GRANTED

No. 99-1235

IN THE
Supreme Court of the United States

GREEN TREE FINANCIAL CORP.—ALABAMA,
AND GREEN TREE FINANCIAL CORPORATION
Petitioners,

v.

LARKETTA RANDOLPH
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
For The Eleventh Circuit**

BRIEF OF THE ALABAMA MANUFACTURED HOUSING INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE WRIT OF CERTIORARI

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THE ALABAMA MANUFACTURED HOUSING INSTITUTE RESPECTFULLY SUBMITS THE FOLLOWING BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE WRIT OF CERTIORARI

INTEREST OF AMICI CURIAE

The Alabama Manufactured Housing Institute ("AMHI") respectfully submits the following brief in support of the Writ of Certiorari.*

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*Consents of counsel for the Petitioners and for the Respondent herein have been obtained and filed with the clerk of this Court. Pursuant to Rule 37.6, *amicus curiae* hereby certify that no counsel for either party has authored the brief, in whole or in part, and that no person or entity, other than the *amicus curiae*, its members, or counsel, have made monetary contributions to the preparation or submission of this brief.

AMHI is a non-profit organization representing all segments of the manufactured housing industry. It is dedicated to providing its members with the tools and information needed to help shape a successful business environment. Its members include nearly 500 manufactured home manufacturers, retailers, parts suppliers, providers of services including delivery and installation, finance and insurance companies, community owners and developers. These members work together to participate in the legislative and regulatory process at the local, state, and national levels.

AMHI has an interest in this case in that the members of AMHI regularly enter into contracts which contain arbitration clauses such as are at issue in this case. The members of AMHI have an interest in enforcement of agreements to submit disputes arising from these contracts to arbitration in order to control the increasing costs of litigation affecting all aspects of the manufactured home industry. The state of Alabama has historically been hostile to enforcement of arbitration clauses as evidenced by the necessity of the Writs of Certiorari granted by this Court in *Allied Bruce Terminix Co. v. Dobson*, 513 U.S. 265 (1995) and *Terminix v. Jackson*, 513 U.S. 1123 (1995) and the lack of any state arbitration enforcement statute. The decision of the Eleventh Circuit will promote further hostility towards arbitration clauses and attempts to avoid their enforcement pursuant to the Federal Arbitration Act by allowing a party to circumvent an order compelling arbitration by appeal prior to participating in the arbitration process. Furthermore, by holding that an arbitration agreement which is silent as to the cost of arbitration is unenforceable, the Eleventh Circuit has thwarted the federal policy favoring arbitration and provided additional grounds for trial courts to avoid the mandates of the Federal Arbitration Act. These consequences impair the ability of the members of AMHI to rely on the arbitration clauses for which they contracted to avoid the high costs and time of litigation.

SUMMARY OF ARGUMENT

Despite the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), and this Court's clear pronouncements that the enactment of the FAA signifies a strong federal policy favoring arbitration, the enforcement of arbitration agreements continues to be met with much hostility and to be more closely scrutinized by the courts than other contracts. The issues before this Court are particularly significant because they will greatly impact the ability of parties to arbitration agreements to realize the full benefit of their contracts to arbitrate the disputes between them.

In addition to the arguments presented by the Petitioners regarding the issue of whether appellate jurisdiction exists for an appeal taken from a dismissal with prejudice when the dismissal is based upon an order granting arbitration, *amicus curiae* submits for this Court's consideration as a basis for reversing the decision of the Eleventh Circuit, that limited appellate jurisdiction exists in such a matter, but not to the extent exercised by the Eleventh Circuit and promoted by the Respondent. As explained below, the FAA sets forth a procedure for dispensing with suits in which the claims have been referred to arbitration. To the extent that the district court failed to follow that scheme the Eleventh Circuit should have reversed the dismissal with prejudice and directed the district court to enter an order staying the action. The Eleventh Circuit should not have engaged in an analysis of the correctness of the decision to refer the matter to arbitration.

Moreover, it is the position of *amicus curiae* that the Eleventh Circuit did not have jurisdiction to engage in the analysis as to the enforceability of the arbitration clause because there was an order directing arbitration. To the extent that the Eleventh Circuit engaged in such an analysis, the holding is in error because it failed to follow general contract principles governing the construction of silent terms, it ignored the federal policy favoring arbitration, and it erroneously placed the burden on the party

seeking enforcement of the arbitration to uphold the arbitration agreement.

Accordingly, for the reasons set forth herein, the decision of the Eleventh Circuit in this matter is due to be reversed.

