IN THE SUPREME COURT OF THE UNITED STATES

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GREEN TREE FINANCIAL CORP., :

NKA CONSECO FINANCE CORP., :

Petitioner :

v. : No. 02-634

LYNN W. BAZZLE, ETC., ET AL. :

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Washington, D.C.

Tuesday, April 22, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:10 a.m.

APPEARANCES:

CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of the Petitioner.

CORNELIA T.L. PILLARD, ESQ., Washington, D.C.; on behalf of the Respondents.

C O N T E N T S

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

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

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

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

QUESTION: Well, but the --

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

to be done.

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

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

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

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

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

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

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

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

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

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

QUESTION: Well, what --

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

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

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

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

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

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

QUESTION: Yes.

MR. PHILLIPS: Well --

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

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

QUESTION: Why -- please.

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

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

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

The --

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

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

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

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

QUESTION: Do you --

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

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

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

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

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

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

QUESTION: -- is, they imputed an intent.

MR. PHILLIPS: -- they imputed an intent.

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

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

QUESTION: Well --

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

QUESTION: You -- you --

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

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

MR. PHILLIPS: Well --

QUESTION: So why do you draw --

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

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

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

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

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

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

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

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

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

MR. PHILLIPS: I'm sorry?

QUESTION: Have there been no class actions in --

MR. PHILLIPS: Other than this one?

QUESTION: Yes.

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

QUESTION: Does the AAA have no rules about --

MR. PHILLIPS: No.

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

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

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

QUESTION: Well, suppose --

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. PHILLIPS: Well --

QUESTION: Not -- not as sweeping --

MR. PHILLIPS: This in a vengeance, I will say, Mr. Chief Justice.

QUESTION: Well, but what is your -- what is your principle objection to Justice Stevens' hypothetical where the arbitrator simply says, I've got 15 of these and I'm going to just try them together?

MR. PHILLIPS: I -- I have a substantial -- substantially less of an objection to that kind of a procedure because it doesn't adjudicate unnamed parties' rights, or purport to adjudicate those rights. At least you have a real dispute that already exists --

QUESTION: But --

MR. PHILLIPS: -- which can justify in some sense consolidation. I still think you have to respect Green Tree's right --

QUESTION: But then -- but you say your -- your objection would have been cured if the arbitrator had written a letter to every plaintiff and gotten an -- a written okay, that would have made it okay?

MR. PHILLIPS: No, because the -- the arbitration process requires the filing of claims and going through it.

QUESTION: Well then, what's the difference

between that and my 15-individual case?

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

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

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

QUESTION: And -- and --

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

QUESTION: Please, finish your answer.

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

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

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

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

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

MR. PHILLIPS: Yes.

QUESTION: We -- we do not consent.

MR. PHILLIPS: We do not consent to that.

QUESTION: And when did you do that?

MR. PHILLIPS: We raised that as --

QUESTION: After the first --

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

QUESTION: -- the idea of class action.

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

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

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

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

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

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

MR. PHILLIPS: Except that --

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

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

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

QUESTION: Why?

MR. PHILLIPS: Because it goes --

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

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

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

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

MR. PHILLIPS: Justice Breyer, I think on the question of whether the arbitrator has jurisdiction --

QUESTION: Yes.

MR. PHILLIPS: -- and authority to decide the rights of a party, that is a question for the court to decide --

QUESTION: Okay, is there any -- is there any --

MR. PHILLIPS: -- not for the arbitrator.

QUESTION: Is there any case you could cite -- I mean, I read most of them when I -- when I wrote the opinion in the Howsam case. I don't think you can think of one.

MR. PHILLIPS: But Howsam dealt with the specific problem of the procedures to be followed with respect to a bilateral --

QUESTION: Oh, are we talking about that here?

MR. PHILLIPS: No, we're not talking about the procedures to be followed in a bilateral agreement. We're talking about what you have to do --

QUESTION: Well, I --

MR. PHILLIPS: -- to resolve the rights of third parties who are not signatories --

QUESTION: Why should --

QUESTION: At least as to the other contracts --

MR. PHILLIPS: Yes.

