No. 08-1198

IN THE
Supreme Court of the United States

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL USA, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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This Court granted certiorari to decide "[w]hether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act" (FAA). Pet. i. At the beginning and end of its brief, Animalfeeds repeats arguments it made at the petition stage for why the Court should not reach that question. Resp. Br. 19-26, 51-59. In between, it argues principally that, even if the parties never reached any actual agreement concerning

class arbitration, the decision to impose it is committed to the arbitrators—as a matter of FAA policy, through interpretation of the original contract, as a routine procedural decision, or because arbitrators are authorized to fill contractual gaps in accordance with their own views of appropriate public policy. *Id.* at 26-51.

None of these arguments provides a sound basis for resolving this case. The parties' supplemental agreement—Animalfeeds' first ground for avoiding review—committed to the arbitrators the question that the plurality in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), concluded should be resolved by arbitration: whether the parties' arbitration clause was silent as to class arbitration or, instead, revealed an agreement by the parties to prohibit or permit it. In this case, the arbitrators resolved that question by finding the agreement to be silent. Only then did the case present the separate statutory issue whether the FAA permits arbitrators to impose class arbitration in the absence of actual agreement. That is the question presented to this Court.

Animalfeeds' arguments on the merits fare no better. To begin with, they rest largely (as did the Second Circuit's decision) on the false premise that *Bazzle* held that the FAA permits arbitrators to impose class arbitration unless the parties expressly prohibit it. That is not correct. The *Bazzle* plurality expressly declined to answer the statutory question presented there—and again here. *See* 539 U.S. at 447, 450 (plurality opinion).

Animalfeeds also seeks to invoke policies underlying the FAA. The foremost such policy, however, is that arbitration is a matter of consent, not coercion. That is why the arbitrators' ruling—which turned on what background rule the arbitrators thought desirable

as a matter of policy, rather than on any finding about the parties' intent—cannot stand. Animalfeeds' arguments based on the text of the arbitration agreement come far too late and are, in any event, unpersuasive. Its attempt to characterize the availability of class arbitration as merely a procedural matter, committed to arbitral discretion, is likewise unavailing. As petitioners have explained, a switch from bilateral to class arbitration is enormously consequential, and may be authorized only by actual agreement of the parties. Lastly, the contention that class arbitration may be imposed here because it is more efficient or "as a matter of public policy" (CAJA A308-A309) fails. Bilateral arbitration in this case would not frustrate any public policy, and in any event, as this Court has repeatedly observed, neither efficiency nor policy considerations can trump the principle that arbitration may proceed only to the extent and in a manner to which the parties have consented.

Animalfeeds' final claim is that the case is unripe. That belated contention is both waived and meritless—as the Court evidently recognized in rejecting it at the petition stage.

ARGUMENT

I. ANIMALFEEDS' ATTEMPTS TO AVOID THE QUESTION PRESENTED SHOULD BE REJECTED

In its brief opposing certiorari, Animalfeeds argued prominently that the parties' supplemental agreement (Pet. App. 55a-63a) committed the question presented to the arbitrators, *see* Br. in Opp. 2, 6 & n.1, 11 n.5, and that the narrow standard of review applicable to most arbitral decisions rendered further consideration pointless, *id.* at 5, 6-10. "In granting certiorari," this Court "necessarily considered and rejected th[ose] conten-

tion[s] as a basis for denying review." *United States* v. *Williams*, 504 U.S. 36, 40 (1992). Undeterred, Animalfeeds repeats essentially the same arguments in its brief on the merits. Resp. Br. 19-26. Now that review has been granted, these arguments provide even less basis for failing to reach and decide the question presented. *Williams*, 504 U.S. at 40. Nonetheless, petitioners respond briefly before turning to the merits.

A. The Parties' Supplemental Agreement Did Not Commit To The Arbitrators The Question Whether They Were Authorized To Impose Class Arbitration On The Basis Of A Contract They Found To Be Silent On That Issue

The parties' post-dispute supplemental agreement did not commit to the arbitrators the question presented here—*i.e.*, whether the FAA permits arbitrators to impose class arbitration on the parties when their arbitration agreement is silent on that issue. On the contrary, the supplemental agreement specifically states that it does not "alter the scope of the Parties' [original] arbitration agreements," and that "[n]either the fact of this Agreement nor any of its terms may be used to support or oppose any argument in favor of a class action arbitration[.]" Pet. App. 62a.

