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 USA, INC.; JO TANKERS B.V.; JO TANKERS, INC.; TOKYO MARINE CO., LTD.,

Petitioners,

v.

ANIMALFEEDS INTERNATIONAL CORP.,

Respondent.

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

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

This case presents two threshold questions concerning whether the district court had the authority to entertain Stolt-Nielsen's petition to vacate the arbitration panel's preliminary clause-construction ruling:

1. Is the case ripe for review?
2. Is the clause-construction ruling an "award" subject to vacatur under the Federal Arbitration Act?

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a national consumer advocacy organization founded in 1971, appears on behalf of its members before Congress, administrative agencies, and the courts on a wide range of issues and works toward enactment and effective enforcement of laws protecting consumers, workers, and the general public.

Public Citizen supports legislative efforts to reform mandatory arbitration because forced arbitration, which has become ubiquitous in consumer transactions, deprives consumers of the chance to hold corporations accountable in court. Absent such reform, class arbitration is, in many cases, the only practical mechanism within the mandatory-arbitration regime by which aggrieved parties can realistically obtain relief. Where, as here, the scale of alleged wrongdoing is great, and the transactions complex, one-on-one arbitration may be economically impractical or, at best, inefficient. That result is even more likely in matters involving large numbers of consumer transactions, where each transaction may involve a relatively small amount of money. Accordingly, where class arbitration is unavailable, not only may resource-rich corporate defendants evade justice in the courts, they may evade justice altogether. Moreover, unwarranted and premature judicial interference in class arbitration proceedings will add to the burdens imposed on claimants seeking to enforce their legal rights using the class-action device.

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[1] Pursuant to Rule 37.6 of this Court, amicus curiae states that this brief was not written in whole or in part by counsel for a party and that no one other than amicus curiae made a monetary contribution to the preparation or submission of this brief. Letters from both parties consenting to all amicus briefs are on file with the Clerk.

STATEMENT

This matter arose in 2003 when respondent Animalfeeds, Inc., a supplier of protein and fat ingredients to animal-feed producers worldwide, claimed violations of the Sherman Act against a number of oceanic cargo shipping entities that had allegedly manipulated the global market for parcel tanker shipping services, including Stolt-Nielsen S.A. and the other petitioners (collectively, "Stolt-Nielsen").

The parties' briefs detail at length the procedural history of the case. Suffice it to say that at Stolt-Nielsen's urging, and upon order of the court of appeals,[2] Animalfeeds submitted its Sherman Act claims to binding arbitration and sought to arbitrate on a classwide basis.

At the threshold, the parties disputed whether their agreements, which did not in so many words address class proceedings, permitted class arbitration. They therefore agreed to submit that issue to the arbitration panel for decision as a prerequisite to a possible request to certify a class.

On December 20, 2005, after hearing evidence and argument, the panel issued its so-called "Partial Final Clause Construction Award," in which it determined no more than that the agreements permitted class arbitration. Stolt-Nielsen immediately filed an action in the United States District Court for the Southern District of New York seeking vacatur of the panel's ruling on clause construction under section 10(a)(4) of the Federal Arbitration Act ("FAA"). The district court vacated the panel's ruling, *Stolt-Nielsen S.A. v.*

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[2] *JLM Indus., Inc. v. Stolt-Nielsen, S.A.*, 387 F.3d 163 (2d Cir. 2004).

Animalfeeds Int'l Corp., 435 F. Supp. 2d 382 (S.D.N.Y. 2006), but the court of appeals reversed. *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008).

SUMMARY OF ARGUMENT

Neither the district court nor the court of appeals should have addressed Stolt-Nielsen's premature effort to obtain federal court review of the arbitrators' preliminary ruling on a procedural matter, and neither should this Court.

Judicial review of a ruling that addresses but does not itself even definitively resolve an issue relating to the future conduct of an arbitration contravenes the principle that only "ripe" controversies are justiciable in the federal courts. The speculative harm Stolt-Nielsen fears—the cost and procedural complexity that it attributes to class arbitration—may never come to pass. Review is premature where neither the parties nor this Court can predict whether the panel ever will certify a class for classwide arbitration.