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

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

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

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

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

MR. PHILLIPS: Right, but --

QUESTION: -- including that one.

MR. PHILLIPS: Right.

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

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

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

QUESTION: But the other individuals --

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

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

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

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

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

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

MR. PHILLIPS: Yes.

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

MR. PHILLIPS: But --

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

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

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

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

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

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

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

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

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

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

MR. PHILLIPS: Well, I apologize --

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

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

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

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

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

MR. PHILLIPS: Yes.

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

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

the arbitration agreement that's before the arbitrator.

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

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

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

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

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

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

MR. PHILLIPS: No. No.

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

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

QUESTION: But not with these arbitrators.

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

QUESTION: But I thought that --

MR. PHILLIPS: We had --

QUESTION: But they have consented to the --

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

QUESTION: But is it really reasonable to assume

that if he knew he had a thousand different arbitrations coming up he'd want a thousand different arbitrators?

MR. PHILLIPS: Sure.

QUESTION: With the same issue in every case?

MR. PHILLIPS: Sure. Why not?

QUESTION: Because --

QUESTION: Don't they wear -- wear out after just one case, then?

MR. PHILLIPS: Well, the -- the point is that --

QUESTION: You might not want to put your company's entire future in the hands of one arbitrator.

MR. PHILLIPS: Of a single arbitrator --

QUESTION: Yes.

MR. PHILLIPS: -- with no right to judicial review --

QUESTION: Makes some sense.

MR. PHILLIPS: -- Justice Stevens. The problem is, why would we make a judgment at the outset of this process that says, we are going to enter into the most informal decisionmaking process with no right to judicial review and with $27 million at stake.

QUESTION: Where -- where is it --

MR. PHILLIPS: No one would. It would be madness.

QUESTION: Where is it in the record that you

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

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

QUESTION: All right.

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

QUESTION: Very well, Mr. Phillips.

Ms. Pillard, we'll hear from you.

ORAL ARGUMENT OF CORNELIA T.L. PILLARD

ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

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

MS. PILLARD: The --

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

(Laughter.)

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

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

MS. PILLARD: You apply --

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

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

QUESTION: There's a big difference --

QUESTION: What are consolidation arbitration --

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

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

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

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

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

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

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

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

MS. PILLARD: They --

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

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

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

MS. PILLARD: It's not hostile --

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

MS. PILLARD: Right.

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

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

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

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

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

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

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

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

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

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

your -- with your explanation.

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

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

MS. PILLARD: Yes.

QUESTION: That's the phrase.

MS. PILLARD: Yes.

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

MS. PILLARD: Exactly, and it was.

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

QUESTION: South Carolina.

QUESTION: South Carolina, sorry. I got it

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

MS. PILLARD: No, Justice Breyer.

QUESTION: Because?

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

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

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

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

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

QUESTION: Yes.

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

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

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

QUESTION: Yes.

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

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

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

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

MS. PILLARD: They moved to decertify --

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

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

QUESTION: No.

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

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

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

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

MS. PILLARD: Certified a class.

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

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

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

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

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

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

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

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

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

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

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

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

MS. PILLARD: I --

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

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

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

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

QUESTION: Wait, wait --

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

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

QUESTION: And -- and why is that?

MS. PILLARD: Because they have --

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

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

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

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

QUESTION: All right, but what --

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

QUESTION: Yes.

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

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

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

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

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

MS. PILLARD: Right.

QUESTION: That's the point of his argument.

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

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

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

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

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

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

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

natural evolution, this is creationism, and --

(Laughter.)

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

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

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

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

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

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

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

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

MS. PILLARD: No.

QUESTION: No, okay.

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

QUESTION: All right, I see, but --

MS. PILLARD: -- broad discovery.

QUESTION: If they had had a --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

interpretation of an arbitration agreement.

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

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

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

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

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

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

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

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

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

MS. PILLARD: Thank you.

QUESTION: Thank you, Ms. Pillard.

Mr. Phillips, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

Thank you, Your Honors.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Phillips.

The case is submitted.

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