No. 08-1198

IN THE
Supreme Court of the United States

STOLT-NIELSEN S.A., *et al.*,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Second Circuit ruled that the arbitration panel's decision that the relevant arbitration clauses permitted class arbitration should not be vacated pursuant to Section 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10, because the panel's decision was not in "manifest disregard" of the law. The questions presented are:

1. Whether an arbitration panel's decision that the parties' arbitration clause permits class arbitration should be vacated pursuant to the demanding standards set forth in Section 10 of the FAA where the parties expressly agreed that the panel would decide the procedural issue of whether the parties' agreements permitted class arbitration and where governing law does not forbid the parties' arbitration agreement to be interpreted to allow class arbitration.

2. Whether the Court has jurisdiction to review an interlocutory arbitration award that is procedural, that addresses neither whether a class should be certified nor the merits of the underlying dispute, and that has not caused and may never cause the speculative harm of which Petitioners complain.

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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STATEMENT

The Second Circuit held that the arbitration panel's decision holding that the relevant contracts in this case permit class arbitration should not be set aside pursuant to the demanding standard set forth in Section 10 of the FAA. Contrary to Petitioners' assertions, the Second Circuit's decision was correct, and there are no conflicts among the Circuits. Additionally, this Court does not have jurisdiction over this dispute. The petition should be denied.

1. Respondent alleges that Petitioners conspired to restrain the world market for parcel tanker shipping services by fixing prices and allocating customers, a *per se* violation of federal antitrust law. Petitioner Stolt-Nielsen Transportation Group Ltd. has been accepted into the Amnesty Program of the United States Department of Justice's Antitrust Division, based on its full admission of wrongdoing for participating in the conspiracy. Moreover, Petitioners Odjfell Seachem AS and Jo Tankers BV and several of their executives have pled guilty for their roles in the conspiracy.

2. After Respondent filed a class action complaint in federal court seeking damages for the harm that the conspiracy caused it and all others similarly situated, Petitioners moved to compel arbitration based on the Vegoilvoy charter party's arbitration clause. Pet. App. 3a. The Second Circuit held that the clause required Respondent's federal antitrust claims be sent to arbitration. *Id.* This broadly worded arbitration clause required that "any dispute arising from the making, performance, or termination of this Charter Party shall

be settled in New York" and that "[s]uch arbitration shall be conducted in conformity with the provisions and procedure of the [Federal] Arbitration Act, and a judgment of the Court shall be entered upon any award made by said arbitrator." Pet. App. 5a-6a. The clause is silent on whether the arbitration may proceed on behalf of a class. Pet. App. 6a.

3. The parties subsequently entered into an agreement governing procedures for the arbitration ("Class Arbitration Agreement"). The Class Arbitration Agreement states, among other things, that the arbitrators "shall follow and be bound by Rules 3 through 7 of the American Arbitration Association's Supplementary Rules for Class Arbitrations (as effective October 8, 2003)" ("AAA Rules"). Pet. App. 3a. Rule 3 provides that "[u]pon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the 'Clause Construction Award')." Pet. App. 4a.

4. Pursuant to the Class Arbitration Agreement, Respondent filed a Consolidated Demand for Class Arbitration, Pet. App. 4a, the parties appointed a distinguished three-member arbitration panel ("Panel"), and Respondent then filed a Motion for Clause Construction Award Permitting Class Arbitration. On December 20, 2005, the Panel issued a unanimous eight-page Partial Final Clause Construction Award. Pet. App. 45a-53a. After noting that all parties agreed that the clause construction issue for the relevant contracts was "a matter of first impression, since there has been no

prior judicial or arbitral decision on whether they allow or prohibit class actions," the Panel concluded that the clauses permitted class proceedings. Pet. App. 49a-52a. The Panel did not consider, let alone decide, whether the arbitration would proceed as a class action. Pet. App. 7a n.5.

In reaching its decision, the Panel found that, pursuant to *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), federal maritime law and New York state law, it had to look to the language of the parties' agreement to ascertain whether the parties intended to permit or preclude class arbitration. Pet. App. 49a. The Panel noted that Respondent identified 21 instances where, subsequent to *Bazzle*, arbitrators have published decisions regarding whether broadly-worded arbitration provisions permit class arbitration despite silence on that specific issue. Pet. App. 49a-50a. In each situation, the arbitrators determined that the clauses permitted class arbitration. Pet. App. 50a. The Panel also noted that despite its specific request, Petitioners did not find any instances of an arbitrator concluding, post-*Bazzle*, that a broadly-worded arbitration clause prohibited class arbitration despite silence on the issue. *Id.*

