets forth a series of procedural matters including (i) the required notice period for a motion to compel arbitration, (ii) the application of the Federal Rules of Civil Procedure to such a motion, and (iii) summary procedures for resolving any dispute over "the making of the arbitration agreement or the failure, neglect, or refusal to perform the same." *Id*. Nothing in Sections 3 or 4, however, modifies the substantive requirements of Section 2 of the FAA or otherwise relieves a court of its obligation to enforce

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[5] *See* Opp. 17 (arguing that the court below "reasonably questioned whether Section 4 even applies to state court decisions regarding arbitrations"); *id.* at 14 (arguing that FAA imposes no "procedural requirements on state courts" and that States therefore are "free to determine whether, under state law, arbitrations may proceed on a class-wide basis"); *id.* at 10 (noting that court below questioned whether Section 4 of the FAA applied in state court).

a written arbitration agreement to which the FAA applies. See *id*. § 2.

This Court frequently has noted that the applicability of Sections 3 or 4 of the FAA to proceedings in state courts remains an open question.[6] Nevertheless, since *Southland*, the Court has never retreated from the conclusion that the core requirement of the FAA—that written agreements to arbitrate that are subject to the FAA must be enforced—applies both in state and federal courts. *E.g.*, *Doctor's Assocs.*, 517 U.S. at 688; *Allied-Bruce*, 513 U.S. at 272; *Volt*, 489 U.S. at 479; *Perry*, 482 U.S. at 490 (FAA mandates that agreements "be 'rigorously enforce[d]'") (alteration in original) (quoting *Dean Witter*, 470 U.S. at 221). Indeed, even though *Southland* itself expressly left open the question whether Sections 3 and 4 of the FAA applied in state courts, 465 U.S. at 16 n.10, the Court nevertheless ruled that Section 2 of the FAA binds state courts.[7]

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[6] For example, in *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983), the Court stated that "state courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Arbitration Act" but thought it "less clear . . . whether the same is true of an order to compel arbitration under § 4 of the Act." *Id*. at 26. In *Southland*, the Court explained, in holding that Section 2 applied to state courts, that it was not holding that Sections 3 and 4 applied, and it added that the Federal Rules of Civil Procedure "do not apply" in "proceedings to compel arbitration." 465 U.S. at 16 n.10. In *Volt Info. Scis., Inc.* v. *Board of Trs. of Leland Stanford Junior Univ*., 489 U.S. 468 (1989), the Court reiterated that the applicability of Sections 3 and 4 in state courts remained an open question. *Id*. at 477 n.6.

[7] Nor does this case implicate or resurrect the issue whether a state court must specifically "enforce[]" arbitration agreements under Section 2. *See generally Allied-Bruce*, 513 U.S. at 294 (Thomas, J., dissenting); *Southland*, 465 U.S. at 31-33 (O'Connor, J., dissenting). To the contrary, even if Sections 3 or 4 of the FAA did not apply, South Carolina law itself requires that arbitration agreements must be specifically performed. S.C. Code Ann. § 15-48-20(a) ("[o]n application of a party showing an agreement . . . and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration").

Similarly, interpreting the substantive provision of Section 2 to prohibit courts from rewriting or modifying private agreements to arbitrate in no way conflicts with the matters reflected in Sections 3 and 4. Any overlap between the requirements of Section 2, on the one hand, and Sections 3 and 4, on the other, merely reflects that Congress sought to ensure that arbitration agreements would be "'rigorously enforce[d],'" *Perry*, 482 U.S. at 490 (alteration in original) (quoting *Dean Witter*, 470 U.S. at 221) "according to their terms," *Volt*, 489 U.S. at 479, notwithstanding the "'judiciary's longstanding refusal to enforce agreements to arbitrate,'" *id.* at 478 (quoting *Dean Witter*, 470 U.S. at 219-20). Moreover, it simply makes no sense to conclude that Congress, by enacting Sections 3 and 4, sought, by negative implication, to create a two-tiered system whereby arbitration agreements in state court may be modified based upon those courts' public policy preferences but the same agreements, reviewed in federal court, must be enforced in accordance with their terms.

