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.; AND UNITED STATES,

Respondents.

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

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INTRODUCTION

Respondents' attempts to justify the strict-liability interpretation of safe-berth clauses are unavailing and confirm that such a construction has no sound basis in contract interpretation or maritime policy. By its plain terms, the clause is a limited provision that gives charterers the right to choose the berth, gives masters the right to refuse a berth they view as unsafe, and requires charterers to pay expenses (such as offloading and rerouting expenses) if the master refuses an unsafe berth. The Third Circuit's warranty approach broadens the provision, making the charterer strictly liable for damage caused by unknown and unknowable dangers in the port, but neither respondent points to any language that remotely addresses those issues. The words "warranty" and "strict liability" do not appear in the clause.

Respondents' central response is akin to the iconic New Yorker cover, *View of the World From 9th Avenue*,[1] depicting Manhattan as the center of the world. It is, in essence, an argument that, whatever the plain language and best reading of the contract, and notwithstanding the lack of any justification for strict liability, the Second Circuit's reading has become the industry custom. They then reprimand CARCO for failing to negotiate language that *expressly disclaims* strict liability. The Court should reject that argument.

New York is a large commercial center and port. Decisions of the Society of Marine Arbitrators ("SMA"), located there, describe the safe-berth clause

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[1] Saul Steinberg, *View of the World from 9th Avenue*, New Yorker (Mar. 29, 1976).

as a warranty, as the Second Circuit does (though most of the decisions Frescati cites do not impose strict liability on a charterer, see *infra* at 10-11). But five of the six largest ports in the United States measured by tonnage are in the Fifth Circuit, including South Louisiana (first), Houston (second), and New Orleans (fourth).[2] Houston has its own maritime arbitration center, and its governing court, the Fifth Circuit, has expressly rejected the warranty construction. The decades-old conflict in the Circuits is echoed in leading admiralty treatises, and reflects the industry's uncertainty about the meaning of the safe-berth clause.

Accordingly, charterers should not be faulted for assuming the safe-berth clause means what it says—and what the Fifth Circuit and a leading admiralty treatise said it means. That is particularly true in this case, because the voyage charter makes clear that the parties—CARCO and Star Tankers—did not intend to adopt the Second Circuit's warranty construction. The voyage charter contains numerous *express* warranties, and it required the vessel, not the charterer, to obtain liability insurance for oil spills. Respondents cannot explain these provisions, which reveal plainly that the parties never intended that the safe-berth clause would make *CARCO* strictly liable for the oil spill. *A fortiori*, the parties did not intend that CARCO be liable to Frescati, which was not a party to the contract or its negotiation.

Respondents downplay the significance of *Atkins* v. *Fibre Disintegrating Co.*, but this Court *disapproved*

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[2] Am. Ass'n of Port Auths., *U.S. Port Ranking by Cargo Volume 2016*, http://aapa.files.cms-plus.com/Statistics/2016%20U.S.%20PORT%20RANKINGS%20BY%20CARGO%20TONNAGE.xlsx.

respondents' warranty interpretation when it affirmed the district court's holding that the charterer's sole obligation was to name a "safe port" and the court's definition of that term as "a port which this vessel could enter and depart from without legal restraint, and *without incurring more than the ordinary perils of the seas*." 2 F. Cas. 78, 79 (E.D.N.Y. 1868) (No. 601) (emphasis added), *aff'd sub nom. Atkins* v. *Disintegrating Co.*, 85 U.S. (18 Wall.) 272 (1874). Indeed, the court rejected the ship owner's argument that the charterer's statement that Port Morant was a "safe port" was a "warranty." *Id.*

In contrast, respondents overplay their hand by claiming that English law supports their position. As demonstrated *infra* at 15-19, English law is complex, and to the extent relevant, it provides that charterers are responsible only for dangers that are "predictable as normal" for a particular ship and port. That approach rejects strict liability for unknown and unknowable dangers and resembles the due diligence standard. When carefully examined, English law does not support respondents.

Finally, respondents incorrectly argue that CARCO is asking the Court to apply tort law, instead of contract interpretation principles. In fact, CARCO relies on contract interpretation principles and supports its better reading of the contract with sound federal maritime policy. Indeed, CARCO's fundamental point is that reading the safe-berth clause to impose strict liability is both inconsistent with contract interpretation rules *and* bad maritime policy.

