

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   STOLT-NIELSEN S.A., ET AL.,                   :

4                   Petitioners                   :

5               v.                                 :   No. 08-1198

6   ANIMALFEEDS                                 :

7   INTERNATIONAL CORP.                         :

8   - - - - - x

9                                 Washington, D.C.

10                                Wednesday, December 9, 2009

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12                               The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States  
14 at 10:02 a.m.

15 APPEARANCES:

16 SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of  
17 the Petitioners.

18 CORNELIA T.L. PILLARD, ESQ., Washington, D.C.; on behalf  
19 of the Respondent.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument first today in Case 08-1198, Stolt-Nielsen S.A.  
5 v. AnimalFeeds International.

6 Mr. Waxman.

7 ORAL ARGUMENT OF SETH P. WAXMAN

8 ON BEHALF OF THE PETITIONERS

9 MR. WAXMAN: Mr. Chief Justice, and may it  
10 please the Court:

11 Unlike courts, arbitrators derive their  
12 authority solely from the consent of the parties to a  
13 particular agreement.

14 That agreement determines not only what the  
15 parties have agreed to arbitrate, but just as  
16 fundamentally, with whom they have agreed to do so. And  
17 when the agreement reveals no intent, no meeting of the  
18 minds to add participants, but the arbitrators  
19 nonetheless extend their reach to hundreds of parties of  
20 other contracts, they violate the basic principle  
21 reflected in the FAA that their authority is created and  
22 circumscribed by an agreement.

23 The decision to impose class proceedings is  
24 not the kind of incidental procedural matter that  
25 arbitrators have to resolve in order to discharge their

1 responsibilities under the foundational agreement.

2 JUSTICE GINSBURG: Mr. Waxman, there's a  
3 preliminary question in this case, and that is: There  
4 was one agreement, undoubtedly signed by both sides,  
5 and that was the one to submit to the arbitrator the  
6 question whether the arbitration clause permitted class  
7 treatment.

8 The arbitrators answered that question,  
9 which they were given authority to do so by both sides,  
10 and the Second Circuit said that the arbitrators  
11 answered within the ballpark.

12 If we agree with that, then there's nothing  
13 else to consider in this case.

14 MR. WAXMAN: I respectfully disagree,  
15 Justice Ginsburg. The arbitrators -- the agreement  
16 reflected in paragraph 7 of the supplemental agreement  
17 -- that is, to proceed to arbitration under the auspices  
18 of Rules 3 through 7 of the AAA rules, and Rule 3 itself  
19 contemplated precisely submitting precisely the  
20 contract issue that the Bazzle plurality said should go  
21 to the arbitrators. That is, looking at the arbitration  
22 clause itself, does it objectively reveal an agreement  
23 among the two parties to permit or prohibit class or  
24 consolidated treatment, or is it truly silent?

25 That is a question of contract

1 interpretation. That is the question that was submitted  
2 to the arbitrators.

3 There is a separate statutory question that  
4 arises if the answer to the contract question is number  
5 3. There is no meeting of the minds. It is truly  
6 silent --

7 JUSTICE BREYER: But there is no such answer.

8 MR. WAXMAN: Excuse me.

9 JUSTICE BREYER: I thought, in contracts,  
10 there is no such answer. When you interpret a contract  
11 and it doesn't say, you try to figure out -- I used to  
12 be taught that; probably I am way out-of-date -- you try  
13 to figure out what a reasonable party would have  
14 intended.

15 MR. WAXMAN: Justice Breyer --

16 JUSTICE BREYER: And I thought that's what  
17 Bazzle said, that --

18 MR. WAXMAN: I very -- I very much doubt  
19 that you are way out-of-date. If you are, I shudder to  
20 think where I am. But let me be clear --

21 JUSTICE BREYER: Not as out-of-date.

22 (Laughter.)

23 MR. WAXMAN: I hope I am as up-to-date as I  
24 need to be to provide a coherent, correct answer.

25 My proposition is twofold, and only the

1 second part gets to your question.

2 The first is that the arbitrators in this  
3 case decided the contractual question, the -- did the  
4 parties have a meeting of the minds, yes or no? And if  
5 so, was it?

6 JUSTICE BREYER: Yes.

7 MR. WAXMAN: And the arbitrators then went  
8 on to say: Even though there is no meeting of the minds  
9 objectively revealed, nonetheless we are going to apply  
10 a background rule that puts the burden on the party  
11 opposing arbitration to prove that there is an intent to  
12 preclude.

13 So, we're establishing that the --

14 JUSTICE BREYER: I see that now, but then --  
15 but there are two separate questions.

16 MR. WAXMAN: Exactly.

17 JUSTICE BREYER: My question was, first, the  
18 same as Justice Ginsburg.

19 MR. WAXMAN: And I have an answer --

20 JUSTICE BREYER: And I have a question for  
21 you on that, because in reading these briefs, I thought  
22 your description of who is to decide this matter of  
23 whether there is to be a class action was just what you  
24 said: The question of who should decide it is a matter  
25 for the parties.

1 MR. WAXMAN: The question --

2 JUSTICE BREYER: So when I looked at -- I  
3 just have been reading Bazzle three, five times, and there  
4 seemed --

5 MR. WAXMAN: Well, you are nowhere near up  
6 to me, then.

7 JUSTICE BREYER: All right. But what it  
8 seems to say is that that's a matter to figure out from  
9 a contract and background circumstances. In Bazzle,  
10 the contract was: Any -- all disputes relating to this  
11 contract.

12 Here, it doesn't say that. It says: "Any  
13 dispute arising from the performance, termination, or  
14 making of the contract."

15 Now, a class-action determination does  
16 relate to. Maybe it doesn't arise out of, okay? That's  
17 an argument.

18 MR. WAXMAN: Yes. No, no, no --

19 JUSTICE BREYER: So why are all these briefs  
20 saying that what Bazzle said was: Whenever this is  
21 silent, it goes to the arbitrator; the who question is  
22 answered at arbitration.

23 I can't find it saying that.

24 MR. WAXMAN: No, no, no. What -- and I -- I'm  
25 interpreting the plurality opinion that you wrote -- or

1     you and three of your colleagues.

2                   JUSTICE BREYER:   Yes, I know.   I know.   But  
3     what I actually thought doesn't matter.   What matters is  
4     what is said.

5                   MR. WAXMAN:   Okay.   Well, our  
6     understanding -- what Bazzle said is, at the very  
7     beginning of the opinion -- look, here's the case:   The  
8     South Carolina Supreme Court found that the arbitration  
9     clause is truly silent, and it then applied a rule of  
10    State law that says, if it's silent, class treatment  
11    will be permitted.   We granted certiorari in this case  
12    to decide whether that rule of South Carolina law  
13    applied to this case is precluded by the FAA, which  
14    requires actual consent, not coercion.

15                   Now, what the plurality in Bazzle, with  
16    respect, said is:   We can't reach the legal question,  
17    the statutory FAA question on which we granted review,  
18    because we can't be certain that the contract really is  
19    silent.   To be sure, there's no express provision, but  
20    Bazzle -- the Bazzle plaintiffs say that it is silent,  
21    and Green Tree says, no, if you look at other words in  
22    it, including the right to choose each arbitrator for  
23    each arbitration, it's not -- the South Carolina courts  
24    answered the question, but they are not the ones,  
25    because when you are talking about a question of the



1 interpretation of a contract that has committed to  
2 arbitration, that is for the arbitrators to decide. The  
3 arbitrators have to decide whether there was actually a  
4 meeting of the minds.

5 JUSTICE BREYER: Now, you're -- so the  
6 answer to Justice Ginsburg's question is, as to the who  
7 question, who shall decide whether or not in your case  
8 class actions are permissible?

9 MR. WAXMAN: And the --

10 JUSTICE BREYER: The who question in Bazzle,  
11 because of the contract and background, was the  
12 arbitrator.

13 MR. WAXMAN: If -- yes.

14 JUSTICE BREYER: The who question here,  
15 irrespective of the contract is the arbitrator for the  
16 reason that Justice Ginsburg said. There's a separate  
17 saying: You are the who; you, arbitrators, are the who.

18 MR. WAXMAN: Yes.

19 JUSTICE BREYER: So now we look to the what.  
20 They then decided it.

21 MR. WAXMAN: Exactly. So in Bazzle --

22 JUSTICE BREYER: What -- what did they decide?  
23 And you are saying that's wrong. And there you run into  
24 all the authority, Misco, who used to be in other  
25 places, saying when the arbitrator says something,

1 unless it's in Marrs, follow it. That's what you are  
2 addressing.