5. Petitioners filed a petition to vacate the Panel's decision in the Southern District of New York. The court concluded, based upon its interpretation of the arbitration clauses under federal maritime law and New York state law, that the Panel's decision was issued in manifest disregard of governing law; the court therefore vacated it. Pet. App. 41a. The Second Circuit reversed. Pet. App. 2a. It explained that Section 10 of the FAA

provides the exclusive grounds for vacating an arbitral award, and that the party seeking to vacate "bears a 'heavy burden.'" Pet. App. 9a-10a. The court also explained why vacating arbitral decisions is unusual: "[t]he parties agreed to submit their dispute to arbitration, more likely than not to enhance efficiency, to reduce costs, or to maintain control over who would settle their disputes and how—or some combination thereof." Pet. App. 11a. In the context of contract interpretation, the court determined that it was required to confirm arbitration awards even if it had serious reservations about the soundness of the arbitrator's reading of the contract. Pet. App. 12a. Accordingly, the court held that the Panel did not manifestly disregard the law: (i) in engaging in its choice-of-law analysis, Pet. App. 21a-22a; (ii) with respect to an established "rule" of federal maritime law, finding custom and usage more of a guide than a rule, Pet. App. 23a-26a; and (iii) with respect to New York law, Pet. App. 26a-27a. The court further noted that the Panel's decision could not have been in manifest disregard of the law since Petitioners agreed that the question raised was a matter of first impression. Pet. App. 24a.

The Second Circuit went on to consider Petitioners' argument that its decisions in *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 the Seventh Circuit's decision in *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), prohibited class arbitration unless expressly provided for in an arbitration agreement. Pet. App. 28a. The court found these cases non-binding because this Court subsequently ruled in *Bazzle* that "when parties agree

to arbitrate, the question whether the agreement permits class arbitration is generally one of contract interpretation to be determined by the arbitrators, not by the court." Pet. App. 29a (citing *Bazzle*, 539 U.S. at 452-53). Finally, the court held that the Panel did not exceed its authority under 9 U.S.C. § 10(a)(4) in ruling as it did. Pet. App. 31a-32a.

REASONS FOR DENYING THE PETITION

The Court should deny the petition for several independent reasons. The question presented by this case is not, as Petitioners assert, whether the FAA forbids an arbitrator from allowing class arbitration pursuant to an arbitration clause that is silent on class arbitrations. Rather, the question here is whether the Panel "exceeded its powers" in construing the arbitration clause within the meaning of Section 10(a)(4) of the FAA, the exclusive basis for vacating an arbitral award. As the Second Circuit held, the Panel did no such thing, because (i) the parties expressly agreed that the Panel would decide whether the arbitration clause permitted class arbitration, and (ii) this Court's well-established precedent—expressed most recently in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), and *Bazzle*—dictates that the procedural issue involved here is for the arbitrators to decide. Applying the Section 10 standard, the Second Circuit correctly held that the Panel had not "exceeded its powers" or "manifestly disregarded" the law. In any event, following this Court's decision in *Bazzle*, the Circuits are not split on the question presented here, and for good reason: *Bazzle* necessarily forecloses a negative answer to this question. Similarly, the Panel's decision could not have

been issued in manifest disregard of established law since the parties conceded that the issue was one of first impression. Finally, this Court does not have jurisdiction to review this interlocutory decision because it is not ripe under Article III and because it is not a "final" award as required by Section 10 of the FAA.

ARGUMENT

I. This Case Is Not A Good Vehicle For Review Because Section 10 Of The Federal Arbitration Act Easily Disposes Of The Petition.

In clear and unmistakable language, the parties' Class Arbitration Agreement states that the arbitrators "shall follow and be bound by" Rule 3 of the AAA Rules. Pet. App. 3a. Rule 3 provides that "the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." Pet. App. 4a. Accordingly, because the Panel rightfully considered whether the underlying contracts permitted class arbitration,[1] Section 10 of the FAA provides the "exclusive regime[]" for reviewing the Panel's decision. *See Hall St. Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008).

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1. Petitioners conceded this critical point. *See* Pet. App. 32a ("the parties specifically agreed that the arbitration panel would decide whether the arbitration clauses permitted class arbitration").

At most, Petitioners argue that the Panel made a mistake when it held that the parties' agreement permitted class arbitration. *See* Pet. at 17-18.[2] But a simple mistake in contract construction (or otherwise) is not a basis for vacating an arbitral award under Section 10: "Section[] 10 . . . address[es] egregious departures from the parties' agreed-upon arbitration: 'corruption,' 'fraud,' 'evident partiality,' 'misconduct,' 'misbehavior,' [and] 'exceed[ing] . . . powers' . . . ." "'Fraud' and a mistake of law are not cut from the same cloth." *Hall St.*, 128 S. Ct. at 1404-05.

Petitioners try to argue around Section 10, constructing non-existing conflicts, *see* Section II, *infra*, and making policy arguments that are not grounded in reality, *see* Section III, *infra*. But the facts are immutable and the law is well-established. A party can ask a court to review an arbitrator's decision, but the reviewing court may only vacate that decision in "very unusual circumstances." *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[The court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.") (citing 9 U.S.C. § 10); *see also* Pet. App. 10a-11a (explaining that a party seeking to vacate an arbitral award bears a "heavy burden," that vacatur is "rare" and "unusual," that courts are "highly deferential to the arbitral award," and that vacatur is limited to "those exceedingly rare instances where some egregious

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2. Petitioners basically ignore the Second Circuit's Section 10 discussion. *See* Pet. App. 9a-27a, 31a-32a. Instead, Petitioners challenge the court's conclusion that pre-*Howsam* and pre-*Bazzle* cases no longer control. *See* Pet. App. 27a-31a.

impropriety on the part of the arbitrators is apparent") (citations omitted). That is the standard the Second Circuit used here.

