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No. 02-

IN THE
Supreme Court of the United States

GREEN TREE FINANCIAL CORP. a/k/a GREEN TREE ACCEPTANCE CORP. a/k/a GREEN TREE FINANCIAL SERVICES CORP. n/k/a CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, In A Representative Capacity On Behalf Of A Class And For All Others Similarly Situated,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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October 23, 2002

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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.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

STATUTES

TABLE OF AUTHORITIES—continued

SCHOLARLY AUTHORITIES — Page

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PETITION FOR WRIT OF CERTIORARI

Petitioner Green Tree Financial Corp. ("Green Tree") respectfully requests that this Court grant its petition for a writ of certiorari to review the decision and judgment of the Supreme Court of South Carolina.

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 this Petition ("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confirming the arbitral award and denying Green Tree's motion to vacate in *Bazzle* v. *Green Tree Financial Corp.* is unpublished and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 award in arbitration in *Bazzle* appears at Pet. App. 55a-81a, and the final order and award in arbitration in *Lackey* appears at Pet. App. 82a-109a.

JURISDICTION

The Supreme Court of South Carolina entered its final judgment on August 26, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT STATUTORY PROVISIONS

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, mandates enforcement of the terms of arbitration agreements contained in contracts evidencing transactions in interstate commerce. In particular, Section 2 of the FAA, 9 U.S.C. § 2, provides that such 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.*

STATEMENT OF THE CASE

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. Those two awards 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 in the Supreme Court of South Carolina because the arbitration agreement underlying them does not provide for class-action arbitration, and the FAA does not permit class-action procedures to be superimposed onto that arbitration agreement. In affirming these awards, the Supreme Court of South Carolina rejected that showing and issued a decision that deepened an already

mature judicial conflict on the question whether the FAA permits class-action procedures to be engrafted onto an arbitration agreement that does not, by its terms, provide for class-action arbitration.

The Supreme Court of South Carolina acknowledged that, on one side of this conflict, a majority of the federal courts of appeals have held that class-wide or consolidated arbitration proceedings cannot be imposed on an arbitration agreement that is "silent" as to those issues. Pet. App. 12a-13a (analyzing *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995)). The decision below also recognized that, on the other side of the conflict, the California Supreme Court and its appellate courts have ruled that class-action procedures can be imposed on arbitration agreements that are "silent" regarding the availability of class-action arbitration. Pet. App. 13a-16a (discussing *Keating* v. *Superior Ct.*, 645 P.2d 1192, 1208-09 (Cal. 1982), *rev'd on other grounds sub nom.* 465 U.S. 1 (1984); *Blue Cross of Cal.* v. *Superior Ct.*, 67 Cal. App. 4th 42, 62-66 (1998)). After analyzing these competing lines of precedent, the Supreme Court of South Carolina highlighted that "[t]he United States Supreme Court has not addressed this issue and the precedent set by the federal circuit courts is not binding on this Court." Pet. App. 22a.

Thereafter, the court rejected the approach taken by the *Champ* line of cases, adopted the "approach taken by the California courts in *Keating* and *Blue Cross*," 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 (emphasis added) (footnote omitted). The South Carolina Supreme Court's holding was based expressly upon its prior determination that "a state court may order *consolidation* of claims subject to mandatory arbitration without any contractual . . . directive to do so." Pet. App. 21a. Because it had permitted "consolidation of appropriate claims where the

arbitration agreement is silent," the court held that it "would permit class-wide arbitration, as ordering class-wide arbitration calls for considerably less intrusion upon the contractual aspects of the relationship." Pet. App. 21a (internal quotation marks omitted).

As shown below, this case squarely presents a recurring issue of paramount importance to the congressional scheme governing arbitration under the FAA that has generated a substantial conflict among the federal courts of appeals and state appellate courts and courts of last resort. As a result, Green Tree respectfully submits that its petition for a writ of certiorari should be granted to allow this Court to address and resolve this important decisional conflict.

Statutory Background

Section 2 of the FAA provides that 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 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 Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219-20 (1985). Specifically, the FAA permits private parties to "'trade[ ] the procedures . . . of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (quoting *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 § 2 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*).

Essential to Congress's goal of ensuring the enforcement of parties' 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).[1]

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). Nevertheless, 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." 514 U.S. 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.

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[1] *See also Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 688 (1996) (enforcement of agreement according to terms is "the very purpose of the Act"); *Volt*, 489 U.S. at 476 ("[T]he federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."); *see also E.E.O.C.* v. *Waffle House, Inc.*, 122 S. Ct. 754, 764 (2002) ("Arbitration under the [FAA] is a matter of consent, not coercion.") (alteration in original) (quoting *Volt*, 489 U.S. at 479).

Mercury Constr. Corp., 460 U.S. 1, 20 (1983) (footnote omitted).

Factual Background

A review of the proceedings leading to the two class-action arbitral awards and the decision of the Supreme Court of South Carolina is necessary to put this case in proper context.

