SUPREME COURT, U.S.
FILED

No. 08-

081198 MAR 26 2009

IN THE

OFFICE OF THE CLERK

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), this Court granted certiorari to decide a question that had divided the lower courts: whether the Federal Arbitration Act permits the imposition of class arbitration when the parties' agreement is silent regarding class arbitration. The Court was unable to reach that question, however, because a plurality concluded that the arbitrator first needed to address whether the agreement there was in fact "silent." That threshold obstacle is not present in this case, and the question presented here—which continues to divide the lower courts—is the same one presented in *Bazzle*:

Whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*

PARTIES TO THE PROCEEDING BELOW

The case caption contains the names of all parties who were parties in the court of appeals. KP Chemical Corp. appears in the court of appeals caption, but it was not a party in that court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioners state as follows:

Petitioner Stolt-Nielsen Transportation Group Ltd. is a wholly owned subsidiary of petitioner Stolt-Nielsen S.A., a publicly traded corporation. Stolt-Nielsen S.A. has no parent corporation and no publicly held company owns 10 percent or more of its stock.

Petitioners Odfjell Seachem AS and Odfjell USA, Inc. are wholly owned subsidiaries of petitioner Odfjell ASA, a publicly traded corporation. Odfjell ASA has no parent corporation and no publicly held corporation owns 10 percent or more of its stock. (Since this case commenced, Odfjell Seachem AS has changed its name to Odfjell Tankers AS, and Odfjell ASA has changed its legal status from an ASA to an SE.)

Petitioner Jo Tankers B.V. has one parent corporation, Jo Tankers (Bermuda) Limited, and no publicly held corporation owns 10 percent or more of the stock of Jo Tankers B.V. or Jo Tankers (Bermuda) Limited. Petitioner Jo Tankers, Inc. is a wholly owned subsidiary of Jo Tankers B.V., which is not a publicly traded corporation.

Mitsui O.S.K. Lines Ltd., a publicly traded corporation, owns 10 percent or more of the stock of petitioner Tokyo Marine Co., Ltd.

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IN THE

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Petitioners Stolt-Nielsen S.A.; Stolt-Nielsen Transportation Group Ltd.; Odfjell ASA; Odfjell Seachem AS; Odfjell USA, Inc.; Jo Tankers B.V.; Jo Tankers, Inc.; and Tokyo Marine Co., Ltd. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-32a) is reported at 548 F.3d 85. The opinion of the district

court vacating the arbitrators' partial final award (App. 35a-44a) is reported at 435 F. Supp. 2d 382. The arbitrators' award (App. 45a-53a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 2008. A petition for rehearing en banc was denied on January 12, 2009. *See* App. 33a-34a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, are set forth in the Appendix (at 71a-73a).

STATEMENT

This case presents the question whether the Federal Arbitration Act permits the imposition of class-action procedures on a private commercial arbitration where the parties' agreement to arbitrate is silent regarding class arbitration. The Court has previously granted review to resolve that precise question, but has been unable to reach it because of threshold issues. *See Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444, 447 (2003) (plurality opinion); *see also Southland Corp.* v. *Keating*, 465 U.S. 1, 3, 8-9 (1984). There are no such threshold issues here.

1. "[T]he central purpose of the Federal Arbitration Act [is] to ensure that private agreements to arbitrate are enforced according to their terms." *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (internal quotation marks omitted). Courts and arbitrators thus may not reform arbitration agree-

ments, but must "'rigorously enforce'" them as written, thereby giving "effect to the contractual rights and expectations of the parties." *Volt. Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (quoting *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985)). Because "[a]rbitration under the Act is a matter of consent, not coercion," *Mastrobuono*, 514 U.S. at 57, a party cannot be forced to arbitrate to an extent greater than provided for in its contract. Thus, Section 4 of the FAA authorizes courts to compel parties to arbitrate, but only "in accordance with the terms of the[ir] agreement." 9 U.S.C. § 4.

The statutory mandate to enforce parties' arbitration agreements strictly as written applies even when doing so may reduce some of the usual advantages of arbitration, such as "simplicity, informality, and expedition." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Indeed, a court or arbitration panel may not alter the terms of an arbitration clause even if it believes those terms will yield inefficient or cumbersome results, such as multiple proceedings. On the contrary, the FAA *"requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983).

