No. 08-1198

MAY 2 6 2009

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

REPLY BRIEF FOR THE PETITIONERS

CHRISTOPHER M. CURRAN
J. MARK GIDLEY
PETER J. CARNEY
ERIC GRANNON
CHARLES C. MOORE
WHITE & CASE LLP
701 13th St. N.W.
Washington, D.C. 20005
(202) 626-3600
Counsel for the Stolt-Nielsen Petitioners

SETH P. WAXMAN
Counsel of Record
EDWARD C. DUMONT
STEVEN F. CHERRY
LEON B. GREENFIELD
DANIEL S. VOLCHOK
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
Counsel for the Odfjell Petitioners

(Additional counsel listed on inside cover)

RICHARD J. RAPPAPORT
AMY B. MANNING
TAMMY L. ADKINS
ANGELO M. RUSSO
McGUIREWOODS LLP
77 West Wacker Dr.
Suite 4100
Chicago, IL 60601
(312) 849-8100

RICHARD L. JARASHOW
McGUIREWOODS LLP
1345 Ave. of the Americas
7th Floor
New York, N.Y. 10105
(212) 548-2100
Counsel for the Jo Tankers Petitioners

RICHARD C. SIEFERT
GARVEY SCHUBERT BARER
1191 Second Ave.
18th Floor
Seattle, WA 98101
(206) 464-3939

RICHARD GLUCK
PAUL S. HOFF
GARVEY SCHUBERT BARER
1000 Potomac St. N.W.
5th Floor
Washington, D.C. 20007
(202) 965-7880
Counsel for Petitioner Tokyo Marine Co., Ltd.

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Animalfeeds argues (*e.g.*, Opp. 5-6) that the availability of class arbitration is a question of contract interpretation to be resolved by arbitrators, with essentially no judicial review. To the contrary, whether the Federal Arbitration Act (FAA) precludes imposition of class arbitration where the parties' contract is silent regarding class arbitration remains just what it was when this Court granted certiorari in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003): an important question of federal arbitration law, on which the

lower courts are divided, that warrants resolution by this Court.

I. THE PETITION PROPERLY PRESENTS A QUESTION OF SUBSTANTIVE ARBITRATION LAW

Animalfeeds argues that (i) the parties agreed to arbitrate whether their contracts permitted class arbitration and (ii) the arbitrators' decision may not be vacated for a "mistake in contract construction." Opp. 7; *see also* Opp. 6-10, 11 n.5, 20. That argument mischaracterizes both the parties' supplemental, post-dispute arbitration agreement (Pet. App. 55a) and the question presented.

The parties agreed to address the question of class arbitration by following American Arbitration Association rules that would allow arbitrators to resolve any contractual issues (consistent with the *Bazzle* plurality's decision), while preserving each side's opportunity for judicial review of whether class arbitration was available as a matter of law. *See* Pet. 5-6. The agreement did not "alter the scope of the Parties' arbitration agreements," and reserved "whatever rights [the parties] may have to seek or to oppose any type of consolidation." Pet. App. 62a. Indeed, it expressly provided for a "partial final award" on class-action availability, subject to immediate judicial review. Pet. App. 4a. Nothing in the agreement provides any basis for denying review here.

In arbitration, the parties agreed—as they do here (Opp. 2)—that their contract was silent as to class arbitration. Pet. App. 49a. They disputed the legal consequences of that silence under the FAA.

The arbitrators rejected petitioners' argument, an argument based on established case law, that imposing

class arbitration without consent is inconsistent with the FAA. Pet. App. 50a-51a. Such a rule, they reasoned, would leave "no basis for a class action absent express agreement among all parties and the putative class members." *Id.* at 51a. That, indeed, is the legal principle petitioners seek to vindicate. It flows directly from the FAA's "central purpose of ... ensur[ing] that private agreements to arbitrate are enforced *according to their terms*," *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (emphasis added; internal quotation marks omitted).