ARGUMENT

This case seeks guidance from this Court as to the impact and effect of the Federal Arbitration Act upon the duty and authority of a trial court and an appellate court in the review and enforcement of an agreement to arbitrate disputes between parties. Heretofore, when faced with other issues arising out of the scope and requirements of the FAA, this Court has provided guiding principles as to the legislative intent behind the FAA and the premises necessary for the proper implementation of the FAA. This Court has proclaimed that "[s]ection 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). The questions for consideration before this Court ask, in light of this liberal federal policy favoring arbitration, (1) when a court grants arbitration, what is the proper method for disposing of the case and in what context is that order reviewable by an appellate court, and (2) does the absence of provisions addressing the allocation of costs of the arbitration render the clause unenforceable.

Concerning the first issue, the Petitioners and the Respondent, as well as the decision by the Eleventh Circuit, suggest that it is an all or nothing proposition. In other words, the Petitioners suggest that any order, at least in an "embedded" proceeding, granting arbitration is not immediately reviewable and therefore, there is no appellate jurisdiction. The Respondent argues, and

the Eleventh Circuit found, that appellate jurisdiction existed when a case was dismissed with prejudice and thereby gave rise to a full review of the order granting arbitration. AMHI, as *amicus curiae*, respectfully suggests for the reasons set forth below that there is a third alternative which promotes the policy favoring arbitration as expressed by the intent of Congress and that this case provides this Court the opportunity to direct the courts of this land as to the proper course of action for disposing of a case in which all of the claims have been sent to arbitration. This alternative is that an appellate court may review the order of dismissal, but may not engage in a determination regarding the arbitration issue.

With respect to the "silence" issue, AMHI maintains that this issue was not properly before the Eleventh Circuit. Moreover, the Eleventh Circuit erred in its construction of the "silent" terms and its allocation of the burden of proof with respect to the issue.

I. THE ELEVENTH CIRCUIT EXCEEDED THE SCOPE OF ITS APPELLATE JURISDICTION IN ITS REVIEW OF THE DECISION GRANTING THE MOTION TO COMPEL ARBITRATION.

At the heart of the issue concerning appellate jurisdiction is Section 16 of the FAA, which provides:

> (a) An appeal may be taken from—
>
> (1) an order—
>
> (A) refusing a stay of any action under section 3 of this title,
>
> (B) denying a petition under section 4 of this title to order arbitration to proceed,
>
> (C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

The text of Section 16 establishes two categories of decisions —those which may be appealed, subsection (a), and those which may not be appealed, subsection (b). As recognized in the *Practice Commentary* following Section 16:

> Subdivision (a) of § 16 enumerates the situations in which an immediate appeal from an arbitrability determination is allowed. It applies for the most part to determinations against arbitration. Subdivision (b) enumerates the situations in which and appeal is not to be allowed, and all of them are decisions in favor of arbitration.

David D. Siegal, *Practice Commentary* to 9 U.S.C.A. § 16 (West 1999). In view of the apparent theme of Section 16 that

orders favoring arbitration should not be subject to review and those denying arbitration should - the courts are split as to the impact that this theme should have on the construction of Section 16(a)(3), which provides that "a final decision with respect to an arbitration that is subject to this title" may be appealed.

The majority of the circuits, recognizing that Congress expressed an intent that judicial involvement in arbitration should be kept to a bare minimum, has construed any order in an "embedded proceeding" granting arbitration as an interlocutory order, and therefore not subject to appellate review. *Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.*, 143 F. 3d 626 (1st Cir. 1998); *John Hancock Mut. Life Ins. v. Olick*, 151 F.3d 132 (3d Cir. 1998); *Napleton v. Gen. Motors Corp.*, 138 F. 3d 1209 (7th Cir. 1998); *McCarthy v. Providential Corp.*, 122 F.3d 1242 (9th Cir. 1997); *Altman Nursing, Inc. v. Clay Capital* Corp., 84 F.3d 769 (5th Cir. 1996); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93 (8th Cir. 1994); *Humphrey v. Prudential Securities, Inc.*, 4 F.3d 313 (4th Cir. 1993). These courts have recognized that if a party is forced to participate in endless judicial review prior to obtaining his right to arbitration, all benefits of the contract to arbitrate will be lost. In order to prevent such a result and to promote a policy favoring arbitration, the majority has characterized an order granting arbitration, regardless of whether it also dismisses the entire action, as an interlocatory order. As an interlocatory order, it is not subject to appellate review. While it would seem that it was the intent of Congress to keep judicial involvement at a bare minimum, the artificial designation of an order as an interlocutory order, notwithstanding its express language suggesting finality, is troublesome at best.