ARGUMENT

I. THE SAFE-BERTH CLAUSE IS NOT A WARRANTY.

Respondents agree that courts construe maritime contracts in the same manner as other contracts, Frescati Br. 17, but they have no persuasive argument that the warranty interpretation of the safe-berth clause accords with its plain language. Nor do they refute CARCO's showing that other provisions of the contract confirm that the parties did *not* intend CARCO to assume strict liability.

A. The Safe-Berth Clause Does Not Provide For Liability Regardless Of Fault.

1. Frescati and the Government characterize the language giving CARCO the right to designate a "safe" berth for the ship "provided" that the berth permits the ship to "proceed thereto, lie at, and depart therefrom always safety afloat," as a "warranty" that the designated port is safe. Frescati Br. 17-18; U.S. Br. 20-21. They are wrong and point to nothing to show that was the parties' intention.

As CARCO explained (Br. 19-20), the provision simply gives the charterer the right to select "any safe place or wharf" where the vessel "shall load and discharge," while the "provided" clause gives the vessel a corresponding right to refuse an unsafe berth, with the charterer bearing "the expense, risk and peril" of "lighterage" [transfer of cargo] necessitated by the master's refusal to discharge at the designated berth. CARCO Br. Add. 8a.

Respondents focus on the word "safe" and argue that the charterer's obligation must be absolute because the charterer's obligation is "unqualified" and not limited to "injuries resulting from lack of due

diligence." Frescati Br. 18; U.S. Br. 27. But the clause nowhere states that the charterer *guarantees* that the port is safe or *warrants* that there are no dangers.[3] Respondents' answer is that not all warranties are express. Frescati Br. 18-19; U.S. Br. 29. As Gilmore & Black explain, however, the language of the clause "contradict[s]" the claim that the clause is a warranty: If the charterer were guaranteeing that the port is safe, there would be no need to specify that the ship is not required to enter the port if it is unsafe. Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 4-4, at 205 (2d ed. 1975); see also Julian Cooke et al., *Voyage Charters* ¶ 5A.34 (4th ed. 2014) (the clause gives the master "great latitude" to refuse to enter a port on grounds that it is "unsafe").

Frescati's argument (at 20) that this interpretation renders the safe-berth clause "surplusage" because "a ship's master can always refuse to enter a port that he knows is unsafe" is puzzling. It is the "provided" language in the clause that creates this contractual right of refusal. Frescati's argument also ignores that the clause has the independent effect of specifying that the charterer bears the costs if the master exercises that right of refusal and declines to enter the port.[4] The clause does not further specify that if

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[3] Of course, in exercising its contract right to select a "safe berth," a charterer must act reasonably and in good faith. *See, e.g.*, Restatement (Second) of Contracts § 205 (Am. Law Inst. 1981). But absent an express assumption of liability without fault, a charterer's "affirmative liability" to ships for unknown and unknowable hazards should be addressed through other sources of law, such as tort law. Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 4-4, at 205 (2d ed. 1975).

[4] The Government is thus wrong to say (at 27) that under CARCO's reading "the master's right of refusal is the *only*

the master does enter the port, the charterer assumes all risks of loss regardless of fault.[5] "Very clear language" should be required for "liability [to be] shifted to the charterer"—a clarity missing from safe-berth clauses. Gilmore & Black, *supra*, § 4-4, at 205.[6] Cf. *Gallo* v. *Moen Inc.*, 813 F.3d 265, 269 (6th Cir. 2016) ("If we do not expect to find 'elephants in mouseholes' in construing statutes, we should not expect to find lifetime commitments in time-limited agreements." (citations omitted)).

2. The need for a clear statement that the parties intended the charterer to assume liability without fault is heightened in this case because the charter party contains numerous express warranties. These express warranties show that the parties knew how to create guarantees when that was their intent. The absence of any express warranty language in the safe-berth clause confirms that the parties did *not* intend it to be a warranty in this contract. CARCO Br. 25-26.

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protection the safe-berth clause affords the chartered vessel and its owner."

