No. 18-565

IN THE

Supreme Court of the United States

CITGO ASPHALT REFINING COMPANY; CITGO PETROLEUM CORPORATION; CITGO EAST COAST OIL CORPORATION,

Petitioners,

v.

FRESCATI SHIPPING COMPANY, LTD.; TSAKOS SHIPPING & TRADING, S.A.; UNITED STATES,

Respondents.

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

BRIEF FOR PRIVATE RESPONDENTS

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QUESTION PRESENTED

Whether petitioners' promise in a particular maritime contract to provide a safe port for respondents' ship was a warranty of safety or merely a promise to exercise due diligence.

RULE 29.6 STATEMENT

Respondents Frescati Shipping Company, Ltd. and Tsakos Shipping & Trading, S.A. have no parent companies, and no publicly held company owns more than 10% of their shares.

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TABLE OF AUTHORITIES

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Atkins v. Fibre Disintegrating Co.,
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Cities Serv. Transp. Co. v. Gulf Ref. Co.,
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Constantine & Pickering S.S. Co. v. W. India S.S. Co.,
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Gard Marine & Energy Ltd v. China Nat'l Chartering Co. (The Ocean Victory),
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The Gazelle & Cargo,
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Hastorf v. O'Brien,
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Leeds Shipping Co. v. Société Française Bunge (The E. City),
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M. & J. Tracy, Inc. v. Marks, Lissberger & Son, Inc.,
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Mencke v. Cargo of Java Sugar,
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Ogden v. Graham (1861),
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Paragon Oil Co. v. Republic Tankers, S.A.,
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Plymouth Transp. Co. v. Red Star Towing & Transp. Co.,
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33 U.S.C. § 2702 4

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U.C.C. § 2-715(2)(b) 21

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Other Authorities

Ass'n of Ship Brokers & Agents (USA) Inc., *Tanker Voyage Charter Party*, https://shippingforum.files.wordpress.com/2012/08/asba-ii1.pdf (last visited Sept. 9, 2019) 32

Benedict on Admiralty ..... *passim*

Black's Law Dictionary (10th ed. 2014) 6

BP Shipping, *BP VOY 4*, cl. 5.1 (June 1998) 31

ChevronTexaco, *Charter Party Clauses*, cl. 35(B) (May 2004) 31

CITGO, *Our Story*, https://www.citgo.com/about/who-we-are/our-story (last visited Sept. 9, 2019) 29

CITGO Petroleum Corp., *Clauses*, cl. 5.7 (Oct. 2005) 33

Terence Coghlin et al., *Time Charters* (7th ed. 2014) 19, 35

Julian Cooke et al., *Voyage Charters* (3d ed. 2007) 7

Julian Cooke et al., *Voyage Charters* (4th ed. 2014) ..... *passim*

Sir Bernard Eder et al., *Scrutton on Charterparties* (23rd ed. 2015) 35, 40

ExxonMobil, *EXXONMOBILVOY2005*, cl. 16(b) 31

Geoffrey W. Gill, *West's Fed. Forms, Admiralty* (4th ed.) 27

Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* (2d ed. 1975) 35, 36

Charles Merrill Hough, *Admiralty Jurisdiction—of Late Years*, 37 Harv. L. Rev. 529 (1924) 29

London P&I Club, *Cover for Charterers* 34

Richard A. Lord, *Williston on Contracts* (4th ed.) 37

MECO Grp., *Why Should Charterers Protect Themselves Against Loss with Liability Insurance?* (Mar. 15, 2019) 33

Peter Lole Ins. Brokers, *Charterers' Liability Insurance* 34

Q88.com, *Charter Party Terms & Clauses*, https://www.q88.com/Feature_CPTerms.aspx?c=1 (last visited Sept. 9, 2019) 30

Thomas J. Schoenbaum, *Admiralty & Maritime Law* (6th ed.) ..... *passim*

Shell, *Shellvoy 6 Part II*, cl. 4 (Mar. 2005) 31

Society of Maritime Arbitrators Awards Decisions:

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Tramp Shipping Co.,
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INTRODUCTION

Although it is difficult to tell from petitioners' brief, this is a contract case, not a tort case. Petitioner CITGO Asphalt Refining Co. (CARCO) (a partnership between petitioners CITGO Petroleum Corp. and CITGO East Coast Oil Corp.) chartered respondents' ship and contractually agreed to send the ship to a safe port. It is undisputed that they sent the ship to an *unsafe* port. The only question before the Court is whether CARCO warranted the safety of its chosen port when it agreed in the charter contract to designate and procure a "safe port." It did. For more than a century, judicial and arbitral decisions have agreed that an unqualified safe-port clause like the one at issue here is a warranty that the charterer's chosen port will be safe—and that if it is not safe, the charterer will be liable for damages that result from the unsafe condition, including when the unsafe condition was unknown to the parties. Industry custom similarly speaks with one voice. When a charterer prefers not to warrant the safety of its chosen port, it contracts for an express due-diligence standard or for no safe-port clause at all; and when it opts for an unqualified safe-port clause, it agrees to a warranty. CARCO does not dispute that—instead it says literally nothing about industry custom or about the prevalence of express due-diligence safe-port clauses. That is a telling omission. As a sophisticated charterer, CARCO knew it was contracting against this massive body of judicial decisions, arbitration awards, and international industry custom when it opted for an unqualified safe-port clause. It should be held to its bargain.

STATEMENT OF THE CASE

1. This case involves the contractual allocation of cleanup responsibility and other damages resulting from a 2004 oil spill off the shores of New Jersey in the Delaware River. Pet. App. 3a-13a.

a. CARCO chartered *Athos I* to deliver crude oil from Venezuela to a berth in Paulsboro, New Jersey that was owned and operated by CARCO. Pet. App. 3a-4a. *Athos I* was a single-hulled tanker owned by respondent Frescati Shipping Company, Ltd. and managed by respondent Tsakos Shipping & Trading, S.A. (collectively, respondents). *Id.* at 3a.

As it comes to the Court, this case presents a dispute over a contract term in the charter contract. At the relevant time, *Athos I* had been chartered into a tanker pool managed by Star Tankers, Inc., which is not a party to this case.[1] Pet. App. 52a. CARCO subchartered the ship from Star Tankers for the voyage that gave rise to this dispute. *Ibid.* The sub-charter contract took the form of a "voyage charter party," a "common form of maritime contract for shipping services." *Ibid.* A "charter party" is "a contract for the use . . . of a vessel in whole or in part" under which "the parties are free to allocate risks contractually either by express contractual provision or by allocating specific duties concerning the cargo, the voyage, and the ship." 2 Thomas J. Schoenbaum, *Admiralty & Maritime Law* § 11:1 (6th ed.) (Schoenbaum); *see* Pet. App. 278a n.1.

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[1] A tanker pool is a collection of tanker vessels under various ownerships, placed under the care of a single administrator known as the pool manager.

The charter party (*i.e.*, the contract) at issue was based on an industry standard form known as the ASBATANKVOY form and is reprinted in an addendum to CARCO's brief. Pet. App. 279a, 332a; Pet. Br. Add. 1a-48a. CARCO chose to use the ASBATANKVOY as the standard form that would provide the basic outline of the charter party. Pet. Br. Add. 49a. Part I of the charter party incorporated by reference "Special Provisions" to the charter party that designated the discharging port—and provided that, in the event of a conflict between Parts I and II of the charter party, Part I would prevail. *Id.* at 1a-2a. The incorporated Special Provisions provided that the "discharge port(s)" would be one or two "safe port(s)" on the Atlantic Coast of the United States or the Caribbean.[2] *Id.* at 2a, 24a. Part II of the charter party also committed CARCO to designate a safe port by providing both that *Athos I* would proceed "direct to the Discharging Port(s), or so near thereunto as she may safely get (always afloat), and deliver said cargo," *id.* at 4a, and that "[t]he vessel shall load and discharge at any safe place or wharf, . . . which shall be designated and procured by the Charterer [CARCO], provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat," *id.* at 8a. The charter party therefore gave CARCO the option of choosing the

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[2] CARCO refers (Pet. Br. 5 n.1) to the contract provision at issue as a "'safe berth' clause," but acknowledges that the charter party includes both a safe-port and a safe-berth clause, relating to the safety of the "place or wharf" where *Athos I* would discharge its cargo. The distinction between safe-berth and safe-port clauses is immaterial to the question presented in the petition. Pet. App. 298a.

discharge port once the voyage was underway. The "Final Recapitulation" and "Fixture Note" also specified that *Athos I* would discharge at a "safe port[]" or "S/P."[3] *Id.* at 49a, 52a, 62a.

When CARCO provided the "voyage instructions" to the captain of *Athos I*, it specified that the ship should load cargo only up to a draft of 37 feet.[4] Pet. App. 89a-90a, 306a. That draft restriction maximized the duration of the "docking window," *i.e.*, the stage of the tide during which *Athos I* could safely dock at CARCO's Paulsboro facility. *Id.* at 90a-91a. The promise of a safe port was therefore tailored to *Athos I*, warranting that the water under the ship would be safe to a depth of at least the ship's maximum draft of 37 feet. *Id.* at 91a, 306a-308a.

b. After safely traveling 1,900 miles from Venezuela to the Delaware River, *Athos I* struck an abandoned submerged anchor only 900 feet from CARCO's berth. Pet. App. 3a. As a result, 264,000 gallons of crude oil spilled into the river. *Ibid.*

Under the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2701 *et seq.*, Frescati, as owner of *Athos I*, was the statutorily designated "responsible party" and was therefore responsible in the first instance for cleanup costs and damages associated with the spill. Pet. App. 3a; 33 U.S.C. §§ 2701(32)(A), 2702. As envisaged by the OPA, respondents cooperated with and assisted the U.S. Coast Guard in the cleanup efforts and paid

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[3] The recapitulation and fixture note represent the parties' agreement to the "bare bones" of a charter, including the "clauses deemed important in the particular trade." Schoenbaum § 11:2.