2. In *Green Tree Financial Corp.* v. *Bazzle*, this Court granted certiorari to decide whether the FAA precluded the South Carolina Supreme Court from holding that class arbitration can be imposed on parties whose arbitration clause is silent as to such arbitration. As the South Carolina court explained, that issue had divided the lower courts. *See Bazzle* v. *Green Tree Fin. Corp.*, 569 S.E.2d 349, 356-358 (S.C. 2002), *vacated on other grounds*, 539 U.S. 444 (2003). This Court did not reach the issue, however, because a plurality concluded

that the parties' arbitrator, rather than the state courts, should have made the initial determination whether the parties' contracts were "in fact silent" regarding class arbitration, or whether they "forb[ade] class arbitration" by their terms, as the petitioner contended. 539 U.S. at 447, 453-454. Justice Stevens would have reached the merits and affirmed, but acquiesced in vacating and remanding in order to produce a judgment for the Court. *Id.* at 454-455 (Stevens, J., concurring in the judgment and dissenting in part). Chief Justice Rehnquist and Justices O'Connor and Kennedy also would have reached the merits, but would have held that the FAA does not permit class arbitration where the parties' "contracts do not by their terms permit" it. *Id.* at 455 (Rehnquist, C.J., dissenting). Justice Thomas did not reach the merits because he adhered to his previously expressed view that the FAA does not apply to proceedings in state courts. *Id.* at 460 (Thomas, J., dissenting).

3. Petitioners and respondent Animalfeeds International Corp. are parties to international maritime contracts under which petitioners agreed to transport Animalfeeds' cargo between non-U.S. ports. App. 2a. The contracts were made on the "Vegoilvoy" charter party, a standard industry form in common use since 1950. App. 5a & n.3, 67a-69a. The form calls for the settlement of disputes through arbitration, to be held in New York and "conducted in conformity with the provisions and procedure of the United States Arbitration Act." App. 5a.[1]

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[1] The Vegoilvoy arbitration clause states in relevant part: "Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and

In 2003, Animalfeeds filed an action against petitioners and other international ocean carriers in federal district court, alleging that the defendants had engaged in a global price-fixing conspiracy. App. 3a. In related litigation, the Second Circuit held that such claims fell within the scope of the parties' agreement to arbitrate. App. 3a & n.1 (citing *JLM Indus., Inc.* v. *Stolt-Nielsen SA*, 387 F.3d 163, 183 (2d Cir. 2004)). Animalfeeds then sought to arbitrate its claims against petitioners—not just on its own behalf, but on behalf of a putative class of buyers of ocean-transportation services, namely chemical companies around the world. *See* App. 36a. The class potentially involves thousands of different shipping contracts, covering transportation of hundreds of different specialty liquids between scores of ports in dozens of countries. Petitioners opposed Animalfeeds' class-arbitration demand on the ground that they had never consented to class arbitration. *Id.*

After this Court's decision in *Bazzle*, the parties here, seeking to conform their arbitration proceedings to the *Bazzle* plurality's opinion, reached a supplemental agreement to govern certain aspects of their arbitration. *See* App. 55a-66a. Pursuant to that agreement,

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Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act, and a judgment of the Court shall be entered upon any award made by said arbitrator." App. 69a. The United States Arbitration Act was the popular name prescribed by Congress in 1925 when it enacted the precursors to the provisions now commonly known as the FAA. *See* Act of Feb. 12, 1925, ch. 213, § 14, 43 Stat. 883, 886.

a three-arbitrator panel was selected and initially tasked with construing the parties' arbitration clause on the question of class arbitration. App. 3a-4a (quoting Rule 3 of the Supplementary Rules for Class Arbitrations of the American Arbitration Association).[2] On that question, the parties agreed that the Vegoilvoy clause was "silent" on the question of class arbitration. App. 49a.

In the face of that silence, petitioners cited federal case law prohibiting class or other consolidated arbitration without all parties' consent. *See* App. 6a, 50a. They also pointed out that the maritime arbitration clauses at issue had never been the basis for a class arbitration. And they provided, as subsequently noted by the arbitrators, undisputed "declarations and testimony from two experts ... to the effect that sophisticated, multinational commercial parties of the type that are sought to be included in the class would never intend that the arbitration clauses would permit a class arbitration." App. 51a. Animalfeeds, on the other hand, relying principally on awards from a number of consumer arbitrations, in which other arbitrators had decided to permit class proceedings under "silent" clauses, argued that "public policy favored class arbitration." App. 6a, 49a-50a. The arbitrators accepted Animalfeeds' position, ruling that the Vegoilvoy clause would permit class arbitration in light of its silence on that issue. App. 7a-8a, 52a.

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[2] The parties' supplemental agreement provides that "neither the fact of this Agreement nor any of its terms may be used to support or oppose any argument in favor of a class action arbitration ... and may not be relied upon by the [p]arties, any arbitration panel, any court, or any other tribunal for such purposes." App 62a-63a.