Conversely, the minority of courts, including the Eleventh Circuit in the case at bar, has rejected the construction that orders granting arbitration are interlocutory orders and discounted the apparent intent of Congress and the policy as declared by this Court of favoring arbitration. These courts have used Sec-

tion 16(a)(3) for a full review of the order granting arbitration, including the issue of whether the matter was in fact subject to arbitration. *Randolph v. Green Tree Financial Corp.*, 178 F.3d 1149 (11th Cir. 1999); *Armijo v. Prudential Ins. Co.*, 72 F.3d 793 (10th Cir. 1995); *Arnold v. Arnold Corp.*, 920 F.3d 1269 (6th Cir. 1990).

AMHI respectfully suggests that neither approach complies with the intent of Congress. It is undeniable that Section 16(a)(3) provides appellate review for a "final decision with respect to arbitration." One might argue that this language should be construed as applying only to a final decision rendered in the arbitration itself, and not to the decision to send the matter to arbitration. After all, when a matter is referred to arbitration, there remains the decision to be made on the merits of the matter, and such decisions are subject to limited review under Sections 9-12 of the FAA.

Nevertheless, assuming that the "final decision" language of Section 16(a)(3) applies to a court's order of dismissal, which in this case was with prejudice, the question is what should be the nature and scope of the appellate court's review. AMHI respectfully suggests that the review should be limited to the "dismissal" of the action and not expanded to a review of the decision to grant arbitration. Section 4 of the FAA provides parties to an arbitration agreement a mechanism to seek specific performance or enforcement of that agreement. 9 U.S.C. § 4. Section 3 provides that a court "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . ." 9 U.S.C. § 3. Thus, under the scheme established by the FAA, when a court grants arbitration, the proper course of action is to stay the action pending completion of the arbitration. Such construction is in line with the review process contemplated by Section 16.

Pursuant to the guidelines of the FAA, the district court should have stayed the action when it granted arbitration. Therefore, when the district court dismissed with prejudice the action after granting arbitration, it went beyond the action contemplated by the FAA. A dismissal with prejudice arguably would appear to be a "final decision" and thus, subject to appeal. However, in reviewing the matter, the Eleventh Circuit should have limited its review to the issue of whether the dismissal with prejudice of the action was proper pursuant to the FAA in connection with an order granting arbitration. In other words, the proper appeal to the Eleventh Circuit was whether the district court erred in dismissing the action with prejudice instead of staying the action in accordance with Section 3 of the FAA when it compelled arbitration. The review of the Eleventh Circuit should have been limited to this issue alone and it should not have engaged in an review of whether the claims were subject to arbitration in view of the order of the district court granting arbitration.

This reasoning finds support in the analogous area of abstention. In essence, when a district court grants arbitration, it is abstaining from exercising its jurisdiction in favor of another forum, which was previously agreed to by the parties. Similarly, under the doctrine of abstention, a federal court is abstaining from exercising its jurisdiction in favor of another forum, the state court, to allow the other forum to address the issue presented. This Court has recognized that in the context of abstention, when a district court elects not to address an issue on the grounds of abstention, "the proper course is for the District Court to retain jurisdiction pending the proceedings in the state courts." *American Trial Lawyers Assn. v. New Jersey Supreme Court*, 409 U.S. 467, 469 (1973)(citing *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498, 512-13 (1972); *Zwickler v. Koota*, 389 U.S. 241, 244-445, n.4 (1967)). Similarly, in the context of arbitration under the FAA, when the court refers the matter to the arbitration forum, the proper course of action is for the dis-

trict court to retain jurisdiction by staying the action pursuant to Section 3 of the FAA, not to dismiss the action with prejudice.

> [The FAA] is a pro-arbitration statute designed to prevent the appellate aspect of the litigation process from impeding the expeditious disposition of an arbitration. Its inherent acknowledgment is that arbitration is a form of dispute resolution designed to save the parties time, money, and effort by substitution for the litigation process the advantages of speed, simplicity, and economy associated with arbitration. Its theme is that judicial involvement in the process should be kept to the barest minimum to avoid undermining these goals. . . . The mission of § 16 is to assure that if the district court does determine that arbitration is called for, the court system's interference with the arbitral process will terminate then and there, leaving the arbitration free to go forward.

David D. Siegel, *Practice Commentary* to 9 U.S.C.A. § 16 (West 1999).