The Bazzle Proceedings. In 1995, Lynn and Burt Bazzle executed a retail installment contract and security agreement with Green Tree to finance home improvements. The agreement entered into by the Bazzles contained an arbitration clause which provided, 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 . . . .

Pet. App. 110a. The agreement, by its terms, dictates that it will be governed "by the Federal Arbitration Act," *id.*, and limits its scope 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 address claims or relationships that result from "*this* Contract," the agreement precludes consolidated or class-wide arbitration of disputes involving

other contracts. The arbitration agreement is reproduced in full at Pet. App. 110a-111a.

Notwithstanding their agreement to arbitrate, on March 25, 1997, the Bazzles filed an 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. On April 21, 1997, the Bazzles filed an amended class-action complaint and, at the same time, a motion for class certification. In response to these pleadings, Green Tree sought a stay of the court proceedings (including the motion for class certification) and an order compelling arbitration. Green Tree explained that an order compelling arbitration, if granted, would preclude class-action treatment. 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.[2]

After the trial court entered an order appointing an arbitrator, the class-action arbitration proceedings ordered by the trial court 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 arbitrator acknowledged that "Plaintiffs as a class did not attempt to show actual damages," Pet. App. 69a, but 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 $3,645,500 in attorney's fees based upon not only their prosecution of the

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[2] 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.

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 "if every hour submitted by Plaintiffs is allowed, a $3,000,000 attorney's fee award would result in an hourly rate exceeding $900.00 per hour." R. on Appeal at 2126. Moreover, the arbitrator ordered that funds awarded to class members that remained unclaimed 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 class-action arbitration had been ordered by the trial court even though the arbitration agreement did not provide for class-action arbitration. On September 15, 2000, the trial court confirmed the arbitral award and denied Green Tree's motion to vacate. Pet. App. 34a. In its order, the trial court stated that it "previously ruled on Green Tree's motion for reconsideration of class certification" and saw "no basis to address the issue again." *Id*.

The Lackey Proceedings. Daniel Lackey (and his fellow class members) entered into consumer installment contracts and security agreements with Green Tree for the purchase of manufactured homes. 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.

Notwithstanding their agreements to arbitrate, on May 28, 1996, Lackey and George and Florine Buggs commenced a class action 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 seeking 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, 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 arbitration. Pet. App. 5a-6a. 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 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 . . . .

R. on Appeal at 516. The arbitrator accepted this argument. As a result, the arbitrator followed the approach mandated by the trial court in *Bazzle*, certified a class-wide arbitration and approved a class notice that was sent to class members.

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 105a-106a. 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.

The trial court confirmed the award and denied Green Tree's motion to vacate. Green Tree timely appealed. Pet. App. 8a.

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 court then addressed "the FAA's impact on class-wide arbitration." *Id.* at 11a. It noted that the "United States Supreme Court has not addressed" that issue, and "[t]hus, there is no binding precedent that this Court is obligated [to] follow." *Id.* The Supreme Court of South Carolina 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.

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 relationships which result from *this contract*,'" the court below concluded that "this language does not limit the arbitration to non-class arbitration." Pet. App. 19a (emphasis added by court). Specifically, the court ruled 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

recognized that this case implicated the conflict between the rule in the *Champ* line of cases decided by the federal courts of appeals and the rule adopted by the California state courts. The court below rejected the *Champ* line of cases, explaining that the "United States Supreme Court has not addressed this issue and the precedent set by the federal circuit courts is not binding on this Court." Pet. App. 19a-20a. 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." *Id.* at 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 arbitral awards in these cases gave each class member a minimum recovery of $5,000 to $7,500, plus attorney's fees, 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 concluded that class-action 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.

REASONS FOR GRANTING THE PETITION

Further review by this Court of the decision of the Supreme Court of South Carolina is necessary to ensure the proper and uniform resolution of a recurring and important issue under the Federal Arbitration Act ("FAA") that has generated a substantial conflict among federal courts of appeals and state appellate courts and courts of last resort. Specifically, this case presents the question whether the FAA permits class-action procedures to be imposed on an arbitration agreement that is "silent" as to class-action arbitration.

The clear majority of courts that have addressed this question and the related issue of consolidation of arbitration proceedings have answered no. These courts have held that, under the FAA, the parties' silence on the question of class-action or consolidated arbitration precludes imposition of class-action or consolidated arbitration proceedings onto the parties' agreement. See, *e.g.*, *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 274-75 (7th Cir. 1995) (citing cases). In doing so, these courts have relied upon this Court's decisions, which hold 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.

The Supreme Court of South Carolina acknowledged the clear rule of these cases, which prohibit class-action procedures from being superimposed on a "silent" arbitration agreement, but expressly rejected that rule in favor of the minority approach first embraced by the California courts. See, *e.g.*, *Keating* v. *Superior Ct.*, 645 P.2d 1192, 1208-10 (1982), *rev'd on other grounds sub nom.* 465 U.S. 1 (1984); *Blue Cross of Cal.* v. *Superior Ct.*, 67 Cal. App. 4th 42, 62-66 (1998) (following *Keating* and rejecting *Champ* line of cases).

