

1                   IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - -X  
3   GREEN TREE FINANCIAL CORP. ,       :  
4   NKA CONSECO FINANCE CORP. ,       :  
5                   Petitioner               :  
6           v.                               :   No. 02-634  
7   LYNN W. BAZZLE, ETC. , ET AL.       :  
8   - - - - -X  
9   Washington, D. C.  
10    Tuesday, April 22, 2003  
11               The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States at  
13   10:10 a.m.  
14   APPEARANCES:  
15   CARTER G. PHILLIPS, ESQ. , Washington, D. C. ; on behalf of  
16       the Petitioner.  
17   CORNELIA T. L. PILLARD, ESQ. , Washington, D. C. ; on behalf  
18       of the Respondents.  
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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	CARTER G. PHILLIPS, ESQ.	
4	On behalf of the Petitioner	3
5	CORNELIA T. L. PILLARD, ESQ.	
6	On behalf of the Respondents	30
7	REBUTTAL ARGUMENT OF	
8	CARTER G. PHILLIPS, ESQ.	
9	On behalf of the Petitioner	57
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument  
now in Number 02-634, the Green Tree Financial Corporation  
versus Lynn W. Bazzle.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS  
ON BEHALF OF THE PETITIONER

MR. PHILLIPS: Thank you, Mr. Chief Justice, and  
may it please the Court:

First in Volt and then again last term in Waffle  
House this Court made clear that, quote, arbitration under  
the Federal Arbitration Act is a matter of consent, not  
coercion. It is that core Federal principle that was  
violated by the South Carolina Supreme Court in this case.

QUESTION: Well, Mr. Phillips, now, the contract  
presumably can be interpreted in accordance with the law  
of the State with jurisdiction.

MR. PHILLIPS: Oh, to be sure, Justice O'Connor,  
but this contract was not interpreted in accordance with  
the understanding of the parties, with -- with respect to  
the parties. Ultimately, you have to look for the  
parties' consent to this kind of an agreement, and what  
the South Carolina Supreme Court was quite clear about --

QUESTION: Well, there was no express provision

1 in the arbitration agreement saying that you can't have  
2 class-wide arbitration.

3 MR. PHILLIPS: To be sure, there was no express  
4 provision to that effect, but if you look at the South  
5 Carolina Supreme Court's decision in this case what it  
6 says is, first, the parties were absolutely silent with  
7 respect to class arbitration. That's not surprising.  
8 I've never read a class arbitration clause in any  
9 contract, and I'm told that no one's ever even attempted  
10 to draft a class arbitration clause.

11 But second of all, the -- the court went further  
12 than that and said what was going to inform its judgment  
13 about how to interpret or how to apply this particular  
14 situation, it wasn't anything with respect to the language  
15 or understanding of the parties. What it was was, without  
16 any contractual directive whatsoever, stated twice, the  
17 court simply coerced Green Tree to defend a class  
18 arbitration proceeding.

19 QUESTION: Well, but the --

20 QUESTION: Well, how does that -- how does  
21 differ from Volt, Mr. Phillips? There, the contract  
22 didn't say anything about the court staying the  
23 arbitration, and yet we said in our opinion that that was  
24 a permissible thing for a -- that once the law of  
25 California had been invoked, that was a permissible thing

1 to be done.

2 MR. PHILLIPS: In -- the difference between this  
3 case and Volt, Mr. Chief Justice, is there the parties  
4 agreed that the arbitration itself would be controlled  
5 solely by California law. That was the consent of the  
6 parties.

7 QUESTION: Well, they said the place where the  
8 construction was -- was taken.

9 MR. PHILLIPS: Right, and that was understood by  
10 this Court, and by the lower courts as a matter of State  
11 law, to embrace California law.

12 QUESTION: But didn't -- didn't the -- didn't  
13 the agreement here say it would be governed by the law of  
14 South Carolina?

15 MR. PHILLIPS: The -- the underlying contract is  
16 governed by South Carolina law, but the arbitration  
17 provision itself is governed exclusively by the Federal  
18 Arbitration Act.

19 QUESTION: Well, is your -- your argument that  
20 if the South Carolina court is unreasonable in  
21 interpreting State law, then it comes up here? I -- I  
22 just don't understand how we get this -- this question.

23 MR. PHILLIPS: It seems to me there are two ways  
24 you can get to this question. In this case, there was no  
25 effort by South Carolina Supreme Court to apply South

1 Carolina law. What they did -- they're not looking for  
2 the consent of the parties. They're looking to coerce a  
3 result based on their view of efficiency and equity which  
4 involves the interests of completely third parties to  
5 this -- to this situation, not the parties to this  
6 particular agreement. If --

7 QUESTION: Why do you -- I'm sorry, I thought  
8 you were done.

9 MR. PHILLIPS: If, in fact, South Carolina had  
10 purported -- if the South Carolina Supreme Court had  
11 purported to try to interpret this agreement as in some  
12 sense reflecting a -- a consent by the parties to a  
13 class-based arbitration it would be a much, much closer  
14 case.

15 QUESTION: Well, what --

16 MR. PHILLIPS: That's not the standard that the  
17 court applied here.

18 QUESTION: What if the South Carolina court in a  
19 somewhat different case had said this arbitration is going  
20 to be governed by our State rules of discovery. The  
21 parties have said nothing about it, but they just say, if  
22 you're going to be bound by the laws of South Carolina,  
23 that's what you're going to do. Is that bad?

24 MR. PHILLIPS: No, that's not bad at all,  
25 Mr. Chief Justice. The difference between that, of

1 course, is that is what you expect when you -- when you  
2 consent to a bilateral arbitration arrangement. When you  
3 say, we're going to proceed to resolve this dispute in an  
4 efficient and economical fashion, you understand that that  
5 means arbitration, however the -- however that gets played  
6 out and, indeed, generally speaking, you would expect that  
7 to be a question for the arbitrator, more than you might  
8 as a matter of State law.

9 The difference here, of course, is we're talking  
10 about making a decision that's binding, or at least  
11 purports to be binding on literally thousands of other  
12 individuals who are not parties to this agreement, and  
13 this goes --

14 QUESTION: And who are not -- and who are not  
15 objecting so far as I know.

16 QUESTION: Yes.

17 MR. PHILLIPS: Well --

18 QUESTION: Green Tree is the one who's  
19 objecting.

20 MR. PHILLIPS: Well, we don't know whether they  
21 objected or not. All we know is that they received notice  
22 and took no action as a consequence of it, but --

23 QUESTION: Why -- please.

24 MR. PHILLIPS: If you -- if you flip this case  
25 around, in this situation, where the -- where the unnamed

1 members potentially are going to receive \$5,000 to \$7,500  
2 of windfall recoveries, my guess is they're not going to  
3 object, but what if the case had gone the other way. What  
4 if the arbitrator had issued a \$1 nominal damage award for  
5 each member of this class. Does anyone seriously doubt  
6 that the next day any of those unnamed class members could  
7 show up and say, excuse me, I have a right under my  
8 contract to choose my arbitrator in an agreement between  
9 myself --

10 QUESTION: Yes. Yes, one might doubt it if  
11 their claim was worth \$2, and it would cost them more to  
12 go into court to make the objection. The -- the class  
13 action vehicle in some cases will make an action possible  
14 that wouldn't be brought before an arbitrator before.

15 The --

16 MR. PHILLIPS: Can I -- can I respond to that,  
17 Justice Ginsburg, because you see, it seems to me that  
18 that simply reflects the manifest hostility to the  
19 arbitration agreement as it's been -- as it's been written  
20 by the parties here.

21 I mean, basically what we're talking about is,  
22 we have a dispute. It involves what will largely be a few  
23 thousand dollars, potentially. I mean, the entire  
24 contract here involved \$15,000 of -- in one case and  
25 \$7,500. You expect the disputes are going to be



1 relatively small, and you expect that the parties are  
2 going to choose an efficient method of trying to resolve  
3 those cases and move on, and -- and they waive their right  
4 to a public, or judicial review, because the theory is,  
5 win or lose, it's worth taking the risk.

6 When you take that kind of a situation and you  
7 convert it into a \$27 million fine, nobody would agree to  
8 that ab initio.

9 QUESTION: Do you --

10 QUESTION: That's true. That's true, but what's  
11 bothering me is exactly this point. I can understand your  
12 argument to this point. A State, I don't think could  
13 possibly, consistent with section 2, interpret the word  
14 arbitration in a contract to contain all the bells and  
15 whistles of a court proceeding, because that would  
16 transform the arbitration into a court proceeding, and  
17 therefore they would have, in this subtle way, not only  
18 have shown hostility to but destroyed the arbitration  
19 contract, but what about this one. Is this hostile to  
20 arbitration?

