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**

## BRIEF FOR RESPONDENT

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## QUESTIONS PRESENTED

1. Whether arbitrators "exceeded their powers" under the Federal Arbitration Act, 9 U.S.C. § 10(a)(4), when they applied ordinary principles of contract interpretation to hold that a contract clause that broadly requires arbitration of "[a]ny dispute" arising from the contract permits class-wide arbitration.

2. Whether a petition to vacate an arbitration panel's interim decision construing the parties' contract to authorize class arbitration is unripe where the panel has made no determination to certify a class nor ruled on the merits of the claims.

## CORPORATE DISCLOSURE STATEMENT

Respondent Animalfeeds International Corporation has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

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# BRIEF FOR THE RESPONDENT

## INTRODUCTION

Petitioners, Stolt-Nielsen, Odfjell, Jo Tankers, and Tokyo Marine,[1] four of the largest parcel tanker shipping companies in the world, engaged in a multi-year criminal antitrust conspiracy to raise, fix, and maintain prices in the parcel tanker shipping business. The conspiracy affected over $600 million in United States commerce alone, unlawfully extracting above-market prices from hundreds of businesses. Stolt responded to ten civil suits that some of the hundreds of overcharged businesses, including respondent Animalfeeds International Corp. ("Animalfeeds"), filed against them by consolidating the suits before a multidistrict litigation panel and obtaining an order compelling arbitration under the parties' broadly worded arbitration clause. The clause provides for arbitration of "[a]ny dispute arising from the making, performance or termination" of the contract. JA 30a. The parties negotiated a supplemental agreement allocating to the arbitrators the determination whether the clause permits class arbitration. Stolt did not see fit specifically to foreclose class proceedings by contract, nor to claim any right to a threshold judicial—as opposed to arbitral—construction of the arb-itration clause. The effect of having committed the

[1] Petitioners are hereinafter collectively referred to as "Stolt" or "petitioners," except where otherwise specified.

contract construction to the arbitrators is that judicial review is very limited. To obtain vacatur here, Stolt would have to show that the arbitrators "exceeded their powers." 9 U.S.C. § 10(a)(4).

When a panel of highly qualified and experienced international arbitrators unanimously issued an interim decision interpreting the parties' arbitration clause to permit class arbitration, Stolt immediately sought to obtain interlocutory judicial review of the decision it had previously committed to the arbitrators. Stolt sought vacatur even before the arbitrators could consider whether to certify a class on the facts of this complaint. Stolt now argues that the businesses seeking restitution must arbitrate one by one, if at all. It asks the Court to adopt the rule it unsuccessfully pressed on the arbitrators: a class action waiver must be implied in an arbitration clause unless the clause specifically authorizes class proceedings by name.

Stolt calls for a broad, FAA-based federal rule for all types of cases, with full preemptive effect in state and federal arbitrations alike, that requires specifically expressed contractual authorization of class arbitration. There is no basis in law for that approach, which conflicts with this Court's established precedent that arbitration contracts are to be interpreted on the same footing as all other contracts. Under maritime and New York contract law alike, a contract's legal effect is determined, not by the kind of rule of extraordinary specificity that Stolt proposes, but by reading its terms in light of rules of contract interpretation and construction. Stolt asks this Court to shear away the corpus of ordinary contract law to

effectuate a new anti-class arbitration presumption. Its rule would broadly displace state law and call into question hundreds of already authorized class arbitrations. This Court should not reach out, especially in a case that comes to it in such an interlocutory and premature posture, to adopt Stolt's proposed broadly preemptive federal rule. The arbitrators acted well within their powers. In the face of the arbitrators' straightforward reliance on maritime and New York contract principles following *Green Tree v. Bazzle*, 539 U.S. 444 (2003), and the extreme judicial deference to arbitration that the FAA requires, *see* 9 U.S.C. §10(a); *Hall St. Assocs., LLC v. Mattel, Inc.,* 128 S. Ct. 1396 (2008), there simply is no ground for vacatur here.

## STATEMENT

### 1. Events leading to the arbitration

The class claims arose out of petitioners' global conspiracy to restrain competition in the world market for parcel tanker shipping services in violation of United States antitrust law. Parcel tankers are ships equipped with multiple tanks that can be separately hired to transport volumes of liquids too small to warrant using a traditional tanker ship. Petitioners are the "big four" parcel tanker companies that dominate the world market for these services. Respondent Animalfeeds is a New Jersey-based company that supplies protein and fat ingredients such as fish oil to animal feed producers in the United States and around the world. Animalfeeds contracts with petitioners to ship its liquids under an industry standard form contract that includes the arbitration

clause at issue here. The arbitration clause broadly requires arbitration of "[a]ny dispute arising from the making, performance or termination" of the contract. JA 30a. It specifies that the arbitration will take place in New York, in accordance with "the provisions and procedures of the United States Arbitration Act," *i.e.,* the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* J.A.30a.

A successful criminal investigation by the United States Department of Justice established, in early 2003, that petitioners had engaged in a criminal global price-fixing conspiracy. Petitioner Stolt was the first co-conspirator to admit fully its participation in the conspiracy and cooperate with the investigation. Early in 2003 the Justice Department accepted Stolt into DOJ's Corporate Leniency Program. CAJA A155-A164. Faced with direct evidence of their criminal activity, other petitioners, Odfjell Seachem AS, Jo Tankers BV, and several of their executives, pleaded guilty to their role in the conspiracy. CAJA A36-A37, A165-A166, A218, A232.[2]

As news of the conspiracy became public, Animalfeeds realized that for several years petitioners had been unlawfully extracting supra-competitive prices for parcel tanker shipping services from Animalfeeds and hundreds of other customers. On September 4, 2003, Animalfeeds sued petitioners for antitrust conspiracy and fraudulent concealment.

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[2] There is information suggesting that Petitioner Tokyo Marine colluded to allocate customers and fix prices, CAJA A35, but Tokyo Marine and its executives were not charged with or convicted of criminal antitrust violations.

CAJA A71. Animalfeeds sought to represent a class of "[a]ll direct purchasers of parcel tanker transportation services globally for bulk liquid chemicals, edible oils, acids, and other specialty liquids from [petitioners] at any time during the period from August 1, 1998, to November 30, 2002." Pet. App. 2a. Other plaintiffs filed parallel suits.

In one such suit filed by another shipper, JLM Industries, Inc., against the same parties that are petitioners here, the district court denied the ship owners' motion to compel arbitration on the ground that the antitrust claims were not covered by an arbitration clause extending only to arbitration of disputes relating to interpretation, construction, or application of the contract itself. The court of appeals reversed. *JLM Indus., Inc. v. Stolt-Nielsen SA,* 387 F.3d 163, 179-181 (2d Cir. 2004). Respondent Animalfeeds was not a party to that appeal, but it established, for purposes of proceedings in the Second Circuit, that it must proceed against Stolt in arbitration, if at all. Pet. App. 3a.

Meanwhile, the United States District Court for the Eastern District of Pennsylvania accepted the sentences recommended by the government pursuant to the guilty pleas, assessing criminal fines against Odfjell and Jo Tankers totaling $62 million, CAJA A229, A236, and sentencing individual executives of those companies to fines and prison terms, A227, A238. As consideration for the government's grant of immunity to it under the Corporate Leniency Program, Stolt-Nielsen promised, *inter alia*, "to make restitution to any person or entity injured as a result of the activity in which [Stolt] participated." CAJA A208.

They have failed to fulfill that promise, necessitating their inclusion in the arbitration they now challenge. The government did not seek restitution against Odfjell and Jo Tankers, observing:

> [A] number of civil suits have been filed by potential victims against [Stolt-Nielsen] and other parcel tanker shipping companies. In light of the pending civil actions and because of the complicated nature and large number of contracts involved, the Government respectfully submits that determining the amount of victims' losses would complicate or prolong the sentencing process.

CAJA A226, A242. The amounts Odfjell and Jo Tankers were required to pay were thereby reduced in anticipation of recovery of restitution in cases such as this one.

With this class action and several other civil antitrust lawsuits pending against them around the country, Stolt successfully moved the Judicial Panel on Multidistrict Litigation to consolidate the cases. Adopting Stolt's own argument to that effect, the panel found centralization was "necessary in order to avoid duplication of discovery, prevent inconsistent or repetitive pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary." *In re Parcel Tanker Shipping Servs. Antitrust Litig.*, 296 F. Supp. 2d 1370, 1371 (J.P.M.L. 2003).

In preparation for arbitration, the parties entered into an Agreement Regarding New York Arbitration Procedures For Putative Class Action

Plaintiffs in Parcel Tanker Services Antitrust Matter, Pet. App. 55a (the "Supplemental Agreement"). That Agreement established the terms for selecting arbitrators empowered to decide whether to certify a class, and to determine liability and award damages to class members. *Id.* at 60a (¶¶10-11). The Agreement states that the parties "seek to avoid duplicative discovery and other related inefficiencies in connection with New York arbitrations of [class claimants'] claims," *id.* at 55a (¶1), and accordingly specified they would "follow and be bound by Rules 3 through 7 of the American Arbitration Association's Supplementary Rules for Class Arbitrations (as effective Oct. 8, 2003)," [AAA Class Rules]. *Id.* at 59a (¶7). The AAA Class Rules respond to this Court's decision in *Green Tree v. Bazzle,* 539 U.S. 444 (2003), by providing procedures for arbitrators to decide whether an arbitration clause permits class arbitration, and to certify classes in appropriate cases under criteria that largely track the most demanding requirements of Federal Rules of Civil Procedure 23(a) and (b)(3) (including requirements of notice to class members and an opportunity to opt out). JA 55a-65a. Of central relevance here in determining the standard of judicial review of the arbitrators' decision, the parties agreed that the arbitrators would decide "whether the applicable clause permits the arbitration to proceed on behalf of or against a class." *Id.* at 56a.