This minority approach holds that the FAA does not prohibit a court from imposing class-action or other procedures onto an arbitration agreement; rather, class-action procedures may be imposed, in the court's discretion, if they further the court's notions of judicial efficiency and equity. Pet. App. 13a-16a. Put another way, the minority approach permits courts to frustrate private agreements to arbitrate by allowing those agreements to be modified whenever they do not unambiguously preclude a procedure or result that a court, in its discretion, believes will "serve efficiency and equity, and would not result in prejudice." *Id*. at 22a.

This minority approach ignores that the FAA is designed to allow parties to choose arbitration rather than litigation by mandating that courts enforce such agreements in accordance with their terms. Moreover, the minority approach cannot be reconciled with this Court's decisions which make clear that concerns regarding efficiency and economy are subsidiary to enforcement of the parties' agreement according to its terms. Indeed, under the minority approach adopted by the court below, parties' agreements to arbitrate would be subject to the same judicial hostility that the FAA was designed to combat when it was enacted more than 75 years ago. That result frustrates congressional intent that arbitration agreements must be enforced according to their terms. Further, adoption of this approach would increase the costs of private arbitration by obligating parties to draft long and unwieldy arbitration agreements that seek to anticipate and address every possible procedural contingency to prevent additional procedures from being imposed upon the parties' private agreement in the putative interests of judicial economy and efficiency.

Finally, the conflict implicated by the decision of the South Carolina Supreme Court is one of paramount importance because, without a uniform nationwide standard, the determination whether class-action arbitration can be

compelled will turn on the happenstance of geography, rather than the intent of parties as expressed in the terms of their arbitration agreements. A uniform national rule is vital because the same arbitration agreements often may apply to agreements entered across the country. Moreover, the absence of a uniform standard fosters not only geographic forum shopping but also forum shopping between federal and state courts. See *Southland*, 465 U.S. at 15 (rejecting interpretation of FAA that would "encourage and reward forum shopping").

In sum, certiorari should be granted to resolve this deep and recurring conflict and to adopt the majority view that the FAA mandates that arbitration agreements be enforced according to their terms and not on the basis of ambiguous policy choices of a court's making.

I. THE DECISION BELOW IMPLICATES A DEEP AND MATURE CONFLICT ON THE QUESTION WHETHER THE FEDERAL ARBITRATION ACT PERMITS CLASS-ACTION PROCEDURES TO BE IMPOSED ON AN ARBITRATION AGREEMENT THAT DOES NOT PROVIDE FOR CLASS-ACTION ARBITRATION.

The decision of the Supreme Court of South Carolina deepens a conflict among both state and federal courts on the recurring and important question whether the FAA permits class-wide arbitration where the parties' arbitration agreement is "silent," *i.e.*, it does not expressly provide for or against class-action arbitration. As shown below, the majority of courts, including the Seventh Circuit, Eighth Circuit and Alabama Supreme Court, have held that the FAA requires enforcement of private arbitration agreements according to their terms, and that courts therefore have no authority to order class-action arbitration where an arbitration agreement does not expressly provide for class-action arbitration. These decisions, in turn, are built on the decisions of the Second, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits, which hold

that a court has no authority to order consolidated arbitration if the parties' agreement does not so provide.

In stark contrast, the minority position, adopted by the court below and other state courts, holds that if the parties' agreement is "silent" regarding class actions—because it does not expressly preclude them—a court may, in its discretion, superimpose class-action arbitration if consistent with its notions of efficiency and equity. The minority position relies, among other things, on a decision of the First Circuit that permits consolidated arbitration even if the parties' agreement does not provide for it. The minority courts invoke the proposition that the FAA leaves them free to order arbitration upon terms as they see fit, so long as they do not *directly* contravene any provision of an agreement and do not require resort to a judicial rather than arbitral forum.

A. Courts Adopting The Majority Approach Have Held That The FAA Prohibits Class-Action Or Consolidated Arbitration Where The Individual Arbitration Agreement Does Not Provide For Either.

In *Champ* v. *Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), the Seventh Circuit held that the FAA does not permit a court to order class-action arbitration where the arbitration agreement did not expressly provide for such a procedure. *Id*. at 275. Relying on this Court's decisions in *Volt*, *Dean Witter*, and *Moses H. Cone*, the *Champ* court rejected the argument that class-action arbitration was permissible so long as it "would not contradict" the terms of the agreement. *Id*. at 274-75. Rather, the Seventh Circuit concluded that the FAA reflects a responsibility "to enforce the type of arbitration to which these parties agreed, which does not include arbitration on a class basis." *Id*. at 277. In reaching that conclusion, the Seventh Circuit also rejected the argument that failure to certify a class would cause "various inefficiencies and inequities," explaining that "the Supreme Court has repeatedly emphasized that we must rigorously enforce the

parties' agreement as they wrote it, 'even if the result is "piece-meal" litigation.'" *Id*. (quoting *Dean Witter*, 470 U.S. at 221). Instead, the *Champ* Court explained that for the court to "substitute our own notion of fairness in place of the explicit terms of [the parties'] agreement would deprive them of the benefit of their bargain just as surely as if we refused to enforce their decision to arbitrate." *Id*. at 275 (internal quotation marks omitted; alteration in original).