The prematurity of such review is underscored by the careful limits that Congress has placed on judicial review of arbitration decisions, which are generally not reviewable until they result in a final award resolving the merits of some controversy submitted to the arbitrators.

The FAA provides that, upon issuance of an arbitration "award," courts have power to vacate, modify, or confirm it. But only issuance of the "award" triggers this judicial power. The FAA thus limits the authority of district courts to entertain petitions to vacate, modify, or confirm arbitral rulings. Preliminary decisions and procedural orders—including discovery orders, rulings addressing the time or location of arbitration, and decisions determining what set of rules

shall apply in arbitration—are not "awards" and therefore are not subject to immediate judicial review.

The panel's ruling on clause construction in this case falls into that category; it is a preliminary decision, not an "award." The ruling is not subject to immediate judicial review, and the district court had no authority to decide Stolt-Nielsen's petition to vacate.

Moreover, strong and longstanding policies against piecemeal review generally, and against repeated judicial interference in arbitration specifically, militate against judicial intervention at this preliminary stage of arbitration. Interlocutory appeals stymie arbitral efficiency and strain an already overworked judiciary. Better to postpone judicial review of a ruling on clause construction until at least the class-certification stage, or later, than to micromanage the arbitrators' every move.

Given this Court's unanimous holding in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), that orders concerning class certification are not final orders immediately appealable under 28 U.S.C. § 1291, permitting review of an arbitral ruling on clause construction—a ruling issued *prior to* one on class certification—creates an anomaly: greater opportunity for judicial review in arbitration than in litigation. Inviting such an untoward result does violence to the entrenched policy opposing piecemeal review and to the legislative preference for minimal judicial interference in arbitration.

Because the panel's clause-construction ruling was not ripe for review and did not satisfy the statutory prerequisites for review under the FAA, this Court should vacate the judgment of the court of appeals and remand with instructions for it to vacate the judgment of the district court.

ARGUMENT

I. The Case Is Not Ripe for Judicial Review.

This case is not ripe for review. Designed to avoid "premature adjudication," *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), ripeness is a justiciability doctrine that both implements Article III's case-or-controversy requirement and reflects additional, prudential considerations that require the federal courts to refrain from premature intervention in a nascent legal dispute. *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003). Even in its prudential form, ripeness is a doctrine that the Court may invoke on its own initiative, regardless of whether it has been raised and decided below. *Id.*

"A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)). Where the likelihood of harm is speculative, this Court has found cases unripe. *See, e.g.*, *Nat'l Park Hospitality Ass'n*, 538 U.S. at 811; *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 59 n.20 (1993); *Poe v. Ullman*, 367 U.S. 497, 508 (1961). And if "no irremediable adverse consequences flow from requiring a later challenge," judicial intervention may be premature. *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967).

This Court has previously declared review premature where arbitrators had yet to render definitive rulings. For example, in *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 406-07 (2003), "mere speculation" that arbitrators would interpret ambiguous contractual provisions one way rather than another made judicial

intervention premature. Similarly, in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995), interlocutory review was premature when the Court could not predict what law the arbitrators would apply to the claims at hand.

Judicial review is likewise premature here because it remains speculative whether the arbitrators will order class proceedings. Class arbitration is a contingent future event that may not occur at all. As the Sixth Circuit observed in *Dealer Computer Servs., Inc. v. Dub Herring Ford*, 547 F.3d 558, 561 (6th Cir. 2008), a ruling on clause construction permitting class arbitration does not conclusively determine that claims *should* proceed as a class arbitration. Because class certification is "far from certain," *id.* at 562, the hardship Stolt-Nielsen fears is speculative at best.

In this respect, the case is similar to *Toilet Goods*, a case this Court found unripe. There, the regulations at issue *permitted* the Commissioner of Food and Drugs to order inspections of certain facilities, but the Court had "no idea whether or when such an inspection" would be ordered. *Toilet Goods*, 387 U.S. at 163. Here, similarly, the clause-construction ruling *permits* arbitration on a classwide basis, but neither the Court nor the parties can predict whether, when, or under what conditions the panel will certify a class. In the meantime, Stolt-Nielsen's complaints reduce to a reluctance to submit to even the *possibility* of class arbitration pure and simple.