The parties entered into the supplemental agreement in an effort to conform their arbitration proceedings to the plurality opinion in *Bazzle*.[1] The Court

[1] The supplemental agreement provides that the arbitrators "shall follow and be bound by Rules 3 through 7 of the American Arbitration Association's Supplementary Rules for Class Arbitrations." Pet. App. 59a ¶ 7. As the AAA's amicus brief explains (at 2), those rules were adopted "[i]n response to this Court's decision in … *Bazzle*."

granted review in that case to address the same statutory question presented here. *See* 539 U.S. at 447 (plurality opinion). It did not reach that question because a plurality concluded that there was an antecedent question of contract interpretation that had to be resolved in arbitration: whether the arbitration clause at issue was really "silent" as to class arbitration, or whether in fact the parties had agreed to forbid it. *Id.* at 447, 453. The plurality "remand[ed] the case so that the arbitrator may decide the *question of contract interpretation*—thereby enforcing the parties' arbitration agreements according to their terms." *Id.* at 454 (emphasis added); *see also id.* at 455 (Stevens, J., concurring in the judgment and dissenting in part).

Here, in light of *Bazzle*, the parties agreed that the arbitrators should first construe the parties' arbitration clause. In that regard, petitioners argued before the arbitrators that the clause was properly read, in light of uniform maritime industry custom and practice, to embody an understanding that any arbitration would be bilateral, not consolidated or class arbitration. *See* JA118a ("You have to look at the intent of the parties at the time. And certainly we show the intent of the parties was not to allow a class action arbitration.").[2]

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[2] *See also, e.g.*, JA91a-92a ("The issue … [is] how our clients read the contract. And so you need to put yourself in their context. … We're talking about recognizing how the industry works, how the parties do business. The fact that they negotiate these contracts with each other, have done that over generations, that they arbitrate all their disputes in an individual arbitration, that they always have done that, that's what they provide for, it's what they expect. They don't allow consolidation, they certainly don't allow class action[s]. … That's certainly not what any of these parties anticipate[s]."); 109a-115a (expert testimony going to inferring

The arbitrators rejected that intent-based argument. Pet. App. 49a-52a. Petitioners disagree with the arbitrators' conclusion, but the question presented here takes it as established that the parties' arbitration agreement is "silent" as to class arbitration—*i.e.*, that the parties reached no actual agreement to prohibit or permit it. Indeed, it was only after the arbitrators resolved the contractual question by finding the agreement to be silent, but nonetheless asserted the authority to impose class arbitration, that this case presented the separate statutory question left open in *Bazzle*: whether the FAA permits arbitrators to impose (or courts to compel) a class arbitration to which the parties never actually agreed. That is the question now presented, once again, for resolution by the Court.

B. The Question Presented Is Subject To Meaningful Review

Animalfeeds likewise conflates the contractual and statutory questions in contending (Br. 24-26) that the FAA leaves no discernible room for this Court to review the Second Circuit's decision that petitioners' agreements with Animalfeeds, though silent, are an adequate basis for compelling class arbitration. The parties certainly authorized the arbitrators to determine whether the parties intended to permit or prohibit class arbitration. But in further deciding that, under the FAA, a silent agreement allowed them to order class arbitration, the arbitrators "exceeded their powers," 9 U.S.C. § 10(a)(4), or acted in manifest disregard of the law, by incorrectly resolving a question the par-

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parties' contractual intent from industry custom and practice); 119a-141a (expert declarations).

ties did not commit to them for final resolution. And in reinstating the arbitrators' award, the court of appeals in effect compelled petitioners—based on a misreading both of *Bazzle* and of the parties' supplemental agreement (*see* Pet. Br. 9-11)—to submit to an arbitration that is manifestly *not* "in accordance with the terms of the[ir] agreement[s]," 9 U.S.C. § 4. As petitioners have argued (Br. 23-25), those errors must be subject to review. Animalfeeds' contrary position would instead leave the legal consequences of silence in a contract governed by the FAA to the unbridled discretion of arbitrators, who could unreviewably "construe" a silent contract to permit class arbitration in any given case. This Court should reject that invitation to abdicate the limited but critical role of courts under the FAA, a role that includes ensuring nationally uniform application of the statute.

II. Under The FAA, Arbitrators And Courts May Not Compel Participation In A Class Arbitration To Which A Party Never Consented

Apart from trying to avoid review, Animalfeeds argues (Br. 26-51) that if parties agreed to arbitrate but never reached any agreement about class arbitration, the decision whether to impose it is committed to the arbitrators. Animalfeeds advances arguments based on FAA policy (Br. 27-30, 39-41) and, more prominently, on interpretation of the original contract (Br. 30-38, 42-51), including contending that the text of the contract supports class arbitration (Br. 31-34); that the decision to impose class arbitration is a merely procedural one understood to be delegated to the arbitrators (*e.g.*, Br. 35-36); and that arbitrators are authorized to fill contractual gaps in accordance with their own views of appropriate public policy (*e.g.*, Br. 49-51). None of these

arguments can justify the imposition of class arbitration in this case.