[5] Frescati claims (at 32 n.11) that CARCO erred in asserting that ASBA, author of the ASBATANKERVOY form, rejected the assertion that "the text of the form clause should be construed as a warranty." But CARCO *quoted* ASBA's statement that the form "'does not specify whether it imposes a strict-liability warranty or a due diligence obligation.'" CARCO Br. 23 (quoting ASBA Br. 23)). CARCO's point is that ASBA agrees its form's *text* does not specify a warranty.

[6] Gilmore & Black's interpretation is grounded in the clause's text, so respondents' argument that the Gilmore treatise describes what the clause "should" mean is incorrect. Frescati Br. 36. Gilmore & Black give the clause its plain meaning. Respondents do not dispute that Gilmore & Black is a leading treatise that this Court and other courts routinely rely upon. CARCO Br. 20 n.4.

Significantly, Frescati fails to address CARCO's argument (at 26) that the express warranty that Star Tankers would maintain $1 billion in "Insurance coverage for oil pollution" reveals that the parties did not intend the safe-berth clause to make *CARCO* strictly liable for oil spills.[7] The Government speculates that the parties intended to make Star Tankers responsible for oil spills in open ocean, and CARCO responsible for spills near its berth. U.S. Br. 29. But the contract contains no hint of this and, if that were the parties' intent, there would have been a need for insurance for both parties.

Finally, respondents fail to undermine CARCO's argument (Br. 27) that the "General exceptions clause" of the contract—which provides that a charterer is not liable for loss or damages resulting from the "perils of the sea"—confirms that the parties did not intend the safe-berth clause to impose strict liability on CARCO for maritime hazards that it could not foresee or prevent. Initially, respondents incorrectly claim CARCO forfeited this argument by not raising it below. Frescati Br. 25-26; U.S. Br. 29-30. CARCO asserted below that it was not strictly liable under the safe-berth clause, and "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992). Thus, CARCO is free to cite the General Exceptions Clause to bolster its argument that it is not strictly liable under the safe-berth clause. That contention plainly is not waived.

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[7] CARCO's *amici* confirm that charterers typically do not get insurance for vessel damage, much less pollution damage, underscoring this provision's importance. N. Am. Export Grain Ass'n ("Grain Exporters") Br. 13-14; Tricon Br. 6-7.

Frescati suggests that the General Exceptions Clause may not apply because whether a particular hazard is a "peril of the sea" is a "fact intensive" question. Frescati Br. 27. But the very case they cite held that a submerged object that was "unknown and unascertainable" was a "peril of the sea," *Ferrara* v. *A. & V. Fishing, Inc.*, 99 F.3d 449, 454-55 (1st Cir. 1996), which is precisely what caused the accident here. CARCO Br. 27.

Respondents further claim that the General Exceptions Clause is irrelevant because it does not apply when the parties "expressly" or specifically provide "otherwise." Frescati Br. 26; U.S. Br. 30. As discussed above, however, the safe-berth clause does not expressly provide that the charterer is strictly liable. The General Exceptions Clause is thus additional confirmation that the parties did *not* intend the safe-berth clause to impose *sub silentio* strict liability on the charterer.

B. Custom Is Relevant To Maritime Contract Interpretation But, Like The Circuits And Treatises, It Is Divided.

Respondents urge the Court to adopt the Second Circuit's reading on the theory that it has become the industry custom, and CARCO (and presumably all similarly situated charterers) could have chosen a safe-berth clause that expressly states that it is *not* a warranty. This argument assumes that, whatever the plain language and best reading of the contract, and despite *Atkins*, all charterers should have known how the Second Circuit interpreted it and protected themselves. This Court should reject that argument.

Contrary to respondents' telling, New York is not the only source of admiralty law for the United States. Houston is the second largest port in the

United States, and the Houston Maritime Arbitrators Association is a respected center for maritime arbitration.[8]

For decades, there has been a conflict between the Second and Fifth Circuits about whether the safe-berth clause is a warranty. For decades, a respected admiralty treatise has espoused the Fifth Circuit's position on the meaning of the clause. These divisions eviscerate the argument that there is an established industry custom interpreting the safe-berth clause and a settled expectation based on that purported custom. As one article summarized, "the law with regard to allocation of responsibility for providing safe ports and berths is not settled in the United States." Tony Nunes, *Charterer's Liabilities Under the Ship Time Charter*, 26 Hous. J. Int'l L. 561, 570 (2004).