Considering the undeniable federal policy favoring arbitration and the harm which will occur to a party entitled to arbitration who is forced to participate in seemingly endless appellate review prior to obtaining arbitration, as well as judicial economy on the whole, the courts should be provided the necessary guidance as to the proper disposition of cases when they are referred to arbitration. The FAA provides that the proper course of action is to stay a proceeding when a matter is sent to arbitration. Allowing parties to evade arbitration under the guise of repeated appellate review, thwarts the intent of Congress in enacting the FAA and renders arbitration contracts on less than equal standing with other contracts.

Because the Eleventh Circuit went beyond the proper review of the matter before it, the decision should be reversed with instructions to remand the decision to the district court to stay the action pending arbitration.

II. THE ELEVENTH CIRCUIT ERRED BY CONSTRUING THE SILENCE OF THE ARBITRATION AGREEMENT AS TO THE ISSUE OF COSTS IN A MANNER SO AS TO RENDER THE AGREEMENT UNENFORCEABLE.

The Eleventh Circuit held that the arbitration clause was unenforceable because it failed to provide the minimum guarantees required to ensure the Respondent's ability to vindicate her statutory rights. *Randolph v. Green Tree,* 178 F.3d 1149, 1158 (11th Cir. 1999). The Eleventh Circuit determined that the required minimum guarantees were lacking because the agreement was silent as to the payment of fees. The Eleventh Circuit expressed its concern as follows:

> The arbitration clause in this case raises serious concerns with respect to filing fees, arbitrators' costs and other arbitration expenses that may curtail or bar a plaintiff's access to the arbitral forum, and thus falls within our holding in *Paladino.* This clause says nothing about the payment of filing fees or the apportionment of the costs of arbitration. It neither assigns an initial responsibility for filing fees or arbitrators' costs, nor provides for a waiver in cases of financial hardship. It does not say whether consumers, if they prevail, will nonetheless be saddled with fees and costs in excess of any award. It does not say whether the rules of the American Arbitration Association, which provide at least some guidelines concerning filing fees and arbitration costs, apply to the proceeding, whether some other set of rules applies, or whether the parties must negotiate their own set of rules.

178 F.3d at 1158. Thus, the Eleventh Circuit, without any reference to normal rules of contract construction assumed the worst case scenario so as to invalidate the contract of the parties.

The purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and

to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)(citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510, n. 4 (1974)). "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements [, therefore,] as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 25 (1983). Furthermore, a court's "duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

AMHI, as *amicus curiae,* respectfully suggests that the Eleventh Circuit failed in its duty to treat the arbitration clause on the same level as other contracts and to resolve any doubt in favor of arbitration. The center of concern for the Eleventh Circuit is the silence of the agreement with respect to the allocation of the payment of fees and costs. In the context of an ordinary contract, if it is silent as to essential terms a court will look to applicable contract law to determine the manner to construe such terms. Generally, contract law requires that when a contract is silent as to a term, it should be assumed that the term is that which is used by ordinary trade or custom and all efforts at construction should be made to uphold the contract as a whole. *See Restatement (Second) of Contracts* §§ 202(5), 203(a), 204 (1981). Instead of looking to applicable contract law to determine the proper construction with respect to silent terms, the Eleventh Circuit assumed that the silent terms could potentially place costs on the Respondent that might impair her from pursuing statutory rights. The Eleventh Circuit made no attempt to construe the contract to uphold the parties' agreement to arbitrate their claims nor the federal policy favoring arbitration. Accordingly, the decision with respect to the enforceability of the arbitration agreement is to be reversed.

CONCLUSION

The Federal Arbitration Act evidences a strong federal policy favoring arbitration and minimizing judicial involvement once it has been determined that a matter should proceed to arbitration. The decision by the Eleventh Circuit is due to be reversed because it improperly exercised appellate jurisdiction beyond a review of the order of dismissal to a review of the decision to send a matter to arbitration prior to the completion of the arbitration proceeding. The courts should be provided guidance that the proper course of action when a matter is referred in its entirety to arbitration is to stay the action pending resolution of the arbitration proceeding. Additionally, the decision of the Eleventh Circuit is due to be reversed because it placed the arbitration agreement in an inferior position to other contracts and because it did not apply applicable law as to the construction of silent terms and attempt to uphold the contract if possible.

Accordingly, should this Court accept the arguments of *amicus curiae,* Alabama Manufactured Housing Institute, the decision of the United States Court of Appeals for the Eleventh Circuit in this matter is due to be reversed.

Respectfully submitted,

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