3 MR. WAXMAN: Right. Exactly. And -- and this  
4 case presents exactly the same answer to that question  
5 that Bazzle presented when it was granted review; that  
6 is, there is -- there was an interpretation of the  
7 contract in Bazzle, and an application of a legal  
8 principle to that interpretation. The who for what --  
9 what the parties actually intended is the arbitrator.  
10 That's what the Bazzle plurality, together with Justice  
11 Stevens, both decided.

12 The question that arises, the legal question  
13 that arises, only if the arbitrators say there was no  
14 meeting of the minds: So what rule does the FAA allow  
15 us to apply as a matter of Federal law? That is for  
16 courts, and you didn't reach it because the preliminary  
17 question of whether the contract was really silent, the  
18 predicate question, wasn't answered. And you remanded  
19 for that --

20 JUSTICE STEVENS: Mr. Waxman, can I ask this  
21 preliminary question? Assume the contract expressly  
22 authorized class arbitration. Would you agree that was  
23 permissible?

24 MR. WAXMAN: If it expressly authorized it?

25 JUSTICE STEVENS: Yes.

1           MR. WAXMAN: If it expressly authorized  
2 class participation, obviously, we would have no  
3 argument that the parties had not agreed to it.

4           JUSTICE STEVENS: I understand, but would  
5 you agree that would be consistent with the law, to  
6 enforce such a provision?

7           MR. WAXMAN: My -- I have a --

8           JUSTICE STEVENS: That is, does the Federal  
9 statute prohibit that kind of provision?

10          MR. WAXMAN: No, certainly not.

11          JUSTICE STEVENS: Oh.

12          MR. WAXMAN: I mean, the only reason -- the  
13 only reason I'm hedging -- and I don't mean to hedge, but  
14 trying to be thoughtful -- is that this Court explained  
15 in Mitsubishi, in the context of the arbitration of a  
16 Sherman Act agreement, and subsequently in Gilmer and  
17 other statutory cases, that in determining whether class  
18 participation or some other form of remedy is or isn't  
19 available, there is a two-part inquiry.

20                 The first part is: What was the scope of  
21 the arbitration agreement? What is it that the parties  
22 have agreed --

23          JUSTICE STEVENS: And you would agree that  
24 if they phrased their order a little differently and  
25 said we think that the best reading of this agreement

1 is that the parties intended to authorize class  
2 arbitration, then you would have no case?

3 MR. WAXMAN: Then we would have review only  
4 under the -- I don't know that I would characterize it  
5 this way, but what Justice Breyer characterized, the  
6 Marrs standard of review; that is, you would have to  
7 show --

8 JUSTICE STEVENS: That there was manifest  
9 disregard --

10 MR. WAXMAN: -- manifest disregard, and a  
11 manifest --

12 JUSTICE STEVENS: And you would not contend  
13 -- you are not arguing that that would be manifest --

14 MR. WAXMAN: No, our -- and the petition in  
15 this case presented the question as given, presented the  
16 issue of contract construction as given, that the  
17 contract itself was silent, not only in the sense that  
18 it didn't include an express provision or prohibition,  
19 but also that it reflected no meeting of the minds. It  
20 objectively revealed no meeting of the minds, looking  
21 not only at the actual text of the contract, but also  
22 looking at the other indicia -- objective indicia of  
23 intent that courts use to --

24 JUSTICE STEVENS: What, in your view --  
25 what, in your view, were the arbitrators asked to decide

1 by the submission by the parties?

2 MR. WAXMAN: The arbitrators were asked to  
3 decide whether the arbitration agreement objectively  
4 reveals consent to prohibit, permit -- whether it  
5 reveals a meeting of the minds to prohibit class  
6 treatment, permit class treatment, or whether it was  
7 truly silent.

8 JUSTICE ALITO: Didn't you just --

9 MR. WAXMAN: And if you look at --

10 JUSTICE ALITO: Didn't you just say that the  
11 parties agreed that there was no meeting of the minds on  
12 this issue?

13 MR. WAXMAN: Well, no, no, no. The  
14 parties that -- I mean -- we actually -- let me step  
15 back and give -- and give the history of it.

16 This case arose immediately in the wake of  
17 Bazzle. Okay? They sued in court; we obtained an order  
18 affirmed by the Second Circuit sending them to  
19 arbitration. Bazzle is decided, and we're all looking  
20 at Bazzle, and we decide -- like the AAA, which has  
21 filed an amicus brief in this case, and said it drafted  
22 these rules in order to provide a procedure to answer  
23 the Bazzle contract interpretation question; the AAA  
24 says, we don't have any view about the statutory  
25 question that arises from silence -- so we drafted a

1 supplemental agreement that, in paragraph 7,  
2 incorporates the AAA Rules 3 through 7.

3 And the AAA Rule 3, which is included on  
4 page 56 of the joint appendix, is headed "Construction  
5 of the Arbitration Clause." And it requires the  
6 arbitrators in this arbitration to determine, quote, "on  
7 construction of the arbitration clause, whether the  
8 applicable arbitration clause permits the arbitration to  
9 proceed on behalf of or against a class." The, quote,  
10 "clause construction award."

11 Now, the legal -- the arbitrators in this  
12 case concluded that it neither permitted nor prohibited,  
13 either by its express terms or by reference to other  
14 objective indicia of intent --

15 JUSTICE STEVENS: I'm a little bit puzzled. I  
16 don't understand how something -- if you ask  
17 whether something permits it, and if it doesn't prohibit  
18 it, doesn't it a fortiori permit it?

19 MR. WAXMAN: It -- in the context of the  
20 Federal Arbitration Act, which this Court has made clear  
21 more times than I can remember that the central purpose  
22 is to ensure that private agreements to arbitrate are  
23 enforced according to their terms, the question is:  
24 Have the parties agreed to it if there is a meeting of  
25 the minds?

1           If no meeting of the minds is objectively  
2   revealed, under the FAA, the arbitrator exceeds his  
3   authority in requiring class arbitration. It's -- there  
4   is no consent. And if there is no consent, the legal  
5   rule under -- the hallmark principle of the FAA is this  
6   is a private consensual matter. This is not a court  
7   exercising public coercive authority. I mean, the --

8           JUSTICE ALITO: What is your understanding  
9   of what Mr. Persky says at 77a of the joint appendix?  
10  He was -- I take it he was counsel for AnimalFeeds? Is  
11  that right?

12          MR. WAXMAN: Correct. He --

13          JUSTICE ALITO: And he says all the parties  
14  agree that when a contract is silent on an issue, there  
15  has been no agreement that has been reached on that  
16  issue; therefore, there has been no agreement to bar  
17  class arbitrations.

18          MR. WAXMAN: Right. I --

19          JUSTICE ALITO: So then I don't understand  
20  what issue there was for the arbitrator to --  
21  arbitrators to decide --

22          MR. WAXMAN: They --

23          JUSTICE ALITO: -- other than to impose a rule  
24  like the rule that had been adopted by South Carolina.  
25  But that would not be within their power, unless they

1     could presumably find that rule in Federal maritime law  
2     or New York law.

3                 MR. WAXMAN:   Correct.   I mean --

4                 JUSTICE ALITO:   So what was the issue for  
5     them to decide?

6                 MR. WAXMAN:   So here's was -- here's what the  
7     issue was.   They said the contract is completely silent  
8     and, as you quoted on page 77, the part -- there's no  
9     meeting of the minds on this issue at all.   That was  
10    their position about the construction of the contract.

11                Our position about the construction of the  
12    contract was that, in fact, although there is no express  
13    provision one way or the other, this is a maritime  
14    contract, and the -- and maritime law is ascertained by  
15    custom and practice.   And we introduced evidence in the  
16    form of affidavits that were unrefuted that since the  
17    days of Marco Polo, these types of spot voyages have  
18    been --

19                JUSTICE BREYER:   That -- isn't that -- you  
20    and I have a contract.   I'll ship you 17 pounds of durum  
21    wheat, and you will pay me \$43.   In the meantime, a  
22    green worm eats up all the durum wheat, and therefore  
23    they can't send durum wheat; they send some duhu wheat.

24                All right?   Question:   Is the contract  
25    valid or not?



1 MR. WAXMAN: I don't owe you.

2 JUSTICE BREYER: Answer: We have courts for  
3 that purpose. We have arbitrators for that purpose.

4 MR. WAXMAN: Exactly.

5 JUSTICE BREYER: Arbitrators will look to  
6 see what it says. If it says nothing, they will try to  
7 determine what the parties thought. If they can't  
8 determine what they thought, they will look to custom,  
9 analogy, et cetera. Now --

10 MR. WAXMAN: No.

11 JUSTICE BREYER: They won't?

12 MR. WAXMAN: In -- in the -- in the context  
13 of -- in the context of a court that has jurisdiction  
14 over a dispute and exercises coercive power, it has to  
15 get to an answer.