21 I have no doubt that Green Tree wouldn't have  
22 agreed, in all likelihood, had they known what was going  
23 to happen, and to that extent it is hostile to  
24 arbitration, but the consumers on the other side might  
25 have said, oh, we rather like it, in which case from their

1 point of view it isn't hostile to arbitration, so sort of  
2 from one side it is, and from the other side it isn't, and  
3 how do we decide whether, overall, it is or it isn't?

4 MR. PHILLIPS: It seems to me that the linchpin  
5 theory of the case ought to be the -- the point I started  
6 with, Justice Breyer, which is, you look to determine  
7 whether there is the consent of the parties or whether --

8 QUESTION: No, but what we don't know here is  
9 whether there is or there isn't. We have silence, and  
10 like many contracts that are silent, you have to impute an  
11 intent, and what South Carolina did is --

12 MR. PHILLIPS: Well, what South Carolina did --

13 QUESTION: -- is, they imputed an intent.

14 MR. PHILLIPS: -- they imputed an intent.

15 QUESTION: And they did it by a rule that says  
16 that since the other parties in our minds would have  
17 jumped for joy, and you, your client would have weeped in  
18 dismay, we in that situation interpret the contract  
19 against the drafter, which happened to be your client, so  
20 they chose the other side and thereby concluded that it  
21 was not hostile to arbitration, though it wasn't in the  
22 interest of one of the parties.

23 MR. PHILLIPS: Well, it also doesn't reflect the  
24 consent of both of the parties.

25 QUESTION: Well --

1                   MR. PHILLIPS: Both parties have to consent,  
2 Justice Breyer. That's the nature of consent.

3                   QUESTION: You -- you --

4                   MR. PHILLIPS: You simply can't have unilateral  
5 consent.

6                   QUESTION: The reason, as I understand it -- the  
7 reason, as I understand it, you say there isn't consent  
8 was the reason you gave in your answer to the Chief  
9 Justice, that, in fact, they had agreed to be bound by  
10 South Carolina law with respect to the interpretation of  
11 the contract, but not with respect to the arbitration  
12 clause itself, and my question is, how do you draw that  
13 line? There's nothing, per se, inconsistent between  
14 applying the FAA and applying some State law. That has to  
15 be done.

16                  MR. PHILLIPS: Well --

17                  QUESTION: So why do you draw --

18                  MR. PHILLIPS: -- South Carolina Supreme Court  
19 drew that line. The South Carolina Supreme Court  
20 specifically held that the parties agreed that the  
21 arbitration clause would be governed exclusively by the  
22 Federal Arbitration Act, and the --

23                  QUESTION: No, but I mean, you say governed  
24 exclusively by the FAA, in the sense that the FAA  
25 naturally is going to trump any inconsistency with State

1 law, but here, there isn't a clear inconsistency with  
2 State law, and the FAA is always applied with some State  
3 law in mind. You have to have some procedure, and so on,  
4 and -- and therefore I -- I don't know how you can draw  
5 this nonporous line between the FAA and arbitration on one  
6 hand and State law on the other.

7 MR. PHILLIPS: Well, there are two ways to get  
8 there. First of all, as a matter of just South Carolina  
9 law we know that South Carolina's arbitration provisions  
10 completely go by the wayside as a matter of State law.  
11 Munoz held that several years ago. If the FAA applies,  
12 there is no State law that is residual to it. It is  
13 determined by the Federal Arbitration Act, which means  
14 that the arbitrator is going to make certain kinds of  
15 decisions.

16 But the -- I think the key line here is that  
17 arbitrators are absolutely free to fashion whatever rules  
18 they think are appropriate for resolving disputes in a  
19 bilateral situation. The question is, where does the  
20 arbitrator get the authority to reach out to literally  
21 thousands of other parties in order to resolve their  
22 rights?

23 QUESTION: Mr. Phillips, first, you're not --  
24 you're not urging that there's any inherent inconsistency  
25 between the arbitration and class action. You concede in

1 your brief, I think, that if the parties agreed, yes, you  
2 could have a class action in arbitration.

3 MR. PHILLIPS: Yes, although, Justice Ginsburg,  
4 there is not a single example that I could identify of any  
5 parties ever agreeing to go into a class action through  
6 arbitration.

7 QUESTION: Have there been no class actions  
8 in -- in arbitration?

9 MR. PHILLIPS: I'm sorry?

10 QUESTION: Have there been no class actions  
11 in --

12 MR. PHILLIPS: Other than this one?

13 QUESTION: Yes.

14 MR. PHILLIPS: There are in California, but  
15 that's -- that's it. California and South Carolina are  
16 the only places, and the reason is, is that what you  
17 create is this extraordinarily hideous hybrid kind of a  
18 proceeding.

19 QUESTION: Does the AAA have no rules about --

20 MR. PHILLIPS: No.

21 QUESTION: -- class actions? It's just  
22 silent --

23 MR. PHILLIPS: Not as far as I know. I mean,  
24 they didn't file a brief in this case, but as far as I  
25 know AAA doesn't have rules specifically dealing with it.

1 They find it to be, as I understand it, quite burdensome  
2 to try to figure out how to deal with it. If you think  
3 about it, this -- you're -- you're taking a dispute that  
4 by its nature is supposed to involve a few thousand  
5 dollars, converting it into \$27 million. The costs in  
6 this case alone --

7 QUESTION: Well, suppose --

8 MR. PHILLIPS: -- were \$36,000.

9 QUESTION: If the parties had chosen, say, a New  
10 York forum -- I thought an arbitration agreement is  
11 supposed to be a forum for action laws.

12 MR. PHILLIPS: Well, that's part of it.

13 QUESTION: If they said nothing about class  
14 action and they chose New York as a forum, New York has a  
15 class action vehicle. They could get -- the plaintiffs  
16 could get a class action, is that not so?

17 MR. PHILLIPS: Well, I mean, the difficulty with  
18 that is that there's -- there's no State law in general --  
19 I mean, there are no statutes out there that provide for  
20 class actions with respect to arbitrations. That's why  
21 this is a hostile --

22 QUESTION: But it -- it -- then arbitration is  
23 something other than a mere choice of forum, because --

24 MR. PHILLIPS: Oh, absolutely. The Federal  
25 Arbitration Act creates a substantive law of

1 arbitrability. To be sure, it incorporates and embraces  
2 decisionmaking by the arbitrator. It recognizes some  
3 limited role in some circumstances for State law, although  
4 again South Carolina doesn't do that, but there -- there  
5 is nothing that provides a mechanism for converting your  
6 ordinary bilateral --

7 QUESTION: Can I -- can I interrupt with this  
8 question, Mr. Phillips? Supposing you had the -- Green  
9 Tree had agreements with a large -- large number of  
10 consumers, and suppose 15 of them filed separate  
11 arbitrations, they all went before the same arbitrator.  
12 Could the arbitrator have entered an order saying, I think  
13 it would be efficient to have all these cases tried  
14 together, so I'm going to enter an order requiring you to  
15 do so?

16 MR. PHILLIPS: I -- I think if the parties all  
17 agreed to have it resolved by the same arbitrator --

18 QUESTION: Well, supposing the -- supposing  
19 Green Tree objects. Could he nevertheless do it?

20 MR. PHILLIPS: No. I think in that situation  
21 what you're then doing is depriving us of our right under  
22 those agreements to choose our own arbitrator.

23 QUESTION: Oh, but here -- here the South  
24 Carolina arbitrator, which you -- you certainly consented  
25 to his appointment, went ahead and did pretty much this.

1                   MR. PHILLIPS: Well --

2                   QUESTION: Not -- not as sweeping --

3                   MR. PHILLIPS: This in a vengeance, I will say,

4                   Mr. Chief Justice.

5                   QUESTION: Well, but what is your -- what is

6                   your principle objection to Justice Stevens' hypothetical

7                   where the arbitrator simply says, I've got 15 of these and

8                   I'm going to just try them together?

9                   MR. PHILLIPS: I -- I have a substantial --

10                  substantially less of an objection to that kind of a

11                  procedure because it doesn't adjudicate unnamed parties'

12                  rights, or purport to adjudicate those rights. At least

13                  you have a real dispute that already exists --

14                  QUESTION: But --

15                  MR. PHILLIPS: -- which can justify in some

16                  sense consolidation. I still think you have to respect

17                  Green Tree's right --

18                  QUESTION: But then -- but you say your -- your

19                  objection would have been cured if the arbitrator had

20                  written a letter to every plaintiff and gotten an -- a

21                  written okay, that would have made it okay?