In the Supplemental Agreement, Stolt specifically reserved various rights. *See, e.g.,* Pet. App. 60a (¶11) (separate damages determinations by the panel or separate panels); *id.* at 60a-61a (¶12) (consolidation, if class certification is denied); *id.* at 62a (¶14) (scope of discovery). It did not, however, reserve

any right to challenge assignment to the arbitrators of the decision whether the arbitration clause permits class arbitration. The Agreement specified that neither its existence nor its terms could be used "to support or oppose any argument in favor of a class action arbitration or the scope and composition of the proposed class," *id.* at 62a-63a (¶15), *i.e.,* the questions whether, on these facts, a clause construction permitting class arbitration is allowable under the FAA and whether and how a class proceeding should go forward. CAJA A152. The Agreement did not, however, reserve any objection to its own (and *Bazzle*'s) allocation of clause construction to the arbitrators, *i.e.,* the question "who decides." *See First Options of Chicago v. Kaplan*, 514 U.S. 938, 942-43 (1995).

### 2. The Arbitrators' Preliminary Ruling

Pursuant to their Supplemental Agreement, the parties selected Kenneth Feinberg and William R. Jentes, who together chose Gerald Aksen as the panel chair. All three panelists are leaders in the international dispute resolution bar with extensive experience resolving complex United States and international cases, including class-wide cases and antitrust disputes. Mr. Aksen, who specializes in complex and international cases, was American Vice Chairman of the International Chamber of Commerce (ICC) International Court of Arbitration, Vice President of the London Court of International Arbitration (LCIA), and served as General Counsel and on the Board of Directors of the American Arbitration Association (AAA). Mr. Jentes was a litigation partner at Kirkland & Ellis LLP for 40 years and has served as a neutral for the International Chamber of Commerce,

the AAA, JAMS The Resolution Experts, and the CPR Institute for Dispute Resolution on hundreds of cases, including antitrust and many international arbitrations. Mr. Feinberg, a former partner at Kaye Scholer LLP and founder of Feinberg Rozen LLP, was Special Master of the Federal September 11th Victim Compensation Fund, currently serves as Special Master for Executive Compensation under the Troubled Asset Recovery Program ("Wall Street Pay Czar"), and has served as a neutral in hundreds of disputes involving breach of contract, antitrust, and a wide range of commercial and other matters. *See* CAJA A2157 nn. 5-7.

Before they construed the arbitration clause, the arbitrators accepted briefing and evidence, including the testimony of Stolt's experts, and heard detailed oral argument from both sides. JA 77a-141a; CAJA A296-A1984. On December 20, 2005, the panel issued its unanimous, written opinion holding that the arbitration clause permitted class arbitration. Pet. App. 45a-53a.

The arbitrators treated the arbitration clause itself as the touchstone for deciding the question; they did not, as Stolt repeatedly contends, "impose [class arbitration] as a matter of public policy." Pet. Br. 12, *see id.* 8, 23, 24, 25, 45. Following *Bazzle,* the arbitrators "look[ed] to the language of the parties' agreement to ascertain the parties' intention whether they intended to permit or preclude class action." Pet. App. 49a. The panel noted that it was guided in that task by New York law and federal maritime law of contract interpretation. *Id.* at 49a-52a. The arbitrators carefully construed the contract language, quoting its

sweeping requirement that the parties arbitrate "any dispute arising from the making, performance or termination" of the contract. Every arbitrator faced with "the same type of broad wording" in a contract had, they noted, held class arbitration to be authorized. *Id.* at 50a. The arbitration panel acknowledged Stolt's expert testimony that this particular clause never had been the basis of a class action, but observed that broadly worded clauses are often held to authorize categories of disputes for the first time; so, too, the broad language here, admittedly presenting an issue of "first impression," could be construed as authorizing class treatment. *Id.* at 49a, 51a-52a.

The arbitrators considered Stolt's objections to the potentially international scope of the class to be premature and more appropriate to the next phase of the proceeding. At that stage, the arbitrators noted, they could address whether there is a viable class warranting certification, what its scope might be, and whether the international sweep of the conspiracy might require adaptations, *e.g.,* that foreign putative class members might have to "opt in" rather than merely decline to opt out in order to be included and bound. *Id.* at 52a.[3]

[3] By separate order, the panel granted Stolt's motion to dismiss claims governed by clauses selecting a non-United States arbitration forum; the panel deferred its decision on Stolt's motion to dismiss certain remaining claims that Stolt contended were outside United States commerce. The panel also deferred decision on Animalfeeds' motion for discovery.

### 3. The District Court Decision

Acting before this Court's decision in *Hall Street Associates v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), which held that the FAA's statutory grounds in 9 U.S.C. § 10(a) are the exclusive bases for review of arbitration awards, the district court applied a "manifest disregard" standard to vacate the panel's contract construction. Pet. App. 37a, 41a. The district court acknowledged that the issue was for the arbitrators in the first instance under *Bazzle*, but vacated the award for "fail[ure] to make any meaningful choice-of-law analysis." *Id.* at 38a. The district court held that maritime law applied, and that the panel's ruling manifestly disregarded what the court took to be "an established federal maritime rule." *Id.* at 38a-39a. That rule, the court held, was supplied by maritime "custom and usage" as described by Stolt's experts, *id.* at 39a-40a–even though the experts did not testify to any special arbitration tradition peculiar to the maritime industry, nor any instances in which the class issue ever had been raised and disavowed for that industry. *See* JA 119a-141a.

### 4. The Court of Appeals Decision

The court of appeals unanimously reversed. The panel (Sack, J., joined by Kearse and Livingston, J.J.) reviewed the district court's decision *de novo* and, acting in the wake of *Hall St.*, 128 S. Ct. 1396, applied the Second Circuit's "manifest disregard" standard narrowly, as "a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA." Pet. App. 16a-17a. The court acknowledged that, but for the Second Circuit's continued adherence to the manifest

disregard standard, the court would have been required to order the district court to dismiss the vacatur petition. *Id.* at 19a. The court of appeals instead reversed and remanded because the arbitrators had not manifestly disregarded the law. *Id.* at 21a.

The court held that Stolt had waived any choice-of-law objection by having argued to the arbitrators that they "need not decide" whether New York or federal maritime law applied, "because the analysis is the same under either." *Id.* at 21a (*quoting* Stolt-Nielsen's Arbitration Br. at 7 n.13 [CAJA A604]). The court also found that, due to the absence of conflict between New York and maritime contract law, there was in fact no need to choose. *Id.* at 22a n.12. The arbitration panel did "what Stolt-Nielsen had asked it to do" by referencing New York and maritime law.

The court concluded that the arbitrators' decision was not in manifest disregard of maritime law, given the absence of any clearly defined governing legal principle of which the panel was aware but refused to apply. Pet. App. 21a (*citing Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003)). It found no established "federal maritime rule of construction specifically preclud[ing] class arbitration where a charter party's arbitration clause is silent." Pet. App. 23a-24a. The court was not persuaded by Stolt's contention that the arbitrators were somehow legally required to find Stolt's experts' testimony dispositive; the arbitrators had "considered Stolt-Nielsen's arguments and found them unpersuasive" on that point. *Id. at* 25a. The court of appeals stressed that "an arbitrator's interpretation of a contract's terms [i]s an area we are

particularly loath to disturb," and that "determinations of custom and usage are findings of fact…which federal courts may not review even for manifest disregard." *Id.* at 24a, 25a.

The court of appeals also found no manifest disregard of New York law. Under binding New York Court of Appeals precedent, which the arbitrators cited, *see* Pet. App. 49a, the parties' intent must be the focal point in contract interpretation, but intent may be discernible "even if the contract is silent on the disputed issue." *Id.* at 26a-27a (*quoting Evans v. Famous Music Corp.*, 1 N.Y.3d 452, 458 (2004)). The court of appeals reasoned that silence may "bespeak[] an intent not to preclude class arbitration." Pet. App. 27a.

The pre-*Bazzle* precedents that Stolt cited in support of its objections that the FAA categorically disallows class arbitration absent express provision were, according to the court of appeals, limited by *Bazzle*'s holding that "the question whether the agreement permits class arbitration is generally one of contract interpretation to be decided by the arbitrators, not by the court." *Id.* at 29a. The court held that each of the three older opinions upon which Stolt placed primary reliance—two anti-consolidation cases, *Glencore, Ltd. v. Schnitzer Steel Products*, 189 F.3d 264 (2d Cir. 1999), and *United Kingdom v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993), and one Seventh Circuit case deciding against class arbitration, *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995)–"had been grounded in federal arbitration law to the effect that the FAA itself did not permit consolidation, joint hearings, or class representation absent express

provisions in the relevant arbitration clause." Pet. App. 29a. After *Bazzle*, "arbitrators must approach such questions as issues of contract interpretation to be decided under the relevant substantive contract law"; Stolt's authorities do not reflect "a governing rule of contract interpretation under federal maritime law or the law of New York. And it is the governing rules of contract interpretation that arbitrators must consult." *Id.* at 29a-30a.

The court of appeals separately considered whether the arbitrators "exceeded their powers" under 9 U.S.C. §10(a)(4) in deciding the issue of contract interpretation. They held that the parties' Supplemental Agreement assigning clause construction to the arbitrators undercut any such claim. Pet. App. 31a-32a. The court noted, but found it unnecessary to rule on, Animalfeeds' contention that class arbitration is necessary to vindicate important statutory rights under the Sherman Antitrust Act. *Id.* at 32a n.17. The court denied rehearing. *Id. at* 33a-34a.

## SUMMARY OF ARGUMENT

At issue here is the preliminary decision of a unanimous panel of three experienced arbitrators who held that the parties' broad arbitration clause—requiring arbitration of "*any dispute* arising from the making, performance or termination of the contract"—permits the civil cases for restitution to be arbitrated on a class-wide basis. The arbitrators have not yet decided that the case will, in fact, proceed as class arbitration, nor have they certified any class.

I. A. The parties' Supplemental Agreement, written when the case was pending, assigned the task of construing the arbitration clause to the arbitrators. Stolt endorsed that assignment repeatedly, orally and in writing, throughout the proceedings below. *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444 (2003), requires that allocation in any event, and Stolt has waived any contrary claim.