Indeed, just two years ago, in *Circuit City*, this Court rejected the argument that Section 1 of the FAA should be interpreted in a manner that would "undo" the scope "of the FAA's coverage in § 2." 532 U.S. at 122; see also *Allied-Bruce*, 513 U.S. at 280. As the Court explained in *Southland*, "[w]e are unwilling to attribute to Congress the intent . . . to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted." 465 U.S. at 15. Thus, regardless of whether Sections 3 and 4 apply in state courts, there can be no doubt that the FAA, through Section 2, requires those courts to enforce arbitration agreements according to their written terms.

2. The question whether Sections 3 and 4 of the FAA apply by force of law to state courts is academic here for the additional reason that the parties agreed that those provisions would govern their arbitration agreement. This Court's

decision in *Volt* establishes that where "the parties have agreed to abide by" certain "rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA." 489 U.S. at 479. *Volt* explained that the FAA permits "the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself." *Id*. It follows, *a fortiori*, that the FAA also permits the parties to agree to arbitrate under the FAA itself.[8]

The arbitration agreement at issue here did just that, thereby creating an additional, independent basis for concluding that the courts below were required to enforce the parties' agreement in accordance with its terms. Specifically, the arbitration agreement provided: "This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1." Pet. App. 110a; see *id*. at 11a n.9. There can be no serious dispute on this point because even the court below noted that the parties "agree the FAA applies . . . to the arbitration agreements in both cases," *id*. at 11a, and added that it had "previously held Green Tree's arbitration clause was governed by the FAA," *id*. at 11a n.9 (citing *Munoz* v. *Green Tree Fin. Corp.*, 542 S.E.2d 360 (S.C. 2001)). In turn, the *Munoz* decision recognized that private parties' agreement that the "arbitration agreement . . . shall be governed by the FAA" means that the "[a]rbitration agreement[], like other

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[8] As such, the conclusion that the court below was obligated to enforce the parties' agreement in accordance with its terms is fully supported by lower court cases which rely upon the language of Section 4 of the FAA to prohibit consolidated or class arbitration absent contractual authorization to do so. *See*, *e.g.*, *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (holding that FAA does not permit a court to order class-action arbitration where the arbitration agreement did not expressly provide for such a procedure); *Government of U.K.* v. *Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993) (holding that a "district court cannot consolidate arbitration proceedings arising from separate agreements to arbitrate, absent the parties' agreement to allow such consolidation").

contracts, [is] enforceable in accordance with [its] terms." *Munoz* v. *Green Tree Fin. Corp.*, 542 S.E.2d 360, 363-64 (S.C. 2001). Indeed, the decision below further recognized the applicability of the FAA by applying Section 10 of the FAA, 9 U.S.C. § 10, in reviewing the arbitral awards. Pet. App. 23a-24a.

Accordingly, the parties' arbitration agreement expressly provides that it "shall be governed by the Federal Arbitration Act," Pet. App. 110a, including Sections 3 and 4. These provisions confirm that the court below was required to enforce the parties' private arbitration clause "in accordance with the terms of the agreement." 9 U.S.C. §§ 3, 4.

II. THE IMPOSITION OF CLASS ARBITRATION ONTO THE AGREEMENTS AT ISSUE, WHICH DO NOT PROVIDE FOR CLASS ARBITRATION, VIOLATED THE FAA.

The judgment of the South Carolina Supreme Court should be reversed because the imposition of class arbitration onto the arbitration agreements in this case is contrary to the bedrock requirements of the FAA. Respondents cannot avoid that result by arguing that the arbitrator exercised "independent judgment" to conclude that class arbitration was consistent with the arbitration agreements. Opp. 25. In the *Bazzle* proceedings, the class arbitration was imposed on the parties and the arbitrator by the South Carolina trial court, and Respondents, throughout these proceedings, affirmatively sought to intertwine *Bazzle* with the *Lackey* proceedings. In all events, the awards must be set aside because the imposition of class arbitration cannot be reconciled with the arbitration agreements. The parties' agreements do not authorize the arbitrator to resolve (i) disputes involving individuals other than the actual parties to the Bazzles' or Lackey Contracts, or (ii) disputes arising from or relating to *other* contracts.

A. The South Carolina Supreme Court's Decision Violated The FAA By Allowing Courts To Impose Their Views Of Equity And Efficiency Onto The Parties' Arbitration Agreements.