The *Champ* court followed the rationale underlying decisions of the Second, Fifth, Sixth, Eighth, Ninth and Eleventh Circuits.[3] The *Champ* court explained that these circuits have held that "absent an express provision in the parties' arbitration agreement, the duty to rigorously enforce arbitration agreements" according to their terms barred consolidated arbitration "even where consolidation would promote the expeditious resolution of related claims." *Id*. at 274-75. The Seventh Circuit agreed with and "adopt[ed]" the reasoning of these cases, concluding that there was "no meaningful basis to distinguish between the failure to provide for consolidated arbitration and class arbitration." *Id.* at 275; see also *Iowa Grain Co.* v. *Brown*, 171 F.3d 504, 510 (7th

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[3] *See 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"); *American Centennial Ins. Co.* v. *National Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991) (holding that "a district court is without power to consolidate arbitration proceedings, over the objection of a party to the arbitration agreement, when the agreement is silent regarding consolidation"); *Baesler* v. *Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990) (holding that "absent a provision in an arbitration agreement authorizing consolidation, a district court is without power to consolidate arbitration proceedings"); *Protective Life Ins. Corp.* v. *Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989) (per curiam) (holding that "'the sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration'"); *Del E. Webb Constr.* v. *Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987) (same); *Weyerhauser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984) (same).

Cir. 1999) (explaining that "[b]ecause arbitration is based fundamentally on an agreement between the parties, the kind of class action contemplated by Fed. R. Civ. P. 23(b) is normally unavailable in arbitration") (citations omitted); *cf. Connecticut Gen. Life Ins. Co.* v. *Sun Life Assur. Co. of Can.*, 210 F.3d 771, 774 (7th Cir. 2000) ("the court has no power to order consolidation if the parties' contract does not authorize it").

In particular, the Seventh Circuit relied on the Second Circuit's decision in *United Kingdom*. *Champ*, 55 F.3d at 275. In *United Kingdom*, the Second Circuit concluded that there was no authority to "order consolidation of arbitration proceedings arising from separate agreements to arbitrate absent the parties' agreement to allow such consolidation." *Government of U.K.* v. *Boeing Co.*, 998 F.2d 68, 69 (2d Cir. 1993). The Second Circuit based that conclusion on "recent Supreme Court case law" that it determined had "undermined [its] previous conclusion that the FAA's 'liberal purposes' and the Federal Rules of Civil Procedure allow us to consolidate arbitration proceedings absent consent." *Id*. at 71; see *id*. at 72. Specifically, the Second Circuit explained that this Court's decisions in *Volt*, *Dean Witter*, and *Moses H. Cone* confirmed that the FAA mandates the enforcement of arbitration agreements in accordance with their terms, regardless of any countervailing considerations such as the court's "'own view of speed and economy.'" *Id*. at 73.[4]

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[4] *See also Glencore, Ltd.* v. *Schnitzer Steel Prods. Co.*, 189 F.3d 264, 266 (2d Cir. 1999) (applying *United Kingdom*, and the "trio of 1980's Supreme Court decisions" on which it relied, to vacate order of joint arbitration hearing); *cf. Salvano* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 647 N.E.2d 1298, 1302 (N.Y. 1995) (holding that FAA barred a trial court's use of state law to order expedited arbitration where the parties' arbitration agreement did not provide for such procedures and rejecting argument that an order to expedite was justified because the FAA "contains no provision *precluding* expedited arbitration") (emphasis added).

The Eighth Circuit follows the same reasoning as *Champ* to bar class arbitrations where the parties have not provided for them. See *Dominium Austin Partners, LLC* v. *Emerson*, 248 F.3d 720, 728 (8th Cir. 2001). In *Emerson*, the Eighth Circuit explained that "the goal of the FAA is to enforce the agreement of the parties, not to effect the most expeditious resolution of claims." *Id.* Because an arbitration agreement must be enforced "'in accordance with its terms,'" the Eighth Circuit held that the district court acted properly in "compelling appellants to submit their claims to arbitration as individuals" where their agreement made "no provision for arbitration as a class." *Id.* at 728, 729; see also *Baesler*, 900 F.2d at 1195 (holding that district court was without power to consolidate arbitration proceedings when arbitration agreements were silent on the issue); *Gammaro* v. *Thorp Consumer Discount Co.*, 828 F. Supp. 673, 674 (D. Minn. 1993) (holding that FAA required it to "give effect to the agreement of the parties," and therefore it had no authority to order class arbitration where the "arbitration agreement makes no provision for class treatment of disputes"), *appeal dismissed*, 15 F.3d 95 (8th Cir. 1994).[5]

Similarly, the Alabama Supreme Court expressly followed *Champ* in *Med Center Cars, Inc.* v. *Smith*, 727 So. 2d 9 (Ala. 1998). There, the Alabama Supreme Court applied the FAA,