[4] A ship's "draft" is the distance from the ship's water line to the ship's bottom.

the cleanup costs. Pet. App. 3a, 70a-71a. Because of respondents' quick action in responding to the spill, the total cleanup cost was a fraction of what it otherwise would have been. *Id.* at 155a. The cleanup costs and other damages ultimately amounted to $143 million. *Id.* at 3a. Pursuant to the OPA, respondents were able to limit their liability for the cleanup costs and were later reimbursed $88 million by the United States. *Ibid.*[5]

2. In 2005, respondents initiated a federal action in the District Court for the Eastern District of Pennsylvania pursuant to the court's admiralty jurisdiction by filing a Petition for Exoneration from or Limitation of Liability pursuant to former 46 U.S.C. app. § 181 *et seq.* Pet. App. 9a, 287a. CARCO filed a claim in the action, seeking compensation for the loss of its cargo; respondents then counterclaimed, asserting both contract claims based on the safe-port warranty and tort claims based on CARCO's role as owner of the wharf where *Athos I* was supposed to dock (wharfinger negligence). *Id.* at 275a-276a, 287a-288a. Respondents seek compensation for unreimbursed

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[5] When cleanup costs exceed a statutory cap, the OPA provides that the Oil Spill Liability Trust Fund will reimburse the responsible party for the costs above the cap, but only if the responsible party promptly reports the spill as required by law and "provide[s] all reasonable cooperation and assistance requested by a responsible official in connection with" the cleanup efforts. 33 U.S.C. § 2704(c). The OPA preserves the right of the responsible party to pursue any claims associated with the spill that it may have against a third party. *Id.* §§ 2703(a), 2708. When the United States reimburses the responsible party for a portion of the cleanup costs, the United States steps into the shoes of the responsible party as subrogee with respect to any claims against a third party. *Id.* § 2715.

cleanup costs and additional damages. *Id.* at 288a. The United States later filed a separate action against CARCO, asserting subrogation rights in a contract claim, and seeking reimbursement for the $88 million it had paid to respondents. *Id.* at 276a, 288a. The two actions were consolidated. *Id.* at 288a.

a. Following a 41-day bench trial, the district court found in favor of CARCO. Pet. App. 330a-344a. In brief, the court held that respondents are not third-party beneficiaries of the safe-port clause in the contract between CARCO and Star Tankers (the voyage charter party); that even if they were, the safe-port clause was a promise only of due diligence, not a warranty; and that any warranty was excused because CARCO specified the port in advance, placing the burden on the captain of *Athos I* to reject it as unsafe. *Ibid.* With respect to the tort claims, the court held that an approach to a berth is limited to the immediate access and that CARCO had no duty of care in the area where the allision[6] occurred. *Id.* at 336a-337a.

b. Respondents and the United States appealed, and the Third Circuit affirmed in part, vacated in part, and remanded for further proceedings. Pet. App. 272a-329a. Because the district court had not clearly set forth its findings of fact and conclusions of law, as required by Federal Rule of Civil Procedure 52, the court of appeals remanded the matter to allow the district court to make findings of fact sufficient to apprise the court of appeals of "the core facts" of the matter.

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[6] An allision is "[t]he contact of a vessel with a stationary object such as an anchored vessel or a pier." Pet. App. 6a n.4 (quoting *Black's Law Dictionary* (10th ed. 2014)) (brackets in original).

Pet. App. 291a-292a. Contrary to CARCO's contention (Pet. Br. 10) that "proper appellate review was not possible," the court of appeals decided some legal questions. "[F]or the sake of efficiency," the court "discuss[ed]—and, to the extent necessary, ma[d]e holdings on—the legal issues appealed." Pet. App. 276a.

On respondents' contract claims, the court of appeals first held that respondents are third-party beneficiaries of the safe-port clause in the voyage charter party. Pet. App. 292a-297a. The court then held that the safe-port clause was an "express assurance of safety"—*i.e.*, a warranty—that covers hazards unknown to the ship's master (*i.e.*, captain). *Id.* at 277a, 297a-304a. The court relied on the "deeply rooted" understanding that "a port is unsafe—and in violation of the safe berth warranty—where the named ship cannot reach it without harm (absent abnormal conditions or those not avoidable by adequate navigation and seamanship)." *Id.* at 298a. The court explained that this Court has twice held that charterers "failed to provide a safe dock where the ship in question could not reach it without damage" because of an obstacle either below or above the water. *Id.* at 298a-299a (citing *Mencke v. Cargo of Java Sugar*, 187 U.S. 248, 253 (1902); *The Gazelle & Cargo*, 128 U.S. 474, 485-486 (1888)). The court explained that an unqualified safe-port clause reflects the contracting parties' choice to allocate to the charterer the risk that the port it chooses is unsafe. *Id.* at 299a-300a. And the court noted that, with the exception of the Fifth Circuit's decision in *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1990), "it was well settled that a safe port clause in a charter constituted a warranty given by a charterer to an owner." Pet. App. 300a (quoting Julian Cooke et al.,

Voyage Charters ¶ 5.124 (3d ed. 2007)). Finally, the court explained that viewing the safe-port clause as "an 'express assurance' warranty is most consistent with industry custom," as illustrated by the fact that some charterers use clauses that specify a due-diligence standard. *Id.* at 303a.

Because the district court "neglected to make the necessary factual findings to resolve whether the warranty was actually breached," Pet. App. 305a, the court of appeals remanded for additional factfinding. In so doing, the court noted that if the district court found either that *Athos I*'s draft at the time of the allision was less than or equal to the maximum agreed ship-draft or that the clearance above the anchor was less than the agreed-upon maximum ship draft, "that finding would indicate that the warranty had been breached." *Id.* at 307a; *see id.* at 305a-308a.

On respondents' tort claim for wharfinger negligence, the court of appeals held that a ship is in an approach when it "transitions from its general voyage to a final, direct path to its destination," Pet. App. 316a, and that "*Athos I* was well within the approach to CARCO's terminal when the casualty occurred," *id.* at 320a. Holding that CARCO "had a duty to exercise reasonable diligence in providing the *Athos I* with a safe approach," *ibid.*, the court of appeals remanded to the district court for findings on the standard of care required to meet CARCO's duty of reasonable diligence, on whether CARCO breached that duty, and on whether any breach caused the casualty, *id.* at 324a, 328a.

The court of appeals denied a petition for rehearing en banc. Pet. App. 345a. This Court denied a petition for a writ of certiorari.[7] 571 U.S. 1197 (2014).

c. On remand to the district court, the case was reassigned to a different judge, who recalled more than 20 witnesses to assess their credibility. Pet. App. 63a. In a detailed opinion, *see id.* at 45a-269a, the court found CARCO liable on respondents' contract claims. The court first found that the warranty was predicated on a maximum draft of 37 feet—and that the actual draft was 36 feet, 7 inches (based on underlying calculations that CARCO no longer challenges). *Id.* at 169a-171a. The court also held that CARCO breached the safe-port warranty because the evidence established that the anchor intruded into the warranted safe depth (thereby reducing the actual safe depth). *Id.* at 163a-180a. The court further held that CARCO was liable in tort because the applicable standard of care required CARCO to inspect the approach periodically using side-scan sonar. *Id.* at 180a-206a. CARCO admitted it had done nothing to search for—and remove or warn invited ships of—submerged hazards in its approach and berth. *Ibid.*

The district court awarded respondents $55,497,375.95 on the contract and tort claims, plus

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[7] In its first cert. petition, CARCO sought review of the contract-interpretation question presented here and of the Third Circuit's holding that respondents are third-party beneficiaries of the safe-port clause in the charter party. 13-462 Pet. i, 2013 WL 5616729. Because CARCO did not seek review of the third-party beneficiary issue in its current trip to this Court, it is now uncontested that respondents are third-party beneficiaries of the safe-port clause in the voyage charter party between Star Tankers and CARCO.

prejudgment interest of $16,010,773.35. Pet. App. 12a, 240a-257a. The court specified that respondents were awarded that amount "independently on each count, but [are] entitled to a total award only in this amount." *Id.* at 260a. The court also ordered CARCO to reimburse the United States for half of the money it paid to respondents, for a total of $43,994,578.66 plus $4,620,159.98 in prejudgment interest. *Id.* at 12a, 233a-234a, 256a.

d. All parties appealed. Pet. App. 12a. The Third Circuit affirmed the judgment in favor of respondents on the contract claim and the award of prejudgment interest, vacated the judgment in favor of respondents on the negligence claim, affirmed in part the judgment in favor of the United States, and remanded the case to the district court. *Id.* at 1a-44a.

Relying on its earlier holding that CARCO provided a safe-port warranty in the charter party, the court of appeals explained that such a warranty "provides, among other things, 'protection against damages to a ship incurred in an unsafe port to which the warranty applies.'" Pet. App. 13a (quoting *id.* at 292a). Noting that it was at that point (and remains now) undisputed that the safe-port warranty applied to "ships drawing less than 37 feet," the court of appeals affirmed the district court's finding that *Athos I* had a draft of 36 feet, 7 inches at the time of the allision. *Id.* at 14a-19a. The court of appeals also affirmed the district court's conclusion that the safe-port warranty was not made inapplicable by any bad navigation or negligent seamanship on the part of respondents or the ship's master. *Id.* at 19a-25a.

The court of appeals vacated the district court's holding that CARCO was liable in tort. Pet. App. 25a-

29a. The court of appeals reiterated its holding that "a wharfinger's duty is to use reasonable diligence to ascertain whether the approach to its berth is safe for an invited vessel." *Id.* at 26a. But the court expressed "doubts about the District Court's balancing of the cost of preventative measures on one hand and the cost of potential accidents on the other." *Id.* at 27a-28a. Explaining that single-hulled tankers like *Athos I* have since been phased out in U.S. waters, *see* 46 U.S.C. § 3703a, the court of appeals opined that a different duty of care might apply where a double-hulled ship is involved. Pet. App. 28a-29a. The court emphasized that "CARCO had some duty to use reasonable diligence to provide the *Athos I* with a safe approach to its berth—a duty it may or may not have breached." *Id.* at 29a. But "given CARCO's independent liability in contract and [the court's] decision to affirm on that basis," the court "once again decline[d] to outline precisely what CARCO's duty of reasonable diligence entailed." *Ibid.*

As CARCO correctly notes (Pet. Br. 13), the Third Circuit "made no inquiry into CARCO's conduct." CARCO therefore errs in suggesting (*ibid.*) that the court agreed with CARCO that it "bore no fault for the casualty." CARCO further errs in asserting that "it is undisputed" that CARCO had no "reason to know" of the anchor's presence, *id.* at 2, and "bore no fault for[] the hidden anchor," *id.* at 12. CARCO had a duty to exercise reasonable diligence to ascertain the safety of its approach—under tort law and under its own interpretation of the safe-port clause. The Third Circuit noted the district court's finding that CARCO "did nothing to look for obstructions." Pet. App. 27a, 192a-

193a. If this Court were to reverse the warranty holding, the case would have to be remanded again to decide whether, by doing nothing, CARCO satisfied its duty of due diligence.

The court of appeals also held that the district court erred in concluding that CARCO was entitled to an equitable-recoupment defense against the United States' contractual subrogation claim and remanded that claim to the district court for recalculation of damages and prejudgment interest. Pet. App. 30a-39a, 43a-44a. And the court of appeals affirmed the district court's award of prejudgment interest to respondents. *Id.* at 42a-43a.

The Third Circuit denied CARCO's petition for rehearing en banc. Pet. App. 270a-271a.

SUMMARY OF ARGUMENT

I. A. This contract case can and should be decided based on the plain language of the contract terms at issue. CARCO promised in the charter party to designate a safe port. It did not qualify its promise in any way. An unqualified safe-port promise is a warranty on its face. CARCO breached the contractual warranty when it designated an unsafe port, and it is liable for the damages proximately caused by that breach. Courts have long construed the type of unqualified safe-port clause at issue here as a warranty based on its plain text.

Nothing in the charter party—or in any of this Court's cases construing safe-port clauses—supports CARCO's atextual argument that the safe-port clause does nothing more than authorize a ship's master to refuse a designated port that he knows to be unsafe. CARCO's reading would render the safe-port clause

surplusage because a master can always refuse to enter a port that he knows is unsafe—and is responsible for damages when he does enter a port that he knows is unsafe. When, as here, a port hazard is unknown to the parties, a charterer that agrees to an unqualified safe-port clause is liable for damages that result from the hazard.