The judgment below cannot be reconciled with the FAA's requirement that courts must enforce the parties' written arbitration agreements and may not modify or rewrite those agreements based upon the court's own views of public policy. Under the FAA, arbitration is a matter of "'consent, not coercion.'" *Waffle House*, 534 U.S. at 294 (quoting *Volt*, 489 U.S. at 479). The decision below directly contravened that bedrock principle by imposing class action arbitration without regard for the parties' contractual intent.

Rather than attempting to divine the intent of the parties, the court below concluded that it was authorized to supplement the arbitration agreement based upon its own views of public policy. Indeed, the court held that "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*." Pet. App. 22a (emphases added). In reaching that result, the court below displayed a hostility to private arbitration agreements by relying on prior South Carolina precedent which held that "a state court may order *consolidation* of claims subject to mandatory arbitration *without any contractual* or statutory *directive to do so*." *Id*. at 21a (citing *Episcopal Hous.*, 255 S.E.2d at 452) (second emphasis added). Because this case law "permit[ted] consolidation of appropriate claims where the arbitration agreement is silent"—*i.e.* where there is no "contractual . . . directive to do so"—the court below reasoned that "it follows that [it] would permit class-wide arbitration, as ordering class-wide arbitration calls for considerably less *intrusion upon the contractual aspects of the relationship*." *Id*. (internal quotation marks omitted) (emphasis added).

But the FAA does not permit *any* "intrusion upon the contractual aspects of the relationship," Pet. App. 22a,

because "'[a]rbitration under the [FAA] is a matter of consent, not coercion.'" *Waffle House*, 534 U.S. at 294 (second alteration in original) (quoting *Volt*, 489 U.S. at 479). Under the analysis of the court below, however, any perceived "omission" or "silence" in an arbitration agreement provides an invitation for the court to impose on the parties its own notions of "efficiency and equity." Pet. App. 22a; *id.* ("hearing such claims (involving identical issues against one defendant) individually, in court or before an arbitrator, does not serve the interest of judicial economy"). That analysis is precluded by the FAA. In particular, although courts in litigation, armed with the coercive power of the state, may consolidate cases or approve class actions even when litigants object, *e.g.*, Fed. R. Civ. P. 23; *id*. 42, the FAA prohibits them from doing likewise in arbitration, in which all power derives from parties' contractual consent.

Put another way, the FAA does not permit courts to transform private arbitration into litigation. "After all, the basic objective in this area [arbitration] is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes," *First Options*, 514 U.S. at 947 (citation omitted), but to "ensur[e] that private arbitration agreements are enforced according to their terms," *Volt*, 489 U.S. at 478. Indeed, the FAA demands "rigorous[]" enforcement of arbitration agreements, *Dean Witter*, 470 U.S. at 221, including "piecemeal resolution when necessary to give effect to an arbitration agreement," *Moses H. Cone*, 460 U.S. at 20.

Here, the effect of imposing a class-action arbitration is to convert a simple two-party dispute about a specific state statutory requirement into a massive proceeding with millions of dollars at stake and the full trappings of the process under Rule 23. No one can doubt that the parties to an arbitration could agree to proceed in such fashion. But in this case they did not, and it is flatly inconsistent with both the FAA's requirement of fidelity to the contract's language and the FAA's policy of providing a more efficient resolution of the

particular dispute being arbitrated to transform a bilateral dispute into a complex class action.

Nor does the FAA require parties to include in their arbitration agreement a comprehensive, point-by-point catalog of the matters that the parties expressly do not want courts to impose on their agreement. But that is the practical effect of the decision below. Requiring the parties to an arbitration agreement to anticipate every possible revision that a court might want to impose would frustrate the goals of the FAA by increasing the costs associated with arbitration and impairing the ability of parties to enter into simple, straightforward arbitration agreements. These additional costs and burdens can be avoided if the FAA is applied to require "courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt*, 489 U.S. at 478.