22                  MR. PHILLIPS: No, because the -- the

23                  arbitration process requires the filing of claims and

24                  going through it.

25                  QUESTION: Well then, what's the difference



1     between that and my 15-individual case?

2                 MR. PHILLIPS:   Because we don't know whether  
3     there is, in fact, a dispute between the parties in the  
4     absence of some effort by the plaintiffs to come forward.

5                 QUESTION:   Well, they know there's a common  
6     issue in all these cases -- I mean, they -- they all had  
7     the same legal issue involved, didn't they?

8                 MR. PHILLIPS:   But -- but it -- just because you  
9     may have a right doesn't mean you necessarily care to  
10    assert your right.   Again, it's -- it's easy to look at  
11    this case and say, well, gee, there's an opportunity to  
12    pick up \$5,000 in windfall, or \$7,500 in windfall, but you  
13    know, an arbitrator could just as easily have rendered a  
14    decision here that said, this is a pure technicality, it's  
15    entitled to \$1 in nominal damages, and the class-wide  
16    relief ought to be \$1,900, and attorney's fees ought to be  
17    a third of that, which is \$600 --

18                QUESTION:   And -- and --

19                MR. PHILLIPS:   -- and I guarantee you they would  
20    not be willing or prepared to -- I'm sorry, Justice  
21    Kennedy.

22                QUESTION:   Please, finish your answer.

23                MR. PHILLIPS:   They would not be prepared to  
24    abide by that.   Every one of the unnamed members would  
25    say, I never had an opportunity to -- to participate in

1 the selection of the arbitrator who has resolved my  
2 substantial rights. There's no basis at all to bind me  
3 under these circumstances, and I'm going to show up and  
4 make a claim.

5 QUESTION: Well, the obvious solution to that  
6 would be to read into their contract the idea that they  
7 had agreed to that situation provided they're fairly  
8 represented, et cetera, and if they don't like the result,  
9 they can arbitrate that, too.

10 MR. PHILLIPS: But see, Justice Breyer, we -- we  
11 keep making up more and more and more, and none of this  
12 is -- is at all linked to any kind of consent among any of  
13 these parties.

14 QUESTION: I want to ask about consent. At what  
15 point and how did you first object to the class action?  
16 Did -- did you instruct the arbitrator that we consented  
17 to your appointment for individuals A, B, and C, but not  
18 for other --

19 MR. PHILLIPS: Yes.

20 QUESTION: We -- we do not consent.

21 MR. PHILLIPS: We do not consent to that.

22 QUESTION: And when did you do that?

23 MR. PHILLIPS: We raised that as --

24 QUESTION: After the first --

25 MR. PHILLIPS: -- as early and often --

1 QUESTION: -- the idea of class action.

2 MR. PHILLIPS: Yes, and the South Carolina  
3 Supreme Court specifically addressed the question of  
4 waiver and found that we never waived our right with  
5 respect to that.

6 QUESTION: But you did select the arbitrator.  
7 It was your arbitrator.

8 MR. PHILLIPS: It was our arbitrator with  
9 respect to the dispute with the Bazzles and the Lackeys  
10 and the Buggses, to be sure, but we did not agree to an  
11 arbitrator to resolve any disputes involving unnamed third  
12 parties --

13 QUESTION: Well, it leaves this open, and I  
14 mean, I agree with you that it is -- whether you did --  
15 whether this or is not the proper interpretation of what  
16 the parties intended is certainly disputable, and if it's  
17 disputable, why shouldn't the arbitrator decide that?

18 MR. PHILLIPS: See, I don't think it is disputed  
19 what the parties -- what the parties intended, Justice  
20 Breyer.

21 QUESTION: Well -- well, wait. You -- I'm going  
22 to hear in about 10 minutes or so a pretty good argument  
23 the other side, too --

24 MR. PHILLIPS: Except that --

25 QUESTION: -- so that my question is, where you

1 have a contract that says, interpretations of the  
2 contractor should be arbitrated, and where, in fact, what  
3 we're arguing about today is how one part of the contract  
4 should be interpreted, how did we get here? Why wasn't  
5 that referred to the arbitrator?

6 MR. PHILLIPS: Because the question of whether  
7 the arbitrator has the authority to resolve the rights of  
8 unnamed third parties is not a question for the arbitrator  
9 to decide. That's a question for the court to decide.

10 QUESTION: Why?

11 MR. PHILLIPS: Because it goes --

12 QUESTION: I would have thought the meaning of  
13 a --

14 MR. PHILLIPS: It goes to the core of the  
15 arbitrator's jurisdiction and authority to decide.

16 QUESTION: No, but wait. There is a case,  
17 including one I just wrote, I think, for the Court which  
18 makes very clear that what you send to the arbitrator -- I  
19 mean, there are dozens of cases where you have a phrase in  
20 a contract, and that's in dispute, and the parties have  
21 agreed we send disputes about the meaning of the contract  
22 to arbitration, you send that to the arbitrator.

23 I mean, the only things that you don't are  
24 whether there's the arbitration contract is itself valid,  
25 et cetera.

1                   MR. PHILLIPS: Justice Breyer, I think on the  
2 question of whether the arbitrator has jurisdiction --  
3                   QUESTION: Yes.  
4                   MR. PHILLIPS: -- and authority to decide the  
5 rights of a party, that is a question for the court to  
6 decide --  
7                   QUESTION: Okay, is there any -- is there any --  
8                   MR. PHILLIPS: -- not for the arbitrator.  
9                   QUESTION: Is there any case you could cite -- I  
10 mean, I read most of them when I -- when I wrote the  
11 opinion in the Howsam case. I don't think you can think  
12 of one.  
13                   MR. PHILLIPS: But Howsam dealt with the  
14 specific problem of the procedures to be followed with  
15 respect to a bilateral --  
16                   QUESTION: Oh, are we talking about that here?  
17                   MR. PHILLIPS: No, we're not talking about the  
18 procedures to be followed in a bilateral agreement. We're  
19 talking about what you have to do --  
20                   QUESTION: Well, I --  
21                   MR. PHILLIPS: -- to resolve the rights of third  
22 parties who are not signatories --  
23                   QUESTION: Why should --  
24                   QUESTION: At least as to the other contracts --  
25                   MR. PHILLIPS: Yes.

1                   QUESTION: -- the ones that get sucked into this  
2 massive litigation, it is certainly a jurisdictional  
3 issue --

4                   MR. PHILLIPS: That -- that's my point, Justice  
5 Scalia.

6                   QUESTION: -- if not as to yours. Yours, you --  
7 you agree to the arbitrator and whatnot, but -- but  
8 take -- take somebody else who --

9                   MR. PHILLIPS: And anything the arbitrator did  
10 to us --

11                  QUESTION: I'm sorry, I don't understand the  
12 meaning of when you say it's a jurisdictional issue, when  
13 you agree to somebody else's statement it's a  
14 jurisdictional issue. What I have in front of me is a  
15 contract. It says, in this phrase, disputes will be  
16 arbitrated, there is a question, what does that mean, that  
17 word arbitration in this contract, and then I know that  
18 the parties have agreed to arbitrate the meaning of the  
19 dispute, all right -- of any phrase --

20                  MR. PHILLIPS: Right, but --

21                  QUESTION: -- including that one.

22                  MR. PHILLIPS: Right.

23                  QUESTION: So -- so how did we suddenly get into  
24 court, was my question?

25                  MR. PHILLIPS: Because, Justice Breyer, the --

1 the contract says that -- that it binds us and you, and us  
2 and you are defined as Green Tree and the -- and the  
3 specific named participants in this proceeding. It  
4 doesn't say word one about the rights of all of the other  
5 individuals in this --

6 QUESTION: But the other individuals --

7 MR. PHILLIPS: -- and the South Carolina -- I'm  
8 sorry.

9 QUESTION: The other individuals are not here  
10 complaining. I mean, they're probably glad they got  
11 the 7,000 bucks --

12 MR. PHILLIPS: Oh, they're not here complaining  
13 today, but Mr. Chief Justice, you're going to have to  
14 resolve the question of whether or not you can interpret  
15 an arbitration agreement in a way that allows these kinds  
16 of proceedings for the -- for the generality of cases, and  
17 what do we --

18 QUESTION: If you're concerned about the third  
19 parties, how does it differ from a court-declared class  
20 action where the safeguards are the class members have  
21 notice, and there's a notice here that is clearer than  
22 most notices, and if they're -- if they say that they were  
23 inadequately represented, they could collateral attack on  
24 that basis. Why should those States' laws be any  
25 different in an arbitral forum than in a court forum?

