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**

## REPLY BRIEF OF PETITIONER

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## REPLY BRIEF OF PETITIONERS

In its opening brief, Green Tree demonstrated that the South Carolina Supreme Court's decision to impose class-wide arbitration upon the parties' agreement to arbitrate "without any contractual or statutory directive to do so," Pet. App. 21a, could not be reconciled with the Federal Arbitration Act's ("FAA's") requirement that state and federal courts enforce arbitration agreements "according to their terms," *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 476 (1989); *accord Mastrobuono* v. *Shearson Lehman Hutton*, *Inc.*, 514 U.S. 52, 54 (1995). Further, the state court's ruling that an "'intrusion upon the contractual aspects of the relationship'" was justified by its own views of "efficiency," "equity" and "judicial economy," Pet. App. 21a-22a, was contrary to the core mandate of the FAA "rigorously" to enforce agreements to arbitrate, *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). Finally, Green Tree demonstrated that the improper imposition of class arbitration onto the parties' agreement infected the arbitral proceedings and, in all events, that the expansion of the arbitration agreements in the bilateral Bazzle and Lackey contracts to encompass claims by thousands of third parties arising from their separate contracts was well beyond the arbitrator's power. See 9 U.S.C. § 10(a)(4); *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 294 (2002); *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 946 (1995).

Respondents call none of these conclusions into question. As shown below, their arguments fail because, under the FAA, a court may not impose class-arbitration or any other judicial mandate onto a private arbitration agreement without a contractual directive to do so. Respondents are correct that "'there is no federal [policy] favoring arbitration under a certain set of procedural rules,'" Resp. Br. 21 (quoting *Volt*, 489 U.S. at 476), but they omit that the Court in *Volt* explained, in the same sentence, that there is a "federal

policy" under the FAA "to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt*, 489 U.S. at 476; see Part I, *infra*. Moreover, because arbitration under the FAA is a matter of "consent and not coercion," an arbitrator exceeds his delegated powers, 9 U.S.C. § 10(a)(4), if he purports to resolve – through class arbitration, consolidation or otherwise – the claims of thousands of other individuals without a contractual directive to do so. Simply put, an arbitrator may not employ procedural devices that extend his power beyond what the contract specifies. See Part II, *infra.*

Before addressing Respondents' arguments in full, it is necessary to clarify the record in a number of respects. First, Respondents principally argue that the court below "applied ordinary state contract doctrine to hold that the arbitration clause . . . permits class-wide arbitration in the arbitrator's discretion as authorized by South Carolina law." Resp. Br. 17-18. That is pure fantasy. The South Carolina Supreme Court did *not* hold that the parties actually intended to authorize class arbitration. Rather, it ruled, that by construing contract language against Green Tree, Pet. App. 19a, the arbitration agreement became "silent" regarding class arbitration, *id.* at 21a, 22a. Thereafter, it relied upon its prior decision 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. Based upon that extra-contractual principle, the court concluded that it "would permit class-wide arbitration" in this case. *Id*.

Under South Carolina law, generally applicable contract principles dictate that "'[w]ords cannot be read into a contract which import intent wholly unexpressed when the contract was executed.'" *Gilstrap* v. *Culpepper*, 320 S.E.2d 445, 447 (S.C. 1984). Recognizing its departure from general contract law, the court below acknowledged that imposition of class arbitration would result in an "intrusion upon the contractual aspects of the relationship," but nevertheless "h[eld] 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. at 22a. That ruling "do[es] violence to the policies behind by the FAA" by preventing private parties from "structur[ing] their arbitration agreements as they see fit" and allowing courts unilaterally to modify the "contractual rights and expectations of the parties." *Volt*, 489 U.S. at 479.

Second, under the FAA, neither a court nor an arbitrator may impose obligations on an arbitration proceeding without a contractual directive to do so. Unlike litigation, which is based upon the coercive power of the state, arbitration is based exclusively upon private contract. *Waffle House, Inc.*, 534 U.S. at 294; *First Options*, 514 U.S. at 943. Thus, although court litigation of a party's claims may be pursued through a class action without contractual authorization, Resp. Br. 24-25 & n.10, in contrast, class arbitration may *not* be imposed without the express contractual agreement of the parties in their agreement to arbitrate. Indeed, the FAA provides that arbitral awards should be set aside where the arbitrators "exceeded their powers." 9 U.S.C. § 10(a)(4). Where, as here, an arbitration agreement does not authorize an arbitrator to resolve claims by third parties, the arbitrator may not extend his power through class arbitration.