Finally, the court below concluded that imposition of class-action arbitration was justified because the "parties with nominal individual claims . . . would be left with no avenue for relief." Pet. App. 22a. As this Court noted in *Allied Bruce*, however, "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." 513 U.S. at 280. More recently, this Court has reconfirmed that "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance" where a case "involves smaller sums." *Circuit City*, 532 U.S. at 123. Moreover, the court ignored that the arbitral awards in these cases gave each class member a minimum recovery of $5,000 to $7,500, plus their costs and significant attorney's fees. As this Court has explained, such claims fall within the heartland of arbitral dispute resolution. *Allied-Bruce*, 513 U.S. at 280 (noting that "one-third of [the American Arbitration Association's] claims involve amounts below $10,000, while another third involve claims of $10,000 to $50,000"). Indeed, the Bazzles initially filed suit

individually, seeking recovery of "actual and punitive damages, statutory damages and penalties, treble damages, attorneys' fees, costs and expenses." Rec. on Appeal at 1374. They did not require the action to be brought as a class to justify coming forward to seek a remedy.

In sum, the decision below cannot be reconciled with the FAA's requirement that courts must enforce written arbitration agreements and may not rewrite them. See 9 U.S.C. § 2. In lieu of enforcing the terms of the parties' agreement, the court below instead concluded that South Carolina law authorized an "'intrusion upon the contractual aspects of the relationship,'" Pet. App. 21a, if that intrusion, in the court's view, would "serve efficiency and equity" as well as "judicial economy." *Id*. at 22a. By distorting the parties' agreement to suit its own policy preferences, the court below violated the FAA by resurrecting the very judicial hostility to private arbitration that the FAA was enacted more than 75 years ago to eliminate.

B. The Trial Court's Imposition Of Class Arbitration Onto The Parties' Agreements In Violation Of The FAA Infected The Arbitrations.

As shown above, the imposition of class arbitration without "any contractual directive to do so" plainly violates the requirements of the FAA. Respondents cannot avoid application of that principle here by arguing that that "the *Arbitrator* decided that this case should proceed as a class arbitration." Opp. 25. More specifically, according to Respondents, "this case was not a situation of the South Carolina courts imposing their views on arbitration, but rather the *Arbitrator* making the decision to proceed with a class arbitration." *Id.* That argument should be rejected because it ignores the course of the proceedings in these two interrelated arbitrations.

In the *Bazzle* proceedings, the decision to impose class arbitration on the parties (and the arbitrator) unquestionably

was made by the court. On December 5, 1997, the trial court both ordered arbitration to proceed and entered "an order granting class certification." Pet. App. 3a. Thereafter, on January 7, 1998, the trial court "ordered that the class action in arbitration proceed on an opt-out basis." *Id*. at 4a. Only after class arbitration had been ordered did the South Carolina trial court appoint Thomas Ervin to preside over the class arbitration that it had previously ordered. *Id.* Respondents recognized these facts when they argued to the trial court below that "this Court determined in this matter that the matter could proceed as a class action." J.A. 31. Indeed, they argued that "to the extent that Judge Ervin [the arbitrator] made such a decision, if any, in this case or the *Lackey* case, it was a reaffirmation and/or adoption of this Court's prior determination." *Id.* at 32 n.2.

That decision to impose class arbitration violates the FAA because, as Respondents acknowledge here, "[n]either the arbitration provision nor any other document prepared by Green Tree makes any reference to class actions." Opp. 5. Because the trial court in the *Bazzle* proceeding imposed class arbitration on the parties' private arbitration agreement without any contractual directive to do so, this case does not implicate the policies that underlie deference to arbitrator decisions regarding the merits of a dispute that the parties have agreed to arbitrate. Any such deference is predicated on the notion that "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi Motors*, 473 U.S. at 628). Such deference cannot apply where, as here, the trial court imposed class arbitration onto Green Tree even though the arbitration agreement does not provide for class arbitration and its language focuses solely on a specific dispute arising between the parties to the contract and no

others.[9] Accordingly, the arbitral award entered in the *Bazzle* arbitration must be set aside because that proceeding was infected from the outset by a clear violation of the FAA's requirement that courts may not impose their public policy choices onto the course of an arbitration proceeding absent a contractual directive to do so. See 9 U.S.C. § 2.

