No. 08-1198

IN THE

Supreme Court of the United States

STOLT-NIELSEN S.A.; STOLT-NIELSEN TRANSPORTATION GROUP LTD.; ODFJELL ASA; ODFJELL SEACHEM AS; ODFJELL US, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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April 27, 2009

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest federation of businesses and associations, with an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every relevant economic sector and geographical region of the country. An important function of the Chamber is the representation of its members' interests by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

Many of the Chamber's members and affiliates routinely utilize agreements to arbitrate in their business contracts. By agreeing to arbitrate, they are able to avoid costly and time-consuming litigation over disputes arising out of and relating to these contracts by submitting to a streamlined, yet fair process based upon the mutual consent of the parties.

Unlike litigation, private arbitration is purely a matter of consent, not coercion. Compelling parties to resolve disputes through costly, time-consuming and high-stakes class arbitration, where the parties have not expressly agreed to do so, frustrates the parties' intent, undermines their existing agreements, and erodes the benefits offered by

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[1] Pursuant to Rule 37.6, no counsel for any party to these proceedings authored this brief, in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person, aside from the *amicus curiae*, their members, and their counsel, made any monetary contribution for the preparation or submission of this brief. Petitioners and respondent have consented to the filing of this brief, and letters reflecting such consent have been filed with the Clerk.

arbitration as an alternative to litigation. Simply put, imposition of class arbitration on a "silent" agreement is contrary to the central goal of the Federal Arbitration Act: To ensure that written agreements to arbitrate are enforced in accordance with the terms adopted by the parties.

The Chamber and its members thus have a vital interest in having this Court grant certiorari and reverse the decision below, which held that that class arbitration may be imposed by an arbitrator in a proceeding involving a "silent" arbitration agreement.

INTRODUCTION AND SUMMARY

In *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003) (plurality opinion), this Court granted review to consider whether the Federal Arbitration Act ("FAA") permits the imposition of class arbitration on an agreement to arbitrate that is "silent" as to whether the parties agreed to arbitrate on a class-wide basis. In *Bazzle*, however, this Court did not answer that question because a plurality of the Court concluded that the arbitrator, not a court, should have made the initial determination as to what the contract meant, *i.e.*, whether it was, in fact, "silent" as to class arbitration. *Id.* at 452-53 (plurality opinion). Further, the *Bazzle* Court had no occasion to address the standards that the arbitrator should apply in resolving whether class arbitration was appropriate in the face of a "silent" agreement. In the wake of *Bazzle*, arbitrators increasingly are being asked to determine whether to impose class arbitration in cases where the parties' agreement contains no language addressing the availability of class arbitration.

Under the FAA, private agreements to arbitrate must be "enforced according to their terms." *Volt*

Info. Scis. v. *Board of Trs.*, 489 U.S. 468, 479 (1989). As petitioners amply demonstrate, Pet. 9-15, the majority of federal circuit courts have concluded that the FAA prohibits *a court* from imposing class arbitration on a silent agreement because agreements to arbitrate under the FAA must be "enforced according to their terms." That conclusion should be no different when this issue is presented to an arbitrator. The command that agreements to arbitrate "shall be valid, irrevocable, and enforceable" is binding not only on courts, 9 U.S.C. § 2, but also on arbitrators who, under the FAA, are "bound to effectuate the intentions of the parties." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636 (1985).

This case presents an ideal opportunity for the Court to provide necessary guidance and ensure that arbitration agreements are interpreted by courts and arbitrators in a manner consistent with the requirements of the FAA. When the terms of the parties' arbitration agreement do not expressly provide for class-wide arbitration, neither courts nor arbitrators should be permitted to rewrite the parties' agreement by transforming the arbitration to which the parties actually consented into a "hybrid" proceeding that requires substantial "external supervision" by courts. *Keating* v. *Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982) *rev'd on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984); see also *Discover Bank* v. *Superior Court*, 113 P.3d 1100, 1106 (Cal. 2005) (class arbitration is a "hybrid procedure").

At its core, arbitration under the FAA is a "matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479. When parties agree to

arbitrate, they "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors*, 473 U.S. at 628. Imposition of class arbitration on a "silent" arbitration agreement violates the FAA's requirement that these agreements be placed on "equal footing" with other contracts negotiated with private parties. *Cf. Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

Under generally applicable contract law, a contract may not be rewritten to add terms that fundamentally transform the agreement when the parties themselves have not agreed to do so. Instead, an additional term may be supplied only when necessary and reasonable to effectuate the intent of the parties. It is neither necessary nor reasonable to assume – in the face of silence – that the parties intended to allow class arbitration because it would undermine many of the benefits of traditional arbitration and would present significant drawbacks to both defendants and absent class members. Indeed, imposition of class arbitration onto an agreement that makes no mention of it "would disrupt[] the negotiated risk/benefit allocation and direct[] [the parties] to proceed with a different sort of arbitration." *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (internal quotation marks omitted; alterations in original).