4. Rule 3 of the AAA class arbitration rules, incorporated by the parties' post-*Bazzle* supplemental agreement, requires a stay of proceedings to allow a party to seek confirmation or vacatur of an award permitting or prohibiting class proceedings. App. 4a & n.2. By adopting this procedure, both parties reserved the right to challenge the legal correctness of the arbitrators' ruling on this threshold issue. Petitioners accordingly petitioned the United States District Court for the Southern District of New York to vacate the panel's partial award.[3]

The district court vacated the award, holding that the arbitrators had failed to apply clear principles of federal maritime law that preclude class arbitration absent specific consent by all parties. *See* App. 38a-41a. The court did not reach petitioners' argument that the FAA does not permit imposition of class arbitration on parties whose contract is silent on that question. *See* App. 44a n.4; *accord* App. 27a-28a.

5. The Second Circuit reversed. App. 1a-32a. The court first discussed at some length the legal standards for vacating an arbitral award based on "manifest disregard" of the law. *See* App. 10a-19a. Applying those standards, it concluded that, although it "might well find [the district court's] analysis persuasive" as an original matter, "the errors it identified" in the arbitra-

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[3] The district court had subject-matter jurisdiction under: (i) 9 U.S.C. § 203, because the underlying arbitration is not entirely between U.S. citizens and hence falls under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards; (ii) 28 U.S.C. § 1333, because the arbitration involves claims arising from a maritime contract; and (iii) 28 U.S.C. § 1331, because the arbitration demand asserts claims under the Sherman Act, 15 U.S.C. § 1.

tors' award did not "rise to the level of manifest disregard of the law." App. 21a; *see also* App. 19a-31a.

The court of appeals next addressed and rejected petitioners' argument, not reached by the district court, that the FAA "prohibit[s] class arbitration unless expressly provided for in an arbitration agreement." App. 28a. The court of appeals recognized that pre-*Bazzle* decisions from the Second and Seventh Circuits were "grounded in federal arbitration law to the effect that the FAA itself did not permit consolidation, joint hearings, or class representation absent express provisions for such proceedings in the relevant arbitration clause." App. 29a. The court held, however, that *Bazzle* "abrogated those decisions to the extent that they read the FAA to prohibit such proceedings." *Id.* (citing Justice Stevens' opinion in *Bazzle*, concurring in the judgment and dissenting in part); *see also* App. 4a n.2. Based on that determination, the court rejected petitioners' contention that, in light of those decisions, the arbitrators here had either disregarded the law or otherwise "'exceeded their powers'" under the FAA. App. 31a (quoting 9 U.S.C. § 10(a)(4)).

REASONS FOR GRANTING THE PETITION

This Court granted certiorari in *Bazzle* to resolve whether the FAA allows class arbitration to be imposed on parties whose arbitration clause is silent on that point. That issue continues to divide the lower courts. Misinterpretations of *Bazzle* by several courts, including the Second Circuit in this case, have exacerbated the uncertainty and confusion caused by the conflict of authority. This case, which is free of the threshold issues that have previously thwarted review, is a good vehicle for resolving this important question.

I. THE LOWER COURTS REMAIN DIVIDED OVER THE QUESTION THIS COURT WAS UNABLE TO REACH IN *BAZZLE*

A. The Pre-*Bazzle* Conflict

As the South Carolina Supreme Court recognized in *Bazzle*, state and lower federal courts "have taken two different approaches" in deciding whether class arbitration is permitted when the parties' agreement is silent on that point. 569 S.E.2d at 356; *see also* Pet. for Cert. 14-23, *Bazzle*, No. 02-634 (Oct. 23, 2002), *available at* 2002 WL 32101094.

1. Several courts construed the FAA to prohibit class arbitration when the agreement is silent

In *Champ* v. *Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995), the Seventh Circuit held that "the FAA forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter," *id.* at 275. Rejecting the argument that class arbitration "would not contradict the terms of an agreement that is silent on the issue," *id.* at 274, the court observed that "to read [class arbitration] into the parties' agreement would disrupt the negotiated risk/benefit allocation and direct the parties to proceed with a different sort of arbitration" than they agreed to, *id.* at 275 (other brackets and internal quotation marks omitted). The court likewise was unpersuaded by the contention that forbidding class arbitration might cause "various inefficiencies and inequities," *id.* at 277, explaining that "the Supreme Court has repeatedly emphasized that we must rigorously enforce the parties' agreement as they wrote it," *id.*