Nor can the impact of that FAA violation be limited to the *Bazzle* proceeding. As Respondents recognize, the two proceedings were intimately related to one another because the same arbitrator decided both the *Bazzle* and *Lackey* arbitrations, and because both arbitrations were born of "identical arbitration clauses." Opp. 25 n.6. Indeed, below, Respondents affirmatively argued, successfully, that the class arbitration ordered by the court in *Bazzle* should control whether class arbitration should be imposed in *Lackey*. In particular, after the trial court had ordered class arbitration in the *Bazzle* proceedings and appointed Thomas Ervin to serve as the arbitrator who would implement the court's class arbitration, Respondents, in the *Lackey* proceedings, asked the same arbitrator to adopt the same approach ordered by the *Bazzle* court and to impose class arbitration in *Lackey*.

Specifically, in the *Lackey* matter, Respondents argued to the arbitrator that class-action arbitration should be imposed because:

> [I]n a similar action pending against the Defendant in Dorchester County, *Bazzle* v. *Green Tree Financial Corporation et al.*, Civil Action Number 97-CP-18-258, the issue of a class action proceeding in arbitration was

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[9] Contrary to the claims of the South Carolina Supreme Court below, Pet. App. 23a, and of Respondents, Opp. 25-28, review, as here, of an arbitrator's authority pursuant to Section 10(a)(4) of the FAA is not the same as review of the *merits* of an arbitrator's award. *See First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 942 (1995) (separately discussing Section 10 of FAA and "'manifest disregard' of law" review as bases for vacating award).

> thoroughly presented in hearings before The Honorable Patrick R. Watts, Special Circuit Judge. The court found that a class action could proceed in arbitration.

Rec. on Appeal at 516. Later, Respondents argued to the court below that "to the extent that Judge Ervin made such a decision, if any, in . . . the *Lackey* case, it was a reaffirmation and/or adoption of [the *Bazzle*] Court's prior determination." J.A. at 32 n.2.

Respondents may not now change positions by asserting in this Court that the arbitrator in *Lackey* made an independent determination untainted by the trial court's violation of the FAA. See *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001) (explaining that judicial estoppel "'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase'") (quoting *Pegram* v. *Herdrich*, 530 U.S. 211, 227 n.8 (2000)); see also 18 James Wm. Moore et al., *Moore's Federal Practice* (MB) § 134.30 (3d ed. June 2002) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding."). In all events, even if the arbitrator also reviewed the arbitration clause, it is inconceivable that, after being ordered by a court to conduct a class-wide arbitration in *Bazzle*, he would then, in a related arbitration proceeding involving an indistinguishable arbitration clause, independently decide not to impose class arbitration. Indeed, there was no effort by the arbitrator to reconcile class arbitration with the express limitations in the contract.

In short, the judgment below must be set aside precisely because this was a case of the South Carolina courts, without contractual directive to do so, impermissibly "imposing their views on arbitration." Opp. 25.

C. In All Events, Class Arbitration Cannot Be Reconciled With The Terms Of The Arbitration Agreements In This Case.

The Federal Arbitration Act provides that a court may vacate the award of an arbitrator, *inter alia*, "where the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4); see *First Options*, 514 U.S. at 942 (summarizing bases for setting aside arbitrator's award). This Court has been clear that "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *AT&T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648-49 (1986) (citing *Gateway Coal Co*. v. *United Mine Workers of Am.*, 414 U.S. 368, 374 (1974)). Applying these standards, even if the arbitral proceedings had not been tainted from the outset by the trial court's imposition of class-wide arbitration, the judgment below still must be reversed, because the conduct of class arbitration significantly exceeds the authority granted to the arbitrator and fundamentally transforms the scope of the arbitration agreements in manifest disregard of the parties' intent.

1. The Terms Of The Arbitration Agreements Preclude Class-Wide Arbitration.

As this Court has explained, "by agreeing to arbitrate, a party 'trades the procedures . . . of the courtroom for the simplicity, informality and expedition of arbitration.'" *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi Motors*, 473 U.S. at 628). To be sure, the FAA leaves parties "free to structure their arbitration agreements as they see fit," *Volt*, 489 U.S. at 479, and "does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement," *id.* at 478 (citation omitted). At bottom, "'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *AT&T Techs.*, 475 U.S. at 648

(quoting *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)).