16 When you are talking about private  
17 arbitration, where the model is a private agreement to  
18 resolve things between two parties, this -- under the  
19 FAA, the arbitrators get their authority only as to  
20 matters as to which there is consent.

21 And there is -- going to Justice Alito's  
22 question, there was consent. It was submitted for  
23 purpose of determining whether -- if you look at the  
24 contract and look at background rules and look at parol  
25 evidence and look at custom and practice, can you

1 discern whether, as -- as you put it in -- in the  
2 opinion in Howsam, Justice Breyer, whether the contract,  
3 quote, "objectively reveals an agreement" by the two  
4 parties.

5 JUSTICE SCALIA: But that's the same before  
6 courts. That's no different. I mean, yes, a court has  
7 to come to a decision, but so does an arbitrator. And I  
8 really -- I really don't understand what it means to say  
9 that the contract does not cover it. I mean, the -- the  
10 contract either requires it or does not require it.

11 And if the contract is silent, either the  
12 court or the arbitrator has to decide what is the  
13 consequence of that silence, in light of the background,  
14 in light of -- of implied understandings. Is the  
15 consequence of the -- of the silence that a class  
16 arbitration is permitted, or is the consequence of the  
17 silence that it is not?

18 But those are the only answers. The  
19 contract requires it or the contract doesn't require it.  
20 I don't know anything in between -- the contract is  
21 silent. If the contract is silent, it's up to the court  
22 or the arbitrator to decide what that silence means.

23 MR. WAXMAN: Exactly. And -- and maybe the  
24 ambiguity here is the fluidity of the term "silence."

25 "Silence" can mean there's no express

1 provision. "Silence" could also mean, well, if you look  
2 at other words in the text of the contract, you can't  
3 work your way through to conclude that there was in fact  
4 an intent.

5           It also may mean -- and this is the sense  
6 that I am using it in, and I think the sense that the  
7 arbitrators have authority to do, is to say, well,  
8 let's look and see, for example, if there is custom and  
9 practice that would inform the backdrop against which  
10 the parties negotiate.

11           JUSTICE KENNEDY: And -- and why is it that  
12 you say an arbitrator cannot do that, but a judge can?

13           MR. WAXMAN: No, no, no, I think an  
14 arbitrator can. The arbitrator has plenary authority,  
15 subject to manifest disregard review, to decide whether  
16 or not there was a meeting of the minds of the parties.  
17 And it can use the text of the statute; it can use an  
18 applicable background principle of governing law; it can  
19 use principles like contra proferentem, as this Court  
20 did in --

21           JUSTICE KENNEDY: But are they situated and  
22 do they have the same authority as a court would in  
23 determining that issue, given the fact that it was  
24 remitted to them to decide?

25           MR. WAXMAN: They have plenary authority to

1    apply rules of construction that go to the parties'  
2    intent, that go to whether there is -- possible to discern  
3    a meeting of the minds.  They don't have --

4                   JUSTICE KENNEDY:  And you would -- would you  
5    describe -- would you describe the authority of a court  
6    any differently than you've just described the authority  
7    of an arbitrator?

8                   MR. WAXMAN:  Well, I think that courts can  
9    -- for example, a court can say -- and the other side  
10   relies heavily on a Seventh Circuit opinion by Judge  
11   Posner, where he basically says:  There is no intent  
12   here, but courts apply contract constructions that seem  
13   most sensible as a matter of public policy, and that's  
14   what we are going to do.

15                   That's what a court can do and an arbitrator  
16   can't.  The arbitrator can use any tools possible,  
17   including, largely, the text and custom and practice, in  
18   order to define whether or not there was a meeting of  
19   the minds.  But if there wasn't --

20                   JUSTICE SCALIA:  Do I have to agree with  
21   Judge Posner on that?  I mean I -- I don't --

22                   MR. WAXMAN:  I think it's a radical  
23   proposition --

24                   JUSTICE SCALIA:  You would -- yes, you --

25                   MR. WAXMAN:  -- as a matter of what courts can

1 do, but it certainly doesn't express what an arbitrator  
2 can do. And he was -- he was performing the kind of  
3 function, ostensibly, that you said that should be done  
4 by an arbitrator in Bazzle. He was doing it as a court.

5 But arbitrators have to construe the  
6 agreement itself between the two parties to see if there  
7 is a meeting of the minds. And there are lots of tools  
8 they can use.

9 And just to get back to your question,  
10 Justice Alito --

11 JUSTICE SCALIA: But --

12 MR. WAXMAN: I'm sorry -- in this case, we  
13 said the contract was not truly silent, that --  
14 essentially, we argued what Judge Rakoff concluded.  
15 They said: No, no, no; it is truly silent, but you  
16 should rule for us on other grounds. And may I please  
17 ask the Court, if you have it, to turn to page 22 of our  
18 blue brief, because on page 22 of our blue brief we have  
19 reprinted exactly what AnimalFeeds told the arbitrators  
20 were the reasons why they should win, in light of Mr.  
21 Persky's statement that there was no meeting of the  
22 minds. And it is the indented paragraph.

23 This is all that they said: "The parties'  
24 arbitration clause should be construed to allow class  
25 arbitration because (a) the clause is silent on the

1 issue of class treatment, and without express  
2 prohibition, class arbitration is permitted under  
3 Bazzle." The arbitrator said: No, that's not what  
4 Bazzle means. Bazzle doesn't mean that unless there's  
5 an express prohibition, it's -- it's permitted. So that  
6 was their reason number one.

7 Let's go to their reason number 3.

8 JUSTICE GINSBURG: Where did the arbitrators  
9 say that?

10 MR. WAXMAN: They said it in -- pardon me  
11 while I get the page.

12 Page 49a: "Claimants argue that Bazzle  
13 requires clear language that forbids class arbitration  
14 in order to bar a class action. The panel, however,  
15 agrees with Respondents that the test is a more general  
16 one. Arbitrators must look to the language of the  
17 parties' agreement to ascertain the parties' intention,  
18 whether they intended to permit or to preclude class  
19 arbitration."

20 Now, let's go back to what they told the  
21 arbitrators, and it's reprinted on page 22. I am going  
22 to skip --

23 JUSTICE STEVENS: But let me just, right  
24 there, interrupt with one question. The alternatives  
25 before the arbitrator were whether it is permitted or

1 precluded?

2 MR. WAXMAN: Or was silent.

3 JUSTICE STEVENS: No, that's not what they  
4 said there, is it? That -- that the parties agree they're  
5 silent -- that whether they -- if they are silent,  
6 whether they permit or preclude class action. Those are  
7 the two alternatives that they were confronted with.  
8 They decided that it did not preclude; ergo, it  
9 permitted.

10 MR. WAXMAN: Well --

11 JUSTICE STEVENS: That's what the answer to  
12 that on page 49a is.

13 MR. WAXMAN: No, with -- with respect -- and  
14 I'll -- let me answer this question --

15 JUSTICE STEVENS: You --

16 MR. WAXMAN: -- before getting back to the  
17 -- what that -- what -- look, you -- you may find,  
18 contrary to the cert grant in this case, that the  
19 predicate of our petition is wrong.

20 Our petition is predicated on the  
21 understanding that the arbitrators found that the  
22 contract was truly silent; that is, it expressed no  
23 meeting of the minds. And, therefore, this case  
24 presents the question --

25 JUSTICE STEVENS: But the question you were

1 asked was whether that silence should be interpreted as  
2 a preclusion or a permission.

3 MR. WAXMAN: And we know from the  
4 arbitrators' decision --

5 JUSTICE STEVENS: You said there was a  
6 permission.

7 MR. WAXMAN: As -- as a background rule,  
8 that's what they said. What they said was, they --  
9 first of all -- and we are looking at page 52 -- they  
10 acknowledge the force of the argument, quote, "that the  
11 bulk of international shippers would never intend to  
12 have their disputes decided in a class arbitration."  
13 But they said, well, we can deal with that later in  
14 deciding whether they can opt in or out.

15 I mean, the point is that if you have to opt  
16 in because it's clear that you never agreed, there is no  
17 meeting of the minds.

18 Secondly --

19 JUSTICE GINSBURG: Mr. Waxman, may I  
20 ask you -- because your time is running and we are  
21 spending all of your time on this preliminary question.

22 There is one fundamental flaw, it seems to  
23 me, in your argument, and I'd like you to answer it.  
24 And you can call it "the vanishing class action."  
25 AnimalFeeds wanted to be in court, not in arbitration.