1           MR. PHILLIPS: Well, if you were going to allow  
2 a class action in an arbitral forum you would certainly  
3 want those -- those protections to be built in. My point  
4 is, is that the way you get those kinds of protections to  
5 exist in the ordinary class action is because the State  
6 coerces the litigation. The ordinary rule is that you  
7 cannot represent third parties, and the court has  
8 identified as a matter of its power situations in which  
9 it's going to embrace that approach, but that doesn't get  
10 you past the contract problem

11           QUESTION: But the court can't do it as it --  
12 the Federal rules have a class action provision --

13           MR. PHILLIPS: Yes.

14           QUESTION: -- and the Federal rules can't affect  
15 substantive rights, only procedure, so the class action  
16 device, classes are certified every day in -- in Federal  
17 court --

18           MR. PHILLIPS: But --

19           QUESTION: -- and they're not changing the  
20 substance of any contract that they're declaring in a  
21 contract setting, a class action.

22           MR. PHILLIPS: The -- the difference there,  
23 Justice Ginsburg, is that here we're talking about a  
24 situation where the full authority of the arbitrator is  
25 defined by the consent of the specific parties to the



1 agreement, and these parties don't have the authority to  
2 bind nonparties. The Court said just last term in  
3 Waffle House --

4 QUESTION: They're not in court by reason of a  
5 contract.

6 MR. PHILLIPS: I -- I'm sorry, Your Honor?

7 QUESTION: They are not in court by reason of a  
8 contract.

9 MR. PHILLIPS: That's correct, Justice Scalia.

10 QUESTION: Here, they are before the arbitrator  
11 only by reason of a contract.

12 MR. PHILLIPS: That's correct, Your Honor,  
13 and -- and --

14 QUESTION: But isn't the difficulty -- and I --  
15 I -- I'm still having trouble getting over this. Isn't  
16 the difficulty that -- one -- one thing you said a second  
17 ago is -- is really not accurate, I don't think.

18 MR. PHILLIPS: Well, I apologize --

19 QUESTION: They don't consent to every jot and  
20 tittle of the means by which the arbitration will be  
21 conducted.

22 They consent in a gross kind of way to  
23 arbitration or nonarbitration, and -- and that's -- that's  
24 what their consent makes the difference between, but they  
25 don't consent to every consequent detail that enters into

1 the actual conduct of the arbitration, so why should we  
2 draw the line where you want us to draw the line as  
3 opposed to drawing the line a little further and saying,  
4 if you consent to arbitration and a State says, not  
5 inconsistently with the FAA, arbitration can be done on a  
6 class basis if there are common issues and so on? Why  
7 should we draw the line to exclude that?

8 MR. PHILLIPS: Well, there are two answers to  
9 that. The premise of it, which is that the FAA doesn't  
10 have anything to say about this, but the core principle of  
11 the FAA is that there is supposed to be consent of the  
12 parties, so we ought to be looking to the expectations of  
13 the parties to determine what rights you're going to  
14 adjudicate as a matter of arbitration.

15 QUESTION: You're -- you're saying, this is so  
16 far from anything that would have been contemplated --

17 MR. PHILLIPS: Yes.

18 QUESTION: -- as a detail to be filled in later,  
19 and that's why you draw the line --

20 MR. PHILLIPS: That's -- that is exactly right,  
21 Justice Souter, and if you look at the South Carolina  
22 Supreme Court's opinion it doesn't talk about anything  
23 that has to do with consent. It talks about equity and  
24 fairness and judicial economy, all factors that influence  
25 the rights of third parties who have nothing to do with

1 the arbitration agreement that's before the arbitrator.

2 QUESTION: I thought the South Carolina Supreme  
3 Court said there's a -- there's a silence in this contract  
4 and we're going to construe it against the drafter. You  
5 concede that you could have arbitration in a class format,  
6 and so that South Carolina said it doesn't -- this  
7 contract doesn't say one way or the other and we'll  
8 construe it against the drafter.

9 MR. PHILLIPS: The -- but what the South  
10 Carolina Supreme Court said was, we're going to promote  
11 judicial economy and we're going to do it without a  
12 contractual directive to do so.

13 To be sure, the court said we -- we do not find  
14 language so clear here -- because you know, what they're  
15 basically worried about is, does this absolutely prohibit  
16 the possibility of class arbitration. Is there language  
17 in there that says, under no circumstances will we ever  
18 have class arbitration. I would have read the -- this  
19 agreement to have actually said that, but they didn't say  
20 that.

21 What they said is, well, we think it's -- we  
22 think it's ambiguous, and therefore we'll construe it  
23 against you, but all that gets you to the point is that  
24 the contract says nothing about this, and the problem with  
25 trying to square that with the FAA is that the animus for,

1 or the -- the motivation for acting under the Federal  
2 Arbitration Act is the consent of the parties, not simply  
3 can you manipulate the contract in a way that gets you  
4 to --

5 QUESTION: But it -- but it is true, is it not,  
6 that everybody in the class has consented to an  
7 arbitration with Green Tree --

8 MR. PHILLIPS: No. No.

9 QUESTION: Not to a class action arbitration,  
10 but to an arbitration.

11 MR. PHILLIPS: Well, has -- well, has  
12 consented -- yes, has signed an arbitration agreement --

13 QUESTION: But not with these arbitrators.

14 MR. PHILLIPS: But not with this arbitrator,  
15 that's correct.

16 QUESTION: But I thought that --

17 MR. PHILLIPS: We had --

18 QUESTION: But they have consented to the --

19 MR. PHILLIPS: And we have a right in it, and  
20 it's worth pointing out we still have a right, with  
21 respect to each one of those third party claims, to have  
22 our choice of arbitrators. We picked this guy for these  
23 three or four claims. As Justice Kennedy observed, we  
24 went --

25 QUESTION: But is it really reasonable to assume

1     that if he knew he had a thousand different arbitrations  
2     coming up he'd want a thousand different arbitrators?  
3             MR. PHILLIPS: Sure.  
4             QUESTION: With the same issue in every case?  
5             MR. PHILLIPS: Sure. Why not?  
6             QUESTION: Because --  
7             QUESTION: Don't they wear -- wear out after  
8     just one case, then?  
9             MR. PHILLIPS: Well, the -- the point is that --  
10            QUESTION: You might not want to put your  
11     company's entire future in the hands of one arbitrator.  
12            MR. PHILLIPS: Of a single arbitrator --  
13            QUESTION: Yes.  
14            MR. PHILLIPS: -- with no right to judicial  
15     review --  
16            QUESTION: Makes some sense.  
17            MR. PHILLIPS: -- Justice Stevens. The problem  
18     is, why would we make a judgment at the outset of this  
19     process that says, we are going to enter into the most  
20     informal decisionmaking process with no right to judicial  
21     review and with \$27 million at stake.  
22            QUESTION: Where -- where is it --  
23            MR. PHILLIPS: No one would. It would be  
24     madness.  
25            QUESTION: Where is it in the record that you

1 first made your objection to the class action, and do  
2 you -- does that objection say that we have not consented  
3 to the arbitration as to these other parties? Is that how  
4 your objection was phrased, and where can I find it in the  
5 record?

6 MR. PHILLIPS: Justice Kennedy, I'm going to  
7 have to answer that on -- in the rebuttal.

8 QUESTION: All right.

9 MR. PHILLIPS: I'll give you the specific  
10 citation when I step up here. If there are no other  
11 questions, I'll reserve the balance of my time.

12 QUESTION: Very well, Mr. Phillips.

13 MS. Pillard, we'll hear from you.

14 ORAL ARGUMENT OF CORNELIA T. L. PILLARD

15 ON BEHALF OF THE RESPONDENTS .

16 MS. PILLARD: Thank you, Mr. Chief Justice, and  
17 may it please the Court:

18 Green Tree first protested by asking the  
19 arbitrator to decide whether the case could go forward as  
20 a class. They did not object to his power to decide, but  
21 they asked him to decide and I -- I think the relevant  
22 document is on page 15 of the joint appendix, which is  
23 Green Tree's memorandum to the arbitrator.

24 There is nothing in the FAA that preempts a  
25 State court or arbitrator from applying ordinary State

1 contract law, the doctrine of construction against the  
2 drafter, to read a contract to authorize class  
3 arbitration. As a legal matter, the consent of the  
4 parties is determined under State contract law by applying  
5 the doctrines of contract law to resolve ambiguities where  
6 they exist.