Class-wide arbitration is fundamentally inconsistent with the arbitration agreements in this case. As Respondents acknowledge, "[n]either the arbitration provision nor any other document prepared by Green Tree makes any reference to class actions." Opp. 5. Instead, the agreements provide that "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. "This contract" refers, of course, to the specific contract entered into by the buyer and seller in these agreements. In light of this context, it is not surprising that the arbitration agreement is structured to provide for bilateral arbitration between two contractually defined parties: "you" and "us." *Id*. Both of these contractually defined parties are reserved a role in the selection of the single arbitrator—*i.e.*, "selected by us with consent of you"—who will resolve their dispute. *Id.* Moreover, the scope of that bilateral arbitration agreement is limited to resolving disputes "arising from or relating to this contract"—*i.e.*, disputes arising from or relating to the contract between "you" and "us." *Id.*[10]

Class arbitration, by contrast, cannot be reconciled with the decision of the parties to arbitrate in general or with the terms of the parties' agreement.[11] As a general matter, class

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[10] The court below stated, without any analysis or elaboration, that this "language does not limit the arbitration to non-class arbitration" and "[a]t best, it creates an ambiguity." Pet. App. 19a. The court below never identified why this language was ambiguous or tried to reconcile its reading with the specific terms of the agreement.

[11] *See Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995) (relying upon Restatement (Second) of Contracts § 202(2) (1979) for the principle that "[a] writing is interpreted as a whole"); *United States* v. *Utah*, 199 U.S. 414, 423 (1905) ("'The elementary canon of interpretation is, not that particular words may be isolatedly considered,

arbitration is not the type of dispute-resolution proceeding that one would contemplate adopting to provide "a less expensive alternative to litigation" or a means of avoiding the "'delay and expense of litigation.'" *Allied-Bruce*, 513 U.S. at 280; see *Circuit City*, 532 U.S. at 123. Indeed, the agreement states that "[t]he parties agree and understand that they have a right or opportunity to litigate disputes through a court, but that they prefer to resolve their disputes through arbitration." Pet. App. 110a. It makes little sense to presume that the parties sought to avoid court litigation, but then authorized the arbitrator to recreate the most complex, expensive and time-consuming aspects of litigation within their private arbitral process. See, *e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-12 (1985) (explaining that in a class action, absent class members must be afforded notice, an opportunity to be heard and to participate in the litigation, and a chance to opt out); *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 833 (1999) (describing pre-requisites to proposed class-action settlement).[12]

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but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them'").

[12] Indeed, even the minority of courts that appear to allow class-action arbitration agree on the necessity of significant court involvement to protect the rights of absent class members. *Keating* v. *Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982) (stating that the court, not arbitrators, would conduct class certifications in arbitrations, would monitor representation and approve proposed settlements), *rev'd in part*, *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984); *Dickler* v. *Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 (Pa. Super. Ct. 1991) (stating that in a class action arbitration, the trial court would have to certify the class, supervise the notice, and "probably have to have final review in order to insure that class representatives adequately provide for absent class members"); *cf.* 5 James Wm. Moore et al., *Moore's Federal Practice* (MB) § 23.25[3][d] (3d ed. June 2002) ("Because absent parties will be bound by the judgment in a class action, courts are required to undertake a continuing examination of the adequacy of representation at all stages of the litigation.") (internal citation omitted).

Indeed, 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 in proceedings where class representatives purport to act on behalf of other individuals. Thus, for example, under Federal Rule of Civil Procedure 23(b)(3), class certification can be authorized only if, after undertaking a "rigorous analysis," a court "finds" that the prerequisites for class certification have been met and the class action may be managed without impairing any party's substantive rights. See *General Tel. Co. of Southwest* v. *Falcon*, 457 U.S. 147, 161 (1982).