The court in *Champ* relied on cases from six other circuits that "held that absent an express provision in the parties' arbitration agreement, the duty to rigorously enforce arbitration agreements 'in accordance with the terms thereof' as set forth in section 4 of the FAA bars district courts from ... requir[ing] consolidated arbitration, even where consolidation would promote the expeditious resolution of related claims." *Champ*, 55 F.3d at 274.[4] The Seventh Circuit focused in particular on *Government of United Kingdom* v. *Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993), observing that in that case the Second Circuit analyzed this Court's decisions in *Volt*, *Dean Witter*, and *Moses H. Cone*, and explained that they mandate enforcement of arbitration agreements as written.[5] The Seventh Circuit embraced

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[4] The cases the Seventh Circuit cited, *see* 55 F.3d at 274-275, were *Government of United Kingdom* v. *Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993); *American Centennial Insurance Co.* v. *National Casualty Co.*, 951 F.2d 107, 108 (6th Cir. 1991); *Baesler* v. *Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990); *Protective Life Insurance Corp.* v. *Lincoln National Life Insurance Corp.*, 873 F.2d 281, 282 (11th Cir. 1989); *Del E. Webb Construction* v. *Richardson Hospital Authority*, 823 F.2d 145, 150 (5th Cir. 1987), *abrogated on other grounds as stated in Pedcor Management Co. Welfare Benefit Plan* v. *Nations Personnel of Texas, Inc.*, 343 F.3d 355, 363 (5th Cir. 2003); and *Weyerhaeuser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984). As the *Champ* court also noted, *see* 55 F.3d at 275 n.2, a divided panel of the First Circuit had held that consolidation of arbitrations in the face of a silent arbitration clause *is* permissible if applicable state arbitration law authorizes it, *see New England Energy Inc.* v. *Keystone Shipping Co.*, 855 F.2d 1, 3 (1st Cir. 1988).

[5] The Second Circuit later applied *Boeing* to prohibit a court from requiring even a joint hearing of separate arbitrations when such a hearing is not authorized by the relevant arbitration

the reasoning of *Boeing* and the other circuit decisions, seeing "no meaningful basis to distinguish between the failure to provide for consolidated arbitration and class arbitration." *Champ*, 55 F.3d at 275.

Other courts likewise concluded, before *Bazzle*, that class arbitration may not be imposed where the parties' arbitration contract is silent on the issue. For example, in *Med Center Cars, Inc.* v. *Smith*, 727 So. 2d 9 (Ala. 1998), the Alabama Supreme Court followed *Champ* in concluding that "to require class-wide arbitration would alter the agreements of the parties, whose arbitration agreements do not provide for class-wide arbitration," *id.* at 20. Similarly, the Eighth Circuit held in *Dominium Austin Partners, L.L.C.* v. *Emerson*, 248 F.3d 720 (8th Cir. 2001), that "because the partnership agreements make no provision for arbitration as a class, the district court did not err by compelling appellants to submit their claims to arbitration as individuals," *id.* at 728-729; *see also Stein* v. *Geonerco, Inc.*, 17 P.3d 1266, 1271 (Wash. Ct. App. 2001) (citing *Champ*); *Johnson* v. *W. Suburban Bank*, 225 F.3d 366, 377 n.4 (3d Cir. 2000) (observing in dicta that class arbitration "appears impossible ... unless the arbitration agreement contemplates such a procedure" (citing *Champ*)).

2. Other courts construed the FAA to permit class arbitration when the agreement is silent

In contrast to the decisions above, other courts held before *Bazzle* that class arbitration may be im-

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clauses. *Glencore, Ltd.* v. *Schnitzer Steel Prods. Co.*, 189 F.3d 264, 266-268 (2d Cir. 1999).

posed when the parties' arbitration clause does not address the issue. The California Supreme Court adopted this rule as a matter of state law in *Keating* v. *Superior Court*, 645 P.2d 1192, 1209-1210 (Cal. 1982), *rev'd on other grounds sub nom. Southland Corp.* v. *Keating*, 465 U.S. 1 (1984).[6] California's intermediate appellate court later rendered a similar ruling as a matter of federal law, holding that the FAA does not "preempt[] California decisional authority authorizing classwide arbitration." *Blue Cross of Cal.* v. *Superior Court*, 78 Cal. Rptr. 2d 779, 781 (Cal. Ct. App. 1998). Similarly, the court in *Dickler* v. *Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991), held that class arbitration is permissible even when the parties' contract does not authorize it, *see id.* at 865-867. Finally, of course, the South Carolina Supreme Court took the same position in *Bazzle*, *see* 569 S.E.2d at 360, although this Court vacated its judgment on other grounds.[7]

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[6] On appeal in *Keating*, this Court held that a California statute invalidating arbitration agreements in certain contracts was preempted by the FAA. *Southland*, 465 U.S. at 3, 10-16. The Court was unable to reach a second question presented—"whether arbitration under the federal Act is impaired when a class-action structure is imposed on the process by the state courts," *id.* at 3—because that question was not pressed or passed upon as a federal issue in the state courts. *Id.* at 8-9, 17.