Citing the FAA's provision for review of arbitral awards, Animalfeeds argues (Opp. 7-10) that the arbitrators cannot be held to have disregarded the law or "exceeded their powers." 9 U.S.C. § 10(a)(4). Tellingly, however, it suggests no other mechanism for judicial resolution of the statutory question presented here. On the contrary, its position appears to be that parties must submit the class-availability issue to arbitration, but then have no way *ever* to seek judicial review. *E.g.*, Opp. 11. Private arbitrators would thus have unreviewable authority not only over the interpretation of particular contracts, but over a basic ground rule for arbitration established by federal law. A legal question that has divided the lower courts (Pet. 9-15) would be insulated from any further review.

This Court should not countenance that result. The FAA provides a framework for the entire system of private arbitration. Whether parties may be forced into class arbitrations to which they never agreed is not a minor "procedural" issue (Opp. 11), but a question of substantive law involving the essence of the arbitral agreement. It goes not to the substance of the parties' legal dispute (which they did agree to submit to arbitration), but to the FAA's promise that arbitration

agreements will be enforced "according to their terms." *Mastrobuono*, 514 U.S. at 54.

In any event, arbitrators who, as here, read contracts that are silent regarding class arbitration to permit class proceedings based on general principles or policies, rather than on express terms or other evidence of the parties' actual intent, have either manifestly disregarded the limits of their commission (*see* Pet. App. 19a) or "exceeded their powers" (9 U.S.C. § 10(a)(4); Pet. App. 31a-32a). Whatever the rubric, this sort of error is subject to judicial correction.

Here, the court of appeals reviewed petitioners' FAA argument, as provided for in the parties' supplemental agreement. It rejected that argument on only one basis: an erroneous conclusion that the various opinions in *Bazzle* had "abrogated" the pre-*Bazzle* authority on which petitioners relied. Pet. App. 29a; *see* Pet. 8, 13. Thus, all agree that the arbitration clause here is silent on class proceedings, and a federal appellate court has ruled that the FAA permits imposition of class arbitration on unconsenting parties. It is hard to imagine a case in which the legal question left unresolved by *Bazzle* would be better presented for review.

II. THE PRE-*BAZZLE* CONFLICT PERSISTS

Animalfeeds does not seriously dispute that lower courts have given different answers to the question presented. It seeks instead to shift the focus by characterizing class arbitration as purely a question of contract interpretation or "procedur[e]" (Opp. 11), and then arguing at length that such questions are committed exclusively to arbitrators. Opp. 10-15, 15-22.

The question is not what the parties' contract said about class arbitration, but what rule applies where the

contract is silent. *Cf. Bazzle*, 539 U.S. at 447 (if clause is silent, "South Carolina law interprets the contracts as permitting class arbitration"). Animalfeeds cannot assume away that question of federal arbitration law. Opp. i (reformulating question to assume that "governing law does not forbid" construing silent clause to permit class arbitration). A definitive answer is necessary to guide courts and arbitrators so that enforcement of arbitration agreements' limits does not depend on the nature of the decision-maker or on where arbitration occurs. *Cf.* Opp. 11-12 & n.7 (seeking to distinguish cases not substantively but because they were decided by courts).

Animalfeeds' discussion of *Employers Insurance Co. of Wausau* v. *Century Indemnity Co.*, 443 F.3d 573 (7th Cir. 2006), Opp. 12-15, never grapples with the Seventh Circuit's square holding that *Bazzle* has no precedential effect. *See* Pet. 14 (citing 443 F.3d at 580). That holding leaves intact the rule of *Champ* v. *Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), which governs arbitrations in the Seventh Circuit. *See also Lefkovitz* v. *Wagner*, 395 F.3d 773, 780 (7th Cir. 2005) ("consolidation of arbitrations is permissible only if the ... arbitration ... clauses authorize it"). That ruling directly contradicts the Second Circuit's ruling here. Accordingly, in the Seventh Circuit, this case would have come out the other way. *See* Pet. App. 27a-30a. That square conflict, with variations discussed in the petition, warrants resolution by this Court.