7 QUESTION: What doctrine of state contract law  
8 led you -- led to this result, the doctrine of construe  
9 the instrument against, contra proferentem against the  
10 person who drafted it?

11 MS. PILLARD: That's exactly right, Justice  
12 Scalia.

13 QUESTION: Now, can -- can that produce  
14 anything? I mean, suppose one side claims the contract  
15 says nothing about it, but one side claims, you should pay  
16 all the costs of the arbitrator, all right. Is -- is a  
17 State court going to decide that question by simply  
18 saying, well, the contract says nothing about it, but to  
19 do it that way would be against the interests of the  
20 drafter, so yes, it's in the contract?

21 MS. PILLARD: The --

22 QUESTION: And my next question is going to be,  
23 what if the other side comes in and says, you ought to pay  
24 me \$10 million, and the other side says, gee, there's  
25 nothing in the contract about that.

1 (Laughter.)

2 QUESTION: Can the State court say, well, it's  
3 against the -- it's against the interests of the drafter  
4 so it must be there in the contract?

5 I mean, that seems -- this seems to me just as  
6 weird --

7 MS. PILLARD: You apply --

8 QUESTION: -- to -- to pluck out a right to a  
9 class action for no other reason than that it is against  
10 the interests of the person who drafted the contract.  
11 It's weird.

12 MS. PILLARD: Justice Scalia, the -- the  
13 argument is that the arbitrator has the authority under  
14 State law to interpret the ambiguity in the contract, and  
15 it's not weird at all in this case, where, since 1979 in  
16 South Carolina, arbitrators have had the authority to  
17 consolidate arbitrations, and the leading cases, Champ,  
18 the case on which Green Tree relies, Episcopal Housing,  
19 which is the First Circuit case, the -- the cases that  
20 look at whether this is allowed, advert to -- I'm sorry,  
21 Episcopal Housing was itself a consolidation case, but the  
22 cases that allow class arbitration advert to the  
23 underlying rule in the jurisdiction --

24 QUESTION: There's a big difference --

25 QUESTION: What are consolidation arbitration --



1 what do you mean by that? You mean when the same  
2 arbitrator has more than one case involving the same  
3 issue?

4 MS. PILLARD: The same arbitrator can take  
5 different disputes under arbitration clauses and bring  
6 them together where --

7 QUESTION: When he's been selected for the  
8 various issues. I mean he -- he's been selected in -- in  
9 all of the various cases. The parties have agreed to this  
10 arbitrator. They just haven't agreed to have them all  
11 decided in one proceeding, is that right?

12 MS. PILLARD: That's right. They're all -- but,  
13 that's one of the versions --

14 QUESTION: But that -- that's a long -- that's a  
15 long way off from compelling somebody who hasn't agreed to  
16 this arbitration.

17 MS. PILLARD: It -- it's not at all. First of  
18 all, I disagree with the premise of your question, Justice  
19 Scalia, that they haven't agreed to this. Where the  
20 contract permits it, what Green Tree and the -- the class  
21 members, absent and named class members agreed to was a  
22 contract with the potential for a class proceeding, with  
23 the potential for a class proceeding.

24 This -- under the Southland cases, since --  
25 since 20 years ago cases have been going forward --

1                   QUESTION: That begs the question. I mean, that  
2 precisely begs the question. I mean --

3                   MS. PILLARD: They --

4                   QUESTION: -- that's what we're debating,  
5 whether they -- whether they agreed to that or not, and to  
6 say that they agreed to it because they agreed to it  
7 doesn't get us very far.

8                   MS. PILLARD: This is an FAA preemption case,  
9 but the FAA has nothing to say here. The act doesn't say  
10 anything about class arbitration, and the FAA ousts only  
11 State law that is hostile to arbitration.

12                  QUESTION: All right, well, why isn't this  
13 hostile? It seems to me that is the question.

14                  MS. PILLARD: It's not hostile --

15                  QUESTION: Well, wait, let me give you an  
16 example. You would agree that the State couldn't  
17 interpret silence as follows. The word arbitration in  
18 this contract, since it's silent, means that the  
19 arbitration will take place at the bottom of a coal mine  
20 with no air, okay. We agree, right?

21                  MS. PILLARD: Right.

22                  QUESTION: All right, and what the other side  
23 has said is, you know, in respect to one of the parties,  
24 this is the same thing. Of course my client would never  
25 have agreed to arbitration if he knew that a class action

1 lawyer could find a provision in the contract that nobody  
2 thinks really hurt them but, in fact, we didn't live up  
3 to, and then obtain \$10 million in a judgment before an  
4 arbitrator, of which he gets three and the rest is  
5 distributed.

6 Now, look, that's what we were trying to get  
7 away from. That's why we went to arbitration and not the  
8 court. Of course we wouldn't agree to such a thing, and  
9 of course reading such a thing into the silence is the  
10 same as putting us at the bottom of that coal mine, or at  
11 least close enough so you cannot say that it is neutral as  
12 to whether or not arbitration is good or bad or likely to  
13 occur, or Volt was neutral or pro-arbitration. This State  
14 rule is not neutral, it is hostile to it.

15 Now, that's basically their argument, as I  
16 understand it, and I'd like to hear the reply.

17 MS. PILLARD: I think, Justice Breyer, that  
18 misapprehends what we mean by hostile to arbitration.  
19 Hostility to arbitration refers to State rules that are  
20 suspicious of or undermine the ability of an arbitral  
21 forum to resolve a dispute, and saying that a case is  
22 going to proceed on a class basis is a far cry from saying  
23 this case is going to proceed at the bottom of a coal  
24 mine, where parties' rights would actually be -- would not  
25 be able to be fulfilled. That's the outside edge. This

1 Court has -- has always said, well, arbitration can't go  
2 forward if the parties can't get meaningful relief, and --  
3 and I think your coal mine case would be such a case.

4 But what we mean by hostile to arbitration is  
5 not whether one or the other party to the arbitration  
6 wishes that they, in the end, once the dispute arises,  
7 that they weren't before an arbitrator. No. What we mean  
8 is, whether State law reflects a suspicion about the  
9 capacity of arbitration to resolve a dispute, and if  
10 anybody --

11 QUESTION: Could they -- could they then have a  
12 State law that says, and the party that invokes the  
13 arbitration in the contract will receive from the other  
14 party a bonus of about \$100,000 for having done a good  
15 thing? See, that's equally ridiculous as to my example in  
16 the coal mine, and all I've done is make sure that the  
17 arbitration -- it's not -- it's not -- you see, it  
18 satisfies your test.

19 MS. PILLARD: I -- I don't think it does,  
20 because it's -- well, because it's -- it's targeted at the  
21 arbitration, and if the State had such a rule one could  
22 look at, what's the purpose, what's the legitimate purpose  
23 of that rule --

24 QUESTION: They love arbitration. Oh, but  
25 forget my ridiculous example. Go ahead with your -- with

1 your -- with your explanation.

2 MS. PILLARD: It seems the -- well, that is --  
3 is the focus. The focus has to be whether the State law,  
4 not looking at ex post, once the parties are -- are  
5 unhappy with the broadly worded contract --

6 QUESTION: Okay, I've got that. Then do you  
7 think -- the other question that's bothering me -- that  
8 was one, and there's one other, is that we have the words  
9 in the contract here, and the words are, the dispute, any  
10 claim, including what the contract means, or the validity  
11 of the arbitration clause, et cetera, shall be resolved by  
12 binding arbitration, by one arbitrator, selected by us,  
13 with consent of you, okay.

14 MS. PILLARD: Yes.

15 QUESTION: That's the phrase.

16 MS. PILLARD: Yes.

17 QUESTION: Now, there obviously is a  
18 disagreement as to the meaning of that phrase. Well, why  
19 shouldn't that be arbitrated?

20 MS. PILLARD: Exactly, and it was.

21 QUESTION: All right. Then what we should do in  
22 this case is say, forget what the North Carolina Supreme  
23 Court says --

24 QUESTION: South Carolina.

25 QUESTION: South Carolina, sorry. I got it

1 right the first time -- South Carolina Supreme Court.  
2 Forget what they say. The question is, what did the  
3 parties mean, and therefore send it back to the arbitrator  
4 for that determination, not influenced by the South  
5 Carolina opinion in front of us. Now, is that the correct  
6 resolution, then?

7 MS. PILLARD: No, Justice Breyer.

8 QUESTION: Because?

9 MS. PILLARD: Because the arbitrator already did  
10 look at this clause and decided that the -- that the  
11 language of the arbitration agreement allowed him to  
12 decide.