For the first time ever, CARCO argues that it should be spared from liability because the charter party's "General Exceptions Clause" excludes liability for damages resulting from "perils of the seas." That argument is meritless. By its own terms, the General Exceptions Clause does not apply when liability is otherwise allocated in another part of the charter party—as it is in the safe-port provisions. Even if the safe-port promise and the General Exceptions Clause conflicted, moreover, the charter party specifies that provisions in Part I of the charter party—which includes CARCO's promise to designate one or more safe ports—prevail over the provisions in Part II—which includes the General Exceptions Clause. Finally, even if the exclusion of liability for damages resulting from perils of the seas did apply, it would not help CARCO. Whether a particular hazard qualifies as a peril of the sea is a fact-bound question—and CARCO's failure to assert that defense during the fact-gathering phases of this litigation forecloses its application now. This Court should reject CARCO's late-breaking attempt to suggest that submerged objects are, as a matter of law, perils of the seas within the meaning of the clause. That view is contradicted even by the authorities CARCO relies on.

B. Notably absent from CARCO's brief is *any* mention of how the shipping industry views the unqualified safe-port clause at issue here. But the parties did not choose the unqualified safe-port clause in a vacuum; they agreed to it against an overwhelming consensus in the industry that such a clause is a warranty.

The shipping industry relies heavily on standardized form charter parties. Those standard forms use two distinct types of safe-port clauses: an unqualified clause like the one the parties to this case chose and a version that expressly disclaims a warranty and/or specifies a due-diligence standard. CARCO does not even acknowledge the widespread practice among charterers of bargaining for an express due-diligence standard when the charterer prefers not to warrant the safety of its chosen port. But the existence and widespread use of such express due-diligence clauses confirms that when a charterer opts for the *other* type of safe-port clause by agreeing to an unqualified promise, it is warranting the safety of its chosen port. The leading treatises on admiralty confirm that a safe-port clause that neither specifies a due-diligence standard nor disclaims a warranty *is a warranty*.

Nearly all standard charter parties require signatories to submit any disputes arising out of the charter party to arbitration in New York or London. Thus, although judicial decisions construing safe-port clauses are relatively few, arbitral decisions doing the same are numerous. New York arbitral decision published by the Society of Maritime Arbitrators agree without exception that an unqualified safe-port clause is a warranty. Respondents can find literally no New York arbitration decision holding what CARCO asks this

Court to hold. Maritime arbitrators are experts in their field, and their decisions form the backdrop against which sophisticated parties contractually allocate liabilities. This Court should not accept CARCO's invitation to upset that regime.

Because shipping is an inherently international industry, moreover, uniformity across the seas is vital to protecting maritime commerce. In England, as in the United States, courts and commentators consistently construe an unqualified safe-port clause as a strict promise of safety. A charterer is free *not* to agree to a warranty by bargaining for a due-diligence standard. But when CARCO bargained for *this* charter party, it did so against the background of a huge body of case law, arbitral decisions, and industry custom, all of which agree that an unqualified safe-port clause is a warranty. CARCO should not be permitted to get out of that bargain now.

II. A. Although CARCO acknowledges that this is a contract case, nearly all of its arguments sound in tort principles. Those principles are irrelevant on their own terms when the question is what the parties to the contract actually agreed to. The question here is not whether CARCO is at fault for the allision, it is whether CARCO contractually agreed to accept liability for damages resulting from unsafe conditions at its chosen port. It did. Parties to a contract are free to allocate liability for unknown risks as they see fit. Those responsibilities are assumed voluntarily, not imposed by a court or by positive law, as CARCO suggests. CARCO is a sophisticated charterer and should be required to abide by its bargain.

B. CARCO errs in arguing that an unqualified safe-port clause should not be viewed as a warranty

because a charterer will only sometimes be in a better position to assess the safety of its chosen port than a ship's master will be. The beauty of contract law is that parties can allocate risks for a particular voyage based on their own assessments of who is in a better position to assess the safety of a port—or based on trade-offs reflected in the charter party as whole. CARCO's arguments are particularly misplaced here because CARCO—as wharfinger of its chosen port—*was* in a better position to assess the safety of the port. CARCO complains that its contractual duty of care as charterer should not be higher than its tort duty of care as wharfinger; but CARCO was free to bargain for the same standard of care if it wished to. It did not.

C. Finally, CARCO is wrong that adhering to the long-standing and widespread view of an unqualified safe-port clause as a warranty will harm maritime commerce. Commercial parties already contract against a firm background understanding that this type of safe-port clause is a warranty. Adopting a contrary view for the United States would upset settled bargains and would create uncertainty going forward. Because speed is of the essence in maritime commerce, charter parties are negotiated expeditiously using standard form contracts. If the same contract term means different things in different places, the efficiency of that system would break down.

ARGUMENT

I. The Unqualified Safe-Port Clause In The Charter Party Is A Warranty.

The shipping industry is a global market with sophisticated contracting parties. When parties agree to an unqualified safe-port clause like the one at issue in

this case, they understand that the charterer is agreeing to warrant the safety of the port it designates. Industry custom confirms that understanding of the plain text of the contract: on both sides of the Atlantic, in judicial and arbitral decisions, an unqualified safe-port clause is a warranty.

A. The Plain Language Of The Safe-Port Clause Is A Warranty That The Charterer's Chosen Port Will Be Safe.

It has long been settled that a safe-port clause means what it says: that the charterer promises to direct the ship to a safe port where it will remain always safely afloat. A promise is a promise, and CARCO cannot identify anything in the clause that even hints at a due-diligence standard.

1. Maritime contracts, like all contracts, "must be construed" "by their terms and consistent with the intent of the parties." *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 31 (2004); 2 Thomas J. Schoenbaum, *Admiralty & Maritime Law* § 11:2 (6th ed.) (Schoenbaum) ("[F]ederal maritime law includes general principles of contract law and agency.") (footnote omitted). The text of the safe-port provisions in the charter party is unambiguous. The charter party specifically designated the "Discharging Port(s)" as "Charterer's Option," to be determined in compliance with "Special Provisions #2." Pet. Br. Add. 2a. The incorporated special provision, in turn, specified that CARCO could designate "one (1) or two (2) safe port(s)" in various geographic areas along the eastern United States and Caribbean. *Id.* at 24a. The charter party gave CARCO the right to designate and procure a safe berth for the ship to discharge the crude oil cargo, "*provided*" that the berth permitted *Athos I* to "proceed

thereto, lie at, and depart therefrom always safely afloat." *Id.* at 8a; *id.* at 4a (*Athos I* shall proceed to destination port "ordered" by CARCO "or so near thereunto as she may safely get (always afloat)"). The language could not be clearer: CARCO was contractually obligated to designate a safe port and would be in breach of its contractual duty if it designated an unsafe port.

CARCO does not dispute that the port it designated turned out to be unsafe. It argues instead that it was not obligated under the contract to designate a safe port because its promise to designate a "safe port[]" where *Athos I* could "proceed thereto, lie at, and depart therefrom always safely afloat," Pet. Br. Add. 8a, 24a, was merely a promise to exercise due diligence in its efforts to choose a port that would be safe. Nothing in the text of the charter party or in contract law (maritime or otherwise) supports that contention. The safe-port provisions in the charter party are unqualified; they do not limit the promise to the exercise of due diligence or condition the promise in any other way. The safe-port promise is a warranty. CARCO errs in contending (Pet. Br. 2, 14, 25-26) that the court of appeals held that the clause is at best an implied warranty. The Third Circuit correctly held that the safe-port clause "is an express assurance made without regard to the amount of diligence taken by the charterer." Pet. App. 304a; *see id.* at 297a ("CARCO expressly warranted to provide a safe berth."). When a promise is plain and unconditional, it need not include the word "warranty" to qualify as an express warranty. *See Davison v. Von Lingen (The Whickham)*, 113 U.S. 40, 49-50 (1885); *Denholm Shipping Co. v. W.E. Hedger Co.*, 47 F.2d 213, 214 (2d Cir. 1931)

(L. Hand, J.); *cf.* U.C.C. § 2-313(2) ("It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty.").

Although the charterer's promise of safety is not limited to an exercise of due diligence, it is limited to the safety of the designated port. When a charterer warrants the safety of a port, it does not accept liability for any casualty that might befall the ship at the destination port. When the condition of the port is not the proximate cause of damage to a ship, the safe-port warranty is not implicated. Thus, for example, when a ship is damaged by the master's negligence in piloting the ship, by the negligence of another ship's master, or by a meteor falling from the sky, the condition of the port is not the cause of the damage even if the casualty occurs within the port. *See*, *e.g.*, Julian Cooke et al., *Voyage Charters* ¶¶ 5A.8, 5A.35 (4th ed. 2014) (*Voyage Charters*); Terence Coghlin et al., *Time Charters* ¶¶ 10.68, 10.69 (7th ed. 2014) (*Time Charters*); n.15, *infra*.

Illustrating how plain the meaning of the unqualified safe-port clause is, in the earliest known decision construing a clause materially identical to the one at issue here, the Court of Queen's Bench in England held that the plain language of the clause obligated the charterer to name a port that was safe for the ship. *Ogden v. Graham* (1861), 121 Eng. Rep. 901 (Q.B); 1 B. & S. 773. The charterer in that case had designated a port that, unbeknownst to the charterer, had been closed and could not be used by the ship without risking confiscation. *Id.* at 779-780. The court concluded that, even if "the charterers were perfectly innocent on this occasion as regards any knowledge of the danger

that might be incurred by the vessel," they were bound by the "contract" to "name" a "safe port" for the ship to enter. *Id.* at 780; *id.* at 781 (concluding that the charterer breached its contractual duty to name a safe port even though it "honestly" believed the port it designated was safe). The court thus held that the charterer was liable in damages to the ship owner. *Id.* at 780. What was clear from the text of the safe-port clause in 1861 remains clear today: it is an unqualified promise to designate a safe port that subjects the charterer to damages liability when the port it designates turns out to be unsafe.

2. CARCO also argues (Pet. Br. 19-20) that "the 'provided' clause" does nothing more than give the ship's owner a "right to refuse an unsafe berth, with the charterer bearing any extra expenses resulting from the vessel master's refusal to enter the unsafe berth." Under that view, a safe-port clause would be mere surplusage (regardless of the level of care it promises) because a ship's master can always refuse to enter a port that he knows is unsafe, regardless of whether a charter party includes a safe-port clause. *See*, *e.g.*, *Voyage Charters* ¶ 5A.34 ("Courts and arbitrators have generally accorded great latitude to a master's decision to refuse to enter a port or berth on the grounds that it is unsafe."); 2A *Benedict on Admiralty* § 175 (same). But that has nothing to do with whether the unqualified safe-port clause is a warranty or a promise of due diligence.