A. The FAA Principle Relevant Here Is That Arbitration Is A Matter Of Consent

Animalfeeds argues that the FAA permits arbitrators to impose class arbitration on the basis of a contract that is silent on the point because (i) class arbitration is feasible (Br. 27-30) and (ii) the FAA should not disfavor it (Br. 22, 39-41). To begin with, petitioners' position does not disfavor arbitration. Whether or not petitioners prevail, their disputes with Animalfeeds and others are committed to arbitration. Indeed, it was petitioners who successfully sought to enforce the underlying arbitration agreements. Petitioners contend only that the arbitration should not proceed in a manner to which the parties never agreed.

That approach is consistent with the FAA's "central purpose," which is not to favor or disfavor particular methods of arbitration but to "ensure that private agreements to arbitrate are enforced according to their terms." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (internal quotation marks omitted). The guiding principle relevant here is thus that arbitration "is a matter of consent, not coercion." *Volt Info. Scis., Inc.* v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). Here, the parties' arbitration agreement is "silent" as to class arbitration—*i.e.*, petitioners never consented to it. And petitioners' fundamental submission is that the transformation from bilateral to class arbitration is too consequential to be made in the absence of actual consent.

Animalfeeds responds to this central point in part by accusing petitioners of seeking a "rule of extraordi-

nary specificity" that "requires specifically expressed contractual authorization of class arbitration." Resp. Br. 2; *see also id.* at 16 (contract must "specifically mention[] class proceedings with approval"), 30 ("special, explicit-statement rule"), 36 ("specifically authorize[s] class arbitration"), 39 ("specifically authorizes class proceedings by name"), 45 ("specifically and expressly authorizing"). Tellingly, Animalfeeds offers no citation to petitioners' brief to support this allegation. As petitioners have made clear (*e.g.*, Pet. Br. 49), consent to class arbitration may be manifested either in the text of the parties' agreement or in other circumstances from which actual intent to authorize class proceedings may properly be inferred.

Those circumstances include, for example, the sort of industry custom and practice that petitioners demonstrated to the arbitrators and the district court—which in this case, of course, would have justified a conclusion that the parties intended to *prohibit* class arbitration. *See, e.g.*, CAJA A599; JA126a ¶ 21; JA139a ¶ 24; Pet. App. 42a, 51a. They would also include background rules of the law selected by the parties to govern their agreement and known to the parties at the time of contracting, such as a default rule that parties will be deemed to have consented to class arbitration unless they expressly prohibit it. *See, e.g.*, Pet. Br. 49-50. Thus, for example, an arbitration agreement governed by South Carolina law and signed after the state supreme court adopted such a default rule in *Bazzle* v. *Green Tree Financial Corp.*, 569 S.E.2d 349 (S.C. 2002), might well support an inference that parties whose arbitration clause is textually silent on the issue nonetheless actually contemplated the possibility of class pro-

ceedings.[3] There is, accordingly, no basis for Animalfeeds' suggestion (Br. 2-3, 40) that petitioners' position would broadly displace ordinary principles of state contract law directed toward ascertaining and enforcing parties' contractual intent.

The FAA does require, however, that any imposition of class arbitration be based on *actual* intent to permit it—a point petitioners have stressed, as Animalfeeds observes (Br. 39). That rule is consistent with this Court's precedents and with standard principles of contract law. *See, e.g.*, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) ("[A]s with any other contract, the parties' intentions control."); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 34 (1991) ("The arbitrator's task is to effectuate the intent of the parties and he or she does not have the general authority to invoke public laws that conflict with the bargain between the parties." (internal quotation marks omitted)); *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995) (relevant contract law would require court to see whether parties "objectively revealed an intent" on issue of arbitrability); *Mastrobuono*, 514 U.S. at 61 (looking to parties' incorporation of specific body of arbitral rules to determine whether parties intended to authorize arbitrators to impose pu-

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[3] Although Animalfeeds suggests to the contrary (Br. 13, 31-32), New York law provides no such rule that might have justified the arbitrators' decision in this case. Even the Second Circuit—citing the same cases as Animalfeeds—recognized this point: "[N]o state-law rule of construction clearly governs the question of whether class arbitration is permitted by an arbitration clause that is silent on the subject[.]" Pet. App. 27a (citing *Evans* v. *Famous Music Corp.*, 807 N.E.2d 869 (N.Y. 2004), and *Cheng* v. *Oxford Health Plans, Inc.*, 846 N.Y.S.2d 16 (App. Div. 2007) (per curiam)).

nitive damages).[4] In contrast, Animalfeeds' proposed rule that class arbitration is permissible unless expressly prohibited (*e.g.*, Br. 33) turns on its head the principle of this Court's cases that the scope and manner of arbitration are matters in which courts must enforce the boundaries of the parties' actual agreement. *E.g.*, *Volt*, 489 U.S. at 474-475 ("[T]he FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed *in the manner provided for in [the parties'] agreement*.' " (alteration in original) (quoting 9 U.S.C. § 4)).[5]