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[5] *See also Johnson* v. *West Suburban Bank*, 225 F.3d 366, 377 n.4 (3d Cir. 2000) (citing *Champ* for the proposition that "it appears impossible" to pursue a class action in an arbitral forum "unless the arbitration agreement contemplates such a procedure"), *cert. denied*, 531 U.S. 1145 (2001); *Howard* v. *KPMG*, 977 F. Supp. 654, 665 n.7 (S.D.N.Y. 1997) (concluding that "a plaintiff . . . who has agreed to arbitrate all claims arising out of her employment may not avoid arbitration by pursuing class claims. Such claims must be pursued in non-class arbitration"), *aff'd*, 173 F.3d 844 (2d Cir. 1999) (table), *available at* 1999 WL 265022; *Herrington* v. *Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026, 1033-34 (S.D. Miss. 2000) (relying on *Del E. Webb*, *Champ*, and *American Centennial* to grant motion to dismiss class-action allegations and compel arbitration), *aff'd*, 265 F.3d 1059 (5th Cir. 2001) (table).

id. at 12-13, to reverse a trial court order permitting class arbitration. See *id*. at 20. The *Med Center* court concluded that "to require class-wide arbitration would alter the agreements of the parties, whose arbitration agreements do not provide for class-wide arbitration." *Id*. at 20.

Finally, other state appellate courts have concluded that class-action procedures cannot be imposed where an arbitration agreement does not provide for them. For example, in *Stein* v. *Geonerco, Inc.*, 17 P.3d 1266, 1271 (Wash. Ct. App. 2001), the Washington court relied upon *Champ* to support its decision to refuse to "compel class arbitration" where "the arbitration clause . . . is silent on class action." *Id.* In doing so, the *Stein* court noted that the "Washington Supreme Court has ruled that when an arbitration agreement is silent on consolidation, a court may not compel consolidated arbitration." *Id.* (citing *Balfour, Guthrie & Co.* v. *Commercial Metals Co.*, 607 P.2d 856, 858 (Wash. 1980)).[6]

If this case had arisen in any of these jurisdictions, there would have been no order of class-action arbitration. The arbitration agreement in this case unquestionably does not provide for class-action arbitration. As a result, the courts in these jurisdictions would have concluded that, under the FAA, they had no authority to order class-action arbitration. The outcome-determinative ruling of the court below to the contrary warrants review by this Court.

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[6] *Cf. Powertel, Inc.* v. *Bexley*, 743 So. 2d 570, 573-74, 576 (Fla. Dist. Ct. App. 1999) (relying upon *Champ* to rule that, under the FAA, court has no authority to compel class-action arbitration where the agreement did not provide for class arbitration).

B. Courts Applying The Minority Approach, Including The Court Below, Have Held That The FAA Permits Discretionary Judgments To Justify Class-Wide Or Consolidated Arbitration Even When An Arbitration Agreement Does Not Provide For Such Procedures.

As the Supreme Court of South Carolina acknowledged, there are "two different approaches" on the question presented here. Pet. App. at 11a. The court below expressly rejected the *Champ* line of cases, and instead adopted the minority position of the state courts in California and Pennsylvania (as supported by the First Circuit). Those courts hold that even if the parties to an arbitration agreement have not provided for class arbitration, the FAA does not prohibit such procedures from being superimposed on an arbitration agreement as a matter of "discretion." *Id.* at 15a.

In the decision below, the Supreme Court of South Carolina criticized *Champ* and *United Kingdom* for making "strict enforcement of the terms of the agreement" the paramount policy under the FAA. Pet. App. 13a. Instead of implementing the parties' intentions as expressed in the terms of their agreement, the court adopted precisely the reasoning that *Champ*, *United Kingdom*, *Med Center*, and other courts expressly have rejected. It held that, faced with an arbitration agreement that is "silent" regarding class arbitrations, class arbitration could be ordered, as a matter of discretion, if doing so "would serve efficiency and equity, and would not result in prejudice." *Id*. at 22a. Although the class members in each of these arbitrations were awarded at least $5,000, plus attorneys' fees, the court below expressed concern that, under the majority position, "parties with nominal individual claims, but significant collective claims, would be left with no avenue for relief," and that arbitrating numerous identical cases in multiple arbitrations would not "serve the interest of judicial economy." *Id*.

The ruling of the court below is built directly and expressly on "the approach taken by the California courts," Pet. App. 22a, particularly *Keating* v. *Superior Court*, 645 P.2d 1192 (1982), and *Blue Cross of California* v. *Superior Court*, 67 Cal. App. 4th 42 (1998). In *Keating*, the California Supreme Court held, in a case under the FAA, that state law permitted a court to order class arbitration even where an arbitration agreement did not provide for it. 645 P.2d at 1209-10. The California Supreme Court acknowledged that "a judicially ordered classwide arbitration would entail a greater degree of judicial involvement than is normally associated with arbitration." *Id.* at 1209 (explaining that court "would have to make initial determinations regarding certification and notice to the class, and . . . . to exercise a measure of external supervision in order to safeguard the rights of absent class members to adequate representation"). Nevertheless, the California Supreme Court concluded that the availability of class arbitration must be determined not based solely with regard to the parties' intent, but rather on an analysis of which procedure offers "a better, more efficient, and fairer solution." *Id.*