Finally, in an apparent effort to distract attention from the legal issues actually presented, Respondents (i) attempt to portray Green Tree as a bad actor that knowingly violated settled South Carolina law, (ii) imply that Green Tree's conduct caused actual damage to thousands of South Carolina residents, and (iii) argue that the statutory provision at issue here can be enforced effectively only through a class-action mechanism. Resp. Br. 2, 5-8, 19-20. These contentions do not withstand scrutiny. Respondents ignore that the basis for the arbitrator's finding of liability was "the ruling of the South Carolina Supreme Court in *Tilley* v. *Pacesetter*," Pet. App. 69a, 91a, a decision handed down in 1998, years *after*

the loans at issue. Similarly, their assertion that Green Tree had "[y]ears before" been "held liable . . . for the same violations at issue here" Resp. Br. 2, is unsupported and unsupportable. Further, Respondents' baseless claims of "predatory lending," Resp. Br. 2, "usurious interest rates," or "other unfair contract terms," *id.* at 5, also are unsupported and belied by their failure even to attempt to show "actual damages," Pet. App. 69a, 96a.[1] Nor can Respondents validly contend that class arbitration was necessary to vindicate or enforce this statutory provision. See Pet. Br. 33-34. The South Carolina legislature has barred class actions based upon the statute at issue while authorizing the recovery of attorneys' fees and statutory damages without a showing of actual damages, see S.C. Code Ann. § 37-10-105(a), and the conduct of parties such as Green Tree remains subject to oversight by regulatory agencies, *e.g.*, *id.* § 37-6-101 *et seq*.

## I. IMPOSITION OF CLASS ARBITRATION "WITHOUT ANY CONTRACTUAL OR STATUTORY DIRECTIVE TO DO SO" VIOLATES THE FAA'S REQUIREMENT THAT ARBITRATION AGREEMENTS BE ENFORCED "IN ACCORDANCE WITH THEIR TERMS."

The judgment below violates the FAA because the South Carolina Supreme Court failed to apply "ordinary state contract doctrine," Resp. Br. 17, and instead approved the imposition of class arbitration onto the parties' agreement without any contractual directive to do so, Pet. App. 21a. Contrary to Respondents' argument, the FAA protects not only the parties' "choice to arbitrate rather than litigate," Resp. Br. 23, but also requires that courts "give effect to the

[1] Respondents' claim that "[m]any purchasers did not understand they were securing the credit transaction with a mortgage on their home," Resp. Br. 7, cannot be reconciled with, for example, the Bazzles' Contract, which stated, "You also agree to give us a separate mortgage" "on the real property described below," J.A. 33, and listed, the street address, city, state, and zip code of the mortgaged property, *id*.

contractual rights and expectations of the parties," *Volt*, 489 U.S. at 479. Continued enforcement of that long-standing mandate would not, as Respondents predict, result in "wholesale federalization" of "arbitration-contract interpretation," Resp. Br. 18, but would mean that a court may not, as here, construe an "[arbitration] agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." *Perry* v. *Thomas*, 482 U.S. 483, 493 n.9 (1987). The South Carolina Supreme Court's hostility to enforcing the arbitration agreements actually entered into by private parties according to their terms warrants reversal of the judgment below.

### A. This Court's Cases Make Clear That The FAA Requires That Agreements To Arbitrate Be Enforced "In Accordance With Their Terms."

Respondents' suggestion that the FAA protects only "the parties' choice to arbitrate rather than litigate," Resp. Br. 23, cannot be squared with this Court's interpretation of Section 2 of the FAA. As this Court has explained, Section 2 puts arbitration "'agreements upon the same footing as other contracts,'" *Allied-Bruce Terminex Cos*. v. *Dobson*, 513 U.S. 265, 271 (1995), and "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms," *Volt*, 489 U.S. at 478; see also *Mastrobuono*, 514 U.S. at 53-54 (same).

As Green Tree showed previously, Pet. Br. 21-23, 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." *First Options*, 514 U.S. at 947 (internal quotation marks and citations omitted). These requirements are incompatible with the suggestion that courts are free to rewrite agreements to arbitrate without regard to the parties' contractual directives so long as, in the end, they permit arbitration. That suggestion cannot be

reconciled with the FAA's basic purpose: "'to put arbitration provisions on the same footing as a contract's other terms.'" *Allied-Bruce*, 513 U.S. at 275.