In arguing that industry custom is clear, Frescati (at 29, 31) also relies on the existence of alternative form contracts that contain "due diligence" language. The existence of these forms shows only that some in the industry may have been aware of the circuit split and addressed the uncertainty it created. But charterers do not sign contracts with lawyers at their elbows, see Tricon Br. 8, at least prior to the incident here. It takes bitter experience (and lengthy litigation), such as CARCO suffered, to teach a business that a court may not accept that a clause in a form contract means what its plain text says. After this accident occurred in 2004, CARCO—and other charterers no doubt dismayed by its experience—adopted a new form for its voyage charters. Citing

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[8] *See About HMAA Texas*, Hous. Mar. Arbitrators Ass'n, https://www.hmaatexas.org/about/hmaa (last visited Oct. 9, 2019).

this industry move to express language as evidence that the original safe-berth clause is a warranty (Frescati Br. 33) is inappropriate and unfair. Of course, a charterer that learns about this litigation risk will attempt to address it. That says nothing about the meaning of the clause as drafted.

Frescati's reliance (at 37) on 67 arbitration rulings from the Society of Maritime Arbitrators in New York as indicative of custom is similarly inapt.[9] Although these decisions describe the safe-berth clause as a "warranty," that does not mean they all held the charterer strictly liable for an accident without regard to fault. Our review determined that in many decisions, the charterer was found not to have breached the safe-berth clause,[10] or the breach occurred in a situation where the charterer was

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[9] Frescati's reliance is particularly ironic given the dim view of arbitration awards it expressed below. Because the safe-berth clause was in CARCO's contract with *Star Tankers*, Frescati can invoke the clause only if it is a third-party beneficiary to the contract. CARCO cited arbitration awards indicating that Frescati is not a third-party beneficiary, which Frescati criticized because arbitration awards "are not reviewable for legal error, and do not carry the authority of [court decisions]." Corrected Reply Brief for Appellants at 28, No. 11-2576 (3d Cir. Apr. 5, 2012).

[10] *See, e.g.*, *Atl. Bulker Shipping Corp.*, SMA 3938, 2006 WL 6171996, at *6 (Sept. 8, 2006) ("Owner has failed to carry its burden" of proving "breach of the warranty of a safe port"); *Calypso Marine Co.*, SMA 3416, 1998 WL 35281250, at *11 (Jan. 30, 1998) ("The panel concludes the Port of Necochea was a safe port for the ADAMASTOS . . . ."); *E. W. Tankers Ltd.,* SMA 3172, 1995 WL 17878811, at *4 (Apr. 28, 1995) ("Owner's argument that the absence of local tugs at Piney point made that port unsafe appears sorely misplaced.").

negligent.[11] One decision tellingly states that "[i]t would be patently impossible for a charterer to guarantee that a vessel would not suffer damages *from any cause whatsoever* at or in proceeding to such port." *Halfdan Grieg & Co. S.A.*, SMA 419, 1969 WL 178325, at *3 (Aug. 8, 1969). Other decisions merely involved disputes about lighterage or demurrage expenses that all parties agree are covered by the clause.[12]

Beyond that, it is unsurprising that arbitrators in New York follow the Second Circuit's warranty approach, because arbitrators tend to follow court rulings. The Houston Maritime Arbitrators Association generally does not issue published decisions.[13] But *amici* that ship to ports in the Fifth

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[11] *See, e.g.*, *Altamar Navegacion S.A.*, SMA 2029, 1984 WL 922779, at *4 (Oct. 31, 1984) ("Charterer did not give the Owner or Master any warning regarding the dangers of the port they were well versed about for so many months"); *Getty Oil Co.*, SMA 1365, 1979 WL 406597, at *10 (Sept. 27, 1979) ("it was known or should have been known by [charterers] that it was not safe for the MARY ANN to attempt such discharge in the absence of tugs"); *Astrovigia Compania Naviera S.A.*, SMA 1277, 1978 WL 403858, at *5 (Dec. 16, 1978) ("Charterer did have prior knowledge of existing dangerous physical conditions and anticipatory tidal problems at that terminal").