Finally, the need for review in this case is critical because the decision below, if permitted to stand, undermines congressional policy under the FAA, and erodes the benefits of arbitration as a quicker, more efficient and more informal alternative to litigation. Under the FAA, parties are entitled not only to choose arbitration over litigation, but "also the

procedure to be used in resolving the dispute." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). This Court's decision in *Bazzle*, however, is being misinterpreted to grant *carte blanche* to arbitrators to impose class arbitration when presented with a "silent" agreement that does not authorize such a fundamental transformation of the arbitral process. Given the narrow judicial review applicable to decisions of arbitrators under the FAA, *Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 128 S. Ct. 1396, 1403-05 (2008), the Court should provide necessary guidance by making clear that arbitrators and courts alike are bound by the FAA's core command rigorously to enforce arbitration agreements and thereby ensure that they are enforced in accordance with their terms.

ARGUMENT

REVIEW OF THE DECISION BELOW IS IMPORTANT TO ENSURE THE PROPER APPLICATION OF THE FAA AND THE CONTINUED VIABILITY OF PRIVATE AGREEMENTS TO ARBITRATE.

1. The FAA was enacted "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate" by placing them "'upon the same footing as other contracts.'" *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 219-20 (1985) (quoting H.R. Rep. No. 68-96, at 1 (1924)). In Section 2, Congress provided that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This broad provision – the "centerpiece" of the FAA – is "at bottom a policy guaranteeing the enforcement of

private contractual arrangements." *Mitsubishi Motors*, 473 U.S. at 625.

Under the FAA, arbitration agreements must be enforced and interpreted under the same principles of contract law applicable generally to any other contract. See, *e.g.*, *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 686-87 (1996); *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987). That core obligation applies both to courts as well as to arbitrators, who are "bound to effectuate the intentions of the parties." *Mitsubishi Motors*, 473 U.S. at 636; *accord 14 Penn Plaza LLC* v. *Pyett*, 2009 U.S. LEXIS 2497, at *28 (U.S. Apr. 1, 2009) ("'the arbitrator's task is to effectuate the intent of the parties'") (quoting *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 53 (1974)).

Like any contract, an agreement to arbitrate is "'a matter of consent, not coercion.'" *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (quoting *Volt*, 489 U.S. at 479). And, as with any contract, "parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479. Parties may choose to limit the types of claims subject to arbitration, see *Mitsubishi Motors*, 473 U.S. at 628, or they may select particular rules and procedures that will govern the manner in which their arbitration proceeds, see *Volt*, 489 U.S. at 479; *Scherk*, 417 U.S. at 519. The FAA does not mandate or prefer any specific set of rules; rather, whatever terms the parties choose, the "primary purpose" of the FAA is "ensuring that private agreements to arbitrate are enforced *according to their terms*." *Volt*, 489 U.S. at 479 (emphasis added).

2. Under generally applicable contract law, parties are bound by the terms of their agreement, and those agreements may not be rewritten by courts or arbitrators to add provisions that the parties could

have included, but did not.[2] Instead, when the terms of an agreement are "silent" on a matter, an additional term may be supplied only if (i) "essential to a determination of [the parties'] rights and duties," *and* (ii) "reasonable in the circumstances." See *Restatement (Second) of Contract Law* § 204 (1981). Put another way, under generally applicable contract law, terms may be added to a "silent" agreement only where "the parties must have intended them and must have failed to express them only because of sheer inadvertence or because they are too obvious to need expression." 11 Richard A. Lord, *Williston on Contracts* § 31:7 (4th ed. 1999).

For example, under the FAA, courts have repeatedly rejected claims that an arbitration agreement cannot be enforced because it fails expressly to state that, by agreeing to arbitrate, the parties are waiving their right to a jury trial. *E.g.*, *Pierson* v. *Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984) ("loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate").[3] In such cases, an

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[2] *E.g.*, *Vermont Teddy Bear Co.* v. *538 Madison Realty Co.*, 807 N.E.2d 876, 879 (N.Y. 2004) ("[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.") (internal quotation marks omitted); *Apra* v. *Aureguy*, 361 P.2d 897, 899 (Cal. 1961) ("In construing a contract which purports on its face to be a complete expression of the entire agreement, courts will not add thereto another term, about which the agreement is silent.") (internal quotation marks omitted).