[7] Several of these cases involved adhesion contracts, which are often claimed to be products of disparities in bargaining power. Whatever the merits of those claims, they are irrelevant in this case, which involves sophisticated international commercial parties on both sides and arbitration language from a decades-old standard industry contract that was not drafted by petitioners. Indeed, when the Second Circuit held in a prior related appeal that the claims against petitioners were subject to arbitration, it rejected the argument that a similar arbitration clause in a similar

B. The Conflict Persists After *Bazzle*

This Court's judgment and opinions in *Bazzle* did not resolve the question on which the Court had granted review—whether the FAA permits the imposition of class arbitration on parties whose arbitration clause is silent on that issue, or whether instead the Act requires affirmative evidence of intent to permit class arbitration. The conflict originally at issue in *Bazzle* thus persists. Indeed, the opinions in *Bazzle* have generated error and confusion in their own right, underscoring the need for the Court to grant certiorari again to resolve this important issue.

Some courts have misread *Bazzle* as having resolved the pre-*Bazzle* conflict in favor of permitting the imposition of class arbitration even when the parties' agreement is silent on the issue. That is the Second Circuit's holding in this case. App. 29a. The Illinois Supreme Court has likewise stated flatly that "the United States Supreme Court held in [*Bazzle*] that class actions may be arbitrated when the agreement between the parties is silent on the question." *Kinkel* v. *Cingular Wireless LLC*, 857 N.E.2d 250, 262 (Ill. 2006). And the Ninth Circuit, citing *Kinkel*, has read *Bazzle* as "an implicit endorsement by a majority of the Court of class arbitration procedures as consistent with the Federal Arbitration Act." *Shroyer* v. *New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 992 (9th Cir. 2007); *see also id.* ("[T]he Supreme Court has recog-

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standard shipping contract was "an unconscionable or oppressive term of adhesion." *JLM Indus.*, 387 F.3d at 170 n.5; *see also id.* (noting that plaintiff, an international shipper similar to Animalfeeds, was "a large and sophisticated commercial enterprise that was familiar with and well understood the [contract]'s terms").

nized the arbitrability of class claims under the [FAA] in *Bazzle*." (internal quotation marks omitted)).

Other courts have correctly rejected that reading of *Bazzle*, leaving intact their pre-*Bazzle* substantive rule prohibiting class arbitration in the face of a silent agreement. The Seventh Circuit, for example, has concluded that the decision in *Bazzle* has no precedential force. *See Employers Ins. Co. of Wausau* v. *Century Indem. Co.*, 443 F.3d 573, 580 (7th Cir. 2006) ("[W]e cannot identify a single rationale endorsed by a majority of the Court [in *Bazzle*]. ... The Justices' rationales do not overlap."). Thus, if this case had originated in the Seventh Circuit, the governing construction of the FAA would still have been the pre-*Bazzle* rule from *Champ* that class arbitration cannot be imposed unless the parties' contract provides for it, and the arbitrators' award here would have been vacated. The *Champ* rule also remains the law in the other jurisdictions that had embraced it before *Bazzle*, because the courts there, like the Seventh Circuit, have not misread *Bazzle* to have changed that rule. On the other hand, courts that followed the contrary rule—allowing the imposition of class procedures based on a silent contract—before *Bazzle* will presumably continue to follow it now. In the Second Circuit, meanwhile, the rule has now flipped from one side of the conflict to the other, based solely on a misreading of the precedential effect of the plurality opinion and partial concurrence in *Bazzle*. Finally, in some instances state and federal courts in the same jurisdiction are applying the FAA differently: If this case had originated in an Illinois state court, that court would have been bound by *Kinkel*, while a federal district court in Illinois would be bound by the contrary holding in *Champ*.

