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 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE ASSOCIATION OF SHIP BROKERS & AGENTS (U.S.A.), INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Can a party to an ASBATANKVOY form of charter party be required to arbitrate disputes arising thereunder with non-parties pursuant to a theory of "class action status"?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES....iii
INTEREST OF AMICUS CURIAE....2
STATEMENT OF THE CASE....3
SUMMARY OF THE ARGUMENT....3
ARGUMENT....3
The ASBATANKVOY Form of Tanker Voyage Charter....4
The History of Clause 24-ARBITRATION....5
Proper Construction of the ASBATANKVOY....6
CONCLUSION....7

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Stolt-Nielsen v. Animalfeeds Int'l Corp., 548 F.3d 85 (2d Cir. 2008) 3

FEDERAL STATUTES

The Federal Arbitration Act, 9 U.S.C.
§ 3 6
§ 4 6

OTHER AUTHORITIES

Grant Gilmore Jr. & Charles L. Black, *The Law of Admiralty* (1957) 6

Thomas McCune, *The ASBATANKVOY Charter, An Analysis of Selected Clauses Together with Annotations of Arbitration Awards and Judicial Decisions* (Lloyd's of London Press Ltd. 1984) (1982) 4

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The Association of Ship Brokers & Agents (U.S.A.), Inc. ("A.S.B.A.") respectfully submits this brief *amicus curiae* in support of Petitioners. Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. All parties have consented to the filing of this brief, and their letters of consent will be filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

A.S.B.A. is a membership trade organization founded in 1934.* Its members consist of the leading ship brokers and agents in the United States. Its purpose is to foster and improve high standards of professional conduct and practices. A.S.B.A. promotes the interest of its members, in particular, and the ocean shipping industry, in general, in various ways. It conducts educational seminars, home study and on-line courses about the shipping business. It publishes a newsletter containing articles of current interest to its members.

Of particular relevance to this petition, A.S.B.A. maintains and causes to be published various standard form charter parties in common usage in the shipping business. One of these forms is a tanker voyage charter used throughout the tanker shipping industry and known by its code name ASBATANKVOY.

Clause 24, ARBITRATION, of the ASBATANKVOY, has now been interpreted by the Partial Final Clause Construction Award in the underlying arbitration and by the court of appeals in a manner which is contrary to the long-standing understanding of the tanker shipping industry that the clause provides for private arbitration of disputes between only those who are parties to the charter party. This class-arbitration interpretation has become a cause for concern amongst the tanker broker members of A.S.B.A. The decision has the potential of adversely affecting their business as many foreign principals would be reluctant to make charter parties in the United States if they could be forced to participate in class arbitrations.

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* Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or part, and no person other than the *amicus curiae* or its counsel made any monetary contribution to its preparation or submission.

For the reasons set forth below, it is in the interest of A.S.B.A. that the ASBATANKVOY have a consistent, universal interpretation of the arbitration clause that disputes arising under the charter party remain private disputes and not be subject to becoming involved in disputes arising under other charter parties for which the parties thereto have no concern.

STATEMENT OF THE CASE

Amicus Curiae A.S.B.A. adopts the statement of the case presented in the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The ASBATANKVOY form provides for private arbitration of disputes between the contract parties. The history and structure of the form, as well as long-standing commercial usage, clearly does not support the interpretation given by the arbitration panel and the court of appeals to Clause 24 permitting involuntary class arbitration.

ARGUMENT

At the outset, A.S.B.A. supports and agrees with the reasons for granting the petition set forth in the petition, but A.S.B.A.'s interest is broader and seeks to protect the integrity of the ASBATANKVOY form as well as the interests of its members and the very many companies that use and rely upon the form.

Until now, no panel of arbitrators has interpreted the ASBATANKVOY arbitration clause so as to permit class arbitration. Although the discussion in *Stolt-Nielsen v. Animalfeeds Int'l Corp.*, 548 F.3d 85 (2d Cir. 2008), focused on the interpretation of the clause, it must be understood that the arbitrators were appointed pursuant to a detailed agreement and not in accordance with the method set forth in the arbitration clause. Further, the arbitrators' authority is

initially limited to determining whether the ASBATANKVOY arbitration clause permits "this consolidated arbitration to proceed as a class arbitration." Pet. App. 52a.