1 MR. WAXMAN: Yes.

2 JUSTICE GINSBURG: You said -- and they  
3 wanted to bring a class action. You persuaded the  
4 Second Circuit they belong in arbitration. So now they  
5 are in arbitration. You say: The only thing we  
6 consented to is a one-on-one claim. Fine.

7 AnimalFeeds can then say: Fine, well, we  
8 didn't consent to anything more than the one-on-one. We  
9 had a class action. We had -- we were in court. We  
10 could have proceeded in an individual action or a class  
11 action. Now we are in arbitration, and under the  
12 agreement, as you read it, we can't have the class  
13 action in arbitration.

14 That doesn't mean it vanishes, because if it  
15 does, then the arbitration clause is not merely saying  
16 what the arbitrator can decide, but it is shrinking  
17 drastically the dimensions of AnimalFeeds' claim.

18 MR. WAXMAN: That is incorrect, with  
19 respect. AnimalFeeds doesn't have a class claim.  
20 AnimalFeeds has a claim. Its claim is that it paid too  
21 much for the contracts that it entered into -- the charter  
22 parties -- to ship some sort of oil from Panama to ports  
23 around the world.

24 It is -- it was asking a court, and is now  
25 asking an arbitrator, to join in the separate claims

1     that other parties to other contracts with other  
2     terms --

3                   JUSTICE GINSBURG:   But that's what it was  
4     doing in court.

5                   MR. WAXMAN:   Exactly.   And --

6                   JUSTICE GINSBURG:   And -- and the court  
7     said this goes to arbitration.   What is the "this"?  
8     If it's only a one-on-one claim, how do they lose the  
9     larger claim that they had in court?

10                  MR. WAXMAN:   It's -- you know, that argument  
11     -- in the JLM case, which is the case in which the  
12     Second Circuit, the district court in the Second Circuit  
13     said, no, you have to arbitrate this -- their briefs  
14     actually made this point.   Their briefs said you can't  
15     send us to arbitration, because we won't get class  
16     treatment in arbitration.

17                  And the Second -- the district court in the  
18     Second Circuit said you have got to arbitrate  
19     according to the terms of your agreement.   In footnote 9  
20     of the Second Circuit's opinion --

21                  JUSTICE GINSBURG:   But they never -- they  
22     never gave up.

23                  MR. WAXMAN:   They never --

24                  JUSTICE GINSBURG:   If -- if the -- if you  
25     would regard arbitration as a change in forum, like

1 a forum selection clause, it says where you go, but it  
2 doesn't change, if you have to go to another forum, what  
3 your claim is.

4 MR. WAXMAN: Their claim was we paid too  
5 much. And with respect, Justice Ginsburg, your point  
6 that they aren't allowed to proceed in class arbitration  
7 is no different than the fact that by agreeing to  
8 arbitrate this bilateral dispute, the parties agreed to  
9 dispense with an appeal and with meaningful judicial  
10 review of the things the arbitrators decided.

11 JUSTICE SCALIA: Mr. Waxman, I hope you are  
12 going to have time to go through (a), (b), and (c) --

13 MR. WAXMAN: I --

14 JUSTICE SCALIA: -- as you started to do.

15 MR. WAXMAN: I will.

16 JUSTICE SCALIA: Thank you.

17 MR. WAXMAN: I -- I was hoping to reserve a  
18 few minutes for rebuttal, but nothing is more  
19 important than --

20 JUSTICE SCALIA: Yes, I bet you were thinking  
21 you'd be able to.

22 MR. WAXMAN: -- than answering the Court's  
23 questions.

24 So I think we have dealt with (a). They --  
25 they said (a) we win because Bazzle requires it. The

1 arbitrators correctly said no.

2 I want to skip (b), because my submission is  
3 that (b) is what they did.

4 (C) says the clause would be unconscionable  
5 and unenforceable if it forbade class arbitration. The  
6 panel said: We aren't reaching that; we are not  
7 deciding that question.

8 So what's left? The only other argument  
9 that AnimalFeeds made was (b): The clause should be  
10 construed to permit class arbitration as a matter of  
11 public policy. And that is exactly what the arbitrators  
12 did.

13 What they said was -- and this is on page 51  
14 of the petition appendix -- they said that if they  
15 followed a strict contractual theory, quote, "There  
16 would appear to be no basis for a class action, absent  
17 express agreement among all parties and putative class  
18 members."

19 And they then, lower down on the page, then  
20 said that we were required to prove that the parties,  
21 quote, "intended to preclude arbitration." That is,  
22 they applied a background rule that they thought was  
23 desirable from a public policy sense.

24 And our sole submission here, the only  
25 question presented in this case, is that that decision

1 is not -- is precluded by the Federal Arbitration Act,  
2 which requires that contracts to arbitrate be construed  
3 only in accordance with their terms and what the parties  
4 agreed with. And section 4 of the Arbitration Act  
5 couldn't be clearer that they -- they can only proceed,  
6 quote, "in accordance with the terms of their  
7 agreement."

8 May I reserve the balance of my time?

9 CHIEF JUSTICE ROBERTS: Thank you.

10 Ms. Pillard.

11 ORAL ARGUMENT OF CORNELIA T.L. PILLARD

12 ON BEHALF OF THE RESPONDENT

13 MS. PILLARD: Thank you, Mr. Chief Justice,  
14 and may it please the Court:

15 What the arbitrators did here was interpret  
16 the contract as the parties asked them to. They did not  
17 impose their own policy judgment. And any judicial  
18 review is under very deferential FAA standards under  
19 section 10, which is confined to correcting what amount  
20 to gross defects in the process.

21 JUSTICE SCALIA: Where -- where -- where do  
22 they say that they were interpreting the intent of the  
23 parties, that it was the intent of the parties to permit  
24 class arbitration?

25 MS. PILLARD: Okay. Petitioners' position

1 rests on a misinterpretation of what the arbitrators  
2 did. And if you look at page 59 of the petition  
3 appendix, Mr. Waxman already read to you the language  
4 that the arbitrators understood they must look to the  
5 language of the parties' agreement to ascertain the  
6 parties' intention.

7 And then the next key part is on page 50a,  
8 which is a little terse, but let's say --

9 JUSTICE SCALIA: Excuse me, what part -- 50?

10 MS. PILLARD: 50a, the next page of the  
11 petition appendix.

12 JUSTICE SCALIA: I thought you said 59a to  
13 start.

14 MS. PILLARD: No.

15 JUSTICE SCALIA: You said 49a.

16 MS. PILLARD: 49a was where --

17 JUSTICE SCALIA: Right.

18 MS. PILLARD: -- the arbitrators described  
19 their methodology, which is standard contract  
20 methodology: To look to the parties' agreement, to  
21 ascertain the parties' intention, whether they intended  
22 to permit --

23 JUSTICE SCALIA: Or to preclude.

24 MS. PILLARD: -- or preclude --

25 JUSTICE SCALIA: Right.

1 MS. PILLARD: -- class action. So they have  
2 set up --

3 CHIEF JUSTICE ROBERTS: Isn't that a  
4 critical difference, though? I mean, I understood the  
5 fundamental question in -- before getting arbitration  
6 is whether the parties have agreed to arbitrate this  
7 dispute with this party.

8 And it's one thing to say that the contract  
9 permitted this sort of arbitration; it's another thing  
10 to say it didn't preclude it.

11 MS. PILLARD: That's right.

12 CHIEF JUSTICE ROBERTS: And if it didn't  
13 preclude, the contract may not preclude -- if I agree --  
14 I guess it's the -- well, if I agree to arbitrate with  
15 A, it doesn't preclude me from arbitrating with B, but  
16 nothing in the agreement compels me to do that.

17 So which did the arbitrators do? Did they  
18 say, under this contract, you agreed to a class action  
19 treatment, in the sense that -- whether it's the  
20 language or the intent or whatever -- or did they say we  
21 don't find anything here that precludes class action  
22 treatment?

23 MS. PILLARD: Mr. Chief Justice, they did  
24 the former. And let me point you to -- on page 50, what  
25 they relied on was the broad language of the agreement,

1 the language "any disputes." And in particular, they  
2 drew on the breadth of that language and on the fact  
3 that many other arbitrators had read similar language to  
4 permit class arbitration. And so those other --

5 CHIEF JUSTICE ROBERTS: Would you show  
6 me this -- I see they have quoted from --

7 MS. PILLARD: Yes.

8 CHIEF JUSTICE ROBERTS: -- from the agreement.  
9 Where is that in the agreement itself?

10 MS. PILLARD: The "any disputes" --

11 CHIEF JUSTICE ROBERTS: Yes.

12 MS. PILLARD: -- language? In the agreement  
13 itself?

14 CHIEF JUSTICE ROBERTS: If you know offhand.

15 MS. PILLARD: Is -- the agreement is  
16 reproduced in Appendix F of the petition appendix, which  
17 starts on page 67a, and the arbitration clause is on  
18 page 69a.