B. Under the FAA, parties agreeing to arbitrate trade away much of the value of ordinary judicial review. Instead, they accept very minimal review of any matter delegated to the arbitrators. Matters committed to arbitrators are subject to vacatur only on narrowly circumscribed statutory grounds, 9 U.S.C. §10(a), including the one on which Stolt relies to claim that the arbitrators "exceeded their powers," *id.* §10(a)(4). Under that standard, ordinary legal error would not suffice; what is required is effectively a showing that the arbitrators acted *ultra vires*.

II. The arbitrators did not exceed their powers here, because they decided precisely what the parties asked them to decide: whether the contract permits class arbitration.

A. Class proceedings are not incompatible with arbitration, and Stolt concedes as much. The jurisprudence of this Court reads the FAA to repose great confidence in arbitrators on even complex matters of great public moment, and that confidence is borne out with respect to class proceedings by a growing body of experience. Hundreds of class proceedings have been successfully administered by major institutional arbitration service providers,

including the American Arbitration Association, under specialized sets of class arbitration rules they have developed in response to *Bazzle.*

B. Under this Court's established FAA decisions, state contract law governs interpretation of an arbitration clause. That is so even where federal law creates the substantive claim, as the Sherman Act does here; there is no general federal common law of contract interpretation, and the FAA is not a mandate to create one. The arbitrators in this case permissibly held that, under traditional contract rules, a clause broadly providing for the arbitration of "any disputes" authorizes class arbitration, even though the clause did not specifically mention it as such—*i.e.,* it was "silent" on the issue. That result comports with *Bazzle,* with specific New York precedent sustaining arbitrators' power to conduct class and consolidated arbitrations under similarly broadly worded clauses, with general principles of New York and maritime contract law, and with the contract constructions of scores of other arbitrators who have applied the ordinary contract principles of multiple states to construe similar terms to permit class arbitration.

C. Stolt seeks vacatur based on its proposed new FAA-based rule that would bar class arbitration unless the contract specifically mentions class proceedings with approval. That rule, it urges, should displace the arbitrators' application of common principles of state contract law. Stolt misreads the FAA's direction to enforce arbitration contracts "in accordance with their terms" as prohibiting arbitrators from acting—in particular, conducting class proceedings—unless the contract authorizes the action by name. This Court has

never read the FAA to impose any such limitation, and it should not do so now. Instead, the statutory reference to interpretation of contracts "in accordance with their terms" requires resort to ordinary principles of state contract law, which is precisely what the arbitrators did here.

D. There is no justification for this Court to create a new federal maritime version of Stolt's proposed rule. There is no maritime law specific to the question of class arbitration, and general maritime contract principles accord with those of New York and many other jurisdictions. Federal courts have a limited mandate to create special contract rules where necessary in admiralty. The interests that Stolt identifies with maritime arbitration are not, however, specific to it, but broadly apply to arbitration in most international and domestic settings, and warrant no special rule.

E. Stolt contends that class arbitration would fundamentally alter the risks and benefits of the parties' arbitration agreement. Petitioners are major international businesses. In entering a broad arbitration clause without incorporating any specific procedural rules, they took the risk that the arbitrators would apply rules they did not like. None of the various policy concerns Stolt raises about class arbitration—including complexity, potential need for judicial oversight, and asserted non-finality—requires vacatur here.

F. The established rule of contract construction requiring that contracts be read so as to serve the public interest adds support to the arbitrators' decision

here. Foreclosing class arbitration under broad clauses like this one 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. The enormous costs of duplicating the complex proof of antitrust injury in individual arbitrations would discourage most claimants from proceeding, resulting in dramatic under-enforcement of the Sherman Act.

III. Finally, the vacatur petition is unripe. The arbitrators merely issued an interim interpretation, and have not yet even decided whether to certify any class. Stolt has suffered no constitutionally cognizable harm; all it faces is further arbitration. The interlocutory petition for vacatur perversely arrogates to Stolt, as an arbitrating party, earlier and more frequent and extensive opportunities for judicial review than are enjoyed by parties to class actions in federal or state courts. To allow review of the arbitrators' interim decision at this preliminary stage would turn on its head the FAA's purpose of providing streamlined and simplified proceedings, and instead reflect the very hostility to arbitration that the FAA was designed to reverse.

## ARGUMENT

### I. THE PARTIES ASSIGNED THE CONTRACT CONSTRUCTION DECISION TO THE ARBITRATORS, WHOSE DECISION IS SUBJECT TO EXCEEDINGLY LIMITED JUDICIAL REVIEW

A decision to arbitrate rather than litigate trades the judicial review that would otherwise be available for the efficiency and certainty of a largely unreviewable arbitral award. Where, as here, the parties agree to present a matter to arbitrators, judicial review of the arbitrators' decisions is extraordinarily limited, focusing on truly aberrant events, such as arbitrator "corruption," "fraud," "evident partiality," "misconduct," or "misbehavior." 9 U.S.C. §10(a)(1)-(3)—or, under the provision Stolt invokes, conduct by arbitrators that "exceeded their powers." *Id.* §10(a)(4). Under the demanding Section 10(a)(4) standard, it is not enough that a court would reach a different conclusion from the arbitrators, or even that the arbitrators clearly erred; rather, a court must find that the arbitrators acted in an essentially *ultra vires* fashion. As long as the arbitrator is "even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987). As the Court has explained, a party without an arbitration agreement has a full right to judicial review, but where a party agrees to arbitrate, it "relinquish[es] much of that right's practical values"; the party "still can ask a

court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances." *First Options*, 514 U.S. at 943. Stolt has shown no such exceptional circumstances here.

### A. The Parties Empowered the Arbitrators to Decide Whether the Clause Permitted Class Arbitration

Stolt emphatically insisted in the prior proceedings in this case that the arbitrators had the power to construe the arbitration clause to permit class arbitration. Stolt negotiated the Supplemental Agreement expressly providing that the arbitrators "shall follow and be bound by" Rule 3 of the American Arbitration Association (AAA) Supplementary Rules for Class Arbitration, Pet. App. 59a (¶7), which specifies that "the arbitrator[s] shall determine...whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." JA 56a (reproducing AAA Rule). Stolt reserved in the Supplemental Agreement various objections—including whether class members' damages would be decided in separate hearings, and the sequencing of merits discovery and class-certification discovery—but they made no objection to the arbitrators deciding whether class treatment was legally authorized. Pet. App. 59a-60a.

Stolt unequivocally told the arbitrators that the arbitrators, not the court, had the power to construe the contract. If there is a valid arbitration clause, they explained, then "it goes to the arbitrators, you guys read the contracts and you figure out the procedures that apply, whether we contemplated having a class

action or not." CAJA A1970. When they petitioned the district court to vacate the award, Stolt's brief again asserted that "when the parties have agreed to arbitrate all disputes, the arbitrator, not the courts, must construe the parties' arbitration agreement in the first instance to determine whether—applying the applicable contract law of construction—the parties intended to permit class-wide arbitration." CAJA A2130.

Even if Stolt had not expressly agreed to commit the clause construction decision to the arbitrators, the issue would have been assigned to them under *Bazzle,* which established that the question whether a generally worded arbitration clause permits class arbitration is a matter for arbitrators to decide in the first instance. 539 U.S. at 452-53 (plurality); *id.* at 454 (Stevens, J., concurring in the judgment and dissenting in part) (doubting need to remand where the state court decision was correct, but conceding that "[a]rguably the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court."). *Bazzle* correctly interpreted and applied this Court's prior FAA jurisprudence. "[P]rocedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (emphasis in original; quotations omitted). *Bazzle* relied on *Howsam* and distinguished *First Options*, because *Bazzle* involved not "whether they agreed to arbitrate a matter," which is normally for independent judicial resolution, but "what kind of arbitration proceeding the parties agreed to," which is for arbitrators to decide. 539 U.S. at 452-53. In this

case, as in *Bazzle*, all parties agreed to arbitrate, and the only issue is what procedures apply in the arbitration. In light of the FAA's strong "national policy favoring arbitration," *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), any doubts concerning the scope of arbitrable issues, including "the construction of the contract language itself," should be resolved in favor of arbitration. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25. There can be no doubt here that the arbitrators were empowered to construe the contract to determine whether it authorized class arbitration.

Stolt failed to raise and therefore waived any challenge to *Bazzle*'s allocation of the clause construction decision. *See* CAJA A1968 (arbitral hearing)("What Basel [sic: *Bazzle*] says is that the contract interpretation issue is left up to the arbitrator, that's the rule in Basel ... you [the arbitrators] decide, not the district court."); *id.* at 2266 (reply brief) (it "is not in dispute" that the arbitration panel decides whether the clause permits class proceedings); *see Stolt-Nielsen v. Animalfeeds*, Brief for Petitioners-Appellees, 06-cv-3474 (2d Cir.) at 9 n. 8, 46-47 (same).

*Bazzle*'s allocation to arbitrators of decisional authority over the precise issue presented here has already proved workable and incurred substantial reliance. Following *Bazzle*, four circuits, including the court below, have held that it is for the arbitrator to determine whether a contract authorizes class arbitration,[4] and two more have relied on *Bazzle* to

[4] *Vaughn v. Leeds, Morelli & Brown, P.C.*, 315 Fed. Appx. 327, 329 (2d Cir. 2009) (summary order, not reported); *Stolt-Nielsen SA v.*

assign to arbitrators similar issues, such as whether a clause permits consolidation.[5] There is no reason to reverse this workable and widely accepted rule. *See 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1478 (2009) (observing that "'[c]onsiderations of stare decisis have special force' over an issue of statutory interpretation"); *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202-203 (1991) (identifying reliance as an important factor weighing against overruling precedent).

Despite Stolt's commitment of the clause construction issue to the arbitrators, they nonetheless belatedly assert that the issue is "one for independent resolution by a court." Pet. Br. 19; *see also id.* at 18, 27-28, 29 (relying on *Bazzle* dissent). They cite *First Options* as providing the relevant analysis, *id.* at 19, notwithstanding that *Bazzle* correctly distinguished that case and specified that the question of class arbitration procedure is governed by *Howsam*'s allocation to the arbitrator. *Bazzle,* 539 U.S. at 452-53.