It was, however, *Stolt-Nielsen* that sought to compel arbitration. Now, dissatisfied with the someday prospect of arbitrating on a classwide basis, *it* seeks refuge in the courts while lamenting the "added layers of judicial review, and inevitable resulting delays" that it contends inhere in class arbitration. *See* Pet'r Br. 32.

Stolt-Nielsen portrays class proceedings as longer, more complex, and therefore anathema to arbitration's expediency. *See* Pet'r Br. 31. But, whatever their merits, those policy arguments would be better addressed not in the abstract, but in a case in which arbitrators have at least actually ordered class arbitration, explained why they have done so, and devised or applied procedures for the arbitration. Here, however, Stolt-Nielsen invites this Court to impose a categorical rule against class arbitration absent the parties' express assent, in a case in which nobody even knows whether class arbitration proceedings will ever happen. The Court should decline that invitation at this time.

In sum, review of the panel's ruling on clause construction is premature. If and when Animalfeeds actually seeks class certification, the panel may or may not certify a class. Amid such speculation, judicial intervention is premature. Indeed, not only is the issue not ripe for review, but, as explained below, the arbitrators' ruling is insufficiently final to justify review under the Federal Arbitration Act itself.

II. The FAA Authorizes Vacatur of an "Award," and a Preliminary Ruling That an Arbitration Agreement Does Not Preclude Class Arbitration Is Not an "Award."

A. The FAA Limits Courts' Authority to the Review of an "Award."

The Court's consideration of whether the issues are sufficiently ripe to justify judicial intervention should also reflect consideration of the congressional policy, reflected in the FAA, of limiting judicial review to final

arbitration decisions.[3] Sections 9 through 12 of the Act contemplate judicial review of the final "award" rendered in an arbitration. *See* 9 U.S.C. §§ 9-12 (2006). Although the statute does not define the term "award," the term's plain meaning, its use in the statutory structure, and its history all reveal that an "award" is a final determination on the merits of a controversy submitted to arbitration.

1. Text. Unless a statute specifies otherwise, courts presume that Congress intends to accord words their plain meaning. *See Morissette v. United States*, 342 U.S. 246, 263 (1952). In ordinary, everyday use, an "award" is "something that is conferred or bestowed [especially] on the basis of merit or need." *Merriam Webster's Collegiate Dictionary* 81 (10th ed. 1996).

"Award" also is a legal term of art with an established meaning, and so Congress' decision to adopt it "may be taken as satisfaction with widely accepted definitions" in the law. *Morissette*, 342 U.S. at 263. An "award" is "[a] *final* judgment or decision, [especially] one by an arbitrator or by a jury assessing damages." *Black's Law Dictionary* 147 (8th ed. 2004) (emphasis added). In 1933, shortly after passage of the FAA, Black's Law Dictionary likewise defined "award" as "the decision or determination rendered by arbitrators or commissioners, or other private or extrajudicial deciders,

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[3] In federal administrative law, for example, the requirement of final agency action is not only a nonjurisdictional element of the right of action provided by the Administrative Procedure Act, *see Trudeau v. FTC*, 456 F.3d 178, 184-85 (D.C. Cir. 2006), but also a part of the Court's consideration of whether an issue is justiciable under the ripeness doctrine. *See Abbott Labs.*, 387 U.S. at 149. The latter issue, as noted above, is cognizable on the Court's own motion even if not raised or decided below. *See supra* at 5.

upon a controversy submitted to them." *Black's Law Dictionary* 177 (3d ed. 1933). Tellingly, this definition suggests that arbitrators render one "award"—"*the* decision"—upon a "controversy."

Similarly, about a decade before the FAA's enactment, Anderson's Law Dictionary defined award as "the judgment of the arbitrator upon the matters submitted." *See Ernst v. McDowell*, 33 Ohio Cir. Dec. 91, 1911 WL 1658, at *3 (1911). This definition refers to "the" judgment, again presupposing one "award." And the definition's reference to the "*judgment*" on the "matters submitted" strongly indicates that the award is the arbitrators' final merits disposition of the entire matter presented to them.