When a charterer designates a port that the owner or master knows is unsafe, the charterer breaches the contract, regardless of the level of care the charterer exercised in choosing the port. In agreeing to the terms of the charter party, the owner obligates himself

to send his ship *only* to one or more safe ports. If the charterer designates a port that the owner or his agent knows is unsafe, the owner has no contractual obligation to take his ship to that port. That much is undisputed. What is disputed is what happens when a ship enters a port that the charterer has chosen and is then damaged because the port is unsafe for a reason that is unknown to (and not reasonably ascertainable by) the charterer or by the owner and his agents. Because the safe-port clause is a warranty, the charterer is liable for those damages. *See* Restatement (Second) of Contracts § 154(a) (1981) ("A party bears the risk of a mistake when . . . the risk is allocated to him by the parties."); *cf.* U.C.C. § 2-715(2)(b) ("Consequential damages resulting from the seller's breach include . . . injury to person or property proximately resulting from any breach of warranty."). Here, the charter party specifically provides that "[d]amages for breach of this Charter shall include all provable damages." Pet. Br. Add. 20a.

3. Contrary to CARCO's contentions (Pet. Br. 27-33), this Court's decisions do not support CARCO's view that the safe-port clause does nothing more than authorize a ship's master to refuse a designated port that he knows is unsafe, without obligating the charterer to do more than exercise due diligence in choosing the port.

a. The Court held in *The Gazelle & Cargo* that the "clear meaning" of an "express" safe-port term in a charter party is that the charterer is "bound to order the vessel" "to a port which she can safely enter with her cargo." 128 U.S. 474, 485 (1888). That is the language of warranty, not of negligence or due diligence. It is true in that case that the owner sought damages

stemming from the master's refusal to enter the designated unsafe port, *id.* at 476, but nothing in the decision even hints that a charterer that breached its obligation to designate a safe port would not be liable for losses incurred when a ship sustains damage as a result of entering a designated port that is unsafe. The same is true of *Mencke v. Cargo of Java Sugar*, which confirmed that a charterer breaches its contractual duty under a safe-port provision when it designates a port that the ship cannot reach without passing "a shoal or bar in the port over which she could not proceed, or a bridge under or through which she could not pass." 187 U.S. 248, 253 (1902). There, too, the ship's master refused to proceed to the designated (unsafe) port, but nothing in the Court's decision suggests that the charterer's breach would not have covered losses caused by a master's attempt to reach a designated port that the master had no reason to know was unsafe.

b. CARCO's reliance on *Atkins v. Fibre Disintegrating Co.*, 2 F. Cas. 78, 79 (E.D.N.Y. 1868), *aff'd*, 85 U.S. (18 Wall.) 272 (1874), is equally unavailing. CARCO asserts (Pet. Br. 28) that the district court "held" that the safe-port clause was not a warranty and that this Court affirmed that holding. That is not true.

The charter party in *Atkins* authorized the charterer to send the ship to a "second safe port." 2 F. Cas. at 79. The charterer instead sent the ship to a port where it could not enter and leave without striking a submerged reef if the wind failed—which is exactly what happened. *Ibid.* The district court described the safe-port clause as a promise to designate a port where

the ship "could enter and depart from without legal restraint, and without incurring more than the ordinary perils of the seas." *Ibid*. Because the court also held that the designated port was unsafe "within the meaning of the charter," *ibid.*, due to the risk that the ship would strike a submerged reef, we know that the charterer's promise *at least* encompassed a promise not to designate a port where a ship could not enter and leave without striking a submerged object. CARCO failed to do that in this case.

More to the point, the outcome in *Atkins* had nothing to do with whether the safe-port clause was a warranty or a promise of due diligence. The critical fact in *Atkins*—a fact all agree is missing from this case—was that the ship's master *knew* that the port was unsafe and took the ship in anyway. 2 F. Cas. at 79. The court thus held that the master *waived* the safe-port warranty, not that the safe-port clause was anything other than a warranty. *Id.* at 79-80; *see* Pet. App. 301a n.14 ("*Atkins* featured a safe berth warranty[.]"); *Voyage Charters* ¶ 5A.9 ("Judge Benedict found in that case that there was a safe berth warranty, but that it was waived[.]"). CARCO's contrary reading of *Atkins* is wrong. The court held that the charterer breached its contractual duty to designate a safe port when it designated a port that the ship could not enter and leave from without striking a submerged reef when the breeze failed. The *only* reason the charterer escaped liability for its breach was because the ship's master waived the warranty by entering the port when he knew it was unsafe. 2 F. Cas. at 79. But where, as here, the hazard is unknown, the charterer's breach is

the proximate cause of any damage caused by the submerged object and the charterer is liable for the damages that result from its breach of contract.

4. For more than 80 years, the Second Circuit has correctly held that an unqualified safe-port clause is "an express assurance . . . that at the berth 'indicated' the ship would be able to lie 'always afloat.'" *Cities Serv. Transp. Co. v. Gulf Ref. Co.*, 79 F.2d 521, 521 (2d Cir. 1935) (per curiam). Where, as here, "[a] place to which the [ship] could proceed and from which she could depart 'always safely afloat' was warranted" and "was not provided," "the warranty was broken and the warrantor was liable for the resulting damage." *Paragon Oil Co. v. Republic Tankers, S.A.*, 310 F.2d 169, 173 (2d Cir. 1962) (Friendly, J.), *cert. denied*, 372 U.S. 967 (1963); *accord Venore Transp. Co. v. Oswego Shipping Corp.*, 498 F.2d 469, 470, 472 (2d Cir.), *cert. denied*, 419 U.S. 998 (1974); *Park S.S. Co. v. Cities Serv. Oil Co.*, 188 F.2d 804, 806 (2d Cir.) (Swan, J.), *cert. denied*, 342 U.S. 862 (1951); *Cities Serv.*, 79 F.2d at 521; *see also Constantine & Pickering S.S. Co. v. W. India S.S. Co.*, 199 F. 964, 967 (S.D.N.Y. 1912); *Crisp v. U.S. & Australasia S.S. Co.*, 124 F. 748, 750 (S.D.N.Y. 1903). CARCO's only criticism of those decisions (Pet. 34-35) is that they are insufficiently reasoned. But when a court gives plain contract language its ordinary meaning, no additional explanation is needed. The Second Circuit correctly held that a promise to send a ship to a safe port is an "express assurance" that the port designated by the charterer is in fact safe. *Cities Serv.*, 79 F.2d at 521. No further "reasoning or authority," Pet. Br. 34, is needed to understand why a charterer is liable for damages that result from a breach of its express assurance. And once

the Second Circuit announced and adhered to its view that an unqualified safe-port clause is a warranty, contracting parties understood what they were agreeing to when they included such a clause in charter parties.

CARCO's further contention (Pet. Br. 35-36) that the Second Circuit has not consistently viewed safe-port clauses as warranties is unsupported to say the least. *None* of the cases it cites for the proposition that a charterer "who selects a berth is only required to exercise reasonable care," *ibid.*, involved a charter party with a safe-port clause. Not one. Each of the cases was instead decided based on general principles of bailment and consignment. *Plymouth Transp. Co. v. Red Star Towing & Transp. Co.*, 20 F.2d 357, 358-359 (2d Cir. 1927); *M. & J. Tracy, Inc. v. Marks, Lissberger & Son, Inc.*, 283 F. 100, 102 (2d Cir. 1922); *Hastorf v. O'Brien*, 173 F. 346, 347-348 (2d Cir. 1909). Those cases self-evidently shed no light on the meaning of the contract clause at issue here.

The Fifth Circuit is the only court to hold that an unqualified safe-port clause is a promise of due diligence. *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1990). No other court of appeals—and no expert arbitration panel, *see* pp. 36-38, *infra*—has adopted that approach and for good reason: it does not even purport to rely on the plain text of the clause at issue and failed to consider industry custom. 913 F.2d at 1156-1157. That court instead relied on tort principles that are wholly misplaced in this context. *See* pp. 44-49, *infra*.

5. For the first time in the nearly 15 years since this case was initiated, CARCO argues (Pet. Br. 27) that the standard "General Exceptions Clause" in the charter party excuses the charterer from liability "for

loss or damages resulting from 'perils of the seas.'" CARCO's argument is both too little and too late.

First, by its express terms, the limitation on liability for damages resulting from "perils of the seas" in the General Exceptions Clause does not apply when such liability is "otherwise" "expressly provided" for in the charter party. Pet. Br. Add. 14a. That clause therefore has no bearing on the meaning of the unqualified safe-port provisions because it contemplates that an express warranty such as the safe-port provisions would override the reservation of liability for perils of the seas. Most charter parties include a general-exceptions clause, but CARCO cannot identify any judicial or arbitral decision concluding that such a clause exempts hazards from submerged objects from a safe-port clause appearing elsewhere in the charter party.

Second, the General Exceptions Clause appears in Part II of the charter party—and the contract expressly provides that, "[i]n the event of a conflict, the provisions of Part I will prevail over those contained in Part II." Pet. Br. Add. 1a. Part I of the charter party includes CARCO's obligation to designate a port in accordance with Special Provisions 2, *id.* at 2a, which includes CARCO's express promise to designate "one (1) or two (2) safe port(s)," *id.* at 24a. Thus, nothing in the General Exceptions Clause can override CARCO's express warranty in Part I of the charter party to designate a safe port for *Athos I*.

Finally, even if that clause did apply here, the question whether the anchor at the bottom of the approach to CARCO's berth even qualifies as a "peril[] of the sea" is a question of fact that cannot be decided by this Court at this stage of the litigation. Even

CARCO's primary authority explains that whether a hazard qualifies as a peril of the sea "is wholly dependent on the facts of each case and is not amenable to a general standard." *Ferrara v. A. & V. Fishing, Inc.*, 99 F.3d 449, 454 (1st Cir. 1996) (citation omitted); *cf.* 7 Geoffrey W. Gill, *West's Fed. Forms, Admiralty* § 10781 (4th ed.) (a determination of whether dangerous conditions qualify as a "peril of the sea" under the Carriage of Goods by Sea Act "is fact intensive").

Contrary to CARCO's contention (Pet. Br. 27), it is far from settled as a matter of law that all submerged objects that a ship might strike qualify as perils of the seas. Indeed, this Court's decision in *Atkins* affirmed a holding that a submerged reef upon which a ship foundered did *not* qualify as "the ordinary perils of the seas." The district court in that case held that a charterer breached its contractual duty to designate a "safe port, within the meaning of the charter," when it designated a port that the sailing ship could not enter and depart from without striking a submerged reef if the breeze failed. *Atkins*, 2 F. Cas. at 79. Although that charter party did not include a general exceptions clause like the one CARCO relies on, the court construed the term "safe port" as "imply[ing] a port which this vessel could enter and depart from without legal restraint, and without incurring more than the ordinary perils of the seas." *Ibid.* Because the port was held not to fall within that definition, the court must have intended the phrase "ordinary perils of the seas" to *exclude* at least some submerged hazards that could not be avoided by ordinary competent seamanship. This Court affirmed in full the conclusions of the district court on the merits. 85 U.S. (18. Wall.) at 299.

The Court should reject CARCO's late-breaking attempt to invent a new fact-bound escape from its express warranty that has no basis in the record or in legal precedent.