California appellate courts have built upon the analysis in *Keating* to hold that the FAA does not prohibit class-action procedures from being superimposed on an arbitration agreement that does not provide for class-wide arbitration. Specifically, the court in *Blue Cross* squarely held that the FAA does not "preempt[] California decisional authority authorizing classwide arbitration." 67 Cal. App. 4th at 46. The *Blue Cross* court rejected the majority position, concluding that if an order of class arbitration would not expressly contradict any terms of the arbitration agreement, a court was free to issue such an order under state law authorizing it. See *id*. at 60, 65. Whether to do so was a question for the discretion of the trial court. *Id*. at 64. The *Blue Cross* court concluded that the purpose of the FAA was simply "to abolish antiarbitration laws and to make

agreements to arbitrate specifically enforceable." *Id*. at 63. Because imposition of class-wide arbitration did not *prevent* arbitration, the court in *Blue Cross* reasoned that this approach did not violate this narrow goal of the FAA and therefore was not pre-empted. *Id*. at 64 ("[E]ven if a conflict exists between the AAA rules and classwide arbitration, the trial court may resolve the conflict. It is unlikely the AAA would refuse to abide by a court order for classwide arbitration.") (citations omitted). Indeed, the *Blue Cross* court thought its rule furthered the purpose of the FAA because it would "facilitate the enforcement of arbitration agreements by making classwide arbitration available in appropriate cases." *Id*. at 65.

The *Blue Cross* court, in rejecting *Champ* and the numerous federal circuit courts and state courts that prohibit class-action and consolidated arbitrations absent an agreement by the parties, instead followed the First Circuit's decision in *New England Energy Inc.* v. *Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988). See *Blue Cross*, 67 Cal. App. 4th at 58-60. In *New England Energy*, the First Circuit held that consolidated arbitration is permissible even where the arbitration agreement does not provide for consolidation, so long as a state law authorizes it. 855 F.2d at 3. In the First Circuit's view, the question was not whether the parties had agreed or consented to arbitration, but instead was whether consolidation was proper under the considerations required by state law. *Id*. at 7. Unless consolidation would "contradict[ ] the contractual terms," *id*. at 5, the FAA did not pre-empt a state law authorizing it, regardless of the parties' intent. The court reasoned that so long as a court order did not actually "divert a case from arbitration to court," it did not violate the FAA's purpose of ensuring that parties who agree to arbitration get an arbitration. *Id*. at 6-7. Within that minimal restriction, the First Circuit concluded that States were free to impose procedures as they saw fit: "We fail to see why a state should be prevented from enhancing the efficiency of

the arbitral process, so long as the state procedure does not directly conflict with a contractual provision." *Id*. at 7.

Finally, *Dickler* v. *Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991), *appeal denied*, 616 A.2d 984 (Pa. 1992), also adopted the minority position. There, the appellate court held that a putative class-action litigation could be maintained as a class arbitration. *Id.* at 862. The court acknowledged that the FAA provided the applicable "standard for enforcing an arbitration agreement," *id*., including the duty to enforce the parties' intentions, *id.* at 862-63, but it noted that the United States Supreme Court had not addressed the permissibility of "superimposing class-action procedures on the contract arbitration." *Id*. at 865. Like the other courts adopting the minority position, the Pennsylvania court did not limit itself to determining and applying the parties' intentions but rather invoked "the dual interest" of not only "respecting and advancing contractually agreed upon arbitration agreements," but also concerns of judicial efficiency and economy. *Id*. at 867.

C. This Case Presents An Appropriate Vehicle For Resolving This Conflict Among The Federal And State Courts.

This case presents a perfect vehicle for resolving the question whether class-action procedures may be superimposed upon an agreement that does not provide for class-action arbitration. The court below concluded that the arbitration agreements in the *Lackey* and *Bazzle* proceedings were "*silent* regarding class-wide arbitration," Pet. App. 19a, and recognized the conflicting lines of cases, *id.* It then expressly held that it would "adopt the approach taken by the California courts in *Keating* and *Blue Cross*, and hold 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*." *Id.* at 22a (emphasis added). That decision was essential to the holding below because there can be no question that the arbitral awards in this case

could not have been affirmed if the Supreme Court of South Carolina had followed the *Champ* line of cases and thus concluded that class-action arbitration cannot be imposed where an arbitration agreement is silent.

Nor can the court below avoid this Court's review by suggesting that it relied upon "independent state grounds to permit class-wide arbitration." Pet. App. 20a. That suggestion simply ignores that the issue in this case is whether the FAA preempts the South Carolina Supreme Court's application of state law. Put another way, this case presents the issue whether the FAA preempts state-law that might allow class-action procedures to be imposed on an arbitration agreement that does not provide for them. See *Volt*, 489 U.S. at 473 & n.4 (explaining that question whether FAA preempts state law is a federal question).[7] Indeed, this is a particularly good vehicle for resolving that dispute because, as the Supreme Court of South Carolina acknowledged, the arbitration agreement, by its terms, was governed by the FAA. Pet. App. 11a & n.9; compare *Dominium Partners*, 248 F.3d at 729 n.9 ("The construction of an agreement to arbitrate is governed by the FAA unless the agreement expressly provides that state law should govern."), with *Volt*, 489 U.S. at 479 ("Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA . . . .").