Bazzle has thus perpetuated a conflict in legal authority and, indeed, generated further misunderstanding, uncertainty, and confusion on an important and recurring issue of federal arbitration law, one that this Court has already deemed worthy of review.[8]

II. THE COURT SHOULD GRANT REVIEW IN THIS CASE TO SETTLE WHETHER THE FAA PERMITS IMPOSITION OF CLASS ARBITRATION WHERE THE PARTIES' ARBITRATION CLAUSE IS SILENT

The Court should grant review in this case to resolve the question it could not reach in *Bazzle*, and thereby bring clarity and uniformity to the law. The case provides a good vehicle for resolution of that important question, and review is warranted both to resolve the conflict and because the Second Circuit's decision betrays the FAA's fundamental promise that parties' arbitration agreements will be enforced "in accordance with the terms thereof." 9 U.S.C. § 4.

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[8] Several circuits have misread *Bazzle* in another respect. These courts, though recognizing that *Bazzle* did not reach the question presented, have perceived a clear holding "that arbitrators are supposed to decide whether an arbitration agreement forbids or allows class arbitration." *Pedcor Mgmt.*, 343 F.3d at 359; *see also Certain Underwriters at Lloyd's London* v. *Westchester Fire Ins. Co.*, 489 F.3d 580, 585-587 & n.2 (3d Cir. 2007) (finding a "common denominator ... implicitly run[ning] through the reasoning of the five Justices who support[ed] the judgment in" *Bazzle* (omission in original) (internal quotation marks omitted)). These courts have thus transformed the *Bazzle* plurality's narrow conclusion—that arbitrators must resolve whether the text of an arbitration clause forbids class arbitration or is simply "silent" on the subject, *see* 539 U.S. at 447, 453—into a broad holding that commits to arbitrators not only the textual interpretation of a contract but also the legal question that *Bazzle* did not reach: What substantive rule, if any, governs when the contract is silent?

A. This Case Is A Good Vehicle For Review

In *Bazzle*, this Court was unable to reach the question presented because a plurality concluded that there was a threshold contractual dispute between the parties about whether their arbitration clause was "in fact silent" on the question of class arbitration, or whether instead the text of the contract itself precluded class proceedings. 539 U.S. at 447, 453. Another impediment to consideration by the full Court was Justice Thomas's conclusion that the FAA "does not apply to proceedings in state courts." *Id.* at 460 (Thomas, J., dissenting). In an earlier case presenting a substantially similar question, meanwhile, the Court was unable to reach the issue because the case arose from the state courts and the imposition of class arbitration had not been challenged on FAA grounds in the state proceedings. *Southland*, 465 U.S. at 3, 8-9.

This case involves none of these obstacles to review. Unlike in *Bazzle*, here the parties and the arbitrators have all agreed that the applicable arbitration clause is silent as to class arbitration. *See* App. 49a. The case arises from the federal courts, and the arbitration agreement provides expressly that arbitration is to be "conducted in conformity with the provisions and procedure of the United States Arbitration Act." App. 5a. Finally, the question whether the FAA, as applied in *Champ*, *Boeing*, and other cases, permits imposing class arbitration where the arbitration clause is silent was both pressed and passed upon below. *E.g.*, App. 27a-31a. This case presents that question cleanly for resolution by this Court.

B. The Second Circuit's Decision Conflicts With Core FAA Principles Repeatedly Recognized By This Court

The Second Circuit's decision that class arbitration may be imposed on parties whose arbitration contract does not provide for it cannot be reconciled with this Court's FAA precedents, which demonstrate that involuntary class arbitration is fundamentally inconsistent with the FAA's emphasis on enforcing parties' agreements as written. As this Court has recognized, "[a]rbitration under the [FAA] is a matter of consent, not coercion." *Volt*, 489 U.S. at 479. Indeed, "[t]he central purpose" of the FAA is "to ensure 'that private agreements to arbitrate are enforced according to their terms.'" *Mastrobuono*, 514 U.S. at 53-54 (quoting *Volt*, 489 U.S. at 479). Moreover, this Court has made clear that efficiency concerns provide no basis for going beyond the parties' actual agreement regarding arbitration of their disputes. *See Moses H. Cone*, 460 U.S. at 20 (holding that the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement" even where there are "other persons who are parties to the underlying dispute but not to the arbitration agreement").