Nor does the FAA insulate from review state-court determinations regarding the proper scope of arbitration agreements. Resp. Br. 26 (stating that FAA "trusts" courts' interpretation of arbitration agreements). In *Volt*, for instance, this Court reviewed whether a state court's interpretation of an arbitration contract conflicted with the FAA, 489 U.S. at 476, and upheld that court's interpretation because it had, as the FAA requires, enforced the agreement in accordance with its terms, *id.* at 473 n.4, 476. Similarly, in *Perry*, this Court explained that a state court could not "construe [an arbitration] agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." 482 U.S. at 493 n.9. Finally, in *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681 (1996), the Court reiterated that Section 2 of the FAA "precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Id.* at 687.

The continued application of these principles in no way threatens a "wholesale federalization of matters of state law." Resp. Br. 18. Rather, the FAA ensures only that courts are not hostile to arbitration agreements and that they steadfastly enforce the intentions of the parties as written. *E.g.*, *Scherk* v. *Alberto Culver Co.*, 417 U.S. 506, 511 (1974) (FAA requires that courts "place arbitration agreements 'upon the same footing as other contracts'") (quoting H.R. Rep. No. 68-91, at 1, 2 (1924)); see *Howsam* v. *Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 593 (2002) (Thomas, J., concurring in judgment). In contrast, adoption of Respondents' approach would constitute a radical departure from settled law that would allow courts to resurrect the same "judicial hostility" to arbitration by conditioning enforcement of the parties' agreement to arbitrate on judicial imposition of terms dictated

not by the parties' consent, but by a court's own notions of "efficiency," equity," and "judicial economy." Pet. App. 22a.

This Court has explained that the FAA permits 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)). Under Respondents' view, a party's decision to choose arbitration instead of litigation would be an empty one because a court freely could rewrite the terms of that private arbitration agreement based upon its own policy preferences so long as the court ultimately required arbitration.

### B. The Decision Below Violated The FAA By Imposing Class Arbitration On The Parties' Agreement Without Any "Contractual Directive To Do So."

The decision below violated the FAA because the South Carolina Supreme Court ordered class arbitration even though it acknowledged there was no "contractual or statutory directive to do so." Pet. App. 21a. That ruling is flatly contrary to general principles of contract law and therefore violates the FAA. Respondents utterly abandon the holding of the court below and now suggest that the arbitration agreements "can be read affirmatively to authorize [class arbitration]." Resp. Br. 31; *id.* at 31-34. Their arguments should be rejected.

1. As Respondents recognize elsewhere, "the state's high court is the ultimate arbiter of the meaning of the contract terms." *Id.* at 28. Here, South Carolina's high court did not conclude that the parties had intended to authorize class-wide arbitration; instead, it determined that the arbitration agreements were "silent" regarding "class-wide arbitration." Pet. App. 21a. That predicate determination was essential to the Court's ultimate ruling: "we 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.[2]

After concluding that the parties' agreement was "silent" on the issue of class arbitration, the court applied its decision in *Episcopal Housing Corp.* v. *Federal Insurance Co.*, 255 S.E.2d 451, 452 (S.C. 1979), where it had "authorized consolidation of the claims" in an arbitration "absent contractual or statutory authority." Pet. App. 18a. Based upon *Episcopal Housing*, the court imposed class arbitration here "without any contractual or statutory directive to do so." *Id.* at 21a. Under that analysis, courts in South Carolina can modify and rewrite private arbitration agreements to impose whatever requirements they deem appropriate so long as they conclude that the arbitration agreement does not expressly foreclose that result.

The parties did not agree to be bound by any arbitration-specific provision of South Carolina law; rather, they expressly agreed that their arbitration agreements would be "governed by the [FAA]," Pet. App. 110a, which this Court has held requires enforcement of such agreements "according to their terms," *e.g.*, *Volt*, 489 U.S. at 476; *Mastrobuono*, 514 U.S. at 54. Allowing a court "to read [class arbitration] into the parties' agreement would 'disrupt[] the negotiated risk/benefit allocation and direct[] [the parties] to proceed with a different sort of arbitration.'" *Champ* v. *Siegel*

[2] As Respondents note, Resp. Br. 30 (citing Pet. App. 19a), the court below concluded that a portion of the "clause providing for arbitration of 'disputes, claims, or controversies arising from or relating to this contract, or the relationships which result from *this contract*,'" "creates an ambiguity," and "construed" that ambiguity "against the drafting party." Pet. App. 19a. Although the court never identified the "ambiguity," the upshot of its analysis was *not* that the parties agreed or authorized class-wide arbitration, but that "Green Tree's arbitration clause was *silent* regarding class-wide arbitration." *Id.* This was necessary to the court's holding that "class-wide arbitration may be ordered when the arbitration agreement is silent." Pet. App. 22a.

*Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (first alteration added) (quoting *New England Energy, Inc.* v. *Keystone Shipping Co.*, 855 F.2d 1, 10 (1st Cir. 1988) (Selya, J., dissenting)).

By no stretch of the imagination does the South Carolina Supreme Court's ruling constitute a "routine application of ordinary state contract law principles." Resp. Br. 19. Under generally applicable contract law in South Carolina, as elsewhere, "'[w]ords cannot be read into a contract which import intent wholly unexpressed when the contract was executed.'" *Gilstrap*, 320 S.E.2d at 447 (holding that interest charge could not be imposed on contract that was "silent as to an interest rate") (internal quotation marks omitted); see *Parker* v. *Byrd*, 420 S.E.2d 850, 852 (S.C. 1992) (reiterating same principle of general contract law); *Blakeley* v. *Rabon*, 221 S.E.2d 767, 769 (S.C. 1976) (same); *McPherson* v. *J.E. Sirrine & Co.*, 33 S.E.2d 501, 509-10 (S.C. 1945) (same).[3] Put another way, in South Carolina, as elsewhere, courts "are without authority to alter a contract by construction or to make new contracts for the parties." *C.A.N. Enters., Inc.* v. *South Carolina Health & Human Servs. Fin. Comm'n*, 373 S.E.2d 584, 587 (S.C. 1988); see *A.T. Conner* v. *Alvarez*, 328 S.E.2d 334, 336 (S.C. 1985) (explaining that court's "'duty is limited to the interpretation of the contract made by the parties themselves'"); *Gilstrap*, 320 S.E.2d at 447 (same).

The South Carolina Supreme Court's determination that a "state court may order consolidation" and class-wide arbitration "of claims subject to mandatory arbitration without

[3] *Accord* 11 R.A. Lord, *Williston on Contracts* § 31.5, at 299 (4th ed. 1999) ("court must enforce [the contract] as drafted by the parties, according to the terms employed, and may not make a new contract for the parties or rewrite their contract while purporting to interpret or construe it") (footnotes omitted); 5 M.N. Kniffin, *Corbin on Contracts* § 24.19, at 184 (rev. ed. 1998) ("courts do not make a contract for the parties and . . . the parties must be content to perform and to receive performance in accordance with whatever agreement they themselves chose to form") (internal quotation marks and citation omitted).

any contractual or statutory authority to do so," Pet. App. 21a, is directly at odds with generally applicable principles of contract law. *E.g.*, *Gilstrap*, 320 S.E.2d at 447; *C.A.N. Enters., Inc*, 373 S.E.2d at 586. That court's abandonment of general principles of contract law in favor of a "different" rule for the construction of arbitration agreements, *Perry*, 482 U.S. at 493 n.9, is contrary to the FAA, which requires that arbitration be put "'upon the same footing as other contracts,'" *Allied-Bruce*, 513 U.S. at 281 (quoting *Volt*, 489 U.S. at 474). Indeed, reversal of the judgment below is appropriate even under the approach advocated by Respondents, who concede that "the FAA displaces state-law principles that *target* arbitration agreements for special or different treatment." Resp. Br. 23-24; see also *Perry*, 482 U.S. at 493 n.9.

2. Unable to defend the decision below on its terms, somewhat ironically, Respondents attempt to substitute their own interpretation of the agreement for that of the South Carolina Supreme Court, arguing that the agreement "can be read affirmatively to authorize [class arbitration]." Resp. Br. 31-36. Respondents, however, previously informed this Court that the "arbitration agreement" does not "speak[] to the question of class arbitrations." Opp. at 12. Moreover, Respondents argue elsewhere that this Court has no authority to review the South Carolina Supreme Court's "reading of the Agreement." Resp. at 26. In this case, the South Carolina Supreme Court concluded that the arbitration agreements were "silent" on the issue of class-wide arbitration and relied upon arbitration-specific precedent to impose additional terms and obligations that the court below believed furthered "judicial economy." Pet. App. 22a.

Here, there can be no question that the parties did not authorize class-wide arbitration. To the contrary, the agreements by their terms authorize only bilateral arbitration by two contractually defined entities, "you" and "us," and dictate the manner in which those parties would choose the

arbitrator who would resolve their disputes. J.A. 33, 35. The notion that the "clause referring to 'arbitration by one arbitrator selected by us with consent of you,'" Resp. Br. at 35, authorizes the arbitrator to resolve claims advanced by thousands of parties other than "you" and "us" is absurd. See *First Options*, 514 U.S. at 942, 946 (holding that arbitration contract could not bind non-parties).