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[7] *See Volt*, 489 U.S. at 475-76 (reviewing whether state-court interpretation of contract subject to FAA was consistent with the "federal policy" embodied in the FAA of "enforceability, according to their terms, of private agreements to arbitrate"); *id*. at 489 U.S. at 473 n. 4 (holding that question whether state court's "interpretation of the contract" "conflicted with the FAA" conferred jurisdiction under 28 U.S.C. § 1257); *cf. Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987) (state law "that takes its meaning from the fact that a contract to arbitrate is at issue" is pre-empted by § 2 of FAA); *Doctor's Assocs.*, 517 U.S. at 685 (same).

Moreover, the court's own reasoning confirms that this case squarely presents a significant *federal* question. In reaching its decision, the court plainly did not conclude that the parties, through their agreement to arbitrate, actually intended to permit class-action arbitration. Instead, the Supreme Court of South Carolina relied upon its prior decisions that 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 (second emphasis added).[8] The court below reasoned that because these prior decisions permit consolidation of claims "where the arbitration agreement is silent"—*i.e.*, where there is no "contractual . . . directive to do so"—it also "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). In doing so, the court below explained that this "intrusion upon the contractual aspects of the relationship" was justified as a matter of state law "if it would serve efficiency and equity, and would not result in prejudice." *Id.* at 21a, 22a (internal quotation marks omitted).

But that is precisely the reasoning and analysis that was rejected by decisions such as *Champ* when they held that to "substitute our own notion of fairness in place of the explicit

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[8] Specifically, the court's reliance on *Episcopal Housing Corp.* v. *Federal Ins. Co.*, 255 S.E.2d 451 (S.C. 1979), confirms that this case directly implicates this substantial judicial conflict. In *Episcopal Housing*, the Supreme Court of South Carolina relied upon the Second Circuit's decision in *Compania Espanola de Petroleos, S.A.* v. *Nereus Shipping, S.A.*, 527 F.2d 966, 975 (2d Cir. 1975) ("*Nereus*"), to hold that consolidated arbitration may be ordered even if the arbitration agreement does not provide for consolidation. 255 S.E.2d at 451. But, as shown in Part I.A, *supra*., the Second Circuit has since held that its prior decision in *Nereus* has been "undermined" by "recent Supreme Court case law" and on the issue presented here "is no longer good law." *United Kingdom*, 998 F.2d at 71.

terms of [the parties'] agreement would deprive them of the benefit of their bargain just as surely as if we refused to enforce their decision to arbitrate." 55 F.3d at 275 (internal quotation marks omitted; alteration in original); see also *supra* at 16 n.3 (collecting cases). In this regard, the South Carolina Supreme Court's reasoning and holding cannot be reconciled with the decisions of this Court which provide that the FAA leaves no room for judicial discretion in enforcement of agreements to arbitrate. See *Dean Witter*, 470 U.S. at 218-21; see *First Options*, 514 U.S. at 947; *Moses H. Cone*, 460 U.S. at 20.[9]

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There is a well developed and persistent conflict among the federal courts of appeals and state courts regarding the requirements of the FAA. On the one hand, the *Champ* line of cases makes clear that class-actions and consolidation cannot be imposed upon an arbitration agreement that does not expressly provide for them. Instead, these courts make clear that the FAA requires such agreements to be enforced rigorously in accordance with their terms. On the other hand, the *Keating* and *Blue Cross* line of cases (and the decision in this case) hold that the FAA requires only that arbitration agreements be enforced, but does not prohibit class-action or consolidation if such a process would, in the court's view, enhance the efficiency and economy of the arbitration. The decision below squarely presents this conflict, and it provides an ideal candidate for resolving this dispute among the lower federal courts and state courts.

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[9] The Supreme Court of South Carolina simply was wrong in suggesting that a trial court's decision whether, and how, to enforce an arbitration agreement is "within the court's discretion." Pet. App. 22a. This Court's decision in *Dean Witter* explained that the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which the arbitration agreement has been signed." 470 U.S. at 218.

II. THE ISSUE WHETHER THE FEDERAL ARBITRATION ACT PERMITS CLASS-ACTION PROCEDURES TO BE IMPOSED ON A "SILENT" ARBITRATION AGREEMENT PRESENTS AN IMPORTANT AND RECURRING ISSUE THAT WARRANTS THIS COURT'S REVIEW.

The question presented here is one of great practical importance. The division of authority has created great uncertainty for parties subject to arbitration agreements. Indeed, as the court below recognized, arbitration agreements often appear in form contracts that are employed or apply in more than one State. As a result, a uniform national rule is essential to ensure that similar cases are resolved in the same way regardless of where the parties reside. Indeed, even cases that have adopted the minority approach recognize that the FAA is designed to "prevent state and federal courts from reaching different results about the validity and enforceability of arbitration agreements in similar cases." *Blue Cross*, 67 Cal. App. 4th at 52.