13 QUESTION: I thought the first case was a case  
14 where the South Carolina Supreme Court, Bazzle or one of  
15 them was -- the South Carolina Supreme Court said what it  
16 meant, not the arbitrator. The second case, which was in  
17 front of the arbitrator, was the arbitrator being  
18 influenced by what the South Carolina Supreme Court had  
19 said.

20 MS. PILLARD: The -- the Bazzle case did not go  
21 up to the South Carolina Supreme Court before --

22 QUESTION: Then it's the other, it's Lackey the  
23 Supreme Court --

24 MS. PILLARD: The cases came up to the Supreme  
25 Court together --

1 QUESTION: Yes.

2 MS. PILLARD: -- after both decisions were made,  
3 and as an initial matter the Bazzle case went to the trial  
4 court, which decided as an initial matter that the -- in  
5 the Lackey case the -- the arbitrator made the decision as  
6 an initial matter, looking at the language of the contract  
7 and determining, without any prior judicial instruction on  
8 the matter --

9 QUESTION: Not an instruction, but -- but was he  
10 not guided or influenced in some way by the Supreme Court  
11 decision?

12 MS. PILLARD: Green Tree tries for the first  
13 time in this Court to dispute that the arbitrator in  
14 Lackey made an independent decision --

15 QUESTION: Yes.

16 MS. PILLARD: -- that the contract authorized  
17 class arbitration. That argument is a complete red  
18 herring. Their own brief to the South Carolina Supreme  
19 Court repeatedly asserted that in Lackey the arbitrator,  
20 quote, took it upon himself to determine the propriety of  
21 a class-wide arbitration and certify a class. That's at  
22 page 29 of their South Carolina Supreme Court brief. They  
23 say again and again -- their question presented refers to  
24 the arbitrator deciding the class action issue himself.  
25 That's question presented 2 --

1                   QUESTION: That was in -- that was in Lackey.  
2 In Bazzle, did the arbitrator, after the, what I'll call  
3 referral from the State trial court, did the arbitrator  
4 then say, as an -- as an independent matter, I ratify, I  
5 confirm, I -- I agree that the contract should be  
6 interpreted this way, or does it -- or did he just say, I  
7 am following the order of the court?

8                   MS. PILLARD: We don't have either precisely,  
9 but let me tell you what I think is relevant to that. The  
10 arbitrator in Bazzle did also consider the issue. The  
11 issue was placed squarely before the arbitrator when Green  
12 Tree moved him to decertify the class to grant that Green  
13 Tree did fight this, a --

14                  QUESTION: Wait, wait, wait. Why -- why -- what  
15 issue was placed before him when they moved to decertify  
16 him?

17                  MS. PILLARD: They moved to decertify --

18                  QUESTION: The issue of whether he would be  
19 in -- in violation of the order of the South Carolina  
20 Supreme Court?

21                  MS. PILLARD: There was no order of the South  
22 Carolina Supreme Court at that time.

23                  QUESTION: No.

24                  MS. PILLARD: There was only the order of the  
25 trial court, which read the contract to allow class



1 arbitration. Then it -- the class was certified and sent  
2 to the arbitrator, and then the issue was before the  
3 arbitrator should he decertify the class, and Green Tree  
4 argued that -- that they should.

5 Moreover, in Green Tree's motion to vacate the  
6 award, after the arbitrator in Bazzle made the arbitration  
7 award, they characterized the arbitrator as having made  
8 the decision that the class could proceed in arbitration.

9 QUESTION: I'm sure they did, so -- but my  
10 impression is they appointed in Bazzle, the district court  
11 appointed a class, or certified it.

12 MS. PILLARD: Certified a class.

13 QUESTION: All right, it was after that that  
14 they go to the arbitrator in Lackey, and now what they're  
15 telling us is, the arbitrator in Lackey, knowing that the  
16 district court had appointed the class in Bazzle, then  
17 appointed the class in Lackey, and what they say, I take  
18 it, is well, that's not independent, he just thought  
19 that's what he's supposed to do.

20 MS. PILLARD: Right, and -- and I very much  
21 disagree with that characterization of the record, and  
22 I'll try to help to make it clearer.

23 First, as I pointed out, in their own briefs in  
24 the South Carolina Supreme Court, they characterized the  
25 Lackey arbitrator as having acted independently. There is

1 no -- no record support for Green Tree's current  
2 assertions that the arbitrator did not make an independent  
3 decision. There is nothing in the record that supports  
4 it, and it is not the case.

5 The arbitrator said that he determined that a  
6 class action should proceed based on his careful review of  
7 the broadly drafted arbitration clause prepared by Green  
8 Tree. That's --

9 QUESTION: Is there any history, Ms. Pillard, of  
10 this in South Carolina, or is this the first time? Have  
11 there been class proceedings before arbitrators in the  
12 past?

13 MS. PILLARD: I'm not aware that there are,  
14 Justice Ginsburg. I'm not aware of any reported decisions  
15 on that. There have been class arbitrations in -- in  
16 the -- one of the largest economies in the world for --  
17 for 20 years, and there have been a smattering of class  
18 arbitrations in other places, and I -- I --

19 QUESTION: Ms. Pillard, when -- when a class  
20 action is instituted, it seems to me it amounts to an  
21 interpretation not just of -- of these contracts that were  
22 in front of this arbitrator, but also of the other  
23 contracts that have been brought into this arbitration,  
24 and what I find it difficult to see is how any  
25 interpretation of one of those other contracts would --

1 would allow them to be brought into this from the  
2 standpoint not of this company -- this company at least  
3 selected this arbitrator for these cases, and you could  
4 say, well, they didn't select him for the other cases,  
5 which may be a good point, but let's talk about the  
6 customers, the plaintiffs.

7           They didn't select this arbitrator for any case,  
8 not even -- not even for their own case. They have had  
9 foisted upon them not some Federal district judge who has,  
10 you know, the -- the army behind him, but -- but some  
11 arbitrator that, you know -- who knows who, that they --  
12 they never selected at all. How can you possibly draw  
13 them into this -- how can you possibly say that that  
14 contract is reasonably interpreted to allow them to be  
15 brought into this -- into this arbitration? .

16           MS. PILLARD: I have two answers to that,  
17 Justice Scalia. First, there's no question that if, under  
18 a contract that had a forum selection clause that said,  
19 any disputes under this contract will be resolved in a  
20 forum chosen by us with the consent of you, and a  
21 plaintiff chose a forum and filed a class action and  
22 offered opt-out rights to every absent class member who  
23 wanted to opt out, and those absent class members were  
24 bound by the same contract, their right to consent to the  
25 forum would be protected.

1                   QUESTION: But that's deceptive. They -- they  
2 are summoned in by the power of the Government, not by --  
3 not by their -- their contractual commitment to be  
4 summoned in. Even if there were no contract they could be  
5 made part of a class action, so to say that you can do it  
6 when the Government is coercing it, and therefore it's a  
7 perfectly reasonable interpretation of a contract, doesn't  
8 make sense to me.

9                   MS. PILLARD: I --

10                  QUESTION: Here, the only basis for getting --  
11 for getting these plaintiffs into this court, or into this  
12 arbitral court is their voluntary agreement, and their  
13 voluntary agreement gave them the right to select an  
14 arbitrator, and they have been deprived of that right  
15 entirely.

16                  MS. PILLARD: I agree with you, Justice Scalia,  
17 up to your last sentence. They have not been deprived of  
18 that right. It is exactly true that the authority of the  
19 arbitrator over the absent class members derives from  
20 contract, and every single absent class member was a -- a  
21 signatory to the -- to the same arbitration clause. They  
22 were all governed by the same clause, and once --

23                  QUESTION: But -- but Green Tree didn't appoint  
24 the arbitrator for that purpose. Green Tree appointed the  
25 arbitrator for X, Y, and Z.

1 MS. PILLARD: Green Tree wrote a clause that --  
2 it swept everything within it. They said, we trust  
3 everything to the arbitrator. This clause is extremely  
4 broad. Once they did that -- they drafted a clause which  
5 the arbitrator and every South Carolina judge to look at  
6 it believed was susceptible of a reading that had  
7 authorized class action. In that case, you read this  
8 contract as if it had provided for class arbitration, and  
9 when they select --

10 QUESTION: Wait, wait --

11 QUESTION: Could the -- could the arbitrator  
12 have said, I'm -- I'm going to include in -- in this class  
13 some people who don't have an arbitration contract at all?