The Second Circuit's decision here cannot be squared with this clear emphasis on the primacy of consent under the FAA. Petitioners in this case separately agreed to arbitrate with Animalfeeds any dispute that arose from "the making, performance or termination of this Charter Party." App. 5a. Each petitioner also agreed to arbitrate—before mutually selected arbitrators—disputes with other parties that might arise under other contracts. No petitioner, however, ever consented to be drawn into or bound by any class arbitration joining multiple claimants and multiple

respondents, as parties to multiple contracts, in one proceeding before one arbitral panel.[9]

Nor can consent to class arbitration be inferred simply from a party's agreement to a general arbitration clause that is silent on that issue. That is because class arbitration is a fundamentally "different animal than individual arbitration." *Dickler*, 596 A.2d at 866. Most obviously, it operates on an entirely different scale. Just one of the two class-certification orders in *Bazzle*, for example, increased the number of claimants nearly a thousand-fold. *See* 569 S.E.2d at 352-353. Involuntary class proceedings, moreover, inevitably deprive the parties of what would normally be their core right to select particular arbitrators to hear and decide particular, individual disputes. *Cf. Lefkovitz* v. *Wagner*, 395 F.3d 773, 780 (7th Cir. 2005) ("Selection of the decision maker by or with the consent of the parties is the cornerstone of the arbitral process."); *see also* n.9, *supra*. Class proceedings also raise several potentially complex and costly substantive and procedural issues unique to the class setting—class definition and certification, notification, selection of counsel and adequacy of class representation, neutral fairness review of the

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[9] After Animalfeeds served separate arbitration demands on each petitioner, all petitioners and Animalfeeds agreed to joint arbitration of this dispute before one panel. *See* App. 55a-56a. As noted, however, see *supra* n.2, that agreement expressly states that it may not be interpreted to support or oppose class arbitration. *See* App. 62a-63a. Notably, the agreement also departs from some aspects of the original arbitration clause relating to necessary qualifications of the arbitrators. *Compare* App. 57a-59a *with* n.1, *supra*. While parties may of course make such modifications to their own agreements on their own behalf, no absent member of the putative class here has ever agreed to vary the terms of the original agreement.

adequacy of settlements, and the extent to which absent class members can either enforce or be bound by a private, informal, putatively contractual adjudication.[10]

In addition, class arbitration dramatically alters the monetary stakes for the defending parties. In *Bazzle*, for example, one class arbitration resulted in statutory damages of $10.9 million and attorney's fees of over $3.6 million, while the other ended with statutory damages of $9.2 million and attorney's fees of over $3 million. *See* 569 S.E.2d at 352-353, 354. A party that was willing to accept the informal procedures, private decisionmakers, often limited decisional explanations, and extremely limited judicial review in exchange for the speed, finality, privacy, and other advantages of arbitrating individual disputes might well not be willing to make anything like the same trade-off when confronted with the prospect of unified adjudication of hundreds or thousands of claims involving millions of dollars in potential liability.

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[10] These issues are different in kind from the sort of routine procedural judgments, such as how to structure the presentation of evidence, that parties may properly be deemed to have committed to arbitrators' discretion simply by agreeing to arbitrate. Indeed, the anomaly of handling class-action issues through private adjudication, particularly without affirmative evidence of agreement by the parties, is well demonstrated by the number of cases in which class "arbitration" has actually required extensive involvement by courts. *See, e.g., Dickler*, 596 A.2d at 866 ("In addition to the need for a trial court to initially certify the class and to insure that notice is provided for, the trial court will probably have to have final review in order to insure that class representatives adequately provide for absent class members." (footnotes omitted) (citing *Keating*, 645 P.2d at 1209)).

Questions asked during the oral argument in *Bazzle* reveal that Members of the Court recognized that the aggregation of claims into a class arbitration fundamentally transforms the stakes of the proceeding. *See* Tr. 29, *Bazzle*, No. 02-634 (Apr. 22, 2003). ("You might not want to put your company's entire future in the hands of one arbitrator."), 47 ("Without judicial review, would [Green Tree] have rolled the dice for $27 million on one arbitrator?"), *available at* 2003 WL 1989562; *see also Bazzle*, 539 U.S. at 459 (Rehnquist, C.J., dissenting) ("[I]t would have been reasonable for petitioner to [choose different arbitrators for different disputes], in order to avoid concentrating all of the risk of substantial damages awards in the hands of a single arbitrator."). And, indeed, recent litigation confirms that some potential defendants will reject arbitration altogether if required to arbitrate class claims. *See Shroyer*, 498 F.3d at 986-987 (giving effect to severability provision under which entire arbitration clause became unenforceable when express waiver of any class arbitration was held to be unconscionable).