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*Animalfeeds Intern. Corp,* 548 F.3d 85 (2d Cir. 2008); *Rollins v. Garrett*, 176 Fed. Appx. 968 (11th Cir. 2006)(per curiam); *Johnson v. Gruma Corp.*, 123 Fed. Appx. 786, 788 (9th Cir. 2005) (memorandum, not reported); *Pedcor Management Co., Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355, 358-59 (5th Cir. 2003).

[5] *Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.*, 489 F.3d 580, 586 n.2 (3d Cir. 2007) (relying on *Bazzle* to allocate clause-construction question to arbitrator on motion for consolidated arbitration); *Kristian v. Comcast Corp.*, 446 F.3d 25, 40-41 (1st Cir. 2006) (relying on *Bazzle* to allocate to arbitrator other questions in class arbitration); *see also Employers Ins. Co. of Wausau v. Century Indem. Co.,* 443 F.3d 573, 577-581 (7th Cir. 2007) (relying on *Bazzle*'s reasoning, but not its precedential effect, to allocate consolidation question to arbitrator).

Stolt cannot, however, escape the consequences of its express submission of the issue to the arbitrators, the governing rule of *Bazzle*, and its own decisive waiver of any challenge to *Bazzle*. They have no claim to *de novo* judicial resolution of the question whether the parties' contract authorizes class arbitration.

### B. The Arbitrators' Decision is Subject to Review Only to Determine Whether They "Exceeded Their Powers"

Stolt rests its challenge on FAA Section 10(a)(4), arguing that the arbitrators' construction of the arbitration clause "exceeded their powers." 9 U.S.C. §10(a)(4); Pet. Br. 16, 18, 23, 24. That provision does not support vacatur here. The arbitrators decided a question properly assigned to them, and their decision can be reversed only if Stolt shows that the arbitrators acted in excess of their authority, *i.e.*, decided an issue not within their power to decide. When parties have granted arbitrators the power to interpret the meaning of their contracts, which they undeniably did here, "it is the arbitrator's view of the facts and the meaning of the contract that they have agreed to accept." *United Paperworkers,* 484 U.S. at 38. The inquiry under § 10(a)(4) "focuses on whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue." *DiRussa v. Dean Witter Reynolds Inc.,* 121 F.3d 818, 824 (2d Cir. 1997).

Stolt also contends (Pet. Br. 24, 48) that the arbitrators acted in "manifest disregard of the law." This Court in *Hall Street Associates L.L.C. v Mattel,*

*Inc.,* 128 S. Ct. 1396, 1402 (2008), recently held that FAA Section 10 provides the exclusive grounds for vacatur of an arbitration award, thus calling into question whether the non-textual "manifest disregard" standard is consistent with the FAA. The Court in *Hall St.* invalidated contracting parties' attempt to contract around the FAA's limited scope of judicial review in order to create an opportunity for *de novo* review of an arbitral award. If the "manifest disregard" standard properly survives *Hall St.* at all, it must be understood, not as a distinct ground for review from those provided in 9 U.S.C. §10(a), but as "a judicial gloss on the specific grounds for vacatur enumerated in section 10." Pet. App. 16a-17a.[6] In any event, the manifest disregard standard supports vacatur only "in the rare instances in which 'the arbitrator knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it.'" Pet. App. 19a, *quoting Westerbeke Corp. v. Daihatsu Motor Co., Ltd.,* 304 F.3d 200, 217 (2d Cir. 2002). On review for manifest disregard, "the issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all, for only then were they exceeding the authority granted to them by the contract's arbitration clause." Pet. App. 18a, *quoting Wise v. Wachovia Sec.*

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[6] *See Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009) (rejecting manifest disregard as independent ground); *but see Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277 (9th Cir. 2009) (preserving manifest disregard standard); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. Appx. 415, 418-19 (6th Cir.2008) (preserving manifest disregard standard).

*LLC*, 450 F.3d 265, 269 (7th Cir.)(citations omitted), *cert. denied*, 127 S. Ct. 582 (2006). As we demonstrate below, under either the "exceeded their powers" or "manifest disregard" standard, the arbitrators' decision here cannot be vacated.

## II. THERE IS NO GROUND FOR VACATUR HERE, WHERE THE ARBITRATORS USED ORDINARY METHODS OF CONTRACT INTERPRETATION, AS THE FAA REQUIRES, TO READ THE ARBITRATION CLAUSE TO PERMIT CLASS ARBITRATION

All parties agree that the arbitration clause is "silent," in the sense that it neither specifically authorizes nor specifically forbids class arbitration. In general, sweeping terms, the clause requires arbitration of "any dispute arising from the making, performance or termination" of the contract. It does not establish any arbitration procedures whatsoever, beyond explicit rules for selection of the arbitrators and general reference to "the provisions and procedure of the United States Arbitration Act." JA 30a. In the arbitration clause, the parties did not elect to address whether and how class arbitration would be permitted, and instead chose to delegate broadly the choice of arbitration rules to the arbitrators. In so doing, all parties undertook certain risks that the arbitrators would employ procedures that they might not like.

The fact that Stolt now is unhappy with the consequences of the arbitrators' decision is no reason for this Court to adopt the broad, new, preemptive federal rule Stolt advocates. Absent evidence that the

arbitrators "exceeded their powers," this Court should not allow Stolt to "walk away from its freely entered obligation," *Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 165 (3d Cir. 2000) (Alito, J., dissenting), which is to abide by the arbitrators' decision that class arbitration is permitted under the contract.

### A. The FAA Evinces a Strong Policy in Favor of Arbitration That Supports Class Arbitration

This Court has recognized, and Stolt concedes, that class arbitration is permissible and feasible if it is contractually authorized by the parties' agreement. Stolt stresses that "[t]he point is not that class arbitration is necessarily unworkable, if all parties have actually agreed to it." Pet. Br. 33; *see also id.* at 13, 26, 41. Even the dissenters in *Bazzle* acknowledged that "the FAA does not prohibit parties from choosing to proceed on a classwide basis," 539 U.S. at 459 (Rehnquist, C.J., dissenting). The *Bazzle* majority's premise was that the arbitration could go forward on a class basis so long as the contract did not forbid it. *See id.* at 454 (plurality); *id.* at 454-55 (Stevens, J., concurring) (noting that nothing in the FAA precluded state court's holding that class-action arbitrations are permissible if arbitration clause allows them). The nonprofit American Arbitration Association (AAA), the world's largest provider of alternative dispute resolution services, also "understood *Bazzle* to endorse the proposition that, under the FAA, class arbitrations are permissible where the parties' arbitration agreement is construed to permit class arbitration." *Brief of American Arbitration Association as Amicus*

*Curiae in Support of Neither Party* (08-1198) [hereinafter AAA Br.] at 9.

The feasibility of class arbitration as a practical matter is amply confirmed by the successful administration of hundreds of class arbitrations before and after this Court's *Bazzle* decision. California has permitted class arbitration for decades, *see Keating v. Superior Court of Alameda County*, 645 P.2d 1192, 1209–10 (Cal. 1982), *rev'd on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984); *see also e.g.*, *Blue Cross of California v. Superior Court of Los Angeles County*, 78 Cal. Rptr. 2d 779, 785 (Cal. Ct. App. 1998), *cert. denied*, 527 U.S. 1003 (1999); *Izzi v. Mesquite Country Club*, 231 Cal. Rptr. 315, 322 (Cal. Ct. App. 1986); *Lewis v. Prudential-Bache Securities, Inc.,* 225 Cal. Rptr. 69 (Cal. Ct. App. 1986); and class arbitration has been conducted elsewhere as well during the past twenty years, *see, e.g.*, *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991).

In the wake of *Bazzle*, various arbitration service providers developed class arbitration rules to provide guidance for the growing number of parties and arbitrators conducting class arbitrations. The AAA published its rules in 2003, and its website contains a readily accessible compendium of one large body of class arbitrations. *See,* http://www.adr.org/sp.asp?id=25562 (searchable class action docket, posting clause construction awards). Two of the other large arbitration service providers, JAMS, The Resolution Experts (formerly Judicial Arbitration and Mediation Services), and NAF (the National Arbitration Forum), have also promulgated

class arbitration rules. *See*, http://www.jamsadr.com/rules-class-action-procedures/ and http://www.adrforum.com/users/naf/resources/Arbitration%20class%20procedures%202007.pdf

The AAA alone reports administering 283 class arbitrations since it adopted its AAA Class Rules. AAA Br. at 22. That figure does not include cases administered by the many other dispute resolution providers, *ad hoc* cases like this one that were not filed with any institutional provider (even though, as here, they may have followed AAA rules), nor class arbitrations before the class rules were in effect. The AAA's experience confirms that class arbitration can be "a fair, balanced, and efficient means of resolving class disputes," AAA Br. at 25, and belies Stolt's complaints that such proceedings will be unjust to the parties against whom they proceed.

The lack of any FAA bar or presumption against class arbitration is consistent with the confidence the Act and this Court's FAA jurisprudence place in the ability of arbitrators to handle complex matters of broad consequence to the parties and the public. "Adaptability and access to expertise are hallmarks of arbitration." *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). The FAA entrusts arbitrators with complex, international antitrust cases affecting businesses all over the world and hundreds of thousands of people. *Id.* This Court has also held arbitration to be an appropriate forum for complex claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), the Securities Acts and employment discrimination laws; it has also held that arbitrators may fashion diverse and

nontraditional forms of relief, including treble or punitive damages and injunctive relief.[7] In sum, experience shows that class arbitration is compatible with the FAA, practicable, and that parties, neutrals and arbitration providers have developed and applied a successful regime of class arbitrations.