Unlike class actions prosecuted in federal or state courts, class arbitrations lack the essential protections mandated in the courts. In court, absent parties cannot be bound by a judgment unless their due-process rights are adequately protected through judicial oversight. See *Hansberry* v. *Lee*, 311 U.S. 32, 41-42 (1940); see also *Shutts*, 472 U.S. at 808. That oversight begins, as mentioned above, with a "rigorous" analysis whether the class certification standards have been met, continues to ensure that there is notice "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection," *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950), and concludes with oversight of the voluntary dismissal or compromise of a class action, *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 617 (1997); *Ortiz*, 527 U.S. at 848.[13] In contrast, arbitration lacks such

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[13] For example, under Federal Rule of Civil Procedure 23, parties seeking class certification must demonstrate that they meet several requirements, namely, numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a); *see also Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 625-28 (1997) (holding that adequacy was not demonstrated because of the diverse groups of plaintiffs). The parties seeking certification must then show that the action is maintainable under the rules that limit the realm of lawsuits that can be brought as class

safeguards because "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi Motors*, 473 U.S. at 628). As a result, class arbitration raises difficult legal and practical questions that should not be addressed unless there is compelling evidence to conclude that the parties actually chose this means of resolving not only their own disputes but also those of other individuals.[14]

The unlikely conclusion that the parties authorized class-action arbitration here is foreclosed by the language of their arbitration agreements. On the one hand, a class action allows a class representative to litigate claims on behalf of himself as well as numerous additional individuals who are not parties to the litigation. See Fed. R. Civ. P. 23. For instance, in the proceedings below, the Bazzles and Lackey litigated not only the specific disputes arising from their respective contracts, but also litigated, on behalf of 3,700 other individuals, disputes arising under or relating to 3,700 *other* contracts. That wholesale expansion of the arbitration agreements runs contrary to the terms of the agreements, which limit the scope of each arbitration proceeding to disputes between "you" and "us," and limit the subject matter to disputes arising from or relating to "this contract" between

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actions. *See*, *e.g.*, Fed. R. Civ. P. 23(b)(1)-(3). Under Rule 23(b)(3), for instance, the action must meet two more requirements: common questions must predominate, and class resolution must be a superior method for the fair and efficient adjudication of the controversy. *Id.* 23(b)(3); *Amchem*, 521 U.S. at 623-25 (finding that the predominance requirement was not met in an asbestos case under Rule 23(b)(3)).

[14] 12 Am. Jur. *Contracts* § 251 ("An agreement capable of an interpretation which will make it valid or legal will be given such interpretation if the agreement is ambiguous."); *Restatement (Second) of Contract Law* § 203(a) (1981) (stating preference in contract interpretation that "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect").

"you" and "us." Pet. App. 110a. One of the core ways in which an arbitrator can exceed his authority is to purport to bind in arbitration parties who have not agreed to be bound. See, *e.g.*, *First Options*, 514 U.S. at 942 (affirming vacatur of arbitrator's decision as applied to parties who had not personally signed an arbitration agreement).[15] Here, class action arbitration exceeds an arbitrator's authority under the express terms of the arbitration agreements.

Nor is that expansion of the arbitrator's authority somehow remedied by an "opt-out" provision that allows non-class representatives to avoid arbitration by opting out of the class. Pet. App. 4a. To the contrary, the opt-out provision further frustrates the parties' intent by rewriting the mechanism by which they will choose an arbitrator. Under the agreement, each arbitrator is "selected by us with consent of you." *Id*. at 110a. The opt-out provision allows a single arbitrator to deny Green Tree its right to select, in the first instance, the individual who would have authority to resolve the disputes arising from or relating to each specific contract.

For the same reason, imposition of class arbitration is not an incidental arbitral power granted to the arbitrator under the parties' agreement. Here, the agreement limits the arbitrator's

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[15] The courts of appeals also have regularly vacated arbitral awards when the arbitrator attempted to arbitrate the claims of parties not included in the arbitration agreement before him. *See*, *e.g.*, *NCR Corp.* v. *Sac-Co., Inc*., 43 F.3d 1076 (6th Cir. 1995) (affirming vacatur of arbitrator's punitive damages award because arbitrator awarded the damages to others who had signed an agreement with defendant but had not brought arbitration proceeding against defendant); *Eljer Mfg., Inc.* v. *Kowin Dev. Corp*., 14 F.3d 1250, 1256 (7th Cir. 1994) (vacating arbitrator's damages award when it was based on losses suffered by an entity that did not bring arbitration proceeding against defendant; arbitration "cannot be construed to delegate to the arbitrator the power to arbitrate disputes between Eljer and a third party"); *Pacific Reinsurance Mgmt. Corp.* v. *Ohio Reinsurance Corp*., 935 F.2d 1019, 1026-27 (9th Cir. 1991) (arbitrators do not have power to add new parties to arbitration proceedings without the consent of all parties).