19 Now, it's clear that the arbitrators  
20 rejected the notion that they should permit --

21 CHIEF JUSTICE ROBERTS: Well, this is -- I'm  
22 sorry. This is what I was wondering. It is, of course,  
23 any dispute arising from -- blah, blah -- performance,  
24 termination of this charter party shall be settled in  
25 New York.



1           Now, there's -- the class is not a party to  
2   this charter party. So disputes arising from this  
3   charter party doesn't involve the class. So they did  
4   not agree to arbitrate with the class.

5           Now, as I understand what the arbitrators  
6   did, they said, well, they didn't preclude it, and so  
7   we get to decide how far our authority goes.

8           MS. PILLARD: I'd like to address that  
9   directly, Mr. Chief Justice. The arbitrators  
10  specifically rejected the notion that they should adopt  
11  as -- as a default rule. And that's on page 49a. Where  
12  we had actually argued that they should, they rejected  
13  our argument.

14          Claimants argue that Bazzle requires clear  
15  language that forbids class arbitration in order to bar  
16  it; the panel, however, agrees with Respondent.

17          So they are saying: We are not going to do  
18  this based on a default rule; we are going to do this  
19  based on the language and intent. Right?

20          CHIEF JUSTICE ROBERTS: Well, now -- now --  
21  I'm sorry. I'm just reading along here. They rejected  
22  your argument about "forbids," but the -- they go on to  
23  say: The issue -- we look at this, we look at that to  
24  see whether they intended to permit or to preclude class  
25  action.

1 MS. PILLARD: Right.

2 CHIEF JUSTICE ROBERTS: So it's enough for  
3 them if the parties did not intend to preclude class  
4 action.

5 MS. PILLARD: I -- I respectfully disagree.  
6 They go on and they read any disputes to authorize --  
7 now, it's not to require class action. I think it's  
8 important that that be clear.

9 It's to put the class action mechanism --  
10 or, to read the contract, that the class action  
11 mechanism is in the arbitrators' toolbox. It's  
12 something that's available. It's not necessarily going  
13 to happen, but it's something that's available. So it's  
14 part of a delegation to the arbitrators of authority  
15 to choose procedures. Now --

16 CHIEF JUSTICE ROBERTS: In -- in any -- in  
17 any case -- when you say "arbitrators' toolbox," I'm  
18 trying to figure out if that is something different than  
19 what the parties agreed to.

20 MS. PILLARD: No, by agreeing to arbitrate  
21 any disputes, the arbitrators found that they were given  
22 the authority to use class arbitration, among other  
23 procedures, if they were appropriate in the particular  
24 case.

25 JUSTICE SCALIA: It -- it seems to me

1     that the arbitrators are putting the choice in a false  
2     manner.  It isn't whether, on the one hand, they agreed  
3     to permit it or, on the other hand, they agreed to  
4     prohibit it.  Just forget about the latter.  They must  
5     have agreed to permit it.

6                 Where did the arbitrators say they agreed --  
7     they agreed to permit it?  Not simply, they did not  
8     agree to prohibit it.  You don't have to agree to  
9     prohibit everything in a contract.  You have to agree to  
10    permit it.  That's what contracting is about.

11                MS. PILLARD:  That's right.  I'd like to  
12    point to two aspects of the opinion that I think clarify  
13    this.

14                The one is their reference to the language  
15    on page 50a, the panel is -- and they are talking about  
16    the language in the context of the other arbitration  
17    precedent, or the other arbitration opinions that had  
18    developed at that point under the AAA arbitration  
19    scheme.  And they are saying the -- they find that the  
20    broad wording "any dispute" to be significant, and the  
21    fact that other arbitrators looking at that language  
22    also found "any dispute" to encompass the choice of this  
23    procedure.

24                Now, I think it was Justice Alito --

25                JUSTICE SCALIA:  Well, no, I mean, they --

1    they put it just -- just the way that -- that is not  
2    good for you.  "The panel is struck by the fact that  
3    Respondents have been unable to cite any post-Bazzle  
4    panels or arbitrators that construed their clauses as  
5    prohibiting a class action."

6                   That's not what -- what they have to find.  
7    They must find positively that it permits a class  
8    action.

9                   MS. PILLARD:  And it's our contention -- and I  
10   think it's clear -- that they found that it was  
11   permitted.  And when you see that following --

12                   JUSTICE SCALIA:  Just give me some language  
13   that says that.  I -- there is nothing in that paragraph  
14   that says it.

15                   MS. PILLARD:  The -- the broad wording, the  
16   "any dispute" -- now, they reject the notion -- they  
17   expressly have rejected the notion that they are  
18   supposed to do it as a matter of default.

19                   And then I just want to address this  
20   language, which I think could be confusing, at the  
21   bottom of 51a, where they say they don't establish that  
22   the parties -- this is the last paragraph on 51a:  The  
23   Respondents' evidence "does not establish that the  
24   parties intended to preclude class arbitration."

25                   You might read that as supporting the

1 argument that you are proffering. However, I believe  
2 that the arbitrators meant that, that once they had  
3 established under the "any disputes" language that there  
4 was affirmative general authorization on the part of the  
5 arbitrators to choose any procedures, to have this in  
6 their toolbox, then in order to overcome that, you would  
7 need to -- and the Petitioners were trying with their  
8 maritime experts -- to show an intent to preclude.

9 JUSTICE SCALIA: So the only language you  
10 can point to is that -- is that "any dispute" language  
11 on 50a?

12 MS. PILLARD: That's right, and I think  
13 that's very important.

14 JUSTICE SCALIA: You are hanging your whole  
15 -- your whole assertion that -- that these arbitrators  
16 not only found that the contract did not prohibit it,  
17 but found that the contract positively authorized class  
18 action, upon that language on 50a?

19 MS. PILLARD: Together with the language on  
20 49a where the panel expressly rejects the idea that all  
21 you need is the absence of language forbidding it.  
22 Right?

23 So they've already -- they've set the issue  
24 up exactly as you -- your hypothetical would require  
25 them to. They've said: It's not enough to find --

1 JUSTICE SCALIA: Where -- where --

2 MS. PILLARD: It's on 49a, the second  
3 sentence under the heading of "Discussion of Parties'  
4 Contentions." They say, "Claimants argue that Bazzle  
5 requires clear language that forbids class arbitration"  
6 --

7 JUSTICE SCALIA: "Clear language" is the  
8 point of that sentence. "Claimants argue that Bazzle  
9 requires clear language that forbids class arbitration.  
10 The panel, however, agrees with Respondents that the  
11 test is a more general one. Arbitrators must look to  
12 the language to ascertain the parties' intention whether  
13 they intended to permit or to preclude class action."

14 MS. PILLARD: I would --

15 JUSTICE SCALIA: The point of those two  
16 sentences is simply that in order for us to find that  
17 you didn't preclude it -- and if you didn't preclude it,  
18 it's okay -- you don't need clear language. We have to  
19 look to everything.

20 MS. PILLARD: I -- I respectfully disagree,  
21 Justice Scalia.

22 JUSTICE SCALIA: Well, that's how I read  
23 the two sentences.

24 MS. PILLARD: But I think that what's very  
25 important here is that judicial review is under a very

1     deferential standard, which is confined to correcting --

2                   CHIEF JUSTICE ROBERTS: Well, that's just  
3     saying that they're -- they're giving up a lot. This  
4     is the basic reason that you require, I thought, fairly  
5     clear language that you are agreeing to arbitrate. They  
6     are giving up their right to go into court. They have  
7     an agreement between A and B that they will arbitrate a  
8     dispute, and they say you are giving up your right to go  
9     to court with the dispute between A and C.

10                  And the "any dispute" language that you're,  
11     you know, quite understandably relying on refers to any  
12     dispute arising from the -- making performance or  
13     termination of "this charter party." "This charter  
14     party" says nothing about arbitrating with C.

15                  MS. PILLARD: No, but this charter party is  
16     the same agreement that the Petitioners have with every  
17     absent class member. We wouldn't be here if every --

18                  CHIEF JUSTICE ROBERTS: Oh, but they can  
19     agree to arbitrate. They can agree to arbitrate with  
20     some and not with others, even if it's the same  
21     contract. They may decide that your client is a very  
22     reasonable person; they are happy to submit that to  
23     arbitration.