This case illustrates the basic flaw in Animalfeeds' proposed rule. Animalfeeds argues (Br. 42) that because there is no "precedent in maritime law" to the contrary, arbitration agreements widely used in the maritime industry should be read to permit class arbitration. But Animalfeeds did not (and does not) contest petitioners' expert testimony that no maritime precedent against class arbitration exists precisely because of the uniform industry understanding that the applicable arbitration language did not permit such arbitra-

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[4] Reference to these principles is particularly appropriate in the context of an arbitration agreement that was designed for use in international commerce, by parties from different legal systems, and that specifies that "arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act." JA30a; *see also* Pet. Br. 4-5 & n.4.

[5] Animalfeeds argues (Br. 40) that "[t]here is no general federal common law of contract interpretation." This Court has made clear, however, that the FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

tion. *See, e.g.*, JA139a ¶ 24 ("I have been working as a maritime arbitrator for thirty years and this matter is the first I have ever encountered where the issue of a class action arbitration has even been raised. … None of the arbitrator colleagues—maritime and otherwise—to whom I have spoken have ever heard of the idea."); JA126a ¶ 21; Association of Ship Brokers and Agents (ASBA) Amicus Br. 33. Animalfeeds' proposed default statutory rule would thus produce a result exactly opposite to what the lack of a precedent in maritime law indicates about the boundaries of the parties' agreement.

B. Animalfeeds' Contractual Arguments Are Inapposite And Unpersuasive

Animalfeeds also argues (Br. 30-38, 42-51) that there is no ground for reversal because the arbitrators' decision to permit class arbitration was based on ordinary principles of contract interpretation. In that regard, Animalfeeds makes essentially three contentions. *First*, it relies on the text of the arbitration clause. *See* Br. 31-34, 37-38. That argument is meritless, but in any event it comes far too late. *Second*, Animalfeeds posits a "background rule … that arbitration *procedures*, if not explicated, are delegated to the discretion of the arbitrators." Br. 36 (emphasis added); *see also* Br. 26, 33, 35-37. It offers no convincing response, however, to petitioners' demonstration (Pet. Br. 25-45) that a decision to change from bilateral to class arbitration is nothing like the sort of truly procedural decisions that may fairly be deemed delegated by contractual silence, such as whether to permit or forbid live testimony or how to limit or manage discovery. *Third*, it argues that class arbitration is a potentially workable adaptation of the traditional arbitration model, even in the interna-

tional maritime context (Br. 27-30, 42-49); that class arbitration is sometimes desirable to facilitate certain types of claims (Br. 49-51); and that public policy therefore supports construing contracts to allow class arbitration unless the parties have expressly forbidden it (*id.*). As explained below, those arguments provide no basis for arbitrators or courts acting under the FAA to impose class arbitration on private parties that have not actually agreed to it.

1. Animalfeeds' Textual Argument Is Inapposite As Well As Meritless

Before the arbitrators, the parties agreed that the text of their arbitration clause was silent on the question of class arbitration—in other words that, as Animalfeeds' counsel put it, "there's been no agreement … reached on that issue." JA77a; *see also, e.g.*, Pet. App. 49a. Now, however, Animalfeeds argues (Br. 33-34, 37-38) that the words "any dispute"—which it at one point re-phrases as "all disputes," Br. 37—should be read to contemplate class proceedings. Whatever else might be said about that argument, it comes far too late. Here, unlike in *Bazzle*, the parties had a full opportunity to submit such questions of contract construction to the arbitrators, and this Court granted review on the premise that the arbitrators resolved those questions by finding the contract to be "silent." Pet. i; *cf. Bazzle*, 539 U.S. at 450-454 (plurality opinion). The issue now is the legal consequence of that silence.

In any event, the argument lacks merit. The Vegoilvoy arbitration clause states:

> Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer

> each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer.

JA30a; *see also* JA9a (defining "Owner" and "Charterer" as particular parties named in the agreement). As this fuller excerpt shows, "any dispute" means any dispute arising under the contract *between the two parties named therein*—the "Owner" and the "Charterer." Each is to choose one arbitrator to resolve *that* discrete dispute. The phrase speaks to what is to be arbitrated, not to who may be brought into the arbitration. Nothing in the phrase authorizes the injection of additional parties.[6]

2. The Availability Of Class Arbitration Is Not An Incidental Procedural Issue Implicitly Delegated To Arbitral Discretion

As to what should be done with a silent contract, Animalfeeds argues that if parties have not expressly *prohibited* class arbitration, they should be deemed as a matter of law to have "delegate[d] to the arbitrators broad power to employ appropriate procedures" (Br. 33)—including transforming the parties' bilateral arbitration into a class proceeding encompassing other parties, other agreements, and other claims. *See* Br. 32-33,

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[6] In addition, of course, petitioners submitted extensive and undisputed evidence showing a clear international maritime custom and practice of engaging in individual, not class, arbitration. Pet. App. 50a-51a; JA126a ¶ 21; JA139a ¶ 24; *see also* ASBA Amicus Br. 30 ("There has never been a class action resolved by international maritime arbitration.").