In addition to the decisions discussed above that have expressly recognized this conflict, other courts have recognized and acknowledged this division of authority and its importance. For example, the Wisconsin Court of Appeals recently certified to its Supreme Court the question of class arbitration under the FAA, noting that "other state and federal jurisdictions have come to opposite conclusions" and that the question is of "substantial importance." *Eastman* v. *Conseco Fin. Servicing Corp.*, No. 01-1743, 2002 WL 1061856, at *3, *4 (Wis. Ct. App., May 29, 2002). Commentators agree that the availability of class-action and consolidated arbitration is "the subject of much litigation." Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, & Clarifying Arbitration Law*, 2001, J. Disp. Resol. 1, 15 (noting that issue of "class-action arbitration[]" is "hotly debated"); see also Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. Ill. L. Rev. 695, 711 nn.128,

129 (noting conflict among courts on availability of class-action arbitration and consolidated arbitration).

The importance of a uniform rule is magnified given the division of authority between forums in the same jurisdiction such as Pennsylvania and California. Pennsylvania state courts, relying on *Dickler*, permit class arbitration in the same circumstances in which Pennsylvania federal courts, relying on the Third Circuit's decision in *Johnson*, would prohibit it. Similarly, California state courts will permit both consolidated and class arbitration in the same circumstances in which California federal courts, following the Ninth Circuit's decision in *Weyerhauser*, would prohibit it. Indeed, although *Weyerhauser* involved consolidated arbitration, federal district courts in California rely on that case, *Champ*, and other cases in the majority to reject class-wide arbitration in circumstances where California state courts might permit it.[10]

This conflict is precisely what this Court sought to avoid in *Southland* because a lack of uniformity, particularly within the same State, "would encourage and reward forum shopping." 465 U.S. at 15. The Court rightly was "unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make that right dependent for its enforcement on the particular forum in which it is asserted." *Id*. For the same reason, review is necessary here.

Furthermore, the question presented implicates a broader, and equally critical, question whether it is permissible, absent the parties' expressed intent, to impose various procedures onto arbitration proceedings. The courts that have adopted

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[10] *See Bischoff* v. *DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1108-09 (C.D. Cal. 2002); *Gray* v. *Conseco, Inc.*, No. SACV000322, 2001 WL 1081347, at *2-*3 (C.D. Cal., Sept. 6, 2001); *McCarthy* v. *Providential Corp.*, No. C 94-0627 FMS, 1994 WL 387852, at *8 (N.D. Cal., July 19, 1994).

the minority view hold that, in the interests of judicial economy and efficiency, various procedures may be imposed upon the parties' agreement to arbitrate so long as those procedures do not *directly conflict* with the arbitration agreement. This rule not only grants virtually free reign to tread on parties' intentions but also, as a result, impairs the ability of parties to enter into workable arbitration agreements, by requiring them to become voluminous to preclude every imaginable supplement. Indeed, the First Circuit in *New England Energy* reasoned that *any* procedures could be imposed on an arbitration agreement so long as they preserved the ill-defined "informal operational procedures" that, in that court's view, are the only goal of private arbitration. 855 F.2d at 6 n.5.

This Court has repeatedly acknowledged that the FAA's requirement that arbitration agreements be enforced according to their terms is at the core of the FAA. *Volt* itself is a prime example of the Court applying this core FAA requirement in reviewing a decision of the California Court of Appeal. Specifically, the Court in *Volt* explained that ensuring enforcement of arbitration agreements according to their terms was the "federal policy" of the FAA, 489 U.S. at 476, "Congress' principal purpose" in enacting the FAA, *id*. at 478, and "the FAA's primary purpose," *id*. at 479. Similarly, in *Doctor's Associates, Inc.* v. *Casarotto*, the Court reviewed a decision of the Montana Supreme Court and stated 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. 681, 688 (1996) (alterations in original) (quoting *Volt*, 489 U.S. at 479). See also *Mastrobuono*, 514 U.S. at 53-54 ("[T]he central purpose" of the FAA is "to ensure 'that private agreements to arbitrate are enforced according to their terms'") (quoting *Volt*, 489 U.S. at 479); *accord id*. at 57; *First Options*, 514 U.S. at 947 (same).[11]

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[11] Because the parties' agreement in this case, by its terms, provided that it would be governed by the FAA, the Court need not determine

In short, there can be no doubt that the decision below presents a critical issue of great practical importance under the FAA, and that the acknowledged division on that question warrants further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 23, 2002

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whether the substantive law reflected most clearly in § 4 of the FAA, 9 U.S.C. § 4, would apply by force of law to state courts. *Cf.* Pet. App. 19a-20a. In any event, as discussed above, this Court's cases make clear that the obligation to enforce arbitration agreements in accordance with their terms is a core aspect of the FAA that applies in cases filed in both federal and state court.