24                  Or it's a very big and important client, and  
25     they don't want to get into court with you. They may

1     decide some other party, for whatever reason, they  
2     don't want to get dragged into court with them. Same  
3     charter party, different -- different parties --

4                 MS. PILLARD: But they've --

5                 CHIEF JUSTICE ROBERTS: -- and different  
6     results.

7                 MS. PILLARD: Excuse me, Mr. Chief Justice.

8                 CHIEF JUSTICE ROBERTS: Go ahead.

9                 MS. PILLARD: They've already entered into  
10    agreement. They've already said they are going to  
11    arbitrate with the absent class members, so everybody  
12    has the same contract that says "any disputes,"  
13    and the question is: Do the arbitrators, under that  
14    broad language, have the authority?

15                And I would point this Court to the -- this  
16    Court's decision in Mastrobuono, which read a clause  
17    requiring arbitration of any controversy to empower  
18    arbitrators to award punitive damages, and that was  
19    despite established New York State law to the contrary.

20                JUSTICE BREYER: That's where I started  
21    this. We don't get many contract interpretation cases,  
22    and that's why I -- I needed to go back to Jack Dawson,  
23    who is a great contracts professor. And I am --

24                JUSTICE SCALIA: I used to teach contracts.  
25    Did you know that?



1 JUSTICE BREYER: What?

2 JUSTICE SCALIA: I used to teach contracts.

3 JUSTICE BREYER: I didn't have that  
4 pleasure, but the --

5 (Laughter.)

6 JUSTICE BREYER: The -- but the -- as I recall,  
7 the way I would have interpreted -- imagine a worker who  
8 says: I have a right, permission -- it's permissible  
9 for me to eat lunch next to the machine. The employer  
10 says no. The question was what is -- does the contract  
11 permit this or not?

12 So the arbitrator or the judge reads the  
13 words. Nothing. They have no idea. Then the judge or  
14 the arbitrator reads the rest of the contract. Hasn't a  
15 clue. Then the arbitrator or the judge goes and looks  
16 and sees what's practice around here? "I don't know."  
17 Then they might look to what happens in the rest of the  
18 industry. Then they might look to what happens in  
19 foreign countries with comparable industries. Then they  
20 might look to public policy.

21 They might look almost to anything under the  
22 sun they think is relevant, and the way, in jargon, you  
23 describe the bottom line is: They have found a meeting  
24 of the minds as to what this means.

25 Now, of course, it isn't really a meeting of

1 the minds. But that's just the summary of the  
2 conclusion as to what, objectively read, those words in  
3 the contract mean. Now, that's how I think I would have  
4 learned it.

5 Is that still done, or is there some other  
6 way of describing it?

7 MS. PILLARD: I think that's pretty good  
8 contract law.

9 JUSTICE BREYER: If that's contract law --

10 MS. PILLARD: And that's the way I understand  
11 it.

12 JUSTICE BREYER: -- then I take it what  
13 they're saying is: It may be true that the arbitrators,  
14 when they looked at some of those elements, really got  
15 it wrong. Now, if they are correct on that -- this is  
16 the other question I have. You are going to say: No,  
17 they're not -- they didn't get it that wrong; wrong,  
18 maybe, but not that wrong.

19 All right. Now, can they not do this? The  
20 next person who has this form contract does not so  
21 readily agree it's up to the arbitrator to say whether  
22 that contains a class action or not. Rather, they say:  
23 I read this contract as reserving that question to the  
24 court. It's not the same language as was there in  
25 Bazzle; it's not the same industry of the kind you had

1 in Bazzle; and, therefore, a judge should decide that.  
2 That's the meeting of the minds on the who question. And  
3 then we'll get it all resolved, because the judge might  
4 come out differently if they're right, and maybe  
5 arbitrators will follow the judge.

6 I'm interested, because we might have to write  
7 something, in your answer to that question.

8 MS. PILLARD: I think that if they wanted to  
9 write around it, they could do that, as this Court --

10 JUSTICE BREYER: Not -- we know they're  
11 going to -- they have something already in place.

12 MS. PILLARD: Could it be interpreted to  
13 say --

14 JUSTICE BREYER: Yes.

15 MS. PILLARD: -- this is a question for the  
16 court?

17 JUSTICE BREYER: Uh-huh.

18 MS. PILLARD: I think -- I don't see the  
19 language here in this contract, but they could try to do  
20 that. There's nothing in the FAA that bars it.

21 And, you know, as we've emphasized, the  
22 contract interpretation, under ordinary contract rules  
23 that the FAA has consistently applied in -- and this  
24 Court has consistently applied to the FAA in -- in many,  
25 many cases -- it's ordinary contract law we're talking

1 about here.

2 Now, I just think one thing -- when we are  
3 thinking about contract law, which is ordinarily in the  
4 province of the States, I think it's important that the  
5 New York Appellate Division, in Cheng v. Oxford Health  
6 Plans, has since approved just such an arbitrator's  
7 contract interpretation under New York law, allowing  
8 class arbitration under a 1998 pre-Bazzele clause --

9 CHIEF JUSTICE ROBERTS: Allowing.

10 MS. PILLARD: -- like this one.

11 CHIEF JUSTICE ROBERTS: Allowing. See, that's  
12 where I get hung up. There's a difference  
13 in arbitration -- and it's a fundamental difference --  
14 between allowing something and a background rule that  
15 requires it if you don't say anything about it.

16 The difference I see with the hypothetical  
17 Justice Breyer put is that you are talking about the  
18 details of a contract once it's agreed there is a  
19 contract. There's a contract that governs the  
20 relationship between the employer and the employee, and  
21 you're trying to figure out if it says anything about  
22 where they eat lunch.

23 This is the much more fundamental issue of  
24 whether you've even agreed to arbitrate with this  
25 person. Is this guy your employee or just somebody who

1     came in off the street?

2                     And I think what your brother's position is,  
3     is that this is just somebody who came off the street;  
4     the class members. I didn't agree to do anything with  
5     them.

6                     MS. PILLARD: Well, I think, Mr. Chief  
7     Justice, that that goes back to whether any disputes can  
8     plausibly be read to encompass the class mechanism,  
9     because if it can, well, then, by agreeing to that  
10    contract, you have, in effect, agreed to something that  
11    delegates to the arbitrator the ability to use that.

12                    CHIEF JUSTICE ROBERTS: So --

13                    MS. PILLARD: So when you picked --

14                    CHIEF JUSTICE ROBERTS: I -- I --

15                    MS. PILLARD: -- your arbitrator you picked  
16    your arbitrator knowing that. And here, they had  
17    extra notice, right, because this case had been filed  
18    in court as a class action? They knew when they picked  
19    these arbitrators -- and you can tell by the caliber of  
20    arbitrators they picked -- that they knew this could be a  
21    class arbitration, and so they are picking people who  
22    are up to that task.

23                    Now, they also know that they are going to  
24    dispute that, but if we're right that the arbitrators,  
25    plausibly and under the -- the Marrs standard of

1     judicial review, have -- have sustainably interpreted  
2     this contract to give the arbitrators the authority to  
3     proceed on a class basis, well, then, I think your  
4     objection --

5                   CHIEF JUSTICE ROBERTS:  Well, that's --  
6     that's what it comes down --

7                   MS. PILLARD:  -- Mr. Chief Justice,  
8     disappears.

9                   CHIEF JUSTICE ROBERTS:  That's what it comes  
10    down to --

11                   MS. PILLARD:  Right.

12                   CHIEF JUSTICE ROBERTS:  -- whether it's an  
13    interpretation of the contract to give the arbitrators  
14    the authority to proceed on a class basis.

15                   Not enough, right, under your view, if  
16    there's nothing in there that precludes them from doing  
17    so?

18                   MS. PILLARD:  I think that's a question of  
19    State law.  For example, under the State law at the time  
20    in South Carolina, what the South Carolina Supreme Court  
21    found in Bazzle was that the contract was silent, but  
22    the -- applying two rules of contract construction,  
23    contra proferentem -- well, one rule of contract  
24    construction and one FAA rule, which is the Moses H.  
25    Cone rule, the court said:  We find this contract

1 authorizes it. Right? So there was contra proferentem.

2           There was also, which I haven't mentioned  
3 and I should, the Moses H. Cone rule, which says when  
4 there's any ambiguity about the scope of issues that  
5 have been given to the arbitrator, we put a finger on  
6 the scale in favor of giving the issue to the  
7 arbitrator. So if it's unclear, any disputes, well,  
8 maybe that only is about contract issues, where the  
9 court in JLM said, no, it's antitrust, too --

10           CHIEF JUSTICE ROBERTS: So what -- what  
11 happens --

12           MS. PILLARD: -- and the arbitrators say  
13 procedure, too.

14           CHIEF JUSTICE ROBERTS: What happens if you  
15 get the arbitrator on the stand, and he says: As we read  
16 the contract, it doesn't say -- and nothing about the  
17 intent of the parties leads me to believe they meant --  
18 you may arbitrate this on a class basis, but at the  
19 same time there is nothing in there that says you may  
20 not. And I looked at the intent of the parties  
21 and background rules, and nothing there says you may  
22 not.