The Second Circuit recognized Section 10's limitations, and that a mistake in contract interpretation is not grounds to vacate an arbitral award:

> It is tempting to think that courts are engaged in judicial review of arbitration awards under the Federal Arbitration Act, but they are not. When parties agree to arbitrate their disputes they opt out of the court system, and when one of them challenges the resulting arbitration award he perforce does so not on the ground that the arbitrators made a mistake but that they violated the agreement to arbitrate, as by corruption, evident partiality, exceeding their powers, etc.—conduct to which the parties did not consent when they included an arbitration clause in their contract. That is why in the typical arbitration . . . the issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators 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., LLC*, 450 F.3d 265, 269 (7th Cir.), *cert. denied*, 127 S. Ct. 582

(2006)).[3] Specifically, the Second Circuit held that the Panel did not disregard the law in engaging in its choice-of-law analysis. In addition to Petitioners assuring the Panel that the choice-of-law issue was "immaterial," Pet. App. 21a (quoting Petitioners' arbitration brief at 7 n.13), the court found that the Panel applied both New York law and federal maritime law, finding that both rendered the same result. Pet. App. 22a.

The Second Circuit also considered whether the Panel disregarded an established "rule" of federal maritime law. Pet. App. 23a. The Panel considered Petitioners' "custom and usage" argument, but concluded that it failed to establish that the parties intended to preclude class arbitration. Pet. App. 25a-26a. Moreover, even if the Panel misapplied custom and usage principles, that misapplication would be one of contract interpretation,[4] which courts are "particularly loath to disturb." Pet. App. 24a-25a.

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3. The Second Circuit also explained that its use of the "manifest disregard" standard was not an additional ground for vacating an arbitral award. Rather, "manifest disregard" is a judicial gloss on the specific grounds for vacatur enumerated in Section 10. Pet. App. 16a-17a. Additionally, the court noted that the Court in *Hall Street* speculated that the term "manifest disregard" may have been "shorthand for § 10(a)(3) and § 10(a)(4), the subsections authorizing vacatur when the arbitrators were 'guilty of misconduct' or 'exceeded their powers.'" Pet. App. 17a-18a (quoting *Hall St.*, 128 S. Ct. at 1404).

4. Petitioners have admitted this fact:

> Indeed, [Petitioners] cite no decision holding that a federal maritime rule of construction specifically precludes class arbitration where a charter party's

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Finally, the Second Circuit found that the Panel did not disregard New York law: "[b]ecause no state-law rule of construction clearly governs the question of whether class arbitration is permitted by an arbitration clause that is silent on the subject, the arbitrators' decision construing such silence to permit class arbitration in this case is not in manifest disregard of the law." Pet. App. 27a.

Accordingly, this case is not a good vehicle for review. Petitioners do not claim that the Panel's decision was procured by corruption, fraud, or undue means, *see* 9 U.S.C. § 10(a)(1), that the arbitrators were partial or corrupt, *see id.* § 10(a)(2), or that the arbitrators were guilty of misconduct, *see id.* § 10(a)(3). Moreover, the Panel did not "exceed[] its powers." *See id.* § 10(a)(4). There is thus no basis to overturn the Second Circuit's decision.

II. The Second Circuit's Ruling Does Not Conflict With The Decision Of Any Other Circuit.

Petitioners strive mightily to create a Circuit split. *See* Pet. at 8-15. But none exists.

Petitioners ignore the Second Circuit's holding: "The question presented on this appeal is whether the arbitration panel, in issuing a clause construction award

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> arbitration clause is silent.... To the contrary, during oral argument before the arbitration panel, counsel for [Petitioners] conceded that the interpretation of the charter parties in this case was an issue of first impression." Pet. App. 24a.

construing that silence to permit class arbitration, acted in manifest disregard of the law. . . . We conclude . . . that the demanding 'manifest disregard' standard has not been met." Pet. App. 2a. *See* Section I, *supra*. Because the availability of class arbitration is a procedural question, rather than a gateway arbitrability question, the Second Circuit correctly determined that the Panel was required to interpret the parties' agreements. And because the Panel was the correct decision maker, its ruling can only be vacated pursuant to the high standard set forth in Section 10 of the FAA.

Accordingly, for there to be a true "conflict" with the Second Circuit's decision, another Circuit would have had to find that the question whether an arbitration agreement allows class arbitration is a gateway question of arbitrability.[5] To generate that "conflict," Petitioners have segregated the case law into a pre-*Bazzle* time period and a post-*Bazzle* time period. But *Bazzle* was only a continuation of the Court's FAA jurisprudence. Petitioners' artificial division draws a line that does not exist.