Arbitration is a contractual right. Under general principles of South Carolina contract law, one party (*e.g.*, the Bazzles or Lackey) cannot enforce the arbitration rights of other parties (*e.g.*, the unnamed class representatives) without a contractual directive to do so. Contrary to their arguments, Resp. Br. 38-39, the generally applicable rule of contract law is that "an individual who is not a party to a contract may not enforce it." *Stokes* v. *Westinghouse Savannah River Co.*, 206 F.3d 420, 429 (4th Cir. 2000) (applying South Carolina law); *Touchberry* v. *City of Florence*, 367 S.E.2d 149, 150 (S.C. 1988) (setting forth background "presumption" that "contract is not enforceable" by third parties); *Goode* v. *St. Stephens United Methodist Church*, 494 S.E.2d 827, 833 (S.C. Ct. App. 1997) ("a third party not in privity of contract with the contracting parties has no right to enforce a contract"). Thus, absent contractual authorization, neither the Bazzles nor Lackey would have the right to enforce the arbitration rights reflected in agreements to which they were not parties. Recognizing as much, Respondents argue that, "in the *context* of a class action, the reference to 'you' may be read as plural." Resp. Br. 36 n.17 (emphasis added). But this argument assumes that the parties agreed to class arbitration, and that simply begs the question. The proper "context" here is the contract entered into by the parties, which defined "'You'" to "mean[] each Buyer above," and defined "'us'" to "mean[] the Seller above, its successors and assigns." J.A. 33, 35.

Respondents' own efforts at contract interpretation fare no better. Their claim that the parties' "choice-of-law clause"

authorized class arbitration because South Carolina law "permits class arbitration in the absence of contract language specifically forbidding it," Resp. Br. 2, 3, 32, constitutes a blatant bootstrap argument. The only support for this "principle" of South Carolina law is the decision under review. Unlike *Volt*, inclusion of a general choice-of-law provision governing the substantive aspects of the contract could not mean that the parties, through silence, agreed to class-wide arbitration where the South Carolina Supreme Court explained that it had never before "considered whether or not class-wide arbitration may be ordered when the arbitration agreement is silent." Pet. App. 17a. To the contrary, the precedent cited by Respondents, Resp. Br. 32, makes clear that in South Carolina "the inclusion of a governing [state] law provision in an arbitration agreement . . . does not necessarily require the application of state, rather than federal, arbitration law," *Zabinski* v. *Bright Acres Assocs.*, 553 S.E.2d 110, 117 (S.C. 2001). This Court reached the same conclusion in *Mastrobuono*, 514 U.S. at 64, holding that a general "choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration." *Id.* In all events, Respondents' argument, Resp. Br. 32 & n.16, simply ignores that the court below determined that the "arbitration agreements expressly state that they . . . are governed by the FAA." Pet. App. 11a.[4]

Respondents' attempt to save the judgment below by plucking snippets from the arbitration clause – Resp. 32-33 ("all powers," "all disputes," and "'equitable' powers") – without regard to the principle that they must be read in connection with the contract as a whole cannot be justified under general principles of contract construction. As this Court has explained, a contract "should be read to give effect to all its provis-

[4] Respondents' suggestion that the parties intended to be governed *only* by the definitional section of the FAA, but not by its remaining provisions, Resp. Br. 42, is specious and ignores the ruling of the court below that the Bazzles' and Lackey's arbitration agreements were to be "governed by the FAA." Pet. App. 11a & n.9.

ions and to render them consistent with each other." *Mastrobuono*, 514 U.S. at 63; see *Myrtle Beach Lumber Co.* v. *Willoughby*, 274 S.E.2d 423, 425 (S.C. 1981) ("[i]n construing an agreement, consideration should be given to all of the verbiage"). Here, the language relied upon by Respondents cannot be considered in isolation from the fact that the arbitrator who is to wield contractually granted "powers" to resolve "all disputes" was chosen by the specific parties to the contracts to resolve only their disputes. Pet. App. 110a.