[3] *See also Snowden* v. *Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (jury trial waiver, though not expressly provided, was implicit as a "'necessary'" and "'obvious'" consequence of the arbitration agreement); *Robert Bosch Corp.* v. *ASC, Inc.*, 195 F. App'x 503, 507 (6th Cir. 2006) ("the loss of

agreement to arbitrate necessarily, reasonably and obviously implies a waiver of a jury trial. The parties' "silence" on this issue is of no moment; it is "too obvious to need expression." *Williston on Contracts* § 31:7.

In contrast, the decision whether to consent to class arbitration fundamentally alters the scope, the stakes, and the character of the parties' agreement to arbitrate. Class arbitration reflects a stark break from traditional arbitration, whereby a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors*, 473 U.S. at 628. Indeed, agreements to arbitrate often provide an attractive alternative to litigation because "streamlined proceedings and expeditious results will best serve [the parties'] needs" and will "keep the effort and expense required to resolve a dispute within manageable bounds." *Id.* at 633.

Imposition of class arbitration on a "silent" arbitration agreement undermines these well-established benefits of arbitration. As the California Supreme Court has recognized, class arbitration "entail[s] a greater degree of judicial involvement than is normally associated with arbitration," which is "ideally a complete proceeding, without resort to court facilities." *Keating*, 645 P.2d at 1209 (internal quotation marks omitted). Instead, class arbitration is a "hybrid" procedure that requires judicial intervention concerning "certification and notice to the class" and "external [court] supervision . . . to safeguard the rights of absent class members to adequate representation and in the event of dismissal

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the right to a civil jury trial is a fairly obvious consequence of failing to object to an arbitration clause and, therefore, does not require an express waiver") (internal quotation marks omitted).

or settlement." *Id.*; see also *Discover Bank*, 113 P.3d at 1106.

3. To be sure, parties to an agreement can, subject to due process constraints, expressly agree to arbitrate their disputes on a classwide basis. See *Volt*, 489 U.S. at 479. The question here, however, is whether a term compelling class arbitration can be added to a "silent" agreement on the assumption that (i) class arbitration is something the parties "must have intended" or (ii) the parties' agreement to class arbitration is "too obvious to need expression." Quite simply, it is unreasonable to make such an assumption about the parties' intent.

At the outset, the very concept of class arbitration is a relatively recent development. Although the FAA was enacted in 1925, the first serious analysis of class arbitration occurred more than 50 years later, when the California Court of Appeal addressed the question whether class arbitration was even possible and, if so, what sort of extraordinary protections courts would need to provide. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 38 (2000) (citing *Keating* v. *Superior Court*, 167 Cal. Rptr. 481 (Cal. Ct. App. 1980), *vacated*, 645 P.2d 1192 (Cal. 1982), *rev'd on other grounds sub nom. Southland Corp.* v. *Keating*, 465 U.S. 1, 16 (1984)). In light of this limited commercial history of class arbitration, including, until very recently, the lack of any guidance regarding how such an arbitration should actually proceed, it is highly unlikely that the parties to a "silent" arbitration agreement reasonably expected that they had

consented to class arbitration.[4] Moreover, it is exceedingly unlikely that the parties would have assumed that they could be compelled to submit to class arbitration absent an *express* agreement to do so because, before 2003, the overwhelming majority of courts to consider the issue had ruled that class arbitration could not be compelled in the face of a "silent" agreement. See Pet. 9-12 (citing cases).

Further, classwide arbitration imposes such significant burdens on the parties that it would be unreasonable to presume that they have agreed, *sub silentio*, to resolve disputes in a classwide proceeding before an arbitrator. In litigation, class actions under Federal Rule of Civil Procedure 23 "allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano* v. *Yamasaki*, 442 U.S. 682, 700-01 (1979). By enabling a class representative to prosecute an action on behalf of absent class members, judicial class actions enable a court to issue an order that is binding on all members of the class. See *Hansberry* v. *Lee*, 311 U.S. 32, 40-41 (1940) (class actions are a "recognized exception" to the "principle of general application in Anglo-American

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[4] The American Arbitration Association ("AAA") did not publish rules addressing class arbitrations until 2003, after this Court's ruling in Bazzle. See AAA, Supplementary Rules for Class Arbitrations (effective date Oct. 8, 2003), *available at* http://www.adr.org/sp.asp?id=21936. The arbitration agreement at issue in this case, and the dispute that transpired under it, all predate the adoption of these rules. *See Stolt-Nielsen SA* v. *AnimalFeeds Int'l Corp.*, 548 F.3d 85, 87-88 (2d. Cir. 2008). After the district court held the dispute arbitrable, the parties agreed to be bound by AAA Supplementary Rules 3-7, which would then govern the arbitration panel's determination whether the arbitration agreement provided for class arbitration. *See id.*

jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process"). In so doing, judicial class actions protect defendants from the inconsistent obligations that might result from individual successive suits by each class member. See *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 402-03 (1980).