authority to disputes between the parties to the contract "arising from or relating to this contract." Pet. App. 110a. Although the granting of that authority to the arbitrator is entirely consistent with an arbitrator's decision to schedule hearings, permit or limit discovery, or issue a scheduling order, imposition of class arbitration is fundamentally different because it would expand the arbitrator's authority both to individuals who are not parties to the Bazzle or Lackey Contracts and to disputes that arise not from "this contract" but from *other* contracts. *Id*. at 110a. As this Court explained in *Mastrobuono*, an arbitration agreement "should be read to give effect to all its provisions and to render them consistent with each other." 514 U.S. at 63.

2. *Waffle House* Confirms That Class Arbitration Cannot Be Imposed Onto The Parties' Agreements.

Nor can class arbitration be imposed onto the parties' agreements based upon generalized presumptions in favor of arbitration. See Opp. 15. This Court's decision in *Waffle House* is instructive. There, the Court explained that the "FAA directs courts to place arbitration agreements on equal footing with other contracts, but it 'does not require parties to arbitrate when they have not agreed to do so.'" 534 U.S. at 293 (quoting *Volt*, 489 U.S. at 478). In *Waffle House*, the lower court ruled that the EEOC could not seek victim-specific relief in a lawsuit under the Americans with Disabilities Act because the employee (Baker) on whose behalf the EEOC was proceeding had signed an arbitration agreement with Waffle House. *Id.* at 284. This Court reversed, explaining that under the FAA, "we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement." *Id.* at 294. The Court underscored that courts cannot "override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *Id.*

Applying these principles, the Court explained that the arbitration agreement in no way limited the EEOC's lawsuit because "[i]t goes without saying that a contract cannot bind a nonparty." *Id.*

This case is no different. Here, as in *Waffle House*, "there is no ambiguity" in the contract, *id*., because the non-representative class members are not parties to the arbitration agreement or contract through which the arbitrator was chosen in the *Bazzle* or *Lackey* proceedings. Just as the arbitration agreement between Baker and Waffle House could not bind the EEOC (even though the EEOC sought relief on behalf of Baker), here too the arbitration agreement cannot bind the non-representative class members who are not parties to the specific arbitration agreements upon which the *Bazzle* and *Lackey* proceedings were predicated.

Under the FAA, "[i]t goes without saying that a contract cannot bind a nonparty." *Id.* Here, the agreement states that the parties (*i.e.*, "you" and "us") agree to "binding arbitration in accord with this contract." Pet. App. 110a. Neither Green Tree nor the non-representative class members have agreed, however, to the imposition of class arbitration that would transform the bilateral contract between "you" and "us" into a multilateral contract including a multilateral dispute resolution mechanism between Green Tree, on the one hand, and more than 3,700 individuals on the other. Simply put, the imposition of class arbitration plainly exceeded the arbitrator's (and *a fortiori* the court's) power by transforming the parties' bilateral contract dispute provision into a mechanism for resolving disputes arising from *other* contracts and *other* parties.

CONCLUSION

For these reasons, the judgment of the South Carolina Supreme Court should be reversed.

Respectfully submitted,

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RELEVANT STATUTES

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9 U.S.C. § 2

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, c. 392, 61 Stat. 670.)

9 U.S.C. § 3

Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on 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, providing the applicant for the stay is not in default in proceeding with such arbitration.

(July 30, 1947, c. 392, 61 Stat. 670.)

9 U.S.C. § 4

Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may

specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

(July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.)

9 U.S.C. § 9

Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

(July 30, 1947, c. 392, 61 Stat. 672.)

9 U.S.C. § 10

Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

(July 30, 1947, c. 392, 61 Stat. 672; Nov. 15, 1990, Pub. L. 101-552, § 5, 104 Stat. 2745; Aug. 26, 1992, Pub. L. 102-354, § 5(b)(4), 106 Stat. 946; May 7, 2002, Pub. L. 107-169, § 1, 116 Stat. 132.)