These definitions together paint a unifying picture: The "award" is the arbitrators' final determination on the merits, disposing of some controversy submitted to arbitration.

2. Structure. The structure of the FAA supports this understanding of the term "award." The Court, of course, "read[s] statutes as a whole." *United States v. Morton*, 467 U.S. 822, 828 (1984). FAA sections 9 through 11 refer to "*the* award," contemplating one arbitration "award" rendered at the conclusion of arbitration. *See* 9 U.S.C. §§ 9-11 (emphasis added).[4]

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[4] In pertinent part, the statute refers to "the award":

"[A] judgment of the court shall be entered upon the award made pursuant to the arbitration.…" 9 U.S.C. § 9.

"[T]he United States court … may make an order vacating the award.…" *Id.* § 10.

"[T]he United States court … may make an order modifying or correcting the award.…" *Id.* § 11.

Section 9, moreover, demonstrates that an award is the arbitral equivalent of a final court judgment. Under section 9, unless the award has been vacated, modified, or corrected, a court *must* "confirm" it upon request of one of the parties. *Id.* § 9. By confirming "the award," the district court transforms it into an enforceable *judgment* of the court itself, appealable under 9 U.S.C. § 16(a)(1)(D) and 28 U.S.C. § 1291. The "judgments" of courts, of course, do not include non-final rulings on procedural matters. *See Holmes v. Jennison*, 39 U.S. 614, 625 (1840) (contrasting a "judgment" with "a decision on a collateral, or interlocutory point"). Rather, a "judgment" is generally a ruling that disposes of a case. *See Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948).

Section 10(a)(4), too, speaks to "finality." The statute authorizes vacatur of an arbitration "award" that purports to be "mutual, *final*, and definite," but is in fact not because the arbitrators have failed to discharge their duty. *See* 9 U.S.C. § 10(a)(4) (emphasis added); *see also Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980). The statute thus makes clear that a proper award must be mutual, *final*, and definite. An "award" that does not even purport to be final is no award at all.

3. History. Historically, a proper arbitration award was, among other things, "final" and "comprehend[ed] every thing submitted." Stewart Kyd, *A Treatise on the Law of Awards* 171, 208 (1808). In eighteenth-century British arbitration law, the term "final" embodied the core object of arbitration: "to prevent any future litigation on the subject of the submission." *Id.* at 208. Additionally, a proper arbitration award had to "comprehend every thing submitted, and must not [have] be[en] of parcel only." *Id.* at 171. In other words, the

award had to address all the matters submitted to arbitration; it had to be "complete."

The origin of section 10 of the FAA strongly indicates that it incorporates this concept of the award. Indeed, section 10's text can be traced to "such disparate sources as the Arbitration Act of 1698 and common law treatises by Blackstone, Chitty, and Kyd." Michael H. LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 2009 J. Disp. Resol. 1, 30-31. Language identical to section 10 also appears in mid-nineteenth century American case law. *See Taylor v. Sayre*, 24 N.J.L. 647, 1855 WL 4284, at *2-3 (N.J. 1855) (noting that the language "procured by corruption or other undue means," which today appears in section 10(a)(1), was "copied" from the 1698 Arbitration Act); *Emmet v. Hoyt*, 17 Wend. 410 (N.Y. Sup. Ct. 1837) (citing revisions to the 1791 New York arbitration act, the language of which mirrors word-for-word the text of section 10). So although the FAA was modeled on New York's 1920 Arbitration Act, *see Hall Street Assocs., LLC v. Mattel, Inc.*, 128 S. Ct. 1396, 1406 n.7 (2008), the precise language dates back much further, lending further support to the notion that "finality," long an integral aspect of a proper arbitration "award," is embodied in the FAA.