Animalfeeds concludes its conflict discussion by asserting (Opp. 15) that petitioners have identified no case holding as a matter of law that parties cannot be forced to engage in class arbitration where their agree-

ment is silent. On the contrary, *Champ* and other decisions cited in the petition hold just that. Pet. 9-11.[1] Other courts, now including the Second Circuit, disagree. Pet. 11-14. Animalfeeds would hide this conflict on a fundamental question of federal arbitration law under a veil of unreviewable arbitral discretion. This Court should grant review and resolve it.

III. THE QUESTION PRESENTED WARRANTS REVIEW

As the petition demonstrates (Pet. 17-24), the question presented is important to the many parties who need a clear, reliable framework for enforcing commercial arbitration agreements under the FAA. Animalfeeds offers only two responses: The AAA has promulgated rules that may be used to guide class arbitrations (Opp. 21-22), and the parties here "could have negotiated [class arbitration] right out of the arbitration agreements" (Opp. 21).

The arbitration community has indeed sought to adapt to the possibility of class arbitration, particularly in light of uncertainty caused by *Bazzle*. Ironically, Animalfeeds now seeks to rely on the AAA's procedures as a panacea for the burdens and challenges posed by class proceedings, while repudiating the AAA's widely adopted provision for early judicial review of decisions in this evolving area. *Compare* Opp. 21-22 *with* Opp. 29. In any event, the fact that private parties can devise ways of managing class proceedings is no response to petitioners' points that class arbitra-

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[1] This FAA issue is not one of "first impression," and petitioners never "conceded" that it was. *E.g.*, Opp. 6, 9 n.4. The only novel question was interpretation of the parties' particular contracts—which all agree are "silent" as to class arbitration (*e.g.*, Opp. 2).

tion is dramatically different, legally and practically, from individual arbitration, and thus agreement to class arbitration cannot be inferred from, or imposed on the basis of, agreements to arbitrate individual disputes. *See* Pet. 18-22.

The argument that petitioners could have negotiated around the class issue ignores the fact that they signed industry-standard contracts, widely used for 50 years in maritime transactions with no hint they would be deemed to authorize class arbitration. *See* Pet. 4, 6, 22 & n.12; A.S.B.A. Amicus Br. 7 ("Since almost every charter party in all the ocean transportation trades provides for arbitration ... the potential for mischief is great."). It also assumes that courts would honor express contractual exclusions, which is by no means clear. *See, e.g., In re Am. Express Merchants' Litig.*, 554 F.3d 300, 320 (2d Cir. 2009) (invalidating no-class-arbitration provision as impediment to "vindication of statutory rights"); *Shroyer* v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 984 (9th Cir. 2007) (invalidating as "unconscionable").

More fundamentally, Animalfeeds' argument begs the question presented. The issue is not whether there is "reason to read the availability of class arbitration *out of* the parties' agreements," Opp. 22 (emphasis added), but whether the FAA permits arbitrators or courts to read agreements to participate in class arbitration *into* contracts that are silent on the issue. The difference is critical because parties must be able to count on U.S. courts to enforce arbitration agreements without straying fundamentally from their terms. *See* U.S. Chamber of Commerce Amicus Br. 1-2 ("Compelling parties to resolve disputes through costly, time-consuming and high-stakes class arbitration, where the parties have not expressly agreed to do so, frustrates

the parties' intent, undermines their existing agreements, and erodes the benefits offered by arbitration as an alternative to litigation.").

In the end, Animalfeeds agrees with petitioners that "arbitration is a matter of contract," and that an incorrect decision as to the rule of law governing this case would "eviscerate the FAA's underpinnings" (Opp. 21). The dispute is over what rule honors the FAA's central principle that "[a]rbitration ... is a matter of consent, not coercion." *Mastrobuono*, 514 U.S. at 57. That dispute is at least as important today as at the time of *Bazzle*, and the Court should grant review to resolve it.

IV. THERE IS NO JURISDICTIONAL ISSUE

Finally, for the first time in four years of litigation, Animalfeeds questions whether the district court had jurisdiction. Its belated arguments are unavailing.