Respondents' final contention that the parties authorized all procedures that were not expressly foreclosed, Resp. Br. 33-34, simply underscores the hostility to private bilateral agreements to arbitrate inherent in their position. Under Respondents' reasoning, the South Carolina Supreme Court would have been entitled to dictate the precise conduct of the parties' arbitration unless the parties, in advance, specifically identified and expressly rejected every such possible contingency. Absent a lengthy recitation of the precise conduct of arbitration, the South Carolina Supreme Court would have carte blanche to impose the entirety of the South Carolina Rules of Civil Procedure onto the parties' agreement and thereby recreate, in an arbitral setting, state-court litigation. That is not an "ordinary principle of contract" law, but is instead nothing less than a power to rewrite the parties' arbitration agreements in a manner squarely foreclosed by the FAA. See *Perry*, 482 U.S. at 492; *Allied-Bruce*, 513 U.S. at 271.

## II. ARBITRATOR DISCRETION CANNOT RESCUE THE DECISION BELOW BECAUSE CLASS ARBITRATION WAS IMPOSED ON THE ARBITRATOR, WHO HAD NO DISCRETION TO EXCEED HIS CONTRACTUAL POWERS.

Respondents cannot dispute that "'[a]rbitration under the [FAA] is a matter of consent, not coercion," *Waffle House*, 534 U.S. at 294 (quoting *Volt*, 489 U.S. at 479) (second alteration in original), and that an arbitration contract "cannot

bind a nonparty," *id.* These principles, coupled with the South Carolina Supreme Court's determination that the arbitration agreements were "silent" regarding class arbitration, Pet. App. 22a, compel the conclusion that class arbitration could not be imposed by the courts or by the arbitrator. See 9 U.S.C. § 10(a)(4). Respondents seek to avoid that result by arguing that the FAA nevertheless permitted the arbitrator to determine whether to conduct a class arbitration, and that such a determination is subject to deferential judicial review. See Resp. Br. 20-22, 43-45. These arguments mischaracterize the proceedings below and misstate the applicable law.

### A. The Imposition Of Class Arbitration Was Not A Discretionary Exercise Of Arbitral Powers Under The Arbitration Agreements.

As Green Tree showed previously, Pet. Br. 34-37, Respondents are flatly mistaken in contending that "the arbitrator decided to proceed on a class-wide basis in both cases." Resp. Br. 2; see *id*. at 43. In doing so, Respondents repeatedly conflate the issue whether the arbitration agreements authorized class arbitration, and the decision to certify a class assuming there was such authority. *Id.* at 44 n.23, 43-44. Only the abritrator's power to conduct class arbitration is at issue here.

On that issue, with regard to the *Bazzle* proceeding, Respondents cannot and do not dispute that the trial court, before referring the case to arbitration, ordered that it proceed as a class, see *id.* at 11-12, and dictated that class-arbitration "proceed on an opt-out basis," Pet. App. 3a-4a. Respondents seek to undermine these facts by quoting a portion of the arbitrator's opinion from the *Lackey* proceeding and representing, mistakenly, that these statements were made in the *Bazzle* proceeding. Resp. Br. at 43 (quoting Pet. App. 84a). Simply put, the arbitral award in the Bazzle proceeding must be set aside because the trial court imposed class

arbitration onto the parties' agreement in a manner foreclosed by the FAA.

Similarly, Green Tree previously showed that the *Bazzle* court's ruling also infected the conduct of the *Lackey* proceeding. Pet. Br. 36-37. There can be no doubt that the erroneous decision of the trial court in *Bazzle* affected the *Lackey* arbitration. As Respondents themselves put it in their Motion to Confirm the arbitral award in *Bazzle*, any decision by the arbitrator in *Lackey* that "the case could proceed as a class action" was simply "a reaffirmation and/or adoption of [the *Bazzle*] Court's prior determination." J.A. 31-32 n.2.

Further, Respondents offer no authority in response to Green Tree's showing of judicial estoppel and instead admit that they "did emphasize [to the *Lackey* arbitrator] that the court had itself earlier approved class certification in identical circumstances in *Bazzle*." Resp. Br. 44 n.23. Indeed, the case for judicial estoppel is particularly strong here because Respondents argued to the *Lackey* arbitrator that "the law of this case compels class arbitration," R. App. 518, and the *Lackey* arbitrator, who expressly relied upon the "briefs of the plaintiffs," ordered class arbitration, *id.* at 73. Thus, principles of judicial estoppel prevent Respondents, who "'prevail[ed] in one phase of [this] case on an argument'" to "'rely[] on a contradictory argument to prevail in another phase.'" *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001).

### B. The Arbitrator's Contractual Power To Bind The Bazzles And Lackey Did Not Extend To The Parties To Thousands Of Other Contracts.