4. Judicial Interpretation. It is therefore no surprise that modern federal courts require that an arbitration "award" be "final"—that it resolve *all* claims or issues submitted to arbitration, or else fix the rights and obligations of the parties as to some separable claim or set of claims—before courts may review it. *See, e.g.*, *Fradella v. Petricca*, 183 F.3d 17, 19 (1st Cir. 1999); *Rocket Jewelry Box, Inc. v. Noble Gift Packaging, Inc.*, 157 F.3d 174, 176 (2d Cir. 1998).

In short, courts review *final* arbitration awards, and preliminary decisions and procedural orders are not final awards subject to immediate judicial review. Courts have identified discovery-oriented orders made in the early stages of arbitration, for example, as preliminary decisions or procedural orders, not "awards." *E.g.*, *Yonir Techs., Inc. v. Duration Sys. (1992) Ltd.*, 244 F. Supp. 2d 195, 206 (S.D.N.Y. 2002); *Yasuda Fire & Marine Ins. Co. of Europe Ltd. v. Cont'l Cas. Co.*, 840 F. Supp. 578, 579 (N.D. Ill. 1993). Likewise, decisions addressing the location of arbitration, *S. J. Groves & Sons Co. v. Am. Arbitration Ass'n*, 452 F. Supp. 121, 124 (D. Minn. 1978), the selection of rules applicable to arbitration, *Mobil Oil Indon., Inc. v. Asamera Oil (Indon.) Ltd.*, 372 N.E.2d 21 (N.Y. 1977), and the timeliness of a request for arbitration, *Ligon Nationwide, Inc. v. Bean*, 761 F. Supp. 633, 635 (S.D. Ind. 1991), have all been deemed interlocutory procedural rulings. None of them is an "award." Neither was an arbitrator's non-binding recommendation that a customer complaint be expunged from a broker-dealer's disciplinary record. *Karsner v. Lothian*, 532 F.3d 876, 886-87 (D.C. Cir. 2008) ("An expungement recommendation … is not an award and, accordingly, the district court is without section 9 authority to 'confirm' it."). Nor was an arbitrator's decision addressing standing and the applicability of the "first sale" doctrine an "award." *COKeM Int'l, Ltd. v. Riverdeep, Inc.*, Nos. 06-CV-3331, 06-CV-3359, 2008 WL 4417323, at *2-3 (D. Minn. Sept. 24, 2008).

These decisions make clear that not every ruling by an arbitrator is an "award." More important, only a "final" award is subject to immediate judicial review under the FAA. Whatever arbitrators decide, they must decide "the whole ball of wax" on at least one of the claims submitted to them before judicial review is

available. *Publicis Commc'n v. True North Commc'ns, Inc.*, 206 F.3d 725, 729 (7th Cir. 2000).

To be sure, section 16(a)(1)(D) of the FAA contemplates appeals where a district court has confirmed (or denied confirmation of) a "partial award," and some courts have reviewed "partial awards," but only where the arbitrator's decision "finally and definitively disposes of a separate, independent claim." *Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 283 (2d Cir. 1986). Those courts have created, in effect, what one judge called "an arbitration analogue to Rule 54(b)," which authorizes appeal of partial *final* judgments. *Id.* at 284 (Feinberg, C.J., dissenting). Courts that have allowed such review have not, therefore, deviated from the fundamental requirement that an award be a final, merits ruling appropriate for incorporation in a judgment of a court. Insofar as courts do review "partial awards," those "awards" are "final" in their resolution of a severable controversy.

B. The Panel's Clause-Construction Ruling Is Not an "Award."

The arbitration panel here interpreted a contract and issued a clause-construction ruling. That preliminary decision is not an "award."[5]

To begin with, the clause-construction ruling does not satisfy the ordinary definition of "award." Nothing was "conferred or bestowed." The panel merely determined the effect of the contract's "silence" with respect to class arbitration and left it to the parties to decide how, if at

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[5] Although the panel titled its ruling on clause construction a "Partial Final Clause Construction Award," the substance of an arbitral ruling—not its nomenclature—determines its status. *See Publicis Commc'n*, 206 F.3d at 728.

all, to proceed. The panel neither endorsed class arbitration in this case nor so much as hinted that arbitration *shall* proceed as a class arbitration. Further, the ruling looks nothing like the prototypical "award" of damages. In fact, the ruling is even more preliminary than discovery-oriented rulings. It is a mere contract interpretation on a procedural issue imposing no affirmative duties on either party.