### B. Under Applicable Contract Law, The Clause's General Grant of Authority to Arbitrate "Any Dispute" Includes Power to Use Class Procedures

The arbitrators' reliance on contract principles, rather than the special, explicit-statement rule that Stolt urges, is precisely what the FAA requires. The core purpose of the FAA is to codify a national policy favoring arbitration and placing agreements to arbitrate "on equal footing with all other contracts." *Hall St. Assocs.,* 128 S. Ct. at 1402. The FAA does not "purport[] to alter background principles of state contract law regarding the scope of agreements." *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1902 (2009). *See First Options*, 514 U.S. 938 (commercial arbitration agreements are enforced "like other

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[7] *See, e.g.*, *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52 (1995) (holding punitive damages arbitrable); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (holding Age Discrimination in Employment Act claims arbitrable, and noting that arbitrators "do have the power to fashion equitable relief"); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (holding Securities Act of 1933 claims arbitrable); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (holding Securities Exchange Act of 1934 and RICO claims, and treble damages, arbitrable); *Mitsubishi*, 473 U.S. 614 (holding international antitrust claims arbitrable).

contracts"); *Volt Info. Sciences v. Board of Trustees,* 489 U.S. 468, 478 (stating that the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, *like other contracts*, in accordance with their terms")(emphasis added). The decision of the arbitrators construing the parties' contract to permit class arbitration faithfully comports with the FAA.

There has been no definitive choice-of-law analysis for the contract construction dispute in this case, and, as the court of appeals correctly concluded, none is needed. The court of appeals determined that Stolt waived any choice-of-law objection when they insisted in their brief to the arbitrators that they "need not decide" between New York and federal maritime law, "because the analysis is the same under either." Pet. App. 21a, *quoting* Stolt-Nielsen's Arbitration Br. 7 n. 13, CAJA 604.

New York state law on reading broad clauses to permit class arbitration directly supports the arbitrators' decision. New York's intermediate appellate court recently sustained an arbitral decision to permit class arbitration under a clause that required arbitration of "all...disputes" arising under the contract. *Cheng v. Oxford Health Plans Inc.,* 846 N.Y.S.2d 16 (1st Dep't 2007) (per curiam).[8] The Second

[8] New York and maritime law both allow consolidation of arbitrations. *See County of Sullivan v. Edward L. Nezelek, Inc.*, 42 N.Y.2d 123, 127 (1977) ("it is no longer open to serious dispute that there is judicial power to order consolidation of arbitration proceedings"). Schoenbaum's admiralty treatise explains that "judges in admiralty cases frequently adopt state law rules through a process of 'borrowing,' thereby incorporating them into the general maritime law." ADMIRALTY AND MARITIME LAW § 4-2.

Circuit in this case permissibly relied, *inter alia*, on *Cheng*. Any decision by this Court to second-guess the state court and its corresponding federal court of appeals would be a break from established FAA law.

To the extent that maritime contract law applies, there is no distinctive, judicially established maritime rule. Federal courts sitting in admiralty typically follow state law rules of decision. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.,* 348 U.S. 310, 313 (1955) (applying state law in recognition that "not...every term in every maritime contract can only be controlled by some federally defined admiralty rule"); Thomas J. Schoenbaum, 1 ADMIRALTY AND MARITIME LAW § 4-2 (4th ed. 2004 & Supp. 2006) (observing that, "[a]lthough the federal judiciary has the power to announce new principles of general maritime law, this is done very infrequently and only when there is a compelling need to fashion new rules"). In the face of Stolt's waiver of choice-of-law objections and the absence of any distinctive maritime rule of law, the arbitrators applied common general principles of both maritime and New York contract law. Pet. App. 49a. Their conclusion comports with the principle, common to both, that a broad and general grant of authority to arbitrate without restriction against class proceedings includes authority to organize the proceedings on a class basis. "Whatever is necessary to

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Using that process, the New York Court of Appeals in a maritime case followed New York law to allow consolidation of arbitration under maritime contract, because "the sole issue was procedural" so there was "no basis upon which to predicate a holding that Federal law controls." *Vigo S. S. Corp. v. Marship Corp. of Monrovia,* 26 N.Y.2d 157, 158 (1970).

be done in order to accomplish work specially contracted to be performed is part of the contract, though not specified." 17A Am. Jur. 2d Contracts § 398 (2009).

The contract itself imposes no explicit restrictions on the particular procedures the arbitrators may employ. It requires arbitration pursuant to the FAA, but does not incorporate any institutional arbitration provider's rules. It thereby reflects the parties' shared intent to delegate to the arbitrators broad power to employ appropriate procedures.

The contract's conferral on the arbitrators of power to decide "*any*" dispute is most reasonably read as not limited to the subset of disputes between a single parcel tanker owner and a single customer. The word "any" is commonly understood expansively. *See Randall v. Bailey*, 288 N.Y. 280, 285-286 (1942) (reading "any" broadly); *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 31-32 (2004) (interpreting "expansive contract language," referring to "any" person, to cover land as well as sea carriers); *Sacramento Nav. Co. v. Salz*, 273 U.S. 326, 331 (1927) (reading contract that broadly referred to "any vessel" to include a combination of barge and tug); *Ali v. Federal Bureau of Prisons*, 128 S. Ct. 831, 832 (2008) (noting that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'"), *quoting U.S. v. Gonzales*, 520 U.S. 1, 5 (1997), *quoting* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976).

So, too, the clause's use of the term "dispute" is permissibly read to include disputes involving multiple parties, as here. Sherman Act cases often must be brought as class actions, for reasons explained below, Point II.F., so a clause encompassing "any" Sherman Act dispute is plausibly understood to cover class cases. The term "dispute" readily and naturally denotes class proceedings; indeed, it was used by the Court in *Bazzle* in referring to the completed class arbitration under review in that case. 539 U.S. at 453 (referring to the arbitrator who "arbitrated the *Bazzle* dispute"). Similarly, Judge Posner's opinion approving consolidated arbitration in *Connecticut General Life Insurance Co. v. Sun Life Assurance Co. of Canada*, 210 F.3d 771, 774 (7th Cir. 2000), applies "usual methods of contract interpretation" to hold that agreements to arbitrate "any dispute" arising from the contract authorized consolidation of arbitration. *Id.* "As normally understood, the word 'dispute' ... does not exclude a dispute involving multiple parties." *Id.* at 775. In sum, the arbitrators reasonably and permissibly read the contract to reflect an agreement to grant the arbitrators discretion to proceed via class arbitration.

It is common for contracts to use broad terms to confer on arbitrators a range of powers not explicitly mentioned. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, for example, the arbitration clause contained no specific reference to punitive damages, but simply conferred on arbitrators the power to resolve "any controversy." 514 U.S. 52, 59 (1995). Using the very phrase which Stolt repeatedly invokes—that arbitration "is a matter of consent, not coercion," *id.* at 57, *see* Pet. Br. 13, 45, 46—this Court

asked whether the contracting parties had "agree[d] to *include* claims for punitive damages within the issues to be arbitrated," and determined that they had. *Mastrobuono,* 514 U.S. at 58 (emphasis in original). The Court so held even though "[t]he agreement contain[ed] no express reference to claims for punitive damages." *Id.* at 59. Indeed, the Court held that the contract's general empowerment of the arbitrator so clearly authorized the particular relief sought that it sufficed to override a common-law rule prohibiting arbitral awards of punitive damages. *Id.* at 58-59. That approach, recognizing arbitrators' powers not mentioned by name, is manifest throughout this Court's arbitration jurisprudence.[9] Stolt offers no good reason to adopt what is essentially the *opposite* approach when it comes to the issue of class arbitration.

Arbitrators' leeway to find authorization for specific action under general contract terms is even more firmly recognized where, as here, arbitration *procedures* are concerned. "[T]he court cannot mess in the arbitrators' procedures beyond the very limited extent permitted by sections 9 and 10 of the Federal Arbitration Act." *Conn. Gen. Life Ins. Co*, 210 F.3d at 774. Whether arbitration can go forward on a class basis is a question of procedure, as the Court correctly noted in *Bazzle*: There, as here, the relevant question was "what kind of arbitration proceeding the parties agreed to," a question that "concerns contract

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[9] *See, e.g.*, *Mitsubishi*, 473 U.S. 627, 626 (reading arbitration agreement, like "any other contract," whereby a general arbitration clause not specifically mentioning statutory claims is read to include them).

interpretation and arbitration procedures." 539 U.S. at 452-453.[10]

There is no requirement under the FAA that parties specify all procedures in advance. The background rule in arbitration is that arbitration procedures, if not explicated, are delegated to the discretion of the arbitrators. "[P]rocedural questions which grow out of the dispute and bear on its final disposition are ... for an arbitrator[] to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *Volt*, 489 U.S. 468, 476 (1989) (arbitrators draw their authority from the arbitration agreement, and need not follow "a certain set of procedural rules").

There was no argument in *Bazzle* that the clause at issue specifically authorized class arbitration in the way that Stolt here argues is required. That clause was either silent or, as Green Tree argued, its language prohibited class arbitration. (Green Tree contended the clause's authorization of arbitration by "one arbitrator selected by us with consent of you" confined the clause to two-party arbitration and so implicitly prohibited class arbitration. *Bazzle,* 539 U.S. at 448). The Court's remand assumed that the arbitrator's certification of the class could be sustained if the clause were silent, but not if it affirmatively forbade arbitration; that was the issue on which the

[10] If the authority to proceed on a class basis were not a *procedural* matter, Federal Rule of Civil Procedure 23 would run afoul of the Rules Enabling Act, 28 U.S.C. § 2072. Class mechanisms comfortably qualify as procedure because they address the "process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Hanna v. Plumer*, 380 U.S. 460, 464 (1965).

Court required a ruling from the arbitrator. But if, as Stolt argues, a silent clause necessarily has the same consequences as one that affirmatively prohibits arbitration, there would have been no need to remand; the Court would simply have held that the class arbitration was impermissible.

Two more features of *Bazzle* underscore the permissibility of the arbitrators' decision here. The Court in *Bazzle* found that it was the clause's reference to "one arbitrator selected by us with consent of you" that created an ambiguity as to whether the clause forbade class arbitration, and therefore warranted a remand. 539 U.S. at 450-451. No similar language and no parallel ambiguity exists here. And, where *Bazzle* required a remand to the arbitrator to make sure that he acted independently and was not deferring to a prior judicial construction of the same clause, there was no prior judicial construction here that might have improperly swayed the arbitrators.