[12] *See, e.g.*, *Dowa Line Am. Co.*, SMA 3308, 1996 WL 34449946, at *3 (Oct. 8, 1996) ("[A] Master's decisions as to the safety of his vessel, crew and cargo are of paramount consideration and should not be second-guessed, absent gross negligence or incompetence, neither of which are alleged here. . . . [T]he decision not to berth at Ferrominera appears entirely reasonable . . . ."); *Hellenic Int'l Shipping S.A.*, SMA 954, 1975 WL 352013, at *6 (June 22, 1975) (due to high wind and seas, berth "was not reachable on arrival, a predictable and expectable situation during January and February months").

[13] *See* George F. Chandler, III, *An Introduction to the Houston Maritime Arbitrators Association*, 33 J. Mar. L. & Com. 233,

Circuit indicate that the safe-berth clauses there "are understood to impose due diligence obligations."[14] There is thus no basis for assuming that "everybody" has understood for decades that the safe-berth clause makes the charterer strictly liable for unknowable dangers.

II. THE WARRANTY APPROACH IS CONTRARY TO THIS COURT'S PRECEDENT AND LACKS A SOUND LEGAL FOUNDATION.

A. The Warranty Interpretation Conflicts With *Atkins*.

Respondents' discussion of this Court's decisions involving safe-berth clauses confirms that the warranty interpretation is unsupported and, indeed, conflicts with this Court's rejection of the warranty interpretation in *Atkins*. CARCO Br. 28-33.

Frescati's treatment of *Atkins* (at 22-23) rests on a factual mischaracterization of that case. This Court necessarily disclaimed the warranty interpretation when it approved the district court's holding that the charterer was only obligated to name a "safe port," to wit "a port which this vessel could enter and depart from without legal restraint, and *without incurring more than the ordinary perils of the seas*." 2 F. Cas. at 79 (emphasis added). The court also rejected the ship owner's argument that the charterer's agent's statement that Port Morant was a "safe port" was a

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233-34 (2002); *see also* Hous. Mar. Arbitrators Ass'n, Arbitration Rule 8.2 (arbitration awards are delivered to the parties and do not state the reason on which they are based unless required by the arbitration agreement or agreement of the parties).

[14] Grain Exporters Br. 9; *see also id.* at 12 ("strict liability for charterers is *not* consistent with U.S. grain exporters' 'industry custom'").

"warranty," explaining that the ship master "accepted" the port as proper and did not "inform [the charterer's agent] that the charterer was to be held responsible in case the vessel received injury in using that port." *Id.* at 79-80.

Frescati responds that the Court interpreted the charterer's promise to "*at least* encompass[] a promise not to designate a port" with "a submerged object," because the designated port was deemed to be unsafe due to the "submerged reef." Frescati Br. 23. Not true. The district court *never* described the reef in Atkins as "submerged" (that term is not in the opinion), so *Atkins* did not involve an underwater or hidden hazard. To the contrary, the reef creating a "narrow entrance" in *Atkins* was a known and obvious danger for all vessels the size of the one at issue, 2 F. Cas. at 79. That is why the court held that the master waived the safe-berth protection when he took the ship into that port. This factual mischaracterization undermines Frescati's attempt to avoid *Atkins* and its later attempt to argue that *Atkins* shows that the Court construed "perils of the seas" "to exclude at least some submerged hazards." Frescati Br. 27 (emphasis omitted). Frescati's assertion is wishful thinking because *Atkins* did not involve a "submerged" hazard.

The Government properly does not suggest that *Atkins* involved a submerged object. It instead argues (at 36) that the *Atkins* court would have viewed the Paulsboro port as unsafe because of the anchor in the Anchorage, just as it viewed the Jamaican port as unsafe because of the reef. But the situations are not parallel. The Government ignores that an unknown submerged anchor is a classic "peril of the sea" (unforeseeable, unpreventable), which the *Atkins* court recognized as outside the safe-berth protection.

The reef in contrast was a *known* peril, so the *Atkins* court found that the charterer should not have designated the port, but that the captain ultimately was at fault for entering the port despite the hazard.