Moreover, the panel's clause-construction ruling is not "final." At this stage of the arbitration, the panel has not yet ruled on any, let alone all, of Animalfeeds' Sherman Act claims. And although the panel ruled on one aspect of a discrete procedural issue, many more remain, including the issue of class certification itself. Nor does the ruling on clause construction fix the "rights and obligations" of the parties. The ruling does not *entitle* either party to class arbitration. It obligates neither party to commence class proceedings. Of course, either party may, if it chooses—and if it meets all other requirements for class arbitration—opt to request that the arbitrators certify a class. But in the wake of this clause-construction ruling, perhaps the parties may settle prior to initiating class arbitration. Or perhaps no class may be certified. Given the numerous paths the case could follow *after* a ruling on clause construction permitting class arbitration, the panel's ruling is not "final" no matter the test applied. Moreover, the ruling is not a reviewable partial award. Far from resolving a separate *claim*, the panel's clause-construction ruling is "merely a first step in deciding all claims submitted to arbitration." *Michaels*, 624 F.2d at 413.

Stolt-Nielsen argues that the scope, rules, and limitations of arbitration agreements must be rigorously enforced. Pet'r Br. 17. That may be so, but parties to arbitration cannot confer power on courts to review

matters that the FAA itself does not render reviewable. *Hall Street*, 128 S. Ct. at 1404 (no expansion by private contract of section 10 grounds to vacate). And although the relevant rules to which the parties agreed—the AAA Supplementary Rules for Class Arbitrations—envision the possibility of immediate judicial review of a clause construction ruling, J.A. 56a ¶3, AAA certainly has no more authority to confer power on district courts than do the parties. Congress alone has that authority. *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8, 9 (1799) ("[T]he disposal of the judicial power … belongs to congress.").[6]

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[6] In addition to being bound up with the Court's consideration of justiciability (*see supra* at 7-8 & n.3), the question whether the arbitrators' clause-construction ruling is a reviewable award within the meaning of FAA section 10 is "fairly included" within the question presented. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 56 (2006). The FAA finality issue is both a "predicate to an intelligent resolution" of the question presented, *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996), and "essential to the correct disposition of the other issues in the case." *United States v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980); *see, e.g.*, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 381 (1995) (threshold issue not raised below was fairly included because it was "impossible to consider" the question presented without addressing the "logically prior" issue). Stolt-Nielsen's entire case is premised on section 10(a)(4)'s grant of authority to federal courts to vacate the "award" where arbitrators have "exceeded their powers." *See* Pet'r Br. 14. The Court can logically and appropriately reach *that* question only if the clause-construction ruling at issue is in fact a reviewable "award" under section 10. It makes little sense to decide if the arbitrators "exceeded their powers" when they issued their clause-construction ruling if the FAA does not even authorize immediate judicial review of such a ruling at all. Absent a final award, the district court lacked statutory authority to consider Stolt-Nielsen's petition for

III. Premature Review of the Ruling on Clause Construction Would Frustrate Federal Policies Against Judicial Interference with Arbitration and Piecemeal Judicial Review.

Regardless of whether the issue is viewed from the standpoint of the ripeness doctrine or statutory authority for judicial review, interlocutory review of the panel's ruling on clause construction would frustrate strong, longstanding policies opposing unnecessary judicial interference in arbitration and opposing piecemeal review.

1. Once arbitration has been directed, minimal judicial interference in arbitration proceedings prevents delaying tactics and streamlines dispute resolution.[7] As this Court recently explained, sections 9 through 11 of the FAA are best seen as "substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[8] *Hall Street*, 128 S. Ct.

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vacatur, and this Court accordingly has no authority to consider it, either.

[7] The courts must, and do, retain full authority to consider "gateway" issues of arbitrability (including the enforceability of arbitration clauses under principles of state contract law) via their authority under sections 3 and 4 of the FAA to consider requests to stay proceedings pending arbitration and to compel arbitration. *See Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003). Once those issues have been judicially resolved and a matter held to be arbitrable, however, other issues such as arbitration procedure fall outside that category and are for decision by arbitrators in the first instance, with review as provided in the provisions for confirmation, vacatur, or modification of awards.