23           What do you understand to be the answer? Can  
24 they proceed on a class basis or not?

25           MS. PILLARD: I understand that to be

1 something that's answered by State contract law --

2 CHIEF JUSTICE ROBERTS: Yes.

3 MS. PILLAR: -- and it might differ from State  
4 to State.

5 CHIEF JUSTICE ROBERTS: Right. It's the  
6 background rule --

7 MS. PILLARD: Right.

8 CHIEF JUSTICE ROBERTS: -- under which you  
9 should interpret this.

10 MS. PILLARD: Right.

11 CHIEF JUSTICE ROBERTS: So we have to  
12 decide, when we -- when the contract says nothing about  
13 class actions, whether the background rule should be you  
14 can go ahead -- or the background rule should be you  
15 can't go ahead.

16 MS. PILLARD: We, the arbitrators, decide  
17 that --

18 CHIEF JUSTICE ROBERTS: Well --

19 MS. PILLARD: -- not we, the United States  
20 Supreme Court. It's a question of State contract law.

21 CHIEF JUSTICE ROBERTS: What the arbitrators  
22 have already told us -- I think you disagree with it --

23 MS. PILLARD: Yes.

24 CHIEF JUSTICE ROBERTS: -- but take it for  
25 purposes of argument. What the arbitrators have told us



1 is that it doesn't say anything.

2 It doesn't say you can do it; it doesn't say  
3 you can't do it. Now, assume that's true.

4 JUSTICE STEVENS: Well, you don't agree to  
5 that, do you?

6 CHIEF JUSTICE ROBERTS: No, I know. I said  
7 she doesn't agree with it.

8 But, I mean, assuming that's true, what's the  
9 answer? Yes or no? Can they go ahead with class action  
10 or not?

11 MS. PILLARD: They -- in my view, they  
12 haven't answered that -- well, maybe they answered that  
13 question under New York law. They have answered the New  
14 York contract law question that was put to them.

15 I think they tee it up in a way that  
16 Mr. Waxman and I agree is a valid statement of New York  
17 contract law, which is on page 49. We look to the  
18 parties' intent and the language to ascertain whether  
19 they would permit or preclude --

20 JUSTICE STEVENS: Would you help me with  
21 one --

22 MS. PILLARD: And if they have applied that  
23 and they have found yes, I think we have to -- under the  
24 deferential standard of review that applies under FAA  
25 section 10, which looks only at gross defects in the

1 process, we have to say they have done their job, they  
2 have found this contract authorizes the arbitrators, if  
3 they find that it's necessary, and -- you know, we do  
4 have a right -- this argument here, which is that they  
5 haven't done anything. They haven't decided whether --

6 JUSTICE STEVENS: May I ask a question, a  
7 very basic, elementary questions? Where in the record is  
8 the specific question to the arbitrators found  
9 -- that they were asked to respond to?

10 MS. PILLARD: Well, that's a good question.  
11 In the arbitrators' own opinion?

12 JUSTICE STEVENS: I understand what the  
13 arbitrators said, but is there anything in the record  
14 that says we want you to answer this narrow question,  
15 and if so, what is it?

16 MS. PILLARD: The -- what I'm looking to,  
17 and I'm not sure this is going to be the best cite for  
18 you, but in the Petitioners' reply brief, they say,  
19 the -- on page 6, "The parties certainly authorized the  
20 arbitrators to determine whether the parties intended to  
21 permit or prohibit class arbitration." And I do think  
22 that's an accurate statement of what the arbitrators --

23 JUSTICE STEVENS: But the record does not  
24 contain --

25 MS. PILLARD: Got it.

1 JUSTICE STEVENS: -- the specific question  
2 that arbitrators were asked to answer. Is that correct?

3 MS. PILLARD: I --

4 JUSTICE STEVENS: Because I haven't been  
5 able to find it. I understand what they say they were  
6 asked to answer, but I thought there would be some  
7 document saying we've agreed to this supplemental  
8 arbitration agreement, which is going to define what the  
9 answer -- what is the question you have to answer.

10 MS. PILLARD: Right. Well, the supplemental  
11 agreement does --

12 JUSTICE STEVENS: Because I don't think,  
13 that -- from what I've been able to read, I don't think  
14 they were ever asked the question whether the agreement  
15 authorizes class action or class procedures. They were  
16 only asked to decide whether it either permitted it or  
17 precluded it, but is that what the question really was?

18 MS. PILLARD: Now, "permitted" I think they  
19 take to understand as "authorize," and the reason -- and  
20 this is something that the court, in the context of  
21 Sixth Circuit Dub Herring case, says -- they explain why  
22 do we use the language "permit"?

23 We use it because they are not saying  
24 whether we are actually going to use this power; we are  
25 just saying this power is available to you. But I

1 think, for purposes of whether the contract is giving  
2 the authority to the arbitrators, that "permitted" means  
3 "authorized."

4 JUSTICE STEVENS: See, as I understand it,  
5 in the supplemental agreement, they were asked a  
6 question about the meaning of the underlying arbitration  
7 agreement.

8 MS. PILLARD: Yes.

9 JUSTICE STEVENS: But I can't find what that  
10 specific question was, which seems, to me, answers the  
11 whole case, if we could find out what it is.

12 JUSTICE BREYER: There's a supplemental  
13 agreement here because I thought --

14 MS. PILLARD: Yes.

15 JUSTICE BREYER: -- in reading this, the  
16 supplemental agreement submitted the case under Rule 3  
17 --

18 MS. PILLARD: Yes.

19 JUSTICE BREYER: -- of the AAA, and it's  
20 supplement --

21 MS. PILLARD: Yes.

22 JUSTICE BREYER: -- rule 3 of the AAA  
23 supplementary rules says, an arbitrator shall, quote,  
24 "determine, as a threshold matter, in a reasoned,  
25 partial, final award, on the construction of the

1 arbitration clause, whether the applicable arbitration  
2 clause permits the arbitration to proceed on behalf of  
3 or against a class."

4 MS. PILLARD: Thank you.

5 JUSTICE BREYER: So I thought the  
6 supplemental agreement said --

7 MS. PILLARD: Thank you.

8 JUSTICE BREYER: -- apply Rule 3, and  
9 therefore, it was asking the arbitrators to decide the  
10 question put in Rule 3. Is that right?

11 MS. PILLARD: I think that's correct, yes.

12 JUSTICE BREYER: So then we could get the  
13 question by reading page 7 of the blue brief.

14 JUSTICE GINSBURG: Well, is that what's on  
15 56a of the joint appendix, Construction of the  
16 Arbitration Clause? That's what Mr. Waxman referred us  
17 to?

18 MS. PILLARD: Yes, that's right -- 56a of the  
19 --

20 JUSTICE GINSBURG: "Upon appointment, the  
21 arbitrator shall determine, as a threshold matter."

22 JUSTICE SCALIA: What page?

23 MS. PILLARD: Are you at -- on the buff --  
24 in the buff joint appendix? 56a?

25 JUSTICE GINSBURG: Yes. 56a.

1 MS. PILLARD: 56a. Exactly. It's -- I've  
2 bracketed it here. It's under heading 3, Construction  
3 of the Arbitration Clause.

4 "Upon appointment, the arbitrator shall  
5 determine, as a threshold matter, in a reasoned,  
6 partial, final award, on the construction of the  
7 arbitration clause, whether the applicable arbitration  
8 clause permits the arbitration to proceed on behalf of  
9 or against a class."

10 So the question put to them is: Is it  
11 permissible in that phase? And the question put to them  
12 in the next phase is: Do you actually want to use it in  
13 the context of this case?

14 I did want to address the language that --  
15 that Justice --

16 JUSTICE SCALIA: May I -- you know, that  
17 doesn't help me a lot. What does it mean, if it permits  
18 it? I mean, I guess you could say, if there's a  
19 background rule, that whether the parties agree to it  
20 or not, it's okay.

21 Does "permits it" mean "authorizes it"? Does  
22 -- does that mean whether the parties have agreed to it?  
23 Is that what "permits" mean there?

24 MS. PILLARD: In my view, it means it  
25 authorizes the arbitrators to choose. We are talking

1 here about a question of arbitration procedure, as this  
2 Court correctly characterized it in Bazzle.