The Government also argues (at 37) that this Court's express endorsement of the district court's merits rulings does not extend to the district court's interpretation of the safe-berth clause. That, too, is wishful thinking. This Court unequivocally endorsed the "views" and "conclusions" of the district court, *Atkins* v. *Disintegrating Co.*, 85 U.S. (18 Wall.) 272, 299 (1874), without limitation or qualification, so the endorsement cannot be limited to the conclusion that the master waived the clause. See also Nunes, *supra*, at 572 (describing *Atkins* as a "prudent man" standard).

Respondents also fail to refute CARCO's demonstration (at 30-32) that *The Gazelle & Cargo*, 128 U.S. 474 (1888), and *Mencke* v. *Cargo of Java Sugar*, 187 U.S. 248 (1902), do not support the warranty approach. This Court gave no hint in either decision that it viewed safe-berth clauses as warranties. It instead applied the Gilmore & Black approach to address who should pay certain expenses when a master refused to enter an unsafe berth. Frescati (at 22) and the Government (at 35) both suggest that the Court would have reached the same result if the cases had involved liability for an accident or unknown hazard, but that is pure speculation because the cases did not present those issues.

B. The Warranty Interpretation Lacks A Sound Legal Foundation.

Respondents fail to uncover the missing rationale for the Second Circuit's decisions. The Government

(at 38) asserts without support that these decisions are "well reasoned," while Frescati contradictorily claims (at 24) that the absence of reasoning is acceptable because the court was simply giving "plain contract language its ordinary meaning." Both suggest that the Second Circuit engaged in a plain meaning analysis, but none of its opinions does more than assert that the clause is a warranty.

As to the older Second Circuit cases that embraced a "reasonableness" standard for charterers' selection of the arrival berth, Frescati points out (at 25) that those cases did not involve ocean voyages (and hence did not involve safe-berth clauses), which CARCO acknowledged (at 36). But the context is similar, and the Second Circuit never explained its shift from a reasonableness standard to strict liability for a charterer's choice of berth.

Respondents also contend that the warranty interpretation is the English rule and that the Court should therefore adopt it. Frescati Br. 39-40; U.S. Br. 39-41. But while "established doctrines of English maritime law are to be accorded respect," *Aetna Ins. Co.* v. *United Fruit Co.*, 304 U.S. 430, 438 (1938), this Court does not "automatically" follow English maritime law. See *Standard Oil Co. of N.J.* v. *United States*, 340 U.S. 54, 59 (1950). Moreover, in this contract dispute, there is little reason to look to English law. U.S. law governs the contract, and the plain language of the parties' agreement does not support the warranty interpretation of the safe-berth clause.

To the extent that English law is relevant, it is far from clear that the due diligence standard followed by the Fifth Circuit would yield different results than the approach currently followed by English courts, at least in cases such as this one involving an unknown

and unknowable hazard. Frescati and the Government cite English decisions describing the clause as a warranty, but the English approach is more nuanced and *cannot be reduced to a characterization of strict liability*. See also Nunes, *supra*, at 572 ("The English courts . . . appear to eschew the strict warranty concept expressed by the U.S. Second Circuit in favor of a more fact-specific and due diligence-approach.").

A recent decision of the Supreme Court of the United Kingdom makes this clear. In *Gard Marine & Energy Ltd.* v. *China National Chartering Co.* (*Ocean Victory*), [2017] UKSC 35 (appeal taken from Eng. & Wales), the court ruled in favor of a charterer and unanimously confirmed prior English case law establishing that a safe-port warranty does not impose liability on a charterer if the damage sustained by the vessel was caused by an "abnormal occurrence." *Id.* at [16], [17], [28]. It explained that the inquiry "is not whether the events which caused the loss were reasonably foreseeable." *Id.* at [14]. Instead, the term "abnormal occurrence" has its "ordinary meaning" and refers to "something rare and unexpected," as opposed to "something which was normal for the particular port for the particular ship's visit at the particular time of the year." *Id.* at [16], [25]. To assess whether the cause of the event was a "normal characteristic or attribute of the port," the U.K. Supreme Court directed lower courts to consider "actual evidence relating to the past history of the port" and "the frequency (if any) of the event." *Id.* at [38]. It also stated that "the date for judging breach of the safe port promise is the date of nomination of the port," because the promise is a "prediction about safety" and not "a continuing warranty." *Id.* at [24]. On the facts, the court ruled

that the charterer was not liable under a safe-port provision for a vessel grounding caused by an unprecedented combination of long waves and an exceptional storm that constituted an abnormal occurrence.