A. Ripeness

Animalfeeds first contends the case is unripe. Opp. 23-26. Ripeness, however, involves both Article III jurisdictional limits and "'prudential reasons for refusing to exercise jurisdiction'" where it exists. Opp. 23 (quoting *Nat'l Park Hospitality Ass'n* v. *Dep't of the Interior*, 538 U.S. 803, 808 (2003) (*NHPA*)). Animalfeeds does not argue lack of justiciability in the Article III sense.[2] Its arguments go only to the prudential question whether petitioners' argument that the arbitrators here lack authority to conduct class proceedings should

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[2] Likewise, Animalfeeds has never disputed statutory jurisdiction under 9 U.S.C. § 203 and 28 U.S.C. §§ 1331, 1333. Pet. 7 n.3.

be heard now, as the parties agreed. Unlike an Article III objection, that prudential contention is one this Court *may*, but need not, entertain at this late date. *See NPHA*, 538 U.S. at 808; *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). Here, prudential objections never raised below have been waived.

In any event, the case is ripe. The question presented is "fit for review": it is purely legal, and will not be clarified by any further factual development. *See NPHA*, 538 U.S. at 812. There is no concern about protecting a non-judicial decisionmaker from premature interference, *see PG&E* v. *State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 200 (1983), because the parties' supplemental arbitration agreement expressly provides for judicial review at this stage. Pet. 7; Pet. App. 3a-4a.[3] Decisions adverse to petitioners have been "formalized," and absent review will be promptly "felt in a concrete way" through extensive litigation over class certification. *PG&E*, 461 U.S. at 200. For the same reason, the hardship to petitioners of withholding review is palpable: Because of the arbitrators' class-availability award, Animalfeeds proposes to subject petitioners to a year-long class-certification proceeding, including extensive fact and expert discovery. While the expense and burden of such proceedings have become normal in federal court, *see Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 558-559 (2007) (noting discovery burdens in class-action antitrust cases), they are anathema to arbitration, *e.g.*, *NBC* v. *Bear Stearns &*

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[3] The parties negotiated this review feature specifically to protect each side's interest in the correctness of a critical decision. It is Animalfeeds' new "ripeness" argument that would interfere with agreed arbitration procedures.

Co., 165 F.3d 184, 190-191 (2d Cir. 1999) (arbitration "especially at odds with the broad-ranging discovery made possible by the Federal Rules"). The immediate prospect of that exponential burden easily satisfies any prudential ripeness test.

Animalfeeds cites *Dealer Computer Services, Inc.* v. *Dub Herring Ford*, 547 F.3d 558, 564 (6th Cir. 2008), which held a class-availability challenge unripe because the arbitrators had not yet certified a class. Whatever the merits of that decision, it provides no basis for denying review here. In *DCS* (which was a breach-of-contract dispute, not a complex antitrust case), the challenger did not articulate any immediate harm, and the court "presum[ed]" that the only harms would stem from actual certification of a class. *Id.* at 561-562 & n.3. Here, harm to petitioners is imminent, regardless of the ultimate certification decision: a year of pre-certification litigation, involving fact and expert discovery for a putative class proceeding in a complex, international antitrust dispute. *See* Pet. 5. Thus, just as the presumed "absence of hardship for DCS at this juncture" led the Sixth Circuit to conclude that DCS's motion to vacate was "premature," 547 F.3d at 563, the presence of immediate hardship for petitioners settles any ripeness inquiry here.

B. "Finality"

Animalfeeds' "finality" argument (Opp. 27-28) is likewise without merit. First, there is again no question that the district court had subject-matter jurisdiction over petitioners' motion to vacate. 9 U.S.C. § 203; 28 U.S.C. §§ 1331, 1333. Section 10 of the FAA, on which Animalfeeds relies (Opp. 27), is not a jurisdictional statute. *E.g.*, *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 26 n.32 (1983). Ar-

guments against vacating a particular award under the FAA are not jurisdictional. *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 516 (2006); *cf. Union Switch & Signal Div. Am. Std. Inc.* v. *United Elec., Radio & Mach. Workers of Am., Local 610*, 900 F.2d 608, 612-614 (3d Cir. 1990). Such non-jurisdictional arguments may be waived, particularly when "raised defensively late in the lawsuit." *Arbaugh*, 546 U.S. at 504. That is surely the case here.