3 And, typically, what you have is an  
4 arbitration clause that says you arbitrate any  
5 disputes and, as this one does, it doesn't incorporate any  
6 arbitration provider's rules; and, therefore, what you  
7 have is the arbitrators have to select the procedures.

8 CHIEF JUSTICE ROBERTS: If you and I have a --

9 MS. PILLARD: So they're not --

10 CHIEF JUSTICE ROBERTS: I'm sorry.

11 If you and I have a contract -- you're going  
12 to sell me a car, and we write up a contract and we  
13 enter into it, and it provides for arbitration if we  
14 have a dispute. I also buy a car from Mr. Waxman, and I  
15 Xerox that contract. It's the exact same contract.

16 We have a dispute, and we go to arbitration.  
17 Can Mr. Waxman come in and say, I got the same contract,  
18 and I've got the same dispute. Arbitrate with me, too?

19 MS. PILLARD: I would say that if  
20 you have -- well, if they've chosen the arbitrator and  
21 we have chosen the arbitrator, and it's the same  
22 arbitrator and the arbitrator wants to put them  
23 together, under this language, I would say the  
24 arbitrator does have the authority to do that, yes.

25 CHIEF JUSTICE ROBERTS: Okay. Now, suppose

1 I have a contract just with you and -- to arbitrate --  
2 or I -- I have the same contract with Mr. Waxman, but  
3 it has no arbitration clause.

4 And he says, well, the dispute is the same,  
5 you are arbitrating that, can I come in, too, and get  
6 bound by your decision?

7 MS. PILLARD: I would say no.

8 CHIEF JUSTICE ROBERTS: You would say no.  
9 And the reason is?

10 MS. PILLARD: He doesn't have an arbitration  
11 agreement with you.

12 CHIEF JUSTICE ROBERTS: Not that I -- he  
13 doesn't have any arbitration agreement with me or that  
14 it's not the same arbitration agreement?

15 MS. PILLARD: He doesn't have an arbitration  
16 agreement that has the same language, that has -- the  
17 same or substantially similar language giving the  
18 arbitrator the authority to use class procedures.

19 CHIEF JUSTICE ROBERTS: Let's say the intent  
20 is pertinent when we enter into the contract, okay? And  
21 there's good evidence about what you and I meant the  
22 contract to mean, and there's not any evidence about  
23 what Mr. Waxman and I meant the contract to mean. Say  
24 we've got an arbitration clause in both cases.

25 Can we arbitrate -- can I be required to



1 arbitrate Mr. Waxman's contract with -- along with the  
2 one that you and I have entered into?

3 MS. PILLARD: I think your question is  
4 getting to we have evidence of subjective intent here  
5 and none there, but the New York law, as is the law in  
6 many jurisdictions, is an objective intent standard, so  
7 you look to the language as evidence of intent.

8 And on this intent question, I did just want  
9 to respond to a question that Justice Alito had asked  
10 Mr. Waxman about Mr. Persky saying there has been no  
11 agreement that has been reached on this issue, which is  
12 in the joint appendix, the buff-colored appendix, on page  
13 77a.

14 Now, he clarifies in the next sentence that  
15 what he -- what he is speaking to there is there has  
16 been no agreement to bar class arbitrations, right? But  
17 this is in the context of disputes over whether this  
18 maritime expert witness testimony is going to be  
19 admitted. And I think it's very clarifying that two  
20 pages later, at page 79a of the joint appendix, Mr.  
21 Persky expressly makes the argument that we believe the  
22 arbitrators adopted, which is that the arbitration  
23 clause here contains broad language, and this language  
24 should be interpreted to permit class arbitrations. And  
25 at the end of the following paragraph he continues:

1 "Use of 'any' normally means all and includes class  
2 arbitration" except -- "unless expressly excluded." So  
3 he is two pages later making --

4 JUSTICE SCALIA: What page -- what page are  
5 you quoting from?

6 MS. PILLARD: I'm -- I'm sorry. I'm quoting  
7 from the buff-colored joint appendix at page 79a around  
8 the middle of the page and then in the following  
9 paragraph.

10 So he's clearly making the argument here,  
11 and he doesn't make it in the brief that Mr. Waxman  
12 cited.

13 And I think the arbitrators correctly  
14 rejected the -- the Respondents' framing of that issue  
15 and actually went further, as they say in their opinion.  
16 They didn't think that those were adequate grounds to  
17 rule for the Respondents, for us. They thought they had  
18 to find an intent in the contract. And then Mr. Persky  
19 does make that argument, which I think is the winning  
20 argument, here on page 79a. Now --

21 JUSTICE GINSBURG: May I -- may I ask  
22 you this question? Let's assume that you prevail in  
23 this case. I -- I would assume that the tankers are now  
24 going to add to their contract, as many contracts do, a  
25 provision saying no class action -- you cannot proceed in

1 a class action. If the arbitration agreement says  
2 agreed to arbitrate any and all disputes, but you may  
3 not proceed on behalf of a class, would that preclude  
4 you from bringing a class action any place?

5 MS. PILLARD: I think it would if -- and if  
6 the -- that might be the exact kind of fact situation  
7 that if the arbitrators somehow ignored that in reading  
8 the contract and said, oh, you -- we still have the  
9 authority to authorize a class, that is the kind of  
10 thing that under this very deferential standard of  
11 review might be exceeding their powers.

12 JUSTICE GINSBURG: There are many, many  
13 contracts -- and pick up your average credit card  
14 agreement -- that will say you may not bring this as a  
15 class.

16 MS. PILLARD: Many such contracts, and  
17 indeed there are contracts that started doing that back  
18 in the '90s. I think the case before -- Discover Bank  
19 is a party that started to put express no-class-action  
20 terms.

21 JUSTICE GINSBURG: But then you won't get --  
22 you win this case, but then all the future AnimalFeeds  
23 lose because they'll just put in the arbitration  
24 agreement you can't proceed on class.

25 MS. PILLARD: That's right. But at least it

1 was incumbent on them to do that here if this was  
2 something that they were so concerned about would be  
3 such a burden on them. And the fact that they did not  
4 do that, even though class arbitration has been  
5 something that has been happening actively in California  
6 for at least a quarter century -- this is one of the  
7 largest, you know -- with an economy --

8 JUSTICE SCALIA: Not in this industry,  
9 however.

10 MS. PILLARD: I'm not so sure. I mean, we  
11 don't have evidence that -- that it has been going on,  
12 no, because this is a --

13 JUSTICE SCALIA: Yes.

14 MS. PILLARD: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Waxman, why don't you take 2 minutes?

17 REBUTTAL ARGUMENT OF SETH P. WAXMAN

18 ON BEHALF OF THE PETITIONERS

19 MR. WAXMAN: Okay. Three points, so I will  
20 take 25 seconds for each point.

21 First of all, these contracts in the class  
22 are not all the same. These are form contracts that are  
23 drafted by the charterers and their brokers, and they  
24 involve different clauses, including different  
25 arbitration clauses.

1           The second point, the Rule 3, I think,  
2   fairly does encapsulate the question that the parties  
3   presented to the Court, which is to construe the  
4   contract, the question that the Bazzle plurality sent  
5   back. The AAA amicus brief in this case, which I  
6   commend to the Court, on behalf of no party says over and  
7   over and over again, we drafted the rules to provide  
8   procedures to answer the Bazzle contract question. We  
9   have no opinion about the answer to the Federal  
10   statutory question that arises if the answer to the  
11   -- the meeting-of-the-minds question is no meeting of the  
12   minds as a matter of contract law.

13           And if you find -- and much of the  
14   discussion this morning has focused on this -- that,  
15   well, somehow the arbitrators did just decide the  
16   meeting-of-the-minds question, they didn't decide the  
17   legal consequences of no meeting of the minds, then just  
18   as in Keating and as in Bazzle, you will not be able to  
19   reach the very important, fundamental FAA statutory  
20   question in this case. And the next generation of  
21   lawyers will come before you or your successors to get  
22   it answered.

23           Now, as to the contract question, I do want  
24   to address your point, Justice Breyer, about the  
25   toolbox. It is true that in answering the contract --

1    what is -- what did the parties intend?  Was there  
2    really a meeting of the minds here?  And, by the way,  
3    let me just say that when Ms. Pillard says, well, we  
4    don't know whether the parties in this industry agreed  
5    or disagreed, all of the -- the evidence was undisputed  
6    that since the days of Marco Polo the background  
7    principle in maritime law has been bilateral, rigorously  
8    bilateral.

9                   CHIEF JUSTICE ROBERTS:  Thank you, counsel.

10                  The case is submitted.

11                  (Whereupon, at 11:04 a.m., the case in the  
12    above-entitled matter was submitted.)

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