The contract's reference to "all disputes" is also similar to the clauses in scores of other cases in which arbitrators have applied the governing contract law of New York, Texas, Massachusetts, Michigan, or another jurisdiction to authorize class arbitration. *See, e.g., JSC Surgutneftegaz v. President and Fellows of Harvard College*, 2007 WL 3019234 at *2 (SDNY) (sustaining arbitrators' determination that, under New York contract law, "the plain language of the agreement" authorizing arbitration of "any...claim" permitted class arbitration), *confirming President and Fellows of Harvard College v. JSC Surgutneftegaz*, AAA Case No. 11 168 T 01654 04 (Aug. 1 2007); *Scher v. Oxford* AAA Case No. 11 139 00548 05, slip op. at 9-

10 (Mar. 7, 2006) (applying New York law to hold that clause requiring that "all disputes" be arbitrated encompassed class disputes), *conf'd, Cheng v. Oxford Health Plans Inc.,* 846 N.Y.S.2d 16 (1st Dep't 2007) (per curiam); *Rene Adame vs. Fleetwood Enterprises, Inc.,* AAA Case No. 1 1 181 01292 07, slip op. at 13, 9-10 (March 11, 2008) (applying Texas contract law to conclude that "class disputes are included within the plain meaning of the phrase 'any dispute or claim'"); *Tomeldon Company, Inc. vs. Medco Health Solutions, Inc.*, AAA Case No. 11 193 00546 06, slip op. at 13 (Nov. 22, 2006) (holding that, under New Jersey contract law, clause language permitting arbitration of "[a]ny controversy or claim," is "certainly broad enough to include a claim brought in a representative capacity and would, without more, encompass class arbitration."); *Dub Herring Ford, Inc. vs. Ford Dealer Computer Service*, AAA Case No. 11 181 01119 06, slip op. 8 (Nov. 12, 2006)(applying Michigan and Texas contract law to permit class arbitration under clause providing for arbitration of "all disputes" because "the plain and generally accepted meaning of 'all'" encompassed class disputes). These and many other, similar opinions are posted on line at: http://www.adr.org/sp.asp?id=25562 (AAA searchable class action docket).

In short, the arbitrators did not exceed their powers or manifestly disregard the law. Their decision follows both maritime and New York law, comports with this Court's FAA jurisprudence, and shares the common approach of a large and growing body of arbitral decisions construing general arbitration clauses to permit class-wide procedures.

### C. There is No FAA-Based Presumption Against Class Arbitration

Stolt urges this Court to create a new, federal common-law default rule foreclosing class arbitration except when the parties' arbitration agreement specifically authorizes class proceedings by name. They seek to ground such a rule in the FAA by repeatedly invoking the FAA's and this Court's references to interpretation of arbitration contracts "in accordance with their terms," Pet. Br. 12, 13, 15, 16-17, 25, 26, 27, 31, 33, 41, 45, 48, as if that phrase calls for something more than contract interpretation according to ordinary principles of generally applicable contract law. They also purport to ground their rule in contract law, but invoke an invented version of contract doctrine at odds with both maritime and New York law. Stolt's references to the contracting parties' intent are consistently qualified by adjectives like "actual" or "real," suggesting a heightened, specific-intent requirement beyond the ordinary contract principles that govern the interpretation of contracts. See Pet. Br. 22, 26, 47, 48, 50, 51 (arguing that "actual agreement" was lacking); *id.* at 23-24, 37, 46 (no "actual consent"); *id.* at 45 (no "real contractual intent"); *id.* at 52 (contending respondent lacks "an actual contract theory"). In sum, Stolt deploys the terminology of this Court's FAA cases out of context, together with a novel and legally unsupported contract theory, to advocate a new rule whereby class arbitration would be permissible only where the contract specifically stated as much in unequivocal terms.

Such a sweeping, novel—and presumably broadly preemptive—federal rule of FAA contract interpretation finds no support in the FAA or this Court's decisions. There is no general federal common law of contract interpretation, *O'Melveny and Myers v. FDIC*, 512 U.S. 79, 83 (1994), and the FAA is not a mandate to create one. *Cf. Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). The point of the FAA Section 4 language requiring courts to enforce arbitration agreements "in accordance with the[ir] terms" is simply to place arbitration contracts on the same footing as other contracts, not to impose any especially stringent specificity requirement on FAA-governed agreements to arbitrate. A long line of FAA precedent makes clear that, by referring to enforcing contracts according to their terms, the Court simply means that arbitration agreements must be interpreted *in the same manner as any other contract*. *See* pages 30-31 *supra* (*citing Hall St., Arthur Andersen, Volt* and *First Options*).

The unprecedented nature of the rule Stolt advocates is underscored by the fact that they cite no body of contract law to the effect that every term must be made explicit in order for the contract to provide authority. Stolt points only to three federal court decisions, *Glencore, Ltd. v. Schnitzer Steel Products*, 189 F.3d 264 (2d Cir. 1999), *United Kingdom v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993), and *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), *see* Pet. Br. 46, 24, and argues that the arbitrators erred in declining to follow them. But to the extent that those courts demand specifically stated contractual authority for class arbitration, they misinterpret both contract law and the FAA. Judge Posner's reasoning

for the Seventh Circuit in *Connecticut General Life Insurance Co.,* 210 F.3d at 774, subsequent to *Champ*, applying "usual methods of contract interpretation" to read a contract's authorization to arbitrate "any disputes" to permit consolidation of arbitrations, is more persuasive and is consistent with this Court's FAA jurisprudence. *See* page 34, *supra.* Stolt's trilogy is also at odds with *Bazzle.* No remand to the arbitrator would have been necessary in *Bazzle* if the FAA required that the failure specifically to authorize class arbitration was an absolute bar.

Stolt's proposed rule of federal contract construction would *disfavor arbitration* by placing class proceedings off limits to arbitrators where courts are authorized to conduct them in similar cases. As this Court has emphasized, arbitration clauses are a species of forum-selection clauses. *See Scherk v. Alberto-Culver Co*, 417 U.S. 506, 519 (1974). If this had been a New York *judicial* forum-selection clause with the same "any disputes" language, there is no question that the New York court would be authorized to conduct a class action. Any doctrine requiring such language to be construed to disable *arbitrators* in parallel circumstances from using otherwise available procedures of that forum would run afoul of the FAA's pro-arbitration policy, because it singles out class arbitration for skepticism in violation of the most basic principle of FAA jurisprudence. *See Doctors' Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Perry v. Thomas*, 482 U.S. 483, 492, n. 9 (1987).

### D. There is No Special Federal Maritime Rule Against Class Arbitration, Nor Reason to Create One

Stolt invokes the maritime context of this case as a rationale for construing the FAA to forbid class arbitration absent specific authorization. Pet. Br. 42-45. It distinguishes this case from consumer contracts of adhesion in particular. *Id.* at 49. More generally, Stolt suggests that the rule it seeks here might not apply to "a silent arbitration clause in a different type of contract, involving different types of parties." *Id.* at 51.

There is no precedent in maritime law for the new rule Stolt proposes. In the absence of any maritime precedent, Stolt was left to rely on expert testimony, which it contends shows "established maritime practice" (but no precedent) against class arbitration. *Id.* at 43; Pet. App. 49a, 51a-52a. The arbitrators duly considered that testimony; they did not "exceed their authority" in declining to fashion an entirely new rule based on it.

The experts testified that they had never heard of class arbitrations in the maritime context. Mere lack of experience, however, does not establish an industry custom. *See Austin Nichols & Co. v. The Isla de Panay*, 267 U.S. 260, 272 (1925) ("custom and usage," refers to trade usage "commonly known and acted upon"). At most, the testimony showed that there is no custom one way or the other with respect to whether broadly worded maritime contracts permit class arbitration.

Further, the matters the experts testified about did not require any special expertise beyond the arbitrators' own. This was not, for example, a contract interpretation question turning on maritime terminology requiring specialized expertise. *Cf. Crescent Oil and Shipping Svcs., Ltd. v. Philbro Energy, Inc.,* 929 F.2d 49 (2d Cir. 1991) (relying on maritime expertise to interpret contractual references to "discharge port" and "lighterage area"). Stolt's experts were not maritime industry participants, but arbitrators, professors, and lawyers—like the arbitration panelists themselves—speaking to the ultimate legal issue of contract interpretation. *See* JA 122a (Kimball); JA 136a-137a (Harris). The arbitrators' treatment of the testimony was not error, let alone the kind of extreme overstepping that requires vacatur under Section 10(a)(4).

This court should reject the invitation to fashion a special, anti-class rule for a subset of maritime arbitrations. Stolt's maritime law experts identified no rationale for interpreting the FAA differently in maritime arbitrations as compared to other categories of cases. The advantages that Stolt contends motivate resort to maritime arbitration are not specific to maritime law, but are features of international arbitration generally (such as avoiding national courts), and of domestic arbitration generally (such as choosing expert decision makers, tailoring procedures to the needs of the case, and resolving disputes more efficiently). JA 121a, 122a, 124a, 130a. Those advantages simply do not bear on whether the arbitrators permissibly construed the arbitration clause before them. The experts identified nothing unique about shipping that would warrant this Court

devising a special maritime doctrine here and imposing it on the arbitrators—implying that they somehow exceeded their powers by not developing it themselves.

### E. Petitioners Advance no Reason to Conclude that Classwide Procedures are Beyond the Authority of the Arbitrators

The arbitrators acted well within their allocated authority. It would be especially difficult to establish that the arbitrators exceeded their powers in the circumstances of this case, where the only issue under review is the precise question that the parties expressly assigned to the arbitrators to decide: Did the clause permit class arbitration, or not? The arbitrators carefully applied the law to that issue. They rendered a written decision that is well reasoned and correct. They did not "exceed their powers," and therefore their decision cannot be vacated. *See supra* Point II.B.