34-37. That argument fairly joins issue on the question presented, but Animalfeeds provides no persuasive reason for the Court to accept it.

Animalfeeds relies in part on *Bazzle*, arguing that the plurality treated the availability of class arbitration as "a question of procedure" to be resolved by arbitrators (Br. 35-36) and that its "premise was that the arbitration could go forward on a class basis so long as the contract did not forbid it" (Br. 27; *see also id.* at 36). That would not be a correct reading of *Bazzle* even if the plurality's decision were an authoritative statement of the law. The plurality reasoned that whether the relevant contracts prohibited or authorized class arbitration, as opposed to being silent on the issue, was a question of "contract interpretation and arbitration procedures" that arbitrators were "well situated to answer." 539 U.S. at 453; *see also id.* at 450, 452-453. That reasoning does not speak to what follows if the interpretation reveals that the contract is, in fact, silent, as the arbitrators determined here.

Moreover, in discussing whether the threshold issue of contractual silence was for arbitrators or courts, the *Bazzle* plurality contrasted "gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy," with the contractual question whether the parties had in fact agreed to permit or prohibit a particular type of arbitration proceeding. 539 U.S. at 452. The plurality drew (*id.* at 451-452) on cases recognizing the special "significance of having arbitrators decide the scope of their own powers," *First Options*, 514 U.S. at 945, and explaining that in some circumstances "contracting parties … are not likely to have thought that they had agreed that an arbitrator would" decide a particular

question, *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002).

Those cases clarify that the sort of "procedural questions" the Court has viewed as "presumptively not for the judge, but for an arbitrator" are incidental issues such as whether "time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met." *Howsam*, 537 U.S. at 84-85. Once a contract has been construed to be silent as to class arbitration, the remaining question—whether arbitrators may nonetheless force a party into a class arbitration—is not a similarly "procedural" matter that it is likely a party, consulted *ex ante*, would reasonably have thought it had given its arbitrators *carte blanche* to decide. The class-arbitration question instead asks whether, under the FAA, an agreement between two parties to arbitrate disputes under a single contract authorizes the arbitrators chosen by those parties to resolve their dispute to assert (and courts to enforce) private arbitral "jurisdiction" over any number of *other* parties and contracts. That is a significant general legal question, as to which courts have the comparative advantage as decisionmakers. *See id.* at 85. As the Court observed in *Howsam*, "for the law to assume an expectation that aligns (1) decisionmaker with (2) comparative expertise will … better … secure a fair and expeditious resolution of the underlying controversy—a goal of arbitration systems and judicial systems alike." *Id.*

Animalfeeds points out that the Court has upheld arbitrators' authority to impose punitive damages and resolve statutory claims where those issues were not expressly mentioned in arbitration agreements. Br. 34-35 & n.9 (citing *Mastrobuono*, 514 U.S. at 58-59, and *Mitsubishi*, 473 U.S. at 626). It argues (Br. 34) that

these cases recognize the use of "broad terms to confer on arbitrators a range of powers not explicitly mentioned." In each case, however, the Court's decision was based on a conclusion about the actual intent (express or implied) of the parties when they concluded their agreements. *See Mastrobuono*, 514 U.S. at 58 ("[T]he case before us comes down to what the contract has to say about the arbitrability of petitioners' claim for punitive damages."); *Mitsubishi*, 473 U.S. at 626 ("[A]s with any other contract, the parties' intentions control."). Here, the parties have been found to have had no intent concerning class arbitration at the time of contracting. Nothing in the FAA or in this Court's cases suggests that, by contracting for traditional bilateral arbitration, the parties assumed a risk that the arbitrators would not only "employ procedures that they might not like" (Resp. Br. 26; *see also id.* at 45) but also fundamentally transform the parties to, scope, and nature of the proceeding.[7]

As petitioners' opening brief explains at length (at 28-45), class arbitration is a fundamentally "different animal [from] individual arbitration." *Dickler* v. *Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 (Pa. Super. Ct. 1991). Class arbitration dramatically alters the risks and benefits of the arbitration bargain. In this case, for example, expanding the arbitration to include

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[7] The arbitrators' acknowledgment that they would consider an opt-*in* mechanism to account for the "concern" that "the bulk of international shippers would never intend to have their disputes decided in a class arbitration" (Pet. App. 52a; *see also* Resp. Br. 48 & n.11) nicely underscores this point. That proposed solution, however, would address the lack of any actual agreement to class proceedings only for potential class members—not for petitioners. *See* Pet. Br. 20-25.

class claims would multiply the amount of commerce allegedly involved by a factor of 13,000 (Pet. Br. 28-29) and, as Animalfeeds itself has asserted, join as parties "at least hundreds" of additional oil, chemical, and specialty-liquids companies from around the world (CAJA A77 ¶ 31; JA67a). Such substantially raised stakes make class proceedings different in kind from bilateral disputes, where each party's exposure is naturally circumscribed. *See* Pet. Br. 29-30.