B. Industry Custom Supports Viewing The Unqualified Safe-Port Clause As A Warranty.

Because the text of the unqualified safe-port clause is so clear, the Court can hold that it is a warranty based on its plain language alone. That reading is fully supported by industry custom, which universally treats such a clause as a warranty. In contract interpretation, an "agreement is supplemented or qualified by a reasonable usage with respect to the agreements of the same type if each party knows or has reason to know of the usage and neither party knows or has reason to know that the other party has an intention inconsistent with the usage." Restatement (Second) of Contracts § 221 (1981); U.C.C. § 1-205 cmt. 4 ("The language [of a commercial contract] is to be interpreted as meaning what it may fairly be expected to mean to parties involved in the particular commercial transaction in a given locality or in a given vocation or trade.").

Remarkably, CARCO says literally nothing about the customary industry interpretation of this clause, even though that was a basis of the court of appeals' decision and even though that is obviously highly relevant to determining what the parties intended when they agreed to the charter party. Trade custom is particularly important in the world of charter parties, where courts should follow the "established practices and customs of the shipping industry." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 675 n.6

(2010) (internal quotation marks omitted). "'[M]aritime law is a body of sea customs' and the 'custom of the sea . . . includes a customary interpretation of contract language.'" *Ibid.* (quoting Charles Merrill Hough, *Admiralty Jurisdiction—of Late Years*, 37 Harv. L. Rev. 529, 536 (1924) (ellipses in original). CARCO's silence on this point is telling because the industry overwhelmingly views an unqualified safe-port clause as a warranty. Because uniformity is vital in maritime commercial law, *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 210 (1996), the Court should pay special attention to how the industry (and the rest of the world) interprets this clause.

1. The shipping industry has long viewed an unqualified safe-port clause as a warranty, and sophisticated charterers like CARCO know that.[8] "The law of charter parties is highly influenced by the widespread use of standardized forms that are used as a basis for charter parties . . . ." Schoenbaum § 11:1. Standard charter-party forms in the industry use two distinct types of safe-port clauses: an unqualified clause like the one at issue in this case and a version that expressly disclaims a warranty and/or specifies a due-diligence standard. Contracting parties choose between the two types of clauses. When a charterer prefers not to provide a safe-port warranty, it agrees to a clause that specifies a due-diligence standard of care (or to no safe-port clause at all). *Voyage Charters*

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[8] Indeed, petitioner CITGO has known for more than 80 years that an unqualified safe-port clause is a warranty. The earliest Second Circuit decision holding as much involved charterer Cities Service Oil Co. In 1965, Cities Service became CITGO. CITGO, *Our Story*, https://www.citgo.com/about/who-we-are/our-story (last visited Sept. 9, 2019).

¶ 5A.8 ("The warranty can be and often is modified by contract by the inclusion of language which reduces it to a due diligence standard."); *see* Pet. App. 303a.

The facts on the ground confirm that unqualified safe-port warranties like the one at issue here are accepted in the industry as warranties. Q88.com is a subscription industry website that, *inter alia*, provides a database of tanker charter terms and clauses from more than 150 charterers.[9] The Q88 database demonstrates widespread use in the industry of safe-port clauses that expressly require only due diligence and/or disclaim a warranty. The database contains tanker charter-party forms and clauses from 157 charterers, some of which use multiple forms. Of those 157 charterers, 79 publish charter parties with safe-port clauses. Of those 79, 46 use a due-diligence clause and/or expressly disclaim a warranty in one or more of their charter forms (including several members of amicus American Fuels & Petrochemical Manufacturers Association (AFPMA) such as BP, Chevron, ExxonMobil, and Shell); 27 use an unqualified warranty clause in one or more of their charter forms; and 6 use both types of clauses in their various forms.[10] An additional

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[9] Q88.com, *Charter Party Terms & Clauses*, https://www.q88.com/Feature_CPTerms.aspx?c=1 (last visited Sept. 9, 2019).

[10] For example, since 1998, BP has used a form that includes the following safe-port clause:

> The Vessel shall be loaded and discharged at any port in accordance with Charterers' Voyage Orders. Before instructing Owners to direct the Vessel to any port, Charterers shall exercise due diligence, to ascertain that the Vessel can always lie safely afloat at such port, but Charterers do not warrant the safety of any port and shall be under no liability

78 charterers do not publish their own safe-port clauses but are free to use printed industry forms that contain either type of safe-port clause. Amicus Tricon's contention (at 7-9) that it would be difficult for a charterer to contract out of a safe-port warranty therefore has no basis in reality.

The treatise *Benedict on Admiralty* has also collected and reprinted safe-port clauses from standard form charter parties. *See* 2E *Benedict on Admiralty*, ch. XXVII, *Charter Party Clauses*. A number of those clauses expressly incorporate a due-diligence standard or disclaim a warranty. For example, clause 3 of the INTERTANKVOY form specifies that "[c]harterers shall exercise due diligence to ascertain that any places to which they order the vessel are safe for the vessel and that she will lie there always afloat." *Ibid.* The same clause further specifies that charterers shall "not be deemed to warrant the safety of any place and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid." *Ibid.* Other standard forms use the same language. *See*, *e.g.*, *ibid.* (STB VOY form cl. 9; BEEPEEVOY 2 form cl. 4; TEXACOVOY form cl.

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in respect thereof except for loss or damage caused by Charterers' failure to exercise due diligence.

BP Shipping, *BP VOY 4*, cl. 5.1 (June 1998).

Chevron, ExxonMobil and Shell use forms that similarly specify a due-diligence standard and disclaim a warranty. ChevronTexaco, *Charter Party Clauses*, cl. 35(B) (May 2004); ExxonMobil, *EXXONMOBILVOY2005*, cl. 16(b); Shell, *Shellvoy 6 Part II*, cl. 4 (Mar. 2005).

10). In addition, in 1986, the Association of Ship Brokers & Agents (USA) Inc. (ASBA) published a standard charter party called ASBATANKVOY II that expressly disclaims that the charterer is warranting the safety of its chosen port and instead specifies only a negligence duty of care. ASBA, *Tanker Voyage Charter Party*, pt. II, cl. 9, https://shippingforum.files.wordpress.com/2012/08/asba-ii1.pdf (last visited Sept. 9, 2019). That standard form—and many others that include a due-diligence standard—was available to CARCO when it chartered *Athos I*.[11]

The fact that parties use safe-port clauses that expressly incorporate a due-diligence standard is strong evidence that a safe-port clause that does *not* specify due diligence or disclaim a warranty is in fact a warranty. Notably, neither CARCO nor any of its amici offers *any* response to this industry-practice argument, which the court of appeals relied on, Pet. App. 303a-304a, and respondents made in their Brief in Opposition (at 15-17). CARCO asserts (Pet. Br. 46) that it did not "bargain[] for" an absolute warranty here. That assertion is difficult to square with the ordinary industry practice of using an explicit due-diligence

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[11] CARCO errs in asserting (Pet. Br. 23) that its cert.-stage *amicus* ASBA, which publishes the ASBATANKVOY form, "rejects any suggestion that the text of the form clause should be construed as a warranty." To the contrary, ASBA and its co-amicus Maritime Law Association of the United States (MLA) specified that they "express[ed] no view on the proper interpretation of the safe-berth clause here." MLA/ASBA Cert. Amicus Br. 7. Those amici supported the petition for a writ of certiorari because they believed the Court should resolve the circuit conflict. But they are conspicuously absent at the merits stage.

clause instead of a warranty clause when a charterer wants the advantage of designating a port without the liability of warranting its safety. Indeed, petitioners themselves use a due-diligence safe-port clause in some of their contracts, departing from the standard-form warranty clauses that are the industry default. CITGO's *pro forma* October 2005 Addendum, for example, includes a safe-port clause that expressly disclaims a warranty.[12] Such a disclaimer in that—or any other—charter-party form would be unnecessary if the standard unqualified safe-port language were not in fact a warranty.[13]

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[12] The form is available at the Q88 website. The clause states in relevant part that the "charterer shall not be liable for any loss, damages, injury, or delay resulting from conditions at ports, public channels and fairways, anchorage or other places not caused by charterer's fault or neglect" and expressly states that the "charterer shall not be deemed to warrant the safety of any of the aforesaid." CITGO Petroleum Corp., *Clauses*, cl. 5.7 (Oct. 2005).

[13] Amicus Tricon's suggestion (at 6-7) that charterers cannot obtain insurance for damage resulting from an unsafe port also has no basis in the real world. Notably, CARCO has not suggested either that it lacked insurance coverage for its liability from the allision in this case or that it lacked the ability to obtain such insurance. Tricon offers no evidence to support its assertions, and for good reason. Many major marine insurers offer charterer policies that cover damage to a ship resulting from a safe port *and* liability resulting from pollution. *See*, *e.g.*, MECO Grp., *Why Should Charterers Protect Themselves Against Loss with Liability Insurance?* (Mar. 15, 2019); Peter Lole Ins. Brokers, *Charterers' Liability Insurance* 5; London P&I Club, *Cover for Charterers* 2. Neither CARCO nor its amici has offered evidence that insurers are not able to manage liability in the existing regime, which includes both safe-port warranties and due-diligence clauses.

More fundamentally, CARCO has not identified *any* form of a safe-port clause from any time period that it agrees would warrant the safety of a designated port. The necessary implication of that argument is that no charter party has *ever* imposed strict liability on the charterer for designating an unsafe port. That is implausible on its face—and is frankly impossible in light of the uniform agreement in the industry and in maritime treatises that an unqualified safe-port clause is a warranty.

2. The leading treatises on admiralty speak with one voice in reporting that unqualified safe-port clauses are viewed in the industry as warranties. Schoenbaum states, for example, that when a charterer promises that "the ship shall 'safely lie, always afloat,'" "the charterer who nominates a port is held to warrant that the particular vessel can proceed to port or berth without being subjected to the risk of physical damage," "[u]nless" the text "is modified by language reducing this obligation to due diligence." Schoenbaum § 11:10. He further explains that "if the ship reasonably complies with the order" to a port designated by a charterer, "the charterer is liable for any damage sustained." *Ibid.* *Benedict on Admiralty* confirms that "[t]he obligation to furnish a safe port or berth is considered a warranty, breach of which justifies the master's refusal to enter the port or entitles the shipowner to sue for damages. 2A *Benedict on Admiralty* § 175; *see Time Charters* ¶ 10A.3 ("The words 'safely lie, always afloat' constitute an express warranty of safe port and safe berth."). The treatise *Voyage Charters* specifically notes that the ASBATANKVOY form—the form used in this case—"con-

tain[s] an express warranty on the part of the charterer of the safety of the loading or discharging port or berth." *Voyage Charters* ¶ 5.30. That treatise further explains that "[s]ometimes the charterer warrants merely the exercise of due diligence to nominate a safe port" by using a "variant[] of the express warranty in common use." *Id.* ¶ 5.32. The English-law treatise *Scrutton on Charterparties* agrees, explaining that "[w]here a charter, whether for voyage or time, expressly provides that a ship shall go to the safe port or berth to be nominated or ordered by the charterer, the charterer is obliged so to nominate or order, and in so doing, warrants that the port or berth is safe." Sir Bernard Eder et al., *Scrutton on Charterparties* § 9-011 (23rd ed. 2015) (*Scrutton*).