The ASBATANKVOY Form of Tanker Voyage Charter

The ASBATANKVOY is one of the most universal and used charter parties in the ocean transportation of crude oil, petroleum products and liquid chemicals. *See* Thomas McCune, *The ASBATANKVOY Charter, An Analysis of Selected Clauses Together with Annotations of Arbitration Awards and Judicial Decisions*, 2 (Lloyd's of London Press Ltd. 1984) (1982) (detailing the prominence, origin, and history of usage of the ASBATANKVOY form charter party). The ASBATANKVOY is a private contract between two parties and the arbitration clause is designed to resolve any disputes that may arise between them.

The ASBATANKVOY form is divided into three parts, the Preamble, Part I, and Part II. *See* Appendix attached hereto (providing full text of the ASBATANKVOY Preamble, Part I, and Clause 24 of Part II).

The Preamble identifies the "Owner" and the "Charterer" and the name of the vessel that will perform the voyage.

Part I consists of lettered clauses "A" through "M." These clauses specify the description of the vessel, the voyage, the amount of cargo to be carried between the named loading and discharging ports, the applicable freight rate and related matters concerning the voyage.

Clause "K" of Part I states:

"The place of General Average and arbitration proceedings to be London/New York (strike out one)."

Part II consists of 26 numbered clauses of which Clause 24 is the arbitration clause. It is a long arbitration clause and sets forth in detail how the parties to the charter should commence and conduct the arbitration. *See* Appendix at 3a-4a (quoting full text of Clause 24). For present purposes, part of these provisions is that the arbitration shall be conducted "pursuant to the laws relating to arbitration there in force . . . ." Thus, if New York is stricken in Part I, then the arbitration takes place in London pursuant to English law.

The History of Clause 24-ARBITRATION

The ASBATANKVOY was first published by A.S.B.A. in October 1977. A.S.B.A. did not develop the form but, as will be explained, took it over from Exxon, as the company was then known. Exxon had used the identical form, including the arbitration clause, since 1969 in its form known as the EXXONVOY 1969. This form was used not only by Exxon but by many third parties, both owners and charterers. These third parties found the form to be fair and that it balanced the commercial interests of both sides. Subsequently, Exxon developed a new substantially different charter and let it be known that it would no longer support, print or otherwise make available the EXXONVOY 1969. The trade did not believe the new Exxon charter party was fair. As a result, A.S.B.A. agreed to take over, maintain, and publish the EXXONVOY 1969 and renamed it, without any change in wording, the ASBATANKVOY. The form has remained, again without any change in wording, in general usage to this day.

A.S.B.A. also maintains and has printed other charter party forms. One of them is the New York Produce Exchange, Government form, Time Charter, which dates back to 1913. As modified over the years, it is still in general usage in the dry cargo trades. It has an arbitration clause.

See Grant Gilmore Jr. & Charles L. Black, *The Law of Admiralty*, app. C at 802-09 (1957).

Proper Construction of the ASBATANKVOY

The concept and indeed potential reality of class actions under Clause 24 is fundamentally at odds with the singular wording and structure of the clause.

The Preamble specifies *the owner* and *the charterer* who are parties to the charter. Indeed, those named parties are the only ones who may petition the district court for an order compelling arbitration. Federal Arbitration Act, 9 U.S.C. §§ 3-4.

Under Clause 24, only "differences and disputes of whatsoever nature *arising out of this charter* . . . shall be put to arbitration . . . ." (Emphasis supplied.) Only the owner or charterer shall have the right to appoint an arbitrator and a second arbitrator in the event the other party fails to appoint its arbitrator within 20 days of the appointment of the first arbitrator. Only a party may designate the disputes to be heard.

Nothing in Clause 24 allows for or permits consolidation or designation as a class arbitration. The ordinary reasonable person involved in chartering ships under this form, or any other for that matter, would never consider reading into the clause wording that is not there. While the New York Procedures Agreement reached by the parties in this case limits the potential class to members who entered into charters which provide for New York arbitration, this potential class does include foreign companies.

The decision of the court of appeals is broadly worded and implies that any arbitration panel appointed in accordance with Clause 24 has the power to greatly expand those who may be permitted to arbitrate under the clause. While the underlying dispute here deals with anti-trust

matters, there is no reason why the rationale could not be expanded to many other areas of potential mass claims. Since almost every charter party in all the ocean transportation trades provides for arbitration, and A.S.B.A. is not aware of any that expressly excludes class arbitration, the potential for mischief is great.

This potential expansion would place a great burden of cost, time, and liability on a party who honestly believed that it had entered into a private contract with a private arbitration clause that could be used to settle disputes arising thereunder.

The potential harm to A.S.B.A. and its members and the foreign commerce of the United States is clear. There would be less fixing of charters in the United States as foreign companies would look elsewhere for their shipping contracts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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