14 MS. PILLARD: I would think not, no, and indeed,  
15 those people were excluded in this case.

16 QUESTION: And -- and why is that?

17 MS. PILLARD: Because they have --

18 QUESTION: Because the -- Green Tree did not  
19 consent to that.

20 MS. PILLARD: Because they have no -- the  
21 arbitrator has no authority over them, because neither  
22 they nor Green Tree consented to that, but by hypothesis,  
23 if you had a clause --

24 QUESTION: The hypothesis is, the consent must  
25 be bilateral, and here it wasn't.

1 MS. PILLARD: Oh, I disagree. The consent was  
2 bilateral. Green Tree chose an arbitrator, and when it  
3 chose an arbitrator for a case under a contract broad  
4 enough to authorize class action, legally it has chosen an  
5 arbitrator with the possibility that the class could  
6 proceed. Indeed, when they chose --

7 QUESTION: All right, but what --

8 MS. PILLARD: -- the arbitrator, the case had  
9 already been filed as a class action. It was -- they were  
10 on notice --

11 QUESTION: Yes.

12 MS. PILLARD: -- of the possibility that this  
13 issue would be litigated on a class basis.

14 QUESTION: Well, they were on notice that  
15 somebody wanted a class action, but it seems to me,  
16 number 1, they were not on notice that South Carolina law  
17 would provide a -- a class arbitration because, as you  
18 said, it hadn't occurred before, and the only thing that  
19 they definitely consented to was an arbitrator for this  
20 case, and in a situation in which there was no existing  
21 State law that put them on notice that they were in  
22 jeopardy of this result, they're saying there are some  
23 things we -- I think they're saying there are some things  
24 we -- we agree that have to be filled in later about the  
25 terms of the arbitration.

1                   But with no history to indicate that the request  
2 for class -- or class treatment would be granted and would  
3 be possible under South Carolina law, we surely did not  
4 consent, we certainly did not take the risk that we  
5 consented, that we were consenting to arbitration for all  
6 of these other people, and if you doubt that, Mr. Phillips  
7 says, just step back and -- and bear this in mind.  
8 Without judicial review, would we have rolled the dice for  
9 \$27 million on one arbitrator? What is -- what is your  
10 answer to that, that it, in effect, it is just too  
11 implausible to draw this conclusion out of the limited  
12 consent that they gave?

13                   MS. PILLARD: I have several answers to that,  
14 Justice Souter. First of all, this Court has never said  
15 that a case with a large amount of money at stake, indeed  
16 in Mitsubishi Motors with antitrust cases, in McMahon with  
17 RICOs -- RICO and securities cases, large amounts of money  
18 at stake, arbitration is permitted. They --

19                   QUESTION: Oh, no question about it. It's a  
20 question of what they plausibly consented to.

21                   MS. PILLARD: Right.

22                   QUESTION: That's the point of his argument.

23                   MS. PILLARD: Right. They were -- they were on  
24 notice. If they had good lawyers doing this, they would  
25 have a long time before 1998 put in the simple one phrase

1 that they put into their contract as of 1998 which says,  
2 nobody who signs this can be a class member or a class  
3 representative.

4 QUESTION: Well, if they had been in California  
5 they would have done that, but were -- were, you know,  
6 were they on notice that they had better guard against  
7 that jeopardy in South Carolina?

8 MS. PILLARD: Yes. I think in -- in particular,  
9 the Episcopal Housing case put them on notice as of 1979  
10 there were consolidations being permitted, and the courts  
11 who were looking at the class question, the Champ court --

12 QUESTION: Consolidations aren't class actions.  
13 I mean, those are quite different.

14 MS. PILLARD: I agree with you, Justice Scalia,  
15 but the fact of the matter is, the courts that have  
16 decided whether or not to authorize class arbitration in  
17 an appropriate case have looked as an analogy to the  
18 consolidation precedent, so you have a jurisdiction in  
19 which there is consolidation precedent, and parties, when  
20 they agree to contracts in ambiguous terms, agree to  
21 submit to the natural evolution of State law, and that  
22 is -- that does on occasion present risks. That does  
23 present risks, but they chose both to draft a clause very  
24 broadly and to submit everything to the arbitrator.

25 QUESTION: Well, they're saying this isn't



1 natural evolution, this is creationism, and --

2 (Laughter.)

3 QUESTION: -- don't -- don't they have a --  
4 don't they have a point that there is a distinction when  
5 the difference gets to be that great?

6 MS. PILLARD: No, and I -- and I certainly don't  
7 think that is a preemption question for this Court. I  
8 certainly don't think so.

9 QUESTION: No, no, but it says the terms have to  
10 be -- I mean, it doesn't -- it says in the statute you  
11 have to enforce the arbitration that they wrote, and  
12 here -- now, it is -- this point is bothering me, because  
13 I'm not sure what your answer to this was. I do see the  
14 phrase, shall be resolved by binding arbitration, by one  
15 arbitrator selected by us, with consent of you.

16 Now, the opt-out can be, consent of you. I get  
17 that. If they don't opt out, they consent, but what about  
18 the phrase, by one arbitrator selected by us? We've come  
19 around, we've been talking about that nonstop, but I -- I  
20 don't have a clear answer to that, because what seems  
21 absolutely clear in the case of Justice Scalia and me, and  
22 he's never been in this courtroom, or in the arbitrator  
23 room or anywhere, you know, I didn't select that  
24 arbitrator. I selected you for a different case.

25 Now -- now, how do we -- how do we square that

1 with the words, an arbitrator selected by me, if I'm Green  
2 Tree?

3 MS. PILLARD: Because -- two reasons. One is  
4 that this was filed as a class action, so when they  
5 selected the arbitrator they were on notice that at least  
6 the plaintiffs were trying to do this. The second --

7 QUESTION: So if they said right at that point  
8 we don't want this as a class action, then they win?

9 MS. PILLARD: No.

10 QUESTION: No, okay.

11 MS. PILLARD: The second answer is that the  
12 contract was written in such a way as to be susceptible of  
13 permitting class arbitration, so when they select an  
14 arbitrator under this contract, they take into account,  
15 this could be an arbitrator that could award punitive  
16 damages. This could be an arbitrator that could proceed  
17 on a class basis. This could be an arbitrator who could  
18 order --

19 QUESTION: All right, I see, but --

20 MS. PILLARD: -- broad discovery.

21 QUESTION: If they had had a --

22 MS. PILLARD: This could be an arbitrator who  
23 could do any of the things the contract permits.

24 QUESTION: If they had had enough foresight,  
25 could they have told the arbitrator, we are selecting you,

1 but for this suit only. You may not have a class action.  
2 We are not consenting. Could they have said that up  
3 front?

4 MS. PILLARD: I don't think so. I don't think  
5 so, because the -- the language of the contract and the  
6 authority that they have given to arbitrators is  
7 determined from the contract language, not from the  
8 parties' choices at the threshold where a particular  
9 dispute has already arisen.

10 QUESTION: I -- I notice the -- none -- none of  
11 your answers to these questions, including -- you had  
12 several answers for Justice Souter. None of your answers  
13 said, well, you know, that's a very interesting theory,  
14 Mr. Justice, but this is a State law matter, it's not for  
15 you. I -- I haven't heard that.

16 MS. PILLARD: Well, I -- I intended to give --  
17 to give that answer when I said this is not a preemption  
18 question. It is not an FAA question. It is a State law  
19 question, and I think that's exactly right, Justice  
20 Kennedy, the narrow scope of FAA preemption focuses on  
21 whether State law is hostile to the arbitration forum, to  
22 the choice of arbitral forum to resolve ambiguities like  
23 these. There is --

24 QUESTION: Suppose a -- suppose the State law  
25 said, not only do we interpret silence to mean you can

1 have it in a class format, but that if any arbitration  
2 clause -- any arbitration contract excludes class action  
3 we will hold that against our public policy and  
4 unenforceable?

5 MS. PILLARD: One would have to look at the  
6 reasoning of the State court in so holding. If the  
7 reasoning was hostility to arbitration, trying to trade it  
8 up --

9 QUESTION: Well, the -- the Supreme Court would  
10 explain, we love arbitration, that's why we're not going  
11 to let anybody make it a smaller arbitration, so that's --  
12 so we're not being hostile to arbitration.

13 MS. PILLARD: That is, as the South Carolina  
14 Supreme Court made clear, not the issue in this case. If  
15 it were an application of general contract principles of  
16 unconscionability in a particular case with no suspicion  
17 of arbitration as such, then I think a State could do that  
18 under State law.