Ocean Victory confirms that English law does not interpret safe-berth clauses as imposing strict liability on charterers, regardless of fault. The court expressly stated that "charterers are not insurers of 'unexpected and abnormal risks.'" *Id.* at [26]. Instead, it determined that a "coherent allocation of risk" includes the following principles: (1) vessel owners are responsible for losses that are avoidable by good navigation and seamanship; (2) charterers are responsible for losses "caused by a danger which was or should have been predictable as normal for the particular ship at the particular time when the ship would be at the nominated port"; and (3) the "owners (and ultimately their hull insurers) are responsible for loss caused by a danger due to 'an abnormal occurrence.'" *Id.*[15] The principle that charterers are only responsible for dangers that were or should have been "predictable" for the particular ship and destination sounds a lot like a due diligence standard—and a rejection of strict liability for unknown and unknowable dangers, like the dropped anchor in the federally controlled Anchorage Area that caused the loss here.

The abandoned anchor was not a "normal" characteristic or attribute of the Paulsboro port, and

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[15] The court added that "the charterparty terms require owners to take out hull insurance (as they will invariably do) which is their protection against rare and unexpected events." *Ocean Victory*, *supra*, at [26]. That is also the situation here, where the charter party required Star Tankers, not CARCO, to obtain oil pollution insurance. *See supra*, at 7.

not a danger that was or should have been "predictable" when CARCO designated the berth. Far from "forfeit[ing]" the point (Frescati Br. 40 n.15; U.S. Br. 41 n.7), CARCO has always maintained that the accident was an "abnormal occurrence" because undisputed evidence demonstrated that dozens of ships with drafts equal to or deeper than that of the *Athos I*'s had passed through the Anchorage Area and safely arrived at or departed from CARCO's berth over many years.[16] The district court initially agreed that this history established the safety of the berth. Pet. App. 342a. The court of appeals, however, found the port history "irrelevant," *id.* at 305a, highlighting the divergence between its strict liability interpretation and the current English approach, which *requires* courts to consider a port's history and the frequency (if any) of the pertinent hazard.

Indeed, the Government observes (at 41 n.7) that "American law has not addressed the concept of an 'abnormal occurrence.'" Plainly, it would be a mistake for this Court to rely on England's concept of a "warranty" to justify the Third Circuit's strict liability

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[16] *See* CARCO's Reply to Frescati Plaintiffs' Post-Trial Brief on Liability (Doc. 610, p. 81) ("The port and berth posed no hazard that could not be (and had not been) avoided by 'good navigation and seamanship,' and the ATHOS I incident was truly an 'abnormal occurrence.'"); Final Brief for Appellees filed in the Third Circuit on April 2, 2012, at 29 ("Paulsboro met the definition of a safe port because, as the law demands, the vessel's contact with the anchor was an abnormal occurrence and the danger could have been avoided by good navigation and seamanship, as evidenced by its safe use by hundreds of vessels while the anchor was present"); *id.* at 76, 77 (arguing "abnormal occurrence"); *see also*, *e.g.*, CARCO's Motion for Judgment on Partial Findings under Fed. R. Civ. P. 52(c) (Doc. 478, pp. 55-56); CARCO's Corrected Post-Trial Brief on Liability (Doc. 599, p. 183); Pet. App. 8a, 126a, 286a-287a, 342a.

approach. Indeed, English law illustrates that in this context, the word "warranty"—which does not even appear in the safe-berth clause—should not be understood to connote strict liability for unknown and unknowable risks.

III. MARITIME COMMERCE IS BEST SERVED BY INTERPRETING SAFE-BERTH CLAUSES AS IMPOSING AT MOST A DUTY OF DUE DILIGENCE ON CHARTERERS.

The Third Circuit's warranty interpretation is detrimental to maritime commerce. If allowed to stand, the decision will burden maritime commerce by introducing uncertainty into shipping relationships, increasing the costs of contracting and insurance, and imposing the specter of open-ended liability. AFPM Br. 26-28; Grain Exporters Br. 21-27; Tricon Br. 2, 7-8.