In the pre-*Bazzle* period, Petitioners focus on *Champ*, and to a lesser extent on *Boeing* and *Glencore*. *See* Pet. at 9-11. In addition to being decided before *Howsam*, *Pacificare Health Systems, Inc. v. Book*, 538

5. Even if a conflict did exist, this case is not a good case to resolve it. The parties expressly agreed that the arbitrators would decide whether the parties' agreements forbid class arbitration. *See* Section I, *supra*. Accordingly, the *First Options-Howsam* question as to the division of labor between courts and arbitrators disappears. Section 10 of the FAA, therefore, controls.

U.S. 401 (2003), and *Bazzle*, these cases did not involve decisions made (contracts interpreted) by arbitrators. *See Champ*, 55 F.3d at 271-72 (district court determined whether it could certify a class in arbitration); *Boeing*, 998 F.2d at 69 (district court determined whether it could consolidate arbitrations); *Glencore*, 189 F.3d at 266 (same).[6] Accordingly, none of these courts considered, as did the Second Circuit below, (i) whether the question presented was one of arbitrability, and (ii) whether the arbitrators' decision should be vacated pursuant to Section 10 of the FAA.[7]

Nevertheless, Petitioners argue that certain courts have left "intact their pre-*Bazzle* substantive rule prohibiting class arbitration in the face of a silent agreement." Pet. at 14. But the only case Petitioners cite—*Employers Insurance Company of Wausau v.*

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6. The cases Petitioners cite in their brief at footnote 4 of page 10 as cases the Seventh Circuit cited in *Champ* also all concern appeals of decisions by district courts, not arbitrators. *See American Centennial Ins. Co. v. National Cas. Co.*, 951 F.2d 107, 107-08 (6th Cir. 1991); *Baesler v. Continental Grain Co.*, 900 F.2d 1193, 1194 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 146 (5th Cir. 1987); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 636 (9th Cir. 1984), *cert. denied*, 469 U.S. 1061 (1984).

7. Petitioners also cite other cases—all pre-*Howsam*, and all in which lower courts, not arbitrators, interpreted the parties' arbitration agreements. *See Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 723 (8th Cir. 2001); *Johnson v. West Suburban Bank*, 225 F.3d 366, 370 (3d Cir. 2000), *cert. denied, Johnson v. Tele-Cash, Inc.*, 531 U.S. 1145 (2001); *Stein v. Geonerco, Inc.*, 17 P.3d 1266, 1268 (Wash. Ct. App. 2001); *Med Ctr. Cars, Inc. v. Smith*, 727 So. 2d 9, 11 (Ala. 1998).

Century Indemnity Co., 443 F.3d 573 (7th Cir. 2006)—does not fulfill the promise of Petitioners' statement. *See* Pet. at 14. Far from showing that the Seventh Circuit continues to adhere to the view that silent clauses foreclose arbitrators from determining that an agreement permits class or consolidated arbitration, *Wausau* demonstrates just the opposite—that the Seventh Circuit, like every other Circuit that has addressed the issue in the wake of *Howsam* and *Bazzle*, considers the construction of silent clauses a matter for the arbitrators.

In *Wausau*, the appellee sought a consolidated arbitration. 443 F.3d at 574. The Seventh Circuit noted that the arbitration agreements did not contain any express provisions regarding consolidated arbitration. *Id.* at 575. Referring to *First Options* and analyzing *Howsam*, the court concluded that the consolidation question is *not* a gateway question of arbitrability:

> The Supreme Court made clear in *Howsam*, 537 U.S. at 84, 123 S. Ct. 588, that procedural issues are presumptively for the arbitrator to decide. Consolidation is a procedural issue. . . . Thus, Wausau now has the burden to show that the Agreements *require* the court, rather than the arbitrator, to address the consolidation issue. . . . Wausau has not met its burden. The Agreements make no mention of consolidation, as Wausau necessarily concedes. The arbitration clause in each Agreement states, in relevant part, that 'any dispute arising out of this Agreement shall be submitted' to arbitration. . . . The Agreements

> do not discuss who decides disputes regarding consolidation, so we presume the arbitrator decides.

Id. at 581 (emphasis in original). That is the same post-*Howsam* analytical framework the Second Circuit applied here.[8]

The Seventh Circuit also noted that its holding is consistent with decisions from other circuits. *See, e.g., Shaw's Supermarkets, Inc. v. United Food and Commercial Workers Union, Local 791, AFL-CIO*, 321 F.3d 251 (1st Cir. 2003) (citing *Howsam* and holding that determination whether to consolidate three grievances into a single arbitration is for the arbitrator); *Dockser v. Schwartzberg*, 433 F.3d 421 (4th Cir. 2006) (finding case resembles *Howsam* and holding that question of proper number of arbitrators is an arbitral decision, not a judicial decision); *see also Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.*, 489 F.3d 580 (3d Cir. 2007) (finding *Howsam* and *Bazzle* guide issue of roles of court and arbitrators and holding that in the face of contractual silence as to consolidation, the procedural issue should be resolved in arbitration);