Imposing class arbitration would also override petitioners' core contractual right to select different arbitrators to handle their disputes with different counterparties under different agreements. *See* Pet. Br. 35-36. Animalfeeds responds (Br. 46) that defendants "generally know that claimants are seeking to proceed as a class" and may select arbitrators suitable for such proceedings. The issue is not, however, whether defendants can find arbitrators suitable to handle a class dispute. Ordinarily—and under the arbitration clause at issue here—a party that enters a number of bilateral arbitration agreements that give rise to disputes is contractually entitled to choose an arbitrator *in each case*. It might, of course, select one individual to handle a set of cases. Indeed, it might voluntarily agree to consolidated or class arbitration. Alternatively, however, the party might wish to select different arbitrators under different agreements—perhaps because of differences in the disputes, or perhaps simply in order to "avoid concentrating all of the risk of substantial damages awards in the hands of a single arbitrator." *Bazzle*, 539 U.S. at 459 (Rehnquist, C.J., dissenting). Taking away that choice radically alters the terms of its agreements.

Such transformations are too consequential for the availability of class arbitration to be classified as an incidental procedural matter that arbitrators may decide

for themselves in the absence of any agreement by the parties. They do not "grow out of" the arbitration the parties agreed to, *Howsam*, 537 U.S. at 84, but rather define essential boundaries of the arbitration itself.

3. Arbitrators Have No Authority To Impose Class Arbitration On The Basis Of Feasibility Or Public Policy

Finally, Animalfeeds repeats (Br. 17, 49-51) the argument with which it prevailed before the arbitrators: that the contract should be construed to permit class arbitration "'as a matter of public policy'" (Pet. Br. 22 (quoting CAJA A308-A309)). It contends that class arbitrations are a feasible adaptation of the traditional bilateral model, even in the international maritime context (Resp. Br. 27-30, 42-49), and that they may sometimes be necessary to "capture efficiencies" required for private enforcement of the Sherman Act (Br. 46, 49-51). Accordingly, the argument runs, holding that the silence of the Vegoilvoy contract precludes class arbitration "would lead either to the inefficiencies and unfairness of multiple, separate arbitrations on common issues, or, more realistically, would make it untenable for would-be class members to proceed individually." Br. 18. And such considerations, according to Animalfeeds (Br. 32-33, 49), are a proper basis for arbitrators to interpolate the availability of class arbitration into a contract that is silent on that question.

As petitioners have argued (*e.g.*, Pet. Br. 23-24, 25-28), that analysis cannot be reconciled with this Court's repeated holdings that arbitration under the FAA is a matter of private ordering based on actual consent. Indeed, the Court has required a two-step inquiry in the enforcement of arbitration agreements precisely in order to isolate the task of contract interpretation from

extrinsic legal or policy considerations. *See Mitsubishi*, 473 U.S. at 628 (courts must "first determin[e] whether the parties' agreement to arbitrate reached the [relevant] issues, and then, upon finding it did, consider[] whether legal constraints external to the parties' agreement foreclose[] the arbitration of those claims"). The legal and policy questions are reserved for separate judicial inquiry into the enforceability of an agreement to arbitrate under 9 U.S.C. § 2. *See* Pet. Br. 50-51. Unless an arbitration agreement is determined to be unenforceable, however, its metes and bounds must be scrupulously honored—even if the result is manifestly *in*efficient. *See* Pet. Br. 46-47 (discussing *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985), and *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983)).

Moreover, even on their own terms, Animalfeeds' policy arguments are unpersuasive. As to this case, Animalfeeds never recants its representation to the arbitrators that it intends to proceed individually against petitioners even if there are no class proceedings. *See* Pet. Br. 51 (quoting CAJA A2366-A2367). It also acknowledges (Br. 50 & n.12) that the record in this case does not establish that litigating on an individual basis would be prohibitive for any other claimant. Accordingly, its arguments about the need for class arbitration (Br. 18, 50, 51) are conspicuously hypothetical.[8]

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[8] They will remain hypothetical, moreover, as to all of the original claimants except Animalfeeds, because petitioners have reached settlements with *every one* of them—belying Animalfeeds' suggestions (*e.g.*, Br. 5-6) that bilateral arbitrations are not an effective way of resolving disputes and providing claimants with any appropriate compensation.