Respondents' four contrary arguments are unpersuasive. First, respondents assert that contract law is better suited than tort law to resolve disputes between commercial parties and that contracting parties are free to impose strict liability and otherwise allocate risk as they see fit. *E.g.*, Frescati Br. 43-45. That argument is premised on an incorrect interpretation of the safe-berth clause, which cannot reasonably be read to impose strict liability. It also fails to address the substance of CARCO's contentions, which demonstrate that its *contract* interpretation is bolstered by the point that strict liability is bad maritime policy. CARCO Br. 38-42.[17]

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[17] Respondents' answer to CARCO's demonstration that interpreting the safe-berth clause to impose strict liability would impose different standards of care on charterers and wharfingers despite their performance of complementary roles with respect to safe berths (CARCO Br. 47-48; U.S. Br. 49) is the

Second, respondents disagree that port risks should be allocated to ship owners because they are better positioned than charterers to avoid those risks. CARCO's argument is, however, confirmed by its *amici*. AFPM Br. 26-30; Grain Exporters Br. 21-27; Tricon Br. 7-8. These industry participants explain that the decision below fundamentally "ignores commercial reality," Tricon Br. 3, 7, by incorrectly presuming that charterers have better information than vessel owners about the safety of berths. See AFPM Br. 28-30; Grain Exporters Br. 10-11. The decision therefore imposes liability on the party least able to prevent losses and insure against them. Grain Exporters Br. 13-14, 16-18; Tricon Br. 3-7. See also *Orduna S.A.* v. *Zen-Noh Grain Corp.*, 913 F.2d 1149, 1156 (5th Cir. 1990); J. Bond Smith, Jr., *Time and Voyage Charters: Safe Port/Safe Berth*, 49 Tul. L. Rev. 860, 868-69 (1975); Gilmore & Black, § 4-4, at 204.[18]

Third, respondents contend that the safe-berth clause has imposed strict liability for years without harm to maritime commerce. Frescati Br. 49-50. As demonstrated *supra* at 8-12, the premise of this argument is incorrect. And imposing strict liability in this setting lacks any sound justification and would harm maritime commerce. CARCO Br. 38-42.

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same—CARCO contracted for strict liability. Frescati Br. 48. Again, CARCO's response is: This misreads the clause and fails to address the maritime policy reasons not to interpret the clause to impose strict liability.

[18] Frescati (at 47) argues that here, CARCO was in a better position than Frescati to know about the hazards of the berth because CARCO selected its own berth. The record provides no basis to believe that this is true, or that CARCO's alleged "knowledge" was considered in negotiating the contract. Furthermore, CARCO's "knowledge" is irrelevant, since the particular risk was both unknown and unknowable.

The Government makes the related argument that adopting the Second Circuit's strict liability approach would provide certainty and minimize litigation costs. U.S. Br. 46. The premise is wrong because the Second Circuit's approach generally requires litigation of the question of the soundness of the shipmaster's navigation and seamanship. But, more significantly, strict liability results in "certainty" in all settings, but is disfavored in most, and for good commercial and fairness reasons.

Fourth, respondents argue that imposing strict liability on CARCO must be equitable because it is consistent with OPA, which permits responsible parties and the Government to bring common law claims against third parties. Frescati Br. 51. That description of OPA is correct, but respondents studiously avoid CARCO's central point (at 49-50) that OPA is a loss-spreading scheme that specifically provides for the federal fund to pay cleanup costs when an unknown third party is responsible for an oil spill. CARCO had no responsibility for the Anchorage where the submerged anchor was struck, and the subrogation OPA authorized was not designed to shift liability to blameless parties.

Frescati and the Government do not dispute that in adopting admiralty rules, this Court considers which principle "produces an equitable result," *Norfolk S. Ry.* v. *Kirby*, 543 U.S. 14, 35 (2004). Nonetheless, and in the face of OPA's purpose, CARCO's payments under that Act, and CARCO's blameless conduct, they attempt to defend the $140 million judgment against CARCO. That result is simply unfair.

CONCLUSION

For these reasons, and those in CARCO's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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