The only treatise CARCO relies on (Pet. Br. *passim*) to support its view that the unqualified safe-port clause is merely a promise of due diligence is Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* (2d ed. 1975).[14] But even Gilmore & Black confirms that the industry custom is to view an unqualified safe-port clause as a warranty. *Id.* at 204 (noting that in the years leading up to the 1975 publication, authorities had viewed a safe-port clause as rendering the charterer "liable for damages to the ship resulting

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[14] CARCO also cites Schoenbaum's statement that a "ship can refuse to proceed to the port nominated without being in breach of the charter," in support of its argument that a charterer who designates an unsafe port is not liable for damages to a ship that enters the port. Pet. Br. 20 (quoting Schoenbaum § 11-10). CARCO conveniently fails to quote the very next sentence, which states: "Furthermore, if the ship reasonably complies with the order and proceeds to port, the charterer is liable for any damage sustained." Schoenbaum § 11-10.

from her having entered an unsafe port"). That treatise agrees with CARCO about what the clause *should* mean, but not about what it *does* mean in the industry. The authors expressly state their view that the cited "authorities go too far." *Ibid.* Academics are entitled to their views about what the law (or industry custom) should be, but those views have little value when a court is called upon to determine what the law (or industry custom) actually is. As this Court has explained, works of "jurists and commentators" "are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)). In any case, the Gilmore & Black treatise has not been updated for nearly 45 years, and every major treatise with more recent revisions rejects its view.

3. Although safe-port clauses are a standard part of most charter parties, there are relatively few judicial decisions construing them. That is because "[i]t is virtually universal to include broad arbitration clauses in charter parties, so that most controversies are resolved not in the courts but in arbitration, often by non-attorney 'commercial men' (yes, even today they are almost all male) whose decisions reflect business practices and customs." Schoenbaum § 11:1 (footnote omitted); *see* 2A *Benedict on Admiralty* § 184; *see* Schoenbaum § 11:19; 21 Richard A. Lord, *Williston on Contracts* § 57:157 (4th ed.). Most charter parties opt for compulsory arbitration in either New York or London. *E.g.*, Pet. Br. Add. 3a, 20a (giving parties option to choose New York or London as arbitration location).

London arbitration awards are generally not published, while most New York awards are published by the Society of Maritime Arbitrators (SMA).

Since 1965, the SMA has published at least 67 decisions involving an unqualified safe-port clause in which the arbitrators interpreted the clause as a strict promise of safety, *i.e.*, a warranty. *See* Addendum, *infra*, for case citations. Respondents have not found *any* SMA decision agreeing with CARCO's due-diligence interpretation—and petitioners have identified none. For nearly 55 years, New York arbitrators have consistently viewed the type of unqualified safe-port clause at issue here as a warranty. There can be no greater illustration of how the industry understands the unqualified safe-port clause. If this Court were to adopt CARCO's view, it would unsettle industry expectations and vitiate settled bargains—all without any basis in the text of the relevant contract.

Notably, several New York arbitration decisions recognize that a charterer that prefers not to warrant the safety of a port it designates can bargain for a lower standard. Nearly a decade before the Fifth Circuit's decision in *Orduna*, one panel expressly rejected the charterer's invitation to excuse the warranty based on the charterer's argument (which the Fifth Circuit would later take up) that the ship's master was in a better position than the charterer to know about the safety of a particular port, explaining that it felt "bound to recognize and follow the long line of decisions dealing with the safe port warranty and the obligations which arise out of it." *Tramp Shipping Co.*, SMA 1602, 1981 WL 640664, at *13 (Oct. 30, 1981). The panel further noted that, "[i]f the obligation is im-

practicable or burdensome, a Charterer need only provide otherwise in his charter party." *Ibid.* Several panels interpreted the safe-port clause in the standard ASBATANKVOY form as a warranty under which the charterer assumes responsibility for any and all port risks. *See*, *e.g.*, *Samp Shipping Co.*, SMA 3625, 2000 WL 35733872 (June 1, 2000); *O.N.E. Shipping Inc.*, SMA 3671, 2001 WL 36175159 (Feb. 27, 2001); *Bayside Marine, Inc.*, SMA 3704, 2001 WL 36175192 (Sept. 12, 2001). Even after *Orduna* was decided, moreover, arbitrators continued to reject the notion that an unqualified assurance that a port would be safe should be viewed as a due-diligence obligation. *T. Klaveness Shipping A/S*, SMA 3686, 2001 WL 36175174, at *10 (Apr. 18, 2001) ("We reject as inapplicable Charterer's contention that it should be excused from liability on the basis of the 'due diligence only' requirement, championed in the minority opinion in *Orduna*[.]").

Maritime arbitrators are "expert adjudicators," hired to "resolve specialized disputes," *Stolt-Nielsen*, 559 U.S. at 685—and they routinely apply the traditional view that a safe-port clause like the one in this case is a warranty.

4. In asking the Court to adopt its atextual due-diligence interpretation of the unqualified safe-port clause, CARCO ignores not only industry custom in the United States, but also industry custom abroad. Shipping is a global commercial industry. This Court has frequently explained that "the 'fundamental interest giving rise to [the Court's] maritime jurisdiction is the protection of maritime commerce,'" which necessitates uniformity in applicable legal rules. *Norfolk S. Ry. Co.*, 543 U.S. at 25 (quoting *Exxon Corp. v. Cent.*

Gulf Lines, Inc., 500 U.S. 603, 608 (1991)) (emphasis omitted); *see id.* at 28. Uniformity is vital not only within the United States but internationally as well—and that is particularly true in this context because nearly all charter parties are based on forms that require arbitration in New York or London. Not surprisingly, English law—like U.S. law—has consistently construed the unqualified safe-port clause as a strict guarantee of safety, not as a promise of due diligence.

Although arbitration awards in London are generally unpublished, English arbitrators are required to follow the law announced by the courts, and awards may be appealed in some circumstances. Legal commentaries and published judicial decisions confirm that the type of clause at issue here is treated as a strict promise of safety. One British maritime expert has explained that, "[a]t common law the implied safe port promise is absolute, and an express promise is construed the same way, save where the words used suggest the contrary." D. Rhidian Thomas, *The Safe Port Promise of Charterers from the Perspective of the English Common Law*, 18 Sing. Acad. L.J. 597, 602 (2006). When a charter party includes an unqualified safe-port clause, English law holds the charterer "absolutely liable" if, "as events turn out, the port is not safe and loss or prejudice results to the ship." *Ibid.* To avoid warranting a safe port under English law—as under American law—a charterer can bargain for an express due-diligence standard, as several large tanker charterers have done. *Id.* at 602-603; *accord Scrutton* § 9-011.

Since at least 1861, English courts have consistently treated an unqualified safe-port clause as a strict

promise of safety, not as a promise to exercise due diligence. *Ogden*, 1 B. & S. at 780-781. Courts and arbitrators on both sides of the Atlantic have consistently followed that view. *Voyage Charters* ¶ 5A.4. The English Supreme Court recently reaffirmed that an unqualified safe-port clause is a strict promise of safety and that a charterer is liable for damages to a ship from "danger which cannot be avoided by good navigation and seamanship." *Gard Marine & Energy Ltd v. China Nat'l Chartering Co. (The Ocean Victory)*, [2017] UKSC 35, [2017] 1 Lloyd's Rep. 521, 526 (quoting *Leeds Shipping Co. v. Société Française Bunge (The E. City)*, [1958] 2 Lloyd's Rep. 127, 131).[15]

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[15] There are few exceptions to liability under an unqualified safe-port clause. The warranty does not apply when negligence by the ship's owner or master acts as a superseding cause of the casualty or possibly when the destination port is named in the charter party. *E.g.*, *Voyage Charters* ¶¶ 5A.12, 5A.35. The only other recognized exception arises when the damage results from an "abnormal occurrence." *Ocean Victory*, [2017] 1 Lloyd's Rep. at 525-526. The phrase "abnormal occurrence" is a term of art that is limited to events that are not normal characteristics of the port at the relevant time of year. *Id.* at 530. An occurrence that results from an attribute of the approach to its berth is not an "abnormal occurrence" under this test, even if it is rare. *Ibid.*; *Voyage Charters* ¶ 5.95. Amicus AFPMA errs in arguing (at 14-17) that the discussion in *Ocean Victory* of the abnormal-occurrence *exception* indicates that English law no longer treats an unqualified safe-port clause as a strict promise of safety.

CARCO has *never* alleged that the anchor lying at the bottom of its berth was an abnormal occurrence as that term is understood in this context. And, in fact, it would not qualify as such. As CARCO's agents testified below, finding debris—including anchors—on the riverbed is a normal attribute of the Paulsboro facility, which is adjacent to an anchorage. 11-2576 C.A. J.A. 357,

Parties are free to contract for whatever standard of care they wish with respect to the designation of a safe port—and parties have already done that based on the accepted view in the United States and abroad that an unqualified safe-port clause is a warranty. The Court should reject CARCO's self-interested attempt to upend that settled expectation and to create disharmony in international maritime law. *See Senator Linie GmbH & Co. KG v. Sunway Line, Inc.*, 291 F.3d 145, 169-170 (2d Cir. 2002) (Sotomayor, J.) (noting in maritime case "that 'in matters of commercial law our decisions should conform to the English decisions, in the absence of some rule of public policy which would forbid'") (quoting *The Turret Crown*, 297 F. 766, 776-777 (2d Cir. 1924)).

5. When CARCO and respondents agreed to a charter party with an unqualified safe-port clause, they were not writing on a blank slate. They plainly understood that CARCO was agreeing to warrant the safety of the port that it would ultimately choose. No other conclusion is possible in light of the massive

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673-674, 969, 1068. Indeed, the anchor had lain there for at least three years before the allision, Pet. App. 8a, and was one of three large hazardous objects found in the approach to CARCO's berth during the investigation of this casualty, 11-2576 C.A. J.A. 523, 836, 1264. CARCO wisely declined to raise this issue in its brief because whether a particular danger was an "abnormal occurrence" is a question of fact that cannot be asserted as a defense at this late date. *Ocean Victory*, [2017] 1 Lloyd's Rep. at 531 (whether an event "would be a breach of the safe port warranty, or the event would be characterised as an abnormal occurrence, would necessarily depend on an evidential evaluation of the particular event giving rise to the damage and the relevant history of the port").

body of judicial and arbitral decisions, along with established industry practice, construing unqualified safe-port clauses as warranties. CARCO leans heavily on the Fifth Circuit's decision in *Orduna*—but that decision is an outlier, and a sophisticated charterer such as CARCO would have known that. If CARCO preferred not to warrant the safety of its chosen port, it should have bargained for a due-diligence clause—as many other oil companies had done. CARCO chose to use a standard form with an unqualified safe-port clause and it chose *not* to modify the standard form by disclaiming a warranty or by including a due-diligence standard when it amended the charter party by adding 43 of its own clauses. Pet. Br. Add. 30a-48a. CARCO should be held to its bargain.