The defendant in a class arbitration brought by a single claimant under a "silent" arbitration agreement may not be afforded this same protection. Arbitration is a matter of contract, and "[i]t goes without saying that a contract cannot bind a nonparty." *Waffle House*, 534 U.S. at 294. Where each class member's contract expressly provides for class arbitration, each may be obligated to submit to binding class arbitration under the representation of another. But, where each contract is "silent" on the issue of class arbitration, the absent class members may very well argue that they did not consent to having their claims prosecuted by a class representative before arbitrators who were not selected in accordance with their individual contracts. *Cf. Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. at 52, 57 (1995) ("the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties").[5]

These concerns are compounded by the heightened stakes associated with the aggregation of hundreds or

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[5] Absent class members also might attempt to avoid the consequences of an adverse class-wide determination by arguing that the arbitration process did not provide them with sufficient due process protections to bind them to the results. *Cf. Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-12 (1985).

thousands of individual claims in a single proceeding. Class arbitration has the effect of "concentrating all of the risk of substantial damages awards in the hands of a single arbitrator." *Bazzle*, 539 U.S. at 459 (Rehnquist, C.J., dissenting). As such, the outcome of a single arbitration could have dramatic consequences for a defendant. In such a high-risk setting, effective appellate review is essential. Thus, in a judicial class action, the potential for enormous liability is tempered by a more liberal provision for interlocutory appeals that enables a party to seek an appeal not just from the final judgment, but also specifically the class certification decision. See Fed. R. Civ. P. 23(f).

Under the FAA, however, even if the parties to a class arbitration were permitted to take interlocutory appeals at various stages of the proceedings, the review under the FAA would remain limited in scope. Under this Court's decision last Term in *Hall St. Associates, L.L.C.* v. *Mattel, Inc.*, Sections 10 and 11 of the FAA contain the grounds for appealing an arbitral decision under that statute, and parties may not supplement those terms by contract. 128 S. Ct. at 1403. Thus, although an arbitral award may be vacated on grounds such as corruption, fraud, or misconduct, 9 U.S.C. § 10, "judicial scrutiny of arbitration awards necessarily is limited." *Shearson/ American Express, Inc.* v. *McMahon*, 482 U.S. 220, 232 (1987). Although this trade-off between efficiency and procedural protections might be attractive to a party expecting to deal with a single claim, the trade-off makes little, if any, practical sense when the outcome of a single arbitration has classwide consequences.

Likewise, it would be unreasonable in the extreme to assume that absent class members would have

consented to class arbitration absent an express provision in the parties' agreement. For absent class members to be bound by class proceedings, they must be afforded baseline procedural due process protections. See *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-12 (1985). Due process requires that the court supervise class representation to ensure that "the named plaintiff at all times adequately represent[s] the interests of the absent class members." *Id.* at 812 (citing *Hansberry*, 311 U.S. at 42-43, 45). In a class arbitration, however, the arbitrators are selected by the named parties, and the absent class members may legitimately object that the arbitrators were selected without any input from them. See Sternlight, *supra* at 113 ("it is difficult to see how such an arbitrator would play the role of the court in checking possible self-dealing").

Moreover, given the limited appellate review that the FAA affords – and that cannot be expanded even by the agreement of the parties, see *Hall St.*, 128 S. Ct. at 1403-05 – absent class members could be left in a situation in which the courts may be unable to correct errors in a decision by arbitrators they did not select and before whom their representation may not have been adequate. There is little reason to assume that absent class members would have consented to such treatment of their claims without saying so expressly in their agreement to arbitrate.[6]

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[6] Although the binding effect of class arbitration on absent class members is not settled, to be effective, class arbitration proceedings nonetheless must operate under the premise that their results will resolve issues on a class-wide basis. *See, e.g.*, AAA *supra*, R. 8(a)(3) ("The arbitrator may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable,

4. Even if a State's law would allow class arbitration to be superimposed on a "silent" agreement to arbitrate, the FAA requires that agreements to arbitrate be enforced in accordance with generally applicable contract principles. See *Perry*, 482 U.S. at 493 n.9 ("[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally") (emphasis in original); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995) (FAA's displacement of conflicting state law is "well-established").