19 If the State had a general law that applied to  
20 litigation and arbitration against class action waivers,  
21 or against waivers of class actions in adhesive contracts  
22 that applied to both fora, to the litigation and to the  
23 arbitration, I think under that circumstance also it would  
24 not be hostile to arbitration for the State law to  
25 override the parties' choice --

1                   QUESTION: What's your authority that -- that it  
2 has to be -- you -- you seem to -- to be positing some  
3 kind of a -- of an intent requirement on the part of the  
4 State. It has to really have it in for arbitration.

5                   Why isn't the Federal Arbitration Act more  
6 reasonably interpreted as directed at those State laws  
7 that -- that are destructive of arbitration, that -- that  
8 are -- are hostile not in the sense of any -- of any  
9 mental intent, but that in their operation make it  
10 difficult for parties to enter into arbitration  
11 agreements, and if that's what it means, a law that  
12 interprets a -- an arbitration agreement fantastically,  
13 you know, down at the bottom of the coal mine, or, you  
14 know, you -- you have to pay so many million dollars win  
15 or lose, or, I think, you -- you have to subject yourself  
16 to -- to class actions, is a law that is hostile to  
17 arbitration, that is -- it is -- it is antagonistic to the  
18 ability of parties to decide between themselves how, when,  
19 and where and to what extent they will have an arbitrator  
20 decide matters for them?

21                  MS. PILLARD: Justice Scalia, parties have an  
22 ability to do that, and anyone who wants to put in a  
23 clause saying, no class arbitration, is invited to do  
24 that. This Court has never interpreted hostility to  
25 arbitration that broadly, as you just described. What

1 this Court has said again and again is that the FAA  
2 preempts only State laws that single out arbitration  
3 provisions for suspect status that undercut the  
4 enforceability of arbitration agreements.

5 Here, the arbitration agreement was enforced,  
6 and there is no FAA rule, contrary to Green Tree's  
7 contentions, that all arbitration agreements should be  
8 enforced according to their written terms without the  
9 benefit of State rules for resolving contract ambiguity.

10 Rather, as the Court reiterated in *Waffle House*,  
11 absent some ambiguity in the agreement, it is the language  
12 of the contract that defines the scope of disputes subject  
13 to arbitration. This Court has repeatedly made clear that  
14 it is State contract law that applies, and it is State  
15 contract law that resolves any contract ambiguity.

16 Green Tree is seeking a radical expansion of FAA  
17 preemption. Their rule would federalize countless  
18 disputes over the meaning of arbitration clauses. Parties  
19 to arbitration will come and say, we never intended to --  
20 to permit discovery, protective orders, various types of  
21 motions, types of damages and the like that would invite  
22 any party unhappy with the results of an arbitration,  
23 saying we're getting into more than we thought, this is  
24 hostile to arbitration as we prefer, to come to this Court  
25 and ask it to second-guess ordinary State law

1 interpretation of an arbitration agreement.

2 This Court should not expand the scope of FAA  
3 preemption in this case. There's no warrant for it here.

4 QUESTION: May I ask this, if you have another  
5 moment: Does this case have any real future significance,  
6 because isn't it fairly clear that all the arbitration  
7 agreements in the future will prohibit class actions?

8 MS. PILLARD: It's really very limited, Justice  
9 Stevens, I agree. This case deals with whether this  
10 particular agreement foreclosed class arbitration. Green  
11 Tree agrees that where an agreement authorizes it, class  
12 arbitration can be done, and so all they're asking you to  
13 do is to second-guess the State court's interpretation  
14 applying the rule of construction against the drafter, and  
15 I would very much dispute their characterization of what  
16 the South Carolina Supreme Court did of applying a -- a  
17 rule without any contractual or statutory directive to do  
18 so.

19 The court was there quoting from a different  
20 case, and this case is a fortiori. Clearly, the court  
21 looked and said, there's no specific directive. As a  
22 preliminary matter, the court said, the contract is  
23 silent. Then they looked at the more general language the  
24 trial court had relied on and said, there's affirmative  
25 authorization here under the general language, and they

1 looked at Green Tree's argument that the reference to this  
2 contract foreclosed it, and the South Carolina Supreme  
3 Court said, I find it ambiguous, and I'm going to apply  
4 the ordinary rule of --

5 QUESTION: Is there a risk that if we just did  
6 what you said, they write in no class actions, a court  
7 says this is a contract of adhesion, and that provision's  
8 oppressive, and so we strike it?

9 MS. PILLARD: It depends on why they think it's  
10 oppressive. If they think that waivers generally in  
11 contracts, pre-dispute agreements to waive the right to  
12 proceed as a class, whether the contract is an arbitration  
13 agreement or not are oppressive, then I think it might not  
14 be hostile to arbitration.

15 If they say, a waiver of a class action in an  
16 arbitration setting is oppressive and unconstitutional,  
17 that might run afoul of this Court's precedence in -- in  
18 Casarotto.

19 QUESTION: You really think that they could  
20 allow a waiver of judicial review and disallow a waiver of  
21 class actions? That would -- that would boggle my mind.  
22 And you think that wouldn't display hostility?

23 MS. PILLARD: Thank you.

24 QUESTION: Thank you, Ms. Pillard.

25 Mr. Phillips, you have 4 minutes remaining.



1                   REBUTTAL ARGUMENT OF CARTER G. PHILLIPS  
2                   ON BEHALF OF THE PETITIONER

3                   MR. PHILLIPS: Thank you, Mr. Chief Justice.

4                   Justice Kennedy, in response to your question, I  
5 don't know precisely the first time that we raised this  
6 issue, but I know that if you look at the record on  
7 decision at pages 152 and again at 1539, in both Bazzle  
8 and in Lackey, we say point blank the arbitrator exceeded  
9 his authority to proceed as a class action, and that  
10 neither Green Tree nor any of the unnamed class members  
11 consented to have the arbitrator arbitrate their claims,  
12 so we said it as plainly as we could with respect to  
13 the -- with respect to the notion of consent.

14                  The specific -- aside from that, the South  
15 Carolina Supreme Court said we didn't waive our rights,  
16 and it's quite clear that if we fight over these issues in  
17 front of the arbitrator, we don't waive our rights. That  
18 was the holding of this Court in First Chicago.

19                  Justice Breyer, with respect to whether or not  
20 the arbitrator thought he exercised independent authority,  
21 I think it's pretty clear that both parties in this case  
22 have taken inconsistent positions. If you read the  
23 respondent's briefs below, they say that the arbitrator  
24 had no authority to go beyond the class certification of  
25 the decision that had already been made by the State

1 court. Whether he did or not I say at the end of the day  
2 doesn't matter, because I don't think it's a question for  
3 the arbitrator, but if it is, he exceeded his authority,  
4 because he clearly doesn't have the authority under this  
5 contract to make a decision with respect to the third  
6 parties.

7           That takes us to the question Justice Scalia  
8 raised, which is, you know, what -- what do you do with  
9 the fact that the South Carolina Supreme Court has said  
10 not word one about arbitrator selected by me? There's  
11 nothing that interprets that language of this agreement,  
12 and if the Federal Arbitration Act doesn't have at least  
13 some component here to say, look, the terms of the  
14 contract cannot be categorically ignored or disregarded by  
15 the State court, those are rights that are there. We said  
16 as plainly as we could we would not consent to this, and  
17 the court rejected it.

18           And the final point I would make with respect to  
19 hostility, while it is true that this Court has  
20 consistently struck down efforts to be hostile to  
21 arbitration, it has never said that that's the only basis  
22 on which preemption will arise. Preemption in this  
23 context exists in the same way it does in every other  
24 context, does it interfere with the full achievement of  
25 Congress' objections. That's *Hines v. Davidowitz*, and the

1 answer to that here, and it's the same answer that would  
2 arise if they were to -- if we had an agreement that said  
3 class action has, that of course this is manifest  
4 hostility to this arbitration agreement as written. It's  
5 a bilateral agreement, and all the South Carolina Supreme  
6 Court had to say about that bilateral agreement is, it  
7 would be judicially inefficient for us to have to go  
8 through each one of these individually.

9 Well, that's all well and good, but that's  
10 coercion, that's not consent, and if the Federal  
11 Arbitration Act has any meaning, it means that you apply  
12 the consent of the parties here, and if you do that, the  
13 South Carolina Supreme Court has to be overturned.

14 Thank you, Your Honors.

15 CHIEF JUSTICE REHNQUIST: Thank you,  
16 Mr. Phillips.

17 The case is submitted.

18 (Whereupon, at 11:09 a.m., the case in the  
19 above-entitled matter was submitted.)

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