Stolt contends that the court of appeals "refused to review the substance of the arbitrators' decision to determine whether they had 'exceeded their powers,'" because the court thought the issue was committed to the arbitrators "irrespective of whether [they] decided the issue correctly." Pet. Br. 24. In fact, the court of appeals accurately stated the implications of the "exceeding powers" standard, under which a merely incorrect contract interpretation must be sustained. *See supra* Point I.B. Ordinary legal error does not suffice. More fundamentally, Stolt is wrong that the court of appeals never reviewed the substance of the decision; the court explained in detail throughout its

opinion why it believed the arbitrators' contract construction was valid. *See* Pet. App. 21a-31a.

The heart of Stolt's plea for vacatur rests on their contention that "class arbitration fundamentally transforms the nature and scope of the proceeding," Pet. Br. 27, such that this Court should fashion a rule prohibiting class arbitration in the absence of a contract term specifically and expressly authorizing it. As explained above, Point II.C., the FAA supports no such rule. The balance of Stolt's brief makes a series of policy arguments that are unsupported by existing law. Even if this Court were poised to make new law, those points provide no ground for any such venture.

Stolt contends that, when a class is certified, the risk of an erroneous result is magnified, which "retroactively alters the core economics" of the arbitration contract. Pet. Br. 28. It must be noted that in this case, in light of Stolt's admissions of culpability and the criminal convictions of Odfjell and Jo Tankers, there is faint cause for concern about the "risk of an erroneous result," *id.,* holding petitioners liable. There is, in any event, nothing retroactive about such risk. Legally sophisticated parties, which petitioners profess to be, have long been on notice of the particular risk that arbitrators might construe a clause granting them powers over "any dispute" to encompass class proceedings. *See supra* page 28.

Stolt raises a series of subsidiary points in support of its claims that class arbitration alters the parties' bargain. First, Stolt claims that class proceedings are complex and unworkable. But Stolt acknowledges that class arbitration is not unworkable

if the parties have agreed to it, *see supra* page 27, and the arbitrators held that they did just that in this case. Arbitrators have been deemed equal to all kinds of complicated, multi-national, high-impact disputes. *See* Point II.A. There is no suggestion in the FAA or this Court's cases that they are not competent to administer class proceedings. To the contrary, the substantial positive experience of the AAA in administering class arbitrations dispels such concerns. *Id.* Moreover, class arbitration is not "complex, litigious and slow," Pet. Br. 31, when compared with myriad individual arbitrations, or no feasible process at all. To the contrary, class arbitration captures efficiencies that often make the difference between fair recovery and none.

Second, Stolt argues that class arbitration "denies defendants their core right to select different arbitrators to resolve disputes with different members of the would-be class." Pet. Br. 35. That argument is circular. The characterization of class arbitration at the hands of a rogue arbitrator "stripping from all unconsenting parties their foundational right" to select their arbitrators, *id.*, assumes what it purports to prove: that the contract forecloses class arbitration. The arbitral panel here permissibly concluded otherwise. By the time parties select arbitrators, they generally know that claimants are seeking to proceed as a class, and they select suitable arbitrators with special competence in class, mass, or complex cases, as they did here. Stolt complains of the "asymmetry" that class members, but not the petitioning ship owners, will have the right to opt out, *id.* at 23, but Stolt was involved in selecting these arbitrators, whereas the putative class members were not.

Third, Stolt contends that the need for judicial oversight confirms that class arbitration is improper absent "actual consent." *Id.* at 37. It is true that due process may require judicial review to ensure that arbitrators do not disregard the rights of absent class members. But since the older decisions to which Stolt refers, *see, e.g.,* Pet. Br. 37, *citing Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991), experience has shown that tasks like class certification can be accomplished by arbitrators as well as courts. And, under the FAA, arbitral awards are subject to judicial review at least where, unlike here, they are sufficiently final. *See infra* Point III.

Fourth, the concern that class arbitration cannot be "meaningfully confidential" (Pet. Br. 38) is belied by the kinds of precautions taken in this case, where documents reflecting proprietary information were filed confidentially. *See* A2339; CAJA A1-A181 (confidential appendix). Class arbitration does require some public disclosure, at least to give potential class members notice and an opportunity to opt out. Parties to class arbitration accordingly cannot be assured confidentiality as to the existence of a dispute and certain basic aspects of it. There is, however, no default requirement of absolute confidentiality in the FAA or in this Court's cases interpreting it, nor any reason to think that adequate confidentiality terms cannot be devised to protect important business and other information in class arbitration.

Stolt's fifth argument is that class arbitration cannot provide finality and repose. Pet. Br. 39-41. That is not the case. Once class members have

received notice and declined to opt out of a class arbitration, they are validly subject to the decision of the arbitrators. There is no reason to believe that a final award in such a matter would have any less binding effect on the absent class members than any arbitral award has on parties to it. *See*, *e.g., EEOC v. Waffle House,* 534 U.S. 279, 280-81 (2002)(noting that "ordinary principles of res judicata . . . may apply" to prevent the EEOC from obtaining victim-specific relief in court for an employee who already obtained relief through arbitration); Fed. R. Civ. P. 8(c) (specifying "arbitration and award" as an affirmative defense for pleading purposes).

Stolt also argues that, based on "the international resistance to class actions," foreign jurisdictions might decline to recognize a United States class arbitration award under the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, art. V(1), 21 U.S.T. 2517 (June 10, 1958) ("New York Convention"). To the extent that foreign resistance exists, it is irrelevant to interpretation of the FAA. Other nations similarly lack our practice of awarding punitive damages in arbitration, for example, but those remedies are nonetheless authorized under *Mastrobuono*, 510 U.S. 52.

Moreover, international comity is strong under the New York Convention and enforcement rates are extremely high. Stolt points to no instance of non-enforcement of a class award under the New York Convention. The provisions for non-recognition that Stolt identifies, *see* Pet. Br. 41, are extremely narrow; "public policy" in art. Section V(2)(b), for example,

refers to the host state's international public policy, not a mere incompatibility with the host country's own laws or policy preferences. Moreover, Stolt does not support its premise of foreign hostility to class mechanisms. Class or other representative actions and arbitrations are, in fact, increasingly brought outside of the United States; they "are an acceptable form of arbitration under the New York Convention . . . deserving of the same treatment given to other types of arbitration." *See* S. I. Strong, *The Sounds Of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration In Cases Of Contractual Silence Or Ambiguity?* 30 Mich. J. Int'l L. 1017, 1024 (2009).[11]

### F. The Arbitrators' Construction Best Serves the Public Interest

The fact that the public interest is well served by the arbitrators' interpretation of the contract further militates against Stolt's approach. "In choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that serves the public interest is generally preferred." RESTATEMENT (SECOND) OF CONTRACTS, § 207 (Interpretation Favoring the Public). Stolt's proposed default rule—

[11] If petitioners are concerned that an overseas class member might seek to litigate in a foreign court even after a final award was entered in this case, and that a foreign court might refuse to recognize the res judicata effect of the award, the arbitrators suggested they might consider an opt-in mechanism that would reinforce preclusion with an individualized, affirmative expression of intent to be bound by the result. *See* Pet. App. 52a. That may be unnecessary, but in any event, those concerns are premature in light of the motions pending before the arbitrators to limit the international reach of the class.

that arbitrators lack power to conduct class arbitration unless the contract explicitly authorizes class arbitration by name—would interfere with effective vindication of the Sherman Act, and would therefore be contrary to the public interest.

This Court has long recognized that antitrust enforcement in the United States relies to a significant extent on private litigation to check anticompetitive misconduct. *See California v. Am. Stores Co.*, 495 U.S. 271, 284-85 (1990); *Mitsubishi*, 473 U.S. at 634-35. The costs of private antitrust enforcement, however, are substantial. In such cases, expert fees alone typically run into the hundreds of thousands of dollars, and the cost of attorney time to litigate is also high. There has not been any opportunity to develop a record in this case regarding the likely costs of litigating it on an individual basis,[12] but evidence in other antitrust cases is instructive. *See, generally In re American Express Antitrust Merchants' Litigation*, 554 F.3d 300, 316 (2d Cir. 2009), *cert. pending sub nom. American Express v. Italian Colors Rest.*, No. 08-1473 (filed May 29, 2009) (evidence that experts' fees in individual antitrust cases range from $300,000 to more than $2 million); *Kristian v. Comcast Corp.*, 446 F.3d 25, 58 (1st Cir. 2006) (witness fees likely to cost $300,000-$600,000 and attorney time likely to cost several million dollars). For all but the largest individual claims, the economic viability of litigating complex, international antitrust claims depends on class procedures. Class actions have accordingly long been a central component of antitrust remediation and

[12] If this Court were to reverse, Animalfeeds would be entitled to an opportunity to develop such a record. *Cf. Green Tree Financial Corp–Alabama v. Randolph*, 531 U.S. 79 (2000).

deterrence. *See Reiter v. Sonotone*, 442 U.S. 330, 334, 344 (1979).

The distinctive features of arbitration intensify the under-enforcement problem that would arise were class procedures unavailable. Because of the nonpublic nature of individual arbitrations and their lack of precedential effect, claimants confined to arbitration and restricted to proceeding individually would be unable to rely on collateral estoppel, s*ee Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979), to streamline the aggregate proof burdens.

Without the opportunity to proceed on a class basis, most victims will rationally conclude that the expected reward of an individual suit would not justify the cost of proof. Thus, non-enforcement, rather than individual enforcement, would be the likely result of adopting Stolt's proposed rule presumptively barring class arbitration. Despite its promise to the Department of Justice to provide restitution, *see* page 5 *supra*, Stolt is well aware that, if class arbitration were unavailable, few individual claimants would be able to arbitrate, and petitioners would have to pay only a tiny fraction of the relief due to those they wronged. That reality lends additional support to the arbitrators' reading of the contract, consistent with public policy, to permit class arbitration.

