

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. :

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9 Washington, D.C.

10 Wednesday, December 9, 2009

11

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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P R O C E E D I N G S

(10:02 a.m.)

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

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN
ON BEHALF OF THE PETITIONERS

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

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

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

The decision to impose class proceedings is not the kind of incidental procedural matter that 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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