Relatedly, the *industry* knew full well by the time this charter party was signed that an unqualified safe-port clause was a warranty. Charterers could have moved away from warranting the safety of ports if doing so had created the types of practical or legal problems that CARCO and its amici predict (without any supporting evidence). But they did not. That is strong evidence that the standard safe-port warranty has served, and continues to serve, the interests of charterers and ship owners—at least when parties opt not to bargain for a due-diligence standard.

II. CARCO's Policy Arguments Are Misplaced.

A reader of CARCO's brief would be forgiven for coming away with the impression that this is a tort case, not a contract case. Nearly all of CARCO's arguments sound in tort principals that have no application here—and would not support CARCO's preferred

result even if they did.[16] CARCO's resort to tort principles is premised on the notion that the contract simply failed to allocate responsibility for damages that might result from unknown port hazards. Even if a century of authority and industry practice did not prove otherwise (it does), that is implausible. Shipping is an inherently dangerous industry, and many hazards are unknown or unknowable to the parties operating a ship. Parties to a charter contract decide in advance who will be responsible for harm from unknown hazards. The allocation of liability for unknown hazards is not a declaration of guilt; it is a simple contract term allocating risks that is part of the overall bargain embodied in the charter party. Tort principles have no role to play in interpreting the contract.

A. Parties To A Contract Are Free To Allocate Liability For Unknown Risks As They See Fit.

The parties agree that neither CARCO nor respondents knew that Paulsboro was unsafe for *Athos I*. It is now settled that neither respondents nor any of their agents were negligent in entering the port or approaching the berth. In that sense, all parties to this dispute were innocent—although respondents' negligence tort claim against CARCO as wharfinger remains undecided. *See* pp. 11-12, *supra*. CARCO nevertheless (Pet. Br. 3, 17, 45) insists that it should

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[16] CARCO eventually attempts to justify its reliance on tort principles by appealing to the Court (Pet. Br. 49) to establish a "default rule" that will govern when charter party language is ambiguous. As explained, the language of the safe-port clause is not ambiguous. But even if it were, a court would not resort to tort law to resolve the meaning of an ambiguous contract term. Contract law has ample tools to resolve ambiguity in language.

not be liable for the damage caused by its designation of an unsafe port because it is an "innocent" charterer. That argument is irrelevant. The reason contracting parties allocate responsibility in advance for unknown risks is because both parties to the contract will be innocent if those risks result in damages, but someone will have to bear the loss. In this case, the parties agreed that CARCO would pay for damages resulting from its designation of an unsafe port. CARCO understandably regrets its bargain now, but that is not a reason to ignore the plain terms of the contract.

Borrowing heavily from tort law, CARCO argues that responsibility for unknown port risks should be allocated to ship owners because they are always better positioned than charterers to avoid those risks. Those arguments are wrong—but even if they were correct, they would have no place in *this* case, which calls upon the Court to interpret a contract. "[T]he main currents of tort law run in different directions from those of contract and warranty, and the latter" is "far more appropriate for commercial disputes of the kind involved here." *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 873 n.8 (1986) (examining maritime products-liability claims sounding in tort).

Tort law, like statutory law, automatically and unilaterally imposes duties on particular parties based on public-policy judgments. *See E. River S.S. Corp.*, 476 U.S. at 866. But where the relationship between parties is based on a contract, the public-policy principles that drive tort law do not apply. *Ibid.* (recognizing that if courts apply tort principles to warranties, "contract law would drown in a sea of tort"). Con-

tract obligations are assumed voluntarily through negotiation between private parties. Signatories to a charter party can—and do—decide for themselves whether they wish to bargain for a safe-port warranty or a due-diligence standard. Here, they plainly contracted for a warranty—and when "contractual responsibilities" are "clearly laid out," "[t]here is no reason to extricate the parties from their bargain." *Id.* at 875. More generally, a final contract reflects the full bargain between the parties—terms that burden one party are often off-set by other terms that benefit the same party. CARCO's attempt to supplant a contract term—but only one contract term—with tort principles after the fact would not take account of the entire bargain reflected in the charter party.

In short, tort principles cannot supplant contracting parties' voluntary allocation of risks from hazards that are unknown and not reasonably knowable. It is not a question of which party *should* bear those risks or of whether it is "unfair" (Pet. Br. 14, 17, 49) for one party to bear those risks rather than the other. Contracting parties are free to *choose* how to deal with those risks—and when they do, there is nothing wrong or unfair about holding the parties to their bargain.

B. CARCO's Arguments About Incentives Are Wrong.

CARCO suggests (Pet. Br. 43) that courts should not (continue to) interpret the unqualified safe-port clause as a warranty because it is more efficient to allocate the risk of unknown port hazards to ship owners. In other words, CARCO asks this Court to step in to tell the parties—sophisticated actors in the maritime shipping industry—that a different contractual allocation of risks would have been more efficient.

That is not how contract law works. Parties are free to strike essentially any bargain they like, and presumably the parties' agreement to an unqualified safe-port clause in this case affected other aspects of their overall bargain. But CARCO is also wrong that the allocation of risks in the safe-port warranty is inefficient.[17]

CARCO argues (Pet. Br. 42-44) that an unqualified safe-port clause should not be viewed as a warranty because a charterer will only *sometimes* be in a better position than a ship owner to know about the risks of a port that it chooses. But that is the beauty of contract law: when the charterer is in a better position, it can choose to warrant the safety of the port (or not); when the owner is in a better position, it can agree to a due-diligence standard for the charterer (or

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[17] CARCO is wrong (Pet. Br. 16, 42) that the court of appeals adhered to the well-established view that an unqualified safe-port clause is a warranty for "policy" reasons. It was the Fifth Circuit in *Orduna* that interpreted the contractual language to fit its own policy-driven view of which party was better situated to avoid port risks. 913 F.2d at 1157 ("[N]o legitimate legal or social policy is furthered by making the charterer warrant the safety of the berth it selects."). The court of appeals below disagreed with *Orduna*'s policy rationales, but its holding was based on the "language" of the clause and on the "deeply rooted" understanding of that clause in judicial decisions and industry custom. Pet. App. 297a-304a. In any case, *Orduna*'s policy rationales are meritless. As discussed at pp. 47-48, *infra*, a ship's master is *not* in a better position to know about port hazards as a general matter—and certainly not when the hazard is unknown. *Contra Orduna*, 913 F.2d at 1156. And a safe-port warranty does not diminish the master's incentive to be diligent in choosing whether to enter a port because a master's negligence would absolve the charterer of liability if it were a superseding cause of a casualty. *Contra id.* at 1157.

not); and when neither party is in a superior position, they can choose *either* a warranty *or* a due-diligence standard, depending on how they structure the remainder of the bargain. Leaving the choice to the contracting parties is the *most efficient* way to allocate port risks.

CARCO concedes (Pet. Br. 47-48), moreover, that when (as here) a charterer is also a wharfinger, it *will* be in a better position to know about the hazards of its own berth. That is all the explanation needed to understand why CARCO would have agreed to a warranty in this case. In fact, the manner in which CARCO designated its own berth in Paulsboro as the point of discharge is instructive. When CARCO ordered *Athos I* to that port, it specified that the port was safe for ships with a draft of up to 37 feet. Pet. App. 4a, 89a-90a. That draft restriction was supplemented by a "docking window" that specified the times during which a ship with that draft could safely dock, according to stages of the tide. *Id.* at 90a. At CARCO's request, the available docking window for ships with a draft up to 37 feet, 6 inches was expanded in 1999. *Id.* at 90a-91a. It is undisputed at this point that *Athos I* had a draft of 36 feet, 7 inches and docked within the specified window. *Id.* at 5a, 139a, 169a-170a. In those circumstances, it is easy to see why CARCO, with its intimate knowledge of its own berth and the approach thereto, would be willing to warrant the safety of the port.

CARCO's only rejoinder (Pet. Br. 47-49; *see* AFPMA Amicus Br. 9-12) is that charterers and wharfingers should have the same duty of care with respect to providing a safe berth, and tort law imposes only a duty of reasonable care on a wharfinger. If a

charterer is also the wharfinger, the charterer can opt for a uniform standard of care by bargaining for a due-diligence standard. But when the charterer chooses to bargain for a higher standard *as charterer*, it should be held to its promise. Nothing prevents a wharfinger from warranting the safety of its berth as a matter of contract law—and a charterer is free to bargain for such a warranty in its contract with a wharfinger or terminal operator.

CARCO argues (Pet. Br. 43) that, even if it used to be true that charterers generally knew more about the ports they chose than ship owners could, that is no longer true because "[w]ith modern information sources such as the internet, both charterers and vessel owners have equal access to pertinent and detailed information about berths and ports." If that were true, it would present an ideal situation for allowing the two well-informed parties to choose which one of them will bear the risk of unknown hazards at the destination port. But it is certainly not true when, as here, the charterer is also the wharfinger. In this case, for example, CARCO reduced the maximum allowed draft at its Paulsboro facility from 38 feet to 36 feet while *Athos I* was en route—but did not inform *Athos I* of the modification. Pet. App. 280a, 289a. CARCO agrees, moreover, that charterers were generally better suited to know about the safety of their chosen port in the decades preceding the information age. During that era, a customary understanding of the unqualified safe-port clause as a warranty developed. If the industry later reacted to the increased availability of information, it was by incorporating more express due-diligence standards in safe-port clauses, not by changing the settled meaning of the clause at issue here.

C. *CARCO Is Wrong That Adhering To The Industry's Standard Interpretation Of An Unqualified Safe-Port Clause Will Harm Maritime Commerce.*

As this Court has held, the overriding purpose of federal maritime jurisdiction is to protect maritime commerce. *Exxon Corp.*, 500 U.S. at 608; *Sisson v. Ruby*, 497 U.S. 358, 367 (1990). The shipping industry is a global market of sophisticated actors where freedom of contract promotes efficient bargains and allocations of risk. For more than a century, charterers and ship owners around the world have bargained with the understanding that an unqualified safe-port clause is a warranty by the charterer. When parties prefer not to include such a warranty in a charter party, they expressly disclaim a warranty and/or specify a due-diligence standard. Courts and arbitrators on both sides of the Atlantic have consistently confirmed the market's understanding of the unqualified safe-port language.

Although CARCO and its amici have not identified or offered evidence of any market problems arising from shipping parties' freedom to contractually allocate risks as they see fit, CARCO urges that allowing the market to adhere to its widespread understanding of this contract term would impair maritime commerce. That contention has no basis in fact or law. Rather, the opposite is true: if this Court imposes on the market a *new* interpretation of this contract term that is *different* from the one adopted in England and by arbitrators on both sides of the Atlantic, settled market expectations will be disrupted and contractual rights overturned. That is the result that would be bad for maritime commerce.