In all events, the decision below affirming the arbitral awards still must be reversed because the arbitrator had no power under the Bazzles' and Lackey's contracts to bind thousands of other individuals who were not parties to those agreements. See 9 U.S.C § 10(a)(4). Confirming that the FAA prohibits an arbitrator from arrogating powers that the

parties have not granted in their arbitration agreement would not, as Respondents warn, cause arbitrations to "grind to a halt." Resp. Br. 30. Rather, ensuring that arbitrators do not exceed the scope of the powers delegated to them promotes arbitration by securing "the contractual rights and expectations of the parties." *Volt*, 489 U.S. at 479.

1. In arguing that Green Tree seeks to create a "federal presumption against class arbitration," Resp. Br. at 37 (capitalization omitted), *id.* at 24-25 & n.10, Respondents ignore the sharp distinction between litigation, which is a matter of coercion, and arbitration, which derives from the parties' consent. Under the FAA, arbitration is "simply a matter of contract between the parties; . . . a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration." *First Options*, 514 U.S. at 943; see *Howsam*, 123 S. Ct. at 591 ("[A]rbitration 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") (alteration in original; internal quotation marks omitted). Unlike courts of general jurisdiction, "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); *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 547 (1964) ("The duty to arbitrate [is] of contractual origin . . . ."). And, unlike a court, an arbitrator "is not a public tribunal imposed upon the parties by superior authority" and "has no general charter to administer justice for a community which transcends the parties," but is instead "part of a system of self-government created by and confined to the parties." *United Steelworkers of Am.* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960) (internal quotation marks omitted).

Because "'[a]rbitration under the [Federal Arbitration Act] is a matter of consent, not coercion,'" *Waffle House*, 534 U.S. at 294, the issue is not, as Respondents would have it,

whether the agreements had "limiting language" excluding such authority or constraining the arbitrator, Resp. Br. 35, or a "presumption" against class-wide arbitration, *id.* at 40; see also *id.* at 3-4, 20, 33-34. Rather, the issue under the FAA is whether the parties, through their agreements to arbitrate, *authorized* the arbitrator to conduct class-wide arbitration that would resolve not only the claims of the parties who initiated arbitration, but also the claims of thousands of other individuals. See 9 U.S.C. § 10(a)(4); *First Options*, 514 U.S. at 943. That legal principal is controlling here because the South Carolina Supreme Court explained – before it extra-contractually modified the agreement in a manner foreclosed by the FAA, see *supra* Part I – that the arbitration agreement did not authorize, but was "silent" as to the issue of class arbitration. Pet. App. 22a.

Similarly, as this Court explained in *Waffle House*, "[i]t goes without saying that a contract cannot bind a nonparty." 534 U.S. at 294. Here, there can be no question that arbitration proceedings at issue in this case were conducted pursuant to arbitration agreements contained in the Bazzles and Lackey Contracts, and that the thousands of other unnamed class members whose claims were resolved were not parties to those contracts. Indeed, as discussed above, general principles of contract law dictate that, absent contractual authorization, the Bazzles and Lackey had no right to enforce the contractual arbitration provisions of third parties. See *Stokes*, 206 F.3d at 429 ("an individual who is not a party to a contract may not enforce it"); *accord Touchberry*, 367 S.E.2d at 150; *Goode*, 494 S.E.2d at 833.

Respondents insist that *Waffle House* is distinguishable because "all the unnamed class members did agree to final and binding arbitration on the same terms as did the class representatives, and *acquiesced to the arbitration*." Resp. Br. 48 (emphasis added). In doing so, Respondents contend that "[t]he unnamed class members' right under the Agreement to withhold their consent to Green Tree's selected arbitrator was

preserved by the right to opt out of the plaintiff classes," *id.* at 36 n.17, and that the rights of these unnamed class members "were carefully preserved" by the arbitrator. *Id.* at 47.

These arguments are wrong for two reasons. First, as to the unnamed class members, Respondents cannot contend that, through silence and inaction, they actually provided the affirmative "consent" that is a prerequisite for an arbitrator to resolve their disputes under the arbitration agreement. Pet. App. 110a (dictating that arbitrator must be "selected by us with consent of you"). Indeed, if the unnamed class members had actually provided consent, there would have been no need to make provision in the arbitral awards for "funds awarded to class members who cannot be located." Pet. App. 79a, 107a.