In that regard, as Animalfeeds correctly observes (Br. 27), petitioners have not argued that class arbitration is unworkable under any circumstances, or that parties may not agree to it if they choose. *See, e.g.*, Pet. Br. 33, 41. Absent such agreement, however, Animalfeeds is forced to concede the substance of many of the concerns petitioners have raised: that judicial oversight is needed to protect the due process rights implicated by class proceedings (Br. 47); that "[c]lass arbitration does require some public disclosure" of otherwise confidential matters (*id.*); and even that there is no precedent for the enforcement of class arbitration awards, either within the United States or abroad (Br. 47-48).

Animalfeeds argues (Br. 48) that appropriate procedures can be devised to address these or similar concerns domestically, and that any foreign resistance is simply "irrelevant to interpretation of the FAA." The devices it proposes, however, such as judicial oversight, notice and opt-out (or opt-in) procedures, and the use of specialized private rules mirroring Rule 23 of the Federal Rules of Civil Procedure (*see* Br. 28-29, 47-48), would replicate the class action procedures of the federal court system. That calls into question why parties would opt to settle disputes in a private system with all the disadvantages of litigation and none of its benefits. *See, e.g.*, *Shroyer* v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 986-987 (9th Cir. 2007) (giving effect to severability provision under which entire arbitration clause became unenforceable when express waiver of

class arbitration was held to be unconscionable); Chamber of Commerce Amicus Br. 2; DRI Amicus Br. 16-29.[9]

More fundamentally, the argument ignores that public rules and procedures are developed, evolve, and are enforced by public officials (including judges), wielding public authority, with their ability to compel compliance from parties defined and limited by generally applicable rules of jurisdiction, statutory and court rules (including appellate review), and rules of due process. Arbitration, on the other hand, is a form of private ordering, in which arbitrators draw their authority solely from the parties' agreement to submit to it. *See* Pet. Br. 18. Neither the supposed desirability of class arbitration nor the ability of arbitrators or private rule-makers to address its complexities if parties authorize them to do so can answer the question presented in this case: whether parties may be compelled to submit to class arbitration when, as is established here, their agreement to arbitrate is silent on that question. Because arbitration is solely a matter of consent and because class arbitration is fundamentally different from a bilateral proceeding, the answer to that question must be "no."[10]

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[9] *Cf. In re Am. Express Merchants' Litig.*, 554 F.3d 300, 321 (2d Cir. 2009) ("[I]n light of the fact that Amex declared at oral argument that it would reconsider its intention to proceed to arbitration should this Court not enforce the class action waiver, we remand to the district court to allow Amex the opportunity to withdraw its motion to compel arbitration."), *cert. pending sub nom. American Express Co.* v. *Italian Colors Rest.*, No. 08-1473 (filed May 29, 2009).

[10] Several of Animalfeeds' amici argue at length that class arbitration must be available, for policy reasons, in other contexts, such as cases involving employment discrimination or consumer

III. ANIMALFEEDS' RENEWED RIPENESS ARGUMENT IS MERITLESS

Animalfeeds concludes its brief by asserting, "[a]s a threshold matter" (Br. 51), that this case is unripe. Like Animalfeeds' other arguments for avoiding a ruling on the question presented, this claim was advanced at the petition stage, Br. in Opp. 23-26, and "necessarily … rejected" when the Court granted review, *Williams*, 504 U.S. at 40. Animalfeeds suggests nothing that would justify a different conclusion now.

"[R]ipeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). Constitutional ripeness is at issue regardless of whether a party raises it or pressed it below. *E.g.*, *United States* v. *Cotton*, 535 U.S. 625, 630 (2002). Prudential ripeness, in contrast, does not implicate jurisdiction, and hence a court "may"—but need not—raise the issue on its own. *National Park Hospitality Ass'n* v. *Department of the Interior* (*NPHA*), 538 U.S. 803, 808 (2003). The non-

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contracts. As petitioners' opening brief explains (at 49-51), reversal here might well not dictate the result in cases involving different agreements arising in those different contexts. In such cases there might, for example, be grounds not present here for properly inferring agreement to class arbitration, such as textual ambiguities that could properly be construed against a more sophisticated and economically superior drafter. Alternatively, in other contexts there might be valid grounds for setting aside entirely, as unconscionable under the circumstances, any arbitration clause that does not allow class arbitration. In any event, questions that could arise in those contexts are not a proper basis for distorting the conventional, consent-based FAA analysis that dictates reversal here.

jurisdictional nature of prudential ripeness also means that it can be waived, particularly if "raised defensively late in the lawsuit." *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 504 (2006). That is certainly the situation here.