[8] This Court has made clear that review in the collective bargaining context is likewise limited. The rationale for

at 1405. After all, the purpose of the FAA was to "reverse the longstanding judicial hostility to arbitration agreements." *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 288-89 (2002). Arbitration, of course, is not litigation, and one of the main differences between the two is that "judicial review of an award is more limited than judicial review of a trial." *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 203 (1956). What this Court has said it does not want is "the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.'" *Hall Street*, 128 S. Ct. at 1405; *see also Metallgesellschaft*, 790 F.2d at 285 (Feinberg, C.J., dissenting) ("[Piecemeal review] will make arbitration more like litigation, a result not to be desired. It would be better to minimize the number of occasions the parties to arbitration can come to court; on the whole this benefits the parties, the arbitration process and the courts.").

2. In litigation as well "there has been a firm congressional policy against interlocutory or 'piecemeal' appeals[,] and courts have consistently given effect to that policy." *Abney v. United States*, 431 U.S. 651, 656 (1977); *see* 28 U.S.C. § 1291. That "finality" rule, which descends from the Judiciary Act of 1791, promotes judicial efficiency and deters "the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise." *Will v. Hallock*, 546 U.S. 345, 350 (2006) (internal quotations omitted).

"insulating arbitral decisions from judicial review" in that context is that "[i]f the courts were free to intervene …, the speedy resolution of grievances by private mechanisms would be greatly undermined." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987).

This Court's treatment of appellate review of district courts' class certification decisions is especially instructive. In *Coopers & Lybrand*, 437 U.S. at 468, the Court held that orders concerning class certification are not appealable final orders under 28 U.S.C. § 1291. Thus, "[a]n order passing on a request for class certification" does not fall within the collateral-order doctrine. *Id.* at 469. Neither, presumably, would a ruling similar to the arbitrators' clause-construction decision here, which is more preliminary than a class-certification decision. The clause-construction ruling, even more so than a class-certification ruling, is effectively reviewable at some later date.

To be sure, Federal Rule of Civil Procedure 23(f) was eventually promulgated in reaction to *Coopers & Lybrand* to give courts *discretion* to hear appeals of class-certification rulings, but the rulemakers quite pointedly did not exercise their authority under 28 U.S.C. § 2072(c) to define such rulings as "final" orders appealable as a matter of right under section 1291. Stolt-Nielsen, by contrast, urges that the preliminary-stage arbitral clause-construction ruling is immediately reviewable as a matter of right in federal district court under section 10 of the FAA, and that the district court's decision to vacate (or modify or confirm) is then itself appealable as a matter of right under section 16 of the FAA and section 1291. Presumably, Stolt-Nielsen would take the same position with respect to an arbitral class-certification ruling as well.

Stolt-Nielsen's position, then, posits two layers of review as of right at two separate points in the arbitrators' decisionmaking process with respect to class arbitration, anomalously affording much greater opportunities for review of class determinations in *arbitration* than in *litigation*. *Cf. Metallgesellschaft*, 790

F.2d at 285 (Feinberg, C.J., dissenting) ("[T]he function of arbitration should make considerations of finality even more compelling in arbitration than they are in conventional litigation."). Not even in litigation, where at least theoretically under the narrowly construed collateral-order doctrine there is a marginally greater tolerance for piecemeal review, do courts countenance such a significant departure from settled principles of finality. *Coopers & Lybrand*, 437 U.S. at 468-70.

In short, two longstanding federal policies—the aversion to piecemeal review and the aversion to judicial interference with arbitration—underscore the point that review of the panel's clause-construction ruling in this case cannot be squared with the limits imposed on judicial review of arbitration awards by the ripeness doctrine and by the FAA itself.

CONCLUSION

The Court should vacate the judgment of the court of appeals and remand with instructions for the court of appeals to vacate the judgment of the district court.

Respectfully submitted,

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