In any event, the argument is wrong. The cases Animalfeeds cites (Opp. 27) do not refuse to review partial final awards.[4] In contrast, those it consigns to a footnote (Opp. 28 n.15) properly hold that where parties direct arbitrators to enter a "partial final award"—including one intended to have "immediate collateral effects in [a] judicial proceeding"—courts will honor that agreement. *Trade & Transp., Inc.* v. *Natural Petroleum Charterers Inc.*, 931 F.2d 191, 195 (2d Cir. 1991). "[T]he submission by the parties determines the scope of the arbitrators' authority," and "if the parties agree that the panel is to make a final decision as to part of the dispute, the arbitrators have the authority and responsibility to do so." *Id.*; *Metallgesellschaft A.G.* v. *M/V Capitan Constante*, 790 F.2d 280, 282 (2d Cir. 1986) (affirming confirmation of partial award, in "compl[iance] with the congressional intent that we enforce the [parties'] agreement"). Indeed, while courts will consider whether review is premature (and in doing so sometimes speak loosely in terms of "jurisdic-

[4] Two involved requests to vacate awards because arbitrators had "imperfectly executed" their powers by rendering awards that were not fully final. 9 U.S.C. § 10(a)(4). The third holds that when a court compels arbitration it should stay, not dismiss, the judicial proceeding.

tion"), they review many such partial final awards. *E.g.*, *Hart Surgical, Inc.* v. *Ultracision, Inc.*, 244 F.3d 231, 234-235 (1st Cir. 2001) (award on liability where parties agreed to bifurcate issues); *cf. Publicis Commc'n* v. *True N. Commc'ns Inc.*, 206 F.3d 725, 728 (7th Cir. 2000) (citing examples).[5] Here the parties and the arbitrators all understood and intended that the class-availability award would be final and reviewable. Animalfeeds' new "jurisdictional" objection is without merit.[6]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[5] Especially after *Bazzle* and the AAA's promulgation of the rules adopted here, these partial final awards include class-availability awards. *E.g.*, *Labor Ready Northwest* v. *Crawford*, 2008 WL 1840749, at *2-4 (D. Or. Apr. 21, 2008); *JSC Surgutneftegaz* v. *President & Fellows of Harvard Coll.*, 2007 WL 3019234, at *2 (S.D.N.Y. Oct. 11, 2007).

[6] Animalfeeds raises its meritless ripeness and finality arguments at a time when simply denying review, as it suggests, would leave a binding decision below. *Cf. DCS*, 547 F.3d at 562-563 (vacating judgment confirming class-availability award and making clear DCS would have "ample opportunity to obtain judicial review" later if arbitrators certified class). If this case were unripe or not "final," the proper disposition would be to vacate with instructions to dismiss for lack of present jurisdiction. *Cf. United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

Respectfully submitted.

CHRISTOPHER M. CURRAN
J. MARK GIDLEY
PETER J. CARNEY
ERIC GRANNON
CHARLES C. MOORE
WHITE & CASE LLP
701 13th St. N.W.
Washington, D.C. 20005
(202) 626-3600
Counsel for the Stolt-Nielsen Petitioners

SETH P. WAXMAN
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EDWARD C. DUMONT
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WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
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RICHARD J. RAPPAPORT
AMY B. MANNING
TAMMY L. ADKINS
ANGELO M. RUSSO
MCGUIREWOODS LLP
77 West Wacker Dr.
Suite 4100
Chicago, IL 60601
(312) 849-8100

RICHARD L. JARASHOW
MCGUIREWOODS LLP
1345 Ave. of the Americas
7th Floor
New York, N.Y. 10105
(212) 548-2100
Counsel for the Jo Tankers Petitioners

RICHARD C. SIEFERT
GARVEY SCHUBERT BARER
1191 Second Ave.
18th Floor
Seattle, WA 98101
(206) 464-3939

RICHARD GLUCK
PAUL S. HOFF
GARVEY SCHUBERT BARER
1000 Potomac St. N.W.
5th Floor
Washington, D.C. 20007
(202) 965-7880
Counsel for Petitioner Tokyo Marine Co., Ltd.

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