In today's global economy, where speed in transferring goods around the globe is of the essence, charter parties are generally negotiated on an expedited basis, based on standardized forms. If basic provisions in those forms mean different things in different places—or even different things in the same charter party depending on where a dispute is ultimately adjudicated or arbitrated—the contracting efficiencies that arise from the use of standard forms will be eviscerated in the short term. Schoenbaum § 11:1 ("Considering the widespread use of standard form clauses, it is of overriding importance that the meaning or legal effect of such clauses be certain and well-understood."); *ibid.* ("Courts and arbitrators should aim at a result so that both shipowners and charterers can procure clear and confident answers concerning their relationship without recourse to long and expensive litigation.").

CARCO's primary commerce-based argument (Pet. Br. 38-42) is that strict liability standards are rare in maritime law and that imposing one here will harm maritime commerce. Once again, CARCO confuses tort law and contract law. No court "imposes strict liability" (*id.* at i) on a charterer that agrees to an unqualified safe-port clause. When a charterer agrees to that language, it *chooses* to warrant the safety of the port. When a charterer prefers not to warrant the safety of its designated port, it bargains for a due-diligence standard. Period.

Maritime law is, moreover, replete with strict-liability tort standards. As CARCO acknowledges (Pet. Br. 38), for example, maritime tort law imposes a strict-liability standard in certain products-liability contexts, *E. River S.S. Co.*, 476 U.S. at 865, and with

respect to a ship owner's duty to provide a seaworthy ship, *Yamaha Motor Corp.*, 516 U.S. at 208. Strict liability also applies to a ship owner's duty to provide his shipboard employees with "maintenance and cure." *Cortes v. Balt. Insular Line, Inc.*, 287 U.S. 367, 371 (1932). Signatories to a charter party need not adopt a strict-liability standard with respect to the safety of a port designated by the charterer—but they certainly may if they wish to.

Finally, CARCO errs in contending (Pet. Br. 49-50) that holding the parties to their unambiguous bargain would be inequitable here because it would be inconsistent with the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2701 *et seq.* CARCO misunderstands the statutory scheme when it suggests (Pet. Br. 50) that, because Congress designated a ship owner as a "responsible party" that is required to assume initial responsibility for cleaning a spill, CARCO should not be held to its contractual duty for a spill that was caused by an absent third party. That is not how the OPA works. The OPA designates ship owners as "responsible parties" in order to properly incentivize a prompt and effective clean-up effort. A ship owner's liability is capped under the statute *only* if, *inter alia*, it reacts quickly and cooperates in cleaning up the oil spill. 33 U.S.C. §§ 2703(c), 2704(c)(2). Nothing in the statutory scheme makes the ship owner legally or financially liable for damages resulting from a spill that it did not cause when another party has agreed to bear that responsibility. To the contrary, the OPA expressly preserves the right of the responsible party to pursue any claims it may have against a third party arising out of a spill, *id.* §§ 2703(a), 2708. That is what respondents have done in this case.

CARCO's argument amounts to a plea for the Court to ignore an express contract term simply because it has turned out to be a bad deal for CARCO. Nothing in maritime law or contract law supports such a result. CARCO is an oil company; surely it understood that damage from an oil spill was within the range of risks it agreed to assume responsibility for when it hired a tanker to carry its oil and warranted the safety of its own berth.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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ADDENDUM

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Society of Maritime Arbitrators published decisions finding an unqualified safe-port clause to be a warranty:

1. *Altamar Navegacion S.A.*, SMA 2029, 1984 WL 922779 (Oct. 31, 1984)
2. *Altamon Maritime, Inc.*, SMA 3423, 1998 WL 35281257 (Feb. 18, 1998)
3. *Astrovigia Compania Naviera S.A.*, SMA 1277, 1978 WL 403858 (Dec. 16, 1978)
4. *Atl. Bulker Shipping Corp.*, SMA 3938, 2006 WL 6171996 (Sept. 8, 2006)
5. *Baldwin Enters. Corp.*, SMA 2273, 1986 WL 1179628 (July 8, 1986)
6. *Bayside Marine Inc.*, SMA 3704, 2001 WL 36175192 (Sept. 12, 2001)
7. *Brue Shipping Co.*, SMA 1331, 1979 WL 406538 (Jan. 2, 1979)
8. *Calypso Marine Co.*, SMA 3416, 1998 WL 35281250 (Jan. 30, 1998)
9. *Chios Beauty Shipping & Trading*, SMA 3463, 1998 WL 35281296 (June 15, 1998)
10. *Compania Ulysses, S.A.*, SMA 2234, 1986 WL 1179560 (Apr. 15, 1986)
11. *Dowa Line Am. Co.*, SMA 3308, 1996 WL 34449946 (Oct. 8, 1996)
12. *E. W. Tankers Ltd.*, SMA 3172, 1995 WL 17878811 (Apr. 28, 1995)
13. *Fed. Commerce & Navigation Ltd.*, SMA 1293, 1979 WL 407506 (Feb. 8, 1979)
14. *Fed. Commerce & Navigation Ltd.*, SMA 2371, 1987 WL 1378172 (Mar. 25, 1987)

15. *Ferelpis Shipping Corp.*, SMA 2251, 1986 WL 1179577 (June 3, 1986)
16. *Fritzen Schiffsagentur und Bereederungs G.m.b.H.*, SMA 2495, 1988 WL 1534489 (July 11, 1988)
17. *Gearbulk Shipping A/S*, SMA 4189, 2012 WL 6968923 (Oct. 31, 2012)
18. *Getty Oil Co.*, SMA 1365, 1979 WL 406597 (Sept. 27, 1979)
19. *Goudara, S.A.*, SMA 2622, 1990 WL 10555640 (Jan. 15, 1990)
20. *Halfdan Grieg & Co. S.A.*, SMA 419, 1969 WL 178325 (Aug. 8, 1969)
21. *Hansen Neuerburg Export-Import GmbH*, SMA 1682, 1982 WL 917235 (May 28, 1982)
22. *Heinrich D. Horn*, SMA 649, 1971 WL 224644 (Sept. 21, 1971)
23. *Hellenic Int'l Shipping S.A.*, SMA 954, 1975 WL 352013 (June 22, 1975)
24. *Hight Will Marine, S.A.*, SMA 1788, 1983 WL 825110 (Feb. 18, 1983)
25. *Hudson Shipping Lines, Inc.*, SMA 4239, 2014 WL 4660785 (Aug. 28, 2014)
26. *Int'l Produce, Inc.*, SMA 1340, 1979 WL 406546 (July 1, 1979)
27. *Island Navigation Corp.*, SMA 2836, 1990 WL 10555635 (June 15, 1990)
28. *Itel Taurus, Inc.*, SMA 1220, 1977 WL 372691 (Apr. 15, 1977)
29. *Julia Shipping Pte., Ltd.*, SMA 4039, 2009 WL 2634385 (July 9, 2009)

30. *K/S Anett Kristin*, SMA 3433, 1998 WL 35281267 (Mar. 13, 1998)
31. *Lexmar Corp.*, SMA 3199, 1995 WL 17878836 (Aug. 4, 1995)
32. *Marine Trading Ltd.*, SMA 1880, 1983 WL 825045 (Sept. 15, 1983)
33. *Marsimbol Compania Naviera, S.A.*, SMA 2347, 1986 WL 1179669 (Dec. 31, 1986)
34. *Meteor Shipping Co.*, SMA 1601, 1981 WL 640663 (Nov. 6, 1981)
35. *Millgate Shipping Corp.*, SMA 3729, 2002 WL 34461638 (Apr. 26, 2002)
36. *Mitsubishi Corp.*, SMA 2276, 1986 WL 1179631 (July 14, 1986)
37. *N. Pac. Carriers Ltd.*, SMA 3136, 1994 WL 16780036 (Dec. 20, 1994)
38. *Nagos Maritime, Inc.*, SMA 3440, 1998 WL 35281274 (Apr. 27, 1998)
39. *Navios Corp.*, SMA 2296, 1986 WL 1179598 (May 20, 1986)
40. *Neptune Maritime Co.*, SMA 1177, 1977 WL 372763 (Dec. 2, 1977)
41. *Norske Olje A/S*, SMA 3327, 1996 WL 34449965 (Nov. 11, 1996)
42. *Oceanic Freighters Corp.*, SMA 1054, 1976 WL 358139 (Aug. 10, 1976)
43. *O.N.E. Shipping Inc.*, SMA 3671, 2001 WL 36175159 (Feb. 27, 2001)
44. *Orient Shipping Rotterdam B.V.*, SMA 3723, 2002 WL 34461633 (Mar. 20, 2002)

45. *Phostiva Compania Naviera, S.A.*, SMA 2405, 1987 WL 1378355 (Aug. 14, 1987)
46. *Phs. Van Ommeren NV*, SMA 2571, 1989 WL 1646306 (May 26, 1989)
47. *Pollux Marine Agencies, Inc.*, SMA 1819, 1983 WL 824985 (Apr. 25, 1983)
48. *Rederikommanditselaskaber Merc Scandia*, SMA 2713, 1990 WL 10555726 (Sept. 4, 1990)
49. *Richco Grain Ltd.*, SMA 3035, 1993 WL 13653073 (Dec. 31, 1993)
50. *Rising Sun Shipping Corp.*, SMA 2393, 1987 WL 1378343 (Mar. 12, 1987)
51. *Rudolf A. Detker*, SMA 508, 1970 WL 203698 (Mar. 1, 1970)
52. *Saguenay Shipping Ltd.*, SMA 1275, 1978 WL 403856 (Dec. 15, 1978)
53. *Samp Shipping Co.*, SMA 3625, 2000 WL 35733872 (June 1, 2000)
54. *Sanko S.S. Co.*, SMA 1349, 1979 WL 406552 (July 20, 1979)
55. *Sanko S.S. Co.*, SMA 1564, 1981 WL 640625 (July 9, 1981)
56. *Sea Terminals, Inc.*, SMA 1056, 1976 WL 358300 (Sept. 17, 1976)
57. *Seaboard Shipping Co.*, SMA 1009, 1975 WL 351549 (Dec. 22, 1975)
58. *Seajoy Shipping Ltd.*, SMA 3441, 1998 WL 35281275 (Apr. 29, 1998)
59. *Sunrise Shipping Co., S.A.*, SMA 1906, 1983 WL 825073 (Nov. 7, 1983)

60. *T. Klaveness Shipping A/S*, SMA 3686, 2001 WL 36175174 (Apr. 18, 2001)
61. *Trade Sol Shipping Ltd.*, SMA 3677, 2001 WL 36175165 (Mar. 15, 2001)
62. *Tramp Shipping Co.*, SMA 1602, 1981 WL 640664 (Oct. 30, 1981)
63. *Transportes del Este Navegaceon, S.A.*, SMA 2663, 1990 A.M.C. 1058 (Feb. 13, 1990)
64. *Tropwood A.G.*, SMA 1172, 1977 WL 372760 (Nov. 15, 1977)
65. *Tsakalotos Navigation Corp.*, SMA 342, 1965 WL 155490 (June 1, 1965)
66. *Uncle Solomon Ltd.*, SMA 3106, 1994 WL 16780006 (Sept. 30, 1994)
67. *Westport Petroleum, Inc.*, SMA 4070, 2010 WL 1526348 (Apr. 2, 2010)