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8. Petitioners also attempt to draw a conflict in Illinois between Illinois state courts and federal courts, *see* Pet. at 14, but none exists. Despite Petitioners' erroneous reading of *Wausau*, the Seventh Circuit clearly embraces the *Howsam* approach, which *Bazzle* simply re-affirmed. In *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250 (Ill. 2006), the Illinois Supreme Court recognized the division of labor set forth in *Howsam*: "the Supreme Court held that whether class claims could be arbitrated was a decision that an arbitrator should make when the arbitration clause does not expressly prohibit class arbitration." *Id.* at 262 (citing *Bazzle*, 539 U.S. at 454).

Ehleiter v. Grapetree Shores, Inc., 482 F.3d 207, 217 (3d Cir. 2007) (explaining that the *Bazzle* Court "reaffirmed the general division of labor articulated in *Howsam*"); *Pedcor Management Co., Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355 (5th Cir. 2003) (finding, consistent with *Bazzle*, that where arbitration agreement is silent, arbitrators should decide whether class arbitration is available).

Petitioners cannot direct this Court to any circuit court decision that has (i) held as a matter of law that where arbitration agreements are silent, the parties cannot engage in class arbitration, or (ii) held that an arbitral decision potentially allowing class arbitration should be vacated pursuant to Section 10 of the FAA. Accordingly, there is no conflict, and the Court should deny the petition.

III. The Second Circuit Properly Applied This Court's Analytical Framework In Assessing The Type Of Arbitration To Which The Parties Agreed.

A. Questions of arbitrability are reserved for courts, while procedural questions, such as whether an arbitration agreement permits class arbitration, are for arbitrators to decide.

In a recent line of cases, this Court built on its FAA jurisprudence and established an analytical framework by which lower courts can determine whether a particular question should be decided by the arbitrator or the court. The framework is rooted in the long-held determination that "arbitration is a matter of contract,"

Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960), and that arbitration agreements must be "rigorously enforce[d]," *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). The framework also recognizes the "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). Consistent with that policy, the Court has held that "[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 24-25.

More recently, the Court has put to rest the issue of who decides arbitrability—the arbitrator or the court. Unless there is "'clea[r] and unmistakabl[e]'" evidence, courts should not assume that the parties agreed to arbitrate arbitrability. *First Options*, 514 U.S. at 944 (quoting *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986)). "In this manner the law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement'—for in respect to this latter question the law reverses the presumption." *Id.* at 944-45 (emphasis in original).

In *Howsam*, the Court refined the dichotomy between which disputes the court should decide and which disputes an arbitrator should decide. The Court

described the former question—*who* should decide the question of arbitrability—as a "gateway dispute" reserved for a court to decide. 537 U.S. at 84. The Court cautioned, however, that such gateway disputes involving "questions of arbitrability" have a "far more limited scope" only applicable in "narrow circumstance[s]." *Id.* at 83. The Court left for the arbitrator to answer the bulk of other questions. Accordingly, "procedural 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." *Id.* at 84 (internal quotations and citation omitted) (emphasis in original). "So, too, the presumption is that the arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability.'" *Id.* (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25).[9]

Later in the same term in which the Court decided *Howsam*, the Court considered whether parties could be compelled to arbitrate claims arising under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), even though the parties' arbitration agreements could have been construed to limit the arbitrator's ability to award damages under RICO. *Pacificare*, 538 U.S. at 402. The Court reiterated its conclusion that "'the phrase "question of arbitrability"

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9. The Court favorably cited to the Revised Uniform Arbitration Act of 2000 ("RUAA"), which explained that "issues of procedural arbitrability, *i.e.*, whether prerequisites such as time limits, notice, laches, estoppels, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *Howsam*, 537 U.S. at 85 (quoting RUAA § 6, comment 2, 7 U.L.A. 13 (Supp. 2002)).

has a . . . limited scope,'" *id.* at 407 n.2 (quoting *Howsam*, 537 U.S. at 83), before holding that the arbitrator should decide the question: "[g]iven our presumption in favor of arbitration, *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983), we think the preliminary question whether the remedial limitations at issue here prohibit an award of RICO treble damages is not a question of arbitrability." *Id.*; *see Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006) (issue of contract's validity is considered by arbitrator in first instance).

B. *Bazzle* did not alter the analytical framework that established the dichotomy between questions of arbitrability and procedural questions.

With this analytical framework in place—courts decide questions of arbitrability and arbitrators decide procedural questions, including the kind of arbitration proceeding to which the parties agreed—the Court considered *Bazzle*. In *Bazzle*, the Court considered whether the Supreme Court of South Carolina's holding that class arbitration was permissible in the face of a silent arbitration clause was consistent with the FAA. 539 U.S. at 447. The Court's decision pivoted on the following question: "Are the contracts in fact silent, or do they forbid class arbitration as Green Tree Financial Corp. contends?" *Id.* Following precedent, the Court determined that the question as to *what kind* of arbitration, *i.e.*, class arbitration, is allowed under the arbitration contract is a question for the arbitrator, not the court. *Id.* at 451-52.