In such instances, this Court has invalidated state laws that frustrated the parties' agreement to arbitrate. See, *e.g.*, *Preston* v. *Ferrer*, 128 S. Ct. 978, 981 (2008) (FAA supersedes state law requiring parties to a valid arbitration agreement instead to submit disputes under that statute to an administrative agency); *Doctor's Assocs.*, 517 U.S. at 683 (FAA supersedes state law invalidating arbitration agreements that are not noticed on the first page of a contract); *Perry* 482 U.S. at 491-92 (FAA supersedes state law providing that state law actions for the collection of wages may be maintained without regard to any arbitration agreement); *Southland Corp.* v. *Keating*, 465 U.S. 1, 16 (1984) (FAA supersedes state law requiring judicial consideration of claims brought pursuant to that statute regardless of parties' agreements to arbitrate).

Significantly, the FAA mandates displacement not only of rules that keep parties out of arbitration altogether, but also of arbitration-specific rules that

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and adequate."). Of course, without meaningful judicial scrutiny, the protections would be completely hollow.

allow arbitration to proceed, but superimpose terms to which the parties did not agree. See *Southland*, 465 U.S. at 13-14. Indeed, one of the problems that Congress sought to address in enacting the FAA was that state courts often would permit arbitration, but only pursuant to procedures supplied by state statute that did not accord with the parties' private agreements. See *id.* (citing Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong. 8 (1923)); see also *Scherk*, 417 U.S. at 519 (parties entitled to choose "the procedure to be used in resolving the dispute").

5. Finally, because generally applicable rules of contractual interpretation apply, the FAA does not permit "silence" to be treated as a license fundamentally to transform the parties' agreement into a class arbitration – whether that transformation is effected by a court or an arbitrator.

Prior to this Court's decision in Baz*zle*, the Court of Appeals for the Second Circuit (in addition to others) had held that the FAA prohibits a compelled class arbitration when the agreement is silent, and thus a district court is without power to compel class arbitration under such an agreement. *Government of U.K. of Gr. Brit.* v. *Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993); see also *Glencore, Ltd.* v. *Schnitzer Steel Prods. Co.*, F.3d 264, 268 (2d Cir. 1999). In the post-*Bazzle* decision below, however, the Second Circuit permitted a panel of arbitrators to do precisely what it held a district court could not do. *Stolt-Nielsen SA* v. *AnimalFeeds Int'l Grp.*, 548 F.3d 85, 99 (2d Cir. 2008). But *Bazzle*, as it was decided, was a case about the identity of the decision-maker, not the rule of decision. 539 U.S. at 452-53 (plurality opinion).

Changing the decision-maker from the court to the arbitrator does not affect the substantive rules to be

applied. See *McMahon*, 482 U.S. at 232 (arbitrators must "follow the law"); *Mitsubishi Motors*, 473 U.S. at 628 (a party to an arbitration "does not forego the substantive rights afforded by the statute"). That essential point is critical because, as noted, the FAA limits the grounds on which a court may overturn an arbitral decision. See *Hall Street*, 128 S. Ct. at 1403-05.

The proceedings below offer a perfect illustration. The Second Circuit misinterpreted *Bazzle* as muddying the clear law explained in *Boeing* and *Glencore*, and incorrectly held that *Bazzle* "abrogated these decisions to the extent that they read the FAA to prohibit" class arbitration on "silent" agreements. *Stolt-Nielsen*, 548 F.3d at 100. Having made this error, the court below ruled that it was obligated to defer to the arbitrators' determination. *Id.* at 99. Under this misreading of *Bazzle*, parties to arbitration agreements are faced with the prospect that arbitrators will impose class arbitrations based on inadequate decisional guidance and thus substitute coercion for consent, in violation of the core requirements of the FAA.

* * * *

Under the FAA, imposition of class arbitration in the face of a "silent" agreement is contrary to generally applicable contract standards, which prohibit agreements from being rewritten to add terms that the parties could have included, but did not. It is patently unreasonable to conclude that parties to an arbitration contract agreed to alter fundamentally the nature, the stakes, and the costs and benefits associated with traditional arbitration without ever saying so in their contracts.

CONCLUSION

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

Respectfully submitted,

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April 27, 2009

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