Second, Respondents disregard the rights of Green Tree, as reflected in the contracts and associated arbitration agreements between Green Tree and each of the individuals who were joined as unnamed class members in the *Bazzle* and *Lackey* arbitrations. Each of these thousands of contracts provided rights not only to these unnamed class members, but also to Green Tree. Thus, Respondents ignore that Green Tree never "acquiesced" to the expansion of the Bazzle and Lackey arbitration agreements to include the claims of thousands of individuals who were not parties to those bilateral contracts. Nor did the arbitrator's opt-out notice "preserve" Green Tree's contractual right – reflected in each of the thousands of agreements – to "select" an arbitrator, "with consent of you," *id.*, in the event that a dispute arose out of that contract.

As a result, to the extent that the arbitrator imposed class arbitration, the arbitral awards must be set aside because the arbitrator plainly "exceeded [his] powers" under an arbitration agreement that does not authorize class arbitration. 9 U.S.C. § 10(a)(4); see also *First Options*, 514 U.S. at 942, 946 (affirming vacatur of arbitrator's decision because arbitrator lacked power over party); *Mastrobuono*, 514 U.S. at 58 (determining whether arbitrator lacked power to award

punitive damages based upon determination of "what the contract has to say").[5] The arbitrator selected by the parties in *Bazzle* and *Lackey* had no authority to bind Green Tree with regard to disputes with thousands of other third parties, and therefore exceeded his powers under the Bazzle and Lackey arbitration agreements.[6]

2. Finally, ensuring that the scope of arbitration remains in accordance with the express terms of the arbitration agreement serves to promote private arbitration and constitutes an essential safeguard expressly incorporated into the FAA. See 9 U.S.C. § 10(a)(4). Respondents ignore the importance of this safeguard when they argue that the scope of arbitration should not be limited by "exclusive reliance on authority spelled out in the contract." Resp. Br. 30. That argument reflects a misunderstanding of private arbitration under the FAA and the parties' agreement to arbitrate.

Under the FAA, parties can choose to "resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration." *First Options*, 514 U.S. at 943; see also *Volt*, 489 U.S. at 478 ("FAA does not require parties to arbitrate when they have not agreed to do so").

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[5] *See also Eljer Mfg., Inc.* v. *Kowin Dev. Corp.*, 14 F.3d 1250, 1256 (7th Cir. 1994) ("[t]he test for vacating an award under section 10(a)(4)" is "whether the arbitrator exceeded the powers *delegated to him by the parties*") (emphasis added); Pet. Br. 43 n.15 (collecting circuit court authority).

[6] As Respondents recognize, Green Tree did not submit the issue whether the arbitrator had power to conduct a class-arbitration to the arbitrator for binding resolution. Resp. Br. 44-45 (explaining that Green Tree "never sought" and "does not want" a determination by the arbitrator of whether arbitration agreement authorized class arbitration). Indeed, Green Tree strenuously and continuously objected to class-wide arbitration, R. App. 132-33, 151-52, 156-63, 407-15, 449-50, 1448, 1451, 1455, 1538-39; *see First Options*, 514 U.S. at 946 (explaining that a party does not, by arguing issue regarding arbitrator's power, indicate "a willingness to be effectively bound by the arbitrator's decision"); *Howsam*, 123 S. Ct. at 592 ("a disagreement about whether an arbitration clause . . . applies to a particular type of controversy is for the court").

Section 10(a)(4) simply ensures that an arbitrator will not "exceed [the] powers" delegated by the parties in their private agreement. Adoption of Respondents' approach – whereby an arbitrator could exercise power without regard to the authority delegated under the parties' agreement – would undermine the federal policy in favor of arbitration because private parties would not enter into private agreements to arbitrate if an arbitrator's power over them were unlimited.

Nor would arbitration proceedings "grind to a halt" if an arbitrator could not exercise power never granted by the parties. Here, the arbitrator indisputably had ample "powers" to resolve the statutory issue brought by the Bazzles and Lackey. Pet. App. 110a. Such "powers" necessarily included the ability to dictate procedural matters to resolve "disputes, claims, or controversies arising from or relating to this contract" between "you" and "us." J.A. 33, 35. Nevertheless, this contractual grant of authority is not a license for an arbitrator – through class arbitration, consolidation or any other mechanism – to transform a bilateral arbitration agreement into a multi-lateral proceeding that purports to resolve disputes involving thousands of additional parties who never signed the agreements through which the arbitrator was selected and never "consent[ed]" to the appointment of the arbitrator. Pet. App. 110a; see *Waffle House*, 534 U.S. at 294.

## CONCLUSION

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

Respectfully submitted,

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