Nevertheless, the Court considered whether the question before it—whether the arbitration contract forbids class arbitration—was a "gateway" matter that "'contracting parties would likely have expected a court' to decide." *Id.* at 452 (quoting *Howsam*, 537 U.S. at 83). Because the relevant question was *not "whether they* [the parties] *agreed to arbitrate a matter*," but rather "what *kind of arbitration proceeding* the parties agreed to," the Court concluded that arbitrators are "well situated" to answer the question. *Id.* at 452-53 (citing *First Options*, 514 U.S. at 942-45) (emphasis in original).[10]

C. The Second Circuit's decision is consistent with this Court's precedent.

Nothing in *Bazzle* altered the well-established dichotomy between what courts, as opposed to arbitrators, decide in the first instance. In *Bazzle*, Justice Breyer simply applied the analytical framework to the facts before the Court.

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10. Along with the four-Justice plurality opinion authored by Justice Breyer, Justice Stevens provided the fifth vote that rendered a "controlling judgment of the Court." *Id.* at 455. Citing *Howsam*, Justice Stevens noted that "arguably" the arbitrator, instead of the court should have interpreted the agreement. *Id.* But because the decision to conduct a class arbitration was "correct as a matter of law" and because the petitioner had not challenged the court's authority to rule, Justice Stevens found there was no need to remand. *Id.* Nevertheless, because Justice Breyer's opinion expressed a view "close to" his own, Justice Stevens concurred in the judgment. *Id.*

The Second Circuit did the same. The parties agreed to a broadly worded arbitration clause. Pet. App. 5a. Moreover, the parties entered into a supplemental agreement that expressly established that the arbitrators would decide whether the arbitration agreement allowed for class-wide arbitration. Pet. App. 3a-4a. The question for the court, therefore, was whether the Panel's decision should be vacated pursuant to Section 10 of the FAA.

The Second Circuit was correct to apply Section 10 because the question whether class arbitration is permitted under the parties' agreements is *not* a question of arbitrability that requires a judicial determination. Rather, it is a procedural question that goes to the heart of what kind of arbitration proceeding the parties agreed to. Moreover, the decision is not determinative about whether the parties "are bound by a given arbitration clause." *Howsam*, 537 U.S. at 84. Accordingly, the Second Circuit rightly concluded that the Panel properly decided the question in the first instance: "parties to an arbitration contract would normally expect a forum-based decisionmaker to decide forum-specific procedural gateway matters." *Id.* at 86.

Moreover, through their agreements, the parties provided "clea[r] and unmistakabl[e]" evidence of their agreement as to *who* should decide arbitrability. *First Options*, 514 U.S. at 944 (quoting *AT&T Technologies*, 475 U.S. at 649). Accordingly, the Second Circuit properly concluded that the Panel rightfully determined that the parties' arbitrations agreements allowed class-wide arbitration. The arbitrators' decision, therefore, can only be vacated if Petitioners establish a ground for vacatur under Section 10, which Petitioners have not done.

D. The Second Circuit's decision is consistent with the Federal Arbitration Act.

The Second Circuit followed the FAA and specifically determined under Section 10 that no basis existed to vacate the Panel's award. Petitioners nevertheless argue that silence must be read as a mutual lack of consent *as a matter of law* under the FAA. *See* Pet. at 17-18. But such a holding is inconsistent with *Bazzle* and would eviscerate the FAA's underpinnings, namely that arbitration is a matter of contract governed by the arbitrator's application of contract law and that only in rare circumstances, set forth in 9 U.S.C. § 10, will an arbitrator's decision be overturned. Petitioners would like to pick and choose which sections of the FAA and which parts of the arbitration suit them. But once the decision to arbitrate is made—and it cannot be disputed that Petitioners agreed to arbitrate—then, as this Court has said, the parties "relinquish" their right to judicial review of every interpretation. *See First Options*, 514 U.S. at 942.

Petitioners also argue that class arbitration could expose Petitioners to greater damages and could open a Pandora's Box of procedural issues. *See* Pet. at 19-22. This argument ignores reality. If Petitioners wanted to exclude any of the perceived "risks" associated with class arbitration, they could have negotiated that procedure right out of the arbitration agreements. It is not this Court's role to assist sophisticated parties with drafting their contracts. In addition, the American Arbitration Association amply provides rules for class arbitration, eliminating Petitioners' concerns.

The Illinois Supreme Court explained how well-suited the AAA is to handle class arbitrations:

> In response to this decision [*Bazzle*], the AAA subsequently promulgated rules governing class arbitration. These rules contain provisions similar to Federal Rule of Civil Procedure 23 (Fed.R.Civ.P. 23). The AAA's policy with regard to class arbitration is that it "will administer demands for class arbitration * * * if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims." AAA Policy on Class Arbitrations[.]