Furthermore, it is far from certain whether, in exchange for the much greater risks inherent in class arbitration, defendants gain any of the potentially compensating advantages of class litigation. In a judicial class action the defendant—win, lose, or settle—achieves a final result that normally binds essentially the entire class. *See, e.g., Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 (1996). In contrast, it is not immediately clear where an arbitrator, whose authority stems exclusively from the parties' contract, obtains the power to bind class members who do not affirmatively agree to be bound. *Cf. Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 846 (1999) ("[M]andatory class actions aggregating damages claims implicate the

due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party...,' it being 'our deep-rooted historic tradition that everyone should have his own day in court.'" (quoting *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940), and *Martin* v. *Wilks*, 490 U.S. 755, 762 (1989)) (other citations and internal quotation marks omitted)). Thus, the defendant in a class arbitration must bear the substantial additional costs and risks of such a proceeding, but will then no doubt face arguments that it is not entitled to reap the benefits of an opt-out judicial class action.[11]

Because consent to class arbitration cannot plausibly be inferred simply from consent to individual arbitration, it is clear that the arbitrators' decision that the contracts here "permit" class arbitration, App. 52a, though phrased in terms of what the parties "intended," App. 49a, 51a, is in fact based entirely on extra-contractual considerations. That, however, is exactly the sort of fundamental revision of the parties' actual arbitration agreement that the FAA does not permit. Parties may presumably choose to authorize class arbitration, but neither courts nor arbitrators may, on their own judgment or for their own purposes, read such authorization into a contract that all agree simply does not speak to the issue. To compel class arbitration in those circumstances impermissibly gives effect to

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[11] If class arbitration *is* imposed in these circumstances, courts will presumably have to find ways to make the results mutually binding, in order to avoid obvious unfairness to class defendants. The extensive litigation that would no doubt be necessary to reach that result would itself be an improper burden on parties that never consented to class arbitration in the first place.

what particular arbitrators or judges may deem desirable or convenient—rather than to "the contractual rights and expectations of the parties." *Volt*, 489 U.S. at 479.[12]

C. The Question Presented Is Important

Resolution of the question presented by this case is at least as important today as it was at the time of *Bazzle*.[13] Arbitration clauses are in widespread use, including in long-term contracts and in contracts used by parties with both nationwide and international operations. It is essential that there be clear, uniform rules governing basic threshold questions, such as whether a clause that does not speak to class arbitration may nonetheless be "interpreted" to allow it. Conflict and confusion in the law promote inconsistency and unfairness, and "encourage and reward forum shopping." *Southland*, 465 U.S. at 15.

These problems are compounded by the lack of transparency and review that typically inhere in private arbitrations. Indeed, as explained above, *see supra* n.8, since *Bazzle* some courts have committed to

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[12] Inferring consent to class arbitration from a general arbitration clause is particularly inappropriate here. As noted above, *see supra* p.6, substantially identical arbitration clauses have been used for decades in industry-standard forms that have never previously been made the basis for a class arbitration. Moreover, all evidence of maritime industry custom and usage here confirms that no party signing any of the agreements at issue would have expected that it authorized class arbitration. App. 51a; *see also* 2d Cir. App. A647-A650, A857-A860.

[13] The substantial number of amicus briefs filed at the merits stage in *Bazzle* (on both sides) is one indicator of the broad significance of the question. *See* 539 U.S. at 446 n.*.

arbitrators not only the textual question whether a contract is silent regarding class arbitration, but also the legal question whether the FAA permits class arbitration when a contract is silent. That approach means that absent review here, judicial resolution of the legal question may never be available—leaving the conflict in the lower courts permanently unresolved.

The harm from an absence of clarity and uniformity is particularly acute where, as here, many of the parties affected are foreign companies engaged in international transactions. *Cf., e.g., Norfolk S. Ry. Co.* v. *James N. Kirby, Pty Ltd.*, 543 U.S. 14, 28 (2004) ("Here, our touchstone is a concern for the uniform meaning of maritime contracts[.]"). Such parties are entitled to clear and reliable rules for arbitration in U.S. commercial centers such as New York—and to clear notice if significant Second Circuit precedents are to be deemed "abrogated" by fractured decisions of this Court, allowing arbitrators to "construe" industry-standard shipping contracts, in use for decades, to permit wholly unprecedented class arbitrations.[14]

Arbitration can have many advantages, but only if the rules for invoking it are predictable and are applied to implement the actual agreements and expectations of the parties. After *Bazzle*, the law is unclear and unpredictable, with the lower courts in conflict, several misreading *Bazzle*, and parties highly vulnerable to po-

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[14] *See, e.g.*, 2d Cir. App. A648 (petitioners' expert opining that "[n]on-U.S. parties typically have no experience with class actions and would be horrified to learn they could find themselves caught up in a class action case by agreeing to arbitrate in New York, as compared with other leading maritime arbitration centers whose legal systems do not recognize these types of cases").

tentially unreviewable decisions in which arbitrators follow their own policy or procedural preferences rather than faithfully observing the limits of the parties' agreement, as this Court's decisions require them to do. That situation warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2009

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