## III. JUDICIAL INTERVENTION HERE IS PREMATURE

As a threshold matter, the Court should dismiss this case as nonjusticiable, because the issue presented

is not ripe for review.[13] The question presented here relates to an interim, procedural decision that Stolt challenged in the district court even before the arbitrators had applied their ruling to the facts of this case. The arbitrators decided only that class procedures were not prohibited by the contract; they have not yet addressed whether this case is appropriate for class-wide resolution, and have not even considered class certification. It is entirely possible that the arbitral panel will find the facts of this case inappropriate for class treatment. Thus, review at this preliminary stage could produce an advisory opinion that might be wholly unnecessary.

The lack of ripeness here has both a constitutional Article III aspect, based on the lack of hardship to Stolt from denying immediate review, *see Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), and a prudential aspect, *see Socialist Labor Party v. Gilligan,* 406 U.S. 583, 588 (1972), based on FAA policy favoring arbitration and avoiding interlocutory vacatur petitions on incomplete records in ongoing arbitration processes. The ripeness doctrine prevents interlocutory petitions to district courts "every time the arbitrator sneezes," *Dealer Computer Services v. Dub Herring Ford*, 547 F.3d 558, 563 (6th Cir 2008), just as it

[13] Lack of ripeness cannot be waived, even though it was not raised below. *Nat'l Park Hospitality Assn. v. Dept. of Interior*, 538 U.S. 803, 808 (2003) (issue may be raised on court's own motion); *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57, n. 18 (1993) (same). Petitioners disparage the ripeness concern as prudential and therefore waived, Pet. Cert. Reply at 8-9, but, as they acknowledge, "even in a case raising prudential concerns, the question of ripeness may be considered on a court's own motion." *Nat'l Park Hospitality Assn.*, 538 U.S. at 808.

generally precludes judicial review of non-final agency action.

**A.** Under ripeness principles as applied to arbitration, judicial review is not appropriate until arbitrators have completed their work and their decision has caused a legally cognizable, concrete and non-speculative harm to would-be challengers. *See generally, Nat'l Park Hospitality Assn. v. Dept. of Interior*, 538 U.S. 803, 808 (2003) (holding that ripeness turns on "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration"). Stolt complains that, in the absence of immediate judicial review, it will have to submit to further arbitration proceedings regarding the propriety of class certification. Pet. Cert. Reply at 9. But this Court "has not considered . . . litigation cost saving sufficient by itself to justify review in a case that would otherwise be unripe." *Ohio Forestry Ass'n v. Sierra Club,* 523 U.S. 726, 734 (1998). In the analogous context of the collateral-order doctrine—whose purpose of protecting trial proceedings from premature disruption by piecemeal appeals is analogous to the need to protect the integrity of the ongoing arbitral process (*see Green Tree Financial Corp–Alabama v. Randolph*, 531 U.S. 79, 86 (2000))—the anticipated burdens of litigation are likewise not sufficient to warrant appellate review before final judgment. *See Will v. Hallock*, 546 U.S. 345, 346 (2006) (stating that litigation burden may be cognizable harm under the collateral order doctrine only when going forward "would imperil a substantial public interest"); *Federal Trade Comm'n v. Standard Oil Co. of Calif.,* 449 U.S. 232, 242-243 (1980) (determining that even "substantial" burden of

defending litigation was inadequate to support interlocutory review); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994). The anticipated harm of proceeding in arbitration to the class certification determination does not make Stolt's question constitutionally ripe for review.

The arbitrators held only that the clause authorizes class proceedings as a general matter. The arbitration panel was "not called upon to decide, nor [did] it decide, whether the arbitration [would] proceed as a class arbitration." Pet. App. 48a-49a. No determination has yet been made whether this case fulfills the class arbitration requirements in AAA Class Rule 4, including numerosity of claimants whose claims raise common issues of fact or law, the typicality of Animalfeeds' claims of those of the putative class, Animalfeeds and counsel's adequacy as class representatives, the similarity of putative class members' arbitration clauses, and the demanding requirement of superiority of the class mechanism to the available alternatives. It thus remains entirely speculative whether the dispute will, in fact, proceed on a class basis.[14] The "basic rationale" of Article III's ripeness requirement is to prevent courts from prematurely "entangling themselves in abstract disagreements." *Abbott Labs.*, 387 U.S. at 148.

This Court has never before reviewed an arbitrators' decision as preliminary as this one.

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[14] There is also no arbitral decision on the scope of any class they might certify, nor on petitioners' pending motion seeking to limit the international reach of the class, *see supra* page 49 n.11, which could bear on some of petitioners' arguments here, such as their concerns about foreign enforcement. Pet. Br. 40-41.

*Compare, e.g.*, *Bazzle*, 539 U.S. at 449-50 (reviewing contractual authorization for class arbitration *after* completion of class arbitration on its merits); *First Options*, 514 U.S. 938 (reviewing claims by non-signatories to arbitration agreement that agreement did not apply to them only *after* the arbitrator had decided the claims on the merits); *Mastrobuono*, 514 U.S. 52 (rejecting challenge that contract did not authorize punitive damages only *after* arbitration panel had decided dispute and awarded such damages); *with PacifiCare Health Sys. v. Book*, 538 U.S. 401, 407 (2003) (finding unripe a claim, not yet determined by the arbitrator, that a contractual bar against punitive damages would unlawfully foreclose treble damages under RICO Act); *Vimar Seguros y Reaseguros, S.A., v. M/V Sky Reefer* 515 U.S. 528, 541 (1995) (rejecting petition to stay pending Japanese arbitration based on "mere speculation" as to arbitrators' future decisions). Deeming the petition here to be ripe would be akin to permitting appellate interlocutory review of a district court's preliminary finding that Rule 23(a) had been satisfied, before the court even considered whether to certify any class under Rule 23(b). The Court should not allow this case to initiate a new and unprecedented level of judicial involvement in arbitration.

**B.** As a prudential matter, too, this case is premature. If the Court were to decide the question presented at this preliminary stage of the arbitration proceedings, before any class has been certified, much less any final award reached, it would invite multiple, interlocutory petitions for judicial review of interim decisions by arbitrators on any number of preliminary

procedural matters.[15] Such early and frequent judicial second-guessing would effectively re-create the very problem the FAA was enacted to address: a widespread pattern of judicial unwillingness to cede decisional authority to arbitrators chosen by parties to resolve their disputes.

The FAA contains no provision authorizing or even contemplating vacatur of preliminary procedural rulings within the arbitration. The fundamental premise of the FAA is that arbitration provides a simplified and streamlined process for dispute resolution, with limited judicial interference. Once a case is sent to arbitration, typically it should not be taken up again by a court until a final award on the merits has been entered. *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 413 (2d Cir. 1980). As this Court recently reemphasized, the FAA "substantiat[ed] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Hall St.* 128 S. Ct. at 1405. The same reasoning applies, not only to the *degree* of scrutiny considered in *Hall St.*, but also with respect to the *timing and frequency* of review. The Congress that adopted the FAA rejected an alternative model, under which arbitrators would "submit any question of law arising during arbitration to judicial determination." *Id.* at 1406 n.7.

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[15] The fact that the arbitrators' clause construction decision is denominated "a partial final clause construction *award*" as a term of art is not determinative. The underlying substance, not the label the arbitrators or the parties apply, is what bears on timeliness. *Publicis Commc'n v. True North Commc'ns, Inc.*, 206 F.3d 725, 728-29 (7th Cir. 2000).

Indeed, it is questionable whether even an arbitral class certification decision, if it had been made, would properly be ripe for review on an immediate vacatur petition to the district court. *See Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 282-83 (2d Cir. 1986) (allowing interlocutory petition to vacate a "partial final award" sustaining the respondent's counterclaim because it "finally and conclusively disposed of a separate and independent claim"); *id.* at 285 (Feinberg, J., dissenting) ("the function of arbitration should make considerations of finality even more compelling in arbitration than they are in conventional litigation"); *cf. Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) (holding district court decision on class certification not appealable until final judgment on the merits in the district court). Only since the recent adoption of Federal Rule of Civil Procedure 23(f) have litigants (as distinct from arbitrating parties) disappointed with trial court decisions on class certification motions had the opportunity, discretionary with the courts of appeals, for immediate review. Before promulgation of Rule 23(f) (for which there is no analogue under the FAA), this Court held parties to the burden of litigating their cases to conclusion before obtaining review of the disputed class question. It did so in order to avoid the "apparent and serious" "potential for multiple appeals in every complex case." *Coopers & Lybrand,* 437 U.S. at 474. That rationale applies here, too, where the FAA's statutory policy protecting the continuity and integrity of arbitral proceedings is at least as strong as the policy against piecemeal review of decisions rendered in the first instance by federal district courts.

Accepting review of Stolt's interlocutory petition here implicitly creates a troubling anomaly: an arbitration regime with *more* frequent and cumbersome review by courts than is currently permitted in litigation. If this Court rules on Stolt's claim in its current posture, every arbitration sought to be pursued on a class basis will involve, first, a petition for vacatur of the clause construction decision, and then a petition for vacatur of the certification decision (both without the threshold control that Rule 23(f) vests in the discretion of the reviewing court). Further, whereas a Rule 23(f) appeal involves only a single stage of judicial review, a vacatur petition from arbitration first goes to the district court and only then to the court of appeals. Allowing such piecemeal and interlocutory judicial review would routinely double the delay and expense of resolving each of the issues subject to review.[16] *Cf. Johnson v. Jones*, 515 U.S. 304, 315-317 (1995) (declining to approve a new category of interlocutory qualified-immunity appeals). Such a regime cannot be squared with the FAA's pro-arbitration policy.

[16] In this regard, the one aspect of its successful regime of class arbitration that the AAA identified as due for revision (AAA Br. 16-17) is the provision in AAA Class Rule 3 for an automatic stay following the arbitrators' clause construction decision. *See* JA 56a-57a. Consistent with concerns expressed herein, the unnecessary delays caused by that provision have garnered criticism. The AAA reports that it will consider revising its rules to eliminate the stays. AAA Br. 16-17 & n.10.

## CONCLUSION

This Court should vacate the decision below and remand with directions to dismiss the vacatur petition as unripe. In the alternative, the decision of the court of appeals should be affirmed.

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Respectfully submitted,

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