Kinkel, 857 N.E.2d at 262.[11] Consequently, there is no reason to read the availability of class arbitration out of the parties' agreements.

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11. The AAA issued its policy in July 2005, before the Panel rendered its decision. *See* AAA Policy on Class Arbitrations, available at http://www.adr.org/Classarbitrationpolicy (last visited May 8, 2009). In light of this additional fact at the Panel's disposal, Petitioners' allegation that the Panel's decision was in "manifest disregard" of the law rings even more hollow.

IV. The Court Does Not Have Jurisdiction Over This Dispute.

A. The arbitral award is not ripe for judicial review.

As a threshold matter, the Court must "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Pursuant to this duty, the Court "must determine whether [Petitioners'] Article III claims demonstrate sufficient ripeness to establish a concrete case or controversy." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 579 (1985) (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138-39 (1974)). Ripeness "draw[s] both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 808 (2003). "[I]ts basic rationale is . . . to protect the [underlying decision maker] from judicial interference until a decision has been formalized and its effects felt in a concrete way by the challenging parties." *Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 200-01 (1983) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)).

The only federal appellate court to decide the precise issue of whether an arbitrators' interlocutory clause construction decision is ripe for judicial review issued its opinion only after the Second Circuit's ruling below, and it squarely rejected the type of piecemeal review that Petitioners now demand. In *Dealer*

Computer Services, Inc. v. Dub Herring Ford, 547 F.3d 558 (6th Cir. 2008), the Sixth Circuit held, pursuant to the same analysis performed below, that a district court lacks jurisdiction to consider a party's motion to vacate an arbitrator's clause construction decision issued under the class arbitration rules that the parties have adopted here. 547 F.3d at 560-65.

The determination of ripeness turns on several factors, including: (1) the likelihood that the harm Petitioners allege ever will occur; and (2) the hardship to the parties if judicial relief is denied at this stage of the proceedings. *See Thomas*, 473 U.S. at 580-81; *Regional Rail*, 419 U.S. at 143; *Pacific Gas*, 461 U.S. at 201; *Abbott Labs.*, 387 U.S. at 149. Application of these factors demonstrates that this matter is not ripe for judicial review.

First, the harm that Petitioners allege—facing "class arbitration," along with its "potentially complex and costly substantive and procedural issues" and heightened "monetary stakes," Pet. at 18-19—may never occur. The Panel expressly limited its ruling to clause construction, Pet. App. 48a-49a, and the Panel was "not called upon to decide, nor [did] it decide, whether the arbitration [would] proceed as a class arbitration." *Id.* Because Petitioners' argument rests on "contingent future events that may not occur as anticipated, or indeed may not occur at all," *Thomas*, 473 U.S. at 580-81, this factor strongly weighs against a finding of ripeness. *See Dealer Computer Services*, 547 F.3d at 562 (for the aforementioned reasons, this factor "strongly weighs against finding the Clause

Construction Award ripe for review") (internal quotations omitted).[12]

Second, the parties will not suffer hardship if judicial review is withheld at this stage of the proceedings. The Panel has yet to certify a class or rule on the merits of the dispute, at which point Petitioners will have the opportunity to seek judicial review. Pet. App. 59a. (Whether a ruling on class certification would be ripe for judicial review is a question that need not be determined here). "Given this prospective opportunity for judicial review," Petitioners will not "suffer any material hardship if review is withheld at this preliminary stage of arbitration." *Dealer Computer Services*, 547 F.3d at 562-63.[13]

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12. Where the Court has found this factor to favor ripeness, the harm that the petitioners faced was immediate, significant and real, in stark contrast to the hypothetical, indeterminate and speculative harm that Petitioners assert here. *See, e.g.*, *Regional Rail*, 419 U.S. at 143 ("occurrence of the conveyance [of rail properties] allegedly violative of Fifth Amendment rights is in no way hypothetical or speculative" and "is virtually a certainty"); *Abbott Labs.*, 387 U.S. at 152-53 ("impact of the regulations upon the petitioners" was "sufficiently direct and immediate" where "immediate compliance with their terms was expected;" if petitioners complied, they would have incurred significant and immediate costs, and if they did not, they would have "risk[ed] serious criminal and civil penalties"). *Cf. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019-20 (1984) (holding matter not ripe where party did not establish that "it had been injured by actual arbitration under the statute").

13. In contrast to this case, the Court has found this factor to militate in favor of judicial review in situations where the hardship the petitioners face is palpable, considerable, and (Cont'd)

Petitioners seek exactly the type of "premature adjudication" and "judicial interference" that the ripeness doctrine seeks to prevent. *See Pacific Gas*, 461 U.S. at 200-01; *Abbott Labs.*, 387 U.S. at 148-49. Accordingly, the Court should deny review.[14]

(Cont'd)
imminent. *See Regional Rail*, 419 U.S. at 143 ("'One does not have to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending, that is enough.'") (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)); *Pacific Gas*, 461 U.S. at 201 (noting that "postponement of decision . . . would impose a palpable and considerable hardship" on the petitioners, who would have been forced to spend "millions of dollars" over many years in complying with questionable nuclear plan regulations).