In considering ripeness, courts "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149 (1967). Animalfeeds makes no argument regarding fitness of the issues, instead focusing solely on hardship (and other policy concerns). But while "both constitutional and prudential concerns operate" with regard to fitness, the hardship factor "is entirely prudential." *McInnis-Misenor* v. *Maine Med. Ctr.*, 319 F.3d 63, 70 (1st Cir. 2003). By waiting three years to raise any ripeness issue—and, indeed, expressly agreeing both to immediate judicial review of the arbitrators' ruling, *see, e.g.*, Pet. App. 3a-4a, and to stays of the arbitration at every level of judicial review—Animalfeeds has waived any prudential ripeness arguments it might once have had.[11]

In any event, the case is ripe. The question presented is certainly fit for review: It is "a purely legal

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[11] Amicus Public Citizen argues (Br. 7-15) that the arbitrators' ruling is not a final award under the FAA and hence was never subject to judicial review. Petitioners addressed that contention when Animalfeeds advanced it in opposing certiorari. *See* Brief in Opp. 27-28; Reply Br. 11-12. Finality under the FAA does not implicate subject-matter jurisdiction, *see Moses H. Cone*, 460 U.S. at 26 n.32, and because the issue was waived in the lower courts, was evidently rejected by this Court in granting certiorari, and is not even advanced by a party on the merits, this Court surely "has no occasion to consider" it, *Bell* v. *Wolfish*, 441 U.S. 520, 531 n.13 (1979).

one," *Abbott Labs.*, 387 U.S. at 149, and will not be clarified by "further factual development," *NPHA*, 538 U.S. at 812.

Nor is there any basis for concern about "the need to protect the integrity of the ongoing arbitral process." Resp. Br. 53; *accord id.* at 57. The FAA authorizes review of "partial award[s]." 9 U.S.C. § 16(a)(1)(D); *compare* Resp. Br. 56. Here the parties' supplemental agreement, by partially incorporating the AAA's class arbitration rules, expressly provides for the issuance of such an award and for immediate judicial review. Thus, the "arbitral process" is proceeding not only in accordance with the FAA but also in precisely the fashion the parties intended. Moreover, the decision adverse to petitioners has been "formalized," and absent review will be promptly "felt in a concrete way," *Pacific Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 200 (1983), through an involuntary, protracted class-certification proceeding likely involving extensive fact and expert discovery. Under these circumstances, any prudential ripeness standard is easily met.[12]

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[12] Animalfeeds quotes (Br. 53) this Court's observation that litigation costs alone do not justify review "in a case that would otherwise be unripe," *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 735 (1998). Here, however, the case is not "otherwise … unripe," *id.*, and the costs petitioners would incur from delay are more than adequate to support immediate review. They are augmented by the harm of being coerced into non-consensual arbitration proceedings, in violation of what the Court's FAA decisions make clear is a "value of a high order" under that statute, *Will* v. *Hallock*, 546 U.S. 345, 352 (2006). And none of that even begins to take into account the tremendous waste of judicial resources that would be entailed by deciding, at this point in this litigation, that this Court, rather than resolving the question presented, should

In asserting the contrary, Animalfeeds (Br. 55) cites *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528 (1995), and *PacifiCare Health Systems, Inc.* v. *Book*, 538 U.S. 401 (2003). In each of those cases, however (as in *Bazzle*), the arbitrator had not addressed the pertinent issue, and this Court unsurprisingly declined to act on "'mere speculation'" about what the arbitrators would do. *Id.* at 406 (quoting *Vimar*, 515 U.S. at 541). Because the arbitrators here *have* ruled on the relevant question, these cases do not help Animalfeeds.

Finally, there is no basis for Animalfeeds' dire prediction (Br. 55-56) that a ruling on the merits here will force lower courts to decide a flood of petitions seeking judicial review of preliminary arbitration rulings. The arbitrators here exceeded their authority by imposing a form of arbitration to which petitioners never consented. That fundamental error, and the court of appeals' endorsement of it, was caused by a misinterpretation of this Court's decision in *Bazzle*. Other arbitrators (and courts) have committed the same error for the same reason. *See* Pet. 13-15. This case presents an opportunity to end the confusion over *Bazzle*, and thus the repeated violation of parties' rights not to be forced to arbitrate except in the way to which they consented—an opportunity that the Court may not have again anytime soon, *see* AAA Amicus Br. 22-23 (in six

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vacate the decisions of the district court and court of appeals and return the matter to the arbitrators—leaving every issue otherwise addressed over the last four years to be litigated anew if and when the arbitrators certify a class, or perhaps only once they have conducted a full class arbitration and rendered a putatively definitive award. *See* Resp. Br. 59. As this Court commented in *Williams*, "[t]hat would be improvident indeed." 504 U.S. at 40.

years since *Bazzle*, not one of hundreds of putative class arbitrations filed with the AAA has yielded a final award). Few cases are likely to present similarly compelling grounds for immediate review.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 2009