14. Further support is garnered from the analogous disposition of certiorari petitions emanating from interlocutory decisions of federal appellate courts. Although the Court has jurisdiction to review such decisions under 28 U.S.C. § 1254(1), it does so only in the "extraordinary" case, *Hamilton-Brown Shoe Co. v. Wolf Bros. Co.*, 240 U.S. 251, 258 (1916), where "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 384 (1893). No such exceptional circumstance exists here. *Cf. Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (denying certiorari where the district court's decision was not sufficiently final because the remedy phase had not been completed).

B. The arbitrators' decision of a preliminary procedural matter is not an "award" subject to review under Section 10 of the Federal Arbitration Act because it is not final.

The conclusion that the Court does not possess jurisdiction to entertain this interlocutory award is underscored by the Federal Arbitration Act itself. Section 10 of the FAA provides that a district court may make an order vacating an arbitral award upon application by a party where, among other circumstances, "the arbitrator exceeded [his] powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4).

Federal courts commonly interpret Section 10 to allow judicial review of final arbitration awards, but not of interim or partial rulings like the Panel's decision here. *See, e.g., Lloyd v. Hovensa, LLC*, 369 F.3d 263, 270 (3d Cir. 2004) ("The legislative scheme of the FAA thus reflects a policy decision that, if a district court determines that arbitration of a claim is called for, the judicial system's interference with the arbitral process should end unless and until there is a final award."); *IDS Life Ins. Co. v. Royal Alliance Associates, Inc.*, 266 F.3d 645, 650 (7th Cir. 2001) ("We take 'mutual' and 'final' to mean that the arbitrators must have resolved the entire dispute (to the extent arbitrable) that had been submitted to them."); *Rocket Jewelry Box, Inc. v. Noble Gift Packaging, Inc.*, 157 F.3d 174, 176 (2d Cir. 1998) ("[A]n arbitration award, to be final, must resolve all the issues submitted to arbitration, and . . . it must resolve them definitively enough so that the rights and obligations of the two parties, *with respect to the issues submitted*, do not stand in need of further adjudication.") (emphasis in

original).[15] This interpretation is also supported by Section 9 of the FAA, which repeatedly references "*the* award," 9 U.S.C. § 9 (emphasis added), evidencing further Congress' intent to limit judicial review to truly final arbitration rulings.

The finality rule applies with particular force here. The arbitral decision was expressly deemed "partial," and it concerned a single, preliminary issue that concerns neither the merits of Respondent's claim nor Petitioners' underlying liability. Nor did the ruling even decide whether the arbitration should be certified for class treatment, a determination that will occur later. In this important regard, the decision was not "final" under Section 10(a)(4).[16]

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15. Although several circuits have recognized limited exceptions to this general rule, no such exception applies here. For example, in *Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280 (2d Cir. 1986), the Second Circuit upheld the district court's power to review the award on a counterclaim, concluding that "an award which finally and definitely disposes of a separate independent claim may be confirmed although it does not dispose of all the claims that were submitted to arbitration." *Id.* at 283. *Accord Trade & Transport, Inc. v. Natural Petroleum Charterers Inc.*, 931 F.2d 191, 192-93 (2d Cir. 1991) (where the parties, pursuant to the district court's request, bifurcated the issues submitted to arbitration and requested an "immediate" decision on liability, holding the award "final" for purposes of judicial review). Here, the Panel did not rule on a separate, independent claim, nor did it rule on liability.

16. It bears noting that the Court apparently has never granted certiorari to review an arbitral award as interlocutory in nature as the instant award. *See Hall St.*, 128 S. Ct. at 1400-01; *Bazzle*, 539 U.S. at 449-50; *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 195-96 (2000); *First Options*, 514 U.S. at 940-41; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54 (1995).

C. Whether the arbitration agreement permits the parties to seek judicial review is irrelevant because the parties cannot confer jurisdiction on the federal courts.

The fact that the parties adopted an arbitration rule that "permit[s] any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award," Rule 3 of the AAA Rules, *see* Pet. App. 59a, cannot save Petitioners. The rule does not state that a court would have jurisdiction over this appeal, but merely that the parties could petition a court of *competent jurisdiction*, which no federal court currently is, to review this award. More fundamentally, private parties cannot "waive away Article III-based ripeness deficiencies," and "[f]ederal courts should not grant judicial review of arbitration awards simply because [those] conducting an arbitration would like them to do so." *Dealer Computer Services*, 547 F.3d at 563. *Accord Hall St.*, 128 S. Ct. at 1403 (rejecting argument that grounds for judicial review under the FAA should be expanded when the arbitration agreement called for it because the requested ground was not within the enumerated grounds for review listed in Sections 10 and 11 of the FAA). For the reasons discussed above, neither this Court nor the lower courts that addressed this issue are courts of competent jurisdiction, and the parties' agreement does not change this.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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